

EAGLE FEATHERS AND EQUALITY: LESSONS ON RELIGIOUS EXCEPTIONS FROM THE NATIVE AMERICAN EXPERIENCE

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The legality and propriety of exempting religiously motivated conduct from otherwise applicable legal norms is the subject of ongoing scholarly, judicial, and legislative debate. The issue is particularly thorny when it arises in a legal system deeply committed to the concept of equality. The Eagle Protection Act, which exempts Native Americans religious practitioners who are members of federally recognized tribes from its general prohibition on the taking and use of bald and golden eagle feathers, provides an interesting context in which to examine that debate. Not only does the Act exempt religiously motivated conduct from the otherwise applicable norms, it prefers some religious users (Native Americans who are members of federally recognized tribes) over other religious users, and does so on the basis of ancestry and political affiliation. A statutory scheme which discriminates on the basis of such important matters as religious preference, ancestry, and political affiliation would seem to run counter to the concept of equality in a number of respects. Yet a closer examination of the unique history and status of Native American religions and Native American tribal sovereignty indicate that the preferential scheme in the statute is, in fact, compatible with the core concepts of equality.

INTRODUCTION

The bald eagle has been a revered symbol of American values for two centuries. As Congress has noted, the bird is a “symbolic representation of a new nation under a new government in a new world . . . a symbol of the American ideals of freedom.”¹ The bald eagle and its

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1. Bald Eagle Protection Act, ch. 278, 54 Stat. 250, 250 (1940) (codified as amended at 16 U.S.C. § 668 (2000)). 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, 773 (1995). The bald eagle is so much a symbol of American values that it is commonly referred to as the “American eagle.” See *id.* at 773 n.3 (citing THE RANDOM HOUSE

close relative, the golden eagle, have been revered symbols and essential parts of many Native American religions for more than two centuries.² As the National Park Service has observed with respect to one Native American tribe, "The eagle serves as the link between the spiritual world and the physical world of the Hopi, a connection that embodies the very essence of Hopi spirituality and belief."³

Unfortunately, while widely revered, the eagle (particularly the bald eagle) is in short supply.⁴ Thus, in 1940, Congress enacted a general

DICTIONARY OF THE ENGLISH LANGUAGE 47 (1st ed. 1966)). See also *United States v. Abeyta*, 632 F. Supp. 1301, 1302 (D.N.M. 1986) (noting American regard for the eagle as "the symbol of their national unity, strength, and purpose").

The powerful effect of the symbol over time is underscored by the fact that the bald eagle has achieved such exalted status despite misgivings about the true nature of the bird among some early influential Americans. Benjamin Franklin famously opined, "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." *United States v. Hetzel*, 385 F. Supp. 1311, 1315-16 n.1 (W.D. Mo. 1974).

2. There are a wide variety of Native American religions, differing from one another in many ways. Not all Native American religions rely on eagles or eagle feathers, but eagles and eagle feathers are an indispensable part of many Native American religions. See De Meo, *supra* note 1, at 774-78.

3. Religious Ceremonial Collection of Golden Eaglets From Wupatki National Monument, 66 Fed. Reg. 6516, 6517 (proposed Jan. 22, 2001) (to be codified at 36 C.F.R. pt. 7). By way of explanation, the Park Service stated:

The practice of eagle gathering is at the heart of the Hopi religious ceremonial cycle and the Hopi culture. . . . Golden eaglets are gathered from nests soon after birth and are kept and raised to fledglings in Hopi villages. Later, during the Niman Kachina ceremony, the golden eagles are sacrificed and "sent" to their spiritual home. The eagles' feathers are subsequently used in all Hopi religious ceremonies such as the Kachina, Flute, and Snake ceremonies. The cyclical relationship between the eagle and the Hopi is renewed annually through the practice of eaglet gathering, sustaining the connection between the spiritual and physical worlds for the next generation of Hopi.

Id.

The centrality of the use of eagles and feathers to the Tribe is underscored by the fact that the Hopi Constitution, adopted at the urging of the federal government in the 1930's, provides that "[t]he Tribal Council shall negotiate with the United States Government agencies concerned, and with other tribes and other persons concerned, in order to secure protection of the right of the Hopi Tribe to hunt for eagles in its traditional territories, and to secure adequate protection for its outlying, established shrines." *Id.* (quoting HOPI TRIBAL CONST. art. IV). See Brent Gunson, *Cultural Tug of Wars: An Analysis of the Legal Issues Involving the NPS Proposed Rule to Allow Taking of Golden Eagles at Wupatki National Monument for Religious Purposes*, 22 J. LAND RESOURCES & ENVTL. L. 399, 402-03 (2002). See also JOHN D. LOFTIN, *RELIGION AND HOPI LIFE* 38-40, 46-48, 50-53, 92-93 (2d ed. 2003).

4. By the 1960's there were fewer than 1,000 breeding pairs of bald eagles in the continental United States. 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, 933 (2004). The population has increased in the last thirty years to the point that there are proposals to delist the bald eagle from

ban⁵ on the killing of bald eagles and the possession of any part of a bald eagle, including its feathers.⁶ In 1962, the law was amended to extend the protection to golden eagles.⁷

At the same time, Congress recognized that eagles and eagle feathers play a critical part in many Native American religions.⁸ Thus, the 1962 Amendment also authorized the Secretary of Interior to issue permits allowing the taking, possession, or use of bald and golden eagles and their feathers "for the religious purposes of Indian tribes."⁹

Acting pursuant to this grant of authority, the U.S. Fish and Wildlife Service promulgated regulations that allow Native Americans to apply for permits authorizing the use and possession of eagles and eagle feathers for religious purposes.¹⁰ The Secretary of the Interior satisfies the authorized requests for eagle feathers through a National Eagle Repository in Commerce City, Colorado to which all federal and state agents

the Endangered Species List. See Proposed Rule to Remove the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife, 64 Fed. Reg. 36,454, 36,454–62 (proposed July 6, 1999) (to be codified at 50 C.F.R. pt. 17). The proposed rule would not, however, remove the bald eagle from the protection provided by the Eagle Protection Act. *Id.* at 36,454. See Jamieson, *supra*, at 935.

5. The 1940 Act did contain some limited exceptions. See *infra* note 9.

6. Bald Eagle Protection Act, ch. 278, 54 Stat. 250, 251 (1940) (codified as amended at 16 U.S.C. § 668 (2000)). The Act makes it a crime to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle . . . or any part . . . thereof . . ." *Id.* The Migratory Bird Treaty Act ("MBTA"), enacted in 1918, prohibits the taking of certain birds, including the bald eagle. 16 U.S.C. §§ 703–712 (2000). The MBTA currently acts as a "useful, supplemental mechanism to the Eagle Protection Act to prevent unauthorized takings of eagles." De Meo, *supra* note 1, at 782. See also Jamieson, *supra* note 4, at 939. The bald eagle is also protected by the Endangered Species Act. See De Meo, *supra* note 1, at 783–85; Jamieson, *supra* note 4, at 940–42.

7. See Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (1962) (codified as amended at 16 U.S.C. § 668 (2000)). Protection was extended to golden eagles in part because the eaglets of the two birds are difficult to distinguish. Thus, "protection of the golden eagle will afford greater protection for the bald eagle . . . because the bald eagle is often killed by persons mistaking it for the golden eagle." *Id.*

8. See *supra* note 3 (describing religious significance of eagles to the Hopi).

9. 16 U.S.C. § 668a (2000). The 1940 Act already authorized exceptions for "scientific or exhibition purposes of public museums, scientific societies, or zoological parks" or when "it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality . . ." Bald Eagle Protection Act, ch. 278, 54 Stat. 250, 251 (1940) (codified as amended at 16 U.S.C. § 668 (2000)). In addition to the Native American religious use exception, the 1962 Act authorized "the taking of golden eagles for the purpose of seasonally protecting domesticated flocks and herds . . ." 16 U.S.C. § 668a (2000). The current version also authorizes an exception for falconry purposes under certain circumstances. See *id.* All exceptions are subject to the requirement that the permitted activity be "compatible with the preservation" of the species. *Id.*

10. 50 C.F.R. §§ 22.1, 22.22 (2004).

send deceased eagles.¹¹ Feathers are generally¹² distributed to authorized permittees on a first-come, first-serve basis,¹³ but demand consistently exceeds supply,¹⁴ and there is often a delay of at least several months before authorized orders are filled.¹⁵

Consistent with the statutory emphasis on Indian "tribes," rather than individuals, the current regulations provide that a permit will issue only if the applicant is a member of a federally recognized tribe¹⁶ who is participating "in bona fide tribal religious ceremonies."¹⁷

On its face, this scheme discriminates against (1) most¹⁸ non-religious users of eagle feathers, (2) religious users who are non-Native Americans, and (3) Native American religious users who are not members of a federally recognized tribe. Thus, the current scheme raises three key questions:

(1) Can religious exemptions from generally applicable laws be justified?

(2) Can religious exemptions which discriminate against non-Native Americans in favor of Native Americans be justified?

11. See *United States v. Hardman*, 297 F.3d 1116, 1123 (10th Cir. 2002); Jamieson, *supra* note 4, at 938. Eagles die from a wide variety of causes, including car collisions, electrocution, natural causes, and poaching. Jamieson, *supra* note 4, at 938.

12. There is an exception to this order for "death ceremonies and other emergencies." *Hardman*, 297 F.3d at 1123 n.12.

13. See *Hardman*, 297 F.3d at 1123; Jamieson, *supra* note 4, at 938.

14. "The National Eagle Repository receives about 1,000 eagles every year and there are approximately 5,000 people on the waiting list to receive eagles." Jamieson, *supra* note 4, at 938.

