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EAGLES, INDIAN TRIBES, AND THE FREE EXERCISE OF RELIGION

Kathryn E. Kovacs*

The Bald and Golden Eagle Protection Act prohibits the taking or possession of eagles and eagle parts. Recognizing the centrality of eagles in many Native American religions, Congress carved out an exception to that prohibition for “the religious purposes of Indian tribes.” The problems with the administration of that exception are reaching crisis proportions. At the Fish and Wildlife Service’s National Eagle Repository, which collects dead eagles from around the country and distributes them to members of federally recognized Indian tribes, more than six thousand tribal members are on a waiting list for eagles. That list grows each year. Frustration with the current system feeds a burgeoning black market that threatens the viability of eagle populations. Neither of the Eagle Act’s goals is being met: eagles are not adequately protected, and tribal religious needs are not satisfied.

Scholarship in this area has neither fully elucidated the cross-cutting tensions in the administration of the Eagle Act nor prescribed a realistic solution. This Article fills that gap. First, the Article examines a series of tensions: between species preservation and religious freedom; between accommodating the religious needs of tribal members and not accommodating others with the same religious needs; within the case law itself; and between the government’s effort to accommodate tribal religion and the deep

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dissatisfaction of the tribal community. This Article then proposes a solution: changing the Fish and Wildlife Service's administration of the exception from permitting individuals to permitting tribes and ultimately turning over much of the administration of the Indian tribes exception to the tribes acting collectively. The Article explains how scholarship on indigenous cultural property, community property solutions to the tragedy of the commons, and tribal self-determination supports this proposal. Finally, the Article shows how this proposal will alleviate some of the tension in the administration of the Eagle Act's Indian tribes exception.

TABLE OF CONTENTS

I. INTRODUCTION	56
II. THE CURRENT LEGAL FRAMEWORK.....	62
A. The Eagle Act	62
B. The Religious Freedom Restoration Act.....	67
C. The Case Law	68
III. THE TENSIONS	71
A. Scarcity	71
B. Inequality	80
C. Tension Within the Case Law.....	83
D. Regulatory Burden on Tribal Members.....	85
IV. ALLEVIATING THE TENSIONS	87
A. Theoretical Foundations	90
1. Acknowledging Cultural Property Rights.....	90
2. Collectivizing Ownership of the Commons.....	94
3. Furthering Self-Determination.....	99
B. Benefits	105
1. Easing Inequality	105
2. Alleviating Burdens	111
3. Enhancing Regulatory Efficiency and Judicial Uniformity	112
C. Implementation	113
V. CONCLUSION.....	116

I. INTRODUCTION

The Bald and Golden Eagle Protection Act¹ (the “Eagle Act” or “Act”) prohibits the taking or possession of eagles and eagle parts. Its purpose is to protect eagles.² But eagles play a critical role in many Native American religions. They serve as a link between the physical and spiritual worlds, and their parts are required for religious ceremonies throughout the year and throughout one’s lifetime.³ Congress recognized the eagle’s significance in Native American religion and carved out an exception to the Eagle Act’s prohibition for “the religious purposes of Indian tribes.”⁴ Under that exception, the Fish and Wildlife Service’s National Eagle Repository collects dead eagles from around the country and distributes them to members of federally recognized Indian tribes.⁵

The problems with the administration of the Eagle Act’s “Indian tribes” exception are reaching crisis proportions. The National Eagle Repository—the only legal source for new eagles and feathers in the United States—answers requests for a few feathers promptly. But tribal members who need a whole eagle (to perform the annual Sun Dance, for example) must wait years for their requests to be filled.⁶ More than six thousand members of federally recognized Indian tribes are on the Repository’s waiting list for eagles.⁷ That list grows each year. The wait for a whole golden eagle is now more than four years.⁸ Frustration with the current system is feeding a burgeoning black market that threatens the viability of eagle populations.⁹ Neither of the Eagle Act’s goals is being met: eagles are not adequately protected, and tribal religious needs are not satisfied.¹⁰

The current administration of the Eagle Act is brimming with tension, perhaps because it falls at the intersection of a number of

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1. 16 U.S.C. § 668 (2006).
 2. *United States v. Hardman*, 297 F.3d 1116, 1122 (10th Cir. 2002) (en banc).
 3. *See infra* Part III.A.
 4. 16 U.S.C. § 668a (2006).
 5. *See infra* Part II.A.
 6. *See infra* note 157.
 7. *See infra* note 159.
 8. *See infra* note 157.
 9. *See infra* note 168.
 10. *See infra* Part III.A.

fundamental concerns: religious freedom, species protection, and tribal sovereignty. The primary difficulty, as is true for many natural resources, is scarcity. There simply is not a sufficient supply of eagles to satisfy the religious demand while preserving the viability of the species.¹¹ To the extent that the demand for eagles grows out of religious belief, the Eagle Act pits species protection against religious freedom. One of the things that makes administering the Eagle Act particularly difficult, however, is the exception from the Act's prohibition for "the religious purposes of Indian tribes."¹² The Fish and Wildlife Service (FWS) implements that exception by issuing permits both to take eagles and to possess eagles and eagle parts to individual members of federally recognized Indian tribes.¹³ That exception adds a layer of inequality to the clash between species preservation and religious freedom. It raises the question the Supreme Court asked in *Gonzales v. O Centro Espirita Beneficente União do Vegetal*:¹⁴ If some people are exempted, why not others?¹⁵

There is also tension within the case law itself. In a number of cases, individuals who are prosecuted for violating the Eagle Act's prohibition or who bring civil claims challenging that prohibition contend that it violates their right to exercise their religion freely under the Religious Freedom Restoration Act (RFRA).¹⁶ The federal courts of appeals disagree about the government's evidentiary burden in such cases and about which compelling interests the Eagle Act furthers.¹⁷ In addition, the current regulatory structure is unwieldy for the government and unsatisfying for the regulated community.¹⁸ The FWS currently is tasked with reviewing thousands of permit applications each year and operating the National Eagle Repository (the "Repository").¹⁹ Although the staff does an admirable job

11. See *infra* Part III.A.

12. 16 U.S.C. § 668a (2006).

13. 50 C.F.R. § 22.22(a) (2012).

14. 546 U.S. 418 (2006).

15. *Id.* at 436.

16. See *infra* Part II.C. The Supreme Court held RFRA unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997), but RFRA still applies to the federal government. See 42 U.S.C. § 2000bb-3(a) (2006); see also *United States v. Wilgus*, 638 F.3d 1274, 1279 (10th Cir. 2011) (holding the RFRA can be applied to the federal government); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 n.10 (9th Cir. 2008) (en banc) ("RFRA remains operative as to the federal government.").

17. See *infra* Part III.C.

18. See *infra* Part III.A.

19. *Id.*

administering this program, tribal members remain dissatisfied with the application process, the wait to receive eagles from the Repository, and the quality of items they receive from the Repository.²⁰ Finally, enforcing the Eagle Act's prohibitions is too big a job for the FWS's limited staff.²¹ Obviously, administrative change entails high transaction costs, but the current system is not sustainable. Eagle populations are not keeping pace with growing demand; tribal members are becoming increasingly frustrated with the current system; and the black market is blossoming.

The many student notes²² and few scholarly articles²³ on the Eagle Act have not prescribed realistic solutions, much less fully

20. *Id.*

21. *See infra* Part III.D.

22. *See* Brett Anderson, *Recognizing Substance: Adoptees and Affiliates of Native American Tribes Claiming Free Exercise Rights*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 61 (2001) (arguing that tribes should be empowered to give eagle parts to nonmembers who are adopted by or affiliated with the tribe); Tina S. Boradiansky, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT. RESOURCES J. 709, 754 (1990) (“[I]ndividual freedom to seek religious gratification at the expense of another species may be an individual freedom which we can no longer afford.”); James R. Dalton, Comment, *There Is Nothing Light About Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions*, 2005 BYU L. REV. 1575 (2005) (advocating giving tribes greater autonomy in administering the Indian tribes exception to the Eagle Act); Michael Davidson, *United States v. Friday and the Future of Native American Religious Challenges to the Bald and Golden Eagle Protection Act*, 86 DENV. U. L. REV. 1133 (2008) (discussing avenues left open for Native American religious challenges to the Eagle Act after *United States v. Friday*); 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, 932 (2004) (arguing that courts should not consider the bald eagle's status under the Endangered Species Act when evaluating the Eagle Act's validity under RFRA); Stephen Rosecan, *A Meaningful Presentation: Proposing a Less Restrictive Way to Distribute Eagle Feathers*, 42 NEW ENG. L. REV. 891, 893 (2008) (advocating allowing tribal members to give feathers to nonmembers “who are actively involved in Native American religious practices”); Francis X. Santangelo, *A Proposal for the Equal Protection of Non-Indians Practicing Native American Religions: Can the Religious Freedom Restoration Act Finally Remove the Existing Deference Without a Difference?*, 69 ST. JOHN'S L. REV. 255 (1995) (arguing that religious practitioners who are not tribal members should have the same access to eagles as tribal members and that RFRA will vindicate nonmembers' claims).

23. *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) (advocating restructuring the eagle permit process to allow tribes to distribute eagle parts); Roberto Iraola, *The Bald and Golden Eagle Protection Act*, 68 ALB. L. REV. 973 (2005) (reviewing the Eagle Act's civil and criminal penalty provisions); Matthew Perkins, *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could Application of the Doctrine Alter the Outcome in U.S. v. Hugs?*, 30 ENVTL. L. 701, 703, 711, 727 (2000) (concluding that Indian trust doctrine provides the most viable means for tribal members to challenge the Eagle Act); Kyle Persaud, *A Permit to Practice Religion for Some but not for Others: How the Federal Government Violates Religious Freedom When it Grants Eagle Feathers Only to Indian Tribe Members*, 36 OHIO N.U. L. REV. 115, 115–16 (2010) (arguing that denying individuals who are not tribal members, but who practice Native American religions,

elucidated the cross-cutting tensions in the administration of the Indian tribes exception.²⁴ This Article fills that gap.²⁵

I propose changing the FWS's administration of the exception from issuing permits to individuals to instead issuing permits to tribes and ultimately turning over much of the administration of the Indian tribes exception to the tribes themselves, acting collectively.²⁶ Under the first phase of my proposal, the FWS would amend its regulations to provide for the issuance of eagle take and possession permits to tribes instead of tribal members. Tribes would then allocate their share of eagles to their members. When a sufficient number of tribes have developed the necessary governance structures (with technical and financial support from the FWS), the tribes acting collectively could be empowered to define the contours of the Indian tribes exception, including perhaps defining who is entitled to take and possess eagles and for what purposes; how they may be obtained, transferred and disposed; and how the initial allocation of permits should be changed. Not much can be done to alleviate the baseline problem of an inadequate supply of a religiously significant species; the Eagle Act will always reflect the clash between religious freedom and species protection.²⁷ The added inequality of the Indian tribes exception and the burdens of the current regulatory system, however, can be alleviated simply by changing the Act's administration.

access to eagle parts violates RFRA); Kevin J. Worthen, *Eagle Feathers and Equality: Lessons on Religious Exceptions from the Native American Experience*, 76 U. COLO. L. REV. 989, 993 (2005) (concluding that the preferential treatment of tribal members in the Eagle Act satisfies "the requirements of both liberty and equality to an acceptable degree").

24. Suggestions that Congress should amend the Eagle Act are impractical. See Dalton, *supra* note 22, at 1578, 1617; De Meo, *supra* note 23, at 810–12. James Dalton also suggested that tribes should be given greater authority under the Eagle Act, Dalton, *supra* note 22, at 1618–21, but his comment did not provide a sufficient analytical foundation for his ideas or explore their implications.

25. Legal scholars who write about Native American religion have focused more on sacred sites than sacred animals. See, e.g., Kristen A. Carpenter, *The Interests of "Peoples" in the Cooperative Management of Sacred Sites*, 42 TULSA L. REV. 37 (2006); Richard B. Collins, *Sacred Sites and Religious Freedom on Government Land*, 5 U. PA. J. CONST. L. 241 (2003); Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757 (2001).

26. See *infra* Part IV.

27. See *infra* Parts III.A, IV.

Although the problem of religious claims to eagles poses unique challenges, scholarly work in other contexts supports my proposal.²⁸ Kristen Carpenter, Sonia Katyal, and Angela Riley developed a theory of indigenous cultural property premised on the idea that certain resources are integral to indigenous group identity and therefore deserving of legal protection.²⁹ Applying that framework here entails recognizing that, because eagles are central to tribal identity, that resource is a form of cultural property, and therefore tribes should be empowered to participate in defining the contours of the stewardship regime for eagles. Scholarship proposing community property solutions to overexploitation of commons resources suggests the same result.³⁰ My proposal also goes part of the way toward giving tribes the sort of meaningful self-determination that Indian-law academics have urged in recent years.³¹

Although the differential treatment of tribal members and non-members with the same religious needs is both necessary and justifiable,³² exempting tribes instead of tribal members would ease the inequitable tension in the current administration of the Eagle Act. As the plain language of the Indian tribes exception reveals, Congress intended the exception to operate as an accommodation for Indian tribes with whom the federal government has long interacted as sovereigns. Implementing the exception consistent with its plain language by issuing permits to tribes would transform what currently looks like an individual religious exemption into the political accommodation it was meant to be. The Eagle Act would no longer favor certain individual religious practitioners over other individual

28. See *infra* Part IV.A.

29. Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1028 (2009); see also Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 322–23 (2008).

30. See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 1–2 (James E. Alt & Douglass C. North eds., 1990); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 62 (2011); Kristin N. Johnson, *Things Falling Apart: Regulating the Credit Default Swap Commons*, 82 U. COLO. L. REV. 167, 168 (2011); Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 546–47 (2007).

31. See, e.g., Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 446 (2005); Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 925 (2011); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777 (2006).

32. See *infra* Part III.B.

religious practitioners. Rather, it would respect the sovereignty of tribes that enjoy a government-to-government relationship with the United States.³³

This suggested change in the administration of the Eagle Act also would alleviate some of the burden the permit process currently imposes on Indian religious practitioners, by empowering tribes to devise administrative procedures for allocating eagles that are more consonant with tribal members' religious needs and sensitivities. Any discomfort with the government evaluating the bona fides of applicants' religious beliefs or interpreting the tenets of applicants' religions would be alleviated by turning those tasks over to tribal governments.³⁴

This change in practice might have salutary effects for the FWS as well. Presumably, administering the permit system would be easier if the number of potential applicants were only 566, not over two million. In the process of preparing tribes to administer their eagle permits, those tribes that do not currently have game regulations or enforcement capacity could be encouraged to develop them, and some of the enforcement burden could eventually shift to the tribes.³⁵

The logistics of implementing this proposal will be challenging and require input from many stakeholders, particularly the tribes who own the cultural property interest in eagles. At the first stage of my proposal, the stakeholders would have to figure out, among other things, how to allocate this limited resource initially; what to do with individuals who are currently on the waiting list; and how to avoid disadvantaging tribes that are less administratively organized. The second stage of my proposal might be even more challenging in that it would require the tribes acting collectively to reach a consensus on what the contours of the Indian tribes exception should be.³⁶

Why should the government take on this enormous task? Because the current system is not sustainable long-term as it is currently structured, for the government, for tribes, or for eagles. Because, although the United States has no legal obligation to accommodate tribal religion, it has a moral obligation. And because

33. *See infra* Part IV.B.1.

34. *See infra* Part IV.B.2.

35. *See infra* Part IV.B.3.

36. *See infra* Part IV.C.

the eagle problem is uniquely amenable to solution at the administrative level. The United States should act voluntarily and immediately to protect tribal interests in this resource that is so central to tribal identity. Otherwise, the bald eagle may recover, but tribal religions will become endangered.

This Article proceeds as follows. I describe the current framework of the Eagle Act, including statutes, regulations, and case law, in Part II. In Part III, I address the tensions in the current administration of the Eagle Act, including scarcity and inequality, which provide the stimulus for questioning the status quo. Finally, Part IV examines my proposal for alleviating those tensions.

II. THE CURRENT LEGAL FRAMEWORK

A. *The Eagle Act*

After two false starts in the 1930s,³⁷ President Roosevelt signed the Act for the Protection of the Bald Eagle on June 8, 1940.³⁸ The preamble to the Act recited that the Continental Congress in 1782 had adopted the bald eagle as the national symbol, “the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom,”³⁹ and it “is now threatened with extinction.”⁴⁰ The statute made it unlawful 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, alive or dead, or any part, nest, or egg

37. The Senate passed eagle protection bills in 1930 and 1935, both of which died in the House. *See* 72 CONG. REC. 6612 (1930); 79 CONG. REC. 10061 (1935). The Eagle Act gained sufficient support to pass in the House only after the federal courts’ view of the Commerce Clause power over wildlife began to change. *See, e.g.*, *Cerritos Gun Club v. Hall*, 96 F.2d 620 (9th Cir. 1938) (upholding a provision of the Migratory Bird Treaty Act that exceeded the terms of the migratory bird treaties as a valid exercise of Congress’s power under the Commerce Clause); *Cochrane v. United States*, 92 F.2d 623 (7th Cir. 1937) (same).

38. Pub. L. No. 76-567, 54 Stat. 250 (1940). At the time, the Migratory Bird Treaty Act, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–11 (2006)), did not protect raptors. *See* Convention Between the United States and Great Britain for the Protection of Migratory Birds, 39 Stat. 1702 (1916) (not including raptors among list of protected birds); Convention Between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (1936) (same).

39. Not surprisingly, given the backdrop of fascist belligerence in Europe, patriotism permeated the hearings on the bill. *See Protection of Bald Eagle: Hearing on H.R. 4832 Before the H. Comm. on Agric.*, 76th Cong. 49, 75, 76–77, 79, 80 (1940) (statements of Rep. Charles Russell Clason, Maud Phillips, President, Blue Cross Animal Relief, and Dr. T.S. Palmer, President, District of Columbia Audubon Society).

