

Peyote and Religious Freedom: How Legal Discourse, Race, and Identity Shape Religion for
American Indians

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Introduction

Religious freedom is a paramount right in the United States and many countries around the world. It is upheld as an ideal that promotes freedom and diversity in the face of oppressive regimes both past and present. In the United States, this ideal goes back to the foundations of the country as one of the first rights explicit in the Bill of Rights. The Free Exercise Clause in the First Amendment ensures religious freedom absent of government coercion. However, the intricacies and specifics of the Free Exercise Clause are not clearly defined. Are there limits to Free Exercise? When does public welfare or state interest outweigh religious freedom? Do minority religious faiths receive the same protections? These are the types of questions that US courts have been debating and resolving since the establishment of religious freedom.

This paper seeks to analyze how courts have interpreted religious freedom regarding American Indian religion. Specifically, this project investigates the Native American Church (NAC) and their legal battle for a federal exemption to use the substance peyote in religious ceremonies. Peyote is a cactus plant currently outlawed in the US as a Schedule I illegal substance, but there is an exemption for its use by American Indians in bona fide religious ceremonies. Courts were forced to deal with the legality of this exemption when non-Indian Americans challenged it as discriminatory and sought a similar right for their own religious practices. Yet again, US courts had to specify their interpretation of religious freedom as it applies to the real-life practices and spiritual lives of American citizens. This project seeks to understand the legal justifications for the creation and continued existence of the peyote exemption in the context of this debate, highlighting what this case has to teach about religious freedom in America.

Religious freedom is not a flawless system. As a legal construct created for the purpose of governing, religious freedom requires certain constraints. Elizabeth Hurd has pointed out that the simplistic understandings of religion used in law and politics do not encompass the complexities of religious life observed by everyday practitioners and believers. She uses the term “lived religion” to refer to the diversity of practice experienced by real people. This contrasts with political promotions of “good” and “bad” religions.¹ Like Hurd, Winnifred Sullivan critiques the practicality of religious freedom. She also emphasizes the impossibility of fitting religious life into a legal definition, arguing that freedom and equality would be better protected without religious freedom.² Using this theoretical framework, one must question the efficacy of religious freedom in every Free Exercise case. It seems especially important to do so with minority religions, which are more poorly understood by outsider, American jurists. It is also essential to remember the legal frame of religious freedom. This is a concept developed in law and intricately tied to the American legal discourse. By this I mean the languages, definitions, and conceptions tied to US law and used in legal conversations. This framework will help illuminate the role religious freedom plays in the peyote legal debate.

This paper will explain the historical circumstances that led to the creation of the peyote exemption and then analyze arguments for and against its continued existence. One will see background information about peyotism in the United States and the formation of the NAC. Introductory information on important legal precedents for understanding Free Exercise cases and religious freedom legal interpretations will also appear. These topics will lead into a

¹ Hurd, E. (2015). *Beyond Religious Freedom: The New Global Politics of Religion*. Princeton, NJ: Princeton University Press. 22-30.

² Sullivan, W.F. (2005). *The Impossibility of Religious Freedom*. Princeton, NJ: Princeton University Press. 138.

discussion on the major Supreme Court case that upheld the illegality of peyote, *Oregon v. Smith*. After the *Smith* case, the Religious Freedom Restoration Act and the American Indian Religious Freedom Act Amendments restored legal protections for diverse religious practices, including peyote use by American Indians. Once the development of the peyote exemption is understood, this paper will analyze two cases challenging it based on claims of racial discrimination. The legality of the exemption remains somewhat ambiguous, but so far intact, forcing American Indians to rely on shaky legal protections. A comparison with cases seeking protection for Native American sacred lands illustrates why peyote was successful in its legal battle. Understanding the success of peyote, however, also requires a discussion of Native American identity. The federal peyote exemption has sparked an ongoing debate, yet remains standing in American law because the legal discourse of religious freedom promotes a specific conception of religion and emphasizes political identity constructions.

The Native American Church in America

Peyotism is an ancient tradition with roots in what is now northern Mexico. The Huicholes, an ethnic group primarily in north-central Mexico, have been practicing the faith for thousands of years. Their mythology relates the story of The Deer Person whose life became the source of peyote. Huicholes embark on sacred pilgrimages to gather peyote every year and recreate the story of its original discovery. In what is now Texas, peyote has also been in use for centuries. In the eighteenth century, peyotist faith began to spread to other states and nations in the United States.³ The development of railroad networks and the concentration of American

³ Maroukis, T. C. (2010). *The Peyote Road: Religious Freedom and the Native American Church*. Norman, OK: University of Oklahoma Press. 17-22.

Indians on reservations helped peyotism embed itself in over 50 tribes.⁴ This faith offered a new spiritual connection with an ancient, indigenous practice, and it helped American Indians maintain an identity contrary to that of their white colonizers.

The physical and psychological effects of peyote create a profound experience for adherents to peyotist religions. The active ingredient in peyote is mescaline. Most people first experience unpleasant physical conditions, such as nausea, dizziness, sweating, increased heartrate, and headaches. After this initial discomfort, one begins to notice differences in sensation. Synesthesia is a common occurrence, as well as a sense of greater connection to the people and the world around oneself. Some people also describe hallucinations and different visual experiences.⁵ For members of the NAC, these experiences relate how peyote is a powerful medicine. It provides holistic healing, treating the spirit, mind, and body as one.⁶ Based on these effects, peyote is labeled differently in different contexts. When used by NAC members in a religious setting, peyote is a medicine or a sacrament, but when used by non-Indians for enjoyment, peyote is a drug. Peyotists are unwilling to identify peyote as a drug, but legal classifications require the substance to fit into a predetermined label.

As peyotist movements grew across the United States, they faced increasing harassment and condemnation along with other aspects of American Indian cultures. The reservation system left American Indians feeling powerless and lost as the US government methodically worked to crush their cultural beliefs and practices. The Bureau of Indian Affairs (BIA), Christian missionaries, and chemists in the late 1800s decided peyote was a dangerous drug preventing

⁴ Urban, H. (2015). The Native American Church. In *New Age, Neopagan, and New Religious Movements* (pp. 26-44). University of California Press.

⁵ Smith, H. & Snake, R. (Eds.). (1996). *One Nation Under God: The Triumph of the Native American Church*. Santa Fe, NM: Clear Light Publishers. 108.

⁶ Maroukis, 66.

Indians from attaining civilization.⁷ In the early 1900s, the US government tried to shut down the trade of the cactus between the US and Mexico. Moreover, beginning in 1912 the BIA lobbied for a federal prohibition against peyote. By 1915, the importation and shipment of the substance was banned by the Pure Food and Drug Act and US Postal Service regulations.⁸ Though initially unsuccessful, the adamant efforts of the BIA demonstrate the long history of misunderstanding and hatred toward Indian use of peyote.

