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INTRODUCTION

What if you practiced a traditional Native American religion? In the past, the federal government seized your sacred sites and turned them into recreational destinations for tourists. Visitors now litter and vandalize the sites, behave disrespectfully while you try to pray or hold services, and even stand on your equivalent of an altar.[1] But what if you practiced a New Age religion that also reveres some of these Native American sacred sites, albeit in a different manner? Out of respect for Native American beliefs, you might be prohibited by a federal agency from worshipping at a site that you hold sacred.[2] How should federal land managers balance the competing religious, commercial, environmental, and recreational interests that seek to use federal lands, while also complying with the United States Constitution?

Motivated by concerns that their decisions were having a negative impact on Native American religious practices, federal land managers have addressed the acute problems that face practitioners of Native American religions by providing them with limited accommodations.[3] Some National Park and Forest Service accommodations have prompted constitutional challenges under

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1. *See* Chris Smith & Elizabeth Manning, *The Sacred and Profane Collide in the West*, HIGH COUNTRY NEWS, May 26, 1997, *available at* http://www.hcn.org (describing the impact of tourism on Native American sacred sites and the destruction of sacred sites caused by the construction of Glen Canyon Dam and Lake Powell).

2. *See* IN THE LIGHT OF REVERENCE: PROTECTING AMERICA'S SACRED LANDS (PBS Point of View broadcast, August 14, 2001) (describing the conflict between practitioners of traditional Native American religions and New Age practitioners over a sacred site on Mt. Shasta).

3. *See* discussion *infra* Section I.

the Establishment Clause of the First Amendment.[4] However, the Establishment Clause only provides half of the constitutional picture.

The First Amendment of the United States Constitution protects the religious liberty of every citizen with two mutually supporting clauses.[5] The Free Exercise Clause protects religious adherents or nonbelievers from government action that either singles them out for discrimination or burdens their religious practices.[6] The Establishment Clause prohibits the government from favoring or promoting religion.[7] Until recently, the test set out in *Lemon v. Kurtzman*,[8] known as the *Lemon* test, controlled Establishment Clause jurisprudence.[9] In *Lynch v. Donnelly*,[10] Justice O'Connor suggested a modified interpretation of the *Lemon* test, and her interpretation became known as the endorsement test.

This Note will show, through a case study of Native American religious sites on federal lands,[11] that the endorsement

4. *See id.*

5. *See* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 11 (1995).

6. *See id.* at 13.

7. *See id.* at 14.

8. 403 U.S. 602, 612–13 (1971).

9. *See* discussion *infra* Section II.

10. 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring).

11. I will argue in Sections III. - V. that the endorsement test ensures that National Park Service and National Forest Service accommodations of Native American religions, which are required by statute and executive order, receive a thorough and informed analysis by the courts before being found constitutional or unconstitutional. *See, e.g.*, 16 U.S.C. § 470a(d)(6)(A)-(B) (2000) (authorizing the inclusion in the National Historic Register of properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization); Archeological Resources Protection Act of 1979, 16 U.S.C. § 470ii(a) (2000) (requiring consideration of the American Indian Religious Freedom Act before promulgating and carrying out rules and regulations); Native American Graves and Repatriation Act, 25 U.S.C. § 3005 (2000) (providing for repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian tribes and Native Hawaiian organizations); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2000) (requiring the government to protect the free exercise of Native American religions by measures "including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites"); Exec. Order No. 13007, 61 Fed. Reg. 26,771

test protects disfavored and minority religions from judicial prejudice or misunderstanding better than exclusive use of the *Lemon* test. Some commentators have suggested that the endorsement test primarily favors majority religions.[12] However, the endorsement test provides two significant benefits to minority religions. If the test is applied in the manner that Justice O'Connor suggests, judicial opinions will be based on an informed understanding of the religion and religious practices in question, and the courts will thoroughly consider *all* effects of the government action.[13] The debate is not settled as to which constitutional test is the best one to use when analyzing cases that deal with the Establishment Clause.[14] However, the endorsement test proposed by Justice O'Connor protects accommodations to disfavored or minority religions from being declared unconstitutional for improper reasons, such as prejudice or misunderstanding.

(May 24, 1996) ("[E]ach executive branch agency with statutory or administrative responsibility for the management of Federal lands shall . . . (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.").

12. *See Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1639, 1647–50 (1987) [hereinafter *Developments in the Law*]; Anjali Sakaria, *Worshipping Substantive Equality Over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations*, 37 HARV. C.R.-C.L. L. REV. 483, 492 (2002).

> The fundamental problem with Justice O'Connor's objective observer test is that her objective observer still measures objectivity against the backdrop of a Christian society. The objective observer is functionally a reasonable Christian and therefore is less likely to see the offensiveness of a government action that supports Christianity. For many non-Christians or atheists, the religious nature of a crèche or prayer does not easily fade into the background, regardless of how long the practice has persisted.

Id.

13. *See* discussion *infra* Sections II. - III.

14. *See, e.g.*, William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495–98 (1986).

The first section will introduce the issues surrounding the practice of Native American religions on federal lands, and the second section will discuss modern Establishment Clause jurisprudence and the endorsement test. The third section will examine how the factors included in the endorsement test apply to Native American religions. The fourth section will demonstrate that Justice O'Connor's endorsement test directs the courts to examine history, context, and all secular purposes for the accommodation. The fifth section will show that use of the endorsement test by the courts gives federal agencies greater discretion to accommodate minority religions in a constitutionally permissible manner.

I. THE FEDERAL GOVERNMENT AND NATIVE AMERICAN RELIGIONS

The government of the United States has a history of suppressing, discriminating against, and burdening the exercise of Native American religions.[15] Between 1980 and 1988, Native Americans tried unsuccessfully to overcome, through litigation, burdens on the free exercise of their traditional religious practices caused by the destruction of their sacred sites on federal lands.[16]

15. *See generally* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO (1969) [hereinafter CUSTER DIED] (analyzing the historical roots of current problems facing Indians); Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Towards Indians*, 66 WASH. L. REV. 643 (1991) (comparing the historical and current treatment of Indians by the United States and Canadian governments).

16. Cases brought under the Free Exercise Clause by Native Americans have failed as a result of judicial prejudices and misunderstanding of Native American religions. *See, e.g.*, Lyng vs. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988) (holding that government action need not serve a compelling government interest in order to significantly burden the free exercise of a religion, as long as the government action does not coerce individuals from or penalize individuals for practicing their religion); Badoni v. Higginson, 638 F.2d 172, 177-78 (10th Cir. 1980) (holding that the government's interest in supplying water from Lake Powell is compelling enough to justify Lake Powell's infringement on the plaintiffs' religious practices and that the government's management of Rainbow Bridge National Monument does not infringe upon the plaintiffs' free exercise of Native American religions); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1165 (6th Cir. 1980) (holding that the plaintiffs "have not alleged infringement of a constitutionally

However, beginning in the 1990's, the National Park Service and National Forest Service attempted to accommodate Native American religious practices on federal lands.[17] As a result, in the late 1990's and the first years of this century, citizens who are not Native American have raised several challenges in court to National Park Service and National Forest Service accommodations. The court challenges relied on the Establishment Clause of the First Amendment, and the plaintiffs argued that the government had established Native American religions.[18] The Supreme Court has not directly ruled on the issue of how the Establishment Clause applies to the accommodation of religious practices on federal lands.[19] Therefore, this Note will examine the Supreme Court's general Establishment Clause jurisprudence, before turning to how the lower federal courts have dealt with this issue.

