NATIVE AMERICANS AND RELIGIOUS FREEDOM: THE CASE FOR A "RE-VISION" OF THE FIRST AMENDMENT

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Questions of religious freedom are inextricably linked to freedom of expression not only historically but in case law to the present day. The reason is not only that the Founders linked these freedoms but that preachers often defended free speech. Furthermore, the Supreme Court has regularly recognized that much of religious ceremony is rhetorical in nature. In *Rosenberger* (see below), for example, a religious magazine won publication funding from a state school because of its First Amendment right to free press, not its right to free exercise of religion. That case, like many before it reveals that the First Amendment contains two kinds of prohibitions: one exclusive, the other inclusive. The latter forbids the making of laws which abridge free speech, press, petition and assembly. The former—the exclusionary portion—bans the government from establishing a religion or interfering with the free exercise of it. In essence, it guarantees political liberties but not religious ones, thereby prioritizing the former over the latter. The evolution of this ordering can be traced in part to Thomas Jefferson's opinion, a view expressed to the Danbury Baptist Association in 1802, that the First Amendment's religious clause builds "a wall of separation between church and State." Incorporating Jefferson's understanding of Enlightenment thinking, the Supreme Court generally has ruled that individuals are free to believe what they want but are not at liberty to practice that belief in ways that violate other, more privileged rights.

THE SUPREME COURT'S PRIORITIZING OF FREE EXERCISE

In a string of rulings starting in 1977 with *Rosebud Sioux Tribe v. Kneip*, the Supreme Court has denied First Amendment protection to Native American religious practices established long before the colonization of the United States. Similar rulings have allowed infringement on sacred sites. For example, in *Sequoyah v. Tennessee Valley Authority* the Supreme Court refused to grant *certiorari* when a federal circuit court ruled the flooding of holy places, ancestral burial grounds, and gathering sites did not violate religious freedom of Cherokees because they had no property rights in the area. The Court thus ruled that such rights supersede ones associated with religion.

The most controversial decision related to the issue of sacred sites is *Lyng v. Northwest Indian Cemetery Assn.* (1988) in which the Supreme Court refused to extend sacred status to natural terrain. In the early 1980s, Indian groups opposed road construction and timber harvesting in the Six Rivers National Forest, a site where various tribes exercised their rights to freedom of expression and assembly by holding vision quests and gathered medicines. The District Court of Northern California and the Ninth Circuit Court used the Free Exercise Clause to uphold an injunction against constructing a road through the area because it "would seriously damage the salient visual, aural, and environmental qualities of the high country," thereby impairing the ability of Native Americans in the area to practice their religion.

The Supreme Court, however, reversed on a five-three decision in which Justice O'Connor, writing for the majority, readily admitted that "[i]t is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion." She also noted that even "indirect coercion or penalties of free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." Nonetheless, the Court held that the Constitution does not protect tribal religious sites used for worship on federal lands unless "effects of government programs" actually "coerce individuals into acting contrary to their religious beliefs." Hence, the government need not offer a "compelling justification" for use of "what is, after all, its land." Consequently, O'Connor wrote, "However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."

Justice Brennan identified the problems with the majority's decision in his dissent. Even though, Brennan wrote, the Court admitted that the case involved use of "federal land in a manner that threatens the very existence of a Native American Religion," it chose to reverse the lower courts because such usage neither "coerce[s] conduct inconsistent with religious belief nor penalize[s] activity." However, free exercise addresses "any form of governmental action that frustrates or inhibits religious practice." The effect of the decision is to "refuse to acknowledge the constitutional injury the respondents will suffer," thereby leaving them with "absolutely no constitutional protection against perhaps the gravest threat to their religious practices." The decision in *Lyng* effectively stripped Native Americans of legal safeguards protecting worship at sacred sites. because it prioritized federal property rights over the needs of a minority religion.

Rulings related to sacramental use of peyote also demonstrate the wont of the Supreme Court to weaken the

constitutional provision protecting free exercise. In 1909 Native Americans founded what was to become the Native American Church of North America so that they could practice peyotism under the protection of the First Amendment. That move, however, did not go unchallenged. In 1914, for example, when a U.S. District Court failed to prohibit consumption of peyote under anti-alcohol statutes, the Office of Indian Affairs tried to circumvent the courts by defining it as a narcotic. Even when localities have recognized the drug as legal, "Indians have ... [suffered] criminal justice harassments, arrests, prosecutions, convictions, and jail time."

The most significant recent case addressing this issue is *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990). Several members of the Native American Church lost their jobs and subsequently were denied unemployment benefits by the state of Oregon because they tested positive at drug screenings after participating in religious use of peyote. The Supreme Court refused them protection, holding that the Free Exercise Clause permits the state to prohibit sacramental use of the substance. The consequent limitation on free exercise was significant. Until Smith, the test applicable in such cases was *Sherbert v. Vernor* (1963) which "involved a three-step process for determining when the state could ... impinge on religious activities, the most important step being a demonstration that ... [it] had a compelling interest in controlling specific kinds of behavior." The Oregon Court of Appeals using that precedent held that denying unemployment benefits violated the respondents' free exercise rights. In reversing the Oregon Court, the 1990 High Court struck down the compelling interest test, substituting in its place the "proposition that the right of free exercise of religion had to be linked to some other freedom guaranteed in the Bill of Rights." Justice Scalia, who wrote the majority opinion, argued that "[t]he present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity," and thus, denied protection. He spent some time justifying his reading of the First Amendment, one which Justice O'Connor dubbed "strained [and] narrow" in her separate concurring opinion in which called for the maintenance of the *Sherbert* test. She claimed the majority opinion disregarded the Court's "consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." In addition, she complained about majoritarian bias: "the Court today suggests that the disfavoring of minority religions is an 'unavoidable consequence' under our system of government and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."

In his dissent, Justice Blackmun made a similar point contending that the Smith decision mischaracterizes precedents and "effectuates a wholesale overturning of settled law concerning the Religious Clauses of our Constitution." One consequence of the *Smith* decision was the passage of the Native American Free Exercise of Religion Act of 1993 , which promises protection of "sacred sites, ... use of peyote, ... religions rights of North American prisoners, ... use of eagle feathers and other surplus animal parts in ceremonies" and "extension of the compelling state interest test to religious practices." In a February, 1996 decision concerning the Rastafarians' use of marijuana as a sacrament, the Ninth U.S. Circuit Court of Appeals overturned three marijuana possession convictions in Montana because the judge had barred evidence of the defendants' religious views. The ruling cited the 1993 act. The Supreme Court, however, re-entered the picture on June 25, 1997, in a decision that surprised some scholars. The Supreme Court struck down the Religious Freedom Act of 1993 , which would have allowed Native Americans to use such substances as peyote if they were a traditional and legitimate part of their ceremonies. The Court ruled 6-3 that the act was an infringement on states' rights. See *City of Boerne v. Florida* (95-2074).

The intersection of education and religious freedom provides a further example of conflict between free exercise and other priorities. In *Wisconsin v. Yoder*, the Supreme Court upheld a compulsory school-attendance law and in subsequent rulings has given considerable leeway to school administrators to control the educational environment, most notably in *Fraser v. Bethel School District* (1986). In 1993, however, in *Alabama & Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District*, the Fifth Court of Appeals overturned a District Court ruling which had validated the right of a school district to regulate hair length even though "many southeastern tribes wore their hair long as a symbol of moral and spiritual strength." The school district contended that such practice was contrary to a dress code designed to "create ... an atmosphere conducive to learning,"[t]o foster ... respect for authority," and "[t]o ensure that the conduct and grooming of students ... creates a favorable impression for the District and the community." This case, which ties the free exercise clause to the equal protection provision of the Fourteenth Amendment, is wending its way to the Supreme Court. When it reaches that body, the Court will have to balance free exercise against the government's right to impose a regulation which "advances an unusually important ... goal." As William Wayne Justice noted in his opinion, however, "[i]t is unclear, after *Smith*, whether a valid free exercise claim in a civil context, unaccompanied by other constitutional claims" would be subject to the compelling state interest test or to a lesser standard."

