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Introduction

Cannonball, North Dakota

The three bustling camps of water protectors near the proposed Dakota Access Pipeline's crossing of the Missouri River lay along the placid banks of the Cannonball River as it joins the Missouri. The pipeline would pump nearly half a million barrels of crude daily under the river a half mile upstream from the Standing Rock Sioux Reservation. In October 2016, a friend and I set out to offer our modest support to the camps and learn more on the ground about what I had spent several weeks trying to discern in a sprawling, complex legal decision by a federal judge in faraway Washington, DC.

The judge had denied a motion by the Standing Rock Sioux Tribe to block construction, rejecting its arguments that sites of sacred, cultural, and historical significance were unlawfully endangered and specifically that the US Army Corps of Engineers, the federal agency controlling the land of the crossing and holding the power to issue the final permits to make the 1,100 mile oil pipeline a done deal, had failed to comply with the consultation procedures with the tribes under the National Historic Preservation Act.¹

I knew that the Missouri River is vital to the seven Lakota, Nakota, and Dakota nations that make up the Oceti Sakowin, the Seven Fires of the Great Sioux Nation, not to mention the Mandan, Arikara, and Hidatsa nations of the upstream Fort Berthold Reservation. I also knew something about how utterly devastating to these nations was the flooding of their choicest bottomlands by the massive Pick-Sloan dam projects of the 1940s and 1950s, especially given the most famous treaty abrogation in US history, that of the Fort Laramie Treaties of 1851 and 1868, the incursion of gold seekers into the sacred Black Hills, and Custer's errant bravado to defend them.



FIG. 0.1. Cannonball, *inyan wakan*

A cannonball, one of the *inyan wakanagapi* or sacred stones that is the namesake of the river along which the water protector camps lay. Although geologists explain the stones as the product of underground water flowing through sandstone, Lakota accounts say the rounded stones formed in the great springtime eddy at the confluence of the Cannonball and Missouri Rivers until completion of the Oahe Dam in 1958. (Author photo)

I had time to ponder these things in the long hours of the drive across the eastern Great Plains “out” from Minnesota to Cannonball, North Dakota. I also pondered the name *Cannonball*; how it must have become important to history by virtue of some US military atrocity, and how fitting it was that what I took to be “protest” camps against the pipeline had remapped such a place and made it a center.

I should have known better.

Even before the road arrived on the crest above the splendid camps, with their tipis, trailers, mess tents, flags, and horse corrals, we pulled over at Cannonball’s store and saw in its parking lot a monument with an olive stone orb, the size of a large globe. This we learned, was one of the *inyan wakanagapi*, translated into English as cannonballs by someone familiar with the US military, or perhaps that person saw a cannonball and understood it as one of the *inyan wakanagapi*.

According to Lakota tradition, these sacred stones took their shape rolling around in the powerful eddies that swirled each spring at the confluence of

the rivers.² Each spring, that is, until the Army Corps of Engineers built Oahe Dam in the 1950s, flooding the places where families lived, horses fed on hay, elders picked and used medicines, and ancestors were buried. The reservoir, Lake Oahe, swallowed up precious land for a staggering 250 miles upstream, the length of Lake Ontario.

It was clear on that day of our arrival that there was here a roiling confluence of sacred and profane, of the holy and of its potential desecration. But the sacred was not simply a function of the threat of desecration. As the sacred stones suggested, the sacred went deep here. The area around the confluence of these rivers was a veritable sacred district. Weeks before, construction crews clearing the way for the pipeline had bulldozed ancestral memorials and stone circles holding Indigenous sky knowledge. Visible from “Facebook Hill” above the camps, where water protectors went for cell phone reception, were the tips of Twin Buttes, two hills where the Mandan people say their ancestors descended to first walk the earth, and which a Cannonball resident told me has been known to glow at night with spirit emanations.

The three water protector camps formed at the self-same place where Sitting Bull and his Hunkpapa Lakota followers traditionally kept their winter camp. We were told Sitting Bull himself wore a small *inyan wakanagapi* around his neck as a talisman of his spiritual power. Native people of the camps spoke hopefully, not just poetically, of the return of traditional community, language, culture, and religion to this important place. The *inipi*, or sweat lodge, that a Lakota spiritual leader had created at the Rosebud Camp, where we were guests of Curly Eagle Hawk and his leadership team, was there to provide spiritual sustenance to water protectors. But the lodge also took direction, and made possible further spiritual direction, from spirits in that place. These correspondences ran deep.

So I should have known better. We had not arrived at some protest camp erected “out there” on the Plains at the arbitrary geography of a diagonal pipeline’s appointed crossing of the Missouri. We had arrived at a sacred center, affirmed in the poetics of the sacred and only *re*-affirmed in the politics of the sacred. When we left, even after only a mere couple of nights at the camps, my own geography had inverted. I wasn’t driving back to Minnesota from “out here”; I was leaving. Imagine how it has felt for the thousands of Indigenous water protectors who sacrificed half a year of their lives, many of whom are still paying the price.

This book is about such places as Cannonball, about the significance and orientation they have provided Native American communities and about the duties and obligations Native peoples have had to them for generations. I am emphatically not using the past tense, not simply to suggest that a few of these traditions are still alive; I'm using the present perfect tense in order to underscore both that Native peoples continue to practice their traditional religions and that changes made to traditions by those communities can be understood as part of what keeps traditions alive. It is also about how such places are sacred today, especially in light of threats to access, use, and integrity. It is also about the resilience and capacity of Native American peoples to tend the fires of their traditional religions in spite of centuries of concerted efforts to drown those fires by baptism, or by criminalization under American law, or by taking their oxygen through a Euro-American craving for Native *spirituality*, a craving that I will show has also undermined legal claims to Native American religious freedom.

This book is also not just about sacred places. It is also about claims to ancestral remains and sacred beings in museum and scientific collections or in the ground in places under development pressure. This book is also about claims Native American communities make, and increasingly make, to sacred practices, including ceremonial practices in highly regulated environments like prisons, but also about lifeway practices like fishing, hunting, gathering, and cultivating that are as much about living in proper spiritual relationships as they are about making a living.

This book examines how we regard the term *sacred* and its weightier corollary, *religion*, in the political and legal spaces in which these claims are made. It explores the intellectual difficulties and legal possibilities at the juncture of Native American traditions, the law, and the definition of religion. In the gaps between the urgent claims Native peoples make for places, practices, and material items that are surely religious though not plainly or solely so, and what courts, legislatures, and administrative arms of the government do with those claims, we find a space of the very making of the category of religion.

Jonathan Z. Smith argued that the concept of religion is “solely the creation of the scholar’s study . . . created for the scholar’s analytic purposes by his imaginative acts of comparison and generalization,” and having “no independent existence apart from the academy.”³ But his particular way of formulating the point so crucial to the critical turn in religious studies also bespeaks how true it is that we scholars don’t get out that much. For religion is being

conceptualized, and thus created, in a number of public domains beyond the scholar's study, and in a very pointed way in law. Witness stands, court opinions, statutes, and the fine print of regulatory law have formed important, if unwitting, sites in the cultural history of religion.

These definitional processes in the law have been of particular moment for Native American peoples, whose traditions have long eluded capture by the modern Western category of religion but who have of necessity appealed to the American discourse of religious freedom to assert their sacred claims. The study of this engagement can illuminate the power of that discourse to potentially include, yet often exclude, Indigenous religions.

The Presenting Problem: “No (*One*) Word for Religion”

Ojibwe people with whom I've worked the past twenty-five years hasten to point out that there is no word for “religion” in their language: religion can be found everywhere and nowhere at once in a traditional lifeway through which they seek the full integration of the sacred. It is an important point to note for the student of “religion.” “If you pull on the thread of ‘Native American religion,’” historian Joel Martin writes, “you end up pulling yourself into the study of Native American culture, art, history, economics, music, dance, dress, politics, and almost everything else. Talk about Hopi religion and you must talk about blue corn. One thing always leads to another and another when land, religion and life ‘are one.’”⁴ I turn now to the distinctive contours of Native American religious traditions.

