July 2, 2011

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

Kathleen M. Sands

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

In two trilogies of Supreme Court decisions, both involving Native Americans, land is a key metaphor, figuring variously as property, territory, wilderness, and reservation. The first trilogy, written by John Marshall, is comprised of Johnson v. M'Intosh (1823), Cherokee Nation v. Georgia (1831) and Worcester v. Georgia (1832). The second trilogy concerns Native American claims for religious freedom under the First Amendment and is comprised of Bowen v. Roy (1986), Lyng v. Northwest Cemetery Protective Association (1988) and Employment Division of Oregon v. Smith (1990). The Marshall trilogy attempted to legitimate the transformation of land from wilderness to territory and property. However, these cases also were "religious" in an important sense: they created a myth of origins that determined the polity's relation to the land and people on which it was built. Of the religious freedom cases, only one was directly concerned with land, but all three were profoundly shaped by the Marshall trilogy and by judicial reasoning that linked land and religion. As these cases show, judicial events at the intersection of land and religion have been calamitous and, for Native Americans, full of violence and loss. However, grounds for hope remain in one meaning of land – the "reservation" – deployed by Marshall in Worcester v. Georgia and artfully analyzed by Philip Frickey in 1993. Revivifying "reservation" promises constructive re-imaginations of both First Nations and religious freedom as unique, foundational political categories.

Table of Contents

Territory, Wilderness, Property, and Reservation:
Land and Religion in Native American Supreme Court Cases[1]

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

We-ah Te-na-tee-many, 1855[2]

Introduction

Might land have something to say to and about America? Something about roots and foundations, possession and conquest, memory and hope? This essay will explore two trilogies of Supreme Court cases, both involving Native Americans, in which land is a telling metaphor. The first cases occurred in 1823 and 1832, with decisions written by John Marshall. The second set of cases took place in the Rehnquist court between 1986 and 1990, and they concerned Native American claims for religious freedom under the First Amendment. In these six cases, land appears variously as property, territory, wilderness, and reservation. The Marshall trilogy attempted to delineate and legitimate the foundations of political sovereignty. They prescribed the manner in which land can be transformed from wilderness to territory and property. Because the Marshall cases were concerned with foundations, they were also "religious" in an important sense: they created a myth of origins that determined the polity's relation to the land and people on which it was built. Of the religious freedom cases, only one was directly concerned with land. But all three were profoundly shaped by the Marshall trilogy and are were shaped b judicial reasoning that linked land and religion. Taken together, these cases tell how land and religion are welded together in constitutional history, which is nowhere more evident than in the history of Native Americans.

Both religion and Native Americans are unique within the constitution. Although religion is perilously hard to define, it does occupy a textual pride of place in the constitution, where it stands as the first item on the Bill of Rights. Whatever it may be, "religion" and only "religion" is afforded the unique privilege of Free Exercise, and "religion" alone constraints government to eschew establishment. Indian tribes, too, are unique in the constitution, singled out for mention as "Indians not taxed."[3] Native Americans are politically unique through a confluence of other factors as well, one of which is constitutional: in Article Six, treaties are said to become the "supreme law of the land." Add to this the historical fact that the federal government made numerous treaties with Native peoples and the principal that treaties can be made only among sovereigns, and the result is a singular status. Native American tribes are effectively recognized as sovereign nations, relating directly to the federal government which is supposed to be as

---

[1] This article is dedicated to the memory of Philip P. Frickey, Professor of Law at the University of California, Berkeley.

[2] Lawrence Kipp, Document: Indian Council in the Valley of the Walla Walla (1855), available at http://www.ccrh.org/comm/river/treaties/kipp.htm (last visited Feb. 10, 2011).

[3] U.S. CONST. art. 1, § 2; art. 14, § 2.

bound by those treaties as by the constitution itself. It was John Marshall who would define and limit the status of Indian Nations implied by this treaty relationship. In addition, Marshall would also define a unique trustee relationship of the federal government to Native peoples; to the extent that it managed Native lands and affairs, the federal government was to do so with a view to the benefit of Native people themselves.

Under the Rehnquist court, however, both religion and the status of Native Americans were set on a negative trajectory: they began to be reduced from constitutionally unique categories to principles of equality. Rather than evoking unique treatment, religious groups (or religious motives, or religious beliefs) often were treated the same as non-religious groups (or motives, or beliefs). Similarly, rather than being treated as a group with constitutionally unique status, Native Americans were treated the same as non-native citizens. Ultimately, this trajectory could mean that Native American religious claims would be handled more by the Fourteenth Amendment, pertaining to the rights of citizens as such, than by the constitutional provisions relating specifically to religion or to Indian tribes.

But the connection between the judiciary's treatment of Indian Nations and its treatment of religion is not just a parallel; it is also a series of intersections, crossings, and crashes. The best-known intersection is the case of *Oregon v. Smith* (1990), in which the loss of Free Exercise exemptions for Native American peyotists was at the same time a major, and perhaps the ultimate, diminishment of Free Exercise for all citizens. But the intersections began well before the Smith case, and in every case bear on land, whether in its literal or its metaphorical meanings.

Taken together, the story told by these two sets of cases is a sad one and, for Native Americans, full of violence and loss. And although judicial events at these intersections often have been calamitous, I will suggest in conclusion that one meaning of land – the "reservation" – promises constructive re-imaginations of both Native rights and religious freedom.

I. The "Place" of Religion: Public Religion and Separationism[4]

Prior to contact with Europeans, Native peoples had no word directly corresponding to religion. It was not that they lacked religion, but quite the contrary: that they did not wall religion off as a separate realm. Instead, what Europeans called "religion" was for native people conterminous with culture and political economy; it embraced healing, planting, hunting, the sharing of resources and the government of community life.[5] But while not bound off from the rest of life, Native religions were and are located; they are *somewhere*. That somewhere, first of all, is the earth. Because the world is sacred, tribal religions find the spiritual realm on earth, rather than in a metaphysically separate sphere. At a more intense level, the sacred in encountered the

---

[4] Elsewhere, I have called this second model of religion exceptionalism rather than separationism. *See* Kathleen Sands, *'A Property of Peculiar Value': Land, Religion, and the Constitution*, 6 J. CULTURE & RELIGION 161; Kathleen Sands, *Feminisms and Secularisms*, in SECULARISMS 308 (Janet R. Jakobsen & Ann Pellegrini, eds., 2008).

[5] JOEL W. MARTIN, THE LAND LOOKS AFTER US: A HISTORY OF NATIVE AMERICAN RELIGION 5 (2001).

specific places – mountains, plains, lakes, woods – where different tribal peoples historically lived. Native American religions, then, are local rather than portable, and collective rather than individualistic. They are the holistic life-ways of particular tribes in particular geographical settings rather than purely personal beliefs about matters metaphysical.[6]

Christianity, on the other hand, has conceived itself as a universal religion, not bound to any one group or any one place. It is eminently portable and, in contrast to tribal religions, decidedly other-worldly. But in historical practice, Christianity like other universalistic religions has not settled for being "nowhere;" instead it has striven to be everywhere and encompass everyone. For the non-Christian world, Christian universalism often has meant Christian imperialism. As the Marshall cases record, Christian imperialism created the Discovery doctrine, which rationalized the conquest of Native American peoples and their lands.

In the Euro-American republic, Christian universalism expressed itself in what the framers dubbed "Publick Religion."[7] It has taken many forms, but for our purposes certain features are most salient. First, what I am calling "Public Religion" is not perceived by the majority culture as a specific or "sectarian" religion; in fact, it may not be seen as religion at all, but simply as the American ethos. Public religion is one rather than many, generic rather than particular. It is felt to undergird public life, providing a common fund of values and virtues without which democracy cannot function. Finally, public religion goes without saying. It functions most effectively as a set of hegemonic assumptions, and breaks down when scrutinized and articulated.

In addition to the universalism that always had characterized Christianity, religion in the American republic developed another distinctive trait – it began to be conceived as a separate, personal "sphere" of life. This notion of religion, which I will call the separationist model, was a consequence of the Reformation and the new forms of religion (meaning, varieties of Christianity) it spawned. After a century of intra-Christian war, a battered Europe was forced to re-conceive religion in the plural, and to work out the terms under which religions could politically co-exist. The separationist notion of religion was a cornerstone of this resolution. Rather than sitting "beneath" the polity as its foundation, religion in the separationist model is envisioned as outside the polity. In the influential metaphor used by Roger Williams and later by Thomas Jefferson, there must be "a wall of separation" between religion and government.[8] Religions in the

---

[6] CLARA SUE KIDWELL ET AL., A NATIVE AMERICAN THEOLOGY pp. 11-15 (2001); VINE DELORIA JR., GOD IS RED: A NATIVE VIEW OF RELIGION 65-66 (3d. ed., 2003).

[7] For helpful essays on public religion in the thought of the founders (including James Madison and Thomas Jefferson), *see* THE FOUNDERS ON GOD AND GOVERNMENT (Daniel L. Driesbach et al. eds., 2004).

What I am calling "public religion" bears some similarity to the phenomenon that Robert Bellah famously described as "American Civil Religion." *See* Robert Bellah, *Civil Religion in America*, DAEDALUS, VOL. 96, NO. 1, 1-21 (WINTER, 1967).

[8] In 1644, Roger Williams' wrote that "…the church of the Jews under the Old Testament in the type and the church of the Christians under the New Testament in the antitype were both separate from the world; and when they have opened a gap in the hedge or wall of separation between the Garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made his garden a wilderness, as at this day." Roger Williams, 1644, *Mr. Cotton's Letter Lately Printed, Examined and Answered*," 1644, JAMES CALVIN DAVIS, ON RELIGIOUS LIBERTY: SELECTIONS FROM THE

separationist model are varied rather than the same, a source of potential conflict rather than consensus. Understood in this way, religion becomes private and personal, centered on metaphysical beliefs, worship and prayer - in short, politically immaterial. As Jefferson said, "it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[9]

These models of religion - Public Religion and Separationist Religion - are obviously contradictory. Yet this has not diminished their historical efficacy. Public religion is found in the Declaration of Independence (for example, the appeal to "nature and nature's God"), in political speeches throughout American history, and it is the assumptive background of countless laws and policies. Yet it is the separationist model that is inscribed in the constitution, where religion is walled off as something unique, private, and deliberately de-politicized. Some have argued that only one idea of religion, and not the other, is true to the framers' visions; others argue the two models operate without serious contradiction, because each plays a distinctive role.[10] As this essay will amplify, there is some truth in each claim. Public religion and Separationism, contradictory though they are, are interdependent aspects of American discourse on religion, the former unofficial but pervasive, the latter official but of limited influence.

When it comes to a word like "religion," logical contradictions may have practical utility for the majority culture – in this case, Euro-Protestant Christianity. In contrast to minorities, this majority culture doesn't much need the religion clauses. Their interests and values are always already embedded in public life, and this is not something that many wish to dis-establish. Moreover, members of the majority have little need for Free Exercise accommodation. But when they do appeal to constitutional religious liberty, their religion is more easily cognizable as religion in the constitutional sense, so their likelihood of success is greater than that of religious minorities. Protestant Christianities, after all, historically could be defined in terms of distinctive metaphysical beliefs, styles of worship, church polity and other sectarian variations with little relevance to public life. For Protestant Christians, then, Public Religion and Separationist Religion often have constituted a win-win situation. In contrast, Americans belonging to minority cultures

---

WORKS OF ROGER WILLIAMS, 70 (2008). Thomas Jefferson deployed the same metaphor in 1802 when he wrote: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof;' thus building a wall of eternal separation between Church and State." *Letter from Thomas Jefferson to the Danbury Baptist Association* (Jan. 1, 1802), available at http://www.loc.gov/loc/lcib/9806/danpost.html (last visited March 22, 2011).

[9] Thomas Jefferson, *Notes On The State Of Virginia: Religion* (1787) Electronic Text Center, University of Virgina, 285, available at http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=17&division=div1 (last visited March 22, 2011).

[10] Martin Marty, for example, argues that public religion is for the sake of order, while separationist religion for the sake of salvation, and both are necessary for the polity. MARTIN E. MARTY, RELIGION AND REPUBLIC: THE AMERICAN CIRCUMSTANCE 64-73 (1989). Another approach, held by Philip Hammond and others, is that only separationism, not public religion, is true to the vision of the founders. *See* PHILIP HAMMOND ET AL., RELIGION ON TRIAL: HOW SUPREME COURT TRENDS THREATEN FREEDOM OF CONSCIENCE IN AMERICA 127-49 (2004).

may lose with respect both to Public Religion and the Separationist Religion. Public Religion tends to neglect or even negate their distinctive values and interests. And when members of minority cultures apply for religious exemptions or accommodations, they are more likely to find that their religions are not recognized as such for purposes of Free Exercise.[11]

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

II Wilderness, Territory, Property: Native Americans in the Euro-American Myth of Origins

Religions often center on what scholars call myths of origin – stories about how and why the world came to be as it now is.[12] A myth of origin founds a "world," but in the process may negate, absorb or actively destroy what came before. For the Euro-American polity, Native peoples were its pre-history and their lands the site of origin. Euro-American public religion, therefore, arose in significant part to legitimate the transformation of Native lands into Euro-American territory and property, and of Native peoples into subjects of the Euro-American polity.

Within Public Religion, the constitution functions like a sacred text – that is, as a foundational text, an ultimate authority. Like other sacred texts, the constitution becomes efficacious by being retold, reinterpreted, and reenacted in the present.[13] It fell to John Marshall and his court to effectuate the constitution in relation to Native peoples and lands. In so doing, Marshall struggled to legitimate the violence on which the Euro-American polity rests. This section will study two of those cases – Johnson v. M'Intosh (1823)[14] and Cherokee v. Georgia (1831).[15] We will return to the third of the Marshall

---

[11] There are many examples of the judicial denial of constitutional legitimacy to non-Christian religions. One is the court's declaration in an 1892 case that "this is a Christian nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). Another is the assertion by Justice Joseph Story that the purpose of the religion clauses was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." Joseph Story, *Commentaries On The Constitution Of The United States* (1833) § 991, 701 (Ronald D. Rotunda & John E. Nowak eds., 1987).