15. See *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (alleging delay of up to three years).

16. Tribes may be federally recognized by an "Act of Congress; . . . administrative procedures . . . ; or by a decision of a United States court." Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, § 103(3), 108 Stat. 4791 (1994) (codified as amended at 25 U.S.C. § 479a (2000)). The list of federally recognized tribes is published annually. 25 U.S.C. § 479a-1 (2000). As of 2002, there were 562 federally recognized tribes, over 200 of which were in Alaska. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs Notice, 67 Fed. Reg. 46,328, 46,328-33 (July 12, 2002). See generally Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271 (2001).

17. U.S. Fish and Wildlife Serv., Dept. of the Interior Eagle Permits Rule, 50 C.F.R. § 22.22 (2004). As required by the statute, the Secretary must also determine that the permitted activity is compatible with the preservation of the species. *Id.*; see 16 U.S.C. § 668a (2000). The regulations also contain other limitations on the use of the feathers (for example, they cannot be transferred to another except when "handed down from generation to generation or from one Indian to another in accordance with tribal or religious customs"). U.S. Fish and Wildlife Serv., Dept. of the Interior Eagle Permits Rule, 50 C.F.R. § 22.22 (2004).

18. There are limited exceptions for some non-religious uses. See *supra* note 9.

(3) Can religious exemptions which discriminate against Native Americans who are not members of a federally recognized tribe in favor of those who are be justified?

While the first question is a familiar one to law and religion scholars,¹⁹ the second and third questions, on which this article focuses, receive much less attention. Analysis of those two questions (which center on the Native American experience with religious liberty) may provide some insight into the proper resolution of the broader, and more fundamental first question.

The article is organized into three sections. The first describes recent legal challenges to the preferential religious exceptions in the current eagle protection scheme. It concludes that the various analyses courts of appeals have employed to assess the legality of the scheme are inadequate and confusing, stemming in large part from the courts' failure to address directly the issue at the heart of the controversy—the fairness of granting preferential treatment to some, but not all, religious practitioners.

Section two—the main focus of the article—sets forth possible justifications for this seemingly inequitable treatment. It concludes that in some situations, including the kind of zero-sum situation which exists with respect to eagle feather use, there are valid reasons why the law should protect the religious practices of Native Americans who are members of federally recognized tribes even though similar protection may not be in order for any other members of our society.

Section three sets forth some tentative insights which the Native American experience with eagle feathers may provide for the larger debate about the feasibility and desirability of religious exceptions to generally applicable laws. While far from complete, the analysis suggests that there are at least some situations in which legislatively created religious exceptions may satisfy the requirements of both liberty and equality to an acceptable degree.

19. This question is the subject of an ongoing debate that at its heart involves the perhaps irreconcilable tension between the two core American values of liberty and equality. See, e.g., Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007 (2001); William P. Marshall, *What is the Matter With Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

I. BALANCING COMPETING COMPELLING INTERESTS: THE EAGLE PROTECTION ACT UNDER THE RELIGIOUS FREEDOM RESTORATION ACT ("RFRA")

The initial legal challenges to the preference provisions of the Eagle Protection Act were brought by Native American members of federally recognized tribes who claimed that the Act's permit requirement violated their treaty and constitutional rights. These claims ultimately proved unsuccessful.²⁰

The most recent round of litigation, on the other hand, has been initiated largely by those not eligible for permits²¹ who have challenged the

20. The first direct challenge to the scheme involved Jose Abeyta, a member of the Isleta Pueblo, a federally recognized tribe in New Mexico. See *United States v. Abeyta*, 632 F. Supp. 1301, 1303 (D.N.M. 1986). In 1985, without obtaining a permit, Abeyta killed a golden eagle within the boundaries of the Isleta Reservation for the "sole purpose" of obtaining its feathers for use in the "religious ceremonies of the Katsina Society." *Id.* at 1303. When Abeyta was subsequently charged with possession of the feathers without a permit, the federal district court dismissed the charges for two reasons: 1) the prosecution violated a provision of the Treaty of Guadalupe Hidalgo, which guaranteed all Mexican citizens residing in the territory in 1848 (including members of the Isleta Pueblo) would be "secured in the free exercise of their religion without restriction," *Id.* at 1304-05 (citing Article IX of the Treaty), and 2) the prosecution violated Abeyta's First Amendment free exercise right because infringement on his religious practices was not the least restrictive means of achieving a compelling governmental interest (the prevailing constitutional test at the time). *Id.* at 1307. In reaching the latter ruling the court indicated that the government did not have a compelling interest in protecting golden eagles because, unlike its bald counterpart, golden eagles were not an endangered species, and moreover, the permit system was not the least restrictive means of protecting the birds because it was "cumbersome, intrusive and demonstrates a palpable insensitivity to Indian religious beliefs." *Id.* The court noted in particular that the regulations permitted some "deprecating golden eagles" to be killed by ranchers, *id.*, even though there were not enough birds in the depository to meet Indian religious needs. *Id.* at 1303-04.

The bases of these two potential defenses were soon swept aside by two Supreme Court rulings. In *United States v. Dion*, 476 U.S. 734, 745 (1986), the Court held that the 1962 amendments to the Eagle Protection Act abrogated any prior treaty rights, and in *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)), the Supreme Court rejected the compelling state interest test, ruling that the First Amendment "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" such as the Eagle Protection Act, which prohibits all taking and possession of eagles and eagle feathers (not just those for religious purposes).

A third potential defense to prosecutions of Native American religionists under the Eagle Protection Act—that they violate the American Indian Religious Freedom Act ("AIRFA"), which expresses a federal policy to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions," 42 U.S.C. § 1996 (2000),—was foreclosed by the Supreme Court's ruling in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988), that AIRFA created no judicially enforceable rights.

21. Some RFRA claims have been made by Native Americans who are members of a federally recognized tribe—those most favorably treated by the federal scheme. Those courts which have directly addressed the issue have unanimously ruled that the permit requirement

scheme under RFRA.²² Consistent with the terms of that statute, these claimants allege that the scheme's failure to allow them to even apply for a permit "substantially burdens" their "free exercise of religion" and that the preferential scheme is not the "least restrictive means" of achieving any "compelling governmental interest."²³ This latest round of litigation has left the law with respect to the Eagle Protection Act's religious exception in a state of confusion. The Ninth and Eleventh Circuits have rejected RFRA challenges to the preferential scheme,²⁴ but for quite different (though equally problematic) reasons. The Tenth Circuit, on the other hand, has upheld one challenge to the scheme,²⁵ but under reasoning that is itself problematic. These cases have proceeded in almost a point-counterpoint fashion, with each succeeding case rebutting the reasoning of its immediate predecessor, adding to the confusion about the legality of the scheme and muddying the proper analysis to be used in making that determination.

The Eleventh Circuit was the first federal court of appeals to weigh in on the matter. In *Gibson v. Babbitt*, the court rejected a RFRA challenge brought by a Native American who was not eligible for a permit because the tribe to which he belonged was not federally recognized.²⁶ The court concluded that although Gibson's inability to file for a permit (and hence his inability to legally secure any eagle feathers for religious purposes) substantially burdened the free exercise of his religion, the limitations imposed on permit eligibility were the least restrictive means of furthering the government's compelling interest in "fulfilling its treaty

does not violate RFRA. See *United States v. Oliver*, 255 F.3d 588 (8th Cir. 2001); *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997); *United States v. Jim*, 888 F. Supp. 1058 (D. Or. 1995). In each case, the court determined that, contrary to the reasoning in *Abeyta*, and despite the fact that the permit scheme results in delays of up to two to three years, the federal government has a compelling interest in preserving the bald eagle, and that the permit system, at least on its face, is the least restrictive means of advancing that goal. *Oliver*, 255 F.3d at 589; *Hugs*, 109 F.3d at 1378; *Jim*, 888 F. Supp. at 1063-65.

22. 42 U.S.C. § 2000bb (2000). RFRA was enacted in response to the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). The Act purported to reinstate statutorily the strict scrutiny test (requiring the government to show that actions substantially burdening religion are the least restrictive means of achieving a compelling governmental interest) which the *Smith* Court had rejected as a constitutional test. 42 U.S.C. § 2000bb-1 (2000). While the Supreme Court subsequently invalidated RFRA's application to state actions, *City of Boerne v. Flores*, 521 U.S. 507 (1997), lower courts have agreed that it still applies to federal action, see, e.g., *Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001), thereby leaving open the claim that the federal government's enactment and enforcement of the Eagle Protection Act scheme violates RFRA.

23. 42 U.S.C. § 2000bb-1 (2000).

24. *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003); *Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000).

25. *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002).

26. *Gibson*, 223 F.3d at 1257-58.

obligations with federally recognized tribes.”²⁷ Without elaborating on why protection of any such rights constituted a compelling governmental interest, the court concluded that restricting permit eligibility to federally recognized tribes was the least restrictive means of furthering that interest because the demand for feathers by members of federally recognized tribes exceeded the current supply.²⁸ Therefore, the court concluded, any expansion of the permit eligibility pool would result in an increase in the delay already experienced by members of federally recognized tribes, “thereby vitiating the government[']s efforts to fulfill its treaty obligations”²⁹

The Eleventh Circuit’s analysis seems inadequate for several reasons. First, not all federally recognized tribes (those who benefit from the current scheme) have entered into treaty relationships with the federal government. Moreover, not all treaties which do exist protect the right to take or use eagle feathers. More fundamentally, the Eleventh Circuit failed to mention—let alone deal with—the fact that in *United States v. Dion* the United States Supreme Court held that the 1962 amendments to the Eagle Protection Act abrogated any prior treaty rights.³⁰ The court thus seemed to allow the preference to stand without subjecting it to the close scrutiny that RFRA requires.

