

BYU Law Review

Volume 2005 | Issue 6

Article 3

12-18-2005

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James R. Dalton

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Recommended Citation

James R. Dalton, *There Is Nothing Light About Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions*, 2005 BYU L. Rev. 1575 (2005).

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There Is Nothing Light About Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions

I. INTRODUCTION

The First Amendment's protection of religious freedom is among the most cherished, most fundamental, and most debated facets of modern American constitutional law.¹ The Amendment and the often fierce debate surrounding its reach are colored by deeply rooted American traditions of faith and spirituality. For example, the first permanent European settlers in America braved the Atlantic for the express purpose of finding religious freedom—truly leaving a legacy of faith.² Their faith and their presence in North America, however, were preceded by the first Americans, the Indians,³ whose spirituality was not only a religion, but a

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–10 (1947) ("A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches.") Ironically, the early settlers, with chartered authority of the English Crown, created government sponsored religious establishments that all were required to both attend and give financial support. *Id.* at 9. By 1619, the Virginia legislature had passed laws providing governmental support of the Anglican clergy. See A DOCUMENTARY HISTORY OF RELIGION IN AMERICA TO 1877, at 58 (Edwin S. Gaustad & Mark A. Noll eds., 3d ed. 2003). The practice of governmental establishment of religion came to be abhorred and inspired the indignation that led to the First Amendment. See SWEET, *supra* at 11–12. Nevertheless, the First Amendment was not applied against the states until the passage of the Fourteenth Amendment. See *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."). *But see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (stating that the Fourteenth Amendment makes the First Amendment applicable against the states).

3. When Christopher Columbus arrived in the Americas, believing he had reached the East Indies, he called the native people "Indians." See ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN 4–5 (1979) (indicating that the term "Indian" denotes any native inhabitant of North or South America and was casually coined by Christopher Columbus who mistakenly believed he had landed in the East Indies, islands off the coast of Asia). Throughout this Comment, the aboriginal people of North America will be referred to as Indians, American Indians, or Native Americans.

way of life.⁴ And while the Native American legacy has the suggestive tincture of religion, the heart of Indian spirituality is not adherence to a strict doctrine, but is, rather, a profound cultural “reverence for nature and for life.”⁵

Both legacies have enriched the American cultural landscape. However, the treatment of Native Americans and the protections afforded them have not historically been consistent with the general treatment of non-Indians.⁶ One of the principal questions that arises in this context is whether the tribal cultural identity and the Indian system of ancient beliefs and indigenous spiritual values can be “reconciled with the subsequently introduced system of individuals rights intended to protect the most cherished liberties supposedly belonging to all United States citizens.”⁷ Nowhere is this more apparent than in the current debate surrounding special Indian religious exemptions to federal laws protecting bald and golden eagles.⁸ In adopting and amending the Bald and Golden Eagle Protection Act (“BGEPA”),⁹ Congress created an express Native American religious exemption to the general prohibition on the use and possession of eagles and eagle parts (i.e., feathers, talons, etc.).¹⁰ However, the exemption has been interpreted and administered such that it applies only to those practicing the Native American religion

4. See, e.g., G. Peter Jemison, *The Journey*, 7 ST. THOMAS L. REV. 433, 435 (1995) (“Our religion [referring to the Seneca Tribe] and our government are entwined as one; we do not separate them and we do not call it religion. Rather it is an Indian way of life that encompasses everything that we do.”); Deward E. Walker Jr., *Protection of American Indian Sacred Geography*, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM (Christopher Vescey ed., 1991).

5. See JOSEPH EPES BROWN, *SPIRITUAL LEGACY OF THE AMERICAN INDIAN* 37 (1982), quoted in Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 *ECOLOGICAL Q.* 795, 801 n.28 (1992).

6. The simple truth is that treatment of Native Americans has been widely disparate, ranging from official governmental policies calling for their destruction or assimilation, to the current policy of self-determination. The historical treatment of American Indians is not the substance of a family-friendly film, but rather reveals a sorry tale of war, maltreatment, discrimination, broken promises, and the destruction, or nearly so, of peoples and cultures that had endured centuries of independent existence.

7. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 739 (5th ed. 2005).

8. Particularly, this issue arises in the context of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1538, 1540 (2000); the Bald and Golden Eagle Protection Act (“BGEPA”), *id.* § 668(a); and the Migratory Bird Treaty Act (“MBTA”), *id.* § 707(a).

9. *Id.* § 668.

10. *Id.*

and who are not only Indian by blood but also members of federally recognized Tribes.¹¹

This special treatment has led to a variety of constitutional challenges by Indians and non-Indians claiming violations of the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments, as well as violations of the Free Exercise and Establishment Clauses of the First Amendment.¹² Under normal constitutional analysis, the special treatment of one individual over another because of race or religion would be patently unconstitutional unless the preference is narrowly tailored to achieve some compelling governmental interest.¹³ However, if the preference or infringement of free exercise is not the result of a facially discriminatory law, but rather is the incidental effect of one that is generally applicable, the Constitution requires only that the government have a rational basis for its action.¹⁴ When one further considers the Religious Freedom Restoration Act¹⁵ and intricacies of Federal Indian law, the discussion becomes even more complicated.

Generally, if Congress were to create an express exemption or preference for a specific religion, the act would violate the Establishment Clause.¹⁶ Indian Tribes, however, are unique in that they are both political sovereigns and religious groups. Does this classification matter? Are Indians nothing more than a political class, subject to the plenary power of Congress? Are they not also a racial and religious minority, beneficiaries of the protections of the Bill of Rights and the Fourteenth Amendment? How do considerations of Congress's plenary power over¹⁷ and fiduciary obligations to Indian tribes¹⁸ factor in? These questions underlie the controversy over Indian religious exemptions to generally applicable laws.

This Comment argues that there are legitimate reasons to treat Indians differently and that Congress and the courts should honor both

11. See *United States v. Dion*, 476 U.S. 734, 740 (1986); *United States v. Antoine*, 318 F.3d 919, 922 (9th Cir. 2003); *United States v. Hardman*, 297 F.3d 1116, 1123 (10th Cir. 2002).

12. See cases listed *supra* note 11.

13. See *Employment Div. v. Smith*, 494 U.S. 872, 894 (1990).

14. *Id.* at 878.

15. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994) [hereinafter RFRA]; see also *Hardman*, 297 F.3d at 1116, 1124.

16. See *Larson v. Valente*, 456 U.S. 228, 246-47 (1982); *Rupert v. Dir.*, U.S. Fish and Wildlife Serv., 957 F.2d 32, 34-35 (1st Cir. 1992).

17. See *infra* Part VII.A.

18. See *infra* Part VII.A.

treaties and trust responsibilities, so far as it is legal and practicable. However, the courts should develop a clear rule that distinguishes a tribe's political identity from its religious function; furthermore, Congress should take steps to give more authority to the tribal political entities in administering programs that have religious implications so as to avoid even the appearance of excessive government entanglement with religion. Specifically, tribes should have greater authority in administering the Indian religious exemptions to the BGEPA because they are uniquely qualified to determine who is or is not a member of their respective tribes, who is or is not a sincere practitioner of the Native American religion, and what is or is not a bona fide Native American religious ceremony. Further, because eagle parts are in such limited supply, tribes would be empowered to prioritize the needs of the tribe and the tribal members, allowing them to distribute eagle parts in a way that accommodates the most immediate needs first.

Part II of this Comment briefly reviews the evolving free exercise, establishment clause and equal protection jurisprudence. Part III frames the issues surrounding Native American free exercise, discussing the interests of the key players: the federally recognized Indian tribes' interest in sovereignty and cultural preservation, the federal government's interest in species conservation and in fulfilling its trust responsibilities to the federally recognized tribes, and the interests of individual non-Indians and Indians who are not members of federally recognized tribes in freely practicing their sincere religious beliefs.

The discussion in Parts IV, V, and VI of the relevant case law identifies a split in the circuit courts of appeals on whether the government's interest in protecting eagles is compelling enough to justify discrimination. These parts also review several of the most recent cases involving eagle feathers as tribal and religious symbols. Part VII critically analyzes the rationale of these cases, reviewing the unique position of Indian tribes in the American constitutional scheme and attempting to discern any cogent and justifiable reason to create religious exemptions for Indian tribes. While such exemptions are intended to benefit Indian tribes, they may actually create a constitutional conundrum that not only amounts to excessive government entanglement in religion, but may actually result in harmful discrimination against Indian tribes. To avoid these problems, Congress should adopt an arm's length oversight policy that creates general exemptions for Indian cultural practices, ceding authority to the tribes to determine when and under what circumstances a permit to use eagle parts is warranted. The

Comment concludes, in Part VIII, by arguing that there is a legitimate basis for disparate treatment of Indian tribes and while honoring that distinction, Congress and courts should be careful not to cast the issue in terms of race or religion, but to make an honest attempt to treat tribes as political sovereigns and allow them to control their own cultural/religious destinies.

II. A CRASH COURSE ON RELIGIOUS FREEDOM

Central to the debate on Indian Religious exemptions is the First Amendment to the United States Constitution, which reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹⁹ The respective clauses apply to any act of the Federal Government and, through the Fourteenth Amendment, to the states.²⁰ Although the amendment is a limitation on Congress’s power, its objective is to protect individual rights. In its most simple application, the First Amendment guarantees at a minimum that the government “may not coerce anyone to . . . participate in religion or its exercise”²¹ or otherwise act in such a way that “establishes a religion or religious faith or tends to do so.”²²

The religious freedom protections are perhaps best conceptualized in the notion of a “separation between church and state.” The phrase allegedly originated in a letter written by Thomas Jefferson to members of the Danbury Baptist Association.²³ In response to their kind and religiously inspired words, Jefferson wrote,

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should

19. U.S. CONST. amend. I.

20. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.”); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (stating that the Fourteenth Amendment makes the First Amendment applicable against the states).

21. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

22. *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984).

23. See *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878) (quoting Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), reprinted at Library of Congress, *Thomas Jefferson’s Letters to the Danbury Baptists* (June 1998), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>).

“make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.²⁴

A. Establishment Clause

In accord with Jefferson’s words, the Establishment Clause has been interpreted to mean that neither the state nor the federal government may establish a church or pass laws that aid or prefer one religion over another.²⁵

To determine whether a law impermissibly establishes, aids, or favors a religion, the Supreme Court announced a three-part test in *Lemon v. Kurtzman*.²⁶ First, the law must have a “secular legislative purpose.”²⁷ Second, the “principal or primary effect” of the law must not be to advance or inhibit religious belief or practice.²⁸ And third, the statute “must not foster ‘an excessive government entanglement with religion.’”²⁹ Since the *Lemon* Test was announced, however, the Court has found the test to be too abstract to be effective. As a result, the *Lemon* test is seen as a device to generate fact specific rules to be more precisely applied in distinct situations.³⁰ Nevertheless, the principles announced by the Court in *Lemon* remain.³¹

In applying the *Lemon* Test, the Supreme Court has determined that while the Establishment Clause requires the separation of church and state, it also affirmatively mandates religious accommodation, not merely

24. *Id.*

25. *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 212 (1948) (“[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”).

26. 403 U.S. 602 (1971).

27. *Id.* at 612.

28. *Id.*; *see also* *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

29. *See Lemon*, 403 U.S. at 613 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

30. *See* EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 724–25 (2001).

31. *See* *Mueller v. Allen*, 463 U.S. 388, 388 (1983) (applying the *Lemon* Test). However, the application of the *Lemon* Test has yielded some seemingly inconsistent results. *See* *Robinson v. City of Edmond*, 68 F.3d 1226, 1228 (10th Cir. 1995), *cert. denied*, 517 U.S. 1201 (1996) (finding the depiction of a cross on a city seal to violate the Establishment Clause under the *Lemon* test). *But see* *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996), *cert. denied*, 517 U.S. 1211 (1996) (finding that statutes using the motto “In God We Trust” do not violate the Establishment Clause under the *Lemon* test).

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tolerance.³² In *Zorach v. Clauson*,³³ Justice Douglas, writing for the majority, said,

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state . . . cooperates with religious authorities . . . it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.³⁴

This attitude of religious accommodation is not only a central issue in Establishment Clause jurisprudence, but also extends to the area of free exercise.

B. Free Exercise

The Free Exercise Clause of the First Amendment has been interpreted to mean that the government cannot interfere with or attempt to regulate a person's religious beliefs, penalize a person for his or her religious beliefs, or coerce a person to affirm any religious beliefs contrary to his or her conscience.³⁵ Therefore, any law that intentionally or expressly burdens either a person's or a group's fundamental right³⁶ to free exercise of religion is unconstitutional.³⁷ Still, the government may regulate religious activities in order to protect the safety, peace, good

32. The First Amendment reflects the philosophy that church and state should be separated. "The First Amendment . . . does not say that in every and all respects there shall be a separation of church and state. Rather, [the amendment] studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

33. *Id.* at 313–14.

