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Martin C. Loesch

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THE FIRST AMERICANS AND THE "FREE" EXERCISE OF RELIGION

Martin C. Loesch*

Introduction

October 1992 marked the quincentennial of the "discovery" of the North and South American continents by European explorers. The occasion provides a fitting opportunity to review the history of interaction between the people of the Americas and the Europeans. As European greed and populations expanded, their explorers headed west in search of land and wealth. They brought to this hemisphere not only immigrants, but also new political structures, cultures, traditions, religions, technologies, economic systems, biases, diseases, languages, and foods. Those imports radically changed the lives and land of the aboriginal peoples they encountered.

When Columbus arrived in the Caribbean in the fall of 1492, he discovered a land already inhabited by millions of people, organized into distinct political and cultural groups. To him they were only heathen savages suitable for servitude, but in fact centuries of civilization and sophisticated systems of spiritual beliefs had developed among them on a continent rich in resources. The domination of the indigenous people in the Americas began with the first people Columbus encountered, the Arawaks, who were taken "by force in order that they might learn and give [Columbus] information of whatever there is in these parts."¹ After Columbus' second expedition to the area he brought 500 Arawak men, women, and children back to Spain as slaves.

In the 250 years that followed, the population of the Arawaks was cut in half by genocide, slave labor, and disease.² The European explorers enslaved, exterminated, or removed these aboriginal people who occupied the land they needed for expansion. The Europeans, like the Arawaks, appreciated the

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* Associate, Gordon & Polscer, Seattle, Wash. B.A. 1987, University of Notre Dame; J.D. 1991, University of Notre Dame Law School; L.L.M. 1992, University of Notre Dame Law School. Many thanks to Dr. Sharon L. O'Brien and to (Rev.) William M. Lewers, C.S.C., whose friendship, inspiration and support made this article possible.

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1. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 1 (1980).

2. In North America, the estimated 10 million Indians inhabiting the continent at the time Columbus arrived would eventually be reduced to one million. *Id.* at 16. More recent scholarship has concluded that the total population of the hemisphere was 75 million to 100 million (with eight million to 12 million people living north of present-day Mexico). DAVID E. STANNARD, AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD 11 (1992). The Arawak people alone likely numbered close to eight million. *Id.* at 72.

abundance of resources in this land, but to the Spanish these resources meant opportunity for economic gain. In the name of progress and religious enlightenment the entire Arawak way of life was sacrificed. Their history was to be repeated time and time again whenever the Europeans discovered new uses for the land which was the home of the people they called "savages." These civilized Europeans took the land, the culture, the spirituality, the children, and the vitality of the "savages" they conquered. The Native Americans continue to struggle today to regain what has been taken from them.

Because the peoples of the Americas are too many, and their struggles to continue to practice their "religions" are too varied for one article to cover comprehensively, this article will focus on the experience of the northern Native Peoples in what has become the United States. The international influence of the legal system of the United States recommends its history of relationship with its native population as an example of the treatment of indigenous peoples. For all its abuses, the legal relationship between the Indian nations of North America and the United States government is seen as quite positive.³ Some tribes still retain a semblance of independent legal status, and the political process continues to bring Indian concerns to the fore. The decisions of the United States Supreme Court and the statements of the United States Congress will provide the context for a brief overview of the conditions of the North American indigenous peoples throughout the history of the United States.

This article will trace the legal history of the Native Americans, especially in their fight for respect for their spiritual practices. To set the stage for the drama of this spiritual and cultural tragedy, this article will first draw out the backdrop of the relationship between the first Americans and the European immigrants. The initial section of this article will show that the dominant culture has vacillated between respecting the autonomy of the Native Peoples and compelling their assimilation into United States society. This article will discuss some of the prevailing attitudes and theories that undergirded the frequently brutal and exploitive, and occasionally the benign, actions of the government with respect to these people.

The second section focuses specifically on the legal question of the right of the Native Americans to freely practice their spiritual beliefs.⁴ This section will first briefly summarize the history of religious rights in the United States, then describe how evolving free exercise jurisprudence has impacted Native American free exercise claims. The cases and jurisprudence pertaining to

3. VINE DELORIA, *GOD IS RED* 282 (1973). Vine Deloria even says that "[a]mong all the nations of the world the United States, because of its secular concern for justice, has created the best record for dealing with aboriginal peoples." *Id.*

4. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

"sacred site" claims will be the focus of some attention. In these cases, Indians attempt to protect particular places from government actions which threaten to limit the ability of Native Americans to practice their "religion." The *Lyng v. Northwest Cemetery Protective Ass'n*⁵ decision is the most recent Supreme Court opinion addressing a sacred site claim, and section three will attend to the questions raised by that case in some detail.

The fourth section attempts to delineate some of the reasons why Native American spiritual practices receive so little protection. Because most of the judicial decisions reflect serious misunderstandings about Indian spiritual beliefs, this section summarizes some of the prominent features of Indian spirituality. There is a wealth of scholarship on this subject which cannot be exhausted in this forum, but this section will highlight some salient differences, because the religions of the majority culture and the spirituality of Native Americans.

There is little cause for hope at the present time. Indian blood is no longer being shed to advance white civilization, but as one Native American said, "They're not killing us on the plains anymore. Now they're killing us in the courts." The result is not substantively different even though the campaign is more subtle.

There are two potential avenues for reform and the fifth section of this article describes their promise. The first requires jurisprudential reform, in the form of a resuscitation of the worn-out Free Exercise Clause of the First Amendment. The Court must recognize that Native American spiritual practice claims are different from the nonreligious practice claims other groups legitimately make upon the state. When Native Americans predicate their claims against the government on religious grounds, they deserve to be treated the same as all others who claim protection for religious practice. No foreseeable judicial reform is on the horizon. The Supreme Court has abdicated its responsibility to protect Native American rights and in *Lyng* stated that the only potential solutions were legislative.⁶

The American Indian Religious Freedom Act (AIRFA)⁷ had the potential to provide the kind of protection that Native American religious practices require. The courts have, however, construed the statute very narrowly so as to be "without teeth."⁸ Several amendments have been proposed to strengthen AIRFA.⁹ Unfortunately, those amendments failed to receive sufficient legislative support. Congress in 1993 has had before it both the Religious Freedom Restoration Act¹⁰ and the Native American Free Exercise of

5. 485 U.S. 439 (1988).

6. *Id.* at 458.

7. Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (1988)).

8. *See infra* § II, pt. C.

9. 1990, 1991, 1992.

10. H.R. 1308, 103d Cong., 1st Sess. (1993); S. 578, 103d Cong., 1st Sess. (1993). *See infra*

Religion Act.¹¹ These bills represent the only realistic hope Native Americans have today for their ability to practice their spiritual beliefs and their way of life. This legislation will provide the legal recourse Native Americans have not found in the Constitution. Although they do not provide the permanent protections that Native Americans deserve, they should both be passed. Congress passed the Religious Freedom Restoration Act and President Clinton signed it into law on November 16, 1993,¹² but the prospects for the passage of the Native American Free Exercise of Religion Act are not good. Only passage of both bills will provide the measure of protection Native American spiritual practices merit.

These recommendations will be supported in due time, but first it is necessary to present some of the history and context of these issues. The history of the first peoples on this continent is important in part because their stories have been silenced, as the stories of women, African-Americans, gays and lesbians, refugees, and other oppressed peoples have been silenced before. The histories of the First Peoples are not often considered in abstract legal debates about jurisprudence, excessive entanglement, compelling interests, or legislative policy. Those stories have not often been told with the honesty and humility that centuries of abuse, deception, and disrespect should engender. Our present political discussion is impoverished if we fail to consider what has transpired in the past. Only with a clear understanding of our collective history can advocates and policy makers begin to appreciate the importance of the issues at hand.

I. The Indigenous Americans

A. The Colonial Period (1492-1776)

Europeans justified the acquisition of land in the Americas two ways: first, as the religious duty of an enlightened and civilized people; and second, as the legal result of "discovering" previously unclaimed land. The colonizing powers secured their interests in the new land by proving to other European powers that they were the first to "discover" a new piece of territory. This rationalization became known as the "Discovery Doctrine," a geographic "first come, first served" theory in which the only relevant players were the competing European countries.¹³ The existence of native populations on these territories was irrelevant to colonial claims.

Francisco de Vitoria, the Spanish legal philosopher and theologian, challenged the validity of the doctrine of discovery, arguing that the Indians

note 12 and accompanying text.

11. S. 1021, 103d Cong., 1st Sess. (1993).

12. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

13. STANNARD, *supra* note 2, at 234-36.

were the true owners of the land. He believed that the "aborigines undoubtedly had true dominion in both public and private matters, just like Christians and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners."¹⁴ Vitoria's views were predicated on a fundamental belief in human equality. Indians were no different from Europeans, he reasoned, and therefore their land could only be taken from them by consent or through conquest resulting from a just war.¹⁵ Since the law between states at that time only recognized discovery as an authoritative source of title when the land was previously uninhabited, discovery of the inhabited territories in the East was inadequate to fend off other claimants.

Based on the "discovery" by Columbus, the Pope legitimized the claims of Spain to the "New World" and proclaimed her dominion over all lands previously unclaimed by other European powers.¹⁶ The intersection between law and religion at this time was significant. Juan Gines de Sepúlveda, at the great debate at Valladolid organized by Charles V in Spain, argued that because the aboriginal people were not Christian, they therefore lacked any legitimate claim to their land, allowing it to be taken for the Church.¹⁷ Sepúlveda, an eminent Spanish scholar, believed that the Indians were inferior barbarians who engaged in human sacrifice and who were destined for servitude.¹⁸ The role of the State and the Church was to Christianize and civilize the "savages," purportedly for their own benefit.¹⁹ The paganism of the "savages" justified the usurpation of their lands. There was no doubt that the new lands could be taken from the natives; the interesting question was whether those acquisitions could be protected from the other colonial powers. The Spanish argued that their discovery of the new continent, plus the papal grants, created an exclusive claim to the new territories.²⁰

Bartolomé de Las Casas, the confrontational slave owner-turned-priest and champion of the Indian people, countered Sepulveda's argument. For five days at the debate, Las Casas recounted tales of Spanish cruelty toward the

14. ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 139 (1991).

15. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective* (1989) (symposium paper) in *HARVARD INDIAN LAW SYMPOSIUM* 211 (Harvard Law School Publications Center 1990).

16. BARTOLOMÉ DE LAS CASAS: *THE ONLY WAY* 10 (Helen R. Parish ed., Francis P. Sullivan trans., 1992) (citing POPE ALEXANDER VI, *BULL OF DONATION* (May 3, 1493)). Later popes were to overturn the doctrine of title by discovery or conquests supported by their predecessors. Pope Paul III argued that the Indians "are not to be deprived of their liberty or the right to their property. They are to have, to hold, to enjoy both liberty and dominion, freely, lawfully." *Id.* at 115 (citing *SUBLIMIS DEUS* (June 2, 1537)).

17. THOMAS R. BERGER, *A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS, 1492-1992*, at 20 (1991).

18. *Id.* at 20-21.

19. *Id.* at 3.

20. *Id.* at 17.

American natives. He described the Spaniards as "ravening beasts, killing, terrorizing, afflicting, torturing, and destroying the native peoples, doing all this with the strangest and most varied . . . methods of cruelty, never seen or heard before . . ."²¹ He claimed that the Spanish only had a right to enter Indian land to Christianize the Indians. Las Casas disputed Sepulveda's portrayal of the Indians as savages by describing their spiritual practices, their cultures, and their political organizations.²²

No formal decision was reached at the debate at Valladolid. The discussion, both about the relationship between the Europeans and the American inhabitants and which, if any, European country held title to the newly acquired lands, continued among other thinkers. Hugo Grotius, the Dutch jurist and statesman, followed Sepulveda's reasoning. He believed that legal authority derived from universal norms rather than the acts of temporal authorities and positive law. Grotius aimed to remove the religious grounds for a just war and rejected title by discovery. Unlike some of the Spanish who viewed the Indians as brutish or inhuman,²³ Grotius acknowledged their ability to make treaties with the Europeans and their fundamental right to self-governance.²⁴

The French and English contested the Spanish claims in America because the Spanish had not consummated their discovery with effective occupation and possession. England and France argued that only on those lands where Spain exercised control and maintained settlements could she claim dominion. Once the occupying powers dismissed paganism as grounds for a just war against the natives, colonization became the most acceptable proof of possession.

Unlike their Central and South American counterparts, the North American colonies were primarily English in origin, though the French and Spanish also had substantial land holdings. The relationship between the newly arrived English and the established indigenous people began with a gift and ended in virtual annihilation. The first immigrants were supported by the Indians and taught how to survive in the "new" land. Their generosity was not returned, however. For example, after Richard Greenville landed in Virginia in 1585, his party encountered an Indian who "stole" a silver cup.²⁵ Greenville plundered and burned the entire Indian village nearby. As more and more refugees from religious intolerance and poverty came to the colonies, land became scarce and the colonists took by force what the natives had earlier given freely.

21. *Id.* at 15 (citing BARTOLOMÉ DE LAS CASAS, *THE DEVASTATION OF THE INDIES: A BRIEF ACCOUNT* (Herma Briffault trans., 1974)).

22. *Id.* at 22.

23. See STANNARD, *supra* note 2, at 218.

24. EIERGER, *supra* note 17, at 196.

25. ZINN, *supra* note 1, at 12.

The colonies were an export operation designed to return wealth to the European continent and Britain. The private charter companies commissioned by the colonizing powers viewed the New World as a source of raw materials and power. The colonists generally found it easier to cooperate with the local inhabitants, who had already established a system of trade and exchange, than to combat them. As a result, the companies actually purchased the title to land held by the natives and promised to respect Indian land holdings.²⁶ However, the experience of the natives was far from uniform. After settlement began in earnest, some of the colonies expropriated land by force while others maintained strictly diplomatic relations with the natives. The Crown set the basic policies, but each colony held general authority to manage its own affairs with the Indians.²⁷

The Carolinas, for example, were developed by Indian slaves.²⁸ Early trading in deer skins gave way to trading in Indians after white settlers from Barbados brought the slave trade with them.²⁹ The Indians wanted guns, metal knives, and cooking utensils which the English offered in exchange for assistance in capturing slaves. In this way the tribes were encouraged to work and fight against one another. Despite condemnation from the government in England and from the Church, the settlers continued their brutal exploitation of Indian slave labor.³⁰ These English entrepreneurs were not troubled by the issues of the debate between Las Casas and Sepulveda.³¹ Theirs was an economic, not an evangelical mission, and the slave trade in Indians was a profitable business.

By the mid-1700s the less exploited tribes of the North were dissatisfied with the persistent land fraud, broken agreements, encroaching white settlement, and trade inequities.³² Hostilities were frequent. The English government attempted to centralize relations with the Indians by appointing two agents to conduct the relations between the Indian nations and the Crown. The "Albany Conference" was convened in 1754 to address Indian complaints about fraudulent land transactions.³³ With the Royal Proclamation of 1763,³⁴ the Crown declared all lands west of the crest of the Appalachians to be Indian Territory and forbade English settlers from taking possession of those

26. Sharon L. O'Brien, *The Application of International Law to the Legal Status of American Indians 21* (1978) (unpublished Ph.D. dissertation, University of Oregon) [hereinafter O'Brien, *International Law*].

27. CLINTON ET AL., *supra* note 14, at 140.

28. BERGER, *supra* note 17, at 47.

29. *Id.* at 48.

30. *Id.* at 51.

31. *Id.*

32. *Id.* at 60.

33. *Id.*

34. Royal Proclamation of 1763, *reprinted in* R.S.C., No. 1 app. I, at 1 (1985).

or any other lands reserved to the Indians.³⁵ The most important provision of the Proclamation prohibited land sales by anyone but the Crown.³⁶ The reservation of land not previously purchased or ceded was absolute.³⁷ The Appalachian crest became the "Proclamation Line."³⁸ In the short term, this segregation eased tensions by minimizing interaction.

The principal goals of British policy at this time were to preserve the colonial foothold on Native American soil so that the resources of the new land could continue to flow, and to avoid disruption of trade. The rights of the Indians were observed more often in rhetoric than in practice and the tradition of pushing the Indians further west began. Nonetheless, the property rights of most of the Indian nations were never again to receive as much respect as they did under English occupation.

B. A Change of Government (1776-1789)

During the Revolutionary War, almost every Indian nation fought on the side of the British.³⁹ The colonists, therefore, struggled valiantly to secure the neutrality of tribes who were not actively fighting. Even Henry Knox, the first Secretary of War, said, "The Indians, being the prior occupants possess the right of the soil."⁴⁰ He noted that "[i]t is a melancholy reflection, that our modes of population have been more destructive to the Indian natives than the conduct of the conquerors of Mexico and Peru. The evidence of this is the utter extirpation of nearly all the Indians in the most populous parts of the Union."⁴¹ The first treaty between the emancipated colonists and the natives was signed on September 17, 1778. This treaty with the Delaware Indians guaranteed the territorial integrity of the Delaware lands, established trade relations, and even contemplated the possibility of an Indian state joining the new confederation at some point in the future.⁴²

The Articles of Confederation provided for centralized regulation of Indian affairs by the Continental Congress.⁴³ After the revolution ended, however,

35. *Id.* at 5-6.

36. *Id.* at 6.

37. *Id.* at 5.

38. BERGER, *supra* note 17, at 62.

39. ZINN, *supra* note 1, at 124.

40. *Id.*; FRANCIS P. PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 10 (1975).

41. PRUCHA, *supra* note 40, at 72 (citing HERBERT APTHEKAR, THE EARLY YEARS OF THE REPUBLIC: FROM THE END OF THE REVOLUTION TO THE FIRST ADMINISTRATION OF WASHINGTON (1783-1793) (1976)).

42. COMMISSIONER OF INDIAN AFFAIRS, TREATIES BETWEEN THE UNITED STATES OF AMERICA AND THE SEVERAL INDIAN TRIBES, FROM 1778 TO 1837, at 3 (Kraus Reprint Co., 1975) (1837).

