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Anglo-American Jurisprudence and the Native American Tribal Quest for Religious Freedom

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Felix Cohen once wrote that Native American legal history manifests the greatest problem in Anglo American jurisprudence.[1] This paper supports that observation through an examination of the Native American tribal quest for religious freedom. The basic theme of the paper is that traditional Native American tribal peoples and mainstream Anglo Americans embody very different world views,[2] and these differences create major problems for Native American tribes who seek to practice their traditional religions.

The first part of this study will compare and contrast traditional Native American tribal views of land and religion with those of Anglo Americans. This picture will be painted with a very broad brush that uncovers the essential differences between the two societies.[3]

Next the paper will examine the ideology of civilization which is part and parcel of the Anglo-American world view and system of jurisprudence. To do this, the study will concentrate on Adam Smith's *Wealth of Nations* and the Supreme Court's decision in *Johnson v. M'Intosh*.

Then the paper overviews some of the foundations of American Indian law, the branch of jurisprudence that deals specifically with Native Americans. Here the study examines cases, treaties, and treaty substitutes.

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The subject of the following section is the problem of Native American religious freedom under the Constitution. First, the paper summarizes the law concerning religious freedom under the Constitution and then analyzes the major Native American free exercise cases.

Finally, the focus becomes the American Indian Religious Freedom Act and the problem of archaeology. A conclusion follows.

Land

The basic problem for Anglo American jurisprudence in dealing with Native American tribal religions is one of understanding and appreciating the centrality of sacred space in native experience and practice. It is well known and well accepted that traditional tribal Indian religious orientations are inseparably related to the land of its people. For Native American tribes land is not simply material; nature is not just natural.[4] As Pueblo Indian and anthropologist Alfonso Ortiz notes, all phenomena in the Pueblo Indian world embody both "essence and matter."[5] In other words, nature contains a spiritual dimension. The life and forms of the Indian cosmos reveal a sacred substance. Gods manifest themselves through the rhythms of their world—lightning, sun, rain, animals etc. . . . But this is not to say that Native Americans are materialistic and polytheistic. Rather the seemingly endless array of nature gods are seen as so many "refractions"[6] of the spiritual essence of the cosmos. As a Hopi Indian put it:

> The sun, the moon, and the stars are the work of a great Power. This Power created them. We speak of Mother Earth, but it is not the earth who created all the creatures that live on the earth. It is this same Power that made the sun and moon and stars. That is what we worship—the Great Power.[7]

For Native American tribes, spiritual substance is the source, sustenance, and end of all cosmic life and forms. Everything depends on it and without it there would be nothing. This is revealed clearly in all Native American creation myths.[8] The sacred gave birth to world. This point is so fundamental that the Hopi think the biggest problem humans face is the belief "that they had created themselves."[9]

Native American tribes do not perceive the spiritual as distinct from their land. Their land and religion are one.[10] To take their

land is to prohibit traditional religious experience and practice. This point must be emphasized because it uncovers a major difference between Indians and Anglos.

For mainstream Anglos, the sacred does not manifest itself through the rhythms and forms of the natural world. Christianity is the dominant religion of Anglo Americans and Christianity tends to view the created order as good but not revelatory of the sacred. The god of the Judeo-Christian tradition is one who manifests "himself" in history, that is, in specifically human events.[11]

This is not to say that Indians and Anglos share no ideas about land. Both societies have legal theories about the possession of land. It seems clear that all human communities have some concept of property law. Without property law, no one would feel secure in his possession of land or personal property and life would be a constant struggle for possessions. Some law is necessary to regulate property possession. This fact led Bentham to claim that, "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[12] Or again, "Now property before it can be offended against must be created, and the creation of it is the work of law."[13] Native Americans would agree with Bentham that there must be a way to regulate possession of resources and each tribe has ways of doing this. Llewellyn's classic study *The Cheyenne Way* demonstrates the complexity of Cheyenne law with respect to a number of phenomena, including property.[14] Robert Black has demonstrated structurally similar property dispute resolutions among the Hopi.[15] Clearly Native Americans have a system by which property is regulated so as to prevent a constant struggle for possession and use. To argue otherwise is to argue they are not human. Therefore, at this level, Native Americans and Anglos are similar.

But there the similarity ends. As soon as one explores the nature of possessory interests a chasm of contrast opens. Bentham states that law depends upon a sovereign,[16] in his view, a political ruler. In fact, the sovereign owns all land in the end and even fee simple title is but a possessory interest. Again, in that sense no real difference exists between Native American and Anglo possessory interests, except that Anglos possess land individually rather than by clan or tribe. The difference emerges when we get to the notion of ultimate ownership. Indian tribes agree that the sovereign owns the land; the issue concerns who is sovereign. For them, the sovereign is not human, but spirit.

This point is well known and accepted as *Holden v. Joy* (1872) demonstrates. There the Supreme Court held that Native Americans assert title derived from "the Great Spirit, to whom the whole earth belongs."[17]

Because of the nature of their title, no human, not even the tribal chief, can own the land. In the Hopi view, the land upon which they live was conditionally entrusted to them in the "ancient time ago" by a deity.[18] The Hopi have a duty to follow "the law of the short blue corn;" that is, a life of simplicity, humility and prayer, as established by sacred covenant. As long as they do so, they have a right to live on the land called Hopi. The Eagle clan chief from Third Mesa put it this way, "A lot of the other villages say the Supreme Being gave us all this land. That is not the way I was told. The land belongs to the people only as long as they labor on it."[19] Another Hopi put it this way, "the land is not ours. We are here only as tenants."[20] The logic of Native Americans with respect to land tenure is impeccable and religious. It seems clear that human beings did not create the world; they emerged into a place that was already there. This understanding, that the world creates humans prior to their affecting the world, is perhaps the most basic premise of Native American tribal life. It is also a basic postulate of religious orientation.[21] The land is their mother—their origin, nature and destiny.

A number of years ago it was said that the Eastern Cherokee understand themselves more as "being oriented" rather than "becoming oriented."[22] In other words, they understand themselves more as passive than active. Therefore, they seek not to better themselves through ambitious, future-oriented self-assertion.[23] Instead they strive to take their proper place in a world that is the possibility of their very being, to follow the path before them. Land is part and parcel of the creator. It is inherently sacred. Said Chief Seattle, "Every part of this soil is sacred in the estimation of my people."[24] Land is primarily religious, not economic. Native Americans orient themselves toward a harmonious relationship with their land. In so doing they search not to utilize efficiently natural resources, as do Anglo ecologists, but rather to unite themselves with the sacred. Land is not to be used for wealth maximization; it is to be lived with in harmony.

How different it is with Anglos. Anglos own land, an interesting point for it implies control over that which is their creation, sustenance and end. Furthermore, land is not intrinsically sacred. True,

a large school of Anglo environmentalists has arisen in the last couple of decades. Many of its proponents argue similarities between the ecological views of nature and those of Native Americans.[25] Among its ranks are some legal commentators who often characterize Native Americans as exemplary environmentalists.[26] Inasmuch as both groups think land is essential to human life, they are alike. But major differences exist. For Anglo environmentalists, proper human land use is primarily a matter of not overutilizing finite natural resources. Native Americans, on the other hand, perceive land use as an intimate relationship with the cosmic mother. All this talk of finite resources is foreign to them for it emerges from a scientific (and economic) world view that they neither agree with nor comprehend.[27] Thus the wedding between Native Americans and Anglo environmentalists is rather tenuous, at best. In fact, it too may represent implicit colonialism through its "use" of Native Americans to solve modern problems. In a word, Native American and Anglo views of land are divergent.

For Anglos, the decisive purpose and value of property is economic exploitation.[28] The basic relation between a person and property is its economic function, exploitation. This is not to say that Native Americans have no means by which they regulate the possession and disposition of their goods; they do. Notwithstanding that, their laws are inextricably related to and grounded in religious concerns of ultimacy. It is true that land yields life in a materialistic, economic sense, but materiality of life is itself enveloped in religious meaning. All of this helps to explain why the Dawes Act of 1887 failed so miserably.[29] The attempt of the United States Government to divide in severalty tribal lands was resisted, not simply because it violated tradition, but because traditional land tenure was part and parcel of religious orientation. To change one was to change the other. To tell Native Americans how to understand and use land is to tell them how to think and live religiously.

Religion

Looking more closely at the religions of Native American tribes and Anglos, other significant differences emerge. These dissimilarities have made the Native American tribal quest for religious freedom difficult because Anglos historically have not understood religions different from their own.

First, the more obvious comparisons. Native American tribal religion encompasses everything significant, from alimentation to New Year ceremonies. As Barney Old Coyote, a Crow, put it, "The area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle including his general outlook upon economic and resource development."[30] So ingrained in life is the religious dimension that Native Americans traditionally had no separate word for religion. To be Hopi was to practice Hopi religion; to be Cherokee was to practice Cherokee religion; the same was true for Sioux, Navajo, and Tlingit. For Anglos the situation is typically different. Most Anglo-Americans are Christian, and consequently Christianity is the dominant religion. Christianity, like Buddhism and Islam, is a "Confessional" religion, one which is confessed.[31] Confessional religions are embraced independent of political, racial or geographical concerns.[32] One can be a Chinese Christian or an American Buddhist. The confessional religions are not intrinsically related to any other aspect of human existence. Their kingdom is not of this world. This difference leads to a number of legal problems for Native Americans and these shall be addressed below, but for now it is enough to point out this difference on a purely theoretical level.

Another contrast, related to the first, is that Native American religions were practiced by everyone in the tribe,[33] while Christianity is a religion embraced by individuals. Christianity cuts across family and political ties. This reflects another difference. Native American religions are tribal in scope; Christianity is universal.[34] Only Hopis can practice Hopi religion; anybody can be a Christian.[35]

Another major distinction between Native American tribes and Anglos concerns their view of the world. Traditional Native Americans are pre-urban or perhaps better, non-urban peoples who attune themselves to the rhythms of nature. Nature is sacred and an attempt is made to lessen the distance between themselves and their world.[36] Christianity, on the other hand, is an urban religion which arose during the days of the Silk Route.[37] Urban life is seen as especially problematic, and thus Christianity stresses the goodness of the next life, the life after death.[38]

The above distinctions have not been noticed by the courts, or when they have, they have been used to deny the legitimacy of Native American religions. As will be seen in the next section, Native American religion has been characterized by Anglos as

either non-existent or primitive and superstitious. Some attempt to overcome Anglo ignorance was made with enactment of the American Indian Religious Freedom Act of 1978, but it gave birth to a whole new set of problems that will be discussed later.

Still the religions of Native Americans and Anglos are not without a basic, structural similarity. Both religions agree that a spiritual power created the world and its human inhabitants and that the proper mode of existence is one put down by this spiritual power. Both religions also emphasize that humanity's biggest problem is the desire and ignorance that leads humans to think they created the world.

So much for explicit religious doctrine. Since the work of Freud, religious scholars have had to take seriously the possibility of covert and unconscious religious dimensions among human communities.[39] Religious symbols often operate at levels below consciousness and thus it is important to explore human societies for religious qualities that lurk beneath the surface. Here comes to mind a number of studies by historians and sociologists of religion which demonstrate latent religious meaning in political and economic phenomena. Most relate Judeo-Christian values that underlie activities that are typically considered secular. Weber's *The Protestant Work Ethic and the Spirit of Capitalism,* remains important.[40] There Weber notes that Calvin's theology had important influence in the development of capitalistic economics. Somewhat different is Bellah's work on civil religion where he argues that Judeo-Christian values underscore much of the Anglo political order, thus showing church and state are connected.[41] Those and similar studies are well-known and are important interpretive works of "recollection."[42] That is, they uncover important religious meanings that pervade Anglo-American life. From the supportive, somewhat pietistic perspective of recollection hermeneutics, those meanings are true and authentic. However, from the critical perspective of the "hermeneutics of suspicion," other problematic meanings emerge.

John Ragsdale recently noted that the legal, political and economic American has adopted the values of individualism, competitiveness, profit, speed, and efficiency.[43] Law's relationship with those values is especially close. He supports his argument with a review of the major areas of law, all of which place great emphasis on economic efficiency or wealth maximization.[44] Property law is also heavily influenced by Posner's theory of efficient

resource use.[45] The doctrine of economic efficiency is related to utilitarian principles which seek the greatest good for the greatest number of people. Sad, though, for Native Americans is the fact that Anglo notions of "public good" leave Indian tribes out of the picture.[46] And this omission is part and parcel of an ideology that is problematic religiously because it denies the humanity of Native Americans. Here reference is made to an implicit Anglo American religiosity related to economics and politics that cannot be explained by recourse to the apologetic tradition of civil religion. Christianity may indeed play a role in Anglo American economics and politics but there is also present an ethnocentric world view that perceives Native Americans as other than human.

Adam Smith and the Religion of Free Enterprise

Modern capitalistic economic theory owes much to Adam Smith's *Wealth of Nations*. Smith's work represents the formative view of capitalism and still provides the basis for most definitions of economics, a point we will return to momentarily. To get at the foundation of Smith's theory of economics, it will be instructive to investigate his anthropology, his theory of human origin and destiny.

Theory of Progress

An integral part of Smith's economics was his theory of progress, or, more specifically, his four stages theory.[47] Whether or not he was the first to discuss it is hard to say but he does seem to be the first to have published it.[48] Smith holds that humanity possesses a natural propensity to progress over time through four more or less distinct and consecutive stages, each corresponding with the different subsistence modes of hunting, herding, farming and capitalistic commerce. For Smith, a society based on capitalism had attained the way of life destined by Nature and was thus fulfilled. It is important to note here that Smith stated the four stages theory in terms of progress and not simply change. He felt that a society of merchants, governed by democracy and oriented by the sciences, was a better society than one based on hunting, herding and farming, although he did recognize that the world of commerce presupposed an agricultural surplus.[49]

Such a society was "civilized" in contrast to the "primitives" living in other cultures.[50] Smith makes much of the difference between civilized and primitive peoples, itself a point to be discussed later, though he recognizes the importance of their "raw materials" for the economic growth of Europeans.[51] In putting together his theory, Smith drew heavily from the voyage literature of the American Indians, since they inhabited the New World "discovered" by Europeans.[52] The discovery of the New World and its raw goods was for Smith the greatest discovery in human history.