34. *Id.*

35. See generally *Sch. Dist. v. Schempp*, 374 U.S. 203, 221 (1963).

36. A fundamental right is one that is implicitly or explicitly embodied in the Constitution. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

37. See *Employment Div. v. Smith*, 494 U.S. 872, 876–77 (1990).

order, and comfort of all members of society, so long as the regulations are nondiscriminatory and reasonable.³⁸ However, the power to regulate religious activities is not without limit.³⁹ Where a generally applicable law interferes with religious exercise, in some instances, religious exemptions may be granted in the interest of accommodating religious exercise.⁴⁰

The practice of granting religious exemptions, however, has evolved over time. Beginning with *Reynolds v. United States*⁴¹ in 1878 and extending until *Sherbert v. Verner*⁴² in 1963, the Supreme Court generally rejected claims that the Free Exercise Clause allowed religious exemptions to generally applicable laws. But in *Sherbert*, the Court granted a religious exemption under a state unemployment statute because the state had recognized secular exemptions under that same law.⁴³ In granting the judicial exemption, the Court applied strict scrutiny to the government's scheme of exemptions, requiring a compelling state interest to justify why religious exemptions were precluded while other secular exemptions were allowed.⁴⁴ What

38. See *Baxley v. United States*, 134 F.2d 937, 938 (4th Cir. 1943).

39. See *Smith*, 494 U.S. at 876–78 (holding that laws infringing on religious freedom must be facially neutral and generally applicable, and have a rational basis to meet a legitimate governmental interest to avoid constitutional infirmity); see also *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (government may not compel an affirmation of religious belief); *United States v. Ballard*, 322 U.S. 78, 86–88 (1944) (government may not punish the expression of religious doctrines it believes to be false); *McDaniel v. Paty*, 435 U.S. 618, 631–32 (1978) (government may not impose special disabilities on the basis of religious views or religious status); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (same); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445–52 (1969) (government may not lend its power to churches in controversies over religious authority).

40. See *Sherbert*, 374 U.S. at 403 (granting constitutional or judicial religious exemption); see also 21 U.S.C. § 821 (2000) (giving authority to the U.S. Attorney General to promulgate rules regulating “manufacture, distribution, and dispensing of controlled substances”); 21 C.F.R. § 1307.31 (1989) (exempting the nondrug use of peyote in bona fide religious ceremonies of the Native American Church).

Whether such religious exemptions are good policy—or even constitutional under the Establishment Clause—is the topic of significant academic debate. Compare Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1129 (1990), with William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319 (1991).

41. 98 U.S. 145 (1878) (refusing to create an exemption to the generally applicable law regulating marriage).

42. *Sherbert*, 374 U.S. at 422–23 (creating a religious exemption to a generally applicable unemployment law where the state had created secular exemptions under the law).

43. *Id.* at 408–09.

44. See *id.*

followed was an era when even an incidental infringement of free exercise compelled a strict scrutiny analysis.⁴⁵

Such analysis led the Supreme Court to grant another religious exemption in *Wisconsin v. Yoder*.⁴⁶ In *Yoder*, despite a generally applicable law requiring all children to attend public school through high school, the Court held that an Amish family's right to direct the education of their child, coupled with a religious belief that drove them to end their child's public education after the eighth grade, outweighed the state's interest in promoting higher education.⁴⁷

In contrast, and particularly germane to this Comment, the Court refused to create a similar exception in a case addressing incidental effects of a generally applicable law on Native American religious freedom.⁴⁸ In *Lyng v. Northwest Indian Cemetery Protective Association*, the Court rejected claims that a proposed logging road near traditional Indian burial sites was an unreasonable burden on Native American religion.⁴⁹ The Court reasoned that because the government action was facially neutral, that is, not targeted at any religion, and did not "coerce individuals into acting contrary to their religious beliefs," the government did not have to show a compelling interest.⁵⁰

Lyng seemed to limit the possibility of judicially created exemptions when a law is facially neutral and generally applicable. The Court's 1990 ruling in *Employment Division v. Smith*⁵¹ left no doubt as to this limitation, establishing that when a law is facially neutral and generally applicable, strict scrutiny is not required.⁵² In that case, two members of the Native American Church were fired from their jobs for using peyote in a religious ceremony.⁵³ When they were denied unemployment benefits, they brought suit, arguing that the state statute that prohibited the use of peyote infringed on their religious freedom and that they should be granted a religious exemption.⁵⁴ In rejecting their claim, the Court generally rejected the model established by *Sherbert v. Verner* of

45. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993).

46. 406 U.S. 205 (1972).

47. *Id.* at 235–36.

48. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 440 (1988).

49. *Id.* at 441–42.

50. See *id.* at 440.

51. 494 U.S. 872 (1990).

52. See *id.* at 882–83.

53. *Id.* at 874.

54. *Id.*

judicially creating exemptions, returning instead to a model of allowing only those statutory exemptions created by positive act of the legislative body.

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (“RFRA”).⁵⁵ Under the Act, Congress attempted to restore the strict scrutiny of the compelling interest test in free exercise cases.⁵⁶ Congress purported to restore the model of judicial exemptions through RFRA by requiring courts to carve out religious exemptions from all federal, state, and local laws and other government actions unless the government could show a narrowly tailored compelling interest for the law.⁵⁷

The full measure of RFRA was short-lived however. In the 1997 case *City of Boerne v. Flores*, the Court held that the RFRA exceeded Congress’s constitutional power, at least as applied to state and local governments.⁵⁸ The Court did not indicate, but subsequent federal courts of appeals have held that RFRA continues to apply to laws enacted by the federal government.⁵⁹ Thus, in the context of federal Indian religious exemptions, RFRA is likely applicable.⁶⁰

C. Equal Protection

Regardless of the applicability of RFRA or the First Amendment, the granting of a religious exemption to one but not all religions raises questions of equal protection. Equal protection is based on both the Due Process Clause of the Fifth Amendment and the express provision of

55. 42 U.S.C. § 2000bb (2000).

56. *Id.* § 2000bb(b)(1).

57. *Id.* § 2000bb-1(b).

58. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). The case involved a San Antonio historic preservation law that precluded a Catholic Church from remodeling a church building.

59. *Id.* at 512 (striking down RFRA as exceeding congressional section five power under the Fourteenth Amendment). Thus, while RFRA does not apply to the states, the Court left open the possibility that RFRA may still be applied to the federal government. *See United States v. Israel*, 317 F.3d 768, 770 (7th Cir. 2003) (recognizing that RFRA may still apply as against the federal government); *United States v. Hardman*, 297 F.3d 1116 (2002) (finding that under RFRA, when the federal government grants a religious exemption to Indian members of federally recognized tribes, but not other Indians and non-Indians who were not members of recognized tribes, it must show this discrimination was narrowly tailored to advance a compelling interest); *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002).

60. *See generally Hardman*, 297 F.3d 1121 (undergoing a RFRA analysis of the Bald and Golden Eagle Protection Act).

equal protection in the Fourteenth Amendment.⁶¹ Under either clause, the Constitution mandates that similarly situated persons be treated alike;⁶² thus, under either the Fourteenth Amendment's Equal Protection Clause or the Fifth Amendment's Due Process Clause, the analysis is the same.⁶³

The fundamental right to equal protection is violated only by purposeful and intentional discrimination.⁶⁴ Where the government classifies or distinguishes between two or more relevant persons or groups who are similarly situated, equal protection is violated unless the government can show that the discrimination is narrowly tailored to achieve some compelling interest.⁶⁵ Thus, an equal protection claim might arise where the government, without compelling justification, discriminates against, or gives a preference to, one group of people, such as a racial or religious minority.⁶⁶

III. FRAMING THE ISSUE

61. U.S. CONST. amends. V, XIV; *Washington v. Davis*, 426 U.S. 229, 239 (1976) (The Fifth Amendment's Due Process Clause "contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.").

62. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985).

63. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (explaining that the standards for analyzing equal protection claims under either amendment are identical); *see also Rostker v. Goldberg*, 453 U.S. 57, 74–75 (1981) (finding that the Fifth Amendment prohibited unlawful gender-based discrimination despite the absence of an express defense of equal protection); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975) ("Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (finding that while the Equal Protection and Due Process clauses are not always interchangeable, both protect against unjustifiable discrimination and stem from "American ideals of fairness"))).

64. *See generally* *Giano v. Senkowski*, 54 F.3d 1050 (2d Cir. 1995) (Equal Protection is a fundamental right); *Vera v. Tue*, 73 F.3d 604, 609 (5th Cir. 1996) ("Discriminatory purpose . . . implies more than intent as violation or as awareness of consequences It implies that the decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for *the purpose* of causing its adverse effect on an identifiable group." (quoting *Lavernia v. Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1988))); *Hispanic Taco Vendors v. City of Pasco*, 994 F.2d 676, 679 n.3 (9th Cir. 1993) (a party must prove discriminatory intent to establish violation of Equal Protection).

65. *See, e.g., Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988).

66. *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 499 (2000) (holding that a state constitutional provision limiting the right to vote to certain "descendants" of specified peoples constituted racial discrimination).

Equal Protection, Due Process, Free Exercise and Establishment Clause issues often are all implicated in claims challenging congressional action to protect or infringe on Native American interests. The analysis, however, becomes much more complicated when Indians' religious freedom interests are weighed against the government's interest in species conservation.

A. *The Eagle*

Protection of the eagle is at the center of much of the controversy over whether Indians should be given religious exemptions to generally applicable laws.⁶⁷ The eagle is an animal of spiritual and cultural significance for the Native American. Likewise, the eagle holds a place of patriotic, political, and ecological importance to the United States.

1. *Importance to the Indian*

While many animal species are important to Indian tribal life and culture, the eagle is arguably the most important.⁶⁸ Eagles play a central role in the spiritual practices of many tribes,⁶⁹ and eagle parts, as religious objects, comprise a central role in Indian religious expression. Judge Edward C. Reed noted that “[e]xperts in comparative religion have likened the status of the eagle feather in Indian religion to that of the cross in the Christian faith.”⁷⁰ To the Indian, the eagle is a messenger to the Creator; it is revered as a spiritual conduit and its feathers and other parts are prized as tools that help the faithful communicate with Divinity.⁷¹ Whether in garb or in ritual, it is no exaggeration to say that most spiritual and cultural tribal ceremonies involve eagles and eagle

67. Specifically, this Comment focuses on the bald eagle (*Haliaeetus leucocephalus*) and the golden eagle (*Aquila chrysaetos*). See MIKLOS D.F. UDVARDY & JOHN FARRAND, JR., NATIONAL AUDUBON SOCIETY FIELD GUIDE TO NORTH AMERICAN BIRDS: WESTERN REGION 325–27 (rev. ed. 1997).

68. See Antonia M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 HASTINGS CONST. L.Q. 771, 788–95 (1995).

69. Tina S. Boradiansky, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT. RESOURCES J. 709, 719–20 (1990). Discussing the congressional debates surrounding amendments to the BGEPA, Boradiansky notes that “[s]imilarly the Department of the Interior observed that ‘the eagle, by reason of its majestic, solitary, and mysterious nature, became an especial object of worship. . . . The mythology of almost every tribe is replete with eagle beings.’” *Id.* at 720 (quoting S. REP. NO. 1986 (1962)).

70. See *United States v. Thirty-Eight Golden Eagles or Eagle Parts*, 649 F. Supp. 269, 276 (D. Nev. 1986), *aff’d*, 829 F.2d 41 (9th Cir. 1987).

71. See De Meo, *supra* note 68, at 775.

parts in some fashion. If access to eagles and eagle parts were categorically prohibited, much of Indian culture and religion would undoubtedly be lost.⁷²

2. Importance to the United States

The eagle also holds an important place of distinction to the United States government. The bald eagle is the national symbol of the United States.⁷³ It is revered, in a secular sense, as a representation of the American ideal. It adorns the Great Seal of the United States and is often seen adorning the staff that bears the national flag.⁷⁴ The bald eagle, however, is not merely honored, but is protected by some of the most potent laws ever enacted by Congress.⁷⁵

72. See *Thirty-Eight Golden Eagles*, 649 F. Supp. at 276 (“[A]ny scheme which limits the access of the faithful to their talisman must be seen as having a profound effect on the exercise of religious belief.” (citing *United States v. Abeyta*, 632 F. Supp. 1301, 1304 (D.N.M. 1986))).

