Native Americans and the Eagle Feather Law

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Abstract

The Eagle is a sacred bird for the native Americans and has been integral to their customs. It is regulated by the Federal authorities and cannot be procured by ordinary citizens. There are special permits for native Americans under the FR Code Title 50 Part II, which allows them access to eagle feathers for ceremonial use. They cannot commercially use and their export is forbidden to them. This has caused severe restriction to the Indian people who work in cottage industries and rely on hand crafted goods for merchandise. They call this law as paper genocide that reinforces racial stereotyping. Their status is governed by the Commerce clause in the US constitution which makes them dependent on the government which controls their access to the foreign markets. It also means that the Congress has a plenary power over them which compromises their sovereign status. On account of this power the US government has entered into Multi lateral treaty (MBTA), however, the eagle is not a migratory bird and still it is outside the native nations jurisdiction to challenge this abuse of their status as independent nations. However, the eagle is no longer a protected species from July 2007, and the native people want better access to the eagle feather under the Religious Freedom and Restoration Act which established a compelling interest test. The freedom of religion and equal protection clauses should be upheld and lead to the revocation of the MBTA and the Commerce clause regime that applies a subjective test and denies to the native people their ability to trade as they please with artefacts that are sacred to their beliefs.

Key words:

Eagle feather law, Migratory Birds Treaty, Commerce clause, Free Exercise of Religion,

In imposing a law on the commercial use of eagle feathers the federal government is abusing the rights of its indigenous peoples.

The US authorities have on 4th July 2007, removed the golden eagle from its list of protected species. It impacts upon the indigenous Americans who regard the soaring bird as a religious symbol. They relate to it in their Creation stories which pay reverence to the Mother Earth. This can be found in their images of consummate equestrianism, apparels of skins plucked from carnivorous beasts, and villages of triangular tents spaced out in an octagonal circle and resting under an open sky. The customs that revolve around them have been circumscribed by the Federal authorities, who have proscribed the eagle parts as merchandise, and regulated trade with a commerce clause that goes back to the inception of the US constitution, and reinforces the subordinate status of the native peoples, who exist as nominally independent nations.
This is a wellspring of an ethos that flows from the concept that habitation is best lived in proximity to nature and the eagle is the message bearer to the Father Sky. While the indigenous Americans are not the only ones for whom the eagle is symbolic, the regalia worn by ‘red’ Indian notables in lithographs and the grainy photographs of the 19th century all show that they have used the wingspan as a mark of identity. Their distinctive capes often extending to the floor are braided with feathers endowing the wearers with a hallmark of aura and dignity.

The gift of a feather is a right of passage marking an individual’s entry into the tribe’s echelons that also determines the hierarchy upon which Indian society has historically been based. The wearing of feathers by native people was not just limited to the mid-Western landscape, but was also to be found in the Eastern Woodlands, where the eagle and other birds of prey existed such as falcons, gulls and herons. The ornaments made from their feathers have been part of the Indian cottage industries paraphernalia, such as dance sticks, society staffs and dream catchers. These make up the ceremonies that revolve around the native American lifestyle of sacrificial pageants.

The US government has been keen to control the access to eagles for native Americans since the Indian wars ended in the later part of the 19th century. The Federal authorities have viewed the native peoples customary observances as a mark of Indian obstructionism. This hostility is partly due to the fact that when the plains culture was destroyed in an exercise of gunboat diplomacy, the tribes who lived on the open prairies were forced into learning cattle breeding and agricultural skills. It was part of an exercise towards integrating them into the American mainstream culture. The native people were confined on reservations, which were agencies of the US government, under the wardship and control of the Bureau of Indian Affairs, based in Washington. This Federal body came into existence in 1824, as a branch of the War department with powers over Indian tribes and Alaskans, before being made a part of the Department of the Interior in 1849, with the same jurisdictional basis.

The BIA oversaw the indigenous people’s forced assimilation by government sponsored missionaries and charitable organisations that was carried through by means of indoctrinating reservation children. It became known as the Boarding house movement, a process of expunging the native people of their inheritance and imposition of education that was alien to their birthright. This necessitated the rejection of Indian names, religion and cultural symbols. In the forefront of this programme of re-acculturation was the Thomas Carlyle school in Pennsylvania, whose founder the Scottish born historian penned the motto: “Kill the Indian and Save the Man”.

One of its pupils was Luther Standing Bear, a Sioux who was removed from his natural parents at the age of 11 and taken to this school. In his later life Standing Bear, who spent 16 years there, became an eminent figure in his tribe taking over the ceremonial title of the 5th member of the Oglala Circle. He wrote an account of this period of brainwashing in his book the Land of the Spotted Eagle:

2 Luther Standing Bear, 1931, Bison Books, Nebraska University Press

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At last at Carlisle the transforming process, the “civilising” process began. It began with clothes. Never, so matter what our philosophy or spiritual qualit, could we be civilised while wearing the moccasin and blanket----- Our accustomed dress was taken and replaced with clothing that felt cumbersome and awkward. Against trousers and handkerchiefs we had a distinct feeling --- they were unsanitary and the trousers kept us from breathing well. High collars, stiff bottomed shirts, and suspenders fully three inches width were uncomfortable, while leather boots caused actual suffering.

We longed to go barefoot, but were told that the dew on the grass would give us colds. That was a new warning for us --- for at time colds catarr, bronchitis, and la grippe were unknown. But we were soon to know them. Then red flannel undergarments, were given to us in winter time , and for me at least, discomfort grew into actual torture----- My niece once asked me what I disliked most during first bewildering days , and I said “ red flannel “ ----- I still remember those horrid sticky garments which we had to wear next to the skin, and I still squirm when I think of them. Of course our hair was cut ----- and in some mysterious way long hair stood in the path of our development. For all the grumbling among the bigger boys, we soon had our heads shaven. How strange I felt involuntarily , time and again, my hands went to my head, and that at night it was a long time before I went to sleep. If we did not learn much at first, it will not be wondered at, I think. Everything was queer, and it took a few months to get adjusted to the new surroundings.

Almost immediately our names were changed to those in common use in the English language. Instead of translating our names into English and calling Zinkcaziwin, Yellow Bird, and Wambli k’ leska, Spotted Eagle, which in itself would have been educational , we were just John, Henry or Maggie, as the case might be. I was told to take a pointer and select a name for myself from the list written on the blackboard, I did, and since one was just as good as another, and as I could not distinguish any difference in them, I placed the pointer on the name Luther---

But the change in the clothing, housing, food, and confinement combined with lonesomeness was too much, and in three years nearly one half of the children from the Plains were dead and through with all earthly schools . In the graveyard at Carlisle most of the graves are those of little ones.