Stephen Feldman makes a persuasive historical argument to the effect that the religion clauses rarely have succeeded in protecting non-Christian religious groups. He tracks in particular the entanglement of church-state jurisprudence with the history of anti-semitism. STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 8-9 (1998).

[12] MIRCEA ELIADE, MYTH AND REALITY 18 (1963).

[13] The analogy developed in this section, between the constitution and religion via the notion of origins, is deeply indebted to Milner Ball. *See* Milner S. Ball, *Legal Storytelling: Stories of Origin and constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989).

[14] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

cases – Worcester v. Georgia (1832)[16] – to explore the more promising implications of "reservation" as a metaphor for land, sovereignty, and religion.

The mythic, foundational character of the problem Marshall would face is evident in the fact that the constitution places Indian Nations both inside and outside the Euro-American polity. This paradox was embedded in Article Six of the Constitution. As noted, section Article Six, by characterizing treaties as the "supreme law of the land," had the effectively acknowledged the sovereignty of Indian nations. However, the larger point of Article Six is to state that the Constitution itself is the "supreme law of the land." Although the primary meaning of "supreme" is that the constitution is the "law of laws," its geographical implications also were momentous. Rather than being simply the law of "the several states," which is how the clause was initially formulated, ultimately the constitution would have no territorial limits. It would be "the supreme law of the land," mythically covering the continent from sea to shining sea.[17]

Johnson v. M'Intosh (1823) was first case in which the mythic role of Native Americans was judicially fixed. At stake was the question of whether the sale of Indian lands could be conducted by the tribes themselves or whether such sales could be brokered only by the federal government. The sales in question had occurred in the mid 1770's, before the revolution, so the pertinent legal framework was British. And according to the British Proclamation of 1763, Indian lands could be directly sold only to the government, not to private interests. In this sense, it was unnecessary to reach the question of whether the Indians actually owned their land; the prior question was the validity of the British proclamation in the American colonies.[18] By the time of the Johnson case, however, the question of Indian ownership that was most salient for all sides – for the Indians, the Euro-American disputants, and even for the judiciary itself.[19] Hence, the case of Johnson v. M'Intosh issued in a decision that said far more than was necessary to resolve the instant dispute, and was profoundly consequential both for Euro-Indian relations and for property law in the United States.

---

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

[16] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[17] At the Constitutional Convention of 1787, the formulation referred to the Committee of Style and Arrangement read as follows: "This Constitution and the Laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the several states." See MAX FARRAND, ED. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. II, 572 (1967). When the clause emerged from the Committee of Style and Arrangement, however, the constitution had become "the supreme law of the land." *Id*., at 603.

[18] STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 117 (2005).

[19] The suit arose from a collusion engineered by attorney Robert Goodloe Harper. *See* LINDSEY GORDON ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 47-53 (2005).

Plaintiffs contended that Indians did own their land, and that their sale of it to the Wabash-Illinois land company (represented by shareholder Johnson) remained valid. Plaintiffs, represented in their opening argument by Daniel Webster, contended that according to the law of civilized nations, the property rights of conquered nations are not abridged by conquest. Neither the (presumed) fact that Indians were savages nor the collective character of their ownership obviated this right. Webster cited Hugo Grotius to the effect that even conquered lands remained "the property of the first occupier, whether it be the King or the whole people."[20] Whatever the precise nature of Indian title, plaintiffs contended, the very fact that Indian lands had been bought was evidence that Indians indeed had owned those lands. The polity itself rested on this premise, they argued, because "all, or nearly all, the lands in the United States is holden under purchases from the Indian nations."[21] The only issue was whether these sales could be made to individuals or to the government alone, and plaintiffs held that sales to individuals were valid unless specifically prohibited by statute. Property, in this reasoning, had a logical and even historical priority over territory; first, land is owned privately and then, by the consent of the owners, becomes the territory of their chosen government.

After the Indians had sold some of their lands to the Wabash-Illinois company, defendant M'Intosh had purchased some of the same lands from the federal government. To secure M'Intosh's ownership claim, the defense contended that, post-conquest, Indians held only a right of occupancy, not a right to ownership in their lands. At the time of the initial sale, defense contended, the land belonged to the British crown by right of conquest; it had then fallen to Virginia after the revolutionary war, and then to the federal government once Virginia ceded its excess lands to the new republic in 1802. The defense argument relied explicitly on the assertion that the Indians were "an inferior race of people, without the privileges of citizens."[22] Here the defense implicitly invoked the metaphor of wilderness, both to describe Indian land and the Indians themselves. Indians, they argued, remained "in a state of nature," neither owning land individually nor improving it by cultivation.[23] This oft-repeated assertion, though counter-factual, was

---

[20] *Johnson*, 21 U.S. at 571 FNl citing Hugo Grotius, (1625) The Rights of War and Peace, Including the Law of Nature and of Nations, Book II, Chapter 2, the general rights of things, paragraph iv. Grotius wrote:

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

Available at http://oll.libertyfund.org/?option=com_staticxt&staticfile_show.php%3Ftitle=553 (1901 edition) (Last visited on March 22, 2011).

[21] *Johnson*, 21 U.S. at 563.

[22] *Id.* at 569.

[23] *Id.* at 566.

a cornerstone of the argument against Indian title. Since Native people, it was held, did not want or need the land as private property, they could assert no ownership rights, nor could they be regarded as sovereign nations.[24]

The defense argument thus ignored the implication of Article Six favorable to Indians (that their treaties with the federal government implied their status as sovereign nations), while relying on the unfavorable implication of Article Six (that the federal government exerted sovereignty over the entire land mass, and therefore over Indian nations as well).[25] In this reasoning, the land of America was government territory before it could become private property. By virtue of discovery and conquest, the lands of America rightfully belonged to whichever European power prevailed. On this premise, argued the defense, hung the legitimacy of all European land claims in America; "the whole theory of their titles to lands in America, rests upon this hypothesis, that the Indians had no right of soil as sovereign, independent nations."[26] In the American circumstance, property was born as territory, owned by the conquering power and only then transferred to private individuals. Indians were under this territory, not independent of it, and they therefore had no independent right to sell.

To the shock of the plaintiffs, Marshall would accept the grandiose claims of the defense. What Marshall offered, in effect, was a different myth of origins than the one narrated by plaintiffs. The transformation of land into private property had to be mediated by its prior transformation into territory, and the latter was something that only government could do. His opinion, a version of the Discovery Doctrine was "that discovery gave title to the government by whose subjects, or by whose authority, it was made against all other European governments, which title might be consummated by possession."[27] In the Worcester decision, Marshall would emphasize the second last clause ("against all European nations") but here he did not. Discovery gave to the conquering power more than a right over against other European nations. It also established "absolute ultimate title" to the land, leaving the original inhabitants with only a "title of occupancy" – that is, a right to live on and use the land.[28] This occupancy right could be extinguished only by the government, and could occur either through purchase

---

[24] *Id.* at 567, n.c (citing EMMERICH DE VATTEL, DROIT DES GENS, OU, PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (1758) (Fr.) *translated in* THE LAW OF NATIONS, OR, THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS (Carnegie Institution of Washington, Charles Fenwick ed., 1916).

[25] It was true, the Defendents conceded, that Indians had been paid for their lands. However, this had been done only for the sake of keeping the peace, not because Indians had a right to payment. In short, the Wabash-Illinois land company did not rightfully own the lands in question because the Indian occupants had no rightful title to sell. *Johnson*, *21 U.S.* at 570.

[26] *Id*. at 567.

[27] *Id*. at 573.

[28] *Id.* at 592.

or conquest. Euro-American citizens, therefore, could purchase Indian lands only through the government.

To justify the current state of affairs, Marshall might have employed the Lockean version of natural law proposed by the defense; he might have claimed that Indians, because they (supposedly) had not "enclosed" and "improved" the land, had no natural right to ownership. But he hesitated to deploy this strategy of legitimation. "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits." Although individuals may hold "private and speculative opinions" about the justice of these claims, Marshall found it disingenuousness to defend as right a state of affairs that had been established by sheer force. With painful honesty, he observed that the Court itself – in other words, Marshall himself - relied on this *a priori* reality. "Conquest gives a title which the Courts of the conqueror cannot deny." And again, soon thereafter: "The title by conquest is acquired and maintained by force."[29] By fact, if not by right, the nation rested on conquest.[30]

> *However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.*[31]

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

While declining to deploy the available philosophical justification for conquest, however, Marshall did display sympathy with its theological justification. The Discovery Doctrine, he observed, was a religious claim as well as a matter of force. It was a pope who first articulated the doctrine,[32] and it had been accepted by all European nations,

---

[29] *Id.* at 588-9.

[30] Philip Frickey argued persuasively that in the Johnson case Marshall was forced to acknowledge that with respect to Native Americans the polity had been created by sheer force. Frickey argues that in the Worcester case, when Marshall is addressing a situation of (post-conquest) colonialism, he attempts to mitigate this relationship of force by subjecting it to principles of law. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381-440 (1993).

[31] *Johnson*, 21 U.S. (8 Wheat.) at 591.

[32] In his Bull of Demarcation (1493) Pope Alexander VI divided the New World between Spain and Portugal. The chief purpose of all expeditions and conquests, stated the Bull, was "to induce the people who inhabit the foresaid islands and continents to embrace the Christian religion." The Lines Of Demarcation Of Pope Alexander VI And The Treaty Of Tortesilla A.D. 1493 And 1494, by Samuel

Protestant and Catholic both. As practiced by European nations and (in pertinent particular) by Great Britain, the Discovery Doctrine was religiously circumscribed. It "was confined to countries 'then unknown to all Christian people'" and it permitted them to take lands "notwithstanding the occupancy of the natives, who were heathens and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery."[33] Marshall himself apparently shared these theological premises. In an extra-judicial context he had stated that "the "American population is entirely Christian and with us, Christianity and Religion are identified.[34] Moreover, in his remaining Native American cases Marshall would explicitly assume that conversion of Indians to Christianity was a necessary and appropriate policy of the federal government.

It might be supposed that of these two lines of reasoning – one based in the theology of Christianity, the other based in the reality of violence – Marshall himself believed only the latter. In that case, what he did in the Johnson decision was not to create a public theology but to unmask theology as an ideological cover-up for material interests. Another interpretation, truer to the genuine ambivalence of the text, is that Marshall did indeed voice a theology in this decision – a theology in which the depravity of nature means that law, rather than emerging "naturally," must be violently imposed. Civilization as such could be seen as a kind of law. And among *civilized* people, it is indeed true that "the conquered shall not be wantonly oppressed" and that "the rights of the conquered to property should remain unimpaired."[35] But civilization – for Marshall of a piece with Christianization – lay at the heart of the matter. For these humane rules of conquest can be applied only when the conquered people can be incorporated into the society of the conqueror. For Marshall, as for his Euro-American contemporaries, this was presumed to require the incorporation of Native Americans into Christianity. While Christians among themselves may find nature ordered and law nascent within it, apart from Christianity what we have is not lawful nature but fallen nature – in other words, "wilderness." As Marshall put it:

> *… the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.*[36]

Edward Dawson (1899) p. 532. Microfiche by Canadian Institute for Historical Microreproductions (1980) CIHM/ICMH Microfiche Series. See 529-31 for bull in original Latin and 532-34 for English translation. Go to http://ia600401.us.archive.org/2/items/cihm_02614/cihm_02614.pdf (last visited March 22, 2011).

[33] *Johnson*, 21 U.S. at 577.

[34] Letter from John Marshall to Jasper Adams (May 9, 1833), *in* RELIGION AND POLITICS IN THE EARLY REPUBLIC, 18-19 (Univ. of Kentucky Press, Daniel Dreisbach, ed. 1996).

[35] *Johnson,* 21 U.S. at 590.

[36] *Id.*

Marshall's justification of state violence in the Johnson decision would return to haunt him in 1831. Emboldened by Marshall's 1823 version of the Discovery Doctrine, the state of Georgia attempted to forcibly remove the Cherokee Nation from the external boundaries of the state. In 1828 and 1829, its legislature had passed laws incorporating Cherokee territory into Georgia and subjecting the Cherokee people to state law.[37] Georgia's action, although it challenged the federal government, was in keeping with a policy that the federal government began to push vigorously in the 1820's: the voluntary removal of all eastern Indians to the area west of the Mississippi River. With the Removal Act of 1830, this policy became federal law. The Removal Act was supposed to encourage the voluntary migration of Indian nations, but this occurred only slowly and sometimes not at all. Georgia had been counting on the removal policy. In 1802, when the state ceded its excess lands to the federal government, it was on the understanding that the federal government would encourage the Cherokees from Georgia as soon as practicable. By the late 1820's, Georgia was aggrieved at the federal government's failure to secure the Cherokees' voluntary emigration, and its anger intensified when gold was discovered on Cherokee land. It was in this context that Georgia had set about dissolving the Cherokee Nation through its own legislative measures. And by the late 1830's the federal government too would impose removal by force, leading most infamously to the Trail of Tears on which thousands of Cherokees were to perish.

