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Smith, Snake, and the Struggle for Indigenous Religious Rights: Protecting Peyotism in *Employment Div. v. Smith*

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[1] Woodrow Crumbo, Peyote Ceremony, *mid-20th century*, painting, 29'' x 47 ¼'' (73.7 x 120 cm), Tulsa: Gilcrease Museum, https://collections.gilcrease.org/object/0227504.

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Acknowledgements:

I'd like to start by acknowledging the inconceivable hardships of the Native American community and my shortcomings in relaying them. I did not intend to write my thesis on indigenous rights; I came across Peyote while researching the Controlled Substance Act, my initial topic of study. However, this project became much bigger than an analysis of drug policy, and though I was grateful, I was unprepared. The pain and resilience of these people is often understated and oversimplified, especially by non-Natives, so as an outsider I tried my best to retell this story of injustice with accuracy and deference. I do, however, recognize potential deficiencies as a result of my limited experience, time, and resources. I'm humbled by the task of recounting this decisive moment in indigenous rights and hope I have done it justice.

My first thank you goes to Professor Elisheva Carlebach. Beyond her role as my thesis advisor, which she did exceptionally, she served as a mentor, role model, and counselor to all of us. Words can't describe my admiration for her, academically and personally. Thank you for the endless patience, support, and wisdom through this formative process.

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Introduction: The History of Peyotism

> *In a place apart, closer to nature than to the human scene, a tepee throws its outline against the night sky, a sacred silhouette. Inside, thirty or so Indians, men and women, sit on blankets and mats around a fire. Several children are sleeping in their parents' laps or on the ground by their sides. A seven-stone water drum pounds loudly and rapidly — the fetal heartbeat raised to cosmic proportions. Songs are sung with piercing intensity, interspersed with prayers and confessions. Tears flow, and a sacrament is ingested.*[2]

The Peyote ceremony is the oldest continuously practiced religious tradition in the Western Hemisphere, and a central part of the Native American religion now known as Peyotism.[3] Despite the ritual's significance to indigenous life, it has faced various legal threats throughout the nineteenth and twentieth centuries.[4] This thesis argues that the ceremony only managed to survive by assimilating into Western frameworks of law and religion; Peyotists institutionalized the practice and adopted Christian vocabulary to gain First Amendment protection. Ultimately, the Supreme Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith* proved that even adaptations to Western frameworks would not ensure the

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[2] Huston Smith et al., introduction to *One Nation Under God: The Triumph of the Native American Church,* ed. Huston Smith and Reuben Snake (Santa Fe: Clear Light Publishers, 1996), 9.

[3] Walter R. Echo-Hawks, *In the Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided* (Golden: Fulcrum Publishing, 2010), 277. Regarding my classification of Peyotism as a "Native American religion," in her book, *The Appropriation of Native American Spirituality* (New York: Continuum International Publishing Group, 2008), pages 9 and 10, Suzanne Owen discusses how some Native American activists and scholars have moved away from using "religion," which is associated with Westernization, and towards "spirituality," which embodies the pervasiveness of indigenous belief systems in their culture. According to Eduardo Viveiros de Castro, the Western assumption is that "religion" stands separate to "culture" — separate to the real world — in a "coherent bundle." However, as Owen discusses in page 11, many also reject the use of "spirituality" due to the modern connotation of the word. Furthermore, Native Americans have been denied religious rights because of this classification. Since the activists in my thesis regard their practices as religious, I have decided to use their terminology, with the understanding of the cultural distinctions between indigenous belief systems and Western conception of religion. I have also chosen to capitalize Peyote and Peyotism, and later Peyotists and Medicine, out of respect to the sacred role of the plant in the NAC and the religious legitimacy of the practice.

[4] In *The Appropriation of Native American Spirituality*, on pages 5 and 6, Suzanna Owen also criticizes academics who use "ritual" and "ceremony" interchangeably, deeming "ritual" an etic version of "ceremony." However, many Native American historians and activists, including Reuben Snake, have used the term "ritual" in reference to the Peyote ceremony. Since she speaks to the use of "ritual" in relation to Lakota traditions, which are not Christianized as Peyote ceremonies are, I have chosen to adhere to the vocabulary of the most relevant scholars of my topic.

ceremony's legality. *Employment Div. v. Smith* therefore marked a strategic change in the struggle for this Native American religious right. While the movement's claims had previously relied on its Western religious and legal frameworks, they now stood on the precept that indigenous people deserved rights irrespective of Western ideals.

At the start of the ritual, each adult usually takes four Peyote "buttons" from a ceremonial pouch.[5] They chew them and can take more later if desired. The effects of this psychoactive cactus vary widely, but usually include nausea and vomiting, change in body temperature, hallucinations, panic or elation, and a "loss of sense of reality."[6] These symptoms contribute to the participants' profound religious experience as they purge their impurities — "[get] the bad stuff out" — and experience "sitting right by God the Creator."[7] Users have reported a variety of additional side effects that vary by person and ceremony. Under the influence of the sacrament, members pray, sing, and make ritual use of drums, fans, eagle bones, whistles, rattles and prayer tobacco — their religious emblems. The ceremony begins at sundown and lasts until sunrise, closing with a brief outdoor prayer followed by a shared breakfast. By morning, the effects of the Peyote disappear.[8]

For indigenous people, the Peyote ceremony has played a central role in religious practices for centuries. According to Omer C. Stewart, "For perhaps ten thousand years before the discovery of America, the aborigines living in the area of Peyote growth, along the lower Rio

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[5] Omer C. Stewart, *Peyote Religion: A History* (Norman: University of Oklahoma Press, 1987), 3-4; See Appendix A. The hallucinogens in Peyote are found in the cactus' small protrusions, called "buttons." These buttons contain mescaline — a type of amphetamine.
[6] "Peyote," *Center for Substance Abuse Research,* October 29, 2013, http://www.cesar.umd.edu/cesar/drugs/Peyote.asp.
[7] Patricia Mousetrail Russell, *One Nation Under God*, 39.
[8] Justice Mathew Tobriner, "Opinion," *People v. Woody*, 61 Cal.2d 716, (S.C. Cal. 1964), *Stanford Law School,* https://scocal.stanford.edu/opinion/people-v-woody-24460.

Grande and south into Mexico as far as Queretaro, were undoubtedly familiar with Peyote and its psychedelic properties."[9] The plant's use eventually spread north and established itself in the United States during the latter half of the 19th century.[10] Today, indigenous peoples of many tribes practice Peyotism, using the plant to treat illness and communicate with spirits. Despite the absence of recorded dogma — and excluding the Native American Church, which only emerged in the twentieth century — tribes have followed surprisingly similar ceremonial protocol and theology.[11] This warrants the umbrella term "Peyotism" and the religious implication it later came to carry.

The most fundamental mismatch between the government's and the indigenous community's understanding of the ceremony is in how they perceive the sacrament — Peyote. Although the ceremony's participants refer to it as their Medicine, the government defines Peyote as a "substance with no accepted medicinal use."[12] Peyote is neither habit forming nor harmful in ceremonial settings, and has been extremely effective in ameliorating alcohol dependency among Native Americans.[13] Nonetheless, in 1965 the government classified Peyote

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[9] Stewart, *Peyote Religion*, 17.
[10] ibid.
[11] Tobriner, "Opinion," *People v. Woody* (1964).
[12] Reuben Snake, *One Nation Under God*, 18; "Drug Scheduling," *United States Drug Enforcement Administration,* https://www.dea.gov/drug-scheduling. Peyote is a Schedule 1 substance, meaning the government has assigned it the highest abuse potential rating. The category is defined as "drugs with no currently accepted medical use and a high potential for abuse."
[13] John H. Halpern et al, "Psychological and Cognitive Effects of Long-Term Peyote Use Among Native Americans," *Biological Psychiatry* 58, no. 8 (2005): 624 - 631, https://www.biologicalpsychiatryjournal.com/article/S0006-3223(05)00855-3/fulltext; Fred Beauvais,"American Indians and Alcohol," *National Institute on Alcohol Abuse and Alcoholism Journal*, 22, no. 4 (1998), 257, https://pubs.niaaa.nih.gov/publications/arh22-4/253.pdf. Halpern's study "found no evidence of psychological or cognitive deficits among Native Americans using peyote regularly in a religious setting" in neuropsychological tests conducted on Navajo NAC members and Beauvais's study of alcoholism among Native Americans affirmed the use of peyote to treat alcoholism on reserves. I also came across a plethora of first hand accounts supporting this.

as a Schedule 1 substance — a drug with "a high potential for abuse" — complicating the legality of its ceremonial usage.[14]

This disregard for Native American religious expression, however, is not limited to the twentieth century. On Christopher Columbus's first day in the Americas, he wrote in his diary that Indians "would easily be made good Christians, because it seemed to [him] that they had no religion."[15] The people that "discovered" the Americas discounted the native belief system because it did not fit into their Western framework of institutionalized religion. In turn, they replaced it with Christianity. Indigenous people needed to justify their Peyote use through the Bible, and claimed that Isaiah 29:4 referenced Peyote: "Then deep from the earth you shall speak, from low in the dust your words shall come; your voice shall come from the ground like the voice of a ghost, and your speech shall whisper out of the dust."[16] By assimilating their practices and beliefs into Western frameworks of religion, Native Americans preserved the most central components of their way of life.

Even with the creation of a new democratic government, threats to the expression of Native American culture continued after colonization. It did so in the form of legal and legislative challenges to the religious legitimacy of indigenous rituals. At the end of the nineteenth century, the U.S. government instigated a "holy war" against Native Americans, outlawing traditional indigenous ceremonies such as Ghost Dance and Sun Dance.[17] During this time, Congress also held extensive hearings on the "dangers" of the Native American's most

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[14] "Drug Scheduling," *US DEA*; Stewart, *Peyote Religion*, 3.
[15] Kirkpatrick Sale, *Conquest of Paradise* (New York: Alfred A. Knopf, 1990), 96-97.
[16] Reuben Snake, *One Nation Under God*, 23.
[17] Steve Pavlik, "The U.S. Supreme Court Decision on Peyote in Employment Division v. Smith: A Case Study in the Suppression of Native American Religious Freedom," *Wicazo Sa Review* 8, no. 2 (1992): 36, https://www.jstor.org/stable/i261452.

sacred sacrament, Peyote, putting at risk its previously unregulated status. States such as Oklahoma attempted to criminalize the substance in the late 1880s, resulting in various state-level legal controversies.[18] By 1918, these debates reached the Congress floor with the House's approval of the Gandy Bill (H.R. 10669), which would prohibit Peyote use at the federal level.[19] When the Native community later contested these discriminatory laws, their religious claims baffled federal judges who had difficulty determining if the Natives' beliefs were legitimate enough to qualify as a "real" religion. To borrow Limerick's words:

> To nineteenth century white Americans, the First Amendment protected the exercise of *religion,* while what the Indians practiced was superstition, primitive rites, and peculiar customs — practices that, to the nineteenth century Anglo American mind, did not deserve the First Amendment's guarantees of liberty.[20]

Throughout the twentieth century, courts branded many genuine indigenous religious practices as "cultural preferences" or desires "to express pride in heritage," allowing the government to legally restrict religious expression.[21]

In response to the Gandy Bill, the Omaha people of Nebraska sent a petition with fifty-four signatures and seven lengthy personal statements to the commissioner of Indian affairs — an attempt to convince the government of Peyote's religious significance. To legitimize these religious claims, each of the statements referenced Christianity, incorporating God and the Bible. In one, the Omaha tribe leader Simon Hollowell wrote, "When we eat Peyote we think about it in the Bible. There is a God, Christ, Holy Ghost we pray to."[22] The statements also spoke to the plant's success in mitigating the alcoholism epidemic that plagued many Native reserves,

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[18] Stewart, *Peyote Religion*, 213.
[19] Ibid., 218.
[20] Patricia Nelson Limerick, "The Repression of Indian Religious Freedom," *NARF Legal review* 18, no. 2 (1993): 10, https://files.eric.ed.gov/fulltext/ED362356.pdf.
[21] Echo-Hawks, *In the Courts of the Conqueror*, 281.
[22] Stewart, *Peyote Religion*, 217.

demonstrating the substance's positive impact, particularly in relation to alcohol, a drug which Jewish and Christian communities received religious exemptions for during prohibition.[23] Situating their claims within a Christian framework proved successful as the prohibition bill failed to make it past the Senate.[24]

Although Congress's attempt to ban Peyote ultimately failed, the scare prompted the formation of a Christian, pan-tribal coalition of Peyotists who called themselves the Native American Church (NAC). Since its formation, the NAC has been the principal entity engaged with political negotiations and, thus, granted religious exemptions for Peyote use. The organization established its first church in Oklahoma and quickly spread to other states, rebranding into several different religious organizations across North America by championing intertribal solidarity. They managed to do so, in the words of their Articles of Incorporation, by "foster[ing] and promot[ing] the religious belief… in the Christian religion with the practice of the Peyote Sacrament as commonly understood and used among the adherents of this religion."[25] The Articles highlight the Christian nature of the coalition, adhering to the Western structure that historically allowed their traditional practices to survive.