It is no wonder that the use of eagle feather became dormant on the reservations where the seasonal dances were banned at the turn of the 19th century, with the result that Indian performers could not show their skills with aplomb. This was in tandem with the near extinction of the buffalo, upon which the Indians depended for their staple foods, that was nearly extinct from the unabated prize hunting on the plains. As a consequence of this the American government decided on measures to conserve the dwindling wildlife, and it came with the passage of the Lacey Act of 1900, that was initiated by the Iowa Republican John F Lacy. The Act empowered the Secretary of the Interior to adopt methods to restore species and to regulate the introduction of birds and animals in areas where they had not existed. The supervision given to the Department of the Interior included the duty to preserve, distribute, introduce and recover wildlife including the buffalo and the eagle, which were both of household importance to the Indians.
This law also prohibited the transportation of illegally captured or prohibited wildlife across state lines. It was the first federal law protecting wildlife, and was revised in 1980 by an Act of the same name. The penalties under this Act are both criminal and civil and enforceable depending upon the nature and type of the violation. A civil penalty can be as much as $10,000 if there is evidence that the violator should have known that the fish, wildlife, or plants were taken, possessed, transported, or sold in violation of any underlying law. The criminal penalties for a felony offence are a maximum $250,000 fine per individual and $500,000 per organization, and/or up to 5 years imprisonment for each violation of the Act. A misdemeanor offence carried a maximum $100,000 fine per individual and $200,000 per organization, and/or up to 1 year in prison.

The draconian nature of the penalties included the forfeiture of any vehicles, aircraft, vessels, or other equipment used during the commission of the crime involving felony convictions. Any fish, wildlife, or plants involved in violations of the Act are also subject to be returned. This Act makes it unlawful to trade in wildlife taken or possessed in violation of federal, state or tribal law, which effectively gives the Federal government jurisdiction over the Indians who live as nominally sovereign nations. In terms of its effect on native Americans there are restrictions on persons, who for money or other consideration offer or provide guiding, outfitting or other services, or apply for a hunting permit for the illegal taking, acquiring, receiving, transporting or possessing wildlife, which is deemed to be a sale in violation of the law.

In taking further steps to conserve wildlife the US government concluded a multilateral treaty with the USSR, UK, Canada, Mexico and Japan in 1916, for the protection of migratory birds that was ratified as a Convention. It was passed into domestic law as the Migratory Birds Treaty of 1918. The US government also renamed the Convention as the Treaty for the Protection of Migratory Birds and Birds in Danger of Extinction. It became part of Federal law in 1974 and its definition was stated as follows:

"An Act to give effect to the conventions between the U.S. and other nations for the protection of migratory birds, birds in danger of extinction, game mammals, and their environment."

There were powers granted to the Federal government by section 3(h) of the Fish and Wildlife Improvement Act of 1978 (P.L. 95-616), amending the MBTA to authorize forfeiture to the U.S. of birds and their parts illegally taken, for disposal by the Secretary of the Interior as he deems appropriate. These amendments also allowed the department the power to issue regulations to permit Alaskan natives to cull migratory birds for their subsistence needs during established seasons, which the original treaty had bestowed them. He was now empowered to decide the term of the established seasons which set out the duration for the preservation and maintenance of migratory bird stocks.

There were specific amendments that came into effect in 1989 that effected the culling of eagles under the Chapter 7, Subchapter II. This makes it "unlawful to pursue, hunt, take, capture, kill or sell birds listed therein ("migratory birds") offer to purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird".
The treaty does not discriminate between diseased or live birds and also grants full protection to any feathers, eggs and nests. The Secretary of the Interior can determine, periodically, when, consistent with the Conventions, "hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any . . . bird, or any part, nest or egg" could be undertaken and to adopt regulations for this purpose. These determinations are to be made based on "due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times of migratory flight".


The MBTA Chapter 713 does allow the indigenous Alaskans the seasonal right to procure migratory birds for their essential needs to preserve and maintain stocks. However, Chapter 704 gives the Secretary for the Interior the right to determine as to when and how the migratory birds may be taken, killed or possessed. In Chapter 708, the state, territorial laws and regulations are set out as to transshipment between states and the restrictions that apply to them.

In 1998 the Migratory Bird Treaty Reform Act amended the US law to make it unlawful to take migratory game birds, by the aid of bait if the person knows or reasonably should know that the area is baited. This provision eliminates the "strict liability" standard that was used to enforce Federal baiting regulations and replaces it with a "know or should have known" standard. These amendments also make it unlawful to place or direct the placement of bait on, or adjacent to an area for the purpose of taking or attempting to take migratory game birds, and makes these violations punishable under the United States Code 18, (with fines up to $100,000 for individuals and $200,000 for organisations), imprisonment for not more than 1 year, or both.

The new amendments require the Secretary of Interior to submit a report to the Senate Committee on Environment and Public Works and the House Committee on Resources, analysing the effect of these amendments and the practice of baiting on migratory bird conservation and law enforcement. This new layer of bureaucracy makes it more difficult for native Americans to acquire eagles feathers when it was brought into the context of environmental protection.

The native Americans have traced this restriction on the eagle as flowing from a commerce clause, written into the US Constitution which binds them into the trading restrictions that effect their ability to be equal parities in global transactions. The clause is the main obstacle to international trade for Indians who reside on the reservations and the MBTA has precluded utilising the eagle feather as a product. In a recent editorial
report in the Indian Country Today dated 30 August ’07 this matter was highlighted in an article entitled the ‘Commerce Clause and Indian entrepreneurship’.

It states:

Have you ever wondered why the main reference to American Indians in the U.S. Constitution is in the commerce clause? In Article I, Section 8, the Constitution states that Congress shall have the power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." By the time the Constitution was written and adopted in the late 1780s, some East Coast Indian tribes had been trading with European colonists for at least two centuries. The Indians provided skins and furs to European traders, who in return traded guns, traps, metal goods, cloth, food, beads, alcohol and other goods. The fur trade was the primary economic relation of American Indians to the colonies and European countries. Deer skins were made into leather goods and beaver furs made into fashionable hats.