43. ARTICLES OF CONFEDERATION art. IX, cl. 4 (U.S. 1781) ("The United States in Congress shall also have the sole and exclusive power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . .").

New York, North Carolina, and Georgia resisted federal control of what they saw as internal issues. The Continental Congress was unable to secure approval for a proposal to limit white encroachment onto Indian lands, and they settled instead on a provision restraining alienation (i.e., forbidding settlement) of Indian lands outside of state boundaries without the express approval of Congress.⁴⁴

The ubiquitous debate over the rights of the immigrants to Indian land rose again during the period in which relationships among the several states were being established.⁴⁵ Was discovery enough to justify usurping Indian territory? Did the successful occupation of Indian lands by the colonists secure their claim to the land? Did the colonists' conquest over the Indians in battle give them title to the land? Were reparations to the Indians required for taking their territory? The Continental Congress appointed a committee to discuss these issues. The committee concluded "that it has long been the opinion of the country, supported by Justice and humanity, that the Indians have just claims to all lands occupied by and not fairly purchased from them."⁴⁶

C. The Constitutional Period (1789-1803)

During this period, aboriginal claims to land were embroiled in a developing controversy between the states and the new federal government. This debate was to become the first constitutional issue relating to the Indians considered by the Supreme Court. Early uncertainty and ambiguity account for the numerous Native American land claims which continue to this day.

The Congress acted quickly to bring Indian Affairs under the ambit of its authority. The Trade and Intercourse Act of 1790⁴⁷ prohibited the sale of any Indian land to any person or state unless done so through the treaty process of the United States.⁴⁸ The new government thereby replicated the policy of the British Royal Proclamation of 1763.⁴⁹ The Act was amended or supplemented seven times⁵⁰ as the government reinterpreted the policies established by its treaties with the Indians and as the fledgling country struggled against the flood of white immigration in its efforts to enforce the Act.⁵¹ The Act had established a system that simply proved to be unworkable. Too many

44. 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 602 (Sept. 22, 1783) (Washington, U.S. Govt. Print. Off. 1904-37).

45. BERGER, *supra* note 17, at 73-74.

46. 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 457 (Aug. 3, 1787) (Washington, U.S. Govt. Print. Off. 1904-37).

47. Ch. 33, 1 Stat. 137 (current versions in scattered sections of 18 U.S.C. & 25 U.S.C.).

48. *Id.* § 4, 1 Stat. at 138.

49. BERGER, *supra* note 17, at 70.

50. 1793, 1796, 1799, 1802, 1817, 1822, 1834.

51. BERGER, *supra* note 17, at 70.

white settlers wanted what the Indians had — land. They also did not want to wait for the wheels of the federal bureaucracy to turn.

Father Francis Paul Prucha, a political and native historian, has described the following fundamental elements of the federal Indian program at this time:

(1) Protection of Indian rights to their land by setting definite boundaries for the Indian Country, restricting the whites from entering the area except under certain controls, and removing illegal intruders.

(2) Control of the disposition of Indian lands by denying the right of private individuals or local governments to acquire land from the Indians by purchase or by other means.

(3) Regulation of the Indian trade by determining the conditions under which individuals might engage in the trade, prohibiting certain classes of traders, and actually entering into the trade itself.

(4) Control of the liquor traffic by regulating the flow of intoxicating liquor into the Indian Country and then prohibiting it altogether.

(5) Provision for the punishment of crimes committed by members of one race against the other and compensation for damages suffered by one group at the hands of the other, in order to remove the occasions for private retaliation which led to frontier hostilities.

(6) Promotion of civilization and education among the Indians, in the hope that they might be absorbed into the general stream of American society.⁵²

These goals constituted the foundation of federal government relations with the Indians. Prodigious effort was expended to establish fixed territorial lines between Indian Country and non-Indian holdings, but the borders fluctuated dramatically. After illegal white settlements were established on Indian land, the federal government negotiated a new grant from the Indians to the United States. As new issues emerged, different aspects of these elements were emphasized and new treaties were drafted and ratified.

The changing policies regarding Indian land were also, in part, governed by simple facts. In 1790, slightly less than 4,000,000 whites occupied the Eastern seaboard of the United States. Fifty years later there were 13,000,000 immigrant non-Indians, 4,500,000 of which had crossed the crest of the Appalachians in violation of the inherited agreement between the Indians and

52. FRANCIS P. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 2-3* (1962), cited in CLINTON ET AL., *supra* note 14, at 143.

the British made eighty years earlier. Clearly, population growth of this magnitude required an expanding land base.⁵³

The purchase of the Louisiana Territory in 1803 provided some desperately needed land and eliminated competition from France on this continent. Unfortunately, much of this land was presently occupied by Indians who had been pushed off their ancestral homelands in the East. Congress enacted legislation authorizing the president to exchange land with a tribe living east of the Mississippi for lands the United States did not want west of the Mississippi. This solution seemed obvious, but difficulties in coercing the Indians to cooperate were to drag on for decades.

D. The Removal Period (1803-1861)

With the French out of the country and the English defeated in the War of 1812,⁵⁴ the Indians were the only remaining competition for territorial resources in the East. In order for whites to enjoy the benefit of the property purchased by President Thomas Jefferson, the Indians would have to leave. The idea of collecting the Indians into a state or states of their own persisted as a solution.⁵⁵

The removal process began diplomatically. The 1817 Treaty with the Cherokees⁵⁶ provided that they trade their present lands for territory on the Arkansas and White rivers. This treaty, and others of the period,⁵⁷ introduced a new aspect to treaty making with the Indians. The government discovered that treaties could be used to divide the Indians amongst themselves. By destroying communal ownership of land and creating internal competition for land grants that were only awarded to "friendly" tribes or sub-sets of tribes, the federal government could educate the Indians in the civilizing aspects of competition as well as limit their ability to unite. Diplomatic efforts also preserved the foundation of legitimate title to Indian land if the government could show that it had been ceded voluntarily.

Three seminal Supreme Court decisions during this period, *Johnson v. M'Intosh*,⁵⁸ *Cherokee Nation v. Georgia*,⁵⁹ and *Worcester v. Georgia*,⁶⁰

53. "[W]hen the eighteenth century was drawing to its close, less than 5000 native people remained alive in all of eastern Virginia, North Carolina, South Carolina, and Louisiana combined" STANNARD, *supra* note 2, at 121.

54. The War of 1812 was the last war in which the Indian nations participated militarily in the contest between European nations vying for control of North America. BERGER, *supra* note 17, at 64.

55. *Id.* at 69.

56. July 8, 1817, U.S.-Cherokee Nation, 7 Stat. 156.

57. Treaty with the Choctaws, Oct. 8, 1820, U.S.-Choctaw Nation, 7 Stat. 210; Treaty with the Creeks, Feb. 12, 1825, U.S.-Creek Nation, 7 Stat. 237; Treaty with the Creeks, Jan. 24, 1826, U.S.-Creek Nation, 7 Stat. 286; Treaty with the Western Cherokee, May 6, 1828, U.S.-Cherokee Nation, 7 Stat. 311; Treaties with the Delawares, Aug. 3, 1829 & Sept. 24, 1829, U.S.-Delaware Indians, 7 Stat. 326, 327; Treaty with the Choctaw, U.S.-Choctaw Nation, Sept. 27, 1830, 7 Stat. 333, 340. These treaties are cited in CLINTON ET AL., *supra* note 14, at 145.

58. 21 U.S. (8 Wheat) 543 (1823):

authored by Chief Justice John Marshall, established the relationship between the Indian nations and the federal government.

The first case, *Johnson v. M'Intosh*,⁶¹ settled, for America, the relationship between discovery and title. Marshall acknowledged that the United States' claims to the land were, for the most part, predicated on conquest of the Native Americans, not voluntary succession.⁶² The issue was whether the Illinois and Piankeshaw Indians held title to land that was freely alienable. Justice Marshall found that the rights of the original inhabitants were necessarily impaired by European development saying:

[The natives] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the fundamental principle that discovery gave exclusive title to those who made it.⁶³

The economic vitality and structure of the United States was at stake in this case; to have found that the Indians did hold valid title would have undercut the entire market for the land companies flourishing at the time. The Court refused to uphold the transfers made by the Indians and thereby established the rule that the United States can determine what Indians can and cannot do with their land.

The second case, *Cherokee Nation v. Georgia*,⁶⁴ defined the character of the Indian Nations relative to the federal government and set in motion an understanding of Native Americans as subjugated peoples. The case focused on the nature and extent of Indian sovereignty. After the State of Georgia annexed the federally established land they also dissolved all the Cherokee organs of government. When one Cherokee man was indicted for the murder of another the state supreme court held that Georgia criminal courts and not the Cherokee tribal courts had jurisdiction because the Cherokee "savages" could not, by definition, have a lawful grant.⁶⁵ Marshall summarized the issue of the case by asking, "Do the Cherokees constitute a *foreign* state in the sense of the constitution?"⁶⁶ Marshall held that they were not foreign states,

59. 30 U.S. (5 Pet.) 1 (1831).

60. 31 U.S. (6 Pet.) 515 (1832).

61. 21 U.S. (8 Wheat) 543 (1823).

62. *M'Intosh*, 21 U.S. (8 Wheat) at 574.

63. *Id.*

64. 30 U.S. (5 Pet.) 1 (1831).

65. BERGER, *supra* note 17, at 76 (citing *Cherokee Nation*, 30 U.S. (5 Pet.) at 19).

66. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16 (emphasis added).

but rather "domestic dependent nations."⁶⁷ He described their relationship with the United States as resembling "that of a ward to his guardian."⁶⁸ This description led to the "trust relationship" later accepted between the United States and the Indian nations. Because the Cherokees were neither a state admitted to the Union nor a foreign state, Article III, Section 2 of the Constitution did not give the Supreme Court jurisdiction to hear the case. The fact that Marshall described this "state of pupilage" as between the Indians and the federal government indicated who was to win the federal/state conflict operating behind the facts of this case.

The third case, *Worcester v. Georgia*,⁶⁹ originated from a Georgia criminal prosecution of four religious missionaries who deliberately broke a law requiring them to have a state license to live on Indian lands. Recall that the state had annexed the Indian territory and required the Cherokee Indians who lived there to submit to Georgia law. Marshall found that the Georgia laws were an unconstitutional interference with the treaty relationships established between the Cherokee Nations and the United States, and, therefore, reversed the Georgia judgment.⁷⁰ Marshall described the Indian relationship with the federal government as follows: "[B]y declaring treaties already made, as well as those to be made, to be the Supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."⁷¹ Marshall analogized the Indian nations to small European nations who sought the protection of greater powers.⁷² By this reasoning, the laws of Georgia could have no force on Cherokee territory.⁷³

The State of Georgia correctly understood, however, that President Andrew Jackson, veteran of military campaigns against the Indians, would not interfere in state assertion of authority over the tribes.⁷⁴ A constitutional crisis, prompted when Jackson refused to execute the judgment of the Supreme Court, was only narrowly averted. To avoid the embarrassment and ensuing conflict, the Court simply ended its session and put off the issue because an improper writ was issued. The case did not overrule *M'Intosh* or *Cherokee*

67. *Id.* at 17.

68. *Id.*

69. 31 U.S. (6 Pet.) 515 (1832).

70. *Id.* at 557-58.

71. *Id.* at 558.

72. *Id.* at 560.

73. *Id.*

74. Jackson is purported to have said in response to Marshall's judgment in the *Worcester* decision: "John Marshall has made his decision, now let him enforce it." 1 HORACE GREELEY, *THE AMERICAN CONFLICT: A HISTORY OF THE GREAT REBELLION IN THE UNITED STATES OF AMERICA 1860-64*, at 106 (Hartford, O.D. Case & Co.; Chicago, G. & C.W. Sherwood, 1864-66), cited in *CLINTON ET AL.*, *supra* note 14, at 28.

Nation, but it did affirm Indian sovereignty by accepting some limited jurisdiction supremacy for Indians on Indian land.

The affirmation was not to last long, however. The Choctaws, Chickasaws, and Creeks had already given in to removal pressure. The Seminoles had lost their desperate attempt to fight off the white military. The Cherokees had not fought back, but had resisted removal by trying to adapt to the white way, taking on European political structures and styles of living. When the pressures on their land became too great, their government was dissolved, their newspaper was suppressed, and their land was given away.⁷⁵ Their experience in Georgia was repeated. They were summoned to sign a removal treaty in 1836,⁷⁶ but only five hundred of the seventeen thousand Cherokees showed up for the signing. The treaty was signed in any case, ratified by the Senate, and the Cherokees were rounded up and pushed westward.⁷⁷ Estimates are that 4000 to 8000 people died on what came to be known as the Trail of Tears.⁷⁸

In a speech to Congress in December 1838, President Martin Van Buren said: "It affords sincere pleasure to apprise the Congress of the entire removal of the Cherokee Nation of Indians to their new homes west of the Mississippi. The measures authorized by Congress at its last session have had the happiest effects."⁷⁹ The policy of removal of Indians to areas beyond state lines lasted until at least 1861.

E. The Reservation System (1861-1887)

The period of time between 1830 and 1855 was a time of tremendous growth for this young country. By 1853, the present boundaries of the United States were established and people were moving west. The settlers moved through the Great Plains and into California in search of gold and land, manifestly destined to conquer all human and geographic obstacles to development of the "new" lands. The pressure on the Indians, who had been "removed" to the Great Plains states, increased.

As California's population increased, federal agents experimented with the creation of smaller Indian land holdings within the state in exchange for guarantees of territorial permanence, social services, and guarantees of self-governance.⁸⁰ Congress withheld immediate approval of these "reservations," because they departed from the removal policy, but despite the vastly increased size of the country, land was becoming scarce. Finally, the Enabling

75. STANNARD, *supra* note 2, at 122.

76. Treaty of New Echota, Dec. 29, 1835, U.S.-Cherokee Nation, 7 Stat. 478.

77. STANNARD, *supra* note 2, at 123.

78. BERGER, *supra* note 17, at 86; *see also* STANNARD, *supra* note 2, at 124.

79. ZINN, *supra* note 1, at 144-46.

80. BERGER, *supra* note 17, at 87.

Act for the Kansas Territory⁸¹ established a policy of respect for the jurisdictional integrity of the Indian lands within the state.

This Act established a pattern whereby newly admitted states would renounce jurisdiction over the Indians, and would grant the Indians some independent sovereignty for activities occurring on their own lands. The states, in turn, received vast land holdings that had previously been promised to the Indians in perpetuity. Most of the famous Indian battles during this time occurred as the government attempted to force Indians onto reservation lands or to keep them there.⁸²

Under the reservation system, other aspects of Indian life began to change as well. In 1871, the government ended all treaty making with the Indian tribes.⁸³ In 1882, Secretary of the Interior, Henry M. Teller, initiated a policy to end Indian religious ceremonies and later to imprison Indians engaging in traditional rites.⁸⁴ In 1885, the Congress passed the Major Crimes Act,⁸⁵ providing federal court jurisdiction over seven enumerated crimes committed by Indians on or off Indian reservations.⁸⁶ For the first time, this statute provided federal jurisdiction over intratribal affairs.⁸⁷ Much of previously settled Indian policy began to be reconsidered during the 1880s.

F. Allotment and Assimilation (1887-1934)

The importance of the Dawes Act⁸⁸ is difficult to overestimate.⁸⁹ Its purpose was intimately tied to the view that promoting Indian separatism was not working, and the solution to the "Indian problem" was to turn them into "white people." Aboriginal people still combat this problem today, as do other minority cultures in contact with a dominant culture.

The following policy objectives guided legal developments during this period in 1877: (1) assimilation of the Indians to white economic life through termination of communal ownership of land, (2) elimination of the Indian community, culture, and political structure, and (3) coercion of the Indians to

81. Ch. 20, 12 Stat. 126 (1861).

82. BERGER, *supra* note 17, at 87-92.

83. Act of Mar. 3, 1871 (Appropriations Act), ch. 120, § 1, 16 Stat. 544, 566 (codified in part at 25 U.S.C. § 71 (1988)).

84. Sharon L. O'Brien, *A Legal Analysis of the American Indian Religious Freedom Act*, in THE HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 28 (Christopher T. Vecsey ed., 1991) [hereinafter HANDBOOK].

85. Act of Mar. 3, 1885 (Appropriations Act), ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified at 18 U.S.C. § 1153 (1988)).

86. *Id.*

87. CLINTON ET AL., *supra* note 14, at 148.

88. General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1988)) (named after Sen. Henry L. Dawes (D.-Mass.), who advocated its passage).

89. BERGER, *supra* note 17, at 102.

adopt habits of civilized life exhibited by the white race.⁹⁰ The Dawes Act is directly related to the first two of these objectives and indirectly related to the third.

Previously, all Indian land had been assigned to the tribes and generally held in common. The Dawes Act assigned particular parcels of sixty-four hectares of land to each family head of household and thirty-two hectares to each single person over eighteen years of age in each tribe.⁹¹ These parcels were to be permanent, could be passed on through inheritance, and were inalienable for twenty-five years.⁹² The Act aimed to induce the Native Americans to adopt a European, profit-generating agrarian lifestyle, instead of their traditional, more communal, and subsistence-based life. The early allotment efforts had been predicated on voluntary acceptance of these terms, but the Act anticipated coercing the Indians to accept allotment and the eventually dissolving the tribes and the reservations.⁹³ The Act envisioned that the Indians would become subject to state law at the end of the inalienation period and provided that any lands not distributed through the allotment process would be ceded to the federal government.⁹⁴ The government sold those lands to anxious white settlers.

During the first twenty-five years of the allotment program, the Indians lost almost two-thirds of their previous land holdings and eighty-seven percent of their "good land,"⁹⁵ through government sales of "surplus" land and fraudulent land deals with whites. Much of this land passed to non-Indian owners through state property tax foreclosures.⁹⁶ President Theodore Roosevelt claimed that the Act would be "a mighty pulverizing engine to break up the tribal mass."⁹⁷ Despite previous treaties promising political autonomy and territorial permanency, the government openly aimed to destroy the Native American society.

