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A Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use

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I. INTRODUCTION

In enacting the American Indian Religious Freedom Amendments Act of 1991[1] ("AIRFAA" or "the Act"), Congress sought to preserve the sacramental use of peyote by traditional Native American religious practitioners by exempting members of federally recognized Indian tribes from state and federal provisions prohibiting peyote possession and use.[2] The United States Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*[3] had put the question of whether Native Americans may use peyote in religious services in a state of uncertainty.[4] At the time *Smith* was decided, inconsistent state laws provided weak protection for practitioners of the Native American Church,[5] and 21 C.F.R. §1307.31[6] ("§1307.31" or "the regulation"), a

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1. *See* 42 U.S.C.A. § 1996a (1994).

2. *See id.* The following is selected text of the Act:

(a) The Congress finds and declares that –

(1) for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures. . . .

(5)the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment. . . .

(b) (1) Notwithstanding any other provision of law, 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. . . .

(c) For purposes of this section—

the term "Indian" means a member of an Indian tribe;

the term "Indian tribe" means any tribe . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

3. 494 U.S. 872 (1990).

4. The *Smith* decision allowed states to prohibit peyote use by Native Americans without running afoul of the U.S. Constitution. At the time, states had widely differing laws and exceptions regarding peyote use. Problems relating to this lack of uniformity will be discussed later in this Note.

5. *See* H.R. REP. NO. 103-675 at 4-5 (1994). Important in any discussion of religious peyote use is the distinction between branches of the Native American Church. The Native American Church of North America and its branches form a large, national organization with specific membership requirements. *See generally* OMER C. STEWART, PEYOTE RELIGION: A HISTORY, 239-64 (University of Oklahoma Press 1987). For purposes of this Note, the "Native American Church of North

Drug Enforcement Administration ("DEA") regulation purporting to address some of these concerns, had received conflicting treatment by courts.[7] The regulation provided protection from prosecution for members of the Native American Church.[8] While the Drug Enforcement Administration had interpreted the language of §1307.31 to be limited to members of the Native American descent within the Native American Church ("NAC"), at least one court had refused to follow that interpretation and held the regulation applicable to all members of Native American Church.[9] Further, §1307.31 did not preempt states from refusing protection to Native American practitioners of peyote religion.

AIRFAA was designed to preserve Native Americans' right to the religious use of peyote by providing a nationwide exemption from prosecution.[10] Arguably, the Act is a successful solution to the problem existing before and exacerbated by *Smith*. However, the same constitutional challenges invoked by non-Native American members of the Native American Church under §1307.31 have been lodged against the exemption from prosecution provided by AIRFAA.[11] Petitioners have generally cited both AIRFAA and §1307.31 to invoke protection of their peyote use.[12] Typical challenges of those claims center around §1307.31's requirement that those relying on the exemption be of a particular religion and race.[13] Petitioners usually argue that the regulation violates the Free

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America" will include the groups that practice traditional peyote religion and have a Native American ethnic descent requirement. Many other branches of the Native American Church have fewer membership requirements and often no connection with any other Native American Churches; these will be referred to in this Note as the "Native American Church" or "NAC." The difference between the various groups using the Native American Church moniker has confused the jurisprudence in this area of the law. *See id.* at 7-9.

6. 21 C.F.R. § 1307.31 (2001).

7. *See* United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (holding that extending regulatory exemption to only Native American members of the Native American Church would violate the Constitution); Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979) (holding that Congress intended the regulatory exemption to apply to all religions using peyote in "bona fide" religious ceremonies); *but see* United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984) (accepting government's contention that regulatory exemption should apply only to members of the Native American Church who are also Native Americans).

8. The following is selected text of 21 C.F.R. § 1307.31: "The listing of peyote as a controlled substance in Schedule I does not apply to the non-drug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration." *Id.*

9. *See Boyll*, 774 F. Supp. at 1333.

10. *See* 42 U.S.C.A. § 1996a(b)(1) (1994) (stating that peyote use by "Indian[s] for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion . . . shall not be prohibited by . . . any State").

11. *See, e.g.*, State v. Mooney, No. 001404536 (Utah Dist. Ct. filed 2001), *cert. granted*, No. 20010787 (Utah Sup. Ct.) (prosecution of non-Native American operator of "Native American Church" for possession of a controlled substance and other related crimes).

12. *See Boyll*, 774 F. Supp. at 1333.

13. *See id.*; *see also Mooney*, No. 001404536 (Utah Dist. Ct. filed 2001).

Exercise Clause, because it unconstitutionally defines religious membership, that it violates the Establishment Clause, because it establishes a preferred religion, and that it violates the Equal Protection Clause of the Fourteenth Amendment. [14] Arguably, continuing use of these arguments in post-AIRFAA cases suggests that AIRFAA has not been successful in addressing the constitutional concerns raised by §1307.31. Perhaps one reason for this apparent failure is that §1307.31 really adds nothing of substance to the AIRFAA exemption, yet it continues in effect with language that raises serious concerns about the regulation's constitutionality.

This Note argues that the continued application of §1307.31 jeopardizes the success of AIRFAA as a narrow but effective exemption. It addresses the constitutionality of §1307.31 and AIRFAA. Part III will examine Equal Protection and Establishment Clause issues, because they represent the most persuasive arguments, though free exercise arguments will also be considered. Before embarking on those questions, Part II will give a history of peyote use by Native Americans in religious ceremonies. This history gives context to the religious services referred to in AIRFAA. It will also outline the religious structures that support these ceremonies in order to understand the problems surrounding §1307.31. Having detailed problems with the coexistence of AIRFAA and §1307.31, this Note will propose elimination of §1307.31. The removal of §1307.31 from the current exemption scheme will address many of the concerns raised by non-Native American religious peyote users and more clearly express Congressional intent without significantly limiting the reach of AIRFAA. This allows for peyote use by those whom Congress wishes to protect while preventing widespread abuse of peyote—a concern of many who seek limits on peyote use. Part IV will give a brief conclusion.

II. BACKGROUND

A. Traditional Use of Peyote by Native Americans

Peyote is a "small, spineless cactus having psychedelic properties."[15] Most scholars believe Native Americans have used peyote in the current territory of the United States since the late eighteenth or early nineteenth

14. *See, e.g.*, Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991); Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193 (5th Cir. 1984); *Boyll*, 774 F. Supp. at 1333; Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342 (N.D. Tex. 1988); United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984); *Mooney*, No. 001404536 (Utah Dist. Ct. filed 2001).

