AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 15:1 (1991) 79-91

COMMENTARY

The Native American Church and the New Court: The *Smith* Case and Indian Religious Freedoms

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For several decades the peyotists within the Native American Church of North America have won numerous legal battles that have helped to ensure the continued existence of their religion.[1] Beginning in 1960 with the landmark decision *Arizona v. Attakai*, a consistent set of state court decisions have supported the church's claim that the use of peyote is a reasonable and legitimate aspect of religion within the church.[2] In 1964, for example, in *People v. Woody, et al.*, the California Supreme Court overturned the drug conviction of church members, saying the state had no "compelling interest" to justify a ban on ceremonial peyote use.[3] The *Woody* court concluded that a ban would remove the "theological heart of Peyotism" and that the government's need to fight drug abuse could not be used to deny religious freedom automatically to members of the Native American Church.[4]

Since the *Woody* decision, the United States Congress has taken legislative steps to clarify and enhance Indian religious freedoms by the passage of the Indian Civil Rights Act of 1968 and the

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American Indian Religious Freedom Act of 1978. Although more broadly conceived than the peyote use issue, these federal acts nevertheless give further evidence that congressional intent, along with the states' courts, offer broad legal and political support for First Amendment protection of Native American religions. More recently, explicit reference to the Indians' right to the sacramental use of peyote can be found in United States House of Representatives testimony to the effect that

> although acts of Congress prohibit the use of peyote as a hallucinogen, it is established federal [policy] that peyote is constitutionally protected when used by a bona fide religion as a sacrament.[5]

Currently, thirteen states have enacted legislative exemptions to afford church members legal access to peyote for religious purposes. An additional eleven states, including California, Idaho, and Oklahoma, have provided exemptions vis-à-vis general court decisions. Many states have simply used the construction of the *Woody* decision to set the pattern for state law enforcement concerning church members. In general, the states have chosen to "resolve" the Indian peyote issue by a reliance on their own courts and without the need for specific federal intrusion.

However, after nearly thirty years of affirmative legal protection for the Indians' sacramental use of peyote, the current United States Supreme Court chose to intrude into the Native American Church and challenge the legality of its religious practices in a deliberate effort to reverse those religious freedoms thought to be confirmed by previous state court rulings and congressional legislative intent.

On 17 April 1990, by a six-to-three decision in *Employment Division, Department of Human Resources of Oregon v. Smith, et al.* (hereafter *Smith*), the United States Supreme Court, Justice Scalia writing the majority opinion, set forth new judicial language that raises serious doubts about this Court's willingness to protect the religious freedoms of American Indians and other minorities.[6]

In this commentary, the authors analyze the *Smith* decision in light of (1) its implications for the religious freedoms of American Indians and, by implication, the religious freedoms of other ethnic or religious minorities, and (2) how this ruling suggests a Court-inspired pattern of conservative judicial activism that

threatens the federal character of the United States Constitution, particularly First Amendment protection.

The historical particulars surrounding the *Smith* case are important and therefore need brief review. Alfred Smith and Galen Black, both Indians and members of the Native American Church, were fired from a private drug rehabilitation organization in Oregon after it was learned they had ingested peyote at a ceremony of their church. When they applied for unemployment compensation through the Employment Division of the state of Oregon they were deemed "ineligible . . . because they had been discharged for work-related 'misconduct.' "[7]

An added legal element in the case is the fact that Oregon is a Public Law 280 state, meaning that under the 1953 P.L. 280, Oregon assumed jurisdiction over tribal lands within its external boundaries. Oregon law prohibits ". . . the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner."[8] But does this law apply to the sacramental use of peyote by Indians in the practice of their religion? And on what legal grounds does the Oregon law challenge the First Amendment rights presumed to protect the sacramental use of peyote by Native American Church members?