Marshall thought the Removal Policy inhumane and abhorred in particular Georgia's imperious cruelty to the Cherokees. "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."[38] Ultimately, however, Marshall would refuse to rule on this case. For one thing, he worried that a ruling in this case might violate the political question doctrine. To intervene against the Georgia legislature, he wrote, "savours too much of the exercise of political power to be within the proper province of the judicial department."[39] This particular compunction would evaporate in the Worcester case, but in the Cherokee case Marshall decided that it need not be reached, because of a prior question of standing. According to Article Three Section 2, only a foreign nation could sue a state to the Supreme Court. This became the decisive question: were or were not the Cherokees a foreign nation in relation to the United States? Marshall's response – that the Cherokees were in fact a nation, but a "domestic, dependent"[40] rather than a foreign nation - would seal the unique and anomalous position of Indian Nations as both inside and outside the constitutional order.

---

[37] As the Cherokee bill to the Supreme Court also complained, Georgia had enforced this claim by hanging a Cherokee, Corn Tassels (a.k.a. George Tassels) for a crime (murder of another Cherokee inside Cherokee Territory) ought to have remained under tribal jurisdiction. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, at 12 (1831).

[38] *Cherokee Nation*, 30 U.S. at 15.

[39] *Id.* at 20.

[40] *Id.* at 17.

Cherokee v. Georgia is the only case in the Marshall trilogy in which a First Nation made its own arguments, and those arguments appealed at every level to the rule of law. Invoking the equivalent of natural law, the Cherokees argued that they had lived in the land from time immemorial, "deriving their title from the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs."[41] They also reinterpreted the Discovery doctrine as a lawful agreement among the European nations, rather than as a legitimization of force. Understood as a matter of positive law, the Discovery Doctrine could not be binding upon the Indian nations who had never accepted it. Discovery conferred only a right of preemption – in other words, a right to buy the lands of a conquered region from its original inhabitants, should the inhabitants chose to sell. Preemption was a right that the conquering nation – for example, Great Britain - held over other European nations who had agreed to the doctrine for the sake of peace among themselves, not over Indian nations. It in no way negated the title of Indian Nations to their homelands, nor their right to sell the lands to whomever they chose. By natural law as well as the law of nations, plaintiffs argued, the Cherokee Nation truly owned their lands.

The Cherokees also held the United States to its own laws. The Georgia legislature, they held, had violated the federal Trade and Intercourse Act of 1802, which decreed that only the federal government, not state governments, could regulate Indian trade and manage Indian affairs. Finally, the United States in failing to constrain Georgia had violated its own supreme law, the constitution. In particular, the United States had violated Article Sixth, which makes treaties the law of the land. According to its treaties with the federal government, and by the very act of making those treaties, the Cherokees were recognized as a sovereign nation with a defined territory and a right to self-government. In the words of the Cherokee brief, they were "a foreign state, not owing allegiance to the United States, nor to any state of this union, nor to any prince, potentate or state, other than their own."[42] The treaty of Holston (1791) was particularly pertinent to the removal crisis, because it specifically provided that those Cherokees who choose to remain in their eastern territory "for the purpose of engaging in the pursuits of agricultural and civilized life …" could rely "on the patronage, aid and good neighbourhood of the United States.'"[43]

In the Worcester decision Marshall would embrace this more lawful, rational version of the Discovery Doctrine laid out by the Cherokees, reversing what he had asserted in Johnson v. M'Intosh. But in the Cherokee case he was not yet prepared to do that. Instead, he asserted that the United States had no east-west geographical boundaries other than the continental landmass itself; from coast to coast, the republic's territory was destined to be "everywhere." "The Indian territory," he wrote, "is admitted to compose a part of the United States…. they are considered as within the jurisdictional limits of the United States."[44] As frankly as in the Johnson case, Marshall describes this situation as

[41] *Id.* at 3.

[42] *Id.*

[43] *Id.* at 6.

[44] *Id.* at 17

the result of force. "They occupy a territory to which we assert a title independent of their will," with the Cherokee retaining only "a right of possession." So, while the United States would be everywhere, the Cherokee were destined to be nowhere. As Justice Johnson suggested in a separate opinion, the Indians were something like the Israelites in the desert, without property or territory, but still technically free to regulate their own members.[45] By this reasoning, some of Marshall's associates argued, the Cherokees not only lacked status as a *foreign* nation; they were not nations in any legal sense. Marshall was not prepared to go that far, partly because as a committed federalist he wanted to constrain the imperious Georgia. The Cherokee people were a nation, he insisted, but not a foreign nation.[46]

It can be argued that Marshall's version of the Discovery Doctrine, as a myth of violent origins, was the decisive reason for his denial of Cherokee standing as a foreign nation. Just as Discovery, in Marshall's telling, was an act of sheer force over indigenous peoples, so the constitutional order forcibly transformed Native American lands into the territory of the federal government. This is why the Cherokee effort to hold the United States to its own supreme law – the constitution – could not serve them. The Cherokee pointed to Article Six, to make the case that treaties implied sovereign nations and were as supreme as the constitution itself. But the supremacy Marshall had in mind was a different aspect of Article Six – the supremacy of the federal constitutional over all other contenders, be they states or Indian nations. When he asserted that the Cherokees were "in our territory," he was informing Georgia that Cherokee nation was part of federal territory, and not of state territory. For the Cherokees this meant that the constitution's supremacy, far from affirming Indian sovereignty, radically truncated it; it also meant that the constitution, rather than binding only the Euro-Americans who had consented to it, also bound Indians by force.

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

---

[45] *Id.* at 27 (Johnson, J., concurring).

[46] In support of this mixed conclusion, Marshall turned to actions of the federal government through which Indian tribes were treated as distinct political entities.

> The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts. *Cherokee Nation*, 30 U.S. at 16.

However, Marshall went on to argue, the constitution did not classify Indian tribes as *foreign* nations, for the Commerce clause (Article I section 8) authorized Congress "to regulate commerce with foreign nations, and among the several states and with Indian tribes." Had the founders understood Indian tribes as foreign nations, Marshall argued, they would not have been accorded a "distinct appellation." *Cherokee Nation*, 30 U.S. at 18.

the benign domination of the United States. "Meanwhile," he continued, "they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian."[47] With these influential words, Marshall placed judicial authority behind the "Civilization Policy" that had been enacted into law by Congress in 1819 and that remained federal Indian policy throughout the nineteenth century and well into the twentieth. The aim of Indian policy was civilization leading to assimilation, and civilization was a package deal. It entailed conversion to Christianity, the private ownership and cultivation of land, and a host of other adaptations to Euro-American culture, such as English only communication, Euro-American sex-gender roles, and the wearing of "citizen's dress."[48]

As plaintiffs pointed out, however, the treaty of Holston (1819) had specifically promised the Cherokees that in return for embracing the civilization program they would not be forced to leave their ancestral homelands. And in fact many of the Cherokees had become "civilized Christians," and turned from hunting to agriculture. In addition, the Cherokee Nation had created for itself a constitution modeled on that of the United States.[49] On the Euro-American side, however, racial prejudice could discount these adaptations.[50] "Civilization" in any case was a double bind, because to succeed at it was

---

[47] *Cherokee Nation*, 30 U.S. at 17.

[48] According to R. Pierce Beaver, the federal policy linking Christian conversion with "civilization" was first developed by Henry Knox, the Secretary of War under George Washington. *See* R. PIERCE BEAVER, CHURCH, STATE AND THE AMERICAN INDIAN: TWO AND A HALF CENTURIES OF PARTNERSHIP BETWEEN PROTESTANT CHURCHES AND GOVERNMENT 63-65 (1966). The Civilization Fund, established by act of Congress in 1819, permanently allocated fund (initially $10,000 per year) "for the purpose of providing against the further decline and final extinction of the Indian tribes." Native American people were to be instructed in "the mode of agriculture suited to their situation," and their children were to learn reading and writing (in English) and arithmetic. The education of Native Americans was to be carried out by persons "of good moral character" under the authority of the President. Although the legislation did not specify that the teachers should be missionaries, in fact the monies did go largely to missionaries, who already were involved with Indian education. *Id*. at 68-69.

According to Robert Berkhofer, civilization (i.e., Europeanization) and Christianization were distinguished by the missionaries themselves, with some missionaries prioritizing the former and others the latter. In any case, both were aspects of the missionary goals. *See* ROBERT BERKHOFER, SALVATION AND THE SAVAGE: AN ANALYSIS OF PROTESTANT MISSIONS AND AMERICAN INDIAN RESPONSE, 1787-1862, 4-10 (1965).

[49] In Marshall's words, the Cherokees had

> established a constitution and form of government, the leading features of which they have borrowed from that of the United States; dividing their government into three separate departments, legislative, executive and judicial. . . . They have established schools for the education of their children, and churches in which the Christian religion is taught; they have abandoned the hunter state, and become agriculturists, mechanics, and herdsmen; and, under provocations long continued and hard to be borne, they have observed, with fidelity, all their engagements by treaty with the United States. Under the promised 'patronage and good neighbourhood' of the United States, a portion of the people of the nation have become civilized Christians and agriculturists; and the bill alleges that in these respects they are willing to submit to a comparison with their white brethren around them.

Cherokee Nation, 30 U.S. at 6.

[50] As Justice Johnson put it in his concurring opinion:

to largely destroy the traditional life-ways of the Cherokees, as a tribal community belonging to a particular geographical place. Just as the domination by Euro-Americans was as religious as it was political, so was the injury on the Cherokee side. The land from which the Euro-American government wished to separate the Cherokees was, as Marshall himself observed, "consecurate in their affections from having been immemorially the property and residence of their ancestors, and from containing now the graves of their fathers, relatives, and friends."[51] To move west of the Mississippi would endanger both the spiritual and the physical survival of the Cherokees. It would be, in Marshall's paraphrase, "the grave not only of their civilization and Christianity, but of the nation itself."[52]

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

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

Despite their inactivity, the religion clauses sat in the constitution, outlining the official relationship between the United States and religion. In contrast to the unofficial Public Religion that Marshall assumed, the constitution conceives religion not as public territory but as private property, not as pervading public space but as walled off. It was succinctly contained in the metaphor employed by James Madison when he wrote: "[A man's] property of peculiar value is in his religious opinions, and in the profession and practice dictated by them."[53] Religion in this imagery was one's own business, the sovereign territory of the individual conscience on which government may not encroach. The property to which Madison referred was first of all the sovereign self – the man who owns and rules himself according to his unique and inviolable conscience. But property also referred to individually owned land - literally, a condition of citizenship;[54] and

---

> Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution. The policy, therefore, of enticing them to the arts of peace, and to those improvements which war might lay desolate, was obvious; and it was wise to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments: a policy which their inveterate habits and deep seated enmity has altogether baffled.

Id. at 23-24 (Johnson, J., concurring).

[51] *Id.* at 9 (majority opinion).

[52] *Id.*

[53] James Madison, *Property* (March 29, 1792), Philip Kerner And Ralph Lerner, THE FOUNDERS' CONSTITUTION, CHAPTER 16, DOCUMENT 23. Available at http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html (last visited June 7, 2011).

metaphorically the territory of the citizen's self-sovereignty. Viewed through this lens, government appears very different than through the lens of Public Religion. Here, government is strictly limited, and its authoritative source is individual conscience rather than a common faith. [55]

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

From the start, the image of wilderness also played a decisive in Church-State jurisprudence through Roger Williams' metaphor of a wall separating the church from the "wilderness" beyond. [56] Religion, cultivated within these walls, was metaphorically associated with property. For Williams, the wilderness included both the Indians and the government. Jefferson, as is well known, had a far more favorable view of government and a far less favorable view of religion.

However, that neither the evangelical nor the enlightened strains of separationism confined God or religion entirely within "the wall." For Williams the wilderness, while devoid of Christian revelation, nonetheless knew what Williams called the "Second Table" of the law (the last six of the Ten Commandments). These divine laws were laid upon all people and could be obeyed by all. Obedience to these commands, while not sufficient for salvation, was sufficient to make people governable. This implied, in Williams' thought, a distinction between Christianization and civilization; the latter could be accomplished without the former. In fact, Williams pointedly observed that the indigenous people adhered to the Second Table as well or better than most Englishmen – a view perhaps related to his unusual regard for the land ownership rights of Native Americans.[57]

---

[54] Jacob Katz Cogan, *The Look Within: Property, Capacity and Suffrage in Nineteenth Century America,* 107 YALE L.J 473, 476-7 (1997).

[55] Cogan writes: "Whereas the eighteenth century looked to property for guidance in determining a person's fitness to vote, the nineteenth century turned to the soundness of a person's mind." However, he concludes, evaluating the "inner self" remained a "difficult proposition." "So it was that the look within possessed a sad irony: Americans, for all their searching inward, could not, in the end, help but look outward." *Id*. at 495 and 497.

[56] For a full discussion of Williams' view, see TIMOTHY HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY (1998).

[57] Williams' advocacy for Native land ownership was among the reasons for his conflict with the leaders of Massachusetts and his eventual banishment. See Jeffrey Glover, *Wunnaumwayean: Roger Williams,*

For Jefferson too, the un-walled regions of America had a double meaning: sometimes he imagined them as wild, sometimes as governed by natural law. Natural law came to mind when Jefferson was thinking of relations among Europeans. But when thinking of indigenous Americans, Jefferson like his cousin John Marshall might revert to images of wilderness. In the Declaration of Independence, addressing the other European nations and in particular Great Britain, he famously invoked "the laws of Nature and Nature's God." But later in the same document, when he refers to the Indian lands not yet under Euro-American control, nature suddenly appears Godless; it is inhabited by "the merciless Indian savages." Human nature itself, then, was riven by a tension between lawfulness and wildness.