15. STEWART, *supra* note 5, at 3.

century.[16] To the Native American religions that use it, peyote is treated somewhat like deity.[17] The typical mode of ingesting peyote is by eating the "buttons" or dried tops of the cactus.[18] The active ingredient in peyote, mescaline, produces a sort of "toxic delirium" that alters the senses and may cause "dissociation of the intellectual part of the personality from the rest of the mind."[19] This delirium may last up to ten hours.[20]

Peyote is typically ingested in an all-night ceremony involving prayer, singing, ingesting peyote, and contemplation.[21] Religious officials preside over the ceremony, usually held in a tipi.[22] These officials each have certain functions to perform, and members often aspire to work through the ranks to be qualified for each position.[23] Participants are usually members of the Native American Church, but guests are often welcomed.[24]

The ceremony usually begins just after dark. The participants then usually pray, ingest the peyote, sing, and contemplate until midnight.[25] There is then a "midnight ceremony" during which more peyote may be ingested.[26] This is usually followed at dawn by more singing, prayer, and a curing ceremony.[27] Breakfast may follow, after which the formal ceremony concludes.[28]

The lengthy nature of these ceremonies is likely one reason for the exemption from controlled substances laws. Those abusing the substance are not likely to do so in such a long and formal ceremony.[29] The peyote

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16. EDWARD F. ANDERSON, PEYOTE: THE DIVINE CACTUS, 25, 31 (University of Arizona Press 1996) (1980); J.S. SLOTKIN, THE PEYOTE RELIGION, 28-44; STEWART, *supra* note 5, at 45-67.

17. *See* SLOTKIN, *supra* note 16, at 76-77.

18. *See* ANDERSON, *supra* note 16, at 50-51.

19. *Id.* at 83.

20. *See id.* at 84 (cataloging in detail the many diverse effects of peyote on the user).

21. *Id.* at 49.

22. *See id.* at 49, 52-53.

23. *See id.* at 53.

24. *See id.*

25. *See id.* at 55-57.

26. *See id.* at 57.

27. *See id.* at 57-58.

28. *See id.* at 58.

29. *See* H.R. REP. NO. 103-675, at 15 (1994) (arguing, in a statement by a DEA official, that there have been no problems with peyote abuse by members of the Native American Church). This Note will later discuss this assertion in more detail, but it is worth noting here that the argument against a restrictive exemption for religious ceremonies is not wholly persuasive. Though the ceremony is long and tedious, it is not only used in the ceremony that presents problems for those enforcing drug laws. The possession of peyote is illegal for those not using it in religious ceremonies, and the presence of an exemption for anyone practicing peyote religion overcomes this illegality. Thus, the exemption could be a valuable tool for recreational users as they might periodically attend peyote ceremonies and remain in good standing with the Church while diverting much peyote for other uses. The discovery by law enforcement officers of peyote in the possession of such an individual would not be viewed as criminal though the use of the peyote was not for religious purposes.

ceremony is less a tribal ceremony than it is a religious one. According to one scholar, "the peyote ceremonies . . . are remarkably homogenous among the tribes of the United States and Canada."[30] One scholar says that this homogeneity results from the distinction in modern peyote religion between church and tribe.[31] Thus, while Native Americans are members of certain tribes, their membership in the Native American Church is viewed separately. Tribal distinctions are less important within this religious structure.

B. Native American Religions and the Structure of the Native American Church

One observer has noted that religion cannot be understood in its usual context when discussing Native American religious beliefs.[32] She notes, "in traditional Native American thought, there is nothing that can be labeled nonreligious."[33] This blend of culture and religion represents a characteristic unique to Native American society. Because the Native American society is an integrated culture quite different from American culture, traditional judicial and legislative thinking is arguably not adequately geared toward dealing with the complex issues inherent in such a society. Consequently, when Congress attempts to fill its role as a guardian of Native American culture, it is faced with the unenviable task of doing so without violating its separate and apparently contradictory duties governing religious treatment.[34]

The organization of the predominant peyote religions presents additional problems for Congress. The name "Native American Church" is somewhat misleading, for it implies one organized church. In reality, the "Native American Church" moniker is given to a myriad of loosely affiliated or unaffiliated organizations practicing "peyote religion."[35] There is no single branch of the church, and no organization exists to dictate policies and government of branches of the Native American Church.[36]

This may be seen as a factual problem which can be overcome in certain circumstances. In reality though, it is highly unlikely that law enforcement could ever overcome the exception in a case like this.

30. *Id.* at 49.

31. *See id.*

32. *See* Ann E. Beeson, *Dances With Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1127-29 (1992).

33. *Id.* at 1128.

34. *See* Morton v. Mancari, 417 U.S. 535, 551-53 (1974) (discussing "guardian-ward" status of Congress and Native Americans and Congress duty).

35. United States v. Boyll, 774 F. Supp. 1333, 1336 (D.N.M. 1991) (discussing the structure of the Native American Church).

36. *See id.*

One organization, the Native American Church of North America, has, among its many membership requirements, a mandate that members have at least twenty-five percent Indian descent.[37] As an internal membership requirement, this could obviously be rescinded by the Church upon amendment. The Native American Church of North America is often referred to as the "mother church" and occupies a unique role in peyote religion.[38] Many other churches that call themselves Native American Churches exist and have similar peyote ceremonies.[39] The Native American Church of North America has had rivalries, disagreements, and other problems with these other organizations.[40]

The structure of the Native American Church, or the lack thereof, creates difficulties when outsiders attempt to define its religion. Perhaps Congress considered these difficulties when it opted to limit AIRFAA's reach to members of federally recognized Indian tribes. Although the legislative history seems to suggest that Congress wished to use membership in the Native American Church to qualify the exemption,[41] it chose to use tribal membership as the determinative factor.[42] In contrast, §1307.31 uses church membership as the qualification for its protection. This difference in language creates problems for courts and endangers the effectiveness of AIRFAA, because courts look to both AIRFAA and §1307.31 for guidance in peyote cases.