For all their differences, Native American peoples are alike ill-served by the conventional wisdom about “religion.” With over 550 federally recognized Native nations, speaking more than two hundred different languages, and practicing traditional lifeways keyed to the full range of American landscapes, diversity must be the first word. Yet there are commonalities, among them a shared reluctance to think of their having religion in the sense of a discrete aspect of life segmented off from other aspects of their traditional lifeways. Indeed, to say “we have no word for religion” can amount to a form of resistance, an assertion of intellectual sovereignty among peoples for whom the integration of religion, economy, polity, art, medicine, and agriculture can be a defining goal of life, one that stands in increasing relief in the midst of a broader society that promotes the separation of these domains as the price of entry to modernity. Following Max Weber, we might think of modernity as deeply

shaped by the effort to differentiate the domains of economy and of politics from the domain of religion (difficult as it has ultimately proved to be in practice). The concept of religion as we know it today emerges reified in this process, assigned to its proper sphere apart from either economics or politics, *spiritual* concerns set off from *material* ones.

None of this has made much sense when it comes to the religious traditions of Native American peoples, for whom the spiritual and the material have been interwoven. Much of the powerful dismissal of “primitive” traditions as not fully religious has been what modern Europeans regarded as their stubborn materiality, their “savage” incapacity to rise above the natural or the fetish.⁵ Think of the power of the stereotypical image of the “rain dance,” mocked as a quaint, superstitious effort to control nature through magic. More recently, the problem has been one of misrecognition: lifeway practices profoundly associated with peoplehood, like harvesting wild rice, spearing walleyed pike, or netting salmon, can be economic and religious at the same time, but the deep religious elements can seem insincere or opportunistic because they can be seen to be conflated with the economic. Or with the political: “this isn’t really about Native religion—these people are just making up these religious freedom claims in a last ditch effort to protest the pipeline,” or the logging road, or the telescope on top of the mountain.

Native religions are diverse and dynamic. Transmitted orally rather than fixed in sacred texts, Native religions can involve considerable internal diversity in ways that confuse an outsider accustomed to seeing religions as defined by orthodox beliefs or bounded by visible institutions. There can be multiple origin or migration stories in play within one tradition. And these traditions can defy conventional wisdom about religions as cultural wholes. An Ojibwe person can participate in a Lakota leader’s Sun Dance; a Navajo person can participate in the Peyote Road. More startling perhaps, many Indigenous people can see themselves as *both* committed Christians *and* observant practitioners of Ojibwe, or Lakota, or Navajo traditions.⁶ Many of the traditions considered in these pages are oriented around the possibility of regular interchange with the spiritual world, of visions and ongoing revelation. In this respect religious change and religious innovations are not structurally anomalous; change—even incorporation of Christian practices—can be hardwired into the sense of the ongoing life of the religions themselves. And yet conventional wisdom that religions are mutually exclusive presents real difficulties for Native people whose practice draws on both or whose return to interrupted traditions can be regarded as discontinuous. Prison inmates may only

have one “religious preference” to check off on their intake form. To choose Christian can block their access to Native traditions; to choose “Native American Spirituality” can defy their affiliation.

Native religions are constituted by practice more than by belief. Elsewhere I have argued this capacity for holding multiple traditions in creative tension has to do with the practice orientation of Native American religious traditions.⁷ Beliefs matter and experiences shape lives, but Native religious traditions are often spoken of as practices, and the logic of their exercise follows the logic of practice in ways that have frustrated those, including judges, looking for clearly defined creeds that distinguish, say, Kiowa religion from Mohawk religion from Christianity. The logic of such practices as maintaining long hair or offering tobacco as a means of prayer or ceremonially ingesting Peyote for healing does not always come with a singular theological reason behind it.

Native American religions are local, not universal, and in at least three respects. First, traditional Native religions are largely coterminous with Native collectivities: nations, tribes, villages, clans, and societies. The community, not the individual, is the basic unit. As Vine Deloria Jr. aptly put it, “There is no salvation in tribal religions apart from the continuance of the tribe itself.”⁸ True, there are some traditions historically—the Ghost Dance, the Peyote Road, the Shaker Church, among them—that have emerged in an intertribal context and extend over multiple Native peoples. And there is increasingly a practice of a self-described Native American Spirituality, but distinctive orientations to community and to land can remain.

Second, Native traditions that are every bit religious typically do not make claims that are universal in nature, or mutually exclusive from teachings of other religions. No one is out to convert others to, say, Osage religion. Vine Deloria Jr. has drawn on the analogy of the Jewish covenant to describe the relationships of particular peoples with the divine. The obligations devolve on peoples, on collectives, not simply on individuals. And the traditions have little concern with the implications for those outside of those covenants. But these covenants make exacting demands on Native peoples, often precise demands that belie the stereotype that for Native Americans, all nature is sacred in some bland, nonspecific way. Obligations may be incumbent to *this* mountain, *this* spring, or *this* waterfall, and not *that* one or all others.

Third, to speak of Native religions as local is very much to acknowledge the ways that they conform and make sense to particular lifeways tied to particular landscapes and waters. Makah traditions focus on relations with

whales; Muscogee traditions with corn; Lakota traditions with bison. The symbolic elements of the traditions make sense in those landscapes, and religious traditions are part not just of making sense of those places but of making a living and living well on them. In these three respects, Native American traditions are often collective obligations and duties, elementally the province of communities more than that of individual belief or conscience or subjective experience.

This is part of the difficulty of fully recognizing what's at stake with Native American relationships with sacred lands. Native religions, as Vine Deloria Jr., put it in *God Is Red*, are oriented to space in contrast to the defining orientation of "Western traditions" to time. Of course, sacred space can matter in Western traditions, too, but Indigenous traditions make full sense fundamentally in relationship to traditional lands, waters, and sacred places. Native peoples can have emergence or migration stories that locate them as peoples belonging to a particular place rather than a universal genesis at the beginning of time. So it's not just that sacred places or traditional territories belong to Native peoples; it's that Native peoples belong to those places. To take one example, the Ojibwe expression for their territory, *anishinaabe akiing*, can rightly be translated as "the land of the people" or "the people of the land."

The language of religion can fall short of the range and complexity of these Indigenous commitments to lands and waters. Indigenous places can be sacred, but not necessarily in terms of a non-negotiable dichotomy between the sacred and the profane. Places may be too sacrosanct to enter, needing time to themselves, or places may be sacred at certain times or for certain purposes, but not impervious to other, less religious uses.

But sacred is not such an ill-fitting term to describe the sense of duty and obligation to such places, the sense of reciprocity with those places, and the moral standing or spiritual subjectivity of the places themselves, or the plants and animals that people them. To speak of the sacred is to invoke, properly in my view, an appreciation for the depth of these relationships, their more-than-instrumental value, and the real presence and subjectivity of spiritual others. Indeed, where many discussions on the topic hearken to what Native people may mean when they say "we have no religion," I think it useful to begin instead from Suzan Shown Harjo's way of putting the matter: "We have no *one* word for religion."⁹ This is to say, Native peoples have a rich vocabulary, not to mention grammar, syntax, and idiom, for what is reductively called "religion" in the modern West. Drawing on her Muscogee and Cheyenne heritages, Harjo points to how the plethora of words for religion are

subtly inflected for specific contexts, including a term for “people who go to ceremonies who don’t have the *religion* to back it up.”¹⁰ Awareness of the sophistication of Indigenous dispositions to the sacred can thicken the understanding of any claim about a practice like salmon fishing or wild rice gathering, about protections of land base, or language, or manner of political deliberation and decision-making. Given the sacred thread that runs through these, it is perhaps *religion* more than keywords of the secularized vocabulary of the social sciences—*economy*, *ecology*, *law*, or even *culture*—that best gets at Indigenous peoples’ lives and lifeways.