Government drives to ban peyote related to larger movements to prohibit drug use in America. In the early 1900s many Americans feared the drunkenness caused by alcohol, pushing the United States Congress to pass the Eighteenth Amendment outlawing the consumption of alcohol. It was in this context of Prohibition that the first Congressional hearing about the possibility of banning peyote was held.⁹ In 1923, peyote was labeled an intoxicant in the Indian Appropriations bill, granting BIA funding to stamp it out of reservations.¹⁰ By the 1960s, the counterculture movement was in swing, and young, white Americans began experimenting with the substance. The use of peyote by these hippie-types meant that the danger of the cactus had spread and was now infecting white bodies. One aspect of the War on Drugs was to target drug use in these nonconformist communities. In 1970, peyote and mescaline were labeled as Schedule I hallucinogens in the Controlled Substances Act. American Indian use of peyote in religious ceremonies was finally outlawed on the federal level, partly because white Americans were abusing their sacramental substance.

⁷ Dawson, A. S. (2018). *The Peyote Effect: From the Inquisition to the War on Drugs*. Berkeley, CA: University of California Press. 4-12.

⁸ Dawson, 37-43.

⁹ Dawson, 44-46.

¹⁰ Dawson, 61.

In efforts to secure greater religious freedom protection, members of tribes across Oklahoma that follow the peyote way decided to incorporate as a religious institution. Thus, in 1918 the Native American Church of Oklahoma was created.¹¹ The founders used the term Church, and other Christian principles to make their practices more sympathetic in the American context. The purpose of their incorporation states, “To establish self-respect and brotherly union among the men of the native race of Indians and to foster and promote their belief in the Christian religion with the practice of the peyote sacrament as commonly understood among Indians.”¹² Many Americans only extend the rights of religious freedom to faiths they understand, or faiths that look like protestant Christianity,¹³ so adopting a syncretic-Christian position gave the NAC greater authority. For example, the NAC explicitly stated that peyote is a sacrament, much like wine in the Catholic Church. Though they point to a Catholic ritual, they do so in a protestant way by identifying a separable, ritual practice. Moreover, the NAC of Oklahoma established a hierarchical institutional structure and codified clear ritual practices. They worked to show the ancient tradition of peyotism, asserting that their religious practice was not a new invention to fear. Identifying as a pan-Indian movement, a church of all Native Americans not just one tribe, also granted them legitimacy as a larger religious body.¹⁴ Another

¹¹ Maroukis, 56-57.

¹² Indians Plan to Establish Native American Church. (1918, October 12). *Dallas Morning News*, p. 9. Available from Readex: America's Historical Newspapers: <https://infoweb-newsbank-com.proxy.lib.ohio-state.edu/apps/readex/doc?p=EANX&docref=image/v2:0F99DDB671832188@EANX-1068E720D16AAF51@2421879-1068E721558F0F35@8-1068E72327100DEF@Indians+Plan+to+Establish+Native+American+Church>.

¹³ The use of the term “protestant,” lowercase, throughout this paper refers to an understanding of religion that stems from Protestant Christianity; Meaning religion can be identified as something individually chosen, with a focus on belief from textual or institutional authority. This term should be distinguished from “Protestant,” capitalized, which refers to practicing Protestant Christians. See also Sullivan, 7-8.

¹⁴ Dawson, 55-56.

way they established legitimacy was to shun or hide non-Indian members.¹⁵ Accentuating ethnically restricted membership allowed them to better capitalize on an indigenous identity and past. With the incorporation of the NAC, peyote looked like a legitimate religion to US law and society.

Though the incorporation claimed to establish a formal institution, the movement lacks a strong centralized body. Different reservations and tribes maintain relatively independent structures, though peyote ceremonies and most beliefs are congruent throughout the US. In 1955 the Native American Church of North America was incorporated, giving peyotists an international lobbying body, but many tribes and communities have incorporated smaller branches as well. The Internal Revenue Service lists 33 branches of the NAC within its tax exempt religious organizations database.¹⁶

As stated, the beliefs and practices of most NAC members are ubiquitous throughout the US, and they center around the belief of peyote as a sacred medicine. For many NAC members who accept the Christian elements that exist in the US today, peyote is God incarnate; peyote is the plant form of God, just as Jesus was the human form.¹⁷ The medicine can cure bodily illnesses and provide spiritual healing. This is one reason many Native Americans attribute their sobriety to the cactus.¹⁸ It also acts as a teacher of morality and righteousness. Reuben Snake, a

¹⁵ Dawson, 112-113.

¹⁶ Internal Revenue Service. (2018). *Results for Tax Exempt Organization Search*. Retrieved from <https://apps.irs.gov/app/eos/allSearch.do?indexOfFirstRow=0&selectedPage=0&country=US&eductibility=all&dispatchMethod=searchAll&isDescending=false&city=&ein1=&postDateFrom=&exemptTypeCode=al&submitName=Search&sortColumn=orgName&totalResults=33&names=Native+American+Church&resultsPerPage=25&indexOfFirstRow=25&postDateTo=&state=All+States>

¹⁷ Smith & Snake, 24.

¹⁸ Maroukis, 59-60.

prominent figure in the battle for NAC legal protection, describes how peyote is key to following the right path in life, often called the peyote way.¹⁹ There are two main forms of peyote ceremonies in the US: the cross-fire ceremony, developed by Quanah Parker, and the half-moon ceremony, established by John Wilson. The half-moon is more widespread, while the cross-fire has more prominent Christian elements. Both ceremonies occur overnight and feature ritual singing, consumption of peyote, and an ongoing bonfire. A community member in need of a ceremony asks the Roadman to hold one, as there are no set times for the ceremony to occur. The Roadman leads the community through a prescribed series of events throughout the night while people sit and pray along the outskirts of the teepee. At dawn, the Water Woman arrives bringing the ceremony to an end. The cross-fire ceremony incorporates more Christian elements, such as prayers from the Bible and stronger Christian images and interpretations. For example, the alter is an almost closed circle said to represent Christ's face or His empty grave.²⁰ While neither ceremony is more valid than the other, their differences illustrate the range of acceptance of Christianity. Nevertheless, peyote remains an essential element to the ritual life and belief system of the NAC.

Developments of Religious Freedom

Religious freedom is at the heart of the peyote exemption debate. The ideal of religious freedom in America emerged with the Bill of Rights. The First Amendment proclaims, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The second clause of the sentence, known as the Free Exercise Clause, aims

¹⁹ Smith & Snake, 23.

²⁰ Urban, 33-36.

to protect religious diversity. However, it must be noted that the original framers of this clause only intended protection for various forms of Protestant Christianity. In fact, most understandings of religion in the US come from a protestant background. Winnifred Sullivan observes that “this modern protestant reading, came to be understood as being private, voluntary, individual, textual, and believed.”²¹ Only understanding religions from this background makes it difficult to incorporate other practices and beliefs as religious. Defining religion is an especially important task for legal authorities, like the US courts. Though most judges shy away from explicitly defining religion, confirming what is religion, or declaring the centrality of individual religious beliefs or practices, they must have some conception in order to make decisions. The overwhelming protestant understanding of religion poses problems for other faiths searching for equality of religious freedom.

