

# Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century

Raymond Cross

*University of Montana School of Law, ray.cross@umontana.edu*

Elizabeth Brenneman

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# ARTICLES

## DEVILS TOWER AT THE CROSSROADS: THE NATIONAL PARK SERVICE AND THE PRESERVATION OF NATIVE AMERICAN CULTURAL RESOURCES IN THE 21st CENTURY

Raymond Cross\*  
Elizabeth Brenneman\*\*

“What unites Western culture in all its phases, tying in with the ambivalence that produces the continuity of change, is a series of demythologizings and consequent ‘losses of faith’—some gradual, some traumatic. Nothing is so characteristic of our traditions, with the result that we can say more truly of Western culture than of almost anything else, ‘plus ça change, plus c’est la même chose.’ The Western world, in short, uses up myth at a tremendous rate, and often has to borrow frantically from other cultures, or to allow the cultural changes and oscillations that “time and chance” will bring but which mythological societies will manage to dampen effectively”

— Herbert Schneida, *The Sacred Discontent*

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\* Associate Professor of Law, School of Law, University of Montana. J.D., 1973, Yale Law School; M.P.A., 1989, Harvard University.

\*\* J.D., 1997, School of Law, University of Montana; B.S., Zoology, 1991, University of Wisconsin, Madison.

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I. INTRODUCTION

George Catlin’s early nineteenth century painting of Mandan warriors engaging in the Sun Dance ceremony framed later non-Native Americans’ cultural references and their understanding of Native American ceremonial

practices as self-brutalizing, sanguinary and possibly anti-Christian.<sup>1</sup> His painting depicts the warriors in a state of near ecstasy, their bodies hoisted aloft in mid-air by ropes slung over the center pole of the earthlodge and attached firmly to skewers embedded in the flesh of the warriors' chests. The warriors' supporters are depicted drumming and chanting in a day and night long vigil, while the blood courses down the warriors' bodies as each is urged by his supporters to be strong and seek his personal vision of his life's significance and meaning.<sup>2</sup>

Catlin, along with other American and European painters, sought to preserve authentic, sometimes first-hand, cultural images of a soon-to-be vanished indigenous people.<sup>3</sup> These artists were convinced, as were early

1. George Catlin was the first American artist to visit and live in the early 1830's with the Mandans in their earthlodges in the Upper Missouri River valleys. His well-known portraits of Mandan chiefs and every-day life in a Mandan village, along with his famous "notes on the Indians," provided Americans and Europeans with an appreciation of the complexity and beauty of Great Plains Indians' ceremonial and cultural practices. See generally GEORGE CATLIN, LETTERS AND NOTES ON THE AMERICAN INDIANS (Michael Macdonald Mooney ed., 1975).

Catlin's description of the Mandans' "O-kee-pa" ceremony evidences an artist's eye for detail but a Christian's mind for interpreting Mandan ceremonial activities within a wholly religious frame of reference. He concluded that there were three distinct "objects" for Mandan ceremonial practices:

*First*, they are held annually as a celebration of the event of the subsiding of the Flood, which they called *Mee-nee-ro-ka-ha-sha* (the sinking down or settling of the waters).

*Secondly*, for the purpose of dancing what they call *Bel-lochk-na-pic* (the bull dance); to the strict observance of which they attribute the coming of buffaloes to supply them with food during the season.

*Thirdly*, for the purpose of conducting the young men of the tribe, as they reach manhood, through an ordeal of privation and torture. It is supposed to harden the muscles and prepare them for extreme endurance. It also enables the chiefs to decide upon their comparative bodily strength and ability to endure the extreme privations and sufferings that often fall to the lots of Indian warriors. The chiefs also decide who is the most hardy and able to lead a war party in case of extreme exigency.

*Id.* at 190-91 (emphasis in original).

2. The young Mandan initiates would fast for 4 days and nights in preparation for the ceremony. The flesh of each man's breast was pierced by a knife that had been "notched with the blade of another to make it produce as much pain as possible." *Id.* at 199. A splinter or skewer was inserted in the incision and "two cords were lowered from the top of the lodge . . . which were fastened to these splinters or skewers, and they instantly began to haul the aspirant up." *Id.* at 200. "He was raised until his body was suspended above the ground, then the knife and a splint were passed through the flesh in a similar manner on each arm below the shoulder (over the *brachialis externus*), below the elbow (over the *extensor carpi radialis*), on the thighs (over the *vastus externus*), and below the knees (over the *peroneus*)." *Id.* Each of these Mandan men were raised until suspended in midair and "blood was streaming down their limbs, the bystanders hung upon the splints each man's appropriate shield, bow and quiver." *Id.* Catlin's reaction to this scene was personal and graphic:

Several of them, seeing me make sketches, beckoned me to look at their faces, which I watched through all this horrid operation without being able to detect anything but the pleasantest smiles as they looked me in the eye, while I could hear the knife rip through the flesh, and feel enough of it myself to start uncontrollable tears down my cheeks.

*Id.*

3. See AMERICA'S FASCINATING INDIAN HERITAGE: THE FIRST AMERICANS: THEIR CUSTOMS, ART, HISTORY AND HOW THEY LIVED, (James A. Maxwell ed., 1978) for richly illustrated historical

American anthropologists such as Lewis Henry Morgan, that the Mandans' Sun Dance ceremony as well as the traditional cultural practices and traditions of the other Great Plains Indian tribes, would soon be extinguished by United States' military forces or the hostile beliefs and values of those missionary societies that had been federally licensed to civilize the Native Americans.<sup>4</sup> For these groups, eradicating the Indians' barbaric and heathen ceremonial practices, including the Sun Dance, from the cultural vocabulary of their Native American charges was an explicit goal.<sup>5</sup>

Thus, federal policy of the late nineteenth and early twentieth century sought unapologetically to eradicate the Native Americans' ancient values and ceremonies, the constitutional principle of governmental accommodation of religious free exercise notwithstanding. During that period, it would have been inconceivable to suggest that the federal government's power to systematically undermine the Native Americans' cultural institutions and belief systems could be restrained, based upon the government's duty to protect an individual's free religious exercise; equally inconceivable would have been the notion that the government was constrained from establishing a federal religion.<sup>6</sup>

Recently, however, the National Park Service has emerged as an ally of Native American traditional cultural practitioners who wish to conduct their traditional ceremonies on public lands.<sup>7</sup> In February of 1995, Super-

accounts of Native American cultural practices.

4. See PETER FARB, *MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE* 6 (1968).

5. The cornerstone strategy of President Grant's post Civil War "Indian Peace" policy was to assign control of the various Indian agencies to Christian missionaries. Grant's policy was born out of the "highest" of motives: to depoliticize a corrupt Indian bureau; to promote the civilization of the Indians; and to spread the Gospel among "barbaric and heathen" tribal peoples. 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN* 512-27 (1984). Grant's method for assigning the Indian agencies to the clamoring Christian denominations was intended to reward those "religious denominations as had heretofore established missionaries among the Indians . . ." *Id.* at 516. This distribution engendered competition from those denominations, particularly the Catholics, that alleged they were being excluded and wanted the Indians to be able to choose which Christian denomination they wanted to manage their agencies. See *Id.* at 523.