73. It is often noted that Benjamin Franklin was allegedly opposed to adopting the bald eagle as our national symbol. See *United States v. Hetzel*, 385 F. Supp. 1311, 1315 n.1 (W.D. Mo. 1974). In a letter to his daughter, Sarah “Sally” Bache, dated January 26, 1784, he expressed his opinion on the 1782 Continental Congress’s action: “I wish the Bald Eagle had not been chosen as the Representative of our Country; he is a Bird of bad moral Character; like those among Men who live by Sharping and Robbing, he is generally poor, and often very lousy. The Turkey [sic] is a much more respectable Bird, and withal, a true original Native of America.” *Id.*; see also WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* 422–23 (2003). In fairness, Franklin’s “riff” about the choice of the national bird may not have been motivated by a passion for turkey, but rather as a means of deriding an effort by General George Washington to create a hereditary society of merit for American Revolution veterans: the Society of the Cincinnati. See *id.* at 422. At the time of Franklin’s letter to his daughter, Washington was promoting the order which had chosen the eagle as the focal point of its seal. *Id.* Many chided the new order, commenting on how much the eagle in the seal actually resembled a turkey. *Id.* at 422–23. Franklin ridiculed the order in his writings, making the now famous quip about turkeys. *Id.* at 423. Even if the turkey was the bird receiving such scrutiny, chances are there would still be controversy. Not only do turkeys have significance in modern American culture at Thanksgiving, but turkeys and turkey parts play a role in myriad native rituals. See, e.g., THOMAS E. MAILS, *THE MYSTIC WARRIORS OF THE PLAINS: THE CULTURE, ARTS, CRAFTS AND RELIGION OF THE PLAINS INDIANS* 257, 379, 544 (2002) (referencing various purposes for both eagle and turkey feathers and other parts by Plains Indians, including feathers for arrow shafts, leg bones for war whistles, etc.).

74. See Bicentennial Year of the American Bald Eagle and National Bald Eagle Day, Proclamation No. 4893, 47 Fed. Reg. 4673 (Jan. 28, 1982).

75. See, e.g., *Ctr. for Biological Diversity v. Norton*, 304 F. Supp 2d 1174, 1178 (D. Ariz. 2003) (“[In the Endangered Species Act,] Congress has spoken in the plainest of words, making it abundantly clear that the balance [of equities] has been struck in favor of affording endangered species the highest of priorities.” (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978))).

Chief among these laws are the Bald and Golden Eagle Protection Act (“BGEPA”),⁷⁶ the Migratory Bird Treaty Act of 1918 (“MBTA”),⁷⁷ and the Endangered Species Act of 1973 (“ESA”).⁷⁸ While each adds a measure of protection to a variety of species, all three specifically protect the bald eagle, with the BGEPA adding special protections to the golden eagle as well. Arguably, all three acts infringe on Indian religious freedom,⁷⁹ but the BGEPA expressly provides an exemption, permitting the use of eagles and eagle parts for bona fide Indian religious purposes.⁸⁰

B. The Bald and Golden Eagle Protection Act

The BGEPA provides significant protection for bald and golden eagles, and while Native Americans generally support such protection, protecting eagles at all costs would severely interfere with the free exercise of many Native American religions. Thus, among several secular exemptions,⁸¹ Congress provided a religious exemption to accommodate Native American religious exercise.⁸²

1. The history and function of the Act

Congress passed the Bald Eagle Protection Act in 1940 to protect a rapidly dwindling population of bald eagles.⁸³ The Act provided criminal

76. 16 U.S.C. §§ 668–668d (1994). Congress first turned its attention to the eagle in the late 1930s as bald eagle populations rapidly declined. See Tina S. Boradiansky, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT. RESOURCES J. 709 (1990). Among the reasons for the decline was a significant loss of habitat, unlawful takings, use of pesticides, and other human disturbances such as electrical power lines. *Id.* In 1940, Congress enacted the Bald Eagle Protection Act, ch. 278, § 1, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. § 668 (2000)), essentially making the bald eagle a “ward of the National Government.” See *United States v. White*, 508 F.2d 453, 460 (8th Cir. 1974); see also H.R. REP. NO. 76-2104 (1940). In passing the Act, Congress explained that “the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom.” Bald Eagle Protection Act § 1, 54 Stat. at 250.

77. 16 U.S.C. §§ 703–711 (2000).

78. *Id.* §§ 1531–1543.

79. See *infra* Part IV.

80. 16 U.S.C. § 668a.

81. *Id.*

82. *Id.*

83. The enacting clause of the Act, provided,

Whereas the Continental Congress in 1782 adopted the bald eagle as the national symbol; and Whereas the bald eagle thus became the symbolic representation of a new nation under a new government in a new world; and Whereas by that Act of Congress

and civil penalties, but protected only bald eagles.⁸⁴ Because bald eaglets⁸⁵ were nearly impossible to distinguish from golden eaglets, and because golden eagle populations were beginning to decline, Congress amended the act in 1962 to add the same protection to golden eagles.⁸⁶ Without a specific permit from the Secretary of the Interior, the Act prohibits knowingly taking,⁸⁷ possessing, bartering, purchasing, selling, offering for sale, purchase, or barter, transporting, exporting, or importing any bald or golden eagle, whether alive or dead, or any eagle part, nest, or egg.⁸⁸

The Act provides both criminal and civil penalties, as well as the potential forfeiture of any property, real or personal, used to take or kill an eagle.⁸⁹ Notably, however, the Act provides for certain exceptions. Specifically, the Secretary of Interior may issue permits allowing the possession of eagles or eagle parts for specific purposes, including: scientific and exhibition purposes; protecting wildlife or agricultural interests; seasonal protection of domesticated flocks and herds; falconry; and the religious purposes of Indian tribes.⁹⁰

2. *The Indian religious exemption*

Because of the importance of the eagle in Native American religious culture, Congress expressly provided a means by which members of Indian tribes could be exempted from the law and allowed to possess eagles and eagle parts for religious purposes pursuant to a federally

and by tradition and custom during the life of this Nation, the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom; and

Whereas the bald eagle is now threatened with extinction: Therefore Be it enacted

84. See 16 U.S.C. §§ 668–668d.

85. An “eaglet” is a young eagle. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

86. See Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (codified as amended at 16 U.S.C. § 668); see also 1962 U.S.C.C.A.N. 1453. Act of October 24, 1962, Pub. L. No. 87–884, 76 Stat. 1246 (“[P]rotection of the golden eagle will afford greater protection for the bald eagle, the national symbol of the United States of America, because the bald eagle is often killed by persons mistaking it for the golden eagle.”).

87. “Take” includes pursuing, shooting, shooting at, poisoning, wounding, killing, capturing, trapping, collecting, or molesting or disturbing. 16 U.S.C. § 668c; 50 C.F.R. § 22.3 (2004).

88. 16 U.S.C. § 668(a); 50 C.F.R. §§ 13, 22 (2004).

89. This includes the potential loss of grazing contracts with the federal government. Anything used to take or kill an eagle is subject to forfeiture under the BGEPA. This includes not only guns, traps, and nets, but also cars, boats, and other equipment. 16 U.S.C. §668b(b).

90. 16 U.S.C. § 668a; 50 C.F.R. §§ 13, 22.21–.25.

issued permit.⁹¹ Thus, the 1962 amendments provided not only for the preservation of the golden eagle but also for the preservation of a cultural or religious practice. For example, in the Congressional House debate of the 1962 amendments, Congress noted that access to eagles was necessary “to continue ancient customs and ceremonies that are of deep religious or emotional significance to [Native Americans].”⁹² Because Congress was adding the golden eagle to the Act, it was understood that this broader protection would substantially affect Native cultural and religious practices, therefore Congress adopted the exemption. The amendment, however, did more than allow for the use of eagles for Indian religious purposes; it also provided exemptions for scientific, educational, or exhibition purposes.⁹³ All such uses were contingent upon compliance with a federally mandated permitting process discussed below.

3. *The permitting process*

While the Act in its entirety has been a source of litigation,⁹⁴ the permit process is the source of a majority of the litigation under the BGEPA. Some argue that the process is too restrictive and unduly infringes on Native American religious freedom.⁹⁵ Others argue that the process unconstitutionally discriminates between Indians and non-Indians and between members of federally recognized tribes and those whose tribes are not so recognized.⁹⁶

The Code of Federal Regulations outlines the requirements and procedures for acquiring a permit to take eagles pursuant to one of the enumerated exemptions.⁹⁷ Under the current regulations, to receive or possess eagle parts an individual Indian must submit a written application to the U.S. Fish and Wildlife Services (USFWS),⁹⁸ which

91. See 16 U.S.C. § 668a; *United States v. Dion*, 476 U.S. 734, 740 (1986).

92. See *Dion*, 476 U.S. at 741 (referencing the House debates on the BGEPA).

93. 16 U.S.C. §668a.

94. See *infra* Part IV.D.1 (discussing challenges based on treaty rights).

95. See De Meo, *supra* note 68, at 788–95 (arguing that the permitting process is not narrowly tailored because it still creates too heavy a burden on tribal free exercise).

96. See Appellee Joseluis Saenz’s Answer Brief at 34, *Saenz v. Dep’t of the Interior* (No. 00-2166) (on file at the 10th Circuit Court of Appeals, Denver, Colo.), *reh’g en banc*, *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002).

97. See 50 C.F.R. §§ 22.21–.22 (2004).

98. *Id.* § 22.22 (“[An applicant] must submit applications for permits to take, possess, transport within the United States, or transport into or out of the United States lawfully acquired bald or golden eagles, or their parts, nests, or eggs for Indian religious use to the appropriate Regional

application includes the applicant's general information, the species and number of eagles or eagle parts requested (up to one whole eagle), the location of the proposed religious activity, the name of the associated tribe, the name of the ceremony, certification from the Bureau of Indian Affairs that the applicant is Indian (and an enrolled member of a federally recognized tribe),⁹⁹ and certification from the applicant's religious group authorizing the ceremony.¹⁰⁰

Indians may also apply to the USFWS to take or kill an eagle, but the USFWS can approve such permits only with the consent of the Secretary of the Interior.¹⁰¹ Because a permit to take or kill an eagle is rare,¹⁰² eagle remains are primarily obtained from the federal repository. Notably, even forfeited or abandoned eagle-adorned property is subject to the restrictions outlined in the Federal Regulations.¹⁰³

Thus, before a Native American can possess an eagle feather or carcass of an eagle found in the wild, and before he or she can inherit or receive as a gift any article made from or adorned with eagle parts, he or she must obtain a permit to possess the article.¹⁰⁴ In essence, no one may possess any eagle part without a permit, regardless of the nature of acquisition. As outlined in the Code of Federal Regulations, the permitting process draws a line of distinction between Indians who are members of federally recognized tribes and those who are not: those who are not may not use eagle parts for any religious ceremony.¹⁰⁵

Director—Attention: Migratory Bird Permit Office. You can find addresses for the appropriate Regional Directors in 50 CFR 2.2.”).

99. A federally recognized tribe is one that enjoys special recognition under federal statute, and enjoys special protections and benefits. *See* Federally Recognized Tribal List Act of 1994, 25 U.S.C. § 479a-1 (2000). Not all Indian tribes are federally recognized for various reasons, including that they may have been “terminated” or disbanded by a prior act of Congress. *See, e.g.*, discussion on Chiricahua Apache tribe, *infra* note 156.

100. *See* 50 C.F.R. § 22.22(a).

101. *See id.* § 22.22.

102. *See* Boradiansky, *supra* note 69, at 711 n.14 (noting that in 1990, the Hopi Tribe held the only permit to take or kill eagles).

103. *See* 50 C.F.R. § 12.36(c) (“Wildlife and plants may be donated to individual American Indians for the practice of traditional American Indian religions. Any donation of the parts of bald or golden eagles to American Indians may only be made to individuals authorized by permit issued in accordance with § 22.22 of this title to possess such items.”).

104. When the author explained this principle to his wife, she commented, “It’s just a feather; we aren’t talking about getting a concealed weapons permit, right?” It may not be a far stretch to say that some Indians might find it easier to get a concealed weapons permit than a permit to carry a feather.

105. 50 C.F.R. § 22.22 (“We will issue a permit only to members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs listed under 25 U.S.C. 479a-1 engaged in religious activities who satisfy all the issuance criteria of this section.”).

In addition to the federally recognized tribe requirement, Native American applicants who otherwise meet all the requirements may be disqualified for having prior criminal convictions or civil penalties awarded for violations of related statutes or administrative regulations.¹⁰⁶ Moreover, even if an application is otherwise viable, the Secretary (or the Director of USFWS) may deny the permit if granting the permit would threaten the eagle population.¹⁰⁷ Finally, if a permit is authorized, the requested eagle or eagle parts are sent to the applicant from the National Eagle Repository.¹⁰⁸

Despite the tedious requirements imposed by the BGEPA, the application process does not necessarily create delays.¹⁰⁹ In fact, a permit may be acquired relatively quickly, but receiving eagle parts can take much longer due to the limited supply and the first-come-first-serve nature of the allocation of eagle parts. Currently, there are over 5,000 people on the waiting list for approximately 1,000 eagles the Repository receives each year.¹¹⁰ Therefore, most of the delays seem to occur after permits are granted: as few as two weeks to fill requests for feathers, six months to a year to fill requests for eagle parts, and eighteen months or longer to deliver an entire eagle carcass.¹¹¹

The permit system attempts to balance interests in species conservation with the religious exercise of federally recognized tribes. However, the shear demand for eagles and the monumental delays in receiving eagle parts has led to frustration and perpetual conflict.

Interestingly, the permit system was enacted in 1974 and has been interpreted to allow permits only to those Indians registered with the Bureau of Indian Affairs and enrolled in federally recognized tribes. Yet, the regulations that prescribed the criteria for federal recognition of tribes were not promulgated until 1978. *See* 25 C.F.R. § 83.7 (2004).

