

Native Americans, Law, and Religion in America

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Study of Native American religions and law highlights the extensive legal regulation of rights to which Native Americans are subject and the questionable legitimacy of the rule of law in the United States. Federal Indian law comprises treaties, federal and state laws, regulations from various agencies, and judicial decisions. These overlapping, occasionally contradicting, sources officially recognize Indian tribes as political entities with some degree of rights to sovereignty and property but that share administration of those rights with the United States. Native American peoples continue to contend with complicated legal obstructions and cultural resistance to assert their human rights and religious self-expression. Historical policies of war, Indian removal, assimilation, and allotment have situated many sacred sites outside of recognized tribal territories and indigenous sacred objects in non-tribal hands. Moreover, Native religions and traditions remain exoticized and poorly understood by the courts, legislatures, agencies, and public that shape U.S. policy. Many Native American religions hold that religion is inseparable from culture and permeates all aspects of human life. Thus, Native Americans struggle to protect their religions and cultures from and through colonial categories and institutions that segregate “religion,” “culture,” and “property,” legally defining such terms in ways that insufficiently accommodate Indian spiritual beliefs, values, or practices.

The term “Indian” is itself a category created by a religiously contextualized legal and cultural discourse that enabled Euro-American acquisition of territories and resources. Scholar of colonialism Jodi A. Byrd notes that historically concepts of “Indians and Indianness have served as the ontological ground through which U.S. settler colonialism enacts itself as settler imperialism.”¹ This cultural category has served as the foil for American society, creating a nebulous Other that helped define America while becoming less real. Judith Butler explains, “the derealization of the ‘Other’ means that it is neither alive nor dead, but interminably spectral.”² This process of derealization has enabled Euro-American forces to perpetuate endless wars against a spectral foe regardless of evidence of its enduring threat or the efficacy of its own actions. Indigenous studies scholars aver that nations frequently employ rhetoric of security in response to perceived threats of invasion or dispossession by indigenous people. In the United States, legislation has articulated the nation’s anxiety over dispossession and threat and perpetuated open or covert war against Native American cultures.

Religious Foundations of European Colonialism

In order to envision their claims to the territories inhabited by the indigenous peoples of the Americas as just and virtuous, European sovereigns needed legal and religious justification for the inclusion of New World lands and peoples beneath their authority. Throughout the history of colonial encounter, European powers wrestled with legal questions of just

authority, the religious foundations of monarchy and sovereignty, and the scope and nature of the territorial rights of the indigenous populations that occupied the lands they sought to incorporate into their colonial schemes. Even before contact with American peoples, European Christianity proffered its initial defense in the so-called Doctrine of Discovery that granted dominion of lands to the first Christians to “discover” them. The doctrine rested upon the belief that as “infidels and savages,” indigenous peoples, including the Native American tribes of North America, were racially, morally, and culturally inferior to Europeans, and thus possessed inferior claim to the lands they inhabited.

The origins of the legal principles and normative judgments undergirding the doctrine emerged during the Crusades of the 11th through 13th centuries. The Crusades provided the first substantial challenge to the Catholic Church and Christian leaders to apply the thereto-theoretical authority of the papacy over all non-Christian peoples throughout the world. Proponents of absolute, universal papal sovereignty posited that only Christian rulers could govern lawfully and legitimately for their power was granted by the pope in Rome. Infidel rulers could thus be deposed and their people divested of their lands by Christian canon law.³ More moderate canon lawyers, including Pope Innocent IV, similarly included infidels beneath the canopy of papal sovereignty but did so on the basis of their failure to adhere to Christian European moral norms framed as “natural law.” Church theologians continued to refine legal justifications for war and opposition to “infidel” or “heathen” peoples well after the conclusion of the Crusades and, in time, applied them within the context of the Christian European “discovery” of new lands in Africa and the Americas.⁴ By the time Columbus set sail, European Christians understood that they could legally and justly claim as “discoveries” and thus new territories any land where the indigenous inhabitants diverged from Christian European cultural and religious norms.

Spanish religious law helped to legitimize and spur Spanish colonization of the Americas and its peoples. In 1513, Crown lawyers promulgated the *Requerimiento*, a charter document of conquest, required to be read aloud to each group of indigenous peoples encountered by Spanish agents, in order to legitimately lay claim to their territories and justify any subsequent hostilities. The *Requerimiento* conjoined religion and legislation in the service of empire. The document proclaimed to Spain’s would-be colonized peoples that God, the source of all legitimate authority, had given charge of the entire human race to the Catholic pope, who, in turn, had granted their lands to the Spanish monarchs. It further informed Native American populations what was required of them as Spanish subjects and the legal penalties they would incur through disobedience.⁵

The lectures of Franciscus de Victoria (1480–1546), a Dominican priest and legal scholar, contemporaneously amended the assumptions of divine law upon which Spanish dominion rested, laying the groundwork for a system of international law based upon natural law administered by secular sovereigns. The initial doctrine of discovery was folded into a new, conceptual European Law of Nations that still undermined any rights of sovereignty or title of territories that tribes could assert. In recognition that Native Americans might not

inherently know all of the rules of this subsequent European Law of Nations, Victoria posited that more civilized nations might take guardianship of them, holding just title and administration to their property and societies, until such time as the indigenous people could be sufficiently civilized and taught the expectation of this international law. This guardianship would mandatorily necessitate the civilization of native populations and their introduction to the moral imperatives inherent in the Law of Nations, which, it was believed, was best accomplished by educating them in the civilizing Christian faith.⁶ In the American southwest, Spain tasked Franciscan friars to establish a series of missions and schools that jointly advanced the missionary enterprise and legitimized the annexation of the region into the burgeoning Spanish Empire.