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cognizable First Amendment right," because they failed to demonstrate that the Little Tennessee Valley was central to their religion); Laurie Ensworth, *Native American Free Exercise Rights to the Use of Public Lands*, *in* NATIVE AMERICAN CULTURAL AND RELIGIOUS FREEDOMS 153–179 (John R. Wunder ed., 1996) (arguing that the courts improperly rejected Native American claims in *Badoni* and *Sequoyah*).

17. *See, e.g.*, ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 78–80, 103, 125–31, 135–44, 149–57, 162–70 (2000) (describing several examples of National Park and Forest Service accommodations).

18. *See* Natural Arch and Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1224–26 (D. Utah 2002) (holding that the accommodations did not violate the Establishment Clause); Wyoming Sawmills, Inc. v. U.S. Forest Service, 179 F. Supp. 2d 1279, 1293–97 (D. Wyo. 2001) (holding that the plaintiffs lacked standing to bring the suit); Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1453–57 (D. Wyo. 1998) (holding that the voluntary climbing ban did not violate the Establishment Clause and the plaintiffs lacked standing to challenge either the interpretative program or the signs asking visitors to stay on the trail), *aff'd*, 175 F.3d 814 (10th Cir. 1999).

19. The Supreme Court denied certiorari to the only circuit court case addressing the issue. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000).

II. MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE

Although many of the Court's opinions concerning Establishment Clause questions have been divided or appear contradictory,[20] a majority of the Court approved the *Lemon v. Kurtzman* test,[21] which has never been expressly overruled.[22] The *Lemon* test requires that every analysis under the Establishment Clause consider three criteria developed by the Court in its past opinions:[23] "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "[24] However, the *Lemon* test, if applied strictly, would nullify any religious accommodations by the government, so the Supreme Court has sometimes applied the test more flexibly in order to comport with Free Exercise Clause requirements.[25] Over the years, the Court has applied the *Lemon* test inconsistently, and many unpredictable or incongruous opinions have resulted.[26] This has caused widespread criticism of the *Lemon* test.[27]

In response to problems created by inconsistent application of the *Lemon* test, Justice O'Connor proposed a clarification of the *Lemon* test in *Lynch v. Donnelly*.[28] She suggested that government action should be prohibited only if it constitutes an "endorsement" of religion.[29] At times, a majority of the Supreme Court has

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20. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14–15, 1288–93 (2d ed. 1988) (describing *Marsh v. Chambers* and *Lynch v. Donelly* as problematic anomalies in Establishment Clause jurisprudence).

21. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

22. *See, e.g.*, Zelman v. Simmons-Harris, 122 S.Ct. 2460, 2476 (2002) (O'Connor, J., concurring).

23. *See Lemon*, 403 U.S. at 612–13.

24. *Id.* (footnote and citations omitted).

25. *See* Shahin Rezai, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 517, 520 (1990).

26. *See id.*

27. *See* Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1302 (1996).

28. 465 U.S. 668, 687–94 (1984).

29. *See id.* (O'Connor, J., concurring)

expressed approval for the endorsement test and applied it in its analysis of Establishment Clause issues,[30] and some circuits have modified the *Lemon* test to include Justice O'Connor's endorsement test.[31] Therefore, it is important to understand Justice O'Connor's proposed application of the endorsement test to Establishment Clause issues.

Justice O'Connor's endorsement test is premised on a different understanding of the Establishment Clause than the *Lemon* test. Her test is based on the presumption that the separation of church and state is impossible, because sometimes the government's interests overlap or conflict with those of particular religions.[32] In her understanding of the Establishment Clause, a government action may constitutionally help or hinder a particular religious group, as long as the government does not use its power to express endorsement or disapproval of religion.[33] She

30. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 593–94, 602–603 (1989); Edwards v. Aguillard, 482 U.S. 578, 585–87 (1987); Wallace v. Jaffree, 472 U.S. 38, 56 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389–90 (1985).

31. *See* ACLU v. City of Birmingham, 791 F.2d 1561, 1563 (6th Cir. 1986); Natural Arch and Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1222 (D. Utah 2002). The court in *Natural Arch* wrote:

> In *Lynch v. Donnelly*, Justice O'Connor's concurring opinion sought "to refine the *Lemon* analysis to focus more on whether the government is 'endorsing' religion." . . . Although Justice O'Connor's concurring opinion in *Lynch* appears to be the predominate test when evaluating Establishment Clause claims, the Tenth Circuit applies "both the purpose and the effect components of the refined endorsement test, together with the entanglement criterion imposed by *Lemon* . . . ."

Id. (citations omitted).

32. *See* Wallace v. Jaffree, 472 U.S. 38, 69–70 (1985) (O'Connor, J., concurring).

33. *See id.* Justice O'Connor describes her understanding of the Establishment Clause:

> A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. . . . The endorsement test does

therefore argues that religious accommodation, if it lifts a government imposed burden on the free exercise of religion and does not endorse religion, is constitutionally permissible under the endorsement test.[34] The endorsement test's flexibility to permit religious accommodation, in certain circumstances, should remove the need to continue applying the *Lemon* test inconsistently.[35]

The addition of the endorsement test shifts the focus of the *Lemon* test inquiry from the substantive effect of the government action to the symbolic effect of the government action.[36] Justice O'Connor defines endorsement as government action that "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[37] In order to determine whether a government action has the symbolic effect of endorsing religion to an objective observer, the endorsement test places additional factors into two of the *Lemon* test's prongs.[38]

> not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure . . . to conform . . . is plain."

Id. (citations omitted).

34. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346–49 (1986) (O'Connor, J., concurring).

35. *See id.*

36. *See* Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring); Marshall, *supra* note 14, at 515–21.

37. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

38. Justice O'Connor describes her additions to the *Lemon* prongs:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to

Two factors—context and secular purpose—are included in the endorsement test and reveal the unique circumstances of the government action,[39] enabling the courts to make more informed rulings on the constitutionality of specific religious accommodations. First, the endorsement test requires a contextual inquiry under the *Lemon* effect prong, in order to determine whether the action conveys an endorsement of religion to an objective observer.[40] Context includes 1) the historical context of the community and forum and 2) the context of other government actions in the community and forum.[41] Second, the endorsement

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> either question should render the challenged practice invalid.

Id. at 690.

39. *See id.* at 694 ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.").

40. *See* Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779–81 (1995) (O'Connor, J., concurring); County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989); Wallace v. Jaffree, 472 U.S. 38, 76, 83 (1985) (O'Connor, J., concurring); *Lynch*, 465 U.S. at 692–693 (O'Connor, J., concurring).

41. *See Capital Square*, 515 U.S. at 780–82 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 595; *Wallace*, 472 U.S. at 76, 83 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 692–93 (O'Connor, J., concurring). The Court articulates the necessity of examining the context of the government action under the endorsement test:

> Although Justice O'Connor joined the majority opinion in *Lynch*, she wrote a concurrence that differs in significant respects from the majority opinion. The main difference is that the concurrence provides a sound analytical framework for evaluating governmental use of religious symbols. . . . [T]he concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." That inquiry, of necessity, turns upon the context in which the contested object appears: "[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." The concurrence thus emphasizes that the

test requires an inquiry under the *Lemon* purpose prong into *all* secular purposes served by the government action, in order to determine whether the government's actual purpose was to endorse religion.[42] In cases that concern Native American religions, analysis under the "purpose" prong invites examination of the general history and culture of Native American tribes.[43] Because the endorsement test factors inform the courts of circumstances that would not otherwise be examined with exclusive use of the *Lemon* test, the endorsement test increases the thoroughness with which the courts analyze accommodations of minority religions, as will be shown in the next section.