This dual assessment of human nature characterized both Jefferson's thinking about Native Americans and his Indian policy as president. According to Anthony Wallace, Jefferson vigorously rejected the theory that Native Americans were of inferior intelligence to whites.[58] Instead, Jefferson espied in Native people what he took to be the universal human capacities for reason and morality, albeit at a lower stage of development.[59] Nonetheless, Wallace shows, Jefferson was unable to see indigenous religions as anything but "superstitious nonsense"[60] and believed that these religions, along with Indian cultures as a while, were destined to end. Despite his remarkably heterodox theology, then, President Jefferson would continue the policy (begun by Henry Knox during the Washington administration) of lending federal support to Christian missionaries who were given the task of "civilizing" the Indians.[61] Not coincidentally, the cultural disappearance of Native Americans was a precondition of what Wallace shows was Jefferson's over-riding interest, which was the acquisition of Indian lands.[62]

But while Euro-Protestants religious sensibilities controlled life on both sides of the "wall," on neither side were Native Americans religions recognized as such or protected from government intrusion. The apparent absence of private property among native people signaled a wildness that needed taming by Euro-American government and Christian missionaries. As Grovenuer Morris had commented during the constitutional convention of 1787, "Men do not enter into Society to preserve their Lives or Liberty – the Savage possesses both in perfection – they unite in Society for the Protection of

---

English Credibility, and the Colonial Land Market, EARLY AMERICAN LITERATURE 41: 3, 429-453, esp. 432-34. (2006). Upon arriving in Rhode Island, he bought land directly from the Narragansetts – a purchase obliquely noted and explained away as anomalous by Marshall in *Johnson v. M'Intosh*, 21 U.S.. at 602.

[58] ANTHONY F. C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST INDIANS, 77 (1999).

[59] *Id*., at 95-96.

[60] *Id.* at 110.

[61] *Id.,* pp. 168-9.

[62] *Id*., at 205;206-40.

Property.[63] As early as 1776, Congress had resolved to place Christian ministers among the Indians, both for purposes of conversion and to encourage agriculture and other "civil arts." [64] In 1779, President Washington ordered Indian commissioners to arrange for Christian missionaries to work with Native peoples, and subsequent presidents followed suit. By the late eighteenth century, many Christian denominations in the U.S. had created missionary societies specifically devoted to Native Americans. In 1819, Congress formalized its support for missionaries policy by setting up a Civilization Fund that would help support Christian missions to the Indians.[65] In 1873, President Grant created what was termed the "Peace Policy," which advanced the same ends even more aggressively and was both administered and implemented by Christian missionaries.[66] In

---

[63] YALE LAW SCHOOL, THE AVALON PROJECT: DOCUMENTS IN LAW, HISTORY AND DIPLOMACY, Notes of Rufus King in the Federal Convention of 1787 (For July 5th), Available at http://avalon.law.yale.edu/18th_century/king.asp (last visited March 24, 2011).

[64] Justice MacLean, in his concurring opinion in the case of *Worcester v. Georgia*, quoted the government's 1776 commissioning of missionaries as follows:

> In April 1776, it was "resolved, that the commissioners of Indian affairs in the middle department, or any one of them, be desired to employ, for reasonable salaries, a minister of the gospel, to reside among the Delaware Indians, and instruct them in the Christian religion; a school master, to teach their youth reading, writing, and arithmetic; also, a blacksmith, to do the work of the Indians. *Worcester v. Georgia*, 31 U.S. 515, 574 (1832) (MacLean, J., concurring).

[65] The Civilization Act did not require that the agents of civilization be missionaries; it did authorize the President to hire for this purpose "persons of good moral character," a phrase understood to refer particularly to missionaries. Missionary societies were in fact the only organizations engaged in Indian work at the time of the Act, so it seems to have been written with them in mind, and upon the passage of the Act it was missionaries among whom its directives were circulated. See BEAVER, *supra* note 47, at 67-79.

As cited by Marshall in *Worcester*, the Civilization Act provided

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

Worcester v. Georgia @557.

[66] None of this is to deny that the motives of the missionaries, though constrained by ethnocentrism, were humanitarian, or to gainsay their efforts to protect Native peoples from the worst depredations of Euro-Americans. On the government's side, too, the support of missions involved humanitarian as well as opportunistic motives. Missionaries were not chosen for this work simply because of their religious credentials. It was expected that missionaries would be people of moral integrity, and in particular that they would be unlikely to have designs on Indian lands. *see* BEAVER, *supra* note 47, 62-64. Missionaries also were perceived as the most experienced and equipped candidates for work with Indians. Well before the Revolutionary War they had been working with Indians, and within the next decades many Christian denominations created the administrative apparatus (e.g., missionary societies) to do the job. Moreover, conversion to Christianity was not as coercive in the early republic as it became in the course of the nineteenth century. Henry Knox, for example, actually forbade the proselytization of Indians who had not already converted. For an excellent account of the missions up until the 1860's. *Id*. at 66.

all these initiatives, conversion to Christianity and the private ownership of land were intertwining aspects of the civilization process. In 1818, this was floridly expressed by a committee of the House of Representatives in support of the Civilization Policy.

> *Put into the hands of their children the primer and the hoe, and they will naturally, in time, take hold of the plow; and, as their minds become enlightened and expand, the Bible will be their book, and they will grow in the habits of morality and industry, leave the chase to those whose minds are less cultivated, and join society.*[67]

These government-supported conversion efforts, because they were tacitly understood as Public Religion, did not raise Establishment concerns. Indeed, the missions to Native Americans received their first government sanction and support in the same period that constitutional principles of non-establishment and religious liberty were being crafted. So it is particularly strange to recall that resistance to government funding for Christian ministers – but to *non-Native Americans* - catalyzed the emergence of the religion clauses. In the late 1770's, a bill for the support of Christian ministers had been proposed to the Virginia legislature, and was fiercely and famously opposed by Jefferson in his "Bill for Establishing Religious Freedom" (1779) and then by Madison in his "Memorial and Remonstrance" (1785) - the documents articulating the principles that Madison and Jefferson would later craft into the religion clauses of the constitution.[68]

When Establishment issues finally were raised about the Indian missions, the issue was not whether it was constitutionally legitimate to force Christianity on Indians. Instead, the Establishment issue was pressed by Euro-American Nativists, who denounced Catholicism and espoused Protestantism as American Public Religion. After the wave of Catholic immigration to the east, a battle arose over the use of the King James Bible in public schools, in reaction to which Catholics established their own schools and requested public funding. Protestant Nativists countered by sharply distinguishing "non-sectarian" (read: Protestant) from "sectarian" religion (read: Catholic) religion. Non-sectarian religion, Nativists argued, was essential for the formation of citizens, and government not only may but must support it; sectarian religion, on the other hand, must be strictly "separated" from the state.[69]

Finally, it is important to note that not all government officials supported the civilization policy. For example, Lewis Cass, architect of the Removal Policy, argued that Indians had to be "reformed" before they could be "civilized." See JOHN WUNDER, RETAINED BY THE PEOPLE: A HISTORY OF NATIVE AMERICANS AND THE BILL OF RIGHTS 23 (1994).

[67] BEAVER, *supra* note 47 at 67-68.

[68] For an excellent analysis how religion clauses were (or, more accurately, were not) applied to Indian Missionaries, see Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997).

[69] Philip Hamburger argues that it was in this context that the ideologies of secularism and separationism (as distinct from simple non-establishment) were first advanced. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193-251 (2002). Because they viewed Protestantism as American and as nonsectarian, Nativists actually were able to equate Protestant public religion with separationism. An excellent illustration is this 1845 statement by the American Republican party:

In the last decades of the nineteenth century, the struggle was repeated farther west, in the context of Indian work. By that time, Catholic missionaries had gained increasingly more government contracts for Indian schools. Protestant Nativists, some of whom (e.g., Thomas Morgan) held elevated roles in Indian affairs, argued that Catholics were unequal to the task of "Americanizing" Indians. Catholics were perceived by Nativists only as un-American but as anti-American; like Indians, Catholics were prone to superstition, ritualism, irrationality and a collectivism that undermined their capacity to think and act as individual citizens.[70] From this conflict arose the first Supreme Court case bearing on Native American religious liberty, Quick Bear v. Leupp (1908). The decision favored Native American religious liberty, but only in a very narrow sense. The Court held that to deny government contracts to Catholic reservation schools would unduly restrict the religious liberty of Native Americans. In other words, religious liberty at this point guaranteed only the right of Native peoples to choose among forms of Christianity; it did not extend to the practice of Native religions themselves.[71]

In fact, during the same period that Catholics gained for Native Americans this cramped version of religious liberty, federal Indian policy enacted its most draconian measures against Native American religions. Strikingly, the suppression of Native religions went hand-in-hand with the breakup of tribal territories and governments. In the Dawes era (1887-1934), also known as the Allotment and Assimilation period, tribal lands were allotted to individual Native American males.[72] As a consequence, about two-

---

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

Id. at 228-29.

[70] See FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIANS, 1865-1900 304-13 (1976).

[71] Reuben Quick Bear, a Protestant and a Sioux, objected to use of government funding (i.e., tribal trust funds that had been created by the federal government) to support a Catholic school at the Rosebud Sioux Reservation in South Dakota. Quick Bear lost, and the Supreme Court's reasoning was that to deny funding to Catholics was to deny religious freedom. The Court held that "…we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof." *Quick Bear v. Leupp*, 210 U.S. 50 (1908) at 81-2.

[72] PRUCHA, *supra* note 68 at 248-57. Curiously enough, this period also was significant in regard to another land metaphor we have been tracing – wilderness – for it was the period in which national parks were first created and designated as sacrosanct "wilderness" areas. In an interesting book on this topic, Spence argues that wilderness now began to mean land devoid of humans, who could enter it only as "visitors" and who also were obligated to leave. These newly established wilderness areas became an important part of Euro-American public religion, functioning as national shrines and pilgrimage sites. Native Americans, however, had to be removed in order to preserve this newly defined "wilderness." MARK DAVID SPENCE,

thirds of Indian lands ended up in the hands of whites and many tribal governments were dissolved. These land policies were integrally linked to the second aim of the Dawes period – the assimilation of Indians into Anglo-American culture. In the Dawes era, assimilation took on especially aggressive aspects, including the forced placement of Indian children into English-only boarding schools and the criminalization of Native American ceremonies (the latter of which resulted in the Wounded Knee massacre of 1898). Native Americans who renounced (or appeared to renounce) their spiritual traditions and who accepted private land allotments now finally could become citizens – and so, for the first time, claim Free Exercise and other constitutional rights. But in gaining those freedoms on Euro-American terms, Indians lost religious and political freedom on their own terms.

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

IV. The Native American Religious Freedom Cases

Not long after constitutional rights became applicable to Native Americans, the religion clauses themselves sat up and drew breath. In 1940 and 1947 respectively, the Supreme Court incorporated the Free Exercise and Establishment clauses to the States. In the 1947 case (Everson v. Board of Education), the "wall" metaphor re-surfaced in a Supreme Court dictum, and with it the implication that government should not merely dis-establish but rigorously *separate* itself from religion.[73] Although the wall metaphor was most closely bound to Establishment jurisprudence, it signaled a strong separationism that affected Free Exercise as well. While government, imagined as "beyond the wall," was being scrubbed of religious bias, the inverse also became true: within the "wall," religion was to be more scrupulously protected. Under the influence of separationism, Free Exercise began to enjoy its highest level of protection, culminating in the Sherbert test of 1963.[74] According to the Sherbert test, government could not place a

---

DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS 3-4 (1999).

[73] *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947). The wall of separation metaphor had also appeared earlier in the case of Reynolds v. United States, 98 U.S. 145 (1878), but it was after *Everson v. Board of Education* that the metaphor became for a time canonical.

[68] *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

"substantial burden" on religion, unless government had a compelling interest in doing so. And even then, government restrictions on religion had to be tailored as narrowly as possible.

It was in this context that the three Native American Free Exercise cases were to arrive and ultimately fail in the Supreme Court. The failures, I've suggested, were telling in relation both to the constitution's view of religion and the political standing of Native Americans. In these three cases, one can trace the gradual reduction of both the religion clauses and the judicial response to Native Americans to matters of mere "equality." Only one of these cases – the Lyng case of 1988 - was about land. However, all three challenged the territorial dominion of Euro-American Public Religion, and in all it was found that Native religious claims could not be protected under the Separationist model of religion as private property. These religious liberty cases are vivid evidence that the notions of religion as private property and as public territory, although logically contradictory, are politically effective for majoritarian interests and against the interests of Native Americans.

In Bowen v. Roy (1986),[75] Abenaki Indian Stephen Roy filed suit on behalf of his daughter, Little Bird of the Snow, who was eligible for food stamps and ADFC benefits. Federal law required that a social security number be assigned to children receiving these benefits. But Roy, upon instruction by an Abenaki chief, came to believe was that use of a unique number would "rob" his daughter's spirit.[76] He refused to secure a social security for his daughter and write it on the pertinent forms, whereupon Little Bird was denied benefits. Roy then brought suit against the government, arguing that his Free Exercise had been violated and requesting an individual religious exemption from the requirement that he write down a social security number for his daughter. In addition, Roy issued a much broader claim: he wanted to enjoin the government itself from using a social security number for his daughter. As it turned out, the government already had assigned the child a number; theoretically therefore it was possible for the government to use the number for administrative purposes, even without Roy's cooperation. Unfortunately for Roy, neither claim was upheld by the Court in its plurality opinion. Only three justices even supported his request for an individual exemption.[77]

In contrast to the judicial view of Native Americans as "heathen", which had characterized the legal treatment of Native religions until the 1930's, the Roy Court accepted the plaintiff's beliefs as legitimately religious in nature. Yet with this less normative and judgmental definition of religion went a diminished standard of Free

[75] *Bowen v. Roy*, 476 U.S. 693 (1986).

[76] *Id.* at 696.