In an opinion addressing three different cases (one involving a Native American whose tribe was not recognized by the federal government³¹ and two involving non-Native American practitioners of Native American religions³²) the Tenth Circuit, sitting en banc, rejected the treaty right argument adopted by the Eleventh Circuit, finding that it “lack[ed] merit.”³³ The Tenth Circuit concluded, however, that the federal government had two other compelling interests in limiting eligibility

27. *Id.* at 1258. Having concluded that the government had met its burden with respect to one compelling interest, the court left unresolved whether preservation of Native American religions qualified as a separate one. *Id.*

28. *Id.*

29. *Id.*

30. *United States v. Dion*, 476 U.S. 734, 745 (1986). See *supra* note 20.

31. Joseluis Saenz was a Chiricahua Apache. While some Chiricahua Apache were members of other federally recognized tribes, the Chiricahua themselves have not been a federally recognized tribe since at least 1866. *Hardman*, 297 F.3d at 1119.

32. Raymond Hardman had been married to a member of the S’Kallum Tribe, a federally recognized tribe in Washington, had two children who were members of that tribe, and resided on the Uintah Ouray Reservation in Utah. *Id.* at 1118. He obtained the feathers at issue from a Hopi tribal religious leader to keep in a truck used to transport the body of his son’s godfather to Arizona for a religious cleansing ceremony. *Id.* Samuel Wilgus claimed to be an adopted member of the Paiute Tribe of Utah, although tribal law did not recognize adopted non-Indian members. *Id.* at 1119 n.3.

33. *Id.* at 1129 n.19. The court further observed that the permit exception was limited to “religious uses” while the treaty rights protected the broader right to hunt eagles. *Id.*

for eagle permits to Native American religionists who were members of federally recognized tribes: (1) preservation of the eagle population;³⁴ and (2) protecting Native American cultures and religions from "extinction."³⁵

Notwithstanding its conclusion that the government had two compelling reasons to limit the distribution of eagle feathers as outlined in the Eagle Protection Act, the Tenth Circuit ruled in favor of the challengers because the government had failed to establish that the permit scheme was the least restrictive means of achieving those interests.³⁶ In reaching that conclusion, the court refused to rely on the logical inferences drawn by the Eleventh Circuit from the fact that demand for eagle feathers exceeded supply. Instead, the Tenth Circuit required that the government actually prove in each case that the two compelling interests (preserving the eagle population and protecting Native American cultures and religion from extinction) could not be achieved by any other means.³⁷

The Tenth Circuit refused to presume, in the absence of an affirmative showing, that increasing the number of eligible applicants would place increased pressure on eagle populations, noting that the result might simply be a longer wait for those with authorized permits.³⁸ While a longer wait might impact the rights of those already eligible for permits (members of federally recognized tribes), the court found that such an impact did not affect the government's interest in preserving eagles.³⁹

Similarly, the Tenth Circuit concluded that the government could not rest on the assumption that expansion of the pool of eligible permittees would inevitably undermine the government's other compelling interest: preserving Native American cultures and religions. The court noted that the government had not shown that "broader eligibility would

34. *Id.* at 1128.

35. *Id.* The Court noted that Congress' power to regulate Commerce with Indian Tribes, U.S. CONST. art. I, § 8, gave rise to an "obligation of trust to protect the rights and interests of federally recognized tribes and to promote their self-determination" and that this "historical obligation to respect Native American sovereignty and to protect Native American culture," gave rise to this compelling interest. *Hardman*, 297 F.3d at 1128 (quoting *Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 35 (1st Cir. 1992)).

36. The government had failed to meet its burden in *Wilgus* and *Hardman* because the issue had not been raised below. *Id.* at 1131. Thus, the court remanded the two cases to allow the government an opportunity to make the requisite showing. *Id.* In *Saenz*, by contrast, the court ruled that the government had been given the opportunity, but had failed to meet its burden. *Id.*

37. *Id.* at 1129-30.

38. *Id.* at 1132.

39. *Id.*

result in an increased wait substantial enough to endanger Native American cultures.”⁴⁰ Furthermore, the court observed, the government had failed to show that allowing non-tribal members who practice Native American religions to share in the use of eagle feathers would impede Native American culture at all. “Allowing a wider variety of people to participate in Native American religion could just as easily *foster* Native American culture and religion by exposing it to a wider array of persons.”⁴¹

The Tenth Circuit’s reasoning is problematic in at least two respects. First, it seems to prefer the preservation of eagles over the preservation of Native American culture without expressing any justification for such a preference. The court characterized the former as an interest in “preserving eagle populations”⁴² (which could be read to mean preventing *any* diminution in the number of eagles), while it characterized the latter as an interest in protecting “Indian cultures” not just from diminution, but “from extinction.”⁴³ Similarly, the court held with respect to the former interest that the government had not shown that expanding the applicant pool would have *any* impact on the eagle population⁴⁴ (implying, perhaps, that such a showing might make a difference), while the government’s failure with respect to the latter was that it had not shown that the harm to Native American culture was “substantial enough to endanger” those cultures, quite a different standard.⁴⁵

Second, the court wholly failed to take into account the relationship between Native American culture and tribal sovereignty, as well as the role the latter can arguably play in promoting the former, a point that Judge Murphy made in his concurrence.⁴⁶ If there is such a relationship, and if the government has an interest in preserving both tribal culture and tribal sovereignty (as argued below), then whether a particular tribal group’s indigenous culture is fostered or harmed by the participation of non-tribal members is a question that should be answered by the tribe, not the courts.

40. *Id.* at 1133.

41. *Id.*

42. *Id.* at 1128.

43. *Id.*

44. The court noted that “[p]resumably, expanding the permit process to include non-Native American adherents would have *no effect* on bird populations.” *Id.* at 1132 (emphasis added).

45. *Id.* at 1133.

46. *Id.* at 1138 n.3 (Murphy, J., concurring) (“I see the contours of the government’s compelling interest a little differently: guaranteeing members of sovereign and semi-autonomous Indian nations the ability to carry on their traditional way of life.”).

By committing these two possible errors, the Tenth Circuit may have rendered the federal government's task unduly difficult. By failing to recognize that the government's competing interests in preserving the eagle population and Native American culture are perhaps equally weighty, the court may have underestimated the difficult balance the federal government has to reach,⁴⁷ thereby making it harder for the government to show that it was doing the best that could be done given the competing interests involved. By failing to take into account the government's interest in preserving tribal sovereignty, the court may have undervalued the strength and nature of the government's full interests, again arguably failing to provide the government sufficient leeway to meet the already high demands of the statute.⁴⁸

Moreover, by remanding two of the cases to allow the government an opportunity to make the requisite showing (if such a showing is possible), the Tenth Circuit created the possibility that the law will develop in an incremental, fact-specific way. Such an approach may be beneficial in some respects, but it is unlikely to satisfactorily resolve the fundamental question of the fairness of granting preferential treatment to some, but not all, religious practitioners since it does not directly address the issue in terms of equality.

In the latest round of circuit court litigation on the issue, the Ninth Circuit joined the Eleventh Circuit in rejecting RFRA claims by indigenous persons who are ineligible for permits because their tribe is not recognized by the federal government.⁴⁹ In doing so, the court first rejected the reasoning in *Hardman*, concluding that the Tenth Circuit had indeed made the government's RFRA task too onerous.⁵⁰ Since the supply of eagle feathers is fixed and since demand exceeds supply, the Ninth Circuit reasoned, the "inescapable result" of increasing the number of those

47. The court did acknowledge the government's need to balance its competing interests in preserving the eagle population and protecting Native American culture. *Id.* at 1134. The court, however, did not fully consider the relative weight of the two interests, or fully consider whether the government had done the best it could in striking that balance. Instead, the court concluded that the government failed by neglecting to demonstrate how it had struck the balance. *Id.* at 1135.

48. As Judge Murphy noted, under one view of the majority's statement of the government's interest, it is difficult to "imagine what evidence the government could produce on remand in *Hardman* and *Wilgus* to demonstrate that the current regulatory scheme is the least restrictive means of balancing the compelling yet competing interests." *Id.* at 1138 n.3 (Murphy, J., concurring).

49. *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003). Antoine was a member of the Cowichan Band of the Salish Indian Tribe, a Canadian tribe not recognized by the U.S. government. *Id.* at 920.

50. *Id.* at 923 ("We do not believe RFRA requires the government to make the showing the Tenth Circuit demands of it.").

eligible to receive eagle feathers is a corresponding decrease in the number of those already eligible who will actually receive feathers.⁵¹ Unlike the Eleventh Circuit, however, the Ninth Circuit did not rule that this line of logic automatically established that the government had met its burden under RFRA. Instead, it concluded that in situations such as these, in which two religious groups are involved in a zero-sum conflict, there is no RFRA claim at all.⁵² "If the freeway must be built," the court observed, "RFRA doesn't say which house of worship should be razed."⁵³

This reasoning is not without its own problems. Although the Ninth Circuit is surely correct that it is difficult to determine in a judicial proceeding "the relative burdens a policy inflicts on religious adherents,"⁵⁴ RFRA arguably imposes just such a duty on the courts, at least in zero-sum situations. Not every burden on a religion triggers RFRA protection. It is only when the burden is "substantial" that the statute comes into play. Thus, if a particular government action substantially burdens one religious practice, while incidentally, though not substantially, burdening another, and if adoption of a second alternative could decrease the harm to the first religion below the substantial burden threshold, without increasing it above that threshold for the other religion, RFRA would seem to require that the government adopt the second alternative in order to minimize the impact on one religion, though it comes at the expense of the other.