While the imperial activities and legal precedents of colonial Spain did influence eventual U.S. federal Indian policy, the legal framework that shaped the political relations between Native American peoples and the United States government may be traced more directly to the experiences and religious legal stances of England during its North American colonization. England's empire contended with questions of Native American status and rights for centuries prior to the American Revolution. The Protestant English Crown, to stymie the growing wealth and influence Catholic Spain had gained from its expanding colonies, similarly sanctioned expeditions to discover and conquer non-Christian lands. Queen Elizabeth authorized Sir Humphrey Gilbert and Sir Walter Raleigh to establish English colonies that could serve as a Protestant foothold and check the growth of Spanish Catholic influence within the "heathen" lands of North America.⁷ The charter of the colony of Jamestown spelled out the religious and legal foundations of the right to claim and colonize the territory. The Crown asserted that the colonization was necessary to propagate the Christian religion to "Infidels and Savages" and guide them toward civility and a stable government.

Later English common law jurists expounded upon the argument for the English monarchy's right to conquer non-Christian territories, most articulately described in Lord Chief Justice Edward Coke's dicta in *Calvin's Case*. Coke argued that all non-Christians were *perpetui inimici*, or perpetual enemies, of the Christian and by their very nature are in a state of war with Christian nations.⁸ However, despite the general consensus that Native American tribes lacked any rights to the territories that they occupied, in practice colonists often felt compelled to obtain at least some formal semblance of legal consent from the tribes through treaties or purchase agreements to assert their claim upon tribal lands. Some colonists even denounced the unilateral rights and universal sovereignty of European Christians over the Native Americans. Colonial theologian Roger Williams rejected the assumption that being white and Christian were sufficient conditions to legitimize colonization or conversion. He argued that since Native Americans clearly believed that they owned the land, Native American-inhabited territories could not be legally treated as *vacuum domicilium* and settled without regard for tribal presence.⁹ Europeans continued to debate conflicting religious interpretations of Indian rights during the early North American colonial era. Yet whenever Native Americans were numerous, proximate, and potentially threatening,

colonizing peoples felt pressed to seek Indian consent for new settlements. Thus, European powers ascribed, to some extent, in practice and in theory a sufficient degree of sovereignty to Native tribes to legitimately transfer claim of lands and administer their own communities.

With the American Revolution, the colonists liberated themselves from the perceived tyranny of the English monarchy. Yet, the new nation internalized the prior justifications for projecting its rights and sovereignty upon Indian territories in North America. Since the English Empire had initially grounded its territorial rights in its identification as the first European “discoverer” of the lands later occupied by the colonies, the United States simply assumed the role of presumptive sovereign stripped from Britain by the Declaration of Independence. The legacy of the doctrine of discovery and the theory of the European Law of Nations continued to diminish the legal rights and recognized authority of Native American tribes in subsequent federal and international law. In 1823, the Supreme Court of the United States affirmed the legality of the doctrine of discovery within U.S. law in *Johnson v. McIntosh*. The court ruled that the United States bases its right to hold its land in North America on that historical doctrine while recognizing its incumbent assumptions that Native Americans possessed inferior rights because, as infidels, they were religiously, racially, and culturally inferior to Europeans. The United States now claims the title granted by that “general rule” and the derivative right to dismiss Native American claims of title or sovereignty to whatever degree circumstances allow it to enforce. While *Johnson v. McIntosh* purports to neither defend the assumptions behind nor the legitimacy of the doctrine, it does suggest that the moral character and practices of the indigenous peoples of North America might excuse or even justify the forfeiture of their rights. Ultimately, it recognizes that authority over Native American peoples and lands was seized by force, is maintained by force, and accordingly, as conqueror, only the United States may prescribe the limits of its authority. Courts into the 21st century continue to cite the landmark case to base their judgments on the legal status of Native American and their claims. The doctrine of discovery and the religious political cosmology that contextualized it continue to limit the rights of First Nations under domestic law and hinder modern efforts toward decolonization.

Extermination and Assimilation

The initial policy of British and American colonial powers toward Native Americans has been described as a “war policy” or a policy of extermination. Between 1492 and the 1890s, the Native American population of North America decreased from approximately 5 million to around 250,000. Wars of extermination first by the British, including the Pequot War of 1637, and then by Americans during the era of westward expansion further reduced a Native American population already devastated from European diseases and intertribal warfare. After the Civil War ended in 1865, the country turned its attention toward western expansion, and the U.S. military turned to Indian fighting. U.S. officials sanctioned hundreds of Native American massacres and called for the complete extermination of tribes who resisted the usurpation of their land or the imposition of federal authority.

It was not until the 1860s, with its introduction of the Peace Policy and resulting gradual shift in focus toward an alternative (apparently more peaceful) mode of “pacification,” that the physical genocide of Native Americans was officially discouraged. The policy shift was in part a response to a series of intense, highly publicized massacres of Indians, epitomized by the egregious Sand Creek (Colorado Territory) massacre of 1864, which brought their plight and questions of their future to the attention of philanthropic groups. American humanitarians, steeped in patrimonies of Christian values, proposed a new solution to the problem of Native Americans present in potential American lands. Their solution to this “Indian problem” was not to eliminate Indians, as the army had been doing, but to eliminate Indianness through acculturation. Christian reformers posited that, if all Indians were completely assimilated, the Indian problem would vanish. The so-called Peace Policy was formulated in direct opposition to the army’s “War Policy” in order to abridge the slaughter of Native Americans perpetuated by the Indian wars. The Peace Policy mandated confining Native tribes to reservations and forcing assimilation in order to bloodlessly eliminate Native peoples. Education, Christianization, and cultural development became the means to disintegrate tribal peoples so that they could be integrated and absorbed by mainstream society. Resultant reservation conditions subjected Native Americans to decades of cultural exchange and ethnocide.