A prime example of this phenomenon is the case of *Warner v. Boca Raton* (1999), which Winnifred Sullivan details in her book, *The Impossibility of Religious Freedom*. This case involves the city of Boca Raton, Florida and the plaintiffs, a group of individuals from diverse religious backgrounds seeking the right to decorate cemetery headstones in excess of the law’s restrictions. This case epitomizes the religious freedom landscape of America. The plaintiffs were forced to prove a substantial burden to their religious practice. Boca Raton argued that cemetery decorations were not central, compulsory tenets of their religions, and therefore there was no substantial burden. From this argument, one can see that Boca Raton had a protestant bias toward religion, where religion is something believed and has texts and authorities. The plaintiffs, however, had a more complex understanding where religion interacts with other

²¹ Sullivan, 8.

beliefs and motivations.²² Ultimately, the Florida court sided with the city, Boca Raton. As Sullivan notes, this case demonstrates how the legal implications of religious freedom, established according to a protestant understanding, can limit individual freedoms to life beyond state control.

Another problem religious freedom seekers commonly face is the conflict between the Establishment Clause and the Free Exercise Clause. There is a catch-22 for First Amendment cases involving religion because granting a group free exercise rights may also establish too close a connection between the government and the religion. This argument is called upon in cases trying to prevent special protections for American Indian practices. The Courts currently use the Lemon Test, established through the case of *Lemon v. Kurtzman* (1971), to identify violations of the Establishment Clause. In *Lemon v. Kurtzman*, the Pennsylvania state government granted public funds to a private, religious school for some of the secular, educational services they offered. The Supreme Court ruled this was not a violation of the Establishment Clause. The Lemon Test is composed of three provisions: the law in question must have a secular purpose, have a predominantly secular effect, and may not foster excessive entanglement between government and religion.²³ In the past several decades the Supreme Court has allowed greater connections between religious organizations and government, effectively breaking down the previous wall of strict separation. However, the principle of separation of church and state remains an important ideal in America. Many arguments against minority religious freedom rights rely on this conflict between the two constitutional religion clauses.

²² Sullivan, 35-36.

²³ *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

With these hurdles in mind, one must also take into account the important developments in Free Exercise jurisprudence. One key development came with a Supreme Court case on Mormon polygamy in 1879. George Reynolds was charged with bigamy for marrying more than one woman. He argued that the bigamy law was unconstitutional because it violated his religious freedom rights. His religion required him to partake in polygamy, so he could not follow a civil law that contradicted his beliefs. The Supreme Court ultimately upheld Reynolds' conviction. The Court determined that Americans maintain freedom of religious belief, but not practice. The government may restrict religious practices in the interest of protecting the general welfare of society.²⁴ The idea that religion can survive solely as belief stems from a protestant understanding. It is this type of thinking and this precedent that continues to inform judicial interpretation.

Another important evolution in Free Exercise interpretation came with the case of *Sherbert v. Verner* (1963). A Seventh-Day Adventist was fired and denied unemployment compensation for refusing to work on Saturdays, which are holy days in her religion. The Supreme Court found a substantial burden on Sherbert's free exercise rights and no compelling state interest to justify the burden. Justice Brennan compared the burden in this case to fining Sherbert for her religious beliefs.²⁵ With this case, the Court established the compelling interest test, which would become precedent in all free exercise cases until the decision in *Oregon v. Smith* in 1990. The test required any claims of statutes violating religious freedom to prove that the statute posed a significant burden on free exercise of religion, and that there is no compelling

²⁴ Reynolds v. United States. (n.d.). *Oyez*. Retrieved October 1, 2018, from <https://www.oyez.org/cases/1850-1900/98us145>

²⁵ *Sherbert v. Verner*, 374 US 398 (1963)

state interest that supports the statute in spite of the free exercise violation. The *Sherbert* case expanded rights to free exercise and made claiming them more accessible.

Religious freedom in the American context has a specific understanding and interpretation. Since the founding fathers wrote the right to free exercise of religion in the Bill of Rights there has been a uniquely protestant underlying assumption about religion in circulation. Religion in America is something authoritative, believed, separable, and identifiable. This causes problems for religious adherents of non-Protestant traditions. Members of minority groups have a long history of struggling to get the government to recognize their religious beliefs, a problem the NAC tackles head on. Religious freedom may very well be a right initially reserved for the white majority of America, but the NAC's fight for peyote demonstrates a successful manipulation of the system.

Oregon v. Smith and Beyond

The moment from which the peyote legal exemption draws its origin is the Supreme Court's ruling in *Oregon v. Smith*. This case brought a new legal understanding of religious freedom into precedent. Al Smith, a Klamath Native American, and Galen Black, a white American, were fired from the Douglas County Council on Alcohol and Drug Abuse Prevention (ADAPT) after partaking in a peyote ceremony with the NAC.²⁶ Though neither of them were official members of the NAC, they still felt their religious freedom was under attack. When ADAPT told Al Smith if he continued to go to peyote ceremonies he would be fired, he took that to mean he could not go to church.²⁷ After denial of unemployment benefits by the state of

²⁶ Epps, G. (2001). *Peyote vs. The State: Religious Freedom on Trial*. Norman, OK: University of Oklahoma Press. 96.

²⁷ Epps, 97-98.

Oregon, they decided to take their case to the courts. The Oregon Attorney General at the time, Dave Frohnmayer, fought to prevent people from sliding other drugs down this slippery slope into accepted use.²⁸ The case worked its way up the Oregon court system to the United States Supreme Court. It was first remanded back to the Oregon Supreme Court seeking their decision on whether sacramental use of peyote is illegal according to Oregon's drug laws. The Oregon Supreme Court found that sacramental peyote use was illegal in the state of Oregon, but held that this statute was unconstitutional as it violated the Free Exercise Clause.²⁹ The case then went back to the federal Supreme Court to evaluate the First Amendment claim.

The Supreme Court's majority opinion introduced a dramatic new precedent, not just for sacramental drug claims, but all religious freedom issues. Justice Scalia's opinion limited the types of cases that could fall under the *Sherbert* compelling interest test by declaring that "the incidental effect of a generally applicable and otherwise valid provision" does not violate the First Amendment. He explains, "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." It is important to remember that within the American legal context citizens have the right to free religious belief, but not action, as determined in *Reynolds v. United States* (1879). In *Smith*, the Court determined that if religion is not specifically targeted, then the statute is constitutional. Scalia noted that granting a religious exemption whenever asked would allow citizens to obviate necessary aspects of political participation, thus becoming lawmakers themselves.³⁰ Al Smith and Galen Black were denied unemployment benefits, and Oregon's prohibition on the use of sacramental peyote was upheld.

²⁸ Epps, 116-117.

²⁹ *Oregon v. Smith*, 494 US 872 (1990)

³⁰ *Oregon v. Smith*, 494 US 872 (1990)

The Smith ruling may have sparked outrage from peyotists wanting legal protection for their religious practices, but it supports important tenets of US law. One must understand these tenets in order to understand how religious freedom operates in America. Justice Scalia emphasizes the priority of belief according to law: “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.”³¹ Religious freedom is not boundless; it applies specifically to beliefs, making practices secondary and in greater danger of restriction. Furthermore, the Justices ensure the Supreme Court maintains its role in the US tripartite system. Justice Scalia alludes to a solution which stems from Congress changing the laws, by creating an exemption for peyote use or legalizing peyote for all. Though an exemption may be desirable, it is not the Court’s job to create such an exemption.³² The Court must protect the integrity of the law, meaning it must ensure all citizens adhere to it before partaking in individual desires. Scalia also seeks to prevent the slippery slope of future requests for exemptions. Understanding how the US courts system prioritizes law and precedent is key to all legal debates in the country. Religious freedom cannot escape this legal discourse.