Thus, if the Tenth Circuit made the government's task too difficult, given the arguable need to equally balance conflicting compelling interests, the Ninth Circuit was arguably not demanding enough, either of the government—which should have been required to make some showing as to whether its actions were required to avoid "substantial" burdens on both religions—or of the judiciary, which is required under RFRA to make difficult determinations about how much religious harm is enough to trigger strict scrutiny.

The latest round of litigation, therefore, has done little to clarify the legality of the current preferential scheme. The courts cannot agree on either the proper reasoning or the proper result. They clearly are strug-

51. *Id.*

52. The court explained: "Antoine isn't asking the government to pursue its eagle-protection goal without burdening religion at all; he wants it to burden other people's religion more and his religion less. This is not a viable RFRA claim; an alternative can't fairly be called 'less restrictive' if it places additional burdens on other believers. A contrary holding would entangle the judiciary in standardless efforts to measure the relative burdens a policy inflicts on other religious adherents. This is not what the statute prescribes." *Id.* at 923–24 (citation omitted).

53. *Id.* at 924.

54. *Id.*

gling to know how to address challenges to the existing scheme. The likely reason for the struggle is that there are competing, compelling interests at play on both sides of the matter. However, contrary to what one might think from reading the opinions, the key competing interests are not the government's interest in preserving eagles and its interest in protecting Native American culture, but, more fundamentally, the government's interest in promoting religious liberty, on the one hand, and its interest in promoting equality, on the other.

Both the Ninth and the Tenth Circuits noted that the real question at the heart of the matter is whether, in a legal system committed to the concept of equality, exemptions granted in the name of religious liberty can justifiably be granted to some religion practitioners and not others.⁵⁵ However, neither those courts nor the Eleventh Circuit directly addressed that issue⁵⁶—a difficult issue that is complicated by the fact that preferential treatment is tied to race and political affiliation.

Therefore, the critical question for determining the legality of the Eagle Protection Act's preferential scheme is one the lower courts have so far hinted at, but avoided: in a system committed to equality, can there ever be a justification for discriminating among religions based on blood and politics? While courts and litigants in the latest round of litigation have avoided the issue by the way they framed the question under RFRA, ultimately the issue must be addressed because it is at the core of the matter, regardless of whether the specific claim is raised under

55. See *United States v. Hardman*, 297 F.3d 1116, 1135 (10th Cir. 2002) ("The question at the heart of this case is why an individual who is not a member of a federally recognized tribe is foreclosed from applying for a permit that may be used as a defense to criminal prosecution for possession of eagle feathers, while an identically situated individual may apply for a permit if she is a member of a federally recognized tribe."). The Ninth Circuit described the question as follows:

[I]n this case, the burden on religion is inescapable; the only question is whom to burden and how much. Both member and nonmember Indians seek to use eagles for religious purposes. The government must decide whether to distribute eagles narrowly and thus burden nonmembers, or distribute them broadly and exacerbate the extreme delays already faced by members. Religion weighs on both sides of the scale."

United States v. Antoine, 318 F.3d 919, 923 (9th Cir. 2003).

56. The Tenth Circuit avoided the question because it concluded that the government had not sufficiently explained the reasons for its preferential scheme.

The government's interest in preserving eagles might have something to do with the total number of people who are allowed to acquire eagle feathers, but it quite possibly has little to do with the question here, which is how those permits are distributed. We do not, however, have a sufficient factual record to state even that conclusion with certainty

Hardman, 297 F.3d at 1135. The Ninth Circuit avoided the question by holding that RFRA had no bearing on the question. *Antoine*, 318 F.3d at 923–24.

RFRA, the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause. Ultimately, a satisfactory answer to that core question demands analysis at a level of abstraction that transcends any particular legal claim. The next section therefore attempts to determine whether the Eagle Protection Act's preferential scheme is compatible with the basic demands of equality.

II. MEETING THE DEMANDS OF EQUALITY: CAN THE CURRENT SCHEME BE JUSTIFIED?

The basic demand of equality is that like cases be treated alike.⁵⁷ That concept is largely meaningless, however, until one determines the relevant points of comparison.⁵⁸ As Professor Steven Smith has pointed out in his seminal work on equality and religious liberty, "every person is in different ways both like and unlike every other person."⁵⁹ The key is to determine the relevant comparative characteristic. In this case, it is religion. Religious discrimination in favor of Native Americans and against non-Native Americans, and religious discrimination in favor of Native Americans who are members of federally recognized tribes and against those who are not, are justifiable, in equality terms,⁶⁰ only to the extent the discrimination reflects a corresponding difference in the situation of the groups *with respect to religion*. It is not enough to show that the groups are different from one another in some respect. The differences must be differences in their situations with respect to religion, and those differences must be sufficient to justify governmental preference of the religion of one of the groups over the other, at least when there is conflict between the groups, as is arguably the case under the Eagle Protection Act.

57. STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 13 (2001).

58. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

59. SMITH, *supra* note 57, at 13.

60. One could attempt to justify preferential treatment on other terms. For example, one could argue that the Equal Protection Clause does not apply at all to preferential treatment for Native Americans, see, e.g., David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991), or that the Indian Commerce Clause grants Congress extraordinary latitude to grant preferential treatment to Native Americans, see, e.g., Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169 (1991). One might also arguably justify preferential treatment on purely remedial grounds—as a means of remedying the effects of past discrimination. See *infra* notes 77–86 and accompanying text. My intent, however, is to justify the preferential treatment solely in terms of the demands of equality in a broad philosophical sense. Thus, while the argument borrows strands from these other efforts to justify preferential treatment, it is more focused on equality in general and religious equality in particular.

Because the current scheme precludes the religious use of eagle feathers by both non-Native Americans and Native Americans who are not members of a federally recognized tribe, it can be justified only if both (1) religious discrimination in favor of Native Americans and (2) religious discrimination in favor of federally recognized tribes can be justified in the terms set forth above. Each question will be addressed in turn.

A. Religious Preferences for All Native Americans: What's Blood Got to Do with It?

Are Native Americans differently situated from non-Native Americans with respect to religion in a way that might justify differential treatment in a system committed to the principle of equality? Arguably, the answer is yes, for four interconnected reasons.

First, Native Americans are different from any other ethnic or religious group in the United States in one fundamental historical way—their ancestors were here first. Indeed, that is what makes indigenous groups indigenous. That simple fact has several significant implications.⁶¹ For present purposes, the critical ones are that (1) Native American cultures differ from other cultures because of the unique way in which they were incorporated into the larger American culture, and (2) Native American cultures differ from other cultures because they were created, shaped, and most importantly, exist, only here.

Because they were here first, Native American cultures became part of our nation in a unique way—not, as with most cultures, as a result of their ancestors' conscious decision to leave their prior cultures and join with that being created here—but as a result of having a larger culture imposed upon them. That experience necessarily affects the way in which Native American culture has developed. For example, immigrant cultures typically link admiration of the larger American culture with veneration for ancestors, because those ancestors at some point found enough good in American culture to induce them to abandon their prior one in its favor.⁶² By contrast, veneration of ancestors in indigenous cul-

61. See PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* 47–131 (2001).

62. Of course not all groups came to the United States by choice. African Americans who are the descendants of slaves brought here by force arguably have their own distinctive culture, which in this respect seems more similar to that of Native Americans than any other ethnic group. However, Native American culture is distinct from African American culture when it comes to the other, more fundamental, implication of their aboriginal status: their culture exists only here. See *infra* notes 64–66 and accompanying text.

tures often requires rejection of the larger culture.⁶³ Thus, Native American culture is quite distinctive among American cultures.

More importantly, because of the second implication of their aboriginal status, Native American culture is truly unique among American cultures in that if Native American cultures cease to exist here, they will be extinct.⁶⁴ This fact is highly significant in a legal scheme committed to cultural pluralism. Just as the federal government has a compelling interest in preventing the extinction of bald eagles and other endangered species, it could well have a compelling interest in preserving endangered cultures,⁶⁵ especially those whose roots and current manifestations exist only in the United States.⁶⁶ Thus, because they were here first, Native American cultures are situated differently from those of any other group in the United States in a way that could justify some extra legal protection.

However, that distinction does not, on its own, justify *religious* discrimination. There must be some link to religion before that kind of legal distinction can be justified. A portion of that link is provided by a second distinctive feature of many Native American religions: they are holistic and integrated in the sense that there is no separation between religion and other aspects of life.⁶⁷ Unlike most traditional Western relig-

63. As one Canadian scholar has noted, "unlike other groups . . . Aboriginal people did not choose to immigrate to Canada and accept pre-existing laws that conflict with their cultural practices." MACKLEM, *supra* note 61, at 60 (citing THOMAS R. BERGER, *FRAGILE FREEDOMS: HUMAN RIGHTS AND DISSENT IN CANADA* 244 (1981)). See also *id.* at 73 (discussing Will Kymlicka's distinction between national minorities (which have been incorporated into larger nation states) and ethnic groups consisting of immigrants who leave their native culture in favor of that of their adopted country).

64. As Carole Goldberg-Ambrose has noted, "unlike other American ethnic groups, Indians cannot rely on perpetuation of their tradition in a home country abroad. If Indian culture vanishes in America, it vanishes altogether." Goldberg-Ambrose, *supra* note 60, at 184.

65. See Williams, *supra* note 60, at 816 ("The government has an interest, perhaps a compelling one, in seeing that these groups have the opportunity to express their heritage, for their own benefit and the benefit of the nation.").

66. See Goldberg-Ambrose, *supra* note 60, at 184 n.77 ("The justification for Indian classifications based on their contribution to cultural diversification draws strength from the fact that Native American culture must survive in America if it is to survive at all.").

67. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 459-60 (1988) (Brennan, J., dissenting) ("[F]or most Native Americans, the area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle." (internal quotation marks and brackets omitted)); William K. Powers & Kathleen J. Martin, *North American Indians: Indians of the Plains* in 10 *ENCYCLOPEDIA OF RELIGION* 6698 (2d ed. 2005) (For most Native American tribes "spirituality and a relationship to the sacred permeate daily life, and most Indian languages do not have specific terms for the word *religion*."); Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1295 (1996) ("For Native Americans, the spiritual life is not separate from the secular life."). See generally Robert S. Michaelsen, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 J.L. & RELIGION 47, 62-63 (1985).

ions, which distinguish the "religious" or "sacred" sphere of life from the secular, Native American religions tend to view everything as religious or sacred.⁶⁸ Religion therefore permeates every aspect of life for many Native Americans. Even seemingly mundane daily tasks, such as hunting,⁶⁹ planting crops,⁷⁰ weaving,⁷¹ or preparing food are religious acts imbued with sacred meaning. Thus, for many Native Americans, culture is the same as religion,⁷² and most unique features of Native American cultures are in fact unique religious features—features that potentially distinguish Native American religions from others in the United States—and features that would not exist if Native American religions were not protected. Thus, the justifications for extra legal protection for Native American cultures which arise as a result of their aboriginal status often transform into justifications for special protection for Native American religions.⁷³

This aspect of Native American religions has proved a stumbling block to Native American free exercise claimants, who are forced to categorize their beliefs and actions in terms that make little sense to them. See Dorothea Theodoratus, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans*, in READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL 302 (Jo Carrillo ed., 1998) ("Because of the particular nature of the Indian perceptual experience . . . any division into 'religious' or 'sacred' is in reality an exercise which forces Indian concepts into non-Indian categories, and distorts the original conceptualization in the process.").

68. As Professor Robert Michaelson has observed: "The typical western approach is to split reality into separate categories which can be objectified and labeled 'church,' 'religion,' 'culture,' 'art,' 'economics,' 'politics,' etc. But the use of this common approach in dealing with traditional Indian realities rends the seamless garment of Indian life." Robert S. Michaelson, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 J. LAW AND RELIGION 47, 62 (1985). In the words of one member of the Crow Tribe, "[t]he area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle, including his general outlook upon economic and resource development." *Id.* at 62–63.

69. As one Hoopa woman testified before Congress: "[T]o most people, hunting and fishing [sic] is a sport. To the American Indian it is a part of religious custom. . . . [E]ven the taking of food was a religious sacrament in a way, particular [sic] in regard to the hunting of deer." Theodoratus, *supra* note 67, at 302.

70. See Loftin, *supra* note 3, at 4–12 (describing religious nature of Hopi farming).

71. See *id.* at 3–4 (describing interlinkage between religious and practical aspects of Hopi weaving).

72. As one scholar observed with respect to the Hopi culture:

The culture is completely religious and therefore completely consistent. If you wrote an essay on Hopi farming, it would be an essay on Hopi religion; on Hopi hunting, it would be an essay on Hopi religion; an essay on Hopi family life would be an essay on Hopi religion; on Hopi games the same – everything they do and think is about their religion.

Hugh Nibley, *Promised Lands*, Address Before the Bill of Rights Symposium (October 9, 1992), in CLARK MEMORANDUM, Spring 1993, at 5–6.

73. That Native American religious cultures continue to exist is potentially critical not only to religious freedom, but also to other aspects of American life. As the Supreme Court noted in *Yoder*, important values have been preserved by religious cultures throughout the

A third distinctive feature of Native American religions provides a further significant differentiating basis. Unlike most mainstream religions in the United States, many Native American religions consider land a living, sacred thing.⁷⁴ They consider specific sites as sacred not just because they are the necessary location for important religious rites and ceremonies, but also because they are holy in and of themselves.⁷⁵ Moreover, because of the indigenous nature of their culture (reflecting the historical fact that they were here first), Native American sacred sites are located only here. While a few non-Native American religions may revere certain sites in the United States, few, if any, have a connection with specific United States sites (and no others) that is as deep-seated as that of many Native American religions. And, the impact of that deep-seated religious connection to these sacred sites sometimes extends beyond the geographic location of the site. Eagle feathers used in traditional Hopi ceremonies, for example, must be gathered from specific areas outside the villages where the ceremonies occur (indeed, outside the Hopi reservation) in order to realize the full religious purposes of the feathers and the ceremony.⁷⁶

ages. See *Wisconsin v. Yoder*, 406 U.S. 205, 223–24 (1972). See also Smith, *supra* note 57, at 101–02. Indeed, for those who perceive and lament a growth in materialism and a diminishment in spirituality, the continued existence of Native American religion may provide valuable lessons in how that trend can be resisted.

74. See, e.g., VINE DELORIA, JR., *GOD IS RED* 148–49 (2d ed. 1992).

75. See, e.g., *Wilson v. Block*, 708 F.2d 735, 738 (D.C. Cir. 1983) (describing Navajo belief that the San Francisco Peaks in Arizona are “the home of specific deities and . . . the body of a spiritual being or god” and Navajo practice of “pray[ing] directly to the Peaks [which they] regard . . . as a living deity”); *Badoni v. Higginson*, 638 F.2d 172, 177 (10th Cir. 1980) (describing Navajo belief that Rainbow Bridge and surrounding areas are “the incarnate forms of Navajo gods,” whose sacred nature is “desecrated . . . by noise, litter and defacement of the Bridge” by visiting tourists).

76. As the National Park Service explained:

Only a few of the Hopi clan and religious societies bear the important ceremonial obligation of eagle gathering, and each of these has a traditional area from which it—and no other clan or society that is not related to it—may gather eagles. Hopi clan ownership of traditional eagle nests is well documented in the anthropological literature. The nests of eagles near village ruins are owned by the descendants of clans which once lived in their neighborhood. The territory around the Hopi villages where eagles may be found is, and has been from time immemorial, divided into portions or allotments, which are controlled by certain clans or families. . . . Clan ownership of eagle nesting areas corresponds to the early settlement areas and migration routes of the clans before they arrived at their modern villages. The Hopi regard the eagles as embodying the spirits of their ancestors, and the clan areas often contain, or are very close to, Hopi clan ruins.

Religious Ceremonial Collection of Golden Eaglets From Wupatki National Monument, 66 Fed. Reg. 6516, 6517 (proposed Jan. 22, 2001) (to be codified at 36 C.F.R. pt. 7) (citation and internal punctuation omitted). See also *United States v. Abeyta*, 632 F. Supp. 1301, 1302 (D.N.M. 1986) (noting that for members of the Katsina Society of the Isleta Pueblo “it is of

Thus, Native American religions are situated differently from other religions in the United States in three significant ways that potentially justify some differential treatment: (1) they were created and exist only here; (2) their beliefs are often unique and culture-encompassing; and (3) those beliefs often revolve around sacred sites which are located only here. Yet, these traits alone may not be sufficient to justify differential legal treatment for discrimination based on an immutable characteristic like ancestry. A fourth distinguishing characteristic, however, may well supply the extra weight needed to tip the equity scales in that direction.

No group in the United States has been dispossessed of as much land, or in such a systematic manner, as have Native Americans. As a result of the federal government's allotment policy, for example, tribal landholdings in the United States fell from 138 million acres to 52 million acres from 1887 to 1934.⁷⁷ And prior to that time, tribes had already been deprived of most of their lands as a result of official federal policies, ranging from the removal policy of the early 1800s⁷⁸ to the reservation policy, which confined them to areas much smaller than their traditional land base.⁷⁹ This massive land deprivation has been particularly devastating to Native American religion because of the intimate connection Native Americans have between land and religion.⁸⁰

Coupled with the other three distinctive features of Native American religions, this large-scale deprivation of land may suffice to justify preferential treatment for Native American religions, particularly since the deprivation occurred as a result of official governmental policy. The Supreme Court has recognized that there are times when past governmental discrimination justifies ancestry-based discrimination.⁸¹ The government's interest in eliminating the ongoing effects of past discrimination constitutes sufficient justification for such discrimination if (1) the past discrimination is identified with sufficient particularity,⁸² and (2)

religious significance that these feathers be of a bird taken from aboriginal Isleta lands").

77. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 20 (1987).

78. See FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 78-92 (1982).

79. See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS* 28-30 (4th ed. 2003).

80. See *supra* text accompanying notes 74-76. As Justice Brennan once observed, "Native American faith is inextricably bound to the use of land." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting).

81. "A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989).

82. Government must "identify [the] discrimination . . . with some specificity before they may use race-conscious relief. A generalized assertion of past discrimination . . . is not adequate." *Shaw*, 517 U.S. at 899 (quotation marks and citation omitted).

there is a strong basis in evidence for concluding that remedial action is still necessary.⁸³

Both of these conditions are arguably met in the context of the Native American religious experience in general, and with respect to eagle feathers in particular. The discrimination being remedied is not merely general societal discrimination against Native Americans, but rather the government's systematic—and in some cases intentional⁸⁴—disruption of Native American religious practices, through outright bans on such activity (such as the 1940 ban on the possession of bald eagle feathers), as well as by denial of access to and control over sacred sites and other critical lands, such as those from which eagle feathers must be gathered. Moreover, there is strong evidence that the effects of this past discrimination are ongoing. Tribes continue to lack access to and control over sacred sites,⁸⁵ including those from which eagle feathers are to be gathered,⁸⁶ and in the absence of a religious exemption in the Eagle Protection Act, they would be prohibited from possessing any eagle feathers, regardless of their source of origin.

Thus, preferential treatment for Native American religious practices, including the possession of eagle feathers, can arguably be justified on the ground that Native Americans are sufficiently different from non-Native Americans in relevant respects to satisfy the requirement that like cases be treated alike.

