UNIVERSITY OF CALIFORNIA
Santa Barbara

"We hold these truths. . .":
The Effect of Constitutional Litigation on Religious Minorities

A Dissertation submitted in partial satisfaction
of the requirements for the degree of

Doctor of Philosophy

in

Religious Studies

by

Eric Michael Mazur

Committee in charge:

Professor Phillip E. Hammond, Chairperson

Professor Catherine L. Albanese

Professor Richard D. Hecht

August 1997

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

UMI Number: 9809635

Copyright 1997 by
Mazur, Eric Michael

All rights reserved.

UMI Microform 9809635
Copyright 1997, by UMI Company. All rights reserved.

This microform edition is protected against unauthorized
copying under Title 17, United States Code.

UMI
300 North Zeeb Road
Ann Arbor, MI 48103

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 4

Constitutional Conflict: Native American Religious Traditions and the Constitutional Order*

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; . . . if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned . . . . However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.
>
> Chief Justice John Marshall[1]

Up to this point this study has examined the confrontations of nonmainstream Protestant groups, and the discussion has suggested the possibility, if not the desire, to reconcile their particularistic sources of authority with that of the American constitutional order. The Jehovah's Witnesses were able to translate their claims both to reduce the threat and convince the order, while the Church of Jesus Christ of Latter-day Saints was unable to become integrated into the order until it ceded its claims to rival political authority. However, both communities possessed the ability to communicate with—and understand the demands of—the constitution order. They simply worked out their respective confrontations differently.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Attention now turns to the question of how a religious community not sharing a European and predominantly Christian orientation can hope to survive a confrontation with the American constitutional order. How can a community for whom the very terms and concepts are unfamiliar come to a resolution of its demands? Is the American constitutional order exclusively European? Or can it admit a plurality of cultures and traditions under its umbrella?

In keeping with the nonchronological nature of this account, here we go back even further to examine the roots of the Native American religious encounter with the American constitutional order.[2] So far this study has examined one religious community's struggle with the Supreme Court (the Jehovah's Witnesses). It has seen the denomination find a common language and successfully maintain its sources of religious authority while at the same time convincing the Court that it was only working in the true spirit of the Constitution. Meanwhile, the study has explored how a second religious community (Mormons) sought refuge from state persecution only to find that its social attitudes (political and economic more than marital) conflicted with the authority posited in the constitutional order. When the Court ceded authority to the legislative and executive branches, and pressure against the Mormons increased to the point of threatened annihilation, the leadership of the religious community worked to save the community, even if it meant capitulating to the ultimate authority of the constitutional order. Now, with the Native American religious

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

community, the experiences of these two religious communities—and the different ways they encountered the American constitutional order—provide contrast for what is both a more simple and more difficult history to explore.

As I will show, the case involving traditional Native American religions is, more than the other two cases, set against the backdrop of political power negotiations. Indeed, given the attitude toward Native Americans typical of the American constitutional order, it would appear initially that this struggle has been defined entirely by power concerns and has had little to do with religion. However, as the story of the relationship between Native Americans and the federal government unfolds, so too does its religious component. Against the background of the previous cases, it is possible to see the most difficult of encounters with the American constitutional order—constitutional conflict.

Constitutional Order and the Conflict Over Authority

By December of 1992, Nathan Jim, Jr., an Oregon member of the Yakima Indian Nation, had already served a prison term for violating the *Eagle Protection Act* and the *Endangered Species Act*.[3] Yet in that month, he was caught with the carcasses of several protected birds—including a bald eagle—in his truck. Though Jim argued that his actions were justified on religious grounds, in a plea bargain for probation in lieu of more prison time, he promised to stop killing the protected birds. "I will obey your law," he told the federal district court judge.[4]

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The media reported the events involving Nathan Jim in simple terms—the conflict's potential to serve as an early test of the *Religious Freedom Restoration Act*. Apparent in Jim's words, however, are the deeper levels of conflict inherent in the struggle between traditional Native American religions and the American constitutional order. His retort to the judge exposes the highest dilemma over authority in our society, and as Jim expressed it, there was no confusion or mingling of *his* sources of authority: "I will obey your law." Not *the* law, but *your* law. Jim did not accept the law as inherently applying to all, but admitted that, given his own legal situation, for the time being he would agree to abide by a law considered authoritative by others if not by him. Implied in his comment was an acknowledgment that the source of authority for his own actions was not co-opted by the legal authority threatening another prison term—he merely agreed not to act on beliefs he thought were justified. He promised that he would behave as the federal authorities demanded; but by recognizing the difference between the two sources of authority, he implied he would not compromise his own system of beliefs.

Nathan Jim's comments regarding the two sources of legal authority express the dilemma faced by communities who by choice or by circumstance may not be included in the pluralism envisioned by the Constitution. In 1852, the same sense of marginality and exclusion from the constitutional order was expressed by Frederick Douglass in his famous speech, "What to the Slave Is the Fourth of July?"[5] Noting that

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the Constitution—the foundation upon which any appeal to maintain the Union had to be built—specifically gave less than full membership to the slaves, Douglass reached further back in history, to the ideals of human equality in the Declaration of Independence for greater inclusion within the framework of the American constitutional order. As Milner Ball argues, Douglass's conclusion that "this Fourth [of] July is *yours*, not *mine*" was "a plea to make it his as well, a plea to render the story [of American origins] capable of embracing him."[6]

Rendering the story "capable of embracing" the Native American has been a much greater challenge, making their inclusion within the constitutional order that much more difficult. Although the history of the Native American encounter with European Americans is in part analogous to that of African Americans, particularly in the arena of religion, structural differences have led to an apparently inherent conflict over authority between Native Americans and the constitutional order that were not present in the African American encounter. African American slaves, removed from the structures of their traditional religions throughout Africa, were compelled to adjust their religious beliefs to match their inherited religious behaviors by adopting slightly altered Christian meanings.[7] Native American communities were often placed in a similar situation, in the sense that the price of acceptance in American society often meant disregarding traditional native religious behaviors in favor of Christianity.[8] As with the African Americans, Native American rights were not originally

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

protected in the United States Constitution. Both communities experienced European culture through force and violence and found themselves in no position of advantage to negotiate an equilibrium. But while Africans were forcibly and violently brought to this continent, Native Americans were here when the Europeans arrived. They had developed intricate social structures and had governed their own affairs free of European intrusion. They did not have their social structures destroyed by transplantation across an ocean; they were not a diaspora searching to find meaning in new surroundings. Instead, they were an increasingly occupied people searching to retain meaning against overwhelming force. The introduction of a competing system of authority profoundly threatened the very structure of Native American society, and the integration of the two systems has continued to be a source of conflict.