The second and third goals were primarily achieved through educational and religious reorientation. Federally administered schools and religious education instructed Indians in the habits of civilized life. Boarding schools were an important instrument for effecting assimilation.⁹⁸ Native American

90. EDWARD H. SPICER, *THE AMERICAN INDIANS 183-90* (1980).

91. BERGER, *supra* note 17, at 102.

92. Though the Secretary of the Interior and many statutes which followed created shorter restraints on alienation. The history of the Menominee reservation is a famous example of the resulting "checkerboard" effect.

93. BERGER, *supra* note 17, at 102.

94. *Id.*

95. CLINTON ET AL., *supra* note 14, at 152. The amount went from 138 million acres to 48 million acres. *Id.* Of the remaining 48 million acres, 20 million were desert or semi-desert. *Id.*

96. BERGER, *supra* note 17, at 103.

97. President Theodore Roosevelt, Message to the Senate and House of Representatives (Dec. 3, 1901), in 10 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908*, at 450 (James D. Richardson ed., 1902).

98. O'Brien, *International Law*, *supra* note 26, at 79.

children were taken from their parents, sometimes after federal officials threatened to withhold food rations if the parents did not cooperate, and sent to schools where they learned English, practiced white cultural traditions, and were taught that Indian culture was inferior.⁹⁹ Oftentimes the children were sent to live with white families during the summer so that they would not be influenced by their parents to pick up Indian ways.¹⁰⁰ Christian religious groups were also active in the schools and on the reservations recruiting Indians to their systems and denigrating Indian religious practices.

The second and third goals were also implemented in a series of institutions created by regulations of the Bureau of Indian Affairs (BIA).¹⁰¹ The BIA created Courts of Indian Offenses and an Indian Service of the Bureau Police. Both served to create an alternative power structure within the Indian community to compete with the traditional tribal organization. The Code of Indian Offenses implemented by the Bureau Police and Courts of Indian Offenses proscribed many traditional Indian cultural and religious practices.¹⁰² Through these two institutions and others like them,¹⁰³ white political relations made great inroads into Indian life.

BIA administrators assumed that, after adopting the way of life of the white people, the Indians would shed their culture and meld into the white culture as the European immigrant groups had done. The one major difference between the immigrants and the Indians, however, was that the immigrants had voluntarily left their own communities, cultures, and homeland in search of what they considered to be better opportunities in the United States. The Indians never made that choice.¹⁰⁴

The last major legislation of the period conferred citizenship on all "noncitizen" Indians born within the United States.¹⁰⁵ The Indian nations that survived allotment now found themselves assimilated by the dictates of the occupying power. The assimilation campaign was officially complete, but the inadequacies and injustice of the previous fifty years began to become more manifest. A report sponsored by the Brookings Institute,¹⁰⁶ however, concluded that "the assimilation campaign had failed to realize its objectives and that the Indians lived in conditions of extreme poverty, with poor health

99. *Id.*

100. See SPICER, *supra* note 90, at 188.

101. Created in 1824.

102. CLINTON ET AL., *supra* note 14, at 151.

103. Legislation such as the Act of June 28, 1898 (Curtis Act), ch. 542, 30 Stat. 567, which dissolved the Cherokee and Choctaw tribal governments as legal institutions, also combined to affect change in Indian life.

104. BERGER, *supra* note 17, at 151.

105. Act of June 2, 1924, ch. 233, 43 Stat. 253.

106. See INSTITUTE FOR GOV'T RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Merriam et al. ed., 1928). This work is popularly known as the *Merriam Report*.

and inadequate education."¹⁰⁷ The BIA, under John Collier as Commissioner of Indian Affairs, reflected the changing attitudes toward Indians that began to arise. Collier abolished official prohibitions against Indian religious practices and instituted other reforms that helped to ease government discrimination against Indians.¹⁰⁸ Slowly, the situation began to improve.

G. The Reorganization Act Period (1934-1940)

If the allotment and assimilation period marked the nadir of the relationship between the Native American peoples and the federal government, then the period which followed indicated a general improvement. The Indian Reorganization Act (IRA)¹⁰⁹ formalized a rejection of the policies that had guided Indian policy for more than fifty years. "By 1934, there was a sense that something very serious was wrong with the direction of federal policy based on the [Dawes] Act and the principles that undergirded it."¹¹⁰ When President Franklin Roosevelt chose John Collier as Commissioner of Indian Affairs, a new era of Indian policy began. The new system implemented policies reflecting Marshall's emphasis on allowing the Indians to govern themselves within their own territory and allowed the tribes to choose to adopt new institutions based on the model of a liberal, European, constitutional democracy. The sense of choice was limited, however. Some of the tribes experienced substantial pressure to accept the IRA and the consequences of refusing to vote whether or not to accept it were severe.¹¹¹

The Act ended land allotments and authorized the Secretary of the Interior to purchase additional lands for Indian use. Further, it required that timber harvesting on Indian lands be designed with the goal of long-term yield, rather than the quick gains brought by clear cutting. The decision about whether or not to harvest remained with the federal government, not the Indians. One of the most important provisions of the IRA allowed the Indian tribes to develop constitutions and corporate charters. Even though these constitutions and the corporate structure were established on white terms, the limited autonomy they brought revived the sense of tribal government and control. These corporations developed widely and became instruments of social change in the tribes.¹¹² Irrigation systems were built, communally owned cattle herds were established, and the exploration of mineral and oil resources began. Not all of the changes "development" generated were positive, but some good effects did come as a result.

107. SPICER, *supra* note 90, at 189-90.

108. See O'Brien, *International Law*, *supra* note 26, at 28.

109. Indian Reorganization Act of 1934 (Wheeler-Howard Act), ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1988 & Supp. II 1990)).

110. CLINTON ET AL., *supra* note 14, at 152.

111. See *Wheeler-Howard Act — Exempt Certain Indians: Hearings Before the House Comm. on Indian Affairs on S. 2103*, 76th Cong., 3d Sess. 22 (1940).

112. SPICER, *supra* note 90, at 193.

Importantly, IRA also defined the term, "Indian," which established the following qualification for election, acceptance, and benefits under the Act:

The term 'Indian' as used in [the IRA] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of [the Act], Eskimos and other aboriginal peoples of Alaska shall be considered Indians.¹¹³

Eventually, 258 tribal elections were held to decide whether or not to accept the Act. A total of 181 tribes, including 129,750 individual Indians, accepted organization under the Act. Seventy-seven tribes, with 86,365 Indians, rejected it.¹¹⁴ IRA and its effects marked a new era in Indian affairs.

*H. The Termination Era (1940-1962)*¹¹⁵

The controversy between assimilation and autonomy was not ended by the IRA. Within Congress there was strong support for the notions that reservations were places of forced internment that should be closed, and that America should cease to deal with the Indians differently from any other minority group. In the name of freeing tribes from federal supervision, Congress undertook a policy "terminating"¹¹⁶ the special relationship between the Native Americans and the United States.

House of Representatives Concurrent Resolution 108¹¹⁷ states that the policy of Congress was that the Indians should be treated identically with all other citizens. Several tribes were "designated"¹¹⁸ as subjects of study, the end result of which was legislation placing the individuals of the tribes fully under state authority. Eventually, 109 tribes were terminated; 1,362,155 acres of reservation land and 11,466 Indians were affected, comprising 3% of all federally managed Indians and 3.2% of the trust land.¹¹⁹ Congress also

113. 25 U.S.C. § 479 (1988)

114. CLINTON ET AL., *supra* note 14, at 154.

115. For a comprehensive analysis of this period, see DONALD FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960* (1986).

116. Act of June 17, 1954 (Termination Act), ch. 303, 68 Stat. 250, 252 (codified as amended at 25 U.S.C. §§ 891-902 (1970) (repealed 1973)), stated that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe" *Id.*, cited in Sharon L. O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1471 n.49 (1991) [hereinafter O'Brien, *Tribes & Indians*].

117. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).

118. *Id.* The Flathead, the Klamath, the Menominee, the Potawatamie, and the Chippewa. *Id.*

119. CLINTON ET AL., *supra* note 14, at 158.

adopted Public Law 280,¹²⁰ which transferred jurisdiction over crimes and civil causes of action previously held by federal and tribal authorities to the states.¹²¹

I. Assertions of Sovereignty (1962-Present)

In recent years court decisions and congressional enactments have diminished the impact of termination. Two terminated tribes, the Menominee and Klamath, challenged the termination of fishing and hunting rights that conflicted with treaty provisions.¹²² The Supreme Court held that the termination legislation did not abrogate their tribe's treaty rights. Congress has restored some tribes to federal recognition and included other terminated tribes in benefit programs aimed at federally recognized tribes.¹²³

Native Americans benefitted in the 1960s from President Lyndon Johnson's War on Poverty and from legislation that gave Indians the opportunity to sue in federal court.¹²⁴ In the 1970s, Native Americans challenged infringement of land, hunting, and fishing rights in court. They challenged federal authority more directly by taking over the Bureau of Indian Affairs Office in Washington in 1972 and by resisting police control at Wounded Knee in 1973. The Indian Civil Rights Act of 1968¹²⁵ also gave Indians guarantees under the Bill of Rights that they had not previously known, including federal *habeas corpus* jurisdiction, and retrocession of Public Law 280 jurisdiction to the federal government.¹²⁶ Though this Act has been very controversial in the Native American community, it permitted Indians to raise individual and collective rights claims in federal court. Also passed during this time were the Indian Self-Determination and Education Assistance Act of 1975¹²⁷ and the Indian Child Welfare Act of 1978,¹²⁸ which strengthened the role of the tribes in making decisions about their members.

120. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Pub. L. No. 83-280) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1988)).

121. *Id.*

122. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1967); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974).

123. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1988 & Supp. II 1990)); Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified in scattered sections of 25 U.S.C.); Indian Education Act, Pub. L. No. 92-318, 86 Stat. 334 (1972) (codified in scattered sections of 20 U.S.C.). These authorities are cited in O'Brien, *Tribes & Indians*, *supra* note 116, at 1472 nn. 50-52.

124. Act of Oct. 10, 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (1988)) (making court challenges possible).

125. Pub. L. No. 90-284, 82 Stat. 77 (codified in part at 25 U.S.C. §§ 1301-1303 (1988)).

126. CLINTON ET AL., *supra* note 14, at 160.

127. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n (1988)).

128. 25 U.S.C. §§ 1901-1963 (1988 & Supp. II 1990).

These assertions of sovereignty and statutory gains in autonomy reawakened latent questions about the nature of federal trust responsibility for Indians. Because Justice Marshall's infamous guardian/ward characterization was formalized in the Dawes Act, requiring the federal government to administer the allotment process for the benefit of Indian land recipients, a trust relationship between the government and the Indians developed. The government was seen as the trustee of a body of assets to which the Indians were entitled and for which they needed the administrative capacities of the federal government. The government, through the Department of the Interior and the Bureau of Indian Affairs, argued that this trust relationship only extended to property and only for federally recognized tribes.¹²⁹ In 1974, the National Tribal Council claimed that the trust responsibility included not only these obligations, but also the requirement that the federal government protect the sovereignty of the Indian tribes.¹³⁰ Some scholars have noted that the trust responsibility works both for and against Native American sovereignty efforts.¹³¹ Care by a trustee allows a beneficiary to enforce her rights to trust assets, but it also necessarily entails a strong sense of control and paternalism. The sword cuts both ways.

In the later part of the 1970s, Native Americans and Native American policy experienced a backlash against what were viewed as excesses of the 1960s. Citizens groups, such as the Montanans Opposed to Discrimination and the Interstate Congress for Equal Rights and Responsibilities, lobbied Congress to return to the assimilation policies of the past. Bills were introduced calling for a reevaluation of Indian law, limitations on hunting and fishing rights, and even an end to all treaties entered into with the Indians by the United States.¹³²

These groups and the change of political agenda that took place in the 1980s set the stage for an increased focus on the financial relationship between the government and the Indians. President Ronald Reagan, in an effort to limit federal expenditures for Indian support, issued a Statement on Indian Policy proclaiming that "[i]t is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government."¹³³ This policy, however, may be little more than the "termination" wolf in the "sovereignty" sheep's clothing. Congress, nonetheless, called for extensive economic

129. FRANCIS P. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 399 (1984).

130. *Id.*

131. *Id.* at 400.

132. CLINTON ET AL., *supra* note 14, at 162.

133. President Ronald Reagan, Statement on Indian Policy (Jan. 24, 1983), in [1983] 1 PUB. PAPERS 96-97.

development on the reservations, though the tribes were expected to provide most of the capital to fund this development.

Since President Richard Nixon's famous call for congressional support of Indian autonomy efforts,¹³⁴ all subsequent presidents have, with varying degrees of credibility, asserted interest in developing Native American self-governance measures. After a meeting with indigenous leaders President George Bush stated, "Today we move forward toward a permanent relationship of understanding and trust, a relationship in which the tribes of the nation sit in positions of sovereignty along with other governments that compose the family that is America."¹³⁵ A project was initiated in 1988 by Congress to support a test group of tribes who participate in a three-year attempt at self-governance. Although the tribes must still negotiate with the Bureau of Indian Affairs for their funding, their relationship approximates that of one sovereign to another.

Conditions on the reservations today, however, are still not good. Estimates are that unemployment on the reservations runs as high as 80% and alcoholism is nearly as widespread. The average annual income is less than \$7000. Nonetheless, there is hope among the tribes who have joined the self-determination project¹³⁶ that new jobs, better schools, and a new pride in Indian culture will be engendered by a return to self-governance.

The Native Americans continue to face many struggles today. The extermination policies have ended and their children are no longer being forced into boarding schools, but the challenges of alcoholism, unemployment, and the battle to maintain their culture are all very real. One of the greatest threats to the Native American community continues to be the assault on their spiritual practices. This assault is no longer military but is instead legal. The stakes, however, are just as high. The following sections discuss the general environment of protection of religious rights in the United States and a focus on how the standards continue to work to the detriment of Native Americans.

II. Constitutional Protection of Religion

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹³⁷ These two clauses of the First

134. President Richard Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), 1970 PUB. PAPERS 564, 576, cited in PRUCHA, *supra* note 129, at 379 ("We have concluded that Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.").

135. Martha Williams, *Some Native Americans Begin Push for Self-Determination*, SEATTLE TIMES, June 30, 1991, at A1.

136. Seven tribes are currently participating: in Washington, the Quinault Indian Nation, the Jamestown Klallam Tribe, the Lummi Indian Tribe; in California, the Hoopa Valley Tribe; in Oklahoma, the Absentee-Shawnee Tribe, the Cherokee Tribe; and in Minnesota, the Mille Lacs Chippewa.

137. U.S. CONST. amend. I.

Amendment are collectively known as the Religion Clauses and individually known as the Establishment Clause and the Free Exercise Clause. These parts of the First Amendment have been made applicable to the states by the Fourteenth Amendment.¹³⁸ Each clause can be implicated by government action that either helps or hinders religion. In the context of Native American religious freedom, Indians claim that the government has violated these constitutional protections when a government action has unduly burdened their spiritual practices. Generally, a free exercise claim is at issue, but occasionally the government will claim that even if a free exercise violation is found the requested government accommodation of Native American spiritual practice would amount to an Establishment Clause violation. "There is a natural antagonism between a command not to establish religion and a command not to inhibit its practice."¹³⁹ A principle of "neutrality" has guided the Court's analysis of Religion Clause claims, but, as this article will show, neutrality has worked almost without exception to the detriment of Native Americans. The next section outlines the standards and method of analysis employed by courts in these cases.

A. The Establishment Clause

Most of the religious rights issues that arise involve the second part of the "Religion Clauses" of the Constitution, rather than the first. Establishment Clause analysis is implicated, however, when the government improperly involves itself in support of a particular religious group. In the Native American context, Establishment Clause issues arise when courts worry that the protection they are asked to afford Indian religious practices require that the government be more than neutral toward Native American spirituality.

The traditional Establishment Clause standards are set forth in *Lemon v. Kurtzman*.¹⁴⁰ In *Lemon*, the Court established a three-part test for determining the validity of state statutes granting financial aid to church related schools. The law in question must: (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. Justice Sandra Day O'Connor has called for a reformulation of the Establishment Clause test that would put the court in the position of an "objective observer."¹⁴¹ Her two-prong test would first ask whether the court has "endorsed" a particular

138. *Everson v. Board of Educ.*, 330 U.S. 1, 14-15 (1947), *reh'g denied*, 330 U.S. 855 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

139. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 1031 (1986).

140. 403 U.S. 602 (1971).

141. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (holding that an Alabama statute authorizing a period of silence of meditation or voluntary prayer violated the Establishment Clause requirement of neutrality toward religion). The Supreme Court has recently announced its intention to reevaluation the *Lemon* test by accepting certiorari of *Grumet v. Board of Educ.*, 618 N.E.2d 94 (N.Y. 1993), *cert. denied*, 62 U.S.L.W. 3368 (Nov. 29, 1993).

religion or religious belief.¹⁴² The second prong of her test would investigate whether the challenged statute requires the government to become excessively entangled with religious institutions.¹⁴³ Though this test seems to be gaining favor on the Court in recent years, it has not yet become the standard of analysis.¹⁴⁴

In the 1992 term, the Supreme Court further muddled the already turbid waters of Establishment Clause analysis by refusing to reconsider *Lemon* while affirming the unconstitutionality of a rabbinical prayer at a public middle school graduation ceremony. By a 5-4 majority, the Court held in *Lee v. Weisman*¹⁴⁵ that a school could not provide for a "nonsectarian" prayer to be led by a member of the clergy selected by the school.¹⁴⁶ The Court held that the conduct of the school principal, in deciding that an invocation and benediction should be given and in selecting a religious participant, constituted state action.¹⁴⁷ The Court languished over the "state-imposed character of an invocation and benediction by clergy selected by the school"¹⁴⁸ and found that the "conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause."¹⁴⁹

After acknowledging the "delicate and fact-sensitive" character of Establishment Clause jurisprudence, Justice Anthony Kennedy, writing for the majority, clearly limited this decision to the school graduation context.¹⁵⁰ Despite his characterization of the decision, however, scholarship has already noted the Court's snub of the *Lemon* test analysis in favor of an expanded focus on coercion as a determinative principal.¹⁵¹ Whether this change portends a reinvigorated future for the Establishment Clause or is the harbinger of further confusion remains to be seen. For Native American religious freedom, the situation could not get much worse.