But what of the requirement that Native Americans be members of a federally recognized tribe? Is there any justification for preferring them in religious matters over Native Americans who do not possess that political affiliation? After all, their ancestors were also here first; their cultures may be just as religion-based; they, too, often have unique claims to sacred sites in the United States; and they, too, were dispossessed of much of their land (indeed, in many cases, of all their land). Is there any possible justification for failing to treat them as favorably as Native

83. *Id.* at 910.

84. See Allison M. 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, 776–805 (1997) (describing government efforts to convert Native Americans to Christianity and to outlaw some Native American religious practices, such as ceremonial dances).

85. See, e.g., *Lyng*, 485 U.S. at 451–52 (rejecting tribal effort to prevent government degradation of sacred area even though it might “virtually destroy the . . . Indians’ ability to practice their religion” (internal quotation marks omitted)). See generally Dussias, *supra* note 84, at 823–833.

86. See, e.g., Gunson, *supra* note 3, at 399–405 (describing conflict arising over National Park Service denial of access to Wupatki National Monument to members of the Hopi tribe wanting to take eagles from the area for religious purposes).

Americans whose tribes are federally recognized? Again, arguably there is.

B. Preferential Treatment for Federally Recognized Tribes: What's Politics Got to Do with It?

At first glance, it may appear odd to attempt to justify religious preferences on the basis of political status or citizenship. However, Native Americans who are members of federally recognized tribes are differently situated from those who are not in three ways that arguably justify unique religious preferences.

First, as a result of constitutional history and current federal policy, Native Americans who belong to federally recognized tribes are to some extent subject to differing governmental norms than are Native Americans who are not members of federally recognized tribes. The federal government has, from the outset,⁸⁷ generally dealt with Native Americans on a tribal, rather than individual, basis,⁸⁸ and in doing so has distinguished between Native Americans who are citizens of sovereign entities⁸⁹ with which the United States has a formal relationship (federally recognized tribes) and those who are not. Because they owed allegiance to another sovereign entity, those who belonged to a federally recognized tribe were, from the beginning, immune from most state and federal regulatory jurisdiction.⁹⁰ Consistent with American notions of freedom, the Constitution also recognized that individual Native Americans could disassociate themselves from their tribes and submit themselves to the jurisdiction of the federal and state governments.⁹¹ Thus, in determining the number of representatives a state was entitled to send to Congress, the original Constitution provided that states were to exclude not all Native Americans, but only those who were "not taxed"⁹²—that is those

87. The policy of treating tribes as sovereign nations predates the creation of the American republic. Great Britain pursued that policy as it dealt with tribes largely through diplomatic means and treaties, a process which assumes the sovereign status of both parties to the treaty. See Cohen, *supra* note 78, at 57–58.

88. For example, the Constitution grants Congress the power to regulate Commerce "with the Indian Tribes" and not with all individual Indians. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

89. See Cohen, *supra* note 78, at 232–35.

90. See *id.* at 388 ("At the time of the Constitution, most tribal Indians were not subject to ordinary federal or state legislation."). See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding state laws had no force in Indian Country).

91. See Cohen, *supra* note 78, at 388 (holding that "those few Indians who had severed their tribal relations and individually joined non-Indian communities were considered to be subject to ordinary laws").

92. U.S. CONST. art. I, § 2, cl. 3.

who were immune from state and federal taxation because they were citizens of a different nation which had been recognized by the federal government as sovereign.⁹³ Those Native Americans who decided⁹⁴ to sever their ties with their tribal governments and assimilate completely into mainstream American society (thereby subjecting themselves to taxation) were included in the count.

Accordingly, since the beginning of the Republic, the Constitution has recognized that Native Americans who belong to federally recognized tribes are differently situated from those who do not—one result being that the two groups were, to some extent, subject to differing governmental authority. This distinction survived passage of the Fourteenth Amendment, which retained the exclusion for “Indians not taxed” in the representation formula,⁹⁵ and provided automatic citizenship to those born in the United States only if they were “subject to the jurisdiction thereof,”⁹⁶ a term clearly designed to distinguish members of federally recognized tribes (who were tribal, not U.S., citizens and therefore not subject to the full jurisdiction of the United States) from all others who were born on American soil,⁹⁷ including Native Americans who had not belonged to any tribe which the United States had recognized.⁹⁸

Full U.S. citizenship was granted to all Native Americans, including those who were members of federally recognized tribes in 1924.⁹⁹ However, membership in a federally recognized tribe continues to have significance with respect to immunity from some state and federal regulatory schemes. Members of federally recognized tribes are exempt from

93. Cohen, *supra* note 78, at 388.

94. In *Elk v. Wilkins*, 112 U.S. 94, 99–104 (1884), the Supreme Court observed that prior to enactment of the Fourteenth Amendment, the choice whether to become subject to the jurisdiction of the United States could not be made unilaterally by a tribal member. Even after the tribal member severed his ties with the tribe, U.S. assent to citizenship was still required. See *id.* The Court in *Elk* also ruled that the Fourteenth Amendment and implementing legislation did not alter that requirement, though the dissent seems more persuasive on that point. See *id.* at 110–11 (Harlan, J., dissenting). See Williams, *supra* note 60, at 846 n.279.

95. U.S. CONST. amend. XIV, § 2.

96. U.S. CONST. amend. XIV, § 1.

97. For a thorough explanation of the connection between the terms “Indians not taxed” and those not “subject to the jurisdiction” of the United States, as well as the history behind the phrases, see Williams, *supra* note 60, at 832–41.

98. In *Elk*, 112 U.S. at 102, the Supreme Court ruled that a Native American born in the United States as a member of a federally recognized tribe was not automatically made a citizen of the United States by the Fourteenth Amendment, nor by his voluntarily leaving the tribe. In order for the latter act to be sufficient, the United States had to assent to the act. See *id.*

99. The Act made United States citizens of “all non-citizen Indians born within the territorial limits of the United States.” Indian Citizenship Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

almost all state legislation¹⁰⁰ when they are in Indian Country.¹⁰¹ They also enjoy some immunity from otherwise applicable federal legislation in some situations.¹⁰² Much of that immunity stems from their membership in a federally recognized tribe,¹⁰³ not from their ancestry.

By virtue of the same constitutional history and current policy, Native Americans who are citizens of federally recognized tribes are differently situated from other Native Americans in another related way. One of the corollaries of having immunity from some state and federal regulation is that Native Americans who are members of federally recognized tribes are subject to *tribal* regulation and jurisdiction that do not apply to Native Americans who are not members of such tribes. In the absence of specific limitations, tribes clearly have jurisdiction to regulate the conduct of their own members within the confines of their territories.¹⁰⁴

100. See, e.g., *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973) (tribal member living and working on the reservation exempt from state income taxation).

101. Indian Country includes "(a) all land within the limits of any Indian reservation . . . (b) all dependent Indian communities . . . , and (c) all Indian allotments the Indian titles to which have not been extinguished." 18 U.S.C. § 1151 (2000). Although § 1151 expressly applies only to the issue of criminal jurisdiction, the Supreme Court has applied it in cases involving civil jurisdiction as well. See *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

102. For example, in the absence of a statutory expression to the contrary, laws generally applicable throughout the United States do not typically apply to lands under the control of federally recognized tribes if (1) the law touches "exclusive rights of self-governance in purely intramural matters;" (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties;" or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (citation omitted). Similarly, general federal criminal jurisdiction does not extend to "any Indian . . . who has been punished by the local law of the tribe." 18 U.S.C. § 1152 (2000). Whether tribes have criminal jurisdiction over Native Americans who are not members of the tribe (a prerequisite for the immunity granted by § 1152), is still a matter of some dispute between Congress and the Supreme Court. See *Duro v. Reina*, 495 U.S. 676 (1990) (holding that federally recognized tribes lack inherent criminal jurisdiction over non-member Native Americans); 25 U.S.C. § 1301(2) (2000) ("[T]he inherent power of Indian tribes [is] hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."); *United States v. Lara*, 541 U.S. 193 (2004) (upholding Congress's power to enact § 1301(2), but not addressing the constitutionality of the statute once applied). It is undisputed, however, that tribes have criminal jurisdiction (and can therefore punish) Native Americans who are members of the tribe. See *United States v. Wheeler*, 435 U.S. 313 (1978) (tribes have inherent criminal jurisdiction over tribal members).

103. For example, a state may tax the on-reservation sale of cigarettes to non-member Native Americans, see *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), but not their sale to tribal members, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991). Similarly, a state's ability to enforce its laws in Indian Country is limited when it interferes with tribal self-government, see, e.g., *Williams v. Lee*, 358 U.S. 217 (1959), an interest which is reduced when non-tribal members are involved, see *Colville*, 447 U.S. at 160–61.

104. *United States v. Wheeler*, 435 U.S. 313 (1978) (tribes have inherent criminal sovereignty over tribal members).

Their authority over non-member Native Americans is not as clear,¹⁰⁵ and, in some cases, is plainly not as extensive as it is over tribal members.¹⁰⁶

Native Americans who are members of federally recognized tribes, therefore, have some choice as to the laws and norms (state, federal, or tribal) to which they will be subjected.¹⁰⁷ In that respect, members of federally recognized tribes are differently situated from other Native Americans—not by virtue of their aboriginal status (which both groups share), but by virtue of their unique “dual” citizenship. What might at first seem like an arbitrary distinction between similarly situated individuals is in reality a logical consequence of long-standing historical and constitutional practice reflecting the way in which the federal government has chosen to deal with the indigenous population.

Again, however, justification for some differential treatment does not necessarily justify differential treatment with respect to religious practices. There must be some connection between the federally recognized tribal member’s dual citizenship status and religion in order for the distinction to make a meaningful difference in the equality analysis. That connection may be established by the second and third distinguishing features of Native Americans belonging to federally recognized tribes.