For Native Americans, the continuing dilemma over the authority of the American constitutional order can be linked to the depth of the systemic conflict of the competing authorities. In part, this is because of the manner in which interaction between Native Americans and the American constitutional order has unfolded historically. But just as significantly, conflicts over the very *notions* of sovereignty and territoriality inevitably have led to continuing struggles over authority within the constitutional order. This struggle between Native American territorial claims and American political demands for sovereignty has been complicated by noncongruous understandings of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

such categories expressed by Native Americans and the American legal system. The powerful meaning ascribed by Native Americans to the notions of community (tribal) sovereignty or sacred land, for example, are virtually unrecognizable in the American constitutional order because of the use these terms enjoy outside of the federalist context. This, combined with the evolving status of Native Americans in the United States, has put them in limbo with regard to American legal history. Subsequently, Native American communities have resisted accepting the demands of the constitutional order—and have been largely unable to live independent of them—because of the direct nature of the conflict over authority and especially the symbolic and tangible role of land in that conflict. Even the idealistic rhetoric found in the Declaration of Independence, the very embodiment of the competing authority to which Douglass was able to appeal, has not been sufficient to secure religious equality. Africans became African-Americans through an appeal to universal equality, while native peoples on this continent have lost much of their distinct and collective identities through the forced application of the same principle by the federal government. Thus, because of the conflicts over group identities and the sources of authority for Native Americans and the constitutional order, the First Amendment guarantee of religious freedom continues to be a confounding ideal. Religious freedom is not yet fully realized by the Native American members of the American constitutional order.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The Beginning of the Occupation

It is probably no understatement to suggest that the relationship between the federal government and the various Native American communities has been troubled from the very beginning of United States history. The predominantly British culture on the Atlantic seaboard, which developed in a world of competing colonial powers, treated the indigenous peoples they encountered on this continent with caution borne not out of respect for the sovereignty of tribal authority, but out of concern for the alliances these peoples would form with the other colonial powers. As Henry Bowden points out in his history of Native American missionary contact, although all of the colonial powers expressed a strong arrogance toward the indigenous peoples in the Americas, the English may have been the worst offenders and "the least concerned to preserve any aspect of native civilization."[9] Of more importance to the colonial powers (than the humanity of the native peoples) were concerns about how the various tribes could be used as buffers against the competition. Indeed, most of the settlers seemed less interested in integrating the Native Americans into their own religious worldview and more interested in removing them from areas deemed desirable.

Little was changed with the establishment of the United States as an independent nation. The federal government approached the indigenous peoples as instruments of foreign policy, and engagement with the tribes in the form of missionary work was promoted as an

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

element of control in pacifying them, or—in the more common parlance of the period—in "civilizing" them. "The new nation" writes church historian Pierce Beaver, "inherited from the colonial era, and particularly from the New England colonies, a common assumption that the Indian missions were the proper concern of the state and were beneficial to the welfare of the state."[10] With the missionaries working to contain the indigenous non-European peoples, the federal government could protect its citizenry from the threat of French, British, or Spanish expansionist policies. Indeed, because of their strategic significance to the new federal government, the role of the religious missions in controlling the Native Americans took on increased importance.

This attitude would shift considerably once the European colonial powers were eliminated from competition. By the early nineteenth century, with competition from France and England effectively out of the way in the Midwest, the federal government was freed of its external national security concerns and could operate with greater self-confidence with regard to territorial expansion. The result was a shift in attitudes toward the Native American tribes, which were now removed as a factor in the equation of national security. "As long as the Indians were pawns in the larger chess game, they received a modicum of respect," summarizes Bowden, but once the threat of outside alliances disappeared, "they lost that small advantage and became simply obstacles in the path of American pioneers."[11] Native Americans as a group

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

became less of an external threat and more of an internal nuisance. By the end of the War of 1812, interactions with the various tribes focused on public policy concerns and not international relations.

Public policy concerns addressed by the federal government did not have the interests of Native Americans in mind since, from the standpoint of the federal government, Native Americans were not considered part of the government's constituency. Article I of the new Constitution excluded "Indians not taxed" from the apportionment of representation, and empowered Congress to regulate commerce with the tribes in the same manner it would with foreign nations—through the Senate's ratification debates over a treaty negotiated and signed by the president and the third party.[12] Even when Article I was amended by the Fourteenth Amendment in 1868, Native Americans were still excluded from apportionment formulas.[13] In addition, even though the threat of collaboration with international forces was reduced significantly, oversight for matters concerning Native Americans was placed under the jurisdiction of the Secretary of War, who in 1824 created the Bureau of Indian Affairs. Only with the establishment of the Department of the Interior in 1849 did oversight of Native American issues transfer from the War Department.[14]

The tribes were not completely uninformed about their ambiguous standing in the new nation. On July 4, 1827, the Cherokee tribe in Georgia adopted a tribal constitution that itself was an adaptation of the federal Constitution. The state of Georgia, perceiving a threat to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

its state sovereignty, responded by extending state jurisdiction to the Cherokee territory and then incorporating the tribe's territory into the state. After being blocked by Georgia from suing in state court, the Cherokee tribe filed under the provisions of Article III, §2, of the United States Constitution, which permits foreign nations to bring legal actions to the Supreme Court. The resulting suit brought by the tribe, *Cherokee Nation v. Georgia*, was dismissed by the Court in 1831 on the grounds that, since the Cherokee tribe was not a foreign nation, the issue was not within the Court's jurisdiction.[15]

However, although the Court lacked jurisdiction, the justices took the opportunity to discuss at some length the nature of the relationship of Native Americans within the constitutional order. "The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else," observed Chief Justice John Marshall, writing for the majority. Native Americans should be understood as "domestic dependent nations," he concluded, since "they occupy a territory to which we assert a title independent of their will . . . . Their relation to the United States resembles that of a ward to his guardian." Justice William Johnson, dissenting from the Court's decision, argued that the mere fact that the federal government interacted with the tribes through the mechanism of treaty indicated that they were considered foreign nations as understood by the Constitution. "And if, as here decided, a separate and distinct jurisdiction or government is the test by which to decide whether a nation be foreign or

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

not; I am unable to perceive any sound and substantial reason why the Cherokee nation should not be so considered."[16]

The following year, the Supreme Court saw the logic of Justice Johnson's dissenting opinion in *Cherokee Nation v. Georgia* when it was again faced with a suit involving Native American standing in the constitutional order. This suit also involved the Cherokee tribe in Georgia, although this time the case, *Worcester v. Georgia*, was brought by the Congregationalist American Board of Commissioners for Foreign Missions on behalf of one of its missionaries, Samuel Worcester, who had defied a Georgia statute and entered the Cherokee territory without state authorization.[17] Justice Marshall, recognizing the futility of a land grant from a king in Europe over territory that was not his to give, as well as the constitutional reality of the treaty mechanism mentioned by Justice Johnson the previous year, nullified Georgia law over the Cherokee territory. He went on to identify the tribe as equal in status to any foreign nation. However, populist President Andrew Jackson, fearing that enforcing the Supreme Court's ruling would exacerbate separatist sentiment in the South, condemned the ruling, refused to enforce it, and suggested that Justice Marshall enforce it himself.[18] Meanwhile, Christian missionaries chose to "sacrifice the Cherokees to save the Union" by counseling the tribe to settle the suit and relocate in the West.[19] The ruling left the status of Native American communities in an ambiguous position within the realm of political theory.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Functionally, however, it was clear that they were subject to the will of the American constitutional order.

