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RECOGNIZING SUBSTANCE: ADOPTEES AND AFFILIATES OF NATIVE AMERICAN TRIBES CLAIMING FREE EXERCISE RIGHTS

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I. INTRODUCTION

It is not surprising to see widespread and far reaching governmental regulations due to the current regulatory welfare state that characterizes our federal government.² More and more frequently the actions of the government directly affect, regulate, or otherwise modify diverse aspects of human affairs.³ Sometimes the regulations are beneficial and welcomed; other times, governmental actions constrain and impinge upon fundamental rights of individuals.⁴ For many, the widespread governmental regulations undesirably attack a very personal realm of individual life — religious freedom, the right to freely exercise religion.⁵ One example of this is the Bald and Golden Eagle Protection Act (BGEPA)⁶ and its impact on the religious practices of Native Americans.⁷

Many Native Americans use eagle feathers in their religious ceremonies and practices.⁸ However, the BGEPA makes it unlawful to “possess...[or] transport...at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part nest, or egg thereof of the foregoing eagles.”⁹ Standing alone, the proscriptions of 16 U.S.C. § 668 appear to eliminate entirely this indispensable article from Native

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2. *Keyishian v. Board of Regents of Univ. of N.H.*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

3. *See Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (“It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers.”). *See, e.g., Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164 (1878) (recognizing Congress’s power to ban polygamy in order to prohibit “actions which were in violation of social duties or subversive of good order”).

4. *See, e.g., E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir.1996) (addressing government’s interests in eradicating sex discrimination and preserving rights of free exercise of religion).

5. *See Yoder*, 406 U.S. at 243 (1972) (Douglas, J., dissenting) (stating “religion is an individual experience”).

6. 16 U.S.C. § 668.

7. *See infra* part IV.

8. *See United States v. Dion*, 476 U.S. 734, 740-42 (1986) (recognizing importance of eagles in Native American religious ceremonies).

9. 16 U.S.C. § 668.

American religious practices.¹⁰ To accommodate the “religious purposes of Indian tribes,” Congress authorized the Secretary of the Interior to issue permits which allow the holder of the permit to possess eagles or eagle parts with impunity.¹¹

This specific instance of legislative accommodation provides a legal means for many Native Americans to more fully follow the dictates of their religious convictions.¹² However, the Native American religious exemption, and more specifically, the regulations promulgated by the Secretary of the Interior that govern the issuance of permits, unnecessarily deny permits to some individuals whose beliefs and affiliation with a Native American tribe are substantially consistent with those individuals who do qualify for a permit and for whom the religious exemption was created.¹³

For example, non-Native Americans who have been adopted into a Native American family or who significantly affiliate with a tribe, but whose names do not appear on the tribal rolls,¹⁴ are unable to obtain a permit to possess eagle feathers under the BGEPA.¹⁵ The denial of a permit occurs despite the applicant’s religious convictions and associations with a Native American tribe.¹⁶ This under-inclusive effect is primarily the result of the criteria set forth by the Department of the Interior in 50 C.F.R. § 22.¹⁷ Specifically, to be eligible for a permit, the regulations require the applicant to attach a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. 479a-1.¹⁸ For some adoptees or affiliates this is a difficult, and sometimes impossible,

10. See *Andrus v. Allard*, 444 U.S. 51, 56 (1979) (stating that proscriptions are “sweepingly framed” and “exhaustive”).

11. See *Dion*, 476 U.S. at 740 (acknowledging exemption “for the religious purposes of Indian tribes”).

12. See *id.* at 744-45 (discussing Interior Department’s regulations limiting permits to “individual Indians who are authentic, bona fide practitioners” of the Native American religion).

13. See, e.g., *Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000) (upholding denial of permit to full blooded Native American because the applicant’s name was not listed on roll of federally recognized tribe).

14. There may be a number of reasons an individual who associates with or who may even be adopted into a Native American family is still not recognized by the tribe as a full fledged member, thereby precluding the inclusion of the individual’s name on the tribal roll. For example, in *Cherokee Intermarriage Cases v. United States*, 203 U.S. 76, 88 (1906) the Court recognized the distinctions between different classes of citizens of the Cherokee Nation. The Court discussed the incongruity between the property rights of a white citizen brought into the tribe by marriage as opposed to a member of the tribe by blood. *Id.* at 88-89. Accordingly, it appears that a tribe may desire the association with an individual and may consider the person a member of the tribe for many purposes, yet still not include the individual’s name on the tribal rolls because the tribe wishes to otherwise limit the rights and privileges appertaining to fully recognized membership. See, e.g., *id.* (classifying members of tribe).

15. See *infra* part IV (discussing inability of adoptee to lawfully possess eagle feathers).

16. See, e.g., *Gibson*, 223 F.3d at 1257 (disregarding applicant’s status as Native American and degree of religious conviction when affirming denial of permit).

17. See *id.* at 1257 (citing regulation as requiring certification of enrollment in appropriate tribe).

18. 50 C.F.R. §22.22(a)(5). See *Gibson*, 223 F.3d at 1257 (quoting approvingly 50 C.F.R. 22.22(a)(5)).

criterion to satisfy. In certain situations, these applicants are denied permits despite the fact that they are substantively similarly situated to qualifying applicants.¹⁹

An additional obstacle is found in 50 C.F.R. § 22.22(c)(2): the government is authorized, when deciding to issue a permit, to consider “[w]hether the applicant is an Indian who is authorized to participate in bona fide tribal religious ceremonies.”²⁰ Implicit in this inquiry is a grant of authority to the agency to consider the applicants status as an “Indian.”²¹ Because there is no satisfactory correlation between one’s race and religious beliefs, the ability of a government employee to utilize this discretion threatens the applicant with a result that is arbitrary and unguided.²² Because the religious exemption in the BGEPA is designed to accommodate Indian tribes, the tribes should be empowered to regulate and determine who should be eligible for the permits.²³ This result would allow qualified and deserving applicants to receive permits, ensuring that eligibility is tied to the substance of the religious exemption and not on a formalistic conclusion based on factors not necessarily relating to the purpose of the religious accommodation.

Accordingly, I contend that the agency’s authority to calculate the applicant’s race into the equation introduces an unnecessary, and potentially invidious, avenue of discretion that is not necessary to carry out the purposes of the BGEPA.²⁴ When this grant of discretion is coupled with the tribal enrollment requirement, a small but distinct class of applicants are improperly precluded from obtaining permits to possess eagles or eagle parts.²⁵ I believe this under-inclusion is improper because the government’s action infringes on these denied applicants’ free exercise rights, by making illegal any use or possession of eagles or eagle parts for religious ceremonies.²⁶

19. See *Gibson*, 72 F. Supp.2d 1356, 1357 (S.D. Fla. 1999) (recognizing Native American applicant’s inability to verify tribal membership due to governments probable role in forcibly relocating his ancestors).

20. 50 C.F.R. § 22.22(c)(2).

21. *Id.*

22. See, e.g., *Morrison v. Garraghty*, 2001 U.S. App. LEXIS 1754 (4th Cir. 2001) (rejecting proposition that religion can be defined by race or heritage); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1086 (1983) (Marshall, J., concurring) (stating that race and religion cannot be used as a proxy for required employment skills under Title VII).

23. See generally Pres. Mem. of April 29, 1994, 59 Fed. Reg. 22953 (requesting agencies to “expand efforts to involve Native American tribes, organizations, and individuals in the distribution process”).

24. See generally *Jean v. Nelson*, 472 U.S. 846, 859 (1985) (Marshall, J., dissenting) (decrying use of race in making parole decisions as unconstitutional invidious discrimination); *McLaughlin v. State of Fla.*, 379 U.S. 184, 194 (1964) (“When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”).

25. See *infra* part IV.

26. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (striking down ordinances as either overbroad or underinclusive under the First Amendment).

This is a classic form over substance problem.²⁷ An applicant can be denied a permit to possess eagle parts solely because the applicant's name does not appear on the roll of a federally recognized tribe, or possibly because the applicant is not an Indian.²⁸ This result occurs regardless of the applicant's degree of religious conviction and beliefs in accordance with the "religious purposes of Indian tribes" exception in the BGEPA.²⁹ Also ignored are the applicant's affiliation and socialization with a tribe, which in many respects, are substantially identical to those of qualifying applicants.³⁰ To remedy these existing or potential threats on religious practices, I recommend the BGEPA and 50 C.F.R. § 22.22 be amended to remove the requirement of certified tribal enrollment and the avenue of bureaucratic discretion to consider race when deciding to issue permits.

Illustrative of the unwarranted harm created by the enrollment requirement and the race discretion feature of the regulations is the case of a Caucasian male who claimed to have been adopted into a Native American family and to be a practicing member of the Native American religion.³¹ This individual was recently arrested for possession of eagle feathers without a permit.

