EAGLE PERMITS, RFRA, AND AMERICAN INDIAN RELIGIOUS FREEDOM:

Legal Avenues for First Amendment Protection

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Abstract

Built on a colonial discourse of justifiable Christian conquest, United States federal Indian law and policies have specifically targeted American Indian religious practices as a way to assimilate American Indians into the dominant colonizing culture and to undermine tribal sovereignty. Federal policies throughout colonization and into the present have drastically swung between denying American Indian religious practice and allowing for it under federal control, creating a confusing string of conflicting precedent. Although the worst of these practices has largely been abandoned, the paternalism of the United States government continues today with the creation and oversight of a permit system, which regulates the use and possession of bald and golden eagle feathers and parts (hereafter "eagles"). This article explores the history of federal policies aimed at American Indian religious practices to demonstrate the ways in which American Indian religious freedom law has been built on precedent and changing policies. I examine the function and regulations of the eagle permit process to situate it within recent challenges to its constitutionality using the First Amendment and the Religious Freedom Restoration Act (RFRA). In doing so, I outline the benefits and pitfalls of pursuing such challenges in the United States Supreme Court. Looking at the success of tribe-to-administrative agency negotiations, this article highlights the 2018 petition to Fish and Wildlife Services as an alternative method to pursuing American Indian religious freedom by accessing eagle parts.

About the Author

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I. Introduction

Built on a colonial discourse of justifiable Christian conquest, United States federal Indian law and policies have specifically targeted American Indian religious practices as a way to assimilate American Indians into the dominant colonizing culture and to undermine tribal sovereignty. Federal policies throughout colonization and into the present have drastically swung between denying American Indian religious practice and allowing for it under federal control, creating a confusing string of conflicting precedent. Although the worst of these practices has largely been abandoned, the paternalism of the United States government continues today with the creation and oversight of a permit system, which regulates the use and possession of bald and golden eagle feathers and parts (hereafter "eagles"). This permit system, a compromised solution to the collision between American Indian religious rights and environmental protection of eagles, has been challenged repeatedly by American Indian practitioners who argue that the system violates their freedom to practice their religion, which requires the use of eagle parts and feathers. In light of the conflicting decisions that federal appellate courts have reached regarding the constitutionality of these regulations, practitioners anticipate that the Supreme Court will soon weigh in on the permit system's effect on American Indian religious practice.[1]

[1] *See, e.g.*, Matthew L.M. Fletcher, *The Supreme Court's Indian Problem,* 59 Hastings

It is not clear, however, whether Supreme Court attention to the issue is desirable. The Supreme Court's history with respect to the rights of Indians and tribes is not entirely positive,[2] although success in recent treaty cases[3] provide some grounds for optimism. The newness of these successes, particularly when coupled with recent changes in the composition of the Court, make it difficult to predict how the Court would resolve the permit issue. However, those hoping to change the permit system can still look to administrative agency negotiation with the federal government as a means of fixing the permit system to better serve religious practitioners. Practitioners should create a diverse and flexible toolbelt of legal methods to protect American Indian religious practice instead of following just one avenue. In general, administrative agency action taken in cooperation with tribes has been effective at implementing changes prior to judicial action. Thus, looking to federal administrative agencies to enact or modify regulations—in addition to fighting against violations of religious freedom through the judiciary branch—can help American Indian religious practitioners address religious freedom issues. Specifically in the case of challenging the permit system, administrative agency action may help practitioners avoid an undesirable ruling on split court decisions.

This paper begins by exploring the history of federal policies aimed at American Indian religious practices to demonstrate the ways in which American Indian religious freedom law has been built on precedent and changing policies dependent upon the relationship between tribes and the federal government. Examining these policies will place the legal discussion of the eagle permit system within its historical context. The

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L.J. 579, 580 (2008) for a discussion of how the Supreme Court selects which Indian law cases to add to the docket: "the Court identifies an important constitutional concern embedded in a run-of-the-mill Indian law certiorari petition, grants certiorari, and then applies its decision-making discretion to decide the "important" constitutional concern." Here, the Supreme Court could use the question of the constitutionality of the eagle feather permit process' limitation to enrolled members of a federally recognized tribe to ultimately rule on the proper test for Religious Freedom Restoration Act claims.

[2] *See, e.g.*, David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream* Values, 86 Minn. L. Rev. 267 (2001); Grant Christensen, *Predicting Supreme Court Behavior in Indian Law Cases*, 26 Mich. J. Race & L. 65 (2021) (discussing how Indian law cases frequently lose in the Supreme Court); Richard Guest, *Tribal Supreme Court Project Ten Year Report October Term 2001 – October Term 2010 (OT01-OT10),* 1 Am. Indian L.J. 28 (2017) (discussing the Supreme Court Project, a joint project between the Native American Rights Fund and the National Congress of American Indians to develop a targeted approach to bringing cases to the Supreme Court); *Supreme Court Project*, Nat'l Cong. Am. Indians, https://www.ncai.org/initiatives/supreme-court-project (last visited June 25, 2022); *Tribal Supreme Court Project*, Native American Rights Fund, https://sct.narf.org (last visited June 25, 2022).

[3] *See, e.g.*, Washington State Dept. of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2019); Herrera v. Wyoming, 139 U.S. S.Ct. 1686 (2019); and McGirt v. Oklahoma, 140 S.Ct. 2452 (2020).

paper will then examine the function and regulations of the eagle permit process before transitioning to recent challenges to its constitutionality using the First Amendment and the Religious Freedom Restoration Act (RFRA). In doing so, this section will explore the benefits and pitfalls of pursuing such challenges in the United States Supreme Court. Finally, this paper will examine the success of tribe-to-administrative agency negotiations, highlighting the 2018 petition to Fish and Wildlife Services as an alternative method to pursuing American Indian religious freedom by accessing eagle parts.

II. Historical Overview of the United States and American Indian Religions

Colonization was inherently a religiously driven enterprise aimed at Christianizing the new world, or the Americas.[4] In 1493, a year after Christopher Columbus' famed "discovery" of the new world, Pope Alexander VI issued a papal bull declaring the divine requirement of Catholic kings and princes to go forth to the new world to acquire land and convert non-Christians to the Christian faith.[5] This directive hung on the ideology that the Pope had a responsibility to Christianize all people, thus justifying and necessitating Holy Wars to conquer non-Christian peoples and acquire land in the name of Christianity.[6] Three-hundred thirty years later, in the landmark case *Johnson v. M'Intosh*, the United States Supreme Court followed this papal doctrine of discovery to rule that only the federal government possessed the ability to acquire Indian land within the boundaries of the United States. The Court stated: "[t]he absolute ultimate title [to land] has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."[7] Following this decision, acquisition of land became a major goal of the federal government. As the population increased, and the United States began expanding westward, the Supreme Court expanded their *Johnson v. M'Intosh* decision in 1823, ultimately ruling that aboriginal title was not entitled to compensation: "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."[8]

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[4] *See generally* Robert A. Williams, Jr, The American Indian in Western Legal Thought (1990) (discussing the history and discourse used to justify religious colonization of the Americas).

[5] Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. M'Intosh, and Plenary Power,* 20 N.Y.U. Rev. L. Soc. Change 303, 310 (1993).

[6] *See* Williams, *supra* note 4.

[7] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592 (1823).

[8] *See id.* at 592; Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955); *See generally* Robert A. Williams, Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (2005).

