Maryland Law Review

Volume 69 | Issue 1 Article 7

Culture, Religion, and Indigenous People

David Bogen

Leslie F. Goldstein

CULTURE, RELIGION, AND INDIGENOUS PEOPLE

David Bogen* and Leslie F. Goldstein**

The Constitution treats culture, religion, and government as separate concepts. Different clauses of the First Amendment protect culture and religion from government. For several decades, the Supreme Court of the United States interpreted the First Amendment as offering religion greater protection against interference than was offered to culture, but the Supreme Court largely dissolved these constitutional differences when confronted with issues posed by the religious practices of Native Americans. With some indigenous Americans, the lines between culture, religion, and even government blur—challenging the Supreme Court's assumptions about the Constitution. The uniqueness of the claims of Native Americans pushed the Supreme Court toward recognition of a common constitutional standard for religion and cultural protection, but also justified political exemptions targeted at tribal behavior that do not extend to other religions or cultures.

I. Culture

If culture is defined as "the integrated pattern of human knowledge, belief, and behavior that depends upon man's capacity for learning and transmitting knowledge to succeeding generations,"[1] it encompasses almost everything we do. Culture includes both government and religion because they are aspects of the ways in which a group of humans live. What makes it culture, however, is intergenerational transmission, which requires some form of communication from one generation to the next.[2] Thus, the First Amendment's guarantees of freedom of speech and freedom of the press protect culture by protecting its transmission. Statements of the beliefs and rituals of a group are one form of transmission, but behavior also transmits ways of living. Actions often express the actor's membership in the culture

---

* Professor Emeritus, University of Maryland School of Law.

** Judge Hugh M. Morris Professor of Political Science, University of Delaware.

1. Merriam-Webster's Collegiate Dictionary 282 (10th ed. 1996).

2. For instance, an anthropology textbook defines "culture" as "a shared way of life that includes values, beliefs, and norms transmitted within a particular society from generation to generation." Raymond Scupin, Cultural Anthropology 43 (5th ed. 2003).

and signal to others how to conform to the culture. Despite its communicative aspect, Congress may regulate such conduct.

The Supreme Court developed the test for regulating expressive behavior in relation to symbolic acts in the 1968 case of *United States v. O'Brien*.[3] The *O'Brien* test upholds regulation affecting communicative acts if the regulation furthers an "important or substantial" governmental interest unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms is not greater than what is necessary to further that interest.[4] Laws targeted at specific cultures will usually fail this test because the governmental interest is not substantial or the restriction is unnecessary to further the purported legitimate interest; however, generally applicable laws normally remain valid.[5]

II. RELIGION

The essence of religion is belief rather than communication. The First Amendment protects religion by forbidding Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[6] Although many religious groups proselytize, courts usually use freedom of speech analysis to judge the constitutionality of regulation.[7] The Free Exercise Clause comes into play primarily when an individual's beliefs conflict with behavioral requirements of government.

Five years before *O'Brien*, the Supreme Court stated in *Sherbert v. Verner*[8] that the government must have a "compelling state interest" to coerce individuals to behave contrary to their religious beliefs.[9] For

---

3. 391 U.S. 367 (1968).

4. *Id.* at 377.

5. For a more in-depth discussion of this point, see generally David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201 (1997).

6. U.S. CONST. amend. I.

7. Jehovah's Witnesses have been involved in many of the great speech cases. *See, e.g.*, Martin v. Struthers, 319 U.S. 141, 142 (1943) (finding a city ordinance that prohibited door-to-door distribution of religious materials unconstitutional when the ordinance was challenged by a Jehovah's Witness who distributed religious literature to households); Chaplinsky v. New Hampshire, 315 U.S. 568, 568, 574 (1942) (holding that state public nuisance laws used to convict a Jehovah's Witness distributing religious literature on the streets were not invalid under the Fourteenth Amendment as unreasonable restraints on the freedom of worship); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591–92, 599–600 (1940) (declining to excuse Jehovah's Witness schoolchildren from compelled participation in a school flag-salute ceremony).

8. 374 U.S. 398 (1963).

9. *Id.* at 403 (citing and quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) (internal quotation marks omitted). *Sherbert* broke with a lengthy line of cases that had endorsed the principle that a neutral, secular law of general applicability that incidentally limited an

nearly three decades thereafter, the Supreme Court preferred religion over other aspects of culture by using a different standard to describe the government interest necessary to regulate religious behavior ("compelling state interest") as opposed to other communicative acts ("important or substantial" interest).[10] Unemployment compensation cases like *Sherbert* often resulted in discharged employees succeeding in obtaining payments by showing a religious motivation for the behavior for which they were discharged.[11] The strongest application of the compelling interest standard occurred in *Wisconsin v. Yoder*,[12] in which the Supreme Court held that Amish parents could refuse to send their children to school after the eighth grade.[13] *Yoder* extended the *Sherbert* path considerably because it was the first to require a religiously based exemption from a *criminal* statute of general applicability (truancy laws).