In response to the passionate lobbying of Christian reformers, President Grant created the Board of Indian Commissioners in 1869. The board, controlled by Christian activists, was established to supervise the governmental procurement and distribution of supplies for Native Americans but quickly assumed a broader mandate. The first annual report of the board later that year called for a new era in Indian policy, based upon the premise that Indians could best be managed if confined to reservations and civilized through assimilation. Forced assimilation was considered a more humane and even righteous course. Assimilation advocates sought to save the Indian race from utter extermination by gathering and dissolving them into the “more advanced” society of the United States, which they maintained would only be possible once they were given the knowledge and moral underpinnings of civilization, namely Christianity. According to reformers and philanthropic societies from the era, civilization and Christianity were essentially conjoined.¹⁰ Thus, civilization necessitated conversion, and only dedicated Christian men and women could effectively perform the task of bringing indigenous peoples into civilization. The Peace Policy, then, was a religious policy in the form of a series of legislative measures that shifted the federal government’s stance from open extermination to Christianization.

The board and the Christian institutions that advised it dominated subsequent Indian policy. The board advocated concentration of Native Americans upon reservations, allotment of land in severalty, abolishment of the prior treaty system with its money annuities, and the establishment of schools to teach English and Christianity. The General Allotment Act of 1887, or “Dawes Act” in reference to the senator who sponsored it, initialized their vision by partitioning reservation lands into privately allotted properties to encourage Native American families to adopt the farming lifestyle, valuation of private property, and moral

character of their white neighbors. However, confused federal policy created a system of overlapping civil and military jurisdiction over Native Americans that was prone to conflict and ineffectiveness. In 1872, the board responded by granting direct control of reservations and the local administrative agencies to Christians who then oversaw the appointment of local agents and the enforcement of the assimilationist agenda. Unfulfilled government promises of payment for lands, failing crops, and rampant disease convinced governing churches and local government agents alike that, in order to save Native Americans from extinction, they needed to be inducted into the civilizing influence of Christian education at all costs. The assimilationist mission became, as famously articulated by Richard Henry Pratt, to “kill the Indian in him, and save the man.”¹¹

From the onset of the missionary enterprises of North America, schools were often recognized as the optimal means of Christianizing or civilizing Indians. Accordingly, in the United States and in Canada, reservation schools were frequently run by Christian missions that had an explicit mandate to implement programs of religious instruction. In 1886, J. G. Wright, Indian agent for Rosebud Agency in Dakota, explained the integration: “Christianity and civilization go hand in hand and . . . education is an assistant thereto.”¹² The Christian agencies governing Indian life became convinced that, by isolating young Native Americans away from the corrupting influences of their families, they could be broken of their “barbarous practices” and instilled with the knowledge and behaviors of civilization. Education administered to Indian youth consequently regularly focused on the education of the heart, which could include instruction in the beliefs, practices, and vocational skills advocated by their teachers as well as cultivation of disregard for those traditions, authorities, and behaviors deemed “sinful.”

By the 1880s, policymakers generally lauded boarding schools as the solution to the civilizing and Christianizing enterprises. They recognized that many parents would be unwilling to have their children taken and segregated from them and authorized school superintendents to impose education by force.¹³ By 1889, Commissioner of Indian Affairs General Thomas J. Morgan successfully lobbied Congress to cut funding to all missionary schools and instead establish government-controlled schools, mandate compulsory school attendance, and implement a standardized curriculum that maintained Christian elements. Further legislation enabled Morgan to withhold rations and annuities from Native American families to coerce the school attendance of their children.

The U.S. Senate later commissioned a report on the state of Native America. The resulting 1928 Meriam Report universally condemned the boarding-school system of education and the forced removal of children from Indian families. It determined that Native Americans were not receiving any improvement in health or economic autonomy from the imposed educational model, and the absence of familial influence was detrimental to their educational development. Yet, W. Carson Ryan, after assuming the directorship of education for the Indian Bureau in 1930, refused to abandon the boarding-school model on the grounds that closing the schools might deny children remote areas access to any education. He did

however seek to reform the curriculum of the boarding schools. Moreover, in response to the findings of the Meriam Report, the new commissioner of Indian Affairs, John Collier spearheaded a thorough initiative to redress the legacy of assimilation and civilization policies.¹⁴

The era of boarding schools did not end there. In the 1970s, the Association of American Indian Affairs published a study that found that between one-fourth and one-third of all Native American children were still being separated from their families and placed in foster care, given to adoptive homes, or made residents of educational institutions.¹⁵ It was not until the passage of the Indian Child Welfare Act in 1978 that Native American parents were granted the legal right to deny the placement of their children in off-reservation schools. However, with few alternatives for education, as late as 1997, 10,445 Native American children were still students in boarding schools.¹⁶ The impact of undermined communal and familial relations, alienation from Native American cultures, and the scars of physical and emotional abuse from poorly restrained-boarding school teachers still affect many Native Americans.

Native American Religions Outlawed

The confluence of Native Americans, religion, and legislation in the service of empire has had a more obvious manifestation as well. The federal government's Peace Policy toward Native American communities effectively supplanted genocide with cultural genocide. American lawmakers believed that, in order to save Native peoples from either their imminent extermination or their self-inflicted declension, it was necessary to assimilate them swiftly into American society, often imagined as coextensive with white Christianity. Thus, the Board of Indian Commissioners focused their attention and policies on the Christian conversion of Native American communities. In response, the U.S. government adopted the intentional repression of Native American religion and its religious authorities as official policy. Native American dances, the practices of medicine men, and in effect Native American religions were legally banned with the promulgation of the "Rules for Indian Courts" on April 10, 1883.

Christian missionaries charged with the task of civilizing and Christianizing Native Americans had historically recognized traditional culture and the medicine men as natural obstacles to Christian interests and acculturation. Early Indian agents noted the same.