As constructed, the *Smith* decision not only has implications for Indian and minority religious freedoms, but also raises a broad range of issues related to tribe-state jurisdiction, and to what extent the United States Constitution can extend First Amendment protection to peyotists arrested under competing state laws.[9]

The United States Supreme Court's involvement with the *Smith* case prior to its 17 April 1990 decision is instructive. The case had been appealed to the Supreme Court on prior occasions, only to be remanded back to the state for a determination on whether peyotism violated state law. Obviously, the Supreme Court was compelling the Oregon state courts to rule on the peyote issue, despite the state courts' apparent reluctance to do so.[10] But why did the Supreme Court provoke this legal confrontation?

Apparently, the Supreme Court sought to use the Oregon courts to refine the case so that it would have an opportunity to rule on peyotism where state law "makes no exception for the 'sacramental use' of the drug."[11] Here was a Court-crafted opportunity to rule on the Free Exercise Clause of the First Amendment and its applicability to the power of state law to regulate

the sacramental use of peyote by Indians. Equally important, the now refined *Smith* case would allow the Supreme Court to rule on less obvious "federalist" issues regarding the extent of state power to preclude federal intent, even those involving fundamental federal constitutional rights.

The case that finally arrived in the United States Supreme Court was a successfully fashioned blend of Indians, drugs, and religious rituals, wrapped in state, federal, and constitutional issues that would give the *Smith* case an importance far beyond that intended by the initial litigants. More than Indians and peyote are at issue here.

According to Justice Scalia in *Smith*, the Free Exercise Clause of the First Amendment permits any state to ban the sacramental use of peyote. In the words of the Court, "If Oregon does prohibit the sacramental use of peyote, and if the prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon . . . [and] . . . the State is free to withhold . . . compensation . . . for engaging in misconduct [sacramental use of peyote] despite its religious motivation."[12]

With these words the Supreme Court retreated substantially from its previously active toleration of religious diversity in our country. Justice Scalia, with concurrence from Justices Rehnquist, White, Stevens, Kennedy, and O'Connor, also dramatically enlarged the scope of "compelling state interest."[13] Justice Scalia contends that fighting the current "war on drugs" is a sufficiently compelling state and federal interest to ban use of peyote, regardless of how its use was previously viewed. The drug issue can lead to constitutional difficulties. Douglas Laycock, a constitutional scholar, states, "If the Supreme Court focuses too narrowly on drugs in this case and misses the larger issue of religious ritual, it could create a devastating precedent for religious freedom."[14]

The threat posed by the Scalia decision is so alarming that even conservative social critic Richard John Neuhaus, in an article for the *National Review*, writes that the *Smith* decision ". . . lays the theoretical groundwork for a massive expansion of state [governmental] power, and not only in the sphere of religion."[15] This new power to curb religion could effectively overturn decades of federal and state supported agreement that the sacramental use of peyote by American Indians is protected by the First Amendment.

The Scalia majority decision provoked unusually strong responses from the other justices, particularly Justices Blackmun, Brennan, and Marshall, with only mild, even token opposition from Justice O'Connor, who eventually sided with the majority.[16] What the Scalia majority means is that any state, like Oregon, can regulate the Native American Church's use of peyote in an absolute fashion. It can dismiss employees like Mr. Smith and deny them access to unemployment benefits, should they use peyote in the practice of their religion. Here state law overpowers previous federal policies, congressional intent, and presumed federal constitutional guarantees of First Amendment protection.

As Scalia and his judicial followers see it, peyotism is a state prerogative. No federal protection exists for peyotism, not even the United States Constitution. In Justice Scalia's opinion, minority religious rights now belong to the political processes of the states. To reiterate, "If Oregon does prohibit the religious use of peyote . . . there is no federal right to engage in that conduct in Oregon."[17] Justice Scalia dismisses the important point that the Constitution was created, in part, to protect minority rights from majority domination. As noted lawyer Gordon Gamm states,

> The state legislatures are limited by the Bill of Rights from infringing minority rights that are protected from majoritarian legislation. Religious minorities' only source of protection from the politically powerful or majority religions is the Supreme Court. The Court's courage in recognizing minority rights may often be politically unpopular because it does not reflect the dominant local political will. However, it is the nature of our constitutional democracy that there are limits to the kinds of infringement of individual freedom that can be imposed by the popular will.[18]