Throughout the early years of the United States, until the 1924 Indian Citizenship Act, Indians remained as foreign entities to which the Constitution, and thus first amendment religious freedom protections did not apply.[9] The federal government initially made no policies regarding the religious practice of Indians. As the country expanded West, however, the federal government was forced to contend with the "Indian problem." Nelson Miles explained this as the problem of what to do with the Indians:

> Whether we shall continue the vacillating and expensive policy that has marred our fair name as a nation and a Christian people or devise some practical and judicious system by which we can govern one quarter of a million of our population, securing and maintaining their loyalty, raising them from the darkness of barbarism to the light of civilization, and put an end to these interminable and expensive Indian wars.[10]

The United States Federal Government concurred with the opinion that the previous policy was vacillating and expensive. Thus in 1819, it passed the Indian Civilization Fund Act of March 3, 1819,[11] to comply with Miles' suggestion to devise a system to assimilate and govern American Indians. The Indian Civilization Fund Act authorized the President to employ "persons of good moral character" and appropriate funds from Congress for the purpose of "introducing among [the Indian tribes] the habits and arts of civilization."[12] With the removal of tribes to reservations after Jackson's enacting of the Indian Removal Act in 1830[13], Christian missionaries served a further role of civilizing and assimilating tribes through holding positions on the reservation entrusted with converting and educating Indians in how to be proper Christians.

In 1869, President Ulysses S. Grant indicated his goal of furthering this civilizing and assimilating policy towards American Indians in his inaugural address. He stated that he would "favor any course toward them which tends to their civilization and ultimate citizenship."[14] This was due to what he saw as the "embarrassment and expense" of past policies towards American Indians. In his 1869 State of the Union Address, he further explained his ultimate goal of assimilating American Indians into mainstream settler society:

> The building of railroads, and the access thereby given to all the agricultural and mineral regions of the country, is rapidly bringing civilized settlements into contact with all the tribes of Indians. No matter what ought to be the relations between such settlements and

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9 *See, e.g.*, Talton v. Mayes, 163 U.S. 367 (1896); Elk v. Wilkins, 112 U.S. 94 (1884).

10 Nelson A. Miles, *The Indian Problem*, 258 N. Am. Rev. 40, 41 (1879).

11 Civilization Fund Act of 1819, Pub. L. No. 15–85, 3 Stat. 516b.

12 *Id.*

13 *Indian Removal Act of 1830, Pub. L. No. 21–148,* 4 Stat. 411.

14 Alysa Landry, *Ulysses S. Grant: Mass Genocide Through 'Permanent Peace' Policy*, Indian Country Today, https://indiancountrytoday.com/uncategorized/ulysses-s-grant-mass-genocide-through-permanent-peace-policy (Sept. 13, 2018).

> the aborigines, the fact is they do not harmonize well, and one or the other has to give way in the end. A system which looks to the extinction of race is too horrible for a nation to adopt without entailing upon itself the wrath of all Christendom and engendering in the citizen a disregard for human life and the rights of others, dangerous to society. I see no substitute for such a system, except in placing all the Indians on large reservations, as rapidly as it can be done, and giving them absolute protection there.[15]

Grant's speech demonstrates the discourse of the time—that without efforts to assimilate American Indians, the only other option was the extinction of the American Indian race, an idea that would be against the Christian principles of the nation. He specifically enlisted The Society of Friends—Quakers, a Christian denomination—to manage reservations and select agents to deal with the inhabitants of these reservations—to work towards assimilation of American Indians.[16]

Another proponent of assimilation, Albert K. Smiley, a member of the Board of Indian Commissioners, brought together wealthy philanthropists annually to discuss Indian affairs. The group offered recommendations to the government on how to transform Indians from "savages to citizens," specifically explaining that "a really civilized people cannot be found in the world except where the Bible has been sent and the gospel taught; hence we believe that the Indians must have, as an essential part of their education, Christian training."[17] Christian training was comprised of assimilation practices, including prohibiting traditional religious practices through the 1883 Code of Indian Offenses, a body of legislation that included the Religious Crimes Code, prohibiting and punishing dances, feasts, and the teachings of medicine men.[18] as well as creating mandatory boarding schools for Indian children.[19]

The 1883 Code of Indian Offenses originated through a letter from the Commissioner of Indian Affairs, Hiram Price. In 1883, he wrote a letter to the Office of Indian Affairs lamenting that the ceremonial practices and medicine men found on Indian reservations provided "a great hindrance to the civilization of the Indians."[20] In response, the Office of Indian Affairs created Courts of Indian Offenses to provide law

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15 President Ulysses S. Grant, First Annual Message (Dec. 6, 1869).

16 *Id.*; *see* W. Nicholson, *The Society of Friends and the Indians: Synopsis of Results for Ten Years.* Friends' Rev.; Religious, Lit. & Misc. J. (1847–1894), 32, 461 (Mar 1, 1879).

17 H.B. Peairs, *Our Work: Its Progress and* Needs, 42 Nat'l Educ. Ass'n J. Procs. Address 1044, 1048 (1903).

18 Dennis Zotigh, *Native Perspectives on the 40th Anniversary of the American Indian Religious Freedom Act*, Nat'l Museum Am. Indian (Nov. 30, 2018), https://www.smithsonianmag.com/blogs/national-museum-american-indian/2018/11/30/native-perspectives-american-indian-religious-freedom-act.

19 *See, e.g.*, *Rules Governing the Court of Indian Offenses*, Off. Robert N. Clinton, http://robert-clinton.com/wp-content/uploads/2018/09/code-of-indian-offenses.pdf; Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 Am. Indian Q. 35, 41, 43 (1997).

20 *See Rules Governing the Court of Indian Offenses*, *supra* note 19.

enforcement on reservations.[21] Further, in creating these courts, the Office of Indian Affairs named ceremonial dances and the practices of medicine men as "Indian offenses" punishable by withholding government provided rations and incarceration. The Code held:

> The usual practices of so-called "medicine-men" shall be considered "Indian offenses" cognizable by the Court of Indian Offenses, and whenever it shall be proven to the satisfaction of the court that the influence or practice of a so-called "medicine-man" operates as a hinderance to the civilization of a tribe, or that said "medicine-man" resorts to any artifice or device to keep the Indians under his influence, or shall adopt any means to prevent the attendance of children at the agency schools, or shall use any of the arts of a conjurer to prevent the Indians from abandoning their heathenish rites and customs, he shall be adjudged guilty of an Indian offense, and upon conviction of any one or more of these specified practices, or, any other, in the opinion of the court, of an equally anti-progressive nature, shall be confined in the agency prison for a term not less than ten days, or until such time as he shall produce evidence satisfactory to the court, and approved by the agent, that he will forever abandon all practices styled Indian offenses under this rule.[22]

American Indian elders and knowledge holders, deemed here "medicine-men," thus were directly prohibited from continuing customary ceremonies and forced to abandon traditional practices under threat of jail. Further, under the Code, elders were prohibited from passing along ceremonial knowledge. The Code denied American Indian "medicine-men" the ability to instruct students and prohibited them from interfering with the attendance of American Indian youth at mandatory federally created and Christian run boarding schools. While the federal government with the assistance of Christianizing missionaries had been working towards assimilating American Indian children through education since the early 1800s, it was not until the late 1800s that the attendance in these schools became mandatory in order to isolate Indian children in hopes of a quicker assimilation.[23]

In 1886, John B. Riley, a Superintendent of an Indian boarding school explained in an annual report to the Office of the Commissioner of Indian Affairs: "If it be admitted that education affords the true solution to the Indian problem, then it must be admitted that the boarding school is the very key to the solution . . . Only by complete isolation of the Indian child from his savage antecedents can he be satisfactorily educated."[24] With the help of Christian missionaries, the federal government implemented and led this boarding school process of assimilation, taking

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[21] *See Court of Indian Offenses,* U.S. Dep't Int'r: Indian Affs., https://www.bia.gov/regional-offices/southern-plains/court-indian-offenses.

[22] *See Rules Governing the Court of Indian Offenses*, *supra* note 19, at 4.

[23] Native American Rights Fund, *Let All That Is Indian Within You Die!*, 38 Native Am. Rts. Fund Legal Rev. 1 (2013).

[24] John B. Riley, *Report of the Indian School Superintendent*, *in* Ann. Rep. Comm'r Indian Affs. to Sec'y Int'r for Year 1886 LIX, LXI.