40. Pub. L. No. 76-567, 54 Stat. 250 (preamble).

thereof,” except as permitted by the Secretary of the Interior.⁴¹ The term “take” broadly included “pursue, shoot, shoot at, wound, kill, capture, trap, collect, or otherwise willfully molest or disturb.”⁴² Section 2 of the Act authorized the Secretary of the Interior, if he determined it to be “compatible with the preservation of the bald eagle as a species to permit the taking, possession, and transportation of [bald eagles] for the scientific or exhibition purposes of public museums, scientific societies, or zoological parks, or . . . for the protection of wildlife or of agricultural or other interests in any particular locality.”⁴³

Because young golden eagles are very difficult to distinguish from young bald eagles,⁴⁴ and bald eagle populations continued to suffer,⁴⁵ Congress extended the statute’s prohibitions to golden eagles in the Bald and Golden Eagle Protection Act of 1962.⁴⁶ At the suggestion of the Department of the Interior, however,⁴⁷ Congress recognized that “feathers of the golden eagle are important in religious ceremonies of some tribes,”⁴⁸ and carved out an exception authorizing the Secretary of the Interior to permit the taking, possession, and transportation of eagles and eagle parts for “the religious purposes of Indian tribes.”⁴⁹

41. *Id.* §§ 1, 2 (codified at 16 U.S.C. § 668a).

42. *Id.* § 4 (codified at 16 U.S.C. § 668c).

43. *Id.* § 2 (codified at 16 U.S.C. § 668a).

44. 107 CONG. REC. 10507–8 (1961) (statement of Sen. Yarborough) (explaining that immature bald eagles “are so similar to the golden eagle that only trained ornithologists are said to be able to distinguish the two species; therefore many bald eagles are taken by mistake”).

45. *Id.* at 10508.

46. Pub. L. No. 87-884, 76 Stat. 1246 (1962).

47. *Miscellaneous Fish and Wildlife Legislation: Hearings before the Subcomm. on Fisheries and Wildlife Conservation of the H. Committee on Merch. Marine and Fisheries*, 87th Cong., 2d Sess., 3 (1962) [hereinafter House Hearings 1962] (pointing out that the golden eagle was “important in enabling many Indian tribes, particularly those in the Southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them”).

48. H.R. REP. NO. 87-1450, at 2 (1962) (recognizing the importance of golden eagle feathers “in religious ceremonies of some Indian tribes”); *see also* S. REP. NO. 87-1986, at 3–4 (1962) (noting that golden eagle feathers “are an important part of Indian religious rituals”); 108 CONG. REC. 22270 (1962) (remarks of Sen. Keating) (stating that the golden eagle “is of religious significance to many Indian tribes in America today”). The House report also noted that Indian religious use of eagles resulted in the killing of “a large number of the birds” and that “if steps are not taken . . . there is grave danger that the golden eagle will completely disappear.” H.R. REP. NO. 87-1450, at 2.

49. 16 U.S.C. § 668a. *See* United States v. Dion, 476 U.S. 734, 740–43 (1986) (describing legislative history of 1962 amendment).

Under regulations implementing the Indian tribes exception, only enrolled members of federally recognized Indian tribes with which the United States maintains a government-to-government relationship may apply for permits.⁵⁰ When the Department of the Interior first issued regulations implementing the Indian tribes exception in 1963, it provided that “[a]pplications for permits to take and possess bald eagles or golden eagles for the religious purposes of Indian tribes must be submitted by individual Indians.”⁵¹ The 1974 amendments to the regulations required applicants to “attach a certification from the Bureau of Indian Affairs that the applicant is an Indian.”⁵² In 1999, Interior clarified that permits under the Indian tribes exception are available only to members of federally recognized Indian tribes.⁵³ Instead of submitting a certification from the Bureau of Indian Affairs, the revised regulations require applicants to attach a certification signed by an official of “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).”⁵⁴

The 1963 regulations provided that the Secretary could issue permits only to “authentic, bona fide practitioners of [tribal] religion.”⁵⁵ The applicant was required to name the religious ceremony in which the eagles would be used and “enclose a statement from a duly authorized official of the religious group in question verifying that the applicant [was] authorized to participate in such ceremonies.”⁵⁶ Interior deleted the latter requirement in 1999, explaining that religious official certification was “largely duplicative of the separate requirements of tribal membership certification and the individual’s statement on the application form itself, under penalty of perjury, of the individual’s religious need for the permit.”⁵⁷ The regulations still require applicants to identify the tribal religious ceremony for which the eagles are needed,⁵⁸ but the application form states: “You may choose not to provide the name of

50. 50 C.F.R. § 22.22(a) (2012) (referencing 25 U.S.C. § 479a-1).

51. 28 Fed. Reg. 976 (Feb. 1, 1963) (codified at 50 C.F.R. § 11.6(d) (1967)).

52. 39 Fed. Reg. 1158, 1184 (Jan. 4, 1974) (codified at 50 C.F.R. § 22.22(a)(5) (1975)).

53. 64 Fed. Reg. 50,467, 50,473 (Sept. 17, 1999).

54. *Id.* (codified at 50 C.F.R. § 22.22(a)(5) (2012)).

55. 28 Fed. Reg. 976 (Feb. 1, 1963) (codified at 50 C.F.R. § 11.5 (1967)).

56. *Id.* (codified at 50 C.F.R. § 11.6(d) (1967)).

57. 64 Fed. Reg. 50,468, 50,473.

58. 50 C.F.R. § 22.22(a)(4) (2012).

the religious ceremony if doing so will violate your religious beliefs.”⁵⁹

Under the so-called Morton Policy, tribal members do not need permits to possess dead eagles and eagle parts that they already own. In a 1975 policy statement clarifying the Eagle Act’s enforcement, Secretary of the Interior Rogers C. B. Morton announced that “American Indians” could, “without fear of Federal prosecution, harassment, or other interference . . . possess, carry, use, wear, give, loan, or exchange among other Indians, without compensation, all federally protected birds, as well as their parts or feathers.”⁶⁰ The Attorney General, echoing the Morton Policy, recently clarified that the federal government will not prosecute members of federally recognized Indian tribes for possessing eagles or eagle parts or for giving them to or exchanging them with other tribal members without compensation.⁶¹ Therefore, applications for possession permits are actually requests to obtain eagles or eagle parts from the FWS. Applications for permits to possess eagle parts are processed at the Service’s regional migratory-bird permit offices and, if approved, are forwarded to the National Eagle Repository in Commerce City, Colorado,⁶² the only legal source for new eagles and eagle parts⁶³

59. Form 3-200-15A (rev. 2010), available at <http://www.fws.gov/forms/3-200-15a.pdf>. The application for take permits simply asks for the name of the applicant’s religion. Form 3-200-77 (rev. 2010), available at <http://www.fws.gov/forms/3-200-77.pdf>.

60. News Release, Department of the Interior, Morton Issues Policy Statement on Indian Use of Bird Feathers (Feb. 5, 1975), available at <http://www.fws.gov/news/historic/1975/19750205.pdf>. The Morton Policy also permitted “American Indians” to “transfer such feathers or parts to tribal craftsmen without charge, but such craftsmen may be compensated for their work.” *Id.* The Policy further clarified that Interior would continue to enforce statutory prohibitions against “killing, buying or selling of eagles, migratory birds, or endangered species.” *Id.* The Eighth Circuit upheld the Morton Policy against a claim that it discriminates on the basis of race in *United States v. Eagleboy*, 200 F.3d 1137 (8th Cir. 1999), where the court reversed the dismissal of a charge against a Native American who was not a member of a federally recognized Indian tribe for possessing hawk parts in violation of the Migratory Bird Treaty Act.

61. Memorandum from the Attorney General to the Assistant Attorney General, Env. and Natural Res. Div., All U.S. Attorneys, Director, Exec. Office for U.S. Attorneys 3 (Oct. 12, 2012), available at <http://www.justice.gov/ag/ef-policy.pdf>. The Attorney General also reiterated the Morton Policy’s commitment not to prosecute tribal members for giving eagle feathers to craftspersons “to be fashioned into objects for eventual use in tribal religious or cultural activities,” so long as no compensation is paid for the bird parts themselves. *Id.* And the Attorney General clarified that tribal members would not be prosecuted for “[a]cquiring from the wild, without compensation of any kind, naturally molted or fallen feathers,” *id.*, though tribal members must obtain a permit to salvage eagle carcasses or parts other than feathers. *Id.* at 7 n.9.

62. See *Office of Law Enforcement*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/le/national-eagle-repository.html> (last visited Sept. 24, 2013).

aside from tribally operated aviaries.⁶⁴ The Repository receives dead eagles and eagle parts and distributes them free of charge to qualified permit applicants on a first-come, first-served basis.⁶⁵ Because the demand for eagle parts exceeds the supply, applicants must wait long periods for their requests to be filled.⁶⁶

Applicants for permits to take eagles must identify the species and number of eagles or feathers proposed to be taken and the state and local area where the taking is proposed.⁶⁷ In processing applications, the FWS considers “the direct or indirect effect which issuing such a permit would be likely to have upon the wild populations of bald or golden eagles.”⁶⁸ When processing permits to take eagles, the Service also considers whether the National Eagle Repository can satisfy the applicant’s need.⁶⁹

On April 29, 1994, “as part of an historic meeting with all federally recognized tribal governments,” President Clinton signed an executive memorandum that sought to facilitate the collection and distribution of bald and golden eagles and their parts “[b]ecause of the feathers’ significance to the Native American heritage and consistent with due respect for the government-to-government relationship between the Federal and Native American tribal governments.”⁷⁰ Accordingly, the President ordered the Department of the Interior to “ensure the priority distribution of eagles, upon permit application, first for traditional Native American religious

63. De Meo, *supra* note 23, at 788; Jay Wexler, *Eagle Party*, 14 GREEN BAG 2D 181, 182 (2011). The Eagle Act does not prohibit possession of bald eagles that were lawfully taken prior to the enactment of the Bald Eagle Protection Act in 1940, or golden eagles that were lawfully taken prior to the 1962 amendments. 16 U.S.C. § 668(a) (2006).

64. The FWS issues permits allowing tribes to operate aviaries. See Form 3-200-78 (rev. 2010), available at <http://www.fws.gov/forms/3-200-78.pdf>. As of June 2012, four tribes operated eagle aviaries—the Zuni, Iowa, Comanche, and Navajo—and the Citizen Potawatomi Nation was expected to open an aviary soon. Email from Eliza Savage, Regulatory Analyst, U.S. Fish and Wildlife Service, to author (June 19, 2012, 10:45 a.m. EST) (on file with author). The FWS is currently considering adopting a regulation that would add the bald and golden eagle to the list of raptors that may be propagated in captivity. Migratory Bird Permits; Changes in the Regulations Governing Raptor Propagation, 76 Fed. Reg. 39,367 (July 6, 2011).

65. See *United States v. Friday*, 525 F.3d 938, 944 (10th Cir. 2008); U.S. FISH & WILDLIFE SERVICE, *supra* note 62; *How Can I Obtain Eagle Feathers or Parts?*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/faq/featherfaq.html> (last visited Sept. 21, 2013).

66. See *infra* Part II.A.

67. 50 C.F.R. § 22.22(a) (2012).

68. 50 C.F.R. § 22.22(e) (2012).

69. See *Friday*, 525 F.3d at 945.

70. Memorandum of Apr. 29, 1994: Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes, 59 Fed. Reg. 22, 953 (May 4, 1994).

purposes, to the extent permitted by law, and then to other uses.”⁷¹ The President also ordered the Interior Department to simplify the permit process, minimize the delay in distributing eagles, and work more closely with tribal governments.⁷² Consistent with that directive, in Director’s Order No. 69, issued on March 30, 1994, the Director of the FWS stated that “[b]ecause the demand always exceeds the supply, eagles will not be donated or distributed for any other purpose until the needs of Native Americans have been met.”⁷³

B. The Religious Freedom Restoration Act

In *Employment Division, Department of Human Resources v. Smith*,⁷⁴ the Supreme Court held that the First Amendment allows the application of neutral, generally applicable laws to religious exercises even when the laws are not supported by a compelling governmental interest.⁷⁵ *Smith* held that the Free Exercise Clause did not require Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church.⁷⁶ Following *Smith*, Free Exercise Clause claims challenging the Eagle Act for its burden on the exercise of religion would likely fail.

Litigants may raise similar claims, however, under RFRA. Congress enacted RFRA following *Smith* to codify, as a requirement of federal statutory law, the Free Exercise Clause standard that the Supreme Court applied before *Smith* in *Sherbert v. Verner*⁷⁷ and *Wisconsin v. Yoder*.⁷⁸ RFRA allows the government to “substantially burden a person’s exercise of religion” only if “it demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁷⁹ Under

71. *Id.*

72. *Id.*

73. U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, DIRECTOR’S ORDER NO. 69 § 4.a (1994), available at <http://www.fws.gov/policy/DO69.html>.

74. 494 U.S. 872 (1990).

75. *Id.* at 884–89.

76. *Id.* at 877–82.

77. 374 U.S. 398 (1963).

78. 406 U.S. 205 (1972); accord 42 U.S.C. § 2000bb(b)(1) (2006); see also *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 (2006) (explaining that RFRA codified “a statutory rule comparable to the constitutional rule rejected in *Smith*”).

79. 42 U.S.C. § 2000bb-1(a)–(b) (2006).

RFRA, the person contesting the government action must first prove that the action substantially burdens a sincerely held religious belief.⁸⁰ When the plaintiff has met that threshold, the government bears the burden on the compelling-interest and narrow-tailoring elements of RFRA.⁸¹ The government, however, is not required to “refute every conceivable option” to prove that a law is narrowly tailored.⁸² Once the government provides evidence that an exemption would impede the government’s compelling interests, the plaintiff “must demonstrate what, if any, less restrictive means remain unexplored.”⁸³ RFRA provides a “workable test for striking sensible balances between religious liberty and competing prior governmental interests.”⁸⁴ The test must “be applied in an appropriately balanced way, with particular sensitivity” to important governmental interests,⁸⁵ and “with regard to the relevant circumstances in each case.”⁸⁶

C. The Case Law

Individuals who are members of federally recognized Indian tribes (tribal members) and individuals who are not members of federally recognized Indian tribes (nonmembers) have raised RFRA as a defense to eagle-related criminal charges and as the basis for affirmative claims against the federal government. The cases fall into three categories, and the courts have upheld the application of the Eagle Act in all three.

The circuits are uniform in upholding the Eagle Act against challenges by tribal members charged with taking eagles without a permit.⁸⁷ In *United States v. Friday*,⁸⁸ for example, Winslow Friday,

80. *Thiry v. Carlson*, 78 F.3d 1491, 1494–95 (10th Cir. 1996).

81. See 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3) (2006); *O Centro*, 546 U.S. at 428.

82. *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996).

83. *Id.*; see also *Fowler v. Crawford*, 534 F.3d 931, 940 (8th Cir. 2008) (explaining that the burden of proof shifted back to plaintiff after the government provided evidence that the exemption would impede a compelling government interest).

84. 42 U.S.C. § 2000bb(a)(5) (2006).

85. *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (addressing the identical standard under the Religious Land Use and Institutionalized Persons Act).

86. S. REP. NO. 103-111, at 9 (1993).

87. See *United States v. Friday*, 525 F.3d 938, 944 (10th Cir. 2008); *United States v. Oliver*, 255 F.3d 588 (8th Cir. 2001); *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997). *Cf.* *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980) (affirming conviction of tribal member who claimed treaty right to kill bald eagles); *United States v. Top Sky*, 547 F.2d 486 (9th Cir. 1976)

a member of the Northern Arapaho Tribe, shot an eagle for use in the Sun Dance.⁸⁹ Friday had not applied for a take permit from the FWS.⁹⁰ The government charged him with a misdemeanor violation of the Eagle Act, and the district court granted Friday's motion to dismiss under RFRA.⁹¹ The Tenth Circuit reversed.⁹² Then-Judge Michael McConnell, writing for the court, held that requiring Friday to apply for a take permit before shooting an eagle did not substantially burden his religion and that the permitting process is narrowly tailored to achieve the government's compelling interests.⁹³

The circuits are also in accord in cases in which nonmembers, appearing as criminal defendants or civil plaintiffs, allege that the Eagle Act's possession ban violates RFRA.⁹⁴ In *United States v. Hardman*,⁹⁵ the Tenth Circuit consolidated for purposes of rehearing en banc three cases involving eagle possession by nonmembers.⁹⁶ In the case involving Joseluis Saenz, the court recognized that the Eagle Act serves compelling interests,⁹⁷ but concluded that the United States had failed to prove that the regulatory scheme furthers those interests and affirmed the district court's judgment in favor of Mr. Saenz.⁹⁸ Because the United States had not had an opportunity to develop a record in the trial courts in the other two cases, against Raymond Hardman and Samuel Ray Wilgus, the court remanded those cases for consideration of the least restrictive means element of

(per curiam) (affirming conviction of tribal member who claimed Free Exercise Clause and treaty right to sell eagle parts).

88. 525 F.3d 938 (10th Cir. 2008).

89. *Id.* at 945. Mr. Friday promised his grandmother on her deathbed that he would participate in the Sun Dance. *Eagle Case Belongs in Tribal Court*, INDIANZ.COM (Oct. 7, 2009), <http://www.indianz.com/News/2009/016885.asp>; *Feds Need to Get Their Act Together on Eagle Feathers*, THE BUFFALO POST (Oct. 7, 2009, 9:08 AM), <http://buffalopost.net/?p=3453>.

90. *Friday*, 525 F.3d at 945.

91. *Id.* at 946.

92. *Id.* at 960.

93. *Id.* at 948.

94. See *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011); *United States v. Vasquez-Ramos*, 531 F.3d 987 (9th Cir. 2008); *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003) (sale and possession charges); *Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000) (per curiam) (denial of possession permit application); see also *Rupert v. Director, U.S. Fish and Wildlife Service*, 957 F.2d 32 (1st Cir. 1992) (holding denial of application to possess eagle feathers filed by nonmember Native American did not violate Free Exercise Clause).

95. 297 F.3d 1118 (10th Cir. 2002) (en banc).

96. *Id.*

97. *Id.* at 1128–29.