A. *United States v. Samuel Ray Wilgus, Jr.*³²

On June 5, 1998, during a routine traffic stop, 50-year-old Samuel Wilgus was found with 137 eagle feathers³³ stored in a box in the back of his truck.³⁴ The traffic stop resulted in an information which charged Mr. Wilgus with two

27. See *Mitchell v. Helms*, 530 U.S. 793, --, 120 S. Ct. 2530, 2546 (2000) (declining to exalt form over substance).

28. See *Gibson*, 223 F.3d at 1257 (denying permit because applicant's name was not on tribal roll).

29. See *id.*

30. See *id.*

31. For the purposes of this article, the terms adoption or adoptee refer to an individual who was adopted into a Native American family. This article will also discuss affiliates, those individuals who may or may not have been adopted into a Native American family but nonetheless significantly associate and affiliate with members of a Native American family or tribe. Adoptees and affiliates may also be duly recognized by the tribe as members, but this article will proceed on the assumption that they are not certified members.

32. *United States v. Wilgus*, No.2:99CR00047W (D. Utah 1999) (unreported opinion).

33. Of the 64 species of eagles worldwide, the bald and golden eagles are the only two species of eagles that live in North America. Ella Sorensen, *Eagles; Utah's Bald Eagles are Thriving*, S.L. TRIBUNE, Jan. 5, 1999, at C1. Thus, in this article, any general reference to eagles, refers to either the bald or golden eagle, both of which are covered by the BGEPA.

34. See Defendant's Memorandum in Support of Motion to Dismiss Information at 1 [hereinafter Defendant's Motion to Dismiss]. The officer who conducted the search acknowledged that the search was performed without permission. Bob Mims, *Battle Lines Drawn in Federal Eagle Feather Case*, S.L. TRIBUNE, July 29, 1999, at B2 [hereinafter Mims, *Battle Lines*]. Four days after the traffic stop, several more feathers were obtained by a Division of Wildlife Resources officer from Mr. Wilgus' wife, Linda, at her home. Defendant's Motion to Dismiss at 1. All the feathers owned by Mr. Wilgus were allegedly given to him as gifts from Wilford Jake and other Native Americans. Defendant's Motion to Dismiss at 2.

counts of violating 16 U.S.C. § 668, the Bald and Golden Eagle Protection Act (BGEPA).³⁵ Mr. Wilgus claimed that he could lawfully possess the feathers based on religious freedom grounds.³⁶ He asserted that he had been adopted into the Native American Jake family and had become a practicing member of the Native American Church.³⁷

Essentially, Mr. Wilgus argued that, although ethnologically he is not a Native American, by virtue of his adoption into a Native American family,³⁸ legally, he should be considered as member of the Paiute tribe and entitled to the religious rights and privileges of its members.³⁹ More specifically, he

35. 16 U.S.C. § 668 *et seq.* The pertinent portion of the BGEPA prohibits the possession, sale, and transportation of any eagle, or parts thereof, unless the owner has a permit as provided in 16 U.S.C. § 668(a). 16 U.S.C. § 668. Native Americans are specifically listed as parties for whom permits are provided by the BGEPA. 16 U.S.C. § 668(a).

36. See Defendant's Motion to Dismiss at 4.

37. See Defendant's Motion to Dismiss at 2-3. The Jake family belongs to the Paiute tribe. *Id.* The late Minnie John Jake allegedly adopted Mr. Wilgus approximately 12 years ago. *Id.* at 2. Minnie's son and Paiute holy man, Wilford Jake, substantiates the adoption, characterizing it as a form of "spiritual adoption" that has been practiced for "hundreds of years" by the Paiute tribe. Mims, *Battle Lines*, *supra* note 17. Describing the adoption, Wilford stated "[i]t was like the old Indian ways, no papers. . . [h]e's my brother - my adopted brother." Mims, *Eagle Feather*, *supra* note 13. Minnie was described as "a very traditional person" and the adoption was "literally on her deathbed." *Id.*

38. Adoption into a tribe or Native American family is a longstanding practice and instances of adoptions are discussed in cases dating back to 1896. See *Alberty v. United States*, 162 U.S. 499 (1896) (discussing Cherokee treaty of July 19, 1866 (14 Stat. 779-803) that recognized the jurisdiction of Indian tribunals over adopted members of the tribe). Adoptions raise a number of significant issues concerning property rights, see *Cherokee Internmarriage Cases*, 203 U.S. 76 (1906) (recognizing tribe's authority to classify different types of membership and respective property rights); see also *U.S. ex rel. West v. Hitchcock*, 205 U.S. 80 (1907) (noting government has power over membership when allotments and federal funds are involved), federal jurisdiction, see *Nofire v. United States*, 164 U.S. 657 (1857) (denying the federal courts jurisdiction in a murder case because the victim, a white man, was duly adopted into the Cherokee Tribe), criminal law see *id.*, family law, see *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. Colo. 1957) (holding no jurisdiction to hear claim of daughter of full blooded Native American member of tribe); *Raymond v. Raymond*, 83 F. 721, (8th Cir. Indian Terr. 1897) (discussing adoption of a non-Native American into tribe by marriage); and tribal sovereignty and free exercise claims, see *Gibson v. Babbitt*, 72 F. Supp.2d 1356 (S.D. Fla. 1999) (discussing tribal membership and free exercise rights of Native Americans).

39. See Defendant's Motion to Dismiss at 3 (recognizing that Mr. Wilgus "is white"). In fact, Mr. Wilgus claims that his actual ancestry is unknown. Interview with Joseph P. Orifici, Attorney for Mr. Wilgus, in Salt Lake City, Utah (Nov. 15, 1999).

At the conclusion of oral arguments on the motion to dismiss the information, Judge Winder denied the motion from the bench, agreeing with the government that Mr. Wilgus is not an Indian and not a member of a federally recognized tribe. Bob Mims, *Adopted Paiute Can't Have Feathers*, S.L. TRIBUNE, Aug. 10, 1999, at B1 [hereinafter Mims, *Can't Have Eagle Feathers*]. The government provided an affidavit from tribal Chairwomen General Anderson, averring that Mr. Wilgus was not on the Paiute membership rolls. Affidavit in Support of Misdemeanor Information, *United States v. Wilgus* (D. Utah 1999) (No. 2:99CR0004W) cited in Brief in Response to Motion to Dismiss at 5. Furthermore, Assistant U.S. Attorney Christopher Chaney relied upon the constitution of the Paiute Indian Tribe of Utah, Article II, Section 1(c), which sets forth the requirements for adoption into the tribe. *Id.*

In pertinent part the Paiute Constitution requires that:

(1) The adoption was granted by a court of competent jurisdiction; and (2) The applicant is four-fourths (4/4) degree [sic] Indian blood from a federally recognized Indian tribe; and (3) The applicant has resided within the Counties of Millard, Sevier, Iron, Beaver or Washington at least five (5) years prior to applying for membership; and (4) The applicant's name has been

argued that he is entitled to possess eagle feathers pursuant to the exemption provided in 16 U.S.C. § 668(a), which allows Native Americans to possess eagle feathers for religious purposes.⁴⁰

Mr. Wilgus alleged that his “beliefs are that of the Native American church.”⁴¹ Eagle feathers are an integral part of his worship activities in the Native American Church. Mr. Wilgus claimed to regularly use the feathers in religious ceremonies on the Paiute reservation.⁴² Thus, Mr. Wilgus asserted that his adoption into the Paiute tribe entitles him to fully practice the tenets of the Native American church, including the right to freely exercise his religion by using the eagle feathers in religious ceremonies. The use of feathers, argued Mr. Wilgus, is an essential element in his religious practices in the Native American Church. He further contended that his beliefs were being unduly burdened by the statute and the underlying permit process, both of which effectively prohibited his possession of eagle feathers.⁴³

submitted to and successfully passed a referendum vote of the tribal membership pursuant to Article XI, Section 2(c) of the constitution.

Id. See text *infra* part III B (discussing tribe’s power to determine membership).

These factors convinced Judge Winder that Mr. Wilgus is “not an Indian.” Mims, *Can’t Have Eagle Feathers*, *supra*. “Mr. Wilgus must be a descendent of Indian blood lines or a member of a federally recognized tribe.” *Id.* Judge Winder decided Mr. Wilgus is neither of the two. *Id.* The judge further declared that the Native American exemption in the BGEPA is to be interpreted narrowly, as supported by case law and congressional intent. *Id.* In short, the judge held that because Mr. Wilgus is not a member of the Paiute tribe the BGEPA does not unconstitutionally infringe upon his religious freedoms. *Id.* After the motion to dismiss was denied, Mr. Wilgus entered a conditional plea of guilty, in order to facilitate his appeal of the denied motion to the 10th Circuit. Mims, *Can’t Have Eagle Feathers*, *supra*. Mr. Orifici plans to appeal both the religious exercise claim and the level of scrutiny applied to the BGEPA. *Id.* The court applied a lower level of scrutiny instead of strict scrutiny that Mr. Orifici contends is the proper standard to apply. *Id.*

40. Motion to Dismiss at 3-4.

41. Defendant’s Motion to Dismiss at 2. Judge Winder’s comments made before his ruling to deny the motion to dismiss acknowledged the sincerity of Mr. Wilgus’ religious beliefs. Mims, *Can’t Have Eagle Feathers*, *supra* note 39.