Indian children away from the influence of their communities aiming to stamp out traditional culture, language, and religion, in the name of assimilation to a broader Christian nation.[25] Denominations such as Quakers, Methodists, Presbyterians, Episcopalians, Catholics, Baptists, Congregationalists, Reformed Dutch, Unitarians, and Lutherans were all involved in the Christianizing of Indian children through boarding schools.[26] The general federal policy during this era, as seen through internal documents documenting suggestions and pathways for how to deal with the "Indian Problem," was that American Indians had the right to choose whatever Christian belief they wished, without interference from the government, however they could not continue their own religious practices.[27]

Federal acts and codes banning religious practice and mandating compulsory attendance at Indian boarding schools continued until the 1924 Indian Citizenship Act, and the 1934 Indianan Reorganization Act. The Indian Citizenship Act gave citizenship to American Indians, and thus in theory provided Indians with constitutional protections, and the Indian Reorganization Act enabled tribes to claim ownership over land, government, and education.[28] While these Acts effectively overturned the previous ban on religious practice, it did not end the prohibitions on or barriers to American Indian religious practices as the next section makes clear.

III. Legal Challenges to the Treatment of American Indian Religions

Following the assimilation policies aimed at American Indians through the early 1900s, Congress determined the new policy of the United States towards American Indians was to terminate federal oversight over tribes, with the goal of fully integrating American Indians into the mainstream society. This was codified in House Concurrent Resolution 108, which was passed on August 1, 1953.[29] This resolution stated Congress's new policy was to "as rapidly as possible, to make the Indians within territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States" and "to end their status as wards of the United states."[30] The resolution further mandated the Secretary of the Interior to "examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but

[25] Native American Rights Fund, *supra* note 23, at 2.
[26] *Id.* at 6.
[27] *See generally* Francis Paul Prucha, The Churches and the Indian Schools, 1888–1912 (1979).
[28] Indian Citizenship Act of 1924, Pub. L. No. 68–175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)); Indian Reorganization Act of 1934, Pub. L. No. 73–383, 48 Stat. 984, 985 (codified as amended in scattered sections of 25 U.S.C.).
[29] H.R. Con. Res. 108, 83rd Cong. (1953).
[30] *Id.*

not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution."[31]

American Indians met this new policy of termination with extreme opposition. Influenced by the damaging effects of the termination policy and with rising civil rights movements, American Indian activists began their own movements aimed at achieving American Indian sovereignty and independence.[32] These movements ultimately led to President Nixon setting forth a new era of Indian policy: self-determination. In his Special Message on Indian Affairs, given to Congress in July 1970, President Nixon stated the official policy shift from termination to self-determination: "the goal of any new national policy toward the Indian people [must be] to strengthen the Indian's sense of autonomy without threatening his sense of community."[33] Thus, under President Nixon, new policies were set forth with the goal of federal assistance in American Indian self-determination. These included protections for American Indian religious freedom in the form of the Morton Policy of 1975[34], and the American Indian Religious Freedom Act of 1978.[35]

Federal protection of American Indian religious practice was further developed during this time through the passage of the American Indian Religious Freedom Act of 1978 (AIRFA).[36] The Act declared: "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."[37] This policy determined that the religious protections included the "use and possession of sacred objects" which provided American Indians with a federal statement that supported the possession of eagles.[38] While these assertions helped to develop exemptions to the laws prohibiting taking eagles, unfortunately, AIRFA did not create enforceable rights for individuals filing lawsuits. Rather, it only stated a general federal policy.[39] However, with the move into this new

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[31] *Id.*

[32] *See, e.g.*, Vine Deloria, Jr., Behind the Trail of Broken Treaties: An Indian Declaration of Independence (1974); Paul Chaat Smith & Robert Allen Warrior, Like a Hurricane: The Indian Movement From Alcatraz to Wounded Knee (1996).

[33] President Richard Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970).

[34] *Morton Issues Policy Statement on Indian Use of Bird Feathers*, U.S. Dep't of the Interior, Indian Affs. (1975), https://www.bia.gov/node/10583/printable/pdf; American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455–456 (1988) cemented the lack of legal protections that AIFRA transmits by looking to Representative Udall's motives behind the bill stating: "Representative Udall emphasized that the bill would not "confer special religious rights on Indians," would

era of American Indian self-determination, the Supreme Court began to see First Amendment challenges to government policies affecting American Indian religious exercise. The Court at this time was no stranger to free exercise claims and had in fact begun to develop tests to determine constitutional limits and instances of governmental action on various individuals' religious practice in 1963.

The first of these influential cases, *Sherbert v. Verner*,[40] held that the denial of unemployment benefits to a Seventh-Day Adventist member, who could not find work as she refused to work on the Sabbath, substantially burdened the claimant's free exercise.[41] Through this case, the Court developed a strict scrutiny test where, once the plaintiff established that the challenged law placed a substantial burden on her practice of religion, the burden shifted to the government. The government is then required to justify the substantial burden by demonstrating first, that there existed a compelling state interest, and second, that there were no other forms of regulation available to fulfill this compelling interest.[42] In *Sherbert* and successive cases, the Court used a common sense, practical approach to defining what constituted a "substantial burden" for purposes of the Free Exercise Clause.[43] However, twenty-five years later, the Court took a different approach in a case regarding American Indian religious exercise.

In *Lyng v. Northwest Indian Cemetery Protective Association*, the Court altered the *Sherbert* test. Rather than defining "substantial burden" through a common sense lens, the Court defined it as a legal term of art carrying a limited and specific meaning.[44] In *Lyng*, the Court ruled that the government activity in question—allowing commercial timber harvesting of sacred land—did not constitute a substantial burden because, as the dissent summarizes, it "neither coerce[s] conduct inconsistent with religious belief nor penalize[s] religious activity."[45] This ruling led to the general test for substantial burden: whether individuals were sanctioned or deprived of a government benefit to which they are otherwise entitled because of their religious exercise. If a plaintiff successfully meets this requirement, the government must prove that it has a compelling interest in imposing the burden, and that the law provides the least restrictive means of fulfilling that compelling interest.

"not change any existing State or Federal law," and in fact "has no teeth in it."

40 *Id.* at 450.

41 Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

42 *Lyng*, 485 U.S. at 475.

43 Wisconsin v. Yoder, 406 U.S. 205 (1972), determined than an Amish family was substantially burdened in practicing their religion because of a law that required all children to attend public or private school. The Court determined that the state law requiring children to attend school had a severe and unavoidable effect on the claimants' religious beliefs as they were forced to either violate the law or abandon certain aspects of their religion.

44 *Lyng*, 485 U.S. 439.

45 *Id.* at 459.

Only two years after the *Lyng* decision, the Supreme Court had another chance to examine violations to American Indian religious exercise. In *Employment Division, Department of Human Resources of Oregon v. Smith*, American Indian practitioners were denied unemployment benefits because their participation in a peyote ceremony resulted in a loss of employment after failing a drug test.[46] On its face, the case looked to be a clear First Amendment violation as set out in *Sherbert* and *Lyng,* however, the Court came to a different conclusion. In *Smith*, the Court abandoned the previously laid out *Sherbert* substantial burden test as modified in *Lyng*. Instead, the Court ruled that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[47] Therefore, the Court abandoned the *Sherbert* and *Lyng* strict scrutiny test and implemented a new test for neutral laws of general applicability. As a result, the Court held that generally applicable, neutral laws will never violate the First Amendment Free Exercise Clause.

