

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Equality/Native Americans

Native American Church of America v. Navajo Tribal Council (1959)

The Native American Church of America brought suit against the Navajo Tribal Council in a federal district court after the tribal council passed an ordinance prohibiting selling, using or possessing peyote in Navajo country. Peyote, a plant with hallucinogenic properties, had long been used in the religious ceremonies of Southwestern tribes. The church claimed that by banning peyote, the tribal council had violated their First Amendment right to practice their religion. The District Court dismissed the plaintiffs' case on the grounds that the First Amendment was not applicable to Indian tribal governments. The plaintiffs appealed to United States Court of Appeals for the Tenth Circuit.

The Court of Appeals affirmed the lower court's decision. Judge Huxman's unanimous opinion held that tribal governments were not bound by the First Amendment or any other provision in the Bill of Rights. Why does Huxman make that claim? Is that claim correct? Did any good reason exist in 1959 to allow tribal councils to have different rules than state governments?

HUXMAN, Circuit Judge.



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Much has been written with respect to the status of Indian tribes under our Government, and with respect to the jurisdiction of Federal or State courts over controversies between non-members and a tribe, or between members of a tribe, or controversies between Indian members of a tribe and the tribe as an entity. The early case of *Worcester v. Georgia* (1832) is the leading case on the subject. The opinion of Chief Justice Marshall developed the subject at great length. The gist of the opinion is that Indian nations and tribes are distinct political entities, having territorial boundaries within which their authority is exclusive; that within their borders they have their own Government, laws and courts, and are not subject to the laws of the State in which they are located or to the laws of the United States, except where Federal laws are made applicable to them by Congressional enactment, and that Federal courts are without jurisdiction unless jurisdiction is expressly conferred by Congressional enactment

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No case is cited and none has been found where the impact of the First Amendment, with respect to religious freedom and freedom of worship by members of the Indian tribes, has been before the court. In *Talton v. Mayes* (1896), the court held that the Fifth Amendment did not apply to local legislation by the Cherokee nation. In *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation* (8th Cir. 1958), the court held that neither the Fifth nor the Fourteenth Amendments had any application to action, legislative in character, of Indian tribes imposing a tax on the use of Indian trust land.

The First Amendment applies only to Congress. It limits the powers of Congress to interfere with religious freedom or religious worship. It is made applicable to the States only by the Fourteenth Amendment. Thus construed, the First Amendment places limitations upon the action of Congress and of the States. But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States. Under the philosophy of the decisions, it, as any other

law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress. No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship.



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