Now what exactly does Smith mean by civilization? Civilization, he argues, presupposes the division of labor[54] and the division of labor presupposes humanity's natural propensity to exchange.[55] For Smith, the propensity to exchange which leads to the division of labor was itself born of the desire for material surplus and wealth which all humans share.[56] Here the "savage other," the Native American, comes into play. Smith argues that humans have a natural desire to accumulate economic surplus; therefore, he says "savages" are not fully human for they have not yet progressed into civilization based on desire for surplus.[57]

Thus, Smith is to credit for the general textbook theory of economics which holds that human beings intrinsically seek a surplus of material wealth. In other words, humans are inherently greedy. The definition of modern economics reflects this same thinking when it discusses humankind's "infinite desire." In Anglo-America this seems so true that it is hardly worth mentioning and yet, because it is so true, it needs to be explored further.

The big problem with the modern understanding of economics centers around the premise of infinite desire that is claimed to be shared by all human beings. Here we return to Smith's stadial theory of progress and positivism itself since it is held that social evolution leads humans from subsistence to surplus economies. The theory of infinite desire goes hand in hand with the theory of social evolution because economics is a social science and social sciences are supposed to explain constitutive aspects of human beings. The argument goes something like this: all people have infinite need and greed and this want leads eventually to commercial and industrial economics. Implicit is the idea that all humans want a surplus of material wealth.[58] But that premise is not so clear. Marshall Sahlins' *Stone Age Economics* remains a classic statement on the economics of hunting-gathering peoples, which demonstrates that wealth is related to want. Wants can

be satisfied in two ways, by producing much or desiring little. Anglo-Americans subscribe to the former theory; Native Americans and other "primitives" to the latter. As he succinctly states, "Want not, lack not."[59] In other words, wealth is largely in the eye of the beholder. Sahlins then goes on to prove that hunter-gatherers work less and enjoy more leisure time than any other people on earth, another point that calls into question capitalistic ethnocentrism. Thus modern economic theory is based on a premise which omits at least ninety percent of human history (the Paleolithic), and all contemporary non-capitalists. Moreover, capitalism embodies, at a foundational level, two other notions that separate it from prior societies.

Usury is a relatively recent innovation in western history, at least within Christian communities. In fact, Christians did not sanction usury for fifteen hundred years, not until the discovery of the New World. (The fact that it flourished nonetheless is another matter.) Martin Luther led the way by legitimating usury for Western Europeans in order to promote economic development.[60] Until that point in time, Christians objected to the practice for religious reasons. Christian love extended to all persons, even enemies. In the eyes of Christianity, every human was a brother. Usury flew in the face of Christian brotherhood and created a universal "otherhood" where each person was an other, not a brother.[61]

Usury, of course, rests on a more basic platform, and again one unknown to Native Americans, profit. Profit is strange indeed. Not the implicit profit in every exchange, the profit that comes from each party's gain in acquiring something they need for the exchange of a less-needed item. That notion of profit is very human and is known to all peoples. The unique profit referred to is something different. Traditionally, humans bartered concrete goods with one another with each acquiring something of value. Various items were made for use by human beings and these were exchanged directly. Certainly this was the case with Native Americans and also with a number of rural communities in Western Europe until the Renaissance.[62] Goods were made and services offered to individuals on a very personal, concrete basis. How different is modern economics. There production is much more abstract and impersonal. The volume is incredible and the exchange between persons of goods and services lacks direct considerations of the people who receive them. Production is mathematical; its goal is money, not humanity. Profit is no longer the

inherent value of human exchange; rather it is an additional something one hopefully receives in an exchange. To not make a profit is to fail, as denoted by the notion of "breaking even." Even the Silk Route, with its caravans of goods and its urban markets involved direct, intimate human contact. In fact it was in the context of those international exchanges that the Confessional religions arose.[63] There people exchanged much more than matter; they circulated religious values that affirmed their common humanity. In a nutshell, as Marx puts it, the ancients made man the objective of production while moderns make production the objective of man, with wealth the objective of production.[64] From a religious perspective, Native American tribes find this new economics worrisome, incomprehensible and inhumane.

But capitalism has a rejoinder; creatures without infinite desire are not fully human—they represent the "primitive" past on the way to "civilization." Until humans became "civilized" they were not complete humans.[65] So now the discussion turns to the "primitive/civilized" structure, another core problem of American Indian law.

The Ideology of Civilized Humanity

At base in Anglo-American jurisprudence are values formative of modern, western, industrial, capitalistic societies—the ideology of civilization. Ideology here refers to Mannheims' definition—those conceptions that are somewhere between a lie based on desire at one extreme, and on the other, a mistake borne of ignorance.[66]

Before delving into problems, western civilization's strong points should be mentioned. The greatest of these is, of course, democratic freedom.[67] "Civilized" humanity devised the greatest program for political freedom in human history—democracy. No other people on earth enjoy the quality of freedom guaranteed by the Constitution of the United States. Let this be admitted at the start. Therefore, it can be argued, the trials and tribulations of the American aborigines, including the genocide of the vast majority,[68] was the price paid for a greater good.

However, conceding the truth of that argument for the purposes of discussion, it must be said that Native Americans disagree that the price was justified. And not simply because of the large numbers of deaths. The advent of Anglo-American freedom paralleled the end of Native American freedom. The former's

gain was the latter's loss. This was so, as Cohen would say, because the means molded the ends that were sought.[69] Proponents of civilization created a surplus population in seeking "freedom" and "public good," one that was never accepted as fully human. Therein lies one of the historically unique aspects of the Anglo conquest of the New World. Peoples have always fought wars and conquered other peoples. Indeed, the Iroquois federation of Native American tribes defeated a number of surrounding tribes and exacted tribute from them.[70] However, important differences remain. European-Americans conquered Native Americans absolutely, never accepting them in their own terms. That is to say, they never accepted Native Americans as fully human—thus such great efforts to civilize them and convert them to Christianity. Iroquois accepted their defeated neighbors as human beings with legitimate religious values and practices. Furthermore, Iroquois did not, aboriginally, systematically destroy food and property during war. The all-out total war of European-Americans was unknown to them. And as for the tribute received, Iroquois became allies who would defend their subjects against all other invaders. Such tribute was nothing compared to the looting that followed Anglo raids. Finally, during the pre-contact era, conquered Native Americans retained their own lands, a far cry from Anglo-American land taking. Land taking was essential to the building of America as even John Marshall perceived quite early.[71]

Above all, "civilization" brought conflicts with Native Americans. Leaving aside all questions of right and wrong, it is clear that the Anglo and Native American orientations to the world were and are different in ways that have manifested themselves in conquest and degradation. Ethnohistorical studies have well-documented the problems for Native Americans of Anglo civilization. What has not been done is to look closely at major cases, treaties and legislative acts, to demonstrate how they implicitly embody the ideology of civilization. Perhaps civilization is viable; perhaps not. But the fact remains that it motivates much of Anglo-American law at an unconscious, unarticulated level, a point difficult to imagine given the otherwise great emphasis that law places on conscious rational analysis. To carry out this discussion, cases decided by the Marshall court will be examined. Those cases are not simply of historical interest; they are cases that laid the foundation for later developments in American Indian law. After that, the focus will shift to treaties and legislative acts.

Johnson v. M'Intosh

Johnson v. M'Intosh remains the basic case in Native American land title theory.[72] Here Justice Marshall set forth a doctrine which has never been seriously questioned, even by justices somewhat sympathetic to Native American concerns. For purposes of this paper, the most significant point to be taken from *Johnson v. M'Intosh* is its exemplification of the ideology of civilization. Marshall outlines very nicely most of the major aspects of civilization, and, of course, in so doing, spells out many points about those "fierce savages," the American Indians.

The case involved lands conveyed by chiefs of the Illinois and Piankeshaw tribes, upon which plaintiff sought ejectment. The issue was whether Native Americans possessed the legal power to give title to individuals. The answer was no. That much is not as interesting as the analysis employed to describe Indian land title. Marshall quickly notes that the European "discoverers" of America were eager to acquire lands and that the "character and religion" of Native Americans, in European eyes, justified conquest, especially given the generous European gifts of "civilization and Christianity."[73] The real legal problem, Marshall notes, concerned settling competing European claims for the lands held by Indian tribes. Actually, both problems were solved with the doctrine of discovery which stated that the discoverer held title against all other European nations as well as native inhabitants.[74] Marshall then notes that while the rights of Native Americans were not entirely destroyed, they were lessened. The crown possessed absolute title while Indians could claim only a right of occupancy, subject to extinguishment by the crown.

Marshall then turns immediately to Adam Smith's stadial theory of progress and says the Court "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."[75] Instead Marshall rests Anglo title in conquest, a title that is "acquired and maintained by force."[76]

Next Marshall waxes historic and notes the general tendency for conquerors to avoid wanton oppression of the conquered. Furthermore, the vanquished are usually fully assimilated with the victorious until all become a single society. Where this is the case, "humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired;

that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers."[77] The basic point Marshall makes is that the "character and religion" of the American Indians justified conquest in light of the "superior genius" of Europe. Implicit here, as argued earlier, is the idea that Native Americans were culturally and spiritually deficient, a flaw that warranted invasion and land taking. However, all was not bleak for Indians since their reward was "civilization and Christianity." In other words, the natives lose their land but gain at least a shot at complete humanity. Or do they?

Marshall quickly notes that assimilation to civilized humanity was not possible with regard to Native Americans. As he puts it:

> [T]he 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 high-spirited as they were fierce. . . . What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix. . . .[78]

Anglos, of course, chose the sword, coloring it with religious symbolism.[79] They had no choice once they decided to stay because the law which traditionally applied to the conquered was inapplicable. Marshall then goes on to explain that might is right, however "extravagant the pretension of converting the discovery of an inhabited country into conquest may appear. . . ."[80] Under this situation Native Americans are to be considered mere occupants in possession without right to transfer title to others. That this was strange doctrine Marshall freely admitted. Nonetheless, the circumstances warranted such a policy; "However, this restriction be opposed to natural right, and to the usages of civilized nations, yet, if it be adapted the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice."[81]

In the end aboriginal title yields to the European discoverer. As Marshall writes, "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."[82]

Thus spoke Justice Marshall. The references to civilization are overt, dogmatic, and numerous.

Historically, *M'Intosh* demonstrates the widespread significance of Adam Smith's theory of progress as Marshall apparently makes reference to it. At this point of the opinion Marshall avoids further discussion of civilization and jumps straight into an apology for conquest. He notes the unusual character of the Anglo treatment of Native Americans but quickly justifies it because the natives are "fierce savages." Very quickly the ideology of civilization resurfaces. Marshall's first point is that the savages were occupied by war, a point not borne out by history.[83] Aboriginal warfare was far from being constant or large-scale. Casualties were few and far between and elaborate, solemn purification rituals followed the killing of an enemy to prevent retribution by both the enemy's gods and his own.[84] True, agricultural tribes warred more than hunters, but none fought all-out wars until they faced the armies of the white man.[85]

As for his comment that most Native Americans drew subsistence from the forest, Marshall delineates still another facet of civilized ideology.[86] Hunter-gatherers roamed from place to place and hence had no real claim to the land. Such was the view of Emmerich de Vattel, a noted eighteenth-century international law commentator who exercised great influence in America.[87] Two points emerge here. First, a good number of Americans were horticulturists, not hunters. Second, hunters migrate within well-defined boundaries which constitute their world.[88] The misperception/deceit of Anglos is obvious—deny that Native American hunters have any conception of property rights and deny that Native American agriculturists existed. Thus there was no civilization, at least not to which active Anglos could subscribe.

The Cherokee Cases

Two Cherokee cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, soon followed *Johnson v. M'Intosh* and established other, in this case, more supportive policies with regard to Native American legal rights. Unfortunately, the precedents laid

down in these cases have not lived without criticism and erosion.[89] Both cases involved attempts by the state of Georgia and the Congress to exercise dominion over Cherokee lands situated in Georgia.

The first case was *Cherokee Nation* (1831). In 1827 Georgia claimed that their sovereign laws extended to the Cherokee whose land claim was but a tenancy at will.[90] A series of statutes were then passed voiding all laws and claims of the Indians and licensing whites to seek residence there. Then, in 1830, under the influence of Georgia delegates, Congress passed a statute calling for the removal of Cherokees from Georgia. The Cherokee decided to take their grievances to the Supreme Court.

On the surface the main issue before the Court was jurisdictional: Did the Supreme Court have original jurisdiction? The answer was no. This seems strange as Swindler notes because Chief Justice Marshall was a great supporter of federal power based on the commerce clause of the Constitution.[91] In fact, his support of the commerce clause was so strong that he demonstrated it through the popular press. The Constitution itself seems clear on this point; Congress had the power "To regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes."[92]

Burke argues that jurisdiction was not in fact the real issue before the Court in *Cherokee Nation*.[93] Controversy surrounded the case and a clash with a popular President Jackson seemed imminent. Popular opinion on tribal political status had factionalized into two camps, both agreeing that tribes were either foreign or subject nations. Marshall averted the issue here by denying jurisdiction but went on to say that tribes were neither foreign nations nor subject states. Rather, they were best described as "domestic dependent nations."[94] In that sense, their relation to the federal government "resembles that of a ward to his guardian."[95]

The very next year, the question of Native American sovereignty received more work in *Worcester v. Georgia*. Worcester was a white missionary living among the Cherokee who was arrested and convicted for refusing to obtain a Georgia license and pledge allegiance to the state. Reverend Worcester was granted review by the Supreme Court.