However, Justice Scalia goes on to say that we must use the doctrine of "compelling state interest" to protect ourselves from religious anarchy and efforts by some to use religious freedom as a shallow ploy to defend drug use.[19] But as an editorial in the Eugene, Oregon paper, *The Register Guardian*, of 29 March 1989 suggests, Scalia's own argument might prove to be the shallow ploy:

> It is not difficult to find clear difference between the Native American Church and would-be religions trying to slide under the First Amendment umbrella. Nor is it difficult to distinguish between special, controlled use of peyote by members of this church and transparently bogus claims of sacramental status for marijuana, cocaine, etc.[20]

Some of the implications of the Scalia decision are obvious—the probable creation of a jurisdictional checkerboard of states that either deny or allow Indian sacramental use of peyote. Since much of the peyote used by Indians is grown in south Texas, the journey to home Indian reservations will become a zig-zag across "unfriendly" states in an effort to avoid prosecution and persecution. In states like Colorado or Wyoming, where statutory exemptions already exist, the Scalia ruling will have no immediate consequence for the Native American Church. However, the future is unpredictable. If the current Supreme Court continues to expand state powers, those with "tolerant" laws could rescind existing exemptions. Other states could follow the Oregon lead and repress peyotists with the full blessing of the presumed protector of the Bill of Rights and the federal Constitution, the United States Supreme Court.

After *Smith*, all Indian religious practices, but particularly those of the Native American Church, can no longer expect federal constitutional protection from religious persecution by the individual states. For United States citizens who are members of the Native American Church, the Bill of Rights is dead. What religious rights this minority will have in the future is a disturbing legal uncertainty that only non-Indian majorities in state legislatures can determine. The Native American Church must wait to see what states, if any, will continue to provide a legal haven for its members' religious use of peyote. Unfortunately, if past state behavior towards Indian religious freedoms is any measure, the *Smith* decision has pushed today's peyotists back into a hostile world of religious and racial intolerance of the kind that once threatened the very survival of the Indian and, not surprisingly, provided motivation for the spread of peyotism.

As was stated in a previous publication by one of this article's authors,

> White America has always had difficulty understanding and accepting Indian religious beliefs and practices,

> particularly the spiritual use of peyote. Historically, traditional Christianity viewed peyote use as a superstitious act contrary to accepted means of worshipping God. Therefore, the social and legal repression of peyote must be understood at least in part as an effort by white America to force cultural assimilation and mainstream Christianity on Indians.[21]
>
> During the 1800s the Office of Indian Affairs was dominated by zealous Christian missionaries who dogmatically wished to rid all Indian lands of primitive religions and paganism. Peyote use quickly became the target of religious persecution by Christians because it was viewed as unenlightened superstitious, sinful behavior.[22]

While there have been several recent attempts by progressive Christian churches to apologize formally for previous efforts to destroy traditional Native American spiritual practices, not all Americans are so forgiving.[23] Scott Kerr, a current writer on Indian treaty rights, has identified the beginnings of a merger between various anti-Indian groups, which favor the abolition of all Indian treaties, and white supremicist groups, which promote Aryan notions of Christianity.[24] The combined efforts of such groups could foster a repeat of the historical repression of Indian religious freedoms and those of other minorities. Unfortunately, Justice Scalia's majority decision in the *Smith* case may give legal encouragement to this process. Legal repression is only a majority vote away in any state legislature.

Similarly, what is happening to the Native American Church opens the possibility that state legislatures may move to limit the religious practices of other churches and be upheld by the United States Supreme Court, even when such state laws revoke human rights now protected and accepted by state and even federal laws and policies. That is the broader implication of *Smith*.

Aware that such actions by the states and others have, from time to time, threatened the freedoms guaranteed by our Constitution, the late founding father of Indian law, Felix Cohen, once warned that

> the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh

> air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.[25]

For Indians and other minorities, the *Smith* decision is a poisonous wind that threatens all constitutionally guaranteed religious freedoms. One has to wonder what Justice Scalia might say if the states began to ban the sacramental use of wine from Christian worship on the grounds that the war on drugs invoked a "compelling state interest."