106. 50 C.F.R. § 13.21(b).

107. *See id.*

108. All remains of eagles that die of natural causes, or which are killed or captured, are collected in one of the National Repositories. *See* National Eagle Repository, U.S. Fish and Wildlife Service, <http://www.r6.fws.gov/law/le65.html> (last visited March 23, 2005) [hereinafter National Eagle Repository]. “The National Eagle Repository . . . is located at Rocky Mountain Arsenal northeast of Denver, Colorado.” *Id.*

109. *See* *United States v. Jim*, 888 F. Supp. 1058, 1060 (D. Or. 1995) (indicating that in 1995, the initial review of an application averages 12.2 days, followed by a review by the Bureau of Indian Affairs (BIA) that averages 26.4 days in length).

110. *See* National Eagle Repository, *supra* note 108.

111. *See Jim*, 888 F. Supp. at 1060; *see also* Matthew Perkins, *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could the Application of the Doctrine Alter the Outcome in U.S. v. Hugs?*, 30 ENVTL. L. 701, 706–07 (2000).

IV. CHALLENGES TO THE BGEPA

Even though eagle parts are available to Indians through the permit system, some have questioned why Indians should be compelled to seek a permit at all. Because Indians have long-standing treaty rights to hunt and fish and have compelling religious and cultural interests in having continued access to eagles, some have argued that Indians should be exempt from the permit process.

A. Indian Challenges Based on Treaty Rights

Most eagle feather cases have arisen as claims that Indian treaty or hunting rights permit tribal members to hunt for eagles.¹¹² The issue of treaty rights was addressed in *United States v. Dion*.¹¹³ Dion, an enrolled member of the Yankton Sioux Tribe, was convicted of, inter alia, shooting four bald eagles.¹¹⁴ Dion argued that the federal laws prohibiting the taking or killing of eagles did not apply because the takings at issue occurred entirely on a reservation in which the right to hunt was absolutely protected by treaty.¹¹⁵ The Court acknowledged the general rule that “Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress.”¹¹⁶ Yet, the Court held that the treaty rights had, in fact, been abrogated by Congress through the BGEPA.¹¹⁷ While Congress must express an intention to abrogate Indian treaty rights in plain and clear language,¹¹⁸ the Court found congressional intention unambiguous in the case of protecting eagles.¹¹⁹

Once it was established that Congress had, indeed, abrogated treaty hunting rights, challenges then shifted to attacking the Act on First Amendment grounds.¹²⁰

112. See GETCHES, *supra* note 7, at 764.

113. 476 U.S. 734 (1986).

114. *Id.* at 735–36.

115. The Court of Appeals held that the Yankton Sioux Tribe had a treaty right to hunt bald and golden eagles. *See id.* at 736.

116. *Id.* at 738 (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 449 (1982)).

117. *Id.* at 743.

118. See *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353 (1941).

119. *Dion*, 476 U.S. at 743 (“It seems plain to us, upon reading the legislative history as a whole, that Congress in 1962 believed that it was abrogating the rights of Indians to take eagles.”).

120. While the Bill of Rights has been interpreted as not applying against tribes, the protections of the Bill of Rights are guaranteed to Indians with regards to state and federal action. *See Talton v. Mayes*, 163 U.S. 376, 382–85 (1896). Furthermore, portions of the Bill of Rights have

B. Indian Challenges Based on Religious Freedom

While the BGEPA undoubtedly infringes on Indian religious practices, challenges to its validity based on an infringement of free exercise have largely been unsuccessful because of the government's compelling interest in conserving eagle populations.

For example, in *United States v. Top Sky*,¹²¹ an Indian crafted religious articles using eagle parts, which he subsequently sold to be used in religious ceremonies. The tribal member was convicted for violation of the BGEPA, but he challenged the conviction on the grounds that it violated his right to free exercise of religion.¹²² The Ninth Circuit upheld the conviction on the basis that he was not convicted for exercising his religion, but for *selling* eagle feathers, an activity expressly prohibited by the Act and for which there is no exemption.¹²³

A similar challenge was raised in *United States v. Thirty-Eight Golden Eagles or Eagle Parts*¹²⁴ where the government sought the forfeiture of eagles and eagle parts obtained from a member of the Red Lake Band of Chippewa Indians. The tribal member argued that the seizure of his eagles and eagle parts violated, inter alia, his free exercise rights, the American Indian Religious Freedom Act ("AIRFA"),¹²⁵ and various treaty rights.¹²⁶ Even though the court found that the BGEPA had significant impact on the tribal member's exercise of religious beliefs, the court held that granting any exemption from the requirements of the BGEPA (including a broader exemption that would not require Indians to acquire permits) would "considerably impede [the] Government's interest in protecting endangered species."¹²⁷

In *United States v. Jim*,¹²⁸ an enrolled member of the Yakima Nation challenged his conviction under the BGEPA and the ESA on the basis that it violated the Religious Freedom Restoration Act (RFRA).¹²⁹ The

been codified in the Indian Civil Rights Act, adding a measure of protection for Indians and non-Indians against Tribal action as well. See Indian Civil Rights Act of 1968 ("ICRA"), Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (1968) (codified as amended at 25 U.S.C. §§ 1301-1303, 1321-1326, 1331, 1341 (2000)).

121. 547 F.2d 483 (9th Cir. 1976).

122. *Id.* at 485.

123. *Id.*

124. 649 F. Supp. 269 (D. Nev. 1986).

125. 42 U.S.C. § 1996 (2000).

126. *Thirty-Eight Golden Eagles*, 649 F. Supp. at 271.

127. *Id.* at 270.

128. 888 F. Supp. 1058 (D. Or. 1995), *aff'd*, 490 U.S. 680 (1989).

129. *Id.* at 1059-60.

court upheld the Indian's conviction for killing two golden and two bald eagles even though BGEPA and ESA substantially burdened his exercise of religion.¹³⁰ The court found that Jim could have sought a permit, and while the permit system would have inconvenienced his religious exercise, "mere inconvenience is insufficient" to constitute a violation of his constitutional rights.¹³¹ Rather, to be subject to constitutional challenge the law must "interfere with a tenet or belief that is central to religious doctrine."¹³²

Interestingly, in *United States v. Gonzales*, a federal district court held that the requirement to identify the religious ceremony for which eagle parts will be used is not the least restrictive (narrowly tailored) means of advancing the government's interest.¹³³ In *Gonzales*, an Indian accused of violating the BGEPA had failed to comply with the permit process because he wished not to disclose the secret (sacred) nature of a particular Indian religious ceremony.¹³⁴ In analyzing the defendant's RFRA challenge, the court found that the requirement to list the specific ceremony was not the least restrictive means to effectuate the government's compelling interest.¹³⁵

Despite *Gonzales*, the weight of authority indicates that challenges by tribal members to the validity of the BGEPA based on free exercise theories will typically fail because the government's interest in protecting species was deemed to be compelling.¹³⁶

130. *Id.* at 1063–64.

131. *Id.* at 1061 (citing *Graham v. Comm'r*, 822 F.2d 844, 850–51 (9th Cir. 1987)).

132. *Id.* The Eighth Circuit has affirmed this reasoning that opening the door to individualized exceptions under the BGEPA would undermine the primary purposes of the Act. *See United States v. Oliver*, 255 F.3d 588 (8th Cir. 2001). Notably, the *Oliver* court also dismissed the claim that the government lacked a compelling interest because of a recent, though not final, proposal to remove the eagle from the endangered species list. *See id.* at 589.

133. 957 F. Supp. 1225 (D.N.M. 1997).

134. Pursuant to 50 C.F.R. § 22.22(a)(4), (6) (2004), an applicant for a permit must disclose the name and nature of the religious ceremony for which eagle parts are requested and must have a certification from a tribal religious leader that the ceremony is bona fide.

135. The court noted that the permit application requires applicants to certify, under criminal penalty of 18 U.S.C. § 1001 (2000), that the information provided in the application is true. *Gonzales*, 957 F. Supp. at 1229. It then found that "[t]his requirement is sufficient to protect the government's compelling interest." *Id.* Instead of requiring the additional two components of the application, *see* 50 C.F.R. § 22.22(a)(4) and (6), the government could "simply require each applicant to swear under penalty of criminal prosecution for perjury that the applicant will use the eagle in a Native American religious ceremony in which the applicant is qualified to participate." *Gonzales*, 957 F. Supp. at 1229.

136. *See, e.g., United States v. Hugs*, 109 F.3d 1375, 1377 (9th Cir. 1997) (following precedent in upholding a conviction under BGEPA thereby rejecting a free exercise claim); *see also*

V. PREVIOUS CHALLENGES TO THE INDIAN RELIGIOUS EXEMPTION

Unlike members of federally recognized tribes, other Indians and non-Indian adherents to the Native American religion are completely precluded from properly exercising their religious beliefs because they are not able to receive a permit granting a religious exemption to the BGEPA.¹³⁷ Is there a compelling reason to discriminate between members of federally recognized tribes and others who share similar religious convictions? Because eagle parts are just as central to non-federally recognized practitioners of the Native American Church, non-Native Americans have raised challenges to the BGEPA based on violations of both the Free Exercise and the Establishment Clause. Short of deciding the constitutional question, the courts have often been able to decide individual cases under RFRA.

A. *The Non-Indian: Rupert and Lundquist*

The First Circuit Court of Appeals addressed whether the BGEPA exemptions violated RFRA and the Establishment Clause in *Rupert v. Director, United States Fish and Wildlife Service*.¹³⁸ In *Rupert*, the First Circuit held that RFRA did not require that non-Native American practitioners of Indian religions be able to obtain eagle parts for religious purposes. Likewise, the court held that even though the BGEPA ostensibly preferenced federally recognized tribes, it did not violate the Establishment Clause. The exemption, the court held, “does not merely *serve* the government’s interests in (1) protecting Native American religion and culture and (2) protecting a dwindling and precious eagle population; it sets those interests in equipoise.”¹³⁹

The plaintiff in *Rupert* challenged the BGEPA as a violation of the Establishment Clause because the permitting process effectively favored one religious group.¹⁴⁰ The court applied an equal protection analysis

De Meo, *supra* note 68, at 802–07; Perkins, *supra* note 111, at 703. *But See* United States v. Abeyta, 632 F. Supp. 1301, 1304 (D.N.M. 1986) (holding that the BGEPA was violative of free exercise rights because the process to obtain needed eagle parts can take as long as eighteen months to two years and is “unnecessarily intrusive and hostile to religious privacy”).

137. Pursuant to the BGEPA, only those identified within the text of the Act are permitted to possess eagle parts. *See* 50 C.F.R. §§ 22.21–22.24 (discussing the requirements to obtain a permit for scientific and exhibition purposes, Indian religious purposes, depredation purposes, and falconry purposes).

138. 957 F.2d 32 (1st Cir. 1992).

139. *Id.* at 35.

140. *Id.* at 33–34.

that had previously been applied in cases of alleged denominational preference.¹⁴¹ But the court distinguished the cases by noting that recognized tribes have a “unique legal status under federal law” and that Congress has “plenary power . . . based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes.”¹⁴² The court reasoned that while denominational preferences are usually reviewed under a strict scrutiny standard, the unique political status—often referred to as the “guardian-ward” relationship—between the quasi-sovereign tribes and the federal government, warranted only a rational basis review.¹⁴³ Ultimately, the court held that a tribe’s status is not racial or religious, but political in nature.¹⁴⁴ Thus, finding that there was a rational basis for the BGEPA exemption, that is the protection of the religion and culture of a political class of Indians, the court upheld the exemption.¹⁴⁵

Likewise, in Oregon, a federal district court rejected a claim that the BGEPA permit process should be judicially amended to allow non-Native Americans to acquire religious exemption permits.¹⁴⁶ In *United States v. Lundquist*, the court found sufficient evidence to prove that the government’s compelling interests—species conservation and preserving Native American culture and religion—would be undermined by an expansion of the religious exemption to include non-federally recognized Indians.¹⁴⁷ Ultimately, the court rejected the RFRA claim, because

141. *See id.* at 34 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216–17 (5th Cir. 1991) (applying equal protection analysis to exemptions from drug laws); *Olsen v. Drug Enforcement Agency*, 878 F.2d 1458, 1463 n.5 (D.C. Cir. 1989) (“[I]n cases of this character, establishment clause and equal protection analyses converge.”); *United States v. Rush*, 738 F.2d 497, 513 (1st Cir. 1984); *see also* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 797 (1984) (“Overarching the tests of the religion clauses is the equal protection principle that suspect classifications, including religious classifications, are sustainable only when necessary to achieve a compelling state interest.”).

142. *Rupert*, 957 F.2d at 34–35 (citing *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974)).

143. *Id.* at 35 (“We therefore see no reason not to use the ‘rational relationship’ analysis here, where the government has treated Native Americans differently from others in a manner that arguably creates a *religious* classification.” (citing *United States v. Antelope*, 430 U.S. 641, 646 (1977))).