Marshall now reviewed the significance of the commerce clause for Native Americans and held that Georgia did not have jurisdiction over Native Americans. He wrote:

> 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.[96]

Treaties

Many of the valuable rights preserved by Native Americans are held in treaties, most of which are described as "forever" or "permanent."[97] The majority of such treaties relate to rights on reservations which were themselves created by treaty. Treaty rights are held with respect according to the Constitution, which declared them to be the "supreme Law of the Land."[98] True, in *Reid v. Covert*,[99] the Supreme Court held that treaties are also subject to constitutional review, but that case was not decided until several generations had elapsed after the last Native American treaty was established. Thus, at the time treaties with Native Americans were negotiated and effected, they were understood by the Court as agreements between sovereign nations.[100]

However, treaty rights can be abrogated unilaterally by Congress.[101] The rationale here is that treaties represent national policy at the time it was made. Changed circumstances, like conquest, may demand modification of treaty terms, in whole or part.[102]

When treaty rights are abrogated the general remedy is *cash* compensation.[103] Needless to say, this policy presents major difficulties for Native Americans whose reservation lands are not reducible in value to dollars and cents. Land is intrinsically related to religion and tribal identity, phenomena that have no monetary value. However, this point is rarely raised by courts wishing to avoid first amendment issues or when it is, some compelling governmental concern can be found which outweighs it. Differences between Native and Anglo American views of land have already been discussed, the essential point being that land for Native Americans is a "sacred and inalienable mother" while

for whites it is a "commodity."[104] In fact it was this understanding of land as sacred that prompted a Blackfoot chief to refuse to sign a treaty, stating:

> Our land is more valuable than your money. It will last forever. . . .It was put here for us by the Great Spirit and we cannot sell it because it does not belong to us. You can count your money and burn it within the nod of a buffalo's head, but only the Great Spirit can count the grains of sand and the blades of grass of these plains. As a present to you, we will give you anything we have that you can take with you; but the land, never.[105]

Treaty rights are important and should not be abrogated by Congress unless "consistent with perfect good faith toward the Indians."[106] Two problems have emerged here, one with respect to congressional good faith, the other with the fact of abrogation. The test of congressional good faith is difficult to gauge, especially given the history of Anglo ignorance, greed and differences in world view. We point to the problem and move on. The second problem, that of treaty abrogation, is equally difficult. Simply stated, it is this: when has Congress abrogated a Native American treaty? The Supreme Court has developed a number of rules concerning Native American treaty construction which create a strong presumption that treaty rights have not been abrogated.[107] In essence, these rules require that Congress show a "clear and plain" intention to abrogate Indian treaty rights. How this is to be done is not very well articulated in the cases. Some courts have required that an intention to modify treaty rights must be explicitly stated in the statute,[108] but the weight of authority holds that clear and reliable evidence from the statute's legislative history is sufficient.[109] Formally, Congress has abrogated only one Native American treaty, and that occurred in 1862 as a result of war between Minnesota and the eastern Sioux.[110] More often, Congress passed a statute that conflicts with an earlier treaty. Unless the statute clearly references the treaty, the problem of ascertaining intent from legislative history arises, often with inconsistent results. For example, in *Lone Wolf v. Hitchcock*, the federal government attempted to get 2.5 million acres of Kiowa, Comanche and Kiowa-Apache lands.[111] The 1867 treaty required three-fourths of the adult males of the tribe to approve the transfer, which was not obtained. Nevertheless, the Senate passed an act that differed greatly from the original agreement.

Lone Wolf then sued Hitchcock, the Secretary of the Interior, to enjoin the statute because it violated the treaty. Justice Edward D. White of the Supreme Court held that Congress could do whatever it wished with Indian lands in a national emergency. Strangely, though, Justice White was never able to find such an emergency and in the end said there was no treaty violation since the confiscation of tribal lands was merely another form of investment for the tribe.

For the Sioux in *United States v. Sioux Nation of Indians,* the situation was different.[112] Here, after a century-long struggle, the Court held the congressional statute of 1877 divesting the Sioux of all rights to the Black Hills did abrogate the Fort Laramie treaty of 1868. The result? Monetary damages. The Sioux's response was twofold. Fist, the Sioux objected to the taking of sacred land at any price, particularly the Black Hills, which are a major pilgrimage site. Second, if money damages were to be awarded, compensation should be made for the fair market value, not the value of the land in the nineteenth century, without interest.[113]

At any rate, from the Native American viewpoint, every treaty made with Anglo Americans has been violated. In 1871 Congress enacted legislation which brought to an end any further treaty making with Native Americans.[114] A review of cases since 1871 casts shadows of doubt on the proposition that prior treaties are to be honored.[115]

With the passage of the 1871 act, statutes emerged as the controlling force in relations between the United States and Native Americans.[116] Before leaving the topic of treaties another point needs to be made. It is sometimes said that, all things considered, Anglo treatment of Native American land claims were just.[117] Even Cohen has written that: "There is no nation on the face of the earth which has set for itself so high a standard of dealing with a native aboriginal people as the United States and no nation on earth that has been more self-critical in seeking to rectify its deviations from those high standards."[118] Cohen admits that some wrongs occurred in the past but argues that they were understandable over a 150-year history in which the transfer of over two million square miles of land, "probably the largest real estate transaction in the history of the world,"[119] took place.

That view is difficult to entertain with the development of ethnohistorical research. A number of clever strategies were utilized by the colonists to win land "legally" from the aborigines. That the negotiations were unsatisfactory was irrelevant as long as

Anglos satisfied their legal consciences.[120] One favorite method was to select friendly natives as "chiefs" and buy the land from them.[121] Another method was the use of bribery, coercion and fraud by negotiators for the United States.[122] Use of the language barrier was also frequent. Here federal negotiators would often "read" a treaty in a native language, obtain signatures, and then inform the aborigines that the treaty held something different. When Native Americans protested, they were told they had signed a written document that was binding.[123] Other equally questionable methods were utilized, all of which raise issues of justice and fair play.[124]

The Supreme Court has taken notice of the above problems and developed the rule that ambiguous provisions must be resolved in favor of Native Americans,[125] that treaties be liberally construed for Native Americans,[126] and that they be read as Native Americans would have understood them.[127] On its face, that rule would seem to end past treaty wrongs, but the cases hold differently.[128] At least the treaty period pays some attention to Native American intentions and understandings. That presumption changes with congressional statutes, where the courts seek to arrive at the intent of Congress, not Native Americans.[129]

Agreements

Cohen notes that the primary reason for termination of treaty making in 1871 was political—to increase congressional power over Native Americans.[130] But the effect was more of the same. Negotiations with tribes now resulted in "agreements" and were ratified by both houses of Congress.[131] Motivating the new emphasis on legislative control was the theory of assimilation.[132] With the rapid move of the Anglos to the West, additional Indian lands were needed. What was needed, then, was a theory of land taking which was arguably beneficial to Native Americans. Assimilation became that theory. If Native Americans became "civilized" they would better utilize their lands and would need less, the surplus going to white settlers. Such a loss was justified on the basis that civilization (i.e. humanity) would progress as a whole.[133] Besides, assimilation would ultimately benefit Native Americans as well by ridding them of their "savage" tribal heritage.[134] But how to effect this intent?

In 1887, Congress passed the General Allotment Act, better known as the Dawes Act.[135] The original Dawes Act allotted to

each head of household 160 acres and 40 acres to minors. In 1891, this was amended to give 80 acres of agricultural land or 160 acres of grazing land to each Native American.[136] It is interesting to note that whites understood enough about traditional Native American views of land to realize that the enactment of the Dawes Act would help destroy tribal heritage and promote assimilation into the mainstream. Assimilation was also pushed hard by a number of proponents of Native American rights to help them progress to civilization.[137] Assimilation was needed because the difference in native and white views of property was fundamental.[138] Said one Indian Affairs Annual Report, "Common property and civilization cannot coexist."[139]

Allotment was followed by federally supported education programs for the Native American.[140] Again the goal was assimilation into the American mainstream. Schooling was important; above all it was to provide Native American children with a civilized homelife.[141] Federal policy aimed at replacing Native American history, culture, religion and language with that of whites.[142] Little education was provided for Native American adults because they were less amenable to such cultural change. Thus, the focus was Native American children for in them lay the red man's hope for a civlized future.[143]

This is not the place to delve into the inhumane brutalities executed by early educators of Native Americans. They are well-documented and need not be discussed here.[144] Besides, utilitarian/social progress supporters will claim that the end (civilization) justified the means, at least for the general public good. It should be noted, however, that Native Americans did not universally (and still do not) welcome programs of assimilation. And here lies the greatest irony of assimilation. For the most part, Native Americans did not want to become like Anglo Americans, even if granted full admission into the mainstream. This point is rarely made. Even well-meaning assimilationist proponents cannot seem to transcend their civlized orientation enough to see that Native Americans simply do not wish to subscribe. For some reason, or perhaps for no good reason at all, Anglo Americans assume their world view and way of life are the best possible. While all peoples are a bit ethnocentric and think their way of life is best for them, few think their lifestyle is best for all others as well. Or if they do, they rarely think their culture so excellent as to force it upon others against their wills in order to bring them humanity and religion. This mentality, that Native Americans

were godless and less than human, motivated much of Anglo-American law and policy.[145] Andrew Jackson even used it to justify removal of the Five Civilized Tribes, saying that relocation "will . . . perhaps cause them gradually, under the protection of the government and through the influence of good counsels to cast off their savage habits and become an interesting, civilized and Christian community."[146]

It is particularly interesting that Jackson spoke so poorly of the Five Civilized Tribes, including the Cherokee. The Cherokee had long before embraced Christianity and Anglo dress, developed a written language and a tribal newspaper, and a system of government and supreme court modeled after democratic lines, the latter fifty years before the state of Georgia.[147] The most puzzling thing about this last point is that the Cherokee were victorious before the United States Supreme Court against Georgia in *Worcester*, and it was this decision which prompted Jackson to exclaim, "John Marshall has made his decision, now let him enforce it."[148] Why he would not wish to execute the decision is hard to understand. First, the Cherokee, by all tangible and articulate standards, were Christian and civilized, arguably more so than most Georgians. Second, John Ross, chief of the Cherokee, had been Jackson's Colonel for over 20 years.[149] Indeed, it was with Cherokee help that the United States, under General Jackson, won the decisive Battle of Horseshoe Bend, a victory that helped Jackson become President. How Jackson could blind himself to all this is difficult to understand. But the more important point concerns the impossibility of Native American assimilation to civilization, even when they tried. Cherokees did not intrinsically wish to become like white men, but were willing to do so to save their lands and traditions. Overtly, Anglos invited assimilation, but the duplicity of the invitation is obvious.

It is within this background that the Native American quest for religious freedom lives and breathes. The duplicity of civilization has manifested itself in the arena of religious orientation and colors even the construction of the Constitution's first amendments rights of religious life.

Religious Freedom Under the Constitution

The United States Constitution, under the first amendment, guarantees the free exercise of religion.[150] This freedom is, however, not absolute with regard to religious practice. The United

States Supreme Court has distinguished religious beliefs, which are protected under the first amendment, from religious practices, which are not necessarily sheltered.[151] Until recently, if the government could establish a compelling state interest to the contrary, limits could be placed on certain activities under the free exercise clause.[152] This doctrine was summarized by the Supreme Court as follows: "The essence of all that has been said and written on the subject is that only those interests of the highest order . . . can over balance legitimate claims to the free exercise of religion."[153] Or, in another case, "only the gravest abuses, endangering paramount interests, give occasions for permissible limitation."[154] All of that was prior to *Lyng*. In 1988, the Court essentially rejected the compelling state interest test and held that government interference with religious beliefs was permissible unless it coerced individuals to violate their religious beliefs.[155]

The question next arises as to what is a legitimate, legally recognized religion? By and large Court has left this question alone. It is not clear why this is so though a New Jersey court argues that such activity would violate the establishment clause by effecting an implicit state religion.[156]

However, the courts have discussed religious practices that are entitled to first amendment protection. Those practices that play a "central role" or are a "cornerstone" of religious exercise receive greatest consideration.[157] Furthermore, to be protected under the free exercise clause, religious practices must be deeply rooted in religious beliefs.[158] Courts will not look into the truth or validity of the belief but are concerned with its sincerity.[159]

A big problem for Native American tribal plaintiffs has been the general bias of the courts toward the Judeo-Christian religious tradition in determining religious issues.[160] Broad differences between Christianity and Native American religions were alluded to earlier; others will be outlined shortly. Those differences present a major obstacle for Native American litigants because of both ignorance of the unfamiliar and prejudice for the familiar. We say ignorance and prejudice because it is difficult to explain the following cases in simply legal terms, given the Court's emphasis on sincerity of belief and their construction of the first amendment to favor no single religion.[161] Furthermore, it should be noted that all religions share important structural similarities,[162] and one must wonder why these are rarely brought to judicial light. As Eliade once remarked, "It is the scale that makes the phenomenon."[163] Perspective is everything in a sense.[164] If

one seeks similarities, one often finds them; the reverse is also true.

The bias in favor of Christianity was evidenced by the Court in *Yoder,* a case involving the Amish.[165] As noted above, *Yoder,* held that few other groups could meet the Court's requirements. Is this because the Court's test was intrinsically stringent or because it was subsequently applied in Native American cases *ad hominem*?

Sequoyah v. TVA

In 1979 a couple of Cherokee tribal organizations and three individual members sought to enjoin the Tennessee Valley Authority from damming the Little Tennessee River.[166] The creation of the Tellico Reservoir would flood Cherokee ancestral burial grounds as well as the ceremonial center of their sacred lands.[167] The District Court for the Eastern District of Tennessee dismissed the motion and granted the defendant's motion to dismiss.