Outside the Supreme Court, the country's territorial expansion continued to affect the status of Native Americans in the constitutional order. Their increasing absence from life in the East tended to soften their image among the settled, who responded with feelings of love that translated into notions of remorse for their earlier behavior of hostility toward Native Americans. This remorse, combined with a sense of moral and religious duty, led non-Native Americans to conclude that the only act of restitution available was to give them that which was so valuable to European Americans: the Gospel. The government agreed with the "gift" to be given to Native Americans but not necessarily for the same reasons; the increased missionary zeal continued to serve public policy goals and was therefore not only supported but actively pursued. Thus, for the better part of the nineteenth century, the federal government and the various churches worked in cooperation for the so-called "elevation of the Indians." In fact, by providing institutional and financial support, the federal government was able to make such missionary work more appealing to groups that might ordinarily have preferred more attractive assignments overseas. Both the government and the missionary societies were able to benefit from the arrangement; the government secured political as well as military advantage by supporting the missionaries, and the missionary societies gained at least an imagined stake in the welfare of the nation.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

This mutual concern shared by the political authorities and the missionary societies did not specifically include respect for the personhood of Native Americans or the dignity of Native American culture. In fact, in a manner reminiscent of some of the political battles of the modern period, the availability of federal money encouraged competition for government financial support rather than enthusiasm for the stated goal of the funding. Assesses Beaver: "Neither the Protestant nor the Roman Catholic missionaries and officials were really concerned about the Indian's right to maintain and defend his own religion, and they were fighting more for freedom of action by the missionary agencies."[20] In fact, the competition grew more fierce when, in an expression of virulent anti-Catholicism, the American Protective Association published a letter revealing the disproportionately high amount of money Catholic missionary societies were receiving from the federal government as part of President Ulysses Grant's "Peace Policy."

By the end of the nineteenth century, as Protestant social hegemony began to wane, the role of the missionary societies in negotiating the relationship between Native Americans and the federal government began to disappear. Religion ceased to be a prime element in the relationship between the federal government and the Native Americans; as concern over Native Americans diminished, so did concern for their spiritual well-being. In 1871, in a rider to the *Indian Appropriation*, the House of Representatives effectively put an end to whatever "foreign" or independent position tribes might have had until

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

then by ending the treaty process unilaterally. Although this unorthodox violation of constitutional protocol may have been an assertion of authority on the part of the House over the Senate, it is also true that this move represented the conclusion that Native Americans no longer posed even the slightest threat to American expansionist aims, and were a domestic rather than an international concern.[21] Coast to coast Native Americans found themselves within American borders, and the frontier, to be declared closed by historian Frederick Jackson Turner only five years later, ceased to be either a place of refuge for Native Americans or the outer boundary of civilization for the expansionist Americans.

With Congress's recategorization of relations with Native Americans from an international to a domestic issue, the government was now in a position to make even greater (though possibly more subtle) demands for membership in the constitutional order. Congress insisted Native American had to be successfully integrated into the American constitutional order. To accomplish this goal, Native Americans had to be remade as recognizable constituents—individual citizens cognizant of the federal government's supreme position of authority. The government would no longer accept collective representation outside the framework of the federalist structure. Significantly, this meant that Native American participation in the constitutional order would have to be carried out by individuals—at the cost of the different tribal sovereignties. Now there was no place in the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

federal structure of authority for tribal authorities competing with the states.[22] In simpler terms, Native Americans would be encouraged to work the land, and even own it, but the federal government, through the theory of eminent domain, would possess the ultimate title, and no one else could stake any superior claim.

Actions symbolic of this altered stance toward Native American authority again came in the guise of good intentions. The *General Allotment Act of 1887* (also known as the *Dawes Act*) was intended to provide individual ownership of tribal land to the Native Americans who had lived on that land. As Native American legal scholars Vine Deloria, Jr., and Clifford Lytle argue, members of Congress and American culture as a whole seemed to believe that "private property . . . had mystical magical qualities about it that led people directly to a 'civilized state'." The program that emerged from the *Dawes Act* was disastrous, however, and led to an eventual diminution of Native American land holdings that was finally halted in 1934.[23] Before that, in 1919, American citizenship was awarded to Native American veterans of World War I, and then in 1924 to all Native Americans born within the United States in the *Indian Citizenship Act*. In 1968, the *Indian Civil Rights Act* extended to Native Americans who lived on reservations under tribal jurisdiction most of the rights other Americans had secured nearly two hundred years earlier, including the First Amendment right to the free exercise of religion.[24] All of these programs of good intent for Native Americans came at great cost; individual property ownership removed

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the authority of the different communities from the land (and in many cases also removed the Native American from it as well), and citizenship reinforced the individuality of identity and ignored or minimized the communal authorities asserted by separate tribes. Even the highly praised *Indian Civil Rights Act*, argues Milner Ball, "diminish[ed] the power of tribal government" by asserting federal protection over internal tribal relationships, and "threaten[ed] to remake tribal courts in the image of the federal judiciary."[25]

By the second half of this century, for well or ill, Native American status as defined by the federal government was more clearly established. In the 1955 case of *Tee-Hit-Ton Indians v. United States*, the Supreme Court articulated the federal government's position on the unilateral incorporation of Native American reservations, noting that

> the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[26]

The historic process of incorporation was symbolically concluded in 1978 when the Court, quoting from a nineteenth-century decision, observed in the case of *Oliphant v. Suquamish Indian Tribe*,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> Indian reservations are "a part of the territory of the United States . . . ." Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority."[27]

Although expressed as *dicta* in both decisions, these comments clearly reflected the Court's evaluation of the relationship between Native Americans and the federal government; the federal government as possessor of ultimate authority clearly dominated the rhetoric. The emphasis in Justice Marshall's original phrase, "domestic dependent nations," was placed on *domestic dependent* rather than on *nation*.

Thus, by the last quarter of the twentieth century, the Supreme Court unilaterally completed the goal of the Declaration of Independence by asserting that indeed, all were created equal. Any distinction to be found in Native American culture, however, was in danger of eradication in the name of that equality. Although the United States Constitution had originally distinguished between individual Native Americans and those who maintained their connection with their tribe ("Indians not taxed"), the Court now leveled the field by making tribal communities simply collections of individual Native Americans who merely happened to live on federal property. Members of Native American tribes, once feared for their ability to influence international relations, had now become ordinary citizens in the eyes of the law: they had been granted citizenship, they were taxed, and they were given

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

opportunities to own and farm land. Granted individual membership in the constitutional order without asking for it, Native Americans could now do virtually everything that all other citizens could, with one significant exception. They could not express themselves through their distinctive collective identities, in collective religious expressions of territorial sovereignty over land now controlled by the same Constitution that served them as individuals.[28]

Native American Religions Encounter the Constitutional Order

The precarious position of the Native American community within the constitutional order only exacerbated the position of Native American religious traditions within the framework of the First Amendment. Because citizenship was not conferred upon Native Americans until late in American history, the practitioners of various Native American religious traditions could not appeal for protection to the constitutional order. Indeed, as we have seen, even when relief was sought through the court system, Christian (predominantly Protestant) presuppositions about the American legal system and its concomitant conceptions of authority and territoriality severely disadvantaged Native Americans. Constitutional scholar Edward Gaffney points out that the legacy of biblical imagery is both a strong and necessary element in the construction of identity in the American constitutional order. As he observes, "Biblical traditions cannot be eliminated from the way that

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

America tells her tale . . . without a significant loss of cultural identity and purpose."[29]

This relationship between Christian conceptions and its operationalization has characterized American society since colonists first came ashore from Europe. The connection deeply affected how settlers interacted with the new peoples they encountered. Ventures such as John Eliot's "praying Indian" villages in seventeenth-century Massachusetts, organized on a model derived from the Book of Exodus, seemed perfectly logical to Europeans familiar with the passage. They were not, of course, a particularly familiar model for native peoples on this continent.[30] Often seen by European Americans as not religions at all, the various religious traditions of the Native Americans were easily overlooked. Indeed, because of the significant differences between European American and Native American religious concepts, dialogue between the two worlds was virtually meaningless, and respect for Native American religious traditions on the part of the European settlers was virtually nonexistent. Native American human agency was generally ignored, and European Americans merely assumed Native Americans to be part of the Christian "cosmic drama," either used by God to aid them toward salvation or used by Satan to confound those efforts.