III. THE ENDORSEMENT TEST AND NATIVE AMERICAN RELIGIONS

The judiciary and the federal government have shown disfavor to Native American religions, denying these minority religions the protections promised by the First Amendment.[44] Although Native American citizens have made great strides in advancing their civil rights,[45] many judges and jurors have either retained subtle prejudices against Native American religions or lack understanding of these traditions.[46] Accommodations of minority religions are also more likely to be found invalid under

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> constitutionality of the crèche in that case depended upon its "particular physical setting," and further observes: "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion[.]"

Allegheny, 492 U.S. at 595 (citations omitted).

42. *See Wallace*, 472 U.S. at 74–75 (O'Connor, J., concurring).

43. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 816–18 (10th Cir. 1999) (describing the history and culture of Native American tribes).

44. *See* discussion *infra* Subsections A. - B.

45. *See, e.g.*, VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 4–24 (2d ed. 1992) [hereinafter GOD IS RED].

46. *See Developments in the Law*, *supra* note 12, at 1734–35; Smith & Manning, *supra* note 1. "As Steven Moore of the Colorado-based Native American Rights Fund points out, not once have the courts saved a sacred place based exclusively on Native American arguments that their right to freely practice their religion was compromised or destroyed." *Id.*

the *Lemon* test than accommodations of majority religions simply because they don't have the weight of tradition behind them.[47]

The two factors required by the endorsement test limit the potential that courts will decide the constitutionality of accommodations of Native American religions based on misunderstanding or arbitrary prejudices. Instead, these factors direct the court to consider the government action in its unique circumstances.[48] If seen in light of history and context, accommodations of disfavored or minority religions are inherently less likely to serve as endorsement of these religions, because an objective observer would view the accommodations as necessary to assure the free exercise of these religions.[49] The application of

47. *Cf.* Marshall, *supra* note 14, at 507–509; W. Scott Simpson, *Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465, 466–70 (1986); William Van Alystyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L. J. 770, 785–87 (1984).

48. *See* Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

> Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded.

Id.

49. *See* Sakaria, *supra* note 12, at 488–89, 502.

> When a legislature accommodates a majority religious group, individuals are more likely to perceive the accommodation as an insidious attempt by the majority to advance a religious agenda, leading to feelings of political exclusion on the part of those not accommodated. Because majority religious groups are often implicitly accommodated through majoritarian laws, accommodations of majority religious groups are more likely to be perceived as expressions of religious favoritism, rather than legitimate attempts to lift a burden on religious exercise. With respect to legislative accommodations of a minority religious group, on the other hand, individuals are likely to perceive the

Justice O'Connor's endorsement test ensures that accommodations of disfavored or minority religions are not deemed unconstitutional without a thorough and informed analysis by the courts.

A. The Context of Accommodations to Native American Religions

Under the effect prong of the *Lemon* test, Justice O'Connor's endorsement test requires an inquiry into the context of the accommodations.[50] Although the context factor of the endorsement test has attracted criticism as applied by the Supreme Court to majority religions,[51] contextual analysis has the potential to benefit minority religions, because it increases the court's overall knowledge of the circumstances. Context includes the historical context of the community and forum and the context of

> accommodations positively and to impute noble intentions of religious tolerance and pluralism to the accommodating legislature .... Upholding a legislative accommodation of a minority religious group, while striking down an identical accommodation for a majority religious group, is not inherently invidious. Given that laws are enacted through a democratic process that advantages majority religions, treating majority and minority religions unequally might be the only way to achieve equal religious liberty in society. Strict adherence to formal denominational neutrality, while superficially providing equal treatment to religious groups, implicitly disfavors the religious liberty of members of minority religions since these individuals are most likely to experience conflict between religious exercise and majoritarian laws.

Id.

50. *See* Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779–81 (1995) (O'Connor, J., concurring); County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); *Lynch*, 465 U.S. at 692–693 (O'Connor, J., concurring).

51. *See, e.g.*, Rezai, *supra* note 25, at 532–36 (criticizing the Court's analysis of context in *Allegheny*).

other government actions in the community and forum.[52] In cases concerning Native American religions on federal lands, the community is the entire United States and the forum includes all federal lands. The following portion of this Note will make the contextual inquiry by 1) examining the historical treatment of Native American religions by the federal government and the agencies that control federal lands and 2) discussing the practices of other religious groups that are permitted, or sponsored by the government, on federal lands.

First, the federal government has historically discriminated against, suppressed, and controlled or limited the practice of Native American religions.[53] One important limitation was the federal government's seizure of Native American sacred sites. Prior to the conquest of the Americas by Europeans, Native Americans possessed the entire continent, including what are now considered federal lands and the National Parks and Forests.[54] Vine Deloria, Jr., a practicing lawyer and professor of Native American studies, describes the centrality of location-specific sacred sites in Native American religious traditions:

> [T]here are . . . some places of inherent sacredness, sites that are holy in and of themselves . . . .
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> Among the duties which must be performed at these Holy Places are ceremonies which the people have been commanded to perform in order that the earth itself and all its forms of life might survive . . . . The *cumulative* effect of continuous secularity [and impiety at

52. *See Capital Square*, 515 U.S. at 780–82 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 595; *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 692–693 (O'Connor, J., concurring).

53. *See generally* CUSTER DIED, *supra* note 15 (analyzing the historical roots of current problems facing Indians); Johnson, *supra* note 15 (comparing the historical and current treatment of Indians by the United States and Canadian governments).

54. *See* Worcester v. Georgia, 31 U.S. 515, 542–44 (1832) (describing land ownership in the Americas before European conquest).

> sacred sites will] . . . bring about the massive destruction of the planet. [55]

However, Native Americans lost all property interest in many of their sacred sites as a direct result of government policies.[56] Loss of title to sacred sites has limited the exercise of many religious practices, because Native Americans are unable to fully use or possess their sacred sites and can no longer exclude others from them.[57] Therefore, the federal government has significantly burdened the free exercise of Native American religions on federal lands, as a result of historical conquest and government policies concerning Native American land ownership.

Not only have Native Americans lost exclusive possession of their sacred sites, the federal government and federal agencies have also actively discriminated against the practice of Native American religions on federal lands.[58] Past federal policy

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55. VINE DELORIA, JR., FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 209–10 (James Treat ed., 1999) [hereinafter FOR THIS LAND].

56. *See* U.S. v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980) (holding that the 1877 Act took the Black Hills, including Devil's Tower, from the Sioux without just compensation.); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); CUSTER DIED, *supra* note 15, at 28–53.

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which . . . demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

Lone Wolf, 187 U.S. at 566.

57. *See* Lyng vs. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 463–64 (1988) (Brennan, J., dissenting) ("Recognizing that the high country is 'indispensable' to the religious lives of the approximately 5,000 Tribe members who reside in the area, the court concluded 'that the proposed government operations would *virtually destroy the . . . Indians' ability to practice their religion.*' ") (citations omitted); H.R. REP. NO. 95-1308, at 1262–65 (1978).

58. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817–18 (10th Cir. 1999); GOD IS RED, *supra* note 45, at 239–41, 246–47.

suppressed the practice of Native American religions through federal support of Christian missionaries on tribal reservations, laws prohibiting Native American religions, and even violence.[59] More recent federal statutes, which were not enacted with the intent of affecting Native American religious practices, have been interpreted by federal agencies in ways that discriminate against the practice of Native American religions on federal lands.[60] Viewed in the historical context of federal control over Native American sacred sites and discrimination against Native American religions, current federal agency policies that protect the practice of Native American religions are best seen as accommodations that lift government imposed burdens on religion, rather than an endorsement of these religions.[61]

Second, viewed in the context of all religious practices permitted in the National Parks, agency policies that protect of

59. *See Bear Lodge*, 175 F.3d at 817–18 (describing past federal policies designed to suppress the practice of Native American religions).

60. *See* H.R. REP. NO. 95-1308, at 1262–65 (1978).

> [T]here were many instances where the religious rights of the traditional Native Americans were being infringed upon by Federal statutes, regulations, or enforcement policies. New barriers have been raised against the pursuit of their traditional culture, of which the religion is an integral part. . . . Lack of knowledge, unawareness, insensitivity, and neglect are the keynotes of the Federal government's interaction with traditional Indian's religions and cultures. This state of affairs is enhanced by the perception of many non-Indian officials that because Indian religious practices are different than their own that they somehow do not have the same status as a "real" religion. Yet, the effect on the individual whose religious customs are violated or infringed upon is as onerous as if [she or he] had been Protestant, Catholic, or Jewish.

Id.

61. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335–36 (1986) (holding that government efforts to accommodate religion are permissible when they remove government-imposed burdens on the free exercise of religion); TRIBE, *supra* note 20, § 14–4, 14–7 (describing religious accommodation as an intersection of the Free Exercise and Establishment Clauses and defining constitutional accommodation).

Native American religions are even more clearly revealed to be remedial accommodations, rather than active endorsements. In fact, Native American religions are *disfavored* compared to the extensive favor the federal government has shown to the practice of Christianity.[62] Native Americans have struggled for the opportunity to freely exercise their religion on federal lands,[63] but Christianity has a secure foothold in the National Parks as a result of the favor shown to it by the federal government.[64] For example, the Park Service manages many parks that have Christian church buildings with active parishes or congregations.[65] Catholic masses

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62. *See* Charles Levendosky, *Respecting Sacred Sites: Why Not Accommodate Indians at Devil's Tower as We Accommodate Christians Elsewhere?*, ROCKY MOUNTAIN NEWS, May 18, 1997, at 1B, *available at* 1997 WL 6836569.

63. *See, e.g.*, Lyng vs. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 45-451 (1988) (holding that government action need not serve a compelling government interest in order to significantly burden the free exercise of a religion, as long as the government action does not coerce individuals from or penalize individuals for practicing their religion); Badoni v. Higginson, 638 F.2d 172, 177-178 (10th Cir. 1980) (holding that the government's interest in supplying water from Lake Powell is compelling enough to justify Lake Powell's infringement on the plaintiffs' religious practices and that the government's management of Rainbow Bridge National Monument does not infringe upon the plaintiffs' free exercise of Native American religions); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1165 (6th Cir. 1980) (holding that the plaintiffs "have not alleged infringement of a constitutionally cognizable First Amendment right," because they failed to demonstrate that the Little Tennessee Valley was central to their religion); Ensworth, *supra* note 16, at 153–179 (arguing that the courts improperly rejected Native American claims in *Badoni* and *Sequoyah*).

64. *See* Levendosky, *supra* note 62.

65. The National Park Service owns and operates Boston National Historical Park, which includes Old North Church, 16 U.S.C. § 410z (a) (2000), San Antonio Missions National Historical Park, 16 U.S.C. § 410ee(a)-(b) (2000) (authorizing cooperative management agreements with the Catholic Archdiocese), Mission San Jose in Tumacácori National Historical Park, 16 U.S.C. § 410ss - 410ss-1 (2000), the Shrine of the Ages Chapel in Grand Canyon National Park, http://www.nps.gov/grca/grandcanyon/trip_planner/general_information.htm (last modified 12/2/02) (on file with the First Amendment Law Review), the Yellowstone National Park Chapel, http://www.nps.gov/yell/tours/ftyell/frtstop5.htm (last modified 7/2/99) (on file with the First Amendment Law Review), Yosemite National Park Chapel, Ron

are still offered in the San Antonio Missions,[66] and the National Park Service even sponsors the re-enactment of a historic Catholic mass at Tumacácori National Historical Park twice each year.[67] The National Park Service also permits a Christian non-profit organization, which engages in proselytization, to minister in thirty-five National Parks.[68] In the Black Hills National Forest, where Lakota Indians were denied the right to set up a spiritual retreat, there are a number of Christian churches as well as the Placerville Camp of the United Church of Christ.[69]

Christianity's secure foothold in the National Parks provides a foil for the treatment of Native American religions by federal agencies.[70] Unlike agency protection of Native American religions, which historical context has shown to be accommodation of these religions, federal agency support for Christianity cannot be viewed as mere accommodation of Christianity. The tenets of Christianity do not require worship services to be held at any particular location, and there is no need to hold services on federal lands.[71] Therefore, allowing the practice of Christianity on federal lands is not an accommodation, because permitting Christian services to be held in the National Parks does not remove any

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Orozco, *Yosemite Community Church*, THE FRESNO BEE, June 9, 2001, *available at* http://www.fresnobee.com/local/religion/church_profiles/story/654759p-700087c.html (on file with the First Amendment Law Review), and countless other churches.

66. *See* http://www.nps.gov/saan/visit/MissionSanJose.htm (last modified 2/10/02) (on file with the First Amendment Law Review).

67. *See* Smith & Manning, *supra* note 1.

68. *See* http://www.coolworks.com/acmnp/parks.htm (last visited 1/9/03) (on file with the First Amendment Law Review) for a list of the parks that have Christian ministry and worship services sponsored by A Christian Ministry in the National Parks.

69. *See* U.S. v. Means, 627 F. Supp. 247, 264 (W.D. S.D. 1985), *rev'd*, 858 F.2d 404 (8th Cir. 1988).

70. Accommodations of Native American religions in the National Parks and Forests have raised public outcry and challenges in court, while the practice of Christianity in the National Parks and Forests has raised little legal controversy. *See* Smith & Manning, *supra* note 1 (reporting on the public outcry in response to the accommodations). There have been no major court challenges to the practice of Christianity in the National Parks and Forests.

71. *See Means*, 627 F.Supp. at 264.

barrier to the free exercise of Christianity.[72] In contrast, Native American religious beliefs require that worship services be held at traditional sacred sites, many of which are now on federal lands.[73]

In the context of all government action in the National Parks and Forests, the federal government appears to endorse the practice of Christianity rather than the practice of Native American religions.[74] Christianity is the majority religion of this nation, and the federal government has actively endorsed Christianity,[75] for

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72. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335–36 (1987) (holding that government efforts to accommodate religion are permissible when they remove government-imposed burdens on the free exercise of religion); TRIBE, *supra* note 20, § 14–4, 14–7 (describing religious accommodation as an intersection of the Free Exercise and Establishment Clauses and defining constitutional accommodation).

73. *See* Lyng vs. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 460–62 (1988) (Brennan, J., dissenting).

> Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. . . . [T]he qualities "of silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of [each] particular site."

Id. (citations omitted).

74. *See* Levendosky, *supra* note 62.