The Cherokee plaintiffs rested their action primarily on the free exercise clause of the first amendment. Even though the court recognized the sacred significance of the land for Cherokees, they did not grant the injunctive relief sought. They summarized eight free exercise cases and then outlined in two sentences their core understanding of free exercise violations: "An essential element to a claim under the free exercise clause is some form of governmental coercion of actions which are contrary to religious belief" and "This government coercion may take the form of pressuring or forcing individuals not to participate in religious practices."[168]

No coercive effect on Cherokees was found. The second part of the court's test was never analyzed. Instead the court cited precedent that there can be no violation of free exercise on government property that is normally closed to the public.[169] The troublesome aspect of this property right theory harks back to issues raised earlier concerning Native American land rights. The Cherokee did not legally own or possess the Tellico area because the government had forcibly removed them from it in defiance of a Supreme Court decision to the contrary. Thus Stambor argues that, "The court's reliance on this lack of a property interest is an insensitive, inequitable, and irresponsible evasion of the more difficult constitutional claim that the Indians raised."[170]

On appeal the dismissal of the motion for injunctive relief was affirmed. The Sixth Circuit, however, did not follow the district court's property interest analysis. Instead they chose to label the plaintiff's claims as cultural, not religious, thus sidestepping the free exercise question.[171] It was fear of loss of cultural heritage, not religious rights, that were in question here. This analysis is questionable. For Native Americans, religion is inseparably related to all significant aspects of life. Even were the Tellico area primarily of cultural interest by Anglo standards, for Native Americans culture is religious. But that is not all. The Tellico area embodied the place of the beginning, the locus of creation for the Cherokee.[172] Hundreds of religious studies from all over the globe have indicated the central, fundamental, indispensable and essential religious significance of ceremonial centers.[173] In a nutshell, the center is the *sine qua non* of traditional religious orientations.[174] Thus to label Tellico cultural rather than religious is like saying the same about salvation's role for Christianity. But nevertheless, the court held that the Little Tennessee River Valley was not the "theological heart" of Cherokee religion. It also seems strange that *Sequoyah* was not decided the other way on the basis of the centrality test of *Yoder*. Religious claims concerning the place of creation and the locus of sacred powers seem "central," more so than Amish desires to avoid public education.[175]

Another problem with *Sequoyah* is posed by the Eighth Circuit's opinion in *Teterud v. Burns*. There the court stated that it was not necessary for Teterud to prove that wearing long hair in braids was an "absolute tenet" of his Native American religion. Instead, "Proof that the practice is deeply rooted in religious belief is sufficient."[176] The *Sequoyah* court considered *Teterud* and then held it inapplicable to the *Sequoyah* fact situation.[177]

Badoni v. Higginson

In 1974 eight Navajos, including three medicine men, sought to enjoin the raising of Lake Powell and the tourist traffic which desecrated Rainbow Bridge, a sacred Navajo monument.[178] As in *Sequoyah*, the principal claim was based on the free exercise clause of the first amendment. The defendants, the Bureau of Reclamation, the National Park Service, and the Department of Interior, moved for judgment on the pleadings. The court granted them summary judgment.

The court first held that the Navajo plaintiffs had no property right to Rainbow Bridge National Monument. It cited no authority. The plaintiffs sought to defend ancient claims to the area but to no avail. Furthermore, the *Badoni* court held that even if the Navajos had a first amendment claim, "the interests of defendants would clearly outweigh the interest of plaintiffs."[179] Finally, quoting *Yoder*, it was held that the Navajo claims were not based on "deep religious conviction, shared by an organized group and intimately related to daily living."[180]

In applying *Yoder* to the facts at hand, the court held that the Navajo did not, in fact, state a religious claim. The Navajo medicine men were not "recognized by the Navajo nation," and the rituals were not performed enough to receive constitutional protection. The first point seems strange when earlier the court found that the medicine men plaintiffs "are qualified and recognized among their people as medicine men."[181] The second point simply reflects ignorance and/or dislike of traditional Native American religions. Ceremonies are held periodically, either according to seasonal change, human developmental stages, or need. Within those categories, regularity of performance is maintained. It seems that the *Badoni* court evaluated Navajo ceremonialism by the standard of weekly church service and concluded that the rites were carried out too sporadically to be central to their religion.

Finally, on appeal the Tenth Circuit stated that even if the Navajo claim were genuinely religious, the granting of relief would violate the establishment clause,[182] a traditional governmental defense in free exercise claims.[183] Recent commentators have shown that the framers clearly intended the individual rights of free exercise to be more basic than the establishment clause's purported purpose of separation of church and state.[184] In an impressively detailed historical examination of the first amendment, it has been shown that both Madison and Justice Story felt that the primary purpose of the establishment clause was to foster free exercise of religion by not establishing a national religion.[185] As for free exercise itself, Justice Story held that the government could aid but not infringe upon that free exercise.[186] Unfortunately, a number of pivotal Supreme Court decisions have failed to note this and consequently the establishment clause has subordinated the free exercise clause.[187]

Furthermore, the Navajo plaintiff argued that they were not asking for affirmative governmental support; rather, they were

asking that government interference with religious freedom be stopped. The *Nyquist* test, as framed by the *Badoni* court, states that the challenged government action must neither advance nor inhibit religion.[188] In *Badoni* the court stressed the former over the latter, again demonstrating the significance of perspective. As Stambur notes, "Rather than ask whether acceding to the Navajo request would implicate the government in an action that has as its primary effect the advancement of the Navajo religion, the court should have inquired whether government refusal to modify its injurious activity impermissibly inhibited the Navajo in the free exercise of their religion."[189]

Wilson v. Block

The Hopi and Navajo tribes in 1983 sought to enjoin the Department of Agriculture from permitting private interests to expand the government-owned Snow Bowl ski area located on the San Francisco Peaks—just north of Flagstaff, Arizona.[190] The District Court for the District of Columbia granted the defendant's summary judgment and the case was appealed to the Second Circuit. They affirmed.

The plaintiffs stressed that the San Francisco Peaks are sacred and the further development of the Snow Bowl would violate their right to freely exercise their religion. The court disagreed. Plaintiffs cited two Supreme Court cases to support their position. In *Sherbert*, the plaintiff was a Seventh-Day Adventist whose employment was terminated because she refused to work on Sunday. The South Carolina Employment Security Commission refused plaintiff's application for unemployment benefits and she brought suit. The Supreme Court, on appeal, held that the government burdens the free exercise of religion when it conditions reception of a government benefit on conduct that violates religious beliefs.[191] Similarly, in *Thomas*, the plaintiff, who was a Jehovah's Witness, was denied employment benefits when he refused to violate his religious beliefs by working at a factory that produced weapons. The Supreme Court reversed for plaintiff and stated that the government burdens free exercise of religion when it forces a person to choose between a government benefit and loyalty to religious belief.

The plaintiffs in *Wilson*, relying on *Sherbert* and *Thomas*, argued that further development of the Snow Bowl impermissibly burdened their religious belief.[192] This was supported by testimony

by a Hopi who stated that expansion of the Snow Bowl would have a "direct and negative impact upon our religious practices."[193] The court, without questioning the sincerity of the plaintiff's beliefs, denied relief through a narrow reading of *Sherbert* and *Thomas*. The plaintiffs read those cases broadly as holding that the government could not directly or indirectly act as to encourage religious practitioners to modify their beliefs. The Second Circuit disagreed, saying that:

> *Sherbert* and *Thomas* hold only that the government may not, by conditioning benefits, penalize adherence to religious belief. Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion.[194]

No such penalty was found.

The court then addressed the issue of religious practice. The plaintiffs argued that they must have access to the San Francisco Peaks to practice their religions. The Second Circuit followed the District Court's use of the *Sequoyah* analysis, and held that "the plaintiffs had failed to show the indispensability of the Snow Bowl to the practice of their religions."[195] The plaintiffs, to evoke first amendment protection, "must at a minimum demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."[196] And that is only a necessary but not sufficient test to gain protection.[197]

The plaintiffs responded, stating that even if that is the standard, their claim qualifies since the religious practices performed in the Snow Bowl are indispensable to their religion such that expansion will make performance more difficult.[198] The government submitted affidavits from two experts on Hopi and Navajo religion who argued that the impact on religious practice would be slight.[199] Also, it was shown that the proposed expansion will not prevent plaintiffs "from performing ceremonies or collecting objects that can be performed or collected in the Snow Bowl but nowhere else."[200] That was perhaps the determining point for the court, notwithstanding the plaintiff's contention that the entire mountain was sacred, not just parts.[201] Finally, the court noted that the plaintiffs had successfully practiced their religion for over fifty years since the original construction of the Snow Bowl ski

area.[202] This argument is interesting and points to a dilemma in Native American religious claims. To make religious claims, Native Americans must prove the existence and sincerity of their religion. The *Wilson* plaintiffs wished to emphasize that development of sacred lands hurts their religion. However, they cannot very well argue that it totally destroys religion for then they would in effect admit that their religion was already dead by virtue of prior development. Thus they are between a rock and a hard place.

Lyng v. Northwest Indian Cemetery Protective Association

In 1982, an Indian tribal organization, individual Indians, nature organizations, and the State of California challenged earlier administrative decisions to allow road-building and timber-harvesting in the Chimney Rock area of the Six Rivers National Forest. Yurok, Karok and Tolowa Indians historically used the area in question for religious purposes. After a trial the District Court of Northern California issued a permanent injunction stopping the government's plan to build a six-mile stretch of paved road through the Chimney Rock section and harvest timber.[203] The court held that both actions would violate the Indians' right to religious freedom. The Ninth Circuit affirmed in part.[204] The majority found that the government had failed to demonstrate a compelling interest in completing the road, which was necessary due to the adverse impact on Indian religious practices.[205] On April 19, 1988 the Supreme Court reversed the decision of the circuit court.[206] A divided Court reasoned the First Amendment centers around the word "prohibit."[207] As Justice O'Connor wrote, "This 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 individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[208]

The Court rested its analysis on *Bowen v. Roy.*[209] There two applicants for welfare assistance challenged a federal statute requiring Social Security numbers, claiming the number would "rob the spirit" of their two-year-old daughter.[210] That challenge failed. The Supreme Court ruled that the Social Security was part of the government's internal procedure and did not prohibit the free exercise of religion.[211]

By analogy, the majority in *Lyng* held that the plaintiff's attempt "to distinguish *Roy* are unavailing."[212] They rejected the arguments that the infringement on religious liberty in *Lyng* was "significantly greater" or is different because "the government action is not at some physically removed location where it places no restriction on what a practitioner may do."[213]

In the end, the "G–0" road would be paved because there was neither governmental coercion nor punishment or religious activities.[214]

The majority rejects the *Yoder* "centrality" test, claiming that the dissent "misreads *Wisconsin v. Yoder*."[215] The statute in *Yoder* would have compelled the Amish to violate their religion and thus was struck down, not because it violated indispensable Amish beliefs, but because it prohibited Amish religious freedom.

But the real reason behind *Lyng* may have been land. Plaintiffs worshipped the sacred on government land and in the end O'Connor notes that, "Whatever rights the Indians may have to use of the area, however, those rights do not divest the government of its right to use what is, after all, *its* land."[216]

American Indian Religious Freedom Act

In 1978 Congress, in recognition of past suppression of traditional Native American religious rights, enacted the American Indian Religious Freedom Act (AIRFA).[217] The Act cites ignorance and insensitivity as two major reasons for encroachments upon Native American religious expression and seeks to remedy free exercise infringements within the limited scope of federal agencies. The purpose of the AIRFA is "to insure that the policies and procedures of various federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion."[218] The essence of the AIRFA is its intent to "protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites."[219]

Most suits brought under the Act have been concerned with sacred sites; thus far Native Americans have yet to succeed.[220]

Included among the cases are claims by Yurok, Karok, and Tolowa (*Northwest*); Oglala Lakota (*Oglala*); Lakota (Sioux) and Tsistsistas (Cheyenne) (*Crow*); Hopi and Navajo (*Wilson*); Navajo (*Badoni*) and Cherokee (*Sequoyah*).[221] In all those cases the free exercise claims were defeated on all theories, including appeals to AIRFA. That history has led one commentator to criticize the Act as a "basically toothless Congressional resolution."[222]

One of the biggest problems with the AIRFA is its construction by courts who arguably give too much weight to the establishment clause. That is ultimately a matter of first amendment interpretation which, though arguably incorrect, has been upheld in numerous decisions.[223]

One of the most curious facts surrounding the creation and enactment of AIRFA is its almost total neglect of scholarly studies of Native American religion.[224] This seems strange given the Act's alleged desire to correct past federal wrongs due to ignorance and sensitivity.[225] The Introduction to the Federal Agencies Task Force Report outlines the contrasts between Native American and Western religions, classifying the former as "continuing" and the latter as "commemorative."[226] The biggest difference, according to the commentator, surrounds each religion's respective views of creation, Native Americans viewing creation as a continuing process, in which the creator is imminent, Anglos perceiving the creator as discrete from the creation. However, this distinction is overdrawn.[227] And it is precisely the Act's tendency to stress differences over relationships that best reflect the Act's embodiment of civilized ideology. In fact, another commentator insightfully notes that little understanding is gained by blaming past violations on ignorance and insensitivity.[228] Rather the tensions have more to do with conflicts between two peoples who emphasize different core values, all within the context of conquest and colonialism. It is tempting to say "live and let live," which Native Americans have essentially done, but that view succeeds only if it is reciprocated by the other side. Unfortunately for Native Americans, civilization, by definition, negates the significance and humanity of Native American religions and attributes to them little power.

Part of the difference relates to each society's embodiment and expression of myth as a structure of perception. Native Americans are mythic peoples; Anglos are historical. Native Americans perceive connections across time and space that give their world

a unity and timelessness that modern, civilized humanity does not see. Numerous studies have concentrated on this issue of mythic and historical modes of apprehension.[229] Western, positivistic, post-Enlightenment humanity, in the name of progress and civilization, has emphasized the rational, critical side of experience while obscuring the mythical to an unprecedented degree. Whether right or wrong such emphasis has hindered the understanding of Native American religions and speaks poorly for the AIRFA.

The Archaeological Problem

The Anglo misunderstanding of myth is most evident in claims to maintain possession of sacred objects unearthed by archaeologists. A number of tribes have made significant efforts to regain possession of sacred objects taken from archaeological sites.[230] Some museums are cooperative; most are not.