6. Father Prucha concludes that "religious liberty was not very broadly conceived in nineteenth-century America." PRUCHA, *supra* note 5, at 524. The various Christian ministries acted in "complete disregard for the religious views and the religious rights of the Indians themselves." *Id.* The literal warfare between rival religious denominations to control the Indian agencies forced Interior Secretary Carl Schurz in 1881 to declare that Indian reservations would be open to all religious denominations except where the "'presence of rival organizations would manifestly be perilous to peace and order' or where treaty stipulations would be violated." *Id.*

7. Ms. Renee Stone, the National Park Service's (NPS) Chief of Staff, points to the NPS' sharing of management responsibilities with the Lakota Sioux for the South Unit of Badlands National Park as example of its accommodation of Native Americans' cultural and economic access claims to our nation's parks. Todd Wilkinson, *Native Americans Challenge Park Agency for Land Rights*, CHRISTIAN SCI. MONITOR, Oct. 22, 1996, at 1. She also notes the NPS accommodation of the Timbishas Indians when decades ago, it allowed them to occupy 40 acres of land in Death Valley. *Id.*

intendent of Devils Tower National Monument, Deborah Liggett adopted a management plan that sought to grant greater access for Native Americans to practice culturally significant summer solstice ceremonies, such as the Sun Dance.<sup>8</sup> After analyzing the impact of the substantially increased and uncontrolled recreational rock climbing,<sup>9</sup> and lengthy consultation and discussion with interested stakeholder groups, she adopted a management plan that, among other things, denied commercial rock climbing licenses during June only, so as to mitigate that burden on Native Americans' cultural use of Devils Tower National Monument.<sup>10</sup>

To be sure, this action was not embraced by all. Some of the dissent took the form of a lawsuit challenging the decision as a constitutionally barred governmental establishment of religion in the federal district court of Wyoming in *Bear Lodge Multiple Use Ass'n v. Babbitt*.<sup>11</sup> This district court proceeding, in which the court found for the plaintiffs and granted an injunction against implementation of the management plan, provides the initial focus of this article. In analyzing both the issues addressed and discarded by the district court, this article seeks to set the management plan in its broader context and emerge with a thoughtful and fair solution to the use of public lands and its connection to our country's collective cultural heritage.<sup>12</sup>

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8. Superintendent Liggett relied on newly instituted cross-cultural educational and interpretive programs, as well as moral and ethical suasion by the mainstream climbing community, to eventually persuade all recreational rock climbers to voluntarily forego ascents on Devils Tower from June 1 to June 30, beginning 1995. She hoped that over a multi-year period, this voluntary compliance program would result in a "continuous significant reduction in the number of climbers on Devils Tower each June" and in an "[increased awareness] among all monument visitors of the cultural significance of Devils Tower to American Indians . . ." U.S. DEP'T. OF THE INTERIOR, NATIONAL PARK SERVICE, ROCKY MOUNTAIN REGION, FINAL CLIMBING MANAGEMENT PLAN FOR DEVILS TOWER NATIONAL MONUMENT 23 (1995) [hereinafter FCMP]. Liggett emphasized that the voluntary closure could become mandatory if the interim management efforts were unsuccessful in achieving its goals. *Id.* at 23-24. The closure zone is described as including "all areas inside the loop of the Tower Trail." *Id.* at 22.

9. The elders of the Dakota, Nakota and Lakota Nations issued a resolution that denounced the continuing damage to Devils Tower by rock climbers who have pounded "hundreds of steel pins . . . into the face of this Sacred Site . . ." *Id.* at 9. They urged the National Park Service to protect Devils Tower from further destruction by tourists, hikers and rock climbers. *Id.* A 1991 ethnographic report recommended, among other things, that the National Park Service prohibit climbing on the tower and act to preserve the ethnographic resources in future management plans. *Id.*

10. Superintendent Liggett concluded that, although it is within her power to close park areas to activities in order to protect natural and cultural resources, it was preferable "that self-regulation by climbers, augmented by the cross-cultural education program" be utilized to achieve management goals. *Id.* at 24. She asserted that the Solicitor of the Department of Interior advised her that this action would not violate the constitutional rights of any citizen. *Id.*

11. No. 96-CV-063-D (D. Wyo. June 8, 1996) (Order granting, in part, Plaintiffs' motion for a preliminary injunction) (on file with authors) [hereinafter *Order*], at 11.

12. Devils Tower was determined eligible for the National Register of Historic Places as a traditional cultural property for its American Indian relationships. A traditional cultural property is protected "because of its association with cultural practices or beliefs of a living community that a) are

The district court's decision presents obstacles to accommodating Native Americans' contemporary ceremonial and cultural practices that will likely influence the fate of future administrative and legislative initiatives.<sup>13</sup> These obstacles are threefold. They are first political, in that the decision inappropriately chills future administrative and legislative implementation of appropriate strategies to preserve Native Americans' contemporary cultural and ceremonial use of our nation's public lands.<sup>14</sup> Second, they are managerial, insofar as the decision narrows public land managers' discretion to accommodate conflicting recreational and preservation uses of public lands.<sup>15</sup> Lastly, the obstacles are interpretive, in that the district court's interpretation of the Free Exercise and Establishment Clauses<sup>16</sup> does not accord with the Supreme Court's evolving judicial understanding of those clauses, an interpretation which permits public land managers to accommodate Native Americans' contemporary cultural and ceremonial use of our nation's public lands.<sup>17</sup>

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rooted in that community's history and b) are important in maintaining the continuing cultural identity of the community." FCMP, *supra* note 8, at 11.

The cultural resources that Superintendent Liggett acted to protect include the butte known as Devils Tower, which is "a sacred site to many American Indians of the northern plains." *Id.* at 37. The on-going Native American ceremonial and cultural events at Devils Tower include prayer offerings, vision quests, the leaving of prayer bundles, sweatlodge rites and the Sun Dance. *Id.* She relied on a 1991 ethnographic overview and assessment that showed that six Indian nations inhabited this region and considered the site to be sacred. These tribes or nations include the Wind River or Eastern Shoshone, Kiowa, Crow, Cheyenne, Arapaho and Lakota. Furthermore, approximately 23 Indian tribes have been identified as culturally affiliated with Devils Tower. *Id.*

13. The NPS is confronting growing Native American claims for cultural and other forms of access to those national parklands that have been carved out of their ancestral lands. Some of these Native American groups have united to form the Alliance to Protect Native Rights in National Parks. Wilkinson, *supra* note 7, at 1. This alliance includes the Timbishas of the Mojave Desert, the Miccosukees of the Florida Everglades, the Pai 'Ohana of Kaloko-Honokohau National Historical Park, the Hualapai on the edge of the Grand Canyon National Park, the Navajos near Canyon de Chelly and five Sandoval Indian Pueblos. *Id.* The size of this alliance is expected to grow substantially over the next few years. Members of Montana's Blackfeet Tribe have sued for use of Glacier National Park. *Id.*

14. This potential chilling effect was evidenced by the nation-wide video conference of managers, convened by the NPS in August of 1996, with regard to the injunction issued by Judge Downes in the Devils Tower litigation. This conference's main topic was how the various managers should react, in light of this injunction, to President Clinton's recent executive order directing the NPS and other federal agencies to ensure Native Americans' access to sacred sites on public lands.