In 1882, Secretary of the Interior Henry M. Teller echoed their concerns in a letter to Hiram Price, the commissioner of Indian Affairs. He requested that active measures be taken to suppress and eliminate religiously contextualized practices, including polygamy and ritualized gift giving; traditional ceremonial dances, especially the Sun Dance; and the existence of medicine men. In response, Commissioner Price established the Court of Indian Offenses. On April 10, 1883, he established a set of policies to clarify its purpose and direct its operations within Native American communities. These "Rules for Indian Courts" interdicted polygamy, prostitution, intoxication, the giveaway practice of redistributing wealth

associated with several Native American religious celebrations, the practices of medicine men, and all Native dances or feasts. The regulation decreed that any person who engaged “in the sun dance, scalp dance, or war dance, or any other similar feast, so called, shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by the withholding of his rations for not exceeding ten days or by imprisonment for not exceeding ten days.”¹⁷ Subsequent convictions carried punishments of up to thirty days of withheld rations or imprisonment. During this era, the issue of Native American religious liberty was not entirely ignored. Historian Francis Paul Prucha avers it was reimagined as a “right, under the Constitution, as much as any other person in the Republic, to the full enjoyment of liberty of conscience; accordingly they have the right to choose whatever Christian belief they wish, without interference from the government.”¹⁸

The new initiative to monitor and repress expressions of indigenous religions proved too great a burden for the limited number of governmentally employed Indian agents. Among each community, Indian police were created to implement this program and authorized to administer physical force for punishment or as moral suasion. As no funding for judges accompanied the creation of the Indian Court, the initial judges were selected from among the previously employed police force. Thus, the police were responsible for arrest, conviction, and often-summary punishment. Such power made the chief of the Indian police the de facto tribal leader on each reservation. Despite the uncertain legality of the courts, the Department of the Interior and the commissioner of Indian Affairs simultaneously outlawed Native religion and created a system to punish violations of the ban.

The ban had wide-ranging effects. The proscription undermined the status and income of Native American religious professionals as both were often connected to their performance of religious rituals. It created rifts within each community between those who felt alienated from their tribal religion, those who eagerly or begrudgingly conformed to the imposed religious expectations, and those who yearned to return the traditional lifeways of their memories. That longing among the later group inspired new religious movements seeking to revive or reimagine the religions of the past, including notably the Ghost Dance of 1890. In many communities, elders chose to maintain their silence rather than fully pass on the sacred knowledge and details of their traditions that might subject younger generations to punishments for disobedience. Gaps in this chain of memory undermined the vitality of prior histories, identities, and cultural lifeways interwoven with religious belief and practice. The inability to freely engage and negotiate the religions within and around their communities further constrained the range of religious variation, impeding processes of religious adaptation or adoption, in each tribe.

While the initiation of the ban may be clearly dated to the promulgation of the Rules for Indian Courts in 1883, its conclusion is less precise. The governmental policy would not shift until 1934, when John Collier, the new commissioner of Indian Affairs, promulgated the circular, “Indian Religious Freedom and Indian Culture.” The letter informed employees of the Indian service, “No interference with Indian religious life or ceremonial expression will

hereafter be tolerated. The cultural liberty of Indians is in all respects to be considered equal to that of any non-Indian group.”¹⁹ Despite this clear shift in policy and the dawning of a new era of Native American–U.S. relations, termed the “Indian New Deal,” Oglala Lakota medicine man Fool Crow recorded in 1952 that he was still required to obtain official permission for eight men to be pierced in order to observe the traditional performance of the Sun Dance. As such acts of self-sacrifice are essential to the Lakota variation of the dance, scholars typically date the end of the ban not to Collier’s directive in 1934, but to this first public performance of the Lakota Sun Dance with piercing. Thus it was not until 1954 that the ban prohibiting the performance of Native American religions was technically lifted.

Moves toward Native American Religious Liberty

Broad intertribal activism throughout the 20th century, culminating in dramatic acts of protest and civil disobedience, brought national attention to the historic plight and present injustices endured by Native American peoples. As a direct result, in 1974, Congress passed the American Indian Policy Review Commission Resolution to Congress, authorizing an investigation and study of the present conditions of Native Americans. In response to the details of the failures of the BIA revealed in the initial report of the Review Commission, Congress passed the American Indian Religious Freedom Act (AIRFA) in 1978. The act serves as a U.S. federal law and joint resolution of Congress that sought to protect the religious rights, traditional religions, and cultural practices of American Indians, Eskimos, Aleuts, and Native Hawaiians. It recognizes that these rights include, but are not necessarily limited to, access to sacred sites, freedom to practice ceremonial and traditional rites, and the use and possession of sacred objects and thus the repatriation of those interned in museums. The AIRFA further ordained that all governmental-agency policies cease interference with the free exercise of Native American religions and grant reasonable accommodations to Native peoples to access religious sites, insofar as such access is practical and not inconsistent the functions of that agency. It also recognizes that the previous U.S. legislation and policies have violated Native American natural and legal rights to religious liberty. The AIRFA has been met with significant criticism primarily over the lack of sufficient measures to enable the enforcement of its provision. The act has repeatedly failed to protect Native American sacred sites and religious free exercise, functioning more as a joint resolution than a practical law. To address these failings, the House of Representatives Committee on Natural Resources and Subcommittee on Native American Affairs met and, on June 10, 1994, introduced HR 4155, to amend the AIRFA and ensure that federal lands be managed in such a way as to not impede the traditional religions and religious purposes of Native Americans. HR 4230 was similarly introduced and passed to protect the use of peyote within Native American religious ceremonies.