The clear tendency of the Supreme Court is to subordinate free exercise to secular, political rights such as free speech and press. The rigidity of the position of the majority is particularly striking in light of contrary rulings by lower courts and the pointed criticism of dissenting Justices. These cases are significant, not only to Native Americans, but to other religious groups who wish to practice religion in their own way, who wish to send their children to private schools or educate at home, who wish to dress and groom their children in ways consistent with religious practices, and who wish to protect what they believe to be sacred sites. The Court seems to have limited religious freedom based on a narrow reading of the First Amendment and perhaps a re-visioning giving more credence to other worldviews is in order. To establish this point, we contextualize recent decisions culturally and historically. The following section distinguishes between Anglo-American and Native American orientations to frame the historical subversion of Native American religious freedoms.

Cultural Difference and the Suppression of Native Freedoms

A factor contributing significantly to the suppression of Native Americans is the difference between the world views of Indian societies and that grounding Anglo-American jurisprudence. As Jung made clear, the myths, rituals, and symbols of a culture reflect its collective unconscious. The Native American collective unconscious, says Barsh, conceives of an initial creation as followed by an "unending embellishment" that generates an "ever-changing, ever-more complex universe filled with a growing number of riddles and moral choices." The Anglo-American narrative, however, posits original creation and sin: God's labor coupled with Adam and Eve's fall depicts a completed world populated by people needing redemption. Todorov, among others, claims that this conception is the root of the

earliest conflicts between natives and Euro-Americans. The Anglo-American collective unconscious, as informed by Judeo-Christian theology, embraces a relatively absolutistic morality which projects an apocalyptic end to existence, and, as informed by the Enlightenment and English common law, subscribes to a linear notion of time, thereby seeing change as characterized by consistency and continuity. Native Americans, however, conceive of creation as continuous and conceive of time as cyclical; hence they posit an uncertain and ambiguous world.

Cyclical versus linear notions of time yield two distinct views of change. The notion of continuous creation grounds time in the "manifold" "rhythms" of "organic life itself," links it to the "daily voyage of the sun, phases of the moon, passage of seasons." The result is a circular perspective characterized by a "repetitive, infinite time in which events eternally recur." Original creation and the telos of perfectibility, however, correlate with an "individual's encounter with birth, maturation, and death," thereby depicting time as "finite [and] directional." For most Anglo-Americans time progresses from an antiquated past to a superior future.

The contrast between ongoing and original creation in turn implies divergent definitions of the self in the collective unconscious. For example, Judeo-Christian theology posits an individual who seeks moral perfection in preparation for judgment day. Most Anglo-Americans see themselves as pursuing the perfection necessary for redemption in a competitive world marked by a qualitative division between the human and the nonhuman. Aboriginal thought, however, describes each individual as a "creative act," and therefore "neither good nor evil ... but unique in ... [her or his] ... capabilities." Living involves discovering ones "own unique talent" within the context of a "universal kinship" which is continuous in time, space, and across species." Human identity thus stems from a union with all of existence rather than from a separateness driven by the need for perfection.

The communal and individual in turn permeate each group's subconscious concept of religion and its attendant ritual. Anglo-American culture sees ritual as symbolic and therefore instrumental; manipulating symbols allows one to influence others and to develop systems of knowledge that effect a concomitant control of nature. Language is conventional because "symbols are arbitrarily chosen ... and are 'correct' only insofar as they conform to patterns of usage." Hence, religious ceremonies are rites used to praise and petition God. Christian ritual embraces a "vertical understanding of the spiritual relationship between" the Creator and a specific person whose salvation is an individual achievement. Christianity is a universal religion because it transcends political and geographic boundaries and often is quite removed from everyday existence; such separation became particularly prominent as the industrial revolution became the technological revolution.

In most native languages, however, meaning is neither abstract nor arbitrary; it inheres "in language as spoken." The potency of speech stems from its capacity to unite people with the essence of life itself. Ritual, therefore, functions to invoke the power of the "supernatural ... through the proper recitation of songs, prayers, and dance." Such recitation must echo the patterns of creation, involve persons in concert with each other, and embody not only the permanence of tradition but the change of creation. This wedding of tradition and change connects participants to creative forces. To tap the power of ritual is to plumb the depths of one's uniqueness and to effect the communal realization necessary for a rewarding life. Blaeser describes the difference between native and western rituals as she distinguishes religion from the spiritual: "[R]eligion ... involves the imposition of the already-established, the fixed order or structure.... [S]pirituality ... involves the interactive formation of relationships ... [for] [i]n an alive world, forces ... change, shift, and develop, requiring, therefore, equal life, equal vitality, in the forms of ritual or the means of connection with [them]." Significantly, since most Indian nations do not delineate religion from other aspects of existence, many native languages have no separate word for the concept.

A third difference includes contrasting concepts of society that echo the individualism and communalism implicit in Anglo- and Native American notions of identity. The ancestors of today's Anglo-Americans inhabited an authoritarian world which used hierarchy, reason, technology, and science to effect order. Theirs was an existence which, although straining to break free of the control of the medieval church, still adopted the principle of the godhead in government. Colonists came from nations whose governments were monarchies or integrated the parliamentary with the royalist. Laws were "prescriptive ... equation[s] for the consequences of individual behavior." This centralizing of control when combined with notion of Original Sin intimated that people were competitive and self interested. The Enlightenment, as translated by America's Founders, provided a system of checks and balances which sought to provide equality of opportunity in the pursuit of happiness. Hence, Anglo-Americans engaged in competitive decision-making in their courts and legislatures, and subscribed to a model of leadership grounded in a hierarchical system of representation.

Another strain of the notion of order in Anglo-American jurisprudence stems from the instrumentalism of scientific technology. Scientism has its roots in rationalistic and positivistic thought. Rationalism proffers logic as the road to a reliable knowledge that can spur social improvement. Positivism bases technological advancement in the scientific method, a value-free system designed to test ideas using logic and objectivity. Scientific progress fast became the watchword of civilization. Thus, whereas religion or spirituality formed the basis for Native American consciousness, Anglo-American jurisprudence rested on the hierarchical competition implicit in government and science.

The Native American collective unconscious springs from an acceptance of universal kinship which begets harmony and consensus rather than hierarchy and competition. These spiritual, political, and ecological bonds imply a unity which results in an egalitarian approach to social order. Because each person is a unique creation, all are equally moral. Therefore people have two primary obligations: each must follow her or his own conscience and must partake in the common goodby accepting responsibility for others. In the Native American collective unconscious, order stems from harmony, not hierarchy. As a consequence, indigenous political systems were purer forms of democracy than were their Anglo-American counterparts because the foundation for order was self-discipline rather than obedience to laws. "Collective action" required not just majority consent but the sanction of "everyone affected — or at least the consensus of all their families." This reliance on consensus and responsibility influenced both decision-making and standards for leadership.

Eschewing the confrontation of debate, most tribal councils were the culmination of a consensual process. Discussion preceded a council, thus "minimizing conflicts and wounded pride" endemic to public dispute. Hence, "speakers" could "build on one another's words so that by the time all had spoken everyone was of one mind." The "real work of foreign affairs" occurred at "annual ceremonies of renewal" which allowed participants to reconcile their "grievances,"

confess their "sins," pay their "debts," enlist "one another's aid," and reaffirm their "kinship." Yearly rites thus marked the cyclical revitalizing of an "original relationship."

Native nations and federations certainly were not free of hierarchy. However, the qualifications for and functions of leaders stemmed from assumption of responsibility, not from personal power. In essence, leadership was an obligation falling to the "selfless" and "most capable." Pelletier of the Ojibwas explains that his people "thought that decisions ... should be made by the wisest and most experienced and bravest people in the community ... [not] the most ambitious." Leaders acted to create consensus, to inspire to action, to win trust and respect by risking self in aid of others. Thus, Native American jurisprudence tended to embody the principle of renewal and promoted social cohesion through the consensus and harmony implicit in the assumption that in life "many voices intersect because all" participate in a common "dialogue."