98. *Id.* at 1132, 1136.

the RFRA test.⁹⁹ On remand, the district court dismissed the charges against both Hardman and Wilgus.¹⁰⁰ The United States did not appeal in the *Hardman* case.¹⁰¹ But in *United States v. Wilgus*,¹⁰² the Tenth Circuit reversed and joined the Ninth and Eleventh Circuits in holding that the Eagle Act satisfies RFRA.¹⁰³

The federal government has also successfully rebutted RFRA claims in criminal cases concerning the commercial trade in eagles.¹⁰⁴ In *United States v. Antoine*,¹⁰⁵ for example, the defendant claimed that prosecuting him for bartering eagle parts violated RFRA because, for him, the exchange of eagle parts had religious significance.¹⁰⁶ The courts of appeals have not addressed head-on the question of whether buying and selling eagles can be a bona fide religious practice, but reject the RFRA claims for other reasons.¹⁰⁷

Aside from the Tenth Circuit's decision in *Hardman*, only two courts have held against the government in Eagle Act cases involving religion claims.¹⁰⁸ Both cases concerned tribal members who killed eagles without a permit. The district court in *United States v. Gonzales*¹⁰⁹ held that requiring an applicant for a permit to take an eagle to identify the ceremony in which the eagle will be used, and include a certification from a tribal elder that the applicant is authorized to participate in that ceremony, violated RFRA.¹¹⁰ The FWS no longer requires permit applicants to submit that information.¹¹¹ The court's primary holding in *United States v. Abeyta*¹¹² was that the Eagle Act did not abrogate the defendant's

99. *Id.* at 1131.

100. *United States v. Wilgus*, 606 F. Supp. 2d 1308 (D. Utah 2009).

101. *United States v. Wilgus*, 638 F.3d 1274, 1281 n.4 (10th Cir. 2011).

102. 638 F.3d 1274 (10th Cir. 2011).

103. *Id.* at 1295.

104. *United States v. Antoine*, 318 F.3d 919, 920 (9th Cir. 2003); *United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997); *cf.* *United States v. Top Sky*, 547 F.2d 486 (9th Cir. 1976) (*per curiam*) (holding Fort Bridger Treaty did not convey right to sell eagles).

105. 318 F.3d 919 (9th Cir. 2003).

106. *Id.* at 920.

107. *But see Top Sky*, 547 F.2d at 487–88 (holding that district court's finding that commercial trade in eagles does not have religious significance was not clearly erroneous).

108. *See United States v. Gonzales*, 957 F. Supp. 1225 (D.N.M. 1997); *United States v. Abeyta*, 632 F. Supp. 1301 (D.N.M. 1986).

109. 957 F. Supp. 1225 (D.N.M. 1997).

110. *Id.*

111. *See supra* text accompanying notes 56–59.

112. 632 F. Supp. 1301 (D.N.M. 1986).

hunting rights under the Treaty of Guadalupe Hidalgo.¹¹³ That conclusion is no longer valid after the Supreme Court's holding in *United States v. Dion*¹¹⁴ that the Eagle Act did abrogate Indian treaty hunting rights.¹¹⁵

III. THE TENSIONS

Despite the uniformity of outcomes in Eagle Act cases, there are several reasons to consider changing the regulatory structure. Natural resources statutes typically balance resource use and resource preservation. Because the primary use for eagles is religious, the Eagle Act must balance religious exercise against species preservation. Unfortunately, the religious demand for eagles far exceeds the supply.¹¹⁶ Tribal members wait for years to receive eagles from the Repository, leading some turn to the black market to fill their needs.¹¹⁷ Adding to the tension between species preservation and religious exercise is the inequality of the Indian tribes exception. Tribal members can obtain eagles for their religious purposes, but individuals who are not tribal members cannot, even if their religious need is indistinguishable.¹¹⁸ Moreover, tension persists within the case law itself. The courts of appeals are split on the government's evidentiary burden in these cases, and they are all over the map on which compelling interests the Indian tribes exception furthers.¹¹⁹ Finally, the tribal community is dissatisfied with the current regulatory scheme.¹²⁰ Those tensions are frustrating the purposes of the Eagle Act and provide an impetus to reexamine the status quo.

A. Scarcity

The primary problem of natural-resource management is scarcity.¹²¹ When the supply of a resource is unlimited, the resource requires no management regime because there is plenty to go around. When the supply is limited, however, and insufficient to meet the

113. *Id.*

114. 476 U.S. 734 (1986).

115. *Id.* at 745.

116. *See infra* Part III.A.

117. *Id.*

118. *See infra* Part III.B.

119. *See infra* Part III.C.

120. *See infra* Part III.D.

121. *See* Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 389 (2006).

demand, natural resources law steps in to regulate the use of the resource.¹²² Thus, natural resources statutes typically pit resource use against resource preservation.¹²³ The National Park Service Organic Act is a classic example of this: it requires the Park Service “to provide for the enjoyment” of the national parks, while simultaneously conserving them and leaving them “unimpaired for the enjoyment of future generations.”¹²⁴

Cases raising religious claims under the Eagle Act are typical of natural resources cases in that the primary problem is scarcity. There simply are not enough eagles to satisfy the demand for dead eagles while still preserving the viability of the species.¹²⁵ If there were an unlimited supply of eagles, there would be little need to give them statutory protection. Some natural resources statutes are atypical, however, in that one of the uses they must manage is religious use.¹²⁶ The Eagle Act is the most noteworthy of those statutes, because it expressly acknowledges and accommodates religious use of the protected resource.¹²⁷ The primary tension in cases raising religious claims under the Eagle Act, then, is between eagle protection and religious exercise.

122. See JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY* 36 (2d ed. 2009); see also Sinden, *supra* note 30, at 534 (“The central question of environmental policy is ‘how much?’”).

123. See generally Jan G. Laitos & Rachael B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENVTL. L. 1091 (2004) (discussing the current era of natural resources regulation, in which the law must reconcile the interests of preservationists with the interests of recreationalists).

124. 16 U.S.C. § 1 (2006); see Jay D. Wexler, *Parks as Gyms? Recreational Paradigms and Public Health in the National Parks*, 30 AM. J.L. & MED. 155, 160 (2004) (“As many have observed, this ‘dual mandate’ sets up a difficult tension for the Service, which must balance conservation with recreation to ensure that the parks can be enjoyed by current and future generations without the sacrifice of natural resources.”).

125. See DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, *supra* note 73 (stating that in implementing the Eagle Act and the Endangered Species Act, FWS needs to recognize that the demand for dead eagle parts “always exceeds the supply”); Wexler, *supra* note 63, at 185 (asserting that demand for eagle parts has increased disproportionately because of the public’s awareness regarding the Repository).

126. See *Access Fund v. U.S. Dep’t of Agric.*, 499 F.3d 1036 (9th Cir. 2007) (upholding Forest Service ban on rock climbing at site that has religious significance for an Indian tribe); *United States v. Adeyemo*, 624 F. Supp. 2d 1081 (N.D. Cal. 2008) (regarding religious freedom defense to charges of violating the Endangered Species Act by importing and possessing leopard skins).

127. 16 U.S.C. § 668a (2006).

Kristen Carpenter cautioned that “American Indian religious practices are sensitive subjects.”¹²⁸ The U.S. government long sought “to eliminate ‘heathenish practices’” from tribal life and criminalized many religious rituals.¹²⁹ That history of religious persecution, Carpenter pointed out, shapes any discussion of tribal religion.¹³⁰ Moreover, there is great variety in Native American religion.¹³¹ Indeed, the Western concept of “religion” itself may not fit the practices of many Native Americans for whom “religion is inseparable from relationships and rituals, from stories and place.”¹³² With those cautions in mind, I will attempt to explain briefly the importance of eagles in Native American religion.

Not all Native Americans require eagles for their religious practices, and among those who do, the uses vary.¹³³ One unifying thread among those who require eagles is that the eagle is “considered a sacred messenger to the spirit world.”¹³⁴ For the Hopi, for example, the golden eagle “serves as the link between the spiritual world and the physical world . . . a connection that

128. Kristen A. Carpenter, *Considering Individual Religious Freedoms Under Tribal Constitutional Law*, 14 KAN. J.L. & PUB. POL’Y 561, 562 (2004) [hereinafter Carpenter, *Religious Freedoms*]; see also Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 396 (2012) [hereinafter Carpenter, *Limiting Principles*] (describing how the law’s lack of context for unique Native American religious practices has posed difficulties for Native American religious practitioners bringing free exercise claims).

129. FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2009); see also William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 30–31 (2005) (outlining the Indian claim for redress based on federal suppression of Indian religion); 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, 787–805 (1997) (detailing federal suppression of Native American religion from 1882 to 1934).

130. Carpenter, *Religious Freedoms*, *supra* note 128, at 563.

131. Worthen, *supra* note 23, at 989–90 n.2. See Carpenter, *Religious Freedoms*, *supra* note 128, at 563; Carpenter, *Limiting Principles*, *supra* note 128, at 403.

132. Carpenter, *Religious Freedoms*, *supra* note 128, at 562; see also DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 727 (6th ed. 2011) (“The very dichotomy suggested by the separate treatment of ‘religion’ and ‘culture’ reflects the inadequacies of the dominant society’s categories in trying to accommodate Indian spiritual beliefs and value systems. For most tribal Indians, culture is coterminous with religion, both terms encompassing the spiritual dimension of a human being living in harmony with all persons and nature.”); Carpenter, *Limiting Principles*, *supra* note 128, at 397 (“In many American Indian communities, the traditional Indian religion is at the root of the tribal culture, social structure, subsistence practices, and even, in theocratic tribes, government.”).

133. Worthen, *supra* note 23, at 990 n.2.

134. De Meo, *supra* note 23, at 774; see also *id.* at 775 (“Eagles are, in essence, Native American prayer messengers.”).

embodies the very essence of Hopi spirituality and belief.”¹³⁵ The Hopi gather golden eaglets soon after birth, raise the fledglings, then send the eagles “to their spiritual home” and use the eagles’ feathers for various religious ceremonies. This annual process sustains “the connection between the spiritual and physical worlds for the next generation of Hopi.”¹³⁶ Other Native American religions prohibit the killing of eagles and only allow practitioners to collect molted feathers or to pluck feathers from eagles without inhibiting their ability to fly.¹³⁷

Eagle feathers and parts are used in religious ceremonies throughout the year and throughout one’s lifetime, including naming, coming-of-age, marriage, burial, healing, and seasonal ceremonies.¹³⁸ For example, in the Northern Arapaho Tribe, the annual Sun Dance, which was among those the federal government outlawed in the late nineteenth century,¹³⁹ requires the dance sponsor to construct an offering lodge and acquire an eagle for use in the dance as “a gift of the creator.”¹⁴⁰ The eagle must be pure, meaning it cannot have died from poisoning, disease, electrocution, or automobile impact, and it cannot have been used in a prior Sun Dance.¹⁴¹

The religious demand for eagles and eagle parts far exceeds the Repository’s supply and the species’ viability.¹⁴² When the Eagle Act was enacted in 1940, trophy hunting, poisoning by ranchers to prevent livestock depredation, and habitat loss had reduced bald

135. Worthen, *supra* note 23, at 990 (quoting Religious Ceremonial Collection of Golden Eaglets from Waputki National Monument, 66 Fed. Reg. 6516, 6517 (proposed Jan. 22, 2001)).

136. *Id.* at 990 n.3 (quoting Religious Ceremonial Collection of Golden Eaglets from Waputki National Monument, 66 Fed. Reg. 6516, 6517 (proposed Jan. 22, 2001)).

137. De Meo, *supra* note 23, at 775–76.

138. *Id.* at 776; Keith Coffman, *Eagle Center Struggles to Supply American Indians Rituals*, CHICAGO TRIBUNE, Apr. 25, 2012, http://articles.chicagotribune.com/2012-04-25/features/sns-rt-us-usa-religion-eaglesbre83o19v-20120425_1_national-eagle-repository-bald-eagles-eagle-carcasses (quoting Hopi anthropologist Micah Loma’omvaya: “Eagles are integral to everything we do. Not just for ceremonies, but offerings with eagle feathers are made for fertility, rain, hunting—everything good in life.”).

139. See COHEN, *supra* note 129.

140. *United States v. Friday*, 525 F.3d 938, 942 (10th Cir. 2008) (internal quotation marks omitted).

141. *Id.* at 943.

142. The severe disjunction between supply and demand for eagles necessitates some sort of permitting system to allocate the eagle resource, as does the Eagle Act itself. 16 U.S.C. § 668a (2006).

eagle populations.¹⁴³ Starting in the late 1940s, the use of DDT for pest control, among other things, caused bald eagle populations to plummet to the point where the Secretary of the Interior, in 1967, listed the bald eagle in the lower forty-eight states as endangered.¹⁴⁴ By 2007, bald eagle populations had rebounded sufficiently for the FWS to remove the bald eagle from the list of species protected under the Endangered Species Act.¹⁴⁵ At that time, the FWS estimated that there were 9,789 nesting pairs of bald eagles in the lower forty eight states.¹⁴⁶ “Bald eagles are now repopulating areas throughout much of the species’ historical range that were unoccupied only a few years ago.”¹⁴⁷ They continue to face pressure, however, from habitat modification, illegal taking, disease, contaminants, electrocution on power lines, collisions with vehicles, and in the future, collisions with wind energy facilities.¹⁴⁸ Moreover, the greater religious demand is for golden eagles.¹⁴⁹ Although there is no reliable data on golden eagle populations nationwide, the species has been extirpated from much of its historic range, and populations in the western United States are declining.¹⁵⁰

Moreover, the increase in bald eagle populations has not translated into equivalent increases in the supply of bald eagles at the National Eagle Repository.¹⁵¹ Most of the eagles turned in to the

143. 77 Fed. Reg. 25,792, 25,794 (May 1, 2012).

144. *Id.* at 25,795; 32 Fed. Reg. 4001 (Mar. 11, 1967). Bald eagles were initially listed as endangered under the Endangered Species Preservation Act of 1966, formerly codified at 16 U.S.C. §§ 668aa–668cc (2006). In 1978, the Secretary of the Interior listed bald eagles as endangered in all of the lower forty-eight states except five, in which it was listed as threatened. 77 Fed. Reg. at 25,795. The bald eagle’s status was changed to threatened in all of the lower forty-eight states in 1995. 60 Fed. Reg. 36,000 (July 12, 1995).

145. 72 Fed. Reg. 37,346 (July 9, 2007). The delisting of the bald eagle was predicated in part on the continued protection of the species under the Eagle Act. *See* 16 U.S.C. §§ 1533(a)(1)(D), (c)(2) (2006) (requiring Secretary to consider “inadequacy of existing regulatory mechanisms” when determining whether to list or delist a species as threatened or endangered); 72 Fed. Reg. 37,353, 37,362–66, 37,367 (July 9, 2007); *see also* *United States v. Vasquez-Ramos*, 531 F.3d 987, 991 (9th Cir. 2008) (stating that when the Department of the Interior removed the bald eagle from the endangered species list it emphasized that the eagle would continue to be protected under the Eagle Act)

146. 72 Fed. Reg. 37,346, 37,347 (July 9, 2007).

147. 77 Fed. Reg. 25,792, 25,795 (May 1, 2012).

148. 72 Fed. Reg. at 37,358–70.

149. *United States v. Wilgus*, 638 F.3d 1274, 1282 (10th Cir. 2011).

150. 74 Fed. Reg. 46,836, 46,839 (Sept. 11, 2009); U.S. FISH AND WILDLIFE SERV., FINAL ENVIRONMENTAL ASSESSMENT: PROPOSAL TO PERMIT TAKE AS PROVIDED UNDER THE BALD AND GOLDEN EAGLE PROTECTION ACT 52–54 (2009), *available at* http://www.fws.gov/migratorybirds/CurrentBirdIssues/BaldEagle/FEA_EagleTakePermit_Final.pdf.

151. *Wilgus*, 638 F.3d at 1291.

Repository are killed in places where they are likely to be noticed by a person, that is, on roads or under power lines.¹⁵² The FWS, however, has reduced eagle mortality from vehicle collisions and power-line electrocution.¹⁵³ The Service has tried to maximize the Repository's supply by conducting outreach to the Service's field staff, state fish and game departments, tribes, and the general public to ensure that those who find eagle carcasses know where to send them.¹⁵⁴ But "those very efforts to raise awareness have also led to an increase in applications for eagle parts from eligible" tribal members who were not previously aware of the Repository.¹⁵⁵

The result is that tribal members have to wait long periods for eagles and eagle feathers from the Repository:¹⁵⁶ more than two and one-half years for a whole bald eagle and three and one-half to four years for a golden eagle.¹⁵⁷ And the backlog at the Repository has grown. In 1985, there were 527 applications pending at the Repository.¹⁵⁸ Now there are over six thousand,¹⁵⁹ which is a significant number, particularly when compared to the approximately ten thousand nesting pairs of eagles in the lower forty-eight states.¹⁶⁰ The scarcity problem promises to get worse, as the number of tribal members is growing,¹⁶¹ and spirituality among tribal members may

152. *Id.*

153. *Id.*; see also *United States v. Friday*, 525 F.3d 938, 958–59 (10th Cir. 2008) (discussing government measures to reduce eagle deaths due to electrocution).

154. *Wilgus*, 638 F.3d at 1291.

155. *Id.*; see also *Wexler*, *supra* note 63, at 185 ("Demand has increased significantly in recent years as the word has gotten out that the Repository is the place to go for legal eagles.").

156. See *Wilgus*, 638 F.3d at 1291; *Friday*, 525 F.3d at 944.

157. *Wilgus*, 638 F.3d at 1291; Dan Frosch, *A Repository for Eagles Finds Itself in Demand*, N.Y. TIMES, May 4, 2012, <http://www.nytimes.com/2012/05/05/us/a-repository-for-eagles-finds-itself-in-demand.html>.

158. *United States v. Abeyta*, 632 F. Supp. 1301, 1303 (D.N.M. 1986).

159. *Wexler*, *supra* note 63, at 185; *Coffman*, *supra* note 138; *Frosch*, *supra* note 157; see also *Possession of Eagle Feathers and Parts by Native Americans*, U.S. FISH & WILDLIFE SERV. (Feb. 2009), <http://www.fws.gov/le/pdf/PossessionOfEagleFeathersFactSheet.pdf> (indicating that there is a very high demand for eagle parts); *National Eagle Repository*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/le/Natives/EagleRepository.htm> (stating that as of 1995 there were 3,000 more approved applications than there were available eagles); *How Can I Obtain Eagle Feathers or Parts?*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/faq/featherfaq.html> ("Currently, there are over 4,000 people on the waiting list for approximately 900 eagles the Repository receives each year. Applicants can expect to wait approximately 2 and one half years for an order to be filled.").

160. See 72 Fed. Reg. 37,346, 37,347 (July 9, 2007).

161. See BUREAU OF INDIAN AFFAIRS, AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, at iii (2005), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf>.

be on the rise too.¹⁶² No available data reveal what proportion of tribal members require eagles for their religious practices, but it is probably safe to assume that more tribal members will translate into more applications to the Repository.

