A Reflection on Native Americans and the Religion Clauses

There is a relatively longstanding recognition that for Indians, free exercise of religion, because of the tribal nature of the religion, may require a degree of establishment of religion. Thus, Native American tribal culture sits uneasily within the U.S. constitutional structure. This essay is a brief meditation on the development of constitutional doctrine on the religion clauses and historical links between that development and Native Americans. (I had greater ambitions for the piece but time has run out.)

I. Three Decades of Religious Freedom: *Wisconsin v. Yoder* (1972) to the Religious Liberty Protection Act (2000)

As a basically individualist liberal most of the time, I have generally viewed with dismay the section of the *Wisconsin v. Yoder* (1972) Court opinion that privileges religious groups such as the Amish over secular cultural groups who might be united by a devotion to particular non-religiously-motivated ways of life, such as those advocated by Thoreau (406 U.S. 205, at 215-217). From my usual perspective, this *Yoder* passage has always seemed to mark the Court's policy as one plainly favoring religion as against non-religion, and therefore to be plainly contrary to what I have understood to be the sense of the Establishment Clause. As is well known, the Court had announced in the unanimous *Lemon v. Kurtzman* (1971) decision that the religion clauses together forbid legislation with the

primary effect of benefiting or hindering one religion or religion in general (cit to *Lemon* test page). The Court's ruling in *Yoder* the very next year that states must carve out special exemptions for religions like the Amish from their mandatory schooling requirements but have no similar obligation for exempting the children of parents with secular objections to high school attendance seemed to flatly contradict this piece of the *Lemon* test.

Thus it was not surprising when Justice Scalia in 1990 in *Employment Div. of Oregon v. Smith* turned its back on this piece of the *Yoder* reasoning, although Scalia's degree of duplicity in doing so was a shock, at least to gullible old me. Scalia claimed that *Wisconsin v. Yoder* had NOT BEEN a ruling endorsing the principle that the free exercise clause calls upon states to allow religious objectors to otherwise valid secular laws to be given an exemption from the laws unless government had a compelling reason for refusing the exemption. Rather, claimed Scalia, *Yoder* combined the claims of the free exercise clause with a truly fundamental right, that of familial privacy, and only because this additional fundamental right was at stake was the exemption from school attendance rules required by the Court.[1]

---

[1] Scalia wrote in *Employment Div. v. Smith* [at 494 U.S. 872, 882],

> "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free

> Exercise Clause in conjunction with other constitutional protections, such as …the right of parents… to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).”

Cf. the Court opinion in *Yoder,* which first emphasized the religiosity of the claim, in order to link it to the free exercise clause and then explicitly for that reason invoked the compelling interest test:

> “A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.
>
> “Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group” (406 U.S., 215-216).
>
> “The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable” (at 218). “A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion” (at 221). “We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way” (221). And, “We must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16”(221).

As is also well-known, Congress then attempted to undo *Employment Division*'s revision of free exercise doctrine by enacting, with only three dissenting votes in the entire Congress, the Religious Freedom Restoration Act of 1993.[2] This Act provided that in instances where a generally applicable law "substantially burdens" religious exercise, state and federal government must grant a waiver from the law unless the government has a "compelling interest" in refusing to do so and unless the legal requirement is the "least restrictive [upon religion] means of furthering that compelling interest." The Supreme Court struck down the portion of RFRA that applied to state government in *Boerne v. Flores*, 521 U.S. 507 (1997). Congress followed up by enacting the Religious Liberty Protection Act in 2000.[3] This law re-enacted the RFRA rules for state governments but limited them to two kinds of situations: (1) those involving land-use issues that would affect commerce among the states because of the use of construction/remodeling

---

It is not only shocking that Scalia would so blatantly mischaracterize free exercise precedent(and OConnor's dissent plainly indicates her annoyance about it), but it is peculiarly ironic that he would rely instead for the compelling interest requirement on the right of privacy, surely not his favorite constitutional right. See,e.g, *Michael H. v. Gerald. D* (give cit.) An additional oddity of the *Employment Division* decision is that compelling arguments were available indicating that prior to the Court's decision the case had been rendered moot by out-of-court developments. These are detailed in Louis Fisher, *Religious Liberty in America* (Lawrence: University of Kansas Press, 2002), 186.

[2] 139 Cong.Rec.26416; 27239-41 (1993)

[3] 114 Stat.803 (2000).

materials and (2) those involving persons confined in state institutions (such as prisons or hospitals) that received federal funds.