[77] The opinion was a plurality decision written by Chief Justice Warren Burger. Only one Justice (Bryon White) supported both Roy's broader request (that the government itself not use the Social Security Number) and his narrower request for an individual exemption. Eight justices rejected Roy's broader request and five of these also rejected the narrower request. However, two of the justices who rejected the exemption request did so because they thought the issue moot and/or not ripe. A minority opinion supporting the exemption request was written by Justice O'Connor.

Exercise. In comparison to the Sherbert standard, the scope of protections or privileges to which religion was constitutionally entitled suddenly shrank. While agreeing that *for Roy* social security numbers were a genuinely religious issue, Justice Burger insisted that for the government they were *not*; it was as if Roy were making "a sincere religious objection to the size or color of the Government's filing cabinets."[78] The Free Exercise clause "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[79]

Clearly, this reasoning rested heavily on a Separationist model in which religion is a clearly delineated part of life, rather than the whole of a cultural world. On one side of this bright line the Court placed Roy's beliefs; on the other, file cabinets, social security cabinets and other presumably secular things. In effect, the Court held that religion for Free Exercise purposes is a matter of personal beliefs that cannot make public truth claims or affect public reality. But Roy, like most religious believers, was making an actual truth claim – that his daughter would be spiritually harmed by the social security number. So for him, what the Court offered was meaningless – a right to believe that his daughter would be harmed, but not the actual power to prevent the harm from being done.

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

This assumption that government is religiously neutral also explained Burger's rejection of Roy's Free Exercise claim. Religious exemptions, Burger argued, are not constitutionally required as long as the law is not intended to discriminate against religion (is "facially neutral" and uniformly applied.) Given "the diversity of beliefs in our pluralistic society … some incidental neutral restraints on the free exercise of religion are inescapable."[80] Since any policy might create "an indirect and incidental burden" on someone's religious belief, Free Exercise did not protect one from having to choose between "a public benefit" (such as AFDC) and a religious belief. The right of Free Exercise, Burger reasoned, only meant that the law could not directly force the violation of a religious belief, or directly penalize religiously mandated behavior. Unless intended

[78] *Bowen v. Roy* 476 U.S. at 700.

[79] *Id.* at 699.

[80] *Id.* at 712.

"to discriminate against particular religious beliefs or against religion in general"[81] a law burdening religion needed only to serve a legitimate (rather than compelling) interest.

In this respect, the Roy case foreshadowed the downward trend noted above: Free Exercise began to shrink from an affirmative freedom (discrimination in favor of religion) to a mere protection against negative discrimination. The Roy plurality read Sherbet Test as promising something much less than special protections for religion. Instead, they interpreted Sherbert only to mean that when a law or policy included "a mechanism for individualized exemptions" it would have to consider exemptions for religious as well as for non-religious reasons.[82] In other words, government could not discriminate *against* religion – a far cry from conferring upon religion any special protection. As O'Connor put it, Burger's low standard of Free Exercise in this case "relegate[d] a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."[83]

The second Native American religious freedom case to reach the Supreme Court also amounted to a systemic challenge that couldn't be contained within the Separationist model. In Lyng v. Northwest Cemetery Protective Association (1988),[84] Native Americans were objecting on Free Exercise grounds to a road (called the G-O road) that the Forest Service proposed to build in the Chimney Rock area of Six Rivers National Forest. The G-O road would have traversed an area known as the high country, sacred to the Tolowa, Karak, and Yoruk tribes. Writing for the majority, Justice O'Connor refused the request on grounds that the Native American respondents in Lyng were asking for too much. More than a religious accommodation or exemption, Native respondents were

---

[81] *Id.* at 706.

> We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.

Id., at 707-8. The compelling interest (Sherbert) standard applied to the latter circumstance but not to the former, Burger concluded.

> In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest. [FN 17] Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

[82] *Id.* at 708. The Thomas case, which like Sherbert had been thought by many to create a high standard of Free Exercise, also was interpreted by Burger as a non-discrimination provision. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981). Justice Stevens in his separate *Bowen* concurrence also argued for a narrow interpretation of these cases. *Bowen v. Roy*, 476 U.S. at 722, n.17.

[83] *Bowen v. Roy,* 476 U.S. at 727.

[84] *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

asking the government "to do its own thing differently."[85] Like Burger in Bowen v. Roy, O'Connor read the Sherbert case in a manner unfavorable to Native American requests. From that case, she quoted this dictum: "For the Free Exercise clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[86]

But recall that Sherbert also decreed that government could place a "substantial burden" on religious liberty only if government could demonstrate a compelling interest in doing so. Justice Brennan, in his dissent, contended that "substantial burden" referred to the impact of government actions on religion. Since the Court recognized that the G-O road could effectively destroy these Native religions, Brennan contended, it was ludicrous to claim that their religion would not be substantially burdened. O'Connor countered that substantial burden pertains to the form rather than the effect of government action. The key word in the Free Exercise clause, she contended, is "prohibit." But while government may not prohibit religion, it may and necessarily albeit unintentionally does *inhibit* some religious expressions. In both the Roy case and the Lyng case, she acknowledged, government was acting in ways that interfered with religious expression. However, she added: "in neither case … would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[87] To demand more was tantamount to demanding that government actually help people practice their religions.

O'Connor did not acknowledge that government in practice does assist the religious practices of Euro-Christians, whose beliefs are always already embedded in public norms. Government, in other words, routinely mistakes religious hegemony for religious neutrality. In the Roy case, government actions reflected the belief that Little Bird could not really be harmed by a social security number. In the Lyng case, the Forest Service acted on the belief that land is not a living, sacred thing and therefore cannot be desecrated by a road. Both the Lyng majority and the Roy plurality presumed rather than examined the government's claim to religious neutrality. [88] From that standpoint, it seemed that only Native Americas, not the government, held unverifiable "religious" beliefs about such matters as land and social security numbers. So, while the Lyng

---

[85] O'Connor applied the same rule she had recommended in *Bowen* – a higher standard than that what had actually prevailed in Burger's plurality opinion. Beyond not criminalizing or penalizing religious expression, she argued, government should not even force a person to choose between following a religious belief and gaining a government benefit (such as food stamps or AFDC).

[86] *Lyng*, 485 U.S. at 451 (citing *Sherbert*, 374 U.S. at 1798).

[87] *Id.* at 449.

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

majority accorded Native Americans the right to *believe* anything they want about land,[89] those beliefs would not affect legal realities. Otherwise, O'Connor reasoned, Free Exercise would entitle Native Americans to claim as much land as they believed was sacred, and to exclude other religious claimants from the same land.[90] In O'Connor's words: "No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." And again: "Whatever rights the Indians may have to the use of the area … do not divest the Government of its right to use what is, after all, *its* land."[91]

Recalling the Marshall cases, however, it must be said that the high country had not always been government property or even government territory. Nor, indeed, had any of the lands now constituting the United States. That history was strangely echoed in O'Connor's distinction between the (Native American) "use" of the land and the (government's) "ownership" of it - terms Marshall had chiseled into law with his Johnson decision. It was this judicial act of dispossession, a century and a half before Lyng, that had established that Indian lands not only as government territory but also as government property. And it had been accomplished through the adoption of a particular version of the Discovery Doctrine, the religious roots of which Marshall had frankly explicated.

On both the Indian and the Euro-American side, then, fundamental beliefs and values were at stake – concerning the meaning and value of land, the relationship of humans to land, the origins and moral legitimacy of various claims to land. As Brennan observed, the Lyng case was "yet another stress point in the longstanding conflict between two disparate cultures--the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred."[92] The same point had been made by the Theodoratus commission, the group appointed by the Forest Service to study the Lyng case. Even the presumptively secular views of land held by the Forest Service and the Court had religious roots, observed the Theodoratus report: "While traditional Western religions view creation as the work of a deity who 'who institutes natural laws which then govern the operation of physical nature,' tribal

---

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

[90] "Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands." *Id.* at 453.

[91] *Id.*

[92] *Id.* at 473 (Brennan, J., dissenting).

religions regard creation as an on-going process in which they are morally and religiously obligated to participate."[93]

These opposing beliefs about land also implied opposing views of religion. For one thing, Native religious beliefs concern the physical world. Therefore, unlike the metaphysical beliefs of Christianity, Native religions can be undermined by actions that injure nature. As Brennan wrote: "Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land."[94] And, again in contrast to Christianity, Native religions are site-specific; they cannot be picked up and taken somewhere else.[95] Neither religion nor land, on Native terms, are fungible – they cannot be liquidated into cash or exchanged for other goods.[96]

But religion, conceived in this way, can't be contained in the Separationist model. As the Theodoratus Report put it, religion is not a discrete sphere for Native peoples, and separating the religious from the cultural, social or political aspects of life "forces Indian concepts into non-Indian categories."[97] We could go farther and say that the co-extensiveness between religion and life-world that obtains for Native Americans exposes the fact that the Euro-American polity is founded on a life-world of its own, a life-world incompatible with Native worlds. This again points to the contradiction between the two Euro-American models of religion: although the constitution constructs religion as separate from the public world, it also relies on a shared Public Religion within religious differences are politically and economically insignificant. As already noted, for Euro-Christians, this contradiction is beneficial. If they are comfortable with the range of accommodations offered by the Free Exercise (and usually they are), it's because they are equally comfortable with the norms that dominate the public sphere. The situation of minority religious is just the reverse. This is most so for Native Americans, whose religious beliefs center on land itself and therefore defy the ideas of territory and property upon which the constitutional order as a whole rests.[98]

But on the Native side of these cases, too, contradictory models of religion also were at play. The difference was that Native people, unlike Euro-Americans, could not make

---

[93] *Id.* at 459 (citing U.S. Federal Agencies Task Force, American Indian Religious Freedom Act Report 11 (1979) ("Theodoratus Report")).

[94] *Id.* at 461.

[95] Another point made by Brennan, again based on his reading of the Theodoratus Report: "And of course respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it non-transportable." *Id.* at 468.

[96] "Within this belief system, therefore, land is not fungible…" *Id.* at 461.

[97] *Id.* at 459 (citing App. 110; D. Theodoratus, Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest (1979)).

[98] *See* ERIC MICHAEL MAZUR, THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER 94-121 (1999).

these contradictions functional. By appealing to the Free Exercise clause, Native Americans were invoking the Separationist notion of religion as something unique and clearly distinguishable from the secular. On the other hand, by claiming liberty to enact a holistic life-world (e.g., to treat land itself as sacred) they were appealing to a very different notion of religion, akin to Euro-American Public Religion. In other words, Native Americans were simultaneously requesting the accommodations available within the constitutional system, and asking for a different system.

A final contradiction was at work in Lyng, and indeed in all three Free Exercise cases: Native Americans come to the court both as American citizens demanding ordinary constitutional rights, and as a legally unique group. For the Lyng respondents, this created a particular problem: insofar as they appealed to Free Exercise rights shared with all other citizens, Native claims upon sacred lands could be countered by non-Native American religious claims to the same lands. For example, New Age rock climbers have claimed a religious freedom to use Native American sacred sites on the same occasions (e.g., the summer solstice) when Indian rituals are performed.[99] From the moral and historical standpoints, of course, there is an incommensurability between Native and non-Native claims. But from the vantage point of the First Amendment, religious claims must be commensurable - it does not matter, or should not matter, whether a religion is ancient or new, or whether its practitioners are privileged or oppressed, native or non-native.

There were, however, federal laws and regulations uniquely available to Native American religious liberty by the time these cases were argued. Most pertinent was the American Indian Religious Freedom Act (AIRFA) of 1978. Indians invoked AIRFA in the Roy case, and more forcefully in the Lyng case, but in both cases the Act proved ineffectual. First of all, AIRFA had no enforcement provisions; it was simply a joint congressional resolution rather than a proper statute. Moreover, it was unclear whether AIRFA did anything special for Native Americans. Neither Burger in the Roy decision [100] nor O'Connor in Lyng thought that it did. Nor even did the resolution's sponsor Morris Udall, who had stated that AIFRA would not "confer special religious rights on Indians," nor "change any existing State or Federal law." According to Udall, the joint resolution simply expressed a Congressional commitment (and a "toothless" commitment at that) to guarantee that "the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration." [101] On the other hand, AIRFA did call for special Congressional oversight of Native American religious freedom. And the very fact that Congress can create legislation pertaining uniquely to Native Americans is a result of the unique political relationship between Indians and the federal government – the relationship that Marshall had so influentially described as that between a ward and guardian. In any case, it was not the

---

[99] *See* LLOYD BURTON, WORSHIP AND WILDERNESS: CULTURE, RELIGION AND LAW IN PUBLIC LANDS MANAGEMENT 273-80 (2002).

[100] *Lyng*, 485 U.S. at 472. Burger interpreted AIRFA minimally; to him it was intended only to reiterate that Native Americans share with non-Natives a constitutional right of Free Exercise.

[101] *Lyng,* 485 U.S. at 455 (majority opinion) (citing 124 Cong. Rec. 21,444-45 (1978)).

unique implications of AIFRA for Native Americans but their presumed equality with other Americans that was decisive in both Lyng and Roy, and this reduction to equality did not bode well for Native Americans.

In Oregon v. Smith (1990)[102] the two streams of this narrative – the judicial treatment of Native Americans and the judicial treatment of religion – ran together and took a decisive turn. In the Smith decision, not only was the Native American Church denied protection; the high standard of Free Exercise that had dominated the Court since the wall metaphor was re-introduced in the 1940's came crashing down. As a result, religion lost much of its uniqueness as a First Amendment category. Rather than requiring that religion be treated in a distinctive way, Free Exercise came to nearly the opposite: that people should neither suffer discrimination nor enjoy unique privileges on account of religion In parallel fashion, the Smith case made clear that for Native Americans mere "equality" – that is, religious liberty on the same footing as non-Native people – was not a winning strategy. After Smith, neither religion in general and Native American religion in particular would be constitutionally cordoned off from majoritarian politics. Rather than remaining "properties of peculiar value," each would be fully territorialized by a public ethos that, as I have argued, amounts to a Public Religion.

