

Religion and Constitutionalism: Indigenous Societies

When groups came to America they often shared the same religion. As these religious communities interacted with other communities, they insisted on their ability to maintain their own religion and not to have other religions imposed on them. In order to obtain such an agreement from other religious communities, each community also had to agree similarly to permit others to retain their religions and agree not to impose their religion on the other community. This assumed an essential distinction between government and religion. This agreement was a necessary condition for forming the larger community, and it was embedded in the Constitution at an early point in two clauses of the First amendment. Although our polity is rife with religious symbolism (“in God we trust” on coinage, ceremonial prayers surrounding inauguration and meetings of congress, “under God” in the pledge of allegiance, and “so help me God” in the oath of office) and no announced atheist has secured election as president, none of these references is within the Constitution. It is an interesting story to follow how the clash of Christian religions produced constitutional commands of tolerance and prohibitions on establishment, while the recognition of the values of other religions such as Judaism, Islam, Buddhism, Hinduism, and Shintoism came only later as it fit into the framework established for competing Christian religions.

The separation of institutions for worship and governance is a significant contribution to governance, as theocratic states prove troublesome to modern ideals. Nevertheless, the holistic cosmology of some indigenous peoples may require recognition of the theocratic state in ways that the Court and the political process do not yet recognize.

A number of the recent decisions under the First Amendment religion clauses or the Fourteenth Amendment incorporation of those principles deal with a group that became part of the United States by coercion rather than choice – the indigenous peoples that were here before Europeans arrived. And cases fundamental to the Court’s view of the First Amendment may have more relationship to issues of political autonomy than religious freedom or establishment. While the Court decisions tend to analyze the issues strictly in terms of the religion clauses of the First Amendment, the political response has treated Indians separately from other religions and made claims instead of autonomy.

The individual rights guarantees of the Constitution do not restrict American Indian tribal operations – the tribes are neither states nor the federal government, but, in Justice Marshall’s

phrase, “domestic dependent nations.” The national government claims authority to regulate within the reservations, and both state and national governments govern the tribe’s operations and those of its members outside the lands it holds. Individual Indians and tribes receive significant federal aid that may be subject to conditions which affect the independence of the person and the tribe. The national government passed a statute (the Indian Civil Rights Law) which states that no tribe in exercising its powers of self government shall “make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances.” Nevertheless, a significant area of self-government remains. For the most part, state law does not apply within the reservation and federal law increasingly is concerned with preserving the culture and identity of the members of tribes.

Preservation of the culture and identity of an indigenous group may involve more than self-government and the retention of physical objects of cultural value. The belief system of native peoples may be challenged by contact with the dominant state and the separate cohesiveness of that system may be threatened by appropriation of that belief system. The state often has an interest in prohibiting practices that are part of the religious exercise of a group and non-indigenous people have an interest in learning about indigenous beliefs. Both of these interests can make it difficult to maintain the belief system and can undermine the distinct nature of indigenous culture – but both are also legitimate interests.

To a significant degree, the self-governance of Indian tribes has been accomplished within a framework imposed by the nonindigenous society. Where traditional tribal governance may have been through elders’ interpretation of traditional mores, the Department of the Interior insistence on a Constitution and Laws for tribal government recognition produced democratic forms that did not reflect the traditional culture. The model separated religion and governance despite the connection that existed. Nevertheless, the Indian Civil Rights statute does not forbid the tribe from establishing religion. This seems to recognize the possibility that religion may be so enmeshed in government in some indigenous cultures that prohibiting the establishment of religion would significantly interfere with the tribe’s governance.

The separation of religion and culture is difficult in many of the various indigenous groups. Justice Brennan wrote:

for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories." . . . Thus, for most Native Americans, "the area of worship cannot be delineated from social, political, cultural and other areas of Indian lifestyle." [citations omitted]

Justice Brennan argued that the religious beliefs of some indigenous peoples made it particularly important for them to be able to engage in ceremonies connected with specific sites.

The federal government has recognized that particular places are sacred to some Native Americans and that care should be taken to avoid disturbing them. The **American Indian Religious Freedom Act, 42 U.S.C. §1996 (AIRFA)** Protection and preservation of traditional religions of Native Americans manifests this concern:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

However, the stated policy of the United States does not mean that the sites will be protected. In some instances, the "sacred" site may be located outside the reservation on public land that is not reserved to the Indians. In *Lyng v. Northwest Indians Cemetery Protective Association (1988)*, the government approved the construction of a road through a National Forest area to connect two towns and enable timber to be removed despite the impact of the road on disturbing the sites in the national forest that had been used by an Indian tribe for ceremonial purposes.

The Cemetery Protective Association sought to block the road on the ground that it was an infringement of their right to free exercise of religion. In effect, they saw the use of forest areas as their church, and a road logging timber through the church despoiled it in innumerable ways. They argued that it violated the First Amendment guarantee of no law prohibiting the free exercise of religion. It clearly affected their religious practices and the government's interest in building the road was not compelling.