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[23] 66th Congress of the United States of America, *Volstead Act,* (Washington, D.C.: 1919), https://www.docsteach.org/documents/document/volstead-act. See footnote 13 for more information on the impact of peyote on alcoholism among Native Americans.

[24] Given the centrality of peyote to the NAC and its Christian framework, claims for First Amendment protection should be arguably just as strong, if not stronger, than those for other religious rituals. Despite the attempt to present peyote as a Christian sacrament, there is a convincing case to be made that peyote is even more essential to peyotism than the sacramental wine and bread is to many Christian services. To use peyote for nonreligious purposes, unlike wine and Christianity, is sacrilegious. Furthermore, peyote itself is the very object of worship; it is invoked in prayer as a Christian may pray to Christ, but not wine. The plant is more similar to Christ himself than to a religious sacrament; members of the church even regard peyote as a "teacher." This is evident in the belief system's name—Peyotism—which comes from its sacred source of knowledge and divinity, as the name Christianity comes from Christ.

[25] Carolyn Long, *Religious Freedom and Indian Rights* (Lawrence: University Press of Kansas, 2000), 14.

After Peyotism's religious institutionalization, the courts accepted Peyote's use in adherence to the First Amendment. The *Arizona v. Attakai* decision in 1960 marked the first codification of this religious right, in which the Arizona Supreme Court, refusing to hear the government's appeal, unanimously decided that the state's narcotics statute could not constitutionally be applied to NAC members.[26] Only four years later, the Supreme Court of California reversed a lower court conviction for Peyote possession, finding that the First Amendment to the U.S. Constitution protected the religious use of Peyote.[27] This case, *People v. Woody,* along with *Arizona v. Attakai,* marked the first major court cases to uphold the right for the NAC's use of Peyote in accordance with their religious traditions, basing these protections on the First Amendment.

Despite the comprehensive drug reform of the late 1960s and early 1970s, the Peyote exemption achieved by the NAC remained intact, but Peyote use, now a Schedule 1 substance, became implicated in matters of drug enforcement. A year after *People v. Woody*, Congress officially criminalized Peyote for the first time by passing the Drug Abuse Control Amendments of 1965.[28] In addition to referencing the legal precedent set by the previous cases, the hearings for this bill explicitly addressed the prohibition's exception to "its use... in connection with the ceremonies of a bona fide religious organization."[29] When indigenous use came up in the

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[26] Eve Driver, "Schedule I Sacrament," *Harvard Politics*, March 23, 2019, https://harvardpolitics.com/culture/schedule-i-sacrament/.

[27] Justice Tobiner, *People v. Woody* (1964).

[28] Kevin Feeney, "Peyote, Race, and Equal Protection in the United States," *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use,* Springer (September 27, 2013): 65-88. https://link-springer-com.ezproxy.cul.columbia.edu/chapter/10.1007/978-3-642-40957-8_4#Fn5.

[29] Committee on Interstate and Foreign Commerce, House of Representatives, "Hearings Before the Committee on State and Foreign Commerce, House of Representatives, 89th Congress, 1st Session on H.R.2" (Washington D.C.: 1965), 2, https://congressional-proquest-com.ezproxy.cul.columbia.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/$2fapp-bin$2fgis-hearing$2fa$2f6$2f6$2fd$2fhrg-1965-fch-0001_from_1_to_390.pdf/entitlementkeys=1234%7Capp-gis%7Chearing%7Chrg-1965-fch-0001

hearings for the subsequent Narcotic Addict Rehabilitation Act of 1966, the government once again affirmed the unique right of indigenous religious groups to use their sacred plant. Even in the midst of Nixon's War on Drugs, after the passing of the Controlled Substance Act of 1970, the Drug Enforcement Administration (DEA) reaffirmed the exemption, stating in 1971 that "The listing of Peyote as a controlled substance in Schedule I does not apply to the non drug use of Peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using Peyote are exempt from registration."[30] Despite the exemption, the government's classification of the sacramental cactus as an addictive narcotic was scientifically unfounded and later proven false.[31] Nevertheless, the indigenous community conceded yet again to the Western legal framework and accepted their narrow exemption.

With Peyote's widespread prohibition, the grounds for exemption also became a matter of indigenous rights, as courts had to fend off appeals for other "religious" immunities for the plant's use. Shortly after the passing of the Drug Abuse Control Amendments of 1965, a white college student who had been arrested for psychedelic possession attempted to use the First Amendment to defend his drug use.[32] Describing himself as "a Peyotist with Buddhist leanings," he claimed to be a member of Arthur Klep's Neo-American Church.[33] The court doubted the validity of the defendant's claim, however, even if it were sincere, the First Amendment could not protect him. Despite the ruling of *Arizona v. Attakai*, the indigenous exemption was not simply a matter of First Amendment rights, but a result of indigenous peoples' unique legal

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[30] Feeney, "Peyote, Race, and Equal Protection in the United States."
[31] Martin Terry and Keeper Trout, "Regulation of Peyote (Lophophora Williamsii: Cactaceae) In the U.S.A.: A Historical Victory of Religion and Politics Over Science and Medicine," *Journal of the Botanical Research Institute of Texas* 11, no. 1 (2017): 147-56, www.jstor.org/stable/26549456. Also see footnote 13.
[32] *State v. Bullard*, 148 S.E.2d 565 (267 N.C. 599, 1966), *Justicia*, https://law.justia.com/cases/north-carolina/supreme-court/1966/826-0-0.html.
[33] Driver, "Schedule I Sacrament."

status in society as a result of the Trust Responsibility; in the 1830s, the cases *Cherokee Nation v. Georgia* and *Worcester v. Georgia* entrusted the United States government to protect the interests of Indian tribes, not only with issues of fiduciary duty or the promotion of tribal self-governance, but also the preservation of Indian cultures and religions.[34]

In 1990, The Supreme Court chose to disrupt a long history of judicial and legislative support for the Native Americans' Peyote exemption, deciding in the infamous *Employment Division, Department of Human Resources of Oregon v. Smith* case that despite First Amendment protections, the expression of non-majoritarian religions was a "luxury," not a right. [35] The defendant, who sought to protect his right to use Peyote, focused on the cultural rights of indigenous communities, reminding the Court of its legal obligation to the Trust Responsibility. The petitioner, meanwhile, exploited fears linked to the War on Drugs, claiming that the state had a "compelling interest" in prohibiting all drugs, including Peyote. The Supreme Court stayed within its constitutional jurisdiction; it relied on the First Amendment to determine if the NAC had religious protection for their practice. After decades of legal protection, the Supreme Court ruled against the indigenous right to use Peyote for religious purposes — previous concessions to ensure the substance's legality in ceremony provided the precedent to do so.

My thesis will analyze this case as a turning point in Peyotism's history. It will answer the question: how did *Smith* change the strategic direction of the struggle for indigenous religious rights at large? In my first chapter, I argue that Smith himself served as a force of resistance against the movement's usual submission to Western cultural frameworks. His decision to not settle the case conflicted with the Peyotist movement's incumbent acquiescence. In my second

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[34] Feeney, "Peyote, Race, and Equal Protection in the United States."
[35] Justice Antonin Scalia, "Opinion Announcement - April 17, 1990," *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), *Oyez*, 3:18, https://www.oyez.org/cases/1989/88-1213.

chapter, I argue that the oral arguments and the Court's decision demonstrated the Supreme Court Justices' clear disregard for the indigenous perspective. Their focus on the First Amendment, or the "religious" component of the practice, indicated that the movement's Westernizing had become a weakness. In my last chapter, I find that the indigenous reaction to the decision, led by Snake, demonstrated a pivot in the movement: from working within the protections of mainstream legal and religious frameworks, to affirming its distinctness from these structures.

Chapter 1: *Employment Div. v. Smith* I (1988)

In 1984, a private drug rehabilitation organization fired two of its counselors for ingesting Peyote — a powerful hallucinogen — in a sacramental Native American Church ceremony. Because their actions were a clear violation of the company's drug policy, and because state law disqualifies employees discharged for "misconduct," the State of Oregon denied Alfred Smith and Galen Black's application for unemployment compensation.[36] Although the federal government protects the NAC's right to the sacramental use of Peyote, Oregon's drug law did not. The state supreme court sided with the counselors, declaring that their First Amendment right to exercise religion had been violated. After remanding the case back to the state court in 1988, the Supreme Court agreed to readdress the case *Employment Division, Department of Human Resources of Oregon v. Smith* two years later. Smith's decision to persist with this lengthy legal process, in defiance of the recommendations from Native American authorities, began the indigenous movement's pivot away from a more accommodating strategy, in which it worked within Western frameworks of religious rights, and towards a more defiant approach that sought to legitimize these rights autonomously.

The case originally had two defendants — Al Smith and Galen Black. Smith was an indigenous staff member at ADAPT, a local drug clinic in Oregon, and a part of the clinic's effort to embrace and expand its Native American clientele. Smith's coworker, Black, joined

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[36] United States Congress, Committee on Natural Resources, Subcommittee on Native American Affairs, "American Indian Religious Freedom Act: Oversight Hearing Before the Subcommittee on Native American Affairs of the Committee on Natural Resources, House of Representatives, One Hundred Third Congress, First Session, on Effectiveness of P.L. 95-346--the American Indian Religious Freedom Act of 1978 (AIRFA)," U.S. Government Printing Office (Washington D.C.: 1993), 40, https://books.google.com/books?id=5R8VAAAAIAAJ&pg=RA1-PA40&lpg=RA1-PA40&dq=Alfred+Smith+and+Galen+Black+fired+in+1988+for+Peyote&source=bl&ots=x1wtcTx0KX&sig=ACfU3U34VuS43QKL7V2Vdprgao6YPa_yGQ&hl=en&sa=X&ved=2ahUKEwiel_L4mPblAhXtpVkKHQQwBA8Q6AEwCHoECAkQAQ#v=onepage&q=Alfred%20Smith%20and%20Galen%20Black%20fired%20in%201988%20for%20Peyote&f=false.