In response to the *Smith* case, religious leaders from a variety of traditions lobbied Congress to pass the Religious Freedom Restoration Act (RFRA). RFRA was successfully passed by both Houses of Congress in 1993. It seeks to protect religious practices despite neutrally-faced laws. With the passage of this act, Congress agreed “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is

³¹ *Oregon v. Smith*, 494 US 872 (1990)

³² *Oregon v. Smith*, 494 US 872 (1990)

substantially burdened.”³³ For many, RFRA was a triumphant win for religious freedom in America. However, American Indians still sought explicit protection for peyote use. Their time came in 1994 when Congress passed an amendments bill to the American Indian Religious Freedom Act (AIRFA) of 1978. In the new bill, “the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State.”³⁴ Native Americans finally received undeniable government acknowledgment of the importance of peyote to their religion.

While RFRA and AIRFA expand religious freedom protections, questions still exist about the conflicts between the two and other legal tenants, such as that of the Equal Protection Clause. Since the passage of these laws, groups who do not qualify as federally recognized Indian tribes have come forward seeking the right to practice peyotism. They argue their free exercise rights, guaranteed under RFRA and the First Amendment, are violated by the AIRFA Amendment. Non-Indians say the Equal Protection Clause should disqualify the AIRFA Amendment based on racial discrimination. In this case, American law seems to promote conflicting rights. On the one hand is the importance of American Indian cultural integrity, and on the other is the ideal of racial equality under the law. It is this conflict that this paper seeks to analyze further.

³³ U.S. House. 103rd Congress, 1st Session. *H.R. 1308, Religious Freedom and Restoration Act*. Washington, Government Printing Office, 1993.

³⁴ U.S. House. 103rd Congress, 2nd Session. *H.R. 4230, American Indian Religious Freedom Act Amendments of 1994*. Washington, Government Printing Office, 1994.

The Legal Controversy: Arguments for and against the Ethnically Restrictive Exemption

There are two cases that have directly questioned the peyote exemption and which highlight some of the arguments for and against the exemption. In 1991, another peyotist group, the Peyote Way Church of God, challenged federal and Texas drug laws that prohibit peyote use for everyone besides NAC members with 25% Indian blood. The Peyote Way Church of God is a non-sectarian organization that welcomes all ethnicities to discover their spiritual path through the sacrament of peyote. The founder of the church, Immanuel Trujillo, claims partial Indian ethnicity and was a member of the NAC before founding his own organization.³⁵ The Peyote Way Church argued that the federal and Texas drug codes violate the Equal Protection Clause of the Fifth Amendment, as well as both religion clauses of the First Amendment. Regarding the Equal Protection Clause, the Peyote Way Church sees the exemption as a clear instance of racial discrimination. They also argue that because the exemption singles out one religion, it establishes too strong a connection between the government and the NAC. The case went to the Fifth Circuit Court of Appeals, where the judges denied all these claims and upheld the peyote exemption: “We hold that the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government’s trust relationship with tribal Native Americans.”³⁶

Another case from 1991 came out of New Mexico and challenged the peyote exemption on racial discrimination grounds, as well. Robert Boyll, a non-Indian American, was charged with illegally importing peyote and distributing it through federal mail. Boyll’s side argued that

³⁵ *The Peyote Way* (n.d.). Retrieved from <https://peyoteway.org/index.php>

³⁶ *Peyote Way Church of God v. Richard Thornburgh*, 922 F.2d 1210 (1991)

many branches of the NAC welcome non-Indian members, so the DEA regulation, which states, “The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug 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,” should not apply to only Indian members of the NAC.³⁷ The New Mexico District Court Judges found this argument compelling based on the plain language of the regulation: “The regulation plainly declares Congress’ purpose to exempt Native American Church members. Nowhere is it even suggested that the exemption applies only to Indian members of the Native American Church.” Allowing the exemption to only apply to Indian members would be a violation of the First Amendment’s Free Exercise clause. In his opinion, Judge Burciaga noted the US government is not similarly situated to the NAC regarding ability to restrict membership; the NAC could adopt racial restrictions that would be inappropriate for the US government. The District Court decided the DEA regulation should apply to all NAC members, regardless of race.³⁸ The result of *Boyll* seems to directly contradict that of *Peyote Way Church*, illustrating the complexity of this debate.

One must note important strengths of the arguments against the ethnically restrictive peyote exemption. Restricting the right to practice a religion based on membership within an ethnic group seems fundamentally opposed to American ideals. Ever since the ratification of the Fourteenth Amendment, Americans have professed equality of the races, at least in law. The fact that some branches of the NAC do open membership to non-Indians diminishes the credibility of cultural integrity claims. Moreover, given the power of free speech and free belief, it seems

³⁷ Native American Church, 21 C.F.R. § 1307.31 (2010)

³⁸ United States v. *Boyll*, 774 F. Supp. 1333 (1991)

impossible to prevent someone from ascribing to peyotism. However, the government can restrict religious practices that it deems dangerous or harmful to others, which could be the basis for restricting practice according to group identity as long as there is no racial requirement. On the other hand, claims that the exemption violates the Establishment Clause do not seem to hold much merit. The Supreme Court has allowed increasingly greater connections between the government and religious organizations (see *Lemon v. Kurtzman* (1973), *Agostini v. Felton* (1997), *Zelman v. Simmons-Harris* (2002), etc.). Furthermore, exemptions which allow a practice to occur do not necessarily promote that practice. Most of these arguments have compelling claims for racial equality, a principle the US government claims to support.

Based on the *Boyll* and *Peyote Way Church* cases, arguments in favor of the peyote exemption as restricted to American Indians also become clear. In the *Peyote Way Church* case, the judges highlighted the trust relationship between American Indian tribes and the US government. This trust relationship establishes American Indian tribes as semi-autonomous communities within the US and ensures they have unique rights. The Equal Protection Clause is therefore not violated because Native Americans are not similarly situated to other US citizens. The government has a compelling interest in preserving Native American culture. To this end, the peyote exemption is the least restrictive means of achieving it. Ultimately the Judges found that the peyote exemption extends a political preference, not a racial one, so it remains within the bounds of the Constitution.³⁹

Though *Boyll* was decided against the ethnically restrictive peyote exemption, one should still note the government's arguments to keep it in place. The government wanted the District Court to evaluate the case under the rules of neutral applicability from *Smith*. The

³⁹ *Peyote Way Church of God v. Richard Thornburgh*, 922 F.2d 1210 (1991)

prohibition on peyote use is a general law, but the District Court found the exemption in question specifically related to religion so they used the compelling interest test from *Sherbert*. The government then sought to promote the compelling interest of protecting Native American culture, arguing that a 25% blood requirement is essential. The NAC of North America does restrict membership to 25% blood relations, though other branches may be more open. The US District Court for the District of New Mexico denied the importance of this government interest, but the historical plight of Native Americans may warrant deeper consideration.