Religious demand for eagles among nonmembers is also significant and growing. Although there are only about two million members of federally recognized tribes, on the 2010 census 2.9 million people reported their race as solely American Indian or Alaska Native—an increase of 18 percent since 2000—and another 2.3 million people reported having some Native ancestry—an increase of 39 percent since 2000.¹⁶³ Thus, more than three million people who are not tribal members report having some Native American ancestry. Again, no available data reveal what proportion of those people practice Native American religions that require eagles, but it is safe to assume that a “non-trivial” proportion of them would request eagles from the Repository if they were eligible.¹⁶⁴ And, of course, an unknown number of people have no Native American ancestry, but practice Native American religions and need eagles for religious purposes.¹⁶⁵ Additionally, one million people in the United States practice Afro-Caribbean religions, like Santeria, that require eagles for religious rituals, and their number is increasing as well.¹⁶⁶ In sum, as Professor Raymond Bucko testified at the *Wilgus* trial, “[w]hile hard numbers are elusive at best, what is evident is that the numbers of persons, both Native and non-Native, engaging in some type of Native American or ‘primal’ religious practice is on the rise,” and the number of people whose religious

162. Frosch, *supra* note 157 (“More and more of our young people are going back to our spiritual way of life, and we can’t do our ceremonies without the eagles.” (quoting Oglala Sioux member Lee Plenty Wolf)); Appellant’s Appendix at 96, *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011) (No. 09-4046) (declaration of Associate Professor Raymond A. Bucko) (“[P]eople who declare Native American religious participation is on the rise.”).

163. See U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 1, 4 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

164. *United States v. Wilgus*, 638 F.3d 1274, 1292 (10th Cir. 2011) (“[A] non-trivial number of additional applicants would appear, if the rules were changed.”).

165. *Id.* at 1281–82, 1291.

166. *Wilgus*, 638 F.3d at 1291; Appellant’s Appendix, *supra* note 162, at 467 (testimony of Raphael Martinez). The government’s expert on Santeria in the *Wilgus* case explained that Santerians worship their guardian spirit or “orisha” and that each orisha has favorite foods, colors, plants, flowers, and animals—including eagles. *Id.* at 147 (affidavit of Raphael Martinez). “Bird offerings are common in all Santeria rituals.” *Id.*

practices “could possibly entail the use of [eagle] feathers” is “trending upwards.”¹⁶⁷

The imbalance between supply and demand for eagles feeds the “thriving” black market.¹⁶⁸ The FWS discovered crimes involving 24,984 eagles or eagle parts between 1997 and 2007, even though fewer than two hundred officers nationwide engage in wildlife law enforcement,¹⁶⁹ and black market prices and activity are increasing exponentially.¹⁷⁰ Tribal members frustrated with the Repository system are driven to the black market to fill their needs.¹⁷¹ The high price paid for eagles on the black market may also lead tribal members who receive eagles from the Repository to sell them on the black market and seek more feathers from the Repository.¹⁷² In fact, the majority of people charged with illegally taking or selling eagles are tribal members.¹⁷³

FWS law enforcement officers testified at the *Wilgus* trial that pow-wow dance competitions, in which both tribal members and nonmembers compete, also drive the black market by offering sizeable cash prizes.¹⁷⁴ Competitors are judged not only on their dancing ability, but also on their regalia, which include feather fans and bustles.¹⁷⁵ “[T]he more decorated with eagle feathers a

167. Appellant’s Appendix, *supra* note 162, at 97, 98 (declaration of Professor Raymond A. Bucko).

168. *Wilgus*, 638 F.3d at 1291; *United States v. Vasquez-Ramos*, 531 F.3d 987, 989 (9th Cir. 2008) (citing S. Rep. No. 71-180, at 2 (1930)); *see also* *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007) (“Other reports state that the trade in wildlife products comprises the world’s second largest black market, trailing only trade in illegal narcotics.”).

169. Appellant’s Appendix, *supra* note 162, at 190 (summary of LEMIS Eagle Case Violation and Property Data Since 1/1/1997 to 10/03/2007); *id.* at 508, 533 (testimony of FWS Information Technology Specialist Mike McLeod and FWS Agent Edward Dominguez).

170. *Id.* at 89, 345 (declaration and testimony of FWS Special Agent Kevin Ellis); *id.* at 539, 541, 551 (testimony of FWS Agent Edward Dominguez).

171. *See Wilgus*, 638 F.3d at 1283 (citing Appellant’s Appendix, *supra* note 162, at 86–87) (noting testimony from FWS agents describing black market demand from pow-wow dance competitions).

172. *Id.* at 1294.

173. Appellant’s Appendix, *supra* note 162, at 555 (testimony of FWS Agent Edward Dominguez).

174. *Id.* at 347–49, 364, 533–35 (testimony of FWS Special Agents Kevin Ellis and Edward Dominguez). As explained above, the government does not prosecute tribal members for possessing eagle feathers. *See* text accompanying notes 60–61. Hence, tribal members may use eagle feathers from the Repository in pow-wow competitions.

175. Appellant’s Appendix, *supra* note 162, at 86–87 (declaration of FWS Special Agent Kevin Ellis).

competitor's costume, the more likely he is to win."¹⁷⁶ Some costumes include feathers from as many as ten to twelve eagles.¹⁷⁷ Dancers "are often looking for new and better feathers," and people who kill eagles "approach winners of pow-wows and attempt to sell them feathers as they know cash for purchases is readily available."¹⁷⁸ Hence, the demand for eagle feathers on the pow-wow circuit is considerable,¹⁷⁹ and attendance at pow-wows "seems to have risen significantly over the last decade, thus increasing the demand for migratory bird feathers."¹⁸⁰ Non-Native American collectors drive up prices as well.¹⁸¹

The black market affects eagles directly because feathers commonly enter the black market through illegal killing.¹⁸² FWS Special Agent Edward Dominguez explained at the *Wilgus* trial that the black market is supplied "by eagles being poisoned intentionally, by people climbing up trees to steal young eaglets from nests and nourishing them until they have molted to where their feathers are in perfect condition, and people shooting livestock and game to lure eagles to feed on them and then shooting the eagles."¹⁸³ As the Supreme Court held in *Andrus v. Allard*,¹⁸⁴ "It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds."¹⁸⁵ In sum, the imbalance between the supply and demand for eagles leaves the species vulnerable and tribal religious needs unsatisfied.

176. *Wilgus*, 638 F.3d at 1283.

177. Appellant's Appendix, *supra* note 162, at 534 (testimony of FWS Agent Edward Dominguez).

178. *Id.* at 87 (declaration of FWS Special Agent Kevin Ellis); *id.* at 364 (testimony of FWS Special Agent Kevin Ellis).

179. *See id.* at 533–34 (testimony of FWS Agent Edward Dominguez).

180. *Id.* at 87 (declaration of FWS Special Agent Kevin Ellis).

181. *See Wilgus*, 638 F.3d at 1283.

182. Appellant's Appendix, *supra* note 162, at 88 (declaration of FWS Special Agent Kevin Ellis).

183. *Id.* at 539 (testimony of FWS Agent Edward Dominguez).

184. 444 U.S. 51, 58 (1979).

185. *Id.* at 58.

B. Inequality

One of the things that makes cases raising religious claims under the Eagle Act particularly difficult is the Indian tribes exception.¹⁸⁶ Allowing members of federally recognized tribes to take and possess eagles while others with the same religious needs are prohibited from doing so adds a layer of inequality in these cases. I believe that this inequality is not only justifiable, but necessary.¹⁸⁷ Nonetheless, the differential treatment of individuals with the same religious needs adds a tension to Eagle Act cases that should inspire us to question the current regulatory scheme.

This sort of inequitable treatment of religious practitioners was at the center of *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.¹⁸⁸ An Amazonian religious group filed suit under RFRA to enjoin the government from enforcing the Controlled Substances Act to block the group's importation and use of a hallucinogenic tea for religious purposes.¹⁸⁹ The Supreme Court rejected the government's argument that the Controlled Substances Act "simply admits of no exceptions,"¹⁹⁰ characterizing it as a "slippery slope" argument that "[i]f I make an exception for you, I [would] have to make one for everybody, so no exceptions."¹⁹¹ Rather, the Court held that "RFRA operates by mandating consideration . . . of exceptions to 'rule[s] of general applicability.'"¹⁹² Thus, under RFRA, courts must look "beyond broadly formulated interests justifying" federal statutes and "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."¹⁹³

186. See 16 U.S.C. § 668a (2006).

187. Professor Worthen and James Dalton have already answered the concern that the Indian tribes exception violates the Establishment Clause. See Worthen, *supra* note 23, at 1002–16 (concluding that the Eagle Act is "compatible with the basic demands of equality" because Native Americans are differently situated from non-Native Americans with respect to religion); Dalton, *supra* note 22, at 1605–16; *Wilgus*, 638 F.3d at 1287; *Rupert v. Director, U.S. Fish and Wildlife Service*, 957 F.2d 32, 35 (1st Cir. 1992). Both Hardman and Wilgus abandoned their Establishment Clause claims in *United States v. Hardman*, 297 F.3d 1116, 1119 (10th Cir. 2002) (en banc).

188. 546 U.S. 418 (2006).

189. *Id.* at 423.

190. *Id.* at 430.

191. *Id.* at 421, 436.

192. *Id.* at 436 (quoting 42 U.S.C. § 2000bb-1(a) (2006)).

193. *Id.* at 431; see also *id.* at 439 (RFRA "requires the Government to address the particular practice at issue").

The primary problem for the government in *O Centro* was that the Controlled Substances Act authorizes the Attorney General to waive the Act's requirements in certain circumstances,¹⁹⁴ and regulations have long exempted the use of peyote for Native American religious use.¹⁹⁵ The government attempted to justify that special treatment based on the United States' "unique relationship" with federally recognized Indian tribes,¹⁹⁶ but the Court held that the government failed to demonstrate how that unique legal status makes tribal members "immune from the health risks the Government asserts accompany any use of a Schedule I substance."¹⁹⁷

O Centro does not control the outcome in Eagle Act cases. In *O Centro*, there was no indication that the supply of the hallucinogenic tea was limited or that other religious groups were vying for the same tea. In Eagle Act cases, in contrast, different groups compete for access to the same limited resource, and the statute itself allows only members of federally recognized Indian tribes to use that resource.¹⁹⁸ Broadening the Indian tribes exception would not just alleviate the religious burden on particular litigants. Instead, it would shift that burden to other religious practitioners, namely, tribal members.¹⁹⁹ *O Centro* did not concern that sort of burden-shifting claim.²⁰⁰

Moreover, in Eagle Act cases, the government attempts to comply with the Supreme Court's instructions in *O Centro*: it "weigh[s] the impact" of altering the regulatory scheme and tries to demonstrate that "granting the requested religious accommodations would seriously compromise its ability to administer" the Eagle Act.²⁰¹ The government has shown to the courts' satisfaction what the result would be if access to the resource were expanded.²⁰²

That said, the government is currently considering expanding the use of eagles as a resource. When the bald eagle was listed as a threatened species under the Endangered Species Act (ESA),

194. *Id.* at 432–33 (citing 21 U.S.C. § 822(d)).

195. *Id.* at 433.

196. *Id.*

197. *Id.* at 434.

198. 16 U.S.C. § 668a (2006); 50 C.F.R. § 22.22 (2012).

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

200. *See* United States v. Vasquez-Ramos, 531 F.3d 987, 992 (9th Cir. 2008) ("Nothing in *O Centro Espirita* undercuts the ruling in *Antoine* that this redistribution of burdens does not raise a valid RFRA claim.").

201. *O Centro*, 546 U.S. at 430, 435.

202. *See* United States v. Wilgus, 638 F.3d 1274, 1292–94 (10th Cir. 2011).

sections 7 and 10 of that Act provided mechanisms for authorizing bald eagle takes that were “associated with, but not the purpose of, a human activity.”²⁰³ The FWS gave its assurance to holders of ESA eagle take authorizations that it would not enforce the Eagle Act or the Migratory Bird Treaty Act against them.²⁰⁴ The Service removed the bald eagle from the list of threatened species in 2007²⁰⁵ and issued regulations in 2009 to replace the now-inapplicable ESA take authorizations.²⁰⁶ The 2009 regulations authorize the taking of bald and golden eagles where the take is compatible with the preservation of the species and is “associated with but not the purpose of [an] activity.”²⁰⁷ In issuing these so-called “nonpurposeful take” permits,²⁰⁸ the regulations require the Service to give higher priority to “Native American religious use for rites and ceremonies that require eagles be taken from the wild.”²⁰⁹ In other words, the Service cannot issue a nonpurposeful take permit if the eagle population then would be unable to accommodate additional takes of live eagles for the religious purposes of Indian tribes.²¹⁰

The FWS has not yet issued a nonpurposeful take permit for a wind power facility, but it anticipates the demand for such permits will reach an average of forty per year by the year 2020.²¹¹ Granting those permits would shift the Eagle Act case law to more closely resemble *O Centro*. If the Secretary determines that, after tribal religious needs are met, eagle populations remain sufficiently robust to allow eagles to be taken for power-generation purposes, *O Centro*

203. Eagle Permits; Take Necessary to Protect Interest in Particular Localities, 74 Fed. Reg. 46,836, 46,837 (Sept. 11, 2009).

204. *Id.* at 46,836.

205. Endangered and Threatened Wildlife and Plants, 72 Fed. Reg. 37,346 (July 9, 2007) (codified at 50 C.F.R. pt. 17).

206. Eagle Permits; Take Necessary to Protect Interest in Particular Localities, 74 Fed. Reg. 46,836 (Sept. 11, 2009) (codified at 50 C.F.R. pt. 13, 22).

207. 50 C.F.R. § 22.26(a) (2012).

208. Eagle Permits; Changes in the Regulations Governing Eagle Permitting, 77 Fed. Reg. 22,267 (proposed Apr. 13, 2012) (to be codified at 50 C.F.R. pt. 13, 22).

209. 50 C.F.R. § 22.26(e)(4) (2012).

210. *Id.* § 22.26(f)(6). The regulations also specify that the Service retains the authority to amend a permit “if new information indicates that revised permit conditions are necessary” or to suspend or revoke a permit where doing so is “necessary to safeguard local or regional eagle populations,” *id.* § 22.26(c)(7), but that provision does not appear to enable the Service to revoke a permit if tribal religious needs increase.

211. Eagles Permits; Changes in the Regulations Governing Eagle Permitting, 77 Fed. Reg. at 22,272. New Era Wind recently filed the first application under these regulations. See *Minn. Wind Farm Seeks First Eagle-Kill Permit*, EENEWS.NET (Jan. 18, 2013), <http://www.eenews.net/Greenwire/2013/01/18/4>.

would appear to mandate that the government give at least as much consideration to the religious needs of nonmembers as it gives to power companies. Whether *O Centro* dictates the outcome in RFRA challenges to the Eagle Act or not, however, the tension highlighted in that case remains and provides impetus to question the current regulatory scheme.

C. Tension Within the Case Law

In addition to the tension between eagle protection and the free exercise of religion, which is compounded in Eagle Act cases by the inequality of the Indian tribes exception, tension within the case law itself provides further impetus to revisit the current regulatory scheme. First, the courts of appeals disagree about the government's evidentiary burden in cases raising RFRA challenges to the Eagle Act. In *Hardman*, the Tenth Circuit, sitting en banc, remanded, requiring the government to present "hard evidence" showing how the current regulatory scheme "serve[s] each of its asserted interests."²¹² The court requested evidence of, among other things, "how many eagles exist, in what direction the eagle population is trending, how many people can be expected to apply for permits if the regulations change, how much additional delay in delivering eagle feathers to applicants could be expected under various alternative schemes, and how much such delays might impact Native American culture."²¹³ To meet that burden on remand in *Hardman* and *Wilgus*, the prosecutors built a voluminous record²¹⁴ addressing a host of issues, including eagle populations and trends, the supply and demand for eagles, the black market in eagles, the difficulties of enforcing the Eagle Act, and the number of people who are not tribal members but practice religions that require the use of eagles.²¹⁵

The Ninth Circuit in *Antoine*, on the other hand, did not "believe RFRA requires the government to make the showing the Tenth Circuit demands of it," because the consequences of expanding the Indian tribes exception to nonmembers "are predictable."²¹⁶ Judge

212. *United States v. Hardman*, 297 F.3d 1116, 1132 (10th Cir. 2002) (en banc).

213. *See id.* at 1135.

214. *See United States v. Wilgus*, 606 F. Supp. 2d 1308, 1315 (D. Utah 2009). ("After the case was remanded, this Court has heard testimony over several days from numerous witnesses and has accepted the uncontested affidavits of them and many others.")

215. *See United States v. Wilgus*, 638 F.3d 1274, 1281–83, 1291–92 (10th Cir. 2011).

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

Kozinski, writing for the court, reasoned that, because the demand for eagles exceeds the fixed supply, “the burden on religion is inescapable; the only question is whom to burden and how much.”²¹⁷ Antoine’s claim sought not to reduce the burden on religion, but to shift his religious burden onto others and therefore was “not a viable RFRA claim; an alternative can’t fairly be called ‘less restrictive’ if it places additional burdens on other believers.”²¹⁸

The circuits are also out of step with each other regarding which compelling interests the Indian tribes exception furthers. The Tenth Circuit in *United States v. Wilgus* held that the Indian tribes exception furthers the government’s compelling interest in “fostering the culture and religion of federally-recognized Indian tribes.”²¹⁹ That holding was consistent with the First Circuit’s pre-RFRA decision in *Rupert v. Director, U.S. Fish and Wildlife Service*.²²⁰ But the uniformity ends there.

The inconsistency in the case law arises from the disjunction between the plain language of the exception and the regulations implementing it. The exception allows the Secretary “to permit the taking, possession, and transportation” of eagles “for the religious purposes of *Indian tribes*.”²²¹ Yet, the regulations provide for issuing permits not to Indian *tribes*, but rather to *individual members* of federally recognized Indian tribes.²²² Thus, in *Hardman*, the Tenth Circuit held that the government has a compelling interest in “fulfilling trust obligations to Native Americans,”²²³ but it did not see how “restricting personal, individual permits for religious purposes to members of federally recognized tribes is connected to the government’s sovereign-to-sovereign relationships with tribes.”²²⁴ In other words, the court did not see how the Indian tribes exception furthers the compelling interest in fulfilling the government’s trust obligations. The Eleventh Circuit in *Gibson*, in contrast, held that the Indian tribes exception furthers the United

217. *Id.*

218. *Id.*

219. *Wilgus*, 638 F.3d at 1295.