American Indians were incorporated into the emerging global markets through the fur trade industry, which was an early version of the contemporary global market. Indians provided hunting skills, tanning production and knowledge, and often transportation to trade posts. While some Indians operated as middlemen for trade with tribes deeper into the interior, most were family or individual hunters and traders. The tribes neither controlled the trade nor profited excessively from it. The trade for European manufactured goods created economic dependencies for tribal economies as they did not produce metal goods, rifles, ammunition and other goods. These dependencies required that tribes make commercial and military alliances, treaties, with one or another of the colonies. During wars, for example during the War of Independence, the United States sought Indian military allies through establishing trade relations. The commerce clause was born from the experience and the colonial rivalries of the late 1700s.

The argument is based upon the fact that the jurisdictional basis of the commerce clause is the US Congress’s ability to exercise legislative control over the tribes and to regulate their penal and reservation policy. The eagle feather law is one such instrument of a statutory regime that has its basis the multi lateral treaty, over which the Indians were never consulted and that denies them their own economic independence. The commerce clause has been looked at by the Courts against the background of the environmental and species protection offered for its continued existence.

However, the most significant statute from the point of view of the native Americans in relation to environmental protection is the one that declared the great eagle as a protected species. The US government has been conscious to preserve the bald eagle as its own national emblem, by transplanting the image of the bird on the Great Seal of the United States, as well as official seals at the White House, Pentagon and State Department, and on a marble sculpture at the Federal Reserve. It is a mascot for the Washington Nationals baseball team and is inscribed on U.S. coins and paper money. The eagle was declared as a protected species by the Bald Eagle Protection Act 1940, which made it illegal to “take; possess; sale; purchase; barter; offer to sell, purchase, or barter; transport, export

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3 Indian Country Today, 31st August 2007
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or import, of any bald or golden eagle, alive or dead, including any part, nest, or egg, unless allowed by permit”.

These provisions were later extended to include the Golden Eagle in 1962, and which made it illegal to kill, possess, sell, purchase, barter, transport, export or import at any time or in any manner a bald or golden eagle, alive or dead; or any part, nest or egg of these raptors. Each separate violation carried up to $5,000 fine and one year in prison. The US Wildlife officers were given powers under the Act to do a search without a warrant and they could seize or arrest anyone whom they believe may be in violation of the law. This was supplemented by the passage of the Endangered Species Act 1973, that applied to 1,200 species including the bald/golden eagle.

In 1962, recognizing the importance of eagle feathers to Native American religions, Congress amended the Bald and Golden Eagle Protection Act to provide an exception for Native American religious purposes to receive eagle feathers, along with those needed by educational establishments for research purposes. This has been incorporated in the framework of the US Code of Federal Regulations Title 50, Part 22, which is known as the ‘Eagle Feather law’. This sets out the following:

“We (US Wildlife Service) will issue a permit only to members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs listed under 25 U.S.C. 479a–1 engaged in religious activities who satisfy all the issuance criteria of this section. We may, under the provisions of this section, issue a permit authorizing the taking, possession, and transportation within the United States, or transportation into or out of the United States of lawfully acquired bald eagles or golden eagles, or their parts, nests, or eggs for Indian religious use. We will not issue a permit under this section that authorizes the transportation into or out of the United States of any live bald or golden eagles, or any live eggs of these birds.

The conditions under which a permit will be issued are stringent and want disclosure under Sec 13.12(a) of information as follows:

(1) Species and number of eagles or feathers proposed to be taken, or acquired by gift or inheritance.

(2) State and local area where the taking is proposed to be done, or from whom acquired.

(3) Name of tribe with which applicant is associated.

(4) Name of tribal religious ceremony (ies) for which required.

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

This governs eagle feather distribution and states that parts of bald or golden eagles and other migratory birds may “not be sold, purchased, bartered, or traded”. They may, however, be handed down “to family members, from generation to generation, or from
one native American to another for religious purposes”, but feathers are prohibited from being conveyed to the non-Native peoples as a gift. This is an indignity to the tribes who have shared their spiritual practices with non-Native people, and have often accommodated them into indigenous familial and spiritual frameworks since the early 1500s, such historical figures as the legendary pioneer of the mid eighteenth century Daniel Boone, Unionist General Sam Houston, the governor of Tennessee, who married into the Cherokee tribe, before moving into Texas, and holding the same office (the only American to be a governor of 2 states). In recent times actor Kevin Costner was given associate membership of the Lakotas, after he filmed a realistic western ‘Dances with Wolves’ on location and learned the basics of the Sioux language.

This turns the eagle feather into a commodity, and the native people view its acquisition as based around a processing factory. The caveats involve them to go through the red tape of the Interior Department with a stamp of approval from the Federal Wildlife Service Regional Migratory Bird Permit Office. It has sole authority to capture eagles, and dispense their feathers to native Americans under the exception granted to them by the CFR.

It was considered by the Supreme Court in US v Bramble 1996, where the defendant Bramble appealed a series of felony and misdemeanor convictions, including possession of eagle feathers and migratory birds. In the indictment against him, Bramble, a non-Indian, had offered to sell sea otter pelts to undercover federal agents. He also showed the agents parts of a bald eagle, golden eagle, red-tailed hawk, and great horned owl. His pelts turned out to be river otter pelts, which are legal to sell, but he was charged and convicted of a felony for possession of eagle feathers as well as a misdemeanour for possession of migratory birds. He was also charged for bearing an illegal firearm and marijuana.

The appeal relied upon the judgment in US v Lopez 1995 where the Supreme Court held that Congress did not have the authority under the commerce clause to define broad classes of activities, including "activities having a substantial relation to interstate commerce." The Court found the proper test was whether the activity "substantially affects" interstate commerce. Bramble challenged the constitutionality of each statute under which he was convicted, arguing that they went beyond the power of Congress to regulate interstate commerce. It also concerned the validity of the federal wildlife protection law as an exercise of the US Congress’s commerce clause authority, whereas the 9th Circuit Court had upheld the EPA 1962 as within the commerce clause power.

The Supreme Court concluded that extinction of the eagle would have a substantial effect on interstate commerce, and accepted the validity of the EPA as justifiable. It also upheld the MBTA, under the Necessary and Proper Clauses and treaty making power of the Constitution, and the Commerce Clause, in part due to a 1920 Supreme Court ruling, Missouri v. Holland. The Ninth Circuit had found that the district court misspoke when it stated that the Supreme Court upheld the Migratory Bird Treaty Act under the Commerce Clause. It pointed out that the Treaty was validated under the Necessary and Proper Clause of Article I, Section 8 of the U.S. Constitution, as well as the Article II treaty-making power, and that The Ninth Circuit had found it unnecessary to consider whether

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4 103 F. 3d 1475
5 514 US 549
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the MBTA was a valid exercise of the commerce clause, but had considered whether the EPA was within the commerce clause power granted in the Constitution. Noting that the Supreme Court as well as the Ninth Circuit have upheld the Act under the commerce clause prior to the *Lopez* ruling, the Court reaffirmed the constitutionality of the Act.