The inconsistency of using a different level of scrutiny for regulations of religion and culture became apparent when the Supreme

---

aspect of someone's religious practice (in a way that did not simultaneously implicate speech or press) did not violate the Free Exercise Clause, and that the Clause did not require a specific religious exemption for such practices. *See* Braunfeld v. Brown, 366 U.S. 599, 600–01, 609–10 (1961) (rejecting a free exercise challenge to Sunday closing laws); Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617, 630–31 (1961) (same); McGowan v. Maryland, 366 U.S. 420, 450–52 (1961) (same); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262, 265 (1934) (holding that a college could require participation in military science and tactics courses as a condition of enrollment despite petitioners' objections based upon religious beliefs); Reynolds v. United States, 98 U.S. 145, 161, 166 (1878) (upholding a statute criminalizing polygamy against a First Amendment challenge by a twice-married member of the Mormon church who had been convicted under the statute).

10. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 186 (1997) (internal citations omitted) (stating the general rule for intermediate scrutiny of content-neutral regulations of speech). If the regulation is not content-neutral, it will fail the prongs of the *O'Brien* test, which require the governmental interest to be unrelated to the suppression of free expression and that the restriction of expression be no greater than necessary to further that legitimate interest. *See supra* text accompanying note 4.

11. *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 830–31, 834–35 (1988) (finding that an individual denied unemployment benefits for refusing to work on Sunday may raise a free exercise claim even if that individual is not a member of an established religious group); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138–39, 143–44, 146 (1987) (finding that an individual may not be denied unemployment benefits for refusing to work on a holy day, consistent with the *Sherbert* standard, even if the individual converted to that religious belief after he or she was originally hired); Thomas v. Review Bd., 450 U.S. 707, 709, 719–20 (1981) (applying *Sherbert* to the unemployment compensation claim of a Jehovah's Witness who was terminated for refusing to produce war materials); *Sherbert*, 374 U.S. at 399–403, 410 (holding that a state may not deny without showing a "compelling state interest" unemployment benefits to an individual discharged for refusing to work on a holy day).

12. 406 U.S. 205 (1972).

13. *Id.* at 207, 234–36.

Court decided a group of cases involving Native Americans.[14] In one case after another, the Supreme Court refused to use the compelling interest standard, culminating in the *Employment Division, Department of Human Resources v. Smith*[15] decision written by Justice Scalia, who claimed that the standard applied only to situations exactly like those in *Sherbert* and *Yoder*.[16]

The first of the aforementioned Native American cases, *Bowen v. Roy*,[17] arose from a parent's belief that if the Social Security Administration were to use the Social Security number it had issued to Roy's two-year-old daughter for record-keeping regarding the distribution of welfare benefits, the use of a Social Security number would rob her of her spirit.[18] Concerning the father's desire to forbid the federal government from using her number at all, eight Justices agreed that free exercise does not entail a right to tell the United States government how to manage its own records.[19] After this point, the five remaining Justices from the original six-Justice majority of *Yoder* disagreed on the remaining issues. Chief Justice Burger, who had written the *Yoder* opinion, 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 . . . ."[20] Justice Blackmun wanted to remand before deciding the merits be-

14. In two of the request-for-religious-exemption cases involving groups other than Native Americans between 1972 and 1990, *Hernandez v. Commissioner*, 490 U.S. 680 (1989), and *United States v. Lee*, 455 U.S. 252 (1982), the Supreme Court ruled that the government had met the *Sherbert/Yoder* test. Both cases involved federal taxes, and the Supreme 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 in order to assure comprehensive participation. *Hernandez*, 490 U.S. at 699–700; *Lee*, 455 U.S. at 258–60. See also the post-*Sherbert* (pre-*Yoder*) case of *Gillette v. United States*, 401 U.S. 437 (1971), in which the Supreme Court upheld the government's refusal of conscientious objector status to religious objectors to particular wars (as distinguished from war *per se*) on the ground that the policy was "strictly justified by substantial governmental interests" in doing what was "necessary" to "raise and support [an] arm[y]." *Id.* at 439, 462. Two other cases that rejected *Sherbert/Yoder* style requests for religious exemptions emerged from contexts where security needs were exceptionally strong, and therefore they constricted normal constitutional liberties. These were *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986), which involved the governmental interest of a need for discipline within the military, and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350–51 (1987), which involved the governmental interest of a need for discipline within its prison system. In other words, all of these cases, except for the two Native American ones, can be viewed as having applied the *Sherbert/Yoder* test.

15. 494 U.S. 872 (1990).

16. *Id.* at 881 & n.1, 883–84.

17. 476 U.S. 693 (1986).

18. *Id.* at 695–96.

19. *Id.* at 699–700.