The case concerned two members of the Native American Church (NAC), whose central ritual involves the ingestion of peyote. Rueben Smith and Galen Black[103] both worked for a private drug rehabilitation agency in Oregon. They found no tension between their use of peyote and their work against substance abuse, since in the NAC sacramental peyote is believed to cure drug and alcohol addiction. But the rehab agency thought otherwise, so Smith and Black were fired. When they applied for unemployment compensation, the state of Oregon denied them on grounds that they had been fired with "good cause" – specifically, that they had broken a criminal law.[104] Peyote use was illegal under Oregon's anti-drug law, and the state legislature had chosen not to exempt the sacramental use of peyote. Smith and Black then brought suit against Oregon arguing that its refusal to create the religious exemption violated their Free Exercise rights. When the case arrived at the Supreme Court, the key question was whether the federal constitution *required* Oregon to create a religious exemption for peyote use. If Oregon was not so required, then the freedom of the NAC to practice its religion without criminal prosecution would rest on the will of the majority culture as expressed in the legislative process.

For Native Americans in this as in other cases, the significance of territory, property and boundaries was more than metaphorical. Of first and fundamental significance was the territorial jurisdiction of the federal government and its claim to title over Indian lands. These claims, affirmed in Johnson v. M'Intosh, provided some "excuse if not justification" for the fact that Native Americans had become subject to Euro-American

---

[102] *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990).

[103] *Id*. at 874. Rueben Smith was a Klamath Indian; Galen Black was non-Native. *See* EDITORS' PREFACE TO CAROLYN N. LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF OREGON V. SMITH ix (2000).

[104] Ironically, however, neither Smith nor Black were prosecuted for these criminal acts. *Id*. at 911.

law in the first place. Closely related to the territorial claims of the federal government were the jurisdictional claims that states have tried to assert over Indian land and people. That was the conundrum Marshall attempted to resolve in Cherokee v. Georgia. By defining Indian territories as "domestic, dependent nations" and Indian peoples as "wards" and "pupils" of the federal government, he had granted the federal government unique powers over Indian lands and Indian peoples. In so doing, he'd also hoped to severely limit the powers of states in regard to Indian affairs.

Even in its own time, sadly, Cherokee v. Georgia had not quieted the jurisdictional claims of states. Despite Marshall's federalist stance in that case and in the Worcester case which was soon to follow, Georgia (thanks to the support of President Jackson) was able to force the Cherokees out of what Georgia regarded as its territory. By the time of the Smith case, the boundaries between federal, state and tribal jurisdictions over Indian lands and people had been drawn and redrawn many times.[105] But on the federal level, at least, Native American sacramental peyote had definitely been exempted from the anti-drug statute of 1970.[106] Although Oregon's drug law was modeled on this federal law, the state chose not to reproduce this exemption. In this sense, the Smith case re-activated the old border conflict between federal and state jurisdiction over Indians. And the Rehnquist court, with its preference for new-style federalism (i.e., states rights) over the old-style federalism of Marshall, would be more deferential to the claims of states than Marshall had been.

Since the special status of Indians was unavailing as far as Oregon's drug laws were concerned, the case brought by Smith and Black did not hinge on whether Native Americans would be treated uniquely. Instead, they simply asked that their religion, like those of all American citizens, be protected against government intrusion. Unlike the Roy and Lyng cases, which seemed to demand that the government conduct its own business in a different manner, Smith and Black asked only that they as peyotists be individually exempt from the law on grounds of Free Exercise. Indeed, from its formation in 1918, the Native American Church was designed specifically to shape peyotism into a religion

---

[105] The most significant intrusion of state power onto Indian lands was the Act of August 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588, amending ch. 53 of 18 U.S.C. to add § 1162 and ch. 85 of 28 U.S.C. to add §1360. PL 280 significantly reduced the power of tribal courts by giving states jurisdiction over most felonies and misdemeanors committed on reservations, with the exception of several "major offenses" which (when committed by Native Americans on reservations) remain under federal jurisdiction. Pub. L. No. 280 was mandatory in some states and voluntary (on the states' part) in others. Although a number of states have retroceded their Pub. L. No. 280 jurisdiction, Native American reservations still remain subject to three sovereigns, depending on the circumstances – tribal, state and federal. This tripartite sovereignty was affirmed by the Rehnquist court in *Cotton Petroleum Corp. v. New Mexico* 490 U.S. 163, at 188 (1989). Pub. L. No. 280 also had some bearing on the case of *Employment Div. of Oregon v. Smith*. Oregon was claiming that peyote religion is not entitled to Free Exercise exemptions, and due to Pub. L. No. 280 the state arguably had jurisdiction on Indian reservations. Respondents argued that by the logic of this position, the state would be able to outlaw Peyote religion even on reservations, where Native religions and cultures are promised federal protection. *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990), Appellate Brief for the Respondents (July 14, 1989) at 41 (WL 1126850).

[106] The federal peyote exemption first appeared in The Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1990). There, peyote was listed as a Schedule 1 drug (highest potential for abuse) but an exemption was created for "the bona fide religious use of peyote in religious ceremonies of the Native American Church." 21 C.F.R. § 1307.31 (1970).

would be entitled to Free Exercise rights. As a result, the Native American Church conformed much more closely than had the Roy or Lyng cases to the idea of religion presumed by the Founders. Native Peyotism was created to be portable, interior, morally conventional and deeply influenced by Christianty.[107]

While the Smith case did not hinge on whether Native Americans would be treated uniquely by the legal system, it did hinge on whether *religion* would be treated uniquely. It hinged, in other words, on whether religion would be treated as a singular source of exemptions and accommodations – which is precisely what the Free Exercise clause textually requires. Remarkably, the answer was no. Writing for the majority, Justice Scalia decided that religious practitioners were not entitled to exemptions from a "generally applicable law," particularly a criminal law. As long as the law in question was not created with the intention of discriminating against a religious group, religious motives for criminal activity were no different than any other motives. In fact, Scalia argued that effective Free Exercise claims had never been more than claims against religious discrimination. In instances where Free Exercise seemed to confer more than that, he argued, this had occurred only because it was combined with other constitutional rights, such as freedom of speech and freedom of association.[108]

Moreover, the Smith majority rejected a distinction that had been crucial in the Roy and Lyng decisions: the distinction between an individual exemption and a challenge to the legal system as a whole. In the Smith decision, that difference no longer was salient; to make an individual exempt from a generally applicable law was to undermine law itself. This amounted to abandonment of the Sherbert standard as most had understood it. [109] Every government regulation, Scalia observed, could "significantly burden"

---

[107] For an insiders' description of the Native American Church, *see* REUBEN SNAKE & HUSTON SMITH, eds., ONE NATION UNDER GOD: THE TRIUMPH OF THE NATIVE AMERICAN CHURCH (1996).

The conventionality of peyote religion (in relation to Euro-American norms) can best be understood by comparison to prophetic revitalization movements among Native Americans, of which the most famous (but far from the only) was the Ghost Dance. David Aberle, in an important study of Native American peyotism, classified it among what he termed the "redemptive" type of religious movement (aimed primarily at interior change) and contrasted in with what he called the "transformative" type of religious movement (which aims at large-sclae social change). *See* DAVID ABERLE, THE PEYOTE RELIGION AMONG THE NAVAJO 315-52 (1966). One political scientist, Carolyn Smith, her a study of Employment Div. of Oregon v. Smith, went so far as to effectively deny the name of religion to what Aberle called the "transformative" movements. She refers to the Ghost Dance and similar prophetic religions simply as "militant movements" and reserves the word "religion" for Native American peyotism. CAROLYN N. LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF OREGON V. SMITH 9 (2000). On Native American prophetic religions, *see* Joel Martin, *Before and Beyond the Sioux Ghost Dance: Native American Prophetic Movements and the Study of Religion*, 59 J. AM. ACAD. RELIGION 4, 677-701 (1991), and Lee Irwin, *Freedom, Law and Prophecy: A Brief History of Native American Religious Resistance*, 21 AM. INDIAN Q. 1, 35-55 (1997).

[108] Scalia characterized this combination of Free Exercise with other constitutional rights a "hybrid situation." *Smith*, 494 U.S. at 882.

[109] Scalia argued that the Sherbert standard was of very limited applicability, pertaining only to programs like unemployment insurance that include a mechanism for case by case assessment. In his reading, Sherbert itself was basically a non-discrimination provision; it meant that if a government program offered individualized exemptions or accommodations, religious reasons for requesting those exemptions should

somebody's religious expression, and therefore would be subject to strict scrutiny. Application of the Sherbert test to cases like Smith would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind…."[110] Even if a law could survive strict scrutiny – and O'Connor (defending the Sherbert standard) argued that Oregon's drug law could – Scalia's point was that the burden on the court's and legislatures would be intolerable. [111] Accommodations of religion therefore should be left largely to the political process, the only alternative being "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[112] As O'Connor had pointed out in Roy, and as she did again in her separate Smith opinion, the Free Exercise clause virtually disappears in this interpretation – replaced either by other items in the Bill of Rights, or by the Equal Protection clause of the Fourteenth Amendment.[113]

Perhaps the most striking feature of this decision was that the Smith majority turned on its head the assumptions of Roy and Lyng about what constitutes religious liberty. In the earlier cases, the court had assumed quite reasonably that the worst thing the government could do to a religious practitioner was to criminalize a religious obligation. Freedom from criminal prosecution was therefore the *minimal* standard of Free Exercise. As O'Connor put it, government does not have to help you follow your religion, but (absent a compelling interest) it may not "prohibit" you from following your religion. But the Smith majority, examining the question from the standpoint of the ruling majority rather than the persecuted minority, drew precisely the opposite conclusion: that the most unreasonable and indeed impossible demand religious people could make on government was to be exempt from criminal laws.[114] Taking the Smith logic to the obvious next step,

---

not be treated less favorably than other reasons. Note that in this reasoning, Scalia reiterates and cites part of Burger's reasoning in *Bowen v. Roy*. *See id.* at 884.

[110] *Id.* at 889.

[111] *See id.* at 888 n.5. The "courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice…or the 'constitutiona[l] significan[ce]' of the 'burden on the specific plaintiffs'…suffices to permit us to confer an exemption." *Id.*

[112] *Id.* at 890.

[113] *Smith*, 494 U.S. at 894 (O'Connor, J., concurring) ("Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any validity, it ought not to be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice."). O'Connor also stated that "we have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause…As the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity." *Id.* at 902.

[114] Consistent with her opinions in *Bowen* and *Lyng*, Justice O'Connor objected strenuously to the Smith majority's acceptance of criminal restrictions on Free Exercise, not however contending with the paradox discussed below. "A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit." *Id.* at 888-89.

one cannot help raising a troubling question: if government can *criminally* prosecute you for following your religion, why could government not inhibit religious expression in *less coercive ways*? And if so, what becomes of Free Exercise?

The devastating implications of the Smith decision illuminate perfectly the intractable contradiction at the heart of Church-State jurisprudence. Criminal laws, after all, presumably embody the norms that the majority views as essential to the wellbeing of the polity. But religion in its constitutional sense also embodies inviolable norms – what the Founders understood to be the inviolable norms of conscience. From the standpoint of the individual citizens norms of this type must *not* be codified as law or, if so codified, must provide generously for conscientious dissent. However, from the standpoint of the polity, exactly the opposite obtains: norms with this sort of essential, inviolable quality *must* be enforced as law.

Until the mid twentieth century, this contradiction was managed by what I have called Public Religion: a set of hegemonic norms that were presumed neutral because the values they encode appeared, to the majority, to go without saying. Public Religion usually was not perceived by the Court as coercive, or indeed as "religion" at all. Consequently, it rarely drew First Amendment scrutiny. At the same time, religion for constitutional purposes could be articulated as a quite limited realm of exemptions, accommodations, and government restraints. Under these circumstances, Free Exercise did not threaten the power of the majority to legislate. Nor did the Establishment clause undermine majoritarian assumptions such as the propriety of devotional bible in public schools,[115] denying atheists the right to hold public offices,[116] - or suppressing the "pagan" and "superstitious" rituals of American Indians.

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

> There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.[117]

Oregon's peyote laws illustrated this point vividly, for in the context of American history and of European colonial history before it, the suppression of peyote was hardly religiously neutral. In fact, it often was a specifically religious form of persecution. Peyotism was effectively characterized as "false" religion – e.g., "heresy," "heathenism," or "superstition." The first European records of peyotism in the New World come from the Spanish Inquisition, which issued a decree against the practice in 1620. In the

---

[115] *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

[116] See *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[117] *Smith*, 494 U.S. at 901.

American republic, federally supported missionaries played a central role in discouraging peyote religion and in supporting state-level anti-peyote laws. By the late nineteenth century, when peyotism formed itself into a large-scale pan-Indian movement, the period of missionary control had ended and ostensibly secularized agencies such as the Bureau of Indian Affairs were in charge of such matters. But in 1883, in the context of its most extensive effort to wipe out Native religions, the BIA prohibited peyotism,[118] along with "heathenish and barbaric" practices such as the Sun Dance and the Ghost Dance. In some states, peyote could be legally used by Euro-Americans for medicinal purposes, while remaining illegal only for Native Americans – in other words, illegal *only* when used for religious purposes![119] It was in response to this long and well known history of religious persecution that the federal government, beginning in the 1920's and 1930's, began to protect Native American peyotism. By this point in time, it was anthropologists rather than missionaries who were most the most influential Euro-American players in Indian Affairs. But just as the missionaries' opposition to peyotism was religious, so was the anthropologists' support.[120] As the relativism of the academy replaced the dogmatism of the church, peyotism began to be protected precisely on the grounds that it is a form of religion.