II. Brief Historical Overview of Government Treatment of Indian Religion

The "Smith" of *Employment Division of Oregon v. Smith* was a Klamath Indian who had asserted a religiously-grounded obligation for the use of peyote, which use had caused him to be fired from his job as a drug and alcohol counselor in Oregon, precipitating his (denied) claim for unemployment benefits.[4] This fact is prominent in the Court's analysis, but a number of broader connections tying Native Americans to the history of RFRA are not so well-known.

It is an old story that when it came to American Indians, the U.S. government honored neither the Constitution's prohibition on establishment of religion nor its prohibition on abridging free exercise thereof. Throughout colonial history, American colonies had authorized missionary activity toward the Indians. The Continental Congress continued this tradition, as did the early U.S.Congresses. Congress viewed federal payments for this missionizing activity as a part of the broader mission of bringing Indians into the mainstream of Western civilization and did not note any tension between this missionary support and the religion clauses. The federal civilizing fund lasted until 1873.[5]

---

[4] Louis Fisher, 183.

[5] Louis Fisher, pp.147-151.

Federal funding of efforts to bring Native Americans into one or another Christian sect and to obliterate Native religious traditions as backward superstitions might appear to modern eyes as obvious violations of both religion clauses, and perhaps as having been permitted only because Indians were conquered foreigners who needed to be taught ways of life that would make them less warlike toward us. But this impression would be erroneous. On the contrary, these practices were far more similar in the nineteenth century to the treatment of Americans generally by their governments than we of the 21st century tend to remember. Public schools generally practiced the Christianizing of students as part of teaching them the arts of western civilization. The reciting of Protestant prayers and the studying of the Christian Bible were normal public school requirements.[6]

During the tragically brutal Indian removal period of 1830-1860, missionary activity "dwindled to dormancy," but then President Grant reinvigorated it in 1869, re-starting appropriations to religious groups to run Indian schools.[7] In the 1880s tensions between Protestants and Catholics produced controversy over the appropriating of federal funds for "sectarian schools" via contracts with religious missions. Eventually this controversy caused the federal government to forbid the

---

[6] Anne Boylan, *Sunday School: The Formation of an American Institution 1790-1880* (Yale University Press, 1988), Ch.2.

[7] Louis Fisher, 155, quoting Robert Keller, "Christian Indian Missions and the American Frontier," 5 *Am. Indian J*. 19, 21 (1979).

annual appropriating of money for missionary schools on reservations after 1899.[8] Although Congress announced that it was ceasing such annual appropriations, in fact, religious groups continued to educate reservation Indians, funding the schools with money they continued to receive annually from the federal government in terms mandated by specific treaties and in the form of interest from tribal trust funds (derived from cessions of tribal land to the federal government).[9] This funding system was challenged in 1908 by a Native American, Quick Bear, as a violation of the Congressional ban from 1899 on future appropriations for "sectarian schools" for Indians, and also as violating "the spirit" of the Establishment Clause.[10] It was defended by lawyers for the U.S. Government as not violating this statutory ban, since the money belonged to each tribe (in trust) to expend as it chose. Government attorneys argued further that this application of the Indian trust funds to sectarian schools not only did not violate the Establishment Clause but also was required in order to honor the Free Exercise Clause rights of the Indians.[11] The Supreme Court agreed with both arguments of

---

[8] Ibid., 155-156. Also, attorneys' briefs for *Quick Bear v. Leupp*, 210 U.S. 50(1908) detail this history, as does the Court opinion at 210 U.S., 78-80.

[9] Louis Fisher, 156.

[10] *Quick Bear v. Leupp*, 210 U.S. 50, 81(1908).

[11] *Quick Bear v. Leupp*, 210 U.S. 50 (1908), attorney briefs at 1908 U.S. LEXIS 1495, 19-25.

the Solicitor General.[12]

In 1881 U.S. government policy ramped up the effort to obliterate traditional Indian religions. Rather then leave matters to missionaries who may have varied in their kindliness toward such practices, the administration enacted an official ban on Indian funeral ceremonies and on the Sun Dance (which involved piercing of one's skin with a sharp stick).[13] This executive regulation was part of a broader intense assimilation campaign between 1881-1928 that included pressuring Indians to take individual allotments from tribal land to become farmers and also included the taking of Indian children into boarding schools for eight years where they were made to dress and speak as Anglo-Americans and to abandon vestiges of Indian religion.[14]

Some reforms began in the 1920s, stimulated by the lobbying of John Collier, as Executive Secretary of the American Indian Defense Association, and later by his acts as Commissioner of Indian Affairs (1934-1945). His efforts were aided by the scholarship of Lewis Merriam, who in 1928, published a report commissioned by The Institute for Government Research of Johns Hopkins University, *The Problem of Indian Administration*. The report offered a harsh

---

[12] *Quick Bear*, 210 U.S., at 81-82.