20. *Id.* at 707–08 (plurality opinion).

cause he was not convinced that the federal government would insist on having Roy re-supply the Social Security number every time he obtained welfare benefits.[21] He further reasoned that if all that is at stake is the issuance of the number and issuance of the number is a *fait accompli*, the case may be moot.[22] He agreed, however, with Justices O'Connor, Brennan, and Marshall 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*.[23] Justice White, in a one-sentence dissent, simply insisted that the *Sherbert* test should control.[24] The other holdovers from *Yoder*, Justice Brennan and Justice Marshall, aligned with Justice O'Connor in a partial dissent and partial concurrence. She believed that persons who objected to supplying their Social Security numbers 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 United States government.[25]

Justice Scalia's claim that the *Bowen* Court did not apply the *Sherbert/Yoder* test is correct because the Supreme Court treated the issue as being whether the federal government could issue a Social Security number to a person against that person's religious objection, and five Justices (Burger, Rehnquist, Powell, Blackmun, and Stevens) appear to have been willing to apply ordinary scrutiny for that issue. Chief Justice Burger, who had authored the *Yoder* opinion, was willing to drop the test for this context, essentially on the ground that the need for comprehensive fraud detection within the welfare system was more like the tax setting of *Hernandez v. Commissioner*[26] and *United States v. Lee*[27] than like the individualized hearing situations of unemployment compensation or criminal prosecution.[28] The *Bowen* majority was will-

21. *Id.* at 714–15 (Blackmun, J., concurring in part).

22. *Id.*

23. *Id.* at 715–16.

24. *Id.* at 733 (White, J., dissenting).

25. *Id.* at 728–29 (O'Connor, J., concurring in part and dissenting in part).

26. 490 U.S. 680 (1989).

27. 455 U.S. 252 (1982).

28. *See Bowen*, 476 U.S. at 709–10 (plurality opinion) ("No one can doubt that preventing fraud in these benefits programs is an important goal . . . [and] it is plain that the Social Security number requirement is a reasonable means of promoting that goal."). Justices Stevens and Blackmun did not announce a test for this issue but simply indicated that how the government itself behaves in its internal administration (apart from the matter of denying any benefits) is not a question that implicates the Free Exercise Clause. *See id.* at 713 (Blackmun, J., concurring in part) (concluding that the appellees' argument that the government's actions must be justified by a compelling state interest "stretches the Free Exercise Clause too far"); *id.* at 716–17 (Stevens, J., concurring in part and concurring in

ing to conclude that in settings like this, the reasonableness test made more sense than strict scrutiny.

Lyng v. Northwest Indian Cemetery Protective Ass'n[29] did not concern alleged governmental robbing of an individual's spirit, but rather involved governmental actions within a National Forest that deprived three Native American tribes of the opportunity for certain tribe members to engage in obligatory meditation-style religious activities, which they understood to benefit their entire tribe.[30] Tribe members had to perform these activities in this particular natural setting, and that setting had to be peaceful, quiet, and unmarred by man-made alterations.[31] The Indian association had sought a court injunction against the building of a logging road.[32] During the litigation, Congress outlawed timber-cutting throughout the contested area so as to minimize disturbance to the Native Americans, but the Tribe wanted to have the road itself blocked.[33] Justice O'Connor wrote for the *Lying* Court and rejected the claim that this program would "prohibit" the free exercise of religion to any significant degree.[34] 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.[35] Three of the four *Yoder* holdovers, Justices 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.[36] Again, Justice Scalia's claim that the majority failed to apply the *Sherbert* test is correct. It is conceivable that Justice White, the other *Yoder* holdover, went with the majority because he agreed with the claim that the *Sherbert* test is triggered only when the government imposes some sort of coercive pressure against religious action.[37]

---

the result) (agreeing with the majority that the Free Exercise Clause "does not give an individual the right to dictate the Government's method of recordkeeping").

29. 485 U.S. 439 (1988).

30. *Id.* at 451; *id.* at 459 (Brennan, J., dissenting).

31. *Id.* at 442 (majority opinion).

32. *Id.* at 443.

33. *Id.* at 444.

34. *Id.* at 450–52.

35. *Id.* at 452.

36. *Id.* at 465, 468–69 (Brennan, J., dissenting).

37. *See id.* at 450–51 (majority opinion) ("[*Sherbert*] does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce . . . require government to bring forward a compelling justification . . . .").