15. Professor George Coggins emphasizes that public natural resources law "was deeply imprinted with a tradition of judicial deference" to federal land managers' actions and decisions. GEORGE C. COGGINS, ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 253 (3d ed. 1993). He explains this traditional judicial deference as an acknowledgement that many land management decisions involved "complex factual and technological questions with which the courts have little or no expertise." *Id.*

16. U.S. CONST. amend. I, cl. 1 & 2.

17. See *infra* notes 139-155 and accompanying text (discussing public land managers' authority to accommodate religious use of public lands). The NPS defends its periodic closure of Devils Tower to commercial rock climbing based on its unique statutory duties to Native American peoples. Brief

This article shall examine these obstacles by first delineating the historical and current importance of Native American cultural resources to our national heritage. It will then examine the regulatory context in which a federal public land manager makes management decisions. Next, it will examine the *Bear Lodge* litigation and the district court's interpretation of Establishment Clause jurisprudence. It will conclude with a proposal for the preservation of Native American cultural resources on public lands in the next century.

## II. RE-ASSESSING THE PLACE OF NATIVE AMERICAN CULTURAL RESOURCES IN OUR NATIONAL CULTURAL HERITAGE

Cultural resources provide a people with an historically derived system of explicit and implicit designs for living a shared meaningful life as a member of a community. Native Americans' unique ceremonial and cultural beliefs and practices provide their members with a personal and societal compass and gyroscope that helps guide them through what some non-Indians may regard as a world of pure facticity and random phenomena.<sup>18</sup>

### A. *Excluding Native American Cultural and Ceremonial Practices from Legal or Constitutional Protection*

The Native Americans' long struggle to preserve their traditional cultural and ceremonial practices must be viewed against the backdrop of our nation's struggle to develop a coherent national cultural preservation policy. This cultural preservation effort's lack of success is the product of two interrelated forces. First, commentators have cited the United States' perceived sense of cultural inferiority to their European cousins as deterring any concerted legislative action to preserve our young nation's histor-

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for United States in Opposition to Plaintiffs' Motion for Preliminary Injunction at 10-13, *Bear Lodge Mult. Use Ass. v. Babbitt*, (D. Wyo. 1996) (No. 96-CV-063-D) (on file with authors) [hereinafter *Defendants' Briefs*]. The agency's government-to-government relationship with the Native American peoples includes an obligation to preserve their unique cultural identity, which is important to effectuating tribal sovereign status. *Id.* at 10. The NPS must also preserve, pursuant to the National Historic Preservation Act, 16 U.S.C. § 470(f) (1994), the "traditions, beliefs, practices, lifeways, arts, crafts and social institutions of any community," including an Indian tribe, which is affiliated with protected property that is listed on the National Historic Register. *Id.* at 12. Devils Tower is an important historic site primarily because of its long-standing cultural affiliation with those Native American groups that use the site for ceremonial and cultural purposes. *Id.* Moreover, the NPS has a duty, under its federal trust relationship with the tribes, to protect their interest. See *infra* notes 188-201 and accompanying text (discussing trust relationship and duties).

18. See generally Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996); Scott Hardt, Comment, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601 (1989).



ic and cultural heritage from destruction.<sup>19</sup> This perception arguably inhibited Americans of the late eighteenth and early nineteenth centuries from thinking of themselves as the inheritors—as did their contemporary Western Europeans—of a valued cultural legacy that was worthy of legislative protection.<sup>20</sup> Many Europeans, in contrast to their American cousins, engaged in public and private concert to preserve their inherited artistic, architectural and aesthetic artifacts, traditions and values.<sup>21</sup>

Contemporary American thinkers conceived of a distinctly American “culture” as a temporally distant project.<sup>22</sup> Its creation would require the “creative destruction” of the surrounding wilderness and the progressive displacement of those aboriginal peoples who resided therein.<sup>23</sup> Only a few American voices in the 1840s and 1850s—most notably Henry David Thoreau and Ralph Waldo Emerson—decried America’s seeming obsession with the destruction of those irreplaceable cultural and social resources embodied in what most Americans regarded as an impenetrable and foreboding Indian-dominated wilderness.<sup>24</sup>

19. See, e.g., Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 574 (1995).

20. The American belief that we have little cultural property worth protecting stems from the dominant culture’s almost exclusive identification with its European ancestry. This fact, coupled with the dominant culture’s seeming de-valuation of America’s significant indigenous cultures and traditions, resulted in what a leading commentator has called a “historyless Western Hemisphere.” *Id.* at 562 n.4. Alfred Kroeber, a leader in the new cultural anthropology school of thought, wrote in 1948:

[I]n the historyless Western Hemisphere, everything pre-Caucasian seemed not so much strung on a long thread of sequence as it seemed one great amorphous mass of data, alike only in that they all preceded Caucasian history. All the data here seemed ‘old’ but the question of *how* old, or how much older than others, did not at first obtrude.

*Id.* (quoting ALFRED L. KROEBER, *ANTHROPOLOGY: RACE, LANGUAGE, CULTURE, PSYCHOLOGY, PRE-HISTORY* 774 (1948)).

21. See Gerstenblith, *supra* note 19, at 562-3.

22. The Founding Fathers arguably viewed America as a blank slate that provided an unrivalled opportunity for democratic and social experimentation so as to create a new society that was untainted by the religious wars that had devastated and fractured European society. *Id.* at 560.

23. The Americans’ “yearning for a European and Mediterranean-based past” caused them to ignore the value of indigenous peoples’ cultures and traditions. There was no idea in early America that an American cultural value could grow “autochthonously from th[e] soil” and be symbolized by the Native Americans’ ceremonies, traditions and artifacts that pre-dated the advent of Europeanism. *Id.*

24. Wilderness is valued by Emerson, according to Max Oelschlaeger, as an “occasion for the individual mind first to discover a reflection of itself (nature as a system of laws, concepts, and commodities) and then to confirm God’s existence.” MAX OELSCHLAEGER, *THE IDEA OF WILDERNESS* 135 (1991). Thoreau’s valuation of nature rejected Emerson’s physico-theologic view that sought to discover purpose and final cause in nature. See *id.* at 170-71. Thoreau’s maturing vision of the American wilderness lead him to accept that wilderness is defined by a “brute facticity . . . [in which] even [man’s] own material body within which his consciousness existed, could be alien.” *Id.* at 149. He came to condemn Emerson’s philosophy, which countenanced the human mission “like so many busy demons, to drive the forest all out of the country, from every solitary beaver-swamp, and mountain-side, as soon as possible.” *Id.* at 150.