[13] Louis Fisher, 157.

[14] Louis Fisher, 157-160; Vine Deloria, "American Indians in Historical Perspective," in *American Indians, American Justice* (Austin, University of Texas Press, 1983), 1-12.

critique of most elements of U.S. Indian policy, including the wholesale effort to destroy Indian religions. In 1924 Congress granted citizenship to all Indians born within the territorial limits of the U.S. Once Collier became Commissioner (in 1934) he enacted administrative regulations that reversed prior policy: "No interference with Indian religious life or ceremonial expression will hereafter be tolerated….The fullest constitutional liberty, in all matters affecting religion, conscience and culture, is insisted on for all Indians."[15]

After a period of turmoil in the late forties and nineteen fifties, when efforts to hand control over the Indians to state governments grew in popularity, the U.S. Congress in 1962 finally began the current period of protecting Indian religious freedom. The first steps were small--in 1962 adding to eagle-protection laws an authorization for the Secretary of the Interior to issue regulations protecting the possession and use of eagles by Indians for religious purposes, and then the issuance of such a regulation in 1963 for Indians engaged in "bonafide, authentic" use of eagles for their religion.[16] Then in 1968 Congress issued the Indian Civil Rights Act, essentially listing the Bill of Rights from the U.S. Constitution and applying them to protect Indians with respect to tribal governments. The Indian Civil Rights Act pointedly omits the prohibition on laws "respecting an

---

[15] Louis Fisher, 158-160.

[16] Fisher, 163-164; 76 Stat, 1246; 28 Fed.Reg. 976, § 11.5 (1963).

establishment of religion," and but does specify that tribal governments may not "make or enforce any law prohibiting the free exercise of religion." [17]

Plainly this piece of the Indian Civil Rights Act proceeded on the understanding that for reservation Indians, because their religion WAS tribal, the individual's right of free exercise implicated a right to HAVE his tribe establish a religion. A national coalition of Native American groups wanted a further guarantee, in light of the federal government's abysmal history, and lobbied beginning in 1967 for specific federal support for Indian religious traditions.[18] Those lobbying efforts bore fruit in the joint resolution of Congress entitled the Indian Religious Freedom Act (AIRFA) of 1978. After recognizing that freedom of religion in America has produced "a rich variety of religious traditions," this resolution states the following:[19]

> "henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American

[17] Fisher, *ibid*. 165-6. Congress moved again in 1970 in support of Indian religion by ceding back to the Pueblo Indians forty-eight thousand acres of land around Blue Lake near Taos New Mexico that presidential order had taken from them in 1906. The Indians viewed this as sacred land. Fisher, 167-168.

[18] Suzan Shown Harjo, "American Indian Religious Freedom Act after Twenty-five Years," *Wicazo Sa Review* (publication of the Association for American Indian Research)19.2 (2004): 129-136, 130.

[19] 92 Stat.469 (1978)

Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

Section Two of the resolution orders the President to direct federal agencies to re-evaluate their policies and procedures, in consultation with the religious leaders of Native Americans, in order to determine changes necessary for "preserv[ing] and protect[ing] Native American religious cultural rights and practices."[20] The President was instructed to "report back to Congress the results of his evaluation, including any changes that were made in administrative policies…and any recommendations he may have for legislative action."[21] The Carter Administration did this in August 1979, after a review in which more than fifty federal agencies participated.[22] Nonetheless, in the words of Justice O'Connor, AIRFA did not "so much as … hint of any intent to create a cause of action or any judicially enforceable individual rights."[23]

III. AIRFA to RFRA to RLPA

The Supreme Court had decided *Wisconsin v. Yoder* just six years prior to

---

[20] 92 Stat.470; Fisher, 168-169.

[21] Suzan Shown Harjo, 131; 92 Stat. 470.

[22] Harjo, *ibid.*; *Lyng v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439, 455 (1988).