Two years later in *Smith*, in a third case involving Native American religion, the Supreme Court scrapped the *Sherbert/Yoder* rule for all future cases except those involving the particular circumstances of the *Sherbert* and *Yoder* litigants. Smith, a Klamath Native American, who had asserted a religiously grounded obligation for the use of peyote, had been fired from his job as a drug and alcohol counselor in Oregon, which precipitated his denied claim for unemployment benefits.[38] Justice Scalia wrote an opinion that rejected the compelling state interest standard. Justice Scalia did not recognize *Yoder* as endorsing the principle that the Free Exercise Clause calls upon states to exempt religious objectors from otherwise valid secular laws unless the government had a compelling reason for refusing the exemption.[39] Rather, claimed Justice Scalia, the *Yoder* Court permitted an exemption from school attendance rules because both free exercise and an additional fundamental right—that of familial privacy—were at stake.[40]

---

38. LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA 183 (2002).

39. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990). The Court explained the following:

> 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 . . . .

Id.

40. *Id.* *But see* Wisconsin v. Yoder, 406 U.S. 205, 215–21 (1972) (emphasizing the religiosity of the claim, in order to link it to the Free Exercise Clause, and then explicitly for that reason invoking the compelling interest test). The *Yoder* Court explained the following:

> 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 . . . .
>
> . . . .
>
> The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable . . . .

But *Smith* also involved a right beyond that of religious exercise. Indigenous peoples have, at the least, a morally recognizable right to maintain their own culture and independence. Religious communities, who sought to maintain their own religion rather than have another imposed upon them, sought and obtained the constitutional guarantee of non-establishment and free exercise of religion. In order to obtain such an agreement, they had to agree not to impose their religion on other communities. Immigrants accepted these political conditions, and descendants of the original compact were arguably bound by their ancestors' actions. Native Americans, however, became part of the United States by coercion rather than by choice—they were here before the Europeans arrived. Interfering with their religious practices, including their cultural integration of religion with government, could not be justified on exactly the same basis as within the Euro-American community.

In *Worcester v. Georgia*,[41] Chief Justice Marshall rhetorically asked, "Did these adventurers, by sailing along the coast; and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it?"[42] But the right to be free from colonial domination has never been recognized constitutionally. Further, Chief Justice Marshall enunciated the theory of discovery in *John-*

. . . .

. . . 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 . . . .

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 . . . . [W]e must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16 . . . .

Id. It is not only shocking that Justice Scalia mischaracterized free exercise precedent, *see Smith*, 494 U.S. at 895–97 (O'Connor, J., concurring in the judgment) (signaling her annoyance with the decision to recast *Yoder* as a "'hybrid' decision[ ]" (quoting *id.* at 892 (majority opinion))), but it is also ironic that he relied on the right of privacy, surely not his favorite constitutional right, for the compelling interest requirement. An additional oddity of the *Smith* decision is that compelling arguments were available indicating that prior to the Supreme Court's decision, the case had been rendered moot by out-of-court developments. *See* FISHER, *supra* note 38, at 186 (detailing changes that called into question *Smith*'s status as a live controversy).

41. 31 U.S. (6 Pet.) 515 (1832).

42. *Id.* at 543.

son v. M'Intosh.[43] It meant that non-indigenous people asserted at least partial dominion within their own justice system over indigenous peoples.[44]

The heart of the claim in *Lyng* was that Native Americans' loss of title to land—whether by treaty, force, or other means—did not surrender their rights to pursue their religious beliefs and practices without disturbance.[45] Justice O'Connor's opinion suggested that the Native Americans' religious claims swept so broadly as to shift from merely religious claims to claims of cultural autonomy, and that acknowledging constitutional priority for such indigenous claims would lead to unacceptable results. Justice O'Connor noted that "such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property."[46] In short, adding concern for the moral right to cultural autonomy of native peoples as the basis for a compelling interest test would reverse the constitutional marginalization of Native American rights and would destabilize the long term understandings of the non-indigenous majority.

The strength of the Native Americans' claim to pursue religious practices was premised more on the history of the nation than on the religious nature of the claim. Even if the particular religious practices were idiosyncratic or grew out of incorporating European religion into native practices, indigenous culture was at stake in the litigation. The problem is particularly acute because many indigenous peoples do not separate government, religion, and culture. In his dissent, Justice Brennan wrote the following:

> [F]or Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise

---

43. *See* 21 U.S. (8 Wheat.) 543, 592 (1823) ("The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.").

44. Under Chief Justice Marshall's theory, discovery gave the right to exclude other would-be discoverers, such as European sovereigns, but Native Americans retained the rights associated with occupancy, which included decisions over how to use the occupied land and control over internal communal government. *Id.* at 573–74.

45. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (noting that the Native Americans "have used [this area within the National Forest] for a very long time").

46. *Id.* at 453. A number of Native Americans supported the forest road, *id.* at 464–65 n.3 (Brennan, J., dissenting), perhaps to benefit the economy and to give them access to the towns, while many non-Native American environmental groups opposed logging in the national forest, *id.* at 443 (majority opinion); *id.* at 463 n.1 (Brennan, J., dissenting). Thus, there was a question of whether a distinct religious interest that should be recognized above all others was at issue, or whether it could be characterized as an environmental claim.