Perhaps one reason for Congress's decision to use membership in an Indian tribe as the qualifier for the exemption instead of membership in the Native American Church was the conflicting judicial application of the church qualification under §1307.31. The regulatory exemption extends only to those engaged in "bona fide religious ceremonies of the Native American Church."[43] Non-Native Americans have often used the language of this exemption, which mentions no tribal membership, to bolster the argument that they, as members of the Native American Church, were allowed to use peyote.[44] In response, the government has argued that the regulation should be interpreted to require the Native

37. *See* STEWART, *supra* note 5, at 333; *see also* H.R. REP. NO. 103-675, at 15 (1994) (statement by DEA official that members of Native American Church are required to be of Native American descent).

38. *See* STEWART, *supra* note 5, at 239, 334 (discussing the role as mother church and noting the broad scope of the Native American Church of North America).

39. *See id.* at 334 (detailing differences between organizations).

40. *See id.*

41. *See* H.R. REP. NO. 103-675, at 3-4 (1994) (outlining the structure of the Native American Church and recognizing it as the "present-day embodiment" of the traditional peyote religions it sought to protect by passage of AIRFAA).

42. *See* 42 U.S.C.A. § 1996a(c) (1994).

43. 21 C.F.R. § 1307.31 (2001).

44. *See* United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991).

American Church member to have Native American ancestry.[45] In *United States v. Boyll*, a federal district court in New Mexico found the government's interpretation to be against the plain language of the exemption.[46] The court in *Boyll* also found that the government's proposed interpretation would violate the Free Exercise Clause of the U.S. Constitution by imposing a racial exclusion on church membership.[47]

Seeing that the church membership test had been criticized, concerns such as that expressed by the *Boyll* court may have led Congress to reject the Native American Church membership test for an exemption.

C. The Lack of Uniformity in Controlled Substance Laws, the Smith *Decision, and the Impetus for Change*

Before AIRFAA and the *Smith* case, differing degrees of protection were available for practitioners of peyote religion. Through §1307.31, the federal government exempted from federal controlled substances laws those engaged in "bona fide religious ceremonies of the Native American Church."[48] Procedurally, religious use as prescribed by the regulation effected a removal of peyote from the listing of controlled substances in the federal controlled substance provision found in 21 U.S.C.A. §812. Further, a survey of state laws at the time of AIRFAA's passage indicated that twenty-eight states had varying degree of protection for peyote use.[49] Some states provided full protection for Native Americans using peyote religiously while other states allowed religious use as an affirmative defense in a criminal prosecution.[50] In Congress's words, there was a "patchwork of laws" regarding the use of peyote in religious ceremonies.[51] By the time the United States Supreme Court decided *Smith*,[52] the lack of uniform laws had become a visible political problem.

The Court's decision in *Smith* established the constitutionality of states' complete prohibitions on peyote use and possession. Two men, both members of the Native American Church, were discharged from their jobs and subsequently denied unemployment benefits by the State

45. *See id.* at 1335 (citing the government's argument that the regulation should be restricted to those members of the Native American Church having more than twenty-five percent descent from "American Indian stock").

46. *See id.* at 1338-39.

47. *See id.* at 1340.

48. 21 C.F.R. § 1307.3.

49. *See* H.R. REP. NO. 103-675, at 4-5 (1994).

50. *See id.*

51. *See id.*

52. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

because the discharge was caused by their own misconduct.[53] This misconduct consisted of the ingestion of peyote in a religious ceremony in violation of the state's controlled substances laws.[54] They argued that they were entitled to unemployment benefits because the religious use of peyote removed them from the criminal law, and, thus, from any misconduct, based on the free exercise limitations of the First Amendment.[55] The Court rejected these arguments and held that a state could, consistent with the First Amendment, prohibit the use of peyote even by religious practitioners.[56]

From *Smith*, one may glean the broader rule in free exercise cases that a state may prohibit religious practices so long as the law prohibiting such practices is neutral and generally applicable.[57] This rule rejected a proposed test that would have required the government to show a "compelling state interest" to prevent certain conduct and to justify proscriptions on religious conduct.[58] The Court also rejected a test that would have required constitutional accommodation of religious practices only when the practices in question are "central" to that religion.[59] Justice Scalia, writing for the Court, recognized the judiciary's inability to make such determinations and hinted at the inappropriateness of such an inquiry.[60] Further, the majority thought that its "centrality" concerns could not likely be avoided, notwithstanding Justice O'Connor's arguments to the contrary:

> "Constitutionally significant burden" would seem to be "centrality" under another name. In any case, dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered.[61]

One of the majority's key policy arguments in favor of its rule was that the application of the compelling interest test to all free exercise

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53. *See id.* at 874.
54. *See id.*
55. *See id.* at 876-78.
56. *See id.* at 890.
57. *See id.* at 885.
58. *See id.* at 888 (stating that "[a]ny society adopting such a system would be courting anarchy").
59. *See id.* at 886.
60. *See id.* at 886-87.
61. *Id.* at 887, n. 4 (emphasis in original).

cases would jeopardize the government's ability to require religious objectors to meet a variety of civic obligations, including "compulsory military service . . ., payment of taxes . . ., health and safety regulation . . ., drug laws . . ., traffic laws . . ., [and] animal cruelty laws."[62] The court reiterated earlier decisions and justified its ruling by characterizing all alternatives as creating a situation where every man "become[s] a law unto himself."[63] Though the Court likely overstated these concerns,[64] its justification for the "neutral and generally applicable" test is a strong one and cannot be passed over lightly. Indeed, requiring the government to jump the high hurdle of the compelling interest test whenever religious conviction is invoked would be cumbersome.[65]

D. AIRFAA's Reaction to Smith

In the wake of the *Smith* decision, Congress was eager to provide a meaningful measure of protection to Native Americans practicing their traditional religion.[66] In accordance with this, Congress found:

> Absent federal legislation, the question of whether a given state has a compelling interest to prohibit the religious use of peyote by Indians is one that would necessarily be determined by the courts on a State-by-State basis. The Committee recognizes that such determination could require numerous State supreme court decisions and a corresponding number of U.S. Supreme Court opinions—with varying results possible, as well as numerous lower State and Federal court decisions. Such piecemeal judicial resolution to this issue is not likely to produce uniform, just or equal results, and would be unduly burdensome, costly and time consuming. The Committee recognizes that uniform and equal protection of Indians without regard to State or reservation of residence, or tribal affiliation, can only be accomplished by Congress through comprehensive legislation.[67]

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62. *Id.* at 888-89 (internal citations omitted).