These were the historical antecedents of the peyote exemption in the federal drug control law, which Oregon had deliberately excluded from its own anti-drug legislation. In view of this history, it was astonishing that the state could present its drug law as simply "neutral" with respect to religion, and more astonishing still that the Supreme Court could accept this characterization. But with the Smith decision, government neutrality was no longer simply assumed; it was aggressively and counterfactually asserted. By requiring only that laws not deliberately discriminate against a religion, government was effectively encouraged to deliberately forget about minority religions - or in the case of Native Americans, to feign ignorance about something it had known for a long time. The Native American Church had shattered that illusion of neutrality by demonstrating that government actions had directly prohibited a religious practice. At that point, the judicial argument had to shift ground, arguing that religious exemptions

---

[118] Peyote was prohibited due to its inclusion in the class of prohibited "intoxicants," but it is fair to say that in the Dawes period these prohibitions were part of a deliberate effort to destroy traditional Native religion and culture. *see* OMER C. STEWART, PEYOTE RELIGION: A HISTORY 128-47 (1987).

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

[120] For example, ethnologist James Mooney in the early 20th century had urged the formation of the Native American Church, specifically so that it could be accorded religious liberty. See Jay Fikes, "A Brief History of the Native American Church," in Snake and Smith, *supra* note 105 at 129. For more on Mooney's role in defending peyotism as a genuine religion, *see* L. G. MOSES, THE INDIAN MAN: A BIOGRAPHY OF JAMES MOONEY 179-205 (1984).

had become simply impracticable. As Scalia put it, the danger of anarchy "increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." Under those circumstances, and "precisely because we value and protect that religious divergence," the polity "cannot afford the luxury" of applying the highest standard of scrutiny to all government actions that might burden somebody's religion.[121] As the Supreme Court's definition of *religion* becomes more capacious and less normative, then, its standard for the *free exercise* of religion shrinks toward the vanishing point.

It would not be accurate, however, to end our study of these cases with the implication that their outcomes resulted only in injustice and were motivated only by majoritarian insensitivity or plain bad will. Certainly, these Free Exercise cases - like the Marshall cases before them - were built on profound historical injustices to Indians, and certainly the decisions in those cases helped legitimate and sometimes advance those injustices. But the story was never that simple, as Stuart Banner argues.[122] Nineteenth century Native Americans were more than victims in their dealings with Euro Americans. They attempted to negotiate the best deals possible in constrained circumstances and they appealed to rules of law that were accepted by their adversaries. As Banner also argues, Euro Americans did not simply take Indian lands by force but typically used their own legal and economic systems – albeit in opportunistic and sometimes cynical ways - to acquire those lands. The same applies to the Free Exercise cases. Native Americans in these cases simultaneously invoked the legal system and challenged it; they both asked to be treated differently than non-Native citizens and to be treated the same. This was done not due to hypocrisy or poor logic but rather to deploy all possible strategies in the hope that one would work.

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

Moreover, religious diversity does indeed erode the Separationist notion of religion, and with it both of the religion clauses. As the category of religion expands, it becomes more and more clear that anything can be a religious issue – from social security numbers, to the use of hallucinogenic drugs, to the building of roads. To these Native

---

[121] *Smith*, 494 U.S. at 888.

[122] BANNER, *supra* note 17 at 6.

American examples we could add headscarves, animal slaughter, the number and gender of persons one can marry, the teaching of Darwin and any number of other issues. And if anything can become a religious issue, then there is no bright line between what is and what is not religion. In other words, religion cannot be "different." Yet it is this very difference upon which the Free Exercise and Establishment clauses – which concern "religion" and only "religion" – depend.

V. Concluding Reservations: Religion and the Ground of Government

In the aftermath of the Smith decision, Free Exercise exemptions to generally applicable, facially neutral laws no longer are constitutionally required.[123] Instead, the more salient question became whether legislatures *may* permit such exemptions without running foul of the Establishment clause. Since Smith, therefore, the Supreme Court has been less occupied with Free Exercise simpliciter than with cases "in the joints," concerning religious exemptions which, while not compelled by the Free Exercise clause, may violate the Establishment clause.[124]

For Native American religions, the decline of Free Exercise implies that it is more promising to rely on their unique treaty and trust relationships with the federal government than on constitutional rights shared with non-natives. At the moment, Native American religious freedoms (like other Native American rights) are more effectively sought by dealing with Congress than with the judiciary – or, as Louis Fisher writes, better sought by legislating than by litigating.[125] It is true, of course, that the trust ("ward-guardian") has entrained some extremely negative meanings and consequences for Native people. On the positive side, however, the trust relationship enables the federal legislature and legislature to create unique protections for Native religions and cultures. And that is precisely what happened after the Smith decision: peyotism and other Native religious traditions have been placed under federal protection by a series of laws, resolutions, and executive orders.[126] But the trust relationship alone is insufficient, because it makes

[123] "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, *is not to say that it is constitutionally required*, and that the appropriate occasions for its creation can be discerned by the courts." *Smith*, 494 U.S. at 889.

[124] *E.g., Locke v. Davey*, 540 U.S. 712, 712 (2004); *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

[125] Louis Fisher, *Indian Religious Freedom: To Litigate or Legislate?*, 26 AM. INDIAN L. REV. 1, 1-39 (2001).

[126] *See, e.g.,* American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344 § 3(b)(1), 108 Stat. 3125, which states

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

Two acts of Congress have greatly extended the protection of Native American religions and cultures: The Native American Graves and Repatriation Act of 1990 (NAGPRA) 25 U.S.C. 3001 *et seq*., and The Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. 2000cc-1 *et seq*). An Executive

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

Non-Native Americans, too, have found that since the Smith decision their religious liberties have been protected more energetically by Congress than by the Court. In 1993, Congress passed the Religious Freedom Restoration Act, which attempted to re-institute the Sherbert standard for all federal and state laws. The Supreme Court overturned RFRA as applied to states, on grounds that the federal government, while it can regulate its own actions, cannot interpret the substantive meaning of the constitution.[127] At the federal level, then, RFRA remains good law, and has been upheld as such by the Court.[128] But from the judicial point of view it sets a higher standard of Free Exercise than is constitutionally required. Since the Boerne case, many states have instituted RFRA's of their own. In short, where there is a high standard of religious liberty in the U.S. today, that is due more to legislatures than to courts.

But for non-natives as for Native Americans, religious liberty ought not to rely on the legislative branch alone; to do is to supplant a guaranteed freedom with a precarious concession. Moreover, "religion" is a matter of origins – i.e., the basic assumptions, values, and worldview of a people. As Marshall conceded in the Johnson case, our national origins were created by violence and often have been maintained through domination. But, for better or worse, those origins are not "finished;" they are continually re-read and re-enacted. The religion clause offer principles for doing so in a deliberative and democratic manner, and the questions they raise are precisely of this "original" or foundational sort. What exactly are the purposes and limits of government? What is the range and meaning of personal liberty? Which norms are so crucial to public life that they must be in some sense "established," and which so crucial to moral integrity that they must not be established? What is the role of sub-political communities within the polity, how much power can/must these communities have to envision and enact distinct life-ways? These are among the most "original" or fundamental of political questions. The religion clauses do not resolve these questions but they do force us to ask them, and they provide constitutional principles and parameters with which to frame the answers.

However, the religion clauses cannot function when religion is treated simply as a suspect classification rather than as a topic bound by unique constitutional principles. On the other hand, as the Native American cases vividly illustrate, religion is a moving target. The list of religions grows and changes over time, and the even the religions on

---

Order of May, 24 1996 (No. 13007) 71 FR 13066-01, referencing NAGPRA, also extended protection to Native American sacred sites.

[127] *City of Boerne v. Flores*, 521 U.S. 507, at 524. (1997).

[128] *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, (2006). This case applies RFRA as federal law in favor of a religious group that made sacramental use of a substance (hoasca) containing a chemical whose use is prohibited by federal law.

the list cannot really agree on what the word means. Nor is the line between the religious and the secular fixed. Indeed, the line may not really exist, given that to define the secular is at the same time a "religious" decision – in other words, a decision about what does and doesn't count as religion. To revitalize democratic deliberation about religion, therefore, we do need to re-imagine religion. But to do so we need metaphors other than territory (with its implication of domination) or property (with its implication of individual ownership). Returning to the third Marshall case (Worcester v. Georgia), I want to suggest that reservation might be such a metaphor.[129]

The word reservation comes from a judicial doctrine of treaty interpretation that was called the "reserved rights doctrine." This doctrine was fully spelled out by the Court in the early twentieth century[130] but first laid down in Marshall's Worcester decision. Reservation referred to the lands retained by Native Americans and within which they could exercise sovereignty. In time, however, reservations became places in which Native peoples were virtually incarcerated.[131] To return to another familiar metaphor, we could say that Native people ended up on the wrong side of the "wall" that separated the reservation from the Euro-American polity. Native Americans, scholars suggest, had understood the land treaties as mostly constraining Euro-Americans; whites could not enter onto reservation land, while natives still were free to hunt and fish outside the reservation. But the Euro-American government (sometimes at the federal level, and sometimes at the state level too) grew to perceive the entire continental landmass as its own territory. Rather than understanding Native Americans to retain everything that they had not specifically given away to the government, the government preferred to imagine that Native people had given away everything not specifically allocated to them. The meaning of reservation, in other words, was turned inside out. For Indian Nations, this shift of meaning was literally disastrous in terms of real property; it meant the loss of nearly everything. On a spiritual level, the relationship of Native people to the land, and thus the heart of their religion, was severely injured.

The facts of the case were these. Samuel Worcester, a white man, had been arrested and convicted by the state of Georgia of having entered Cherokee territory without a state permit and without having taken a required oath of loyalty to the state. Georgia issued

---

[129] My turn to "reservation," both as a metaphor and as a legal concept, is much indebted to Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HAR. L. REV. 381 (1993), and to VINE DELORIA, *Trouble in High Places: Erosion of American Indian Rights to Religious Freedom in the United States*, *in* Native American Cultural and Religious Freedoms 353 (John R. Wunder ed., 1999).

[130] *See United States v. Winans*, 198 U.S. 371 (1905); Winters v. United States, 207 U.S. 564 (1908).

[131] The virtual equivalency between reservation life and incarceration in the late 19th century was noted ruefully by U.S. Court of Claims in 1898.

> The Indians in 1878 occupied an anomalous position, unknown to the common or the civil law or to any system of municipal law. They were neither citizens nor aliens; they were neither free persons nor slaves; they were wards of the nation and yet, on a reservation under military guard, were little other than prisoners of war while a war did not exist. As stated in the 1894 report of the Congressional Committee on Indian affairs, '[t]he Indian not being considered a citizen of the United States but a ward of the nation, he cannot even leave the reservation without permission.' *Connors v. U.S.* 33 C. Cls, 317, (1898) 1800 WL 2047 at 5.

these charges pursuant to the laws it had passed in 1828 and 1829, after gold was discovered in Cherokee territory. Georgia claimed absolute territorial control over Cherokee lands that lay within the state's external boundaries and attempted to dissolve the Cherokee's own government, in an attempt to force the Cherokees from their lands. The underlying issue, then, was the same as that raised by the Cherokees a year before, in their own suit (Cherokee v. Georgia). Ironically, the injustice that Marshall could not address on behalf of the Cherokees themselves (given, in his view, their status as "domestic, dependent nations") he was eager to address and redress when the Worcester case gave him the opportunity.

Georgia contended that in treaties (primarily the Hopewell Treaty of 1785 and the Holston Treaty of 1791), the Cherokees had given away their land, retaining only their "hunting grounds." Moreover, Georgia argued, in agreeing to allow that federal government to manage "all their affairs," the Cherokees had surrendered their sovereignty. Worcester's advocates countered with three arguments, one statutory and the other two constitutional. He argued that Georgia, with the laws of 1828 and 1829, violated 1802 act of Congress that arrogated to the federal government alone the power to regulate "trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." On the constitutional plane, Worcester pointed out that the constitution gives Congress, not the states, the power to regulate relations with Indians. Most importantly, Worcester pointed to the sovereignty of the Cherokee Nation over its own territory, as implied by its treaties relationship with the federal government.[132]

Public Religion played a central role for the plaintiff, since Samuel Worcester was "a duly authorised missionary of the American Board of Commissioners for Foreign Missions, under the authority of the president of the United States."[133] As his brief correctly observed, Worcester's presence in Cherokee territory belonged to a longstanding tradition of federally funded missions to the Indians.[134] As noted, this policy had been formalized through the Civilization Act of 1819, in which Congress created a fund to support "persons of good character" (in effect, Christian missionaries) to live with Indians and advance their level of "civilization."[135] These missionaries would be under

---

[132] *Worcester v. Georgia*, 31 U.S. 515, 519 (1832). "The constitution, by declaring treaties . . . to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties." *Id.*

[133] *Id.* at 529.