Courts evaluating Native American free exercise claims have found Establishment Clause problems when asked to protect religious freedom on government lands.¹⁵² In *Inupiat Community of Arctic Slope v. United*

142. *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990).

143. *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (holding that the inclusion of a nativity scene in a city display does not violate the Establishment Clause).

144. Laurence H. Tribe, Comments on Proposed Legislation to Protect Native American Religious Freedom, Memorandum to Native American Tribal Leaders and Academics Meeting at Harvard Divinity School (Nov. 13, 1990) (on file with author).

145. 112 S. Ct. 2649 (1992).

146. *Id.* at 2655.

147. *Id.* at 2655-56.

148. *Id.* at 2660.

149. *Id.* at 2661.

150. *Id.*

151. *See The Supreme Court, 1991 Term — Leading Cases*, 100 HARV. L. REV. 163, 259 (1992).

152. Though not in a Native American rights context, the Supreme Court's statement in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), tells the tale. The Court said, "The principle that

States,¹⁵³ the court observed that the Inupiat claims sought to deprive the public of normal use of the seas at issue and therefore created serious Establishment Clause problems. The court in *Crow v. Gullet*¹⁵⁴ noted that other courts had expressed concern about affording special treatment to Indians and so becoming excessively entangled with religion.¹⁵⁵ Not all courts have shared this concern. One court found that "where government action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief."¹⁵⁶

Because the bulk of Native American Religion Clause claims are based on a perceived threat to the right to freely engage in their spiritual practices, the next section delves into the specific details of free exercise jurisprudence in some detail.

B. Free Exercise Jurisprudence in American History

The framers of the Bill of Rights gave the protection of religious freedom priority in their list of protections which citizens reserved for themselves in this country. The objective of this First Amendment was unqualified federal government neutrality regarding religious beliefs and governmental accommodation of religious practices where its actions burdened them.¹⁵⁷ Since the Fourteenth Amendment extended this protection to the states, state action has generated most of the conflict between government interests and the rights of individuals to practice their religious beliefs freely. A brief survey of the history of free exercise jurisprudence reveals three prominent perspectives.

1. Belief and Practice

In the first free exercise case, *Reynolds v. United States*,¹⁵⁸ the Supreme Court upheld an anti-polygamy law against the claim of a Mormon plaintiff that his religious beliefs required such marriages. The Court stated that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."¹⁵⁹ Because polygamy was in "violation of social duties" and

government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Id.* at 2655.

153. 548 F. Supp. 182, 189 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (1984).

154. 541 F. Supp. 785, 794 (D.C. S.D. 1982).

155. *Id.* at 794 (citing *Widmar v. Vincent*, 454 U.S. 263, 263 (1981)).

156. *Wilson v. Block*, 708 F.2d 735, 747 (1983) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)).

157. *Gillette v. United States*, 401 U.S. 437, 449-50 (1971). "[W]hen government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact." *Id.* at 450.

158. 98 U.S. 145 (1878).

159. *Id.* at 164.

subversive of good order,"¹⁶⁰ Congress was free to make a law to outlaw this offensive practice, despite its infringement on the plaintiff's religious practice.

This opinion required the government to protect only religious *belief*, not religious practice. The Court reasoned that any other position would subordinate law to religious belief allowing every citizen to construct his or her own law based on religious conviction.¹⁶¹ After 1940, the Court deemphasized the distinction between belief and practice and established new standards for permissible burdens on religious practice.

In *Cantwell v. Connecticut*,¹⁶² the Court expanded protection for religious conduct.¹⁶³ The *Cantwell* Court reversed the conviction of several Jehovah's Witnesses for failing to obtain government approval before soliciting money. In addition to supporting its absolute ban on governmental interference with beliefs,¹⁶⁴ the Court held that the government could not inhibit the plaintiff's "chosen form of religion."¹⁶⁵ This decision protected not only the freedom to believe, but also, in some circumstances, the freedom to act on those beliefs.¹⁶⁶

Three years later, in *West Virginia State Board of Education v. Barnette*,¹⁶⁷ the Court supported the *Cantwell* standard and rejected a weaker test outlined in *Minersville School District v. Gobitis*.¹⁶⁸ Acknowledging that the First Amendment limited permissible government action, the *Barnette* Court recognized as valid only those restrictions on freedom of speech and of the press, of assembly and of worship only to the extent necessary protect a legitimate state interest from "grave and immediate danger."¹⁶⁹

160. *Id.* at 159.

161. *Id.* at 166-67; see also Kenneth Marin, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine* 40 AMER. U.L. REV. 1431, 1436 (1991).

162. 310 U.S. 296 (1940).

163. *Id.* at 303-04.

164. *Id.* at 303. This protection has been maintained throughout the history of the Court. See *Torcaso v. Watkins*, 367 U.S. 488 (1961) (striking down a state constitutionally required declaration of belief in God as a prerequisite for holding public office).

165. *Cantwell*, 310 U.S. at 303.

166. *Id.* Justice Owen Roberts stated that "[t]he first is absolute but, in the nature of things, the second cannot be." *Id.* at 303-04.

167. 319 U.S. 624 (1943).

168. 310 U.S. 586 (1940), *overruled by* *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Here, the Court supported a school board expulsion of a Jehovah's Witness who refused to salute the flag, finding that the expulsion was not directed at the student's belief, but at his refusal to follow school rules. *Gobitis*, 310 U.S. at 594, 599-600. That decision excluded from free exercise strict scrutiny any "general law not aimed at the promotion or restriction of religious beliefs." *Id.* at 594. It established a general "rational basis" test for government action affecting religious belief. *Id.* at 598-600.

169. *Barnette*, 319 U.S. at 639.

2. Setting the Standard

The major free exercise decision of the Earl Warren Court was *Sherbert v. Verner*.¹⁷⁰ *Sherbert* used the two-part balancing test established in *Braunfeld v. Brown*,¹⁷¹ which required that the plaintiff first establish that an action of the government has burdened a sincerely held¹⁷² religious belief.¹⁷³ After the plaintiff established an infringement on religious rights, the burden shifted to the government to show that its infringement was justified by a compelling interest. The Court upheld a state law requiring that businesses close on Sunday, despite the burden on merchants whose religion also required them to rest on days other than Sunday.¹⁷⁴ Because this burden was indirect in that its purpose was not to impede religious observance or discriminate between religions, the Court found that it did not amount to a compulsion to act contrary to religious beliefs.¹⁷⁵

In *Sherbert*,¹⁷⁶ the Court increased the level of scrutiny applied to indirect burdens on the free exercise of religion.¹⁷⁷ The Court again rejected the rational basis standard of review¹⁷⁸ and held that even incidental burdens on religious practice had to be justified by a compelling state interest.¹⁷⁹ Once the plaintiff established the prima facie requirements of sincere belief and burden on religion, the infringement was unconstitutional unless the government could show that the infringement on religious practice was justified by a compelling governmental interest which could not be protected by less restrictive means.¹⁸⁰ The Court found that even economic burdens of the *Braunfeld* type amounted to "the same kind of burden . . . as would a fine imposed . . . for . . . Sunday worship."¹⁸¹

The Court next expanded its application of the free exercise clause in *Wisconsin v. Yoder*,¹⁸² in holding that Wisconsin could not require members of the Old Order Amish religion and the Conservative Mennonite Church to send their children to school after the eighth grade.¹⁸³ The Court followed

170. 374 U.S. 398 (1963).

171. 366 U.S. 599 (1961).

172. For a discussion of sincerity assessment, see John T. Noonan, *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713, which analyzes *United States v. Ballard*, 322 U.S. 78 (1944), which is the origin of sincerity assessment addressed by the Court.

173. *Braunfeld*, 366 U.S. at 606-07

174. *Id.* at 605-06.

175. *Id.*

176. 374 U.S. 398 (1963).

177. *Id.* at 406.

178. *Id.*

179. *Id.* at 403.

180. *Id.* The state had to show that "no alternative forms of regulation" could pass constitutional muster. *Id.* at 407.

181. *Id.* at 404.

182. 406 U.S. 205 (1972).

183. *Id.* at 232-34.

its familiar balancing test and found that the Amish and Mennonites sincerely held a religiously-based belief that sending their children to secondary school would expose them to worldly influences that ran counter to their religious emphasis on different values.¹⁸⁴ Justice Warren Burger, writing for the majority, emphasized that the Amish way of life was intimately related with their religious beliefs.¹⁸⁵ The Amish and Mennonites could claim an exemption from the school obligation since they had shown that this government behavior had a coercive effect on the practice of their religion due to the burden it placed on that practice.¹⁸⁶

The state requirement at issue in *Yoder* could only be justified by a compelling state interest in imposing modern society upon the Amish.¹⁸⁷ The state failed to demonstrate an interest of significant importance and the Court saw that there were less burdensome means of achieving the state articulated goal of training good citizens.¹⁸⁸ The Court also reasoned that the Amish and Mennonite system of education was ideal for training their children for life in their community.¹⁸⁹ This facially neutral statute was found to unduly burden the free exercise of the Amish and Mennonite religions; the Court, therefore, exempted Amish and Mennonite children from attending public school beyond the eighth grade.¹⁹⁰

With these cases, the Court established the two-prong test for evaluating indirect burdens on the free exercise of religion which exists to this day: a plaintiff must first show that a government action coerced her to violate religious beliefs or penalized her for a religious practice, and second prove that those beliefs are sincere, deeply rooted in religion, and shared by others. If both prongs are satisfied, the government bears the burden of showing a compelling need for its action. Direct burdens on religious freedom are still absolutely prohibited.¹⁹¹ In recent years, however, the Court has tended to interpret state interests broadly and individual religious interests narrowly.¹⁹²

3. *The Scope Narrows*

In *United States v. Lee*,¹⁹³ the Court denied an Amish employer's right to refuse to withhold social security taxes from his Amish employees. Though the Court recognized the genuine burden that participating in the social

184. *Id.* at 211.

185. *Id.* at 235-36.

186. *Id.* at 234.

187. *Id.* at 235.

188. *Id.* at 224-25.

189. *Id.* at 223.

190. *Id.* at 234.

191. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

192. *See, e.g., Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439 (1988).

193. 455 U.S. 252 (1982).

security system placed on the plaintiff's religious liberty,¹⁹⁴ it found that compulsory payments were necessary for the maintenance of the system and that an exemption would be unduly difficult to administer. Efficiency in the "social security system justified forcing Lee to comply with the law in violation of his faith."¹⁹⁵ This decision marked a movement away from an expansive view of the governmental duty to refrain from infringing upon individual religious practices.

The Court has continued to move in that direction in recent decisions. In *Bowen v. Roy*,¹⁹⁶ the Court refused to exempt a Native American child from identification by a social security number. It characterized her father's claim as a demand that government "conduct its own internal affairs in ways that comport with [his] religious beliefs"¹⁹⁷ Some commentators have suggested that this decision implies a heightened level of scrutiny by the Court of government actions that require a choice between adherence to a religious belief and enjoyment of a government benefit.¹⁹⁸ Those government actions which make the practice of a particular faith more difficult or costly, on the contrary, require a less substantial government interest to overcome burdens to the free exercise of religion.

The Court's attack on judicial enforcement of the right to free religious exercise continued in *Employment Division, Department of Human Resources v. Smith*.¹⁹⁹ In that case the Court upheld Oregon's denial of unemployment compensation to two drug counselors who were fired from their jobs after ingesting peyote in an annual sacramental ritual of the Native American Church.²⁰⁰ Consumption of peyote was a crime under Oregon law. The state unemployment agency denied their application for benefits based on its conclusion that they were fired for work-related misconduct. The Supreme Court upheld the constitutionality of the denial of benefits against a free exercise challenge, finding that if a "generally applicable and otherwise valid"²⁰¹ across-the-board criminal statute exists, any impact on a person's ability to freely practice his or her religion is "merely the incidental effect"²⁰² of the statute. Such an incidental effect does not violate the First Amendment.²⁰³ In order to "trigger free exercise balancing analysis, the object of a criminal statute on its face must proscribe the exercise of

194. *Id.* at 259-61.

195. NOWAK ET AL., *supra* note 139, at 1078.

196. 476 U.S. 693 (1986).

197. *Id.* at 699.

198. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-13, at 1262-64 (2d ed. 1988).

199. 494 U.S. 872 (1990).

200. *Id.* at 890.

201. *Id.* at 878.

202. *Id.*

203. *Id.*

religion."²⁰⁴ This holding virtually guarantees that any general criminal statute that is opposed on free exercise grounds will not be open to balancing by a reviewing court. As a result, the Court will never get to the question of whether the state interest asserted is compelling enough to warrant an infringement on religious rights, nor will the state have to show that its means of achieving that interest are the least intrusive possible. Implicitly, the Court is saying that any police power interest bars free exercise analysis by the courts. This development leaves minority religious claims at the mercy of majoritarian politics without the check of the judiciary.²⁰⁵

The result of these sobering developments is that the First Amendment restriction on government activities which prohibit the free exercise of religion means:

- (1) The government cannot directly act to proscribe religious belief.²⁰⁶
- (2) To qualify for judicial review of a government action which allegedly implicates Religion Clause protections, the claimant must show:
 - (a) That the religious beliefs burdened are held in good faith; and
 - (b) The affected religious practice is rooted in religious belief and furthers this belief; and
 - (c) The practice is central or important to the practice of her or his religion.²⁰⁷
- (3) Regulation of religious conduct is permissible if the motive of the legislation is not discriminatorily directed at religion.²⁰⁸
- (4) Neutral civil laws or government conduct which directly burden the ability of citizens to engage in sincere religious practices are subject to strict scrutiny.²⁰⁹
- (5) Neutral and generally applicable criminal laws are not open to free exercise challenge.²¹⁰

204. John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 80 (1991) (citing *Smith*, 494 U.S. at 878-84).

205. Justice Harry Blackmun acknowledges, in his dissent, that the majority's instruction for plaintiffs like these to look to the political process for redress "will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890 (Blackmun, J., dissenting).

206. *Braunfeld v. Brown*, 366 U.S. 599, 603-04 (1961).

207. *See Wisconsin v. Yoder*, 406 U.S. 205, 216-19 (1972).

208. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

209. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

210. *Smith*, 494 U.S. at 872. The Supreme Court recently applied and upheld this standard in *Church of the Lukumi Babalu Aye v. City of Hialeah* 113 S. Ct. 2217 (1993). In *Hialeah*, the Court struck down a Florida statute for violating both the neutrality toward religion and general applicability arms of the *Smith* test. *Id.* at 2226. As a result of the failure to meet those two requirements, the enactments were given compelling interest scrutiny. *Id.* at 2227. The ordinances at issue failed to meet the requirements of the most rigorous judicial scrutiny and were invalidated. *Id.*

(6) Government actions which indirectly make it "more difficult to practice certain religious beliefs" will not require a compelling governmental justification, but instead some lower level of justification.²¹¹

As recently as June 24, 1992, the Supreme Court has said that "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."²¹² Nonetheless, if recent court opinions are any indication, it will be very difficult for a plaintiff to establish a direct government burden on the practice of religion. The current Court favors restrictions on the claims that individuals can make on the government when it comes to protection of religious practices. These restrictions have profoundly affected Native American religious rights' claims.

C. The Free Exercise Clause and Native Americans

The Free Exercise Clause has been invoked by Native Americans to protect their right to ingest sacred peyote,²¹³ to practice their spirituality at sacred sites,²¹⁴ to gather and keep sacred objects,²¹⁵ to hunt and fish,²¹⁶ to protect the spirits of their children,²¹⁷ and to express their spirituality through traditional dress while in prison.²¹⁸ A complete exposition of all the Native American free exercise cases would extend far beyond the scope of this article. A brief survey of the impact of free exercise jurisprudence on Native Americans follows. To further limit the scope of this analysis, this article will only consider free exercise jurisprudence within the context of Native American "sacred site" claims. Where these lands are claimed by the United States government, conflicts between the government's intended use and ceremonial use by Indians often arise.

Five cases will demonstrate the difficulties of applying the *Sherbert* and *Yoder* tests to sacred site claims. In all these cases, Native American claims failed the analysis required by the court. After studying these cases, one can see that the balance is weighted against Native Americans. Even when the religious nature of the claim is accepted, it is very difficult for an Indian

211. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

212. *Lee v. Weisman*, 112 S. Ct. 2649, 2656 (1992).

213. *People v. Woody*, 40 Cal. Rptr. 69 (1964).

214. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). See also *Lyng's* ancestors and progeny.

215. *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985).

216. *Frank v. State*, 604 P.2d 1068 (Alaska 1979).

217. *Bowen v. Roy*, 476 U.S. 693 (1986).

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

religious right to outweigh the government's interest. Ethnocentrism,²¹⁹ rather than objective analysis, pervades judicial commentary on these decisions.

These cases can usefully be broken down into three categories.²²⁰ First, in *Badoni v. Higginson*,²²¹ the court found that the government interest outweighed the plaintiff's religious interest.²²² Second, in *Sequoyah v. TVA*²²³ and *Inupiat Community of Arctic Slope v. United States (Inupiat Community I)*,²²⁴ the courts found that the practices which the Indians claimed to be protected by the First Amendment were not religious.²²⁵ Third, in *Crow v. Gullet*²²⁶ and *Wilson v. Block*,²²⁷ the court found no burden on Native American religious practices.²²⁸ All of these cases framed their discussion of the question presented in *Sherbert* and *Yoder* terms, but the character of the analysis varied widely.

1. The Government's Interest Outweighs Indian Religious Claims

The creation of the Glen Canyon Dam and Reservoir, known as Lake Powell, on the Colorado river flooded land fifty-eight miles upstream. Eventually, these waters entered the Rainbow Bridge National Monument which is surrounded by the Navajo reservation in southern Utah and is managed by the National Park Service. The rising waters of Lake Powell flooded areas previously used by the Navajo for prayer ceremonies for at least a hundred years. The Navajo also believe that some of their gods live in the area of Rainbow Bridge that is now underwater. Tourists have desecrated the sacred nature of the site with graffiti, alcohol consumption, and general failure to respect the importance of the area to Native Americans. As a result of these changes to a once isolated and pristine area, the Navajo are no longer able to engage in practice their spiritual practices in the area.