Second, the Americans of that era did not generally value contemporary Native American ceremonial practices and traditions as cultural resources that were worth preserving as a irreplaceable part of our shared national heritage. This view was not held solely by frontierspeople who viewed the "Indian as wolf," but by influential federal Indian policy makers and by the emerging social scientific communities as well.<sup>25</sup>

These influential thinkers viewed efforts to preserve the Native Americans' contemporary ceremonies and cultural practices as both impracticable and imprudent. Lewis Henry Morgan, the father of modern anthropology, contributed an ostensible social scientific rationale in the 1870s for the federal government's destruction of indigenous "tribalism" and the programmatic assimilation of qualified individual Native Americans as American citizens.<sup>26</sup> His writings suggest that Native American societies were stuck at a lesser stage of human development because they were burdened by barbaric customs, traditions and belief systems.<sup>27</sup>

Federal Indian policy makers of the 1870's and 1880's readily interpreted Morgan's writings as justifying the systematic eradication of indigenous tribal cultural and social institutions so to facilitate the successful incorporation of individual tribal members as American citizens. They assumed that the Native Americans' traditional cultural structures and belief systems deterred individual tribal members from successfully assimilating into the larger American society. Federal Indian policy in the late nineteenth and early twentieth centuries is largely a record of the conscious destruction of Native American institutions of "tribalism," including the sometimes violent suppression of the Native Americans' traditional

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25. George Washington described his federal Indian policy as based on the "expediency of being upon good terms with the Indians" and intended to gradually extend non-Indian settlement into Indian lands. DAVID GETCHES ET AL., *FEDERAL INDIAN LAW* 96 (3d ed. 1993). Washington contended that the Indian would retreat deeper into wilderness because the Indians are like "beasts of prey tho' they differ in shape." *Id.*

26. Native American "tribalism," from the American viewpoint, encompassed three inter-related elements: 1) the Indians' military capability to resist dispossession of their lands; 2) the Indians' structure of self-governance which included their ceremonial and cultural values; and 3) their national sovereignty which bound them together as identifiable peoples. STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 45 (1988). The federal government's late nineteenth century Indian policy sought to destroy each aspect of Native American tribalism. *Id.* at 45-6.

27. All human societies were required to progress, according to Morgan, through seven stages of civilization: lower savagery, middle savagery, upper savagery, lower barbarism, middle barbarism, upper barbarism, and finally civilization. FARB, *supra* note 4, at 6. Peter Farb, a leading American cultural anthropologist, describes Morgan's view as ego-centric and now generally discredited in favor of a modern culture anthropology that does not rank cultures and societies on a European dominated scale of civilization. *Id.* at 6-7 But Farb admits that only recently has American anthropology and ethnography recognized that Native American cultures "are something more than patchworks or haphazard end products of history." *See id.* at 8. Farb notes that Americans slowly appreciated that Native American societies represented "all stages of human society from simplest kind of band up to the complex state." *Id.*

ceremonial and cultural practices.<sup>28</sup>

Many European and American artists, writers and social scientists responded to this systematic destruction of Native American cultures by rushing to the Great Plains to witness, and perhaps briefly be part of the indigenous tribal societies and cultures that they believed would soon vanish. But Native American cultural beliefs and ceremonial practices proved far more durable and resilient than expected.<sup>29</sup>

Ironically, those artistic and scientific interests paired with federal policies that forced the Native Americans' ceremonial and cultural practices underground during the Indian Reservation Period of the 1870s to the 1930s, had the unintended effect of strengthening the Native Americans' hold on the new generations of reservation-born Native American adherents. Today, these ancient Native American cultural and ceremonial practices are enjoying a renaissance among many Native American adherents, from both urban and reservation settings.<sup>30</sup>

#### B. *Awarding Legal Protection to Selected Native American Artifacts and Culturally Significant Places*

Frederick Jackson Turner is credited with alerting white America to the need to preserve the culturally significant remnants of our fabulous frontier history and culture.<sup>31</sup> His "end of the American frontier" thesis of

28. See Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451, 454-56 (1995).

29. The re-vitalization of Native American cultural and ceremonial practices during the Indian Reservation Era (1870 to 1934) resulted in the growth of Native American apocalyptic and syncretic cultural movements. A Paiute Indian named Wovoka popularized a cultural re-awakening of Native Americans that became known as the Ghost Dance. One version counseled the Indians to work hard and live in peace with the Whites. Adherents would eventually be re-united with their long dead loved ones as a reward for their following the disciplined and peaceful Red Road on earth. But the Sioux and Pawnee gave Wovoka's vision an apocalyptic and hostile twist. Whites would soon be swept away in a great cataclysm and the Buffalo would again return in vast herds to the Plains. It was this version of the Ghost Dance that alarmed the perhaps understandably anxious members of the newly re-constituted Seventh Cavalry and contributed to the 1890 massacre at Wounded Knee. CORNELL, *supra* note 26, at 62-67.

30. Cultural resources represent the real power in Native American and other human societies. The reservation Indians leveraged belief, custom and interpretation so as to retain those three elements of "tribalism" that federal Indian policy had vowed to destroy. As both conservative and innovative tools, the reservation Indians were able to deploy a wide-array of ceremonies, practices and traditions that re-affirmed a coherent Indian role and identity in a sea of non-Indian inflicted change. *Id.* at 66-7.

31. Turner's *The Significance of the Frontier in American History* influenced a generation of Progressivist thinkers who struggled to come to terms with the closing of the American frontier. Among Turner's students at Harvard, for example, was Farrington R. Carpenter, the first director of the Interior Department's Grazing Division. Carpenter had the unenviable task of implementing the real closing of the frontier by persuading America's cattlemen to cooperate in regulating the former open public range under the Taylor Grazing Act. WILLIAM K. WYANT, *WESTWARD IN EDEN: THE PUBLIC LANDS AND THE CONSERVATION MOVEMENT* 311 (1982).

1890 confronted Americans with the stark realization that Americans must now conserve those resources once imagined as boundless and inexhaustible. This reality of a finite American world forced Progressivists of the early twentieth century to focus upon preserving those shared common resources that private parties had hitherto exploited mercilessly without regard to future consequences.<sup>32</sup>

In contrast, the need for cultural preservation was virtually ignored by those early Progressivist thinkers. Gifford C. Pinchot, the champion of the early conservation movement, focussed on a utilitarian rationale for preserving our common lands from unbridled private use and development.<sup>33</sup> Even John Muir's broader-gauged conservation philosophy advocated legislative protection of only those significant aesthetic, and distinctly non-human, features of America's remaining wilderness.<sup>34</sup>

Neither Pinchot nor Muir sought to preserve the Native Americans' cultural values or traditions as part of our nation's common preservation heritage. Undoubtedly both likely assumed that the question of guaranteed cultural access of Native Americans to their traditional and accustomed ceremonial sites on America's public lands was moot. The Muir/Pinchot debate understandably kept preservationists' attention on the practical and ethical dimensions of the debate—whether wilderness preservation or the utilitarian development of America's common resources would best serve the Americans' long-term interests.<sup>35</sup>

Pressure to preserve Native Americans' ancient cultural values and artifacts through legislative enactment originated from a very different professional community than those represented by Pinchot or Muir. Ram-

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32. Gifford C. Pinchot's appointment as head of the Division of Forestry in 1898 until he left his position as Chief of the Forest Service in 1910, marks what some historians refer to as the "Golden Era" of conservation history. SAMUEL TRASK DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES 69-71* (2d ed. 1980). Conservation for Pinchot was a broad-gauged "wise use" utilitarian-based philosophy that included prudent preservation of all valuable aspects of natural resources. *Id.* at 72.