One of the greatest obstacles to the practice of Native American religions has been the historical difficulty of federal and state courts to situate claims of Indian religious freedom relative to the legal protections created by the Bill of Rights. The framework for America’s founding documents and later legislation and the subsequent criterion for evaluating Native

American petitions for legal protection of traditional spiritual or religious practices are all deeply rooted in European Christian values and norms. That Western cultural framework generally associates religion with organized churches, tasking governments to maintain benevolent neutrality that neither supports nor hinders an individual's pursuit of institutional religion. The political and legal systems of the United States were not constructed to recognize or protect the form of religion found among many Native American peoples for whom spirituality, ritual performances, and a sense of the sacred may pervade all aspects of their lives. In this way, the continued imposition of American legislation upon Native communities perpetuates American colonialism and imperialism. Community relocations, educational decisions, and even economic policies impact traditional ways of life and interpersonal relations, both communal and spiritual, which may be recognized as sacred. Native American traditions evaluate ecological devastation and political interventions within Native American lives within a natural world populated with spiritual beings and structured by spiritual forces and the effect such events have on the community, religious practices, and the interconnected web of spiritual relationships that undergird reality. Throughout much of Native American history, the First Amendment to the U.S. Constitution was considered inapplicable to the indigenous beliefs or practices of Native American cultures. Other than Christianity, Euro-American observers seldom perceived religion among Indians. Christopher Columbus and Amerigo Vespucci identified neither creed nor church among the indigenous peoples they encountered and so declared them to be without religion.²⁰ Over five hundred years later, Native Americans continue to struggle to protect their religion and culture within institutions that designate separate categories and have divergent understandings of "religion," "culture," and "property."

Much of the national focus and subsequent scholarship have focused on Native Americans' struggle to legally practice the use of peyote in religious rituals. Peyote (*lophophora williamsii*) is a spineless cactus indigenous to the Rio Grande Valley and northern Mexico that may produce psychophysiological or hallucinogenic effects. Although the use of peyote by Native Americans within a religious context is likely prehistoric, the first recorded observation of the "Peyote religion" by a non-Native was James Mooney in 1897, who noted its presence among the Kiowa, Comanche, and Wichita Agencies in Oklahoma.²¹ The Peyote religion, also sometimes termed the Peyotism or Peyote way, is a cross-tribal religious movement that incorporates singing, prayer, and meditation, and incorporates peyote as a spiritually significant symbol and sacrament. The movement was formalized by Quanah Parker in the 1890s with the founding of the Native American Church. The Native American Church incorporates elements of Christianity and various indigenous traditions from North America, celebrating peyote as a gift from God, and promotes an agenda of ethical and social reform. Despite the popularity and proliferation of peyotism and the Native American Church, peyote remains legally classified as a Class One drug and has even been denounced by some tribal councils. After Commissioner of Indian Affairs John Collier instituted the sweeping reforms of the "Indian New Deal" in the 1930s, the Bureau of Indian Affairs officially adopted a policy of noninterference with the religious practices of the Native American Church.²²

However, in the early 1990s, protections for members of the Native American Church to engage in their religious observations remained inconsistent. Only twenty-eight states had passed legislation protecting the cultivation, transportation, possession, or use of peyote for religious purposes. Facing increasing stigmatization and religious opposition, the Native American Church sought recourse for their precarious legal position in state and federal courts and legislatures. Despite tentative state-level success against anti-peyote legislation, in 1991, the Supreme Court ruled in *Employment Division of Oregon v. Smith* that the religious protections of the First Amendment do not safeguard individuals who use peyote within Native American religious ceremonies. The case appealed the denial of unemployment benefits to Alfred Leo Smith of the Klamath Nation whose employment with a drug- and alcohol-treatment facility in Oregon had been terminated after he consumed peyote in a religious ceremony. The court maintained that there is no constitutional mandate that state legislatures enact statutes that exempt the use of peyote for religious purposes from general legal prohibitions “nor of state courts to afford relief.”²³ The decision has been widely criticized by religious organizations in the United States as a hindrance to religious freedom. Thus in 1993, Congress overwhelmingly passed and President Clinton signed the Religious Freedom Restoration Act to restore the requirement that legislatures demonstrate a strong “compelling interest” before enacting legislation that would substantially burden or otherwise hinder the practice of a religion. The Supreme Court quickly struck down part of the act that would have required state legislatures to apply a compelling-interest standard to their legislation in *City of Boerne v. Flores*. Congress responded by passing the 1994 amendment to the American Indian Religious Freedom Act, HR 4230, to specifically exempt the use of peyote from federal- and state-controlled substance laws and protect from discrimination those individuals who use peyote for religious purposes within bona fide Native American religious ritual.

Legal Obstacles to Religious Freedom

The concerted efforts of Indian activists and sympathetic lobbyists, before and after HRs 4155 and 4230, have attempted to establish legal recognition of the religious significance of the human remains, sacred objects, and cemeteries of Native American tribes and provide them some legal protection. In 1989, Congress passed the National American Indian Museum and Memorial Act to begin the repatriation of Native American and Native Hawaiian artifacts procured through questionable means. The statute directed the Smithsonian Institution to identify and inventory human remains and consult with Native leadership regarding the appropriate actions to be taken with them. The Native American Grave Protection and Repatriation Act (NAGPRA), passed in November 1990, further applied these regulations to all federal agencies and federally funded museums. Although technically exempted from NAGPRA, the Smithsonian Institution has crafted a “Policy on Native American Human Remains and Cultural Materials” that has resulted in the repatriation of over 200 items from its collection of human remains.²⁴ Professional and academic reception of NAGPRA has been mixed. While many recognize the need to return ancestral remains to their descendants, Native American skeletal remains make up the largest source of

osteological data for scientific research.²⁵ Additionally, the colonial narrative that envisions Western scholarship as both savior and custodian of “disappearing” “primitive” Native American cultures is intractably entrenched in academia. Further complicating repatriation efforts, NAGPRA requires that in order to file a claim for the return of “sacred and ceremonial items, funerary objects,” or “objects of cultural patrimony,” claimants must prove their cultural affiliation, that is, demonstrate their relationship with the archaeological culture and representative artifacts to the satisfaction of professional archaeologists and museum personnel.²⁶ Contemporary Native Americans are required to argue for their connections to communities and a past that has been constructed by a profession and discourse that has excluded them for centuries and do so within a legal theatre constructed without their input. Nonetheless, increasingly, archaeologists have joined Native communities to advocate for repatriation based upon religious rights or interhuman respect.