The Court also found that the extinction of the eagle will make several types of commercial activities impossible, rejecting Bramble’s appeal on the ground that the sale of eagle parts would not have a bearing on the interstate commerce. It ruled that there was a “substantial effect” in activities such as future commerce in eagles or their parts, interstate travel for viewing or studying eagles, and trade in products derived from eagles or from study of their genetic material. The judgment also pointed out that the only two cases to confront post-*Lopez* challenges to federal wildlife protection laws reached the same conclusion. It reasoned that the protection of an endangered species may lead to a significant enough regeneration of the species in the future and also help to activate interstate commerce.

However, on its 214th anniversary, the US government removed the tag of endangered species on the bald/ golden eagle. The Secretary for the Interior Department Dirk Kempthorne, announced the lifting of the ban on Independence Day by stating: "From this point forward, we will work to ensure that the eagle never again needs the protection of the Endangered Species Act". The government supported its case by offering evidence from biologists that documented nearly 10,000 nesting pairs of bald eagles, including at least one pair in each of the 48 contiguous states. This compares to only 417 such pairs in 1963, when the bird was on the verge of disappearing altogether in the country, except for Alaska, and in Hawaii where they have never existed. While no longer declared endangered or threatened, the bald eagle will continue to be protected by the EPA 1940 that remains in force making it still illegal to kill the bird — as well as state statutes, protecting it from being hunted.

As a result of this the Interior department is also preparing guidelines for protecting the bird's nesting habitat under the 1940 law, and developing a permitting process that landowners will have to use if eagles are found on property they want to develop. The FWS has also indicated that the removal of the bald eagle from the list of threatened species may only impact the eagle's habitat or environment, and American Indians who wish to possess the feathers and other eagle parts are required to go through the same routine of application for permits to receive the feather and parts from the Eagle Repository in Colorado. This has been accompanied by the opening of a new National Eagle Centre, on May 1, which is coordinating its work with the Prairie Island Dakota Community in Minnesota.

The eagle is the most prized bird for nearly all the Indians tribes who have revered it as a messenger of the people to the Great Spirit Chief, that transmutes itself from a bird into a medicine *pipe* bearer. The Lakotas have used an eagle bone whistle during their annual Sun dance, which serves as a herald to cleanse themselves of earthly corruptions. The Creek and Cherokee have performed an Eagle Dance, when they wear eagle masks replete with an authentic beak, and the Zuni have historically utilized an eagle fetish to help gain a personal insight, and to increase their hunting prowess. To this end they have had their own eagle sanctuary since time immemorial, where they would collect the eaglets and then raise them in their earthen dwellings or ‘pueblos’, where the Spanish first found
them in the 16th century. They have lived as a settled agricultural community along the parameters of New Mexico, an exception among the generally nomadic native Americans.

This is reinforcing calls that the law is discriminatory, because the CFR 50–22 stipulates the native people have to prove membership of a tribe, which means that only enrolled members who are actually registered as native American can apply for an eagle feather. Those enrolled in federally recognized tribes may legally possess eagle feathers and other parts for use in religious ceremonies. However, as the prohibition mandates that these feathers cannot be sold, bartered or given away to anyone other than another enrolled member of a federally recognized tribe. There is also a “pre-act” clause in the law that allows for the possession of ‘bald eagle feathers acquired before June 8, 1940 and golden eagles’ before October 24, 1962, but this clause also does not allow for the selling, trading or bartering of these birds, or their parts.

The patchwork of enrolments rules, which determine who is an Indian, have eliminated many tribes and ruled out potential applicants. Under the Indian Enrolment Allotment Act of 1887, all native American tribes were enrolled at the instigation of Senator Henry L Dawes, who was a great enthusiast of uniformity and forced assimilation. He advocated native land being opened to white settlement by means of an allotment policy, which gave individual tribal members shares upon land that had previously been held in common by the tribe. As there were not many Indians, in proportion to their estate once the tribe’s land had been divided or parcelled out to individuals, the rest was sold to the white settlers who wanted it for their own cultivation and commercial exploitation.

It called for the implementation of an industrial style documentation programme that required the proofs of native American ancestry, and was to be officially recorded in the original Dawes Rolls (or Final Rolls of Citizens and Freedmen of the Five Civilized Tribes, or the Dawes Commission of Final Rolls), which had to be submitted with evidence of current membership in a federally recognised tribe. The standard terms for enrolment were that membership of a tribe required a minimum blood quantum of ¼ native American ancestry (having at least one grandparent who was full blood native American) even though quantum requirements for tribal membership vary widely. This allows for individuals who are adopted members of federally recognized tribes to obtain eagle feather permits, all applicants need to first be able to prove their ethnicity as Indians.

This has been criticised as a way of racial profiling the native Americans and thereby preventing the accessibility of eagle feathers to those who are not descended from the enrolled tribes of the Dawes legislation. In a recent article entitled New Eagle Feather Law, Da Shane Stokes, the director of the public advocacy group Religious Freedom with Raptors has called the original enrolment process as flawed and stereotypical. He wants a more broad based system that will allow for the exchange of feathers with non native peoples to be enacted.

He writes:

“The problems that the Eagle feather law creates are immeasurable. The law creates a value system for bloodlines that creates and sustains in fighting that is rampantly tearing apart families and cultural ties on many reservations. The law creates racial

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6 New Feather Law, Indian Country Today, 19 February 2007
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barriers for those who wish to adopt non – Natives into Native families. The law also makes it impossible for tribes that remain officially “un recognised” since the 1950s ‘termination era’ to preserve traditional customs. Many people do not know how problematic the eagle feather law really is. To possess eagle feathers, citizens must be able to prove their ethnicity and only individuals of certifiable Indian ancestry enrolled in a federally recognised tribe are authorized to obtain permits. Those caught without permits face imprisonment and fines up to $25,000 for practicing their religion.