It should be noted that no one has ever died of peyote abuse, yet millions continue to die from the abusive use of wine and other Euro-American spirits. Apparently, Scalia and his brethren see the need to remove the mythical scourge of peyote but selectively ignore the real scourge of alcohol. The Scalia majority sees no difference in the sacramental use of drugs such as wine or peyote and their abusive use in non-religious contexts. One might conclude that the Court's orchestrated attack on peyotism has more to do with its use by a vulnerable racial and ethnic minority than its unsubstantiated association with the tragic "drug culture" of a powerful white majority.

The unavoidable hypocrisy that permeates the *Smith* case and Scalia's majority decision is highlighted by the fact that both the state of Oregon and the federal government continue to profit handsomely from the sale of alcohol, a drug that kills tens of thousands of citizens every year, including Indians. Yet the Court still feels compelled to attack the Indians' use of the non-habituate peyote, a major source of strength in efforts to end Indian alcoholism. Given the direction of the Scalia opinion, one has to wonder if the drug war issue is real or simply a facile theme upon which to hang other Court intolerances for minority rights.

The *Smith* decision suggests that with the retirement of Justice Brennan and the recent appointment of Justice Souter, the Court no longer is a legal haven for this nation's minorities and their always vulnerable civil rights. What appears likely is that the Court will weaken its resolve towards (1) human rights, (2) the separation of church and state, and (3) further affirmation of the Bill of Rights for all Americans, not just the privileged or the majority.

An almost ignored aspect of the case is the potential cost to all parties as the *Smith* decision is diffused into state law. Any repe-

tition of previous efforts to end peyotism will be costly to both the Native American Church and the states involved. The best-case scenario would have states without legislatively enacted exemptions doing nothing. Clearly, legal experts in organizations like the Native American Rights Fund in Boulder, Colorado hope the Supreme Court's negative impact on minority religions will be diluted by states' not rescinding decades of tolerance for the sacramental use of peyote by native people.[26]

As currently worded, the *Smith* decision has little legal impact on the use of peyote on Indian reservations. Such tribal lands are basically immune from most state criminal codes, except in P.L. 280 states like Oregon, where the ban now extends onto reservations.[27] It is hoped that immunity from state prosecution in non-P.L. 280 states will not change. Where the *Smith* decision does pose serious practical problems is in the transportation of peyote across state boundaries, particularly to Indian reservations within states that have banned its possession or use. If all the states choose to follow Oregon, then transporting peyote to any Indian reservation will become a "bootleg" operation, pitting state officials against resourceful Indian peyotists.

Despite limited retrocession of state jurisdiction back to tribes under the revised P.L. 280, some state courts continue to maintain the legality of arrest when Native American Church members are "caught" passing over state lands and highways to transport peyote from one reservation to another.[28] In some states, church members may eventually be released without prosecution, but they face the chilling effects of detention until their claims of church membership are verified. Such detention procedures are time-consuming and costly to the Indians and states involved and can create opportunities for a wide range of human rights abuses.

Finally, in non-P.L. 280 states, the federal tolerance for peyotism on tribal lands is not absolute. Currently, the Federal Drug Enforcement Administration (DEA) policy on peyotism determines law enforcement practices on tribal lands. Some states use DEA guidelines to rule on Native American Church issues. The lack of a clear federal mandate on peyotism has allowed the DEA to assert a kind of jurisdiction over this culturally and legally sensitive subject matter. Consequently, DEA actions on peyotism often reflect whatever the current president's philosophy is with regard to drugs and minority rights. With a philosophical or personnel change in the administration or DEA, changes in attitudes, policies, and practices towards peyotism are likely to follow.

Unfortunately, the *Smith* decision has moved Indian peyotism into a highly sensitive political arena over which its practitioners have little or no control. What is particularly frustrating about the *Smith* decision is that although the federal government (if we set aside a few shrill efforts by overly zealous congressmen, senators or Bureau of Indian Affairs officials) has a reasonably good thirty-year record on the Indians' sacramental use of peyote,[29] the Scalia majority has changed everything. Neither the states nor the federal government is sure what lies ahead for peyotism.