In an attempt to curtail the taking of sacred artifacts from Native American lands, Congress enacted the Act for the Preservation of American Antiquities.[231] The Act makes it illegal for anyone to take, excavate or harm any object of antiquity situated on government lands without government permission.[232] This seems good at first glance and is, except for its lack of definition of terms like "ruin," "monument," or "object of antiquity." In *Diaz* the Ninth Circuit held the statute to be unconstitutionally vague.[233] The case was an appeal from a conviction for theft of sacred masks from the San Carlos Indian Resrvation. Attempts by an anthropologist and an Apache medicine man to define "objects of antiquity" were rejected by the court.[234]

Congress then in 1979 attempted to redress the definitional problem of the Antiquities Act by enacting another statute, the Archaeological Resources Protection Act.[235] Under the statute, an item is not considered an "archaeological resource" unless it is at least 100 years of age.[236] Thus sacred objects made 95 years ago are not protected. The problem here is that antiquity is for Native Americans more a matter of perception than historical dating. Recently manufactured objects are sometimes invested with sacrality as their essence, which is spiritual and is perceived as timeless.[237] Indeed, the Apache medicine man in *Diaz* admitted that the masks in question were made arounhd 1969 or 1970. Nonetheless, he claimed that they were religious objects of great sacred

significance. If sincerity of belief is a standard of judging the merits of a free exercise claim, then it seems that the various archaeological statues would incorporate the Native American view of the matter.

Other Problems

Another major concern for Native American litigants is the court's almost total reliance on Anglo American perspective. Native Americans' own views of matters are rarely heard and if they are, it is within a subordinate context. Reference has already been made to the ethnocentrism that pervades legal discussions of religion. But there is another component as well—the fact that Native Americans must adopt Anglo legal categories to adjudicate their claims. And since Anglo American legal concepts are largely incompatible with Native American modes of experience, a difficult situation arises in which Native Americans seek relief through a process and language that do not truly embody their perspective. A few commentators have noticed this problem in part but it remains basically unresolved.[238]

A related problem is the generally poor scholarship in legal circles, especially with regard to Native American religions. Clinton argues that much of the fault lies with scholars whose work is too theoretical.[239] Indeed, he calls for more scholarly works that attempt to address contemporary legal issues.[240] However, it seems to me that there is plenty of academic material that is relevant for the issues of American Indian law but the poor communication between disciplines prevents its application. As a result, legal commentators too often paint a rather inaccurate picture of Native American religions. This is true even for Native American supporters.[241] In their desire to advocate Native American interests, they often say too much and portray their clients romantically as something more than human. Or they lack the proper disciplinary training to understand the phenomenon they address, the critical skills necessary to review competently the scholarly literature, and often they rely on rather general and/or popular works. The problem, of course, cuts both ways for scholars who lack formal legal training generally fare poorly in legal research.

Still another thorn for Native American litigants is the historical instability of federal policy that has undergone a number of stages, including removal, reservation establishment, allotment

and assimilation, termination and self-determination.[242] For example, federal statutes enacted during the period of assimilationist policies often maintain legal consequences in the present, when the congressional perspective of Native American issues is very different. In other words, sheer recourse to historical construction of contemporary issues simply will not work.[243] A number of present legal problems did not surface when many statutes were enacted and thus it is not always rational to apply outmoded legislation to unprecedented circumstances.

At the same time, this is not to say that sound past policies should be ignored. Canby has recently noted a couple of problematic trends in Native American case law that modify the policy of tribal sovereignty that was established in the Cherokee cases.[244] The first trend began in 1973 with *McClanahan v. Arizona State Tax Commission*.[245] There the Supreme Court unanimously held that the State of Arizona could not place an income tax on Navajo income earned on the reservation. That is not surprising. What is surprising is the Court's basis for the decision. Noting a trend away from tribal sovereignty, the Court emphasizes federal preemption as a bar to state jurisdiction over tribes. The federal preemption theory is "extremely fact-specific."[246] As a consequence, decisions are more unpredictable that before. And in *Rice v. Rehner* the Supreme Court further decreased tribal sovereignty by holding that the preemption analysis turns on whether the activity in question was traditionally under the tribe's control.[247] Justices Blackman, Brennan and Marshall dissented, noting that federal policy simply favors denying states power over tribes and criticizes the lack of precedent for this new standard.[248]

Implicitly, *Rice* creates a vacuum and simultaneously gives the state increasing power to fill it. The trend towards increased state power over Native Americans is also paradoxically supported by self-determination.[249] One wonders if the policy of self-determination might be used to passively dominate Native Americans by withdrawing needed federal support before tribes are ready to walk on their own. Canby supports this idea by demonstrating that self-determination decreases tribal power by making tribes more vulnerable to state and private interests.[250]

Conclusion

To say the least, fundamental problems define the character of American Indian law, especially with respect to issues of tribal

free exercise of religion. The issues are stated within a legal context but ultimately point beyond to the realm of world view. In the end the question is one of truth, reality and power. For Native American tribes, truth is mythological; for Anglo jurists it is logical. Reality is spiritual for traditional Native Americans, material for Anglo legalists. And finally, there is the question of power. It is often said that Anglos exercise a "might makes right" philosophy and indeed they do. But the same is true for Native Americans. However, the two peoples perceive the locus of power to be quite different. Anglo legalists emphasize human, political power while Native American tribes stress the power of the world that creates and sustains them. This difference in world view is legally significant because tribes are the politically subordinate party in the dispute over religious freedom and may contest the dominant society only by employing the language of a foreign world.

"To each is own," says one; "to the victor goes the spoils" says another. That may be true, but there remains the intrinsic problem of civilized humanity's self-definition. Civilization defines itself largely through its negative contrast of "primitives" and "savages." This is an ancient problem, elevating oneself by leveling another. Long calls this the problem of the "empirical other."[251] Scheler calls it "ressentiment."[252] Whatever it is called, it remains a basic, core human problem and one that must be recognized before it can be confronted and eliminated. Intrinsic to western, industrial, capitalistic humanity,[253] it is also part and parcel of Anglo American jurisprudence. "Civilization," with its divisive ideology, is so ingrained as to be embodied almost without reflection, as a self-evident truth. One wonders if its impact does not represent a violation of the establishment clause, signaling the kind of state religion that the framers feared so much. At any rate, civilization underscores fundamental legal problems that confront Native American tribes, especially those surrounding the quest for religious freedom.

NOTES

1. Felix S. Cohen, "The Erosion of Indian Rights, 1950–53," *Yale Law Journal* 62(1953):390.

2. By world view I refer to both traditional religious orientations and secular ideologies. Ninian Smart, *World Views: Crosscultural Explorations of Human Beliefs* (New York: Charles Scribner's Sons, 1983), 2.

3. No doubt objections will be raised at the beginning over an attempt to generalize about Native American tribes and Anglo-Americans. First, what, after contact and intermarriage, is a Native American and what is an Anglo-American?

Notwithstanding such criticisms, the author carries on. My attempt here is to map a reality. Maps are always generalizations of the world, and so it is with all of human experience, including scholarship. Raw life is always more complex and overdetermined than is any experience thereof. Even a detailed, multivolumed biography omits more than it captures. Some are more detailed than others but that does not mean they are better; indeed they may lose the forest in the trees. Which is the better map, a 3 × 5 of the Hopi Reservation, or a 3 × 5 of the United States? The strength of one is also its weakness.

For a basic introduction to the problem (and solution) of experience and raw life, see G. Van der Leeuw, *Religion in Essence and Manifestation*, II, trans. J.E. Turner (Gloucester, MA: Peter Smith, 1967), 671-678.

When I use the term Native Americans I refer to Native American tribal peoples as they were during initial contact with Europeans and as most still are, at least in heart. A number of Native Americans have been assimilated into Anglo society, some voluntarily, some involuntarily. I do not refer to the former as Native Americans for purposes of this paper since they are Anglo in spirit.

Some tribes seem assimilated at first glance but retain many traditions while participating in Anglo society. A Catawba recently put it this way:

Many Catawba people function very effectively in the mainstream of non-Indian culture today. We know that we must be able to survive within non-Indian communities as well as on our historic lands in traditional ways that preserve our unique heritage and culture. Times change and we have to change with them. But we do not wish to be absorbed into another society, particularly one which rejects our aboriginal identity. See Thomas J. Blumes, *Bibliography of the Catawba* (Metuchen, N.J.: Scarecrow Press, 1987), ix. The Catawba still live on some of their traditional lands but no longer speak Catawba. See also Jeanne Guillemin, *Urban Renegades: The Cultural Strategy of American Indians* (New York: Columbia University Press, 1975; Allison Lewis, "Orientation to the Natural World: A Personal View of Ritual and Ceremony in Hopi Society," *Telescope* 1(1981):110–118; Edward H. Spicer, ed., *Perspectives in American Indian Culture Change* (Chicago: University of Chicago Press, 1971).

Another point I wish to make about generalizations concerns the focus of this paper. Arguably, the problem of the Native American tribal quest for religious freedom is structurally unchanged since Anglo contact. In my judgment, the fundamental tension between Anglo society and all traditional Native Americans remains the same. Reforms in law have not addressed the constitutive problem of the ideology of western civilization.

Finally, I want to make it clear that the fact that traditional Native American religion was practiced tribally means that there was great diversity among Native Americans. In that sense, there was no such thing as Native American religion in general. Notwithstanding that, Indians, after contact, clearly have come to perceive certain parallels and similarities among all tribes. Indeed I would go further and argue that Native Americans lived those similarities through their division into tribes prior to contact. Surely many sophisticated, symbolic understandings of their own traditions and recognized an ineffable mysterious ground upon which all specific doctrines, myths and rites were

based. Indian terms for the sacred such as *a'ni himu* (Hopi) *manitou* (Ojibwa), *wakan tanka* (Sioux), *orenda* (Iroquois), *diyin* (Navajo), and *maxpe'* (Crow) all refer to the powerful, mysterious spiritual essence that is the ultimate reality. See Benjamin L. Whorf, "An American Indian Model of the Universe," ed. Edward Kennard, *International Journal of American Linguistics* 16(1950): 69 n.2; W. Jones, "The Algonkin Manitou," *Journal of American Folklore* 28(1905):183-90; A. Fletcher, "Wakonda: Handbook of the American Indians," *Bureau of American Ethnology, Bulletin*, vol. 30 (Washington: GPO, 1910), 897-98; J.N.B. Hewitt, "Orenda and a Definition of Religion," *American Anthropologist*, O.S., 4(1902): 33-46; Louise Lamphere, "Symbolic Elements in Navajo Ritual," *Southwestern Journal of Anthropology* 25(1969):282; R.H. Lowie, "The Religion of the Crow Indians," *Anthropological Papers of the American Museum of Natural History*, vol. 25, no. 2 (New York, 1922), 315.

More specifically, at the level of Indian tribes it seems to me that traditional Native Americans share certain religious symbols related to cosmic religion such as earth, sky, water, stone and fire as well as religious rites such as dancing, singing and smoking the pipe. The sweat bath was common everywhere except among the Pueblos. For statements about common themes in Native American tribal religions see: Åke Hultkrantz, "The Religion of the Goddess in North America," *The Book of the Goddess Past and Present: An Introduction to Her Religion*, ed. Carl Olsen (New York: Crossroads, 1983), 202; Christopher Vecsey, review of Sam D. Gill, *Mother Earth: An American Story*," *American Indian Quarterly* 12(1988):254-256; Thomas Buckley, "The Goddess that Stepped Forth from the Word," *History of Religions* 281(1989):357-359; Jordan D. Paper, "The Sacred Pipe: The Historical Context of Contemporary Pan-Indian Religion," *Journal of the American Academy of Religion* 61(1989):643-666. Vecsey and Buckley both criticize Sam Gill's argument that there is no common earth mother goddess among Indian tribes. Both agree that tribal names for the earth mother varied but both seem to say that Indians possessed a common symbolic understanding of earth as mother long before contact with whites. Specifics may have differed but the underlying religious meaning was the same. See Sam D. Gill, *Mother Earth: An American Story* (Chicago: University of Chicago Press, 1987), especially 1-7, 151-158.

Given the recency of the above citations, it is clear that the issue of Native American tribal religious commonalities is a hot one and I do not presume to have had the last word. My assumption for this paper is that virtually all tribes shared a few fundamental religious symbols and practices prior to contact although contact may have increased tribal recognition of such similarities due to the stark contrast of Anglo-American religion and ideology.

However, Gill's point is well-taken. My own work with the Hopi reveals that Hopis are very much aware of tribal differences and most Hopis consider themselves Hopi first and Indian second. At the same time, many Hopis recognize religious links with other tribes that distinguish them from Anglos. Therefore, within a proper context, it is arguably fair to draw certain generalizations about Indian religion, especially when comparing Anglo-American legal thought.

Biolosi recently criticized Martin's theory of the "Indian mind" by noting the great differences between hunting-gathering Great Basin bands and the urban (I would argue near urban) prehistoric settlements such as Cahokia. Notwithstanding their dissimilarities in architecture, language, food production, social structure, population density, and religious understandings and rituals, both

peoples arguably shared a mythic world view. Furthermore, they may have shared a reverence for sacred lands and certain rites such as smoking and/or the sweat bath. See Calvin Martin, ed., *The American Indian and the Problem of History* (Oxford: Oxford University Press, 1986); Thomas Biolosi, "The American Indian and the Problem of Culture," *American Indian Quarterly* 12(1989):261–269.

4. Hundreds of studies note the spiritual character of Native American tribal lands. A few good overviews are Sam D. Gill, *Native American Religions: An Introduction* (Belmont, CA: Wadsworth, 1982); Walter H. Capps, ed., *Seeing with a Native Eye: Essays on Native American Religion* (New York: Harper & Row, 1976); Åke Hultkrantz, *The Religions of the American Indians*, trans. Monica Setterwall (Berkeley: University of California Press, 1979); Alfonso Ortiz, *The Tewa World: Space, Time, Being, and Becoming in a Pueblo Society* (Chicago: University of Chicago Press, 1969); Dennis Tedlock and Barbara Tedlock, eds., *Teachings from the American Earth: Indian Religion and Philosophy* (New York: Liveright, 1975); Peggy V. Beck and A.L. Walters, *The Sacred: Ways of Knowledge, Sources of Life* (Tsaile, AZ: Navajo Community College, 1977); Pieter Hovens, ed., *North American Indian Studies: European Contributions* (Gottingen: Edition Heredot, 1981).

5. Alfonso Ortiz, "Ritual Drama and the Pueblo World View," *New Perspectives on the Pueblos*, ed. Alfonso Ortiz (Albuquerque: University of New Mexico Press, 1972), 143.