The arguments in favor of the ethnically restrictive peyote exemption are few, but carry significant weight. Given the atrocities the US government has executed on the Native American population, such as forcing them off land, killing great numbers of the population, and suppressing their culture, they have a humanitarian responsibility to ensure proper reconciliation. Of course, this is a responsibility not guaranteed by law, so the government could continue to suppress American Indian culture without consequence. However, more people seem to realize the government's failures of the past, placing American Indian culture at a unique status. In addition, the semi-autonomous political nature of Indian tribes does give them special rights within US law. For example, federally recognized tribes can enact and enforce their own laws, collect taxes, determine membership requirements, and regulate activities within their jurisdiction.⁴⁰ Because the AIRFA Amendment mentions federally recognized tribe members, it alludes to their special political status and protects against claims of racial discrimination. However, the DEA exemption in US Food and Drug codes exempts the NAC, which is not directly related to the trust relationship status of federally recognized tribes. The US government

⁴⁰ Bureau of Indian Affairs. (n.d.) *Frequently Asked Questions*. Retrieved from <https://www.bia.gov/frequently-asked-questions>

has strong arguments to support the ethnically restrictive peyote exemption, but regulations are not consistent, which creates problems and areas of dispute.

Ongoing Debate and Fragile Protections

The legal debate surrounding the peyote exemption is an ongoing battle. The exemption remains standing, but contradictions and controversies continue to complicate the situation and ensure lingering questions. The lack of standardized language across different areas of government is a primary source of controversy. This oversight allows non-Indian peyotists to bring forth continued challenges. For example, the Drug Enforcement Administration's federal regulations stipulate in Title 21 that the exemption applies to "ceremonies of the Native American Church, and members of the Native American Church."⁴¹ This wording singles out a specific religious group, which could invite challenges against an Establishment Clause violation. On the other hand, AIRFA refers to Indians as members of federally recognized tribes.⁴² This statute relies on the political distinction Native Americans enjoy based on the trust relationship between the US government and federally recognized tribes. This language may ensure the greatest protection for Native American peyote use because there are few possible challenges against the trust relationship.

Lastly, individual states have peyote exemptions of varying language. The Texas Health and Safety Code, for example, applies the exemption to members of the Native American Church with at least 25 percent Indian blood.⁴³ The explicit ethnic requirement incites challenges based

⁴¹ Native American Church, 21 C.F.R. § 1307.31 (2010).

⁴² U.S. House. 103rd Congress, 2nd Session. *H.R. 4230, American Indian Religious Freedom Act Amendments of 1994*. Washington, Government Printing Office, 1994.

⁴³ Texas Controlled Substances Act, 6 T.H.S.C. § 481.111 (1989).

on Equal Protection, as seen in the *Peyote Way Church* case. Texas uses some of the strictest language. Some states, such as Arizona and Oregon, require only sincere religious practice to qualify for the peyote exemption, with no mention of the NAC or Indian blood. Iowa and South Dakota permit anyone to take peyote as long as it is part of a NAC ceremony, regardless of membership or ethnicity.⁴⁴ The lack of uniform language prevents a national resolution to the peyote legal debate.

Contradictory court decisions also show the lack of a cohesive conclusion. As detailed earlier in the *Peyote Way Church* and *Boyll* cases, in the early 1990s federal judges produced decisions that directly contradicted each other. One decision supported an ethnic restriction to the peyote exemption, while the other do not. Federal judges hold differing opinions regarding this matter, and there is currently no overriding decision from the Supreme Court to provide finalized clarity. A lack of consensus on the peyote exemption produces contradictions in other religious freedom cases involving illegal drug use. For example, in *McBride v. Shawnee County*, the US District Court for the District of Kansas denied permission to a Rastafarian group for the use of marijuana because the Rastas were not similarly situated to members of the NAC within the federal trust relationship.⁴⁵ However, in *Gonzales v. O Centro Espirita Benificente Uniao Do Vegetal*, a case before the Supreme Court in 2006, the Court found that the federal peyote exemption for Native Americans was sufficient precedent to permit the use of hoasca for members of this religious group.⁴⁶ The discord about the interpretation of the peyote exemption leads to contradictory decisions for other religious groups in America.

⁴⁴ The Peyote Foundation. (2000). *Peyote Legal State by State Status*. Retrieved from https://erowid.org/plants/peyote/peyote_law1.shtml

⁴⁵ *McBride v. Shawnee County*, 71 F. Supp. 2d 1098 (1999)

⁴⁶ *Gonzales v. O Centro Espirita Benificente Uniao Do Vegetal*, 546 US 418 (2006)

Another contributing factor to this ongoing legal debate is the unresolved tension between Congress and the Supreme Court regarding RFRA. In creating RFRA, Congress attempted to work around the Supreme Court decision in *Oregon v. Smith*. RFRA instructs federal courts to use a specific interpreting method, the compelling interest test, when the Supreme Court is typically responsible for those decisions. The Supreme Court responded to the creation of RFRA in 1997 with the case, *City of Boerne v. Flores*. In this case, the Supreme Court declared RFRA unconstitutional as it applies to states because enacting the law and enforcing its provisions on the states are beyond the powers of Congress. Congress could not determine how states chose to enforce the provisions of RFRA, however the law remains good statute for federal cases. Maintaining separation of powers and the federal balance was an important priority for the Supreme Court.⁴⁷ Though, the *Smith* precedent remains binding for First Amendment cases, the Court must rely on RFRA for challenges to federal legislation. The legislative and judicial branches of the government often use different lenses to interpret laws and the legal protections citizens seek. Congress must answer to an electorate, whereas the Supreme Court seeks to build lasting precedents. The tri-partite structure of the government permits contradicting evaluations.

For the most part, Congress continues to support RFRA, and the Supreme Court continues to rely on *Smith*. However, in more recent years, the Supreme Court has been more accepting of RFRA. In *Burwell v. Hobby Lobby* (2014), the Court gave a decision on whether for-profit companies can deny contraception coverage based on religious objections of the company's owners. The Court decided there are no important distinctions between for-profit and non-profit organizations when it comes to receiving exemption status in contraception coverage.

⁴⁷ *City of Boerne v. Flores*, 521 US 507 (1997)

This decision relied on the compelling interest test, though, which as Justice Ginsburg noted in her dissent should not apply in this case because *Smith* is the precedent for generally applicable laws.⁴⁸ Justices of the Court lack consensus on how to enforce Free Exercise precedents, ensuring an arena of uncertainty for those seeking to protect religious freedom rights.