42. Defendant’s Motion to Dismiss at 3.

43. See Defendant’s Motion to Dismiss at 4 (contending that Mr. Wilgus’s free exercise rights have been violated). It would appear, however, that Mr. Wilgus can only attack the statute, as applied to him, in order to escape the penalties for possessing the feathers without a permit. See *id.* (attacking constitutionality of the BGEPA). It is not clear whether Mr. Wilgus could also attack the permit process and the regulations by which it is administered because he did not apply for a permit, thus, he would not have standing. See *United States v. Lundquist*, 932 F. Supp. 1237, 1242 n.4 (D. Or. 1996) (denying standing to challenge permit); *United States v. Thirty Eight Golden Eagles*, 649 F. Supp. 269, 277 (D. Nev. 1986) (recognizing that failure to apply for permit precludes standing); *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220-21 (9th Cir. 1992) (holding that a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit) *cited in Hugs*, 109 F.3d at 1378. Generally, this is the law, but there is an exception: the doctrine of futility.

The futility doctrine may be applicable for some parties, like Mr. Wilgus, who face a threshold standing inquiry. A number of courts “have excused on grounds of futility the threshold standing requirement that the plaintiff submit to the policy being challenged by applying for the benefit regulated by that policy.” *United States v. Duniher*, 997 F. Supp. 1237, 1240 (N.D. Ca. 1998); see also *Jackson-Bey v. Hansmaier*, 115 F.3d 1091, 1096 (2nd Cir.1997) (recognizing futility as an exception to standing). The establishment of futility requires a substantial showing that an adverse decision by the agency is a certainty.

B. Recognizing the Substance

Mr. Wilgus's case raises a number of interesting issues regarding adoption into a Native American tribe. This article will address only two of these issues. One, whether a Native American tribe's sovereign power permits it to adopt non-Native Americans into the tribe or to affiliate with non-members of the tribe to such a high degree that the individual should be recognized as a "quasi-member" of the tribe. And two, the scope of the free exercise rights and privileges of adoptees or affiliates.⁴⁴ This article will analyze these two issues in the context of an adoptee's or affiliate's right to obtain permits to possess eagle feathers under the BGEPA by virtue of membership in or affiliation with a tribe and because the feathers are being used for religious purposes.⁴⁵

Part 2 of this article briefly discusses the purposes, proscriptions, and underlying regulations of the BGEPA. Part 3 sets forth the development and modern understanding of the notion of tribal sovereignty as it pertains to tribal membership. Part 4 describes the interplay between the BGEPA, tribal membership law, and the free exercise rights of adoptees or affiliates. Part 5 contends that the BGEPA and the regulations that govern the administration of permits under the BGEPA, as interpreted by the courts, deny the right of free exercise to legitimate adoptees and affiliates of the tribe. Moreover, the

See Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 105 (D.C. Cir.1986) (stating futility depends on certainty of adverse decision).

An adoptee or affiliate, like Mr. Wilgus, might have a colorable claim against the permit process by virtue of the futility exception to the standing requirements. For example, Mr. Wilgus did not apply for a permit, but if he had, it is unlikely that the agency issuing the permit would have entertained his request. He is not ethnologically an Indian and is not on the tribal roll. Consequently, Mr. Wilgus cannot meet the threshold requirements to obtain a permit. *See* 50 C.F.R. § 22.22(c)(2) (requiring that an applicant "attach a certification of enrollment in an Indian tribe that is federally recognized"). The regulation further states that one of the criteria that may be considered for determining eligibility is whether "the applicant is an Indian who is authorized to participate in bona fide tribal religious ceremonies." 50 C.F.R. § 22.22(c)(2). Because it is almost certain that Mr. Wilgus's application process would be futile, he would probably be able to escape the standing requirement and mount an attack against the permit process.

It would not be surprising, however, if a court rejected the futility argument because, theoretically, it may be possible for an adoptee, like Mr. Wilgus, to obtain a permit. If the individual was duly enrolled in a federally recognized tribe, his permit application may be approved. Furthermore, the individual's status as an "Indian" is not necessarily the determinative factor in a permit application. 50 C.F.R. § 22.22(c)(2). The agency is authorized to consider whether the individual is an "Indian" when determining eligibility for the permit. An individual's status as an "Indian" can be interpreted as one of many factors for consideration and not as a mandatory requirement. If an adoptee applies for a permit, conceivably, the application may be accepted. For these reasons, a futility argument may fail.

44. A discussion of all the rights and privileges of adoptees would be informative and intriguing; however, this paper will address only the rights of qualified adoptees or affiliates to possess eagle feathers. The underlying law and rationale supporting this narrow focus may be applicable in analyzing other rights and privileges of such claimants.

45. *See* 16 U.S.C. § 668a (authorizing permits to Native Americans for religious purposes).

current BGEPA regulations allow the United States Fish and Wildlife Service to consider the applicant's status as an Indian, thus providing the government with an opportunity to make invidious decisions in this religious arena on account of race.⁴⁶

This article will conclude that the BGEPA and the regulations by which it is administered, as applied to adopted non-Native Americans or affiliates of a tribe, are unnecessarily restrictive and inconsistent with the goals and purposes of the BGEPA. To remedy this problem, this article proposes that the underlying regulations of the BGEPA should be amended to delete the certification of tribal enrollment requirement and instead grant permits to those individuals who are recognized by the tribe. A written endorsement from a duly authorized tribal leader will be necessary to obtain a permit.

This amendment will ensure that the substantive concerns embodied in the Native American exemption are well served, and will also safeguard the applicant from the risk that the government will improperly use race as a proxy for religious beliefs. Furthermore, such an amendment will allow the tribe to effectively determine who is eligible for a permit, by deciding whether to endorse or include the applicant's name on the tribal rolls. The tribe is in a better position than the government to evaluate the religious convictions of their members or associates, thereby ensuring that eagle feathers are only provided to deserving applicants. The proposed amendment is consistent with the Executive Memorandum issued by President Clinton, urging governmental bodies to allow the tribes greater participatory roles in governmental functions where Native American affairs are involved.⁴⁷ In short, the ability of the tribe to participate in and regulate, to some degree, the administration of the permits under the BGEPA will likewise enhance and protect tribal sovereignty.⁴⁸

II. THE BALD AND GOLDEN EAGLE PROTECTION ACT

Enacted in 1940, the Bald Eagle Protection Act (Act)⁴⁹ was designed to protect the bald eagle that was then "threatened with extinction."⁵⁰ The bald

46. As an additional matter, when adoptees or affiliates of the tribe are prohibited by the BGEPA from participating with the tribe in religious ceremonies involving eagle feathers, the rights of the tribe to fully determine the its membership and religious affiliations are similarly violated.

47. See Pres. Mem. of April 29, 1994, 59 Fed. Reg. 22953 (requesting agencies to "seek opportunities to accommodate Native American religious practices").

48. See generally *U. S. v. Wheeler*, 435 U.S. 313, 331 (1978) (discussing tribal sovereignty and noting that tribes have a significant interest in preserving tribal customs and orders).

49. 16 U.S.C. § 668 *et seq.*

50. 16 U.S.C. § 668 (Enacting Clause of Eagle Protection Act, June 8, 1940). Congress further stated that "by tradition and custom during the life of this Nation, the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom." *Id.* The population of eagles in the United States was at one time estimated by the Department of Interior to be between 10,000 and 20,000 for

eagle, adopted as the national symbol in 1782 by the Continental Congress, was revered as “symbolic representation of a new nation under a new government in a new world.”⁵¹ This proud symbol of America was slowly being destroyed in the very country it was chosen to represent.⁵² As the country has evolved and grown, the presence and proliferation of illegal poaching, chemicals, pesticides, power lines and land development have contributed to the decline in eagle numbers.⁵³ In 1962, the Act was amended to include the golden eagle.⁵⁴ The inclusion of golden eagles into the Act was because young eaglets of golden eagles are difficult to distinguish from bald eagles; consequently, young bald eagles were mistakenly taken as golden eagles.⁵⁵ Therefore, the act was renamed the Bald and Golden Eagle Protection Act.⁵⁶

A. Proscriptions under the BGEPA

The BGEPA prohibits a person, without a permit, to “take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import...any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles.”⁵⁷ The BGEPA authorizes the Secretary of the Interior to issue permits to take, possess, and transport eagles or eagle parts when it is compatible with the preservation of the eagles.⁵⁸ Permits are available for “religious purposes of Indian tribes.”⁵⁹

golden eagles, between 20,000 and 30,000 for bald eagles. *United States v. Hetzel*, 385 F. Supp. 1311, 1314 (W.D. Mo. 1974) (citing S. Rep. No. 92-1159, 92nd Cong., 2d Sess. 4258 (1972)). The low populations, together with the fact that only an estimated 600 pairs of northern bald eagles and less than 400 pairs of southern bald eagles nested in the contiguous United States in 1971, motivated federal protection for the eagles. *Id.*

51. 16 U.S.C. § 668 (stating findings and purposes of BGEPA).