One thing is certain: To preserve the Native American Church and the First Amendment rights of Indians, Congress will need to act decisively, and soon. As various supporters of the Native American Church have suggested, it behooves the church to get Congress to enact legislation counteracting the implications of the *Smith* decision. In fact, such a move has surfaced recently in Congress.

On 27 September 1990, the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary heard initial testimony from supporters of House Bill 5377 (HR 5377), the "Religious Freedom Restoration Act." This bill has strong bipartisan support from various liberal and conservative political groups. For example, Congressman William E. Dannemeyer, Republican from California, has stated that "the embarrassment known as *Employment Division v. Smith* will undoubtedly go down in legal history as a case study in intellectual rigidity. . . . We are here today to overturn the Scalia doctrine . . . and return the law of the land to reason."[30] Congressman Stephen J. Solarz, Democrat from New York, echoed the words of his conservative California colleague by stating, "This legislation restores the religious rights of all Native Americans as they were prior to *Smith* without tampering with the Bill of Rights. . . . It is a narrowly crafted, legislative response to the radical work of an activist Supreme Court."

Besides political testimony, various religious leaders stepped forward to support HR 5377. Robert P. Dugan, director of the National Association of Evangelicals and a religious conservative, offered the following statement:

> Let us not mince words. In *Employment Division v. Smith* five Justices of the Supreme Court eviscerated the Free Exercise Clause of the First Amendment. In the post-*Smith* world, government no longer needs to demonstrate a compelling governmental interest to

> justify an erosion of religious freedom. Now all that is needed to restrict religious exercise is a neutral law of general applicability. . . . We are dismayed. So are many others. Indeed, the religious liberty coalition supporting H.R. 5377 spans the political/religious spectrum. . . . we were stunned when the Court used this seemingly innocuous case to announce a complete overhaul of established First Amendment law.[31]

Numerous other people spoke in support of the bill, and none spoke in opposition. The general feeling was that Justice Scalia and those who followed him have mobilized an activisim that threatens the United States Supreme Court's historic role as federal protector of constitutional guarantees from state usurpation.

Following the House lead, legislation was introduced in the Senate by Senators Biden and Hatch to effectively match the House efforts. It is hoped that next year Congress will pass a statute negating the Scalia majority opinion. Few Supreme Court decisions in recent years have received such universal condemnation.

In conclusion, Native American Church members (and those of other religious organizations) must actively protect themselves from the *Smith* decision. The church must confront both the state and federal issues raised by *Smith*, if it wants to avoid the loss of decades of hard-earned progress in religious freedom. Simultaneously, efforts must be made to strengthen tribal sovereignty over Indian Country (especially in P.L. 280 states), if the tribes and states are to avoid the kind of jurisdictional chaos promoted by this activist Court. If a clear and unambiguous legal and political response is not found to the *Smith* decision, only one thing is certain: State and national efforts to suppress Indian peyotism will become an embarrassing and costly effort. The suppression of human freedoms always is.

NOTES

1. For a thorough review of the legal battles fought by the Native American Church in recent decades, see Paul E. Lawson and Jennifer Scholes, "Jurisprudence, Peyote, and the Native American Church," *American Indian Culture and Research Journal* 10:1 (1986): 13–27.

2. *Arizona v. Attakai*, Criminal Number 4098, Coconino County, Arizona, July 1960.

3. *People v. Woody, et al.*, 61 Cal. 2d 716:40 Cal. Rptr. 69; 394 P. 2d 813, 1964.