Figure #1 summarizes the differences between the collective unconscious of Native Americans and that grounding Anglo-American jurisprudence. These major themes and differences form a point around which many variations cluster. Native American cultures are diverse, as are their Anglo-American counterparts. Nevertheless, as Irwin argues, these two orientations correspond roughly to right and left-brain functioning. Native cultures, he contends, are "holistic," "imagistic, synthetic, spatial, [and] imaginative"; the contrasting European mode is "verbal, analytic, linear, [and] rational," favoring "sequential processing ... and an active, pragmatic interaction with the environment." The collective unconscious of each culture sheds light on the difference manifest in governance of freedom of expression and religion. The following examination of the history of the relationship between the two cultures highlights the relationship of this cultural contrast to suppression of Native American freedoms.

The Legacy of Suppression

When settlers came to North America, they faced the question of how to cope with its people. A need for the protection of larger tribes resulted in a treaty-making policy that remained in tact until 1871. As white numbers grew, the government used treaties to remove Indians from desirable lands, thus embarking on a policy of isolation. For example, Delawares from the north were moved into and out of Indiana, Missouri, and Kansas, finally ending in Oklahoma: Cherokees of the South also were resettled via Arkansas in Oklahoma; the Sioux nation saw its territory shrink in the Midwest; and northwestern nations in Oregon's Willamette Valley were relocated to less desirable terrain in the area. This coerced ceding of territory uprooted Native peoples from their homelands, altered their lifestyle, and subjected them to a control that fostered dependence and impotence. Most significantly, being torn from their homes impacted religious freedom because of the centrality of land to Native spirituality.

A second means of control was less benevolent. Annihilation through disease, environmental destruction, and military action depleted the indigenous population. Between the advent of European colonization and the late 19th century, the number of aboriginal peoples in the contiguous forty-eight states dropped from over thirteen million to about 250,000. The attitude which spawned and justified annihilation implied that the demise of indigenous peoples was a regrettable but natural step in the advance of civilization. Like the policy of isolation, this narrative has also become a potent argument in jurisprudential battles in today's courts.

Ultimately, toward the end of the 1800s isolation and annihilation proved either unworkable or intolerable and in 1924 the privileges of citizenship were extended to Native peoples. Suppressive strategies changed significantly: the dominant culture first attempted to transform or remake Native Americans by altering their use of land, Anglicizing the Christianizing their approach to education, and outlawing key religious rites. It then turned to marginalizing Indian attempts at redress through the courts and through protest.

Transformation

In 1877, newly elected president Rutherford B. Hayes told the Congress that "Many, if not most, of our Indian wars have had their origin in broken promises and acts of injustice on our part." Hayes' message signaled the uneasiness of political leaders concerning the tactics used to deal with Native Americans. Hence, national policy shifted to attempts to transform and thus assimilate the indigenous population, to make them "white" by educating and Christianizing them as well as by teaching them farming and the value of private property. Those efforts at transformation put into stark relief the subversion that results when a linear, instrumental culture dominates one based on harmony and cyclical renewal.

The linearity of Anglo-American culture was pervasive: knowledge was cumulative, advancing through the testing of ideas, so that new replaced old; in law recent rulings superseded those of the past; civilization progressed so that the life of tomorrow would be better than previous existence; religion prepared people for a heaven of the future. Indigenous peoples, however, embraced circular metaphors, notably the sacred hoop which stood for the earth, sun, stars, and planets, as well as for seasonal cycles and other natural patterns. The Lakota, for example, used a spiral pattern to record their history on a buffalo skin. The hoop embodies the cyclical principle of living in and renewing harmony with the natural world. Imposing linearity on Native peoples inflicted a "psychic nightmare" of straight lines and boxes.

In 1881 President Arthur advocated introducing Indians to "the customs and pursuits of civilized life and gradually absorb them into the mass of our citizens." A major tool for effecting this assimilation was the Dawes Act of 1887, which altered drastically the relationship between native peoples and the land. It promised 160 acres and eventual citizenship to those who would work the land, thus abandoning nomadic lifestyles and cooperative farming favored by many tribes. It pledged increased aid but also gave the president the right to abrogate treaty agreements with the tribes. This latter provision allowed whites to seize vast territory. The result was a reduction in Indian lands from 1887 to 1934 from 138 to 48 million acres. Of the latter, almost half were semiarid or desert and therefore virtually useless for cultivation.

According to a study commissioned fifty years after the Act's adoption, allotment was a dismal failure because it required indigenous peoples to live in ways antithetical to their own cultures. Reservations and farms curtailed the adaptability characteristic of traditional lifestyles governed by the rhythms of seasonal change which facilitated adjusting to the bounty of the land rather than using it. Black Elk explains the Lakota's aversion to white use of land:

"The Wasichus [whites] have put us in these square boxes [reservations].... They slaughtered all the bison and shut us up in pens. Our power is gone and we are dying.... [T]he nation's hoop is broken and scattered." The Native way was to "unite ... with the sacred," to close the circle; they therefore "perceive[d] land use as an intimate relationship with the cosmic mother," not as the utilization of finite resources. At the Lake Mohawk Conference Proceedings in 1900, Merrill Gates described the Dawes Act as "a mighty pulverizing engine [that] breaks up ... tribal life."

In addition, land was central to spirituality for many Indian nations. The concept of universal kinship made it much more than a resource or commodity for them. Because they viewed humans as inextricably related to all creation, because they saw ongoing creation as wedding them to specific lands, because they perceived land as the ground for a "spiritual substance" which was the "source, sustenance, and end of all cosmic life and forms," their notions of ownership differed radically from those of Europeans. Bands or tribes, not specific individuals, had the right to occupy land. Furthermore, the source of sovereignty was not human but spirit, the creative source which gave and continues to give life to all creation. Hence, "no human, not even a tribal chief" could "own the land." In addition, a people retained their right to stewardship only if they fulfilled a compact to live in harmony with the rest of nature. Thus, to the Native American, the concept of land use was an anathema and the idea that human beings could exchange that which ultimately they could not possess was nonsensical. The wrenching effect of the Dawes Act separated them from sacred, spiritual space and thereby alienated them from the core of their culture in much the same way as the earlier policy of isolation did.

Anglo-American education also ran contrary to Native norms as it attempted to transform beliefs by indoctrination. As early as 1839, the Commissioner of Indian Affairs asserted that education was the key to a program to make the "Indian better than he is." Its purpose was to dispel the "dark clouds of ignorance and superstition" so that the "light of Christianity and general knowledge" could guide Native peoples "from the night of barbarism into the fair dawn of Christian civilization." Education thus depended on importing objective knowledge that would erase the lines between Native and Anglo society. It was a system based on separation of the human from the rest of existence, one that required Indians to deny their own cultures.

The negative impact of an Anglo-American system that failed to admit the viability of traditional ways endures to the present day. Eddie Benton-Banai of the Ojibwas describes his first experience at a Bureau of Indian Affairs boarding school:

> *We'd been riding on a school bus the better part of that day, ... and we arrived ... around midnight. I thought for sure they would feed us — but they didn't do that.... [T]he first stop was this little room ... [where] everybody got their hair lopped off.... [T]here on the floor lay my pretty eagle plume and the braids that my mother had so carefully fixed and tied.... Then all of our clothes were taken away from us and we were all dressed in blue coveralls ... [and] government-issue black shoes.*

This stripping of personal identity surely stigmatized tribal custom. Morris and Wander describe Native American children as being "taken away to 'Indian' schools far from their friends, families, traditions, rituals, systems of belief, languages, principles, ancestors—nearly everything that made them who they were." Since a people live on in their stories, literature, ceremonial speeches, music, dance, poetry, dreams, the process of re-education is particularly suppressive when it strips tribal members of these rhetorical moments.