But there is a problem. Falsification of state records in what has been termed “paper genocide” has artificially decreased the true number of indigenous people in the US and terminated the “official” existence of many tribes. Consequently, many Native Americans cannot be found on the Dawes Rolls (the major determinant of tribal enrolment and application for an eagle permit) and many tribes are unable to win federal recognition. As a result, many people lose access to eagles and the ability to practice and preserve traditional customs otherwise protected for “recognised” tribes and their members.

While there are many forms this new law might take, it is critical that we replace the race requirement of tribal enrolment. One promising option would be the creation of a Certificate of Religious Participation endorsed by a tribal member or spiritual leader. This certificate would replace the tribal enrolment requirement while ensuring that only approved participants in bona fide Native American customs are eligible to receive eagle permits. This allows for direct oversight of eagle feathers to ensure that feathers and ceremonies will not be abused.

The certificate would also give legal protection to those Native Americans who wish to exercise their right to include others of their choosing in traditional customs involving eagle feathers. The certificate would also ensure that applications for eagles are reviewed on a case-by-case basis - ensuring that applicants are judged on factors that have traditionally governed eagle feather distribution, such as personal merit and individual character - rather than skin colour.

The process of disenfranchising Indian tribes went further in the mid 20th century. This happened with the abolishment of some tribes, reservation catchments, and treaties with the express aim of terminating the Federal government’s supervision over native people and to incorporate the “former” Indians completely into American society. In August 1953 the Congress passed the Concurrent Resolution 108, requiring the Secretary of the Interior to submit legislation that came into effect as the Termination Act, a year later. This was an instrument of Federal policy that led to the disappearing from the books of 109 tribes and bands, with the outcome that over 11,000 native Americans lost over 1.3 million acres of land, by the time the programme ended in the late 1960s.

It was a broad based policy to assimilate native people that led to the ending of the involvement of the Bureau of Indian Affairs (BIA) in the running of tribal governments. The cornerstone of the TA was the enforcement of Public Order 280, that reduced tribal sovereignty by subjecting Indians living on reservations in the Mid West to the state criminal laws. The TA ended Federal responsibility in social services, education, health, and welfare to the Indians and led further to the reservations being taxed for services,
curtailment of tribal self government and relocation of many Indians to the cities to find employment.

In this process of eliminating the old trustee/beneficiary relationship the US government took drastic steps which the writer Valerie Taliman,\(^7\) describes in her article Native Currents : Termination by Bureaucracy. She states:

> In order to free up some 150 million acres of land collectively held by Indian tribes at the turn of the century, the government devised a scheme to allot individual parcels of land to "eligible" Indians - those who possessed "not less than one-half degree of Indian blood." This excluded untold thousands of Native people, many of whom refused to participate in the allotment.

> Using a narrow definition of eligibility and ignoring tribes' inherent rights to determine their own members, the government's late 1890s official count of Indians was estimated to be little more than 237,000. Once each enrolled Indian had received his land allotment, albeit in "trust status," which varied from 40 to 160 acres, the rest of Indian territory - more than 100 million acres - was converted to "surplus lands" available to non-Indian homesteaders, military outposts and private businesses. Pursuant to treaty obligations, the federal government owed permanent monetary commitments to enrolled Indians for a range of services that included food rations, annuity payments, education and health care.

The combined effects of the 1924 Indian Citizenship Act, the 1934 Indian Reorganization Act (IRA), the Termination Act 1954 was to confine the native Americans at less than 1 percent of the U.S. population. The writer Jack D Forbes notes in his article Undercounting Native Americans: The 1980 Census and the Manipulation of Racial Identity in the US, Wicazo Sa Review, University of Minnesota Press,\(^8\) that 1969 Bureau of the Census methods forced mixed-blood indigenous peoples to choose whether they were American Indian, Hispanic or African. This process "erased" some 15 million people of mixed-Native ancestry by 1980 when census figures estimated the Native American population at 1.4 million. The magazine argues that if all persons of native ancestry identified themselves as native, the 1990 census would have showed native inhabitants of the US to be almost 30 million.

The process of annulments is that those not formerly enrolled as Indians are outside the CFR grant of eagle feathers/ parts to native peoples. In US v Lundquist 1996, 932 F Supp 1237\(^9\) a native American from a federally terminated tribe came into possession of eagle feathers and was prosecuted. He argued that restricting the permit process to Native Americans of federally recognized tribes was indeed a substantial burden on the defendant’s religious practices. However, the court decided that the limitations in the permit process were indeed the ‘least restrictive means’ that the government exercised to allocate the eagle feather to native people who were registered. The Court also cited the government’s compelling interests as protecting eagle populations and preserving native American cultures.

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\(^7\) ‘Native American magazine’ Spring – Summer issue 2002

\(^8\) Vol 6 No 1  Spring 1990.

\(^9\) WL 1790584

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This issue resurfaced in a later case of **Gibson v Babbit 2000 223 F. 3d 1256**\(^{10}\), where the defendant Gibson appealed from a conviction that he lied for a permit to obtain eagle parts, because although he is native American, his tribe, the Muscogee (Creek) tribe, is not federally recognized. The majority of the Muscogee were forcibly removed to Indian Territory in Oklahoma in the early 19th century. However, a small number remained east of the Mississippi, but without federal recognition. On March 21, 1973, the Florida branch of the Muscogee was east of the Mississippi, the tribe of which Gibson is a member, filed for recognized status, on December 21, 1981, that recognition was denied, and that remained the case thereafter.

In his appeal to the 11th Circuit Court, Gibson claimed that the permit process denied his religious rights under the First Amendment 1791, which states: “**Congress shall make no laws respecting an establishment or free practice of religion ****” and, further, from the Religious Freedom and Restoration Act (RFRA) 1993. The First Amendment claims were thrown out, and the Court focused on the RFRA which established a "compelling interest" test, as cited in the **Lundquist** case. The judge acknowledged both Gibson’s sincere religious belief and the fact that he was native American and described his use of turkey feathers instead of eagle feathers as "akin to using colored water for sacramental wine". However, the court again found in favour of the government, stating that the authorities had three valid compelling interests to limit the permit process. The three interests were: the enactment of BGEPA, preservation of native American cultures under the federal government's trust responsibility, and treaty obligations made to federally recognized tribes.