33. Pinchot embodied the social and economic ideals of the Progressivist brand of conservation. His genius lay in taking "old ideas and often made suggestions" and elaborating them into a natural resources management program. *Id.* at 96.

34. John Muir was the "product of a hard scrabble youth" on a Midwest homestead. *Id.* at 45. His preservationist philosophy emphasized the reservation of areas of natural beauty from private development. However, as a practical matter, it is hard to distinguish the conservationists from the preservationists in the early twentieth century because they were united in their efforts to stop the destruction of our public lands and resources. *Id.*

35. The famous Hetch Hetchy controversy exposed the division between Muir and Pinchot over the future direction of the American conservation effort. *Id.* at 108-9. Muir opposed the construction of the reservoir that would flood a portion of Yosemite Valley in order to provide municipal water supplies to San Francisco. Pinchot, although not a direct proponent of the project, did side with those San Franciscans who sought the water supplies and electric power that the dam and reservoir would provide. *Id.* Although Muir lost this battle, he later won the war with the passage of the act establishing the National Park System in 1916. *Id.*

pant vandalism of ancient Southwestern Native American burial and archaeological sites in the late nineteenth century dismayed and outraged the new social scientists in the emerging disciplines of anthropology, archaeology and ethnography.<sup>36</sup> These new professionals agitated for federal statutory protection of the irreplaceable scientific and cultural data and knowledge embodied in the countless Native American artifacts, burial sites, and architectural structures located on public lands throughout the West.<sup>37</sup>

Forceful federal legislation would provide the only effective means for preserving the irreplaceable scientific data contained in these ancient Native American sites, artifacts and burial mounds. Absent such legislation, this scientific data regarding ancient Native American peoples and their cultures would be lost forever to grave robbers and looters.<sup>38</sup> A thriving black market motivated the routine vandalization of these sites for marketable Mesoamerican artifacts, pottery and human remains that were highly prized by private collectors and public museums.<sup>39</sup>

Congress responded to the social scientists' outcry for statutory protection of these ancient Native American sites and artifacts in 1906 with the passage of the Antiquities Act.<sup>40</sup> That act authorized the President to set aside public lands deemed to contain unique scientific, historical or aesthetic data or values.<sup>41</sup> Devils Tower was the first national monument set aside by a President under the authority of that act.<sup>42</sup> Seeking to deter vandalism and destruction of ancient Native American sites on public and

36. American interest in Native American cultural resources is dated from the Smithsonian Institution exhibition in Philadelphia at the Centennial Exposition of 1876. That year also witnessed the founding of two important social scientific organizations: the Anthropological Society of Washington and the Archaeological Institute of America. Lewis Henry Morgan was later elected president of the American Association for the Advancement of Science. Gerstenblith, *supra* note 19, at 577. Gerstenblith notes a dichotomy in American cultural resources preservation law and policy, in that the majority culture seeks to preserve those European-based elements of our society based on respect for the past, but seeks to preserve Native American cultural resources for economic and scientific motives. *Id.* at 578.

37. *Id.*

38. Grave robbers and looters quickly grasped that money could be made in Native American artifacts and human remains, given the burgeoning archaeological and scientific interest that resulted in public and private museums' competition to quickly develop their Native American collections. *Id.*

39. *Id.*

40. Pub L. No. 59-209, 34 Stat. 225 (1906) (codified at 16 U.S.C. §§ 431-433 (1994)). The act authorizes the President to declare as national monuments "historic landmarks, historic and prehistoric structures, and other objects of scientific interest" that are located on public lands. 16 U.S.C. § 431. In addition, it punished the unauthorized private destruction, excavation, appropriation or injury of any historic or prehistoric ruin or monument or object of antiquity. § 433.

41. *Id.*

42. The 1347 acre site known as Devils Tower National Monument is located in Crook County, Wyoming, in the northeast corner of that state. FCMP, *supra* note 8, at 2. Proclaiming Devils Tower, that "lofty and isolated rock," as a National Monument was Theodore Roosevelt's first withdrawal under the Antiquities Act. Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 452 n. 93. (citing Pres. Proc. No. 658, 34 Stat. 3236 (1906)).

Indian lands, the act provided criminal sanctions for those individuals who looted, excavated or otherwise damaged such sites without prior federal permission.<sup>43</sup>

The vagueness of the Antiquities Act's criminal provisions, however, coupled with the lack of adequate federal enforcement staff and funding, severely undermined its effectiveness as a cultural preservation law.<sup>44</sup> Despite the inadequacy of those provisions, Congress did not until recently strengthen the protection for archaeological resources, by enacting the Archaeological Resources Protection Act, which significantly increased the criminal penalties and fines that the act's violators confront.<sup>45</sup>

Most of these Native American cultural preservation statutes are directed at protecting inanimate objects—scientific data and ancient artifacts preserved because of their scientific significance and utility to non-Native American scientific or aesthetically interested communities. This may be at least partially because none of the earlier Native American cultural preservation statutes provided for Native American participation in the planning or administration of federal programs or projects that have significant impact on protected Native American cultural resources.<sup>46</sup> Superintendent's Liggett's periodic closure of Devils Tower to commercial rock climbing stands in striking relief to these existing programs and projects. At long last, a federal public land manager has sought to preserve the living culture of contemporary Native American communities.<sup>47</sup>

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43. See 16 U.S.C. § 433.

44. Gerstenblith observes that the act intended to promote the scientific investigation of ancient Native American sites and to ensure that legitimate museums, rather than untrained amateurs, excavated archaeologically or anthropologically significant Native American sites. Unfortunately, amateur excavators and looters of ancient Native American sites were not, in fact, much deterred by the act's minor criminal and civil penalties or the lax federal enforcement of that act. GERSTENBLITH, *supra* note 19, at 579.

45. Desultory federal criminal prosecutions in the 1970s of unauthorized grave robbers and pot hunters under the Antiquities Act sometimes resulted in convictions and sometimes not. Compare *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (reversing a conviction on the grounds that the Antiquities Act was unconstitutionally vague as applied, since no reasonable person could discern the meaning of "ancient" artifacts within the statute's context) with *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979) (affirming convictions because artifacts were clearly "ancient," being some 800 to 900 years old). Congress responded by enacting the Archaeological Resources Protection Act of 1979, Pub. L. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa-470mm (1994)).

46. The recent enactment of the Native American Grave Protection and Repatriation Act, Pub. L. No. 101-106, 104 Stat. 3052 (1990) (codified at 25 U.S.C. §§ 3001-3013 (1994)), somewhat modifies the Native American cultural preservation law. Federal museums must now inventory their Native American collections and notify affected Indian tribes of any skeletal or other human remains or artifacts that are derived from that tribal culture. Tribes may request their return for appropriate tribal administration. GERSTENBLITH, *supra* note 19, at 584.