75. *See* County of Allegheny v. ACLU, 492 U.S. 573, 604–605 (1989) ("The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.") (citations omitted); Wallace v. Jaffree, 472 U.S. 38, 91–106 (1985) (Rehnquist, J., dissenting) (arguing that the historical preference of the government for Christianity as the state religion means that the Establishment Clause only forbids the establishment of an official national religion and preference among religious sects); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (holding that Christian legislative prayer does not violate the Establishment Clause).

example, when it forced Native Americans to convert to Christianity.[76] Christianity, as a religious tradition, also seeks to convert new members.[77] On the other hand, adherents to Native American religions have always been in the minority and have often been subjected to unfavorable government policies.[78] Most adherents of Native American religions do not proselytize, and most sects limit their membership to those born into a particular tribe or with Native American ancestry.[79]

Accommodations of Native American religions, viewed in historical context and considered in the context of all religious practices permitted on federal lands, will not convey endorsement of these religions. Therefore, according to Justice O'Connor's endorsement test, such accommodations do not violate the Establishment Clause.

B. The Secular Purposes for Accommodation of Native American Religions

Under the purpose prong of the *Lemon* test, Justice O'Connor's endorsement test also requires an inquiry into all secular purposes served by the accommodations in order to determine whether the government's actual purpose was to endorse religion. In cases concerning Native American religions, an examination of the general history and culture of Native American tribes is necessary to determine the secular purposes served by the

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76. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817–18 (10th Cir. 1999).

77. *See* FOR THIS LAND, *supra* note 55, at 262.

78. *See Bear Lodge*, 175 F.3d at 817–18.

79. *See* FOR THIS LAND, *supra* note 55, at 262.

> Unlike Western religions which sought to convert a selected number of true believers and convince them a particular interpretation of planetary history was correct, tribal religions were believed to be special communications between spirits and a specific group of people . . . No demand existed, however, for the people to go into the world and inform or instruct other people in the rituals or beliefs of the tribe.

Id.

accommodation of these religions.[80] The history of Native American religions detailed in the previous subsection reveals the fact that the federal government has imposed substantial burdens on the free exercise of these religions.[81] This adverse history and the adverse history of Native American tribes in general has created three secular purposes for the accommodation of Native American religions on federal lands: religious accommodation, the fulfillment of trust responsibilities owed by the federal government to Native tribes, and cultural preservation.[82]

The first secular purpose served by accommodation of Native American religions on federal lands is constitutionally permissible religious accommodation.[83] The federal government created significant barriers to the free exercise of Native American religions when it assumed ownership of Native American sacred sites, attempted to suppress all exercise of these religions, and prevented the exercise of these religions on what are now federal lands.[84] The Supreme Court has held that removal of a government-imposed burden on the free exercise of a religion is a valid secular purpose.[85]

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80. *See Wallace*, 472 U.S. at 74–75 (O'Connor, J., concurring).

81. *See* discussion *supra* Subsection A.

82. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1454–55 (D. Wyo. 1998) (finding the secular purposes served by the accommodation of Native American religions in the National Parks and National Forests), *aff'd*, 175 F.3d 814 (10th Cir. 1999).

83. *See Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).

84. *See Bear Lodge*, 175 F.3d at 817–18; Johnson, *supra* note 15, at 646–662, 685–86.

85. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335–36 (1987) (holding that government efforts to accommodate religion are permissible when they remove government-imposed burdens on the free exercise of religion); *Bear Lodge*, 2 F. Supp. 2d at 1454–55. The court in *Bear Lodge* held that accommodation is a legitimate secular purpose:

> In this case the Defendants contend that the climbing plan was designed, in part, to eliminate barriers to American Indian's free practice of religion. They argue that this type of accommodation is particularly appropriate in situations like this where impediments to worship arise because a group's sacred place of worship is found on property of the United States. . . .

The second secular purpose served by accommodation of Native American religions on federal lands is the fulfillment of the trust responsibilities the United States government owes to Native American tribes to return to the tribes the use of their sacred sites.[86] Most federal lands, including those on which Native American sacred sites are located, were taken from Native Americans by war, treaty, allotment policies, or in the exercise of authority as the trustee of tribal lands.[87] Tribes lost control over their sacred sites as a result of federal policies, even though they never intended to give up their right to practice their religion at their sacred sites.[88] The federal government has acknowledged its responsibility to Native Americans to restore their religious freedoms with the passage of the American Indian Religious Freedom Act of 1978 and other statutes and the signing of an Executive Order in 1996.[89] Therefore, the accommodation of

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> The purposes underlying the ban are really to remove barriers to religious worship occasioned by public ownership of the Tower. This is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose.

Id.

86. *See* Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 247 (1985) (holding that the Indian right of occupancy can only be extinguished by plain and unambiguous government action, because "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."); Lone Wolf v. Hitchcock, 187 U.S. 553, 565, 567 (1903) (describing the trust relationship between the United States government and Native American tribes); Natural Arch and Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1226 (D. Utah 2002) (finding that the trust relationship between the United States government and Native Americans provided a valid secular purpose for consultation with tribes concerning the management of federal lands).

87. *See* CUSTER DIED, *supra* note 15, at 28–53; Johnson, *supra* note 15, at 646–662, 685–86.

88. *See* Rebecca Tsosie, *Land, Culture, and Community*, 34 IND. L. REV. 1291, 1306 (2001) ("Native peoples ... hold different notions about the appropriate relationship and obligations people hold with respect to the land. The mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor ... that they no longer maintain the rights to these lands.").

89. *See, e.g.*, 16 U.S.C. § 470a(d)(6)(A)-(B) (2000) (authorizing the inclusion in the National Historic Register of properties of traditional religious

Native American religions on federal lands also serves the purely secular purpose of restoring to the tribes, through federal agency policies and management plans, some of the property rights lost when the United States government failed to adequately protect their interests.

The third secular purpose served by accommodation of Native American religions on federal lands is the preservation of Native American culture. Cultural preservation, under the National Historic Preservation Act,[90] has been considered a valid secular purpose by at least one court.[91] Traditional Native Americans insist that their religion and culture are inextricably intertwined.[92] Deloria describes traditional Native American beliefs,

> Religion is not conceived as a personal relationship between the deity and each individual. It is rather a covenant between a particular god and a particular community . . . . Religion dominates the tribal culture, and distinctions existing in Western civilization

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and cultural importance to an Indian tribe or Native Hawaiian organization); Archeological Resources Protection Act of 1979, 16 U.S.C. § 470ii(a) (2000) (requiring consideration of the American Indian Religious Freedom Act before promulgating and carrying out rules and regulations); Native American Graves and Repatriation Act, 25 U.S.C. § 3005 (2000) (providing for repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian tribes and Native Hawaiian organizations); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2000) (requiring the government to protect the free exercise of Native American religions by measures "including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites"); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996) ("[E]ach executive branch agency with statutory or administrative responsibility for the management of Federal lands shall ... (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.").

90. National Historic Preservation Act of 1966, 16 U.S.C. § 470–470x-6 (2000).

91. *See* Natural Arch and Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1224 (D. Utah 2002); H.R. REP. NO. 95–1308, at 1262–65 (1978).

92. *See* GOD IS RED, *supra* note 45, at 194.

> no longer present themselves. Political activity and religious activity are barely distinguishable. History is not divided into categories. It is simultaneously religious, political, economic, social, and intellectual.[93]

Preservation of a traditional American culture, such as Native American culture, is a proper secular goal for the National Park Service and Forest Service under the National Historic Preservation Act.[94]

The presence of three such significant secular purposes for the accommodation of Native American religions indicates that the government's purpose was not to convey endorsement of these religions. Therefore, according to Justice O'Connor's endorsement test, such accommodations do not violate the Establishment Clause.