ADAPT only two weeks prior to Smith. Black was Caucasian, but became curious about Native American religion through the sweat lodge ceremonies Smith held at the clinic and asked him about Peyote, which Smith described as an "individual church."[37] In other words, Smith did not push Black to take the sacrament, but rather believed it to be a personal decision. On September 10, 1983, Black attended a ceremony and had an enlightening experience.[38] He shared this with the counselor on duty as he thought it would be a useful resource to the clinic due to Peyote's track record with treating alcoholics in the Native community.[39] Around a week later, Black was suspended for his drug use, pending a psychological evaluation, and naturally, the clinic's director, John Gardin, confronted the only Native American counselor, Smith, on the matter. Smith told Gardin that he planned to attend a tipi meeting, upon which Gardin advised him not to take Peyote. After the fact, when asked, Smith informed Gardin that he had taken "the sacred sacrament" and had "prayed for [him] and the rest of [the] sick mothers."[40] Smith got fired on the spot. The dismissal was formalized on March 5, 1984 and his application for unemployment compensation was denied on the 22nd.[41]

Both Black and Smith cared enough to contest the claim that their Peyote use had violated the clinic's policy, but as a Native American, Smith had higher stakes in the matter. Black claimed that the company's employee policy did not apply to this case because the rule referred to "abuse" of "mind-altering" drugs. To him, sacramental use was not abuse and, within

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[37] Thomas Constantine Maroukis, *Peyote and the Yankton Sioux: The Life and Times of Sam Necklace* (Norman: University of Oklahoma Press, 2005), 163-164 The Sweat Lodge ceremony is another indigenous ceremony practiced by the NAC. Rituals and prayers are held in a lodge heated by a sacred fire.
Garrett Epps, "To An Unknown God: The Hidden History of Employment Division v. Smith," *Arizona State Law Journal* 30, no. 4 (1998), 981.
[38] ibid.
[39] See footnote 13.
[40] Epps, "To An Unknown God," 895.
[41] ibid.

the context of the Native American ceremony, Peyote was neither a drug nor mind-altering; Al Smith agreed.[42] Smith also felt a moral obligation to defend his community's rights. In his words: "You go to Church and then you get terminated and then it is a continuation of being put down, of my people, and our religion is not recognized by you newcomers and so they just riled me up to the point where I'm ready for a fight."[43] While both had a personal interest in clearing their name, Smith felt the added responsibility of pushing back against the historic prosecution of his people.

To Smith, this case was emblematic of white society's ongoing attack on Native culture.[44] Legal threats to indigenous religious expression first peaked in the late nineteenth century. Historian Patricia Limerick understands these attacks on Native rituals as a reflection of postcolonial socio-political tensions.

> By the 1890s, the wars of conquest were officially over; but the power politics of conquest remained unsettled… the suppression of religious freedom carried down-to-earth meanings of power and dominance. To the agents of the 1890s, religion could rebuild a people's morale; religion could make them defiant; religion could make them hard to rule. In those terms, suppressing religion was as vital a part of conquest as sending troops out to engage in direct military combat.[45]

In other words, Limerick sees the government's religious oppression as a means of reaffirming its colonially-sourced power over indigenous people. These same intentions, Smith believed, drove the movement to criminalize Peyote throughout the twentieth century and the punishment for his own religious use of the cactus.

Smith experienced this cultural oppression first-hand, further motivating him to follow through with these legal proceedings for over five years, despite pushback from indigenous

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[42] Epps, "To An Unknown God," 983.
[43] ibid., 985.
[44] ibid., 958.
[45] Limerick, "The Repression of Indian Religious Freedom," 12.

leadership. At age seven, Smith was sent to Sacred Heart Academy, a Catholic boarding school in Klamath Falls, as part of a federal initiative, which Garrett Epps described as a "policy designed to eradicate the Native identity of a new generation."[46] In recounting his experience there, Smith compared it to incarceration. He tried to run away several times, but was intercepted by the police and beaten by the school's staff. In response, his mother transferred him to a federal boarding school for Native American children in Nevada. Two years after graduating, he joined the military, but five years later was dishonorably discharged due to drinking and misbehavior; he was an alcoholic for the 20 years following high school. He joined AA in 1957 and committed to sobriety from then on. He focused his energies on helping alcoholics in the Native American community, attracting the attention of the American Indian Commission on Alcohol and Alcohol Abuse in 1973. Five years later he moved on to work at a rehabilitation and treatment facility for the Native people of Corvallis, Oregon. Here, his clients introduced him to the NAC and their ceremonies as a method of combating the alcoholism epidemic in their community. In 1979, Smith attended his first ceremony at Makai Reservation in Washington and continued to take the sacrament for the subsequent five years; he was not a lifelong NAC member. In 1982, a local alcohol and drug treatment facility, ADAPT, hired him in order to reach out to Native Americans specifically.[47] According to John Gardin, the clinic's director who interviewed Smith:

> We wished to serve our Native American clients more thoroughly and we wanted to address that problem by hiring a Native American, if possible… we also wished to use the Native American spiritual principles with our client load in general, and having one

[46] Garrett Epps, "Elegy for a Hero of Religious Freedom," The Atlantic, December 9, 2014, https://www.theatlantic.com/politics/archive/2014/12/elegy-for-an-american-hero-al-smith-smith-employment-division-supreme-court/383582/.
[47] Epps, "To An Unknown God," 959-963.

> on staff we could implement those principles. And his — I must say his experiences, recovery experiences as a recovering alcoholic was attractive.[48]

However, Gardin made no attempt to understand what implementing "Native American spiritual principles" would mean, branding Smith as "a spiritual leader within the Native American community."[49] Once again, Smith served as the token Native American and had to pay a price for it. A man systematically stripped of his identity, culture, and religion, Al Smith's predicament at ADAPT was all too familiar.

Those in charge of the clinic, however, saw their punishment as a fair enforcement of abstinence policies. Like the government, they regarded Peyote as simply another narcotic. Gardin, the center's director, believed himself to be an alcoholic so he and John De Smet, the president of the Board, strongly supported and adhered to a zero tolerance policy for all substances, enforced among their employees. However, the primarily white agency knew little about Peyotism and indigenous culture more generally — Smith had been their first Native American recruit. They had never considered a situation in which a counselor might become involved in Peyote ceremonies. ADAPT eventually admitted this; two years after the incident, the clinic signed a consent decree with the U.S. Equal Employment Opportunity Commission stating that it would never again discipline any member of the Church "for the non-drug sacramental use of Peyote during a bona fide ceremony of the Native American Church." ADAPT also made settlement payments to both Smith and Black for the incident.[50] Their dismissal ultimately stemmed from a lack of understanding regarding Peyote's religious importance, an ignorance that would persist throughout the Supreme Court trials.

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[48] Epps, "To An Unknown God," 980.
[49] Epps, "To An Unknown God," 980.
[50] Epps, "To An Unknown God," 980-989.

The Attorney General of Oregon who brought claim against Smith, Dave Frohnmayer, came from the same state as Smith, but a drastically different reality, informing his take on the case. He was born July 9, 1940 in Medford, a city in southern Oregon, where his father was a successful local lawyer. Fromayer graduated magna cum laude from Harvard in 1962 and proceeded to become a Rhodes Scholar, continuing on to obtain a law degree. In 1969, at the inception of the War on Drugs, he moved to Washington to work as a special assistance to President Nixon's secretary of Health, Education, and Welfare, Robert H. Finch.[51] In 1975, he was elected to the Oregon House of Representatives, then Attorney General of the state in 1980. He had an extremely impressive track record, winning six of the seven cases he argued in front of the Supreme Court.[52]

In accordance with the government's and clinic's understanding of Peyote, Frohnmayer adamantly believed the case was a matter of drug enforcement, not religious liberty and definitely not Native American rights. According to Frohnmayer's recollection of the case, he claims, "It really was a concern about the spill-over effects into other controlled substances [and] other religions."[53] Although he lost the case in the Oregon state court, his concern was proven valid when, the following summer, the *State of Oregon v. Alan Charles Venet* case appeared on his desk. In it, a religious sect in Oregon wanted an exemption for ceremonial marijuana. Frohnmayer asked for certiorari on both *Venet* and *Smith* in December of 1986.[54] The conjunction of these two cases most likely shaped his perspective of *Smith* and the decision to appeal Black and Smith's state-level victories to the Supreme Court.

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[51] Garrett Epps, "The Man Who Wrestled Death to a Draw," *The Atlantic*, March 15, 2015, https://www.theatlantic.com/politics/archive/2015/03/the-man-who-wrestled-death-to-a-drw/387760/
[52] Epps, "To An Unknown God," 965-966.
[53] ibid., 995.
[54] ibid., 996.

Perceptions of Peyote and its religious significance shape the lens through which each party approached the case, whether as a matter of First Amendment rights, indigenous rights, or drug enforcement. However, the precedent the government set by making Peyote a Schedule 1 substance allowed for the case to become a matter of narcotic regulation, distancing the substance from its religious and cultural significance. Smith rejected this classification entirely and, consequently, the drug enforcement narrative Frohnmayer wove around it. However, those involved in the case were more conforming; the discussion moved away from the indigenous perspective by engaging with Western assumptions around Peyote and the need to justify its legality via religious protections.

When Frohnmayer successfully appealed the state's decision to the Supreme Court, he combined Smith's case with Black's, who was Caucasian, effectively shifting the focus away from indigenous rights. To Smith, "It seemed like it changed then from the unemployment, money thing, to drug thing. The whole thing changed… when Frohnmayer got involved and when they started bringing Galen and putting us together or setting this case up as a drug case."[55] Smith saw this as a theft, since it undermined the legitimacy of his claim that this incident was emblematic of the insensitivity of white society towards indigenous culture.

In his appeal to the Supreme Court, Frohnmayer continued to insist that the case was a matter of maintaining order; the government's Schedule 1 classification allowed him to treat the substance and its religious use as a destabilizing legal force. He defended the illegality of Peyote

[55] Epps, "To An Unknown God," 997.

in his state, even for NAC members, under the claim that a special exemption would undermine legal neutrality toward religion as required by the state and federal constitution. Furthermore, activities prohibited under criminal state law were not constitutionally protected and, therefore, the religious protection did not apply.[56] He argued that the government should not "compromise its health and safety interest with such exemption from dangerous drugs," basing this claim on Peyote's Schedule 1 status.[57] He warned that the exemption would have "ominous effects for state drug enforcement policy."[58]

Even Susanne Lovendahl, Black and Smith's lawyer, did not fully understand the case as one of indigenous rights, focusing instead on its historic First Amendment protections gained through Peyotism's Christianization. She did not accept the legal aid offered by indigenous rights organizations such as the Native American Rights Fund (NARF) despite being aware of their stake in the case's outcome.[59] NARF even arranged moot courts to help Lovendahl prepare, but she never showed up.[60] In her oral argument to the Supreme Court, she affirmed the cactus' role as an "extremely important culturally-specific treatment plan" to help Native American people "overcome the problems of drug addiction and alcohol abuse." However, she only did so in the last few minutes.[61] Her disregard for the indigenous voice ultimately reinforced Frohnmayer's argument that the case was not one of Native American rights.