It is pretty well established by now that legal protections for religious freedom under the First Amendment or the 1993 Religious Freedom Restoration Act (RFRA) have delivered more failure than promise when it comes to Native American claims to sacred lands and Free Exercise practices. Indeed, this book follows Native peoples as they have taken their claims beyond the language of religious freedom, articulating sacred claims in the managerial discourse of cultural resource under domestic environmental and historic preservation law, the limited sovereignty discourse of federal Indian law, and, increasingly, the discourse of Indigenous rights in international human rights law, especially in light of the 2007 UN Declaration on the Rights of Indigenous Peoples.

But claims engaging these discourses have not uniformly succeeded where religious freedom claims have failed. Articulating claims to what they hold sacred in the language of culture or of peoplehood presents its own intellectual or legal limits. Indeed, if the discourse of religion has been relatively moribund for Native claims in the courts, it remains among the more rhetorically powerful ways of conveying their urgency, and of generating broad political support for such statutory protections as the American Indian Religious Freedom Act (AIRFA, 1978), AIRFA’s Peyote Amendment (1994), and the Native American Graves Protection and Repatriation Act (NAGPRA, 1990).¹¹ The power of religious freedom discourse shown in enactments of AIRFA and NAGPRA, I argue in these pages, should make us think twice before declaring legal arguments toward religious freedom dead on arrival.

Sacred claims to religious rights protections for Native American places, practices, objects, and ancestors can be understood more properly as collective rights of Native peoples rather than as merely the private conscience rights of so many Native individuals, especially when Native nations are the litigants. This book is largely descriptive and analytical, but it is informed by a constructive argument rooted in the analysis. What I propose is an approach

to Native American religious claims that aligns and conjoins such claims with elements of federal Indian law and with the emerging norms of Indigenous rights in international human rights law. Along the way, I argue that the language of religion may still have legs for Native claims in legal and political processes if Native peoples continue to insist on claiming what is distinctive about the collective structure of their religious freedom claims.¹²

This book is informed by my broader academic training in religious studies and in American religious history. It is informed and inspired by scholarship bringing humanities sensibilities to this corner of the law: work on sacred lands by Peter Nabokov, Lloyd Burton, Andrew Gulliford, and especially the generative, deeply learned and prolific work of Vine Deloria Jr.;¹³ work on religious freedom generally by Robert Michaelson, Christopher Vecsey, Huston Smith, and Jace Weaver;¹⁴ and work on repatriation by James Riding In, Kathleen Fine-Dare, and Greg Johnson.¹⁵ The book is also informed and inspired by a growing circle of fresh scholarship on similar topics. Tisa Wenger has emerged as the go-to historian of Native religious freedom, along with Thomas Maroukis on the Peyote Road.¹⁶ Greg Johnson has recent articles and a forthcoming book that are enormously helpful in understanding religious renewal in the crucible of legal and political struggles and bringing theoretical clarity to the task.¹⁷ Nick Estes has powerfully placed Standing Rock's resistance to Dakota Access in a longer narrative of Indigenous resistance. Todd Morman has just published a fine book focused on the administrative public land management of sacred places.¹⁸ Nicholas Shrubsole has published a counterpart of sorts to this book in the context of Canadian law.¹⁹ Tiffany Hale and Dana Lloyd have just completed important dissertations (Hale on the Ghost Dance and Lloyd on the *Lynx* decision) and are in the process of bringing that work to publication.²⁰ The last five projects have appeared on the scene after I had written the manuscript. I can only incorporate their insights at the edges here; readers will have the benefit of engaging all views.

The analysis is particularly driven by targeted legal training that has impressed on me how little intellectual commerce there is between the fields of federal Indian law and religious liberty law. There's a tension to be sure between federal Indian law, a complex body of law based largely on treaties and the collective rights of members/citizens of Native nations, and religious liberty law, applicable in theory to all citizens equally, but under which religion has largely been interpreted to consist primarily in an individual right of conscience. Scholars of religious liberty, I've learned, are not generally conversant in the distinct political and legal framework of Indian claims, nor the

elementally collective nature of those claims. This book reflects my effort to draw on both fields of law to reconsider what religion and religious freedom can mean in Native cases. For the indeterminacy of the category of religion, its capacity for reinterpretation in law and politics is a possibility, not simply a constraint.

Why Not Religion and Religious Freedom?

“Why bother?” the reader may ask. Why try to think through how better to articulate Indigenous claims in the language of the colonizer, and in particular in courts where religious freedom has so clearly been shown to be a discourse of exclusion rather than inclusion? To squeeze relationships to land, or traditional practices associated with those lands, into the category of religion is already to denature them and to concede cultural, not to mention legal, sovereignty. I cannot help but concur with such criticisms, and for at least four reasons that I must briefly identify if I am to persuade any reader of the continued relevance of religious freedom for Native claims.

Religious Freedom’s Failure in Courts

First, Native claims to religious freedom have often failed in court. The two key Supreme Court decisions on Native religious practice have been flagship cases by which the Rehnquist Court restricted the reach of the First Amendment’s Free Exercise clause. In its 1988 decision in *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court upheld Forest Service approval of a logging road through a sacred precinct of high country central to California Native nations, granting the sincerity of Yurok, Karuk, and Tolowa beliefs about the high country but reasoning that the impacts on their spiritual fulfillment did not rise to the level of an unconstitutional prohibition of religion.²¹

Two years later and building on its decision in *Lyng*, the Supreme Court found the First Amendment was not violated in the denial of unemployment benefits to two chemical dependency counselors fired for their involvement in the Native American Church, despite broad recognition of the Peyote Road as a bona fide religion and, in the respondents’ case, as a keystone to their own sobriety.²² The *Employment Division v. Smith* decision is known for restricting the reach of religious Free Exercise protections generally by excluding First Amendment challenges to “neutral laws of general applicability” even when

those government actions have the effect of prohibiting religious exercise. Because Native religious exercise is effectively infringed on by any number of government actions that aren't expressly targeting it, these two decisions not only settled the particular questions at hand, but they also foreclosed countless other Native American cases that might have come before courts under the First Amendment.

What is more, when a nearly unanimous Congress acted in 1993 to restore the bedrock principle of religious freedom in the Religious Freedom Restoration Act (RFRA), specifically outmaneuvering the *Smith* decision and restoring the higher "strict scrutiny" standard of judicial review of government actions before *Smith*, Native claims have been left out in the cold. This is all the more remarkable in view of the fact that RFRA's definition of "religious exercise" was expanded in 2000 so as not to require courts to determine whether religious exercise was central or indispensable to a religion, overcoming a difficulty particularly vexing for Native claims to sacred lands. But in 2008, the Ninth Circuit Court of Appeals found no RFRA violation in government approval of a scheme to make artificial snow with treated sewage effluent for skiing on Arizona's highest mountain, a massif called San Francisco Peaks in English, but "Shining on Top" by the Navajo, a living being who is one of the holy mountains that define the Navajo world, an object of daily devotions and source of medicine and power necessary for all Navajo ceremonies.²³ For the Hopi, the massif is the home of the kachinas, ancestors who bring rain and life, a place where paradigmatic sacred events happened, and a site of pilgrimage and veneration today. The governments of four other Native nations joined the Navajo and Hopi to challenge the sewage-to-snowmaking scheme as a violation of their religious freedom under RFRA. While the court accepted all the detailed factual findings about the Indigenous claims to the sacred mountain as sincere and in force, the Ninth Circuit found as a matter of law that religious exercise was not "substantially burdened" by the treated wastewater. Since the ski area comprises only one percent of the surface of the mountain, and because there would be no limiting of access or physical destruction of plants or sites on the ski slopes, the court found that the "sole effect of the artificial snow" is on the Native Americans' "subjective spiritual experience," amounting merely to diminished spiritual fulfillment:

That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nev-

ertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a “substantial burden”—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.²⁴

Here, recognized claims by tribal governments to collective duties and religious obligations—in Navajo law, the Navajo Tribal Code codifies obligations to respect and protect the six sacred mountains—are denatured into claims of subjective spiritual fulfillment that characterize romanticized misconceptions of Native American nature piety.