47. Superintendent Liggett's action was taken in compliance with Congress' mandate to preserve Native American cultural use of Devils Tower as a "historical, architectural or [site of] cultural significance at the community, state or local level." See *Watch v. Harris*, 603 F.2d 310, 321 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979); see also National Historical Preservation Act (NHPA), 16

The controversy surrounding Superintendent Liggett's management plan exemplifies the land managers' dilemma in carrying out their newly imposed preservation duties under statutes such as the National Historic Preservation Act.<sup>48</sup> Only recently have public land managers come to grips with their obligation to consult and work with affected Native American communities in carrying out regulatory and project related activities affecting Native Americans' cultural and historical resources.<sup>49</sup> Native American governments and user groups had historically been ignored regarding agency-sponsored projects or planning affecting the cultural or historical resources of tribal peoples. Some land managers, as well as some social scientists, have decried the recent addition of Native American consultation to the management process as disruptive and unnecessary.<sup>50</sup>

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U.S.C. §§ 470 to 470W-6 (1994). NHPA's purpose is to preserve America's historic and cultural resources. *See* *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1387 (D.D.C. 1991). The NHPA has emerged as the cornerstone of America's cultural preservation policy.

48. The 1992 amendments to the NHPA require that Superintendent Liggett's preservation-related activities be "carried out in consultation with the affected tribes." *See* 16 U.S.C. § 470a(d) (1994). The NHPA also requires land managers to "take into account the effect" of their "undertakings" on anything "included in or eligible for inclusion in the National Register" and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. 16 U.S.C. § 470f. Furthermore, the NHPA requires managers to "assume responsibility for the preservation of historic properties" under their control by: 1) establishing preservation programs to ensure identification, evaluation and protection of the historic properties; 2) ensuring such properties are managed and maintained in a manner that considers the preservation of their "historic, archeological, . . . and cultural values;" and 3) ensuring that preservation-related activities are carried out in consultation with "Federal, State, and local agencies, Indian Tribes, [and] Native Hawaiian organizations carrying out historic preservation planning activities." 16 U.S.C. § 470h-2 (listing numerous other related duties).

49. The new duties of preservation and consultation with Indian tribes imposed on federal public land managers undoubtedly complicates their managerial lives. But in balancing cultural preservation duties with an agency's pre-existing mandate, public managers are given considerable discretionary leeway. However, that discretion is limited by the statutory factors set out in the NHPA. *See* *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971) ("Discretion to decide [under NHPA] does not include a right to act perfunctorily or arbitrarily.").

50. *See* Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 NAT. RESOURCES J. 133, 153 (1995). However, other public land managers have genuinely sought to develop working relationships with affected Native American communities. Superintendent Liggett's creation of a Devils Tower working group that included affected Native American communities, representatives of the recreational climbing community, and local governmental and economic interests represents one example of a public land manager's effort to comply with the broadened consultation requirements of the NHPA. FCMP, *supra* note 8, at 1, 8, 88.

Ms. Ramona Hutchinson, a research historian at Mesa Verde National Park, cites agency staffing and funding constraints as significantly limiting the effectiveness and value of the consultation process with Native Americans, as well as other stakeholders in the preservation and protection of significant cultural and historic resources on public lands. The downsizing of the professional staff within the NPS, and the increased reliance on contract providers of historical and ethnographic research, have likewise slowed the progress of the consultation process with affected Native American groups and communities. Telephone Interview with Ramona Hutchinson, Research Historian, Mesa Verde National Park, Colorado (June 16, 1997).

Superintendent Liggett's attempt to manage this tectonic shift in the National Park Service's mission prompted her to engage affected Native American communities in the management of Devils Tower's unique historic and cultural resources. Accordingly, in the preamble of the Devils Tower Final Climbing Management Plan (FCMP), she cited her cultural and historic preservation duties as the legal and practical rationale for imposing regulatory limits on recreational rock climbing.<sup>51</sup>

### III. ASSESSING THE CONTEXT OF THE DECISION TO PERIODICALLY CLOSE DEVILS TOWER TO COMMERCIAL ROCK CLIMBING

Cultural resources are a newly-recognized public asset that must be managed by public land managers just as they manage any other entrusted public resource and value. But the National Park Service has long functioned under a specific preservation mandate that arguably obligates it to preserve Native American cultural resources even in the absence of its "new" preservation mandates.

#### A. *Examining the National Park Service's Uneasy Role as a Preservation Agency*

The periodic closure of Devils Tower to commercial rock climbing should be viewed against the backdrop of the National Park Service's evolving cultural and historic preservation duties and policies, rather than the checkered judicial history of the Establishment Clause.<sup>52</sup> Superintendent Liggett's regulatory effort to accommodate both recreational rock climbing *and* Native Americans' cultural access to Devils Tower can and should be resolved with regard to well-established public land law principles.<sup>53</sup>

In 1916, Congress in its foresight recognized the National Parks' vulnerability to existing and future conflicting user demands, and entrusted the National Park Service with the authority to allocate those resource values between conflicting recreation and preservation demands.<sup>54</sup> The

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51. FCMP, *supra* note 8, at 2-3. Recreational rock climbing is acknowledged as a legitimate public use of Devils Tower but that use is subject to regulation given its demonstrated adverse environmental and inconsistent use character. *Id.*

52. See John H. Garvey, *Is There a Principle of Religious Liberty?*, 94 MICH. L. REV. 1379 (1996) (describing that checkered history).

53. Professor George Coggins concludes that public natural resources law was "deeply imprinted with a tradition of judicial deference to actions taken by land management agencies . . . [because public resource allocation decisions involve] complex factual and technological questions with which the courts have little or no expertise." COGGINS, *supra* note 15, at 253.

54. The 1916 Organic Act that created the National Park System represents Congress' "be-grudging[]" step to consciously preserve America's remaining wilderness resource. But the act im-



evolving and intractable tension instilled by these twin mandates has forced the National Park Service to periodically re-visit and refine its accommodation strategies, given its duty to promote recreational use of the parks and to preserve those areas in an unimpaired state for future generations of Americans.<sup>55</sup>

Commentators have long criticized the National Park Service's over-emphasis of the recreational prong of its statutory mandate at the seeming expense of its co-equal preservation duties under the second prong of that mandate.<sup>56</sup> In retrospect, Stephen Mather's "master builder" emphasis on promoting tourist and recreational uses of the National Parks in the 1920s and 1930s pragmatically exploited the changing leisure time needs of the newly entrenched American middle class. By the late 1920s, Americans were becoming a people on wheels, as automobile ownership came within the economic reach of many American workers. Mather's bargains with railroad barons, hotel and service concessionaires, and the early automobile users associations built public support for the National Parks as the playing fields of the average American.<sup>57</sup>

Mather's utilitarian tilt of his agency's mission toward tourism and recreation uses alienated many preservation advocates both inside and outside of the National Park Service.<sup>58</sup> But even his critics conceded that he was very successful in building a broad base of public support for the growing National Park System.<sup>59</sup> Some critics have argued that he was perhaps too successful, because his utilitarian emphasis caught the agency unprepared to deal with the ecological and preservationist revolutions of the 1970s and the 1980s.<sup>60</sup>

One authority contends that Congress' imposition of new ecologic

posed a "seemingly contradictory set of preservation and recreation" duties on the fledgling NPS. *See AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 2* (Larry M. Dilsaver ed., 1994) [hereinafter DILSAVER].