> which forces Indian concepts into non-Indian categories." Thus, for most Native Americans, "[t]he area of worship cannot be delineated from social, political, cultur[al] and other areas o[f] Indian lifestyle."[47]

Justice Brennan argued that the religious beliefs of some indigenous peoples made it particularly important for them to be able to engage in ceremonies connected with specific sites, and this fact implied that they had a First Amendment right to a degree of land use control.[48]

The integration of culture, religion, and government was demonstrated by the historic effort at destruction of all three through mission schools.[49] Federal support for mission schools raised serious establishment questions, but the Supreme Court justified payments to these religious institutions under the theory of indigenous autonomy—federal authorities were making payments out of monies set aside in trust for the Native American nations according to the desires of those nations.[50] However justified, the mission schools delegi-

---

47. *Id.* at 459–60 (Brennan, J., dissenting) (internal citation omitted).

48. *See id.* at 467–68 ("[T]he site-specific nature of their belief system renders it nontransportable.").

49. Congress viewed federal payments for mission activity as a part of the broader goal of bringing Native Americans into the mainstream of Western civilization. The federal "civilization fund" lasted until 1873. FISHER, *supra* note 38, at 147–51. President Grant reinvigorated dormant missionary activity by authorizing appropriations to religious groups to run Native American schools. *Id.* at 155. In the 1880s, tensions between Protestants and Catholics produced controversy over the appropriation of federal funds for "sectarian schools" via contracts with religious missions. *Id.* at 155–56. Eventually, this controversy caused the federal government to forbid the annual appropriation of money for missionary schools on reservations after 1899. *Id.* at 156. Although Congress announced that it was ceasing such annual appropriations, in fact, religious groups continued to educate Native Americans on reservations, funding the schools with money they continued to receive annually from the federal government through 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). *Id.* at 156 & n.59. In 1881, U.S. government policy ramped up the effort to obliterate traditional Native American religions. *Id.* at 157. Rather than leave matters to missionaries, who may have varied in their kindliness toward such practices, the administration enacted an official ban on Native American funeral ceremonies and on the Sun Dance. *Id.* at 57. This executive regulation was part of a broader intense assimilation campaign between 1881–1928, which included pressuring Native Americans into taking individual allotments from tribal land to become farmers and sending Native American children to boarding schools for eight years where they were forced to dress and speak as Anglo-Americans and to abandon vestiges of their religion. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 8–12 (1983); FISHER, *supra* note 38, at 157–59.

50. Quick Bear, a Native American, challenged the funding system as a violation of the congressional ban on future appropriations for "sectarian schools" for Native Americans and as violating "the spirit" of the Establishment Clause. Quick Bear v. Leupp, 210 U.S. 50, 81 (1908). The Government successfully argued that it did not violate the statutory ban because the money belonged to each tribe (in trust) to expend as it chose. *Id.* at 80–81. The Supreme Court also accepted the argument that the application of Native American

timized old ways of doing things and thus weakened indigenous culture. The United States government was targeting indigenous language, religion, and traditional understandings and rules as obstacles to "civilization" and intentionally undermining them.

The history of the treatment of Native Americans demonstrates how religion was enmeshed in their culture and highlights the anomaly of using different standards for their protection. The standard used by the Supreme Court to protect culture has been derived from free speech cases rather than from free exercise cases, and the Supreme Court seemed to recognize that the two clauses of the First Amendment should be on par, even though in *Smith* it abandoned the "compelling interest" test for free exercise cases. Government acts directed at destroying religion or culture violate the First Amendment, but the Supreme Court will uphold as constitutional any acts that have an incidental effect on the exercise of either religion or culture if they are closely tailored to furthering any substantial government interest.[51]

III. POLITICS

The *Smith* Court's rejection of decades of First Amendment law prompted Congress to enact the Religious Freedom Restoration Act of 1993 ("RFRA"),[52] which effectively restored to all Americans the pro-free-exercise posture enshrined in the tone of the American Indian Religious Freedom Act of 1978.[53] RFRA provided that in instances where a generally applicable law "substantially burden[s]" religious exercise, state and federal government must grant a waiver from the law unless the government has a "compelling governmental interest" in refusing to do so and the legal requirement is the "least restrictive means of furthering that compelling interest."[54] The Supreme Court, with all the *Yoder* Justices having been replaced, subsequently struck down the portion of RFRA that applied to state

---

trust funds to sectarian schools not only did not violate the Establishment Clause, but it was required in order to honor the Free Exercise Clause rights of the Native Americans. *Id.* at 82.

51. *See* Bogen, *supra* note 5, at 204–05 (arguing that the *O'Brien* test is appropriate for both religion and speech clauses where a generally applicable law is challenged).

52. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4 (2006)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

53. 42 U.S.C. § 1996 (2006).