This approach to sacred land claims under religious freedom law prevailed in the second volley of the Dakota Access Pipeline litigation. A federal judge said the Cheyenne River Sioux Tribe’s assertion that the pipeline violated their RFRA rights to religious freedom came too little and too late to support a temporary restraining order before the oil flowed. The judge found the religious freedom claims weakened for their not having been asserted legally at the outset of the court challenge and in any event unlikely to succeed on the merits of establishing a substantial burden on religious exercise, citing the failure to establish coercion against religious beliefs in the San Francisco Peaks and *Lyng* cases.²⁵ Again, diminished spiritual fulfillment was all the court could ultimately see.

One could rightly argue that the transmutation of religious obligation into spiritual fulfillment is precisely what is likely to happen when complex collective Native American traditions oriented to land and lifeway are conceptually assimilated into a framework of religious freedom shaped by and more accustomed to cognates of Christianity.

The Ill Fit between Native Traditions and “Religion”

Indeed, many Native peoples are understandably reluctant to speak of their traditions in the language of religion, given that their orientation to place doesn’t conform to the conceptual shape of religion conventionally understood. Native peoples also have good reason to be reluctant because of frequent associations of the sacred with the secret. Where most Christians are glad to speak publicly about their beliefs and practices, for many Native peoples, to traipse out dreams, visions, or sacred knowledge belonging to a lineage or an initiatory society in public as religion is potentially to bring danger. It can

also make sacred knowledge available to non-Native seekers—or academics—for uses considered unauthorized, decontextualized, or disrespectful.

What is more, to make claims in the language of religion and religious freedom can for some Native people suggest the undermining of collective self-determination. Native nations with sovereignty over internal affairs can and do regulate the religious life within their nations in ways that can provoke religious freedom claims from their own members. As Tisa Wenger shows, some of the earliest appeals to religious freedom discourse were by Christian Pueblo members challenging conscription in ceremonial dances as part of Pueblo citizenship. Other examples include past Navajo regulations against Peyote use on their reservation.²⁶ In part to guarantee that internal tribal sovereignty could not violate the civil rights of Native individuals on reservations, Congress passed the Indian Civil Rights Act in 1968, but there remain complex issues, some of them coming before federal courts in ways that situate religious freedom in opposition to Indigenous sovereignty.²⁷

Such concerns add to the intellectual difficulty of fitting Native traditions into the category of religion. I used to think, as a student of the distinctive contours of Indigenous religions, that the issue here is fundamentally one of poetics, of translational imagination, of a search for less impoverished metaphors than “Bear Butte is our St. Patrick’s Cathedral” by which jurists could better grasp the religiousness of Native religious claims.

The Masked Exclusions of Religious Freedom

But the problem of Native American religious freedom goes far deeper than one remedied by education alone. As a growing body of critical religious studies literature has shown, the reason that some religions don’t fully count for religious freedom legal protection is not simply a function of their being misrecognized. The very notion of religious freedom can have baked into it a subtle but no less forceful discrimination that naturalizes and universalizes the individual, interior, subjective, chosen, belief-oriented piety characteristic of Protestant Christianity and enables such a piety to flourish at the expense of traditions characterized more by community obligations, law, and ritualized practice.

Historians have long called attention to the justification for anti-Catholic laws and policies in the nineteenth century under an assumed Catholic disregard for religious freedom. Bigotry clothed itself in sanctimony over religious freedom.²⁸ Seen as ineluctably oriented to Rome and committed to global

dominance rather than to American democratic institutions, Catholicism was seen as antithetical to those democratic institutions. It was this rabid anti-Catholicism, argues Philip Hamburger, that was the key driver in elaborating on the language of separation between church and state.²⁹ Historian Daryl Sehat takes such an insight into the *Myth of American Religious Freedom*, exposing the mythmaking about religious freedom as the keystone to other American liberties and where those American liberties are exceptional in the world.³⁰ Although he acknowledges that the myth of religious freedom functions to help cohere an American identity around it, Sehat pursues the work of exposure of how discussions about religion in public life “trade on a series of fables about the American past.”³¹

Anthropologist Talal Asad has shown how the discourses of religion and of religious freedom have served to universalize a particular, culturally specific order of things on the entire world, and thus to define Islam and Islamic nations as incommensurable with modern democracy.³² More recently, scholars led by Winnifred Fallers Sullivan, Saba Mahmood, Peter Danchin, and Elizabeth Shakman Hurd have shown how this dark underbelly of religious freedom discourse, far from being a thing of the past, characterizes its deployment abroad as a tool of American imperialism and informs its domestic “impossibility” as a matter of US law.³³

“Religious freedom,” Hurd writes, has become a “dominant discourse” because it is “conceptually simple, enjoys a communicative monopoly, offers enormous flexibility of application, encompasses great ideological plasticity, and is serviceable for established institutional purposes.”³⁴ The presumed universality of the discourse tidily and effectively masks the reality of the exclusions it secures; some religions count, others don’t, but no one is led to believe the discourse itself is the problem.

We learn from Winnifred Fallers Sullivan’s groundbreaking work that what makes all this possible is the fundamental indeterminacy of religion. “In order to enforce laws guaranteeing religious freedom,” Sullivan writes, “you must first have religion.”³⁵ And the difficulties of ascertaining, or even agreeing, on just what religion is, make its legal protection as such “theoretically incoherent and possibly unconstitutional.”³⁶ In the book she titles *The Impossibility of Religious Freedom*, Sullivan shows how messy is the task any court faces in trying to maintain a clear boundary between religion and government, for in the doing it inevitably finds itself regulating religion. Sullivan backs up this strong position with compelling analysis of a Florida RFRA case involving competing views of what counts as properly “religious” funerary

practice at a public cemetery.³⁷ “Courts, legislatures and other government agencies judge the actions of persons as religious or not, as protected or not, based on models of religion that often make a poor fit with religion as it is lived.”³⁸

Sullivan goes on to identify the very particular shape of the religion that counts in legal processes. She refers to this as “protestant” with a small *p*—private, voluntary, individual, textual, and believed—as opposed to the “public, coercive, communal, oral, and enacted religion characteristic of Catholicism and Islam but also part of the lived religion of any tradition.”³⁹ In making determinations of what is to be legally cognizable as properly religious and what is not, Sullivan argues, courts become entangled in questions of orthodoxy and heterodoxy, of good and bad religion.

In subsequent work on publicly funded chaplaincy programs and what she views as their remarkable imperviousness to Establishment Clause challenges, Sullivan elaborates on the “naturalization” of a universally human spirituality.⁴⁰ In this later work, Sullivan chooses to use religion and spirituality interchangeably, any meaningful distinction between them being eclipsed by their similar (small *p*) protestant shape: private, voluntary, individual, textual, and believed. What’s more, we learn from David Chidester that the very category of religion settles into the semantic shape by which we know it at the time of colonization in and through the regulation of Indigenous others and their untidy practices.⁴¹ Accordingly, Native religious exclusions were fully a part of the larger capture of Native lands and people.

Tisa Wenger has recently called out just how crucial was the language of religious freedom as moral justification and call to arms for domestic colonization of Native peoples and lands and in American imperialism in the Philippines. “The dominant voice in the culture,” she writes, “linked racial whiteness, Protestant Christianity, and American national identity not only to freedom in general but to this [religious] freedom in particular.”⁴² The civilizational assemblage of race and religion that Wenger sees coursing through US regulation of Native traditions from the 1880s to the 1930s never really seems to go away.⁴³ The career of the Peyote Road is instructive on this point: strategic efforts by Peyotists in the early 1900s to protect their traditions under religious freedom logic by incorporating as the Native American Church faced their challenges, to be sure, but were by and large successful until the Supreme Court, in the 1990 *Smith* decision, criminalized them as collateral damage in a broader aim of withdrawing the reach of First Amendment Free Exercise protection.