52. 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, 779 (1995) (discussing causes leading to decline in eagle populations and need for federal protection for the eagle).

53. See *id.* 779, notes 43-52 and accompanying text (describing different factors affecting eagles).

54. See *id.* at 786.

55. Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (codified as amended at 16 U.S.C. § 668 (1988)).

56. Bald and Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (codified as amended at 16 U.S.C. § 668 et seq. (1988)). The Act is now referred to as the Bald and Golden Eagle Protection Act. 16 U.S.C. § 668 (1999).

57. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668. The first offense is punishable by up to one year imprisonment and up to \$5000 in fines. *Id.* Subsequent convictions can carry up to two years imprisonment and \$10,000 in fines. *Id.* Civil penalties up to \$5000 for each offense can also be sought by the Secretary of the Interior. *Id.*

58. 16 U.S.C. § 668a.

59. *Id.* The statute also provides permits for other designated purposes, such as: scientific or exhibition purposes; wildlife or agricultural interests in certain locales; seasonal protection of domesticated game; falconry; resource development or recovery operations. 16 U.S.C. § 668(b).

B. Exemption for the Religious Purposes of Indian Tribes

Eagles are revered by Native Americans as a most sacred animal.⁶⁰ Many Native Americans believe eagles serve as messengers delivering the prayers of Native Americans to the Great Spirit.⁶¹ In other words, the feathers enable Native Americans to communicate with the Great Spirit.⁶² Because they are a medium for religious dialogue, the feathers are of the upmost importance to the religious practices of Native Americans.⁶³

Eagle feathers have been analogized to the cross or Bible of some Christian religions.⁶⁴ Eagle feathers are used by Native Americans in religious activities including “womanhood ceremonies, naming ceremonies, marriage ceremonies, and burial ceremonies.”⁶⁵ The use of eagle feathers by Native Americans from time immemorial in their many ceremonies renders the feathers irreplaceable, without which, a major portion of Native American religious practices would be curtailed, if not destroyed.⁶⁶

In order to accommodate the religious beliefs of Native Americans, Congress allows Native Americans to obtain a permit to possess eagles and eagle parts.⁶⁷ The process to obtain a permit is set out in the regulations promulgated under the BGEPA, in 50 C.F.R. § 22.⁶⁸ The specific process for Native Americans to obtain the necessary permit to possess eagle feathers is found in 50 C.F.R. §22.22.⁶⁹

Permits will only be issued to “members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs”⁷⁰ . . . engaged in religious activities who satisfy all the issuance criteria

60. See De Meo, *supra* note 52, at 774 (discussing sacred nature of eagles in Native American religion).

61. See *id.*

62. Barbara A. Gray, *A Question of Sovereignty: Protected Eagle Feathers For Indian Religious Use*, SOVEREIGNTY SYMPOSIUM XI, p. 410 (1998).

63. See *United States v. Dion*, 476 U.S. 734, 741 (1986) (stating that “[a]mong the many birds held in superstitious and appreciative regard by the aborigines of North America, the eagle, by reason of its majestic, solitary, and mysterious nature, became an especial object of worship”) (citations omitted). This view is illustrated by the use of the eagle by Native Americans for religious and esthetic purposes only. *Id.*

64. De Meo, *supra* note 52, at 774.

65. *Id.* at 776. See generally *U.S. v. Thirty Eight Golden Eagles or Eagle Parts*, 649 F. Supp. 269, 276 (D.Nev. Oct 15, 1986) (recognizing ceremonial use of eagle feathers in Native American religion).

66. See De Meo, *supra* note, 52 at 774.

67. See *United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997) (stating that “[t]he legislative history of the BGEPA reflects the importance of protecting eagles because of their religious significance to Native Americans”).

68. 50 C.F.R. § 22 (listing requirements for “Eagle Permits” generally).

69. 50 C.F.R. § 22.22 (governing permits for “Indian Religious Purposes”).

70. Furthermore, the National Repository is the only legal source to obtain eagle feathers. See De Meo, *supra* note 52, at 788 (citing Washington Hearing II) (citations omitted).

of this section.”⁷¹ An applicant must answer a number of inquiries in order to receive a permit, including the following:⁷²

(a)(3) Name of tribe with which applicant is associated,

(a)(4) Name of tribal religious ceremony(ies) for which required, and

(a)(5) You must attach a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. 479a-1, 108 Stat. 4791 (1994). The certificate must be signed by the tribal official who is authorized to certify that an individual is a duly enrolled member of that tribe, and must include the official title of that certifying official.⁷³

This permit system prevents adoptees or affiliates from possessing the eagle feathers under 16 U.S.C. § 668a.⁷⁴ The harm caused by an adoptee’s or affiliate’s inability to possess eagle feathers is two-fold. The obvious harm is that the individual is not free to practice the religion of his or her choice. When a permit is withheld due to blind adherence to formalities— whether the applicant’s name is present on a roll of a federally recognized tribe— the substance of the issue is neglected and the purposes of the law are not fully served. Furthermore, when the agency is afforded discretion to evaluate race in determining eligibility for a religious exemption, there is the potential for an unjustified infringement on the free exercise rights of the applicant.

The second mischief, although not discussed in this article, is visited upon the tribe when a non-Native American with whom the tribe seeks to enjoy religious association is denied access to feathers for ceremonial purposes. When this happens the tribe is not free to religiously associate with other adherents of its religion.⁷⁵ In this respect, the tribe’s ability to determine and enjoy tribal membership and affiliation is curtailed by governmental regulation.⁷⁶

71. De Meo, *supra* note 52, at 786. To receive a permit the applicant (not a tribe) must submit a request for a permit to the Regional Director and furnish all the requested information found in subparts 22.22 and 13.12(a). *Id.* Each application enables the applicant to request one eagle or the equivalent parts thereof, but the waiting list can be up to 700 people and may take up to two years to be processed. See De Meo, *supra* note 52, at 786 n. 107 (citing various congressional hearings) (citations omitted). A permit may be denied for a number of reasons, including a previous conviction under the BGEPA. 50 C.F.R. § 13.21. If a permit is denied, administrative review is available for the applicant to seek reconsideration. 50 C.F.R. § 13.29.

72. The criteria listed above are only those that are relevant to the issues in this article.

73. 50 C.F.R. § 13.29

74. 16 U.S.C. § 668.

75. See NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (stating it is “immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”).

76. See generally *Masayeva for and on Behalf of Hopi Indian Tribe v. Zah*, 792 F. Supp. 1178, 1188

III. SOVEREIGNTY AND MEMBERSHIP IN THE TRIBE

Article I, section 8, clause 3 of the United States Constitution grants Congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.⁷⁷ Since Indian tribes are listed with foreign nations and the several states, it is not unreasonable to conclude that tribes are, or should be, analogues of the other two; and thus, tribes hold a constitutional position equal to a state or foreign nation.⁷⁸ This is not the case, however.

I will briefly discuss the principles developed by the courts that delineate the tribes' sovereign power under our government. These principles are not only the product of the courts, but have stemmed from treaties, statutes, and administrative regulations as well.⁷⁹

The foundation for much of our modern Indian Law is based on Justice Marshall's well-known trilogy of *Johnson v. M'Intosh*,⁸⁰ *Cherokee Nation v. Georgia*,⁸¹ and *Worcester v. Georgia*.⁸² These cases define the status and sovereignty of the tribes and the power of the government over the tribes.⁸³

In *Johnson*, the question presented was whether a conveyance of lands by tribal chiefs to non-Indians was a valid transaction, one recognizable by the courts.⁸⁴ Justice Marshall relied upon the doctrine of discovery to hold the conveyance invalid.⁸⁵ Marshall stated that Indians had a right to possession and use but that "their rights to complete sovereignty, as independent nations,

(1992) ("The right to define membership is a right central to the existence of an Indian tribe.") (citations omitted).

77. *Felix S. Cohen*, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 91 (1986). In fact, Cohen points out that "there is excellent authority for the view that Congress has no Constitutional power over Indians except what is conferred by the commerce clause and other clauses of the constitution." *Id.* at 90. See U.S. CONST. Art. I, § 8, cl. 3. "The Commerce Clause is the only grant of power in the Federal Constitution which mentions Indians." See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (stating the provisions of the Constitution "comprehend all that is required for the regulation of our intercourse with the Indians"). Marshall's view of the government's plenary power over the Indian tribes became the general rule, as will be shown below.