63. *Id.* at 885 (citing Reynolds v. United States, 98 U.S. 145, 167 (1879)).

64. What is not apparent is why the Court should impede religious practices so readily. Is a test which is difficult for courts to administer one which is necessarily not constitutionally required? If the constitution requires protection, it requires it even though it may burden the government. The "government" includes the judiciary.

65. It is not within the scope of this Note to analyze whether the *Smith* court got it right when it rejected the compelling interest test. However, it is worth noting that the Court's concerns about the automatic invocation of the compelling interest test upon the mere mention of religious objection are well founded. Further, if the Free Exercise Clause is to be given teeth, it must extend beyond mere belief, and the Constitution might require further inquiry into the seriousness of religious belief.

66. *See* H.R. REP. NO. 103-675, at 5-6 (1994) (discussing *Smith* case, expressing Congress's distaste for the Court's decision, and recognizing that traditional Native American religious practices should be preserved to restore religious freedom in the wake of *Smith*).

67. *Id.* at 8.

Congress chose to remedy the *Smith* ruling and to explicitly recognize an exception tied directly to the political status of the individual.[68] With AIRFAA, Congress established a bright-line rule: if one belonged to a federally recognized Indian tribe, one was exempt from federal controlled substance provisions making peyote use and possession illegal. However, the exemption applied only in religious services and for ceremonial uses.[69]

Under this narrow exception, certain individuals may not qualify even if Native American by descent, because they do not belong to a federally recognized tribe. Likewise, under §1307.31's provisions, there may be members of a federally recognized Indian tribe who are not members of the Native American Church. Consequently, either tribal members or NAC members would not be eligible for protection depending on the invoked exemption. This inconsistency between the Act and §1307.31 must have been apparent to Congress during its consideration of AIRFAA.

Perhaps one reason why Congress chose to apply the Act's exemption to members of tribes recognized by the federal government was the recognition of the political/racial distinction drawn in the United States Supreme Court's landmark case *Morton v. Mancari*, which recognized Congress's broad latitude in matters regarding Native American governance.[70] This conclusion seems consistent with the legislative history of AIRFAA, which expressly considered the *Morton* case in the discussion of the Act's constitutionality.[71] Thus, Congress seemed to have purposely chosen to avoid the problematic language of §1307.31 by giving a different scope to the AIRFAA exemption.

III. ANALYSIS

A. Constitutional Challenges to the Current Exemptions Scheme

As noted above, there have been various challenges to the exemptions contained in §1307.31 and AIRFAA. They will be discussed here, and particular attention will be given to the more consequential Establishment Clause and Equal Protection arguments.

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68. *See* 42 U.S.C.A. § 1996a(c) (1994).

69. *See id.* § 1996a(b)(1).

70. *See* H.R. REP. NO. 103-675, at 8-9 (1994) (citing *Morton* for the proposition that Indian tribes enjoy special legal status under federal law and the U.S. Constitution, which status will provide justification for special legislation that benefits the tribes while excluding other groups).

71. *See id.*

*1. Post-*Smith *Free Exercise Clause challenges generally*

The *Smith* case has become the starting point in cases decided under the Free Exercise Clause. In the post-*Smith* period, inquiries concerning the constitutionality of any given piece of legislation must begin with a determination of whether the law in question is "neutral" and "generally applicable."[72] Neutrality and general applicability, according to the *Smith* court, "are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied."[73] In the context of the exemptions provided by AIRFAA and §1307.31, the neutrality and general applicability discussion is complicated by the fact that the question may be framed in one of two ways: 1) are the controlled substances laws under which defendants are charged neutral and generally applicable, or 2) is the exemption, which the defendant seeks to invalidate or extend, neutral and generally applicable?

Intuitively, it seems that the courts should focus the neutrality and applicability discussions on the broader controlled substances law to which the defendant has been subjected. On the other hand, broad exemptions provided to others may be so widespread as to negate any underlying generality.[74] However, both §1307.31 and the AIRFAA exemptions are rather narrow in their scope.

2. AIRFAA and §1307.31 pass the Smith *Free Exercise Clause tests*

In *Church of Lukumi Babalu Aye,* the United States Supreme Court invalidated a law prohibiting ritual animal sacrifices by members of the Santeria religion.[75] The city in which the church was located allowed virtually universal exemptions from the law; the only conduct proscribed was that of the church.[76] Given the targeted effect of the law, the Supreme Court, after applying the compelling governmental interest test, struck down the law as unconstitutionally prohibiting religious conduct.[77] Thus, the compelling interest test is appropriate where the law does not meet the neutrality and general applicability requirements of *Smith.*[78]

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72. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (stating that enforcement of generally applicable laws cannot be predicated on lack of religious objections).

73. *Id.*

74. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534-35 (1993) (holding that "[f]acial neutrality is not determinative" and that "the effect of a law in its real operation is strong evidence of its object").

75. *See id.*

76. *See id.*

77. *See id.* at 546-47.

78. *See id.* at 546 (holding that such a law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests").

In contrast, neither AIRFAA nor §1307.31 provide a system of nearly universal exemptions. In fact, they are the only exemptions to the prohibition on peyote use and possession, and they have a very narrow scope. Both §1307.31 and AIRFAA are provided in recognition of the congressional interest in preserving Native American culture.[79] Given the narrow scope of both exemptions and the stated Congressional interest, it seems apparent that they both pass the constitutionality requirements of *Smith*.

Indeed, courts considering the matter before *Smith* were relatively consistent in holding that the government could meet the compelling interest test while granting the administrative exemption provided by §1307.31.[80] Even assuming that the exemptions provided under federal law place the question within the compelling interest scheme because of a lack of neutrality, unconstitutionality is not a foregone conclusion, and courts are likely to continue to uphold the exemption in the face of free exercise challenges.

Having determined that the exemptions provided by AIRFAA and §1307.31 do not violate the Free Exercise Clause, both Establishment Clause and Equal Protection arguments will now be considered in turn.