Advocacy for the right to worship freely facilitated recognition that Native Americans should have greater access to sacred sites, land, and location taken and administered by the U.S. federal government that are deemed sacred by some Native cultures. Native peoples in North America have struggled to have land recognized and treated as sacred and inviolable. Many Native American cultures do not divide the cosmos into natural and supernatural realms. Nature itself is imbued with spiritual significance. Land might house the remains of ancestors, embody a host of spiritual forces, serve as a source of inspiration and strength, or connect a people to their past, their identity, and those powers they deem sacred. However, the colonial cultures of North America frequently necessitated material evidence of human activity or augmentation of a space to denote it as sacred or designate a place important.

Throughout its history, the U.S. government has overseen the annexation of Native American lands, displacement of indigenous populations, and exile of peoples from their sacred sites. In the course of westward expansion, the development of public and private lands frequently superseded the religious needs of Native Americans and desecrated or destroyed sacred spaces.²⁷ Yet, the destruction of sacred sites in the interests of development continued well after the 19th century. In 1972, the forest service drew up a land-management plan for a 67,500-acre area of Six Rivers National Forest in California that failed to take into account the spiritual significance of sites in the area within the religions of local Native American tribes, who had taken pilgrimages to the region for centuries to conduct religious performances. The forest service had authorized a road through an ancient site held sacred by several peoples. The resulting legal battle eventually went to the Supreme Court. In 1988, the Supreme Court determined in *Lyng v. Northwest Indian Cemetery Protective Association* that the protections of the First Amendment did not prevent the government from permitting timber harvesting and road construction on public land even if near sacred sites. Although the Native American plaintiffs demonstrated that road construction would significantly alter the High Country where numerous sacred sites were located and thereby hinder their religion, the court ruled that the Constitution did not protect persons or religions from the consequences of government land use. This decision established the future criterion for courts to evaluate possible violations of religious freedom under the First

Amendment—whether a government action forces or coerces individuals into violating their beliefs. The consequences of governmental actions on the abilities of a person or group to perform its religion are constitutionality irrelevant.

The *Lyng* decision revealed the need for additional legal safeguards for Native American religion and further prompted the 1994 amendment of the American Indian Religious Freedom Act. The revision prescribes “the management of federal lands in a manner that does not undermine or frustrate traditional Native American religions or religious practices.”²⁸ The amendment further provides for a process for future negotiation between the United States and Indian tribes to “identify appropriate land management procedures” that may produce Sacred Sites Protection Agreements.²⁹ However, subsequent governmental decisions to develop lands and potentially destroy sacred sites have claimed compelling public interests that trump the traditional protections afforded to religious practice.

Most recently, between summer of 2016 and early winter of 2017, thousands of Native Americans and allies converged upon the Cannonball River in North Dakota to join the Standing Rock Sioux Tribe in protest of the construction of the Dakota Access Pipeline. The proposed pipeline would transport half a million barrels of crude oil per day across five states to distribution centers and refineries in the Gulf of Mexico. The construction will run within half a mile of the Standing Rock Sioux Reservation, over lands granted to the tribe in prior treaties, through sacred lands, and under the main source of drinking water for the tribe. After a series of suits describing the failure of the contracted companies to adequately consult the Standing Rock tribe, insufficient environmental impact surveys, and violations of Native American rights to religious freedom, the Obama administration negotiated a halt to construction in contested territories, urging federal agencies and departments to reassess the project’s prior tribal consultations and consider alternative routes. However, in 2017, the Trump administration freed construction to resume. Resistance has continued, but tribal lawyers struggle to meaningfully articulate the significance of Native American religious traditions within the language and legally protected categories of U.S. law.

Religion and Resistance

During policies of extermination and assimilation and through the long struggle for religious freedom, religion has served as a medium for resistance and cultural negotiation. Encounter with the religions and cultures of colonial empires produced a range of individual and collective Native American responses, from rejection through hybridization and parallelism to assimilation and conversion. During times of cultural upheaval, religion often served as the foundation and medium to articulate Native American policies of resistance or assimilation. Euro-American legal policies begat religious innovation and inspired religious movements that fostered new, often more inclusive, Native identities. The seminal notion of Indian unity germinated in small refugee communities in the Susquehanna River Valley and spread throughout eastern North America through the course of the Seven Years’ War and the War of 1812, developing into a religious and political movement identified as Pan-

Indianism. At its heart was a message that all Native Americans were a single people, created and required to perform specific ritual or ethical obligations. Often the calamities facing Native American communities were characterized as the result of a loss of sacred power, incurred by failure to fulfill these duties. The movement drew upon religious beliefs, practices, and contexts of numerous Native groups that colonial displacement had brought into increasing contact and frequently incorporated Christian elements to produce new ways to address moral injustices and communal misfortunes.³⁰ Leaders within the intertribal, and increasingly cross-continental, movement were labeled prophets by Euro-American observers, who recorded their message of reformation, religious restoration or innovation, and unity in opposition to American encroachment. Neolin, Pontiac, Tenskwatawa, and Tecumseh were among the most well documented of innumerable nativist leaders of this multi-generational movement before its decline in 1815, in the wake of the devastating War of 1812.