[23] *Lyng*, 485 U.S., at 455.

AIRFA, and four years after the pro-religious-freedom tilt in the version of the Bill of Rights that Congress had placed into the Indian Civil Rights Act of 1968. Plainly, Congress and the U.S. Supreme Court were of like mind during this period. Despite the neutrality language of the *Lemon* rule, they shared a desire to have government go out of its way to support religious freedom. The *Yoder* decision followed in the path set forth in *Sherbert v. Verner* (1963), which had required religiously-based exemptions from restrictions on governmental unemployment compensation so that persons who lose their jobs on the grounds of religiously-based Sabbath-observance cannot be excluded from compensation. Moreover, *Sherbert* had set forth a new rule of free exercise interpretation: Where an otherwise neutral law places a "substantial infringement" or significant "burden" on the exercise of someone's religion, the state must grant that person an exemption from the law unless it can show a compelling interest in not doing so.[24] *Sherbert* marked a sharp break with precedents like *Braunfeld v. Brown* , 366 U.S 599 (1961), where sabbatarians had been refused exemptions from Sunday closing laws of general applicabililty.[25] *Yoder* extended the *Sherbert* path considerably, however, because it was the first to require a religiously-based exemption from a

[24] *Sherbert v. Verner*, 374 U.S. 398, 403-406 (1963).

[25] See Justice Stewart's concurring opinion in *Sherbert* to the effect that he believed *Braunfeld* must now have been silently overruled, 374 U.S. 398, 413-418.

CRIMINAL statute of general applicability (truancy laws). In its terms, although (in contrast to *Sherbert* and *Yoder*) AIRFA did not mention anything as concrete as the compelling governmental interest test, AIRFA did seem to embrace their spirit. It placed government in a proactive position with respect to religious freedom; government now was not simply to refrain from interfering with religious exercise (as per the First Amendment) but was to extend itself in order to "preserve and protect" religious observance. But only for Native Americans.

Between the *Yoder* decision embracing and extending the *Sherbert* rule, and the *Smith* decision rejecting that rule except as applied to the two specific contexts of unemployment compensation and Amish parents objecting to ninth and tenth grade public schooling, the only decisions handed down that departed from the *Sherbert* test were cases involving Native American religious claims, *Bowen v. Roy* (1986), and *Lyng v. Northwest Indian Cemetery Protective Association* (1988).[26] *Employment Division v. Smith* was the third such Native American case, and the one that finally pushed the Court majority openly to drop the test.

In two of the request-for-religious-exemption cases between 1972 and 1990,

---

[26] I base this observation on the list provided by Justice Scalia in *Employment Division*, the third case involving Native Americans to depart from the *Sherbert* test. He does not categorize the cases this way, instead dividing them among unemployment compensation cases (which upheld exemption claims) and non-unemployment compensation cases (which often did not), and among early post-*Sherbert* cases and cases of "recent years," 494 U.S. 872, 883-4. He adds that in cases like *Yoder*, a non-unemployment based case, it was the addition of a constitutional right other than free exercise (there, family privacy) that triggered the compelling government interest test.

U.S. v. Lee (1982) and *Hernandez v. Commissioner of IRS*, 490 U.S. 680 (1989) the Court ruled that the *Sherbert/Yoder* test had been met by the government--both cases involved federal taxes, and the Court reasoned that the successful operation of a complex, nationwide tax scheme amounted to an overriding interest for which it was "essential" that particularized religious objections not be honored, to assure comprehensive participation.[27] Two other case that rejected *Sherbert/Yoder* style requests for religious exemptions emerged from contexts where security needs are exceptionally strong and therefore constrict normal constitutional liberties. These were *Goldman v. Weinberger*, 475 U.S. 503 (1986), which involved the governmental interest of a need for discipline within the military,[28] and *O'Lone v. Shabazz*, 482 U.S. 342 (1987), which involved the governmental interest of a need for discipline within its prison system.

In other words, all of these cases between *Yoder* and *Smith* can be viewed as having applied the *Sherbert/Yoder* test, except for the two Native American ones. The first of those *Bowen v. Roy*, 476 U.S. 693 (1986), presented a claim that if the Social Security Administration were to use the social security number that it had

---

[27] *U.S. v. Lee*, 455 U.S. 252, 258-259 (1982).