Justice O'Connor, writing for the majority, upheld the decision to build the road. She said that it was an internal decision of government about the government's own operations. It

did not coerce natives to violate their beliefs, nor was it directed at harming them. Justice O'Connor concluded that AIRFA did not provide a cause of action, and was merely a directive to take the interests of Native Americans into account. She said that the Forest Service had done so in the study done before building and in the design of the road. She found that the more stringent tests for invasions of religious freedom did not apply in this case: ". . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."

Justice O'Connor's opinion suggested a fear that is just the opposite of the theory of discovery. Chief Justice Marshall asked in *Worcester v. Georgia*, "Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it?" The theory of discovery suggested to a degree that these nonindigenous people did get power. Justice O'Connor saw the Indian claim in *Lyng* as the reverse: "No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property."¹

Despite such concerns, President Clinton issued an executive order in 1996 pursuant to AIRFA which told all federal agencies who dealt with federal laws to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." This suggests that the federal government in the future would pay greater attention to the interests of the native religions in the management of federal lands – even though "accommodation" leaves room for disagreement, and may be perfectly consistent with the behavior of the federal government in *Lyng* itself.

Justice O'Connor had been careful to distinguish *Lyng* from laws that directly coerce Native Americans to abandon religious practices by punishing them for engaging in it. For such laws she would apply the test that had developed over the last half of the twentieth century and require a showing that substantial impairments of religious exercise be justified by a

¹ A number of Indians wanted the forest road to benefit the economy and to give them access to the towns while many non-Indian environmental groups opposed logging in the national forest. Thus, there was a question whether a distinct religious interest that should be recognized above all others was at issue, or whether it was simply a more forceful environmental claim.

“compelling” government interest. But only two years later Justice O’Connor lost the battle over the standard in *Employment Division v. Smith* (1990).

Al Smith and Galen Black were fired from their positions as employees of a private drug rehabilitation agency because they used peyote at a religious ceremony of the Native American church to which they belonged. They were denied unemployment compensation by the employment division of Oregon because they were fired for “misconduct.” They challenged the denial of unemployment benefits on the grounds that their behavior was the exercise of their religion and the denial of benefits operated as a prohibition on the free exercise of their religion.

Peyote is a central part of the religious practice of the Native American Church. As Justice Blackmun wrote:

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 5-6 (“To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit”).

Smith and Black were able to cite a slew of Supreme Court precedents in which the court had found that the fiscal interest of the unemployment compensation scheme was not a sufficiently compelling interest to justify denial of benefits when unemployment resulted from a discharge based on religious exercise – particularly sabbatarians who were fired for refusal to work on Saturday. The Supreme Court distinguished these precedents on the grounds that those discharges were for conduct that was legal. Oregon law made the use of peyote illegal. But the biggest step for the Court was its decision to change the test to be applied to laws that impaired religious exercise. Justice Scalia got five votes to support a change that eliminated the compelling interest test. “[I]f prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”

Justice O’Connor concurred, but objected to the change in the applicable test. She believed that religious exercises should be free from substantial impairment unless the government had a compelling interest in its law, but thought that enforcement of the state’s drug

laws was just such a compelling interest. Dissenting justices, led by Justice Blackmun, would have followed the Oregon court in finding that the interest of the government was not compelling. The state “offers, however, no evidence that the religious use of peyote has ever harmed anyone.” Indeed, Justice Blackmun argued that the religious use of peyote furthered the general goals of the drug statute. “There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population.” Justice Blackmun cited AIRFA to support his dissent, but also acknowledged that the statute did not create enforceable rights.

The *Smith* decision aroused a storm of protest among civil libertarians and religious groups who felt that their religious exercise might be threatened. They managed to get the Religious Freedom Restoration Act (RFRA) through Congress to require the reinstatement of the compelling interest test; however, in *Bourne v. Flores* the Supreme Court held RFRA unconstitutional.

In the wake of RFRA, Congress also passed **the 'American Indian Religious Freedom Act Amendments of 1994'. 42 U.S.C. §1996a**. The new statute was narrowly directed at protecting the Native American church in its ceremonial use of peyote. It noted that federal drug laws and those of a majority of states had exempted the religious use of peyote and then prohibited other states from proscribing it.

The Congress finds and declares that -

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

(b) Use, possession, or transportation of peyote

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

The new statute had several constitutional bases that did not apply to RFRA – the general federal power with respect to Indian tribes from *Kagama*, and the 14th Amendment §5 power to enforce the proscription against racial discrimination. Thus, if the classification is regarded as racial, the law is justified as a means of preventing racial discrimination; if it is political, the law is justified as part of the United States power over its “ward.” At the same time, the law would not even affect one of the parties to the case – Galen Black was not an Indian. Thus, the current state of the law has more regard for the religious exercise of Native Americans than for other sects.

As a result of the decision of the Court to invalidate the Religious Freedom Restoration Act, Indians may be privileged to use peyote in religious ceremonies while other religions may not be protected against the impact of drug laws on their ceremonial acts. Even members of the Native American church may be reachable by drug laws if they are not “Indians”. Surely distinctions among worshipers would normally be invalid on equal protection or free exercise grounds, yet they are likely to be valid here. The statutory exclusions (remember Justice Scalia suggesting that religions should rely on the political process for exemptions) suggest that the cases were as much about the degree of political autonomy of indigenous peoples as they were about religious freedom.