54. *Id.* § 2000bb-1(b), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

government in *City of Boerne v. Flores*.[55] Congress followed up by enacting the Religious Land Use and Institutionalized Persons Act of 2000.[56] This law reenacted 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 or remodeling materials; and (2) those involving persons confined in state institutions—such as prisons or hospitals—that received federal funds.[57]

The result of these events has been to move the protection of religious exercise from the constitutional realm to that of the political. Protecting religious exercise by granting religious believers rights denied to others raises establishment issues. The Establishment Clause forbids government from enacting a law respecting an establishment of religion. It protects minority religions by creating a barrier to preferring one religion over others or even over irreligion. The democratic electoral process ensures that the dominant political culture will be established and will enact laws pursuant to its vision. Free speech protects dissenting voices, but it does not protect them from laws contrary to their views. The Establishment Clause, however, does protect religion from having contrary religions established. Thus, in this context, religion receives a particular protection because it is assumed to be separated from the governmental process.

Although *Smith* permits government to apply generally applicable laws to religious exercise, it does not forbid government from exempting religious exercise from such laws.[58] Exemptions have been challenged as establishing religion because religious believers receive a privilege denied to persons who seek exemption from laws for other reasons. The Supreme Court has found that religious exemptions may be justified by concern for the Free Exercise Clause.[59] Neverthe-

---

55. 521 U.S. at 511. It left standing the RFRA's application to federal laws. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436–37 (2006) (applying RFRA to require exemption from the Controlled Substances Act for the ritual use of *hoasca*). Also, because it was struck down essentially on Tenth Amendment grounds, the ruling presumably left standing both the 1978 Indian Religious Freedom Act and the applicability of RFRA to Native American religious practice, since Congress has particular constitutional power to deal with Native Americans. *See infra* Part IV; United States v. Kagama, 118 U.S. 375 (1886).

56. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc–2000cc-5 (2006)).

57. *Id.*

58. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

59. *See* Cutter v. Wilkinson, 544 U.S. 709, 722–24 (2005) (unanimously holding that the Religious Land Use and Institutionalized Persons Act of 2000 does not violate the Establishment Clause where it required prisons to show a compelling governmental interest for imposing a substantial burden on religious exercise of confined persons).

less, any such exemption must apply to all religions or the Establishment Clause objection would succeed.[60] Although establishment doctrine prohibits distinctions based on religion, it does not forbid distinctions based on tribal membership with respect to religious exemptions. Thus, Native Americans often fare better than other cultures or religions.

IV. THE INDIGENOUS EXCEPTION

The blend of culture and religion in Native American cases led the Supreme Court to apply a single constitutional standard for all cases concerning religious and cultural freedom. The Supreme Court has treated Native American religions and nonindigenous religions alike for purposes of the application of the Free Speech and Free Exercise Clauses; however, the Constitution treats them differently with respect to political protections offered by Congress.

Beginning in the 1960s, the government began to specifically protect Native American religious and cultural interests. The first steps were small. In 1962, Congress authorized the Secretary of the Interior to issue regulations protecting the Native Americans' possession and use of eagles for religious purposes,[61] and in 1963, the Secretary of the Interior issued such a regulation for Native Americans engaged in "authentic, bona fide" use of eagles for their religion.[62] Subsequently, in 1968, Congress issued the Indian Civil Rights Act,[63] which essentially listed the Bill of Rights from the United States Constitution and applied them to protect Native Americans with respect to tribal governments. The Indian Civil Rights Act pointedly omits the prohibition on laws "respecting an establishment of religion," but does specify that tribal governments may not "make or enforce any law prohibiting the free exercise of religion . . . ."[64]

---

60. *Id.* at 720 (citing Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994)).

61. Pub. L. No. 87-884, 76 Stat. 1246 (1962) (authorizing the Secretary of the Interior to promulgate regulations for the preservation of the golden eagle); FISHER, *supra* note 38, at 163.

62. Possession and Use for Religious Purposes, 28 Fed. Reg. 23,975, 23,976 (Feb. 1, 1963); FISHER, *supra* note 38, at 164.

63. Pub. L. No. 90-284, tit. II, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

64. *Id.*; FISHER, *supra* note 38, at 165. In 1970, Congress again supported Native American religious rights by ceding back to the Pueblo Indians 48,000 acres of land around Blue Lake near Taos, New Mexico, that a presidential order had taken from them in 1906. Pub. L. No. 91-550, 84 Stat. 1437 (1970); FISHER, *supra* note 38, at 167–68. These Native Americans viewed this as sacred land. *Id.* at 167.