From the history and continued battle of the peyote exemption, one sees the importance of explicit protection to gain religious freedom in America. Though the Bill of Rights proclaims for all the right to religious freedom, people are not automatically treated to it. They must fight for protection under the law, especially for members of minority religions that do not fall into the protestant understanding of religion. Elizabeth Hurd notes how religion produced for law and government is often an isolated entity that cannot encompass the complexities that scholars of religion highlight.⁴⁹ The American legal context forces religious groups to identify themselves clearly and seek explicit protection. The NAC worked and succeeded in the case of peyote to get this protection. However, protecting their rights can seemingly take away the rights of others, such as members of the Peyote Way Church who do not qualify under the federal peyote exemption. Members of the Peyote Way Church have begun the battle to proclaim their rights, but it remains to be seen if they will find success. The need for explicit protection and the continued controversies surrounding the peyote exemption leave American Indians with fear and worry. They understand the fragile nature of their rights. Walter Echo-Hawk, a Native American attorney who worked to help get the AIRFA Amendments passed, has said the protection and survival of Indian religions is a key human rights issue in America.⁵⁰ The US

⁴⁸ *Burwell, v. Hobby Lobby Stores*, 573 US _ (2014)

⁴⁹ Hurd, 29-30.

⁵⁰ Smith, H. & Cousineau, P. (2206). *A Seat at the Table*. Berkeley, CA: University of California Press. 36.

legal structure forced Native Americans to fight for their rights, but it also contributes to lingering doubts about their state of protection.

How Does Sacred Land Compare

At the moment, peyote is a case of success for American Indian religious freedom. A comparison with cases brought about sacred land helps illustrate how gaining the federal peyote exemption prevailed. American Indians maintain a unique relationship with land. Many believe the land of their ancestry is imbued with a numinous, spiritual nature. For example, the Cherokee claim that land “is not merely the symbol of something sacred or merely a place to bring forth memories of past persons or events. It is *itself sacred*, itself the source of sacred power.”⁵¹ For the Hopi people, some of their deities live in the Peaks mountains in Arizona; for the Navajos, the Peaks are a physical embodiment of god.⁵² Land is also a shared environment. Pre-colonization Indian tribes were nomadic, sharing space without claims of ownership.⁵³ This concept of land as sacred and communal is completely foreign to the American legal system, which prioritizes land as property. American Indians have failed to gain legal protection for sacred sites because they cannot make property claims or show the indispensability of specific sites to their religion.

Four cases regarding sacred land have reached federal Circuit Courts. In *Sequoyah v. Tennessee Valley Authority* (1980), a group of Cherokee sought to prevent the flooding of their sacred homeland by the Tellico Dam. The Court of Appeals for the Sixth Circuit found “no such

⁵¹ Brown, B. E. (1999). *Religion, Law and the Land: Native Americans and the Judicial Interpretation of Sacred Land*. Westport, CT: Greenwood Press. 14.

⁵² Brown, 61-62.

⁵³ Chidester, D. (1988). Native Americans. In *Patterns of Power: Religion & Politics in American Culture* (pp. 110-138). Englewood Cliffs, NJ: Prentice-Hall, Inc. 120.

claim of centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances.”⁵⁴ Using the *Sherbert* compelling interest test, the court saw no significant burden to religious practice because the land is only the place where religion is performed, and not essential to belief.⁵⁵ In *Badoni v. Higginson* (1980), the Navajo wanted to stop the flooding of the Rainbow Bridge rock formation in Utah to form Lake Powell because it would prevent access to prayer sites, drown their gods, and allow tourists to desecrate the area. The Tenth Circuit Court of Appeals relied on the Navajo’s lack of property claims and a compelling government interest to deny their Free Exercise claim. The Navajo were not barred from entering the site, so their religious practice was not burdened.⁵⁶ In *Wilson v. Block* (1983), Hopi and Navajo tribes sought protection for the Peaks mountain range in Arizona.⁵⁷ The District of Columbia Circuit Court emphasized government ownership of the land. Though the tribal representatives claimed they would be forced to change their religious doctrine or abandon their religious beliefs, the government held that their practices could be performed at another site without harming belief.⁵⁸ Over and over in these cases, one sees the superiority of belief to practice in the American legal understanding of religion. In *Frank Fools Crow v. Gullet* (1983), Lakota and Tsistsistas Indians fought for protection of Bear Butte in the Black Hills state park. They argued the presence of tourists and restricted access to the site burdened their religious practice.⁵⁹ The government made an Establishment Clause argument, claiming that granting special permissions for these religious groups would effectively promote their religions. Though

⁵⁴ *Sequoyah v. Tennessee Valley Authority*, 620 F. 2d 1159 (1980)

⁵⁵ *Brown*, 37

⁵⁶ *Badoni v. Higginson*, 638 F. 2d 172 (1980)

⁵⁷ *Wilson v. Block*, 708 F. 2d 735 (1983)

⁵⁸ *Brown*, 81-89.

⁵⁹ *Frank Fools Crow v. Gullet*, 706 F 2d 856 (1983)

this argument was denied, the Eighth Circuit Court of Appeals still found no Free Exercise violation, relying on the understanding of the land as government property.⁶⁰ All of these cases show American judges' inability to understand religion as defined by American Indians.

The fight for sacred land rights was terminally crushed when it reached the Supreme Court in 1988 with the case, *Lyng v. Northwest Indian Cemetery Protective Association*. In *Lyng*, the US Forest Service wanted to pave a road through Six Rivers National Forest in Northern California, which the Indian defendants believed to be sacred as an entirety. The Supreme Court based its argument on the fact that the government was not coercing action contrary to religious belief, and the government owned the land. In the majority opinion, Justice O'Connor declared, "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." She goes on to say that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."⁶¹ The Court confirmed building the road would burden defendants' religious beliefs and practices, but found a compelling government interest to override this fault.

There are several reasons why these cases for sacred land rights failed to gain legal protection when peyote succeeded. All were brought forth on behalf of specific Indian tribes, whereas the NAC as a pan-Indian group fought for the peyote exemption. Though this may be a minor consideration, it seems to highlight how a universal, national organization can more easily gain protection. The NAC as an institutional body complies with the protestant understanding of a religious organization. In addition, the American Indian conception of land fails to fit this

⁶⁰ Brown, 109.

⁶¹ *Lyng v. Northwest Indian Cemetery Protective Association*, 485 US 439 (1988)

preconceived bias. Judges wanted to see how land was a central element to religious practice based on codified orders. To them, religious practice is separable from beliefs. American Indians were unable to prove that their religion fit this understanding because it ultimately does not. Moreover, the American legal discourse emphasizes land as property, so the communal and spiritual nature of land for American Indians does not compute. Lastly, land has a much greater value to the government than the peyote cactus. Government-owned land is a source of revenue. Though not explicit in the legal arguments, it makes complete sense that the government would be more concerned with income than the substances ingested by a minority of its citizens. The failure of sacred land claims illustrates the supremacy of the legal discourse in religious freedom cases.

The Role of Identity in the Legal Discourse

Peyote succeeded in gaining legal protections because its use by American Indians made sense to the legal discourse in place. Previous sections showed how the NAC complied with the legal conception of religion as something that resembles a protestant religion. This section will demonstrate how American Indian identity also fits into the American legal discourse. Native American peyotists can draw on multiple identities to make their plea stronger. They have access to membership in different groups based on religion, culture, political autonomy, minority status, history, and citizenship. People who support the ethnically restrictive peyote exemption rely on these at different times and in different legal arguments. American judges and American Indian activists often refer to different identity constructions, illustrating the fluid nature of identity for this group of people. Identity becomes important in the legal context, as specific group membership is required for certain legal benefits. Not every aspect of American Indian

identity grants peyote legal protection, but the political side is most persuasive in the American legal discourse for the continuation of the ethnically restrictive peyote exemption.