55. *Id.* at 2-4.

56. The first Director of the NPS, Stephen Mather, considered it "democratic and prudent" to promote public use of park units. *Id.* at 53. But Mather's "anthropocentric idea" of wise use arguably led to wanton destruction of other park resources. *Id.* at 54-55.

57. Mather viewed as his responsibility the expansion of the National Park System, and he was a "zealous[] crusader" for this goal. DANA & FAIRFAX *supra* note 32, at 109. His three major allies in this effort were the railroads, the newly established American Automobile Association, and concessionaire interests. *Id.* at 110. Dana and Fairfax conclude that the goal of "preservation . . . was replaced by a commitment to tourism." *Id.*

58. *Id.*

59. Mather is viewed as the Park Service's "Pinchot," except that he was "less irascible." Mather was "extremely effective in building congressional and public support for his fledgling agency." DANA & FAIRFAX, *supra* note 32, at 111.

60. The mounting pressure to diversify the NPS to include preservation and recreation goals strained the system and required continual reinterpretation and adjustment of its goals and mission. DILSAVER, *supra* note 54, at 269-70.

and preservation duties on the National Park Service transformed the agency's underlying mission and goals.<sup>61</sup> These new duties stimulated the employment of new staff professionals—ethnographers, anthropologists, and ethnohistorians—whose task is to re-orient the agency's mission toward the development of ecological and preservation focussed programs and management plans.<sup>62</sup> These new preservation duties have likewise forced the National Park Service to forge new government-to-government relationships with many affected Native American tribes and communities.<sup>63</sup>

In view of the increased use of the National Parks, this new agency emphasis on its ecological and cultural preservation mission may be inevitable. Recreational rock climbing, for example, has gone unregulated, despite growing environmental alarm about its adverse impacts on physically limited and highly vulnerable areas such as Devils Tower.<sup>64</sup>

Although the National Park Service has long debated system-wide regulation of recreational use of public land, Superintendent Liggett's regulation of recreational rock climbing is the agency's first managerial response to the adverse environmental and cultural impacts of that sport.<sup>65</sup> It represents the initial response by the National Park Service to broad-scale cultural shifts in recreational demands by non-Native American users of public lands.

### B. *Recreational Rock Climbing as a New Public Use Demand at Devils Tower*

The phenomenal growth in the number and frequency of recreational rock climbers at Devils Tower testifies to the emergence of a significant new recreational user group that is contesting for its fair share of public

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61. *Id.* at 372. President Nixon, for example, signed Executive Order No. 11593, which strengthened the NHPA and required the NPS to take additional steps and expend resources to protect cultural and historical resources within its jurisdiction. *Id.*

62. See, e.g., Jane H. Kelley & Ronald F. Williamson, *The Positioning of Archaeology Within Anthropology: A Canadian Historical Perspective*, AMERICAN ANTIQUITY, Jan. 1, 1996, at 5 (describing the consultation work of the Cultural Resources Section of the NPS).

63. The 1992 NHPA amendments require that the NPS carry out its preservation duties in "consultation with [affected] Indian tribes." Stern & Slade, *supra* note 50, at 137 (citing NHPA, 16 U.S.C. § 470a(d)(2)).

64. See FCMP, *supra* note 8, at 3-13.

65. Professor Joseph Sax has criticized the NPS' failure to develop a coherent recreational management policy for our national parklands. See Joseph L. Sax, *Fashioning a Recreation Policy for Our National Parklands: The Philosophy of the Choice and Choice of Philosophy*, 12 CREIGHTON L. REV. 973 (1979). Sax would doubtless sympathize with that agency's struggle to accommodate recreational rock climbing among the panoply of other permitted public uses of our parks. But he would expect the agency to come to grips, as Superintendent Liggett has attempted to do at Devils Tower, with regulating that use consistent with the agency's co-equal preservation mandate. See *id.*

land resources.<sup>66</sup> The explosive growth of this new recreational sport at Devils Tower is meticulously catalogued in the FCMP.<sup>67</sup>

This growth in recreational rock climbing may be explained by the convergence of two factors. First, this sport's growth may reflect the technological advances in equipment that reduces the individual skill level necessary to make a successful ascent of a forbidding natural structure such as Devils Tower.<sup>68</sup> Second, this sport's growth may reflect the general diffusion of training sites and educational opportunities that enable high school and college students to become competent technical climbers as an alternative leisure time pursuit.<sup>69</sup>

### C. *Revitalizing Native Americans' Cultural and Ceremonial Access to Public Lands*

Superintendent Liggett's regulatory action responds to the Native Americans' entitlement to reasonable cultural access to Devils Tower so that they may continue their long-standing ceremonial use of that sacred site, particularly during the summer solstice month of June. The Native Americans' demand for cultural access to Devils Tower may reflect two significant trends in contemporary Indian Country. First, many Native American communities have sought to re-vitalize their traditional Native American ceremonial values and practices as a means of combatting significant social problems among their members, such as drug or alcohol abuse.<sup>70</sup> Second, Native American youth in both reservation and urban settings have re-asserted their interest in understanding and participating in their once suppressed Native American cultural and ceremonial heritage.<sup>71</sup>

By no means do these *ad hoc* observations fully explain the underlying social or cultural influences that drive large-scale changes in Americans' choice of leisure time pursuits or in revitalization movements

66. See FCMP, *supra* note 8, at 4-5.

67. The substantial growth in recreational rock climbing and the accompanying adverse environmental and aesthetic effects at Devils Tower required Superintendent Liggett to take action. See *id.* at ii-iii.

68. For example, power rock drills aided in the development of new routes on Devils Tower and similar natural climbing structures that were once considered "unclimbable." *Id.* at 12.

69. Rock climbers pursue their sport for a variety of reasons. Some climbers describe the pure physical challenge of climbing Devils Tower, while others enjoy a sense of psychological and spiritual satisfaction in reaching the summit of Devils Tower. *Id.* at 4-5.

70. Native American cultural and ceremonial practices became a vehicle for promoting intertribal social interaction and exchange. Stephen Cornell emphasizes the "affiliative" features of this revitalization movement as laying the basis for fostering intertribal linkages and providing common frameworks of belief for diverse Native American groups. Contemporary intertribal pow-wows and ceremonial gatherings reinforce shared cultural identities and values that undergird a pan-Indian political and organizational consciousness. CORNELL, *supra* note 26, at 110-11.