The most virulent effort to transform Native Americans involved Christianization with its resulting suppression of religious practices. Missionaries adhered to a creed based on the linear metaphor of descent/ascent. The fall (descent) in the Garden of Eden requires redemption (ascent) through God's grace. Christ's sacrifice creates the possibility of a salvation attainable only by individuals who live the Christian life. Because Christianity provides a code for future salvation, it has little in common with religions founded on a cyclical unity and harmony with creation. Government attempts to eradicate native dances highlight the conflict between linear transformation endorsed by Christians and the native cyclical principle of renewal.

Opponents of Indian religious practices depicted them as "superstitious, cruel, licentious." One attempt to combat this "barbarism" involved the 1883 legislation that outlawed the Sun Dance of the Oglala, a rite which entailed offering one's body and soul to Wakan-Tanka, the Creator, thereby affirming a unity binding humans with continuous creation. Anglo-Americans considered the ritual savage because it required piercing of the skin. In 1883 the Secretary of the Interior informed the Commissioner of Indian Affairs that the Sun Dance was a heathen rite which hindered the civilization of the tribes and stimulated warlike passions. The Commissioner responded by criminalizing ceremonial dances, practices of medicine men, and the giving and destroying of property during funeral rituals. Similarly, a 1920 report alleged that the Snake Dance of the Hopi, a supplication for rain and bountiful harvest, involved immoral sexual practices and child abuse. Although the data for the report was suspect because it came from Anglos and Christianized Native Americans, the Commissioner of Indian Affairs recommended "fines and imprisonment" be imposed on participants in the dance and similar ceremonies. Hence, both the Hopi and the Sioux ran afoul of a bureaucracy dedicated to "improvement" of Native Americans by abolishing religious rites.

The most famous ritual the government suppressed was the Ghost Dance, a ceremony based on the message of Wovoka, a Paiute born in Nevada in 1858. His promise of "renewal, rebirth, and 'revitalization'" encouraged Indians to envision a brighter future. Demoralized by broken promises, military defeats, loss of their homelands, and assaults on their way of life, they saw in his teachings a promise of "deliverance from their depression and sorrow." Hence, more than half of Native Americans west of the Missouri participated in a shared cultural and spiritual response which constituted the largest Indian movement of the nineteenth century.

Wovoka claimed to have experienced a rebirth in which he returned from heaven graced with God's directions for life and worship. His vision promised Indians a millennium, provided they performed the dance and adopted peaceful ways. The rite itself was an exhausting event producing a "delirium" that enabled "participants" to communicate with "the dead." Word of the prophet's teachings spread throughout the west. Because of differences among indigenous cultures, the Ghost Dance movement was pluralistic. Each nation "built a structure from its own mythology" in embracing the hope of a millennium. Many traveled to hear Wovoka, returning to their homes with a Messiah Letter that counseled adherents to partake in the dance, live in peace, work with white people, and take heart that their

ancestors would return.

Anglo-Americans dubbed the movement a "Ghost Dance" because of the promise to awaken native ancestors. With the willing cooperation of newspapers, they fixated on predictions that redemption would bring destruction of whites and linked an apocalyptic religion proclaiming fraternity and peace with images of rebellious Sioux driven mad by a savage dance. The government banned the dance despite the First Amendment's protection of freedom of religion and assembly because, officials argued, the pseudo-sovereign status of native nations precluded their protection under the Bill of Rights. The banning led to the last tragedy of the Indian Wars, the massacre in South Dakota in which a "dream" based on a "religion of Hope died with the Sioux on the snow-swept plains ... [of] Wounded Knee."

In 1909 the Secretary of the Interior argued that transforming aboriginal peoples was highly discriminatory because "[h]ad a Christian denomination ... or the Jewish community been ... [treated similarly], the outcry would have been tremendous." Cadwalader and Deloria explain the paternalistic rationale for that discrimination: "[A]ssimilationists confidently envisioned a future in which tribes had disappeared ... to be remembered only as symbols of a by-gone and primitive era." Remaking Native America failed because it required Indians to abandon their cultures, to forsake their identities by adopting the creeds and behaviors of a linear perspective. Transformation was an attack on the core of the spiritual bases of many Indian cultures; it denied Native Americans voice by curtailing their ability to live in harmony with the land, discounting traditional education, and outlawing religious rites. It too provides a strong exigence for relief in cases before Anglo-American courts.

Marginalization

The modern era for Native Americans began with the Indian Citizenship Act of 1924 and the Wheeler-Howard Act of 1934, which expanded reservations, encouraged self-government, and supported programs affirming of Indian culture. Since then, contemporary conflicts over free speech and religion have become exceedingly complex. The result is a stark illustration of the suppression of rights because of the differences and disparity in power between the two groups.

Strategies for circumventing the Citizenship Act by restricting the privileges of citizenship emerged early. In 1928 Arizona's Supreme Court denied reservation residents the franchise because they were "under guardianship" and therefore "not capable of handling [their] own affairs." Arizona also disenfranchised anyone unable to read English, thereby declaring Native and other languages inferior and/or illegitimate. Given the centrality of language to Indian culture, such a prohibition undermined freedom of expression and attacked the basis for Native American spirituality.

As Echo-Hawk observes, "religious intolerance and suppression have been primary features ... [of] the relationship between native people ... and the newcomers from the Old World." This zealousness invaded the law through regulations prohibiting Native rites and entered politics through influence by Christians in the Office of Indian Affairs. Especially perplexing to Native Americans were the "Indian Offenses" of the 1880s. Although the government lifted those sanctions in 1934 and passed the American Indian Religious Freedom Resolution in 1978, harassment related to Native religious practices continued. Chief Walking Buffalo articulates his people's response to this denigration and repression:

> *You ... assumed we were savages. You didn't understand our prayers.... When we sang our praises to the sun or moon or wind, you said we were worshiping idols.... We saw the Great Spirit's work in almost everything: sun, moon, trees, wind, and mountains. Sometimes we approached him through these things. Was that so bad? ... Indians living close to nature and nature's ruler are not living in darkness.*

Walking Buffalo's lament reflects the contrast between Native and Anglo-Americans views of nature a difference which justifies marginalizing native claims concerning sacred sites and the use of eagle feathers and other animal parts in religious ceremonies. Anglo-Americans view themselves as separate from and above the rest of creation, whereas Native Americans accept the principle of universal kinship. Hence, the dominant culture has had difficulty accepting religions that see nature as sacred, particularly given its acceptance of rationalism. Sale explains:

> *The task of rationalism ... was to ... prove that there was no sanctity about ... nature, that ... [it was] not animate or purposeful, ... but rather nothing more than measurable combinations of ... properties subject to scientific analysis, prediction, and manipulation. Being de-godded, ... [nature] could thereby be capable of human use and control according to human whim and desire. This "de-godding" was especially important to a religion that fought for survival against pre-Christian faiths that venerated nature. As a consequence, sacred objects in Christianity are ones made by people such as crosses and statues, not feathers and hides. Similarly, Christians respect the sanctity of the Wailing Wall, the Mount of Olives, Calvary, the Vatican, or even Mecca, not the sacredness of natural holy places of the Oglala in the Black Hills of South Dakota.*

Divergent concepts of the relationship between people and nature manifest themselves in the recent Supreme Court decisions (cited above) related to sacred sites, peyotism, and education. In *Lyng*, the Court chose to honor the principles of land use and ownership central to an Anglo-American perspective rather than recognizing that "[w]orship at sacred sites is a basic attribute of religion itself." Instead the Court considered sacred sites property to be used for the benefit of its owners, in this case the federal government. Perhaps, as Echo-Hawk argues "[t]t is ... difficult for a culture with an inherent fear of 'wilderness' and a fundamental belief in the 'religious domination' of humans over animals to envision that certain aspects of nature can be sacred."