The second distinguishing feature is that Native Americans who are members of federally recognized tribes are subject to governmentally imposed religious norms and values in ways that other Native Americans are not. This reality arises from the fact that, as noted above, there is a close connection between many tribal cultures and tribal religions. Some tribal governments are closely connected with tribal religions. Indeed, some tribal governments still contain many features of their theocratic traditions.¹⁰⁸ More importantly, all tribal governments have the power to

105. See *supra* note 102; *Nevada v. Hicks*, 533 U.S. 353, 377 n.2 (2001) (Souter, J., concurring) (questioning the extent of inherent tribal civil jurisdiction over non-member Native Americans).

106. See, e.g., Indian Child Welfare Act, 25 U.S.C. §§ 1901–1923 (2000) (granting tribes considerable—and sometimes exclusive—control over child custody proceedings involving children who are tribal members).

107. The choice will largely be exercised in deciding to retain or renounce tribal membership.

108. The Hopi Tribal Constitution, for example, grants special powers to traditional religious leaders known as Kikmongwi, who must certify village representatives to the tribal council, HOPI TRIBAL CONST., art. IV, § 4, and who have the power to call for an election on proposed village constitutions, *Id.* at art. III, § 4. Moreover, until otherwise organized, villages are to be governed “under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader.” *Id.* at art. III, § 3.

In recognition of the intimate connection between the government and religion in some tribes,

establish legal norms for tribal members that reflect religious norms. Thus, when members of federally recognized tribes exercise the choice to subject themselves to tribal, rather than state or federal jurisdiction, they will in many cases implicitly consent to adhere to some tribal religious norms.¹⁰⁹ Native Americans who do not belong to federally recognized tribes do not make a similar choice. Laws that distinguish between the religions of those two groups may, therefore, merely reflect the reality that the religious beliefs and practices of the former group may be shaped by a tribal sovereign, while the latter may not.

A federally recognized tribe's ability to insist on compliance with some religious norms as a condition of tribal membership produces a third distinguishing feature of Native Americans who belong to federally recognized tribes. Native Americans who are members of federally recognized tribes may often be in a better position than other Native Americans to provide courts with assurances that their religious liberty claims are legitimate. Because RFRA requires claimants to demonstrate that the challenged practice "substantially" burdens their free exercise of religion, the Act requires courts to determine the sincerity of the claimant's belief that the impacted action is religious.¹¹⁰ Requiring Native American claimants of religious exemptions to belong to a federally recognized tribe may aid courts in making this difficult determination, which has also plagued the law in contexts other than RFRA.¹¹¹ To the extent that

when Congress enacted the Indian Civil Rights Act ("ICRA"), which statutorily imposed many of the restrictions in the Bill of Rights on Indian tribes, it excluded a prohibition against the establishment of a religion. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 591-92 (1972).

109. There are, obviously, limits on a tribe's ability to require adherence to tribal religious norms. The ICRA does prohibit a tribe from "mak[ing] or enforc[ing] any law prohibiting the free exercise of religion." 25 U.S.C. § 1302(1) (2000). However, that provision may grant tribal governments more leeway than the First and Fourteenth Amendments provide to federal and state governments for two reasons. First, there are indications that the norms of the ICRA are not identical to those in the Constitution. See e.g., *Howlett v. Salish and Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 238 (9th Cir., 1976) (indicating that in some situations the Equal Protection Clause of the ICRA "may be implemented somewhat differently than its constitutional counterpart"); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge*, 507 F.2d 1079, 1082 (8th Cir. 1975) (concluding that "the equal protection clause of the ICRA is not coextensive with the equal protection clause of the fourteenth amendment to the United States Constitution"); *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971) (ruling similar to *Wounded Head*). Second, following *Martinez*, interpretation of that particular provision of ICRA will be made by tribal courts in all cases not involving a writ of habeas corpus. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The leeway is extended even further because of the absence of an establishment clause in ICRA. Allowing a tribe additional leeway in enforcing religious norms is arguably justified by the fact that the tribal member can always renounce her tribal membership.

110. *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001).

111. See, e.g., *United States v. Ballard*, 322 U.S. 78, 89-92 (1944) (Stone, C.J., dissenting)

the particular conduct is identified as religious by the tribal entity, the court can have greater assurance that the tribal member sincerely believes the challenged action is part of her religion. Moreover, a tribe's acceptance of the claimant as a member could implicitly or expressly (depending on the extent of the connection among tribal culture, tribal government, and tribal religion) indicate tribal attestation of the religious bona fides of the claimant. Native Americans who are not members of a recognized tribe are not in a position to provide courts with that kind of assistance and assurance, in part because they are not citizens of a sovereign which has established the kind of relationship with the federal government that allows courts to rely on their governmental determinations.

A federally recognized tribal member's ability to provide such assurance and assistance might not only make a difficult judicial task more manageable, it might also prevent an anti-religious bias from creeping into religious liberty jurisprudence. While courts addressing RFRA often avoid the daunting task of measuring the substantiality of the burden on the claimant's belief by assuming that the claimant sincerely believes the conduct to be religious and the standard is met, one cannot help but wonder if doubts about the matter unconsciously (or consciously) shape the analysis under the other prongs of the test.¹¹² Measures which prevent that from happening—by giving courts greater confidence in addressing the sincerity issue head-on—arguably promote the cause of religious liberty in a way that provides some justification for preferential treatment.

Thus, for historical and policy reasons, Native Americans who are members of federally recognized tribes are subject to differing governmental norms and values than those who are not. Moreover, because of the unique way in which tribal governments operate, those governmental

(noting that in Free Exercise cases, juries may decide whether defendants' religious beliefs were sincerely held); see also *United States v. Seeger*, 380 U.S. 163, 184–85 (1964) (noting that Free Exercise claims require factfinder to decide sincerity of beliefs). Cf. *Ballard*, 322 U.S. at 92–93 (Jackson, J., dissenting) (noting difficulty of determining sincerity of beliefs without consideration of veracity of beliefs). See generally Brian A. Freeman, *Expatriating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 36–37 (2001); Kent Greenawalt, *Judicial Resolution of Issues About Religious Conviction*, 81 MARQ. L. REV. 461, 462–63 (1998).

112. Perhaps the Ninth Circuit's overly generous deference to the government in *Antoine*, see *supra* text accompanying notes 46–51, was the result of unarticulated suspicions about the sincerity of Antoine's beliefs. The court noted that Antoine "claims" that exchanging eagle feathers for goods and money is "part of [a] native custom . . . which to him has religious significance." *United States v. Antoine*, 318 F.3d 919, 920 (9th Cir. 2003). It then indicated that in light of its other analysis it saw no reason to disturb the district court's assumption that his beliefs were sincere. *Id.* at 921 n.2. The court might have been more demanding of the government had Antoine been a member of a federally recognized tribe which provided evidence that such a custom was indeed part of the tribal religious culture and that Antoine was indeed a member in good standing.

norms and values include religious norms and values. Finally, a federally recognized tribe's ability to impose those norms on its members (and not others) makes it possible for them to assist in the proper development of religious liberty jurisprudence¹¹³ in ways that are not possible when litigation involves Native Americans who are not members of a tribe. Accordingly, the preference for members of federally recognized tribes may well reflect genuine differences between the situation of such members and other Native Americans.

One might still object to the preference for federally recognized tribal members on the ground that Native Americans who are not part of such tribes are ultimately being discriminated against based on their ancestry, rather than their political affiliation. After all, it was the actions of their forbearers, not the current Native Americans, which led to the lack of federal recognition. In the absence of the kinds of compelling differences noted in the prior section¹¹⁴ (which do not apply to the tribal recognition differential), such ancestry-based discrimination may demand more justification than the prior arguments in this section provide.

However, Native Americans whose tribes are not currently recognized are not completely without recourse. Federal recognition is an ongoing process. A tribal group which demonstrates, among other things, that it is a distinctive community which has been identified on a substantially continuous basis as Native American can gain federal recognition through an administrative process¹¹⁵ or through congressional action,¹¹⁶ thus placing them in the preferred category. Conversely, if a tribal group cannot make that showing because it has lost connection to its aboriginal roots, its members may not be situated that differently from non-Native Americans, who are also not eligible for special protection.¹¹⁷ Thus, the

113. If the tribal membership requirement does assist in the proper development of religious liberty jurisprudence, *see supra* text accompanying notes 103–04, and if that benefit is a necessary part of the justification for granting preferential treatment to tribal members, the current regulatory scheme may not be focused enough. It may not be enough that the person possesses the eagles for religious purposes and is a member of a federally recognized tribe; it may also be necessary for the person to possess the feathers as part of a religious practice recognized as *bona fide* by *that particular tribe*. Otherwise, the tribe might not be in a position to assist the court in determining the religious *bona fides* of the tribal member. The language of the current rule, which focuses in part on “[w]hether the applicant is . . . authorized to participate in *bona fide* tribal religious ceremonies,” permits such an interpretation. 50 C.F.R. § 22.2(c)(2) (2004). It is unclear whether it is being enforced that way.

114. *See supra* Part II.A.

115. *See* 25 C.F.R. § 83.7 (2004) (listing mandatory criteria for recognition). This is not to imply that federal recognition through the administrative process is easy. *See Myers, supra* note 16.

116. *See, e.g.,* Indian Claims Settlement Act of 1987, 25 U.S.C. § 1771 (2000) (recognizing the Wampanoag Tribe of Gay Head).

117. The arguments in favor of the political component of the exemption requirement do

political discrimination imposed by the current scheme is flexible enough to allow some self-correction along the way.