144. *Id.*

145. *Id.*

146. *United States v. Lundquist*, 932 F. Supp. 1237 (D. Or. 1996). Legally, the defendant was a non-Native American who practiced a Native American religion; he was not enrolled in any federally recognized tribe. Nevertheless, he claimed to be descended from Cherokee and Lakota Sioux Indian grandparents. *Id.* at 1239.

147. *Id.* at 1242–43.

eagles still warranted protection, and because protecting the limited supply of eagles was rationally related to the preservation of the spiritual and cultural practices of federally recognized tribes.¹⁴⁸

As in *Rupert* and *Lundquist*, most challenges to the BGEPA brought by non-Indians have failed, both because of the compelling governmental interest in protecting eagles and in protecting Indian culture. On the latter, the government has generally contended that expanding the religious exemptions to non-Indians could infringe on the ability of Indians to seek and receive eagle parts for religious ceremonies. Ironically, even those who are racial Indians do not necessarily benefit from the exemption to the BGEPA.

B. The Non-Federally Recognized Indian: Gibson v. Babbitt

Employing a RFRA analysis, the court in *Gibson v. Babbitt*,¹⁴⁹ held that the government was justified in discriminating between members of federally recognized Indian tribes and other Indians. The court determined that the government had a compelling interest in preserving the limited supply of bald and golden eagle parts for those with whom the federal government had a special, political obligation.¹⁵⁰ In upholding the permit process, the court reasoned that the distinction was the least restrictive means of effecting species conservation while fulfilling treaty obligations to recognized tribes and preserving Native American cultures.¹⁵¹

Ostensibly, whether on free exercise (First Amendment or RFRA) claims, or under an Establishment Clause analysis, most cases through *Babbitt* seemed to infer that the government has a compelling interest—whether protecting eagles or preserving Native American culture and religion.

VI. RECENT CASES AND THE SCOPE OF THE COMPELLING INTEREST FOR INDIAN-LIMITED EXEMPTIONS

More recent cases have inferred that the extent of the government's compelling interest at the expense of religious exercise may be waning

148. *See id.* at 1243.

149. 223 F.3d 1256 (11th Cir. 2000).

150. *Id.* at 1257–58.

151. *Id.* at 1258.

with the restoration of eagle populations.¹⁵² Still, there is a seeming split among the circuits on this point.

A. *United States v. Hardman: Not Necessarily Narrowly Tailored*

In contrast to *Babbitt*, *Lundquist*, and *Rupert*, which generally upheld the preferential exemption afforded members of federally recognized tribes, recently the Tenth Circuit has ostensibly opened the door to an expansion. Sitting en banc, the Tenth Circuit reheard three separate but similar cases.¹⁵³ The cases involved three faithful adherents to the Native American faith: one non-Indian;¹⁵⁴ one non-Indian claiming to be informally adopted into a federally recognized tribe;¹⁵⁵ and one Indian who is not a member of any currently recognized federal tribe.¹⁵⁶

152. See Amie Jamieson, *Will Bald Eagles Remain Compelling Enough to Validate the Bald and Golden Eagle Protection Act After ESA Delisting? The Ninth Circuit's Analysis in United States v. Antoine*, 34 ENVTL. L. 929, 947-48 (2004) (describing a series of cases that imply that as eagles are removed from the Endangered Species List that the state may no longer have a compelling interest); see also *United States v. Abeyta*, 632 F. Supp. 1301, 1307 (D.N.M. 1986).

153. *United States v. Hardman*, No. 99-4210, 2001 WL 892808 (10th Cir. Aug. 8, 2001), *reh'g en banc granted, opinion vacated by United States v. Hardman*, 260 F.3d 1199 (10th Cir. 2001); *Saenz v. Dep't of the Interior*, No. 00-2166, 2001 WL 892631 (10th Cir. Aug. 8, 2001), *reh'g en banc granted, opinion vacated by United States v. Hardman*, 260 F.3d 1199 (10th Cir. 2001); *United States v. Wilgus*, No. 00-4015, 2001 WL 892798, (10th Cir. Aug. 8, 2001), *reh'g en banc granted, opinion vacated by United States v. Hardman*, 260 F.3d 1199 (10th Cir. 2001).

154. *Hardman* was a non-Indian practitioner of the Native American religion for over fourteen years and lived on the Uintah and Ouray Reservation in Neola, Utah. *Hardman*, 297 F.3d at 1118. He was previously married to a member of the federally recognized S'Kallum Tribe located in Washington State and was father to two children enrolled in the their mother's tribe. *Id.* A Hopi Medicine Man gave *Hardman* a bundle of prayer feathers after he transported the body of a tribal elder, and his son's Godfather, to Arizona for funeral services. *Id.* *Hardman* was charged with, and pled guilty to, a violation of the Migratory Bird Treaty Act ("MBTA"). *Id.*

155. *Wilgus* is not of Native American descent and is not a member of any federally recognized tribe. *Id.* at 1119. He faithfully practices the Native American religion and claims to be an adopted member of the Paiute Tribe of Utah, despite the fact that Paiute Tribal law does not recognize the adoption of non-Indians as members of the Tribe. *Id.* at 1119 n.3. *Wilgus* had received a number of eagle feathers from various Native Americans and was charged with violating the Bald and Gold Eagle Protection Act ("BGEPA"). *Id.*

156. *Saenz* is a descendant of the Chiricahua Apache Indian Tribe, which was once a federally recognized tribe, but which was terminated/disbanded in 1886. *Id.* at 1119. *Saenz* obtained numerous eagle feather items in connection with various religious ceremonies. *Id.* at 1120. He was charged under the BGEPA but charges were ultimately dismissed. *Id.* In his suit, *Saenz* sought retrieval of the seized eagle feather relics. *Id.* The Chiricahua Apache, from which *Saenz* descends, are best known for legendary stories of their leader, Geronimo, who led a fierce Apache rebellion in the 1880s. See GERONIMO, GERONIMO: HIS OWN STORY 54 (S.M. Barrett trans., Plume Books rev. ed. 1996) (1969). The Chiricahua Tribe has not been federally recognized since at least 1886 when the U.S. Government disbanded the tribe. *Id.* at 110 (indicating that the final surrender of Geronimo occurred in August of 1886); see also *In re Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at *2

Although each case presented slightly unique factual scenarios, each ultimately posed a similar question: is the government's scheme under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act narrowly tailored to achieve a compelling interest, thus justifying the basis for discrimination against faithful non-Indians and Indians seeking to participate in the Native American religion?

The court held that the government's seizure of eagle feathers from Saenz, a native Indian, violated the Religious Freedom Restoration Act.¹⁵⁷ Concurrently with this holding, the court remanded the other two non-Indian challenges to the BGEPA on the basis that the government failed to prove that its eagle permit system, as administered, was in fact the least restrictive means of achieving a compelling interest.¹⁵⁸

The government argued that it had two compelling interests: "(a) protecting eagles and (b) preserving Native American culture and religion and pursuing the federal government's trust obligations to Native American Tribes."¹⁵⁹ On the first interest, the court noted that the government's interest is not only based on preservation of the species, but perpetuation of the national symbol.¹⁶⁰ And since the population of bald and golden eagles had been increasing, the court ruled that the government's interest, while still compelling, was undermined and may not actually justify the full scope of the former protection.¹⁶¹ Therefore, the court held that the BGEPA, with its narrow exemption, may not be as narrowly tailored as the least restrictive means of achieving the interest.¹⁶²

On the second interest, the court acknowledged the government's argument that the long-standing obligation to preserve Native American

(10th Cir. Aug. 8, 2001); Appellee Joseluis Saenz's Answer Brief at 5, *Saenz v. Dep't of the Interior* (No. 00-2166) (on file at the 10th Circuit Court of Appeals, Denver, Colo.), *reh'g en banc*, *Hardman*, 297 F.3d 1116.

157. *Hardman*, 297 F.3d at 1131. *In re Saenz*, 2001 U.S. App. LEXIS 17698, was one of three cases consolidated and reheard en banc by the Tenth Circuit in *Hardman*. In the *Saenz* case, the court confronted the issue of whether a member of a previously recognized Indian tribe should have eagle feathers that were seized by the government returned to him.

158. *Hardman*, 297 F.3d at 1131. The non-Indians' RFRA claims were dismissed at trial and therefore no factual record had been developed on whether the government's means of achieving the compelling interest was the least restrictive. *Id.*

159. *Id.* at 1127.

160. *Id.* The court noted that "most" other courts have likewise held that preservation of the eagle is a compelling interest. *Id.* (citing *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001); *United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997); *Gibson v. Babbitt*, 72 F. Supp. 2d 1356, 1360 (S.D. Fla. 1999), *aff'd*, 223 F.3d 1256 (11th Cir. 2000)).

161. *Id.* at 1127-28.

162. *Id.* at 1128.

cultures, concomitant with the Indian Commerce Power and the guardian-ward relationship, is compelling.¹⁶³ It further acknowledged that, in the context of government action in the furtherance of the Indian trust responsibility and Congress's "extraordinarily broad power" to legislate Indian affairs, Congressional action is generally only required to have some rational basis to be upheld.¹⁶⁴ However, because RFRA was implicated, the court held that Congress "plainly commands that . . . federal program[s] that substantially burden[] religion must be the least restrictive means of achieving a compelling government interest."¹⁶⁵

With regards to Mr. Saenz, the Chiricahua Apache, the court reviewed the record and found that the government had failed to prove that limiting eagle permits only to members of federally recognized tribes was the least restrictive means of preserving eagle populations while protecting Native American culture.¹⁶⁶ As for the protection of eagles, the court reasoned that the government provided nothing more than supposition that expanding the permit process to include all Indian religious adherents, and not just those recognized by the government, would affect bird populations.¹⁶⁷ Further, because the government provided nothing more than tenuous statistics and unfounded suppositions, the court repudiated the assertion that increasing the number of potential permit applicants would increase the wait period for eagle parts, thus increasing the potential for poaching.¹⁶⁸

On the issue of cultural preservation, the court similarly rejected the government's argument as "mere speculation."¹⁶⁹ The government argued that allowing non-federally recognized Indians to apply for permits would increase the waiting period for members of recognized tribes, thus jeopardizing their religion and culture.¹⁷⁰ While

163. *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 35 (1st Cir. 1992)).

164. *Id.* at 1128–29 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978)).

165. *Id.* at 1129.

166. *Id.* at 1132.

167. *Id.*

168. *Id.* at 1132–33. The court found the opposite to be equally plausible: while the wait period might increase for members of federally recognized tribes, the wait would decrease for Indians who previously had no legal access, thus potentially offsetting any potential increase in poaching by federally recognized Indians with a decrease in poaching among non-federally recognized Indians.

169. *Id.* at 1133.

170. *Id.*

acknowledging the government's interest in preserving cultural practices as a means of preserving the tribes,¹⁷¹ the court noted, however, that "[a]llowing a wider variety of people to participate in the Native American religion could just as easily *foster* Native American culture and religion by exposing it to a wider array of persons."¹⁷²

The government also argued that expanding the permit process to include all Native Americans would transform a proper political distinction¹⁷³ into an impermissible race-based classification.¹⁷⁴ However, the court seemed dismissive of this argument in describing the unique legal status of tribes and the historic government-to-government relationship.¹⁷⁵ In essence, the court implied that where Congress is acting pursuant to the Indian Commerce Power or under its trust obligations, such actions are based on a "political" status and not a racial or religious classification.

Ultimately, the court found the record to be inadequate in the case of the two non-Indians, and fatal in the case of Saenz.¹⁷⁶ Whether the permitting process was the least restrictive means to achieve both the preservation of eagles and the perpetuation of tribal sovereignty and culture seemed to hinge on the number and status of the eagle.¹⁷⁷ Because the government could not show that expanding access to eagle parts would in fact harm either eagles or the recognized tribes, the exclusive exemption was not intuitively the least restrictive means.¹⁷⁸

171. *Id.* at 1133 n.2.

172. *Id.* at 1133.

173. This political distinction is one based on the Court's holding in *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974), which defined the status of being an Indian as one of a political nature and not merely racial.

174. See Brief for the Appellant, *Saenz v. Dep't of the Interior* at 23–24, (No. 00-2166) (on file at the 10th Circuit Court of Appeals, Denver, Colo.), *reh'g en banc*, *Hardman*, 297 F.3d 1116, *reh'g en banc*, *Hardman*, 297 F.3d 1116.

175. See *Hardman*, 297 F.3d at 1128 ("The Supreme Court has therefore held that limited hiring preferences for Native Americans at the Bureau of Indian Affairs did not constitute unlawful race discrimination." (citing *Mancari*, 417 U.S. at 553–54)).

176. *Id.* at 1133.

177. *Id.* at 1135.

178. *Id.* at 1136.