Following criticism from the legal and American Indian communities regarding this shift in testing for a violation of free exercise, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[48] RFRA was enacted with the purpose of restoring the compelling interest test as set forth in *Sherbert* and *Yoder* with the goal of "guarantee[ing] its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[49] A substantial burden exists where "individuals are forced to choose between following the tenants of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions (*Yoder*)."[50] The RFRA test uses a strict scrutiny analysis to determine whether a government's action that imposed a substantial burden on an individual's religious exercise is still constitutionally valid. Under this test, the burden shifts to the government to prove that the government action fulfills a compelling governmental interest and that action is narrowly tailored to the governmental interest, and is the least restrictive means of fulfilling that interest.[51]

While this Act intended to correct the ruling in *Smith*, subsequent Supreme Court cases tested its constitutionality. *City of Boerne v. Flores*[52]

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46 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).
47 *Id.* at 879.
48 Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488.
49 *Id.*
50 Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1069–1070 (9th Cir. 2008) (quoting Sherbert v. Verner, 374 U.S. 398 (1963) and Wis. v. Yoder, 406 U.S. 205 (1972)).
51 Burwell v. Hobby Lobby Stores, 573 U.S. 682, 728 (2014).
52 City of Boerne v. Flores, 521 U.S. 507 (1997).

and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,*[53] both questioned the constitutionality of the Congress' ability to apply federal law to state action. These cases ultimately determined that RFRA was unconstitutional when applied to state action because in creating the Act, Congress exceeded the powers granted to it by forcing states to adopt federal policy. However, this unconstitutionality only extends to state action, not federal action.[54] As federal Acts, the Migratory Bird Act and the Bald and Golden Eagle Protection Act are still judged by the stricter RFRA standards, thus the tests from *Sherbert* and *Lyng* apply to these Acts when individuals bring First Amendment claims.[55]

IV. The Eagle Permit System

American Indian religious practitioners continue to face governmentally created burdens to religious practice today. This can be seen through the creation, implementation, and challenges to the federally created eagle permit system. Because of federal protections in place, namely the Bald and Golden Eagle Protection Act (BAGEPA),[56] and the Migratory Bird Treaty Act (MBTA),[57] it is illegal to kill, collect, or possess bald and golden eagle parts in the United States. These environmentally driven Acts conflict with American Indian religious practice as eagles are used in "smudging rituals, traditional religious dances, and as gifts on religiously significant occasions."[58] Notably, these are the same types of activities that were considered illegal under the 1883 Religious Crimes Codes and thus are "religious practices" under the perspective of the law. Eagles are so intricately tied to many American Indians' religious practices that Pastor Robert Soto, Lipan Apache, explains "for many Native Americans, denying them access to eagle feathers is much like denying a Christian the use of a Bible, rosary, or holy water."[59]

Eagle parts and birds are protected under two federal Acts: The Bald and Golden Eagle Protection Act (BGEPA)[60] and the Migratory Bird Treaty Act (MBTA).[61] As the industrial revolution brought about an onslaught of urbanization, concern over the potential extinction of

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[53] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[54] Jessica L. Fjerstad, *The First Amendment and Eagle Feathers: An Analysis of RFRA, BGEPA and the Regulation of Indian Religious Practices*, 55 S.D.L Rev. 528, 534 (2010).

[55] *Id.*

[56] Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668a–d.

[57] Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–712.

[58] Pastor Robert Soto, Petition Before the Fish and Wildlife Service, United States Department of the Interior To End the Criminal Ban on Religious Exercise with Eagle Feathers and to Protect Native American Religious Practices, at 1 (2018), https://vdocuments.mx/petition-before-the-fish-and-wildlife-service-united-the-federal-eagle-feather.html?page=1 [hereinafter Petition to end the Ban on Religious Exercise with Eagle Feathers].

[59] *Id.* at 7.

[60] 16 U.S.C. § 668a–d.

[61] 16 USC §§ 703–712.

North American birds led the United States and Great Britain to enact the Migratory Bird Treaty Act in 1916.[62] In 1940, the federal government extended further protections specifically to bald eagles through their the BGEPA. This Act specifically called for the protection of these birds because of their position as a "symbol of American ideals of freedom."[63] Following the passage of the MBTA and BGEPA, American Indians could no longer possess eagle parts for religious purposes. This Act was further extended in 1961 to include protection of golden eagles to deter accidental killings of bald eagles.[64] Since its inception, the BGEPA allowed for the use of eagle feathers "for the religious purposes of Indian Tribes," and FWS implemented the application system for federally recognized American Indians to apply to possess eagle parts and feathers.[65]

After the shift in federal policies aimed at American Indians to one of self-determination under President Nixon, however, the federal government had to contend with American Indian objections to this bar to practicing their religious activities. Therefore, in 1975, the Department of the Interior released "The Morton Policy" which stated that American Indians could "possess, carry, use, wear, give, loan, or exchange among other Indians, without compensation, all federally protected birds, as well as their parts or feathers."[66] The policy of the department then was that they would not prosecute American Indians for using eagle parts without a permit as long as they did not kill or barter for the birds and parts.[67] This policy was reaffirmed in 2012 when the Department of Interior and the Department of Justice issued a memorandum "formaliz[ing] and memorializ[ing]" the 1975 policy.[68] However, like AIRFA, the Morton Policy is just a statement of policy rather than a law guaranteeing any rights or protections.[69]

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[62] Adair Martin Smith, *Native American Use of Eagle Feathers Under the Religious Freedom Restoration Act*, 84 U. Cin. L. Rev. 575, 576 (2016); *see generally* 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 (2010).

[63] Bald Eagle Protection Act, 54 Stat. 250, 250 (1940) (codified as amended at 16 U.S.C. § 668); *see also* Kevin J. Worthen, *Eagle Feathers and Equality: Lessons on Religious Exceptions from the Native American Experience*, 76 U. Colo. L. Rev. 989, 989–991 (2005).

[64] Smith, *supra* note 62, at 578; Worthen, *supra* note 63, at 991.

[65] Petition to end the Ban on Religious Exercise with Eagle Feathers, *supra* note 58, at 7; 50 C.F.R. § 22.22 (1999).

[66] *Morton Issues Policy Statement*, *supra* note 34.

[67] *Id.*; Petition to end the Ban on Religious Exercise with Eagle Feathers, *supra* note 58, at 7.

[68] Eric Holder, *Memorandum: Possession or Use of the Feathers or Other Parts of Federally Protected Birds for Tribal Cultural and Religious Purposes,* Office of the Attorney General (Oct. 12, 2012), https://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf; *See* Petition to end the Ban on Religious Exercise with Eagle Feathers, *supra* note 58, at 8.

[69] For a fuller discussion of the efficacy and use of general policy statements, see Jared P. Cole & Todd Garvey, Cong. Rsch. Serv., R44468, General Policy Statements:

V. Exploring Challenges to the Eagle Permit System

Together, the MBTA and BGEPA prohibit taking, possessing, selling, buying, bartering, offering to sell, buy, purchase, or barter, transporting, exporting, or importing bald and golden eagles or their parts without a federally-issued permit.[70] While in 1962, the BGEPA was amended to include the authorized use of bald and golden eagles "for the religious purposes of Indian tribes,"[71] the MBTA does not have exemptions for Native American possession or use.[72] A violation of the BGEPA can result in a fine of $100,000 for individuals, and $200,000 for organizations, as well as imprisonment terms for one year for a first time offense.[73] Further, the MBTA can impose a fine of up to $15,000 and up to six months in prison.[74] In order to avoid these fines and imprisonments, members of federally recognized tribes may submit permits to take, possess, and transport lawfully possessed eagles or their parts.[75] American Indians who are in state recognized tribes, or are not enrolled in federally recognized tribes do not receive the same exemptions, and thus cannot take, own, or possess bald or golden eagle feathers or parts without risking imprisonment and hefty fines. For those who are enrolled members of federally recognized tribes, even with the exemption to these two Acts, the process to receive eagle parts is extremely lengthy.