On a local level, American Indians often identify with the reservation on which they live and their tribe. There are 573 federally recognized American Indian tribes and 326 federal Indian reservations in the United States.⁶² Tribal identity is incredibly diverse and can be divisive. Walter Echo-Hawk notes that “the United States is not just one nation; it is composed of over five hundred nations within one.”⁶³ Moreover, tribal membership connects one to an ancient historical past and cultural traditions. Prior to colonization of the North American continent, American Indians solely identified with their tribe. Post-colonization, they have found a collective identity as the indigenous peoples of this continent. The Ghost Dance, Sun Dance, and peyote movements helped solidify this collective identity and preserve indigenous traditions. American Indians began to focus on common religious and political concerns.⁶⁴ There are inherent cultural and ethnic requirements for membership in the American Indian community. Part of this identity comes from colonial generalizations, yet a collective identity has proven useful in fighting for rights and protections.

American Indians fighting for the right to peyote use often invoke this cultural and ethnic identity as the indigenous people of North America. During the beginnings of the reservation system, American Indians felt a growing sense of powerlessness that led them to reinforce their identities as indigenous people; they turned to peyotism to fulfill a spiritual and cultural need for identity.⁶⁵ Today they call on the long historical practices of the peyotist faith in their battles for

⁶² Bureau of Indian Affairs. (n.d.) *Frequently Asked Questions*. Retrieved from <https://www.bia.gov/frequently-asked-questions>

⁶³ Smith, & Cousineau, 29.

⁶⁴ Chidester, 129-133.

⁶⁵ Maroukis, 25.

legal protection. They view their faith and culture as distinct and pre-existent from that of mainstream America. During the course of the *Smith* case, Al Smith highlighted this sentiment: “It is a continuation of being put down, of my people and our religion not being recognized by you newcomers.”⁶⁶ He identified with the historic, indigenous culture of peyotists, whose practices went back hundreds of years. As an American Indian, he felt he had rights to an indigenous culture that preexisted American law.

Another important identity American Indians may claim is a religious identity as members of the Native American Church. The decision to form the NAC and incorporate as a religious organization was a thoughtful choice. The founding members actively sought the legal protections that accompany religious organizations. As explained earlier in the paper, in America, Christian organizations are widely more accepted than other minority religious entities. The NAC founders chose to use the title church to ensure greater protection.⁶⁷ Membership in a recognized religious organization can offer legal protections for religious practices because religious organizations are understood within the American legal discourse.

Though the NAC chose to incorporate and later charter the overarching Native American Church of North America in 1955, it never became a well-organized, institutional body. It functions more as a loose group of related congregations that share a common belief and practice, yet management of daily needs is left up to the discretion of each branch. This makes tracking down membership requirements difficult because they often differ from one branch to another. There are branches of the NAC throughout the United States that permit white and non-Indian members. Remember that Galen Black, a white American, was able to partake in a

⁶⁶ Epps, 101.

⁶⁷ Maroukis, 56-57.

peyote ceremony in Oregon, which led to his involvement in the *Smith* case. However, the Native American Church of North America officially restricts membership to those with 25 percent American Indian blood. Even if a non-Indian attains membership to a local branch of the NAC, that may not be recognized by national bodies or federal courts. It is not possible for everyone wanting to practice peyotism to gain access to the incorporated religious group identity.

For those American Indians who can claim identity from membership in this religious organization, their fight for legal protection is indeed strengthened because there is a place for religious organizations in the American legal discourse. The Internal Revenue Service identifies religious organizations and grants tax-exempt status. In fact, they hold the only clear, government definition of a religious body, which includes fourteen points of reference.⁶⁸ In the past few decades, public support for protection of religious practice has increased. Practices that people used to condemn as strange and unseemly in the twentieth century are now acknowledged and allowed to flourish. This shift became especially visible after the counterculture movement of the 1960s and 1970s. Today, a group claiming a religious narrative has a shell of protection that forces people to keep their mistrust at a distance. As noted, the NAC recognized the strength of religious status in America. In *Smith*, the defendants argued that their religious use of peyote goes beyond criminal laws directed at secular acts.⁶⁹ They reasoned that the need for religious protection is greater than the need to prevent dangerous drug use. Though membership in a religious community, especially one recognized by the federal government, was not able to sway the Justices in *Smith*, without this recognized identity the defendants would have less

⁶⁸ Internal Revenue Service. (2018). “*Churches*” *Defined*. Retrieved from <https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined>

⁶⁹ *Oregon v. Smith*, 494 US 872 (1990)

standing in the American legal context. In the fight for religious freedom, recognized religious identity is an essential first claim, even though it does not guarantee protection.

Complications with a religious identity arise, however, when faced with the Establishment Clause. It prohibits the establishment of a government supported religion, often interpreted to forbid excessive ties between government and religion. In the *Peyote Way* case, members of the church argued that restricting application of the peyote exemption to members of the NAC resulted in a government established religion, and some federal judges have agreed.⁷⁰ The value of religious freedom and the diversity of religious belief in America prevent the government from showing favor for any type of religion or any specific religious organization. In the past several decades the Supreme Court has turned to a non-preferential understanding of the Establishment Clause; government may support and provide funding to religious organizations as long as the support is equally available to all religious groups. In *Agostini v. Felton* (1997), the Supreme Court ruled that educational programs at religious institutions could receive federal aid because education was a secular goal.⁷¹ The government may engage religion in a non-preferential way. One could interpret singling out members of a specific religious group for special treatment as government support of that religion, but the judges in *Peyote Way Church* decided American Indians may receive special treatment not from their religious identity, but from their political one.⁷² Again, one's religious identity cannot guarantee religious freedom protections.

The last key aspect of American Indian identity then, and the most important in the legal context, is their political status in the United States. American Indians maintain a semi-

⁷⁰ *Peyote Way Church of God v. Richard Thornburgh*, 922 F.2d 1210 (1991)

⁷¹ *Agostini v. Felton*, 521 U.S. 203 (1997)

⁷² *Peyote Way Church of God v. Richard Thornburgh*, 922 F.2d 1210 (1991)

autonomous status through the trust relationship between federally recognized tribes and the US government. A federally recognized tribe has the authority of a government over its population and preserves a government-to-government relationship with the US federal government.⁷³

From this distinction, American Indians are not similarly situated to other US citizens. The Supreme Court upheld this unique status in *Morton v. Mancari* (1974). The Court maintained that the federal government may protect interests relating to its special relationship with Indian tribes, and an employment preference for Indians in the Bureau of Indian Affairs was not discrimination prohibited by civil rights legislation because it was not a racial distinction.⁷⁴ This unique political identity greatly advances arguments in support of the ethnically restrictive exemption, or rather the politically restrictive exemption.