6. For an elaboration of this idea see John D. Loftin, "Supplication and Participation: The Distance and Relation of the Sacred in Hopi Prayer Rites," *Anthropos* 81(1986):185–187.

7. Walter C. O'Kane, *The Hopis: Portrait of a Desert People* (Norman: University of Oklahoma Press, 1953), 161–162.

8. See for example William E. Coffer, *Spirits of the Sacred Mountains: Creation Stories of the American Indian* (New York: Van Nostrand, 1978).

9. Harold Courlander, *Hopi Voices: Recollections, Traditions, and Narratives of the Hopi Indians* (Albuquerque: University of New Mexico Press, 1982),, 19.

10. In a letter written to the Commissioner of Indian Affairs by various Hopi clan elders and religious leaders, they stated that "Our land, our religion, and our life are one. . . ." See Harry C. James, *Pages from Hopi History* (Tucson: University of Arizona Press, 1974), 102.

11. The best general overview of the difference between cosmic gods and the god of history is Mircea Eliade, *The Myth of the Eternal Return or, Cosmos and History*, trans. W.R. Trask (Princeton: Princeton University Press, 1954).

12. Jeremy Bentham, *Theory of Legislation, Principles of the Civil Code*, trans. Hildreth, ed. Dumont (1864), 113.

13. Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart (University of London: Athlone Press, 1970), 255.

14. Karl Nickerson Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1967).

15. Robert Black, *A Content Analysis of 81 Hopi Indian Chants* (Ph.D. diss., Indiana University, 1965); See also Alfred L. Kroeber, "Nature of the Land-Holding Group," *Ethnohistory* 2(1955):303–314; E. Adamson Hoebel, "The Authority Systems of the Pueblos of the Southwestern United States," *Akten des 34 Internationalen Amerikanisten Kongresses* (Vienna, 1960), 555–563, Ernest Beaglehole, "Ownership and Inheritance in an American Indian Tribe," *Iowa Law Review* 20(1935):304.

16. Bentham, *Of Laws in General*, 1.

17. Holden, v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872).

18. For recent works on the Hopi reception of land from deity see Ekkehart Malotki and Michael Lomatuway'ma, *Maasaw: Profile of a Hopi God* (Lincoln: University of Nebraska Press, 1987); Malotki and Lomatuway'ma, *Stories of Maasaw: A Hopi God* (Lincoln: University of Nebraska Press, 1987).

19. Carl Hodge, "The Hopi Prophecies," *Arizona Highways* 56(1980):44.

20. Malotki and Lomatuway'ma, *Stories of Maasaw: A Hopi God*, 289.

21. Mircea Eliade, *The Sacred and the Profane: The Nature of Religion*, trans. W.R. Trask (New York: Harcourt, Brace Jovanovich, 1959); Loftin, "Supplication and Participation: The Distance and Relation of the Sacred in Hopi Prayer Rites," 186.

22. John Gulick, *Cherokees at the Crossroads*, (Chapel Hill, NC: Institute for Research in Social Science, UNC—CH, 1973), 141.

23. John D. Loftin, "The 'Harmony Ethic' of the Conservative Eastern Cherokee: A Religious Interpretation," *Journal of Cherokee Studies* 8(1983):42.

24. Chief Seattle's quote is taken from Vine Deloria, *God is Red* (New York: Grosett & Dunlap, 1973), 176.

25. See Thomas Overholt, "American Indians as 'Natural Ecologists'," *American Indian Journal* 5(1979):9.

26. John W. Ragsdale, Jr., "Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values," *Harvard Environmental Law Review* 10(1986):417-456; Ragsdale, "The Institutions, Laws and Values of the Hopi Indians: A Stable State Society," *University of Missouri—Kansas City Law Review* 55(1987):335-392.

27. Sekaquaptewa, "Hopi Indian Ceremonies," 42.

28. William Ebenstein, *The Pure Theory of Law* (South Hackensack, NJ: Rothman Reprints, 1969), 174.

29. 25 U.S.C. section 331 (1887).

30. *American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Anglo Affairs*, 95th Cong., 2d Sess. 86-87 (1978). See also comments by Walter Echo-Hawk: *Religious Discrimination: A Neglected Issue*, Consultation Sponsored by the U.S. Comm. on Civil Rights (Washington, D.C., April 9-10, 1979), 282.

31. For some general treatments of the major world religions, the Confessional religions, see Ninian Smart, *The Religious Experience of Mankind*, 3rd ed. (New York: Charles Scribner's Sons, 1984); Niels C. Nielson, Jr., et. al., *Religions of the World* (New York: St. Martin's Press, 1983); Mircea Eliade, *A History of Religious Ideas*, II (Chicago: Chicago University Press), 1982.

32. A couple of qualifying points are due here. First, it must be noted that a number of new religions, most of them influenced by Christianity, are practiced by Native Americans. Furthermore, some Native Americans have fully assimilated themselves into Anglo-American culture and have embraced the institutional Christian Church. For some discussions of post-contact religious transformations such as Tecumseh, Handsome Lake, the Ghost Dance, and the Peyote Cult see Harold W. Turner, *Bibliography of New Religious Movements in Primal Societies*, II:*North America* (Boston: G.K. Hall, 1978); Ake Hultkrantz, *The Study of American Indian Religions*, ed. Christopher Vecsey (Chico, CA: Scholars Press, 1983), 119-25. For a very recent study of the Delaware revitalization

movement, see Duane Champagne, "The Delaware Revitalization Movement of the Early 1760's: A Suggested Reinterpretation," *American Indian Quarterly* 12(1988):107-126.

Except for full fledged conversion to institutional Christianity, the new Indian religious movements differ from the Confessional religions in that they are open only to Native Americans. Confessional religions, by contrast, are universal in scope. Thus the Peyote Cult, though inter-tribal in scope, is not open to everyone.

It is true that there are Confessional religions which are wrapped up with political and geographical concerns. For example, it is clear that a number of Fundamentalist Christian groups have begun to link religion and politics. This is a transformation, like John Calvin's Geneva, that does not square with Christianity in its early years. Religions often change over time and the above is an example of such historical transformation. But Christianity remains a religion that one can embrace irrespective of political or geographical factors, a point that differentiates it from even Peyotism, the broadest Indian religion, which is open only to Native Americans.

33. Native American religions were traditionally practiced at some level by all tribal members. To be a member of a tribe was to practice that tribe's religion. True, tribes were often broken up into different clans and religious societies that practiced rites known only to them, but there was nonetheless a tribal sense of religious commonality. For example, the Hopi are divided into a number of autonomous villages which vary religious practices. Furthermore, there are clans which have their own traditions and myths that cut across village ties to an extent. And there are religious societies which cut across clan ties that are very secretive about their affairs. Nonetheless, it is still fair to talk about Hopi religion on a tribal scale for there are some underlying religious meanings, principles, and values which are Hopi. See for example Mischa Titiev, *Old Oraibi: A Study of the Hopi Indians of Third Mesa*, "Harvard University, Peabody Museum of American Archaeology and Ethnology, Papers," vol. 22, no. 1 (Cambridge: Peabody Museum, 1944); Fred Eggan, *Social Organization of the Western Pueblos* (Chicago: University of Chicago Press, 1950), 1-138.

That there is a common religious orientation among tribal members is also shown by the fact that the translation of virtually every tribal name means "people" or "human being." All members of a tribe consider themselves human beings and humans have religion.

Again, I refer here to traditional Native Americans. Today there are individual Indian members of tribes who seek to practice religions that are different from that of the tribe. Here conflicts are possible between tribal rights and individual rights. See The Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (codified in part at 25 U.S.C. & 1301 et seq 1976). This Act guarantees freedom of religious expression to individual Indians. But it should be emphasized that such conflicts are post-contact in nature and reflect the impact of the dominant Anglo culture. In other words, this apparently internal problem, like most others, parallels Anglo arrival and contact.

34. Hultkrantz, *The Religions of the American Indians*; Eliade, *The Myth of the Eternal Return or, Cosmos and History*.

35. On this point see Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: University of Minnesota, 1977), 149-160.

36. As Eliade has noted, for traditional non-urban peoples, "nature is never

purely 'natural'." Mircea Eliade, *Patterns in Comparative Religion*, trans. R. Sheed (New York: Sheed & Ward, 1958), 38. I realize that certain Central American tribes such as Zapotecs, Mayans and Aztecs may have approached urbanity. My paper is limited to Native North Americans where the only cultures that approached urban were prehistoric. The classic example was the Hopewell culture which thrived from about 500-1000 A.D. See Richard E. W. Adams, *Prehistoric Mesoamerica* (Boston: Little, Brown and Co., 1977); G. R. Willey, *An Introduction to American Archaeology*, vol. 1 (Englewood Cliffs, N.J.: Prentice Hall, 1966); J. B. Griffin, ed., *Archaeology of Eastern United States* (Chicago: University of Chicago Press, 1952).

If in fact true cities existed in prehistoric North America, complete with the decline of myth and the emergence of a Confessional religion, then I except such Indian societies from this discussion.

37. Karl Jaspers, *The Origin and Goal of History*, trans. M. Bullock (London: Routledge & Kegan Paul, 1953).

38. See Norman Perrin, *The New Testament: An Introduction* (New York: Harcourt Brace Jovanovich, 1974); Rudolf Bultmann, *Primitive Christianity*, trans. R.H. Fuller (New York: World Publishing, 1956); T.W. Marson, *The Teaching of Jesus* (Cambridge: Cambridge University Press, 1931).

39. See Mircea Eliade, "Methodological Remarks on the Study of Religious Symbolism," *The History of Religions: Essays in Methodology*, eds. M. Eliade & J. Kitagawa (Chicago: University of Chicago Press, 1959), 86–107; Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation*, trans. Denis Savage (New Haven: Yale University Press, 1970).

40. For a recent work that critiques Weber's *Protestant Ethic* through development of themes Weber himself introduced, see David Zaret, *The Heavenly Contract: Ideology and Organization in the Pre-Revolutionary Puritanism* (Chicago: University of Chicago Press, 1985).

41. Bellah, *Beyond Belief: Essays on Religion in a Post-Industrial World*; Robert N. Bellah & Sanford Levinson, "Law as Our Civil Religion," *Civil Religion in Time of Trial* (New York: Seabury, 1975). Most recently see Robert N. Bellah, "Religion and Technological Revolution in Japan and the United States," *The University Lecture in Religion at Arizona State University* (1987). See also Talcott Parsons, "Christianity and Modern Industrial Society, *Sociological Theory, Values and Sociocultural Change*, ed. Ed Tiryakian (Glencoe: Free Press, 1963); Parsons, "Religious and Economic Symbolism in the Western World," *Sociological Inquiry* 49(1979):1–48; Parsons, "Religion in Postindustrial America," *The Problem of Secularization, Action, Theory and the Human Condition* (New York: Free Press, 1978); Bellah, *Beyond Belief: Essays on Religion in a Post-Industrial World*.

42. Paul Ricoeur coined the terms, "hermeneutics of recollection" and "hermeneutics of suspicion". The former refers to interpretations that uncover explicitly, piestic meanings, while the latter signifies studies, like those of Freud and Marx, which unpack covert meanings that critique the authenticity of religion. Ricoeur, *Freud and Philosophy*.

43. Ragsdale, "Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values," 420.

44. See especially Richard Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1977); Posner, *The Economic Approach to Law* (Coral Gables, FL: University of Miami School of Law, 1975); Posner, *The Economics of Justice* (Cambridge: Cambridge University Press, 1981).

45. See also R.H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3(1960):1-44; Daniel Coquillette, "Mosses from an Old Manse: Another Look at Some Historical Property Cases About the Environment," *Cornell Law Review* 64(1979);761-821; Edwin Seligman, *Principles of Economics* (New York: Longmans, Green, 1905), 131-134; Richard Ely, *Property and Contract in Their Relation to the Distribution of Wealth*, 1 (New York: MacMillan, 1914), 274-275.

46. Robert A. Williams, Jr., "Jefferson, The Norman Yoke and American Indian Lands," *Arizona Law Review* 29(1987):190; see also J. Youngblood Henderson, "Unraveling the Riddle of Aboriginal Title," *American Indian Law Review* 75(1977):81.

47. For a discussion of Adam Smith's four stages theory, see Ronald Meek, *Social Science and the Ignoble Savage* (Cambridge: Cambridge University Press, 1976), 2.

48. Ibid., 99..

49. Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (New York: Modern Library, 1937), 259, 346.

50. Ibid., lviii.

51. Ibid., 590. Actually, as Francis Jennings points out, the so-called raw goods gathered by Europeans were often processed goods like deerskins and cured tobacco. Francis Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (Chapel Hill: University of North Carolina Press, 1975), 85-104.

52. Meek, *Social Science and the Ignoble Savage*, 115.

53. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, 590.

54. Ibid., 13.

55. Ibid.

56. Ibid., 259.

57. As Pearce puts it, ,"American Indians were everywhere found to be, simply enough, men who were not men, who were religiously and politically incomplete." Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Baltimore: Johns Hopkins Press, 1965), 6.

58. Some will argue that the Native Americans of the Northwest Coast are the exception to the rule that Indians were not greedy traditionally. Scholars have long noted the Northwest Coast's emphasis on economic and status achievement. However, a recent paper critiques the idea that Northwest Coast tribes are more economic and social than religious. Steven Vertovec demonstrates that the essential meaning of the potlach ceremonies in which individuals give away possessions to acquire status is religious. Northwest Coast tribes perform the potlach to acquire new names and souls, that is, to become complete human beings.

Also, it must be noted that the rivalry and secularization of the potlach is a post-contact phenomena that signals the decline of traditional religious traditions. See Steven Vertovec, "Potlaching and the Mythic Past: A Re-Evaluation of the Traditional Northwest Coast American Indian Complex," *Religion* 13 (1983):323-344; Homer G. Barnett, *The Nature and Function of the Potlach* (Eugene, Oregon: Department of Anthropology, 1968), 100 ff.; Helen Codere, "The Understanding of the Kwakiutl," *The Anthropology of Franz Boaz*, W. Goldschmidt, ed., "Memoirs, American Anthropological Association," No. 69 (Menasha, WI: American Anthropology Association 1959), 451.