220. 957 F.2d 32, 35 (1st Cir. 1992).

221. 16 U.S.C. § 668a (2006) (emphasis added).

222. 50 C.F.R. § 22.22 (2012) (“We will issue a permit only to members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs listed under 25 U.S.C. 479a-1.”).

223. *United States v. Hardman*, 297 F.3d 1116, 1129 (10th Cir. 2002) (en banc).

224. *Id.* at 1134.

States' interest in fulfilling treaty obligations to federally recognized Indian tribes.²²⁵ The Tenth Circuit in *Hardman* did not find that interest compelling,²²⁶ but even if it had, it may not have believed that granting permits to individual tribal members fulfills treaty obligations that are generally owed to Indian tribes.²²⁷

The Ninth Circuit has not identified which compelling interests the Indian tribes exception serves, because it held that any claim seeking to shift a litigant's religious burden onto others is not viable under RFRA.²²⁸ The Eighth Circuit has had no need to identify the interests underlying the Indian tribes exception either, because it has addressed only the claim of a tribal member charged with taking an eagle without a permit.²²⁹ That claim required the court of appeals to identify only the interests underlying the permit requirement, not the Indian tribes exception.²³⁰ Thus, the question of which compelling interests the Indian tribes exception furthers is another point of tension in the case law.

Finally, while panels of the Eighth, Ninth, Tenth, and Eleventh Circuits have upheld the Eagle Act against RFRA challenges,²³¹ that uniformity may not persist. The Act remains potentially vulnerable *en banc* in those circuits, at the panel level in other circuits, and in the Supreme Court. The Supreme Court's decision in *O Centro*, although not directly controlling in Eagle Act cases, reflects a sympathy for religious practitioners and a skepticism about the legal status of federally recognized Indian tribes that could undermine the Eagle Act in the courts of appeals and in the Supreme Court itself.

D. Regulatory Burden on Tribal Members

Another, more important reason to revisit the current regulatory scheme is the burden it imposes on tribal members. The Tenth Circuit in *Friday* was "skeptical that the bare requirement of obtaining a permit [to take eagles] can be regarded as a 'substantial

225. *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (per curiam).

226. *Hardman*, 297 F.3d at 1129 n.19.

227. *See Dry v. United States*, 235 F.3d 1249, 1256 (10th Cir. 2000) ("[T]he very great majority of Indian treaties create tribal, not individual rights." (quoting *Hebah v. United States*, 428 F.2d 1334, 1337 (Ct. Cl. 1970)) (internal quotation marks omitted)).

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

229. *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001).

230. *Id.* ("[U]nrestricted access to bald eagles would destroy [the] legitimate and conscientious eagle population conservation goal of the [Eagle Act].").

231. *See* cases cited *supra* notes 87, 93, 103 and accompanying text.

burden' under RFRA."²³² The court pointed out correctly that many religious activities require government authorization, like building a church or operating a religious school.²³³ No doubt, the court was correct that the requirement to obtain a permit before taking an eagle does not rise to the level of a *substantial* burden under RFRA. But it is, nonetheless, a burden. One tribal member remarked that "[i]t's the same as having to have a permit to carry a cross."²³⁴ And tribal members who seek not to take eagles but to obtain parts from the Repository must not only fill out an application form, but also wait long periods of time to obtain items that are central to their religious practice.²³⁵

These regulatory burdens drive some tribal members to find alternative, illegal sources of eagles.²³⁶ Frustration with the current regulatory scheme therefore increases pressure on eagle populations.²³⁷ Even when tribal members make the effort to jump through the regulatory hoops and obtain items from the Repository, they sometimes find the quality of the parts unsatisfactory.²³⁸ And tribal members object to the regulatory provision that, by accepting an eagle permit, the permittee consents to inspection by FWS agents.²³⁹ That the group intended to benefit from the Indian tribes

232. *United States v. Friday*, 525 F.3d 938, 947 (10th Cir. 2008). *But see* *United States v. Hardman*, 297 F.3d 1116, 1126–27 (10th Cir. 2002) (en banc) (“Any scheme that limits their access to eagle feathers therefore must be seen as having a substantial effect on the exercise of religious belief.”); *United States v. Hugs*, 109 F.3d 1377, 1378 (9th Cir. 1997) (“We do not question that the BGEPA imposed a substantial burden on the practice of such religions by restricting the ability of adherents to obtain and possess eagles and eagle parts.”).

233. *Friday*, 525 F.3d at 947.

234. Steven Bodzin, *A Troubling Chapter in the Bald Eagle's Success Story*, L.A. TIMES, July 18, 2005, <http://articles.latimes.com/print/2005/jul/18/nation/na-eagles18>.

235. *See Wilgus*, 638 F.3d at 1291 (indicating that even tribal members who only seek eagle feathers may need to wait anywhere from three to six months); *Friday*, 525 F.3d at 944 (stating that the estimated wait time for a “whole tail” from the Repository is 3.5 years).

236. *See Hugs*, 109 F.3d at 1377–78; *see also* De Meo, *supra* note 23, at 790 (“These long delays, coupled with the immediacy of certain religious ceremonies, force some Native Americans to violate this permit procedure in order to follow their religious beliefs.”).

237. *See Wilgus*, 638 F.3d at 1291–92 (quoting the testimony of FWS agents and asserting that “[m]any Native Americans who would normally obtain [eagle] feathers from legal sources . . . turn to the black market due to frustration in obtaining feather legally”); Appellant’s Appendix, *supra* note 162, at 539 (testimony of FWS Special Agents Kevin Ellis and Edward Dominguez) (stating that the black market is supplied by people poisoning and shooting eagles, or by stealing young eaglets from their nests).

238. *Friday*, 525 F.3d at 944; Coffman, *supra* note 138.

239. *Friday*, 525 F.3d at 951 (“If construed to allow Fish and Wildlife Service agents to attend the offering-lodge ceremony at the Sun Dance, Mr. Friday contends, this condition would violate the sacred nature of the ritual.”); 50 C.F.R. § 13.21(e)(2) (2012).

exception is so dissatisfied with its administration necessitates revisiting its implementation.²⁴⁰

For all of these reasons, it is worth considering whether there is a way to alleviate the tensions in Eagle Act cases that also addresses some of the practical problems with the current regulatory approach. My suggestion follows.

IV. ALLEVIATING THE TENSIONS

There does not appear to be any way to alleviate the baseline scarcity problem in Eagle Act cases sufficiently. Permits to operate aviaries and propagate eagles in captivity will help by generating a supply of molted feathers for religious use.²⁴¹ But very few tribes have taken the opportunity to establish aviaries, and the regulations authorizing captive propagation of eagles have not been finalized.²⁴² Thus, there is no reason to think that those options will eliminate the severe disjunction between supply and demand. We must take the scarcity problem as a given.²⁴³

Because eagles are a limited resource that faces competing demands—use and preservation—the Eagle Act pits two compelling interests against each other. The Act requires the government to protect the needs of recognized Indian tribes while simultaneously protecting eagle populations. One district court explained:

Were the [Eagle Act] to simply ban possession for all persons, the government would have succeeded in protecting eagle parts, but failed to protect Native American culture. Were the [Eagle Act] to allow all persons to possess the eagle parts for any religious use, it would create severe difficulties in enforcing poaching laws, because it is (1) very rare to catch poachers in the act of poaching, and (2) nearly impossible to determine whether the birds were

240. See generally U.S. DEPARTMENT OF JUSTICE, OFFICE OF TRIBAL JUSTICE, DOJ CONSIDERATION OF EAGLE FEATHERS POLICY: TRIBAL CONSULTATION AND RESPONSE TO TRIBAL COMMENTS 11 (2012), available at <http://turtletalk.files.wordpress.com/2012/06/consultation-on-proposed-dojeagle-feathers-policy-framing-p.pdf> (summarizing tribes' frustration with the current administration of the Eagle Act); Frosch, *supra* note 157 ("Having to wait so long to use eagles in religious ceremonies has become a source of frustration for many tribes.").

241. A national aviary operated by the FWS would ease the scarcity problem as well.

242. See *supra* note 64.

243. *United States v. Wilgus*, 638 F.3d 1274, 1291 (10th Cir. 2011) ("We must take the current level of supply of eagle parts . . . as a given.").

poached or not, when confiscated. Not only would the waiting period swell, making it difficult for the recognized tribes to use birds for their ceremonies, but the black market would also increase, since more people would be able to possess eagle feathers—legally or illegally procured—without fear of prosecution. In the long run, eagle populations would suffer. In the ensuing eagle scarcity, the government would have failed at both of its objectives.²⁴⁴

The courts have concluded that the Indian tribes exception “sets those interests in equipoise.”²⁴⁵ As the First Circuit observed in *Rupert*, “[a]ny diminution of the exemption would adversely affect [the interest in protecting Native American religion and culture], but any extension of it would adversely affect [the interest in protecting a dwindling and precious eagle population].”²⁴⁶

Although there is no way to balance those compelling interests without sacrificing one or the other, some of the tensions in the Eagle Act may be alleviated simply by changing the FWS’s administration of the Indian tribes exception. The alternative I propose is for the FWS to issue eagle take and possession permits to tribes instead of individual tribal members and ultimately turn over much of the administration of the Indian tribes exception to the tribes acting collectively. The first step to implementation is for the FWS to amend its regulations to provide for the issuance of permits under the Indian tribes exception to federally recognized Indian tribes. The FWS has issued the Hopi tribe’s chairman a permit to take eagles

244. *United States v. Winddancer*, 435 F. Supp. 2d 687, 698 (M.D. Tenn. 2006).

245. *Rupert v. Director, U.S. Fish and Wildlife Serv.*, 957 F.2d 32, 35 (1st Cir. 1992); *see also United States v. Dion*, 476 U.S. 734, 743–44 (1986) (“Congress thus considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow exception.”).

246. 957 F.2d at 35; *see also Winddancer*, 435 F. Supp. 2d at 698 (“In forming its categorization on a political basis, the government has balanced its two competing objectives in the only way this court has been shown to be possible. By limiting the number of people who can possess the feathers, the government succeeds in limiting the potential customers for the black market in eagle feathers. It also keeps the waiting period for the eagle repository low. By granting access to the feathers only to members of the officially recognized tribes, the government protects those tribes in the only way possible under the Establishment Clause.”). *Cf. Wilgus*, 638 F.3d at 1295 (holding that the existing permitting scheme is the least restrictive means of furthering the government’s compelling interests). *But cf. United States v. Antoine*, 318 F.3d 919, 924 (9th Cir. 2003) (“Any allocation of the ensuing religious burdens” between members and nonmembers of recognized tribes “is least restrictive because reconfiguration would necessarily restrict *someone’s* free exercise.”).

annually since 1986.²⁴⁷ Since 1997, each of these permits has authorized the take of up to forty golden eagles for religious purposes.²⁴⁸ The tribe itself allocates those forty eagle takes to its members.²⁴⁹ The Hopi take permit could serve as a model for other tribes not just for permits to take eagles, but also for permits to possess eagles. Because there is an insufficient supply of eagles, however, the stakeholders would have to determine, among other things, how to allocate the eagle resource initially among the federally recognized tribes and what to do with the people who are already on the Repository's waiting list.

Further down the road, when the process of issuing permits to tribes is established and the less administratively sophisticated tribes have developed the necessary governance structures, more of the permit system's administration could be turned over to the tribes acting collectively. The tribes could be empowered to define the contours of the Indian tribes exception, including perhaps defining who is entitled to take and possess eagles and for what purposes; how they may be obtained, transferred, and disposed; and how the initial allocation of permits should be changed. Tribes might also suggest more fundamental changes to the permit system that I have not anticipated.

Whether this approach is viewed as a recognition of tribes' cultural property rights to the eagle resource, as a common ownership solution to the tragedy of the eagle commons, or as another example of tribal self-determination, this proposal would alleviate, or at least help to justify, the inequality of the current scheme. It would do this by bringing the administration of the Indian tribes exception into line with the plain language of the statute, thus emphasizing the exception's inherently political nature. It would also

247. *United States v. Tawahongva*, 456 F. Supp. 2d 1120, 1123 (D. Ariz. 2006); Boradiansky, *supra* note 22, at 711 n.14.

248. *Tawahongva*, 456 F. Supp. 2d at 1123. "Additionally, the State of Arizona has permitted the Hopi to take ten golden eagles per year from state lands, and the Navajo Nation has permitted the Hopi to take twelve eagles per year from Navajo reservation lands each year from 1998 through 2003." *Id.*

249. *See id.* (stating that the 2005 FWS permit granted to the Hopi tribe allowed "the [Hopi] Chairman and any tribal members designated by him to take forty golden eagles") (internal quotations omitted). The bylaws of the Hopi Tribe require the Tribal Council to "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." CONSTITUTION AND BY-LAWS OF THE HOPI TRIBE, By-Laws art. IV (1937), available at <http://thorpe.ou.edu/IRA/hopicons.html>.

alleviate some of the burden that the current scheme imposes on tribal members, while providing regulatory benefits for the government. This part first explores the theoretical foundations upon which this proposal rests, then explains how it would alleviate some of the tensions in the Eagle Act, and concludes with a few brief thoughts on implementation.

A. Theoretical Foundations

Three lines of scholarship support this approach. First, Kristen Carpenter and others have developed a theory of indigenous cultural property premised on the idea that certain resources are integral to indigenous group identity and therefore deserving of legal protection.²⁵⁰ Applying that framework here entails recognizing that, because eagles are central to tribal identity, they are a form of cultural property, and therefore tribes should be empowered to define the contours of the stewardship regime for eagles. Second, scholarship proposing community property solutions to overexploitation of commons resources suggests the same result.²⁵¹ And finally, my proposal goes part of the way toward giving tribes the sort of meaningful self-determination that Indian-law academics have urged in recent years. My goal in this section is not to give comprehensive accounts of the voluminous literature on these subjects, but merely to place my proposal within these scholarly frameworks.

1. Acknowledging Cultural Property Rights

In an article entitled *In Defense of Property*, Professors Kristen Carpenter, Sonia Katyal, and Angela Riley responded to scholarly criticism of indigenous groups' recent attempts to use property law to protect cultural resources.²⁵² They argued that the critics' conception of property is too narrow because "[i]n reality, indigenous cultural property transcends the classic legal concepts."²⁵³ In proposing an alternative framework, Carpenter, Katyal, and Riley made two moves that are particularly salient here. First, they extended

250. Carpenter et al., *supra* note 29, at 1028.

251. Johnson, *supra* note 30, at 246 (proposing a community governance model "to address concerns in the credit default swap market"); Sinden, *supra* note 30, at 546–47 ("[C]ommon ownership regimes can . . . in some circumstances avert the tragedy of the commons.").

252. Carpenter et al., *supra* note 29, at 1024–26.

253. *Id.* at 1027; *see also id.* at 1046.

Margaret Jane Radin's theory of property "as an element of individual personhood"²⁵⁴ to "a model of property and *peoplehood*" premised on the idea that certain resources are integral to indigenous group identity and thus deserving of legal protection as "cultural property."²⁵⁵ Second, they moved from a classic ownership paradigm to a stewardship paradigm, grounded on "the exercise of rights and obligations independent of title."²⁵⁶ The stewardship model "captures property as a 'web of interests,' rather than a discrete bundle of rights or sticks,"²⁵⁷ and reveals "the unique ways in which indigenous groups may exercise cultural property entitlements as nonowners."²⁵⁸ Ultimately, Carpenter, Katyal, and Riley contended that indigenous peoples should be legally empowered to define their own notions of cultural property.²⁵⁹ Thus, their stewardship model may yield a variety of practical results: some cultural property may be alienable, while other cultural property may be kept out of the market; some may be laid to rest, and some may be preserved for access and use.²⁶⁰

Applying Carpenter, Katyal, and Riley's cultural property framework here would entail first recognizing that eagles are central to tribal identity and thus viewing that resource as a form of cultural property in which tribes have an interest that should be given some form of legal recognition. Eagles are a critical component of many Native American religions, and for many tribes, religion is an inextricable part of tribal sovereignty.²⁶¹ "[T]he primary purpose of tribal religion is for the survival of the tribe itself, and not for individual salvation."²⁶² Native American religions are "holistic and integrated in the sense that there is no separation between religion

254. *Id.* at 1050 (citing Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982)).

255. *Id.* at 1028 (emphasis added); *see also* Carpenter, *Real Property and Peoplehood*, *supra* note 29, at 322–23 ("[W]hereas Radin focuses on property that expresses individual personhood, I am interested in property that expresses collective 'peoplehood.'").

256. Carpenter et al., *supra* note 29, at 1067; *see also id.* at 1069 (elaborating on the concept of stewardship).

257. *Id.* at 1080 (quoting Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002))

258. *Id.* at 1088.

259. *Id.* at 1086.

260. *Id.* at 1085.

261. *See* Carpenter, *Limiting Principles*, *supra* note 128, at 442; Worthen, *supra* note 23, at 998–99, 1014–15.

262. Carpenter, *Limiting Principles*, *supra* note 128, at 441–42.

and other aspects of life.”²⁶³ Thus, tribal members “do not necessarily distinguish religious practice from cultural or political activity.”²⁶⁴

Indeed, the Indian tribes exception can be read as an acknowledgment of the tribal cultural property interest in eagles. Interior’s recommendation that Congress include an exception to the Eagle Act for Indian tribes’ religious needs was premised on its recognition that eagles are an integral part of many tribes’ identities. Interior pointed out to Congress that the golden eagle was “important in enabling many Indian tribes, particularly those in the Southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them.”²⁶⁵

Second, Carpenter, Katyal, and Riley’s framework suggests that, given their cultural property interest in the eagle resource, tribes should be included in defining the contours of the stewardship regime for eagles: who is entitled to take and possess eagles and for what purposes, and how they may be obtained, transferred, and disposed.²⁶⁶ In other words, the administration of the Indian tribes exception itself would be handed over, at least in part, to the tribes. Carpenter, Katyal, and Riley would have no objection to *partial* empowerment of tribes since, “from [these authors’] perspective, assertions of cultural property rights . . . rarely . . . vest indigenous peoples with . . . absolute powers of control, exclusion, or alienation.”²⁶⁷

In the Eagle Act context, two statutory constraints would necessarily remain. The initial, biological determination of how many permits can be issued “compatible with the preservation” of the species would have to stay with Interior.²⁶⁸ I would not go so far as to say that the cultural property interest in the eagle resource is so complete as to empower tribes to completely decimate the species,

263. Worthen, *supra* note 23, at 1004.

264. Dalton, *supra* note 22, at 1614.

265. *Miscellaneous Fish and Wildlife Legislation: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries*, 87th Cong. 3 (1962) [hereinafter House Hearings 1962].