This piece of the Indian Civil Rights Act plainly proceeded on the understanding that for reservation Native Americans, because their religion *was* tribal, the individual's right of free exercise implicated a right to *have* his tribe establish a religion. In light of their history with the federal government, a national coalition of Native American groups wanted a further guarantee and lobbied beginning in 1967 for specific federal support for Native American religious traditions.[65] Those lobbying efforts bore fruit in the joint resolution of Congress, which resulted in the American Indian Religious Freedom Act ("AIRFA") of 1978.[66] Recognizing that freedom of religion in America has produced "a rich variety of religious heritages,"[67] AIRFA states the following:

> [I]t 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 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.[68]

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."[69]

In the wake of RFRA, Congress passed the American Indian Religious Freedom Act Amendments of 1994.[70] The new statute was narrowly directed at protecting the Native American church in its ceremonial use of peyote. It noted that federal drug laws and those of

---

65. Suzan Shown Harjo, *American Indian Religious Freedom Act After Twenty-Five Years*, WICAZO SA REVIEW, Fall 2004, at 129, 130.

66. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996 (2006)).

67. *Id.*

68. *Id.* 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 "protect[ing] and preserv[ing] Native American religious cultural rights and practices" and to "report back to the Congress the results of [their] evaluation, including any changes which were made in administrative policies . . . and any recommendations [they] may have for legislative action." *Id.*; *see also* FISHER, *supra* note 38, at 168–69 (discussing generally the review process under AIRFA); Harjo, *supra* note 65, at 131 (same). The Carter Administration did this in August 1979 after a review in which more than fifty federal agencies participated. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988); Harjo, *supra* note 65, at 131.

69. *Lyng*, 485 U.S. at 455.

70. Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified as amended at 42 U.S.C. § 1996a (2006)).

a majority of states had exempted the religious use of peyote and prohibited other states from proscribing it.[71] The statute provided that the ceremonial use of peyote by Native Americans is lawful and may not be made illegal by any state or the United States government.[72]

The new statute had several constitutional bases that did not apply to RFRA—the general federal power with respect to Native American tribes from *United States v. Kagama*,[73] and the Fourteenth Amendment Section 5[74] power to enforce the proscription against racial discrimination. Thus, if the classification is regarded as racial, the law is justified as a means of preventing racial discrimination;[75] if it is

---

71. *Id.* The law provided the following:

> The Congress finds and declares that:
> (1) for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures;
> (2) since 1965, this ceremonial use of peyote by Indians has been protected by Federal regulation;
> (3) while at least 28 States have enacted laws which are similar to, or are in conformance with, the Federal regulation which protects the ceremonial use of peyote by Indian religious practitioners, 22 States have not done so, and this lack of uniformity has created hardship for Indian people who participate in such religious ceremonies;
> (4) the Supreme Court of the United States, in the case of Employment Division v. Smith, 494 U.S. 872 (1990), held that the First Amendment does not protect Indian practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling State interest standard; and
> (5) the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment.

Id.

72. *Id.* The statute declared the following:

> (b)(1) 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.

Id.

73. 118 U.S. 375, 384–85 (1886).

74. U.S. CONST. amend. XIV, § 5.

75. One might wonder how this law is anti-discrimination, since it protects *only* tribal member Native Americans in the sacramental use of this drug. One answer might be that Congress presumed that such use by others is typically not a bona fide religious practice, that to refuse to create a sacramental use exemption for peyote, when such exemption is typically provided for sacramental use of wine in "dry jurisdictions," shows a prior practice of racially linked discrimination. To be a Native American is to belong to a racial, cultural, and political group (with perhaps different but overlapping membership). Discrimination against Native Americans violates equal protection, and arguably the failure to exempt the

political, the law is justified as part of the United States government's power over its "ward." At the same time, the law would not even affect all the parties to the *Smith* case. Galen Black was not a Native American.[76] Thus, the current state of the law has more regard for the religious exercise of Native Americans than for others.

Although some have argued that Native Americans should not have greater rights to religious or cultural protection than other people,[77] the history and constitutional position of America's indigenous peoples justifies such rights.[78] Political exceptionalism for indigenous religion is neither establishment nor forbidden by equal protection when it is structured on the basis of indigeneity. The reason for affording special protection to indigenous traditional rites was rooted in a disapproval of imposing outside norms on a group entitled by their original occupation of the land to respect and autonomy—that is, respect for cultural autonomy rather than religion—although specific rules were often articulated in religious terms.

The Constitution applies to federal and state governments, but it does not apply to Native American nations. Such nations form, in Justice John Marshall's words, "domestic dependent nations."[79] Tribes have lawmaking authority over reservation lands that may be enforced through tribal courts[80] and are not subject to state law over Native Americans on that land.[81] Although tribal laws are not subject to the constitutional commands of free exercise and non-establish-

---

drug or even the proscription of the drug might be racially based—government may have initially proscribed the drug because it is associated with an unpopular racial group. The remedy, however, may proceed one step at a time and include only members of tribes (a politically determined identity rather than simply a racial identity) because administratively, it is a more workable rule. States, however, remain free to offer religious peyote exemptions to non-Native Americans.