59. Marshall Sahlins, *Stone Age Economics* (New York: Aldine, 1972), 11.

60. Benjamin N. Nelson, *The Idea of Usury: From Tribal Brotherhood to Universal Otherhood,* (Princeton: Princeton University Press, 1949), xix-xx, 29-30. This point challenges the view that Protestant Christianity influenced capitalism more than capitalism influenced Protestant Christianity.

The fact that many Christians in fact engaged in usurious activities does not detract from the fact that it was wrong in theory. It simply means Christians did not practice what they preached.

61. Ibid.

62. David Zaret, *The Heavenly Contract: Ideology and Organization in Pre-Revolutionary Puritanism* (Chicago: University of Chicago Press, 1985).

63. Karl Jaspers, *The Origin and Goal of History.*

64. Karl Marx, Fondaments de la critique de l'economie politique, I (Paris: Editions Anthropos, 1967), 450. It is important to note that Karl Marx was aware of the difference between ancient and modern economics. The ideology of civilization underlies not only capitalistic democracies but also communist, socialist societies.

65. Jennings, *The Invasion of America,* 103; Pearce, *Savagism and Civilization,* 6.

66. For a quote of Mannheim's definition of ideology see Jennings, *The Invasion of America,* 1. See also Charles H. Long, "Primitive/Civilized: The Locus of a Problem," *History of Religions* 200(1980):60.

67. Democratic freedom is recognized as a strength even by critics of civilization. See Long, "Primitive/Civilized: The Locus of a Problem," 50.

68. It seems clear that the vast majority of American aborigines during contact died as a result of European disease and warfare. Jennings, *The Invasion of America,* 15-31.

69. Cohen, "The Erosion of Indian Rights," 390.

70. Jennings, *The Invasion of America,* 156.

71. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 542 (1823).

72. For commentaries on *M'Intosh* see Monroe E. Price and Robert N. Clinton, *Law and the American Indian,* 2d ed. (Charlottesville, VA: Michie, 1983), 703; Vine Deloria, *American Indians, American Justice* (Austin, TX: University of Texas Press, 1983), 4, 26, 30; Felix Cohen, "Original Indian Title," *Minnesota Law Review* 32(1947):28-59; Williams, "Jefferson, The Norman Yoke and American Indian Lands," 166-169; Donald Juneau, "The Light of Dead Stars," *American Indian Law Review* 11(1983):1-55.

73. *M'Intosh,* 21 U.S. at 573.

74. Ibid. For a historical discussion of the discovery doctrine see Cohen, *Handbook of Federal Indian Law,* 50-53.

75. *M'Intosh,* 21 U.S. at 588.

76. Ibid., 589. But see 92-93, Henderson, "Unraveling the Riddle of Aboriginal Title," where it is argued that *M'Intosh* does not validate conquest, but rather notes it as a potential legal theory.

77. *M'Intosh* 21 U.S. at 589.

78. Ibid., 590.

79. For an insightful study of the religious symbolism of American conquest see Eliade, *The Quest: History and Meaning in Religion,* 88-101. See also Sam D. Gill, *Native American Traditions: Sources and Interpretations* (Belmont, CA: Wadsworth, 1983), 1-11; Richard Comstock, "On Seeing with the Eye of the Native European," *See with a Native Eye: Essays on Native American Religion,* 58-78.

80. *M'Intosh*, 21 U.S. at 591.

81. Ibid.

82. Ibid., 592. Juneau notes that *M'Intosh* only referred to vacant lands, not those inhabited by Indians. Justice Marshall insists that even after conquest, "the rights of the conquered to property should remain unimpaired," and although, "the Indian inhabitants are to be considered more as occupants, [they are] to be protected, indeed, while in peace, in the possession of their land . . . ." Ibid., 591. Juneau, "The Light of Dead Stars," 46–55.

83. Jennings, *The Invasion of America*, 60.

84. For a Hopi example of ritual purification following the slaying of an enemy, see Mischa Titiev, *Old Oraibi: A Study of the Hopi Indians of Third Mesa*, 159–160.

85. Jennings, *The Invasion of America*, 146–170; Mark A. Judy, "Powder Keg on the Upper Missouri: Sources of Blackfeet Hostility," *American Indian Quarterly* 11(1987):31–48.

86. Jennings, *The Invasion of America*, 60.

87. Emmerich de Vattel, *Le Droit des Gens; ou, Principes de la Loi Naturelle*, III, trans. Charles Fenwick (Washington, D.C., 1916).

88. Jennings, *The Invasion of America*, 60.

89. William C. Canby, Jr., "The Status of Indian Tribes in American Law Today," *Washington Law Review* 62(1987):1–22.

90. Resolution of Dec. 27, 1827, Ga. Laws 1827, 249.

91. William F. Swindler, "Politics as Law: The Cherokee Cases," *American Indian Law Review* 3(1975):13.

92. U.S. Const., art. I, § 8, cl. 3.

93. Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review* 21(1969):514–515.

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

95. Ibid.

96. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1831).

97. See, for example Treaty with the Seneca Nation, June 30, 1802, 7 Stat. 72; Treaty with the Cherokees, May 6, 1828, 7 Stat. 311; Treaty with the Winnebago Tribe, Mar. 8, 1865, 14 Stat. 671.

98. U.S. Const., art. VI. Prior to 1815 many Native Americans negotiated treaties from a position of power since they could align themselves with the British if they wished. Samuel E. Morison, Henry S. Commanger & William E. Leuchtenburg, *The Growth of the American Republic*, 1, 6th ed. (London: Oxford University Press, 1969), 362–365.

99. Reid v. Covert, 354 U.S. 1 (1957).

100. United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876). It should be noted however that many founding fathers viewed treaties with Native Americans as a simple way to acquire their land.

101. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

102. Ibid. at 566; Rosebud Sioux Tribe v. Kneip, 430 U.S. 534, 594 (1977).

103. United States v. Creek Nation, 295 U.S. 103 (1935).

104. Wilcomb E. Washburn, *Red Man's Land—White Man's Law* (New York: Scribner, 1971), 143.

105. T.C. McLuhan, *Touch the Earth: A Self-Portrait of Indian Existence* (New York: Promontory, 1971), 53.

106. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

107. Charles Wilkinson and John Volkman, "Judicial Review of Indian Treaty Abrogations," *California Law Review* 63(1975):617.

108. Frost v. Wenie, 157 U.S. 46, 60 (1895); Leavenworth, L. & G.R.R. v. United States, 92 U.S. 733, 740 (1875).

109. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425, 447 (1975).

110. 12 Stat. 512 (1862).

111. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

112. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

113. Ibid.

114. 25 U.S.C. Section 71 (1963).

115. See generally Wilkinson and Volkman, "Judicial Review of Indian Treaty Abrogations."

116. Ibid., 615; Cohen, *Handbook of Federal Indian Law*, 127.

117. Alden Vaughn, *New England Frontier: Puritans and Indians, 1620–1675* (Boston, 1965); Robert M. Bartlett, *The Faith of the Pilgrims* (New York: United Church Press, 1978).

118. Felix Cohen, "Original Indian Title," 43.

119. Ibid., 42.

120. Wilkinson and Volkman, "Judicial Review of Indian Treaty Abrogations," 610; Jennings, *The Invasion of America*, 144.

121. Ibid. See also Ben Bridgers, "An Historical Analysis of the Legal Status of the North Carolina Cherokees," *North Carolina Law Review* 58(1980):1093.

122. Grant Foreman, *Indian Removal* (Norman: University of Oklahoma Press; 1979), 55–56; William Hagan, *American Indians*, rev. ed. (Chicago: University of Chicago Press, 1979), 55–56.

123. George Harman, "The North Carolina Cherokees and the New Echota Treaty of 1835," *North Carolina Historical Review* 6(1929):135; Harman, *Sixty Years of Indian Affairs* (Chapel Hill, NC: University of North Carolina Press, 1941), 188–191; Jennings, *The Invasion of America*, 144.

124. Alvin Josephy, Jr. *The Indian Heritage of America* (New York: Knopf, 1968), 283–284; Josephy, *The Nez Perce Indians and the Opening of the Northwest*, abr. ed. (New Haven: Yale University Press, 1971); Jones v. Meeham, 175 U.S. 1, 11 (1899).

125. For example, Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943).

126. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973).

127. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970). See also Craig A. Decker, "The Construction of Indian Treaties, Agreements, and Statutes," *American Indian Law Review* 51(1977):299–311; Wilkinson and Volkman, "Judicial Review of Indian Treaty Abrogations," 617. William Canby notes, however, that the historical presumption for favoring Native Americans in treaty construction is weakening. Canby, "The Status of Indian Tribes in American Law Today," 19.

128. Alban Hoopes, *Indian Affairs and Their Administration* (Philadelphia: University of Pennsylvania, 1932), 180; Jay Kinney, *A Continent Lost—A Civilization Won* (New York: Octagon 1937), 58.

129. Rosebud-Sioux Tribe v. Kneip, 430 U.S. 583 (1977).

130. Cohen, *Handbook of Federal Indian Law*, 127.

131. See, for example, Act of Mar. 1, 1901, ch. 675, 31 Stat. 848.

132. Cohen, *Handbook of Federal Indian Law*, 128; Price and Clinton, *Law and the American Indian*, 77; Deloria, *American Indians, American Justice*, 8.

133. Delos Otis, *The Dawes Act and the Allotment of Indian Lands*, ed. Francis Prucha (Norman: University of Oklahoma Press, 1973).

134. Comm'r Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 1, 51st Cong., 1st Sess. 3-4 (1889).

135. Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381).

136. Act of Feb. 28, 1891, ch. 383, §§ 1-2, 26 Stat. 794 (codified as amended at 25 U.S.C. § 331).

137. Comm'r Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 1, 51st Cong., 1st Sess. (1889).

138. Comm'r Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 1, 44th Cong., 2d Sess. 381, 387 (1876).

139. Comm'r Ind. Aff. Ann. Rep., Sen. Doc. No. 9, 25th Cong., 3d Sess. 440, 454 (1838).

140. Cohen, *Handbook on Federal Indian Law*, 139; See also Harry James, *Pages from Hopi History* (Tucson: University of Arizona Press, 1974), 111, 106-107, 125-127, 162-166.

141. Comm'r Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 1, 50th Cong., 2d Sess. XIX (1888).

142. Comm'r Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 1, 51st Cong., 2d Sess. VI (1890).

143. Ibid., 136; Comm'r Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 1, 51st Cong., 1st Sess. 94-96 (1889).

144. For example, see James, *Pages From Hopi History*, 152; K. Tsiana Lomawaima, "Oral Histories from Chilocco Indian Agricultural School, 1920-1940," *American Indian Quarterly* 11(1987):241.

145. In support of the thesis that Anglos viewed Native Americans as less than human, it should be noted that not until 1924 were Native Americans granted citizenship. Indian Citizenship Act of 1924. Ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1970). Furthermore, prior to 1946 tribes had to petition Congress for special jurisdictional legislation to bring suits in the Court of Claims. Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. §§ 70-70v-3).

146. J.D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, vol. 2, 519, as quoted from *Religion in the Constitutioni: A Delicate Balance*, Clearinghouse Publication No. 80, United States Comm. on Civil Rights 28 (1983).

147. Grace Woodard, *The Cherokees* (Norman: University of Oklahoma Press, 1963).

148. This quote attributed to Andrew Jackson may be fictitious. Marquis James, *The Life of Andrew Jackson* (Indianapolis: Bobbs-Merrill, 1938), 603-604. Legally Jackson could not have enforced the Supreme Court's decision until the Judiciary Act of 1789 was revised in 1833 to allow federal marshalls to enforce it. It may be that Jackson referred to the enforceability problem in his remark (if he made it at all) but given his hatred of Native Americans that is questionable.

149. Woodward, *The Cherokees*.

150. U.S. Const., Amend. I. It must be noted that there is some question as

to whether the first amendment is, in theory, applicable to Indian tribes. Tribes possess, according to Cohen, "inherent powers of a limited sovereignty which has never been extinguished." As Wilkinson notes, Indian law is unique because tribes possess a limited sovereignty "that is both preconstitutional and extraconstitutional." Felix Cohen, *Handbook of Federal Indian Law*, ed. Rennard Strickland (Charlottesville, VA: Michie & Bobbs Merrill, 1982), 231-232; Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987), 14.

Notwithstanding the theoretical justification for holding the first amendment inapplicable to tribes, various tribes have filed free exercise claims against government interference with religion.

151. Reynolds v. United States, 98 U.S. 145 (1878); Cantwell v. Connecticut, 310 U.S. 296 (1940).

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

153. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). *Yoder* has recently been reinterpreted (some say overturned) in *Lyng*. See below note 222.

154. *Sherbert*, 374 U.S. at 406.

155. Lyng v. Northwest Indian Cemetery Protective Association, No. 86-1013, 19 April 88.

156. Kolbeck v. Kramer, 84 N.J. Super. 569, 202 A.2d 889 (1964).

157. *Reynolds*, 98 U.S. at 165-66; Frank v. State, 604 P.2d 1068, 1071-72 (1979); People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73, 77 (1964).

158. Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 713 (1981).

159. See above notes, 170, 171, 175.

160. Robin Rannow, "Religion: The First Amendment and the American Indian Religious Freedom Act of 1978," *American Indian Law Review* 10(1982):151, 157; Donald Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development," *Harvard Law Review* 80(1967):1419.

161. United States v. Ballard, 322 U.S. 78 (1944).

162. See for example Rudolf Otto, *The Idea of the Holy: An Inquiry into the Nonrational Factor in the Idea of the Divine and Its Relation to the Rational*, trans. John Harvey, 2d ed., (Oxford: Oxford University Press, 1973); Charles H. Long, "Prolegomenon to a Religious Hermeneutic," *History of Religions* 6(1967):254-264.

163. Eliade, *Patterns in Comparative Religion*, xiii.

164. See Jennings, *The Invasion of America*, 15-16; Robert Clinton, "The Cause of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation," *Arizona Law Review* 28(1986):30-46.

165. *Yoder*, 406 U.S. at 205. This bias for Christianity was also demonstrated recently in *Lyng*. See below note 235.

166. Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

167. Exhibits C-GG, Affidavits of Affiants. Richard Crowe, a Cherokee, stated, "*di ga ta le no hr*. This means, 'This is where WE began.' "

168. *Sequoyah*, 620 F.2d at 611.

169. Ibid., 612.

170. Howard Stambor, "Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and the Drowned Gods," *American Indian Law Review* 3(1982):65.

171. *Sequoyah*, 620 F.2d at 1162.

172. See above note 185.

173. The seminal studies here are by Eliade. Eliade, *The Myth of the Eternal Return, or Cosmos and History*, 121–27; Eliade, *Patterns in Comparative Religion*, 367–387; Eliade, *The Sacred and the Profane: The Nature of Religion*, trans. W.R. Trask (New York: Harcourt Brace Jovanovich, 1959), 20–67.

174. By traditional religious orientations we mean non-urban cosmic religions.

175. It is also interesting to note that the federal government forced education upon Native Americans, but not upon the Amish.

176. Teterud v. Burns, 522 F.2d 357, 360 (8th Cir. 1975).

177. *Sequoyah*, 620 F.2d at 1163, n.2.

178. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

179. Ibid., 645. Here the government does offer a strong argument. Lake Powell provided many people with water and a great deal of money had been spent on the project prior to the suit.

180. Ibid., citing *Yoder*, 407 U.S. at 216.

181. Ibid., 642.

182. Ibid., 178.

183. Widmar v. Vincent, 454 U.S. 263 (1981); *Sherbert*, 374 U.S. at 409–410.

184. The most detailed treatment of this problem is in Rodney Smith, "Getting Off on the Wrong Foot and Back Again: A Re-examination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions," *Wake Forest Law Review* 20(1984):569–643. See also Stephen L. Pepper, "The Conundrum of the Free Exercise Clause —Some Reflections on Recent Cases," *Northern Kentucky Law Review* 9(1982): 265–303; Harold Berman, "The Interaction of Law and Religion," *Mercer Law Review* 31(1980):405–413; Stambor, "Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and the Drowned Gods," 59–90; Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," *Columbia Law Review* 81(1981):1380–1385. For a list of other works suggesting primacy of free exercise rights over those of the establishment clause, see Laurence Tribe, *American Constitutional Law* (Mineaola, NY: Foundation Press, 1978), 833–834.

185. Smith, "Getting Off on the Wrong Foot and Back on Again," 630.

186. Ibid.

187. Ibid. The relevance of the framers' intent is another question. On the question of relevance in historical research see Clinton, "The Curse of Relevance." Arnold Loewy argues in favor of Justice Brennan's view that historical research guided at the specific intent is impossible unless there is a clear mandate. Arnold Loewy, "Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight," *North Carolina Law Review* 64(1986):1053, n. 35.

Loewy also argues that most historical research is somewhat biased. But then, so is legal research and for that matter human experience itself. See Maurice Merleau-Ponty, *Phenomenology of Perception*, trans. C. Smith (London: Rutledge & Kegan Paul, 1962); G. Van der Leeuw, *Religion in Essence and Manifestation*, II, trans. J.E. Turner (Gloucester, MA; Peter Smith; 1967), 671–689.

188. Howard Stambor notes that the framing of the *Nyquist* test in terms of "neither . . . nor" lessens the significance of the free exercise clause in favor of the establishment clause. Stambor, "Manifest Destiny and American Indian Religious Freedom," 80.
189. Ibid.
190. Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1984), *cert. denied*, 464 U.S. 956 (1984).
191. Ibid., 740.
192. Ibid., 741
193. Ibid., 740, n.2.
194. Ibid., 741.
195. Ibid., 742-743.
196. Ibid., 744.
197. Ibid., 77, n. 5. The court did, nevertheless, say that free exercise claims are not irrelevant on government land.
198. Ibid.
199. Ibid. The expert witness affidavits conflict squarely with the testimony of a Hopi elder who described the impact on Hopi religion as "direct and negative."
200. Ibid.
201. Ibid.
202. Ibid., 745.
203. Lyng v. Northwest Indian Cemetery Protective Association, No. 86-1013, 19 April 88.
204. Ibid., 4293.
205. Ibid.
206. Ibid., 4292.
207. Ibid., 4295.
208. Ibid.
209. Bowen v. Roy, 476 U.S. 693 (1986).
210. Ibid., 696.
211. Ibid., 699-700.
212. *Lyng*, 86-1013 at 4295.
213. Ibid., 4294.
214. Ibid.
215. Ibid., 4296.
216. Ibid: *Lyng* is problematical for a number of reasons. First, the federal government more often than not took land from Native Americans in an unjust manner. Second, it is not clear that free exercise claims have no relevance on government lands. Finally, why was it acceptable to coerce Native American children to attend school but not Amish? (Of course today most Native Americans want an education, either to assimilate fully into Anglo society or to fight to preseve their tribal identity.)
217. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. section 1996, 1979). For a thorough discussion of the Act from a religious perspective see Robert Michaelson, "The Significance of the American Indian Religious Freedom Act," *Journal of the American Academy of Religion* 52(1984):93-115. See also Dean Suagee, "American Indian

Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers," *American Indian Law Review* 3(1982):1-58; Rannow, "Religion: The First Amendment and the American Indian Religious Freedom Act of 1978;" *Religion in the Constitution: A Delicate Balance*, Clearinghouse Publication No. 80, United States Comm. on Civil Rights (1983), 31-33.

218. H. Rep. No. 1308, 95th Cong., 2d Sess. 2, 4 (1978).

219. American Indian Religious Freedom Act.

220. For example, many of the cases already discussed were also tried under the AIRFA: *Wilson*, 708 F.2d 735; *Sequoyah*, 620 F.2d 1159; *Badoni*, 638 F.2d 172. Other cases tried under the AIRFA were Northwest Indian Cemetery Protective Association v. Peterson, 552 F.Supp. 951 (N.D. Cal. 1982), *aff'd* 795 F.2d 688 (9th Cir 1986), *rev'd*. Lyng v. Northwest Indian Cemetery Protective Association, No. 86-1013, 19 April 88. (Indians tried to stop construction of a road through sacred lands); Crow v. Gullett, 541 F.Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984). (Lakotas and Tsistsistas objected to construction in Bear Butte State Park.)

221. Ibid.

222. Michaelson, "The Significance of the American Indian Religious Freedom Act of 1978," 98. Congressman Udall rightly noted on the floor of Congress that passage of the AIRFA was not significant because it was "toothless," and he has recently introduced an amendment to give it more bite.

223. See above note 202.

224. Michaelson, "The Significance of the American Indian Religious Freedom Act of 1978," 106.

225. United States Department of the Interior, Federal Agencies Task Force, American Indian Religious Freedom Act Report, P.L. 95-341 (1979), 8-12.

226. Ibid.

227. Michaelson, "The Significance of the American Indian Religious Freedom Act," 106-108; David White, "Native American Religious Issues . . . Also Land Issues," *Wassaja: The Indian Historian* 13(1980):39-44.

228. Suagee, "American Indian Religious Freedom and Cultural Resources Management," 5. See also Clinton, "The Curse of Relevance," 45.

229. See works by Mircea Eliade cited above in note 191. See also Maurice Leenhardt, *Do Kamo: Person and Myth in the Melanesian World*, trans. Basia Gulati (Chicago: University of Chicago Press, 1979); Marshall Sahlins, *Islands of History* (Chicago: University of Chicago Press, 1985); Long, *Alpha: The Myth of Creation*; Joseph Campbell, *The Masks of God: Primitive Mythology* (New York: Penquin, 1969); Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1966).

For studies of myth in Native American context, see Christopher Vecsey, "The Emergence of the Hopi People," *American Indian Quarterly* 7(1983):69-92; Marla Powers, *Oglala Women: Myth, Ritual and Reality* (Chicago: University of Chicago Press, 1986); Vertovec, "Potlaching and the Mythic Past: A Reevaluation of the Traditional Northwest Coast American Indian Complex," 322-344; Kenneth Morrison, "The Mythological Sources of Abenaki Catholicism: A Case Study of the Social History of Power, *Religion* 11(1981):235-263; Catherine Albanese, "Exploring Regional Religion: A Case Study of the Eastern Cherokee," *History of Religions* 23(1984):344-371; John D. Loftin, "Mythic and

Historical Modes of Understanding: A Hopi-Anglo Dialogue," (Unpublished manuscript, 1987, 30 pages).

230. Bowen Blair, "Native Americans Versus American Museums: A Battle for Artifacts," *American Indian Law Review* 7(1979):125–154; Jake Page, "Return of the Kachinas," *Science* 4(1983):58–63. Another more basic problem in this area concerns the fact of archaeology—digging up Indian graves. It is beyond the scope of this paper to deal with a problem of this magnitude but suffice it to say that Native American resistance to archaeology is gaining momentum nationwide. George Horse Capture, a Gros Venture, thinks the uncovering of Indian human remains and sacred objects is the "single most unifying issue in Indian country, transcending tribe and region." Rick Hill, "Mining the Dead," *Daybreak: American Indian World Views*, vol. 2, Issue 3, Summer 1988):11.

231. Act of June 8, 1906, ch. 3060, 34 Stat. 225 (codified at 16 U.S.C. sections 431–433 (1976).

232. Ibid., section 433.

233. United States v. Diaz, 499 F.2d 113, 115 (9th Cir. 1974).

234. Ibid. Because of the *Diaz* result, the plaintiffs in *Jones* did not prosecute the theft of many archaeological artifacts under the Antiquities Act. Instead they sought to prosecute them for theft and malicious mischief. The court dismissed the charges, holding that the Act was the "exclusive means" by which the government could prosecute acts included in the Act. *United States v. Jones*, 449 F.Supp. 42, 46(D. Ariz. 1978).

235. Archaeological Resources Protection Act of 1979, Pub. L. No. 96–95, 93 Stat. 721 (codified at 16 U.S.C. sections 470aa–47011 (Supp. 4 1980).

236. Ibid., section 470 bb(1).

237. For example see Eliade, *The Myth of the Eternal Return or, Cosmos and History*, 34–48. For a well-detailed example of mythologizing recent events see Fred Eggan, "From History to Myth: A Hopi Example," *Studies in Southwestern Ethnolinguistics*, eds. D. Hymes & W. Bittle (Hague: Mouton, 1967), 33–53. For a Cherokee example see Albanese, "Exploring Regional Religion: A Case Study of the Eastern Cherokee."

238. Pepper, "The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases," 284; Irene Harvey, "Constitutional Law: Congressional Plenary Power Over Indian Affairs—A Doctrine Rooted in Prejudice," *American Indian Law Review* 10(1982):117–150; Jerry Muskrat, "The Constitution and the American Indian: Past and Prologue," *Hastings Constitutional Law Quarterly* 3(1976):657–677.

239. Clinton, "The Curse of Relevance."

240. Clinton realizes that historical research that seeks legal relevance may be colored by one's bias on an issue. Notwithstanding that, he suggests that it may be better to admit bias and proceed than attempt an objective study which is, in fact, impossible.

Clinton's point is well taken. The big problem that arises in American Indian legal studies is transliterating Native American categories into Anglo-American legal discourse. This paper is one such effort; whether it is successful is another question.

241. For example, John Ragsdale in a well-researched paper makes a number of inaccurate statements about the Hopi. He notes that the Hopi can serve

as a guide for the larger American society in terms of "preserving rather than depleting environmental resources." I disagree. Hopis do not view the world in terms of limited resources in a scientific sense. The earth is a living relative with whom the Hopi commune. Also, the Hopi solution to the environmental crisis is decidedly non-urban and non-industrialized. That is to say, they never created the kinds of problems Anglos now wish to solve. Anglos created the ecological crisis and Anglos must solve it. Recourse to the Hopi for a solution, however well-intended, asks too much and often romanticizes the Hopi as more than humanly balanced. Ragsdale does state that Anglos should not attempt to be like Hopis. But his reasoning reflects Anglo perspectives. Indeed, that is shown in the very idea of adopting a Hopi lifestyle. Hopi is a way of life that is embodied, not consciously chosen. See Emory Sekaquaptewa's comments in "On Approaching Native American Religions—A Panel Discussion," *Seeing with a Native Eye: Essays on Native American Religion*, ed. Walter H. Capps (New York: Harper & Row, 1976), 113.

Ragsdale also makes far too much of the Hopi factions, groups he labels as traditionalists and moderns. These categories mean little to the Hopi themselves. Ragsdale displays a profound sense of misunderstanding by insinuating that the moderns are less religious and less Hopi than the traditionalists. See Shuichi Nagata, *Modern Transformations of Moenkopi Pueblo* (Urbana: University of Illinois Press, 1970), 37-38; Ragsdale, "Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values," 419-451.

242. Deloria and Lytle, *American Indians, American Justice*, 1-24; Cohen, *Handbook of Federal Indian Law*, 47-206; Price and Clinton, *Law and the American Indian*, 68-92; William C. Canby, Jr. *American Indian Law* (St. Paul, MN: West, 1981), 9-31.

243. Clinton, "The Curse of Relevance," 42.

244. Canby, "The Status of Indian Tribes in American Law Today."

245. 411 U.S. 164(1973).

246. Canby, "The Status of Indian Tribes in American Law Today," 7.

247. 463 U.S. 713 (1983).

248. Canby, "The Status of Indian Tribes in American Law Today," 18.

249. Self-determination marks the latest phase of federal policy for Native Americans, replacing termination. With the advent of self-determination the government purportedly encourages tribes to govern themselves with regard to a number of matters traditionally administered by the federal government. See Deloria and Lytle, *American Indians, American Justice*, 21-24; Cohen, *Handbook of Federal Indian Law*, 180-206; Canby, *American Indian Law*, 9-31; Price and Clinton, *Law and the American Indian*, 68-91.

250. Canby, "The Status of Indian Tribes in American Law Today," 22.

251. Long, "Primitive/Civilized: The Locus of a Problem," 45-49.

252. Max Scheler, *Ressentiment*, trans. William Holdeim (New York: Schocken, 1961).

253. It should be noted that the ideology of civilization is world wide and is not limited only to western, industrial, capitalistic societies. Eastern, industrial, communistic societies may also define their worth by finding fault in others.