To receive a permit, eligible individuals must navigate through the federal FWS website to find and complete an application.[76] The application requires individuals to answer a series of questions about the type and use of bird parts requested, and requires individuals to submit proof of enrollment with their application.[77] After submitting an application, the processing time between applying and receiving the requested parts can be lengthy.[78] The outbreak of the global pandemic COVID-19 in March 2020 has further exacerbated this issue. The repository moved to 50 percent capacity following the outbreak of COVID-19 and thus current wait times for applicants range from six months to receive a pair of

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Legal Overview (2016); For discussion of AIRFA as a policy statement, *see also* Jennifer H. Weddle, *Navigating Cultural Resources Consultation: Collision Avoidance Strategies for Federal Agencies, Energy Project Proponents, and Tribes*, 60 Rocky Mtn. Min. L. Inst. 22–1, 22–12 (2014).

70 Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d.

71 16 U.S.C. § 668a.

72 Fjerstad, *supra* note 54, at 537; 50 C.F.R. § 22.22 (1999).

73 *The Bald and Golden Eagle Protection Act*, U.S. Fish & Wildlife Serv., https://www.fws.gov/law/bald-and-golden-eagle-protection-act (last visited June 25, 2022).

74 Fjerstad, *supra* note 54, at 537.

75 50 C.F.R. § 22.22 (1999).

76 *Eagle Repository Documents & Forms*, U.S. Fish & Wildlife Serv., https://www.fws.gov/library/collections/eagle-repository-documents-forms.

77 *Federal Fish and Wildlife Permit Application Form: Native American Take for Religious Purposes*, U.S. Fish & Wildlife Serv., https://fwsepermits.servicenowservices.com/sys_attachment.do?sys_id=b21072381bde68509407eb9ce54bcb02 (last visited June 25, 2022)

78 *See generally* Smith, *supra* note 62 (discussing the eagle feathers petition process).

wings, to nine years and one month to receive an immature golden eagle whole bird.[79] Because of the burdensome permit process for federally recognized tribes, and the inability for non-federally recognized tribes, or non-members to legally obtain eagle parts, the federal courts are now dealing with questions regarding the legitimacy of this process.[80]

Following the implementation of RFRA, federal courts have now had to contend with its application to cases arguing against the permit system's constitutionality. District courts are now split on whether or not the permit system is a constitutional burden on American Indian religious practice based on the RFRA test, leading legal experts to believe this issue may eventually make its way to the Supreme Court in order to create a clear precedent for how to apply RFRA. Contemporary cases have turned on two main RFRA issues: first whether the permit system is an unconstitutional burden on American Indian religious practice based on the cost, inefficiency, and limitation of applications to federally recognized tribes, and second if it is a burden, whether the permit system is the least restrictive means of fulfilling a compelling government interest.

A. *Status of Current Legal Challenges*

Currently, Circuit Courts are split as to the whether the eagle permit process violates RFRA. Three districts have ruled on this question: the Ninth Circuit in *US v. Vasquez-Ramos*,[81] the Tenth Circuit in *US v. Wilgus,*[82] and the Fifth Circuit in *McAllen Grace Brethren Church v. Salazar*.[83] Both the Ninth and Tenth Circuits have argued that the eagle permit process satisfies the RFRA test, while the Fifth Circuit remanded the case determining that the system may not be the least restrictive means to fulfill the governmental interest. The distinctions made between these cases, as discussed below, indicate the capriciousness of RFRA, as well as the uncertainty of how the Supreme Court will rule on the constitutionality of the eagle permit system.

In 2008, the Ninth Circuit in *U.S. v. Vasquez-Ramos* first examined the issue of whether the federal law prohibiting the possession of eagle feathers and talons without a permit violated RFRA for individuals who are not enrolled in federally recognized tribes.[84] In this case, the defendants, who were not members of federally recognized tribes, were

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[79] *Current Wait Times September-December 2022*, Nat'l Eagle Repository, U.S. Fish & Wildlife Serv., https://www.fws.gov/media/current-wait-times-september-december-2022pdf.

[80] *See e.g.*, United States v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008); United States v. Wilgus, 638 F.3d 1274 (10th Cir. 2011); McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014).

[81] *Vasquez-Ramos*, 531 F.3d 987.

[82] *Wilgus*, 638 F.3d 1274.

[83] *McAllen Grace Brethren Church*, 764 F.3d 465.

[84] *See Smith*, *supra* note 62, at 583; *see generally* Zackeree S. Kelin, *Dramatically Narrowing RFRA's Definition of "Substantial Burden" in the Ninth Circuit – the Vestiges of Lyng v. Northwest Indian Cemetery Protective Association in Navajo Nation et al. v. United States Forest Service et al.,* 55 S.D. L. Rev. 426 (2009).

charged with violating both the BGEPA and MBTA for possessing eagle parts and feathers. These individuals subsequently sued claiming the permit process' limitation to only federally recognized tribes violated RFRA. The Ninth Circuit ultimately held that the eagle permit system did not violate RFRA, because while the requirement for individuals to be part of federally recognized tribes was a substantial burden to defendants' religious practice, the requirement for federally recognized status was the least restrictive means of fulfilling the compelling interest of protecting a "symbol of the American ideals of freedom."[85]

In doing so, the Ninth Circuit in *Vasquez-Ramos* conceded that the permit process, specifically the limitation of permit applications to federally recognized tribes, substantially burdened the defendants' freedom of religious exercise.[86] Thus, following the reinstated *Sherbert* and *Lyng* tests in RFRA, the Ninth Circuit then looked to whether the federal government: (1) had a compelling interest in maintaining the eagle permit process; and (2) whether maintaining the federally recognized tribe requirement was the least restrictive means to achieve said compelling interest.[87]

First, the Court determined based on precedent in *United States v. Antoine*,[88] that the protection of eagles was still a compelling interest for the federal government, and thus the "compelling interest in eagle protection . . . justifies limiting supply to eagles that pass through the repository, even though religious demand exceeds supply as a result."[89] The Circuit Court then briefly explained that "Congress and the Department of the Interior have chosen a means of allocating scare eagle parts that is 'least restrictive' while still protecting our important national symbol."[90] Last, the Court determined that "RFRA does not require the government to make the practice of religion easier." It further explained that the First Amendment "is written in terms of what the government cannot do to an individual, not in terms of what the individual can exact from the government." Therefore, the federal government had no duty increase salvaging and recovering of eagle parts in order to increase the efficiency of the permit process and allow for non-federally recognized individuals to practice their religion. The Court ultimately ruled that restricting the permit system for federally recognized tribes was the least burdensome method of fulfilling the governmental compelling interest of protecting eagles as opening the process up to non-federally recognized American Indians would burden federally recognized tribes.[91]

The Tenth Circuit had their chance to weigh in on this issue in 2011 in *United States v. Wilgus*. They addressed the same question when a

[85] *Vasquez-Ramos*, 531 F.3d at 989, 991.
[86] *Id.* at 990–991.
[87] *Id.*
[88] United States v. Antoine, 318 F.3d 919 (9th Cir. 2003).
[89] *Id.* at 924.
[90] *Vasquez-Ramos*, 531 F.3d at 992.
[91] *Id.*

non-federally recognized Native American religious adherent was arrested for possessing bald and golden eagle feathers.[92] This Court equally saw the permit system as the least restrictive means of fulfilling a compelling interest, because of their status as national symbols. Citing *Harman*, the Court wrote: "whether there [are] 100 eagles or 100,000 eagles, the governments interest in them remains compelling."[93] Additionally, the Tenth Circuit Court added a second compelling governmental interest of preserving federally recognized American Indian culture and religion.[94] The Tenth Circuit stated: "there is considerable disagreement among tribes holding eagle feathers sacred regarding the appropriate role – if any – of person who are not tribal members in tribal worship . . . While some tribes welcome non-Native American adherents in their worship, others regard members of other races "playing Indian" as a threat to Native American culture."[95] This interest in preserving Native American culture and religion was born of a special relationship between federally recognized tribes and the federal government, and thus opening up the permit process to non-federally recognized practitioners would increase wait times even further and create additional burdens to religious practice for federally recognized tribes.[96] The Court thus determined that specifically limiting the permit system to federally recognized applicants was the least restrictive means of both protecting the national symbol and "preserving the religion and culture of federally-recognized Indian tribes."[97]