“Religion” Deployed against Native Traditions

A fourth criticism of engaging religious freedom is the legacy of the plain fact that religion has long been used against Native American peoples. The legal Doctrine of Christian Discovery gave legal authorization to conquest and theft by vesting absolute title in Christian monarchs and divesting those “without religion” of all but rights of occupancy. More pervasively still, the category of “religion” was deployed against Native peoples in the Civilization Regulations, which for more than fifty years from 1883 until 1934 criminalized Native religious practices like the Sun Dance, Potlatch, and ceremonial healing. The cumulative effect of fifty years of this policy was traumatic pushing underground the ceremonies and healing systems of traditional religions and continuing to suppress them beyond the formal disavowal of such policies in 1934. And tracing early twentieth-century efforts by Native peoples to engage religious freedom protections for what they positioned as the Native American Church were never the stable “first freedom” they were for other communities, as the 1990 *Smith* decision made resoundingly clear. So I would only underscore Tisa Wenger’s caution about any sanguine engagement with religious freedom talk used so deliberately against Native people.

Why Religion? What Can Religious Freedom Mean?

But I have to say, the closer I’ve gotten to the stories of Native religious and cultural claim-making over the last fifty years, the less drawn I feel to the view (whether it is projected from empirical historical study or deduced more theoretically) that arguments for religious freedom are destined to be dead on arrival. A sampling of recent book titles speaks to the contemporary valuation of religious freedom talk: *Beyond Religious Freedom*, *The Politics of Religious Freedom*, *The Myth of Religious Freedom*, *The Production of Religious Freedom*, or *The Impossibility of Religious Freedom*.⁴⁴ As important as these projects are for their unmasking of how religious freedom discourse serves to secure and advance the power of the powerful, to exclude those at the margins of power, and to authorize discrimination—especially at this particular political moment—I think otherwise amazing work can risk contenting itself without more fully appreciating how myths and discourses work in part because even as they grease the wheels of power, they also provide the medium for resistance to power.⁴⁵

This book takes its main cues from the claim-making of Native nations to accentuate what has become something of a footnote in much of this work:

that religion and religious freedom are not simply used to exclude those at margins; they are reworked creatively from the margins, their indeterminacy a possibility and not just a limit.

Historian Tisa Wenger stays closer to the ground in this regard, especially in her first book on the Pueblo dance controversy.⁴⁶ Wenger shows how those with relatively little power engage the discourse at the margins to create space for themselves. But in the work of others, this point amounts to an unelaborated footnote and can have the effect of reducing to pitiful dupes those who, like Native people, have shaped the discourse to their own ends—whether that be on nineteenth-century reservations or in Senate office buildings in 1989. A fair criticism from this literature is that such resistance cannot be fully effective, because it is articulated in the discursive realm already cooked up against Native peoples. But where courts can decide what religion will count for legal purposes, the discourse of religious freedom is more than just a matter of judicial outcomes. As Greg Johnson's work shows so well, the broad appeal in Hawai'i or at Standing Rock is the strategic and generative engagement with the discourse of the "sacred."⁴⁷ So even where religious freedom may fail in courts, it captures imagination in courts of public opinion precisely because of its power as a discourse.

It is this religious studies insight into the discourse of religious freedom—the exclusions encoded into its presumed universalism, the exclusions empirically felt in a series of Native American claims to religious freedom—that can embolden us to think about how that discourse can be trained in new directions. For as we've learned from any number of postmodern and postcolonial theorists, discourses don't just function as airtight expressions of colonizers' wishes; they involve contradictions, trade-offs, and in the end, consent, to continue to work. And as discourses go, I do not see that of religious freedom disappearing anytime soon—whatever the actual history of its interpretation in the courts. Given its profile in the first clauses of the Bill of Rights, "religion" will long be a term of power.

This all perhaps rings of an optimism unbecoming a religious studies scholar who is fully aware of the checkered past. I aspire to show in this book that the approach is more realistic, since the Native advocates I engage are pragmatic, not wide-eyed, when it comes to speaking their claims in the language of religion. Indeed, often as not, the legal appeals to religious freedom appear as last resorts after other, putatively more salutary, legal arguments for cultural resource protection fail.⁴⁸

Like those advocates, I don't just ask what religious freedom means; I ask what religious freedom *can* mean. Although this book treats this question with nuance, there is an arc to my analysis toward an appreciation for the collective shape of—and the collective rights to—Native American religions. I draw on a number of sources of legal authority for this overall argument.

Where I End Up: Religion as Peoplehood

This book looks to the possibilities of eliding what's *religious* about Native claims to sacred lands, practices, ancestors, and material heritage into notions of sovereignty and peoplehood. This replaces the conceptual gymnastics required to render claims as those of Native American "religion" and relieves Native peoples of having to reveal proprietary, initiatory, or secret traditional knowledge to make a showing of "religion." Most importantly, eliding the religious honors Indigenous peoples' rights to self-determination, including the rights to determine for themselves what's sacred and how to treat it.

So this is where I end up. In chapter 7, I focus on affirmations of sovereignty and treaty rights under domestic federal Indian law, where Native nations have quite successfully protected traditional practices associated with ceremony and peoplehood—salmon fishing and whaling in the Northwest; fishing and wild rice practices in the Great Lakes—when there are treaty provisions on which to hang the argument and when courts aren't otherwise held back by federal Indian law's racist and colonizing apparatus tied to the Doctrine of Christian Discovery, congressional Plenary Power. Chapter 8 celebrates the enormous potential of rights as Indigenous peoples under the ripening norms of international law after the passage of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and its adoption with reservations by the United States in 2010.⁴⁹

Keeping Religion in the Mix: Toward Religious Sovereignty

But as a matter of legal and political effectiveness, this book does not content itself with the elision of religion into something else. Apart from the relative weakness of international law norms in US courts, in the case of UNDRIP, religious rights are very much a species of cultural rights that make a lot of sense in the world of international law but that lack constitutional or other meaningful legal reference points in domestic US law. And the distinctive

legal architecture of federal Indian law seems increasingly precarious, with increasingly conservative courts determined to decimate what they only see as “special rights” as though federal Indian law is one more instance of affirmative action.⁵⁰

So while I end up beyond the First Amendment, beyond RFRA, I maintain there’s legal and political value in keeping “religion” and “religious freedom” in the mix, toward a bundle or hybrid construal of religious freedom law in terms of the collectivist protections of federal Indian law and emerging norms of Indigenous rights in international law, for something we might call *religious sovereignty*. What I mean by religious sovereignty is less grandiose and more specific than it might seem. First, it builds on important work of Indigenous law scholar Rebecca Tsosie, who argues out from the experience of cultural appropriation, and cultural property, repatriation, and intellectual property law toward a full-throated cultural sovereignty, a complement and completion to the political sovereignty that is so often the concern in federal Indian law. Tsosie glosses cultural sovereignty not primarily in terms of sovereignty over cultural matters, though that to be sure is implied. It has more to do with “the internal construction of sovereignty by Native peoples themselves that will elicit the core meaning and significance of sovereignty for contemporary Native communities.”⁵¹ It reflects Native jurisprudential understandings of the matters that find their way to courts, and among other things an implicit rejection of forms of law, including delimited sovereignty, that “emphasize the secular nature of ‘legitimate governance.’” In this, cultural sovereignty doesn’t shy away from aspects of Native law that extend to what we might call the religious—spiritual relationships, responsibilities, and rights. Tsosie writes with the long-serving leader of the Comanche Nation, Wallace Coffey:

We must create our own internal appraisal of what “sovereignty” means, what “autonomy” means, and what rights, duties, and responsibilities are entailed in our relationships between and among ourselves, our Ancestors, our future generations, and the external society. . . . It requires us to articulate the appropriate norms of governance and the contours of our own social order, from both a political and spiritual perspective.⁵²

Coffey put the spiritual matter more directly still: “Cultural sovereignty is the heart and soul that you have, and no one has jurisdiction over that but God.”⁵³ For as religious as such an utterance is, Coffey and Tsosie stop short of calling

this *religious* sovereignty because like *political* sovereignty, religion is a decidedly non-Indigenous category. I agree. But I do think wedding notions of sovereignty and peoplehood to an indigenized inflection of religion can make pragmatic legal sense. *Religious sovereignty*, as I offer the term, is not a claim for the collective autonomy of *any religious* group but is tailored to the special legal status and nation-to-nation relationship between Native nations and the United States and also to the prerogative of Indigenous peoples themselves to determine what matters are sacred to them. But more than *cultural sovereignty*, it brings to bear a legibility that carries force in American politics and law.