A week before the Supreme Court handed down its decision for *Smith*, the Native American community received news of a devastating legal loss, serving as a reminder that their

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[56] Long, *Religious Freedom and Indian Rights,* 103.
[57] ibid., 123.
[58] Epps, "To An Unknown God," 995.
[59] Long, *Religious Freedom and Indian Rights,* 112.
[60] ibid., 124.
[61] ibid., 137.

rights were not the Court's priority. On April 21, 1988, the Supreme Court ruled against the protection of sacred indigenous land in *Lyng v. Northwest Indian Cemetery Protective Association*. On April 27, to the relief of the disheartened Native community, the Court remanded the first *Smith* case back to the State Court.[62] Addressing the legality of sacramental Peyote use again became the responsibility of non-federal legislators. The Court noted that unlike the cases that established the decision's precedent, such as *Sherbert v. Verner, Thomas v. Review Board, Indiana Employment,* and *Hobbie v. Unemployment Appeals Comm'n of Florida, Smith* was not criminal and the decisions of these previous cases, "might well have been different if the employees had been discharged for engaging in criminal conduct."[63] Therefore, the crucial issue became the status of Peyotism under Oregon law. Since the Court had asked to address the legality of an indigenous religious practice, the case went from a civil case to a criminal one. In response, Craig Dorsey, executive director of the Native American Program at Oregon Legal Services (NAPOLS), joined Smith and Black's legal team to help Lovendahl with the remand. According to Dorsay, the remand turned the case into "a direct assault on the NAC" and a matter of Native American rights explicitly.[64]

However, even when confronted with the Supreme Court's remand, Lovendahl continued to reject Native American input, rearguing the case in the Oregon Supreme Court without informing the OLS attorneys. Dorsay heard about her trial for the first time on the radio, recounting:

> She just didn't want us there and she couldn't stand to have anyone look at her work product. It's not exactly the way you want to work as co-counsel. So we had limited involvement in the work on remand from the Oregon Court. Which is unfortunate,

[62] Long, *Religious Freedom and Indian Rights,* 148.
[63] Epps, "To An Unknown God," 1001.
[64] Long, *Religious Freedom and Indian Rights,* 150.

> because we would have argued the case differently and hopefully avoided having the case go back to the U.S. Supreme Court.[65]

She once again argued that the question of Peyote's legality was irrelevant as this was not a criminal case. Instead, the basis for her client's claim rested on the indigenous people's right to practice their religion as protected by the First Amendment, decisions from other State Courts, and the legislative precedent set by the U.S. government.

Luckily, the Oregon State Court did see the case as one of indigenous cultural rights. The Oregon court admitted that "the Oregon statute against possession of controlled substances, which includes Peyote, makes no exception for the sacramental use of Peyote." However, the Court agreed with Lovendahl's argument that the legality of Peyote was irrelevant to the case and refused to address if Peyote possession was a felony by state law, if the state had an interest in preventing drug use, or if Oregon criminal law had a religious Peyote exemption, since the two counselors had not been arrested. It concluded that "the outright prohibition of good faith religious use of Peyote by adult members of the NAC would violate the First Amendment directly and as interpreted by Congress," pointing to the twenty-three states that protect Native Americans' religious use of Peyote.[66] The court also referred to the 1978 American Indian Religious Freedom Act, which states that the U.S. must "protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religion… including, but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[67] Once again, the state court ruled

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[65] ibid., 151.
[66] Long, *Religious Freedom and Indian Rights,* 150-152.
[67] 95th Congress, American Indian Religious Freedom Act, Public Law 95-341—Aug 11, 1978, [S.J.Res. 102] (Washington D.C.: 1978), https://congressional-proquest-com.ezproxy.cul.columbia.edu/congressional/result/congressional/congdocumentview?accountid=10226&groupid=106481&parmId=170EE483340&rsId=170EE478049#Content%20Notation

in Smith's favor: "We hold on remand that the First Amendment prevents enforcement of prohibitions against possession or use of Peyote for religious purposes in the Native American Church."[68] However, it refused to answer the crucial question regarding the criminality of Peyote. According to Historian Garrett Epps, the state opinion could be read as responding to the Supreme Court that "It is *your* doctrine… and if you want to scrap it then *you* do it."[69] Frohnmayer decided to appeal the case to the Supreme Court for a second hearing.

Frohnmayer received backlash for his decision to reappeal the case, but he believed that seeking review of the decision for a second time was necessary; he remained concerned with the ramifications of the state court's decision for drug law enforcement:

> What the Oregon Supreme Court did, is by having gone again to the merits, they put a case on the books that: a) established a church, b) that set a terrible precedent in view of the marijuana case that was coming up, or other drug/religion cases coming up, and answered an unnecessary question in an advisory way. And if we couldn't take that case off the books, we were in a major world of hurt.[70]

His petition argued that the issue was now whether "the federal constitution protects religious use of dangerous drugs.[71] Although Frohnmayer expected that appealing to the Supreme Court for a second time would be seen as hostile to the indigenous community, he saw the case as one that could undermine the entire legal structure upholding substance prohibition.[72]

Since the case was no longer related to employment compensation, Susanne Lovendahl passed the case on to Craig Dorsay, who specialized in Native American law, although not a Native American himself. This change allowed Smith to adopt a more indigenous-centric

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[68] Long, *Religious Freedom and Indian Rights,* 152.
[69] Epps, "To An Unknown God," 1002
[70] ibid., 1003.
[71] ibid.
[72] Long, *Religious Freedom and Indian Rights,* 153.

narrative for his case.[73] Dorsay firmly disputed Frohnmayer's Supreme Court appeal, deeming it unnecessary due to the consistency in the state court's decisions and the case's limited importance since no legal action could be taken. Despite Dorsay's efforts, the Supreme Court accepted Frohnmayer's motion to appeal, reigniting anxiety and fear within the indigenous community.[74]

Although Fronhmayer denied that the case was one of Native American rights, it undoubtedly would have decisive consequences for the indigenous community. During the NAC's annual convention in Wyoming, held the summer following the *Smith* remand and *Lyng* loss, the Church asked NARF to defend their interests in this case.[75] As Moore explains,

> In the church's opinion, this was much more than a case about a single litigant's appeal for unemployment compensation from the state of Oregon… I think the most frustrating aspect for the national church was that they were not a party, and the very essence of their belief system was on trial here.[76]

The Native American Church had a complex relationship with the case; no one in the national leadership of NAC claimed to know Smith since the Oregon chapter had not been officially sanctioned. Smith was also a relatively new member of the Church. With the high stakes and little hope, the strategy was to avoid trial. In the words of NARF's staff attorney, Steve Moore:

> We had been seeing some troubling signs in decisions from the Supreme Court, and things really began to turn in the mid-80s for Native Americans in the Court… The tea leaves were pretty clear, especially after *Lyng*. I think we took the attitude in advising our

[73] Epps, "To An Unknown God," 1002.
[74] Long, *Religious Freedom and Indian Rights,* 156.
[75] ibid., 162.
[76] ibid., 163.

> clients that we've got to make an effort to get this case out of the hands of the Supreme Court. There's a train wreck coming here.[77]

The Church and NARF fought aggressively to settle with Frohnmayer, instead of taking a chance with a Supreme Court that had recently ruled against indigenous protections.

With the critical investment of many different groups, the settlement discussions were impassioned. Frohnmayer recalled that Walter Echo-hawk, the NARF staff attorney alongside Moore, gave him a book on Peyotism and told him "you should really read this book and drop the case."[78] According to Moore's recollection of these discussions, "We went to Dave [Frohnmayer] and said, we want an unconditional agreement from you and your office to withdraw this appeal. It's immoral. There is no reason to take the Native American Church down in this context."[79] The NAC even extended Frohnmayer an invitation to attend a Peyote ceremony, which he declined in adherence to his "say no to drugs" philosophy.

The case also garnered the attention of a vast array of important religious, ethnic, and political interest groups, who were concerned with the sensitive religious liberty questions at hand. In 1988, when the case was first picked up by the Supreme Court, the ACLU became formally involved, submitting an *amicus curiae* ("friend of the court") brief in defense of the counselors' religious rights, with "high hopes that the Oregon Supreme Court might use the facts of this case to flesh out the religious freedom provisions of the Oregon Bill of Rights."[80] The subsequent settlement talks caught the attention of the Oregon Ecumenical Ministries, an interdenominational religious lobbying group, who offered their support by sending a letter in

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[77] ibid., 162.
[78] Long, *Religious Freedom and Indian Rights,* 167.
[79] ibid.
[80] ibid., 97-8.

early October to Frohnmayer expressing its concern with his decision to pursue the case. The Pacific Northwest religious leaders also wrote him a letter calling his decision "misguided and ill-founded" and urged him to "respect the religious freedom of the Native American Church."[81] Similarly, a coalition of church leaders representing the mainline Protestant and Catholic denominations in the Pacific Northwest issued a "Public Declaration," apologizing for "their long-withstanding participation in the destruction of traditional Native American spiritual practices," admitting that they "have frequently been unconscious and insensitive and have not come to [the NAC's] aid when [they] have been victimized by unjust Federal policies and practices" and pledging to support the NAC in "righting previous wrongs."[82] With mounting pressure from powerful interest groups Frohnmayer caved, agreeing to settle rather than argue the case again in the Supreme Court.

Because of Smith's, and consequently Dorsay's, different perspective on the case, the NARF often chose to hold these meetings without their presence, input, or knowledge. As a result, the settlement process and terms deeply offended Smith's family. In the handwritten notes on the back of the settlement agreement draft, Smith's wife, Jane Farrell-Smith complained that "Al's case was negotiated away to nothing" since he had been purposely excluded from the settlement talks.[83] She credited this disregard for her husband's interests to the NARF attorneys' offensive and degrading opinion of Smith. She revealed that "Steve Moore ha[d] already commented to Craig [Dorsay] — Al was just a flack, not a *real* member, just hangs out w/ white women, *not* traditional."[84] As his Caucasian wife, she found this statement particularly

[81] Long, *Religious Freedom and Indian Rights,* 168-9.
[82] ibid., 164-5.
[83] Epps, "To An Unknown God," 1008-1009.
[84] ibid.

triggering. She also expressed confusion and disappointment in the organization's motives for wanting to settle a potentially landmark case, inquiring, "Is this not the same persecution NARF has pleaded to end? Is this moral support for Smith? How can one deny an individual his freedom, and justice in order to save those freedoms for this larger community?"[85] She claimed that the organization had even threatened Smith to back out by accusing him of "killing the church because he was too pigheaded to back out."[86] She perceived the settlement to be an insult to Smith's character and questioned NARF's commitment to protecting Native American rights. To her, the unethical process and terms of the agreement were reason enough to ignore NARF's advice.

Smith's children also urged their father to fight for their long-standing religious right:

> In the wee hours of the morning it came to me. Your kids are going to grow up and the case is going to come up one of these days and someone will say, "Your dad is Al Smith? Oh, he's the guy that sold out…" I'm not going to lay that on my kids. I'm not going to have my kids feel ashamed. Even if we lose the case, they are going to say, "Yeah, my dad stood up for what he thought was right."[87]

After a sleepless night, Smith phoned Dorsay and told him he wanted to go to court. Smith's concern with the larger, conceptual struggle associated with giving up this fight overrode that with the case's practical barriers and potential consequences. Unwilling to coward to the oppressive Western legal system, Smith chose to face the Court and its prejudice.

The contention surrounding the settlement process emerged from divergent approaches to achieving the same goal — protecting indigenous rights. After being forced to assimilate to white Christian culture, Smith sought to dismantle the postcolonial suppression of his own indigenous identity. On the other hand, NARF and the NAC fought for indigenous rights by

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[85] Epps, "To An Unknown God," 1008-1009.
[86] ibid.
[87] Epps, "Elegy for a Hero of Religious Freedom."

utilizing these Western frameworks to their advantage. These organizations embraced Christianization and the American legal system, seeking haven under First Amendment protections, which attracted the support of the ACLU. This also allowed them to amass powerful religious allies and strengthened their appeal for Frohnmayer to settle. As a result of NAC and NARF's poor communication and inattention to Smith's concerns, Smith went against their wishes, putting the NAC's core practice at the mercy of the Supreme Court. The odds were not in their favor; the fate of Peyotism was to be decided by the very people who had been undermining Native American protections for the past decade.

