

Religious Freedom for Native Americans

Summary: The constitutionally guaranteed free exercise of religion for Native Americans has been violated throughout the history of the United States. Violent repression of native practices, the withholding of resources from Native communities, and the devaluing of religious frameworks and practices that do not align with Protestant normativity have been and continue to be major obstacles in Native Americans realizing religious freedom in the United States. This issue has been taken up many times in the U.S. judicial system.

Since the 1790s, the First Amendment to the United States Constitution has guaranteed the “free exercise” of religion. However, from the perspective of many Native Americans, this commitment has proven historically empty. Because many Native traditions did not fit prevalent Protestant Christian definitions of “religion,” the practices and beliefs of Native communities often have not received protection under the First Amendment. Of course, Constitutional protection was general applied to Native Americans only intermittently until they were recognized as citizens. The status of citizenship was applied to all Native Americans only as recently as the 1924 Indian Citizenship Act.

Even as U.S. policy in the late 19th and early 20th centuries tried to bring Native people under the protections and responsibilities of U.S. law, authorities often deemed Native ceremonies and beliefs “savage” or “primitive,” impediments to religious and cultural assimilation. The Bureau of Indian Affairs was situated under the War Department of the U.S. government until 1849, when it became part of the Home Department, later the Department of the Interior. Between 1887 and 1934, official policy entrusted a great deal of discretionary authority on any given reservation to agents of the Bureau of Indian Affairs and to Christian missionaries. Violations of religious freedom seldom required Congressional action. Some ceremonies were simply outlawed outright by Executive Order, such as the Great Sun Dance of the Lakota and other Northern Plains Indians or the Ghost Dance, an intertribal visionary and prophetic movement that preached renewal and revitalization through moral reform and ceremonial dance. The 200 Lakota men, women, and children who were massacred in 1890 at Wounded Knee, South Dakota, were associated with the Ghost Dance movement, thought by the United States to be a threat to order and safety.

Often the violation of religious freedom was far more subtle. At each reservation, authorities distributed treaty payments—in the form of food, clothing, livestock, and farming capital—at their own discretion. They developed a system of rewards and punishments in which Native people, sometimes starving from

lack of resources, were forced to give up the public display of their traditions simply to survive. Public expressions of ritual and belief had to go underground, even in cases where treaty agreements stipulated the freedom to practice traditional religious ways.

In 1934, the United States formally directed its Bureau of Indian Affairs to refrain from “interference with Indian religious life or ceremonial expression. The cultural liberty of Indians is in all respects to be considered equal to that of any non-Indian group.” But even this policy under the so-called “Indian New Deal” of reversing the overt violation of Native religious freedom, did not solve a core issue: many Native traditions simply did not conform to creed-centered Protestant Christian notions of religion. One interesting Native response to the pressure to conform can be seen in the growth of the Peyote Road, incorporated under the name of the Native American Church. This new “church” began to identify a consistent set of beliefs and readily identifiable structures of leadership and organization in order to gain protection for its religious life under the First Amendment. Other Native communities responded by keeping their traditions underground, firmly in the oral tradition and away from the purview of the U.S. courts.

It was not until the 1940s that the Supreme Court began to offer clarifications of constitutional protections to religious freedom. The Supreme Court, under Chief Justices Warren and Burger in the 1960s and 1970s, expanded free exercise protection and its accommodations considerably. In retrospect, too few Native communities were sufficiently organized or capitalized—or perhaps even motivated, given their chastened experience of the narrow possibilities of protection under U.S. law—to press their claims before the courts. Those communities who did pursue such interests experienced first hand the difficulty of trying to squeeze communal Native traditions, construals of sacred land, and practices at once economic and sacred into the conceptual box of “religion” and “an individual’s right” to its free exercise.