This decision must now be seen in the light of **US v Hardman 2002**\(^{11}\), in which there were cases involving three defendants, two non-native Americans, Hardman and Wilgus and one native American Saeanz, a member of a non-recognized tribe. In the main case Raymond Hardman, a non American Indian living in Utah, was arrested for possessing eagle feathers given to him by a Hopi tribal member. Hardman's wife and children were members of the federally recognized S'Kallum Tribe. In 1993 Hardman's son's godfather died and he transported the body to Arizona to the tribe’s burial ground for the performance of the appropriate services. As part of the cleansing ritual, a Hopi religious leader gave Hardman a bundle of prayer feathers, which included several eagle feathers, to be kept in the truck that had transported the deceased body.

After returning home, Hardman contacted the Utah Division of Wildlife to obtain a permit to keep the feathers. He was informed that he would not be allowed to apply because he was not a member of a federally recognized tribe. When he later separated from his wife, she informed Ute tribal officials that he was in possession of the feathers. He was found guilty along with Samuel Wilgus Jr in the 10th Circuit Court for violating the Migratory Bird Treaty Act, even though there was no question that his religious beliefs were sincerely held for unrelated counts of illegally possessing eagle feathers in violation of sections 703 and 668(a) of Title 16 of MBTA. However, because of the conflicting panel outcomes and the factual and legal similarities among the cases, the Court simultaneously issued opinions, *sua sponte*, ordering that the cases be reheard en banc. This meant that all the circuit judges sat together, in order to examine and deliberate whether the permitting

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\(^{10}\) 467 U.S. 837

\(^{11}\) 10 CIR, 890

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process would withstand a review based on RFRA. The two non-native Americans, Raymond Hardman and Samuel R. Wilgus, had not made claims under RFRA in their initial cases, but instead had made them under the First Amendment. It was held at this retrial that the defendants and the government did not have proper time to develop cases under RFRA, so the cases were remanded to a lower court.

The District Court ruled that "the government has not shown that broader permit eligibility would damage the government's ability to fulfill its trust obligations ", and the court where the appeal will be heard should “develop a record as to whether these compelling interests are met through the least restrictive means ”. It then considered the matter under its jurisdiction of ‘free exercise’ challenges and under the statutes dealing with protecting Indian religious freedom, and the regulatory scheme of the Eagle Protection Acts. The Court stated that it would not deal with them under the First Amendment as it did not have to broaden them into constitutional cases, but ruled that there was no proof that the eagle feather regulations were based on honoring treaty or other Indian rights, and that they had a more “narrower framework”. It stated that “we consider this issue sua sponte only because all parties were put on notice by the en banc order, and then only because the adversely affected party--the United States--had an opportunity to develop a factual record in the district court in one of the consolidated cases”.

In delivering his opinion the Chief Judge Deanell R Tacha stated that “The government had failed to show that limiting permits for eagle feathers only to members of federally recognized tribes is the least restrictive means of advancing the government's interests in preserving eagle populations and protecting native American culture”. The judges concurred in the view that expanding the pool of applications could lead to an increased awareness of native American culture, and if the number of permits issued remained constant, it would, at worst simply add to the delay to applicants with no effect on eagles. Therefore, they ruled that the record created in dispensing eagle feathers thus far by the government was insufficient to support its justification of ‘compelling interests’. The Court effectively held that the burden of proof is on the federal government to uphold it’s bald and golden eagle protections on the basis that it is based upon its Indian trust responsibility. The government, it ruled, had failed to provide enough evidence in this matter to show that eagle populations would be threatened if opened up to non-Indians and non-federally recognized tribal members.

The judges did not consider the constitutional grounds, but based their decision entirely upon the B/GEPA and RFRA. The US government, however, argued that the district court's analysis under RFRA was erroneous and failed to give deference to the Secretary of the Interior's interpretation of the B/GEPA's exception for "Indian tribes," as required by Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc, 1984. This case created a two step test that federal courts use as the standard of review to evaluate executive agency’s statutory interpretation, in addition to establishing that there can be more than one permissible interpretation of an ambiguous statute. The first stage requires the court to ask whether the statute is clear on the issue in question. If the statute uses clear language and the agency interpretation does not follow the statute, the court must reject the agency’s interpretation.

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However, if the court finds the statute is ambiguous, the court will then turn to the second stage in this test. The court will ask whether the agency’s statutory interpretation is “permissible” or “reasonable”. If the statutory interpretation is “unreasonable” the court will affirm the challenged interpretation. The central tenet of *Chevron* rests on the assumption that agencies should interpret ambiguous statutory terms rather than the courts.

As part of the decision in *U.S. v. Hardman*, both Hardman and Wilgus will be able to raise their argument in the 10th Circuit Court of Appeals, where the lower court will hear if the eagle feather law can include non Native Americans in the permit process. However, the District Court established that even as a non native American, Hardman had sufficient standing to challenge the eagle permit system, despite his failure to apply for such a permit. The appeal will be based upon the claimants contention that they have sufficient standing to challenge the eagle permit system, despite their failure to apply for permits where such application would have been futile.

In the case of the third claimant the matter was heard in a subsequent hearing of *Joseluis Saenz v Department of the Interior 2002* where a member of the Chirachua Apache tribe that had been officially abolished in the 1880s, brought an action to recover the eagle feathers and assorted parts pursuant to Fed.R.Crim.P. 41(e). These had been seized by the officials of the Wildlife Service as he was not deemed qualified to receive them. The district court granted the motion for the rehearing en banc and Saenz did not face a prosecution.

His tribe had been in exile since the late nineteenth century after wars involving the legendary Geronimo, when some members were forced onto agencies and others fled to Mexico. They had not been enrolled even after it returned from exile in the 1930s, when its prisoner of war status ended. Saenz initially brought his claims under the Eagle Protection Acts and Religious Freedom and Restoration Act 1994, the Free Exercise Clause, and the Equal Protection Clause. The government moved to have the 41(e) motion treated as a civil complaint, but the district court granted Saenz's motion, and ordered the return of the feathers by stating that the government failed the compelling interest test. The decision was based on the fact that expanding the permit pool to include non-recognized native Americans would not have an effect on the eagle populations, because it was only allowing more people to apply for eagle parts. Further by allowing native Americans of non-recognized tribes to apply would not interfere with the government’s interest in protecting their culture as the permit process would still be limited to them.