When determining whether accommodations to Native American religions violate the Establishment Clause, the courts *should* consider the context of these accommodations. They *should* also examine the three secular purposes of religious accommodation, fulfillment of trust responsibilities, and cultural preservation. Without these considerations, a court's analysis cannot be truly informed and thorough. Because the *Lemon* test alone does not direct the courts to consider context and all the secular purposes served by the government action, Justice O'Connor's endorsement test provides necessary guidance for Establishment Clause jurisprudence when it concerns the accommodation of Native American or other minority religions.

IV. LEMON-AID: THE BENEFITS OF INTEGRATING THE ENDORSEMENT TEST

Three cases, *Badoni v. Higginson*,[95] *Natural Arch and Bridge Society v. Alston*,[96] and *Bear Lodge Multiple Use Ass'n v.*

93. *Id.*

94. *See* discussion of Medicine Wheel National Historic Landmark *infra* Section V.

95. 638 F.2d 172 (10th Cir. 1980).

96. 209 F. Supp. 2d 1207 (D. Utah 2002).

Babbitt,[97] demonstrate how the endorsement test prevents incomplete and conclusory analysis, which results from the application of the *Lemon* test alone. *Badoni* was decided before Justice O'Connor proposed the endorsement test, while *Natural Arch* and *Bear Lodge* were decided after the Tenth Circuit adopted the endorsement test.[98] Both *Badoni* and *Natural Arch* concern the same sacred site, Rainbow Bridge National Monument, and similar requests for accommodation by Native American tribes.[99] However, the Tenth Circuit in *Badoni* held that proposed accommodations of Native American religions at Rainbow Bridge National Monument would violate the Establishment Clause,[100] while a Tenth Circuit district court held in *Natural Arch* that similar accommodations of Native American religions did not violate the Establishment Clause.[101]

A. Badoni

Before Justice O'Connor proposed the endorsement test,[102] the court in *Badoni* applied the *Lemon* test exclusively. The rigid language of the *Lemon* test resulted in an incomplete analysis by the court of the Establishment Clause issues raised by the proposed accommodations.[103] The court's literal reading of the purpose prong of the *Lemon* test invalidated any form of religious accommodation,[104] even though religious accommodation is sometimes required under the Free Exercise Clause.[105]

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97. 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999).

98. *Badoni* was decided in 1980; *Lynch* was decided in 1984; *Bear Lodge* was decided in 1999; *Natural Arch* was decided in 2002.

99. *See Badoni*, 638 F.2d at 175; *Natural Arch*, 209 F. Supp. 2d at 1210.

100. *See Badoni*, 638 F.2d at 179–80.

101. *See Natural Arch*, 209 F. Supp. 2d at 1225.

102. *See supra* note 98.

103. *See Badoni*, 638 F.2d at 179–80.

104. *But see* Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144–45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."); Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972) ("The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of

The court's cursory analysis, which resulted from its use of the *Lemon* test, is apparent in this passage from *Badoni*:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[106]

Bound by this literal reading, the court was unable to examine in its analysis the history of Native American religions in the United States or the context of Native American religions on federal lands.[107] The court held that the appellants' request for privacy to conduct occasional religious ceremonies at Rainbow Bridge and that tourists visiting the Bridge act "in a respectful and appreciative manner"[108] would turn the Bridge into "a government-managed religious shrine"[109] in violation of the Establishment Clause.[110] If the endorsement test had not been adopted, and the *Lemon* test remained the sole standard of constitutionality, courts in the Tenth Circuit would continue to use such conclusory reasoning to

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the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."); TRIBE, *supra* note 20, at § 14–4, 14–7 (describing religious accommodation as an intersection of the Free Exercise and Establishment Clauses and defining constitutional accommodation).

105. *See Yoder*, 406 U.S. at 220–21.

106. *Badoni*, 638 F.2d at 179 (footnote and citations omitted); *Cf.* Lynch v. Donnelly, 465 U.S. 668, 691–92 (1984) (O'Connor, J., concurring) ("Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion.").

107. *See Badoni*, 638 F.2d at 179–80.

108. *Id.* at 179.

109. *Id.*

110. *Id.* at 179–80.

determine whether an accommodation of Native American religions on federal lands violates the Establishment Clause.[111]

B. Natural Arch

Twenty-two years after *Badoni*, a Tenth Circuit district court examined the very same issue in *Natural Arch*.[112] However, the court used the endorsement test, in addition to the *Lemon* test, and reached an entirely different result.[113] After *Badoni* was decided, Rainbow Bridge in the late 1980's suffered ecological damage, vandalism, overcrowding and excessive noise, and destruction of archeological sites and petroglyphs, as a result of the large crowds from Glen Canyon Recreational Area who could now easily access the Monument.[114] In the words of the district court, "[u]nlimited visitor access desecrated the sanctity of the bridge to surrounding Native American tribes and lessened its overall cultural importance."[115] This desecration was a direct result of the *Badoni* holding that any limitations on visitor access with the purpose of accommodating Native American religions would be unconstitutional.

The Park Service responded to the problem with the preparation of a General Management Plan, which was completed in 1993 after consultation with tribal religious leaders.[116] The Plan accommodated Native American religious practices and beliefs by educating the public about the spiritual significance of the site to Native American religions and requesting that visitors not walk

111. *Cf.* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) ("Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith . . . the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.").

112. Natural Arch and Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002).

113. *See id.* at 1222–26.

114. *See id.* at 1213.

115. *Id.*

116. *See id at* 1213–14.

under the bridge out of respect for the beliefs of those religions.[117] These accommodations are very similar to some of the accommodations proposed by the earlier plaintiffs in *Badoni*. In response, Natural Arch and Bridge Society, a non-profit agency, sued to have the Plan declared unconstitutional.

The district court held that the religious accommodations, which included consultation with the tribes prior to making any management decisions, visitor education, and requests for respectful behavior, did not violate the Establishment Clause under the *Lemon* test or the endorsement test.[118] The accommodations had many valid secular purposes,[119] did not primarily advance religion,[120] and did not excessively entangle the Park Service in religion.[121]

Under its Endorsement test inquiry, the court found that:

> [A] reasonable observer aware of the history and context of the community, would not view the 1993 GMP and Interpretive Prospectus as communicating a message of government endorsement or disapproval. . . . Visitors are made aware of the beliefs of others, but are not told that those beliefs are to be preferred over any others, or that the Park Service has adopted traditional religion as its

117. *See* Natural Arch and Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1214 (D. Utah 2002).

118. *See id.* at 1224–26.

119. *See id.* at 1223–24. The court held:

> [P]romoting an understanding of neighboring cultures is an appropriate secular purpose which allows the general public the opportunity to enhance their individual and collective perspective. The purpose is primarily informational. In addition, the policy serves a dual secular purpose of fostering the preservation of the historical, social, and cultural practices of Native Americans.

Id. at 1224.

120. The effect of the accommodations was not to "establish, promote, or advance religion . . . [but] to educate and inform the public about different cultures and increase sensitivity to the beliefs of others." *Id.* at 1222–24.

121. *See id.* at 1225–26.

> own. . . . The policy . . . does not . . . coerce visitors into practicing the Native American religion associated with the belief about not walking under the Rainbow God. In fact, visitors to Rainbow Bridge have virtually *no* opportunity to observe, let alone participate in, the practice of traditional Native American religions.[122]

The court also found that the government's trust responsibilities towards Native American tribes and the various federal statutes enacted to protect tribal governments, cultures, and religions provided additional secular purposes for the consultation.[123] Despite the fact that the Tenth Circuit in *Badoni* held that very similar accommodations were an unconstitutional "advancement" of Native American religions,[124] the court in *Natural Arch* held that the accommodations were constitutional under the endorsement test.