In 1978, after decades of pressure from an increasingly organized Native American lobby, Congress passed the American Indian Religious Freedom Act (AIRFA) in order to extend the definition of constitutionally protected religion to encompass the beliefs and practices central to the spiritual health of Native communities. The Act reads, in part, “It shall be the policy of the U.S. to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional

religions” including “access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”

Lacking explicit teeth for direct enforcement, the AIRFA has been interpreted conservatively by the courts. As federal agencies weigh the implications of a particular policy for Native religious practice, AIRFA has been seen as a simple procedural guide. In its 1988 decision in *Lyng vs. Northwest Indian Cemetery Protective Association*, the Supreme Court dismissed a Native challenge to the construction of a logging road across land sacred to the Yurok, Karok, and Tolowa peoples of Northern California, viewing the land as not indispensable to Native religious life. This decision was made despite Native testimony that the area “is not even a part of this world that we live in here. That place up there, the high country, belongs to the spirit and it exists in another world apart from us.” The *Lyng* case is one of a number of important cases involving Native sacred land claims, pressed unsuccessfully in the courts.

What the *Lyng* decision began to do with respect to sacred land protection was finished off with respect to restricting free exercise more broadly in the Rehnquist Court’s 1990 decision in *Employment Division, State of Oregon v. Smith* (1990). In this case, two employees of an Oregon state chemical dependency program were fired for their involvement in the Native American Church and its sacramental eating of peyote, deemed a “controlled substance.” Despite decades of hard-won support for the ceremonial use of peyote in different states, the Supreme Court ruled that the State of Oregon need not provide unemployment benefits to the fired workers. The majority decision written by Justice Scalia stated that if a law is “neutral” and “generally applicable” the fact that it incidentally discriminates against a particular religious practice, such as peyote use, does not mean such a practice must be protected under the First Amendment.

A host of minority religious communities, civil liberties organizations, and liberal Christian groups were alarmed at the precedent set in *Smith*. So controversial was this decision, known as the “*Smith* decision,” which reversed decades of Court precedent, that the U.S. Congress enacted the Religious Freedom Restoration Act in 1993, arguing that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” According to this Act the government must show a “compelling state interest” in order to restrict religious freedom. Despite congressional efforts to

curb the impact of *Smith*, the Supreme Court reasserted its authority as primary interpreter of the constitution in *City of Bourne v. Flores* (1997).

Many of the modest protections of religious freedoms won by Native communities have undergone constitutional challenges as violating the establishment clause. The issue of governmental accommodations versus perceived endorsement of a particular tradition has emerged in a number of challenges to federal administrative policies by the National Park Service and National Forest Service such as the voluntary ban on climbing during the ceremonially significant month of June on what the Lakota and others consider Bear Lodge at Devil's Tower National Monument. Additional stakeholders, such as the Mountain States Legal Foundation, an initiative funded in part by mining, timbering, and recreational industries with significant money interests in the disposition of federal lands in the west, also play a role in these conversations.

In light of courts' findings on these Native claims to constitutional protection under the First Amendment, Native communities have taken steps in a number of other strategic directions to secure their religious and cultural freedoms. Native communities and organizations have registered claims and concerns about religious and cultural freedoms with the international community and institutions representing it in a variety of ways. Making reference to their status as sovereign nations whose treaties with the U.S. have not been honored, frustrated with previous efforts to seek remedies under U.S. law, concerned with the capacity for constitutional protection of what are typically "group" and not individual rights, and sometimes spurned by questions about the rightful jurisdiction of the U.S., Native organizations have sought consideration of their claims before the United Nations and engaged in its consultations on indigenous rights.

The 2006 *United Nations Declaration of the Rights of Indigenous Peoples* includes reference to the "right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains" [Article 12.1]. In Article 11, Indigenous peoples are recognized as having "the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites artefacts, designs, ceremonies, technologies and visual and performing arts and literature." Also

specified are their rights to their languages. An offshoot of the American Indian Movement, the International Indian Treaty Council is one such organization that has shifted its attention to the international arena for protections of indigenous rights, including those of religious and cultural freedom.