The Tenth Circuit further refused to consider any alternatives that could be less restrictive beyond those introduced by the lower court and the defendant Wilgus, stating: "The task of deciding whether a particular regulatory framework is the least restrictive – out of all conceivable – means of achieving a goal virtually begs a judge to go on a fishing expedition in his or her own mind without tethering the inquiry to the evidence in the record."[98] After examining the two options offered in the lower court, the Circuit Court determined that neither would successfully advance the government's compelling interest in preserving the culture and religion of federally recognized tribes.[99]

Three years later, in 2014, the Fifth Circuit split with the Ninth and Tenth Circuits in *McAllen Grace Brethren Church v. Salazar*. In this case,

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92 United States v. Wilgus, 638 F.3d 1274, 1285 (10th Cir. 2011)
93 *Id.*
94 *Id.*
95 *Id* at 1281.
96 *Id* at 1290. While the Court focuses on the potential that non-Indians would "play Indian" if the permit process was opened to individuals not enrolled in a federally recognized tribe, it fails to account for the numerous tribes whose federally recognized status was terminated during the Termination era including numerous tribes who were terminated through the California Rancheria Termination Acts 72 Stat. 619.
97 *Id* at 1295.
98 *Id* at 1289.
99 *Id.*

appellants filed suit against the Department of Interior seeking a declaration of rights stating that the permit system violates both the First Amendment Free Exercise Clause and RFRA because it requires individuals to be enrolled in federally recognized tribes to practice their religion.[100] Again, the Court here did not question whether the plaintiff's religious practice had been substantially burdened, and agreed with the Tenth Circuit *Wilgus* ruling that the government had a compelling interest in protecting bald and golden eagles as national symbols and protecting the culture and religion of federally recognized tribes. However, on the second part of the RFRA test, the Fifth Circuit court determined that the government had in fact failed to show that the permit system was the least restrictive means of fulfilling their compelling interests.[101] This decision split from the Tenth Circuit by specifically pointing to the Department's insufficient evidence to prove that the solutions the plaintiff proposed, including collecting molted feathers from zoos and allowing tribes to maintain aviaries, could not achieve the government's goals of eagle protection.[102] The Court specifically stated that the harm to non-federally recognized American Indian individuals was one of the Government's own making through their inefficiencies, and that "the burden on the Department is a high one: they must demonstrate that "no alternative forms of regulation" would maintain this relationship [between the government and federally recognized tribes] without infringing upon the rights of others."[103]

This split between the Fifth, Ninth and Tenth Circuits has been attributed to the expansion of RFRA in the 2014 United States Supreme Court case *Burwell v. Hobby Lobby*.[104] Two months prior to the *McAllen Grace* decision, the Supreme Court ruled on a case questioning the Affordable Care Act's (ACA) constitutionality based on RFRA claims. In this case, the Supreme Court ruled that the contraceptive mandate in ACA violated Hobby Lobby's exercise of their Christian religion as it required them to provide contraceptives to employees, which contradicted their beliefs about contraceptive drugs and devices.[105] By applying the RFRA test, the Court determined that the ACA contraceptive mandate

[100] McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014).

[101] *Id.*; Petitioner Soto referenced in his petition a number of exceptions for non-religious use of eagles including falconry for sport, scientific collecting, and utility infrastructure development among others. He explains in ten years, the Department of the Interior issued 337 permits for non-religious purposes to take eagles from the wild. One such type of non-religious permits granted was for energy companies to kill eagles for infrastructure purposes. Another was granted to allow the Southeast Raptor Center at Auburn University in Auburn, Alabama to rehabilitate and train eagles to fly over the football stadium during games. During this time, the Department only issued seven take permits for American Indian religious purposes. *See* Petition to end the Ban on Religious Exercise with Eagle Feathers, *supra* note 58.

[102] *McAllen,* 764 F.3d at 480.

[103] *Id.*

[104] *See Burwell*, *supra* note 51.

[105] 573 U.S. 682 (2014).

required Hobby Lobby to engage in conduct that violated their religious beliefs or else suffer economic consequences in taxes for refusing to comply with the ACA.[106]

Next, the Court assessed whether this substantial burden was the least restrictive means of fulfilling the compelling governmental interest of ensuring that all women have access to contraceptives.[107] The Court ruled that in fact, because the Department of Health and Human Services had carved out other exceptions for religious non-profit organizations, the contraceptive mandate for corporations was not the least restrictive means of achieving that compelling interest.[108] Following this case, the RFRA test has expanded, requiring the government to prove that federal laws "must satisfy a rigorous constitutional test whenever they are applied to objecting believers."[109] This includes the requirement that if there is an alternative way to achieve a compelling interest, the interest fails the least restrictive means RFRA test.[110] The Fifth Circuit in *McAllen* specifically point to this higher burden on the government for demonstrating that the current process is the least restrictive means.[111]

Following the expansion of the RFRA test under *Hobby Lobby* and the subsequent Fifth Circuit's decision, there is hope that the Supreme Court could resolve these splits through determining that the permit system is not the least restrictive means of serving the government's compelling interests in protecting eagles and federally recognized American Indian religious and cultural practices.[112] This hope is further amplified by the recent United States Supreme Court decisions regarding treaty rights, however, because of the history of inconsistent policies of the federal government toward American Indian religious practice, as seen above, as well as the recent change in composition of the Supreme Court bench the future of American Indian cases at this level is still uncertain.[113] Thus, with regard to American Indian religious exercise, and specifically within the context of arguing against the constitutionality of the permit system, it may be beneficial to look at negotiation with administrative agencies as an avenue for religious protection rather than only utilizing the judicial branch. Using both judicial and administrative agency avenues to implement and modify religious protections provides practitioners with options for the best method to pursue under their unique circumstances and it could potentially be beneficial to pursue multiple avenues at the same time. Here, because of the uncertainty of

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[106] Smith, *supra* note 62, at 581.
[107] *Burwell*, *supra* note 51, at 725.
[108] *Id.*
[109] *See* Smith, *supra* note 62, at 582.
[110] *Id.* at 588.
[111] McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 480 (5th Cir. 2014).
[112] *See* Smith, *supra* note 62.
[113] Acee Agoyo, *Supreme Court takes up Indian Law cases as tribes face new 'unknown',* Indianz (Oct. 19, 2021), https://www.indianz.com/News/2021/10/19/supreme-court-takes-up-indian-law-cases-as-tribes-face-new-unknown/.

how the Supreme Court may rule, working directly with federal agencies may provide a better chance of success in fixing the burden the permit system places on American Indian religious practice.

B. *Pursuing Those Challenges in the Supreme Court*

Recent treaty-rights cases have Indian law practitioner's hopeful for the possibility that the Supreme Court is finally ready to take Indian rights seriously. However, I argue that the recent pro-Indian interest[114] decisions do not indicate a likelihood of success of any cases regarding the constitutionality of the eagle permit system as these cases require the Supreme Court to carve out religious exercise exceptions. Further, recent changes to the current Supreme Court bench with the passing of Justice Ginsberg and the appointment of Justice Coney-Barrett make it unlikely that the Supreme Court will favor tribal rights more so than they have in the past.[115]

In March 2019, the Supreme Court first indicated its willingness to take treaty rights seriously when it upheld an 1855 treaty between the United States and the Yakama Nation, mandating that the State of Washington could not impose a motor vehicle fuel tax upon members of the Yakama Nation.[116] Shortly thereafter, in May 2019, the Court continued to give hope to treaty rights cases when it remanded a case wherein a Crow member was charged with violating state laws for hunting elk out of season and without a permit.[117] The Supreme Court held that Wyoming's statehood did not void the Crow Tribe's treaty-given right to hunt on unoccupied lands of the United States. While the initial outcome, namely the Court determining that the Crow still had a valid treaty hunting right, is positive for pro-Indian issues, the Court remanded the case and it is now facing an uphill battle back to the Supreme Court from the Wyoming State District Court. The Wyoming State District Court must now determine if Wyoming had a compelling reason for regulating Crow hunting, such as conservation necessity of elk, or that the lands were no longer "unoccupied" within the meaning of the 1868 Treaty thus rendering the treaty hunting right void.[118] The outcomes of two cases together indicated that the addition of Justice Gorsuch to the bench in 2017 could mean a new interest and favorability for Indian law cases at the Supreme Court level.[119]

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[114] *See* Christensen, *supra* note 2, at 68 (discussing that there are usually no Indian parties in cases, thus instead of analyzing Indian case outcomes as Indian wins or losses, it is more accurate to look at whether the outcome of the case is pro-Indian interest or against Indian interest).