3. Establishment Clause v. Equal Protection analysis

When examining §1307.31 and the AIRFAA exemptions, two similar arguments are often made. First, opponents of the restrictive exemptions argue that the provision of an exemption to one religion and not another constitutes a violation of the Establishment Clause of the First Amendment.[81] Secondly, they argue that AIRFAA's allowance for peyote use by members of federally recognized Indian tribes and not by those of different races violates the Equal Protection Clause of the Fourteenth Amendment.[82] To determine which mode of analysis to use, the words of the Fifth Circuit are instructive, "[w]hile we recognize that the establishment clause exists to ensure government neutrality toward religion, we agree with Justice Harlan that '[n]eutrality in its application requires an equal protection mode of analysis.'"[83]

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79. *See* H.R. REP. NO. 103-675, at 8-9 (1994).

80. *See* Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342, 1346 (N.D. Tex. 1988) (holding that "government's overriding concern for the protection of the public welfare" justifies restrictions on right to freely exercise religion); *see also* United States v. Warner, 595 F. Supp. 595, 599 (D.N.D. 1984) (holding that compelling interest justifies prohibiting peyote possession and use).

81. *See, e.g.*, Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1216 (5th Cir. 1991).

82. *See, e.g.*, *Warner*, 595 F. Supp. at 660.

83. *Thornburgh*, 922 F.2d at 1217 (citing Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

It seems that, despite their separate constitutional origins, the Establishment and the Equal Protection Clauses are related to one another in this context. For reasons that will later become evident and because the exemptions may be read as excluding some individuals on the basis of religion and some on the basis of race, the Equal Protection and the Establishment Clause arguments will be addressed separetaly.

a. Establishment Clause analysis generally. According to a leading case in the area, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[84] Thus, in the ordinary case, a law granting such a preference would be invalidated unless "justified by a compelling governmental interest, and unless it is closely fitted to further that interest."[85] However, the judicial task is complicated in the case of the present exemptions because the denomination preferred by that regulation is the Native American Church.[86]

The complication stems from the nature of the Native American Church which is culturally tied to the Native Americans. Further, Congress has the special role of preserving Native American self-governance and culture.[87] Citing *Morton v. Mancari*, the Fifth Circuit has outlined the various sources of Congress's duty to preserve Native American culture:

> (1) the historically unique guardian-ward trust relationship of the federal government with quasi-sovereign Native American tribes; (2) Congress' plenary power to "regulate Commerce . . . with the Indian Tribes" under the Constitution's Article I, section 8; (3) the federal government's Article II, section 2 treaty power; and (4) a line of cases in which the Court has upheld legislation preferentially treating Native Americans who are tribal members or live on or near a reservation.[88]

It is evident from both *Morton* and the Fifth Circuit's *Thornburgh* case that there is a significant body of law giving preferential treatment to Native Americans because of their unique status. In the words of another court:

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84. Larson v. Valente, 456 U.S. 228, 244 (1982).

85. *Id.* at 247 (internal citations omitted).

86. The Native American Church as referred to in 21 C.F.R. § 1307.31 has been variously interpreted to mean any Native American Church or the Native American Church of North America. *See* United States v. Boyll, 774 F. Supp. 1333, 1336-38 (D.N.M. 1991) (holding that the regulation refers to all members of the Native American Church, regardless of race—the Native American Church of North America only has members of Native American descent); *but see Thornburgh*, 922 F.2d at 1212 (citing the prohibition against "peyote possession by all except members of the Native American Church of North America").

87. *See* Morton v. Mancari, 417 U.S. 535, 554-55 (1974).

88. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214 (5th Cir. 1991).

> Literally every piece of legislation dealing with Indian tribes and reservations single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians were deemed invidious racial discrimination, the entire Title 25 of the United States Code would be effectively erased, and the solemn commitment of the United States toward the Indians would be jeopardized.[89]

Congress itself recognized this role when it enacted the exemption for Native Americans provided by AIRFAA.[90]

Facially, an evaluation of the constitutionality of the AIRFAA exemption from prosecution for peyote use by certain individuals reveals no denominational preference that would subject it to Establishment Clause scrutiny. The AIRFAA exemption relies not on an individual's religious preference next but on his being a member of a federally recognized Indian tribe.[91] Seemingly, such a purely racial/political preference is not subject to evaluation under the Establishment Clause. However, it does prefer religion generally as it allows the use of peyote only when it is done "for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion."[92] This likely places AIRFAA's exemption squarely within the domain of Establishment Clause jurisprudence.

The exemption under §1307.31 is more explicitly denominational. It applies to members of a particular denomination while excluding all others.[93] Because the exemptions implicate Establishment Clause concerns, their constitutionality will be addressed.

b. Establishment Clause Challenges to the §1307.31 exemption. This section will examine a minimal number of cases that have reviewed §1307.31's exemption to expose the relevant considerations in the Establishment Clause analysis. While not exhaustive, the treated cases are representative, and any discussion of additional cases would only be duplicative.

Cases dealing with the regulatory exemption have generally failed to fully address all relevant considerations in making Establishment Clause determinations. In perhaps the most thorough case, *Thornburgh*, decided by the Fifth Circuit after the Supreme Court's decision in *Smith*, the court noted the difficulties presented when it must balance competing constitutional considerations. *Thornburgh* involved a church—not a Na-

89. United States v. Warner, 595 F. Supp. 595, 600 (D.N.D. 1984).
90. *See* H.R. REP. NO. 103-675, at 8-9 (1994).
91. *See* 42 U.S.C.A. § 1996a(c) (1994).
92. *Id.* § 1996a(b)(1).
93. *See* 21 C.F.R. § 1307.31 (2001).

tive American Church in any sense—seeking a declaratory judgment extending the §1307.31 exemption to allow its use of peyote. On one hand, the court was forced to confront the proposition that the regulatory exemption was facially preferential. On the other hand, it attempted to give due weight to the government's protective role toward Native Americans. Seeing these problems, the court noted:

> The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.[94]

The textual basis for the Fifth Circuit's statement that Congress has a "constitutional" duty to protect Native American culture is not clear. However, it is evident that Congress has been given substantial leeway by the judiciary in enacting preferential legislation.[95] This leeway has included upholding legislation that would otherwise violate separate constitutional provisions.[96] The *Thornburgh* court, after noting these concerns, accepted the government's contention that the Native American Church of North America is the only "tribal Native American organization . . . that uses peyote in bona fide religious ceremonies."[97] On that ground, it held that the "federal NAC exemption represents the government's protection of the culture of quasi-sovereign Native American tribes and as such, does not represent an establishment of religion in contravention of the First Amendment."[98]

Perhaps one flaw in the *Thornburgh* analysis of the Establishment Clause problems caused by §1307.31's exemption is that it failed to consider the Supreme Court's command in *Larkin v. Grendel's Den, Inc.* that churches must be excluded from governmental functions.[99] *Larkin* challenged a statute which gave churches essentially a veto power over the issuance of a liquor license to a business near the church. The Court, finding a violation of the three-part *Lemon* test,[100] essentially forbade any

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94. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1991).