Chapter 2: *Employment Div. v. Smith II* (1990)

The night before the Supreme Court heard *Smith* for a second time, Native American religious leaders gathered to hold a prayer service across the street from the Courthouse.[88] Only a few months prior, the *Lyng* decision declared that destroying a holy place didn't violate the First Amendment because the government hadn't "burden[ed] anyone's religious worship" as no one had been punished for practicing their religion.[89] To the Native American community, this proved the court's blatant apathy towards preserving indigenous protections, making these same Justices unlikely to respect them when deciding *Smith*.[90] To make matters worse, Frohnmayer "was notable in the 1980s for combating religious minorities like Indian Peyotists, Islamic prisoners, and sects from other lands," and had been successful in doing so.[91] He had an impressive track record with the Supreme Court as well. Unfortunately, these fears proved founded — the case exposed the Justices' indifference to indigenous rights as they focused instead on the practice's First Amendment protections and the implications for drug enforcement. The outcome demonstrated that adaptations to Western religious and legal frameworks would not be enough to protect this ancient tradition.

To no one's surprise, Frohnmayer completely disregarded matters of Native American rights in his oral argument. Instead, he focused on the state's "compelling interest" in prohibiting Peyote use — a test that the Supreme Court established in its *Sherbert v. Verner* (1963) decision regarding the limitations of First Amendment protections. This lawsuit was brought about by a Seventh Day Adventist in South Carolina who was fired, then denied unemployment benefits, for

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[88] Epps, "To An Unknown God," 1011.
[89] *Lyng v. Northwest Indian Cemetery Protective Association,* 485 US 439 (1988), *Oyez,* https://www.oyez.org/cases/1987/86-1013.
[90] Echo-Hawks, *In the Courts of the Conqueror*, 277.
[91] ibid., 312.

refusing to work on Saturdays as prohibited by her religion. The decision established a double layered test to determine if the state had a compelling interest in limiting their citizens' First Amendment rights in any form. The first prong answers whether the government has burdened the individual's free exercise of religion. If the government confronts an individual with a choice that pressures them to forego a religious practice, either by imposing a penalty or withholding a benefit, then the government has indeed burdened the individual's religious freedom. Even so, the government may still constitutionally restrict a person's religious expression if the government can show some compelling state interest that justifies the infringement. The second prong must affirm that there is no alternative option that could both avoid the infringement and carry out the state's proven compelling interest.[92]

Frohnmayer outlined three important "compelling interests" that the state must prioritize above the Peyote exemption. The first interest was to protect the state's citizens and their health, which underlies all substance prohibitions. Second, he argued that the NAC exemption would trigger a series of other drug exemptions that would undermine the legitimacy of the Controlled Substance Act and its enforcement. Finally, he claimed that the state could not give preference to one church over another due to the intended neutrality of law.[93]

To prove the state's compelling interest in prohibiting Peyote, Frohnmayer exploited drug war hysteria and the substance's previous classification as a dangerous narcotic, claiming that "Religious use of hallucinogens and other dangerous drugs simply is not compatible with society's compelling interest in controlling and eliminating drug use and abuse."[94] He

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[92] *Sherbert v. Verner,* 374 U.S. 398 (1963)*, Oyez,* https://www.oyez.org/cases/1962/526.
[93] David Frohnmayer, "Oral Argument - November 06, 1989," *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), *Oyez*, 8:46, https://www.oyez.org/cases/1989/88-1213.
[94] Hamilton, "*Employment Division v. Smith* at the Supreme Court," 1687.

disregarded Peyote's sacred importance and the NAC's spotless track record using the substance safely. As Frohnmayer proudly recalls of his oral argument,

> I went in there with two sorts of slogans in my mind: Slippery Slope, Slippery Slope, and Drugs are Bad, Drugs are Bad. If there are two central themes to the argument it is that differentiating the substances is much harder than you may think. And what you allow to one religion you're going to have to allow on equal terms to others, at least potentially.[95]

Any exemption to drug laws, he reasoned, would undermine their enforcement and, thus, the War on Drugs. The conservative party's obsession with the drug war made this a powerful point against the Peyote exemption.[96]

Since other religious groups had requested drug exemption through First Amendment claims, Frohnmayer had evidence to support his slippery slope argument, overlooking the historical context that distinguished this case from the others. The cases he encountered as Oregon's Attorney General, including a request from the Peyote Church of God to also use Peyote in their ceremonies, and a Church suing for the right to use marijuana religiously, served as proof that these religious exemptions from drug laws were in high demand. He cited these examples as a warning.

> We simply invite this Court's careful review of those cases, which are shamelessly result-driven and involve religious gerrymandering from which no consistent neutral principle emerges. And our point is that if we cannot accommodate on equal ground, then the requirement of accommodation must fail.[97]

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[95] Epps, "To An Unknown God," 1010.
[96] On February 28, 1990, a month before the *Smith* decision, the Supreme Court had rules in favor of the DEA in *United States v. Verdugo-Urquidez* regarding Fourth Amendment protections of nonresidents. Furthermore, a few months before the Smith hearing, on September 5, 1989, President George H. W. Bush made a Presidential Address on National Drug Policy vowing to escalate funding for the War on Drugs, which he deemed the "the greatest domestic threat facing our nation today." The Rehnquist Court was generally more conservative and operated in the context of the government's escalation of War on Drugs.
[97] Frohnmayer, "Oral arguments," 25:40.

These cases also connected to his last crucial point — the importance of maintaining religious neutrality in generally applicable laws. Frohnmayer argued that "individual-by-individual exemptions" undermined the intended "general, non-sectarian 'conscious objector' standard" of the law.[98] This had broader repercussions beyond drug law — it spoke to all First Amendment "privileges."

Although Frohnmayer spoke of the many dangers that could come from Peyote's limited decriminalization, the NAC had no reported health incidents after centuries of Peyote ceremonies. Peyote, despite its Schedule 1 classification, had been proven to be a safe substance. Frohnmayer rebutted this fact by reasoning that:

> Denominational practices, and indeed individual believers, even in long-standing religions, can and do change. They change the nature of their religious beliefs they change the nature of their doctrine and that is the very essence of freedom of religion and belief. So a constitutional exemption that is bound in time and place is very risky. If we exempt a practice, even if we are presently satisfied by its safety, control passes forever into private hands.[99]

In other words, he pushed the Court to decide if it trusted the stability and authenticity of the NAC, ignoring the substance's harmless nature. He could do so because the NAC had accepted their sacrament's classification as Schedule 1 with a limited, and evidently precarious, exemption for their use. Reflecting back on the oral arguments, Frohnmayer boasted that this was "a killer argument" and the Court agreed.[100] He tapped into the anti-drug paranoia of the time, convincing the primarily conservative justices of the potential danger that could arise if they allowed the

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[98] Marci A. Hamilton, "*Employment Division v. Smith* at the Supreme Court: the Justices, the Litigants, and the Doctrinal Discourse," *Cardozo Law Review* 32, no. 5 (2011): 1686-7, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1839963

[99] Frohnmayer, "Oral arguments," 26:05.

[100] Epps, "To An Unknown God," 1010-1011.

NAC to continue using Peyote in their ceremonies. He disregarded the exemption's legislative history, the substance's proven safety, and its religious significance. The Court followed suit.

Before he began reciting his prepared oral argument, Craig Dorsay took a moment to strategically recenter the discussion, focusing on the matters that the *Smith* incident originally centered on — substance safety and indigenous religious rights.

> [I]f you looked at this situation and Indian people were in charge of the United States right now, or in charge of government, and you look at the devastating impact that alcohol has had on Indian people and Indian tribes through the history of the United States, you might find that alcohol was the Schedule I substance and Peyote was not listed at all. And we are getting here to the heart of an ethnocentric view, I think, of what constitutes religion in the US. And I think that needs to be looked at very hard before determining what is a dangerous substance and what is not.[101]

To counter Frohnmayer's biased interpretation of the case, Dorsay used legal precedent to remind the Court of its historic support for this religious right. He referenced the *People v. Woody* decision, in which Justice Tobriner wrote:

> the right to free religious expression embodies a precious heritage of our history... The varying currents of the subcultures that flow into the mainstream of our national life give depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly proactive an old religion in using Peyote one night at a meeting in a desert hogan near Needles, California.[102]

A year after *Sherbert*, that California court found that there was no truly compelling interest to prohibit Peyote. The cactus had been proven safe and there was no evidence of misuse within the NAC. The substance had also been shown to be irrelevant to the country's drug trafficking problem.[103] Dorsay emphasized the sacrament's centrality to indigenous religious expression,

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[101] Craig Dorsay, "Oral arguments," 29:25.
[102] Pavlik, "The U.S. Supreme Court Decision on Peyote in Employment Division v. Smith," 32.
[103] Dorsay, "Oral arguments," 32:24.

which would require an extremely strong state interest to justifiably dismantle, arguing that "The state [had] failed to meet its burden under the first amendment to justify what we believe would be the total destruction of this religion, and that is because of the test that has been established by this court in First Amendment cases."[104] The priority of the Court, Dorsay argued, should be preserving Native American rights and First Amendment liberties, not the drug enforcement of a substance that was clearly not a threat. *People v. Woody* legitimized these claims. The decision highlighted the cultural and religious importance of this practice and prioritized minority rights, particularly those of Native Americans who maintain a special relationship with the Government due to the Trust Responsibility.

Dorsay emphasized the importance of the Trust Responsibility when dealing with indigenous rights, which Frohnmayer strategically overlooked, reminding the court of the government's unique, historic imperative to not only protect Native communities, but also preserve their autonomy and culture. Dorsay argued:

> the second reason for just upholding the Native American Church is that it's a federal exemption that is governed by the United States Trust Responsibility to Indian tribes. That's why the Native American Church has been singled out in the legislative history and in the American Indian Religious Freedom Act… we certainly believe that the singling out of one church in this case is based on the federal government's relationship with Indian tribes.[105]

Although Frohnmayer had warned the court that the exemption would necessarily result in the legalization of other drugs under any religious claim, Dorsay argued that the NAC had a clear distinguishing factor that would allow this exemption to remain unique: "The Native American Church was exempted only because it was listed in the legislative history. The federal government takes the position that that is a unique exemption, and is of no precedential value for

[104] Dorsay, "Oral arguments," 41:41.
[105] ibid., 56:41.

any other exemption."[106] He further distinguished the NAC exemption by reemphasizing the fact that Peyote was different from other drugs in that it did not cause a law enforcement problem, unlike substances such as marijuana.[107] Not only was Peyote's sacramental use by the church irrelevant to the nation's drug problem, but it actually

> supports the state's drug enforcement effort in every respect. The tenet of the church believe any misuse of this drug, any misuse of other drugs or alcohol is sacrilegious. And so there is no disparity between the beliefs of this church, we believe, and the beliefs of... the interests of the state in this case.[108]

However, these points did not sway Scalia's paranoia that various drugs would become legalized through First Amendment claims; he refused to see the legitimacy behind indigenous-specific rights. This stubbornness confined the case to matters of First Amendment protections and disregarded Dorsay's compelling arguments and valid evidence.

At one point during Dorsay's oral argument, Justice Scalia interrupted him to say: "Well, I suppose you could say a law against human sacrifice would, you know, would affect only the Aztecs. But I don't know that you have to make… exceptions. If it is a generally applicable law." Scalia exposed his association of "uncivilized" practices such as human sacrifice with indigenous culture and undermined their legal legitimacy. He demonstrated that sentiments towards indigenous culture were still steeped in the prejudice that Native Americans had experienced at the hands of the continent's colonists.[109] Dorsay vividly recalled this moment with resentment: "It was just sort of disrespectful, I thought, the way Scalia approached it… You could hear Indian people — there were a large number in the courtroom — just sort of exhale, a large sigh,

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[106] Dorsay, "Oral arguments," 49:00.
[107] ibid., 50:45.
[108] Antonin Scalia, ibid.., 58:29.
[109] Epps, "To An Unknown God," 1015

like, 'Oh, God, we got this jerk again.'"[110] Through the oral arguments and his decision, Scalia had shown his ignorance towards indigenous culture and disinterest in protecting their religious practices, setting the tone for the majority opinion.