[115] *See generally* Matthew L.M. Fletcher, *Factbound and Spitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 Ariz. L. Rev. 933 (2009) (discussing Indian law cases in the Supreme Court); *see also* Christensen, *supra* note 2 (providing a full discussion of each Justice's Indian Law voting record from 1953 – July 2020).

[116] *See* Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019).

[117] *See* Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

[118] *Id.* at 1703.

[119] *Id.*

In July 2020, the Supreme Court ruled on another Indian law case, *McGirt v. Oklahoma*, wherein a Seminole member was convicted of crimes against a child by the Oklahoma State Court. The crimes occurred in what was originally Muscogee Creek territory based on a series of treaties signed with the United States,[120] but these lands have been treated as if they are state land following the Oklahoma Enabling Act, which merged Indian land with state land to create the single state of Oklahoma.[121] Since this Act, the State has been operating under the assumption that the reservation land no longer exists, thus giving jurisdiction over this case to the Oklahoma state courts. However, in *McGirt,* the question presented to the Court was: did this enabling act actually dissolve the reservation, and if not, who has jurisdiction over crimes on this land? Following the enactment of the Northwest Ordinance of 1787,[122] only Congress has the ability to take away land from tribes. Thus, the majority opinion determined that because Congress had not expressly taken reservation land away from the Muscogee Creek, and following the reasoning of the Major Crimes Act[123] which states that only the federal government has authority over enumerated Major Crimes such as rape and murder, the federal government should have jurisdiction over the land, and thus over the original crime committed therein.[124]

Unlike other Indian law cases, the legal question of *McGirt* is not one of guaranteeing treaty-rights, or carving out exceptions or rights for American Indians, but rather a federalist question of who has jurisdiction over a piece of land: the state government or the federal government. Here, because the main issue was not a question of state versus tribal jurisdiction,[125] such as in *Cougar Den* and *Herrera*, the case could be decided without need for remand, and without a concern over creating tribal claims that outcompete state claims. In *McGirt*, the ultimate question becomes whether the state or the federal courts had jurisdiction to try McGirt for his crimes. The treaty-rights are present and form a significant part of the decision making, but only as far as whether the State or Federal government controls American Indian action. Here, there is no need for the Supreme Court to carve out exceptions for tribal members or provide tribal authority superior claim over state and federal governmental claims.

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120 *McGirt* v. Oklahoma, 140 S.Ct. 2452, 2460–1 (2020).

121 *Id.* at 2471.

122 The Northwest Ordinance (Jul. 13, 1787)

123 The Major Crimes Act, 18 U.S.C. § 1153 (1885); *see also* U.S. v. Kagama, 118 U.S. 375 (1886).

124 The Northwest Ordinance (Jul. 13, 1787); *see also McGirt*, 140 S. Ct.

125 *See* Christensen, *supra* note 2, at 95–6 (discussing the relevant factors in determining how an Indian law case may result, including the Tribe's position as appellant, the geographic location of the case, and the question of state versus tribal jurisdiction: "Many Indian law cases directly confront jurisdictional questions centered around the interaction of competing tribal, state, and federal powers").

All three of these recent treaty rights cases were 5–4 decisions, with Justices Ginsburg, Breyer, Sotomayor, Kagan and Gorsuch forming the majority.[126] Justice Gorsuch, a President Trump appointee, acted as a swing vote, and joined the liberal Justices to form majority. While it would initially seem surprising that in both of these cases Justice Gorsuch would vote against his Republican-appointed peers, Gorsuch's background in the Tenth Circuit provides more context for this decision. Prior to appointment to the Supreme Court bench, Gorsuch was a Tenth Circuit judge where he ruled on numerous Indian law cases, including a treaty-rights based case, *Sharp v. Murphy*,[127] which went through the Tenth Circuit prior to Gorsuch's appointment to the Supreme Court. This case, decided *per curium* following *McGirt*, additionally considered a murder on Muscogee Creek land. While serving in the Tenth Circuit, Gorsuch ruled in this case that in fact the Muscogee Creek reservation had not been disestablished, foreshadowing his *McGirt* opinion. Gorsuch's experience and familiarity with Indian law and policy led him to rule against his conservative Justices in these three cases.[128]

While the recent Supreme Court successes may indicate that the Court is currently favorable to Indian law cases, these decisions have only succeeded narrowly, and a common thread of upholding treaty rights that do not carve out exceptions for American Indian action runs through them. Unlike these cases, the legal question of whether the eagle permit system violates RFRA protections for non-federally recognized American Indian religious practitioners requires that the Court create religious exemptions to federal laws. Additionally, with the loss of Justice Ginsburg, and the addition of Justice Barrett to the bench, it is unclear whether Indian cases could still reach the narrow majority seen in these three cases. While Justice Ginsburg was not always a staunch supporter of Indian rights,[129] she did help to form the majority in each of these cases. Her passing in September 2020, and the subsequent appointment of Justice Coney Barrett creates uncertainty as to whether a pro-Indian issues majority could be reached in Indian law cases. Justice Coney Barrett has an uncertain record with Indian law cases, but her political ideology may indicate she would not rule as favorably.[130] Because of the history of unfriendly treatment of Indian law cases in the Supreme Court, as well as the uncertainty of the new bench, it is beneficial for tribes to look to

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[126] *See, e.g.*, Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond,* 2017 U. Ill. L. Rev. 1901, 1941–42 (2017) (discussing the effect of Justice Gorsuch's appointment on Indian law jurisprudence).

[127] Sharp v. Murphy, 140 S.Ct. 2412 (2020).

[128] It was because of this decision that McGirt began his own appeal process. *Sharp* similarly went up to the Supreme Court in 2018, however it could not be decided as Gorsuch recused himself from the case, and a five-justice majority couldn't be reached. This decision in *McGirt* decided that case per curium this past term.

[129] *See* Christensen, *supra* note 2, at 73–4.

[130] *Id.* at 78.

alternative means to achieving legal changes in Indian Law. One avenue that may provide success in limiting barriers to eagle possession for religious purposes is direct agency action such as Robert Soto's 2018 Petition to the Fish and Wildlife Service in the Department of the Interior.[131]

C. *Pursuing Challenges through Administrative Agencies*

While the United States Supreme Court may still be a risky and unfriendly climate for Indian law cases, tribal members and governments have successfully protected American Indian religious exercise through action at the agency level.[132] Collaboration between tribes and governmental agencies allows tribes to be directly involved in the decision making process, as opposed to only being able to challenge already made decisions and policies in the judicial system.[133] In addition to working proactively, rather than reactively through the judicial system, these agency actions can provide more protection, as federal courts give more deference to agency action, creating a presumption in favor of upholding that agency's action.[134] Furthermore, agencies can provide relief to the judicial system in providing exemptions which could alleviate the judicial system from facing numerous individual cases. Success in agency-tribe negotiations can be seen through the case studies of recreational climbing bans at Mato Tipila, and plant gathering agreements in Buffalo National River.