95. *See* Morton v. Mancari, 417 U.S. 535, 553-55 (1974) (upholding legislation that would otherwise constitute a violation of the Fifth Amendment so long as it is rationally related to Congress's obligation toward Native Americans).

96. *See generally, id.* at 554-55.

97. *Thornburgh*, 922 F.2d at 1217.

98. *Id.*

99. 459 U.S. 116, 126-27 (1982).

100. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (holding that a statute preferring religion "must have a secular purpose," the principal effect of which "neither advances nor inhibits religion" that does "not foster an 'excessive government entanglement with religion'").

religious group from determining to whom a governmental benefit will be applied.

The same situation is presented by the exemption offered in §1307.31. In defining its membership, as any church, the Native American Church essentially determines who may receive the benefit of §1307.31's exemption. This is precisely what *Larkin* forbids. It seems evident that the *Thornburgh* court, had it considered the question, would have relied upon the same reasoning to avoid *Larkin* as it did to avoid other Establishment Clause cases—the relationship between Congress and the Indian tribes is unique and prevents such separation.

Another case upholding §1307.31 against challenges for violations of the Establishment Clause, *Olsen v. Drug Enforcement Administration*,[101] dealt with a challenge by one professing to use marijuana as a religious sacrament. Though the *Olsen* case does not deal squarely with questions raised by this Note,[102] the dissenting judge's opinion is relevant here.[103] He stated that the "Church's status as an indigenous faith does not affect its religious character."[104] The majority had used an equal protection analysis and had not squarely faced the competing interests addressed by the court in *Thornburgh*. Despite the dissent's correct observation that the Establishment Clause was the correct method of analysis, it fails to give any weight to the government's duty to protect Indian culture.[105] Instead, it detaches that culture from Native American religion. As noted above, however, that cannot be done. Native American religion and culture cannot be divorced from one another.[106]

The cases above illustrate that a few separate principles govern the jurisprudence in the area pertinent to this Note. The beginning point for the appropriate Establishment Clause analysis, found in *Larkin*, is that a church may not perform governmental functions without running afoul of the Establishment Clause.[107] However, this limitation is qualified by the reality that Congress has long been given considerable leeway in enacting legislation that gives preferences to Native Americans. Recognizing Congress's role, the rule of *Morton* provides that a law that facially

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101. 878 F.2d 1458 (D.C. Cir. 1989).

102. The *Olsen* court decided that there was no need to apply the strict scrutiny tests in these areas because the parties were not similarly situated in that the controlled substances they sought to use were different—marijuana and peyote—and the government's interest in controlling each was different. *See id.* at 1460-61.

103. *See id.* at 1468-72 (Buckley, J. dissenting).

104. *Id.* at 1469.

105. *See id.* at 1468.

106. *See* Beeson, *supra* note 32, at 1127 (stating that "in traditional Native American thought there is nothing that can be labeled nonreligious").

107. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982).

violates a constitutional provision, because it gives a preference to Native Americans, must only be rationally related to the government's power to protect Native Americans as a political unit in order to survive a constitutional challenge.[108] The next section will apply this framework to determine the constitutionality of AIRFAA and §1307.31.

c. The complete Establishment Clause analysis. In addition to the above analytical framework, there are other factors that must be weighed in considering the constitutionality of the exemptions. The most important of these are the nature and structure of the Native American Church, including the Native American Church of North America and the extent of integration between Native American culture and religion. Reviewing all these factors, courts could ultimately conclude that the regulatory exemption provided by §1307.31 is unconstitutional while the AIRFAA exemption is free of such infirmity. This is so because the preference found in AIRFAA is not so overtly denominational, and AIRFAA is not plagued by the imprecision present in §1307.31.

No matter what interpretation of "Native American Church" is followed, §1307.31 clearly violates the rule established by the Supreme Court in *Larkin*. It provides that the Native American Church may, through admitting or refusing admittance to individuals, define the scope of the exemption. Thus, in order to survive, the exemption must fall under *Morton's* rule that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, legislative judgments will not be disturbed."[109] In order to find that the treatment is tied to that obligation, a court would need to find that the preservation of peyote use by members of the Native American Church is a rational method of preserving the Native American culture of using peyote. Such a finding might be difficult when the regulation is so imprecise.

The *Boyll* court illuminated §1307.31's imprecision when faced with a challenge by a non-Native American member of one branch of the Native American Church.[110] It refused to follow the government's interpretation of §1307.31 that the "Native American Church" meant the Native American Church branches that require Native American descent.[111] Had the government taken the position that the regulation applied to non-Native American members of the Native American Church, its equal pro-

108. *See* Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

109. *Id.* at 555. Note that *Morton* dealt with the Due Process Clause of the Fifth Amendment. The reasoning in *Morton* that the rational relationship test governs applies to Establishment Clause cases as well.

110. *See* United States v. Boyll, 774 F. Supp. 1333, 1336 (D.N.M. 1991).

111. *See id.* at 1339-40.

tection arguments would be significantly weaker. The government would find it more difficult to claim that the exemption was given in recognition of Native Americans' political status when it extended the exemption to anyone who was a member of a specific religion. Thus, it was placed in the position of arguing that the exemption was limited by a qualification not in the language of the regulation. Plainly, there is no racial requirement in §1307.31.[112]

Though the *Boyll* court's analysis was flawed in other areas, its discussion illustrates problems with §1307.31. In the event a court accepts the reading that §1307.31 applies only to Native American members of the Native American Church, it may determine that the exemption is constitutional. Important in this determination is the fact that Native American religion and culture cannot be viewed apart.[113] However, given the differing interpretations of the regulation, it is probable that some courts might continue to hold that §1307.31's exemption is rationally related to preserving Native American culture and thus, an allowable preference. Other courts will likely continue to refuse such a blatantly preferential exemption. Either position seems tenable, though the regulation injects confusion into the analysis.