Such opposing results under such similar circumstances reveal the significance of incorporating the endorsement test into the *Lemon* test. The three endorsement test factors prompted the court in *Natural Arch* to inquire into the "history and context of the community"[125] and examine all possible secular purposes served by the accommodations. The court in *Badoni* was limited by the language and form of the *Lemon* test: after holding that the government action advanced religion in violation of one prong of *Lemon*, the court was required to hold that the action violated the Establishment Clause, regardless of how many important secular purposes the action served.[126] In contrast, the endorsement test permits the government to advance religion as long as it does not endorse religion and shifts the focus of the constitutional inquiry to the circumstances surrounding the accommodation.

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122. Natural Arch and Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1224–25 (D. Utah 2002).

123. *See id.* at 1226.

124. Badoni v. Higginson, 638 F.2d 172, 179–80 (10th Cir. 1980).

125. *Natural Arch*, 209 F. Supp. 2d at 1224–25.

126. *See Badoni*, 638 F.2d at 179–80.

C. *Bear Lodge*

Bear Lodge,[127] the third case addressing this issue, provides another demonstration that the endorsement test requires the courts to consider accommodations in their unique circumstances before making any ruling regarding their constitutionality. In *Bear Lodge*, the Tenth Circuit affirmed the district court's holding that the National Park Service Final Climbing Management Plan did not violate the Establishment Clause.[128] The Plan required Park Service employees to request that rock climbers voluntarily refrain from climbing Devil's Tower during June out of respect for Native American religious practices such as the Sun Dance.[129] The Tenth Circuit held that the rock climbers lacked standing to sue, because they alleged no injury in fact resulting from the Final Climbing Management Plan.[130]

In *Bear Lodge*, the Tenth Circuit and the district court engaged in a more thorough inquiry and a more informed analysis of the facts than in *Badoni*. The district court specifically acknowledged that religious accommodation serves a valid secular purpose.[131] It held that the Plan was a religious accommodation, not coercive, did not advance religion, and did not excessively entangle the government in religion.[132]

Although it did not reach the merits of the claim, the Tenth Circuit recognized the importance of Devil's Tower to Native American culture and religion by beginning its opinion with a lengthy discussion of Native American religions and the significance of Devil's Tower to various Native tribes.[133] The Tenth Circuit also noted the federal statutes that accommodate Native American religions, by extending special protection to them

127. Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999).

128. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 822 (10th Cir. 1999).

129. *See id.* at 820.

130. *Id.* at 822.

131. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1454–55 (D. Wyo. 1998).

132. *See id.* at 1554–56.

133. *See Bear Lodge*, 175 F.3d at 815–18.

or allowing access to and/or authorizing temporary closure of specific sacred sites located on federal lands.[134] When examined in concert, these three cases, *Badoni*, *Natural Arch*, and *Bear Lodge*, demonstrate that the adoption of endorsement test has improved the quality of the constitutional analysis of Establishment Clause questions in the Tenth Circuit.

V. A "GOVERNMENT MANAGED SHRINE": MEDICINE WHEEL NATIONAL HISTORIC LANDMARK AS SACRED SITE AND TRADITIONAL CULTURAL PROPERTY

Wyoming Sawmills, Inc. v. United States Forest Service,[135] a case concerned with the protection of Medicine Wheel National Historic Landmark, is currently before the Tenth Circuit. This new case is important because it demonstrates another potential benefit of the endorsement test: use of the endorsement test by the courts gives federal agencies greater discretion to accommodate minority religions in a constitutionally permissible manner.

Federal agencies, which are required by statute and executive order to accommodate the free exercise of Native American religions,[136] are more likely to do so in ways that satisfy

134. *See id.* at 818.

135. Wyoming Sawmills, Inc. v. U.S. Forest Service, 179 F. Supp. 2d 1279 (D. Wyo. 2001).

136. *See, e.g.*, 16 U.S.C. § 470a(d) (6) (A)-(B) (2000) (authorizing the inclusion in the National Historic Register of properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization); Archeological Resources Protection Act of 1979, 16 U.S.C. § 470ii(a) (2000) (requiring consideration of the American Indian Religious Freedom Act before promulgating and carrying out rules and regulations); Native American Graves and Repatriation Act, 25 U.S.C. § 3005 (2000) (providing for repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian tribes and Native Hawaiian organizations); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2000) (requiring the government to protect the free exercise of Native American religions by measures "including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites"); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996) ("[E]ach executive branch agency with statutory or administrative responsibility for the management of Federal lands shall ... (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2)

practitioners of these religions if they believe the accommodations will survive Establishment Clause challenges.[137] Judicial application of the endorsement test is more likely to result in an accommodation of Native American religions being deemed constitutional than judicial use of the *Lemon* test alone.[138]

Therefore, with strong evidence of a secular purpose or purposes, federal agencies should theoretically be able to provide broader accommodations, because any potential message of endorsement would be diminished by the secular purpose.[139] The National Historic Preservation Act (NHPA)[140] provides such a strong secular purpose, namely that of cultural preservation. This Note will show how National Forest Service accommodations of Native American religions at Medicine Wheel National Historic Landmark under the NHPA are more encompassing than the accommodations in *Natural Arch* and *Bear Lodge* as a result of the overlap between NHPA requirements and the endorsement test factors.[141]

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avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.").

137. After a preliminary injunction by the district court enjoining the National Park Service from banning commercial rock climbing at Devil's Tower, the Park Service withdrew all plans for mandatory bans on rock climbing at Devil's Tower. The Forest Service also reversed its mandatory ban on rock climbing at Cave Rock. However, the Park Service and Forest Service have continued to pursue visitor education and voluntary bans, like the one upheld in *Bear Lodge*. *See Bear Lodge*, 175 F.3d at 820–21; Emily Miller, *Climbing Ban Fails*, HIGH COUNTRY NEWS, June 23, 1997, *available at* http://www.hcn.org.

138. *See* discussion *supra* Section IV.

139. *Cf.* Lynch v. Donnelly, 465 U.S. 668, 692–93 (1984) (O'Connor, J., concurring) (suggesting that even marginal secular purposes, such as "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" or the "celebration of a public holiday with traditional symbols," may negate any message of government endorsement of religion).

140. National Historic Preservation Act of 1966, 16 U.S.C. § 470 - 470x-6 (2000).

141. The accommodations in *Natural Arch* and *Bear Lodge* addressed visitor education and voluntary requests for visitors to be respectful of Native American beliefs. *See* discussion *supra* at pp. 140–141. At Medicine Wheel, one goal of the Historic Preservation Plan is to decrease the number of visitors and increase the privacy of Native American practitioners. *See* Historic

Unlike Rainbow Bridge National Landmark or Devil's Tower National Monument, Medicine Wheel is managed primarily for the purpose of cultural preservation. Under the NHPA, Medicine Wheel was declared a National Historic Landmark in April 1969, and the latest Historic Preservation Plan for the site was approved in 1996.[142] Medicine Wheel is recognized as "a sacred site and a nationally important traditional cultural property."[143] Cultural preservation under the NHPA has important implications under the endorsement test. The fact that a federal statute, which does not concern religion, also supports the necessity of religious accommodation lessens any appearance of government endorsement of Native American religions.