However, the rules of the permit system are so stringent and so narrowly defined that there are problems even for enrolled members of tribes if they want to conduct their rituals in a manner that was prevalent in the days of the unfenced plains. The FWS have been reluctant to issue permits in many cases causing the applicant to risk the imposition of a criminal sanction. In *US v Friday 2006*, the defendant Winslow Friday, a member of the Northern Arapaho Tribe based on the Wind River Reservation was arrested for shooting a bald eagle without a permit. In his defense Friday argued that he needed the feathers for use in his tribe's Sun Dance, for which only "clean eagles" (that had not died by electrocution or vehicle collision) could be used. He caught eagles in the wild, which is forbidden to do and he was charged with the breach of the Bald Eagle Protection Act.

In his defence he raised the argument that the US Fish and Wildlife Service generally refuses to grant permits allowing tribal members for Sun Dance rituals. His tribe supported...
his contention that it he had failed after repeated attempts to obtain permission from the
department on behalf of Friday. The Wyoming District Judge William F Downes ruled
for the majority in exonerating the defendant. He ruled that
“Although the government professes respect and accommodation of the religious practices
of native Americans, its actions show callous indifference to such practices. It is clear to
this Court that the government has no intention of accommodating the religious beliefs of
native Americans except on its own terms and on its own good time”.

The victory of a native American defendant is important as it may precipitate an alteration
of the permit process for obtaining eagle parts. Currently, no permit exists for the taking of
an eagle by even a registered member of a Native American Tribe. The decision is
particularly significant as the court did not decide that the defendant was not guilty because
he did not commit the crime, but rather from the Federal Government not fulfilling its
obligations to accommodate the religious traditions of Native practitioners. Federal
officials filed a notice last November that they planned to appeal the decision.

The call for reform assumes the form of a civil rights issue due to the complex nature of
American Indian religious beliefs, which has meant that traditionally American Indian
religion has often been at odds with existing federal laws and government policies. There
were three general areas of conflict, firstly, American Indians did not have access to a
number of sacred places that were used in religious ceremonies, because these sites had
been designated as national parks or other federal lands. It had brought American Indian
religious practice into conflict with the Federal idea that public lands exist for the use and
benefit of the people at large. The second area of conflict was the restriction of sacred
items such as the essential ceremonial items of the eagle feathers, or peyote (a restricted
hallucinatory drug). The third general area of conflict was an issue of interference in
sacred ceremonies which were sometimes subject to proscription from overzealous
officials or curious onlookers.

In general fundamental civil and political rights granted in the Constitution such as the
First Amendment have not sufficed to protect minority groups in American society. Based
on considerations prevailing at the time with the African Americans, in 1968, Congress
enacted the Indian Civil Rights Act (ICRA), which requires native American tribes to
respect the civil rights of persons living within their jurisdictions, such as their freedom of
worship according to their ancient beliefs. The Act provides in section 2 that "[n]o Indian
tribe in exercising its powers of self-government shall . . . make or enforce any law
prohibiting the free exercise of religion . . . .". This also impacted on Indians of other tribes
whose members may be resident with in the reservations of other tribes.

These reflect the tone of the last 25 years, that have brought to public notice the native
American linguistic, religious and cultural concerns and their purported resolution. During
the Carter presidency the Senate and the House of Representatives jointly issued a policy
document on August 11, 1978. This served as the preamble to the American Religious
Freedom Act (ARFA) and, later legislation regarding the US government policy to Indian
religious freedom. It states:

“In the past, Government agencies and departments have on occasion denied Native
Americans access to particular sites and interfered with religious practices and
customs where such use conflicted with Federal regulations. In many instances, the
Federal officials responsible for the enforcement of these regulations were unaware

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of the nature of traditional native religious practices and, consequently, of the
degree to which their agencies interfered with such practices. It 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 of the American
Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to
sites, use and possession of sacred objects, and the freedom to worship through
ceremonials and traditional rites.”

This gave overdue recognition to Native American religions that had often been
misunderstood or disregarded by the majority culture. Section 18 of the Act established the
following policy for the United States agencies of government: . . . to protect and
preserve for American Indians their inherent right of freedom to believe, express, and
exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native
Hawaiians, including but not limited to access to sites, use and possession of sacred
objects, and the freedom to worship through ceremonies and traditional rites.

Although this Act was a catalyst for the Native American Graves Protection and
Reparation Act in 1990, (NAGPRA), which facilitated the return of many sacred and
culturally important objects to the American Indians, the right to free exercise of religion
in the United States is not absolute, and the government is not required to accommodate
the religious practices in every instance. Accordingly, the U.S. Supreme Court has found
that Native American hallowed ceremonies are not to be accepted unqualified, but must be
appropriately balanced against other public and private rights and interests.

As if to reinforce that argument there are two court decisions made post ARFA, which
have become benchmarks in American Indian religious freedom issues, and establish the
extent to which the courts are prepared to go to safeguard the interests of the native
Americans in defending their claims under the religious protection Acts. They take account
of the past wrongs and present day realities. The first one is Lyng v. Northwest Indian
Cemetery Protective Association 1988.13

It concerned land claimed by a logging company, which wanted to build a road through
forest areas where the Karok, Tolawa, and Yurok tribes vision quested to attain and
reinvigorate their spiritual powers. The issue was if the company interfered with the
undisturbed natural setting and, whether the construction of a paved road through Federal
land and allowance of timber harvesting by the US Forest Service violated the Free
Exercise Clause, when part of such land has historically been used by certain American
Indians for religious ritual that depend upon the road remaining sacrosanct. The Supreme
Court stated that the logging company, for the greater economic good of the American
society, had the right to build the road. In reaching this decision, the Court found that
AIRFA did not establish judicially binding rights under the First Amendment.

The Courts ruling has been criticised for its unwillingness to consider the effects of
government policies while focusing only on the form of the government action taken. In a
Cornell Law Review article “Conduct and Belief in the Free Exercise Clause:
Developments and deviation in Lyng v Northwest

13 CPA 485 US 439
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The scope of the Constitutional guarantee of free exercise of religion now depends on the Court's tenuous distinction between regulations that conveniently impact religious practices and regulations that only make it more difficult for an individual to practice his beliefs.

The clash between a materialistic ethic and an encamped value system came up again in legal proceedings in Employment Division v Smith 1990. This concerned an unemployment compensation claim, which had been denied to two workers of indigenous background at a drug rehabilitation centre. The pair were fired when found using peyote, which they had used as part of their traditional worship service granted to them by the Native American Church. The dispute became more serious when the pair argued that the denial of benefits was, in effect, a form of religious persecution and infringed their first amendment rights because they were Native Americans who used the peyote ceremonially, as opposed to recreational use. The case reached the Supreme Court, which ruled that the Oregon law was constitutional, and the denial of unemployment benefits was legal.