Among other claims, the Navajo plaintiffs in *Badoni*²²⁹ sought declaratory and injunctive relief for the violation of their First Amendment rights. The trial court granted summary judgment for the government because it believed that the plaintiffs lack of a property interest in the Monument was disposi-

219. "Ethnocentrism" is defined as: "1: Having race as a central interest 2: characterized by or based on the attitude that one's own group is superior." WEBSTER'S NEW COLLEGIATE DICTIONARY 389 (1981).

220. See Erica Rosenberg, *Native American's Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C. L. REV. 463, 475 (1985).

221. 638 F.2d 172 (10th Cir. 1980).

222. *Id.* at 177-78.

223. 620 F.2d 1159 (6th Cir. 1980).

224. 548 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984) (*Inupiat Community I*).

225. *Id.* at 188-89.

226. 706 F.2d 856 (8th Cir. 1983).

227. 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983).

228. *Crow*, 706 F.2d at 858; *Wilson*, 708 F.2d at 746.

229. 455 F. Supp. 641 (D. Utah 1977).

tive.²³⁰ The *Badoni* court rejected the "no property interest" argument,²³¹ stating that the "government must manage its property in a manner that does not offend the Constitution."²³² It did, however, affirm the lower court judgment for different reasons.²³³

The *Badoni* court acknowledged the *Yoder* two-step free exercise analysis.²³⁴ Though it did not explicitly state that the Native Americans had been burdened in their religious practice, it did cite the changed circumstances at the Monument and the destructive effects these changes had on the ability of the Navajo to engage in their spiritual practices.²³⁵ The court then stated, without actually balancing the burden on the Navajo, that the government interest in maintaining Lake Powell outweighed the religious interest of the plaintiffs.²³⁶ Any accommodation of the Navajo claims would have required a reduction in the water level of Lake Powell. Because the court found that maintaining the level of Lake Powell is a compelling government interest, it did not "reach the question [of] whether the government action involved infringe[d upon] plaintiffs' free exercise of religion."²³⁷

The court failed to address the second part of the second prong of the *Sherbert/Yoder* test, which requires the government to show that its compelling interest cannot be satisfied by a less intrusive means. It did find that it was "reasonable to conclude that no action other than reducing the water level would avoid the alleged infringement of the plaintiffs' beliefs and practices."²³⁸ No argument or discussion of possible alternatives supported that finding.

The balance was never struck in *Badoni*. The court cited the proper authorities and stated the rule correctly, but failed to apply the test to the facts. A proper adjudication of these issues would have first evaluated the burden on religious practice and assessed whether it was sincere and substantial. In this case, the court found that there was a substantial burden of a sincerely held religious belief brought about by the flooding of Navajo sacred sites. Had the court followed the *Sherbert/Yoder* test, the second step would have studied the nature of the government's interest in its activity and how substantial the interests involved were. Those interests would have been weighed against a fundamental religious right to determine whether or not there was a violation. Finally, even if the government's interest was found to outweigh the plaintiff's religious rights, the court should have required the

230. *Id.* at 644-45.

231. *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980).

232. *Id.*

233. *Id.*

234. *Id.* at 176-77.

235. *Id.* at 177.

236. *Id.* at 177-78.

237. *Id.* at 177 n.4.

238. *Id.* at 177.

government to prove that its interest could not be satisfied by any less intrusive means.

In legal realist terms, the religious rights of the Navajo lost to economic development interests. Economic development for the benefit of the majority outweighed the fundamental religious rights of the minority.

2. *Not All That Is Claimed To Be Religious Will Be Respected As Such*

Native Americans have to worry not only that their religious rights will not be valued by the courts, but also that their actions and beliefs will not be recognized as religious at all. Two courts failed to protect Indian religious practices because they did not believe them to be, in fact, religious. In *Sequoyah*²³⁹ and *Inupiat Community I*²⁴⁰ the courts found themselves in the "confusing and essentially uncharted waters"²⁴¹ of First Amendment free exercise law. Neither of these cases, unfortunately, did much to help clear up these challenging issues.

Since 1965 the Cherokee Indians had been challenging the construction of the Tellico Dam on the Little Tennessee River in Tennessee. Like the Glen Canyon Dam discussed above, the completion of the Tellico Dam would have resulted in the flooding of a vast area upstream from the dam. Some of that area included Cherokee sacred sites, prayer spots, holy places, and cemeteries.²⁴² The Cherokee complaint stated that the Indians would "suffer injury by the infringement of their right to worship the religion of their choice in the manner of their choosing by the destruction of sites which they hold in reverence"²⁴³ The court also noted that particular locations are more important to Indian religions than they are to most other religions.²⁴⁴

Despite the Indian claims, the *Sequoyah* court concluded that what was at issue was actually cultural and traditional interests and not religious interests.²⁴⁵ It struggled with the notion that the destruction of a particular place could deny the plaintiffs the ability to freely exercise their religion. The court also required some sense that the contested government action inhibited some practice or belief that was *central* to the plaintiffs' religion.²⁴⁶ It stated the following:

Granting as we do that the individual plaintiffs sincerely adhere to a religion which honors ancestors and draws its spiritual strength from feelings of kinship with nature, they have fallen

239. 620 F.2d 1159 (1980).

240. 543 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984).

241. *Sequoyah v. TVA*, 620 F.2d 1159, 1165 (6th Cir. 1980) (Merritt, J., dissenting).

242. *Id.* at 1160.

243. *Id.*

244. *Id.* at 1163.

245. *Id.* at 1164-65.

246. *Id.* at 1164.

short of demonstrating that worship at *the particular geographic location in question* is inseparable from the way of life, the cornerstone of their religious observance, or plays a central role in their religious ceremonies and practices.²⁴⁷

The court based its interest in centrality and particularity on *Wisconsin v. Yoder*,²⁴⁸ *Frank v. State*,²⁴⁹ and *People v. Woody*.²⁵⁰ The *Sequoyah* court found that the impairment the Cherokee would suffer by the flooding of the Little Tennessee Valley would be cultural, rather than religious.²⁵¹ Because no religious interest was threatened, the rest of the *Yoder* analysis did not apply.

The *Sequoyah* court misconstrued the case law it used to support its opinion. The *Frank* opinion expressly stated that "[i]t is sufficient that the practice be deeply rooted in religious belief to bring it within the ambit of the free exercise clause and place on the state its burden of justification."²⁵² The *Frank* court decidedly rejected centrality as the standard for constitutional review.²⁵³

The Inupiat people faced a similar problem in their claim to title of the Beaufort and Chukchi Seas of the Arctic Ocean. They attempted to prevent the lease-sale of oil exploration rights in the seas that they traditionally used for fishing and whaling. They also claimed that the government action would deny them access to sacred sites.²⁵⁴ Though this case was predominantly decided on sovereignty grounds, the Inupiat were also making an important religious exercise claim. The Ninth Circuit opinion²⁵⁵ is very brief and relies heavily upon the District Court decision.²⁵⁶ The religious exercise analysis of that decision focused upon the *Yoder* and *Sequoyah* decisions.

As in *Sequoyah*, the *Inupiat* court failed to find support for the religious character of the plaintiffs' claims. They revealed a lack of understanding regarding site-specific or place-based religious traditions in the following statements:

In essence, the Inupiat claim that their religious beliefs are inextricably inter-twined with their hunting and gathering life-

247. *Id.* (emphasis added) (citations omitted).

248. 406 U.S. 205 (1972).

249. 604 P.2d 1068 (Alaska 1979).

250. 40 Cal. Rptr. 69 (1964).

251. *Sequoyah*, 620 F.2d at 1165.

252. *Frank*, 604 P.2d at 1072-73 (citations omitted).

253. *Id.* at 1074-75.

254. *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182, 183 (D. Alaska 1982) (*Inupiat Community I*).

255. See *Inupiat Community of Arctic Slope v. United States*, 746 F.2d 570 (9th Cir. 1984) (*Inupiat Community II*).

256. *Inupiat Community I*, 548 F. Supp. at 188.

style, and since all exploratory activities [in the contested area] negatively affect some portion of their subsistence area, all such activity should be interdicted on free-exercise grounds. Carried to its ultimate, their contention would result in the creation of a vast religious sanctuary over the Arctic seas beyond the state's territorial waters. A claim to such a large area based on such non-specific grounds cannot provide the sort of 'serious obstacle' contemplated by *Yoder*.²⁵⁷

The court found that the Inupiat had offered no explanation for the religious significance of the area at issue and for how the defendants' activities would interfere with their free exercise of religion.²⁵⁸ Based on the geographic scope and religious unfamiliarity of their claim, the Native Americans were denied access to the free exercise test.

The Inupiat, however, did submit evidence of the integration of their religion and subsistence living.²⁵⁹ In their culture, ice, sea, whale, and seal are all part of the religion. Any interference with their natural relations, therefore, affects the ability of the Inupiat to practice their religion. Because the court did not understand or could not appreciate this interdependence, they found no burden on religion.

Since they found no burden on religious practice, the court should not have reached the second prong of the *Yoder* test.²⁶⁰ To correctly apply the second prong of *Yoder*, the court would have first had to find an Inupiat religious interest in the Beaufort and Chukchi Seas. Only then should they have balanced that religious interest against the government interest in selling oil exploration leases.²⁶¹ In this confused analysis the court skipped to the balancing test without first finding a religious burden.

These two cases show the clash between dominant and minority religions and traditions. In the Native American and Native Alaskan communities, the religious and cultural aspects of the individual and the community cannot be separated. The *Yoder* test has not adapted well to this difference between dominant culture religions and Native American religions. Unfortunately, even when the *Yoder* test might usefully have been employed, courts have frequently misapplied the analysis.

257. *Id.* at 188-89.

258. *Id.*

259. Plaintiffs' Memorandum in Opposition to Defendants' Motions for Judgment on the Pleadings at 126, *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982) (No. A 81-19 CIV.) (*Inupiat Community I*), cited in Rosenberg, *supra* note 220, at 480 n.235.

260. *Inupiat Community I*, 548 F. Supp. at 189.

261. Rosenberg, *supra* note 220, at 481.

3. When Government Actions Do Not Infringe on Religion

Even when courts recognize that Native American interests in particular areas are religious, they are not always willing to accept that government action infringes upon religious practice. These cases generally turn on factual determinations made by courts that contradict claims made by plaintiff Indians. The *Yoder* balancing test is often misapplied by these courts as they balance government interest against religious interests after determining that the contested government actions do not infringe on religious rights. Two cases will illustrate the improper application of the *Yoder* standards.

In *Crow v. Gullet*,²⁶² the Lakota and Tsistsistas plaintiffs sought declaratory and injunctive relief against development in Bear Butte State Park in South Dakota. This area had been used by the Lakota and Tsistsistas Indians for vision quests, sweat lodge ceremonies, and the rite of isolation and deprivation. The beauty of the Black Hills had also attracted tourists and the state constructed a state park. The case at issue arose when the state made plans to develop this park by adding more roads and visitor facilities. The plaintiffs claimed that these developments and the restrictions necessary for construction of the new facilities diminished the spiritual value of the Butte and impaired their religious ceremonies.

The district court was not convinced by the Lakota and Tsistsistas claims and concluded that they had "failed to establish any infringement of a constitutionally cognizable first amendment right."²⁶³ The court based its opinion, in part, on the fact that the plaintiffs had no "property interest" in the park.²⁶⁴ The court also compared the total infringement suffered in *Badoni*²⁶⁵ and noted that the impact suffered by the present plaintiffs was only partial and temporary.²⁶⁶ Finally, the district court compared the temporary restrictions on the ability of the Lakota and Tsistsistas to practice their religion with the "compelling state interest[]" 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.²⁶⁷ In short, the state interest in maintaining this park outweighed the religious rights of the Lakota and Tsistsistas.

This extraordinary opinion was affirmed by the Eighth Circuit²⁶⁸ as not clearly erroneous. Although the district court found no religious burden, it mistakenly proceeded to the second step of the *Yoder* analysis. Finding no

262. 706 F.2d 856 (8th Cir. 1983).

263. *Crow v. Gullet*, 541 F. Supp. 785, 794 (D.C. S.D. 1982).

264. *Id.* at 791.

265. *See supra* text accompanying notes 229-39.

266. *Crow*, 541 F. Supp. at 792.

267. *Id.* at 794.

268. *Crow*, 706 F.2d at 856.

burden should have ended the analysis. The comparison with *Badoni* is similarly misplaced because the plaintiffs in this case had not, according to the court, met their burden of proving the "indispensability" of overnight camping.²⁶⁹ Lastly, the lack of property interest of the plaintiffs, while possibly a valid factor to be considered, is clearly not dispositive of whether or not citizens can complain about governmental uses of public land that infringe upon individual rights.²⁷⁰

The Navajo and Hopi tribes of northeastern Arizona protested similar development in the Coconino National Forest in *Wilson v. Block*.²⁷¹ The San Francisco Peaks lie adjacent to the Navajo and Hopi reservations and are believed by them to be the home of specific deities who are invoked in Navajo religious ceremonies. The Hopis believe the Peaks to be the home of "Kachinas" who are emissaries sent by the creator to communicate with human beings. The tribes believe that development of the area would impair the healing power of the Peaks and insult the Kachinas and the creator.

The Forest Service had used a portion of the Peaks for downhill skiing since 1937, though the facilities were limited. In 1977 the Forest Service transferred the permit to operate the ski facilities to a private company who wanted to expand the operations. The Navajo and Hopi protested this planned expansion because it would cause the Peaks to lose their healing power and, therefore, their religious efficacy to the tribes. They also noted that expansion of the ski facilities would make it more difficult to teach their people that these places were sacred. The chair of the Hopi tribe stated, "[t]he destruction of these [religious] practices will also destroy our present way of life and culture."²⁷²

The court acknowledged that the claims of the Navajo and Hopi were legitimately religious. It also correctly summarized the *Cantwell*, *Sherbert*, and *Thomas* line of analysis. The court, however, rejected the plaintiffs' application of *Sherbert* and *Thomas* because "[t]he government here has not conditioned any benefit upon conduct proscribed or mandated by plaintiffs' beliefs."²⁷³ Because the religious practices and beliefs of the Navajo and Hopi are site specific, they argued that development would "severely impair the practice of [their] religions if it destroyed the natural conditions necessary for the performance of ceremonies"²⁷⁴ The court backed away from the *Sequoyah* centrality requirement, but said that "[i]f the plaintiffs cannot demonstrate that the government land at issue is indispensable to some

269. *Id.* at 858. Overnight camping had been restricted during the construction of the park improvements. *Id.*

270. See *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (1980).

271. 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 977 (1983).

272. *Id.* at 740 n.2.

273. *Id.* at 741.

274. *Id.* at 742.

religious practice, whether or not central to their religious practice, they have not justified a First Amendment claim.²⁷⁵

The Navajo and Hopi produced evidence that peaks were sacred and indispensable to their religious practice.²⁷⁶ The government argued that the limited proposed development would only impact on a portion of the character of the Peaks and that a guarantee of access to the Peaks should permit continuation of "all essential rituals."²⁷⁷ The court held that the plaintiffs had not met their burden of demonstrating that the government's proposed land use "would impair a religious practice that could not be performed at any other site."²⁷⁸ Because the court found that the plaintiffs had not shown a burden on their religious practice, it did not reach the question of whether the government's interest in the proposed expansion was compelling or not.²⁷⁹

Wilson reveals the danger of allowing courts to determine whether an infringement on religious rights meets the *Yoder* "burden" standard. *Wilson* was reduced to a contest of experts. The Navajo and Hopi affidavits spoke of the tragic effects this development would have on their ability to practice their religion. The government experts testified that the effects would not be all that bad. The court was impressed by the government's experts and required the plaintiffs to prove the indispensability of the particular area at issue. It ignored the Navajo and Hopi claims that the Peaks are "sacred" and that their religious practices required "natural conditions."²⁸⁰ Indispensability, in this case, became only a thin mask for the *Sequoyah* centrality requirement. The decision was meant to take the court out of making doctrinal judgments about religious claims, but this case shows that the judgment of what is and is not indispensable will still require government approval of religious claims. Even if the "indispensable" standard is preferable to the "centrality" standard, the opportunity for a court to apply culturally dominant perspectives to its analysis of a minority religion is too difficult to avoid.

D. Free Exercise Conclusions

Analysis of the history and development of free exercise jurisprudence, focusing especially on the conflicts that arise between the government and Native Americans, reveals that the Indians almost always lose. Sometimes the government refuses to recognize the religious character of Indian religious claims. Other times the government recognizes that the Native American interests are religious but does not acknowledge that the government actions at issue actually burden religious practice. In other instances the government

275. *Id.* at 743.

276. *Id.* at 744.

277. *Id.* (quoting a government expert on Hopi and Navajo religion).

278. *Id.* at 744.

279. *Id.* at 745.

280. *Id.* at 742.

acknowledges its burden on Native Americans' religious practices but believes that the interests of the majority culture trump the religious rights of the Indians. In all these cases the courts have failed to protect the religious exercise claims of Native Americans.

In *Northwest Indian Cemetery Protective Ass'n v. Peterson*,²⁸¹ the Ninth Circuit held out the promise of a brighter future for Native Peoples. Unfortunately, that decision was overturned by the Supreme Court in *Lyng*.²⁸² Because the *Lyng* decision captures the essence of the conflict over religious rights, the next section focuses on it exclusively.

III. Lyng v. Northwest Indian Cemetery Protection Ass'n and an Evolving Understanding of Judicial Responsibility for Individual Rights

The Supreme Court continues to be engaged in an historical debate concerning the protection of individual rights and the scope of the role of the judiciary. Recently, the Supreme Court held that the Free Exercise Clause of the First Amendment to the United States Constitution did not prohibit the government from harvesting timber or constructing a road through land considered sacred to three Northern California Indian tribes.²⁸³ The differences between the majority opinion and the dissent characterize some of the salient features of the process of questioning the role of the judiciary in resolving these conflicts.