Ironically, it was not until the year that incorporation of tribal reservations was completed by unilateral Supreme Court fiat (1978) that Congress passed the *American Indian Religious Freedom Act* (AIRFA).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

This nonbinding resolution, which recognized the extension of the free exercise clause to traditional Native American religions, urged federal agencies that interacted with Native Americans to be respectful of their religions. However, the act was written without corresponding penalties, making it virtually meaningless. If AIRFA was to have any strength, its tenets would have to be tested in the courts.

As a result of the historic evolution of rights traced above, until January, 1986, no Native American free exercise claim had been decided by the Supreme Court. Indeed, since most Native Americans had not been declared citizens until after World War I, and had not been specifically protected by the Bill of Rights until 1968, it is not surprising that the federal courts did not recognize their free exercise claims until the 1970s. Even so, in the lower federal courts Native Americans have been predominantly unsuccessful. In *Sequoyah v. Tennessee Valley Authority* (1979) and *Badoni v. Higginson* (1980), two different federal circuit courts ruled that flooding (by the damming of nearby rivers) of different cites deemed sacred by members of the Cherokees and Navajo communities did not violate their respective free exercise rights. Three years later, in *Fools Crow v. Gullet* (1983), another federal circuit court ruled that public use of park land in South Dakota did not violate the free exercise rights of members of the Lakota and Tsistsistas communities. That same year, the federal circuit court for the District of Columbia ruled that the construction of a ski resort in the San Francisco Peaks region of Arizona did not violate the free exercise rights of the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Hopi and Navajo communities. These two communities not only considered the mountains to be the home of their deities, but considered the mountains actually to be deities.

Losses at the circuit level have had a strong negative impact on litigation, and have left the practice of traditional Native American religions "more hampered and threatened than is the practice of any other traditional religion in this country." It is not a coincidence, continues Robert Michaelsen, that "the most significant losses have occurred in connection with access to sacred site claims."[31]

However, there have been victories for Native Americans claiming that governmental rules for land use are an infringement on their free exercise rights. In *United States v. Means* (1985), a district court affirmed Lakota claims that their denial of "special use" permits by the Park Service violated their free exercise rights over land use. However, three years later a circuit court later reversed this ruling. And in *Northwest Indian Cemetery Protective Association v. Peterson* (1983), a district court affirmed claims that construction of a logging road would violate Karuk, Yurok, and Tolowa free exercise rights over land use. In 1986, while a circuit court rejected part of the district court's ruling, it affirmed that court's decision regarding free exercise claims.

This last decision (now know by the party replacing Peterson in the suit, Richard Lyng) was the first land-use dispute brought by Native Americans to reach the United States Supreme Court, and it clearly demonstrates the disadvantageous position of traditional Native

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

American religions in federal courts. The members of the tribes represented in the case argued that the proposed logging road would desecrate the sacred meaning of a location known as "the high country," an area that included the three highest peaks in the region. They understood the rather remote area that included these mountains to be a place where they could communicate with their Creator and therefore a place of unmatched religious significance.[32] In an *amicus* brief filed in conjunction with the National Congress of American Indians, the Association on American Indian Affairs, and the tribes affected by the case, Steven Moore of the Native American Rights Fund argued that one significant difference between "world" religions and "tribal group" religions was that the former were commemorative while the latter were continuing. This meant that while most European American religious communities sacralized events commemorated from their past, Native American religious communities sacralized events that were continuously revealed to them. Such a formula meant that while European American communities could commemorate events in any location, Native American communities had to remain in contact with the location where instructions were continually received from the transcendent sources of authority.[33] Since the "high country" represented a location where ongoing revelations were received, no other location could be erected that would take its place. It was sacred by the very nature of the ongoing communication, rather than because of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the commemoration of an event in the past, and construction on it, through it, or even around it would destroy the integrity of the location.

Prior to the *Lyng* decision (known informally as the "G-O Road" decision, since the logging road would connect Gasquet and Orleans), the closest the Supreme Court had come to a sacred site dispute was the 1890 decision in *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States* discussed in the previous chapter. This judicial action was hardly a model for optimism for Native Americans; it had resulted in the disenfranchisement of the Mormon community and the wholesale dismantling of church real estate holdings in the Utah Territory. In *Lyng*, the Court followed the example established in this Mormon decision, but also relied heavily on the holding in *Bowen v. Roy*, which suggested that the federal government had the authority to determine its operational needs, even at the cost of occasionally offending religious sensibilities. Overcoming objections on religious grounds raised by the Cemetery Protective Association, the Court determined there existed a "compelling interest" in building a road through lands deemed sacred by a number of tribes in northern California, and effectively reversed the decisions of the two lower courts.[34]

The focus of this case, as in the other lower court cases involving Native American claims over land for religious free exercise purposes, does not pit the traditional Native American religions against specific government "interests," but instead pits them against the most general

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

of governmental interest, its own authority. According to the brief submitted to the Supreme Court on behalf of the Cemetery Protective Association, any decision involving conflicting claims over land use must address two questions. First, do the Native Americans demonstrate that "the land in question is central and indispensable to the exercise of their religion and that the proposed governmental operations will interfere with that exercise?" Second, does the government demonstrate that "its operations serve a compelling interest?"[35] The combination of factors including Native Americans and European Americans cultural differences and the necessary balance a court must strike given these two questions places a high burden on Native American religious traditions. Indeed, since the courts have been unsympathetic to Native American religious free exercise claims, it is inevitable that they would decide most cases in favor of the governmental interests, regardless of how "compelling" they might be. It is in the government's interest to control its territory, and Native American challenges to that control, in the shape of religious claims, usually are not able to overcome that obstacle. As Michaelsen summarizes:

> Governmental interests have been generally well treated in Native American sacred site cases. Indeed, as the Circuit Court of the District of Columbia commented in one case, some courts have even implied that "The Free Exercise

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> Clause can never supersede the government's ownership rights and duties of public management." On the contrary, that court continued in a statement that is both obvious and necessary: "The government must manage its lands in accordance with the Constitution . . . ."[36]

Common Land as Uncommon Symbol

"The government must manage its lands in accordance with the Constitution." This powerfully symbolic statement written in a circuit court opinion in 1983 makes painfully obvious the level of conflict over the meaning of land and its role in the power struggle between Native Americans and the American constitutional order. When the dispute over the authority of the Constitution involves religious issues, the conflict over simple land management and authority becomes a theological clash of monumental proportions. It is in this area where the conflict between Native American religious traditions and the constitutional order erupts; where the differences between what it means to be a practitioner of traditional Native American religions and what it means to be a citizen of the American constitutional order clash. While debate over the use of various sacraments or rituals may continue between the dominant religious community and various minority communities, it is the difference over the meaning of land that presents the most perplexing dilemmas between Native American religious communities and the dominant culture. Ultimately, as the LDS Church

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

learned, what is at issue in the confrontation with the American constitutional order is authority over land. However, unlike the Mormons who started with familiar theological underpinnings, or the Jehovah's Witnesses who were able to find a common language to express their needs, the various Native American religious communities did not share the basic theological orientations familiar to the dominant culture. Indeed, Native American legal scholar, Vine Deloria, Jr., characterizes the difference in orientations in terms of the difference in reference to space versus time:

> American Indians hold their lands—places—as having the highest possible meaning, and all their statements are made with this reference point in mind. Immigrants review the movement of their ancestors across the continent as a steady progression of basically good events and experiences, thereby placing history—time—in the best possible light.[37]

In other words, because Christianity (the predominant religion of the European American settlers) focuses on redemption through the grace of God, it describes this world as a temporary stage on which human actions are played out over time in preparation for elevation to another, higher stage. Traditional Native American religions, on the other hand, generally picture the land as part of what is essentially sacred, so that "all aspects of life take on religious significance and religion and culture are

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

intimately connected."[38] Christianity occupies space while it anticipates the passage of time; Native American religious traditions occupy time while orienting themselves to space.