The status of "traditional cultural property" for tribal sacred sites under the NHPA[144] provides credibility for the argument that cultural preservation, rather than religious endorsement, is the purpose and effect of accommodation. Detailed studies of a living community's historical connection to the site, and the importance of the site to the community's culture, are required before a site can be designated a National Historic Landmark on this basis.[145] This requirement forces the National Park Service and National Forest Service to establish the significance of a site to Native American tribal cultures prior to giving a sacred site additional protection under the Act.[146] The detailed studies give the National Park Service and National Forest Service substantial evidence of the cultural and educational purposes served by the protection of a

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Preservation Plan for Medicine Wheel National Historic Landmark and Vicinity, USDA Forest Service, Bighorn National Forest, 1969 S. Sheridan Ave., Sheridan, Wyoming 82801, pp. 31–34, 41–42 (September 1996) [hereinafter HPP].

142. *See* Wyoming Sawmills, Inc. v. U.S. Forest Serv., 179 F. Supp. 2d 1279, 1286–87 (D. Wyo. 2001).

143. *See* HPP, *supra* note 141, at 5.

144. 16 U.S.C. § 470a(d)(6)(A)-(B) (2000).

145. *See* Patricia L. Parker & Thomas E. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, NATIONAL REGISTER BULLETIN 38 (National Park Service); HPP, *supra* note 141, at 6–11.

146. Once a property is designated a National Historic Landmark, it ihas substantially more protection than properties merely listed on the National Register or not recognized at all. *See* Dean B. Suagee, *Tribal Voices in Historic Preservation*, 21 VT. L. REV. 145, 167–70 (1996).

sacred site and accommodations at the site,[147] and this evidence in turn negates the appearance of government endorsement of religion under the endorsement test.

The management of Native American sacred sites as "traditional cultural property" also integrates the full range of concerns that Native American practitioners have regarding the spiritual and cultural value of the sites and gives Native Americans a voice in their management.[148] The Historic Preservation Plan describes the Medicine Wheel in terms sensitive to Native American beliefs,[149] and protection of the Landmark focuses on "maintaining the traditional cultural values that exist in this part of the Forest. Multiple uses will be managed in a way that will not detract from the spiritual and traditional values associated with these properties."[150] The entire Mountain and areas within view of the Mountain will be managed in accordance with Native American beliefs,[151] with the sole goal of permitting visitors to

147. *See* HPP, *supra* note 141, at 10–11.

148. *See* discussion of Native American belief that religion and culture are intertwined *supra* p. 22; Suagee, *supra* note 146, at 190–94.

149. *See* HPP, *supra* note 141, at 10.

> [W]ithin the belief systems of Native American traditional communities, the entirety of Medicine Mountain is a traditional cultural property where various interrelated ceremonial, religious, and other traditional cultural activities occur . . . . Ceremonial activities are ongoing today . . . . Other places in the Medicine Mountain vicinity are of critical importance within the functioning of Native American belief systems, but they exhibit no material evidence of their use because the nature of the activities conducted there do not result in the accumulation of physical remains. Nevertheless, the lack of material evidence at these locations make them no less important to the traditional cultural values of the Mountain and its continued traditional use.

Id.

150. HPP, *supra* note 141, at 23.

151. *See* HPP, *supra* note 141, at 10, 15, 24, 26, 31, 41–42. For example: The National Forest Service will consult with traditional Native Americans designated by the Medicine Wheel Coalition. *Id.* at 15–16. The area immediately surrounding the Wheel will be managed exclusively for the protection of traditional cultural values, and the entire landscape will be treated

"experience [its] powerful sanctity and learn about the nature of Indian religions and the central importance that religion has in traditional practitioners' lives."[152]

Predictably, the 1996 management plan aroused opposition, especially from the local logging industry.[153] Wyoming Sawmills Incorporated filed suit, demanding that the court strike the plan, because it believed the plan violated the Establishment Clause.[154] The court held that Sawmills showed an injury in fact only with respect to its Complaint injuries,[155] but that these injuries were not caused by the 1996 Historic Preservation Plan nor were these injuries redressable by the court.[156] Therefore, the district court granted the National Forest Service's motion to dismiss these claims.[157] Because the district court resolved the case on issues of standing, *Wyoming Sawmills, Inc. v. United States Forest Service* does not address the merits of Wyoming Sawmills' Establishment Clause claim.[158] The issue of whether the Historic Preservation Plan violates the Establishment Clause is still very much alive.

However, the circumstances of *Wyoming Sawmill* differ from the prior three cases dealing with the accommodation of Native American religions on federal lands. At Medicine Wheel, the focus of National Forest Service accommodation of Native American religions is the secular purpose of preserving a traditional cultural resource and traditional cultural use of the

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as a sacred place. *Id.* at 23–24, 29. The view from the Mountain and its entire ecosystem will be maintained in as natural a state as possible, because the view and the ecosystem are intrinsic to its value as a sacred place. *Id.* at 26. Certain sacred sites on the Mountain will not be disclosed to the public at the request of Native practitioners. *Id.* at 10. Visitor access to the site will be limited to increase the privacy of Native American practitioners and prevent further environmental degradation of the site. *Id.* at 29–39.

152. HPP, *supra* note 141, at 11.

153. *See* Wyoming Sawmills, Inc. v. U.S. Forest Service, 179 F. Supp. 2d 1279, 1286–88 (D. Wyo. 2001).

154. *See id.* at 1292–93.

155. *See id.* at 1293–96.

156. *See id.* at 1296–97.

157. *See id.* at 1296–97, 1306.

158. *See* Wyoming Sawmills, Inc. v. U.S. Forest Service, 179 F. Supp. 2d 1279, 1294–97 (D. Wyo. 2001).

Wheel.[159] The language of the Plan emphasizes the value that Medicine Wheel has to both Native American culture and religion.[160] The management of the Landmark as both a sacred site and an educational resource for visitors underscores its cultural value[161] and differs from the emphasis on recreational use at Rainbow Bridge and Devil's Tower. The important secular purpose of cultural preservation and the educational benefits of the plan, which result from a consulting partnership with Native American tribes,[162] improve the likelihood that the Plan will withstand any future Establishment Clause challenges under the endorsement test. Therefore, under the endorsement test, NHPA recognition of a Native American sacred site as a "traditional cultural property" can be used by the National Park Service and Forest Service to support the constitutionality of accommodations at the site.

CONCLUSION

Federal courts addressing Establishment Clause questions that concern minority or disfavored religions should adopt the endorsement test, because it promotes a thorough and informed analysis of Establishment Clause questions. The endorsement test also gives the National Park Service and the National Forest Service latitude to create management plans that accommodate Native American religions *and* can survive constitutional scrutiny. The ultimate result of constitutional accommodations of Native American religions on federal lands will not be coerced belief in these religions, but understanding and tolerance of them. In the words of Park Superintendent Deborah Liggett who oversaw the creation of the General Management Plan at issue in *Bear Lodge*, "I argue that a gesture of respect costs us little and benefits us as a people - first people, most recent people and Americans yet to come. I argue for reasonable accommodation. I argue for mutual

159. *See* HPP, *supra* note 141, at 5, 29–30.

160. *See* discussion of Native American belief that religion and culture are intertwined *supra* pp. 140–141.

161. *See* HPP, *supra* note 141, at 41–42.

162. *See* HPP, *supra* note 141, at Attachment C.

respect."[163] The courts should permit the government to fulfill the guarantees of the Free Exercise Clause and sanction constitutional accommodations of religion.

163. Deborah Liggett, *Mutual Respect Costs Us Little and Gains Us Much*, HIGH COUNTRY NEWS, May 26, 1997, *available at* http://www.hcn.org.