78. See *Cohen v. Little Six Inc.*, 543 N.W.2d 376, 388 (Ct. App. Minn. 1996) (Randall, dissenting) (citing *LONE WOLF v. HITCHCOCK*, 187 U.S. 553, 566 (1903) holding that Indian tribes are not true sovereigns like Canada, Mexico, or Great Britain); *Worcester v. Georgia*, 31 U.S. 515, 551-552, 554 (1832) (discussing limited sovereign attributes of Indian nations).

79. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) (recognizing treaties and statutes as sources for "judicially made Indian law").

80. 21 U.S. (8 Wheat.) 543 (1823).

81. 30 U.S. (5 Pet.) 1 (1831).

82. 31 U.S. (6 Pet.) 515 (1832).

83. See *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 451 (1989) (recognizing limited sovereignty of the tribe as developed in the Marshall trilogy).

84. *Johnson*, 21 U.S. (8 Wheat.) 543 (1823).

85. *Id.* at 572-73.

were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the fundamental principle, that discovery gave exclusive title to those who made it.”⁸⁶ Whatever merits the *Johnson* holding has, it, together with the two aforementioned cases, laid the foundation that eventually formed the bedrock that is federal Indian law.⁸⁷

In *Cherokee Nation*,⁸⁸ the tribe sought to be defined as a foreign nation,⁸⁹ so as to fall under Article III, section 2 of the Constitution, which allows diversity jurisdiction between a “State” and “foreign States.”⁹⁰ Again, Justice Marshall decided against the tribe by holding that the Cherokee Nation was not a “foreign state.”⁹¹ In so doing, Justice Marshall took the opportunity to describe the unique status of the tribe. Marshall explained that “[t]he condition of the Indian in relation to the United States is perhaps unlike any other two people in existence;” it is a relationship “marked by peculiar and cardinal distinctions which exist no where else.”⁹² The relationship was described to be “that of a ward to his guardian,” because the tribes were viewed, at least in the Court’s eyes, as “domestic dependant nations.”⁹³

*Worcester v. Georgia*⁹⁴ dealt with the conviction of a white missionary under a Georgia statute that prohibited his residing on Cherokee land without a state license and an oath to defend the laws of Georgia.⁹⁵ The issue presented was whether the state statute was unconstitutional.⁹⁶ While striking down the statute by virtue of the Supremacy Clause, Justice Marshall again elaborated on Indian sovereignty, stating that the Cherokee Nation was a distinct community outside the reach of Georgia law, absent consent by the

86. *Id.* at 574. Justice Marshall further stated that the Indians’ title could only be extinguished by the United States through conquest or purchase. Many believe, and perhaps rightly so, that the discovery doctrine is extremely vulnerable to criticism. See, e.g., Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (decrying government’s assumed power over the tribes).

87. AMERICAN INDIAN LAW DESKBOOK 1 (Joseph P. Mazurek chair editing committee, Univ. Press of Colo. 1998).

88. 30 U.S. (5 Pet.) 1.

89. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

90. See U.S. CONST. art. III, § 2, cl. 1. The tribe claimed, *inter alia*, that Georgian laws allowed the state to seize and use Cherokee lands: no federal question was presented. *Cherokee Nation*, 30 U.S. (5 Pet.) at 1.

91. 30 U.S. (5 Pet.) at 20. That the Cherokee Nation is not a “foreign state” relating to jurisdictional purposes may leave open the possibility that for other purposes a different conclusion may be reached. See e.g. *Tribal Sovereignty Upheld*, DOI Home page (visited Nov. 10, 1999) <<http://doi.gov/bia.html>> (discussing District Court of Montana’s affirming EPA’s approval of confederation of tribes’ application for treatment-as-states status under the Clean Water Act).

92. 30 U.S. (5 Pet.) at 16.

93. *Id.* at 17-18. The opinion further declared that “[the Indians] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.” *Id.* at 17-18.

94. 31 U.S. (6 Pet.) 515 (1832).

95. *Id.* at 536-41.

96. *Id.* at 536.

tribe or by operation of treaties or acts of Congress.⁹⁷ Marshall further explained that the “whole power of regulating the intercourse with [the United States and the Cherokee nation]. . . was vested in the United States.”⁹⁸

These three cases lay out the “anomalous” position of the tribe as viewed by our federal and state governments.⁹⁹ The Marshall opinions established that Congress has plenary authority to regulate the tribe.¹⁰⁰ This authority comes from the Indian Commerce Clause and numerous treaties entered into between the various tribes and the United States.¹⁰¹

However, with this power comes responsibility; indeed, there exists a “general trust relationship between the United States and the Indian people.”¹⁰² This relationship originates from the “guardian-ward” status that Marshall described in *Cherokee Nation*.¹⁰³ Even though the application of the trust doctrine has not always been obvious,¹⁰⁴ it has been used to justify hiring preferences,¹⁰⁵ land disputes (e.g., accretion),¹⁰⁶ hunting and fishing rights,¹⁰⁷ and perhaps most importantly, the favorable statutory interpretation that Indians enjoy.¹⁰⁸ Statutes are to be construed as an Indian would understand

97. *Id.* at 559-60.

98. *Id.* at 560. See also *United States v. Wheeler*, 435 U.S. 313 (1978) (stating “[t]he sovereignty that the Indian tribes retain is of a unique and limited character [which] exists only at the sufferance of Congress and is subject to complete defeasance.”).

99. *United States v. Kagama*, 118 U.S. 375, 381 (1886) (stating that *Cherokee Nation* and *Worcester* set out United States’ position that native Americans “were, and always have been regarded asking a semi-independent position where they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people.” *Id.* at 581-82).

100. See *Cohen v. Little Six, Inc.*, 543 N.W.2d 376 (Ct. App. Minn. 1996) (recognizing that Marshall’s cases stand for plenary congressional power over tribes).

101. *Worcester*, 31 U.S. (6 Pet.) at 559.

102. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) [hereinafter *Mitchell II*]. See also *United States v. Mitchell*, 445 U.S. 535 (1980) [hereinafter *Mitchell I*]. Both *Mitchell I* and *II* involved the question whether the federal government could be held liable for the mismanagement of timber resources on the reservation. The court, in *Mitchell I*, excluded the management of resources from the government’s duty. *Mitchell I*, 445 U.S. at 542. One dissenter disagreed, finding a fiduciary duty in the language of the statute considered in the case. *Id.* at 550 (White, J., dissenting). On remand, the Court referenced more modern statutes to bolster the general fiduciary relationship between the government and the tribe and the existence of a duty was affirmed. *Mitchell II*, 463 U.S. at 226.

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

104. See Amy Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1565 (1994) (stating the Indian trust doctrine “has not yet matured” to a state of certainty and constancy across a variety of circumstances).

105. See *Morton v. Mancari*, 417 U.S. 535 (1974) (relating to section 12 of the Indian Reorganization Act, codified at 25 U.S.C. § 472). The Court further explained that the hiring preference was “not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.” *Id.* at 553 n. 24.

106. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (discussing Native American tribe’s action to quiet title).

107. See *United States v. Dion*, 476 U.S. 734, 738 (stating Indian hunting and fishing rights are preserved absent clearly stated provisions in treaties or by acts of Congress).

108. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (noting that rules of statutory construction relating to Indian law stems from trust relationship). See also *Choctaw Nation of*

them and ambiguities are to be resolved in favor of the tribe; however, this beneficial cannon of statutory construction does not summarily trump clear congressional intent, surrounding circumstances, and legislative history.¹⁰⁹ Recognizing the favored status that Indians enjoy due to their unique relationship is essential to fully understanding the many nuances of Indian law.¹¹⁰ One major aspect of Indian law effected by this peculiar relationship is tribal membership.¹¹¹

A. Tribal Self-Government

In *Worcester*, the corpus of law concerning tribal sovereignty, which was introduced in *Cherokee Nations*, is further expounded upon by Justice Marshall.¹¹² Justice Marshall expressly stated that Indian tribes “had always been considered as distinct, independent political communities, retaining their original natural rights.”¹¹³ Analogizing to international law, Marshall affirmed that a weaker nation does not give up its rights to self-governance by merely relying on a stronger nation for protection.¹¹⁴ Thus, unlike the powers of the federal government, which are delegated by the people,¹¹⁵ the sovereign powers of the Indian tribes’ exist by virtue of the inherent sovereignty that the tribes enjoy based on original natural rights.¹¹⁶

It is now commonly accepted that Indian self-government extends into both criminal and civil law,¹¹⁷ and controls issues regarding property and

Indians v. United States, 318 U.S. 423, 432 (1943) (stating that when “interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people”) (quotations omitted).