This difference is most clearly manifest within the constitutional order in the reactions of the mainstream political religious community to the two most significant decisions handed down by the Supreme Court in cases involving Native American religious freedom. Following the *Lyng* decision, in which Native American sacred site land claims were rebuked for the construction of a logging road, there was hardly a reaction from the organized religious community.[39] On the other hand, there was an uproar after the Court upheld a state's prohibition of the ritual use of peyote in *Employment Division v. Smith.* The Court ruled that the sacramental use—designated as illegal by the Oregon legislature—did not enjoy constitutional protection simply because of religious meaning attached to it. Scores of politically organized religious groups banded together (many for the first time) to ask for a rehearing from the Supreme Court.[40] When that failed they organized, drafted, and lobbied for legislative redress in the form of the *Religious Freedom Restoration Act.* What accounted for these quite different responses? Significantly, many observers thought that the Court's decision in *Smith* could mean sweeping changes in constitutional jurisprudence that potentially could affect the status of non-Native American religious communities. In other words, the non-Native American religious communities did not feel threatened by the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Court's decision in a sacred land decision based on a principle that was unlikely ever to affect them. They did, however, feel threatened by the Court's decision in a case involving ritual, a category more easily accessible to western religious traditions, and one that is used by them to mark the passage of time.

Western culture generally accepts the assumption that land is a commodity that can easily be exchanged. This assumption stands in stark contrast to many traditional Native American religious beliefs that posit a custodial or partnership approach. Indeed, Ball argues, quoting Standing Bear, that the entire idea of wilderness—as in the European American vision of it as wild and dangerous—is the creation of a society that has become alienated from nature. By contrast, Native American attitudes toward land were "characteristic of a gift economy";[41] these beliefs described the idea of land in terms of its interdependence with a community, and not as a commodity. Such attitudes toward land are virtually unrecognizable in European American culture, except in the case of the Mormons. In that community, however, the attachment is still based on a biblical construction of property, and not on the interrelationship between individual, land, and community. Once the LDS Church leadership conceded temporal authority to the constitutional order, it could—like the Jehovah's Witnesses—accept the occupation of the federal government until, quite literally, the end of time. On the other hand, many traditional Native American communities—the Cheyenne and Sioux (Black Hills) and the Taos

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Pueblo (Blue Lake and neighboring mountains), for example—recognize certain lands as sacred. Indeed, the Navajo believe that not only are the San Francisco Peaks the home of their gods, but that the peaks are also a deity in a sacred cosmos.[42] Traditional Native American religions, centered as they are on space and not on the passage of time, could not so easily reinterpret their relationship to account for the occupation of the American constitutional order. This contrast in attitudes provides a powerful explanation for the conflicts between the two cultures, and suggests both a reason for the inability to reach a meaningful understanding about the religious significance of land and the incidence of Native American millenarian responses after contact with European American cultures was established.

Such different levels of meaning have made crosscultural dialogue difficult. Of greater significance, however, this conflict over meanings of space and time helps to preserve the dispute over authority between Native Americans and the constitutional order. As missionary societies were attempting to convert Native Americans to Christianity during the nineteenth and early twentieth centuries, the federal government was trying to make them into "good citizens." There can be no question that the former goal well served the latter for several reasons. First, it is unlikely that the Framers of the Constitution wrote the First Amendment to include religious traditions that did not share a Protestant worldview. This assumption, articulated by early Supreme Court Justice Joseph Story in his multi-volume work *Commentaries on*

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the Constitution of the United States, suggests a close connection between the two categories of communion and citizenship, at least early in American history.[43] Second, although the preamble of the Constitution clearly rests its authority on a communal category ("We, the people"), it actually expresses rights in terms of the individual.[44] As already seen, this individualistic understanding of rights proved to be a serious and continuing challenge to the structure and authority of Native American communities. It ensured, as well, the dominance of the constitutional order in their stead. Third, the parallelism between the symbolic voice of authority for Protestant Christianity—"The Word" (John 1:1) as represented by the Bible—and the symbolic voice of authority for the American constitutional order—the U.S. Constitution—masked the *actual* source of authority of the latter, namely territorial sovereignty. With mainstream Christian theology placing its emphasis on the world to come, the American constitutional order could assert its authority over the world that was and all the territory therein contained. However, since this formula was not part of traditional Native American religious conceptions, this masking obscured the full ramifications of the federal government's challenge to Native American land claims, especially when they reached religious dimensions. So long as citizenship was symbolically defined by a written contract (in other words, the United States Constitution), the foundation of the federal government's authority over territory did not conflict with underlying Protestant belief but actually complemented it in the life of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the citizen. But because the source of authority rested on the federal government's ability to control territory (or maintain sovereignty), Native American claims of sovereignty over land, whether religiously based or not, threatened the very foundation of the constitutional order's authority.

From the earliest days of cultural interaction, the intellectual foundations through which European Americans could have understood Native American religious traditions were meager; the inclusion of Native Americans as a quasi-independent unit in the constitutional order probably never had much of a chance. Indeed, early on, European Americans' appropriation of traditionally recognized title to land had little to do with the presence of Native Americans. In 1629, John Winthrop declared that possession of land in the Massachusetts Bay Colony would be determined by the doctrine of *vacuum domicillum*; ownership meant improvement (as in buildings or farming), not mere occupancy (as in transience or hunting patterns). In the absence of such improvements, the entire colonial period was governed by the doctrine of discovery, in which any aboriginal claims to the land were virtually ignored.[45] Nearly one hundred sixty years later, as Milner Ball points out, the Constitution would be declared "the supreme law of the land," thereby shifting authority away from those political units that could participate democratically (as defined by the rest of the document for individual citizens and the states) to a geographic region encompassing all peoples and institutions, both willing and not.[46]

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

For the federal government and the dominant European heritage it represented, land was a possession, a tool in the business of this world, and subject to God's command to "have dominion over" it until the end of time.[47] The federal government, as representative of the dominant culture and imbued with its own transcending authority, subsumed under its command the right to control all property for the time being and for the benefit (salvation, even) of its citizenry. The doctrine of "Manifest Destiny" and its implicit theological presuppositions governed the attitude toward land expressed by the American constitutional order.[48]

The Constitutional Order Meets Native American Religions

Because of the extraordinary differences between their cultures, as we have seen, Native American conceptions of religion and law were virtually unrecognizable to European settlers, colonists, and pioneers (and *vice versa*). Even when European Americans comprehended Native American religion and law, they did so in their own cultural terms, and so described Native American elements as inferior and uncivilized. Estimated one Christian missionary, "The two great hindrances to progress were the Indian religion and the absence of law."[49]

Native Americans religions and legal systems have functioned successfully in the frameworks of their various cultures for centuries, of course. However, the tenuous position of Native American religious

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

claims in American jurisprudence, and the consequent need to combat the constitutional order's extension of its authority to Native American territorial claims, has placed a heavy burden on traditional Native American religions. Because of the negative, mythic image of "Indian" in American society, writes Robert Michaelsen, "if Indians do not conform to the majority image of them as a vanishing race which embraces a quaint but clearly other-worldly religion, then their keen interest in land must be understood in the earthbound terms of the majority view."[50]