After presenting the facts and analysis of *Lyng* in detail, this section will discuss some of the ways in which the decision exemplifies current trends in the Supreme Court and what those trends might mean for Native American religious liberty.

A. Facts

The towns of Gasquet and Orleans are approximately sixty miles apart in the northwest corner of California, twenty miles from the Pacific Ocean and thirty miles south of the Oregon border. Between them lies the Six Rivers National Forest. The Forest Service first planned to link these towns in the late 1940s. A standard jeep road was constructed in the mid-1960s and was paved in parts over the next twenty years. The primary purpose of the road was to facilitate logging efforts in the area, though it also helped in forest fire protection and provided increased recreational access to the area.

In 1972, the Forest Service began preparing a multiple-use management plan for a 67,500 acre area known as the Blue Creek Unit of the Six Rivers National Forest. The plan called for the harvesting of 733,000,000 board feet

281. 764 F.2d 581 (9th Cir. 1985), *withdrawn and aff'd on reh'g*, 795 F.2d 688 (9th Cir. 1986).

282. 485 U.S. 439 (1988).

283. *Peterson*, 764 F.2d at 586.

of timber over an eighty year period, the paving of the remaining six mile segment of the road between Gasquet and Orleans (the G-O road), and the construction of an additional two hundred miles of logging roads. The Blue Creek Unit Plan, adopted in 1976, was the origin of the dispute which arose between the Yurok, Karok, and Tolowa Indians and the Forest Service.

These tribes call the area known to the United States government as the Blue Creek area, the High Country. For at least two hundred years, and possibly longer, they have gone to the High Country for religious purposes. Though these three communities have somewhat different religious beliefs, they all share some common beliefs and practices. The High Country, they believe, is where the prehuman spirits went when human beings arrived on earth. These spirits are a source of religious power and medicine. Through interaction with the spirits of these places, individual practitioners attain spiritual and curative power which is shared with other members of their community. The communities at large depend on the spirits of the High Country to prepare their tribal leaders for ceremonies and to provide them with healing power. These tribes also believe that their religious practices have important "World Renewal" functions as well. The welfare of the tribe and indeed all humanity depend on the ability of individual practitioners to communicate with the spirits of the High Country.

Of special importance in the Blue Creek area are rock outcroppings called Chimney Rock, Doctor Rock, and Peak 8. The importance of these peaks has grown as others have been developed or desecrated. These sites themselves are believed to be sacred, as they provide the environment where spiritual rituals may take place. The qualities of "silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of [each] particular site."²⁸⁴ The pristine, undisturbed natural environment, privacy and silence that have characterized the High Country, and especially these particular peaks, for the preceding centuries are essential for spiritual use of the area. The G-O Road plan called for construction within a mile of these sacred areas.

After administrative remedies failed, the plaintiff Indians²⁸⁵ and the State of California sought a preliminary injunction against the Forest Service to prevent, among other things, the construction of the final six mile segment of road, known as the Chimney Rock section. Their request for injunctive relief was denied,²⁸⁶ but a trial on the merits found that the Forest Service plan

284. DORTHEA THEODORATUS ET AL., CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST 101-02 (1979), *reprinted in* FOREST SERVICE, U.S. DEPT OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT, GASQUET-ORLEANS ROAD, CHIMNEY ROCK SECTION app. K, at 14 (1982), *cited in* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 459 (1987).

285. Including four Indian individuals, seven conservation groups, two individual conservationists, and the Northwest Indian Cemetery Protective Association.

286. Northwest Indian Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 951 (N.D. Cal.

violated the First Amendment of the Constitution,²⁸⁷ several federal environmental acts,²⁸⁸ and the fishing and water rights of the Hoopa Valley Indian Reservation residents and the federal government's trust responsibilities to the Hoopa Valley Indians. The district court judge permanently enjoined the Forest Service from constructing the Chimney Rock section of the G-O Road or engaging in timber harvesting until they produced a new environmental impact statement.²⁸⁹

While appeal to the Ninth Circuit was pending, the United States Congress passed the California Wilderness Act of 1984.²⁹⁰ The Act protected most of the contested area from timber harvesting but left open a corridor for the construction of the Chimney Rock section of the G-O Road. The Ninth Circuit affirmed the district court in nearly all respects.²⁹¹ It did, however, vacate the district court order as it applied to the federal government's trust responsibility to the Indians of the Hoopa Valley Reservation, because the trust responsibility issue could not be decided properly without the tribe being represented.²⁹² It also withdrew that part of the order relating to the violation of the federal Wilderness Act that had been made moot by the passage of the California Wilderness Act. The other parts of the district court order, including the constitutional issue, were affirmed.

The Supreme Court, in a 5-3 decision,²⁹³ reversed the Ninth Circuit.²⁹⁴ Justice O'Connor wrote for the majority²⁹⁵ and held that the First Amendment did not prohibit the government from permitting timber harvesting and road construction in the Blue Creek/High Country area.²⁹⁶ The majority viewed this question to be controlled by the Court's analysis in *Bowen v. Roy*²⁹⁷ where the Court rejected an Indian's constitutional challenge to the

1982).

287. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

288. National Environmental Policy Act (NEPA) of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370(b) (1988)); Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (1988)); Federal Water Pollution Control (Clean Water) Act, Pub. L. No. 92-500, 86 Stat. 880 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

289. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 606 (N.D. Cal. 1983).

290. Pub. L. 98-425, 98 Stat. 1619 (codified as amended at 16 U.S.C. §§ 1131-1132 (1988)).

291. See Northwest Indian Cemetery Protective Ass'n v. Peterson 764 F.2d 581 (9th Cir. 1985), *withdrawn and aff'd on reh'g*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1987).

292. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 697 n.10.

293. Newly appointed Justice Anthony Kennedy did not participate in this decision.

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

295. Chief Justice William Rehnquist and Justices O'Connor, Antonin Scalia, John Paul Stevens, and Byron White.

296. Lyng, at 440.

297. 476 U.S. 693 (1986).

assignment of a social security number to his daughter.²⁹⁸ He believed that the use of a social security number by government agencies would "rob the spirit" of his daughter and prevent her from becoming a holy person.²⁹⁹ The *Lyng* Court stated that the use of a social security number could not be distinguished from the building of a road or the harvesting of timber on government land.³⁰⁰ For the majority, the key point was that these actions did not coerce an individual to act in opposition to his or her religious beliefs or penalize him or her by prohibiting the receipt of some governmental benefit. They reasoned that any other decision in this context would amount to "beneficial ownership of . . . public property" and "diminution of the Government[']s property rights."³⁰¹

The dissent³⁰² described the majority reading of the Free Exercise Clause as narrow, emphasizing the form rather than the effect of government action.³⁰³ Where the majority required that the plaintiffs show affirmative coercion, Justice Brennan, writing in dissent, called for a test that focuses on government action that poses a real and substantial threat of frustrating religious practices.³⁰⁴ The Brennan test would require that claimants would have to show a sincere belief and a substantial threat to religious practice. Upon such a showing the government would have to justify the infringement upon religious exercise with a compelling state interest.

B. Sacred Places and Free Exercise of Religion

As a result of the *Lyng* decision, the sole inquiry in a free exercise conflict is whether a government action coerces an individual into violating his or her religious beliefs. An infringement can be either indirect coercion or a penalty, but the effect of a government action upon the ability of a particular group to practice its religion is not relevant to the determination of constitutionality.³⁰⁵ The dissent protests that "[b]oth common sense and our prior cases teach us . . . that governmental action that makes the practice of a given faith more difficult necessarily penalizes that practice and thereby tends to prevent adherence to religious belief."³⁰⁶ Justice Brennan explained, "The incongruous result is that when the government forces an individual or group to chose between their beliefs and a benefit, it is an impermissible burden, yet when the government prevents a practice and entirely eliminates the element of choice, no burden exists."³⁰⁷

298. *Id.* at 710-12.

299. *Id.* at 696.

300. *Lyng*, 485 U.S. at 449.

301. *Id.* at 453.

302. Justices William Brennan, Thurgood Marshall, and Blackmun.

303. *Lyng*, 485 U.S. at 466-67 (Brennan, J., dissenting).

304. *Id.* at 459.

305. *Id.* at 451.

306. *Id.* at 456.

307. Nancy Akins, *New Direction in Sacred Lands Claims: Lyng v. Northwest Indian*

C. The Role of the Judiciary

1. The Judiciary and Native Americans

The previous sections have developed the history and analysis of the *Lyng* case in some detail because these issues point to what is the primary precipitate of the *Lyng* decision. *Lyng* is rightly seen as a case about the Free Exercise Clause and Native American claims to sacred lands. Underlying the analysis in *Lyng*, however, is the central issue of the role of the judiciary in protecting individual rights and its interaction with the other branches of government.

Justice O'Connor raises this issue in her response to Justice Brennan's dissent when she asserts that his proposal "would cast the Judiciary in a role that [it] was never intended to play."³⁰⁸ Her opinion reflects her own significant deference to other branches of government on constitutional issues, one that seems to be gaining greater acceptance by other members of the Court.³⁰⁹ Justice Brennan described this abdication to the legislature as bestowing "on one party . . . the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be 'sensitive' to affected religions."³¹⁰

Justice O'Connor sees the claimants as asking the Court "to satisfy every citizen's religious needs and desires."³¹¹ In a pluralistic society with many religious beliefs, she anticipates competing demands on government to conform to the mandates of each religious group. Since neither the Constitution nor the courts are equipped to reconcile these competing demands, that task is left to the legislature. To support her claim, she cites *The Federalist No. 10*, which suggests that competition among religious and political factions will temper these demands.³¹²

This decision has profound implications for all litigation of constitutional claims. Her statement puts the religious interests of minorities in the hands of the majoritarian dominated branches of government to protect them from infringement on fundamental rights by those same branches. *Roy*,³¹³ upon which the majority decision heavily relies, centers upon the fact that the claimant was asking the government to change one of its internal procedures to avoid offending his religious beliefs. That case focused on *how* the

Cemetery Protective Association, 29 NAT. RESOURCES J. 593, 605 (1989).

308. *Lyng*, 485 U.S. at 458.

309. Donald Falk, *Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 ECOLOGY L.Q. 515, 561 (1989).

310. *Lyng*, 485 U.S. at 473.

311. *Id.* at 453.

312. *Id.* (citing THE FEDERALIST No. 10, at 58-59 (James Madison) (Jacob E. Cooke ed., 1961)).

313. 476 U.S. 693 (1986).

government conducted its own affairs. The issue in the *Lyng* case centers upon *what* effect the government is having on the ability of the claimants to practice their religion. By characterizing all government agency action as same as *Roy* internal procedures, the Court confers absolute discretion on executive and congressional agencies with respect to the effect of their actions on fundamental rights.

For Native Americans, this decision means that there is no constitutional review of government actions that fail to prohibit outright rituals or require violation of beliefs. Actions which make it impossible or meaningless for Indians to practice their faith cannot be reviewed. The severity of this ruling is exacerbated by the fact that Indians are dependent upon so many federal agencies and subject to the actions of so many public land managers.³¹⁴ The Court encourages land managers to accommodate religious practices of Native Americans,³¹⁵ but also assures the agencies that their determination of what is an acceptable level of deleterious effect will receive unfavorable review.

When one branch of government abdicates its responsibility, the three-footed stool of American democracy cannot stand. A government which does not check cannot balance. James Madison warned against the gradual accumulation of power in one of the departments of government. Madison saw that the legislative branch was most prone to power grabbing in a republican government. A government which allows the power of majority factions to dominate minority groups is, in his mind, no different from the pre-social contract community. He said:

Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger.³¹⁶

The *Lyng* decision returns Native Americans to the state of nature in regards to religious liberty. Unless some bulwark can be established against the strength of the majority, their religious freedom will not be secure against the violence of intolerance.

2. Constitutional Rights and the Judiciary

That Justice O'Connor and Justice Brennan, along with their fellow justices, should disagree about what is the proper role of the judiciary in resolving an issue of this complexity is not surprising. These questions require herculean

314. Falk, *supra* note 309, at 564.

315. *Lyng*, 485 U.S. at 453.

316. THE FEDERALIST No. 51, at 352 (James Madison) (Jacob E. Cooke ed., 1961).

effort to dissect and have been the source of immense conflict throughout the history of the modern liberal state. Since Jean Jacques Rousseau and the Baron de Montesquieu derived different understandings of the nature of the state and the relationship of the judiciary to the other constituent parts of the state, there has been widespread disagreement on these points.

The interesting aspect of this problem in *Lyng* is more *how* the Court arrived at its decision than *what* its decision held. The two opinions in the case reach substantially different results through generally different approaches, even though they do manifest some similarity. Loosely, Justice O'Connor appears to favor a restrained judiciary that defers substantially to legislative determinations in all areas save for those directly relegated to the care of the Court. Justice Brennan, on the other hand, calls the Court to be more active in protecting individual liberty against the excesses of the representative branches. In this sense, both Justices agree with Montesquieu that the different branches need to be separated from one another and with the Federalists that they should also serve as some form of check on the power of the other. Justice O'Connor seems to share Rousseau's optimism that the general will of the people will produce a legal culture that will respect minority rights, while Justice Brennan appears more skeptical.

Justice O'Connor relies on a variety of methods of legal reasoning to justify her decision: appeal to fundamental principles, reference to general policy goals, and reliance upon established precedent. These three approaches are interwoven throughout her discussion of the impact of the Free Exercise Clause of the Constitution on this case. She relies on the interpretation of the scope of the Free Exercise Clause discussed in *Bowen v. Roy* to limit the breadth of the Court's discussion.³¹⁷ She points to the potential conflict between a wide range of government policies and the fundamental rights asserted by the *Lyng* plaintiffs.³¹⁸ She discusses the central principles which give order to the relationship among the governmental branches.³¹⁹

D. Lyng and What It Portends

Lyng is a tragic defeat for the Native American population in this country, who saw it as an opportunity for vindication and protection of what they understood to be their rights as United States citizens. Their disappointment is also a loss for other minority groups, who might otherwise have sought the protection of the judicial system from over-zealous legislatures. The Court has restricted its own ability to protect individual rights by limiting the questions it will consider. Part of this decision is an only slightly subtle intertextual discussion of which body among the governmental entities is best equipped to respond to this claim. The *Lyng* Court has held that unless there is a clear and

317. *Lyng*, 485 U.S. at 457-58.

318. *Id.* at 452.

319. *Id.* at 457-58.

unambiguous violation of the plain meaning of the Free Exercise Clause, it will not interfere in legislative or administrative decisions. This decision reflects a heavy deference to majoritarian decision making, with all its attendant difficulties.

IV. Native American Spirituality

At the center of all the controversy expressed in the cases discussed in this article Indian peoples are struggling desperately to maintain their spiritual beliefs, their culture, their ethnic identity, and their way of life. Two problems appear between the majority Indian communities. The first difficulty Native American communities have faced in presenting their legal challenges to the actions of the invading peoples is that they, like most insular minorities, tend to be viewed as one and similar. Because they are different from Europeans, all Indians are seen as a mass or a unit. Most people fail to see that individual tribal groups and indeed individual Indians have different experiences of spirituality and different belief systems. Native Americans are quick to point out that their traditions are as complex and varied as the multiplicity of their cultures would suggest. The first problem Native Peoples face is that judges fail to accept that Native American belief and practice is itself pluralistic and varied.

The second problem Native Americans face when they present constitutional challenges to government action is that they are asking judges to protect religious beliefs and traditions fundamentally different from their own. If courts are to make insightful decisions about Native American religious exercise disputes, they must have some understanding of the nature of Indian life and of its differences from that of the dominant culture.

This section attempts to illuminate some of those differences, to describe some of the general characteristics of Native American spirituality, and in particular to draw out the significance of sacred places. Of necessity, this discussion will simplify a complex subject. Not all Native American groups would ascribe to all of the beliefs portrayed here, but this level of generalization will usefully capture some of the most salient points of interest. Other scholars have written on this subject with particular virtuosity and should be consulted for a more detailed description of the spirituality of America's original peoples.³²⁰

320. See, e.g., DELORIA, *supra* note 3; SEEING WITH A NATIVE EYE (Walter H. Capps ed., 1976); JOHN (FIRE) LAME DEER & RICHARD ERDOES, LAME DEER: SEEKER OF VISIONS (1972); JOHN G. NEIHARDT, BLACK ELK SPEAKS (1932); AKE HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS (1967); RUPERT ROSS, DANCING WITH A GHOST (1992).

A. Differences Between Europeans and Americans

Before courts can protect Indian sacred sites and practices, they must first appreciate the spiritual character of their claims. The many differences between the spiritual life of Native Americans and the descendants of immigrants challenges understanding and toleration. These differences arise from several factors.

As discussed earlier,³²¹ the general assumption by Europeans when they encountered Native Peoples was that the natives knew no religion. Out of ignorance and intolerance of theologies different from their own, the Europeans called the indigenous peoples pagans, savages, brutes, and heathens. The process of cultural destruction began with the first Columbian contacts.

[E]ach time the Spanish encountered a native individual or group in the course of their travels they were ordered to read to the Indians a statement informing them of the truth of Christianity and the necessity to swear immediate allegiance to the Pope and the Spanish crown. . . . As one Spanish conquistador and historian described the routine: 'After they had been put in chains, someone read the *Requerimento* without knowing their language and without any interpreters, and without either the reader or the Indians understanding the language they had not opportunity to reply, being immediately carried away prisoners, the Spanish not failing to use the stick on those who did not go fast enough.'³²²

As it was at that time, language is currently one of the primary obstacles. Because the dominant society has not accepted native spirituality on its own terms, all Indian traditions and beliefs must be translated, in order for their petition to be heard in the American judicial system.³²³

This necessity might seem only practically expedient, but it has significant consequences. The result is that the plaintiff Indians in *Smith* had to describe their use of peyote as "sacrament," even though that word has no currency in Indian spirituality. Indians describe their sacred places as churches or altars in order to help non-Indians understand their significance. They have analogized moose meat used in a funeral ceremony to the "wine and wafer of Christianity."³²⁴ All these phenomena are understood, if at all, only in translation, not in their original terms. Indeed, Native American traditional languages do not even have a word to express the European notion of

321. See *supra* text accompanying notes 14-38.

322. STANNARD, *supra* note 2, at 65-66.

323. See Christopher T. Vecsey, *Prologue*, in HANDBOOK, *supra* note 84, at 12.

324. Frank v. State, 604 P.2d 1072, 1072 (Alaska 1979).

"religion."³²⁵ These differences frustrate any discussion of spiritual practices.