B. United States v. Antoine: *Finding the BGEPA
To Be Narrowly Tailored—For Now*

In contrast, the Ninth Circuit did not follow *Hardman* in a case with very similar facts. In *United States v. Antoine*,¹⁷⁹ the court found that the government's evidence, which was similar in nature to the evidence adduced in *Hardman*, was sufficient to show that the permitting process was the least restrictive means of achieving the government's compelling interests.¹⁸⁰

Antoine, a member of the Cowichan Band of the Salish Indian Tribe in British Columbia, Canada, was convicted of violating the BGEPA while in the United States.¹⁸¹ Antoine challenged the conviction under RFRA, but the Ninth Circuit found that the government had narrowly tailored the statute to achieve a balance in species protection and preservation of Native culture and religion.¹⁸² The court reasoned that the BGEPA permit program does not deny Antoine a permit because of his religion, but rather because of his political classification.¹⁸³ The court found that the evidence supported this distinction and that the government's interest was sufficiently compelling to justify the apparent discrimination.¹⁸⁴

Antoine also sought to invalidate his conviction by arguing that a proposed rule to remove the bald eagle from the Endangered Species List showed that the government's interest was no longer compelling enough to justify the infringement on his religious exercises.¹⁸⁵ However, while the court discounted the proposed rule as not substantially weakening the governmental interest, it did infer that a final rule might provide the type of "substantial change"¹⁸⁶ that could "render a well-tailored statute misproportioned."¹⁸⁷ Ultimately, the court upheld the permitting program.

179. *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003).

180. *Id.* at 923.

181. *Id.* at 920.

182. *Id.* at 924.

183. *Id.*

184. *Id.*

185. *Id.* at 921–22.

186. *Id.* at 922.

187. *See id.* at 921–22 ("Because the delisting proposal is based on incomplete information, it carries less weight than a final rule.").

VII. THE RATIONALE FOR THE INDIAN-LIMITED EXEMPTION

The apparent split between the Ninth and Tenth Circuits leaves many unanswered questions. First and foremost, will the purpose of the BGEPA remain compelling when bald eagles are removed from the Endangered Species List, or is there another compelling basis for the protection? Second, assuming that protection of eagles remains compelling, is the basis for the Indian religious exemption valid? Why should members of federally recognized Indian tribes receive special protection?

This Comment advocates that there are legitimate reasons to distinguish and give special treatment to members of federally recognized tribes. The tribes have a unique place in our constitutional structure that gives them a special political classification. Even if such distinctions were characterized by race or religion, the government could find a compelling interest in fulfilling its trust responsibilities and preserving Indian culture and sovereignty. Furthermore, if race or religion were deemed to be motivating factors, Congress might still be justified in exempting Indians from the BGEPA on other bases: namely, to remedy past discrimination against Indians. However, classifying Indian tribes as only political, only racial, or only religious could subject them to discrimination that would be prohibited with any other religious or racial minority. Consequently, if an action is justified entirely on the basis of one of these classifications, then tribes and Indians will not be afforded the full protections given to them by Congress and provided in U.S. Constitution.

*A. Plenary Power, Trust Obligations, and
Other Reasons To Prefer Indian Tribes*

First, any action by Congress relating to an Indian tribe, including granting a religious exemption, is ostensibly within its power—when acting to regulate the affairs of or interactions with Indian tribes, Congress has exclusive authority.¹⁸⁸ Furthermore, this power is said to be plenary, meaning that Congress has absolute power to regulate the

188. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”); *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.”).

affairs of Indian tribes.¹⁸⁹ With regards to the tribes, as legal or political entities, Congress's power is virtually unbounded;¹⁹⁰ Congress has the power to prefer¹⁹¹ or even destroy tribes if it chooses.¹⁹² However, Congress is bounded by the Constitution, treaties, and laws of the United States. Thus, where rights and obligations are established by treaty or statute, they remain unless such rights and obligations are abrogated.¹⁹³

Because Congress has plenary power, it has power to exempt Indian tribes and their members from otherwise generally applicable laws.¹⁹⁴ What remains in question, however, is whether such power is limited by any of the Constitution's other protections.¹⁹⁵

189. *See, e.g.*, *United States v. Kagama*, 118 U.S. 375, 384 (1886) (holding that Congress has plenary power of tribes); *Worcester*, 31 U.S. at 561 (affirming the principle that federal law preempts state law on matters of Indian affairs); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–65 (1903) (maintaining that congressional authority over Indians is plenary, political, and not justiciable). *But see* *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 90 (1977) (indicating that congressional plenary power over Indian tribes does not prevent a due process challenge).

190. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984) (discussing the various connotations of “plenary power”). “As to the category of unlimited power, if a general power over Indian affairs exists, any legislation relating to Indians would be permissible.” *Id.* at 196 n.3 (citing *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1840) for the proposition that “congressional policy decisions dealing with Indians are not open to question by the judiciary”).

191. *See* *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974) (affirming certain preferences granted to members of Indian tribes).

192. Many tribes were congressionally dissolved by individual acts that “terminated” the tribe’s political existence. *See, e.g.*, 1954 Klamath Termination Act, ch. 732, § 1, 68 Stat. 718 (1954) (codified at 25 U.S.C. § 564 (2000)). Consider the case of the Menominee Tribe, which was recognized and granted a reservation under the Treaty of Wolf River in 1854, but which was terminated in 1954. *See* *Menominee Tribe v. United States* 391 U.S. 404, 405, 407 (1968).

193. *See, e.g.*, *United States v. Dion*, 476 U.S. 734, 745 (1986) (finding that Congress intended to abrogate treaty rights to hunt eagles); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 687 (1979) (finding that congressional regulation of Indian fishing rights abrogated treaty rights to unlimited fishing on reservation); *Menominee Tribe*, 391 U.S. at 412 (finding that despite the fact that Congress terminated the tribe, it did not expressly abrogate the treaty hunting and fishing rights secured for the members of the tribe); *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 353–54 (1941) (holding that Congress may abrogate treaties but must be clear that it intended to do so); *Lone Wolf*, 187 U.S. at 566 (reaffirming that Congress has power to abrogate treaties with Indian tribes).

194. *See* AIRFA, 42 U.S.C. § 1996 (2000) (providing a religious exemption for use of peyote).

195. *See* Newton, *supra* note 190, at 196–97 (describing the unique status of Indian tribes as a justification of Congressional plenary power).

1. Tribal sovereignty and the unique legal and political classification of tribes

While Congress has power to regulate Indian tribes, to their benefit or detriment,¹⁹⁶ there are very good reasons why Congress should continue to give special consideration to tribes and to their culture and religion. Chief among these, and perhaps the most significant factor tending to support the myriad exemptions and seeming preferences afforded Indian tribes, is their unique legal and political relationship with the United States. While members of a particular Indian tribe often share common customs, history, religion, and ethnicity, the tribal entity is more than a racial group, a social club, or a church; it is an inherent sovereign with a distinct political identity.¹⁹⁷ Tribes are a type of “domestic dependent nation[,]”¹⁹⁸ that have historically held a status often referred to as quasi-sovereign and have interacted with the federal government on a government-to-government basis.¹⁹⁹ Many tribes have treaties²⁰⁰ or statutory agreements²⁰¹ with the United States that have the force of law

196. See generally Allison Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997) (describing nineteenth-century congressional and judicial actions that ostensibly suppressed traditional Indian beliefs and practices and comparing those to more recent government activities).

197. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 530–31 (1832) (acknowledging the inherent sovereignty of the Cherokee nation as a distinct political entity, capable of maintaining relations of peace and war, with boundaries, and the right to self-government). “The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power . . .” *Id.* at 519.

[W]e have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community—not a foreign, but a domestic community—not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation.

Id. at 583.

198. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

199. See *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (describing tribes as “quasi-sovereign” entities that are uniquely governed by the federal government); *Worcester*, 31 U.S. at 519 (“[I]ntercourse with [Indians] shall be carried on exclusively by the government of the union.”).

200. See, e.g., Treaty of Hopewell with the Cherokees, Nov. 28, 1785, *partially reprinted in* GETCHES, *supra* note 7, at 87–88; see also e.g., *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (discussing provisions of the Treaty of Medicine Creek and other treaties between the United States and fourteen tribes in western Washington).

201. In 1871, Congress attached a rider to the Indian Appropriations Act of 1871 that effectively ended all treaty-making with Indian tribes and provided that all future agreements with

and that promised certain services and benefits in exchange for the cession of tribal occupancy rights of vast tracts of land.²⁰² The rights and privileges provided for in these agreements are federal law and are supreme unless Congress expressly abridges them.²⁰³

Thus, as various courts have affirmed, tribal status is and can be genuinely characterized as a political status, and membership in a federally recognized tribe is a legitimate basis for special treatment.²⁰⁴ It is a proper impetus for granting Indian tribes exemptions to otherwise generally applicable laws, so long as there is a rational basis in doing so.²⁰⁵ In other words, being an Indian is a political distinction that counts.

2. Federal trust obligations and the guardian-ward relationship

More than just being an Indian, being a member of a federally recognized tribe not only counts, but is central to the debate on Indian exemptions and special preferences. There is a special trust relationship between the federal government and the various tribes,²⁰⁶ and this relationship is also a basis for congressional action to prefer, promote, or benefit Indian tribes, including the special Indian religious exemption to the BGEPA. The federal government has a “distinctive obligation of trust incumbent . . . in its dealings with these dependent and sometimes

tribes would be statutory in nature, requiring adoption in both houses of Congress and the signature of the President to become law. *See* GETCHES, *supra* note 7, at 152 (citing Indian Appropriation Act of 1871, 16 Stat. 544, 566 (1871)).

202. *See* GETCHES, *supra* note 7, at 2–3. In return for certain promises and rights, treaties were entered into with tribes, “to the extent necessary to procure their consent to cession of their right to occupy the land.” *Id.* at 2.

203. *See Worcester*, 31 U.S. at 559 (“The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.”); *see also* *United States v. Dion*, 476 U.S. 734, 745 (1986) (finding that Congress intended to abrogate Indian treaty hunting rights); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979) (indicating a reluctance to find congressional abrogation of treaty rights unless express) (citing *Menominee Tribe v. United States*, 391 U.S. 404 (1968)).

204. *See, e.g., Morton*, 417 U.S. at 554–55.

205. *See generally* AIRFA, Pub. L. No. 95-341, § 1, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2000)).

206. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286 (1942) (discussing the federal trust responsibilities to Indians); *Tulee v. Washington*, 316 U.S. 681 (1942) (same); *United States v. Kagama*, 118 U.S. 375 (1886) (same); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, (1831) (same).

exploited people [referring to Indians].”²⁰⁷ In carrying out its treaty obligations, the government is “something more than a mere contracting party.”²⁰⁸ Rather, the government has a fiduciary duty: “Not honesty alone, but the punctilio of an honor the most sensitive.”²⁰⁹

The long history of cases on the subject²¹⁰ generally adopt the view that the federal-tribal relationship is one in which the federal government must protect Native American interests while leaving an element of sovereign power in the tribes.²¹¹ Nevertheless, as one court has noted, “The existence of a general fiduciary duty does not mean . . . that every Government action disliked by the Indians is automatically a violation of that trust.”²¹² And while the trust doctrine is typically applied in the context of protecting tribal land and other legal and economic interests, it has also been extended to apply to other social, cultural, and religious interests.²¹³ In fact, Congress has expressly adopted a policy of protecting Indian religion and culture through the American Indian Religious Freedom Act.²¹⁴

The history of congressional power over Indian affairs runs parallel with Congress’s historic protective role. Tribes have been described as “wards of the nation”²¹⁵ and the federal government as guardian.²¹⁶ Courts have long believed that Indian communities are dependent on the federal government.²¹⁷ Because of treaties in which tribes ceded land

207. See *Seminole Nation*, 316 U.S. at 296.

208. *Id.*

209. *Id.* at 297 (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)).

210. See, e.g., *Cherokee Nation*, 30 U.S. 1; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 530–31 (1832).

211. See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1496–99.

212. See *Cherokee Nation v. United States*, 21 Cl. Ct. 565, 577 (1990) (quoting *Pawnee v. United States*, 830 F.2d 187, 190 n.5 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988)).

213. See Sharon L. O’Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451 (1995) (arguing “that the federal government is obligated by the special status” of Indian tribes and Congress’s special trust relationship to ensure religious preservation among tribes).

214. See AIRFA Amendments, Pub. L. No. 103-344, § 2, 108 Stat. 3125 (1994); (amending 42 U.S.C. § 1996 (1994)). At least one scholar believes that because Congress enacted AIRFA, it elevated the influence of the Indian Trust Doctrine. See Perkins, *supra* note 111 at 719–21.

215. See *United States v. Kagama*, 118 U.S. 375, 382–83 (1886).

216. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (characterizing the relationship between the United States and Indian Tribes as “guardian-ward”).