Sources of Authority for the Argument

My argument rests on a lawyerly conviction that the indeterminacy of the category is a possibility, not just a limit, and draws on a number of sources of legal authority. First, where religious freedom claims have largely failed in the courts, Native leaders have had success in drawing on the rhetorical power of religious freedom to get Congress to pass Native specific legislative accommodations, especially the American Indian Religious Freedom Act of 1978 and the Native American Graves Protection and Repatriation Act of 1990. Remarkable because Congress was moved by a group with very little political power—fewer than two percent of the US population and a relatively poor two percent at that; remarkable also for the deft ways that religious freedom arguments could engender protections that conform less to the individual rights logic of religious freedom and instead conform to the collective rights implicit in the nation-to-nation relationships of federal Indian law.

Second, US courts have acknowledged the distinctly collective shape of Native religious claims, at least through the back door. On the one hand, courts have consistently upheld off-reservation treaty rights to fishing and hunting that form the basis of chapter 7. In these cases, the collective nature of the claims is explicit but their religious nature, I argue, is implicit and often overlooked from the vantage point that they are merely economic rights. As Frank Ettawageshik put it, “the true treaty right” his Odawa people have to Lake Michigan fish is not a quantifiable property right but a right to continued relationship: “Our ancestors didn’t say ‘those are our fish.’ Rather, they reserved the right to fish. That meant they reserved a right to sing to the fish, to dance for the fish, to pray for the fish, to catch and eat the fish but to live with the fish, to have a relationship with the fish.”⁵⁴

On the other hand, courts have consistently affirmed the collective rights to Native religions in a colorful batch of case law involving possession of ceremonial eagle feathers.⁵⁵ In these cases, the religiousness of the claims is explicit but the collective nature of the claims is implicit. An exemption to the criminalization of feather possession under the Bald and Golden Eagle Protection Act for members of federally recognized tribes, administered by a permitting and distribution process under the US Fish and Wildlife Service's Eagle Repository in Denver, has been upheld against legal challenges by individual practitioners of Native religions who are not members of federally recognized tribes.⁵⁶ Several appellate courts have recently invoked the federal trust responsibility—the special government-to-government obligations to acknowledged tribes that are the progeny of treaties and the corpus of federal Indian law—in addressing Native religious freedom objections under RFRA to the federal permitting process for possession of bald eagle feathers.

Third, if working out the kinks of the Eagle Act accommodation is seen as merely an instance of judicial reasoning about Native religions as group rights sneaking in through the back door of the US legal system, I turn to the forthright front-door reasoning of international human rights law, particularly as clarified in the 2007 UN Declaration on the Rights of Indigenous Peoples, which was endorsed by the United States in 2010. The Declaration doesn't create any new human rights but clarifies that existing human rights in international law, if they're to apply meaningfully to the globe's Indigenous peoples, must apply as collective, and not just individual, rights. I agree with Walter Echo-Hawk, Robert Williams Jr., and others that recent Supreme Court cases have destabilized the already shaky foundation of federal Indian law, making claims to sovereignty based on that foundation less reliable in courts. I agree with them that federal Indian law must more fully incorporate the elaboration of the aspirational standards set out in the UN Declaration to sink those foundations deeper into the bedrock of Indigenous peoplehood.

If to have religious freedom you must first have "religion," and if religion is as problematic a moniker for urgent and sacred Native claims, it is also true that Native nations and their advocates are less interested in whether religious freedom is conceptually bankrupt or not. And too much focus on court cases can skew our sense of how claims made in the register of religion are useful in courts of public opinion, shaping the political context for positive legislative and administrative developments.

In arguing toward a religious sovereignty, toward the collective rights of Native American religious freedom sewn into to the special political and legal

status of Native Americans in the United States, it is useful briefly to acknowledge the promise of parallel developments in Canada. A recent book by Nicholas Shrubsole, to which readers are heartily referred for a fuller treatment, argues that First Nations' rights to sacred places can and should rest on a hybrid of legal protections for religion freedom under Article 2 of the Canadian Charter, and the Constitution Act's Section 35(1), which provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Drawing on work that elaborates Canada's First Nations peoples as "citizens plus," Shrubsole points toward a "religions plus" framework that weds the discourse of religion with the formal acknowledgment of collective aboriginal rights.⁵⁷ As Shrubsole's book was taking shape, the Supreme Court of Canada rejected arguments that the Ktunaxa First Nation, in their effort to block development of a year-round ski resort on sacred lands, enjoyed such a hybrid claim to collective religious freedom.⁵⁸ Indeed, a whole potential chapter of this book might have been dedicated to that case had the Supreme Court of Canada held otherwise, but Shrubsole's argument, especially in an era of formal Canadian commitments to and energetic public discussion of reconciliation, can commend a legal framework where Indigenous rights are unambiguously a constitutional matter.

Even without an equivalent provision to Canada's 35(1), US law has also established a constitutional grounding for recognition of the inherent sovereignty of Native nations and their special legal status. Although the chapters of this book will further develop the implications, we turn now, by way of introduction, to the political status of Native American peoples.

The Distinctive Political Status of Native American Peoples

Both US courts and Congress have recognized Native Americans—at least those who are members of federally acknowledged tribes—not simply as members of a racial or ethnic minority or protected economic class but as Americans with a distinctive political status.⁵⁹ Recognition of this status has multiple sources in US law. First and most important, it is rooted in the "inherent sovereignty" of Native nations who predate the Constitution and whose inherent sovereignty is elaborated in the nation-to-nation structure of treaties.⁶⁰ The US Constitution speaks of Native peoples in several places, and in ways that clarify their distinct status. Art. 1, Sec. 2, Clause 3 states, "Representatives and direct Taxes shall be apportioned among the several

States ... excluding Indians not taxed." The Commerce Clause allocates to Congress the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁶¹ Early legislative acts and early Supreme Court decisions elaborated on this political status, ensuring that the nation-to-nation relationship would align Native nations with the federal government, not state governments. Finally, the special political status of Native Americans has been ensconced in a legal doctrine of the federal trust responsibility with Native tribes, under which courts have held the United States accountable as a trustee of Indian interests and resources with whom it has a particular responsibility.⁶²

Federal Indian Law

The distinctive political status of Native peoples has given rise to a discrete body of law commonly known as federal Indian law. In part because this body of law is distinguished by the political status of Native peoples, it is not uniformly well known by jurists unless they encounter its distinctive cases on a regular basis. Even for its specialists, however, federal Indian law is characterized by core tensions, ambiguities, even contradictions, that are often identified within early Supreme Court efforts, led by Chief Justice John Marshall, to integrate into the common law and American law traditions the colonization of Indigenous peoples. Native peoples' presence on their traditional territories has raised vexing moral, intellectual, and practical legal questions for settler colonialism. At different moments in this book, I attend to the so-called Marshall trilogy of Supreme Court cases and join federal Indian law scholars trying to come to terms with the contradictions. *Johnson v. M'Intosh* (1823) introduces into American law the Doctrine of Christian Discovery, a crucial legal doctrine that secures most title to the United States atop the theological presumption rooted in early modern papal decrees and later adopted by the Protestant British Crown that the sovereigns who "discover" New World lands in the name of Christianity enjoy absolute title to those lands, reducing Native rights to rights of occupancy only. *Cherokee Nation v. Georgia* (1831) likens Native peoples to "domestic, dependent nations," dramatically limiting their recognized sovereignty to internal matters and construing them in terms of a ward/guardian relationship with the United States. *Worcester v. Georgia* (1832) explicitly affirms that the sovereignty of Native nations, limited as it may be under the circumstances, is no less an "inherent sovereignty," and that the rights reserved by Native peoples in treaties are not grants or

gifts from the United States but obligations respecting Native inherent sovereignty. As a later Supreme Court decision put the matter:

The treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.⁶³

All three cases codify racist stereotypes of the day and reason from these outmoded views of Native peoples as savage, incapable of civilization. Astoundingly, these cases remain on the books, leading many to call for their complete rejection by courts in an age where few share the racist views on which “good law” is premised.⁶⁴ Others are left trying to reform and rewrite federal Indian law, trying to maintain what is valuable in this body of precedent, such as the distinctive political status of Native American peoples affirmed in *Worcester*, in spite of these racist views.