In 1977, one year before the passage of AIFRA, recreational climbing at Mato Tipila began to surge after the geological feature was highlighted in the film *Close Encounters of the Third Kind*.[135] Mato Tipila, also known as Devil's Tower or Bear Lodge, is a key feature in many Plains cosmologies, ceremonies and religious traditions.[136] In the 1990s, recreational climbers and tribal members come to conflict over the climbers' treatment of Mato Tipila, namely the hammering of metal pitons into the side of the geological feature.[137] To combat these rising issues, the site manager of the National Park sought to create a climbing management plan that took into consideration the concerns of American Indian tribes as well as environmental groups, climbers and governmental officials.[138] Creating this working group equipped the U.S. National Park Service with the skills needed to create dialogue and cultural exchange between Indian tribes and climbers fighting over use of Mato Tipila, and ultimately created a Final Climbing Management Plan that took into con-

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[131] *See* Petition to end the Ban on Religious Exercise with Eagle Feathers, *supra* note 58.

[132] *See* Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration,* 8 Tex. J. C.L. & C.R. 1 (2003).

[133] Melissa L. Tatum & Jill Kappus Shaw, Law, Culture & Environment (2014).

[134] *Id.* at 97.

[135] *Id.* at 59–60.

[136] *Id.* at 59.

[137] *Id.* at 60–61.

[138] *Id.* at 61.

sideration tribes' opposition to metal pitons, and promoted a voluntary ban of individual and ban of commercial climbing in June, the month when the Lakota held their sun dance at the tower.[139]

Another example of an agency action which served to allow for traditional religious practices is the agreement between the Buffalo National River, a river area managed by the National Park Service and the Cherokee Nation to allow for plant gathering within National Parks.[140] On U.S. National Forests, Parks, or Monuments, it is illegal for all people to collect plants without a permit issued for scientific or educational purposes.[141] In 2016, however, the Cherokee Nation and Cherokee Medicine Keepers worked together with the National Park Service, and the University of Arizona school of Anthropology to create a mechanism for tribes to create agreements with national parks in their traditional homelands to gather traditional plants.[142] For this project, the Cherokee Medicine Keepers worked to educate National Park Service officials on land-based knowledge and stewardship practices which ultimately led the department to acknowledge ancestral and political relationships between American Indians and their traditional land, as well as create a mechanism to reconnect or sustain this relationship.[143] This agreement process is now open to all federally recognized tribes.[144]

As with the eagle permit process, there are still disadvantages to this type of permit process. For example, the new plant gathering permit process could pose the same burdens to American Indian religious practice, including barring non-federally recognized tribes from taking part in this type of agreement. Additionally, there are quite a few responsibilities and requirements of tribes before they can gather plants which could create burdens to religious exercise. Tribes must designate enrolled members who are authorized to gather and submit a written request explaining the tribe's traditional association, purposes for gathering, and the description of gathering the tribe plans to do.[145] Tribes must also still comply with federal laws regarding protections of specific species such as the National Environmental Policy Act of 1969,[146] the National Historic Preservation Act,[147] and the Endangered Species Act.[148]

Notwithstanding these challenges, in working with the federal agencies, the Cherokee successfully created this mechanism for all federally

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[139] *Id.* at 63–64.
[140] Clint Carroll, *Cherokee Relationships to Land: Reflections on a Historic Plant Gathering Agreement Between Buffalo National River and the Cherokee Nation,* 36 Park Stewardship Forum 154, 154–8 (2020).
[141] 36 C.F.R. § 2.5 (2006).
[142] 36 C.F.R. § 2.6 (2021); Carroll, *supra* note 140, at 156–7.
[143] Carroll, *supra* note 140, at 156–7.
[144] 36 C.F.R. § 2.6 (2021).
[145] 36 C.F.R. § 2.6(b)-(c) (2021).
[146] 42 U.S.C. § 4321 et seq.
[147] 54 U.S.C. §§ 300101–307108.
[148] 16 U.S.C. § 1531 et seq.

recognized tribes to access traditional plants in their traditional homelands, an action that had previously been illegal. Now, with this Act in place, federally and non-federally recognized American Indians can continue to work with federal agencies to adjust the process to better serve American Indian individuals and communities.[149] Further, with the appointment of Deb Haaland, an enrolled member of the Pueblo of Laguna and the first American Indian Cabinet pick for Secretary of the Interior Department, agency action could become even more achievable.[150] American Indian religious practitioners looking to alter the eagle permit process can follow these examples and work with individual agencies to create mechanisms for their religious exercises.

D. *2018 Petition to Fish and Wildlife Service*

One such way to achieve this agency action, is through the proposed 2018 Petition Before the Fish and Wildlife Service (FWS). In 2018, Pastor Robert Soto, a member of the state-recognized Lipan Apache tribe and lead plaintiff in the *McAllen Grace Brethren Church v. Salazar,* composed a petition to the Fish and Wildlife Service in the Department of the Interior.[151] In this document, Soto used his Fifth Circuit Court ruling to petition FWS to alter the eagle permit process. Soto asked for reform of three broad things. First, he requested FWS to broaden the Morton Policy to include all sincere religious believers regardless of their enrollment status in a federally recognized tribe. Second, he petitioned to make the Morton Policy a formal rule rather than only informal guidance. Third, Soto asked FWS to give American Indian tribes more control over eagle parts and feathers through government-to-government consultations to better fight the illegal possession of birds and parts, and to effectively expand and regulate the supply of eagle feathers and parts from the National Eagle Repository.[152]

Soto ended his petition with a call for Fish and Wildlife Service to adopt a new subchapter under subchapter B of chapter I, title 50 of the Code of Federal Regulations. These requested additions to the C.F.R would enable sincere religious believers regardless of federally recognized status to possess, use, acquire, gift, and travel with eagle parts and birds, and would provide federally recognized and state recognized tribal members, as well as members of a Native American church a presumption of their sincerely held beliefs.[153]

As seen through the Mato Tipila negotiations and the Cherokee gathering agreement, working together with agencies, as Soto proposes, provides a good alternative means to make changes to barriers to

[149] 36 C.F.R. § 2.6(d)(2) (2021).
[150] Jeff Turrentine, *Meet Deb Haaland*, NRDC (Mar. 15, 2021), https://www.nrdc.org/stories/meet-deb-haaland.
[151] *See* Petition to end the Ban on Religious Exercise with Eagle Feathers, *supra* note 58.
[152] *Id.* at 3.
[153] *Id.* at 42–44.

American Indian religious practice. Here, Soto's petition proposes additions to the C.F.R. that do not require much change or work on the part of FWS. Further the request to change the C.F.R. is not requiring the judicial branch to carve out an exception for religious practitioners. While judicial action can be successful in other arenas, agency negotiations may be more fruitful in modifying the permit system to better serve American Indian religious practice.

Conclusion

United States Federal policies and the United States Supreme Court have rarely been friendly towards American Indian religious practitioners. Throughout colonization and into the 1970s, American Indian religious practice was specifically targeted and prohibited. Contemporarily, American Indian religious practitioners, especially those not members of a federally recognized tribe, continue to face substantial burdens from the federal government to their religious practice as seen through the lengthy, and limiting permit process to receive eagle parts for religious purposes. Split circuit decisions, an expansion of RFRA, and recent United States Supreme Court treaty rights cases have given Indian law practitioners and American Indian religious members hope that the United States Supreme Court could soon resolve these split decisions by ruling that the requirement of eagle part applicants to be members of federally recognized tribes is unconstitutional under RFRA. However, with the current uncertainty of Supreme Court bench, and the history of negative treatment of Indian law cases, it is still risky to bring these issues through the judiciary branch. American Indian religious practitioners should look to agency actions and collaboration with friendlier administrative agencies, as Soto proposes in his 2018 petition, as an alternative method to reducing barriers to religious practice. Working with administrative agencies alleviates the problem of numerous, individual lawsuits challenging the constitutionality of the minimally functioning permit system in the courts, and instead, provides legislation in the proper venue as well as the ability to negotiate between parties prior to judicial action.