Within the American legal framework, courts and political actors primarily care about federally recognized tribal membership. In this sense, the government put a political classification on the American Indian ethnic identity. Within the legal discourse, one must have political recognition in order to wield the ethnic and cultural identity. There is not one way of gaining membership into this identity according to federal or tribal laws; each tribe often has its own set of criteria, of which blood quantum may be just one aspect. Whether one can gain tribal membership based on cultural knowledge or family ties depends on the individual tribe's criteria. The United States then grants individual American Indians special rights solely based on their tribal membership.⁷⁵

⁷³ Bureau of Indian Affairs. (n.d.) *Frequently Asked Questions*. Retrieved from <https://www.bia.gov/frequently-asked-questions>

⁷⁴ *Morton v. Mancari*, 417 US 535 (1974)

⁷⁵ Bureau of Indian Affairs. (n.d.) *Frequently Asked Questions*. Retrieved from <https://www.bia.gov/frequently-asked-questions>

The political identity is especially persuasive for American judges. There have been several cases in which judges use the special status of American Indians to support their partial treatment, especially regarding the right to illicit substance use. Recall the case of *McBride v. Shawnee County* (1999), where the US District Court for Kansas denied Rastafarians use of marijuana for religious purposes, while upholding the American Indian peyote exemption. The court acknowledged the special trust relationship between Indian tribes and the government allowed for partial treatment.⁷⁶ Federal judges rely on the special political status of American Indians to uphold the peyote exemption and prohibit similar exceptions for other religious groups.

The structure of American law and politics in the global nation-state system ensures the priority of political status. People do not have rights unless a political authority grants them. Take the example of refugees and stateless persons. Without a political body of belonging, these people have no rights in the countries to which they immigrate. Governments across the globe prioritize citizenship and political rights over any inherent human qualities. People viewed rights throughout history as intrinsically tied to territory and citizenship. Early democratic revolutions, such as the ones that took place in the United States and France, fought for political rights, but only applied them to a select group of people within their territory.⁷⁷ Though a more universal understanding of human rights has developed since the late twentieth century, citizenship rights continue to control state activities. The American government follows these tendencies; it emphasizes political identity, especially in a legal context. As a secular government, focusing on cultural or religious identities can cause disharmony and civil disagreements. In order to

⁷⁶ *McBride v. Shawnee County*, 71 F. Supp. 2d 1098 (1999)

⁷⁷ Moyn, S. (2010). *The Last Utopia: Human Rights in History*. Cambridge, MA: The Belknap Press of Harvard University Press. 12-13.

preserve diversity, prioritizing secular, political identities becomes essential. The political nature of American Indian tribes grants the possibility for special treatment despite the appearance of cultural or ethnic favoritism.

At this time, one needs a political identity in order to succeed in the legal context of a modern nation-state like the United States. There are important differences to how religious, cultural, and political identities function in the American legal context. Religious, cultural, and ethnic identities can bring about claims of discrimination and require careful treatment. In a secular state that tries to eliminate discrimination, legislating based on these types of identity causes problems. On the other hand, people understand political identities as secular; they have greater resilience to withstand claims of discrimination. Membership within a religious or political group both play key roles in supporting legal arguments. Religious organizations have greater authority in the American legal context than cultural identity, especially once the US government recognizes a religious group. However, political identity has the most legitimacy in a legal discourse. Within the current legal framework political identity reigns supreme, even in matters where human equality and cultural protection appear to be important factors.

Conclusion

The importance of political identity and the understanding of religious freedom within the American legal discourse ensure the ethnically restrictive peyote exemption remains standing in US law. American Indians hold a special status in the United States through the trust relationship between the federal government and federally recognized Indian tribes. This status grants them semi-autonomy and a unique political identity. This protection extends to members of the Native American Church, a religious organization that adheres to peyotism. Their peyotist

faith stems from a long history of indigenous practice and strengthens American Indians' cultural identity. Once the NAC incorporated in 1918, they also gained identification as a religious organization. These three identities, political, cultural, and religious, are all factors in the peyote legal debate.

The legal framework of religious freedom in America is inescapable in the peyote legal debate. American legal authorities comprehend religion according to a protestant understanding, in which religion is a separate, identifiable belief system and practice is negotiable. The NAC incorporated with the title "church" to ensure recognition and protection. Religious beliefs and practices must fit within this protestant understanding in order to gain legal rights. This is also evident in the failure of cases seeking legal protection for sacred land because the American Indian conception of sacred land does not match the American legal idea of property ownership. Moreover, religious freedom claims only apply to beliefs; the government may regulate religious practices to advance reasonable state interests. The unresolved tension between the compelling interest test put forth by *Sherbert* and RFRA and the narrowed understanding proclaimed in *Smith* complicates the legal understanding and application of religious freedom. For the time being, the ethnically restrictive peyote exemption remains standing because it adheres to the American legal discourse, though the debate continues if this should remain so.

From this vein of clarity, Winnifred Sullivan's argument in *The Impossibility of Religious Freedom* holds merit. Because of the intricate ties between religious freedom and law, legal institutions must rely on underlying conceptions of religion and religious activities to use as working definitions. These definitions undoubtedly fail to encompass the broadness of religious life in America. Religious freedom prohibits equal protections because it relies on an unequal historical legal discourse, in which legal authorities prioritize protestant-looking faiths. The

peyote debate shows another angle to this argument, which is that constructed political identities can also play a role in the granting of religious freedom. There is a tension between these two factors. The protestant understanding of religion emphasizes belief, implying a religion should be accessible to all. It also highlights the individuality of religious faith. The political identity, though, restricts accessibility to members within a specific group. Though these two factors are most persuasive in the peyote debate, they do not always work together. They each offer compelling arguments in their own way to sustain the peyote exemption in the American legal context.

Within this context, legal authority determines what and how much external factors can contribute to an argument, ensuring the predetermined legal discourse remains paramount. As a legal construct, religious freedom will always rely on conceptions and labels that have power within the legal discourse. For American Indians and the use of peyote, those are a semi-autonomous political identity and a protestant understanding of religion. The peyote legal debate demonstrates the larger connection between US law and religious freedom in the ways the Native American Church was able to satisfy the American legal discourse. It illustrates one of the limitations inherent in religious freedom and how it continues to impact cases seeking free exercise protections.

Appendix 1 - Timeline

~2000 BCE: Early images of peyote rituals in what is today southern Texas and northern Mexico

1879: *Reynolds v. United States*

1899: Oklahoma is first territory to ban peyote

1915: Pure Food and Drug Act bans importation of peyote

US Postal Service bans shipment of peyote

1918: Incorporation of the Native American Church of Oklahoma

1919: Eighteenth Amendment

1955: Founding of the Native American Church of North America

1963: *Sherbert v. Verner*

1970: Controlled Substances Act

1973: *Lemon v. Kurtzman*

1974: *Morton v. Mancari*

1988: *Lyng v. Northwest Indian Cemetery Protective Association*

1990: *Oregon v. Smith*

1991: *United States v. Boyll*

Peyote Way Church of God v. Richard Thornburgh

1993: Religious Freedom and Restoration Act

1994: American Indian Religious Freedom Act Amendment

1997: *City of Boerne v. Flores*

1999: *McBride v. Shawnee County*

2006: *Gonzales v. O Centro Espirita Benificente Uniao Do Vegetal*

2010: Native American Church, 21 C.F.R. § 1307.31 (DEA Regulation)

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