266. See Carpenter et al., *supra* note 29, at 1029.

267. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *Clarifying Cultural Property*, 17 INT’L J. OF CULTURAL PROP. 581, 585 (2010); see also *id.* at 587 (“[I]n some instances, indigenous peoples’ claims may need to accommodate other’s interests in science, speech, or invention.”).

268. See 16 U.S.C. § 668a (2006).

thus abrogating the rest of society's interests in the preservation of our national symbol. The other statutory constraint that would persist is that only uses that can be considered "religious" would be permissible. Since tribes would decide for themselves what that term means, it might not impose much of a constraint in practice. Beyond those statutory constraints, however, the Indian tribes exception permitting process can ultimately be turned over to the tribes.²⁶⁹

Applying Carpenter, Katyal, and Riley's cultural property paradigm to eagles does not raise the same concerns as applying it to land. Unlike land, living wildlife is not seen as capable of being owned by individuals.²⁷⁰ The Supreme Court explained in *Geer v. Connecticut*²⁷¹ that "the ownership of wild animals, so far as they are capable of ownership, is in the State, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of its people in common."²⁷² Thus, living wildlife cannot be privately owned, "except in so far as the people may elect to make it so."²⁷³ The Supreme Court whittled away at *Geer* for many years until it finally repudiated *Geer*'s holding and denounced the state ownership doctrine as a legal fiction in *Hughes v. Oklahoma*.²⁷⁴ However, *Hughes* simply affirmed the federal government's supreme authority to regulate wildlife;²⁷⁵ it did not hold that living wildlife can be privately owned.²⁷⁶ As Professor Babcock explained, "*Hughes* neither disturbed the common law canon of the State's preeminent

269. The first phase of my proposal is consistent with Kristen Carpenter's "empowering practices" approach by which tribes and agencies develop religious accommodations "that are informed by the tribal religions themselves." Carpenter, *Limiting Principles*, *supra* note 128, at 400. In fact, Carpenter highlights the eagle take permit the FWS recently issued to the chairman of the Northern Arapaho tribe, *see infra* note 397, as an example of this approach. Carpenter, *Limiting Principles*, *supra* note 128, at 465–66. The second phase of my proposal extends beyond the "empowering practices" approach to implement the tribal cultural property interest in eagles, as suggested by Carpenter's earlier work with Professors Katyal and Riley. *See* Carpenter et al., *supra* note 29.

270. *See* Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849, 883–89 (2000).

271. 161 U.S. 519 (1896), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

272. *Id.* at 529 (quoting *State v. Rodman*, 58 Minn. 393, 400 (1894)).

273. *Id.* (quoting *Ex parte Maier*, 103 Cal. 476, 483 (1894)).

274. 441 U.S. 322, 335 (1979).

275. *See* John D. Echeverria & Julie Lurman, "Perfectly Astounding" *Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331, 366–67 (2003).

276. Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 62 (2000).

interest in and responsibility for preserving wildlife . . . , nor did it disturb the idea that the State acts on behalf of its citizens when it takes steps to preserve wildlife.”²⁷⁷ Unlike land, wildlife has traditionally been considered a public resource.²⁷⁸ As a result, shifting from federal stewardship to tribal stewardship would not undermine individual property rights, but would merely replace one governmental steward with another.²⁷⁹

2. Collectivizing Ownership of the Commons

In more traditional natural-resources-management terms, my suggestion can be conceptualized as an alternative solution to a tragedy of the commons. In an essay in *Science* magazine in 1968, biology professor Garrett Hardin addressed “the population problem.”²⁸⁰ Professor Hardin sketched a scenario involving a pasture open to all. Hardin anticipated that each herdsman, acting in his rational self-interest, would maximize the number of cattle he grazed on the pasture, leading to the pasture’s ruin.²⁸¹ Thus, Hardin concluded that “[f]reedom in a commons brings ruin to all.”²⁸² The only solutions to this tragedy of the commons, according to Professor Hardin, are to privatize the commons or “allocate the right to enter them.”²⁸³ For commons that “cannot readily be fenced,” like air and water, Hardin posited that “coercive laws or taxing devices” are the only solutions.²⁸⁴ Hardin acknowledged that “[e]very new enclosure

277. Babcock, *supra* note 270, at 886; *see also id.* at 889 (“[T]he Court left intact the State’s underlying, preeminent fiduciary duty to protect wildlife on behalf of its citizens.”); Wood, *supra* note 276, at 53 & n.258, 58–62 (“[T]he Court [in *Geer*] set forth a principle of sovereign trusteeship in wildlife that endures to this day.”).

278. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 265 (2010) (“Air, water, and wildlife are other examples of environmental physical public resources.”).

279. Applying Carpenter, Katyal and Riley’s framework to eagles, which, like all wildlife, have traditionally been considered a form of property, also does not raise the same concerns as applying their framework to other forms of cultural patrimony that have not traditionally been subject to property laws. *See* Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN. ST. L. REV. 641, 665–66 (2011) (criticizing Carpenter, et al. for not distinguishing between cultural property and cultural heritage and fully accounting for the limitations of property-based theories).

280. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243 (1968), available at <http://www.sciencemag.org/content/162/3859/1243.full.pdf>.

281. *Id.* at 1244.

282. *Id.* Hardin was not the first to identify the tragedy of the commons. *See* OSTROM, *supra* note 30, at 2; Sinden, *supra* note 30, at 546 & n.35.

283. Hardin, *supra* note 269, at 1245.

284. *Id.*

of the commons involves the infringement of somebody's personal liberty," but he thought that compromising personal liberty, particularly of the "freedom to breed," is essential to the survival of humankind.²⁸⁵

Nobel Prize winning political economist Elinor Ostrom contested Hardin's conclusion that privatization and government regulation are the only possible solutions to the tragedy of the commons.²⁸⁶ She argued that "neither the state nor the market is uniformly successful in enabling individuals to sustain long-term, productive use of natural resource systems."²⁸⁷ In her seminal work, *Governing the Commons: The Evolution of Institutions for Collective Action*, Ostrom detailed her case studies of alternatives to state- and market-based solutions to commons problems and developed a "theory of collective action whereby a group of principals can organize themselves voluntarily to retain the residuals of their own efforts."²⁸⁸ "[M]ore than any other scholar," Ostrom "overturned the assumption that free riding would reign in a commons given the tendency toward individual self-interest. Instead, she . . . demonstrated that many social groups have struggled successfully against threats of resource degradation by developing and maintaining self-governing institutions."²⁸⁹

Scholars have continued to explore common property solutions to the tragedy of the commons in various contexts.²⁹⁰ Professor

285. *Id.* at 1248.

286. OSTROM, *supra* note 30, at 1. Others have criticized Hardin for discounting the possibility of community management of resources. *See, e.g.*, Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 67 (2011) ("[Hardin] largely ignored the possibility of community management (public property, if you will) as an alternative possibility to privatizing the 'commons.'"); Sinden, *supra* note 30, at 546–47 ("Hardin was criticized for not recognizing that common ownership regimes can also in some circumstances avert the tragedy of the commons."); *see also* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Public Policy*, U. CHI. L. REV. 711, 720 (1986) (exploring "inherently public property" as an alternative solution to market failures).

287. OSTROM, *supra* note 30, at 1.

288. *Id.* at 25; *see also* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991) (demonstrating that people largely resolve disputes and govern themselves through informal social rules, rather than through a state system or central authority).

289. Foster, *supra* note 30, at 82.

290. *E.g.*, Brigham Daniels, *Governing the Presidential Nomination Commons*, 84 TUL. L. REV. 899 (2010) (analyzing the trend toward earlier presidential primaries as a tragedy of the commons); Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515, 515 (2002) (examining how private rights in parking spaces are allocated based on rules that govern the public parking commons); Foster, *supra* note 30, at 62 (discussing collective resource management as an alternative to the tragedy of the commons); Gregg W.

Kristin Johnson, for example, recently advocated a “community governance model” to solve the commons problem in credit default swap markets.²⁹¹ Concluding that the traditional approaches to solving the tragedy of the commons “spectacularly fail,”²⁹² Johnson proposed a model, premised on Elinor Ostrom’s work, that “involves the creation of an institution managed directly by resource users with oversight by an external authority.”²⁹³ The external authority enforces standards that reflect the community’s “normative expectations” and prevent overexploitation of the commons. This structure gives “the benefits of an openly accessible resource while curbing self-interested behavior.”²⁹⁴

The national eagle population can be viewed as a commons that is currently managed by “coercion by an external, central regulatory authority”; the FWS “exercise[s] authority to issue and revoke licenses that grant rights to use commons resources.”²⁹⁵ Absent that regulatory control, individual free-exercise rights to use eagles would compromise the resource beyond repair. That is not, however, an optimal solution to the tragedy of the eagle commons, if only because tribal members are deeply dissatisfied with the current regulatory structure.²⁹⁶

By distributing aggregate permits to tribes, the first stage of my proposal draws some of the benefits of a privatization solution to the tragedy of the commons. When a commons is privatized, certain users are given the right to exploit the commons and exclude others,

Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMP. L. REV. 1, 32–35 (2004) (concluding that sidewalk vending does not necessarily lead to a tragedy of the commons); Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 659 (2010) (applying Ostrom’s work to “environments for developing and distributing cultural and scientific knowledge through institutions that support pooling and sharing that knowledge in a managed way”); Pammela Quinn Saunders, *A Sea Change Off the Coast of Maine: Common Pool Resources as Cultural Property*, 60 EMORY L.J. 1323 (2011) (developing a model for recognizing group property rights in communities that are the *de facto* stewards of common pool resources).

291. Johnson, *supra* note 30, at 175.

292. *Id.* at 218.

293. *Id.* at 244.

294. *Id.*

295. *Id.* at 220; *see also* OSTROM, *supra* note 30, at 8–9 (examining the argument that problems related to the tragedy of the commons cannot be solved through cooperation, and governmental control with “major coercive powers” is the overwhelming solution).

296. *See supra* Part III.D. Sheila Foster observed that overconsumption of a common resource that is managed by the government can result from “regulatory slippage,” that is, reduced enforcement of regulatory standards. Foster, *supra* note 30, at 67.

which gives those users the incentive “to use the resource at sustainable levels.”²⁹⁷ “Privatization, it is thought, allocates resources to those who value them most, to the benefit of everyone in society.”²⁹⁸ My proposal is far from a perfect example of an effective privatization solution to the tragedy of the commons, if such a thing exists;²⁹⁹ I do not propose that the FWS relinquish its regulatory obligation to determine how many eagle permits are compatible with species preservation, much less convey title to individual birds. As Professor Sinden pointed out, solutions like mine are not truly “privatization,” because they do not use the market to solve the commons problem, but instead use government regulation “to address the central ‘how much’ question of environmental law.”³⁰⁰ My proposal only constitutes privatization to the extent that that term refers to “a broad spectrum of policy choices or mechanisms that shift some responsibility from the government to private actors.”³⁰¹ Yet, dividing the eagle commons among recognized tribes would give the tribes a more direct interest in ensuring the sustainability of eagle populations and perhaps “introduce[] greater flexibility and efficiency in the management and oversight” of the eagle resource.³⁰² Under the current regulatory structure, tribes play no role and thus have no incentive to maximize resource sustainability or management efficiency.

The second stage of my proposal is a variant of a common ownership regime insofar as it allows the tribes themselves to set some of the parameters for the regulatory scheme.³⁰³ Professor Sinden explained that “common ownership” is a “property rights system” wherein “group members jointly hold property rights in the resource as against the rest of the world.”³⁰⁴ Common ownership regimes are distinguishable from privatization regimes, however,

297. Johnson, *supra* note 30, at 218–19.

298. *Id.* at 219 (citing Rose, *supra* note 286, at 711–12).

299. See OSTROM, *supra* note 30, at 13 (noting difficulty of applying privatization solutions to “nonstationary resources” like fish); Sinden, *supra* note 30, at 605–10 (explaining difficulties with attempts to privatize wildlife commons).

300. Sinden, *supra* note 30, at 538.

301. Foster, *supra* note 30, at 109.

302. *Id.* at 110.

303. See Johnson, *supra* note 30, at 244.

304. Sinden, *supra* note 30, at 547.

because the former rely on collective decision-making, instead of the free market, to allocate the resource.³⁰⁵

Sinden cautioned that “common property regimes don’t really get us very far in terms of solving the tragedy of the commons in most real-world situations” because they only work in “cultural conditions that are becoming ever less common as small communities become increasingly integrated into a global economy.”³⁰⁶ Insofar as my proposal is a common ownership regime, it may depend for its success on a community of “relatively small size, stable membership, and . . . homogenous culture where norms of reciprocity and trust predominate.”³⁰⁷ Although the 566 federally recognized Indian tribes exhibit great variety, *relatively* the tribal community in the United States is small, stable, and culturally homogeneous. Recognized tribes share history, beliefs, vulnerabilities, and needs. Thus, they share enough attributes to make a common ownership regime a viable alternative to the current regulatory system under the Eagle Act.³⁰⁸ Professor Foster observed that, with regard to urban commons, local governments play an important role in enabling and sustaining the collective action necessary for a common property regime to prosper.³⁰⁹ One of her central insights was that an inverse relationship exists between what she terms “endogenous variables”—i.e., the size and homogeneity of the resource user group and the scale of the resource—and the role of the government.³¹⁰ Smaller, more homogeneous user groups are better able to cooperatively manage discrete, local common

305. *Id.* at 548.

306. *Id.*

307. *Id.*; see also Foster, *supra* note 30, at 84 (“Collective action . . . is particularly successful where there exists a resource with clearly defined boundaries and a community with stable membership and a homogeneous culture, who also share beliefs, a history, or expectation of continued interaction and reciprocity.”); *id.* at 91 (“The ability of collective commons management regimes to remain stable and endure over time can be very much dependent on community size and knittedness, community makeup, stability of community membership, resource scale, and shared social norms/social capital.”).

308. Elinor Ostrom concluded that institutional change also requires resource users to “share a common judgment that they will be harmed if they do not adopt an alternative rule”; “be affected in similar ways by the proposed rule changes”; “highly value the continuation activities from this [resource]”; and “face relatively low information, transformation, and enforcement costs.” OSTROM, *supra* note 30, at 211. Those factors are largely satisfied or can be satisfied in this context.

309. Foster, *supra* note 30, at 83, 88–91.

310. *Id.* at 92.

resources with limited government involvement.³¹¹ As the scale and complexity of the resource increases, the government plays a stronger role.³¹² Hence, in the Eagle Act context, the FWS's coordinating role can be tailored to the tribal community and the eagle resource to minimize the transaction costs of my proposal and make improvements in the regulatory structure more likely to last.³¹³

Because the number of eagles will not change, individual tribal members are not likely to have any greater access to eagles under my proposal. Nonetheless, because their own tribal governments will "participate in the development of governing rules" regarding when, where, how, and why eagles may be taken or possessed, tribal members can be expected "to perceive regulation as having greater legitimacy."³¹⁴ That perception can only benefit eagle populations.

3. Furthering Self-Determination

Issuing permits to tribes instead of individual tribal members also would be consistent with the scholarly response to modern federal Indian policy, which emphasizes tribal self-determination and self-governance. Beginning in the early 1960s, federal Indian policy began to shift toward promoting "the practical exercise of inherent sovereign powers possessed by Indian tribes."³¹⁵ In 1975, Congress aligned itself with this approach by passing the Indian Self-Determination and Education Assistance Act,³¹⁶ which required the Bureau of Indian Affairs to delegate the administration of health, education, economic development, and other social programs to tribal governments via contracts.³¹⁷ Under so-called "638 contracts," "the tribe would perform the federal government's functions under

311. *Id.*

312. *Id.* at 92; *see also id.* at 123 ("[T]he size and scale of the resource necessarily influences the degree of responsibility, range of function, and discretion allowed the collective regime.").

313. *Id.* at 92–93.

314. *See* Johnson, *supra* note 30, at 245.

315. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 (2009); *see also* Matthew L.M. Fletcher, *Indian Wars: Old and New*, 15 J. GENDER RACE & JUST. 201, 203–13 (2012) (detailing the connection between President Johnson's War on Poverty and self-determination policy); Washburn, *supra* note 31, at 779 ("Scholars generally agree that the era of tribal self-determination began to form as early as the administration of President John F. Kennedy, and was formalized, at least in the Executive Branch, with Richard Nixon's significant 1970 statement on federal Indian policy.").

316. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450).

317. *See* Washburn, *supra* note 31, at 779.

specific performance standards and record-keeping requirements imposed by law and federal regulations.”³¹⁸

Congress broadened self-determination policy in the Tribal Self-Governance Act of 1994³¹⁹ by “provid[ing] for an initial foundational agreement between a tribe and a federal agency, after which federal controls are diminished and the tribe assumes primacy over the program.”³²⁰ Instead of entering into separate contracts for each delegated function, the 1994 Act “allowed tribes to negotiate broad compacts with the Department of the Interior,” provided block grants covering a range of services, and gave tribes “discretion as to how to allocate those federal funds.”³²¹

That trend has continued.³²² Under the Indian Tribal Energy Development and Self-Determination Act of 2005,³²³ for example, once a tribe enters into an agreement with the Department of the Interior, it can manage the development of certain tribal natural resources with little federal involvement.³²⁴ The National Park

318. *Id.*

319. Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. IV, 108 Stat. 4270 (1994) (codified at 25 U.S.C. §§ 450a note, 458aa).

320. Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 286 (2010); *see also id.* at 282 (referring to the current period of federal Indian policy as the “Self-Governance Era”).

321. Washburn, *supra* note 31, at 780. Congress also acted to preserve tribal cultures. *See, e.g.*, Indian Child Welfare Act, 25 U.S.C. § 1902 (2006) (“[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes.”); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006) (“[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions.”); Native American Languages Act, 25 U.S.C. § 2901 (2006) (“[T]he United States has the responsibility . . . to ensure the survival of these unique cultures and languages.”); Native American Graves and Repatriation Act, 25 U.S.C. §§ 3001, 3010 (2006) (“This chapter reflects the unique relationship between the Federal Government and Indian tribes . . . and should not be construed to establish a precedent with respect to any other individual.”); Indian Tribal Justice Act, 25 U.S.C. § 3601 (2006) (“The Congress finds and declares that—(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; . . . (7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this chapter.”).