As if taking a lesson from the Jehovah's Witnesses, scholars have suggested several strategies for translating Native American religious concepts of land into the "earthbound terms of the majority view," thereby securing more reliable guarantees for religious free exercise. Such methods as the use of analogy or metaphor have been considered, with some degree of success. Robert Michaelsen uses examples including the dirt in a medicine man's pouch as analogous to a land title, or the Native American Church, which chose to incorporate as a church in order to make its religious identity more readily understandable.[51] Yet the issue of reconciling Native American religious traditions with European American constructs of law may not be so simple as explanation by analogy or narrative. Deep differences exist between the very communal structures of Native American religious traditions and the deeply individualistic pattern of rights recognized and celebrated in the American constitutional order. Indeed, the need to translate

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

religious differences may have a profoundly adverse effect on traditional Native American patterns of religious authority by subordinating the particularistic religious authority to that of the Constitution and the pluralistic society it represents.[52] But if the root of the conflict itself is based in competing conceptions of authority in time and space, Native American religious expression may have little alternative than to face continuous struggle with the American constitutional order over land claims. Not simply a matter of rights or toleration, the real issue is who has the right to define a particular space, and who has sovereignty over that space at any given time.

Ultimately, this problem of competing notions of authority underscores the dilemma of constitutional authority in the realm of religious free exercise. For traditional Native American religious expression, the conception of authority comes from the very structure of religious and social categories and cannot be aligned with American constitutional authority merely by a slight adjustment. Recent decisions suggest the courts have made individualism the overwhelming paradigm in the conferral of religious rights, as they have in other areas of rights, but we must recognize the danger that this trend poses. The threat is acute for Native American religions, especially as that threat is incorporated in the basic conflict over land. The power of Christian American cultural dominance, with its potential for accepting temporal governments as caretakers of the realm until the final act of the cosmic drama, simply overwhelms traditional Native American religious

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

communities, denying them the wherewithal to create a separate peace as the Jehovah's Witnesses have, or to reconfigure their structures of authority as the Mormons did.

Conclusion

Traditional Native American religious communities thus face a dilemma of greater proportions than either the Jehovah's Witnesses or the Mormons. As with all minorities facing the threat of acculturation into the dominant culture, the integration of the individual Native American into the American constitutional order threatens the traditional community and therefore tribal identity. However, because of the tense relationship between Native Americans and the federal government and the subsequent struggle over territorial authority, Native American religious traditions have experienced continuous conflict with the American constitutional order. Representing as they do nations subsumed but not really integrated into the order, Native Americans continue to face limitations on religious claims that are perceived to conflict with the expression of authority vested in the federal structure. Because of marked differences in orientation, they do not readily have at their disposal the means to translate their claims into concepts acceptable to the order. And even if they did, the nature of the claims is such that they strike at the foundations of the authority guarded by the American constitutional order since Native Americans cannot accept delayed appropriation of the territory like their Christian

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

neighbors. In a very real sense, they are damned if they do and damned if they don't.

The recognition of culture-based religious distinctions presents a challenge to American political rhetoric—although Americans say "all men are created equal," rights based on a collective identity have fared less well than the rights of others that are founded on individual identities. In the past, the courts occasionally have conferred religious identity and rights on the basis of community designation. For instance, as recently as World War I, membership in specific "Peace Churches" served as sufficient reason for automatic dismissal from military service.[53] More recently, identification as a member of the Amish community permitted removal from public school before the state mandated age.[54] Yet these solutions were crafted for thoroughly European American biblical traditions. It would seem that the foundation for authority in the American constitutional order—vested in the possession and the control of land—is threatened by the religious expressions of traditional Native American religions whose conceptions of land challenge that authority. Ultimately, the legitimacy of the constitutional order might depend on how the two are integrated.

Native religions are not merely a unique example from American history. They also are harbingers of the challenge the American constitutional order will encounter as it faces the integration of larger non-Western communities not sharing the Framers' biblical presuppositions or the complementary nature of Christian theology and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

political territoriality. Although the conflict over land may make the Native American struggle distinctive, it suggests that greater flexibility will be required if more diverse religious traditions not sharing basic Christian millennialist presuppositions are to be included in the constitutional order. As Frederick Douglass argued in the 1850s, and as Milner Ball points out, the elements of this flexibility already exist in the nature of constitutional authority. On this point, Ball writes:

> The Declaration's second sentence tacitly recognizes that, in a democratic society, even self-evident truth requires mediation, dialogue, consent. Had the truths recited by Jefferson been self-evident in the sense that they were politically monologic, i.e., irresistibly compelling, he would simply have announced them rather than prefacing them with the formula 'We hold.' This introduction is a grammatical acknowledgment that truth, equality, and rights require agreement in the republic. They are matters of opinion exchanged and held.[55]

It might also be added that notions of authority, sovereignty, and political participation are not necessarily constructed on a single intellectual foundation. In the case of Nathan Jim, as well as in the broader historical development of the relationship of Native American religious traditions and the American constitutional order, there are

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

clear differences over how authority is determined, and by whom and under what circumstances. Native traditions, centered (at least in part) on the cultural orientation toward land, cannot but conflict with the American constitutional order's orientation toward the same land. Not so easily integrated into American cultural Christianity's symbolic emphasis on "The Word" (and its parallel relationship to the Constitution as symbolic of the federal government's authority dependent on territoriality), Native American religious traditions expose the very real and tangible conflict that lies at the heart of the American constitutional order. The strength behind the Constitution *is* grounded in the control of the land, and any challenge to that control can be met with indirect, but powerful, resistance. Nathan Jim may not see the legal system of the American constitution order as his law, but he has understood the power it holds over him and has agreed to abide by it. So, too, in many ways, have Native American religious traditions agreed to abide by the American constitutional order. Unlike the Mormons who were able to sacrifice community authority to preserve community identity, Native American religious traditions either have had to sacrifice both—linked as they are—or face continuous conflict.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

NOTES

*A version of this paper will be published as "The Supreme Law of the Land": Sources of Conflict Between Native Americans and the Constitutional Order," in *American Indian Studies: An Interdisciplinary Approach to Contemporary Issues*, ed. Dane Morrison (Baltimore: Peter Lang Publishing, forthcoming). The author wishes to thank Heidi Burns, Robert Michaelsen, Dane Morrison, Ines Talamantez, and Gabrielle Tayac for their helpful suggestions.

[1]*Johnson v. McIntosh* (1823), 591-92. Full citations for all statutes and decisions in this chapter are provided in the bibliography.

[2]For the purposes of this chapter, I have conflated Native American and European American religious traditions into general categories in much the same way, while recognizing their vast internal differences. With reference to the appropriateness of this convention for Native American religious traditions, Native American historian of religions Joel Martin notes that

> rather than focus upon their commonalities, pre-contact Native Americans must have been most conscious of the plethora of highly diverse religious, linguistic, political, social, and cultural forms that divided them into a great number of ethnic groups . . . . The situation changed dramatically when these diverse peoples were collectively misnamed 'Indians' and then reconstructed as colonized subjects within a world-system dominated by European nation-states. Though ethnic differences did not diminish, and intertribal conflicts did not cease, very deep and widespread cultural and religious commonalities could not help but become more apparent.