76. FISHER, *supra* note 38, at 184.

77. *See, e.g.*, David Garrett, Note, *Vine of the Dead: Reviving Equal Protection Rites for Religious Drug Use*, 31 AM. INDIAN L. REV. 143, 162 (2007) (concluding that allowing religious drug use based on the government's special relationship with Native American tribes creates a virtually impossible standard for other groups trying to establish exceptions for their own religious drug use).

78. *See* Kevin J. Worthen, *Eagle Feathers and Equality: Lessons on Religious Exceptions from the Native American Experience*, 76 U. COLO. L. REV. 989, 1003–09 (2005) (discussing various historical and cultural reasons that Native Americans are differently situated from non-Native Americans, thus justifying differential treatment in the American constitutional system).

79. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

80. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.") (internal citations omitted).

81. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

ment, they are subject to federal laws that override. The degree of autonomy permitted by the federal government is hotly contested, but the decisions are largely political rather than constitutional ones.

The quasi-sovereign status of the Native American tribe has been recognized in several ways. In the Constitution, Congress has been given power to "regulate Commerce . . . with the Indian Tribes."[82] Further, congressional regulatory power has been based on the notion that "Indian tribes *are* the wards of the nation."[83] But the tribe also exerts sovereignty over its land, and that excludes the regulatory power of the state within which it exists.[84] The Supreme Court also recognized the sovereign immunity of Native American tribes to preclude suit in federal court by one of the members.[85] And membership in a tribe suffices to distinguish Native Americans from other citizens for purposes of the Equal Protection Clause. Thus, the Supreme Court upheld a preference for tribal members in employment with the Bureau of Indian Affairs on the ground that the preference was not a racial classification but applied to them "as members of quasi-sovereign tribal entities . . . ."[86]

---

82. U.S. CONST. art. I, § 8, cl. 3.

83. United States v. Kagama, 118 U.S. 375, 383 (1886).

84. *Worcester*, 31 U.S. (6 Pet.) at 561. There are complicated caveats to such a bold general statement, but they do not undermine the general proposition that Native American nations are a unique political entity under our Constitution and laws. For example, after World War II, the pendulum in Native American policy swung again toward assimilationist policies. Congress launched an effort to terminate the status of Native American tribes to eliminate federal supervision of their activities. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953). Ultimately, about 109 tribes and bands were terminated, affecting about three percent of all federally recognized Native Americans and Native American trust land. Charles F. Wilkinson & Eric Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977). Most of the affected tribes were small and would have real difficulty in maintaining much of a governmental structure, but the impact of termination was a loss of services and some rights. *Id.* at 153–54.

In connection with these policies of selectively getting out of supervision, Congress enacted Public Law 280 in 1953, which imposed state jurisdiction on specified areas and allowed states to take jurisdiction. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588; *see also* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 537–38 (1975). The remnants of that statute are in 18 U.S.C. § 1162 (2006), which imposes state jurisdiction to extend state criminal laws and supplant the federal jurisdiction that previously existed in limited situations.

85. *See Santa Clara Pueblo*, 436 U.S. at 51, 58, 70–72 (holding that where a tribal member sued to enjoin enforcement of a tribal ordinance as a gender-based violation of the Indian Civil Rights Act, the tribe had sovereign immunity just as though it were a separate nation, that the immunity applied because there was nothing in the Indian Civil Rights Act of 1968 that expressly waived it, and that no cause of action should be implied even against the officials of the tribe who would not personally have such immunity).

86. Morton v. Mancari, 417 U.S. 535, 554 (1974).

Membership in a tribe may not be sufficient to justify all distinctions and preferences for Native Americans, but the promotion of tribal autonomy from federal as well as state law has become a cornerstone of federal policy, as was seen in *Lyng*. The dimensions of that autonomy remain in constant flux because the Supreme Court recognizes the ultimate regulatory power of the federal government, but the history of America supports the legitimacy of the federal interest in preserving the cultural and religious autonomy of the indigenous peoples distinct from the interests of any other group—because no other group was recognized as sovereign in dealings in the past nor maintains such quasi-sovereign status today.

V. CONCLUSION

The collision of indigenous interests and the religion clause of the Constitution has produced some paradoxical results. The distinctive nature of religion as a part of Native American culture seems to have influenced the Supreme Court to cabin the constitutional limits on government power that are specifically protective of religion. It led the Court to apply the same constitutional standards for applicable laws that impair religious exercise as it uses to judge such laws that incidentally affect speech. The unique nature of the Native American experience eventually led to a common constitutional standard for the Free Exercise Clause applicable to all peoples in the United States. That standard ultimately placed responsibility in the political process for the protection of religion and communication from incidental interference. Here the history of indigenous peoples, who retain a degree of sovereignty and autonomy unique among the peoples of the United States, justifies the government's political choices to grant them rights that no other group can claim.