The US Supreme Court ruled that even though the use of the drug was part of a religious ritual, the states may enforce laws that have the incidental effect of interfering with the ability of residents to engage in religious practices. It stated that while states have the power to accommodate otherwise illegal acts done in pursuit of religious beliefs, they are not required to do so on the reasoning that if the state could punish the possession of peyote as a crime without infringing a person's right to exercise his religion, it could also withhold unemployment benefits from those who possess peyote without violating the right to exercise religion. But the Oregon Supreme Court had not relied on the fact that possession of peyote was a crime in Oregon, and so the U.S. Supreme Court sent the case back to the Oregon Supreme Court so that it could answer that question. The Oregon Supreme Court held that Oregon law did indeed proscribe the possession of peyote, but that applying Oregon's ban on possession of peyote to deny the applicants unemployment benefits violated their right to exercise their religion. The state asked the U.S. Supreme Court to review this second decision of the Oregon Supreme Court, and it agreed to do so.

Justice Scalia delivering the decision for the majority stated:

"The First Amendment forbids government from prohibiting the "free exercise" of religion. This means, of course, that government may not regulate beliefs as such, either by compelling certain beliefs or forbidding them. Religious belief frequently entails the performance of physical acts -- assembling for worship, consumption of bread and wine, abstaining from certain foods or behaviors. Government could no more ban the performance of these physical acts when engaged in for religious reasons than it could ban the religious beliefs that compel those actions in the first place. 'It would doubtless be unconstitutional, for example, to ban the casting of statues that are to be used for worship purposes or to prohibit bowing down before a golden calf.'

But Oregon's ban on the possession of peyote is not a law specifically aimed at a physical act engaged in for a religious reason. Rather, it is a law that applies to everyone who might possess peyote, for whatever reason -- a 'neutral law of general...

14 494 US 872
applicability,' in the jargon the Court uses. The applicants argument is an attempt to use their religious motivation to use peyote in order to place themselves beyond the reach of Oregon's legal provisions, which general ban on the possession of peyote. The First Amendment's protection of the "free exercise" of religion does not allow a person to use a religious motivation as a reason not to obey such generally applicable laws. To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Thus, the Court had held that religious beliefs did not excuse people from complying with laws forbidding polygamy, child labor laws, Sunday closing laws, laws requiring citizens to register for Selective Service and laws requiring the payment of Social Security taxes ".

The Court ruled that religious motivation to exempt a person from a neutral, generally applicable law involved the assertion of both the right of free exercise of religion along with another complimentary right, that would bind them if they were not the claimant group they were. Thus, for example, religious publishers are exempt from a law requiring them to obtain a license if that may be denied to any publisher which the government deems nonreligious; government may not require the Amish to send their children to school because their religion demands otherwise, but because the applicants in this case were not asserting a hybrid right, they could not claim a religious exemption under the First Amendment from Oregon's ban on peyote.

The decision seem to indicate that the 14th Amendment would not extend to cover the gap in these cases.

This provides a guarantee of equal protection in its clause (i) which states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

The restricting of access to religious objects on the basis of ethnicity promotes the notion that there is ‘unequal protection’ for native American claimants. The application of the ‘eagle feather law’ seems to suggest that the eagle permit certification restrictions based on race impede the ability of people with native American ancestry, but who may be unable to prove their ancestry, from exploring their heritage; many Native American people have given feathers to non-Native Americans who have been deemed to have earned the feathers; forbidding religious participation on the basis of race encourages those who are approved to participate in Native American customs, but who are unable to obtain eagle feathers through existing Federal channels, to break the law in order to follow their beliefs, and their sum total is that eagle laws promote unequal access to the feathers as religious objects.

However, Congress disapproved of the Smith decision on peyote, and enacted the Religious Freedom Restoration Act of 1993 (RFRA), which seeks to guarantee application of the free exercise clause. It remains to be seen how the rights of Native Americans to believe, express, and exercise their traditional religion, including access to sacred sites, use and possession of sacred objects such as peyote and eagle feathers, and the freedom to worship through ceremonial and traditional rites, will be affected by this legislation.
This states in Article 27 that the Government should not “substantially burden a person’s exercise of religion” and stipulates that the federal agencies are bound to consult with indigenous American spiritual leaders to determine appropriate procedures to protect the inherent rights of native people, as set out in the Act. It also requires federally-funded museums to draw up an inventory of their holdings of human remains, funerary and sacred objects, and objects of cultural patrimony. The agencies and museums must work with native American tribes and native Hawaiian organizations to reach agreements on the repatriation or other disposition of these remains and objects. The Act also protects native American burial sites and controls the removal of objects on Federal, Indian, and native Hawaiian lands.

The RFRA laid the groundwork for federal museums repatriating several Native human remains and sacred objects to the tribes. It formed the basis of the statement called the Policy Concerning Eagle Feathers for Native American Religious Practice of 1994. This was issued by the U.S. Fish and Wildlife Service on June 28, 1994, which set forth the principles that will guide the government-to-government relationship with Tribes in matters relative to fish and wildlife resources. However, it does not change the conditions in which the members of the tribe may apply or dispose of the feathers once their application has been approved leaving the eagle feather law intact.

Since its enactment the RFRA has been subject to much criticism, which is based upon the its failure to protect certain sacred sites of the American Indians such as the Bear Butte mountain in the Black Hills from commercial exploitation. Another criticism of the RFRA is that Federal prisons do not give American Indians the same treatment as other ethnic or religious groups. Their rights to possess tobacco and prayer pipes, burn cedar and sage, and grow long hair are all banned in prison. It has provided grounds for the Indian civil rights groups to argue that freedom of religious belief is still not being protected.

The demand to practice religious freedom according to their folklore rises from the grassroots level upwards for indigenous Americans. This has a special potency now that the eagle is no longer on the endangered list, and it has raised expectations that there will be a change with the overturning of the eagle feather law by the abolishment of the B/GEPA’s various sections. The commerce clause needs to be excised by Congress which has the jurisdictional power that makes the effect of the First Amendment null and void. As the eagle is not a migratory bird it should be not be bound by Chapter 7, sub chapter II of the Migratory Birds Act, which native Americans had no role in framing. In the Federal enrolment laws the artificial values of blood quantum and certifiable ancestry have precluded many Indians from spiritual renewal and accommodation with nature and their claim to equal protection under the 14th amendment needs to be recognized and must not be viewed as beckoning to superstition and magic.