Parallel difficulties impact the controversy over peyotism, a substance considered sacred and necessary to religious practice by many native peoples but viewed merely as an hallucinogenic drug by the dominant society. The Court ruled in *Smith* that a state which chose to declare peyote illegal had the right to do so, even in the face of a plethora of conflicting statutes in other states and a paucity of evidence that peyote leads to problematic behavior. Similarly, the issue in *Alabama & Coushatta* is whether the right of a school district can regulate hair length because to promote discipline is more important than a personal choice having "religious significance."

Marginalization is also evident when we examine a second means used by Native Americans seeking redress, the

protests during the '60s and '70s. The dominant culture's response was to restrict those actions by condemning them as unlawful or socially divisive, minimizing the seriousness of both problems and activities which spawned the protest, and ignoring activists' demands. Although Indian protest became more visible toward the end of the Vietnam war, such rhetoric emerged out of a history of active and passive resistance. For example, after the passage of the Citizenship Act of 1924, Navajos and Paiutes waged "war" in New Mexico and Colorado, respectively. Indigenous peoples founded political organizations such as the Alaskan Native Brotherhood, the All-Pueblo Indian Council, and the Indian Defense league; some traditional groups, in support of tribal sovereignty, resisted conscription during World War II ; and in the 1950s, Indian nations opposed projects that threatened the environment.

Nevertheless, the activism of the "new" Indian movement created division among Native Americans because it was inconsistent with traditional ways. Its competitiveness ran counter to the cooperation emblematic of speaking in council. In addition, because protest was public and involved forging bonds across various tribes, it embraced a pan-Indianism foreign to a tribal orientation. Hence, Indians on the reservations saw the actions of urban protesters as "un-Indian" behaviors that betrayed the culture they sought to protect. Nonetheless, poor living conditions coupled with the Vietnam era of protests spawned militant activities. The most conspicuous of new militant groups was the American Indian Movement (AIM), founded by Vernon and Clyde Bellecourt. The movement professed to be a mending of the sacred hoop. Eddie Benton-Banai, Grand Chief of the Three Fires Society, explained that a spiritual renaissance was taking place among the Native American aimed at reviving the original covenant with the Creator and "Mother Earth."

On November 20, 1969, Indians under the leadership of AIM staged a takeover of Alcatraz Island, demanding attention to health, educational, and cultural needs. The rationale for selecting Alcatraz is telling. In a newsletter the militants proclaimed:

> *Alcatraz Island is more than suitable for an Indian reservation, as determined by the white man's own standards.... 1. It is isolated from modern facilities, and without adequate means of transportation. 2. It has no fresh running water. 3. It has inadequate sanitation facilities. 4. There are no oil or mineral rights. 5. There is no industry and so unemployment is very great. 6. There are no health care facilities. 7. The soil is rocky and non-productive; and the land does not support game. 8. There are no educational facilities. 9. The population has always exceeded the land base. 10. The population has always been held as prisoners and kept dependent upon others.*

Alcatraz echoed the anguish of reservation life. At the same time protesters harkened to the harmony grounding their cultures for, they said, they came with "little hate or anger in ... [their] hearts for the thought of a lasting unity [has] kept us whole and in harmony with life." Their objective was to launch "a movement" radiating not "a fire of anger but a warming glow." The occupation lasted nineteen months. Eventually, after publicity, enthusiasm, and support dissipated, federal officials evicted the Native Americans remaining on the island.

This militancy spilled over into the 1970s. On September 13, 1972 forty protesters seized the Bureau of Indian Affairs office in Pawnee, Oklahoma after learning about the mishandling of funds marked for children. After negotiating a settlement, Vernon Bellecourt organized caravans to Washington, D. C. to publicize mistreatment and neglect of Native Americans. On November 2, five hundred people seized BIA headquarters, barricading themselves inside the building. The Nixon administration ignored their demands and challenged the movement's legitimacy; a Washington judge declared the protesters in contempt and mandated their arrest. Subsequently, they left the building after reaching an accord with White House negotiators.

Tactics escalated on February 27, 1973 with seizure of the village of Wounded Knee. The protesters' goal was to gain "the freedom to determine their own lives and destinies as a sovereign people" by establishing "their own government, where they [could] run their affairs according to their own traditions." Gone were the references during Alcatraz to the "warm glow" of peaceful harmony. Wounded Knee was a cry against poverty and cultural decimation. A skirmish between federal troops and the militants led to the wounding of one soldier and the death of two Native Americans. When the violence dissipated, the armed occupation of Wounded Knee ended on May 8, 1973.

The protests did much to create pride and raise national consciousness. Wounded Knee, with its tie to the massacres of the 1800s, caught the imagination of Native Americans as well as of the larger public. Before Wounded knee in July of 1970, President Nixon had decried the "suffocating paternalism" of contemporary Indian policy: "The time has come to ... create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."

Although protest against intolerable living conditions clearly is a political action in the Anglo-American sense, the choices made by the protesters have religious underpinnings: Alcatraz was seized because of its religious significance; Wounded Knee marked a return to the cite of a massacre which occurred because of fear and religious intolerance. The government response was to deflect, thereby marginalizing a culturally different people. Bureaucratic America ignored the position paper advanced by Indians participating in the caravan to Washington, acknowledging it only after violence broke out. Officials at Wounded Knee minimized the significance of that takeover by defining the conflict as a problem unique to Pine Ridge. The government condemned Native actions as those of unreasonable radicals, describing the protesters as "criminals," "savages," "militants,"and "agitators." Similarly, it denied a request to hold religious services at Arlington Cemetery because that request conflicted with regulations prohibiting any services "closely related" to "partisan activities." In Hardin, Montana Native Americans on the "Trail of Broken Treaties" were refused permission to erect a cast-iron plaque at Custer National Battlefield as a memorial to their ancestors who died in the Battle of the Little Big Horn. In essence, then, the dominant society engaged in a self-protective marginalization of distressingly different dissidents.

Revisioning the First Amendment

The history of Indian suppression suggests a disturbing inflexibility on the part of a power structure grounded in Anglo-American jurisprudence. The treatment of Native Americans points to an important irony: Catholics, Jews, Quakers, and Puritans all sought haven in America to escape religious persecution in Europe. Preachers were leaders in articulating revolutionary sentiments. And since underground presses and public orators had helped foment revolt,

freedom of expression and freedom of religion became aims for which the revolution was fought. And yet throughout American history, Native Americans have been denied the very liberties motivating the formation of this country. As the foregoing discussion reveals, that denial is a function of three significant cultural contrasts: 1) the native concept of continuous creation grounds a view of change as cyclical renewal whereas the Anglo-American notion of original creation leads to the idea of linear progress; 2) the native positing of universal kinship creates the unity implicit in communal identity whereas Anglo-American collective consciousness rooted in a hierarchical differentiation between people and the rest of existence leads to concepts of self-based individual achievement; 3) the Indian mechanism for creating social order is consensual harmony whereas the impetus toward control in Enlightenment culture results in a reliance on hierarchical competition.

Our analysis of the strategies used to suppress Native cultures indicates the impact of these differences on freedom of expression, especially religious expression. Generally, government efforts to transform aboriginal peoples compelled them to forsake their religion, land, language and lifestyle; reservation living and private business both are foreign to peoples whose lives revolved around living in harmony with the seasons and land; the Anglo-American approach to education runs counter to a holistic worldview based on universal kinship; too often Christian leaders have painted Native religious practices as heretical and pagan. Similarly, attempts to marginalize Native Americans as manifest in legal suppression of religious customs and the deflecting of protest trivialize the languages and spiritual bases for entire peoples. By undermining the foundations of Native cultures, by demanding that Indians live according to the assumptions and norms of the dominant society, the Anglo-American system of governance has effectively denied the religious and political voices of original Americans.

Hence, to be audible to the dominant society, indigenous peoples have achieved partial redress by adopting behaviors contrary to their cultures. The powerful in the United States do not understand and therefore have difficulty hearing speakers using Native languages to articulate non-Judeo-Christian Enlightenment views. To gain voice, Indian activists had to violate their own customs and norms: they communicated competitively through militant activity that attracted attention of the mainstream press; they abandoned an oral tradition by issuing printed proclamations; they went outside tribal institutions for effecting justice by entering political and legal arenas. In essence, to protect the languages and religions essential to their voice they used the skills of a culture which represses them. Such adjustment hardly is a sign of the political and religious parity supposedly fundamental to American society.