The exemption provided by AIRFAA presents no such blatant denominational preference because it applies to a member of a federally recognized tribe.[114] This exemption is offered less to a religion than to a political classification, and it seems more in line with the policy justifications outlined in *Morton*. Additionally, AIRFAA clearly defines the limits of its application, unlike §1307.31, which is subject to varying interpretations. Thus, even if the restriction of AIRFAA to "religious ceremonies" results in a violation of *Larkin*, AIRFAA more readily affects a political preference as required by *Morton*. This is especially so if one understands the structure of the Native American Church and Native American culture.

As noted above, the Native American Church of North America is essentially the protector of peyote religion.[115] It has a racial component that many other Native American Churches do not.[116] Though the "mother church," as the Native American Church of North America is often known, is not a tribe, it has been held the "only tribal Native American organization of which the government is aware that uses peyote in bona fide religious ceremonies" and the only one entitled to the

112. *See* 21 C.F.R. § 1307.31 (2001).
113. *See* Beeson, *supra* note 32.
114. *See* 42 U.S.C.A. § 1996a (1994).
115. *See* STEWART, *supra* note 5.
116. *See id.*

same protection as Native American individuals and tribes.[117] This proposition might go too far, but it illustrates that the role of religion in Native American culture cannot be denied or circumvented. Thus, without allowing the exemption for the religious use of practitioners who happen to be members of the Native American Church of North America, there would be no exemption as no other group practices peyote religion in the manner contemplated by the government when enacting AIRFAA. It seems that if, in fact, Congress does have a duty, as noted in *Morton*, in preserving Native American culture, it must be allowed to fashion an exemption to its controlled substance laws with a religious component.

Understanding that a rational relationship test governs the balancing of the competing interests of the Establishment Clause and that the government has a guardian/ward relationship, it seems that the exemption contained in AIRFAA is constitutional while questions surrounding §1307.31's constitutionality persist.

d. Equal Protection Clause challenges generally. Though the analysis in Equal Protection Clause cases is, at least in the present context, remarkably similar to that in Establishment Clause cases, it does have a different focus. The critical question to determine whether the Establishment Clause has been violated is whether there is a denominational preference and, more importantly, what role the government's duty toward Native American culture plays. In equal protection cases, the question turns not on denominational preferences but on whether there is a racial preference. This is important because equal protection claims are easily overcome when preferences are given for political reasons rather than racial.[118] Thus, in the absence of a racial preference, the exemptions provided both by §1307.31 and AIRFAA will likely survive equal protection scrutiny. However, such a preference arguably exists in §1307.31, which can be read as applying only to those members of the Native American Church that are of Native American descent.

Cases addressing §1307.31's exemption have answered the equal protection question in different ways, and some courts have avoided the question altogether.[119] For example, the court in *Boyll* avoided the critical equal protection question and gave no deference to the administrative interpretation that §1307.31 applied only to Native American members of the Native American Church. *Boyll* did not accept the government's contention that the exemption represents a political, rather than racial, dis-

117. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1991).

118. *See, e.g.*, United States v. Warner, 595 F. Supp. 595, 600-01 (D.N.D. 1984) (applying a rational basis test after concluding that classification was political, not racial).

119. *See, e.g.*, United States v. Boyll, 774 F. Supp. 1333, 1338-39 (D.N.M. 1991).

tinction,[120] which would ordinarily result in a lower level of Fourteenth Amendment scrutiny.[121] Instead, the court offered in dicta that a distinction based on Native American descent would likely offend the Constitution.[122] *Boyll* did not specifically address the Equal Protection Clause, because it read the language of the regulatory exemption as providing relief to all members of the Native American Church.[123] However, in addressing its reasons for so reading the exemption, it cited a court's duty to avoid construing the exemption in a manner that might be unconstitutional and opined that a racial reading would raise doubts about the exemption's constitutionality.[124] The court failed to even address the government's duty toward Native Americans and *Morton's* command that preferences should not be racial in character. Though following the plain language of the regulation might plausibly lead to the conclusion that the exemption applies to all members of the Native American Church, regardless of race, the persuasiveness of the court's opinion in *Boyll* is greatly diminished by its failure to address the government's duty toward Native Americans cited in *Morton*.

By returning to the *Thornburgh* case, one can gain a better understanding of the role of courts in equal protection cases. The court begins its analysis by noting the general proposition that equal protection "mandates similar treatment under the law for those similarly situated."[125] It then discusses *Morton's* political/racial distinction and notes that racial preferences will be subjected to strict scrutiny.[126] In answering the political/racial question, the *Thornburgh* court reviews the evidence surrounding the Native American Church[127] and concludes that the classification is a political one.[128]

At least one other court has considered the make-up and position of the Native American Church of North America in Native American culture in answering the equal protection question.[129] Applying this analysis

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120. *See id.* at 1339 (discussing racial component of the regulatory exemption).

121. *See Warner*, 595 F. Supp. at 600-01. *See generally Morton*, 417 U.S. at 554-55 (holding that legislation preferring Native Americans is based on a political, not racial, classification and should be rationally related to government's obligation toward Native Americans).

122. *See Boyll*, 774 F. Supp. at 1340 (stating that a "racially restrictive" reading would raise constitutional concerns of the sort to be avoided when interpreting statutes).

123. *See id.* at 1338-40.

124. *See id.* at 1339.

125. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214 (5th Cir. 1991).

126. *See id.* at 1215.

127. The court, though not specifying so, was referring to the Native American Church of North America. This is evident by its discussion of the ethnic descent requirement cited by the court. *See id.*

128. *See id.*

129. *See* Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342, 1347 (N.D. Tex. 1988) (holding that Native American Church of North America is *sui generis* and "should be viewed

to AIRFAA, it seems even easier to find that the classification is political. This is because AIRFAA requires membership in a federally recognized tribe rather than merely requiring Native American descent. Additionally, courts reviewing AIRFAA will not need to address the question of whether the plain language of the regulation allows the government's restrictive interpretation thereof.

Having found a political, not racial preference, the next step a court needs to take to determine if the Equal Protection Clause is violated is to evaluate whether the "rational relationship" test is met.[130] The *Thornburgh* court concluded, "[w]e 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."[131] The consideration of this rational relationship test is the same in Establishment Clause cases.