217. See *id.* (noting that because of the treatment of tribes throughout American history, Indians were, at the time, dependent on the United States for “daily food,” “political rights,” and protection). *Id.* “They owe no allegiance to the States, and receive from them no protection. Because

and authority, wars in which tribes were conquered or disarmed, and bitter dealings in which tribes were often treated less than favorably, courts have recognized a duty of protection that arises from congressional assumption of power.²¹⁸ In this context, to fulfill its obligation as trustee, the federal government may be obligated to preserve Indian religious rights.²¹⁹

While some might criticize this policy²²⁰ and its various manifestations,²²¹ the trust relationship may justify congressional actions that might otherwise violate constitutional protections. Because of the guardian-ward classification, giving tribes a religious preference—or otherwise reasonably accommodating their religious practices—can be no more violative of the Establishment Clause than making reasonable accommodations for a child in state custody to practice her religious beliefs.²²² Actually, because of the First Amendment, such accommodation and facilitation may actually be required to fulfill the guardian obligations.²²³ Thus, in a real sense, the Indian religious exemption to the BGEPA is justified, not as a violation of the First Amendment, but as an accommodation of the religious exercise of a ward of the federal government. However, as will be discussed below, while the exemption may be justified, the administration of the current eagle permitting system may go beyond mere accommodation and into excessive entanglement.

of the local ill feeling, the people of the States where they are found are often their deadliest enemies.” *Id.*

218. *Id.*; see also Newton, *supra* note 190 at 215.

219. See O’Brien, *supra* note 213, at 474–83.

220. See, e.g., Rupert v. Dir., U.S. Fish and Wildlife Serv., 957 F.2d 32, 34–35 (1st Cir. 1992). Plaintiff argued that limiting the religious exemption of the BGEPA was an unconstitutional denominational preference and violative of the Establishment Clause. *Id.*

221. See AIRFA Amendments, Pub. L. No. 103-344, § 2, 108 Stat. 3125 (1994) (amending 42 U.S.C. § 1996 (1994)) (creating an express exemption for Indian religious use of peyote); 1962 Amendments to the Bald Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (1962) (amending 16 U.S.C. §§ 668, 668a) (creating exemption for Indian religious use of eagle feathers).

222. See *Braker v. City of New York*, 337 F. Supp. 2d 539, 555 (S.D.N.Y. 2004) (The First Amendment requires state to make “reasonable efforts to assure that the religious needs of the children’ placed in foster care are met during the period of that care.” (quoting *Wilder v. Bernstein*, 848 F.2d 1338, 1347 (2nd Cir. 1988))).

223. *Cf. id.* at 555 (requiring religious accommodation for foster children because they are wards of the state). Some have suggested that the Indian Trust Doctrine may actually be used to challenge the validity of the BGEPA, despite the exemptions providing for religious purposes of Indians. See Perkins, *supra* note 111, at 713–14 (arguing that the trust doctrine will be the next mode of challenging the BGEPA by Native Americans).

3. Special Indian religious accommodation derives from the same basis as other Indian preferences

Putting aside the issues arising from the Establishment Clause, it is clear that other Indian preferences have been upheld against equal protection challenges under a similar analysis.²²⁴ In fact, Indian preferences are upheld because of the unique status of Indian tribes and because of the federal government's fiduciary duties.²²⁵ Whether granting special tax status to Indians,²²⁶ providing for employment preferences,²²⁷ awarding special welfare benefits,²²⁸ or providing for special judicial treatment,²²⁹ Congress has authority to prefer Indians "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed."²³⁰

In reviewing the breadth of such Indian preferences, it is difficult to precisely distinguish religious preference—which raise First Amendment concerns—from cultural preferences that have little or no First Amendment implications. Still, considering the interconnection of religion and every other aspect of Indian life, the basis for allowing Congress to act in nonreligious contexts should apply even when the scope of congressional protection crosses into religious/cultural areas.

4. Inadequate classifications: using race and religion in protecting tribal rights as a means of remedying past discrimination

Part of the difficulty in addressing Indian exemptions to generally applicable laws, including Indian religious exemptions to the BGEPA, is that Indian tribes cannot be singularly classified as political, religious,

224. See *Rupert*, 957 F.2d at 34–35 (holding that claim is rooted in the Establishment Clause and “requires an equal protection mode of analysis.” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring))).

225. Government actions that preference Indians have become widely accepted because the unique political status of tribes leaves them singularly situated (as opposed to similarly situated). See *infra* notes 229–32.

226. See *Bd. of County Comm’rs v. Seber*, 318 U.S. 705, 709 (1943) (upholding federally granted tax immunity); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 165 (1973) (same).

227. See *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

228. See *Morton v. Ruiz*, 415 U.S. 199, 230 (1974) (upholding special federal welfare benefits for Indians “on or near” reservations).

229. See *Williams v. Lee*, 358 U.S. 217, 223 (1959) (upholding grants/reservations of jurisdiction to tribal courts over reservation affairs).

230. *Mancari*, 417 U.S. at 555.

racial, or social groups. Although they are duly characterized as political sovereigns, within a tribe they generally share common cultural and religious beliefs and practices. They also share a common race and ethnicity. This notion challenges what is arguably one of the flaws of the American social conscience, which seemingly infects legal reasoning: the inability to accept that not every social, cultural, religious, or political phenomenon can be defined in terms of American conception.

Consider the American treatment of property ownership. Property ownership plays a fundamental role in American society,²³¹ as seen in the notions of *manifest destiny*²³² and common notions of the American dream.²³³ Consequently, as the United States emerged from colonial infancy and expanded westward, individuals and governments built fences and drew boundaries.²³⁴ This division of property had significant impact on American Indians²³⁵ who were not acquainted with the American conception of property ownership, largely because the Indians believed that men did not own the land, rather men belonged to the land.²³⁶

Another concept that seems inherent to the American paradigm, but which was foreign to Indian conceptions of life, is the view that spiritual and religious life can be separated from daily living and culture. For

231. See Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1348–49 (2000) (identifying home/property ownership as a fundamental aspect of the American dream).

232. See generally Karin P. Sheldon, *The Thrilling Days of Yesteryear: Some Comments on the Settlement of the West and the Development of Federal Land and Resource Law*, SF34 A.L.I.-A.B.A. COURSE OF STUDY 1, 9 (2000).

233. The American Dream, in this context refers to the common desire of many Americans to work and acquire enough wealth to own a home and land. See Mann, *supra* note 231, at 1348–49. One poignant example of the historical underpinnings of the American aspiration of property ownership can be seen in the aftermath of the Indian General Allotment Act, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354 (1994)). The Act opened up vast tracts of previously Indian land in the Oklahoma Territory and in the rest of the United States to white settlement. *Id.*; see Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 306 (1997). The Oklahoma land runs later became the setting of a motion picture starring Tom Cruise and Nicole Kidman. FAR AND AWAY (Universal Studios 1992).

234. See Homestead Act of 1862, 43 U.S.C. §§ 161–284 (1862) (repealed 1976); see also Sheldon, *supra* note 232, at 9–10.

235. See Gregory A. Smith, *The Role of Indian Tribes in the Section 106 National Historic Preservation Act Review Process*, SJ053 A.L.I.-A.B.A. 649, 678–79 (2004) (“Over the years, the United States has advocated many policies, such as ‘Manifest Destiny’ or the distribution of ‘40 Acres and a Mule’ out West, which were widely lauded as beneficial to the Nation but which came at the great expense of Indian tribes.”) (presentation before the Federal Communications Commission in Washington, D.C.).

236. See BROWN, *supra* note 5, at 37.

example, a common perception of mainstream American life includes regular church attendance: Sunday or Saturday, as the case may be, tends to be a special day of religious significance, separate and apart from the rest of the “work” week. Likewise, in fiercely protecting religious freedom, Americans have erected a “wall of separation” between church and state.²³⁷ Americans tend to divide life into the secular and the nonsecular. Indians, however, do not necessarily distinguish religious practice from cultural or political activity.²³⁸ The traditional Indian paradigm does not distinguish religious life; rather, it sees spirituality as a unified part of their culture, their social and political order, and even their existence.²³⁹ In stark contrast, the “American” way of thinking seems to categorize and compartmentalize; we draw boundaries and note distinctions.

The difference in the perception of religion is a part of the problem, and while Americans make categorical generalizations, much like the author has just done, failure to recognize the multi-faceted character of tribes by categorically defining them as merely religious, racial, or political groups is shortsighted. In fact, such classification may become a means of discrimination. As previously discussed, recent uses of the political distinction have led to benefits to federally recognized tribes;²⁴⁰ however, throughout history, this has not always been the case. Some of the most horrifying acts committed against Indians were justified on the basis of congressional power over Indians as a political class of people.²⁴¹ Consider the many Indian wars waged, the denial of citizenship to Indians until 1924,²⁴² the denial of the right to vote, and the unilateral rewriting of treaties, to name a few.²⁴³

237. See *supra* text accompanying note 24.

238. See Tamara Zentner, *One Nation Under God: The Judeo/Christian Application of the Free Exercise to Native American Religion* 3–4 (Mar. 6, 1995) (unpublished thesis, Brigham Young University) (in circulation at the Howard W. Hunter Law Library, Brigham Young University, Provo, UT); see also Jemison, *supra* note 4.

239. See Jemison, *supra* note 4.

240. See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding preferential treatment of Indians based on political classification).

241. See generally Dussias, *supra* note 196 (chronicling the United States’ efforts to eradicate or suppress Indian culture and religion).

242. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(a)(2) (2000)).

243. See generally GETCHES, *supra* note 7, at 5, 84–85, 93–128, 199–216 (discussing federal removal policies, termination, treaty abrogation, etc.).

It is difficult to dispute that the political classification of tribes has been a means of invidious discrimination. Clearly, tribes have been subject to discrimination throughout history for racial, religious, and political reasons. However, such discrimination and poor treatment, while morally reprehensible, may not have been unlawful given the courts' interpretation of Congress's plenary power.²⁴⁴ Though some might suggest that Congress could enact preferences for Indians based on a desire to remedy past discrimination, providing a remedy where there may be no legal wrong is problematic. Further, whether Congress can properly act to remedy past lawful discrimination raises other issues outside the scope of this Comment. However, once the rationale of remedial power is adopted, then all discrimination, including Indian preferences, may become suspect if such remedial measures are not congruent and proportional to an identified past discrimination.²⁴⁵ Even if sustained as proper remedies for past discrimination, such treatment would then be vulnerable to the same challenges as affirmative action.²⁴⁶

As the understanding of tribal status and sovereignty evolves, Congress should proceed with caution. Even though Congress generally purports to act on Indians and Indian tribes by virtue of their political status, Congress and the courts have employed a "degree of Indian blood" test to determine the legitimacy of tribal membership.²⁴⁷ Similarly, Indian tribes often determine their membership based on race or blood-ties to the tribe.²⁴⁸ As a result, even a neutral political classification might ultimately turn on an assessment of race and/or blood ties, and this blatant use of race/ethnic origin might implicate greater constitutional protection.

244. See discussion on Congress's plenary power over Indians, *supra* note 189.

245. Cf. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) (indicating that remedial measures under the Fourteenth Amendment must be proportional and congruent to the wrong that is sought to be remedied). For example, Indian tax preferences have been enacted because of a desire to respect sovereignty and not to remedy any past discriminatory tax practices. Such preferences may become suspect precisely because they do remedy identified past discrimination.

246. See generally Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 959 (2002) (discussing the difference between Indian preferences and affirmative action).

247. See *United States v. Bruce*, 394 F.3d 1215, 1223–27 (9th Cir. 2005) (discussing the criteria for being a legal Indian).

248. Consider the Cherokee Tribe, which requires a "Certificate of Degree of Indian Blood (CDIB), issued by the Bureau of Indian Affairs" as a criteria for tribal membership. See The Cherokee Nation, *Tribal Registration*, <http://www.cherokee.org/Services/TribalRegistration.asp> (last visited Nov. 22, 2005).

While these Indian preferences and other discriminatory practices are currently justifiable on the basis of tribal status (political classification),²⁴⁹ the underlying legal basis is a two-edged sword. Today, Congress uses the political classification to protect Indian interests,²⁵⁰ but the same unbounded power deemed nonjusticiable by courts may, one day, once again be used as a justification to invidiously discriminate against Indians. It is naïve, if not dangerous, to casually characterize Indian tribes as political groups, without consideration of the fact that they also represent racial and religious minorities. Consequently, Congress and the courts must take special care in exercising and reviewing congressional power: political classification is a legitimate basis for distinction, but it must not become a surrogate means of invidious racial or religious discrimination.

B. Avoiding Unconstitutional Government-Sponsored Discrimination and Excessive Entanglement in Religion

Perhaps those challenging the Indian exemption to the BGEPA have not been satisfied with the “political status” rationale because Congress has drafted the exemption in terms of “religious purposes.”²⁵¹ Further, in administering this religious exemption, Congress and the Department of Interior have taken an intimate role in discerning whether a religious ceremony warrants the issuance of an eagle permit.²⁵² To avoid actual or perceived constitutional problems, Congress should adopt a revised policy of arm’s length oversight of Indian cultural practice. First, Congress should not unnecessarily define the exemption provided for members of federally recognized Indian tribes as explicitly religious in nature. Second, the administration of the BGEPA permit process should be bifurcated, dividing authority between the Department of Interior and the individual Indian tribes.

249. See Goldberg, *supra* note 246, at 959 (“Classifications based only on being an Indian, however, are racial; discrimination against or preference for nontribal Indians—or even for tribal Indians if the justification is their race and not their tribal status—would thus violate [anti-affirmative action and nondiscrimination laws].” (quoting Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1358-59 (1997) (citations omitted))).