109. See *Choctaw Nation*, 318 U.S. at 432 (recognizing numerous factors affecting statutory interpretation).

110. It is important to remember that when legislatures use the word “Indian,” it is usually in reference to the group of people that hold this unique status with the government. The reference is to a political body, not a member of a racial minority group. See *United States v. Antelope*, 430 U.S. 641, 646 (1977) (declaring that federal regulation of Indians is not legislation of racial groups but of political communities); *Morton v. Mancari*, 417 U.S. 535 (1974) (noting Indian is a referent to political groups); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) (stating “the term ‘Indian’ describes a political group or membership, not a racial group”).

111. See Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1188-89 (1983) (asserting that if trust relationship were to end, Indians would lose legal status and be no different than other state citizens).

112. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

113. *Worcester*, 31 U.S. (6 Pet.) at 559.

114. *Id.* at 560-61.

115. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (stating that “the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected”).

116. See *Worcester*, 31 U.S. (6 Pet.) at 580 (recognizing attributes of Indian sovereignty).

117. See *Nofire v. United States*, 164 U.S. 657 (1897) (stating that valid adoption of white man by tribe deprived federal courts of jurisdiction over murder case and left case to tribal courts.).

inheritance,¹¹⁸ taxation,¹¹⁹ domestic and family law,¹²⁰ and tribal membership.¹²¹ All of these areas are subject to divestment per the plenary power of Congress.¹²²

B. Determining Tribal Membership

The determination of tribal membership is not always clear and is often quite difficult to ascertain.¹²³ An individual, for example, may be ethnologically an Indian, a blood-descendent of a Native American tribe, but not be legally recognized as an Indian by the government or the tribe.¹²⁴ Similarly, a member of a non-Native American ethnotype may be deemed a legal Indian, even though ethnologically that person is clearly not Native American.¹²⁵ The factors that determine one's status in the tribe are diverse, such as in- or voluntary withdrawal from a tribe;¹²⁶ location of one's residence on or off the reservation;¹²⁷ and the association with a Native American community in which the individual resides.¹²⁸

118. 25 U.S.C. § 184 (codifying Indian property rights of offspring of white man and Indian woman are dependent upon tribes recognizing the woman as member of tribe). The field of tribal property is regulated by Congress and the Secretary of the Interior. Statutes enacted by Congress authorizing the Secretary of the Interior to keep rolls and review tribal membership represent one aspect of government involvement in tribal activities. This activity is viewed, at least by Congress, as a result of the trust relationship between the two parties and is intended to be beneficial to the Indians.

119. See *Cohen*, *supra* note 76. (stating Indian tribes retain necessary sovereign power to levy taxes, unless Congress dictates otherwise).

120. See *id.* at 145 (recognizing tribe's power to regulate marriage of its members). See also *United States v. Quiver*, 241 U.S. 602, 605 (1916) (stating that "bigamy, polygamy, incest, adultery or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws").

121. See *id.*, at 133 (declaring that "in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership"); *Patterson v. Council of Seneca Nation*, 157 N.E. 734, 738 (1927) (stating that "Seneca Nation retains for itself the power of determining who are Senecas").

122. See COHEN, *Federal Indian Law*, at 133 (noting Congressional power as a limit on tribes power).

123. See *id.* at 137 (stating that tribal membership law, "has been and is being exercised along widely divergent lines").

124. See *Gray*, *supra* note 61, at 427 (discussing loss of legal Indian status of Native American woman, Delia Cook). Delia Cook has a blood quantum that is 100% Native American. *Id.* at 427. She, however, lost her status as an Indian because she withdrew her name, for religious reasons, from the tribal rolls. *Id.* Cf. *Perkins v. Lake County Dept. of Utils.*, 860 F. Supp. 1262, 1278 (N.D. Ohio 1994) (recognizing that although Indian may not be member of a tribe, "he is [still] a member of a protected class"). For Equal Protection purposes, however, tribal membership is not determinative of one's status as an Indian. *Perkins*, 860 F. Supp. at 1278.

125. See *Nofire v. United States*, 164 U.S. 657 (1897) (recognizing that statutory jurisdiction limited to offenses between tribal members was satisfied even when one of the individuals in question was white man adopted into Indian tribe and was thus legally Indian).

126. *Id.*

127. See *United States v. Antelope*, 430 U.S. 641, 647 (1977) (stating that residency on the reservation and continued relations with tribe are indicative of tribal membership).

128. *Id.*

Felix Cohen, summarized two general qualifications for determining whether an individual is to be legally recognized as an Indian.¹²⁹ One criteria is “[t]hat some of his ancestors lived in America before its discovery by the white race.”¹³⁰ The other factor is “that the individual is considered an ‘Indian’ by the community in which he lives.”¹³¹ Even these general rules, however, are subject to the specific provisions the tribe has adopted to determine its membership.¹³² Unsurprisingly, exceptions to these general rules are numerous. For example, tribal customs have been determinative of the question of membership, thus allowing individuals, not Native American by blood, to become members of the tribe through adoption.¹³³ When tribal laws or customs are not clear on the issue of membership, courts have relied on the tribal chief to settle the matter.¹³⁴

There is a distinction to be recognized between membership for tribal matters versus other incidents involving governmental agency action. According to *United States v. Rogers*,¹³⁵ a white man adopted into a tribe could not divest the courts of jurisdiction over him as a white man, an exception being “confined to those who by the usages and customs of the Indians are regarded as belonging to their race.”¹³⁶ This case has been interpreted to mean “that for purposes in which the tribe has the last word, tribal adoption is valid without reference to departmental approval.”¹³⁷ However, “for those purposes in which departmental actions are authorized, the department may demand the right to approve or disapprove [the] adoption.”¹³⁸ Thus, an individual’s status as an Indian may depend in large part on circumstance. In other words, an adoptee may be considered by the government as a member of the tribe in some contexts, but not in others.

129. See COHEN, *supra* note 76, at 2.

130. *Id.*

131. *Id.*

132. See *Patterson v. Council of Seneca Nation*, 157 N.E. 734 (N.Y. 1927) (recognizing tribe’s constitution in determining membership).

133. See *Waldron v. United States*, 143 F. 413, 419 (C.C.S.D. 1905) (noting that “usages and customs” can define membership despite contrary holding by Interior Department). The court also stated “that the common law does not obtain among said tribes” as to the determination of race of children of white husband and Indian wife. *Id.* See also *Nofire*, 164 U.S. at 658 (recognizing that a white man can be adopted into the Cherokee Nation); *Alberty v. United States*, 162 U. S. 499, 502-03 (1896) (holding that courts of Indian Nations have jurisdiction over offenses committed by one Indian upon the person of another, including statutes of both Indians by birth and Indians by adoption).

134. See *Hy-yu-tse-mil-kin v. Smith*, 194 U.S. 401, 403 (1904) (noting tribal chief’s role in determining tribal membership).

135. *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846).

136. *Rogers*, 45 U.S. (4 How.) at 572.

137. COHEN, *supra* note 121, at 136.

138. *Id.* at 136.

IV. FREE EXERCISE FOR ADOPTEES AND AFFILIATES

The First Amendment of the United States Constitution provides that “[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹³⁹ A discussion of an adoptee’s free exercise claim is subject to substantially different forms of analysis depending on the source relied upon to provide the applicable standard.¹⁴⁰ The standard set forth in *Employment Division, Department of Human Resources of Oregon v. Smith* applies a low level of scrutiny to free exercise claims based on generally applicable statutes.¹⁴¹ *Smith* held that a neutral or generally applicable statute did not offend the First Amendment, even if the statute incidentally burdened the free exercise of religion.¹⁴²

The Religious Freedom Restoration Act of 1993 (RFRA)¹⁴³ was enacted, among other reasons, to “restore” the compelling interest test as set forth in *Sherbert v. Verner*.¹⁴⁴ Specifically, RFRA prohibited the government from substantially burdening one’s exercise of religion, even if the burden was based on a generally applicable statute, unless the government demonstrated that the burden furthered a compelling government interest and was the least restrictive means of furthering that interest.¹⁴⁵

An appropriate question is what standard is applicable to the free exercise claim of an adoptee or affiliate. For example, the U.S. Attorney, who tried Mr. Wilgus’s case, contended that the proper standard to apply is the one set forth in *Smith*.¹⁴⁶ The U.S. Attorney’s position, however, ignored current free

139. U.S. CONST. amend. I.

140. Compare *Employment Div., Dep’t of Human Resources of Or. v. Smith*, 494 U.S. 872, 884-85 (1990) (holding that neutral or generally applicable statute could be applied to religious practices even without support by compelling governmental interest) with Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb through 2000bb-4 (1994) (prohibiting “[g]overnment” from “substantially burden[ing]” person’s exercise of religion even if burden results from rule of general applicability unless government can demonstrate burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest.”) cited in *City of Boerne v. Flores*, 511 U.S. 507, 511 (1997) (concluding that statute exceeded Congress’ power as applied to the states).