The prophetic movement resurged in the face of new pressures brought to bear on Native American communities after the American Civil War and through the era of western expansion. Intertribal religious cooperation spread again in the American southwest with proliferation of the Sun Dance and the increasingly apocalyptic and eschatological Ghost Dance movements of the 1870s and 1890. The Ghost Dance movement of 1890, which prophesied the imminent dawning of a new age of peace and possibly the return of the dead, became widespread and stoked the fears of Indian agents and the War Department, who believed that the dances would inflame Indian passions and aggression and hinder assimilationist efforts. Historian James Mooney posits that “the Ghost Dance could never have become so widespread, and would probably have died out within a year of its inception, had it not been for the efficient aid it received from the returned pupils of various eastern government schools” who handled the correspondence for the movement, acted as interpreters among tribes, and frequently assumed leadership in the conduction of the dance.³¹ In 1890, the War Department instructed concerned Indian agents to use “every prudent measure to stop the dance and . . . that military assistance would be furnished if immediate need should arise.”³² Amid growing fears and tensions between tribes and the U.S. federal government, troops were deployed to help suppress the religious movement and confine Indians to assigned reservations. In December of 1890, the Seventh Cavalry intercepted a group of Lakota bound to Pine Ridge Reservation. The following morning, when the soldiers attempted to disarm the Lakota detained at Wounded Knee Creek, violence broke out. When the smoke cleared, 25 U.S. soldiers and over 150 Native American men, women, and children lay dead in what is remembered as the Wounded Knee Massacre. The massacre effectively marks the end of open, cross-tribal religious resistance to American policies until the middle of the 20th century.

Acts of political resistance have been inextricably bound with the construction and realization of Native American identities as well as the religious elements that such activities and identities engage. Native American religions scholar Dennis Kelley posits, “In fact, political action can be seen as a form of ritual activity, ceremony done on behalf of the

People, both human and other-than-human.”³³ Just as religious ceremonies and powwow events may be seen as political expressions asserting Indian identities, acts of political activism and civil disobedience may be understood as religious. Both sets of activities provide opportunities for individuals and communities to negotiate their relationships with and situate themselves relative to the world, others, and themselves. Each seeks to maintain shared religiously contextualized identities, realize more ideal inter- and intra-tribal relations, and affirm communal views of the cosmos. Whether religious action or not, political activism has become a means by which religious values and norms are articulated in resistance to the religious culture and legislation that would seek to force Native American submission or assimilation.

The modern rise of American Indian activism may be traced to the establishment of the Nation Congress of American Indians (NCAI) in 1944. This supratribal organization marshaled the efforts of several tribes to resist the assimilationist and termination policies of the U.S. government. While earlier supratribal movements appealed to a pan-Indian religiosity as the foundation for cooperation and a sense of commonality, the NCAI drew from the Red Power movement and countercultural movements of the 20th century to foster intertribal cooperation over mutual desires to protect governmental programs that support and benefit Native American communities, improve Native American education, enhance health-care services, and strengthen environmental-protection legislation. For many Native American participants, such issues and their actions in support of them are experienced as a part of their spirituality or religion. As the NCAI grew from its 100 original members to over 250 member tribes, it fluoresced into the National Indian Youth Council (NIYC) and the American Indian Movement (AIM) in 1968. Activists from these organizations protested in support of urban issues; organized “fish-ins” that adapted “sit-in” tactics to protest treaty-rights violations in the Pacific Northwest; began a march on Washington, DC, in 1972 known as the “Trail of Broken Treaties”; and engaged in a series of acts of civil disobedience including the occupation of Alcatraz Island in San Francisco in 1969, the occupation of Bureau of Indian Affairs (BIA) headquarters in 1972, and the occupation of Wounded Knee, South Dakota, in 1973.³⁴ The NCAI has been critical about legal efforts to ensure the freedom of Native Americans to use peyote as a sacrament within religious rituals, especially within the Native American Church. These acts of political protest give voice to those who would resist religious and cultural assimilation and help galvanize support in opposition to policies deemed harmful to Indian life. As ceremonies they serve to express a shared sense of the loss of power over their own destinies, often identified as the spiritual cause of present misfortunes, and, by exercising the rights that define them as sovereign nations, function as rituals of self-identification.

Review of Literature

Few texts specifically analyze the theoretical or historical relationship among Native Americans, religion, and law. Lawyers and legal scholars have written the majority of works that touch upon these themes. This legal scholarship has tended to focus on the shifting

national policy toward Native Americans or the emergence and development of tribal sovereignty, touching upon religion only insofar as such becomes affected by such policies and legislation. Early academic literature on the subject reflects the entrenched disciplinary divisions of departments and graduate programs. Professional scholars are often employed within discipline-specific departments and surrounded with peers in the same field. Often, the resulting scholarship is similarly produced for others within their field through discipline-specific peer-reviewed journals. Such specialization has deepened the conversation over particular moments of legislation and specific aspects of Native American historical experience but has occasionally occluded the significance of insights and intellectual trends within other fields or across multiple disciplines.

Moreover, the prominent influence of the “secularization thesis” within 20th-century scholarship has veiled the enduring significance of religion and minimized the relevancy of religion to many modern scholars. This modern myth of secularization maintains that modernity is inimical to religion. Thus, the history of the modern world must necessarily reflect the diminishment of religious practice and social influence. Consequently much of the literature on Native Americans, religion, and law from legal scholars and policy analysts investigates the legal and historical foundations of legislation or seeks to situate policies within a historical discourse but notably excludes as irrelevant the influence of or on religion.³⁵ There has been a marked increase in academic attention to religion and religious motivations across disciplines in the wake of the dramatic national events of 2001. Leading scholarship within religious studies, American history, and American studies notably included religion as a salient category within studies of Native American communities decades prior.