[134] *Id.*

[135] *Id.* at 533, quoting the Civilization Act of 1819:

> In 1819, congress passed an act for promoting those humane designs of civilizing the neighbouring Indians, which had long been cherished by the executive. It enacts, "that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the president of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic; and for performing such other duties

the direct authority of the executive branch. Again, this was rationalized through the image of wilderness; Native people were "sons of the forest" or "sons of the wilderness" in need of benevolent taming by Euro-Christians.[136]

Under the Civilization Policy, missionary and government aims with respect to Indians were congruent. Like the missionaries, the federal government believed that Native people needed moral training, and that Christianization was obviously the best way to accomplish this. Like the government, missionaries hoped that Christian conversion would pacify Native Americans and thereby ensure the safety of Euro-Americans. Both the government and the missionaries linked Christianity with Euro-American cultural habits, in particular the private ownership and cultivation of land. Given that the tribal relationship to land lies at the heart of Native spirituality, this commodification of land also decimated tribal religion. Politically, the ending of tribal land ownership entailed the disappearance of Indian nations as such. All of this was intended by both the government and the missionaries. To put it bluntly but accurately, the cultural death of Native peoples was viewed as the condition for their physical survival.[137]

When Samuel Worcester was arrested, he was a federal agent in his capacity a missionary and as postmaster to boot. In the years since 1819, however, another federal policy was being introduced – the removal of Eastern Indians to the areas west of the Mississippi. Like the Civilization policy, the Removal Policy was rationalized as a way of protecting and improving Indian life. Initially, this was to be done through treaty agreements; ultimately (and in the case of the Cherokees) it would be done by violent force. Georgia's conflict with the Cherokees flared up in the context of this policy shift from civilization to removal.

Whatever humanitarian motives for removal may have been asserted, the material interests of Euro-Americans in this new policy were plain to see – land for the ever-increasing white population of the East, extension of Euro-American political control,

---

> as may be enjoined, according to such instructions and rules as the president may give and prescribe for the regulation of their conduct in the discharge of their duties.

[136] *See* BEAVER, *supra* note 47 at 67-68. The image of wilderness appeared also in Justice Maclean's comments on the Civilization, in his concurring opinion. *See Worcester*, 31 U.S. at 588 (Maclean, J., concurring): "The humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling; and if the efforts made have not proved as successful as was anticipated, still much has been done."

[137] *Worcester,* 31 U.S. at 593. McLean stated explicitly that both the civilization program and Indian sovereignty were intended to be temporary:

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

and access to material resources on Indian lands – for example, the gold of the Cherokees. And while missionization could be viewed as humane, forced removal was transparently cruel. In fact, as R. Pierce Beaver reported, it was the introduction of the Removal Policy that caused the first serious friction between the federal government and the missionaries, most notably Samuel Worcester.[138] Nonetheless, Removal was ideologically consistent with the assumption underlying the Civilization Policy – that Native American cultures were destined to end.

John Marshall supported the Civilization policy of which Worcester was an agent, characterizing it as "an act for promoting those humane designs of civilizing the neighbouring Indians, which had long been cherished by the executive."[139] But he regarded Removal as profoundly inhumane, as he'd made clear the year before in Cherokee v. Georgia. In other words, Marshall regarded the Removal Policy as inconsistent with the Civilization Policy, despite the fact that both policies aimed ultimately at the ending of Native cultures. While Marshall anticipated the same outcome in the long term, in the shorter term he understood civilization as the alternative to removal; if Indians became civilized, he believed, they should not have to move.[140] And the Cherokees, in fact, had become "civilized." As Marshall pointed out, they had they had set up a constitutional government, taken up farming and many had converted to Christianity.

Uncomfortably for John Marshall, however, Removal also was consistent with the Discovery Doctrine as he had formulated it in Johnson. In Johnson, recall, Marshall had claimed that "discovery" gave the conquering nation the right to "extinguish Indian title," and this pre-emptive claim to land would become the foundation of the Removal Policy too. Moreover, the Marshall of Johnson noted, albeit with a tone of opprobrium, that the Discovery Doctrine was at root theological; it was because Europeans were Christians that they could assert that political and cultural conquest was actually in the interest of the land and its inhabitants. Although the claim to title that grew out of this theological doctrine were "extravagant," the Marshall of Johnson had underlined that it had in effect come true; it was now the very "law of the land." In Johnson, then, the law of the land was acknowledged to be founded on Christianity, yet also violent, imposed by force alone.

Marshall's rejection of the Removal Policy amounted to a change in his public

---

[138] According to Beaver, the Removal Policy created the first tension between missionaries and the government, although most missionaries accepted the Removal Policy and some (e.g., Baptist Isaac McCoy) actively collaborated with its adoption. *See* BEAVER, *supra* note 47 at 85-121. However, Samuel Worcester was among the missionaries who resisted the policy. But even Worcester was to change his mind, in view of events that transpired after his case was won. In defiance of John Marshall's order, the federal government made clear its resolve to remove the Cherokees by force and Georgia continued to place white soldiers and miners in Cherokee territory. Faced with the physical threat of forcible removal, and the moral threat of contact with badly-behaving whites, the Cherokee could not be safe in Georgia, Worcester sadly concluded. For Worcester's and other responses to the Removal Policy, *see* RONALD SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 39-63, esp. 55 (1975).

[139] *Worcester*, 31 U.S. at 557 (Marshall, J., majority opinion).

[140] *Id.* Referring to the Civilization Act, Marshall wrote: "This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home."

theology, specifically an attempt to remediate its originative violence. In Worcester, Marshall again calls the European claim to title "extravagant." But now, rather than adding that this extravagant claim is nonetheless the law of the land, he calls it "extravagant and *absurd*." In fact, the Marshall of Worcester claims, the idea that Euro-American territory and property would cover the land mass from east to west, including the lands of the Indians "did not enter the mind of any man." An extraordinary claim, since in his Johnson decision, the idea seems not only to have entered Marshall's own mind but for a time settled there.[141]

In an unacknowledged but radical revision of his prior Discovery Doctrine, Marshall now adopts a more lawful and limited version, akin to that proposed by the Cherokees the year before. Discovery, he states, was an agreement that European nations had made with each other, and they had made it only "because it was the interest of all." It only meant that the conquering nation held the exclusive right to purchase the conquered lands from its inhabitants, but it "could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man." There remained an important element of force; Indian nations could sell their land only to the government of their conquerors. But this one constraint, "imposed by irresistible power," was "the single separation" to a lawful relation between Indians and the federal government.[142] Once conquest was complete, a more lawful and less violent relationship had to be established. This applied also to the Christianization process. Although Christian ideology had been forcibly effected through the Discovery doctrine, Marshall argued that in the present, post-conquest situation Christianity had to behave differently with Indians. In the present, he argued, conversion to Christianity must be "accomplished by conciliatory conduct and good example; not by extermination."[143]

The key shift in Marshall's public theology was an implicit theory of "reserved rights," which as I've suggested bears both on Native American rights and on the constitutional substance of religion. In respect to land, Marshall traced the idea of reservation to the British crown which in 1769 proclaimed that any lands not specifically

---

[141] *Id.* at 544-45. "The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man."
Frickey argues that there may be less inconsistency than appears between *Johnson v. M'Intosh* and the *Worcester* case, because in the earlier case Marshall's primary concern was not with Native American claims to their own lands but with the narrower question of how non-Natives could purchase Indian lands. Frickey, *supra* note 29 at 389-90.

[142] *Worcester*, 31 U.S. at 544.

> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

Id.

[143] *Id.* at 546.

ceded by Indians to the crown were to be understood as reserved for the Indians themselves.[144] Marshall applied the same theory to treaties between the Indians and the federal government. As Philip Frickey has shown, this involved a generous, even tortuous interpretation of certain words – particularly "allocated" and "hunting grounds" as these appeared in the treaty of Holston, article four.[145] For the Cherokees, Marshall contended, "hunting grounds" would have been indistinguishable from land as such, since hunting was their primary relationship to land. Therefore in retaining their "hunting grounds" the Cherokees would not have understood themselves to be left only with the right to "use" rather than to own the land in question.[146] And where the treaty spoke of lands "allocated" to the Cherokees, the Cherokees would not have understood this to imply that the federal government now possessed everything not specifically retained by the Cherokees. Instead, the Cherokees would have assumed precisely the opposite – that it was they who retained the fullness of their territory and sovereignty, of which they ceded a part to the U.S. government.

Marshall justified his generous interpretive strategy partly with reference to the fact that the Cherokees were not literate and likely did not pick up the nuances and risks of the treaty language.[147] Moreover, Marshall argued, treaties must never be read in a way that negated the sovereignty of the weaker party. Citing Vattel, Marshall asserted this principle as belonging to "the settled law of nations."[148] Because Indian nations were the

---

[144] *Id.* at 520.

> The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the king), as aforesaid, are reserved to the said Indians, or any of them.
>
> ***
>
> . . . and we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea, from the west and northwest as aforesaid: and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

Id.

[145] Frickey, *supra* note 29 at 398-406.

[146] *Worcester*, 31 U.S. at 543.

> So with respect to the words 'hunting grounds.' Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.

Id.

[147] *Id.* at 551.

[148] *Id.* at 560-61.

> The very fact of repeated treaties with them recognises it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its

weaker party (and also, no doubt, because of the federal government's trust relationship with them), any ambiguities in the treaty language must be interpreted in the best interests of the Indians. Philip Frickey draws from this an additional, but persuasive conclusion: Marshall handled Indian treaties as *constitutive* documents.[149] Belonging to the "supreme law of the land," treaties between Indian nations and the government were akin to the constitutional government itself. Just as the federal constitution could be understood as a sort of treaty among sovereign states, each of which (according to the Tenth Amendment) "reserved" every right and power that it did not specifically cede, so the treaties between Indian Nations and the federal government could be understood as an agreement among sovereigns, each of which retained everything not specifically ceded to the other.[150] Apart from the imposed constraint of selling only to the federal government, Marshall wrote, Indian nations "had always been considered as distinct, independent political communities, retaining their original natural rights." By declaring treaties to be the supreme law of the land, he argued, the constitution not only binds the federal government to the terms of its Indian treaties but, even more importantly, admits that Indian nations "rank among those powers who are capable of making treaties." In regard to Georgia, this meant that its laws of 1828 and 1829, attempting to dissolve the Cherokee nation, were unconstitutional – in violation of "the supreme law of the land."[151]

"Reservation," then, meant something more than a tract of land, however broadly bounded. More than the literal "breadth" of geographical sovereignty, reservation also implies the metaphorical "depth" of self-sovereignty – whether of individuals, of states or of nations – as the foundation of political authority. For Indian nations, this self-

---

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

[149] Frickey, *supra* note 29 at 408-411. This he suggests, provides a "systematic and attractive" way of interpreting Native American treaties. *Id.* at 406.

[150] Frickey argues that Marshall recognized with some discomfort that at the point of conquest relations between the government and the Indians were founded on sheer force. *Id.* at 389. However, Frickey argues, the Marshall of *Worcester* was attempting to conceive a post-conquest arrangement in which relations with Indians, while still colonial, would be founded on law. A treaty (in this case, the 1785 Treaty of Hopewell) between an Indian Nation and the United States became "the piece of positive law that reflected the constitutive relationship between two sovereigns." *Id* at 408. By conceiving the treaty as a constitutive document, Frickey argued, Marshall could interpret the Treaty of Hopewell to accord with its "spirit" (the premise of sovereignty) *Id.* at 412.

[151] *Worcester*, 31 U.S. at 561.

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

sovereignty is signaled by the constitutional status of treaties as the supreme law of the land.[152] For all citizens, native and non-Native alike, the phrase "we the people" signals the same point. These words, deliberately chosen by the framers in lieu of direct reference to God, indicate that the ultimate authority of the constitutional order – its "sacred ground" – is the power of self-determination that inheres in each citizen. Political authority is not a limited commodity rationed out by government; instead, political authority comes from the depthless wellspring of self-determination. This, in the constitution, appears to be the point of contact between law and the absolute or infinite. It is *self*-sovereignty that is in principle unlimited, and government that is to be limited – indeed, *absolutely* limited.

Based on the history of these two trilogies of cases, it seems clear that Native American rights are better protected through their unique status as sovereign nations, than through minority protections as such. Religion, too, I've argued also is better understood as a unique constitutional category than as a "suspect categorization" that may not (for better or worse) be treated in a distinctive manner. But what exactly is religion, in a constitutional sense? Besides the arbitrary and changing list of religions, and beyond the artificial distinction between the religious and the secular, how can religion be meaningfully described for constitutional purposes?

This is not the place to offer a detailed answer to this question, but two suggestions at least emerge from this story. First, for constitutional purposes religion has to be defined with respect to other constitutional principles, rather than with respect to a list of religions or definition of religion extrinsic to the constitution. Secondly, the principle of reserved rights (rights "retained by the people") spelled out in the Ninth Amendment, [153] illuminates what is unique and distinctive about the religion clauses. As the depthless "reservation" from which political order and authority spring, religious liberty points to the ground beneath the constitutional foundation. It is the site where the polity opens to the most profound, ever-present and ever-changing questions about its purposes, scope, and legitimacy.

In an important sense, then, religious liberty is an extra-constitutional (or perhaps meta-constitutional) issue. To a degree, all constitutional principles partake of this quality, for unless they live primarily in the polity as a whole (reaching the judiciary only at crisis point), they hardly live at all. But with respect to the religion clauses, this extra-constitutional quality implies something more: that in contrast to any other constitutional principles, this first item on the Bill of Rights points to the most profound questions with which democratic deliberation must concern itself. "Religion," and the constitutional

---

[152] Marshall's view of Indian treaties was affirmed in *United States v. Winans*, 198 U.S. 371 (1905), where the Court ruled that treaties were not grants of rights to Native Americans from the government, but grants of rights from Native Americans to the government.

[153] Elsewhere, I have argued that religion for constitutional purposes might be reconceived as an amalgam of freedom of conscience (for the framers, identified with religion), freedom of speech/expression, and freedom of association (both intimate and expressive association. The principle of reserved rights, emphasized in this essay, is not meant to supplant this proposed amalgam, but to indicate the sense in which religious liberty is foundational and in this sense extra-constitutional. See Sands, *'A Property of Peculiar Value': Land, Religion, and the Constitution*, 6 J. CULTURE & RELIGION 177 (2005).

questions it raises, pulls us back to our political origins, to seek that which lies before and beyond law. Returning to this origin as a place to dig the questions, rather than a place to bury them, perhaps the ground will speak to us again.