Other factors are equally significant. Native American spiritual practices manifest great diversity from group to group. They also tolerate substantially more internal diversity than does the Judeo-Christian tradition. Within Native American life there are no accepted canonical texts, no sense of orthodoxy. The *Lyng* court saw in this lack of uniformity a source of doubt as to the validity of the claims of the plaintiffs.³²⁶ In reality, however, Indian traditions simply allow a greater sense of pluralism than do others. Unfortunately, this diversity has not been accepted by non-Indians as an essential aspect of tribal beliefs.³²⁷

Native American spiritual traditions tend to be more spatially oriented and less time-oriented. Western European religions are based on a different relationship to space and an "assumption that time proceeds in a linear fashion."³²⁸ The result for Judeo-Christian religions is that "[r]evelation has generally been considered as a specific body of truth related to a particular individual at a specific time."³²⁹ For Native Americans, "[r]evelation [is] a particular experience at a particular place, [with] no universal truth emerging"³³⁰ Some Judeo-Christian religions, unlike Indian religions, are arranged hierarchically.³³¹ There is a clear line of authority; some people decide what other people should believe. Though Native American communities also have shamans, priests, and medicine men and women, their relationship to the people is much different. They are viewed not as teachers or missionaries, but as people who have some special "proximity and access to the sacred beings and forces."³³²

Finally, Native American spiritual practices are mystifying because they are generally conducted in secret and in remote places. Most non-Indians have never witnessed an authentic Indian spiritual ceremony. Because they have been remembered through the oral history of discrete communities, there has been little opportunity even for those with interest in Native American spirituality to understand and appreciate them.

325. HULTKRANTZ, *supra* note 320, at 9.

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

327. Vecsey, *supra* note 323, at 12.

328. DELORIA, *supra* note 3, at 76.

329. *Id.* at 80.

330. *Id.*

331. JERRY MANDER, *THE ABSENCE OF THE SACRED: THE FAILURE OF TECHNOLOGY AND THE SURVIVAL OF THE INDIAN NATIONS* 209 (1991).

332. Deward E. Walker, Jr., *Protection of American Indian Sacred Geography*, in *HANDBOOK*, *supra* note 84, at 105.

B. Characteristics of Native American Spiritual Traditions

Being rooted in and connected to the natural world are two fundamental characteristics of Indian spirituality. Indian religions are "religions of nature." Through the myths, legends, stories, and rituals that carry the religious beliefs through history, Indians learn that they are part of the environment around them. "Mysterious but real power dwells in nature — in mountains, rivers, rocks, even pebbles. White people may consider them inanimate objects, but to the Indian, they are enmeshed in the web of the universe, pulsating with life and potent with medicine."³³³ Indians also acknowledge their dependence upon the earth.

We all start out in this world as tiny seeds — no different from our animal brothers and sisters, the deer, the bear, the buffalo, or the trees, the flowers, the winged people. Every particle of our bodies come from the good things Mother Earth has put forth. Mother Earth is our real mother, because every bit of us truly comes from her, and daily she takes care of us.³³⁴

They hunted and farmed, took life and sustained it, but they attributed their success to the generosity of nature.³³⁵ Out of this reverence for nature grows the sense that places can be sacred.

Native American spiritual beliefs are also based on a related spirit of "connectedness." All of Indian life is interrelated and dependent. All aspects of reality, earth, animals, spirits, stars, humans, and plants, are one. The past is contained in the present. The earth which gives life to people today is the body of people who have died. A Crow chief said: "The soil you see is not ordinary soil — it is the dust of the blood, the flesh and the bones of our ancestors. . . . You will have to dig down through the surface before you can find nature's earth, as the upper portion is Crow."³³⁶ In the Indian world it is impossible to "separate religious reality from other aspects of communal experience."³³⁷ The spiritual aspect of life is intimately tied to the political, the economic, and the social.³³⁸ Every human action, hunting, weaving, prayer, and dance is "a recognition and affirmation of the sacredness of life."³³⁹

333. RICHARD ERDOES & ALPHONSO ORTIZ, *AMERICAN INDIAN MYTHS AND LEGENDS* at xi (1984).

334. ED MCGAA, *EAGLE MAN, MOTHER EARTH SPIRITUALITY: NATIVE AMERICAN PATHS TO HEALING OURSELVES AND OUR WORLD* 203 (1990).

335. Christopher T. Vecsey, *American Indian Environmental Religions*, in CHRISTOPHER T. VECSEY ET AL., *AMERICAN INDIAN ENVIRONMENTALISTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY* 15 (1980).

336. DELORIA, *supra* note 3, at 166.

337. *Id.* at 82; see also Barre Toelken, *Seeing with a Native Eye: How Many Sheep Will it Hold?*, in *SEEING WITH A NATIVE EYE*, *supra* note 320, at 14.

338. MANDER, *supra* note 331, at 208.

339. Annie L. Booth & Harvey L. Jacobs, *Ties that Bind: Native American Beliefs as a*

Native American spirituality is also communal. Christianity, on the other hand, is premised upon an individual response to revelation.³⁴⁰ Indian tribal culture is dominated by religion. "Ceremonies of community wide [sic] scope are the chief characteristic feature of religious activity."³⁴¹ The interdependence of subsistence living requires that every aspect of the community be integrated. There is, of course, a deep individual dimension to Indian spirituality, but the religions remain inherently communal.³⁴² The communal character of belief and practice informs the connection to the natural world and the connectedness of reality. It allows the Navajo in *Wilson v. Block*³⁴³ to believe that the San Francisco Peaks are a living deity and that they are essential to the survival of the Navajo people.

Deward E. Walker, Jr. has summarized the "core features" of traditional Native American spirituality as follows:

1. A body of mythic accounts explaining cultural origins and cultural development as distinctive peoples.
2. A special sense of the sacred that is centered in natural time and natural geography.
3. A set of critical and calendrical rituals that give social form and expression to religious beliefs and permit the groups and their members to experience their mythology.
4. A group of individuals normally described as shamans (medicine men and medicine women) who teach and lead group(s) in the conduct of their ritual life.
5. A set of prescriptive and proscriptive (ethical) guidelines establishing appropriate behavior associated with the sacred.
6. A means of communicating (dreams and visions) with sacred spirits and forces.
7. A belief in dreams and visions as the principal sources of religious knowledge.
8. A belief that harmony must be maintained with the sacred through the satisfactory conduct of rituals and adherence to sacred prescriptions and proscriptions.
9. A belief that while all aspects of nature and culture are potentially sacred, there are certain times and geological locations that together possess great sacredness.
10. The major goal of religious life is gaining the spiritual power and understanding necessary for a successful life,

Foundation for Environmental Consciousness, 12 ENVTL. ETHICS 40 (1990).

340. DELORIA, *supra* note 3, at 63, 198.

341. *Id.* at 200.

342. *Id.* at 200-08.

343. *See supra* note 227.

by entering into the sacred at certain sacred times/
places.³⁴⁴

These norms would not be likely to achieve universal approval, but they are generally descriptive of the common attributes of Native American spirituality.

C. Sacred Places

The sacredness of place captures all of these characteristics of Native American life. When Indians claim that particular sites are sacred they say,

[O]ur ancestors arose from the earth here; our parents are buried here, we receive revelation here; . . . we make pilgrimages and vision quests here; our gods dwell here; our religion requires that we have privacy here; . . . [and] hence, this sacred site must remain undisturbed, or we must have unlimited access to this place.³⁴⁵

They say that when they speak of land, they "are speaking of something sacred,"³⁴⁶ and they say that some areas are more sacred than others.³⁴⁷

To Native Americans the sanctity of land and places is the reference point for their understanding of the world.³⁴⁸ The Indians chose to live close to their sacred places: there the power and mystery of life are concentrated. The sacred sites are sources of insight and meaning. They are regarded as "essential for human survival."³⁴⁹

D. Conclusions

The history of Indian interaction with whites has been a struggle for land. European immigrants wanted land to occupy and develop, to exploit and civilize. For the Indians, this struggle has been not only a territorial issue, but also a spiritual issue, and a question of cultural survival. This section has shown that the Indian relationship with the land is intimately spiritual. Because relationship with the earth pervades the entire Indian existence, any damage to the land affects the entire people. The contests portrayed in the cases discussed herein are, as a result, not simple battles over resources, not merely logging interests against wilderness preservation. At their core, they are about the survival of the Indian nations, the identity of the plaintiffs as Indians, and the well being of all people.

344. Walker, *supra* note 332, at 102.

345. Vecsey, *supra* note 323, at 22.

346. PETER MATHIESSON, INDIAN COUNTRY 119 (1984).

347. Dewald Walker identifies 30 sacred sites that are currently in use, out of an accumulating list of approximately 300. Walker, *supra* note 332, at 108-09.

348. DELORIA, *supra* note 3, at 75.

349. Walker, *supra* note 332, at 25.

V. What Can We Do?

The unwillingness of the Supreme Court to entertain Indian free exercise challenges to government actions when Indians ask the Court to protect sacred sites creates a completely novel situation in the history of fundamental rights in this country. Native Americans have been told by the court in *Lyng*³⁵⁰ and *Smith*³⁵¹ that they should look to legislative solutions for their problems with the federal government's use of its own land.³⁵² The Bill of Rights was drafted to protect fundamental individual rights from the whims of majoritarian politics, but the Supreme Court has told Indians that it will not protect those rights against actions by the other branches of government. Justice O'Connor, the author of the *Lyng* opinion, in her earlier concurrence in *Smith* quoted Justice Jackson's memorable words:

The very purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.³⁵³

Native Americans are forced to ask the very people they believe to be infringing on their rights to protect them. In this situation there is little cause for hope.

Any solution must advocate some substantial changes in approach. Two possible solutions are (1) reformation of the free exercise jurisprudence of free exercise, and (2) legislative action.

A. Jurisprudential Reform

The *Lyng* and *Smith* Courts read the Free Exercise Clause protections very narrowly.³⁵⁴ As a result, Indian claims have not even been successful when

350. The *Lyng* Court stated:

The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

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

352. *Id.* at 890.

353. *Id.* at 903 (O'Connor, J., concurring) (quoting *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

354. "[D]ecisions of the United States Supreme Court . . . have narrowed the scope of Native American religious free exercise rights under the free exercise clause of the First Amendment of the Constitution of the United States" S. 1979, 101st Cong., 1st Sess. pmb. (1989)

the Court has accepted that the proposed government action would "virtually destroy"³⁵⁵ the ability of the Indians to practice their religion. Because the action at issue was seen to have only an "incidental" effect and did not directly coerce individuals to act contrary to their beliefs, the *Lyng* Court held that the Free Exercise Clause was not violated.

A different standard for infringement would be required in order to protect the rights of Native Americans. Dewald Walker has argued that the "centrality" standard, which requires that a sacred site be deemed essential, indispensable, or required for the practice of a religion, be replaced with an "integrity" standard.³⁵⁶ An integrity standard would view an infringement on religious exercise as a forced or undesired change in the customary practice of a religion. This standard would find an infringement if the physical conditions required for a customary ritual had been so altered that performance was prevented.³⁵⁷ This standard would clearly benefit Native Americans, but the case law has demonstrated that even when the plaintiffs can prove an infringement on religious rights, courts easily outweigh religious interests with almost any government interest.³⁵⁸

Perhaps a better response to the judicial practice of "passing the buck" is to abolish the incidental/direct harm dichotomy. After *Smith*, the government is free to harm religious practice if it does so indirectly. Only overt intention to harm religious practice is prohibited. A framework whereby a violation of the First Amendment would be found whenever a governmental action adversely affected the ability of an individual to practice his or her religion could be usefully and constitutionally applied. The plaintiff would still initially be required to demonstrate the religious character of her belief and that it was sincerely held. If that burden is met, whether the governmental action directly targets religious believers or whether it only incidentally affects the ability of believers to practice their beliefs, the government would then have to demonstrate a compelling interest to justify the interference with free exercise rights. Many new claims would be open to free exercise balancing as a result. Courts would be required to undergo the same factual assessment that they already perform in the free speech context. This suggestion is, however, susceptible to the same criticism as is Walker's, but it avoids potential problems with the ability of the judiciary to evaluate both when the integrity of a religious practice is disturbed and Establishment Clause conflicts that might result.

(introduced by Sen. Inouye).

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

356. Walker, *supra* note 332, at 112.

357. *Id.* at 113.

358. See *supra* text accompanying notes 229-61.

Because neither of these suggestions are likely to be heeded by the present Supreme Court, Native Americans might do better to accept Justice O'Connor's suggestion to look to the legislature for assistance.

B. Legislative Possibilities

Shortly after the *Lyng* decision was rendered, Rep. Morris Udall (D.-Ariz.) introduced a bill calling for amendments to the AIRFA,³⁵⁹ to prohibit federal agencies from managing government land in a manner that poses a "substantial and realistic threat to undermine and frustrate traditional Native American practices."³⁶⁰ Representative Udall had been widely quoted by courts for referring to AIRFA as a bill that conferred no "special religious rights on Indians" and which in fact had "no teeth in it."³⁶¹ Courts have accepted this reading of the Act, even though other less restrictive readings are possible.³⁶²

AIRFA was the first legislative attempt to protect and preserve the rights of American Indians to believe, express, and practice their traditional religions. The Act was meant to accomplish the protections that the First Amendment had not been able to achieve.³⁶³ Although AIRFA established a governmental *policy* of protecting Native American religious practice, it did nothing to affect the *practice* of federal land management. In the years since the passage of AIRFA, the ability of Indians to practice their religion on government lands has been limited.

Since that time, various other amendments to the AIRFA have been proposed. Representative Udall, Sen. John McCain (R.-Ariz.), and Sen. Daniel Inouye (D.-Haw.) have all introduced bills to amend the AIRFA. Senator Inouye's bill³⁶⁴ was reintroduced on January 14th, 1991 and showed the most promise of early passage. This bill directed the Executive branch to develop rules and regulations which will guarantee Native American free exercise of religion.³⁶⁵ It encouraged cooperation between Federal agencies on accommodating both Native American religious needs and the other management goals for federal land.³⁶⁶ It also established administrative procedures for Indians to complain when federal activities "disturb the integrity of Native American religious places, sacred places, or the sanctity thereof, or interfere with the access thereto, or use thereof, or adversely affect the exercise of the Native American religions, as *determined* by the affected Native American

359. Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (1988)).

360. H.R. 1546, 101st Cong., 1st Sess., § 3(a) (1989).

361. 124 CONG. REC. 21,444-45 (1978) (statement of Rep. Udall); *see also Lyng*, 485 U.S. at 455.

362. *See O'Brien, Tribes & Indians*, *supra* note 116, at 1471.

363. *See supra* note 359.

364. S. 110, 103d Cong., 1st Sess. (1991).

365. *Id.*

366. *Id.*

practitioners."³⁶⁷ The bill aimed to involve Native American input into federal land management decisions and to give them recourse when their rights are not adequately protected.

Concerns were raised at the time that this bill was languishing in Congress that it could implicate Establishment Clause conflicts. Professor Laurence Tribe proposed several revisions of the amendment to avoid the Establishment Clause problems raised by the involvement and authority of Native American religious leaders in determining when a government activity infringes on religious liberty.³⁶⁸ Professor David Williams also evaluated the appearance of an Establishment Clause violation and determined that the amendments fell into a category of accommodation of religion that is neither proscribed nor prescribed.³⁶⁹ In any event, the Inouye amendments to AIRFA were never passed.

Other legislative possibilities have been discussed. Jack Trope has suggested that Native Americans could consider using the National Historic Preservation Act³⁷⁰ to register sacred sites as "landmarks" to protect them from other government actions.³⁷¹ Religious sites are not generally included within the designation of landmark, but Indian religious places may qualify because Indians do not segregate religion from the other aspects of their culture. This suggestion would require that Native Americans identify particular sacred areas, something tribal groups such as the Hopi would surely resist. They have continuously asserted that the location of their sacred places are secret. If protection cannot be found elsewhere, there may be no other legislative alternative.

The National Environmental Policy Act (NEPA) of 1969³⁷² is also a possible avenue for protection of Native American religious sites. NEPA requires an environmental impact statement for any government action which significantly affects the "quality of the human environment."³⁷³ Effects on historical or cultural sites are included within the parameters of the environmental impact statement, and actions adversely affecting landmarks on the

367. *Id.* § 6(a) (emphasis added).

368. Laurence H. Tribe, Comments on Proposed Legislation to Protect Native American Religious Freedom, Memorandum to 1990 Meeting of Native American Tribal Leaders and Academics (on file with author).

369. David C. Williams, *Constitutionality of Proposed Amendments to the American Indian Religious Freedom Act, Written Testimony Before the Senate Select Committee on Indian Affairs*, 101st Cong., 1st Sess. 369 (commenting on the first Inouye bill, S. 979, 101th Cong., 1st Sess. (1987), which was resubmitted as S. 110).

370. Pub. L. No. 89-664, 80 Stat. 915 (codified as amended at 16 U.S.C. § 470 (1988)).

371. Jack F. Trope, *Alternative Approaches to the Protection of Sacred Sites*, Association of American Indian Affairs Memo (Jan. 16, 1991) (on file with author).

372. 42 U.S.C. §§ 4321-4370(b) (1988).

373. *Id.* § 4332.