Shifting Winds of Federal Indian Law

With its unstable base in the Marshall trilogy, federal Indian law has proved most susceptible to rapid changes over time, caught in shifting winds of popular opinion and policy without the ballast that lends stability and coherence to other bodies of law.⁶⁵ For example, assimilation policies from 1871 until 1934 took the view that “tribalism” was a thing of the past, and so too, the solemn treaties with Native nations, and that the future was for Indians, as individuals, to assimilate to American economy, policy, society, culture, and Christian religion. The Supreme Court gave legal backing to this astounding pivot in 1903, ruling in *Lone Wolf v. Hitchcock* that forced allotment to individual Indians of collective Kiowa reservation lands (and sale of the surplus to white settlers) was lawful because the treaty securing those lands had been made with the foreknowledge that Congress could violate the terms of the treaty to effect policies it knew would be good for Indians.⁶⁶

Like the Marshall trilogy, *Lone Wolf* remains “good law” in federal Indian law, but the prevailing winds have changed again and again. Assimilation Policy ended abruptly in 1934 when Congress passed the Indian Reorganization Act (IRA), restoring collective rights to land, language, culture, and Native self-government. Tribal governments were established initially using template constitutions from the Indian Bureau, in up/down votes by Native peoples themselves.⁶⁷ These governments are the ones formally recognized by the United States as the agencies of tribal sovereignty, but in many cases today are still called “IRA governments” in Native circles to mark their departure

from Indigenous governance traditions. Efforts by Native leaders to seek redress for the wrongs of Assimilation Policy, and to reclaim religious and cultural rights, were many. Less known, because not overtly or plainly religious in appeal, were their efforts to reclaim sacred lands under the Indian Claims Commission process, begun in 1946 to settle outstanding claims once and for all with the tribal governments.⁶⁸ With the formation, also in the 1940s, of the National Congress of American Indians, came the coalescence of these tribe-specific efforts.⁶⁹

In the 1950s, Indian policy took a pendulum swing back toward dissolving the special status of Indians. The United States sought to terminate tribes through settlements to individuals, and successfully did so to many tribes, some of which, like the Menominee Nation, later sought reinstatement. US policy also incentivized Native people to leave reservation homelands for relocation in cities to access industrial jobs in the postwar recovery. By the 1970s, fully half of the Native population of the United States lived primarily off reservations in these cities, among other things fueling an intertribal American Indian identity, reconfigured religious practices, and the burgeoning American Indian Movement.

The 1970s also saw the beginnings of a formal policy of Indian self-determination, a policy posture that has strengthened in decades since Native people and Native nations have played an increasing role in shaping policies affecting them. The implications of self-determination policy for statutory religious and cultural protections are detailed in chapter 5, but it behooves us to reflect here on a key facet of policies of self-determination: the federal trust responsibility.

Federal Trust Responsibility

The notion of a federal trust responsibility is paternalistic on the face of it. And to be sure, the trust relationship is rooted in the metaphor, first introduced in *Cherokee Nation v. Georgia*, of Indian wards to their federal guardians. Unsurprisingly, this has provided a source of federal power, including a source of power to intervene in tribal affairs to protect the individual rights of tribal members.⁷⁰ But the trust responsibility has also offered some important legal leverage toward Native self-determination, seen most prominently perhaps when the United States litigates on behalf of tribes. Some of the most important treaty rights cases have pitted the United States on behalf of tribes

against states, as in *U.S. v. Washington*, and much of the case law considered in these pages involves the United States acting legally in its trustee role. Even when the United States is the defendant in actions brought by tribes against it, the trust responsibility can serve as a legal lever for courts to hold the United States accountable to the “highest fiduciary standards” in its trustee role. David Wilkins, Vine Deloria Jr., and others, for all their criticism of the paternalism involved, observe that the trust responsibility admits of important ambiguities; it could signal guardian and ward or it could signal a fuller “protectorate” relationship between the United States and Native nations with limited inherent sovereignty. Or it could even be imagined from an Indigenous perspective as a “trust” that the other party only do “what is diplomatically agreed or consented to.”⁷¹ For some courts, it really is like the assimilation era’s view of government’s paternalistic power to identify what’s in Native peoples’ best interest subject only to honor and “good faith.” But courts have increasingly held the United States legally accountable for its conduct as a fiduciary that is legally, not just morally, obligated to preserve or enhance tribal resources.⁷² In 2009, a class action challenge to federal malfeasance as trustee resulted in a \$3.4 billion settlement.⁷³

While the federal trust responsibility applies in fairly plain legal fashion to the fiduciary management of natural and economic resources, it has also been understood to extend to cultural resources: the languages, cultures, and religions of tribes.⁷⁴ Even beyond the legal obligations of the highest fiduciary standard, the trust responsibility can be understood to encompass a federal responsibility to provide affirmative remedies for past failures as trustee in preserving and protecting Native natural and cultural resources. But rooted in treaties and the recognition that tribal governments are the third source of sovereignty in US law (with the federal and state governments), the trust relationship also distinguishes federal relationships to federally recognized tribes from its treatment of other minority populations.

Equal protection, due process, voting rights, and other civil rights challenges to this approach to federal Indian law and policy have been many. In the late 1970s, even as it was ruling otherwise in the *Bakke* case,⁷⁵ the Supreme Court made clear that it was the political, rather than racial, character of American Indian status elaborated in federal Indian law. The Supreme Court held in *Morton v. Mancari* (1974) that the Bureau of Indian Affairs’ hiring preference for Indians survived challenges that it was discriminatory,⁷⁶ and its rulings in *Santa Clara Pueblo v. Martinez* (1978),⁷⁷ *United States v. Antelope*

(1977),⁷⁸ and *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation* (1979) suggested that laws that “might otherwise be constitutionally offensive” might be acceptable if they are enacted pursuant to the United States’ trust relationship.⁷⁹ To underscore the nonracial basis for this decision, the Supreme Court in *Morton v. Mancari* made explicit that the focus on members of federally recognized tribes, rather than on American Indians generally, suggested the political and nonracial basis for the unique relationship.

Nonrecognized Native Peoples

Among the most problematic aspects of the distinctive political status under federal Indian law is the striking exclusion of the many Native people who, for a range of reasons, are not members of federally acknowledged tribes. A Native person might be the daughter, son, or even parent, of a member of a federally recognized tribe but fail to have sufficient heritage if a given tribe is one of the many that continue to use “blood quantum” as part of its citizenship/membership criteria. Or a Native person might be a full member of one of the hundreds of peoples that are not among those formally recognized by the United States. Or that people may be among those terminated by the United States in the 1950s. That people may have been among the many that opted out of seeking recognition in the 1930s as a tribe under the Indian Reorganization Act, convinced as many were after fifty years of forced assimilation that further incorporation into government systems would only harm them. Or perhaps that people is stuck in the slow administrative process of federal acknowledgment. Many Native people feel, and rightly so, that the terms of federal recognition are not only bureaucratic but also racist, oppressive, humiliating, and irredeemably colonizing.⁸⁰

I tell the story in chapters 5 and 6 of Native efforts to align religious freedom matters to the government-to-government structure of federal Indian law, begging questions of who is left out. Those efforts made clear attempts to include the religious freedoms for all Native Americans, not just those who count in federal Indian law. I wrestle most with this question at the end of chapter 5, but admittedly without a fully satisfying result. Chapter 4’s consideration of environmental law and historic preservation law offers another legal resource in this regard, where Native peoples lacking federal recognition are not shut out from potential protections. The final chapter’s consideration of Indigenous rights in international law offers the more expansive way of rethinking the law in this regard.