The Court ruled in Frohnmayer's favor in a 6-3 final vote. Chief Justice Rehnquist voted in favor of reversing the Oregon Supreme Court due to the concern that the Court would "walk into a trap" of having to grant all religious requests for exemption since "all cases concern sincere belief." He did not recognize a "historic exception" because he did not believe there should be special treatment for a long-entrenched religious organization simply because of its longevity.[111] Furthermore, this feature did not make the NAC unique, meaning the exemption would not necessarily be singular. Justice White joined Rehnquist because there were "all sorts of relig[ion]s popping up."[112] Also voting to reverse the decision, Justice Stevens rejected the claim that prohibiting Peyote in Oregon would stomp out the religion since it was legal in 12 other states. Consequently, he believed it to be within the state's jurisdiction to prohibit this practice due to its compelling interest in doing so.[113] Justice Kennedy joined the majority as well. Scalia volunteered to write the majority opinion. Only Justices Brennan, Marshall and Blackmun dissented, while O'Connor decided to write her own, concurring decision.

Scalia's opinion shocked the plaintiff as well as the defendant since he completely scrapped the "compelling government interest" test that both parties relied on. He ignored the

[110] Epps, "To An Unknown God," 1015.
[111] Hamilton, "*Employment Division v. Smith* at the Supreme Court," 1689.
[112] Ibid., 1690.
[113] ibid.

test's past application, claiming that the First Amendment did not apply to all criminal and civil statutes of general applicability. His decision also greatly narrowed the scope of First Amendment applicability, limiting these protections to cases that involve a combination of First Amendment freedoms. In other words, a law could prohibit religious expression as long as it did not infringe on another First Amendment right, such as that of speech, as well. As Echo-hawk recounts,

> the conservative axis brazenly ignored established legal precedent, openly abandoned legal tests that it considered too tough on the government, and carved gaping exceptions that place nearly every kind of statue beyond the protective reach of the First Amendment.[114]

In reaction, Justice O'Connor wrote a concurring opinion that confirmed the effectiveness of Frohnmayer's slippery slope tactic and the Court's fear of addressing the nation's responsibility to protect indigenous culture. Although also tolerant of Peyote's criminal status in Oregon, she disagreed with Scalia's assertion that generally applicable laws did not invoke the protection of the free exercise clause, explaining that:

> Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a 'constitutional anomaly,' the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a 'constitutional nor[m],' not an 'anomaly.'[115]

She acknowledged that the decision would seriously impair the NAC's religious expression, but concluded that the "uniform application of Oregon's criminal prohibition is essential to accomplish its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance," assuming Peyote to be dangerous and a threat to law

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[114] Echo-Hawks, *In the Courts of the Conqueror*, 279.
[115] Justice Sandra Day O'Connor, "Concurrence," *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), *Cornell Law School,* https://www.law.cornell.edu/supremecourt/text/494/872.

enforcement.[116] While the Court did support legislative measures by states to allow Peyote use within the NAC, it provided no legal guarantees, agreeing to leave the survival of this sacred Native ritual at the mercy of the legislature.

Both Justices Scalia and O'Connor refused to acknowledge the importance of indigenous rights and Peyote's centrality in the NAC, even though past legal cases had engaged with these matters explicitly. Instead, they kept the question of Peyote within the realm of a Church's right to exercise their religion, only recognizing the Court's responsibility to the First Amendment, and not the preservation of indigenous cultural rights. Justice Scalia's refusal to address any Peyote-related evidence reflects an indifference, at best, to the unique substance and cultural context at hand. Instead, he and O'Connor chose to push the decision to the legislative branch.

Justice Blackmun's dissent shed light on the various blindspots in Scalia's and O'Connor opinions, namely the indigenous rights component of this case — acknowledging the substance's cultural significance outside the limiting frameworks of drug enforcement and even the NAC's status as a church. Firstly, he strongly disagreed with O'Connor's assessment that there was a compelling state interest in prohibiting Peyote, arguing that the substance's danger had not been proven — it was simply "not a popular drug. Its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country."[117] As proof, Blackmun cited that from 1980 to 1987, the DEA only seized a total of 19.4 lbs of Peyote,

[116] O'Connor, "Concurrence."
[117] Justice Harry Blackmun, *Employment Division,* "Dissent," *Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), *Cornell Law School,* https://www.law.cornell.edu/supremecourt/text/494/872.

but over 15 million lbs of marijuana.[118] He also cited various scholarly works on the NAC and Peyote and examined past cases such as *People v. Woody* and *State v. Whittingham*, concluding that, "Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster."[119] Unlike the other Justices, he did not let the government's inaccurate classification of Peyote cloud his judgment.

Similarly, Blackmun did not overlook the unique legislative position and special rights the government had promised (but not granted to) the indigenous community. He reminded them of the American Indian Religious Freedom Act of 1978, explaining that if it were not enforced, it would merely serve as "an unfulfilled and hollow promise."[120] He warned of the "potentially devastating impact [of prohibiting Peyote], [which] must be viewed in light of the federal policy — reached in reaction to many years of religious persecution and intolerance — of protecting the religious freedom of Native Americans."[121] In his notes from the oral arguments, he noted that Mr. Frohnmayer refused to "concede [the Native American Church] religion w[oul]d b[e] destroyed," as did Justice Stevens.[122] Blackmun completely disagreed with this, instead addressing the centrality of Peyote in the NAC's religious exercise. He concluded "that Oregon's interest in enforcing its drug laws against religious use of Peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion."[123] He pointedly critiqued the opinion of the court for "return[ing] to the rule of law that prevailed under *Reynolds v. U.S.*

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[118] Blackmun, "Dissent."
[119] ibid.
[120] ibid.
[121] ibid.
[122] Hamilton, "*Employment Division v. Smith* at the Supreme Court," 1689.
[123] Blackmun, "Dissent."

(1878)," explicitly denouncing Justice Scalia for barely acknowledging a century's worth of evolution in the free exercise jurisprudence.[124]

Scholars widely condemned *Smith* as "one of the most unpopular decisions in the Court's recent history."[125] This is often done, however, through a religious liberties lens, despite the significant implications of this case for the indigenous rights movement. Since the Court's decision only engaged with the case on matters of First Amendment protections, it became a major threat to all religious freedom. O'Connor's opinion warned the Court of this widespread impact, but inadvertently enforced it by also choosing to only interpret the case through the scope of the First Amendment, with mention of the potential threat to drug enforcement. In response, religious coalitions came together to revert the decision. Although they tried to convince the Court to rehear the case, their petition was denied.[126] These coalitions then turned to legislative activism in attempts to restore First Amendment protections. However, in doing this, they deserted the Native cause, choosing to focus instead on less controversial matters. The abandonment the NAC faced from its former allies set the tone for a more autonomous indigenous rights movement. Without the coalition's support, the Native American community had to come together to fight for its rights alone, but this time, through Congress.

[124] Blackmun, "Dissent."
[125] Echo-Hawks, *In the Courts of the Conqueror,* 315.
[126] Long, *Religious Freedom and Indian Rights,* 211.

Chapter 3: RFRA and The AIRFA Amendments of 1994

On September 29, 1990, Reuben Snake, the Winnebago tribe leader and national chairman of the American Indian Movement (AIM), attended and spoke at a rally for indigenous rights in D.C. Addressing the recent *Smith* decision, he implored the public to,

> Consider the implications of this case from our perspective. The United States Supreme Court reversed a long line of settled cases in order to rule that the use of the sacrament of Native American worship, the holy medicine, Peyote, is not protected under the First Amendment of the Constitution. They said, in our case, our religious exercise, our form of worship, the use of our holy sacrament, is not protected by the Constitution. The Court said that Native Americans, who have enjoyed religious liberty on this land since before the pilgrims fled here, are no longer entitled to religious liberty.[127]

In this speech, Snake also criticized the Court for its "widespread fear, bordering on panic, about the tragedy of drug abuse" and lack of understanding of the NAC's ideology and history. [128] In light of this ignorance, Snake dedicated himself to educating the international community on Peyotism, speaking to the UN Committee on Human Rights and the World Council of Churches on the subject.[129] Snake did not simply advocate to subvert the *Smith* decision; he aimed to reframe the discussion around Peyote and its uses, shedding the Western redactions that had informed the country's understanding of this sacred substance and its importance. Under Snake's leadership, the Peyotist movement would hereon work to reclaim agency over the perception and, thus, the legality of their ancient ritual.

John Echohawk, executive director of the Native American Rights Fund (NARF), also vocalized his concerns with the decision, but continued to appeal to the movement's non-Native allies. Shortly after *Smith*, he wrote in the organization's newsletter:

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[127] Long, *Religious Freedom and Indian Rights,* 225.
[128] ibid.
[129] ibid., 242.

> Mistreatment of American Indian Religion by federal courts has seriously weakened religious liberty for all Americans. Mainstream religious groups, who were previously unconcerned about the fate of Indian religious practitioners, are now deeply concerned about their own religious liberty. This irony gives meaning to Reverend King's statement, 'Injustice anywhere is a threat to justice everywhere.' Smith and its progeny demonstrate that when law cannot protect the basic freedoms of the weakest, it lacks vitality to protect the rest of society.[130]

The indigenous outrage to the case was warranted and expected. However, as Echohawk noted, *Smith* had shocked other religious groups too; the decision threatened all religious liberties. Criticisms against the decision centered on three points: the Court's interpretation of precedent, the decision's implications beyond the immediate case at hand, and the suggestion that the legislature, and not the courts, should safeguard religious liberty.[131] These failures, religious leaders hoped, would be enough to warrant a rehearing of the case, but the Court denied their petition.[132] In response to this new, narrowed interpretation of the First Amendment, political representatives of majoritarian religions came together to form the Religious Freedom Restoration Act Coalition, hoping to pass legislation that would undermine this dangerous ruling. This turned the case into a matter of religious rights, rather than Native American rights, repeating the movement's historic mistake of attempting to distance itself from indigenous-specific concerns to avoid controversy.

Reuben Snake deviated from NARF's accommodating attitude towards the government; like Smith, he was ready to fight and unwilling to compromise. Snake's past included experiences similar to those of Smith — military service, alcoholism, and 'emigration' from their reserves. Their shared indigenous-centric struggles perhaps informed their uncompromising approach to securing Native American rights. For Reuben A. Snake Jr., these struggles began on

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[130] Long, *Religious Freedom and Indian Rights,* 221.
[131] ibid., 198.
[132] ibid.,, 211.

the Winnebago reservation in Nebraska, where he was born. Financial hardships separated Snake from his family in his early life, resulting in a turbulent childhood.[133] He attended the Native American University Haskell Institute, but was unable to graduate due to his alcoholism. Instead, he decided to join the army. After his honorable discharge, Snake stopped drinking and began to reconnect to his roots; he became more engaged in the NAC and indigenous activism. Throughout the 1970s he was an active member of the American Indian Movement (AIM), which consolidated against the backdrop of the civil rights movement. A"militant" Native American civil rights group, AIM fought for indigenous political autonomy, legal protections, and cultural revitalization.[134] The organization is known for its participation in the occupation of Alcatraz Island, the March on Washington, and the Wounded Knee protest, most of which centered around Native land protection. By 1972, he had risen through the ranks to become the national chairman.[135] None of these demonstrations, however, directly spoke to Peyote's recent Schedule 1 classification — the NAC exemption supposedly secured the legality of ceremonial Peyote use, so it wasn't seen as an issue at the time.[136] Although a Roadman for the NAC, Snake only became politically involved in the Peyotist movement later in his life and brought with him the rebellious spirit of AIM.