National Register must also be noted.³⁷⁴ Native Americans should consider using these two acts in combination, if other options are not available.³⁷⁵

Two bills were introduced in the 103d Congress in 1993 that have the potential of providing the protection which the Supreme Court has failed to provide and which has not yet been forthcoming legislatively. The Religious Freedom Restoration Act³⁷⁶ was introduced in the House of Representatives by Rep. Charles E. Schumer (D.-N.Y.) and in the Senate by Sen. Edward M. Kennedy (D.-Mass). The purpose of the bill is "to restore the compelling interest test as set forth in *Sherbert v. Verner*... and *Wisconsin v. Yoder*... and to guarantee its application in all cases where free exercise of religion is burdened."³⁷⁷ The bill also aims "to provide a claim or defense to persons whose religious exercise is burdened by government."³⁷⁸ This bill legislatively "overturns" the *Smith* decision by requiring the government to justify burdens on religious exercise even if those burdens are imposed by laws which are facially neutral toward religion. Initially, several groups opposed the bill, fearing that the bill might impact upon the right of religious organizations to receive public funds for social service programs and might create a "religious" right to abortion. After those issues were resolved and the most significant opposition to the bill agreed to support it, the bill passed the Congress and was signed by President Clinton on November 16, 1993. Unfortunately, it alone will not adequately protect free exercise rights peculiar to Native Americans.

The Native American Free Exercise of Religion Act of 1993³⁷⁹ was introduced in the Senate by Senator Inouye. This bill acknowledges the "chilling and discriminatory effect on the free exercise of Native American religions"³⁸⁰ of the *Lyng* decision. In response, it creates specific protection for Native American sacred sites, the traditional use of peyote, Native American prisoners' rights to practice their religion while incarcerated, and the religious use of eagles and other animals and plants. A very important component of this bill is a section which gives any federal court jurisdiction over Native American claims that a governmental action would restrict the petitioner's free exercise of religion. If the petitioner can show "any evidence that a restriction upon the practitioner's free exercise of religion exists as a result of federal or state action,"³⁸¹ then "the governmental authority shall refrain from such action unless it can demonstrate that application of the restriction to the practitioner is essential to further a compelling governmental

374. 40 C.F.R. §§ 1508.8, 1508.27(8) (1991).

375. Trope, *supra* note 368.

376. H.R. 1308, 103d Cong., 1st Sess. (1993); S. 578, 103d Cong., 1st Sess. (1993).

377. H.R. 1308, § 2(b)(1); S. 578, § 2(b)(1).

378. H.R. 1308, § 2(b)(2); S. 578 § 2(b)(2).

379. S. 1021, 103d Cong., 1st Sess. (1993).

380. *Id.* § 101(9).

381. *Id.* § 501(2).

interest and the application is the least restrictive means of furthering that compelling governmental interest.¹³⁸²

The provisions of this bill cure some of the Establishment Clause issues raised about the amendments to AIRFA. The previous legislation, which allowed the Native American petitioners to define a violation, even if they did not violate the Establishment Clause, left too much ambiguity to be practically workable. The new bill provides more clarity.

Together these bills would undo much of the damage done to the free exercise rights of the first Americans. Legislative remedies, though not satisfying, are necessary responses to the failure of the judicial system to protect Native American religious rights. Legislative whims change with the political wind. Protections afforded today can be eroded by future representatives. While the current jurisprudence refuses to acknowledge the religious integrity and cultural necessity of the spiritual practices of Native Peoples, legislation is probably the best protection available. Protection today, although ephemeral, is better than no protection at all.

The Native American Free Exercise of Religion Act of 1993 and the Religious Freedom Restoration Act appear to afford the most substantial guarantees for Native American religious practice. Other possibilities do exist, though they would not provide the full range of protection afforded under these acts. Congress should provide a clear mandate to restore the "full scope of rights and remedies . . . available under the free exercise of the Constitution of the United States . . ."³⁸³ Nothing less befits the tradition of religious toleration with which this country began and nothing less befits the special responsibility owed to the first Americans.

Conclusion

The United States has had a troubled relationship with the first Americans. Alexis de Tocqueville described the European majority in the young country he observed as "omnipotent."³⁸⁴ Native Americans experienced that power as they struggled to maintain their homelands and even their identity throughout hundreds of years of abuse. The United States policy has shifted from respect for the autonomy of aboriginal peoples to attempting to assimilate them into the dominant culture. Presently, Native Americans stand on the threshold of a new era that might return them to the status of the self-governing communities they enjoyed before the arrival of white people.

Indigenous people all over the globe have begun to organize themselves politically, to be recognized by the established governmental powers, and to

382. *Id.* § 501(1).

383. S. 110 at pmbl.

384. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 246 (George Lawrence trans., 1966).

gain support for their demands of autonomy and protection. They raise the international agreements which pertain to them in their domestic court battles and press for new developments on the international front. The years to come hold the possibility of developing the respect for their rich cultural heritage.³⁸⁵

Indigenous people are one of the least protected minorities in the world today. They struggle against political regimes that still for the most part do not allow them to live their traditional lifestyle and do not provide the protection that their cultures need and deserve. National governments do not give Native Peoples equal opportunities to choose the benefits of development and at the same time they do not permit them to remain the same. One of the most common conflicts is over the rights of indigenous peoples to practice their traditional spiritual beliefs. The native North Americans have found their ability to exercise their beliefs limited in many ways.

This article has reviewed the history of the battle for religious rights that Native Americans continue to wage to this day. Indian sacred places are still not protected from the economic development interests of federal land managers who do not value Native American culture. The judiciary has washed its hands of this question. Without significant jurisprudential reform, courts will not provide the fundamental Constitutional rights to Indians that they do to other United States citizens. The Supreme Court has pointed Native Americans to the door of the legislature as a possible source for religious protection. Though we all should be concerned about the Court's willingness to abdicate their mandate as champion of individual rights and fundamental freedoms, there are possibilities for Native Americans within the political sphere. The AIRFA should be given the "teeth" it never received in the form of the Native American Free Exercise of Religion Act. The Religious Freedom Restoration Act should be passed to put the Native Peoples on the same footing, with the same standards of protection, as all other religious groups. Other current legislation should be examined for its potential to defend Indian sacred places. Protection of the ability of Native Americans to practice their beliefs is not only a matter of principle. It is a matter of cultural survival. Their struggle should be the concern of every citizen of this country, for until the first Americans are equal Americans, the wounds of years past will continue to stain all of our hands with guilt.

385. See the appendix to this article.

APPENDIX

Indigenous People in International Perspective

The history of the indigenous Americans is but one story among many similar stories throughout the history of the world. Indigenous people have generally lost in their relations with European powers. They have lost their lives, their territory, their culture, their autonomy, and their spirituality. The Native Americans are one example of the system of exploitation that has become common worldwide. Still, the system in the United States is seen internationally as a success. The treatment of Indians in this country, while at times genocidal and inhumane, has become the measure against which other systems are assessed. Though it may challenge credulity, Native Peoples in the United States, in general, have been better treated than those in other countries.

To this day, no universally accepted international standards exist to guide relations with indigenous people. The current international system remains predominantly state centered; states are therefore reluctant to support indigenous rights claims which might conflict with their assertions of sovereignty.³⁸⁶ To establish an international legal system that guarantees indigenous rights will take great effort. First, the content of those rights must be established and agreed upon. Second, indigenous people must gain the support of those rights by states, despite state fears of diminution in sovereignty.³⁸⁷ A brief discussion of the relationship between the modern organized international community and Native Peoples will demonstrate the difficulty of this task.

Hundreds of years of history are relevant to this discussion, but for purposes of this short history, the period after the formation of the United Nations in 1948 will only be discussed. In 1949, Bolivia proposed setting up a United Nations subcommission to study the "situation of the aboriginal population of the American continent."³⁸⁸ A number of American countries did not support this idea, and no other similar proposals were made for two decades.³⁸⁹

During the period of the late sixties and seventies, the special problems of indigenous peoples began attracting more and more international attention. In 1970, the U.N. recommended that a detailed study of discrimination against

386. Anaya, *supra* note 15.

387. *Id.* at 215.

388. JOSÉ R. MARTINEZ COBO, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add.1-4 (1987).

389. Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 657 (1988).

indigenous peoples be prepared. Nongovernmental organizations began to get involved in the problem and a number of major conferences were called to discuss indigenous issues. The first international conference of nongovernmental organizations on indigenous issues was held in 1977. In 1981, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur to study discrimination against indigenous people.³⁹⁰

All this attention resulted in the establishment, in 1981, of a Working Group on Indigenous Populations of the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Since its founding the Working Group has been seen as innovative on a number of levels. It allowed oral and written contributions by all indigenous peoples organizations who wished to participate, and more than fifty organizations participated in its fifth session in 1987.³⁹¹ The group has seen itself as the primary center for the collection of information about the condition of indigenous people around the world. They have documented numerous killings, arrests, tortures, land deprivations, and desecration of religious sites.³⁹² They have pointed to the link between autonomy and self-determination on the one hand and peace and development on the other.³⁹³ The group's primary effort since 1985, however, has been the production of a draft declaration of the rights of indigenous populations.

The Draft Declaration³⁹⁴ is now in its third revision. The Working Group on Indigenous Populations completed its work in July and submitted the draft to the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities. From the Subcommission the Declaration moves to the U.N. Human Rights Commission in March of 1994, then to the Economic and Social Council and finally, to the General Assembly.³⁹⁵

In many ways the Declaration is a revolutionary document. One of its primary objectives is the protection of the right of indigenous groups to exist and to preserve their own culture. It calls for the right to "full and effective enjoyment of all human rights and fundamental freedoms," as well as the

390. ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 1295 (1991).

391. *Id.* at 1296.

392. *Id.* at 1297.

393. *Discrimination Against Indigenous Peoples, Report of the United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples*, U.N. ESCOR Comm. on Human Rights, 44th Sess., Agenda Item 15, at 6, U.N. Doc. E/CN.4/Sub.2/1992/31 (prov. ed. 1992) [hereinafter *Report*].

394. *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Tenth Session, United Nations Sub-Commission Draft Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR Comm. on Human Rights, 44th Sess., Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) [hereinafter *Declaration*].

395. INDIAN RIGHTS, HUMAN RIGHTS (Indian Law Resource Center Memorandum, Helena, Mont.), No. 4, Summer 1993, at 2.

observance of the corresponding responsibilities, "which are recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."³⁹⁶ It also emphasizes collective rights,³⁹⁷ which the indigenous people overcome the limitations of individually-focused rights norms. The Declaration also attempts to protect land holdings of indigenous people from governmental confiscation.³⁹⁸ Perhaps most importantly, the Declaration consistently refers to aboriginal populations as "peoples," a deeply controversial title that troubles governmental representatives because of its meaning within the U.N. Charter.

In the United Nations Charter, "peoples" are entitled to "equal rights and self-determination."³⁹⁹ Indigenous groups must attain the title "peoples" because it identifies them as primarily a community, rather than an amalgamation of individuals.⁴⁰⁰ The current draft of the Declaration states in part:

Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government.⁴⁰¹

Identification as "distinct peoples" is existence in the international arena. As international law now stands, *peoples* have enforceable rights under international law, *people* are governed by national law. If the Declaration can state that indigenous peoples are "peoples," then many of the international protections which have previously been denied them would be secured.

The most direct statement on the rights of indigenous people can be found in the 1989 International Labour Organization Convention of Indigenous and Tribal Peoples. This convention revised a 1957 convention which represented a mixture of assimilationist policies and protection for indigenous people. The previous convention aimed to facilitate the progression of indigenous populations into their national communities,⁴⁰² but became inadequate as the

396. *Declaration*, *supra* note 394, at 46 (Annex I, pt. I, para. 2).

397. "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext." *Id.* at 46 (Annex I, pt. II, para. 5).

398. *Id.* at 48-49 (Annex I, pt. IV, paras. 26, 27).

399. U.N. CHARTER art. 1, par. 2.

400. "Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification." *Declaration*, *supra* note 394, at 47 (Annex I, pt. II, para. 6).

401. *Id.* at 46 (Annex I, pt. I, para. 1).

402. International Labour Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries pmbl., June 26, 1957, 328 U.N.T.S. 247 (entered into force June 2, 1959).

consensus of international opinion shifted toward helping indigenous communities to maintain their unique cultural identities. Although international opinion on how to respond to indigenous peoples has changed since 1957, the ILO deserves credit for adopting the first international legal instrument to protect the rights of indigenous peoples.

The present ILO Convention speaks in terms of respecting "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . which they occupy or otherwise use, and in particular the collective aspects of that relationship."⁴⁰³ Clearly, the tenor of the 1989 Convention reflects developments in the understanding of indigenous peoples. The 1989 Convention, unfortunately, has not yet entered into force, and so carries no weight in international law at this point. Despite its impotence, the ILO Convention is being considered in the development of the Declaration of Indigenous Rights mentioned earlier.⁴⁰⁴

Other recent developments indicate that collective rights of ethnic minorities, such as indigenous peoples, are beginning to get more respect. The United Nations Conference on Environment and Development held in Rio de Janeiro during the summer of 1992 addressed many pressing indigenous and environmental issues. Agenda 21 of the Conference Declaration states:

Indigenous peoples and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.⁴⁰⁵

Indigenous people are making their presence felt at international decision-making forums and have even gained consultative status at a number of United Nations bodies.⁴⁰⁶ In 1985, the General Assembly of the United Nations established the Voluntary Fund for Indigenous Populations to provide financial assistance to representatives of indigenous communities and organizations attending Working Group sessions. In 1992, Rigoberta Menchu, the first indigenous person ever to be recognized for her work defending the human rights of indigenous peoples, won the Nobel Peace Prize. She has been appointed the United Nations Ambassador at Large and as such convened the first Summit of Indigenous Peoples in Guatemala in May of 1993. Each of

403. *Id.* at art. 13.

404. *Trends, ILO Takes Up Indian Cause; Latin American Legislation "In the Vanguard,"* WR-93-22 LATIN AM. WKLY. REP. 258 (issue dated June 10, 1993), available in LEXIS, Nexis Library, Omni File.

405. *Report, supra* note 393, at 5 (quoting principle 22 of United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, Braz., 1992)).

406. United Nations Economic and Social Council and others.

these steps are important in the long road to respect for the rights of indigenous peoples, but even they are not sufficient.

The United Nations made a powerful statement on December 10, 1992, when it declared 1993 to be the International Year for the World's Indigenous People.⁴⁰⁷ In his statement on the opening celebration of the Year of Indigenous Peoples, Secretary General Boutros Boutros-Ghali said, "Unity through diversity is the only true and enduring diversity."⁴⁰⁸ He also acknowledged that there "could be no protection of human rights without preserving cultural authenticity."⁴⁰⁹

The second World Conference on Human Rights, which opened in Vienna on June 14, 1993, gave special attention to the rights of indigenous peoples in its deliberations. The results were a mixture of successes and failures. The indigenous delegates succeeded in securing a recommendation from the conference that the General Assembly declare a Decade of Indigenous Peoples beginning in 1994 to give special attention to the world's 300,000,000 indigenous people. The indigenous peoples in attendance at the conference also sought to solidify their right to self-determination within the nation-state system and renewed the argument over whether they should be known as "peoples" or simply "people." On the latter score, nations again failed to protect indigenous rights as the crucial "s" was deleted from every paragraph referring to indigenous peoples in the concluding document by the Brazilian president of the drafting committee, Gilberto Saboia, on June 20, 1993.⁴¹⁰ As a result, the Conference only recognized the variety of peoples represented by 200 delegates from all over the globe as one people, despite differences in culture, language, religions, and native lands.

While the United Nations World Conference on Human Rights was going on, a Nongovernmental Organization-Forum was also held in Vienna. The NGO-Forum was attended by 2000 people representing 1000 human rights NGOs. The NGO-Forum provided an opportunity for human rights organizations to evaluate the performance of the United Nations in promoting human rights. The organizations present also made recommendations on how to improve the United Nations' human rights programs. One working group evaluated the state of indigenous peoples rights and made recommendations for improvement. They contributed the following to the final statement of the NGO-Forum:

407. G.A. Res. 45/164, U.N. GAOR, 45th Sess., 69th plen. mtg., at 277-78, U.N. Doc. No. E/CN.4/1992/2 (1990).

408. *United Nations: Indigenous Year Gets Off to a Bumpy Start*, INTER PRESS SERVICE, Dec. 10, 1992, available in LEXIS, Nexis Library, Omni File.

409. *Id.*

410. Carmen A. Fernandez & Alecia McKenzie, *Human Rights: Indigenous Peoples Disappointed With Conference*, INTER PRESS SERVICE, June 25, 1993, available in LEXIS, Nexis Library, Omni File.

The members of the working group B stress the distinct characteristics of indigenous peoples which distinguish them from minorities. They urge that indigenous peoples be recognized as nations with inherent collective rights of self-determination, development, self-government and autonomy.

Recommendations include the proclamation of the International Decade of the World's Indigenous Peoples, the establishment of a High Commissioner, a Special Rapporteur or another permanent UN body with adequate resources for the protection of the rights of indigenous peoples. Furthermore, they urge the UN to adopt, without further delay, the strongest possible draft of the Universal Declaration of the Rights of Indigenous Peoples and to ensure full participation of representatives of indigenous peoples in the drafting process and related activities.⁴¹¹

These recommendations, if adopted by the United Nations, would be a good start toward the protection of the rights of indigenous peoples.⁴¹²

The International Year of Indigenous People is only a start. Even a Decade of Indigenous People and a Declaration of Indigenous Rights are but a beginning. The road to a more just future will be secured only when the international community both acknowledges the terrible history of oppression that is the story of the relationship between indigenous peoples and the dominant societies, and affirms the inherent right of all indigenous peoples to the protection of their culture, land, religion, and ethnicity. Today's efforts are essential, but much remains to be done. They are, however, cause for hope. Though indigenous people lack substantive guarantees of their rights even today, the rosy fingers of a new dawn are visible on the horizon.

411. Final Statement at the World Conference on Human Rights, NGO-Forum (All Human Rights for All), Vienna, Aus. (June 12, 1993) (on file with author).

412. These references are current as of July 1, 1993. The Drafting Committee for the Universal Declaration of the Rights of Indigenous Peoples was scheduled to meet in mid-July 1993. A third draft of the Universal Declaration was expected in the fall of 1993.