Joel W. Martin, "Before and Beyond the Sioux Ghost Dance: Native American Prophetic Movements and the Study of Religion," *Journal of the American Academy of Religion* 49, 4 (Winter, 1991): 691-2. See also Catherine L. Albanese, *America: Religions and Religion* (Belmont, Calif.: Wadsworth Publishing Company, 1981), 19-38.

[3]Full citations for all statutes and decisions in this chapter are provided in the bibliography.

[4]Marc Peyser, with Sonya Zalubowski, "Between a Wing and a Prayer," *Newsweek*, 19 September 1994, 58. *Newsweek*, the source of this information, apparently misspelled the name of the tribe of which Mr. Jim is a member. I have used the generally accepted spelling rather than "Yakama" as reported.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

[5]Frederick Douglass, "What to the Slave is the Fourth of July? An Address Delivered in Rochester, New York, on 5 July 1852," in *The Frederick Douglass Papers, Series 1: Speeches, Debates, and Interviews*, John W. Blassingame, ed. (New Haven: Yale University Press, 1982), 2: 359, quoted in Milner S. Ball, "Stories of Origin and Constitutional Possibilities," *Michigan Law Review* 87, 8 (August, 1989): 2282-83.

[6]Ball, "Stories of Origin," 2283. Emphasis in the original.

[7]See Albert J. Raboteau, *Slave Religion: The "Invisible Institution" in the Antebellum South* (New York: Oxford University Press, 1978), especially 87-92.

[8]See Joel W. Martin, *Sacred Revolt: The Muskogees' Struggle for a New World* (Boston: Beacon Press, 1991), especially 87-113.

[9]Henry Warner Bowden, *American Indians and Christian Missions: Studies in Cultural Conflict* (Chicago: The University of Chicago Press, 1981), 113. By comparison, the French Jesuits were more readily accepted by the Native Americans due to their "favorable attitude" toward the religion of the peoples with whom they worked. (Ibid., 78.)

[10]R. Pierce Beaver, *Church, State and the American Indian: Two and a Half Centuries of Partnership in Missions between Protestant Churches and Government* (St. Louis: Concordia Publishing House, 1966), 53-54. Unless otherwise noted, much of the information regarding early governmental relations with Native Americans is drawn from this source, as well as two corresponding sources by R. Pierce Beaver, "Church, State, and the Indians: Indians Missions in the New Nation," *Journal of Church and State* 4, 1 (May, 1962): 11-30; and "The Churches and President Grant's Peace Policy," *Journal of Church and State* 4, 2 (November, 1962): 174-90.

[11]Bowden, *American Indians and Christian Missions*, 163.

[12]In a structural ambiguity of federalism contained in section 8, the Constitution also provides for the same delegation of authority to Congress when regulating commerce "among the several states." This inclusion confuses whatever parallelism might be asserted to exist between "foreign nations" and "Indian tribes." Chief Justice John Marshall addresses this issue in *Cherokee Nation v. Georgia* (1831), 18-19—taxed Indians were generally those who lived as individuals in urban settings, off the reservation and outside of tribal territory.

[13]Article I, section 2, which this portion of the amendment replaced, had specified that slaves be counted as three-fifths of a person for the purposes of the apportionment of representation, a compromise that did not anticipate the independent status of Native Americans but merely addressed the marginal status of African American slaves and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

their role in preserving the Union, north and south. Amendment XIV did not address the status of Native Americans established in Article I.

[14]Beaver, *Church, State, and the American Indian*, 63.

[15]For a history of the suit, see William G. McLoughlin, *Cherokee Renascence in the New Republic* (Princeton, NJ: Princeton University Press, 1986), 388-447. For an analysis of the resulting majority and dissenting opinions, see Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 29-32.

[16]*Cherokee Nation v. Georgia*, 16-17, 57.

[17]McLoughlin, *Cherokee Renascence*, 443-44.

[18]President Jackson allegedly exclaimed, "John Marshall has made his decision: *—now let him enforce it!*" Albert J. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin Company, 1919), iv: 515. (Emphasis in the original.)

[19]McLoughlin, *Cherokee Renascence*, 446.

[20]Beaver, *Church, State, and the American Indian*, 157.

[21]Under the structures of the Constitution and the doctrine of the separation of powers, the House of Representatives retains general primary responsibility over domestic affairs through its budgetary process, while the Senate retains primary responsibility for international affairs through the treaty process.

[22]Ralph Lerner argues that the Native American political units may actually have been better treated than the Spanish and French political units the new American nation encountered as it expanded. There was never any question of incorporating the French or Spanish as separate political entities with equal rights in the American system, but an effort was attempted for the Native Americans, feeble though it might have been. See Ralph Lerner, "Reds and Whites: Rights and Wrongs," in *The Supreme Court Review, 1971*, Philip B. Kurland, ed. (Chicago: The University of Chicago Press, 1971), 202-4.

[23]Deloria and Lytle, *American Indians*, 9-14. The policy of allotment was overturned by the passage of the *Indian Reorganization Act*, also known as the *Wheeler-Howard Act*.

[24]In recognition of the theocratic nature of some tribal governments, the *Indian Civil Rights Act* did not extend the prohibition against the establishment of religion to tribal authorities. In addition, the act did not extend 15th Amendment rights, which guarantee voting rights regardless of race, for fear that this would limit the tribes' abilities to determine membership.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

[25]Ball, "Stories of Origin," 2308. The federal government's extension protected *individual* Native Americans from actions taken by their *tribal* authority, meaning that, similar to protection for citizens against state action (by the incorporation of the Bill of Rights through the Fourteenth Amendment), Native Americans could now initiate causes of action in federal courts *against their own tribe* for the denial of basic rights.

[26]*Tee-Hit-Ton Indians v. United States* (1955), 289-90. The Court denied compensation to a band of the Tlingit community in Alaska for the harvesting of lumber on property claimed by the Native Americans.

[27]*Oliphant v. Suquamish Indian Tribe* (1978), 208-9. The Court was quoting from *United States v. Rogers* (1846), 571-72, in which the Court denied a European-American who had been adopted by a Native American community immunity from federal jurisdiction over the murder on a reservation of another European American who had been adopted by a Native American community.

[28]This is not to suggest that the individuality of Native Americans is a new category of existence. While it is recognized that not all Native Americans live in geographic proximity to their tribal affiliation, or even necessarily retain such affiliation with respect to religion, there can be no argument that the federal government, since its inception, has distinguished Native Americans in their tribal groupings from those who lived their lives seemingly independent of tribal authority, see note 15. In addition, since specific rights as well as potential financial settlements have rested on the very definition of who is or is not a member of a given Native American tribe, the very concept of affiliation has not escaped litigation. (See *Elk v. Wilkins* [1884], in which the Court denied citizenship—in the form of voting rights—to a Native American who provided no evidence of having paid taxes, and thus still fell under the limitations of the Fourteenth Amendment; *Morton v. Mancari* [1973], in which the Supreme Court ruled the BIA hiring preference for Native Americans was politically rather than racially based, and therefore not subject to employment restrictions; and *Santa Clara Pueblo v. Martinez* [1978], in which the Supreme Court ruled that the *Indian Civil Rights Act* did not require federal jurisdiction over all internal Native American disputes, in this case a dispute over tribal membership standards.) It is also a category of obvious distinction in some contemporary Native American scholarship, which notes the tribal affiliations for Native Americans but ignores parallel ethnic identifications for people of other non-Native American ethnicities. See Wunder, *"Retained by the People,"* 162.

[29]Edward McGlynn Gaffney, Jr., "The Interaction of Biblical Religion and American Constitutional Law," in *The Bible in American Law, Politics, and Political Rhetoric*, ed. James Turner Johnson (Philadelphia: Fortress Press, 1985), 99.