250. The author does not purport to speak on the use of congressional power from the Indian perspective. Indeed, there may be many Indians who do not believe that Congress is currently acting in the best interest of the tribes.

251. 16 U.S.C. § 668a (2000).

252. See generally 50 C.F.R. §§ 13.1 *et seq.* (2004) (outlining the process for acquiring an eagle permit).

1. Eliminating the Indian religious exemption in favor of a political exemption

Imposing a “religious” classification on traditional Indian cultural practices ignores the reality of Indian culture and is unnecessary; it results only in concerns of improper governmental religious entanglement and discrimination. Arguably, because religion is not a distinct aspect of Indian culture, but permeates every aspect of Indian life, any historic or cultural Indian practice could be classified as religious, especially those that make use of eagle feathers or eagle parts. However, the classification of these activities as “religious” is not an Indian classification but an external imposition of an American social construct.²⁵³ Attempting to distinguish religious activities from other Indian cultural observances is not only inaccurate but unnecessary. Congress should create a more accurate and less problematic classification for the purposes of describing an Indian exemption, such as the religious exemption to the BGEPA, by expressly basing the classification on the unique political status of Indian tribes and tying it to historical and cultural practices as identified by the tribes.

Accordingly, Congress should amend the Bald and Gold Eagle Protection Act to make an express declaration that bases the Indian exemption on tribal political status and is for traditional tribal cultural purposes. Congress might amend the text of 16 U.S.C. § 668a to read as follows:

Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the traditional cultural ~~religious~~ purposes of federally recognized Indian tribes

While admittedly superficial, this change would avoid the dangers arising from federal government involvement in religious establishment resulting from the creation of so-called religious exemptions.²⁵⁴ Particularly, this change would help resolve seeming inconsistent application of the exemption to cases such as those in *Hardman* and

253. See discussion *supra* Part VII.A.4.

254. See generally Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 85–94, 104–119 (2000) (discussing problems in constitutional doctrines providing religious exemptions).

Antoine, where practitioners of the same religion received different treatment because some were racially and politically Indians and others were not.²⁵⁵ Changing the exemption to one based expressly on political status, such as whether an Indian is a member of a federally recognized tribe, and, for the purpose of promoting Indian culture as opposed to religion, seems prudent and could eliminate many of the confusions and contentions about the current exemption.²⁵⁶

2. *Ceding greater authority over eagle permits to tribes*

A second modification to the eagle permitting process should distance the federal government somewhat from the direct responsibility to administer the issuance of eagle permits for Indian cultural purposes. Currently, the U.S. Fish and Wildlife Service assesses each individual application for an eagle permit on a set of criteria that includes, “[w]hether the applicant is an Indian who is authorized to participate in *bona fide* tribal religious ceremonies.”²⁵⁷ Such criteria requires that the federal government determine not only who is “authorized” to engage in religious exercise but also which religious ceremonies are legitimate or “*bona fide*.” This criteria seems improper and raises serious First Amendment concerns. The process should be modified to remove the federal government from being an arbiter of religious dogma. Instead, the federal government should give tribes greater authority to make decisions and establish criteria for granting permits to members of their own tribes, especially on matters of cultural and religious practice. While the Department of Interior should continue to play a central role in the administration of the eagle permit process with regards to ensuring eagle conservation, Indian tribes—particularly larger tribes—should be delegated the authority to determine which traditional cultural practices warrant the issue of an eagle permit.²⁵⁸

To effect this change, the BGEPA and relevant federal rules should be amended to limit initial application for eagle parts to recognized tribal governments. That is, the tribe, as a political entity, should be the party responsible to apply for eagle parts from the federal repository. After all,

255. See discussion *supra* Part VI.

256. Admittedly, this change might not help non-Indians or Indians who are not members of any federally recognized tribe in securing exemption to the BGEPA, but this Comment does not argue for such accommodation.

257. See 50 C.F.R. § 22.22(c)(2) (2004).

258. See generally De Meo, *supra* note 68 (arguing for reforms in the eagle permitting process that would involve tribes at a greater level).

if the rationale for the exemption is the unique political status of federally recognized tribes, and if the established legal relationship is between the federal government and the tribe, it is proper that the transactions be government-to-government. Individual members of the tribes would then apply to their own tribal government for approval of an eagle permit. Individual applications to the federal government would not be allowed, except under extenuating circumstances or as a means to appeal a fundamentally unfair decision by a tribe.

In determining which tribal members should be granted permits for eagle parts, tribes can establish criteria for granting eagle permits that better account for tribal needs, interests, and particular cultural and religious practices. Tribes can develop eligibility criteria that reflect actual tribal membership, as determined by the tribe. They can further determine for themselves what is or is not an appropriate use of eagle parts based on their own traditional tribal practices and norms.²⁵⁹

For large tribes with established governments, the administration of the eagle permitting process within their tribe would not be burdensome and would likely be a welcomed power.²⁶⁰ For smaller tribes, there may be need for continued federal administration. However, as smaller tribes develop the ability to accommodate the increased responsibility, they, along with the larger tribes, will greatly benefit. For example, under the current system, there are concerns over an inefficient process that can take years to produce eagle parts for what may be immediate needs.²⁶¹ By granting the power to administer the eagle permitting process to the tribe, the tribe, as a community, could prioritize the use of the limited supply of eagle parts among its members. This could speed up the process for the most pressing cases, and in any event, would place the burden on the tribe to discern which applications merit expedited consideration. To protect against arbitrary or fundamentally unfair decisions by tribes on individual applications for eagle permits, the federal government, through the Department of Interior and Bureau of

259. Not all tribes use eagle parts in the same way or in the same frequency, but a majority of tribes place some significance on the use of eagle parts. *See supra* text accompanying notes 71–72.

260. Many tribes are working to strengthen their tribal governments and to become more effective. *See, e.g.,* Eric Lemont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention*, 28 AM. INDIAN L. REV. 1, 34 (2003–04) (describing the experience of the Cherokee in adopting a new constitution and concluding that American Indian nations are “engaged in a process of creating more effective and legitimate constitutions”).

261. *See supra* text accompanying note 137.

Indian Affairs, could provide an avenue for appeal from decisions of individual tribes.

By putting the decision into the realm of tribal lawmakers, tribes would be further empowered to oversee and regulate the use of eagle parts; the tribe, and not the ominous federal government, would have primary responsibility for authorizing and distributing the eagle parts among its members. Tribal enforcement would likely be especially effective because tribes have unique and vested interests in both preserving eagle populations and preserving their own cultural and religious practices.

While ceding greater power to the tribes, the federal government can maintain general oversight over the issuance of eagle permits. First, the method of physically collecting and distributing eagle parts to bona fide permit holders need not change. The National Eagle Repository could continue to ship eagle parts to the applicants after tribal approval or after successful appeal to the Department of Interior. The Department of Interior could continue to set limits on the total number of permits that can be issued by allocating available permits among the recognized tribes, and by providing other guidelines for continued enforcement of the permitting scheme. These changes would allow the federal government to continue to protect and conserve eagle populations while meeting its federal treaty and trust obligations to preserve Indian cultural practices. Amending the eagle permitting process in this way would give Indian tribes greater control over their own cultural and religious practices and would be consistent with the federal government's policy of Indian self-determination.²⁶²

The shift of authority would also diminish concerns over excessive government entanglement in religion, religious discrimination, and racial discrimination (in the form of discrimination against non-Indians seeking the benefit of the exemption) because it would leave the power to grant

262. "Beginning in the 1960s, the Executive, Legislative, and Judicial branches of the federal government each recognized, at least to some extent, the rights of self-determination with respect to Indian affairs." Jeremy R. Fitzpatrick, Note, *The Competent Ward*, 28 AM. INDIAN L. REV. 189, 192 (2003-04); see also Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, §§ 102-104, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450 (2000) *et seq.*) (showing Congress's desire to promote Indian self-determination by ceding greater governmental powers to the tribes, such as education and other services); Indian Reorganization Act, 48 Stat. 984 (1934) (codified at 25 U.S.C. § 461 *et seq.*); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (referring to the federal policy of tribal self-determination and self-governance which was in force before the Dawes Act, and which was again adopted after enactment of the Indian Reorganization Act in 1934).

or deny permit applications with the tribes. In this sense, the tribes are also uniquely qualified to administer the permits pursuant to the BGEPA exemption because they are *not* subject to the same constitutional limitations imposed on Congress by the Bill of Rights.²⁶³

Of course, religious considerations are not the underlying motivation for the BGEPA and the permitting process; rather, the motivation is the government's interest in eagle conservation balanced with its treaty and trust obligations to the tribes. But if the principal goal of the BGEPA is truly to conserve eagle populations, and not to determine the validity of individual tribal religious and cultural practices, then giving tribes greater authority presents no danger to eagles. Giving tribes power to grant or deny applications for eagle permits from their members would be merely an exercise of sovereign tribal power over members of federally recognized tribes. So long as it is administered within limits established as a part of a neutral conservation plan, and, so long as eagle parts continue to come solely from those annually collected and distributed from the federal eagle repositories, there will be no adverse effect on eagles.

VIII. CONCLUSION

This Comment has attempted to bring form to a complicated and controversial issue. To many Americans, the controversy surrounding the use of eagle feathers may seem unimportant, or even petty. However, the use of eagles and eagle parts in Native American cultural and religious practices is central to their faith, identity, and way of life. It also touches on foundational elements of American law: freedom of religion, equal protection, due process, and historic treaty obligations. The federal government has plenary power over Indian tribes and, because of the tribes' political status, is justified in providing an exemption from the Bald and Golden Eagle Protection Act for Indian purposes. Yet, rational concerns over excessive entanglement in religion and perceived racial and religious discrimination may ultimately jeopardize the important tribal interests. As recent cases like *Hardman* and *Antoine* suggest, when Congress words the ostensibly political exemption in terms of religion

263. See *Talton v. Mayes*, 163 U.S. 376, 382–85 (1896) (holding that the Bill of Rights, specifically the Fifth Amendment, did not apply to Indian Tribes). *But see* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201–701, 82 Stat. 73, 77–81 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303, 1321–1326, 1331, 1341 (2000)) (imposing certain restrictions on Indian Tribes that resemble many of the constitutional limitations imposed by the Bill of Rights).

and when the application of the exemption has such strong racial implications, it raises serious concerns of violations of the Free Exercise, Establishment, and Equal Protection Clauses of the Constitution.

While the government's interest in protecting eagles may continue to be compelling, challenges to the BGEPA and the Indian religious exemption will continue as the permitting scheme increasingly appears to be not-so-narrowly tailored. As eagle populations increase, it will become harder to justify denying a religious exemption to non-Indian practitioners of the Native American religion. It will also be more difficult to justify denying the exemption to practitioners who are racially Indian, but whose tribes are not blessed with federal recognition. If the Indian exemption continues to be seen as a religious exemption that applies only to people who are both racially Indian and politically members of federally recognized tribes, the controversy will continue.

Assuming that species conservation remains compelling, Congress may need to fashion an approach that focuses on the political status of tribes and which emphasizes that the Indian exemption is for political and cultural and not necessarily religious purposes. The permitting process should also recognize the sovereignty and capabilities of federally recognized tribes by giving them direct oversight of the administration of the eagle permit program for their respective tribes. As individual members apply to their respective tribes, the tribe can prioritize the use of eagles, eagle feathers, and other eagle parts, giving special consideration to immediate needs and planning to make the best use of an extremely limited resource. The federal government can and should set guidelines and limits on the total number of permits to ensure maintenance of conservation efforts but can also avoid what many consider an excessive entanglement in religion.²⁶⁴

Most importantly, ceding (or re-ceding) this authority will further what most tribes and Native Americans seek: "a relationship to the [federal] government that will give them, *as a group*, political, economic, and socio-cultural equality with the rest of . . . society while allowing them to retain their identity as Indians."²⁶⁵ And just as important, the desire to retain a tribal identity is not sought as a "privilege bestowed by

264. See generally De Meo, *supra* note 68 (arguing for reforms in the eagle permitting process that would involve tribes at a greater level).

265. Elizabeth A. Pearce, *Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law*, 22 COLUM. HUM. RTS. L. REV. 361, 384 (1991) (alteration in original) (quoting PATHWAYS TO SELF-DETERMINATION: CANADIAN INDIANS AND THE CANADIAN STATE xvii (L. Little Bear, M. Boldt & J. Long eds., 1984)).

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a benevolent [federal] government, nor as a concession from a fashionably liberal society” but rather as an “inherent right.”²⁶⁶ So, to many it may be just a feather; but to Indian tribes and to the federal government, it embodies a weighty constitutional question with important implications on a historic struggle for faith, cultural identity, and tribal sovereignty.

*James R. Dalton**

266. *Id.*

* The author wishes to thank Dean Kevin Worthen (J. Reuben Clark Law School, Brigham Young University) for his guidance and direction in the research underlying this comment. Also, the author wishes to acknowledge the support of his wife, Jill, and his children, Kaylee and Tessa, without whom this piece could not have been completed.