It is worth noting that a decision holding the classification to be racial rather than political would not automatically equate to unconstitutionality of the exemption.[132] A court would next be left to determine whether there was a compelling interest, the fulfillment of which was accomplished by a narrowly tailored exemption.[133] On its face, it seems that the historical and constitutional duty to protect Native American culture might pass the compelling interest test. The exemptions provided by AIRFAA and the DEA's regulatory exemption are narrowly tailored to meet the interest noted in *Morton*. This seems evident when one places peyote use in its proper context and is aware of the reality that there can be no traditional cultural peyote use apart from religious ceremonies. That is, the statute allows only that use which is necessary to preserve the culture of Native Americans.

Taking a different tack, a federal district court in Kansas considering the equal protection implications of the exemptions for Native Americans answered the "similarly situated" question by resorting to three different justifications, only two of which are applicable here.[134] This was

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as a statement that the Native American Church 'is of its own kind or class, that is, the only one of its own kind'").

130. *See Thornburgh*, 922 F.2d at 1216.

131. *Id.*

132. *See id.* at 1214 (stating that racial classifications are subjected to strict scrutiny). It is also worth noting here that a holding of unconstitutionality may not accomplish the objectives of the objector. Extending an unconstitutional exemption to others in the face of Congressional intent to limit peyote use as much as is prudent is far from intuitive. Rather, it seems more reasonable for a court to declare the exemption unconstitutional and apply the controlled substance laws across the board.

133. *See id.* at 1214-15.

134. *See* McBride v. Shawnee County, Kan. Ct. Serv., 71 F. Supp. 2d 1098, 1100-02 (D.Kan. 1999) (agreeing with Kansas Court of Appeals that differences in patterns of drug usage and the political position of the Native American Church place the groups in different situations for equal pro-

done in denying a Rastafarian group's claim that they were entitled to free religious use of marijuana. Following the usual pattern, seen above, the court held that the political position of the Native American Church removed the exemption from strict scrutiny.[135] Somewhat unique to this case is its discussion of the patterns of drug use among the different religious groups.[136] In the court's words, "[t]he two religions are not similarly situated because the circumstances surrounding their drug use is drastically different."[137] In reaching this conclusion, the court noted that the Rastafarians' use of marijuana was relatively uncontrolled, unlike Native American use of peyote.[138] The use of marijuana by Rastafarians "whenever the mood strikes"[139] is markedly different than the controlled use of peyote in lengthy ceremonies by members of the Native American Church of North America—a critical distinction to the *McBride* court.[140] The court noted that such marijuana use posed a much greater problem for law enforcement officials than peyote use by members of the Native American Church of North America.[141] This justification for holding that the parties were not similarly situated might be extended to prevent peyote use by many Native American Churches.

The peyote ceremony as practiced by the Native American Church of North America is not the only use of peyote in connection with the various branches of the Native American Church.[142] According to one Native American Church website, it uses peyote more generally than other Native American Church.[143] In fact, the Oklevueha branch claims to have seven different ceremonies, and it "believes that the use of Peyote can enhance every ceremony, should the spirit dictate the need."[144] This broad use of peyote whenever "the spirit dictate[s]," although a religious use, unlike the lengthy peyote ceremony described earlier in this Note, does nothing to further the congressional goal of preserving traditional Native American culture. Given that it does not fulfill that goal, the use by churches such as Oklevueha falls under *Smith's* general Free Exercise Clause jurisprudence, which empowers states to prohibit peyote use.

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tection analysis).

135. *See id.* at 1102.

136. *See id.* at 1101.

137. *Id.*

138. *See id.*

139. *Id.*

140. *See id.* (noting that enforcement difficulties stemming from uncontrolled marijuana use presens a markedly different scenario than the exempted use of peyote).

141. *See id.*

142. *See Oklevueha Earth Walks Native American Church of Utah, Inc.* (last modified Sept. 26, 2001) <http//:www.earthwalks.com/nacindex.html>.

143. *See id.* (stating "[o]ther NACs do not use the Peyote as generally as we do").

144. *See id.*

B. Eliminating §1307.31 to Avoid Constitutional Problems

Despite many decisions involving the regulatory exemption, litigation on these points persists. It is evident from the discussion above that AIRFAA has a better prospect for constitutionality than the expressly denominational and arguably politically/racially preferential §1307.31. Because of that, Congress may benefit from legislative elimination of §1307.31 and leaving AIRFAA on its own to resist constitutional challenges. This proposed change would not eliminate the concerns of many who participate in peyote ceremonies but would add greater weight to the constitutional arguments for a limited exemption. Inevitably there will be those excluded who would assert the same constitutional arguments addressed above. However, without the blatant denominational preference or the interpretation problems plaguing §1307.31, those arguments would be less likely to prevail.

IV. CONCLUSION

While the current exemption structure seems to provide ample protection to Native Americans practicing peyote religion, continuing challenges to the constitutionality of the exemptions by non-Native Americans indicates that Congress could strengthen and clarify the exemption to avoid future problems and court challenges. The analysis of constitutionality in this Note is aligned with the majority of judicial decisions on the matter and much of the thinking on the topic.

Clearly, it is within Congress's power to prohibit all peyote use, even for religious purposes.[145] This essentially answers questions of constitutionality under the Free Exercise Clause of the First Amendment. Establishment Clause and Equal Protection Clause matters are likewise constitutional under AIRFAA, though that conclusion is not so evident. Because Native Americans occupy a unique place in American history, Congress has been given a correspondingly unique power to preserve Native American culture. In recognition of this power, courts have allowed preferential treatment of Native Americans whenever that treatment bears a corresponding rational relationship.[146] AIRFAA's exemption allowing peyote use by Native Americans survives constitutional scrutiny because of Congress's power and duty to preserve Native American culture. Though the United States Supreme Court's decision in *Morton*, requiring only a rational relationship, is helpful in getting AIRFAA over constitutional hurdles, it is not necessary. Because of the

145. *See generally* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (holding that peyote use may be prohibited).

146. *See* Morton v. Mancari, 417 U.S. 535, 554-55 (1974).

unique role Congress has toward Native Americans, it is likely that AIRFAA could pass the strict scrutiny tests that would be mandated by findings of denominational and racial preferences.

The current administrative regulation, 21 C.F.R. §1307.31, has raised more constitutional questions than necessary to allow peyote use by Native Americans in traditional religious services. The biggest problem with the current exemption scheme is clarity. By limiting the application and scope of the federal exemptions and by eliminating §1307.31, Congress can ensure more uniform treatment from the courts.

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