The actions of the American Indian Movement brought greater awareness and scholastic attentiveness to the conditions to which federal law and agency policies have subjected Native American peoples. The activist “countercultural” movements of the mid-20th century coincided with the beginning of an interdisciplinary ethnographic turn within academia. Greater use of ethnographic methodologies produced works that emphasized the relational character of fieldwork, and research more generally, while complicating claims of objectivity. Increasing academic reflexivity and focus on relationality encouraged interdisciplinarity. Richard White, James Merrell, Robbie Etheridge, Gregory Dowd, Daniel Richter, and Colin Calloway are a few of the many scholars who led a wave of “new Indian history” that cultivated culturally sensitive narratives that positioned Native Americans at the center of American histories. These texts present Native Americans as volitional, historical actors, thoughtfully engaging, influencing, and being influenced by colonial populations. Several depict the historical experiences of Native subjects as they negotiated imperial legislation and adapted their ways of life within an evolving matrix of political relations. Increasingly ethnographically influenced, interdisciplinary monographs have tended to engage similarly interstitial and interlocative subjects, clustered around themes of negotiation, community, practice, and cultural literacy. While revealing the sustained patterns of exchange that produced cross-cultural encounters and understandings, these multidisciplinary analyses

focus more on ethnicity, communal identity, and cultural vitality than the non-native category of religion. Some specifically touch upon religion, usually when obvious instances of such affecting legal policy necessitate its inclusion within more focused ethnographic works.

Recently, historical scholarship regarding religion has shifted away from its early prioritization of myth, belief, and creed and toward greater concern with practice, performance, material culture, and lived experiences. Characteristic works, influenced by the salvific undercurrent in Western scholarship or moved by human empathy at the suffering of historical and contemporary subjects, are frequently activist and polemic, advocating respect for Native American religious perspectives and recounting the history of abusive failures to do so.³⁶ This broad trend toward the study of practice has illuminated the experiences and responses of particular communities to historical circumstances at the expense of analyses of impingent texts or institutional policy nuances. As a result, considerations of the role of formal legislation and the impact of legal language upon the colonial power dynamic are regularly downplayed. Scholars championing the actions and perseverance of subaltern Native American communities in the face of well-known instances of legal oppression provide notable exception to this pattern. Within this generation, Native American resistance to the Dawes Act and embodied in the Ghost Dance of 1890 have received considerable attention, often as cultural-revitalization movements.³⁷

Recent policy-centric scholarship clusters around the three primary realms in which American jurisprudence and local expressions of tribal sovereignty complicate the free exercise or practice of Native American religions.³⁸ Most obvious are analyses of cases in which Native Americans are either accused of violating a law in or are hindered from the participation in Native American rituals or ways of life, including the use or transportation of peyote or the practice of ceremonies within the constraints of prisons and educational institutions.³⁹ The second concentration of religiously focused legal scholarship concerns instances of political actions and legal proceedings to reclaim sacred artifacts and revered objects, including bones from ancestral cemeteries, that have been taken and are either displayed against the will of the originating community or treated in a manner deemed disrespectful or sacrilegious.⁴⁰ The most widely studied area where Native American spirituality rubs against American legality concerns conflicts over sacred sites. Scholars continue to investigate the frequent occasions when Native Americans religious traditions and access to sacred lands are endangered by governmental policies or private enterprises.⁴¹ The ten-year anniversary of the passage of the AIRFA gave occasion for leading law and Native American religious scholars to convene the American Indian Religious Freedom Act Conference at Newberry Library in Chicago. The resulting work, edited by Christopher Vecsey, succinctly analyzes the legal and religious issues within the historical relationships between Native American peoples and the United States and considers the impact of the AIRFA within each of the primary areas in which American Indian religious practice encounters U.S. legislation.⁴²

Growing appreciation for Native experiences and perspectives has prompted scholars to draw from studies of Native American cultures to complicate conceptions of religion and highlight the Western origin and bias of the category itself.⁴³ As a category born from a Euro-American context, it prioritizes aspects of culture and life of significance within Western perspectives. Its use within Native American studies, then, may imply an expectation of correlation of such elements upon non-Western subjects. Consequently, many scholars employ terms such as “spirituality” or “lifeway” to refer to aspects of religiosity within Native American lives. A growing number of scholars since the 1980s have similarly explicated the difficulties facing efforts to situate Native American religiosity within an American legal framework, noted the ill fit of the category of religion within Native American cultures, and explored the complicated, frequently colonial overtones of the use of the term “religion.”⁴⁴ Within the recent maturation of colonial and postcolonial theory, academics have begun to incorporate the voices of indigenous societies within their theorizations of the conditions of postcoloniality and indigenous categories within critiques of the legislation and continued colonial agenda perpetuated by policies of the United States.⁴⁵ The transoceanic, international nature of postcolonial scholarship, along with mounting public interest in globalization, has directed a few contemporary investigators to the growing body of international legislation that advocate Native rights and may influence the future of Native American lifeways. Though some work has emerged on the 1995 United Nations Declaration on the Rights of Indigenous Peoples, the relationship among Native Americans, religion, and international law remains underdeveloped.⁴⁶

Significant lacunas in the breadth and depth of the field remain. However, the recent work of Dennis Kelly presents a promising path for future academic investigations. By drawing on performance theory and the diffuse nature of many indigenous understandings of religion, scholars might analyze both legislation and resistance to legislation as religious performance, expressions of identity, and ritual realizations of cosmologies. The diversity of Native American religions and lack of a salient identity within studies of Native Americans, religion, and law pose initial obstacles to interested scholars. Conveniently, several general texts that trace an overview of the diversity and common characteristics of Native American religions may serve as a convenient point of entry.⁴⁷ Although future research into Native Americans, religion, and law will and should come from multiple disciplines and approaches, the central primary-source material will likely remain official federal policy and governmental legislation. These documents as public record are readily available through a number of online databases, many hosted by the federal agencies affected by the legislation. Even more useful for those concerned with the intersection of Native Americans and law, veteran scholars in the field have assembled several excellent collections of legal documents and relevant primary-source materials.⁴⁸