These inequities emerge clearly when one examines current interpretations of the First Amendment. The Anglo-American stance, which grants specific, separable, universal liberties to individuals to protect them from governmental oppression, is diametrically opposed to the Native notion of a holistic system of freedoms applicable to particular peoples. Furthermore, the dominant culture's reading of the various clauses of the Amendment privileges political speech and other rights over religious freedom by relying on Jefferson's enlightenment view. For example, Justice Scalia, writing for the majority in Smith, warranted the Court's endorsement of Oregon's right to deny employment benefits to persons fired for sacramental use of peyote by contending that "the only decisions in which ... [the Court had] held that the First Amendment bars application of a ... generally applicable law to religiously motivated action ... involved not the Free Exercise Clause alone, but ... [it] in conjunction with other constitutional projections, such as freedom of speech and of the press."

In addition, as Justice Brennan observed in his dissent regarding the decision in *Lyng*, the Court affirmed "the Government's contention that its prerogative as landowner should take precedence over a claim that a particular use of federal property infringes on religious practices." Thus, Free Exercise cannot stand alone; nor is it as important as ownership, a principle dear to a world view based on human control of nature.

Worse yet, a string of cases based on Jefferson's call for a "wall of separation" has led to a kind of paralysis of the religious clauses of the First Amendment. "The language of" those clauses, wrote Chief Justice Warren Burger in his explication of the decision in *Lemon v. Kurtzman*, "is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state ... religion .... Instead they commanded that there should be 'no law respecting an establishment of religion.'" Hence, the Establishment Clause precludes the government from supporting religious activities and the Free Exercise Clause stops it from preventing them. The government must therefore walk a fine line between neither discouraging nor encouraging religion.

Unfortunately, this paralysis poses significant threats to Free Exercise. In *Smith*, the majority ruled that a state need not balance laws abridging religious freedom with a compelling state interest unless those policies somehow were coercive, for to limit the applicably of laws would amount to establishing a particular religion. Such action, they admitted, well might lead to the "unavoidable consequence" of placing "at a relative disadvantage those" faiths not widely practiced. In like vein, the Court argued in *Lyng* that "even assuming that the Government's actions [would] virtually destroy the Indians' ability to practice their religion," the First Amendment does not mandate redress.

This prioritizing of the political over the religious and the relative paralysis engendered by the Court's overall interpretation of the First Amendment suppresses Native American religious, and thus political freedoms because the face of the Amendment varies culturally. This divergence comes into stark relief when one considers the function of religion for Native and other Americans. Western and many other major world religions are universal: Danes, Germans, Brazilians, and Mexicans all may well be Christians; Russians, Germans, and Americans practice Judaism; Egyptians, Syrians, Jordanians, and Iranians are members of the nation of Islam. The same is true for Eastern faiths like Buddhism and Shintoism. But Indian nations have their own religions and languages. Hence, the Anglo-American wont to separate freedom of expression from religion or to subordinate religious rights to other liberties is an egregious violation of Native religious freedom and by extension of expressive liberties. As Justice Brennan observed, dissenting in *Lyng*, because "religion is not a discrete sphere of activity separate from all others, ... any attempt to isolate the religious aspects of Indian life" performs an acute cultural disservice. In essence, then, the Western assumptions that rights are "universal" breaks down in the face of cultural diversity.

The Supreme Court's consideration of issues related to free exercise relegates matters of cultural difference to the political realm, and thereby, argued Brennan, engages in an "abdication" which "bestow[s] on one party ... the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be 'sensitive' to affected religions." The history of the relationship between Native and Anglo-American cultures,

unfortunately, bodes ill for the efficacy of the political and legal "sensitivity" called for by the Court. That history calls for a re-visioning of the First Amendment which puts aside the fear expressed by Justice O'Connor in *Lyng* of trying "to satisfy every citizen's religious needs" and points instead to her conclusion in *Smith* that because "the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."

If the past and potential damage to Native American (and other) cultures is to be undone, if we are live in a pluralistic society, then a new reading of the First Amendment ought to be undertaken by the Supreme Court which accommodates Justice Brennan's objections and Justice O'Connor's plea. That reading would establish a dialectic that incorporated Native American's and others' belief in a holistic universe pervaded by spirituality. It would recognize that Jefferson's "wall of separation" is not part of the First Amendment, nor in any other section of the Constitution. It would examine the line of cases devoted to Free Exercise to redress problems related to the relationship between the religious clauses and to the subordination of religious liberties to other freedoms. In essence, it would embrace cultural pluralism rather than logical monism. Such a reading might lead to the kind of enlightened opinion Justice Blackmun penned in the Smith case where he wrote, "Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.... Without Peyote, they could not enact the essential ritual of their religion."

The monism of the majority in that case is suspect given the multifaceted nature of today's America. The United States as a nation may well have to internalize something Native nations knew long before Europeans came to the North American continent. Those peoples lived in a pluralistic world, one in which "[o]ther[s] ... looked, spoke, dressed, believed, and prayed in ways singularly appropriate to themselves." Our system of jurisprudence may need to accept a new reality, a new definition of symbolic and religious freedom. Such a reality would hear diverse voices, would honor a myriad of spiritual orientations, and would partake in the richness of a culture characterized but not threatened by many sounds, many creeds, many colors.

Endnotes

- Saul K. Padover, *The Complete Jefferson* (New York: Harcourt, Brace, 1943) 519.
- See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *In Everson v. Board of Education*, 330 U.S. 1 (1947) Justice Rutledge persuaded his brethren that the establishment clause meant no government aid to any religions. At 15 in the majority opinion, Justice Black writes, "Neither [the Federal Government nor the states] can force nor influence a person to go to or to remain away from church against his will or for him to profess belief or disbelief in any religion.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." See also *Engel v. Vitale*, 370 U.S. 421 (1962) which outlawed prayer in public schools. See Mark Fischer, "The Sacred and the Secular: An Examination of the 'Wall of Separation' and Its Implications on the Religious World View," *University of Pittsburgh Law Review*, 54 (1990) which concludes, "Underlying many of the theories used in Establishment Clause jurisprudence is an implicit disdain for the religious world view" (340). For further analysis, see Robert S. Alley, "Public Education and the Public Good," *William & Mary Bill of Rights Journal*, 4 (1995): 277-350.
- 430 U.S. 584.
- See also *Montana v. U.S.*, 450 U.S. 544 [1981]; *Sioux Nation v. U.S.*, 448 U.S. 371 [1980]; *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439 [1988], and *Employment Div., Dept. of Human Resources v. Smith*, 108 L. Ed. 2d 876 [1990]. In these cases, the Court draws a sharp line between religious beliefs and religious conduct. The *Smith* case is particularly disturbing because it overturned the three part test established in *Sherbert v. Verner*, 374 U.S. 398 [1963], which placed a heavy burden on states seeking to restrict religious practices. In *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993), a plaintiff won for the first time in twenty years when the Court ruled that "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." The decision somewhat mitigates *Smith* but has created confusion. See Rod Fliegel, "Free Exercise and the Religious Freedom Restoration Act of 1993: Where We Are, Where We Have Been, and Where We Are Going," *Constitutional Law Journal* 5 (1994): 81, 83-88.
- 620 F. 2d 1159, 1164-65 [6th Cir.] cert. denied, 449 U.S. 953 (1980).
- *Bowen v. Roy*, 476 U.S. 633, is a related precedential case cited in the opinion.
- The Hoopa Valley Indian reservation adjoins the forest and Chimney Rock has historically been used for religious purposes by Yurok, Karok, and Tolowa tribes.
- *Northwest Indian Cemetery Protective Assn. v. Peterson*, 790 F. 2d (1986).
- 485 U.S. 447. Justice O'Connor wrote the majority opinion in which Rehnquist, White, Stevens, and Scalia concurred. Justice Brennan wrote the dissent with Marshall and Blackmun concurring. Justice Kennedy did not participate in the case.
- 485 U.S. 451.
- 485 U.S. 490.
- 485 U.S. 453.
- 485 U.S. 451, 490, 453, and 452. See also Justice Scalia, writing for the majority in Smith, 494 U.S. 888.
- 485 U.S. 459.
- For a careful analysis of this issue, see Luralene D. Tapahe, "After the Religious Freedom Restoration Act: Still No Equal Protection for First Amendment Worshipers," *New Mexico Law Review*, 24 (1994): 331-363. Tapahe

(332) contends that "native claims challenging the development of sacred land sites have not been given the same doctrinal treatment as those claims brought by mainstream Judeo-Christian plaintiffs."