141. *Employment Div., Dep’t of Human Resources of Or. v. Smith*, 494 U.S. 872, 884-85 (1990) (holding that test balancing substantial burden to religious practice against compelling governmental interest did not apply to challenges to generally applicable criminal prohibitions on particular forms of conduct).

142. See *id.* at 884-85.

143. 42 U.S.C. § 2000bb through 2000bb-4 (1994).

144. *Sherbert v. Verner*, 374 U.S. 398 (1963). Under the *Sherbert* test the court must inquire whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling government interest. *Id.*, at 403-09.

145. See 42 U.S.C. § 2000bb-1 (restoring *Sherbert* test).

146. See Response to Motion to Dismiss at 3-5 (asserting that applicable standard was found in *Smith*) *United States v. Wilgus*, No. 2:99CR00047W (D.Utah 1999). The U.S. Attorney bolstered this argument by pointing out that the RFRA standard was struck down in *City of Boerne v. Flores*, 521, 511 U.S. 507 (1997), which also reaffirmed *Smith*, *supra* note 141. This argument was persuasive to the District Court of Utah; however, recent Circuit Courts indicate that the argument is mistaken. See *infra* note 148 (discussing validity of RFRA as to federal laws).

exercise jurisprudence handed down by the circuit courts after *City of Boerne v. Flores*.¹⁴⁷ Recent circuit court decisions stand for the proposition that the Supreme Court invalidated RFRA as applied to state and local law, not *federal* law.¹⁴⁸ The BGEPA is federal law.¹⁴⁹ Thus, RFRA may still be viable and binding on the BGEPA, at least in some circuits.¹⁵⁰

If so, for the statute to withstand the scrutiny imposed by RFRA, the government must show that the burdens imposed on an adoptee's or affiliate's beliefs further a compelling government interest and are carried out in the least restrictive means to serve that end.¹⁵¹ Before reaching that inquiry, the complaining party must establish that the regulation of eagle feathers substantially interferes with the exercise of religious beliefs.¹⁵² The court's function in this inquiry is to ascertain the sincerity of the belief and its religious nature.¹⁵³ Adoptees prevented from using the feathers must establish that this burden imposed by the BGEPA is more than inconvenient to their religious practices--that it is, in fact, a burden central to the adoptees' beliefs.¹⁵⁴

As demonstrated above, eagle feathers are vital to Native American worship.¹⁵⁵ Native Americans require the use of feathers to practice their

147. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

148. See *Adams v. Comm'r*, 170 F.3d 173, 175 n. 1 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000) (stating "[i]n general, courts that have addressed the question of the constitutionality have founded that RFRA is constitutional as applied to the federal government"); *In re Young*, 141 F.3d 854, 858 (8th Cir. 1998), *cert denied*, 525 U.S. 811 (1998) (stating that "[t]he [*City of Boerne*] Court did not reach any decision as to the constitutionality of RFRA as applied to federal law" and citing H.R. REP. NO. 103-88, at 17 (1993) to show Congress' belief that the power to enact RFRA as applied to the federal government was pursuant to the "Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution"); *Peterson v. Shanks*, 149 F.3d 1140, 1145 (10th Cir. 1998) (declaring that *City of Boerne* held that RFRA was unconstitutional as applied to state governments). See also *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (applying RFRA to free exercise claim made against BGEPA).

But see In re Young, 141 F.3d at 863-64 (Bogue, J., dissenting) (citing *City of Boerne* and arguing that RFRA was unconstitutional even as applied to federal law because it invaded judicial province to interpret constitutional guarantees of First Amendment).

149. 16 U.S.C. § 668 (1994) (criminalizing commercial use of American bald eagles).

150. See *supra* note 148 (discussing validity of RFRA as to federal laws).

151. See 42 U.S.C. § 2000bb-1(b) (permitting government to substantially to burden exercise of religion only if burden furthers compelling government interest and is least restrictive means of furthering it).

152. See 42 U.S.C. § 2000bb(a)(2) & (3) (finding that laws neutral toward religion sometimes burden religious exercise but should not do so substantially unless compelling justification exists).

153. See *Jolly v. Coughlin*, 76 F.3d 468, 476 (2nd Cir. 1996) (stating that "[o]ur scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature"); *but see Rossi v. Portuondo*, 714 N.Y.S.2d 816, 817 (N.Y. App. Div. 2000) (noting that *City of Boerne* declared unconstitutional the statutory scheme under which *Jolly* was decided). Anything beyond that limited inquiry is inappropriate and beyond the court's purview. *Jolly*, 76 F.3d at 476. See *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (stating that "it is not within the judicial function and judicial competence to inquire whether the petitioners or his fellow worker more correctly perceived the commands of their common faith.").

154. See *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (requiring substantial burden); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (same).

155. See *supra* Part II B.

religion.¹⁵⁶ Once an adoptee has established that the statute places a substantial burden on the adoptee's ability to practice religion, the burden shifts to the government to demonstrate a compelling government interest in not exempting this person.¹⁵⁷

To determine whether the government has a compelling interest in preserving eagles under the BGEPA, "it is useful to look first at the importance of the value underlying the regulation, and second, at the degree of proximity and necessity that the chosen regulation bears to the underlying value."¹⁵⁸ The BGEPA involves two governmental interests, only one of which is compelling. Courts have held that the government's interest in preserving eagles is compelling.¹⁵⁹ The second interest of the BGEPA is to preserve the Native American religion.¹⁶⁰ Although it has been argued that the removal of the bald eagle from the endangered species list weakens the government's interest in protecting the eagles below that of protecting a complainant's religious freedoms, this argument has not been successful.¹⁶¹

The need for governmental regulation of eagles is commonly accepted by the courts.¹⁶² The next step in the RFRA strict scrutiny analysis requires a strong nexus between the regulation and the government interest.¹⁶³ This nexus is premised on the underlying objective of the BGEPA— "to prevent the illegal killing of eagles by discouraging an excessive demand for their parts"—and on the assumption that "the compelling interest can be furthered only by criminalization of the possession of eagle parts."¹⁶⁴

An adoptee or affiliate must therefore attack the statute as violating the least restrictive means inquiry. Some courts have held, without much discussion, that the permit system is the least restrictive means of furthering the government's interests under the BGEPA.¹⁶⁵ However, *Callahan v. Woods* stated a test for this inquiry.¹⁶⁶ "If the compelling state goal can be

156. See *supra* Part II B.

157. See *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (shifting burden to government).

158. *Callahan v. Woods*, 736 F.2d 1269, 1274 (9th Cir. 1984).

159. See *United States v. Lundquist*, 932 F. Supp. 1237, 1244 (D. Or. 1996) (recognizing compelling interest in eagle preservation).

160. See *id.* at 1243 (recognizing the government's interest in "preserving access to eagle parts" by Indians).

161. See *Lundquist*, 932 F. Supp. at 1241-43 (analyzing merits of government's interest in preserving eagle and concluding that it was still compelling). The court noted the slow maturation of the eagles, susceptibility to illegal poaching, and the fact that the eagle was still a threatened species. See *id.* at 1241.

162. See *id.* at 1241.

163. See *id.*

164. See *id.* at 1242.

165. See *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (agreeing with district court that government's interest in eagle preservation was compelling and that permit system was least restrictive means for furthering government's interest).

166. *Callahan v. Woods*, 736 F.2d 1269, 1272-73 (9th Cir. 1984).

accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest. A synthesis of the two prongs is . . . whether the government has a compelling interest in not exempting a religious individual from a particular regulation."¹⁶⁷

The defendant in *Lundquist*, although not enrolled in a federally recognized tribe, urged the court to exempt non-enrolled persons of Native American descent from the BGEPA. The *Lundquist* court found that allowing this broad exemption from the prohibitions of the BGEPA would undermine the purpose of the act.¹⁶⁸ The court further noted the "government's interest in preserving Native American religion, the limited supply of eagle feathers and parts, and the high demand by eligible Native Americans, which has already caused long waits and a burden on the free exercise of religion."¹⁶⁹ A combination of the above factors coupled with the potential for an unlimited number of people asserting claims similar to *Lundquist*'s was too much for the court to accept a least restrictive means argument.¹⁷⁰ The court concluded that the proposed exemption was unlike *Callahan*.¹⁷¹ In *Callahan* "the cost of exempting one individual from the numbering system had not been shown by the government, and actually appeared, in common sense, to be fairly slight."¹⁷² In *Lundquist*, however, "the cost of exempting all Indians from the regulatory procedures would be disastrous to the eagles, in that their numbers could be severely reduced."¹⁷³ In short, *Lundquist*'s proposed exemption was too broad and founded upon speculation.¹⁷⁴

An adoptee's or affiliate's least restrictive means argument does not suffer from the same fatal flaws as *Lundquist*'s. First, adoptees and affiliates are not seeking a broad exemption to the statutory scheme. Indeed, the possession of feathers under the BGEPA will still require a permit.¹⁷⁵ The government can still ensure that the feathers are obtainable only by those who will truly use the eagle parts for religious reasons.¹⁷⁶ Because a presumably small number of

167. *Callahan*, 736 F.2d at 1272-73 cited in *Lundquist*, 932 F. Supp. at 1242.