322. *But see* Washburn, *supra* note 31, at 781 & n.27 (opining that the last “significant” self-determination enactment was the American Housing and Self-Determination Act of 1996).

323. 25 U.S.C. § 3501 (2006).

324. *See* Skibine, *supra* note 320, at 286. Professor Skibine likened this statutory scheme to cooperative federalism under the Clean Air Act, Clean Water Act, and Safe Drinking Water Act. *Id.* at 287. From 1986 to 1990, Congress amended those statutes to authorize the EPA to treat tribes the same as states for purposes of regulating the environment in areas under their jurisdiction. *Id.* (citing 33 U.S.C. § 1377(e); 42 U.S.C. §§ 300j-11, 7601(d)). *See generally* Jessica Owley, *Tribal Sovereignty over Water Quality*, 20 J. LAND USE & ENVTL. L. 61, 76–84

Service recently proposed that Congress designate the South Unit of Badlands National Park, which is on the Pine Ridge Indian Reservation, as the first “tribal national park.”³²⁵ Under this proposal, the Oglala Sioux Tribe would manage the South Unit pursuant to both tribal and federal law.³²⁶ Similarly, the FWS has proposed turning over the day-to-day management of the National Bison Range in Montana, formerly part of the Flathead Reservation, to the Confederated Salish and Kootenai Tribes, though FWS would retain oversight by a federal refuge manager.³²⁷

Academics generally endorse these developments. Dean Kevin Washburn, now serving as Assistant Secretary for Indian Affairs at the Department of the Interior, observed that “the existing tribal self-determination initiatives are widely believed successful, and it is difficult to find criticism of them in any literature.”³²⁸

Scholars focus now on expanding these self-determination initiatives into more meaningful self-governance and tribal sovereignty. Most scholars agree that genuine self-determination requires something more than federal policy has provided. Rather than try to describe the full scope of that scholarship, I highlight here a few recent articles that give some context to my proposal. Washburn, for example, argued that self-determination “must denote the ability of an Indian tribe to ‘determine’ its identity, or in other words, to create its own identity through defining and affirming its

(2004) (describing tribal “treatment as state” provision in the Clean Water Act). These provisions are not directly analogous to my proposal because, although they reflect some respect for tribal sovereignty, they do not recognize any special tribal interest in a resource, much less give tribes authority to design the regulatory structure.

325. See *South Unit General Management Plan, Record of Decision Signed*, NATIONAL PARK SERVICE (June 7, 2012), available at <http://www.nps.gov/badl/parknews/south-unit-general-management-plan-record-of-decision-signed.htm>; see also *South Unit Badlands National Park, Final General Management Plan & Environmental Impact Statement*, NATIONAL PARK SERVICE, 38 (Apr. 2012), available at <http://parkplanning.nps.gov/document.cfm?parkID=117&projectID=17543&documentID=47117> (announcing the General Management Plan and Environmental Impact Statement, prepared by the National Park Service in conjunction with the Oglala Sioux Tribe).

326. *South Unit Badlands National Park, Final General Management Plan & Environmental Impact Statement*, *supra* note 325, at 39.

327. Emily Yehle, *FWS's Plan to Share Management of Bison Refuge with Tribes Sparks Lawsuit*, EENEWS.NET (May 22, 2012), <http://www.eenews.net/public/Greenwire/2012/05/22/9>.

328. Washburn, *supra* note 31, at 781; see also *id.* at 781 n.28 (citing sources); *id.* at 779–80 (“Although neither BIA officials nor tribes were particularly happy with the implementation of the 638 contracts program, the contracting of functions on Indian reservations by Indian tribes was widely hailed as an improvement in federal Indian policy and a meaningful step toward self-determination.”).

cultural values.”³²⁹ As a practical matter, Washburn posited that tribal self-determination might require tribes to be able “to determine [their] own governmental structure and implement the policies that will effectuate [their] broader tribal values.”³³⁰ Federal self-determination programs by and large have delegated federal programs and funds to tribes, but retained control at the federal level.³³¹ “While these efforts have been enormously positive,” Washburn opined, they were “to some degree, low-hanging fruit that was easily plucked from the tree.”³³² To achieve “real self-determination,” Washburn endorsed giving tribes the authority to define felonies under their own criminal laws.³³³

Hope Babcock drew on civic republican theory to provide a foundation for returning greater sovereignty to tribes.³³⁴ Not unlike Washburn, she wrote that giving tribes “undiminished authority to determine their own lives . . . is an essential aspect of sovereignty.”³³⁵ Federalism-inspired approaches that share governmental power with tribes fall short, Professor Babcock said, because they do not address the federal government’s self-proclaimed power to preempt tribal law—a power that she asserted is inherently inconsistent with true tribal sovereignty.³³⁶ Instead, she

329. *Id.* at 782.

330. *Id.*

331. *Id.* at 786.

332. *Id.*

333. *Id.* Matthew Fletcher promoted agreements between tribes and state or local governments concerning services, economic development, and shared resources as a means of expanding tribal self-governance “while meeting the needs of non-Indian governments that are frustrated by the limited application of state law in Indian country.” Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 *FED. LAW.* 38, 38 (2006). Similarly, Kevin Gover advocated negotiated agreements between tribes and the Department of the Interior “to apportion responsibilities for the management of Indian trust lands between the Department and the Tribe.” Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 *NAT. RESOURCES J.* 317, 319 (2006).

334. Babcock, *A Civic-Republican Vision*, *supra* note 31, at 446.

335. *Id.* at 454.

336. *Id.* at 501, 557; *see also* Gover, *supra* note 333, at 340 (“The doctrine of federal plenary power, as scholar P.S. Deloria regularly points out, makes it possible for Congress and the courts to do away with tribal government in an afternoon, should they choose to do so.”). William Bradford agreed that the federal government’s plenary power over tribes must “be authoritatively withdrawn.” Bradford, *supra* note 129, at 98. He proposed a model for making reparations for the harm the federal government has caused Indians that would restore both ancestral lands and “meaningful self-determination” to tribes to the greatest extent possible. *Id.* at 84, 89, 91. Bradford’s model would give tribes “near-absolute territorial autonomy . . . in respect to all issue areas” except commerce, foreign relations, and defense, a change that Bradford recognized might require a constitutional amendment. *Id.* at 93, 98.

advocated allowing tribes to opt out of federal laws that undermine their sovereignty and threaten their very existence.³³⁷

Rebecca Tsosie, in analyzing the extent to which U.S. Indian policy meets the aspirations of the United Nations' Declaration on the Rights of Indigenous Peoples,³³⁸ broke down the right to self-determination into four models, all of which play some role in federal Indian policy. First, the "indigenous sovereignty" model recognizes tribes' inherent authority as separate governments "to make [their] own laws and apply them within a defined territory."³³⁹ Professor Tsosie explained that federal Indian policy adheres to this model not only insofar as it protects tribes' rights to govern their own territories and members, but also in that it delegates to tribes federal powers that may be delegated only to governmental entities, such as the authority to act as a state under the Clean Air Act.³⁴⁰ Second, under the "self-management" model, federal agencies authorize tribes to operate federally designed and funded programs. The contracting program under the Indian Self-Determination and Education Assistance Act of 1975 typifies this model.³⁴¹ Third, the "co-management" model facilitates tribal "access and control of lands that are currently outside their jurisdiction,"³⁴² such as the FWS proposal for the Confederated Salish and Kootenai tribes to manage the National Bison Range. Fourth, the "participatory governance" model "advocates the full participation of indigenous peoples within the dominant society's political system," a model reflected in the 1924 Act that gave federal citizenship to Indians.³⁴³ Professor Tsosie concluded, along the same lines as Hope Babcock, that the federal government's self-proclaimed power to "divest a tribal government of its sovereign powers without its consent" is inconsistent with international human rights law.³⁴⁴ Ultimately, she

337. Babcock, *A Civic-Republican Vision*, *supra* note 31, at 559, 564.

338. Tsosie, *supra* note 31, at 925.

339. *Id.* at 930. Tsosie's argument expanded well beyond federally recognized Indian tribes. She argued that all indigenous peoples are entitled to self-determination under the U.N. Declaration on the Rights of Indigenous Peoples. *Id.* at 941.

340. *Id.* at 930-31 & nn.55-56.

341. *Id.* at 931; *see also* Judith Rae, *Program Delivery Devolution: A Stepping Stone or Quagmire for First Nations*, 7 *INDIGENOUS L.J.* 1, 6-9 (2008) (distinguishing self-administration and self-government).

342. Tsosie, *supra* note 31, at 932.

343. *Id.* at 933.

344. *Id.* at 941. Tsosie also argues that federal abrogation of Indian treaties violates the U.N. Declaration's "emphasis upon the need to negotiate a contemporary political relationship between

applauded the Obama administration's support of the U.N. Declaration on the Rights of Indigenous Peoples, but demonstrated that U.S. domestic law has a long way to go to meet the normative aspirations of that document.³⁴⁵

Empowering tribes to allocate the eagle resource is consistent with the trend of allowing tribal governments greater control over resources. The first stage of my proposal, issuing Eagle Act permits to tribes instead of individual tribal members, is the sort of "low-hanging fruit"³⁴⁶ that could have been plucked years ago. That regulatory change would merely delegate part of a federal program to recognized tribes, while retaining control at the federal level, and thus extends no further than current law and policy.

The second stage of my proposal, turning over more of the actual definition and administration of the Indian tribes exception to the tribes acting collectively, is in line with academic calls for greater tribal self-determination. Empowering tribes to define the contours of the Indian tribes exception—including, perhaps, defining who is entitled to take and possess eagles and for what purposes, how they may be obtained, transferred, and disposed, and how permits should be allocated—would allow tribes, in Washburn's words, to determine their own identities by implementing policies that reflect tribal values.³⁴⁷ In Rebecca Tsosie's scheme, the second stage of my proposal goes beyond the "self-management" model insofar as it does not just delegate the authority to administer a federally designed program, but gives tribes some, albeit limited, power to design the law itself.³⁴⁸

The second stage of my proposal is also relatively low-hanging fruit insofar as it does not interfere with any settled expectations of non-Indians or with state authority. It certainly does not go so far as Professor Tsosie's "indigenous sovereignty" model and allow tribes to make and apply their own law within their own territory.³⁴⁹ In that

indigenous peoples and the nation-state that is founded upon respect, trust, and political equality." *Id.* at 943.

345. *Id.* at 924–25.

346. *See* Washburn, *supra* note 31, at 786.

347. *See id.* at 782.

348. *See* Tsosie, *supra* note 31, at 931.

349. *See id.* at 930. My proposal also fails to satisfy Professor Tsosie's call for enhancing the self-determination of indigenous groups that are not federally recognized. *See id.* at 941. Expanding access to nonmembers would be problematic for the reasons explained in the text accompanying notes 349–55.

sense, my proposal falls far short of scholarly calls for more genuine self-determination. For example, the Eagle Act probably falls within the scope of laws from which Hope Babcock believes tribes should be able to exempt themselves because it “touches matters at the core of the individual or collective identities of Aboriginal peoples as tribal Indians” and concerns a “fundamental collective right.”³⁵⁰ Several factors preclude returning full tribal sovereignty over eagles: the biology of the species necessitates oversight by biological experts at the regional and national level; the bald eagle is not just a tribal resource, but our national symbol; states traditionally have regulated wildlife and would balk at any infringement of this authority; and eliminating FWS oversight would necessitate amending the Eagle Act. I hope that part of my proposal’s appeal is that it is a realistic means of returning some control over a resource that is vital to the identity of many tribes to the tribes themselves.

B. Benefits

Shifting from permitting individual tribal members to permitting tribes would have several advantages. It would alleviate some of the inequitable tension of the current regulatory scheme, as well as some of the burden that scheme imposes on tribal members. It would also yield benefits for the federal government’s implementation of the Eagle Act, and it could channel the courts of appeals toward a more unified approach in Eagle Act cases.

1. Easing Inequality

The Indian tribes exception can be seen primarily as either a religious accommodation or a political accommodation, and the interest it creates can be seen as inuring to the benefit of either individual tribal members or the tribes themselves. I believe the

350. See Babcock, *A Civic-Republican Vision*, *supra* note 31, at 561, 564. In the Eagle Act context, however, my suggestion that the FWS retain the authority to oversee the viability of the nation’s eagle populations is not entirely inconsistent with Babcock’s thesis. In situations where exempting themselves from a federal law would cause “undesired spillover impacts on adjacent communities,” Babcock expected that tribes would “learn to adjust [their] activities so that they are not harmful to residents of neighboring states.” *Id.* at 566. This concept seems to rely on the availability of federal judicial review to adjudicate competing interests. See *id.* at 566 n.553. Thus, Babcock agrees that some overriding federal standard might survive in contexts such as this. Moreover, the availability of federal judicial review is severely curtailed in the Eagle Act context because the Eagle Act does not provide a private right of action. See *Defenders of Wildlife v. Adm’r, E.P.A.*, 882 F.2d 1294, 1301 (8th Cir. 1989).

better view takes the Indian tribes exception as primarily a political accommodation for Indian tribes. Essentially, I advocate treating tribal use of eagle feathers not as a religious issue, but as a political and property-based issue. Implementing the Eagle Act in accordance with that view and issuing permits to tribes instead of individual tribal members would alleviate, though not eliminate, some of the inequitable tension the government's current implementation of the Eagle Act creates.³⁵¹

Viewing the Indian tribes exception as primarily a political accommodation for tribes is consistent with Congress's intent and the plain language of the Eagle Act, as well as with historic practice. Treaties with numerous Indian tribes guaranteed them exclusive rights to hunt and fish on their lands.³⁵² Those treaty rights generally inured to the benefit of tribes, not individuals.³⁵³ The Eagle Act abrogated those treaty rights with respect to eagles.³⁵⁴ In the 1962 amendment to the Eagle Act, Congress restored some of those pre-existing treaty rights through the Indian tribes exception. As the Supreme Court observed in *Dion*, Congress replaced the treaty regime "in which Indian on-reservation hunting was unrestricted" with "a regime in which the Secretary of the Interior had control over Indian hunting."³⁵⁵ Accordingly, the Eleventh Circuit held that the Indian tribes exception serves the United States' interest in fulfilling its treaty commitments to federally recognized Indian tribes.³⁵⁶

351. As explained above, I believe the inequality between tribal members and nonmembers with the same religious needs is both necessary and justifiable. *See supra* text accompanying note 187.

352. *See* *United States v. Dion*, 476 U.S. 734, 738 (1986); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405–06 (1968); *see also, e.g.*, Treaty with the Flatheads, 12 Stat. 975 (1855); Treaty with the Nez Perce, 12 Stat. 957 (1855); Treaty with the Yakima, 12 Stat. 951 (1855); Treaty with the Tribes of Middle Oregon, 12 Stat. 963 (1855); Treaty with the Chippewa, 7 Stat. 536 (1837); Treaty of Fort Laramie with the Sioux, etc., 11 Stat. 749 (1851).

353. *See* *Dry v. United States*, 235 F.3d 1249, 1256 (10th Cir. 2000) ("[T]he very great majority of Indian treaties create tribal, not individual rights." (internal quotes omitted)); Wood, *supra* note 276, at 33, 35–36 (discussing treaty fishing rights).

354. *Dion*, 476 U.S. at 745.

355. *Dion*, 476 U.S. at 743; *see also* *Gibson v. Babbitt*, 72 F. Supp. 2d 1356, 1360 (S.D. Fla. 1999) ("[B]y providing bald and golden eagle parts to federally recognized Indian tribes, the United States—albeit in a substituted fashion—is fulfilling a pre-existing treaty obligation to the tribes.").

356. *Gibson*, 223 F.3d at 1258 (per curiam). Scholars have justifiably criticized the administrative process through which the Department of the Interior determines which groups are entitled to federal acknowledgment. *See, e.g.*, Tsosie, *supra* note 31, at 939–40.

That Congress intended the Indian tribes exception to be an accommodation for tribes is reflected in its decision to exempt “Indian tribes,” not “Indians.”³⁵⁷ “It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”³⁵⁸ If Congress had intended to accommodate the religious needs of individual Indians, it could have drafted an exception to accomplish that purpose.³⁵⁹ Congress should not be presumed to have intended a different result.³⁶⁰ Thus, the plain language of the Indian tribes exception indicates that it was intended to be primarily an accommodation for tribes.

Moreover, that intent is consistent with the federal government’s traditional practice of interacting with Indian tribes as sovereigns rather than with individual members of tribes. Although some federal statutes provide benefits to individual tribal members, “the United States always treated Indian affairs as a relationship between the federal government and Indian tribes, not as a race-based relationship involving Indians.”³⁶¹ Thus, the Indian tribes exception is best seen as primarily a political—not religious—accommodation for tribes and not for individuals.

357. See Carpenter, *Limiting Principles*, *supra* note 128, at 437 (“Congress explicitly referenced the rights of *tribes* as an aspect of its interest in accommodating Indian religious freedoms.”).

358. 2A Norman J. Singer & J.D. Shambie Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2011) (quotation marks omitted); see also *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”).

359. See, e.g., 25 U.S.C. § 479 (1934) (defining “Indian” in Indian Reorganization Act to include “all other persons of one-half or more Indian blood”).

360. See, e.g., *Ransom v. FIA Card Services, N.A.*, 131 S. Ct. 716, 724 (2011) (observing that Congress’s intent presumably is reflected in the words it chooses to use in a statute).

361. Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN’S L. REV. 153, 156 (2008). Professor Fletcher demonstrates that both before and after the Constitution was ratified, “the federal government . . . engage[d] in Indian affairs by dealing solely with Indian tribes and not individual Indians.” *Id.* at 172; see also *id.* at 170 (“The Executive branch continued engaging in treaty-making with Indian tribes, as opposed to seeking opportunities to purchase lands from individual Indian landholders.”). That practice continued through the adoption of the Reconstruction Amendments. *Id.* at 176. Sarah Krakoff explains that “[t]he political and the racial are therefore hopelessly intermingled in current legal definitions of tribes.” Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1043 (2012). Thus, while the category “federally recognized Indian tribe” is certainly political, it also reflects the “racialized history” of the federal government’s relationship with Indians. *Id.* at 1132. Krakoff urges courts not to try to untangle the racial and political in Indian affairs because doing so is “more likely to entrench historical discrimination against indigenous peoples than to reverse it.” *Id.*

Singling out federally recognized Indian tribes for special treatment is constitutionally permissible. In *Morton v. Mancari*,³⁶² the Supreme Court upheld a Bureau of Indian Affairs hiring preference for members of federally recognized Indian tribes,³⁶³ and reiterated that federally recognized Indian tribes have a “unique legal status” affording Congress “plenary power . . . to legislate on [their] behalf.”³⁶⁴ The government’s authority to enact legislation specifically benefiting tribes, the Court held,³⁶⁵ is drawn from the Indian Commerce Clause³⁶⁶ and the President’s treaty power.³⁶⁷ The Supreme Court reaffirmed more recently that “Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs.”³⁶⁸ Professor Worthen went a step further and concluded that because, among other things, tribes have a unique legal status and the United States has traditionally interacted with tribes, not individual Indians, the Eagle Act’s preferential treatment of Indian tribes is normatively acceptable.³⁶⁹

Even if we recognize that the Indian tribes exception is primarily a political accommodation, however, it obviously has a religious component insofar as it exempts only the “religious purposes” of Indian tribes. Since both the purpose and effect of the exception are primarily secular, however, that religious component introduces no constitutional infirmity. The Supreme Court has invalidated statutes for being insufficiently secular only when religion provided the primary purpose or constituted the principal effect of the enactment.³⁷⁰ Accordingly, the First Circuit appropriately relied on

362. *Morton v. Mancari*, 417 U.S. 535 (1974).

363. *See id.* at 553 n.24.

364. *Id.* at 551, 553.

365. *Id.* at 551–52.

366. U.S. CONST. art. I, § 8, cl. 3.

367. U.S. CONST. art. II, § 2, cl. 2.

368. *Rice v. Cayetano*, 528 U.S. 495, 519 (2000).

369. Worthen, *supra* note 23, at 993, 1009, 1014–15.

370. *See* *McCreary Cnty. v. ACLU*, 545 U.S. 844, 864–65 (2005); *Hernandez v. Comm’r*, 490 U.S. 680, 696 (1989) (“[A] statute primarily having a secular effect does not violate the Establishment Clause merely because it ‘happens to coincide or harmonize with the tenets of some or all religions.’” (quoting *McGowan v. Maryland*, 366 U.S. 420, 422 (1961))); *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (“[N]ot every law that confers an indirect, remote, or incidental benefit upon [religion] is, for that reason alone, constitutionally invalid.” (internal quotation marks omitted) (citing *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973))).

Morton v. Mancari to reject an Establishment Clause challenge to the Eagle Act.³⁷¹

Viewing the Indian tribes exception as primarily a religious accommodation, on the other hand, would introduce a problem. Congress may accommodate particular religious needs without running afoul of the Constitution. The Supreme Court “has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause.”³⁷² Preferences that are intended to “alleviate significant governmental interference” with the exercise of religion are constitutionally permissible.³⁷³ As Michael McConnell explained, a “legitimate accommodation . . . merely removes obstacles to the exercise of a religious conviction adopted for reasons independent of the government’s action.”³⁷⁴ Accommodating religious groups instead of individuals is also permissible.³⁷⁵ Indeed, in a seminal religious accommodation case, the Supreme Court upheld Title VII’s provision exempting religious organizations from the prohibition against employment discrimination based on religion.³⁷⁶ The Court

371. *Rupert v. Dir.*, U.S. Fish and Wildlife Serv., 957 F.2d 32, 34–35 (1st Cir. 1992); *see also* *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216–17 (5th Cir. 1991) (holding state law that prohibited peyote use except by members of recognized tribes did not violate the Establishment Clause).

372. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (quoting *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144–45 (1987)).

373. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

374. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992); *see also* Zoe Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133 (2011) (applying a public choice model to conclude that statutory religious accommodations are animated by legislators’ self-interests and hence favor majoritarian interests). *But see* Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1016 (2001) (arguing that McConnell’s view is erroneous because “the Establishment Clause . . . prohibit[s] the government from preferring religion to nonreligion for two basic reasons: to protect against government preference among religions and to recognize the importance of both religious and nonreligious values in a modern, pluralistic society”).

375. *Cf. Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 706 (2012) (“[T]he text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations” and “protects a religious group’s right to shape its own faith and mission.”); *id.* at 700, 705, 710 (holding the judicially created “ministerial exception,” which “precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers,” barred the Americans with Disabilities Act claim of a “called” teacher at a religious school). *But cf. Leslie Griffin, The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 981 (2013) (criticizing *Hosanna-Tabor* for, inter alia, favoring religious institutions over individuals).

376. *Amos*, 483 U.S. at 330.

held that “it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”³⁷⁷

The problem with viewing the Indian tribes exception as primarily a religious accommodation, however, is that the government cannot favor one religion over others.³⁷⁸ If the Indian tribes exception is primarily a religious accommodation, then the government must extend that accommodation to similarly situated religious groups,³⁷⁹ including the one million practitioners of Afro-Caribbean religions that require eagles.³⁸⁰ Opening up the Indian tribes exception to people who are not members of federally recognized Indian tribes would increase wait times at the Repository.³⁸¹ As Judge Kozinski explained, “If the government extended eligibility, every permit issued to a nonmember would be one fewer issued to a member. This is the inescapable result of a demand that exceeds a fixed supply.”³⁸² The Repository already cannot meet the current demand.³⁸³ Increasing the number of eligible applicants would thus vitiate the government’s efforts to satisfy the needs of recognized tribes.³⁸⁴ Increased delays would be particularly problematic for theocratic tribes, like the Zuni, in which “all aspects of tribal life—including governance, social structures, justice systems, and culture—are infused with religious meaning.”³⁸⁵

Issuing permits to tribes instead of individual tribal members would make what currently appears to be a religious exception for certain individuals look more like the primarily political

377. *Id.* at 335.

378. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also* *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding statutory test identical to RFRA must be “administered neutrally among different faiths”).

379. *See* *Bd. of Educ. of Kiryas Joel Vill. School Dist. v. Grumet*, 512 U.S. 687, 706–07 (1994) (holding a statute creating a special school district using the lines for a village enclave of a particular form of Judaism violated the Establishment Clause); *see also* *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533–36 (1993) (holding an animal cruelty ordinance that accommodated kosher slaughter, but not Santerian sacrifice, violated the Free Exercise Clause).

380. *See supra* Part II.A.

381. *See* *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (*per curiam*); *United States v. Wilgus*, 638 F.3d 1274, 1293 (10th Cir. 2011).

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

383. Frosch, *supra* note 157 (explaining that “with 4,500 requests each year, the repository simply does not have enough eagles”).

384. *Gibson*, 223 F.3d at 1258; *Wilgus*, 638 F.3d at 1293 & n.9.

385. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 845 (2007).

accommodation it was originally intended to be. It would no longer pit individual religious practitioners against other individual religious practitioners. Rather, it would pit individual religious practitioners against sovereign nations with whom the United States has a government-to-government relationship, thus alleviating, though certainly not abrogating, the inequitable tension in the Eagle Act case law.

2. Alleviating Burdens

Granting permits to Indian tribes would alleviate some of the burden the permit process currently imposes on tribal religious practitioners. Implementing the first phase of my proposal would necessarily require tribes to develop administrative structures to distribute their share of the feathers or take permits, as the Hopi have already done. While this might not be an easy task for some tribes, it would give tribes an opportunity to tailor their regulatory requirements to their members' needs and sensitivities, making the program "a closer cultural match."³⁸⁶ For example, tribes might opt not to operate on a first-come, first-served basis, but instead to prioritize certain religious needs. Tribal members might still have to fill out application forms and wait for their requests to be filled, but at least they would not be making a personal, religious request to a federal agency. Rather, they would be making requests to people who share their culture. Hopefully, administering eagle permits at the tribal level will enhance tribal members' sense of ownership in the program and result in a more effective regulatory program.³⁸⁷

Turning the distribution of the eagle resource over to tribes would also remove the discomfort of empowering a federal agency to assess the bona fides of applicants' religious beliefs. Tribal governments would be free to evaluate applicants' sincerity and the validity of their religious tenets, so long as their organic laws do not forbid it.³⁸⁸

386. Rae, *supra* note 341, at 18; *see also* Gover, *supra* note 333, at 320 ("The diversity of tribal circumstances requires a policy that is sufficiently flexible to meet the diverse conditions and capabilities of the Tribes."); *id.* at 359–60 (discussing the necessity of a customized trust administration).

387. Rae, *supra* note 341, at 19 (discussing empirical studies demonstrating that "self-administered programs are more likely to succeed in generating the desired outcomes of the program").

388. *See generally* Carpenter, *Religious Freedoms*, *supra* note 128 (arguing that tribes can protect individual religious freedoms in ways that reflect tribal norms and enhance sovereignty).

The second phase of my proposal would provide an opportunity to further alleviate the regulatory scheme's burdens on tribes. For example, the tribes acting collectively could decide to allow tribal members to keep eagles they find instead of requiring them to turn those birds in to the Repository. They might decide to take over the operation of the Repository or replace the Repository with some other distributional mechanism.

3. Enhancing Regulatory Efficiency and Judicial Uniformity

The long-term benefits of this regulatory change would justify the short-term burden on tribes and the FWS. The burden of implementing the Eagle Act permit system should be alleviated by cutting the number of potential applicants from over two million members of federally recognized tribes to only 566 tribal governments. Although the FWS has not received many requests for eagle take permits, it should be easier to protect the species' viability if take permits are aggregated at the tribal level, rather than issued to individuals.

Moreover, tribes that wish to participate in the eagle permitting system could be encouraged or required to develop tribal game codes, if they do not already exist. Those tribal codes could enhance federal law enforcement by making Lacey Act charges a viable alternative to the Eagle Act and the Migratory Bird Treaty Act.³⁸⁹ Tribal law-enforcement capacity might grow, too, and provide even more assistance to federal enforcement officers than tribal authorities currently do. Ultimately, tribes might operate the Repository and take on the task of determining among themselves how to allocate the eagle resource with federal oversight to ensure species health. In short, enhanced tribal wildlife governance structures will supplement federal administration and could free up federal resources for other important wildlife priorities.

Finally, directing the regulatory structure to tribes instead of individual tribal members could bring more uniformity to the case law. Refocusing the Indian tribes exception as a political

Indian tribes are not subject to the U.S. Constitution. *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959). Also, the Indian Civil Rights Act does not contain an Establishment Clause analog. *See* 25 U.S.C. § 1302(1) (2010).

389. *See* 16 U.S.C. § 3372 (2013).

accommodation would highlight its role in fulfilling the government's trust and treaty obligations toward recognized tribes, making it more likely that the courts would recognize that as a compelling interest underlying the exception. This regulatory change also might alleviate some of the concern with inequity that may have inspired the Tenth Circuit in *Hardman* to impose a daunting evidentiary burden on the government. Instead, the courts of appeals, seeing eagles as a tribal property interest, might be more inclined toward the Ninth Circuit's recognition in *Antoine* that RFRA does not authorize shifting burdens from one person onto others.³⁹⁰ Similarly, this change would further distance the Eagle Act from *O Centro*'s concern about singling out particular religious claimants for special treatment.³⁹¹

C. Implementation

Designing a new regulatory system would require the knowledge, experience, and expertise of the FWS's biologists and law enforcement officers, as well as tribal government representatives. No doubt, the logistics would be challenging. However, the system is not sustainable in the long-term as it is currently structured. The tensions the Eagle Act creates, as currently administered, threaten to pull the entire scheme apart. Without a viable regulatory system that protects eagles and accommodates tribal religion, neither will survive.

Some questions will need to be answered in developing a new regulatory system.³⁹² At the first stage of my proposal, amending the Eagle Act regulations to provide for issuing permits to tribes instead of individual tribal members, the stakeholders will have to determine how to allocate the eagle resource initially among federally recognized tribes and what to do with people who already are on the National Eagle Repository's waiting list.³⁹³ One option is to allocate

390. See *supra* Part III.C.

391. See *supra* Part III.B.

392. The FWS could consider using a negotiated rulemaking process. See 5 U.S.C. §§ 561–70 (2013); see generally Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987 (2008) (discussing the process and benefits of negotiated rulemaking).

393. To the extent that individuals on the waiting list have a vested interest in receiving feathers from the Repository that tribal governments may not compromise, the FWS may need to honor those pending requests to avoid unlawful retroactivity. See *Bowen v. Georgetown Univ.*

permits initially based on historic demand. For what are currently known as possession permits—that is, applications to receive eagles and eagle parts from the Repository—the number of applications members of each tribe have filed in the past, including applications that are already pending at the Repository, could be used to determine the initial allocation of tribal permits, and the burden could be placed on the tribes to justify a different allocation. As explained above,³⁹⁴ Carpenter, Katyal, and Riley’s theory of indigenous cultural property posits that “some cultural resources are so sacred and intimately connected to a people’s collective identity and experience that they deserve special consideration as a form of cultural property.”³⁹⁵ The new regulatory scheme could be built on the presumption that, if eagles are integral to a particular tribe’s identity, members of that tribe will have applied for parts from the Repository in the past, as the Repository is the only legal source for new eagles and feathers. There may be many reasons, however, why a particular tribe’s members did not apply to the Repository; perhaps the long wait or the quality of the feathers would not have satisfied those individuals’ religious needs. Thus, allocating possession permits to tribes is not so simple as counting past applications.

The allocation of permits to take live eagles would be even more complex because historic demand cannot be determined based solely on federal permit applications. Before the Tenth Circuit decided *United States v. Friday* in 2008, the FWS had issued only a handful of permits to take golden eagles because the availability of take permits was not widely known.³⁹⁶ Nonetheless, tribes whose members have applied for take permits in the past could be given priority in the initial allocation of tribal take permits because their past applications demonstrate that taking live eagles is integral to the tribe’s identity. An added complication for eagle take permits is the geographic element. Unlike dead eagles and their parts, which can be distributed nationwide, populations of live eagles that are healthy enough to withstand permitted takes are concentrated in certain areas. For example, when the FWS issued a take permit to the

Hosp., 488 U.S. 204 (1988); *Nat’l Mining Assoc. v. Dept. of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002).

394. See text accompanying notes 266-274.

395. Carpenter et al., *supra* note 29, at 1028.

396. *United States v. Friday*, 525 F.3d 938, 945 (10th Cir. 2008) (“The permit process is used infrequently, and is not widely known.”).

Chairman of the Northern Arapaho Tribe's Business Council, it specified that the eagles could not be taken on the Tribe's reservation.³⁹⁷

Issuing Eagle Act permits to tribes will also necessitate identifying which tribal entity will apply for the permit and distribute the tribe's share of eagles among its members. The tribes should be given an adequate amount of time and support, both technical and financial, to develop the required administrative structures, but the tribes themselves should decide how to accomplish these tasks. Giving the tribes that responsibility, however, raises another significant question that the stakeholders designing the new regulatory system will have to answer: What happens when a particular tribe is not up to the task? Should the Department of the Interior administer the Eagle Act permit program for it?

At the second stage of my proposal, when a sufficient number of tribes have developed the governance structures necessary to administer the permit system, the tribes acting collectively could be empowered to, among other things, define who is entitled to take and possess eagles and for what purposes, how they may be obtained, transferred, and disposed, and how the initial allocation of permits should be changed. In the language of Carpenter, Katyal, and Riley's cultural property theory, the tribes would be enabled to define the parameters of the stewardship regime for eagles.³⁹⁸ Similarly, Kristen Johnson's and Sheila Foster's community governance models suggest that the tribes would create and manage an institution for administering the Indian tribes exception, overseen by the FWS.³⁹⁹

397. See *Judge Rules Against Tribe in Bald Eagle Case*, EENEWS.NET, (Nov. 7, 2012), <http://www.eenews.net/Greenwire/print/2012/11/07/18>; Ben Neary, *Northern Arapaho Tribe: Bald Eagle Permit a Victory for Tradition*, HUFFINGTON POST, (Mar. 17, 2012, 10:20 AM), http://www.huffingtonpost.com/2012/03/17/northern-arapaho-tribe-bald-eagle_n_1355335.html; *Northern Arapaho Tribe Labels Federal Eagle Permit a Sham*, INDIANZ.COM, (Apr. 5, 2012), <http://64.38.12.138/News/2012/005200.asp>.

398. See Carpenter et al., *supra* note 29, at 1086.

399. See Johnson, *supra* note 30, at 244; Foster, *supra* note 30, at 88–91. Elinor Ostrom concluded that self-governing common-pool resource management systems that have endured over time share certain characteristics: they have “clearly defined boundaries”; the rules governing appropriation and provision of the resource are tailored to local conditions; resource users who are affected by the rules can participate in modifying them; the system includes effective monitoring, graduated sanctions, and conflict-resolution mechanisms; the government recognizes the right of resource users to establish the rules for the resource; and all of these features “are organized in multiple layers of nested enterprises.” OSTROM, *supra* note 30, at 90–102. The stakeholders should pay attention to these factors in fleshing out the details of my proposal.

As Indian-law scholars urge, this stage of my proposal would go part of the way toward recognizing tribes' inherent sovereign right to manage a resource that is central to the cultural identity of many tribes.⁴⁰⁰ Given the great variation in tribal religious practices, the tribes acting collectively might decide to leave many of these decisions to individual tribes or to the FWS.⁴⁰¹ Ultimately, however, that is a decision the tribes themselves should make.

V. CONCLUSION

The imbalance between the supply and the religious demand for eagles is growing and may soon reach a breaking point. The system must change if eagles and tribal religion are to survive. This Article proposes to pick some "low-hanging fruit" by amending the FWS regulations to issue Eagle Act take and possession permits to federally recognized Indian tribes instead of to individual tribal members, and eventually to go further and enable the tribes themselves to define the contours of the Indian tribes exception. These changes will alleviate much of the tension in the current regulatory scheme and yield benefits for tribes, for the federal government, and for eagles. It is my sincere hope that this Article will spur further discussion and lead to lasting, positive change.

400. *See, e.g.*, Washburn, *supra* note 31, at 782.

401. *Cf.* Gover, *supra* note 333, at 333 (emphasizing that, given tribal wariness of efforts to reduce federal responsibility for trust resources, "[t]he challenge for current policy makers is to find a formula that leaves the tribes feeling secure in the federal-tribal relationship even as the federal role is reduced and tribal self-governance strengthened").