- Paul E. Lawson and Jennifer Scholes, "Jurisprudence, Peyote and the Native American Church," *American Indian Culture and Research Journal* 10 (1986): 15, 16, 25.
- 494 U.S. 872. Justice Scalia delivered the opinion of the Court in which Justices Rehnquist, White, Stevens and Kennedy joined. Justice O'Connor filed a separate opinion concurring in the judgment, in Part I and II of which Justices Brennan, Marshall and Blackmun joined without concurring in the judgment. Justice Blackmun filed a dissenting opinion in which Brennan and Marshall joined.
- Adell Sherbert had been fired for refusing to work on her Sabbath day, Saturday. The Court ruled that such an infringement on the practice of religion required justification through a "compelling state interest." (374 U.S. at 403.)
- Vine Deloria, Jr., "Secularism, Civil Religion, and the Religious Freedom of American Indians," *American Indian Culture and Research Journal* 16 (1992): 13. The consequences of this decision were quickly seen in the lower courts. For example, in *Alabama & Coushatta Tribes* discussed below, the district court cited Smith to this effect: "It is unclear, after *Smith*, where a valid free exercise claim in a civil context, unaccompanied by other constitutional claims, would be entitled to the intense scrutiny necessitated by the least restrictive means, or compelling state interest, standard. See *Smith*, 494 U.S. at 884."
- 494 U.S. 892, 895.
- At 894.
- At 902.
- 494 U.S. 908.
- On November 19, 1990, the Native American Graves Protection and Repatriation Act became law.
- Walter R. Echo-Hawk, "Native American Religious Liberty: Five Hundred Years After Columbus," *American Indian Culture and Research Journal*, 17 (1993): 49-50.
- 406 U.S. 205 (1972).
- These cases seem to limit the famous injunction from *Tinker* (1969) that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503.
- 20 F. 3d 469. This case, if upheld, would reverse *New Rider v. Board of Education of Independent School District No. 1*, Oklahoma (480 F. 2d 693, 10th Cir., cert. denied 414 U.S. 1097 (1973) involving a Pawnee youth who violated school restrictions by wearing his hair in long braids.
- 1323.
- 1930.
- Carl G. Jung, *Man and His Symbols* (New York: Dell, 1978).
- Tzvetan Todorov, *The Conquest of America: The Question of the Other* (New York: Harper and Row, 1984).
- Russell Lawrence Barsh, "The Nature and Spirit of North American Political Systems," *American Indian Quarterly* 10 (1986): 181. See also John Rhodes, "An American Tradition: The Religious Persecution of Native Americans," *Montana Law Review* 52 (1991): 19. Rhodes demonstrates that the Sioux felt a "[k]inship with all creates of the earth," the Osage believed all life is spirit, and the Hopis saw themselves as "caretakers of all the world" (19, 22).
- Randall A. Lake, "Between Myth and History: Enacting Time in Native American Protest Rhetoric," *Quarterly Journal of Speech* 77 (1991): 123.
- Loftin demonstrates that Adam Smith's Wealth of Nations certainly is in this tradition and that it in turn reinforces the commitment to progress. John D. Loftin, "Anglo-American Jurisprudence and the Native American Tribal Quest for Religious Freedom," *American Indian Culture and Research Journal*, 13 (1989): 8-11.
- See Gregory Bateson, *Steps to an Ecology of Mind* (New York: Ballantine, 1972) 462.
- Barsh, "Systems" 182, 187.
- Randall A. Lake, "The Rhetor as Dialectician in 'Last Change for Survival,'" *Communication Monographs* 53 (1986): 271.
- Kimberly M. Blaeser, "Pagans Rewriting the Bible: Heterodoxy and the Representation of Spirituality in Native American Literature," *Ariel* 25 (1994): 18.
- Loftin 6.
- Joseph Epes Brown, quoted in Richard Morris and Philip Wander, "Native American Rhetoric: Dancing in the Shadows of the Ghost Dance," *Quarterly Journal of Speech* 76 (1990): 167.
- Gayle High Pine explains that because "[e]ach language has its own spirit," use of ones natural language is necessary to follow "the sacred paths." Thus, "language gives ... people ... a shared world and makes them of one seeing and one feeling.... [I]t is this which ... [constitutes a] people ... [into] a nation of one spirit, binding together free individuals as one." Quoted in Lake, "Survival" 205.
- Randall A. Lake, "Enacting Red Power: The Consummatory Function in Native American Protest Rhetoric,"

Quarterly Journal of Speech 69 (1983): 136.

- Lake, "Red Power" 137.
- Blaeser 23.
- Barney Old Coyote, quoted in Loftin 6.
- Barsh, "Systems" 183.
- Barsh, "Systems" 185; see also Loftin 9.
- Barsh, "Systems" 190.
- See James L. Golden, Goodwin F. Berquist, and William E. Coleman, *The Rhetoric of Western Thought*, Fourth ed. (Dubuque, IA: Kendall/Hunt, 1989) 173; and Theodore W. Adorno et al., *The Positivism Dispute in German Sociology*, trans. Glyn Adey and David Frisby (New York: Harper & Row, 1976) xii.
- As Deloria observes, the western belief was that "[e]ventually one branch of the human family overcame their superstitions and developed a technology that enabled them to achieve mastery over the rest of mankind [sic] and to order nature to do their bidding." See Vine Deloria, Jr., "Ethnoscience and Indian Realities," *Winds of Change* 7 (1992): 14.
- One does not have to look much further than Federalist No. 10 on this point. It is cited by Justice O'Connor in her majority decision in *Lyng*.
- Barsh details its dimensions: "Continuity in time connects ancestors with the unborn.... [E]ach family extends both backwards and forwards through time, bridging the physical and spiritual worlds.... Continuity in space connects family with family.... [R]elationships among families [are political bonds that] transcend time.... Continuity across species connects human beings with all life.... [Such ecological unity implies] there is no 'ownership' of land, ... only the right to live in a place with one's relatives, both human and nonhuman." Barsh, "Systems" 187.
- Barsh, "Systems" 185.
- Barsh, "Systems" 185, 194.
- Barsh, "Systems" 191.
- Winfred Pelletier, quoted in Barsh, "Systems" 191.
- Blaeser 24.
- Lee Irwin, "Dreams, Theory, and Culture: The Plains Vision Quest Paradigm," *American Indian Quarterly* 18 (1994): 234.
- The inability of Euro-Americans to understand the importance of land to Native peoples stems from use of conflicting metaphors to structure experience. Loftin comments on the "centrality of sacred space in native experience and practice"(2). Hence, George E. Tinker argues ("Spirituality, Native American Personhood, Sovereignty and Solidarity" *Ecumenical Review* 44 [1992]) that the spacial and temporal master metaphors of Native and Euro-Americans oppose each other diametrically (314, 317). The focus on temporarily correlates with acts and events, not natural place. Hence, Euro-Americans honor two kinds of sites: (1) churches and other shrines constructed by humans and (2) sites of significant events. Consequently, many sacred sites for Americans are those of the secular religion—eg., Gettysburg and Bull Run. The United States has nothing comparable to Lourdes or Fatima.
- The decline reversed, however, by 1970, when the census reported 792,000 U.S. Indians. Presently, the Native American population in the U.S. is two million (or 0.8% of the total population) disbursed across 515 tribes. See *Time* 9 November 1992: 53.
- Joseph Kossuth Dixon quoted in Russell Lawrence Barsh, "An American Heart of Darkness: The 1913 Expedition for American Indian Citizenship," *Great Plains Quarterly* 13:2 (1993): 94.
- In 1980 the Supreme Court awarded eight Sioux tribes $105 million in compensation for the land grabs of 1874 and 1877.
- John Lame Deer explains the significance of the hoop:

  > *[It] stands for the togetherness of people who sit ... around the campfire, ... united in peace.... The camp ... was also a ring ... and all the families in the village were in turn circles within a larger circle, part of the larger hoop which was the seven campfires of the Sioux. The nation was ... part of the universe, in itself circular and made of the earth, ... the sun, ... or the stars, [all of] which are round ... with no beginning and no end."*

  John Fire/Lame Deer and Richard Erdoes, *Lame Deer Seeker of Visions* (New York: Simon and Schuster, 1972) 112.
- Robert Fleck, "Black Elk Speaks: A Native American View of Nineteenth-Century American History," *Journal of American Culture* 17 (1994): 68.
- Chester A. Arthur, quoted in Michael A. Dorris, "The Grass Still Grows, The Rivers Still Flow: Contemporary Native Americans," *Daedalus* 110 (1981): 8.
- Dorris 51.
- Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: U of Texas P, 1983) 10.
- Deloria and Lytle 12-13; Dorris 52.

- John G. Neihardt, *Black Elk Speaks* (1932; New York: Washington Square P, 1959) 166, 195, 230.
- Loftin 4, 5.
- Francis Paul Prucha, *Indian Policy in the United States* (Lincoln: U of Nebraska P, 1981) 28.
- Loftin 3, 4.
- Vine Deloria, Jr., "Knowledge and Understanding: Traditional Education in the Modern World," *Winds of Change* 5:1 (1986): 15.
- Prucha 16-17.
- Prucha 27.
- Although Indian schools had functioned for decades, beginning in 1879 off-reservation vocational boarding schools became a dimension in federal Indian education.
- Steve Wall and Harvey Arden, *Wisdomkeepers: Meetings With Native American Spiritual Elders* (Hillsboro, OR: Beyond Words Publishing, 1990) 54-55.
- Morris and Wander 170.
- Wilcomb E. Washburn, "Indian Policy Since the 1880s," *The Aggression of Civilization: Federal Indian Policy Since the 1880s*, ed. Sandra L. Cadwalader and Vine Deloria, Jr. (Philadelphia, PA: Temple U P, 1984) 52.
- The Sun Dance, one of the seven rites of the Oglala, takes place during the Moon of Fattening (June) or the Moon of Cherries Blackening (July). It is an offering of one's body and soul to Wakan-Tanka (the Creator). See Joseph Epes Brown, *The Sacred Pipe* (Norman: U of Oklahoma P, 1953) 67-68.
- Paul B. Steinmetz, Pipe, Bible and Peyote Among the Oglala Lakota (Knoxville: U of Tennessee P, 1990) 17.
- David M. Strausfield, "Reformers in Conflict: The Pueblo Dance Controversy," *The Aggressions of Civilization: Federal Indian Policy Since the 1880s*, ed. Sandra L. Cadwalader and Vine Deloria, Jr. (Philadelphia, PA: Temple U P, 1984) 25-26.
- L. G. Moses, "'The Father Tells Me So!' Wovoka: The Ghost Dance Prophet," *American Indian Quarterly* 9 (1985): 336, 335.
- *Mooney describes the prophet's revelation: "God told him he must go back and tell his people they must ... love one another ... and live in peace with the whites; that they must work, and not lie or steal; that they must put away... [warlike] practices; that if they faithfully obeyed his instructions they would ... be reunited ... in this other world, where there would be no more death or sickness or old age. He was then given the dance ... to bring back to his people." James Mooney, "The Ghost Dance Religion and the Sioux Outbreak of 1890," Fourteenth Annual Report of the Bureau of Ethnology (Washington, D.C.: Government Printing Office, 1896): 770-771.*
- Moses 339.
- Mooney 23, 780-781.
- Moses 342.
- Quoted in Echo-Hawk 36.
- Sandra L. Cadwalader and Vine Deloria, Jr., "Preface," *The Aggressions of Civilization: Federal Indian Policy Since the 1880s* (Philadelphia, PA: Temple U P, 1984) x.
- In some areas, the effort continues. *Rider v. Board of Education of Independent School District*, 414 U.S. 109, has so far upheld the right of an Oklahoma school district to require Pawnee Indian children to cut their braids before being admitted to school. The Pawnees argue that the braids are a symbol of their religious culture.
- The same court reversed itself twenty years later in *Harrison v. Laveen* 196 U. S. 2nd 585.
- *Porter v. Hall* 271 U. S. 411 (1928).
- Glenn A. Phelps, "Representation Without Taxation: Citizenship and Suffrage in Indian Country," *American Indian Quarterly* 9 (1985): 136.
- Echo-Hawk 34.
- Lawson and Scholes 14.
- Chief Walking Buffalo quoted in Rennard Strickland, "Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony," *Arizona State Law Journal* 24 (1992): 175.
- Kirkpatrick Sale, *The Conquest of Paradise* (New York: Alfred A. Knopf, 1990) 40.
- Echo-Hawk 39, 41.
- Echo-Hawk (47) explains that "the federal government and about twenty-seven states exempt the religious use of peyote by American Indians from drug laws—and have done so for decades without experiencing law enforcement, public health, safety, or other problems."
- U.S. Dist. 817 F. Supp. 1325.
- Steve Talbot, "Free Alcatraz: The Culture of Native American Liberation," *Journal of Ethnic Studies* 6 (1978): 87.

- Jeff Sklansky, "Rock, Reservation and Prison: The Native American Occupation of Alcatraz Island," *American Indian Culture and Research Journal* 13:2 (1989): 52; D'Arcy McNickle, *Native American Tribalism: Indian Survivals and Renewals* (New York: Oxford UP, 1973) ix.
- Lake, "Time" 137; see also Talbot 86.
- See Robert S. Cathcart, "Movements: Confrontation as Rhetorical Form," *Southern Speech Communication Journal* 43 (1978): 233-47.
- Wall and Arden 50.
- For a description of the Alcatraz affair by Adam Fortunate Eagle, a Red Lake Chippewa, see Peter Nabokov, *Native American Testimony* (New York: Penguin, 1992) 367-370.
- *Indians of All Tribes Newsletter* 1:2, quoted in Sklansky 47.
- *Akwesasne Notes* December 1969: 7.
- Kenneth Tilsen, quoted in *Akwesasne Notes* June 1973: 5.
- Sklansky 60.
- Richard M. Nixon, quoted in Sklansky 62.
- D'Arcy McNickle, *Native American Tribalism: Indian Survivals and Renewals* (New York: Oxford UP, 1973) ix.
- Morris and Wander 182.
- *Akwesasne Notes* Early Winter 1973: 5.
- *Akwesasne Notes* Early Winter 1973: 4.
- 494 U.S. 881.
- 485 U.S. 464.
- 403 U.S. 612
- This dilemma is most clearly apparent in *Zorach v. Clauson*, 343 U.S. 306. It also surfaces in the Lemon test, the second prong of which requires that the "principle or primary effect [of government action] must be one that neither advances nor inhibits religion" (403 U.S. 629).
- 494 U.S. 890.
- 485 U.S. 439.
- 485 U.S. 459.
- 485 U.S. 473.
- 485 U.S. 452. See also Justice Scalia, writing for the majority in *Smith*, 494 U.S. 888.
- 494 U.S. 893.
- 915-916.
- Dorris 44, 45.

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