C. *Lingering Doubts: Mixing Blood and Politics*

Even if one accepts the arguments outlined above, there are still lingering doubts about the compatibility of the current scheme with the basic concept of equality, doubts which emerge upon closer scrutiny of some of those arguments. First, Native Americans may be less unique with respect to religion than first appears. While it is true that Native American religion existed here prior to any others that currently exist, other religions have originated in the United States. The Church of Jesus Christ of Latter-day Saints¹¹⁸ and the Jehovah's Witnesses¹¹⁹ are just two examples. While some of these groups now have strong bases outside the United States (so that their failure to exist here would not mean their entire elimination), others exist predominantly here.¹²⁰ They, too, may be threatened with extinction unless they are granted special protection.

Second, the exact boundaries between culture and religion are far from clear. It is entirely possible that there is such a thing as an "American Mormon" culture, for example, which was created and exists only in the United States. Furthermore, cultures (even in a broader sense) are not as well-defined or as static as the above analysis may suggest. While it is true that Native American culture exists only here, the same could be said for African-American, or Asian-American cultures. Although these cultures may trace a portion of their roots to other countries – and while

not appear to be as strong as they are for the racial component. See *supra* Part II.A. However, they may nevertheless be sufficient, since discrimination based on race is more suspect, and therefore more difficult to sustain, than discrimination based on political affiliation or citizenship. See *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974) (characterizing employment preference for Native Americans as political rather than racial and applying lower standard of scrutiny). Moreover, use of the political component may be further justified by the fact that its presence ameliorates some of the lingering concerns about the propriety of the racial component. See *supra* Part II.C.

118. The LDS Church was organized in 1830 in Fayette, New York. THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Preface to Section 21 at 40 (1981).

119. The Jehovah's Witnesses began in the early 1870s in Allegheny, Pennsylvania. *Jehovah's Witnesses — Who Are They? What Do They Believe?*, at http://www.watchtower.org/library/jt/article_02.htm (last visited Apr. 12, 2005).

120. Examples include Church of God General Conference, with several thousand members and headquartered in Morrow, Georgia, FRANK S. MEAD ET AL., HANDBOOK OF DENOMINATIONS IN THE UNITED STATES, 31 (11th ed. 2001), and the Jesus People USA, a Chicago-based religious group with a few hundred members, 1 EDWARD L. QUEEN II ET AL., ENCYCLOPEDIA OF AMERICAN RELIGIOUS HISTORY 558 (rev. ed. 2001).

they may have close counterparts in those countries – arguably, they are also unique and exist only in the United States. Thus, unless longevity by itself is the distinguishing relevant feature, Native American religious culture may be less uniquely situated than first appears – perhaps enough less to render preferential religious treatment on that basis somewhat questionable.

Third, if preservation of Native American religious culture is the compelling interest which justifies preferential treatment, it is not a foregone conclusion that the goal is best, or even better, achieved by prohibiting non-Native Americans from participating in those religions, as the Tenth Circuit noted in *Hardman*.¹²¹

Finally, with respect to the federally recognized tribal membership distinction, the connection between tribal culture/religion and tribal government is not as close in some tribes as in others. Because of the lack of care with which the federal government proceeded when enclosing Native Americans on reservations in the late 1800s, some federally recognized tribes consist of native groups whose culture and language do not match.¹²² Indeed, in some cases, historical enemies were placed in the same tribe.¹²³ Thus, the fit between the category of federally recognized tribes and religion is less snug than the prior section makes it appear.

These lingering doubts may be addressed in a number of ways. One is to point out the possible synergistic relationship between the two requirements of the current exception (the Native American ancestry requirement and the tribal membership requirement). The latter requirement (tribal membership) arguably addresses the lingering doubts about the former (ancestry), and vice-versa.

For example, the concerns raised by the first three lingering doubts (which are all doubts about whether distinctions based on ancestry are valid) are ameliorated somewhat by requiring membership in a federally recognized tribe. Even if other religions and cultures share some features with Native American religions and cultures, none of them has been treated as a sovereign entity, whose members are both subject to its coercive governmental power (including power over religious matters) and, at the same time, exempt to some extent from the coercive power of the federal and state governments. Moreover, tribal membership require-

121. *United States v. Hardman*, 297 F.3d 1116, 1133 (10th Cir. 2002).

122. For example, membership in the Colorado River Indian Tribes extends to both Mojave and Chemehuevi Indians, as well as to some Hopi and Navajo. Kevin J. Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND. L. REV. 1273, 1295 (1991).

123. The Wind River Tribe is composed of both the Shoshone and their traditional enemies, the Arapahoe. *Id.*

ments provide some concrete defining point for determining the otherwise vague boundaries of a culture. Native Americans who are members of federally recognized tribes are truly unique in those respects, and that uniqueness may justify treatment different from groups that otherwise share somewhat similar circumstances.

Similarly, the last doubt (which concerns whether distinctions based on federally recognized status can legitimately apply to culturally or religiously "mixed" tribes) may be ameliorated by emphasizing the similarities which all aboriginal peoples share with one another, but which differentiate them from non-Native Americans. Even those tribes which are linguistically and culturally distinct from one another share some of the common features which distinguish them from non-Native Americans (and which are discussed in the first part of this section).

Still, the fit is concededly not exact. Not all federally recognized tribes fit the profile set forth above, and some non-Native American religious groups share more in common with Native American religions than with other non-Native American religions. There are at least two possible responses to this reality.

One is to simply acknowledge that we live in a less than perfect world and then conclude that this is the best we can do given the current situation. The fact that we cannot undo the imperfect features of our past treatment of Native Americans in a way that perfectly matches the remedy with the harm should not prevent us from doing what we can (the perfect not being allowed to be the enemy of the good, so to speak). Under this view it is better to allow protection for some conduct that may not deserve it, than to disallow all religious practices because the exact line between what should be allowed and what actually is allowed cannot be drawn precisely. This line of argument may be particularly compelling in zero-sum situations, such as that involving eagle feathers, where there has to be some basis for preferring some claims over others because not all claims can be satisfied.

Alternatively, one could argue that the exception should be more narrowly tailored so that it applies only to members of those groups which meet all the requirements implicit in the arguments above. That is, for example, one might conclude that eagle feather permits ought to be issued only to members of groups who: (1) are aboriginal, (2) are culturally and religiously integrated, (3) have an ongoing need for access to eagle feathers for religious purposes, and (4) are federally recognized as distinct sovereigns whose members are subject to their governmental ju-

risdiction over religious matters and who are exempt to some extent from the jurisdiction of other governments in our system.¹²⁴

In any event, while strict equality may require narrower tailoring, it seems that there are valid equality-based justifications for preferential treatment for at least some Native Americans who are members of at least some federally recognized tribes. This conclusion has some relevance to the larger question concerning the general compatibility of religious exemptions with the demands of equality.

CONCLUSION: TENTATIVE LESSONS FROM THE NATIVE AMERICAN EXPERIENCE WITH EAGLE FEATHERS

As noted above, many scholars believe that the real question is not whether exemptions which favor some religious practitioners over others can be justified in a system committed to equality, but whether there is ever sufficient justification for any religious exemptions in such a system.¹²⁵ While the analysis outlined above does not fully answer that question, it does provide some tentative insights that could be useful in the debate.

First, the Native American experience with eagle feathers provides some insight into the potential benefits of religious exceptions in situations where religious liberty appears to be in conflict with other compelling interests, such as the preservation of the eagle population. In such cases, a regime that completely prohibits religious exemptions may foreclose the possibility of resolving the conflict to the satisfaction of both interests. If no religious exemptions were permitted in the eagle feather situation, the government would be forced to decide either to outlaw all possession of eagle feathers, thereby threatening the destruction of truly unique religions and cultures for whom such use is essential, or to allow everyone access to them, thereby threatening the extinction of the eagle. Narrowly tailored religious exemptions may well allow accommodation of both interests.

Second, the Native American experience with eagle feathers indicates that religious exemptions may be particularly helpful and justifiable in situations in which conflicts between religions present zero-sum situations.¹²⁶ In such cases, neutrality (the concept at the heart of the no ex-

124. Arguably, the exemption should be narrowed even further to apply only to those who use the feathers in a way sanctioned by the tribe to which they belong. *See supra* note 113.

125. *See supra* note 19.

126. Similar zero-sum situations may arise in other circumstances, such as when two groups claim competing access to the same physical site.

ception policy)¹²⁷ would seem to require that government deny all religionists access to the good, since the only other neutral option (granting full access to both) is not physically possible. Permitting religious exemptions, including those that in rare cases favor one religion over another, can again allow for greater protection of religious liberty overall, without offending the notion of equality, if one accepts the analysis set forth above.

Finally, if one is persuaded by the analysis above that preferential treatment in favor of particular religions can be justified in some situations, it seems likely that there are situations in which preferential treatment in favor of *all* religions might be permissible—the former situation being a subset of the latter in some respects. The Native American experience with respect to eagle feathers demonstrates that what at first appears to be unjustifiable inequitable treatment may in reality be wholly sustainable equal treatment based on fundamental differences between two seemingly similar groups. All that may be required is a deeper analysis of the relevant characteristics.¹²⁸ The Native American experience with eagle feathers may therefore prove that, with more in-depth analysis, the concepts of equality and religious exemptions can be compatible after all.

127. See SMITH, *supra* note 57, at 104 (“In its substantive content . . . religious ‘neutrality’ is a close corollary of, or even a virtual synonym for, the ideal of religious ‘equality’ . . .”).

128. The relevant characteristics in the latter case will not be the same as in the former. With the former, the question is whether the two groups are differently situated with respect to religion. With the latter, the question would be a broader one, e.g., is religion situated differently from other interests with respect to liberty? See, e.g., Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002).