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[133] "Reuben Snake Papers, 1971-1996 NMAI.AC.012," *National Museum of the American Indian Archive Center*, https://americanindian.si.edu/sites/1/files/archivecenter/AC012_snake.html#ref6.
[134] "American Indian Movement," *Britannica*, https://www.britannica.com/topic/American-Indian-Movement.
[135] "1972: Reuben A. Snake Jr. leads American Indian Movement," Native Voices, *U.S. National Library of Medicine*, https://www.nlm.nih.gov/nativevoices/timeline/532.html
[136] In her book *The Appropriation of Native American Spirituality*, pages 39 and 40, Suzanne Owen discusses AIM's politicalization and appropriation of Lakota ceremonial practices. The movement adopted the pipe symbol, which supposedly represented "anti-acculturation and anti-Christian" values because AIM believed the Lakota tradition to be purely pre-colonial, ignoring any of its cultural adaptations. Peyotism is not included in the Lakota belief system and is overtly Christian. Therefore, the Peyote movement was probably not attractive cause to AIM at the time as it did not represent the 'pure' cultural indigeneity the movement sought to promote.

Although Snake had not been one of the active participants in the *Smith* proceedings, when he heard of the decision, he sprung into action. He phoned his long time friend and attorney, James Botsford, and told him, "we're going to have to go and overturn it." Botsford, who did not have a legal team or funds, asked him, "So how are we going to overturn the Supreme Court?" To which Snake replied, "We'll find good friends along the way."[137] Snake became the church's official spokesperson after the decision and brought a bold temperament to the movement. He dedicated the rest of his life to the Peyote cause, succeeding not only through strong political alliances, but by diverging from the NAC's usual conciliatory strategy — including its partnerships.

Reuben Snake joined the Coalition as a representative of the direct victims of this decision — the indigenous community — but quickly came to realize that his own religious liberty was not the Coalition's priority. Although he fought for the inclusion of Native American rights in their proposed bill, the leaders rejected his request. David Saperstein, a member of the Coalition for the Free Exercise of Religion and director of the Religious Action Center of Reform Judaism, explains the reasoning behind this:

> From the beginning, the Coalition agreed very quickly on the ruling assumption that the only way to keep a coalition this broad together was to restore the rule in Smith and let the chips fall as they may on the particular issue that was brought to the table. We agreed that there would be no exemptions to the bill.[138]

In other words, the Coalition chose to overlook the religious right to use Peyote for the greater goal of preserving the Coalition and their legislative agenda. Although these groups showed

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[137] Jerry Reynolds, "Reuben Snake papers carry his spirit to National Museum," Indian Country Today, December 29, 2006, https://indiancountrytoday.com/archive/reuben-snake-papers-carry-his-spirit-to-national-museum-1ZE5Kd8ZckWOWuW0Ft894w

[138] Long, *Religious Freedom and Indian Rights,* 213.

support during the *Smith* proceedings, the decision affirmed that indigenous rights were a tough sell to the U.S. government. Their main priority was to reinstate the "compelling state interest" test that Scalia struck down.[139]

In anticipation of issues like this one, the Association on American Indian Affairs, the National Congress of American Indians and NARF had already come together in 1988 to establish the American Indian Religious Freedom Coalition (AIRFC) after the *Lyng* decision in order to "develop and support legislation to restore the protections of the First Amendment to American Indian People." The legislative project to reinstate the Peyote exemption became part of AIRFC's larger effort to protect indigenous religious freedom. Shortly after Snake's rally speech, the AIRFC launched a two track campaign to prove the safety and benefits of Peyote, as well as lobby Congress to protect its use.[140] After realizing that the Religious Freedom Restoration Act Coalition would not prioritize indigenous rights, Snake galvanized the AIRFC to commit to the fight for indigenous religious rights. Hundreds joined this new indigenous-focused coalition.[141]

On March 7, 1992, Reuben Snake testified at the first oversight hearings for the religious freedom rights legislation in Portland, Oregon, which had been set up by his indigenous ally, Senator Daniel K. Inouye. Straying from the NAC's usual tone, Snake proclaimed, "We demand that our use of our sacrament, the holy medicine Peyote, be fully protected by law without qualification. We ask no more, we expect no more, and we are entitled to nothing less!" He acknowledged his departure from the movement's usual tenor, explaining,

> We are reduced to this posture because of laws passed and enforced in an atmosphere of almost total ignorance about Native Americans. Perhaps we should not be surprised... we

[139] James Botsford and Walter B. Echo-Hawk, *One Nation Under God*, 138.
[140] Long, *Religious Freedom and Indian Rights,* 241.
[141] ibid.

> like to go about our business quietly and without drawing attention to ourselves... We have never held a press conference before. We have never drawn attention to ourselves before. We are uncomfortable this morning, but to protect ourselves, we have a duty.[142]

During these pre hearings, Snake also addressed the larger historic tensions and misperceptions that informed the *Smith* decision.

> Europeans politicize Christianity and because they did that, they brought that political movement to this country. And they enforced upon indigenous people their view and so for 500 years we have been contending with this cultural arrogance on the part of European people coming here and trying to make us give up our beliefs and our values, our practices and our ceremonies. And the Smith case is the most recent effort on the part of these people to try to destroy our way of life.[143]

Like Smith, Snake saw this case as a continuation of the colonial suppression of indigenous religion. Rather than use Peyotism's Christianization as a means to legitimize claims for legal protections, Snake identified it as a badge of oppression. Snake denounced the government's cultural arrogance instead of acclimating to it.

The Religious Freedom Restoration Act (RFRA) managed to pass on November 16, 1993, essentially nullifying the *Smith* decision, but with no mention of Peyote.[144] Ironically, abortion rights, not the independent efforts to allow religious Peyote use, received the biggest pushback in the passing of the RFRA.[145] In fact, at the RFRA signing ceremony, President Clinton expressed his explicit support for indigenous rights, proclaiming:

> The agenda for restoration of religious freedom in American will not be complete until traditional Native American religious practices have received the protection they deserve. My administration has been and will continue to work actively with Native Americans and the Congress on legislation to address these concerns[146]

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[142] Senator Daniel Inouye, "SENATE-Tuesday, June 29, 1993," Congressional Record—Senate (June 29, 1993): 14560. https://www.govinfo.gov/content/pkg/GPO-CRECB-1993-pt10/pdf/GPO-CRECB-1993-pt10-5-1.pdf

[143] "Your Humble Serpent: The Wisdom of Reuben Snake," directed by Gary Rhine (Berkeley: Berkeley Media, 1996), https://video-alexanderstreet-com.ezproxy.cul.columbia.edu/watch/your-humble-serpent-the-wisdom-of-reuben-snak.e. 48:23-49:14.

[144] Long, *Religious Freedom and Indian Rights,* 240.

[145] ibid., 228.

[146] ibid., 241.

As his endorsement implies, Clinton did not trust the Court, which had been particularly harsh on the indigenous community, to uphold Native American rights, but hoped that legislation would. At the time Clinton signed the RFRA, Congress was debating other legislation regarding Native American rights. He not only endorsed these measures in his speech, but also took the time to meet with each federally recognized tribe leader. Additionally, he sent a memorandum to the Department of the Interior asking to streamline the legislation's approval process.[147] His support proved valuable as Clinton happily signed the bill into law less than a year later.

Despite this powerful backing, the process to pass legislation enforcing Native American protections proved to be difficult. The first bill, HR 4155, which sought to protect sacred indigenous sites, died in committee. The Native American Cultural Protection and Free Exercise Act of 1994, or S 2269, addressed cultural practices in addition to religious liberty and applied to non-federally recognized tribes as well. The Act had to be revised to remove the Peyote clause and even so died in committee due to Republican resistance. Simultaneously, the House debated another bill, HR 4230, which sought to add a new section to the American Indian Religious Freedom Act of 1978 (AIRFA) that specifically authorized the sacramental use of Peyote.[148] President Clinton's endorsement helped preserve and streamline this bill. Nevertheless, these measures faced major pushback from miner and agricultural lobbyists, who argued that indigenous protections violated the First Amendment Establishment Clause and Fourteenth Amendment.[149]

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[147] ibid., 246.
[148] ibid., 248
[149] ibid., 245.

Despite this resistance, HR 4230 finally passed and became Public Law 103-344, effectively legitimizing Peyotism. Unlike previous federal iterations of the exemption, the bill included all Native Americans, not solely NAC members, defining "Indian" therein:

> (1) … a member of an Indian tribe; (2) the term 'Indian Tribe' means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village…, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; (3) the term 'Indian religions' means any religion — (A) which is practiced by Indians, and (B) the origin and interpretation of which is formed within a traditional Indian culture or community.[150]

The right to practice religion was no longer exclusive to federally recognized tribe members or official NAC members. Instead, restrictions could be placed on the specific circumstances of Peyote's use, if they passed the "compelling state interest" test. The government had finally accepted Peyote outside of its narcotic label and Christian framework, recognizing it within the context of Native American rights more generally.

According to James Botsford and Walter Echo-Hawk, "When President Clinton signed into law the American Indian Religious Freedom Act Amendments of 1994, he brought to a close an epic struggle to protect an American religious practice that predates by millennia the whites' invasion of America."[151] Elmer L. Blackbird, an Omaha Native American, even suggested sending a thank-you letter to the Supreme Court for the *Smith* decision, writing: "You sent shockwaves through our Church. The threat your decision posed — that it might do us in — made us realize how much the Church means to us. It mobilized our energies. We went to work,

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[150] 103rd Congress, "American Indian Religious Freedom Act Amendments of 1994," Public Law 103-344 [H.R. 4230], (Washington, D.C.: 1994). https://congressional-proquest-com.ezproxy.cul.columbia.edu/congressional/docview/t41.d42.103_pl_344?accountid=10226.

[151] *One Nation Under God*, 125.

and in four years won back our rights through Congress."[152] The case was undoubtedly a turning point for the Peyotist movement.

Reuben Snake did not live to see President Clinton sign the American Indian Religious Freedom Act Amendments. On the Congressional Record of June 29, 1993, Senator Inouye mourned Snake's passing the day prior, explaining how even his final days had been dedicated to the fight for indigenous religious rights. Inouye promised to "secur[e] the passage of this vital legislation to complete the work which Reuben Snake helped to foster."[153] He succeeded. Even from beyond the grave, Snake continued to drive legislative efforts forward. Under his leadership, Peyotists coalesced into an energetic, independent, and unified political front. They did so without the need to adhere to the restricting framework of their former allies — majoritarian religious groups and the Court. Smith took a stance against the movement's reliance on these crutches in deciding not to settle the case; Snake eliminated these crutches entirely.

[152] *One Nation Under God*, 71.
[153] Inouye, "SENATE-Tuesday, June 29, 1993," 14559.

Conclusion:

I began this thesis by briefly outlining Peyotism's battles from colonization to the end of the twentieth century. Peyotism initially embraced and worked within Western frameworks of religion and law in order to survive. By Christianizing, the Native American Church managed to use the First Amendment as a shield against various legal threats, particularly in response to Peyote's Schedule 1 classification in 1965. Courts upheld this cultural right through the Trust Responsibility, in which the government vowed to support the autonomy of Native American communities as their laws predate those created after colonization. But then, in 1990, the Supreme Court decided to limit the scope of First Amendment protections and ignore its responsibility to the indigenous community, leaving this ancient religious practice at the mercy of state legislation. I therefore asked how the *Smith* loss changed the strategic direction of the Peyote movement.