168. *Lundquist*, 932 F. Supp. at 1243 (emphasizing two government interests at stake, preserving eagles and preserving Native American religion).

169. *Id.*

170. *See id.* (mentioning "that the practice of Native American religion is not restricted to a very few individuals").

171. *See id.*

172. *United States v. Thirty-Eight Golden Eagles or Eagle Parts*, 649 F.Supp. 269, 277 (D. Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir 1987), cited in *Lundquist*, 932 F.Supp. at 1243.

173. *Thirty-Eight Golden Eagles*, 649 F.Supp. at 277, cited in *Lundquist*, 932 F.Supp. at 1243.

174. *See Lundquist*, 932 F. Supp. at 1242-43.

175. Under my proposed amendment, however, the permit for adoptees will be dependant on an endorsement from the tribe, through an authorized leader.

176. The allegation that Mr. Wilgus received all of his feathers from Native Americans, who were trying to provide a means for him to worship, is illustrative of the ability and desire of Native Americans

individuals are situated similarly to Mr. Wilgus, the fear of substantially increasing demand for an already scarce supply of feathers is unfounded. Furthermore, a requirement that ranking members of a tribe corroborate the adoption or affirmation via a written endorsement—as opposed to self-proclaimed membership—diminishes considerably the threat of eagles being exploited for non-religious purposes.¹⁷⁷

Moreover, as mentioned above, the legal definition of Indian denotes affiliation with a political body—the tribe.¹⁷⁸ The race of an adoptee or affiliate should have little, if any, bearing on the individual's eligibility to possess feathers for religious purposes.¹⁷⁹

The BGEPA exempts from the general proscriptions the use of eagle feathers by Indian tribes for religious purposes.¹⁸⁰ Currently, the permit, which enables one lawfully to possess eagle feathers, is available to listed members of federally recognized tribes.¹⁸¹ The existence of one's name on a list predicts holding religious beliefs in accordance with the beliefs protected by the BGEPA.¹⁸² Except for the mere presence of a name on a tribal roll of a federally recognized tribe, an adoptee or affiliate, like Mr. Wilgus, is in all relevant respects like the Native Americans whose beliefs the act protects. The statute's and regulation's refusal to accommodate the religious beliefs of such individuals, whose beliefs are strikingly similar to those Native Americans eligible for permits under the BGEPA, illustrates the underinclusiveness of the BGEPA.¹⁸³

To be sure, the BGEPA was established to preserve and respect religious practices and beliefs of "Indian tribes."¹⁸⁴ To serve these ends, administrators should apply the statute with an eye to substance (presence and conviction of

respectfully and properly to provide non-Native Americans with eagle feathers for religious purposes.

177. In fact, the written endorsement may prove useful in preventing non-religious Native Americans from obtaining eagle feathers for ulterior purposes. *See, e.g., United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976) (discussing conviction of two Native Americans for attempting to sell eagle parts to undercover Fish and Wildlife agents for purported resale to east coast collectors).

178. *See supra* note 68 (referring to Indians as a political unit and not as racial group)

179. *See Morrison v. Garraghty*, 2001 U.S. App. LEXIS 1754, *34-36 (4th Cir. Feb. 7, 2001) (holding that penitentiary's decision to deny white inmate access to various religious articles that were available to qualifying Native Americans was unconstitutional denial of equal protection).

180. *See* 16 U.S.C. § 668a (1994) (empowering Secretary of Interior to authorize taking of eagles for religious purposes of Indian tribes).

181. *See* 50 C.F.R. § 22.22(a)(5) (2001) (describing requirements concerning permits for Indian religious purposes).

182. *See* 16 U.S.C. § 668a (1994) (defining religious beliefs in terms of membership in tribe). One of the purposes of the BGEPA is to preserve Native American religion, and this is carried out by allowing members of Native American tribes to possess eagle feathers. Obviously, the inference is that members of the tribe hold beliefs in harmony with the Native American religion.

183. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) (finding ordinance not narrowly tailored because it was both overbroad and underinclusive).

184. *See* 16 U.S.C. § 668a (1994) (creating exemption for religious purposes of Native American tribes).

religious beliefs in harmony with the exemption in the BGEPA) and not formalism (presence or absence of a name on a list). We need an allocation system based on substantive criteria because blind allegiance to formalism denies access to eagle feathers to individuals who would be eligible for permits but for the absence of their name from a mere list.¹⁸⁵

And perhaps even more objectionably, permits may be denied solely because the government can give weight to the status of the applicant as an "Indian." In this instance, race substituting for religious beliefs, and the correlation is not necessarily present.¹⁸⁶ When the Native American religious exemption of the BGEPA is not carried out in a manner to serve the ends for which it was created, modifications are necessary. Amending the regulations that govern the permit system would end the arbitrary manner in which permits are or are not issued to those deserving applicants. *VI. Proposed Amendments to C.F.R. § 22*

My proposed amendments are rather simple, but ensure a degree of substantive honesty not found in the BGEPA as presently administered. The requirement that the applicant "attach a certification of enrollment in an Indian tribe that is federally recognized"¹⁸⁷ should be deleted. Instead, the regulation should only require the applicant to present a written endorsement from a tribal official who is authorized to certify that the individual is a member or religious affiliate with the tribe. Not only would this provision provide the tribes with greater say in the regulation of eagle parts for religious purposes, it also attempts to recognize the religious substance of the permit application.

My second proposed amendment is to remove the Department of the Interior's ability, under 50 C.F.R. § 22.22(c)(2), to consider the applicants status as an Indian (race) when issuing permits. As mentioned before, the correlation between religion and race is not necessarily perfect. Furthermore, an amendment is warranted based on the mere fact that a threat exists that an applicant can be denied a permit based on an arbitrary race-based classification.

185. See *Gibson v. Babbitt*, 223 F.3d 1256, 1257-58 (11th Cir. 2000) (denying permit to duly recognized Native American merely because his name was not on the tribal roll of a federally recognized tribe).

186. See *Morrison v. Garraghty*, 2001 U.S. App. LEXIS 1754, * 27-29 (4th Cir. Feb. 7, 2001) (rejecting relationship between religious beliefs and racial make-up or tribal membership); *Combs v. Corrections Corp. of America*, 977 F. Supp. 799, 802 (W.D. La. 1997) (stating that "the policy is akin to a requirement that practicing Catholics prove an Italian ancestry, or that Muslims trace their roots to Mohammed"). See also *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (stating that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality").

187. 50 C.F.R. § 22.22.

The religious purposes of the statute are better served by a system that does not rely on arbitrary indicators of religious affiliation and conviction. It is better to put the power to govern disbursement of eagle permits in the hands of the tribe. The tribe is in a better position to evaluate the eligibility of applicants based on the substance of their religious beliefs. Certainly, this method would better serve the ends of the Native American exemption in the BGEPA. The result of these amendments is a greater recognition of free exercise rights of adoptees and a respectful grant of sovereignty to the tribe in an area as important as religion.

VI. CONCLUSION

The presence and administration of far reaching governmental regulations has had the unwelcomed effect of impinging upon the religious practices of many citizens. Unfortunately, there is no panacea for the afflictions these regulations place on guaranteed first amendment rights. Yet, some of the adverse effects of liberty restricting statutes can be easily remedied. The solution to accommodate the religious freedom asserted by adoptees or affiliates of Native American tribes is illustrative of this fact.

At present, the BGEPA prohibits possession of eagles or eagle parts unless the possessor has a valid permit. Permits are available for some Native Americans who can show a certification of enrollment in a federally recognized tribe. Furthermore, to obtain a permit the applicant must avoid the potentially invidious discretionary power of an agency official to consider the applicants race when deciding whether to issue the permit. For adoptees and affiliates, like Mr. Wilgus, these criteria are insurmountable. Although, these individuals believe and practice the tenets of the Native American religion and associate with the tribe, they are prohibited from possessing feathers, as their religious beliefs dictate, merely because of an enrollment list, or even worse, because of their race. The simple amendments I propose would do much to eliminate the overt oppression on religion, the underinclusiveness of the current permit system, and the threat of racial classifications to serve as a proxy for religion that are present in the current administration of the BGEPA.¹⁸⁸

188. See *Keyishian v. Board of Regents of Univ. of N.H.*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues.").