The Shape of the Book and Major Findings

In the service of sustaining attention to the problem of religion and religious freedom as engaged by Native peoples, I have organized the chapters not overtly in terms of the issues involved—sacred lands, repatriation of sacred items in museum collections, religious exercise in prison, and such—but in terms of the legal languages in which Native peoples make their sacred claims. These include *religion as religion* (or *spirituality* as the case may be) in religious freedom law; *religion as cultural resource* in environmental and historic preservation law; *religion as collective right* in statutory federal Indian law; and *religion as peoplehood* in domestic treaty law and in international law. Still, I cover most bases in terms of the range of religious practices to which Native peoples make those legal claims. I discuss prison religion in chapter 2; sacred lands in chapters 3 and 4; the Peyote Road in chapter 5; repatriation and ceremonial access to eagle feathers in chapter 6; and customary lifeway practices, like whaling and fishing, in chapter 7. And although I organize the book in terms of available legal languages for Native sacred claims, I strive to ensure each chapter is not beholden to judicial renderings of the Native concerns, a trap into which much of the legal studies literature falls, rooted as it is in readings of case law opinions. Still, some parts of the book are necessarily quite technical, and readers who need less technical detail are invited to make good use of introductory and concluding sections of each chapter, and to skim sections about the detailed processes, such as those under NEPA and NHPA, in order to be fresh to other moments in the book that speak to them.

The initial chapter, “Religion as Weapon,” not only offers crucial historical context; it also shows just how freighted the category of *religion* can be for Native peoples. Religion, or its absence, served as a key instrument in the legalization of the dispossession of North America, first through the legal Doctrine of Christian Discovery, which continues to inform federal Indian law, and second through the criminalization of traditional religions under the federal Indian Bureau’s Civilization Regulations from 1883 to 1934. As devastating as the regulations and their assemblage of civilization with a thinly veiled Protestant Christianity were, affected Native people strategically engaged religious freedom discourse to protect those threatened practices that they increasingly argued were their “religions” and protected under religious liberty. A desire to heal from historical trauma is what brought Peyotists in the 1910s to incorporate as the Native American Church; it is also how many spoke of their no-DAPL protest/ceremony. Even as the government and missionary

sought to curb Native religious practices thought to retard civilization, Euro-Americans began in earnest to fantasize about a Native spirituality that they could collect, admire, and inhabit. But while this awakened Euro-American appreciation for Native cultures served to help lift the formal confines of the Civilization Regulations in the 1930s, it has continued to beset Native efforts to protect collective traditions.

Chapters 2 and 3 form a couplet of sorts as they treat straightforward claims under religious freedom law. But arguments about distinctive Native religions are shown to be haunted by the power of Euro-American desire for Native spirituality. This manner of putative respect for Native cultures has served in important cases to erode rather than sharpen an appreciation for the religiousness of Native claims to religion, and so I have titled these chapters “Religion as Spirituality.” Chapter 2 considers the relative success of court decisions accommodating certain individual Native American inmates in their religious exercise in prisons, especially the sweat lodge. These cases reveal a pattern of what officials refer to as “Native American Spirituality.” Especially insofar as the cases largely involve a triad of intertribal practices: sweat lodges, pipe ceremonies, and access to medicinal tobacco, sage, cedar, and sweetgrass.

Chapter 3 traces the failure, by contrast, of efforts by Native nations to secure sacred places on public lands under the First Amendment and the Religious Freedom Restoration Act. In the tracing, I query what has been so problematic about legal definitions of religion, since courts have consistently misrecognized collective claims to sacred lands as those of individuals cultivating interior spirituality. Read as a couplet, the chapters relate the legal success in prison cases and the legal failure in the sacred lands cases by the common thread coursing through both outcomes: claims to protect Native religions as *religions* are seen by the courts through the powerful lens of spirituality. Individual, voluntary, interiorized spirituality that makes few claims on the public gain entry to legal protections for Native American religious freedom. But where religion extends beyond the self, making claims on sacred lands, and on an American project based on theft of that land, spirituality alone doesn't pass legal muster. Where the redress sought concerns of collective, obligatory, and material claims, those claims fail to pass the “substantial burden” threshold, viewed simply as diminished spiritual fulfillment.

Chapter 4 considers the protections sought for “Religion as Cultural Resource,” especially under environmental and historic preservation law and the complex world of cultural resource management, and considers the fine grain

of the litigation in the Standing Rock case. Recognizing the importance of procedural protections under the National Environmental Policy Act and the National Historic Preservation Act, my case studies show the legal limitations of rendering the sacred in this managerial discourse of cultural resource.⁸¹ *Culture* proves to be as indeterminate as *religion*, frustrating efforts for legal protection, but without religion's status as a power word in the Constitution.

Chapters 5 and 6 consider what Native peoples have done with the indeterminacy of religion, how they have stretched it to argue for "Religion as Collective Right." Chapter 5 considers efforts to legislate Native American religious freedom in the American Indian Religious Freedom Act (AIRFA, 1978). If the legal force of "religious freedom" discourse has been only dimly effective for Native sacred claims in courts, this chapter is the one that most pointedly shows how Native peoples drew on the rhetorical power of the sacred and religious freedom to win significant legislative protections specific to Native peoples. Interviews with Suzan Shown Harjo show how the remarkable legislative accomplishment of AIRFA and, later, the Native American Graves Protection and Repatriation Act (1990), carry the rhetorical force of religious freedom into the legal shape of federal Indian law, with its recognition of treaty-based collective rights and the United States' nation-to-nation relationship with Native peoples.

Chapter 6 follows this inquiry in the context of repatriation law and a cluster of legal cases involving possession of ceremonial eagle feathers, where courts have consistently affirmed the collective contours of Native religions. Courts have upheld an exemption to the criminal penalties for feather possession tailored to members of federally recognized tribes against legal challenges by individual practitioners of Native religions who are not members of those tribes. These cases illustrate well the difficulties and the possibilities of *religion* as a category encompassing collective Native traditions.

Chapters 7 and 8 together explore the argument for "Religion as Peoplehood," for folding claims to what is arguably religious into broader claims of tribal sovereignty under federal Indian law and Indigenous rights under international law. Chapter 7 explores landmark court cases where treaty rights are asserted for the protection of traditional places and practices. The cases involve salmon fishing and whale hunting in the Pacific Northwest, and off-reservation fishing and gathering rights in Wisconsin and Minnesota.

Chapter 8 extends this discussion of "Religion as Peoplehood" beyond the very real limits of federal Indian law, exploring the possibilities and drawbacks of increasing appeals to Indigenous rights under international human

rights law. As rich as the possibilities are of the United Nations Declaration on the Rights of Indigenous Peoples and its implementation apparatus for protecting Native religions under Indigenous rights and thus without having to define them as such, the approach is slow to grow domestic legal teeth in the United States. Its incremental development as authoritative law can, I think, be strengthened by making clearer associations with US religious freedom law.

My aim in these chapters is not to pick the proper register in which to articulate claims. The question is what is lost and what is gained by thus articulating claims in each register, in different legal and political environments? Unlike academic scholars of religious studies, jurists are pragmatically driven, even obligated, to layer arguments in different registers: religious freedom, cultural resource law, federal Indian law, treaty rights, and international law.

The book concludes with a nod in the direction of successful negotiated settlements and other agreements that grab fewer headlines and leave fewer public traces because they can avoid the courts altogether and proceed in the context of the nation-to-nation relationship. For an example, I will turn to the newly created and recently embattled Bears Ears National Monument, a collaboratively managed preserve of sacred lands, cultural landscapes, and traditional knowledge in southern Utah. Since the quiet goal for most Native people is to protect what is sacred to them without calling attention to themselves, the best outcomes for Native American religious freedom are so far beyond the First Amendment and its legal counterparts they can remain entirely off line, and so it shall be fitting to end there.

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