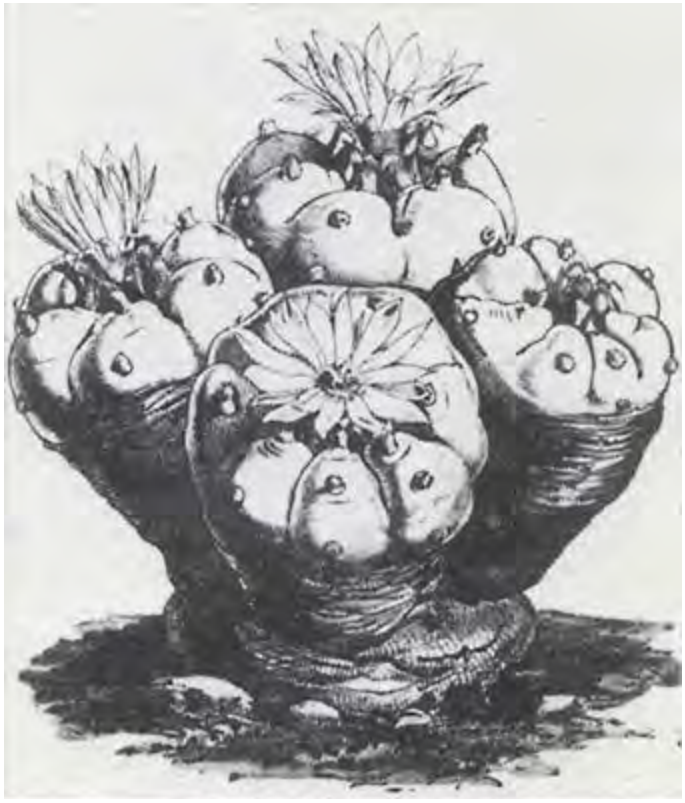
The answer begins with Smith's decision to carry on with the case, despite the NAC's plans to settle. In doing so, Smith pushed back against the movement's reliance on Western allies and frameworks, refusing to stay passive in the face of injustice. The Court's choice to ignore the importance of Peyotism in Native American culture and address the matter solely within the Western framework of the Church exposed the risk of conforming an ancient religious practice to a foreign legal system. It allowed the Justices to disregard their duty to the Trust Responsibility and forced Scalia to whittle down First Amendment protections. The Court did not uphold the Native community's long-standing right to use Peyote ceremonially, nor did it admit to rights beyond that granted to any church. In response, the indigenous movement had to unify to fight for its right to use Peyote independent of its religious allies. In contrast to the NAC's formation

in 1918, the movement shed its dependence on Western cultural powers, choosing confrontation over conformity.

According to Senator Inouye, "It was not until its 1990 decision in *Smith* that the Supreme Court's insensitivity to Native religious rights came to the attention of the general public." *Smith* not only exemplified the postcolonial suppression of indigenous religion, but brought it to the public consciousness. The Court's ability to restrict Peyote's historic protections rested on the religion's Christianization. The ruling therefore exposed the weaknesses in Peyotism's reliance on Western religious protections.[154] Native American Peyote use had to be legitimized not through its dependency on Christian frameworks, but the community's inherent right to live as they have always lived, which AIRFA ultimately accomplished. The case's proceedings shed light on the Court's shameless disregard for indigenous cultural rights, revealing that the legal system's misunderstanding of Native religion had survived the 20th century. This, in turn, ignited a long overdue social and political shift in the movement, characterized by Peyotism's autonomy, and not by assimilation into the rules and structures imposed by colonizers. In taking the case to court, Smith lost the battle, but won the war.

[154] Daniel Inouye, "Discrimination and Native American Relgious Rights," in *Native Americans and the Law: Native American Cultural and Religious Freedoms*, ed. John R. Wunder (New York: Garland Publishing, Inc., 1996), 13.

Appendix:



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Appendix 1: Earliest known botanical illustration of *lophophora williamsii*, peyote. *Botanical Magazine,* 1847, tap. 4296 (Stewart, "Peyote Religion," 3)

Bibliography:

"American Indian Movement." *Britannica*. https://www.britannica.com/topic/American-Indian-Movement.

Beauvais, Fred. "American Indians and Alcohol." *National Institute on Alcohol Abuse and Alcoholism Journal* 22, no. 4 (1998): 253-259. https://pubs.niaaa.nih.gov/publications/arh22-4/253.pdf.

Bush, George H. W. *Presidential Address on National Drug Policy.* Video. C-Span. September 5, 1989. https://www.c-span.org/video/?8921-1/president-bush-address-national-drug-policy

Committee on Interstate and Foreign Commerce, House of Representatives. "Hearings Before the Committee on State and Foreign Commerce, House of Representatives, 89th Congress, 1st Session on H.R. 2." (Washington D.C.: 1965): 2. https://congressional-proquest-com.ezproxy.cul.columbia.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/$2fapp-bin$2fgis-hearing$2fa$2f6$2f6$2fd$2fhrg-1965-fch-0001_from_1_to_390.pdf/entitlementkeys=1234%7Capp-gis%7Chearing%7Chrg-1965-fch-0001

Crumbo, Woodrow. *Peyote Ceremony*. Mid-20th century. Painting, 29'' x 47 ¼' (73.7 x 120 cm). Tulsa: Gilcrease Museum. https://collections.gilcrease.org/object/0227504.

Driver, Eve. "Schedule I Sacrament." *Harvard Politics*. March 23, 2019. https://harvardpolitics.com/culture/schedule-i-sacrament/

Echo-Hawks, Walter R. *In the Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided*. Golden: Fulcrum Publishing, 2010.

Edited by John R. Wunder. *Native Americans and the Law: Native American Cultural and Religious Freedoms*. New York: Garland Publishing, Inc., 1996.

Edited by Huston Smith and Reuben Snake. *One Nation Under God: The Triumph of the Native American Church.* Santa Fe: Clear Light Publishers, 1996.

Epps, Garrett. "Elegy for a Hero of Religious Freedom." *The Atlantic*. December 9, 2014.

Epps, Garrett. "To An Unknown God: The Hidden History of Employment Divisionv. Smith." *Arizona State Law Journal* 30, no. 4 (1998): 953-1022.

Employment Division, Department of Human Resources of Oregon v. Smith. 494 US 872 (1990). *Cornell Law School.* https://www.law.cornell.edu/supremecourt/text/494/872.

Employment Division, Department of Human Resources of Oregon v. Smith. 494 US 872 (1990). *Oyez*. https://www.oyez.org/cases/1989/88-1213.

Feeney, Kevin."Peyote, Race, and Equal Protection in the United States." *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use.* Springer (September 27, 2013): 65-88. https://link-springer-com.ezproxy.cul.columbia.edu/chapter/10.1007/978-3-642-40957-8_4#Fn5.

Halpern, John H, Andrea R. Sherwood, James I. Hudson, Deborah Yurgelun-Todd, and Harrison G. Pope Jr. "Psychological and cognitive effects of long-term peyote use among Native Americans." *Biological Psychiatry* 58, no. 8 (2005): 624 - 631. https://www.biologicalpsychiatryjournal.com/article/S0006-3223(05)00855-3/fulltext

Hamilton, Marci A. "*Employment Division v. Smith* at the Supreme Court: the Justices, the Litigants, and the Doctrinal Discourse." *Cardozo Law Review* 32, no. 5 (2011): 1671-1699. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1839963

Limerick, Patricia Nelson. "The Repression of Indian Religious Freedom." *NARF Legal review* 18, no. 2 (1993): 11-15. https://files.eric.ed.gov/fulltext/ED362356.pdf.

Long, Carolyn N. *Religious Freedom and Indian Rights: The Case of Oregon v. Smith.* Lawrence: University of Kansas Press, 2000.

Maroukis, Thomas Constantine. *Peyote and the Yankton Sioux: The Life and Times of Sam Necklace*. Norman: University of Oklahoma Press, 2005.

Owen, Suzanne. *The Appropriation of Native American Spirituality.* New York: Continuum International Publishing Group, 2008.

Pavlik, Steve. "The U.S. Supreme Court Decision on Peyote in Employment Division v. Smith: A Case Study in the Suppression of Native American Religious Freedom." *Wicazo Sa Review* 8, no. 2 (Autumn, 1992): 30-39.

"Peyote." *Center for Substance Abuse Research.* http://www.cesar.umd.edu/cesar/drugs/peyote.asp.

"Reuben Snake Papers, 1971-1996 NMAI.AC.012." National Museum of the American Indian Archive Center. https://americanindian.si.edu/sites/1/files/archivecenter/AC012_snake.html#ref6.

Reynolds, Jerry. "Reuben Snake papers carry his spirit to the National Museum." Indian Country Today. December 29, 2006. https://indiancountrytoday.com/archive/reuben-snake-papers-carry-his-spirit-to-national-museum-1ZE5Kd8ZckWOWuW0Ft894w

Rhine, Gary, dir. *Your Humble Serpent: The Wisdom of Reuben Snake.* Berkeley: Berkeley Media, 1996. https://video-alexanderstreet-com.ezproxy.cul.columbia.edu/watch/your-humble-serpent-the-wisdom-of-reuben-snake.

Sale, Kirkpatrick. *Conquest of Paradise.* New York: Alfred A. Knopf, 1990.

State v. Bullard. 148 S.E.2d 565 (267 N.C. 599, 1966). *Justicia*. https://law.justia.com/cases/north-carolina/supreme-court/1966/826-0-0.html.

Stewart, Omer C. *Peyote Religion: A History.* Norman: University of Oklahoma Press, 1987.

Terry, Martin and Keeper Trout. **"**Regulation of Peyote (Lophophora Williamsii: Cactaceae) In the U.S.A.: A Historical Victory of Religion and Politics Over Science and Medicine.," *Journal of the Botanical Research Institute of Texas* 11, no. 1 (2017): 147-56. www.jstor.org/stable/26549456.

People v. Woody. 61 Cal.2d 716, (S.C. Cal. 1964). *Stanford Law School*. https://scocal.stanford.edu/opinion/people-v-woody-24460

United States Congress, Committee on Natural Resources, Subcommittee on Native American Affairs. "American Indian Religious Freedom Act: Oversight Hearing Before the Subcommittee on Native American Affairs of the Committee on Natural Resources, House of Representatives, One Hundred Third Congress, First Session, on Effectiveness of P.L. 95-346--the American Indian Religious Freedom Act of 1978 (AIRFA)." U.S. Government Printing Office (Washington D.C.: 1993): 40. https://books.google.com/books?id=5R8VAAAAIAAJ&pg=RA1-PA40&lpg=RA1-PA40&dq=Alfred+Smith+and+Galen+Black+fired+in+1988+for+Peyote&source=bl&ots=x1wtcTx0KX&sig=ACfU3U34VuS43QKL7V2Vdprgao6YPa_yGQ&hl=en&sa=X&ved=2ahUKEwiel_L4mPblAhXtpVkKHQQwBA8Q6AEwCHoECAkQAQ#v=onepage&q=Alfred%20Smith%20and%20Galen%20Black%20fired%20in%201988%20for%20Peyote&f=false.

United States v. Verdugo-Urquidez. 494 US 259 (1990). *Oyez*. https://www.oyez.org/cases/1989/88-1353

95th Congress. "American Indian Religious Freedom Act." Public Law 95-341 [S.J.Res. 102], (Washington D.C.: 1978) https://congressional-proquest-com.ezproxy.cul.columbia.edu/congressional/result/congressional/congdocumentview?accountid=10226&groupid=106481&parmId=170EE483340&rsId=170EE478049#Content%20Notation

103rd Congress. "Religious Freedom Restoration Act of 1993." H.R.1308 (Washington D.C.: 1993-1994). https://www.congress.gov/bill/103rd-congress/house-bill/1308

103rd Congress. “American Indian Religious Freedom Act Amendments of 1994.” Public Law 103-344 [H.R. 4230]. (Washington, D.C.: 1994).

“1972: Reuben A. Snake Jr. leads American Indian Movement.” Native Voices. *U.S. National Library of Medicine*. https://www.nlm.nih.gov/nativevoices/timeline/532.html