[30]The relevant portion of Exodus 18: 21 reads: "Moreover thou shalt provide out of all the people able men, such as fear God, men of truth, hating unjust gain; and place such

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

over them, to be rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens;..." thus providing for a hierarchical social structure of governance.

[31]Michaelsen, "American Indian Religious Freedom Litigation," 50, 53. In its first Native American religious freedom decision (*Bowen v. Roy* [1986]), the Supreme Court ruled that a parent's religious objections could not overrule the government's need to maintain its internal accounting procedures, in this case by providing a child with a Social Security number.

[32]Brief for the Indian Respondents in Opposition, On Petition for a Writ of Certiorari, *Richard E. Lyng, Secretary of Agriculture, et al. v. Northwest Indian Cemetery Protective Association, et al.* (No. 86-1013), 2.

[33]Brief of Amici Curiae, *Richard E. Lyng, Secretary of Agriculture, et al. v. Northwest Indian Cemetery Protective Association, et al.* (No. 86-1013), 9-11. Moore was citing the report issues in conjunction with the *American Indian Religious Freedom Act.*

[34]For a detailed analysis of the decision, see Robert S. Michaelsen, "Is the Miner's Canary Silent? Implications of the Supreme Court's Denial of American Indian Free Exercise of Religion Claims," *The Journal of Law and Religion* 6, 1 (1988): 97-114. The Supreme Court handed down another Native American religious freedom decision (*Employment Division, Department of Human Resources of the State of Oregon v. Smith* [1988]), in the same term as *Lyng*. However, in that decision the Court remanded the issue of a state's prohibition of sacramental peyote use for further consideration. This case returned to the Supreme Court two years later (*Employment Division, Department of Human Resources of Oregon et al. v. Smith et al.* [1990]), and the state's prohibition was declared constitutional.

[35]Brief for the Indian Respondents in Opposition, On Petition, *Lyng v. Northwest Indian Cemetery Protective Association*, 10-11. The "compelling interest" test was removed as a jurisprudential requirement in *Employment Division v. Smith* (1990), restored by Congress through the *Religious Freedom Restoration Act*, and removed again by the Supreme Court in 1997.

[36]Michaelsen, "'We Also Have a Religion,'" 132, quoting *Wilson v. Black; Hopi Indian Tribe v. Black; Navajo Medicinemen's Association v. Black* (D.C. Cir. 1983).

[37]Vine Deloria, Jr., *God is Red: A Native View of Religion*, 2d ed. (Golden, Colo.: Fulcrum Publishing, 1994), 62.

[38]Michaelsen, "'We Also Have a Religion,'" 112. In another piece, Michaelsen suggests that the differences between traditional Native American religions and European American religions could best be understood utilizing categories developed by Robert Bellah to describe the various stages through which religion has evolved in human

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

history. See "Sacred Land," 249-68. Michaelsen is referring to Robert N. Bellah, "Religious Evolution," *American Sociological Review* 29, 3 (1964): 358-74.

[39]No non-Native American organizations were represented as signatories in the *amici* filed in the *Lyng* case. See Brief for the Indian Respondents, *Richard E. Lyng, Secretary of Agriculture et al. v. Northwest Indian Cemetery Protective Association, et al.* (No. 86-1013), signed by representatives from California Indian Legal Services; and Brief of Amici Curiae, *Richard E. Lyng, Secretary of Agriculture et al. v. Northwest Indian Cemetery Protective Association, et al.* (No. 86-1013), which included representatives from 8 Native American tribes or associations.

[40]Petition for Rehearing for the Native American Program, Oregon Legal Services, *Employment Division, Department of Human Resources of Oregon et al. v. Smith et al.* (No. 88-1213). Representatives from 19 national political organizations (including the American Civil Liberties Union, the Christian Legal Society, the National Association of Evangelicals, the American Jewish Congress, the Lutheran Church-Missouri Synod, the Worldwide Church of God, People for the American Way and the American Friends Service Committee) and 48 faculty members of various law schools signed the petition. The petition was denied.

[41]Milner S. Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison: The University of Wisconsin Press, 1981), 7.

[42]Michaelsen, "American Indian Religious Freedom Litigation," 60. For an interesting response to the magnified role of land within Native American scholarship, see Sam D. Gill, *Mother Earth: An American Story* (Chicago: The University of Chicago Press, 1987).

[43]For an early analysis of the relationship between Christianity and constitutional law, see Joseph Story, *Commentaries on the Constitution of the United States* (Cambridge, Mass.: Hilliard, Gray and Company, 1833; reprint, New York: Da Capo, 1970). See also Morton Borden, *Jews, Turks, and Infidels* (Chapel Hill: The University of North Carolina Press, 1984); H. Frank Way, "Death of the Christian Nation: The Judiciary and Church-State Relations" *Journal of Church and State* 29, 3 (autumn 1987): 509-29; and John K. Wilson, "Religion Under the State Constitutions, 1776-1800" *Journal of Church and State* 32, 4 (Autumn, 1990): 753-73.

[44]On this point, see Phillip E. Hammond, *From Toleration to Liberty: An Essay on Religion and Conscience* (Louisville: Westminster/John Knox Press, forthcoming), especially Part 6.

[45]See *United States v. Kagama* (1886), in which the Court ruled that the murder of a Native American by a Native American was under the jurisdiction of the federal courts, overturning its own ruling in *Ex parte Crow Dog* (1883). Justice Miller provides an analysis of the doctrine of discovery and the U.S. attitude toward Native American protectorship, 381-385.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

[46]Ball, "Stories of Origin," 2305-6. Ball points out that an early draft of the Constitution's supremacy clause read that it would be "the supreme law of the several States." The change in wording indicated a radical shift in authority, since the first draft covered only those states participating in the Union, while the final version incorporated all land claimed by the Union—states, territories, possessions, and conquests. It also signified a shift in abstractions from authority over a polity to authority over space.

[47]Genesis 1: 26-30.

[48]This same attitude toward discovery can be seen in events within the last thirty years, such as in the planting of an American flag on the surface of the Moon.

[49]Beaver, *Church, State, and the American Indian*, 196.

[50]Michaelsen, "American Indian Religious Freedom Litigation," 64.

[51]See Robert S. Michaelsen, "Dirt in the Court Room: Indian Land Claims and American Property Rights," in American Sacred Space, ed. David Chidester and Edward T. Linenthal (Bloomington: Indiana University Press, 1995), 43-45; Michaelsen, "American Indian Religious Freedom Litigation," 50, 62. However, he and other scholars have noted limitations to this approach. See Michaelsen, "American Indian Religious Freedom Litigation," 68; Ball, *Lying Down Together*, 22. Ball has suggested the use of metaphors that are more inclusive, such as a creation narrative for Americans which stresses the successive arrivals of different peoples (including Native Americans, African Americans and new immigrant communities as well as the western European colonialists) rather than the conventional colonial narrative which privileges one culture. See Ball, "Stories of Origin," 2311.

[52]Michaelsen, "American Indian Religious Freedom Litigation," 73-74. Michaelsen suggests a more specific erosion of authority, namely the need to meet legal standards to participate in the system.

[53]*Selective Draft Law Cases* (1918), 376. For an interesting discussion of the evolution of religion and the military draft, see *United States v. Seeger* (1965).

[54]*Wisconsin v. Yoder* (1972).

[55]Ball, "Stories of Origin," 2293.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.