[28] See also the post-*Sherbert* (pre-*Yoder*)case of *Gillette v. U.S.*, 401 U.S. 437, at 462 (1971), where the Court upheld the governmental refusal of conscientious objector status to religious objectors to particular wars (as distinguished from war per se), on the grounds that it was "strictly justified by substantial governmental interests" in doing what was "necessary" to "raise and support an army."

issued to Roy's two-year-old daughter (unbeknownst to Roy) for record-keeping with respect to the distribution of welfare benefits, the use of a social security number would rob her of her spirit. Having to supply that number to the government each month in order to obtain welfare benefits also would rob her of her spirit. On the father's desire to forbid the federal government to use her number at all, the justices were unanimous. Free exercise does not entail a right to tell the U.S. government how to manage its own records. After this point, this case broke apart the five remaining justices from the original 6-justice majority of *Yoder*. Burger, who had written the *Yoder* opinion, along with White who silently aligned with him, wanted to apply ordinary rather than strict scrutiny because this case involved a "requirement for the administration of welfare programs reaching many millions of people."[29] Blackmun wanted to remand before deciding the merits because he was not convinced that the federal government will insist on having Bowen re-supply the social security number every time he obtains welfare benefits, and if all that is at stake is the issuance of the number, since that is a fait accompli the case may be moot.[30] He agreed however with the three dissenters that if the government were to insist that this number be provided every month in order to get welfare benefits, that practice would be unconstitutional under *Sherbert* and *Yoder*.

---

[29] *Bowen*, 476 U.S. 693, 707-708.

[30] *Bowen*, 476 U.S. 693, 714-715

The other holdovers from *Yoder*, Brennan and Marshall, align with O'Connor in dissent. Their view was that persons who objected to supplying their social security number in order to get a government benefit on the ground that its use would rob them of their spirit were so rare that allowing them an exemption from that duty would not seriously burden the U.S. government. But Scalia's claim that the Court here did not apply the *Sherbert/Yoder* test is correct, because both White and Burger were willing to drop the test for this context, essentially on the grounds that the need for comprehensive fraud detection within the welfare system was more like the tax setting of *U.S. v. Lee* and *Hernandez v. Commissioners* than like the individualized hearings situations of unemployment compensation or criminal prosecution. They were willing to say that in settings like this, the reasonableness test made more sense than strict scrutiny.

Lyng v. Northwest Indian concerned not a claim of governmental robbing of an individual's spirit but of governmental actions within a twenty-five square mile section of a National Forest that would deprive three Indian tribes of the opportunity for certain of their members to engage in particular obligatory meditation-style religious activities which they understood to benefit their entire tribe. These activities had to be performed in this particular natural setting and that setting had to be peaceful, quiet, and unmarred by man-made alterations. The Indian association was attempting to get a court injunction against the building of a

logging road. During the litigation, Congress had outlawed the planned timber-cutting throughout the contested area so as to minimize disturbance to the Indians, but they wanted to have the road itself also blocked. O'Connor wrote for the Court and rejected the claim that this program to any significant degree "prohibited" the free exercise of religion. She insisted that free exercise did not amount to a right to a religiously motivated veto over a government program simply because the program made it harder to practice one's religion. Three of the four *Yoder* holdovers, Brennan, Marshall and Blackmun, dissented on the grounds that a government program rendering a particular religious practice impossible to carry out did not substantially differ from a government program forbidding the practice, and that the government had shown no compelling reason for the road. Again, Scalia's claim that the *Sherbert* test was not applied here is correct as to the formal Court opinion. It is conceivable that White, the other *Yoder* holdover, went with the majority because he agreed with the majority claim[31] that the *Sherbert* test is triggered only when the government is imposing some sort of coercive pressure against religious action.

Two years later, in a third case involving Native American religion, *Employment Division v. Smith*, the Court scrapped the *Sherbert/Yoder* rule for all future cases except those involving the particular circumstances of the *Sherbert*

[31] 485 U.S. 439 at 449.

and *Yoder* litigants.

The rejection of decades of First Amendment law in the *Employment Division* ruling then prompted Congress by 1993 to enact the Religious Freedom Restoration Act, which effectively restored to all Americans the pro-free-exercise posture enshrined in the tone of the American Indian Religious Freedom Act of 1978. The Supreme Court in *Boerne* with all the *Yoder* justices now gone from the Court, overturned RFRA, and Congress in 2000 came back with a narrower version of RFRA, the Religious Liberty Protection Act.

IV. Conclusion?

Leslie F. Goldstein
University of Delaware