4. David H. Getches, et al., *Federal Indian Law: Cases and Materials* (St. Paul: West Publishing Co., 1978): 502.

5. H.R.Rep. No. 1308, 95th Cong., 2d sess. 2 (1978) and 21 C.F.R. 1307.31.

6. See Justice Scalia opinion in *Employment Division v. Smith*, 494 U.S., 108 L.Ed. 2d 876, 110 S.Ct. (1990).

7. See *Smith* decision, 2.

8. See *Smith* decision, 1.

9. The legal history of the case goes beyond the intent of this commentary. Suffice it to say here that the Oregon Appeals Court ruled on First Amendment grounds in favor of the petitioners. The Oregon Supreme Court affirmed. However, the "U.S. Supreme Court vacated the judgement and remanded for determination whether sacramental peyote use is proscribed by the State's controlled substance law. On remand, the State Supreme Court held that sacramental peyote use violated, and was not excepted from the state-law prohibition, but concluded that the prohibition was invalid under the Free Exercise Clause." (See Smith 301 Ore. 209, 217–19, 721 P. 2d 445, 449–50 [1986]. See also Smith, 485 U.S. 660, 670 [1988] [Smith I].)

10. See Smith I (*Employment Division, Department of Human Resources of Oregon v. Smith*, 485 U.S. 660, 670, 673 [1988]).

11. See Scalia decision in *Smith*, 3.

12. Ibid., 5.

13. The doctrine of compelling state interest simply means the state can ban activities, speech, etc., whenever the good of the state and general population supersedes the rights of the individual or group to conduct such behaviors. An example would be the prohibition against polygamy as practiced by certain members of the Mormon religion. Compelling state interest allows the government to say you can believe what you wish, but you cannot automatically act on those beliefs, if there is a "compelling state interest" not to do so.

14. Douglas Laycock, "Peyote, Wine and the First Amendment," *The Christian Century* 106 (July–December 1989): 876.

15. John Richard Neuhaus, "Church, State, and Peyote," *National Review* (11 June 1990): 40–44.

16. In the dissenting opinion written by Justice Blackmun, with concurrence from Justices Brennan and Marshall, the following points were strongly argued: (1) The *Smith* decision overturns previously settled law concerning the Religious Clauses of our Constitution (p. 2); (2) the majority decision implies that free exercise of religion is a luxury that well-ordered societies cannot afford (p. 2); (3) the decision allows governments to rely on mere speculations about potential harms and then use such speculations to ban religious freedoms (p. 25), and, most directly; (4) "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" (p. 15). See Justice Blackmun opinion in *Smith*.

17. See Scalia decision, 4.

18. Gordon Gamm, "Abortion, Catholicism, and the Constitution," *The Humanist*, April 1990, 25.

19. See Scalia decision, 15.

20. See the editorial page of *The Register Guardian* (29 March 1989), Eugene, Oregon.

21. See Paul Lawson and Jennifer Scholes, "Jurisprudence, Peyote," 13.
22. Ibid., 14.
23. For examples of such public declarations by current churches illustrating their formal apology to native people, see the *Native American Rights Fund Review* (Winter 1988):3.
24. Scott Kerr, "The New Indian Wars: The Trail of Broken Treaties Grows Longer," *The Progressive*, April 1990, 20.
25. See Getches (1979), xxv.
26. The authors would like to thank various people at the Native American Rights Fund for their help and information. Special thanks to Steven Moore and Robert Peregoy for providing important documents. This paper expresses our conclusions, which are not necessarily theirs.
27. Public Law 280 (see 18 U.S.C.A. & 1162, 1360, 1321, 1326, 1323) was passed by Congress in 1953 and allowed several states to assume criminal and/or civil jurisdiction over Indian reservations within the external boundaries of the state. In the law as originally passed, the affected tribes were given no voice in the legislation or its implementation. In 1968, in the Indian Civil Rights Act, Congress revised P.L. 280 and made it voluntary.
28. *Golden Eagle v. Deputy Sheriff Johnson*, 493 F. 2d 1179, 1974.
29. See C. P. Morris, "The Spirit and the Law: Indian Policy and Indian Religious Freedom," in *The Concept of Sacred Materials and Their Place in the World*, ed. George Horse Capture (Cody, WY: Plains Indian Museum, 1989), 4–19.
30. The included quotes by Dannemeyer, Solarz, and Dugan all come from this 27 September 1990 testimony.
31. Ibid.