71. See *id.*

within indigenous cultures. But Superintendent Liggett, as well as other land managers, can undoubtedly attest that our public lands have become the theater of conflict for historic and emerging user groups.<sup>72</sup>

#### D. *The Legal Basis for the Final Climbing Management Plan for Devils Tower National Monument*

Superintendent Deborah Liggett, like other public land managers, routinely confronts difficult managerial choices that require the accommodation of competing uses of her statutorily entrusted public resources. Her managerial task at Devils Tower National Monument differs only in the nature of the conflicting public uses she must accommodate. She must manage recreation and preservation-related demands now that the Monument has become a premier rock climbing site because of the numerous, challenging and breath-taking technical climbing routes and experiences it offers to the rock climbing public;<sup>73</sup> and it is a major historic ceremonial and cultural site for Native Americans for their performance of the ancient Sun Dance ceremony, sweatlodge practices and personal vision quests.<sup>74</sup> These factors must also be weighed with Superintendent Liggett's statutory duty to regulate the increasing and demonstrably severe environmental impacts of unregulated recreational rock climbing on Devils Tower<sup>75</sup> and her duty to preserve the Native Americans' right of cultural access to Devils Tower.<sup>76</sup>

Settled public land law principles grant land managers wide discretionary latitude in striking a reasonable balance to accommodate competing public uses of a entrusted public resource such as Devils Tower.<sup>77</sup>

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72. Just a small sample of the many newspaper articles, op-ed pieces and letters to the editor generated by the Devils Tower litigation reveals the nature of this conflict. For example, Bob Archbold, a member of the task force that helped draft the FCMP, said that he was "saddened that some commercial climbers chose not to refrain from climbing" even though he believed most climbers supported the voluntary closure of Devils Tower. *Devils Tower Ban*, RAPID CITY J., June 11, 1996, at A1, A2. But other non-Indians disagreed with Archbold. Perry Pendley, President of the Mountain States Legal Foundation, contended that the climbers' voluntary compliance with the closure request was a product of governmental threat to make the closure mandatory if the climbers did not voluntarily comply. Still other non-Indians, such as Steve Moore of the Native American Rights Fund, argued that long-term leases granted to mainstream religious denominations in national parks would be jeopardized by Judge Downes' ruling. Christ Tollefson, *Commercial Guides Win Round*, CASPER STAR TRIB., June 11, 1996, at A1, A8.

73. See FCMP, *supra* note 8, at 4-5.

74. *Id.*; Tollefson, *supra* note 72, at A1.

75. See generally *id.*

76. The federal defendants cite several statutes and an executive order as obligating the NPS to preserve and protect the unique cultural resources of the Native American peoples. *Defendants' Brief*, *supra* note 17, at 10-13.

77. Stern and Slade describe the NHPA as not an "action forcing" statute, but as imposing procedural duties on the NPS, and similarly situated federal agencies, to promote the preservation of

The environmental and physical facts about Devils Tower demonstrate why Superintendent Liggett deserves such regulatory latitude. Her regulatory action seeks to mitigate the demonstrably adverse environmental impacts of recreational rock climbing on a uniquely vulnerable and heavily visited area.<sup>78</sup> Colliding public uses in a constrained area like Devils Tower require that she be granted managerial discretion.<sup>79</sup>

Neither the plaintiffs nor the defendants in *Bear Lodge* disagree that Superintendent Liggett has been delegated wide regulatory discretion to manage recreational rock climbing and Native American ceremonial uses of Devils Tower.<sup>80</sup> The conflict lies in whether she may limit commercial rock climbing one month of the year to accommodate Native American cultural uses of Devils Tower.<sup>81</sup>

#### E. Superintendent Liggett's Effort to Build an Overlapping Consensus Regarding the Management of Devils Tower

The FCMP for Devils Tower is the product of Superintendent Liggett's lengthy consultation with potentially antagonistic user groups regarding future management alternatives for Devils Tower.<sup>82</sup> She brought together recreational rock climbers and Native American ceremonial practitioners to develop a preferred management plan for Devils Tower. She relied on expert advice from ethnologists and historians to develop cross-cultural educational and interpretive programs to inform the general visiting public about Devils Towers' historic connections with Native American ceremonial practices and cultural beliefs.<sup>83</sup>

Her consultative goal was to build a consensus that would support the long-term implementation of the major environmental and cultural preservation goals of the FCMP.<sup>84</sup> Having the major stakeholder groups agree about the need for future regulation of recreational rock climbing for envi-

identified historical and cultural resources. Stern & Slade, *supra* note 50, at 139. However, courts have interpreted these procedural duties as mandatory in nature. *Id.* at 139-40.

78. See FCMP, *supra* note 8, at 30-37.

79. The federal defendants assert that the FCMP serves important secular purposes, including regulation of climbing activity, management of conflicting public uses, and preservation of historic cross-cultural resources. *Defendants' Brief*, *supra* note 17, at 20.

80. The plaintiffs agree that the federal government can mitigate burdens that are imposed on minority religious practitioners so long as it does not violate the Establishment Clause. Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, at 3, *Bear Lodge Multiple Use Ass'n v. Babbitt*, (D. Wyo. 1996) (No. 96-CV-063-D) (on file with author).

81. Plaintiffs contend that the FCMP goes well beyond the accommodation of Native American cultural practices, and amounts to a governmental endorsement of a particular religion. *Id.* at 4-5.

82. When Superintendent Liggett created a Climbing Management Plan Work Group, she included representatives of key stakeholder interests. FCMP, *supra* note 8, at 88.

83. *Id.* at 15-16.

84. See FCMP, *supra* note 8, at 8, 46.

ronmental and preservation purposes provided a community-derived yardstick for a rational and reasonable management plan for Devils Tower.<sup>85</sup>

This working group included official representatives of the recreational rock climbing community, affected Native American governments or communities, and local governmental and economic development officials.<sup>86</sup> This group had the opportunity to work with agency managers and scientific consultants to develop a long-term management plan that reconciles recreational uses and preservation values of Devils Tower.<sup>87</sup>

The working group's differing viewpoints on resource management goals converged in its general acceptance of a preferred management alternative that would mandate periodic closure of Devils Tower to commercial, but not private, recreational rock climbing. The working group's deliberations were informed by its extensive access to relevant scientific and ethnographic data regarding the Native American cultural resources that should be preserved in the management plan for Devils Tower. The working group's contribution toward selection of the management alternatives represents the major stakeholders' efforts toward a long-term accommodation of conflicting recreation and preservation uses of Devils Tower.<sup>88</sup>

#### F. Summary

Standard public land law principles support Superintendent Liggett's periodic closure of Devils Tower to commercial rock climbing. Her action was taken in consultation with a representative working group of recreational climbers, Native American ceremonial practitioners, local governmental and economic interests, and environmental groups. Superintendent Liggett, like other public land managers, confronted the unenviable task of allocating entrusted public resources among a growing list of competing public users. She must also preserve Native Americans' cultural traditions and practices, as well as those of similarly situated ethnic and local communities, under her agency's historic and newly-imposed preservation mandates.

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85. Superintendent Liggett's action was informed by her concern about the adverse environmental impacts of recreational rock climbing at Devils Tower and the burdens imposed on Native American cultural use of that site. Stern and Slade note that such an agency consultation process, under the NHPA, intends to inform participants about the nature of the properties at issue and the potential impacts of proposed management plans. Stern & Slade, *supra* note 50, at 146-51.

86. FCMP, *supra* note 8, at 88.

87. *See id.* at 7-8.

88. *Id.* at 9.

IV. THE APPLICABILITY OF THE ESTABLISHMENT CLAUSE TO THE ISSUE OF NATIVE AMERICAN CULTURAL ACCESS TO PUBLIC LANDS

A. *Factual Context of the Final Climbing Management Plan*

In February 1995, the National Park Service issued its FCMP for Devils Tower in response to a tremendous increase in the rate of technical climbing and the corresponding need to protect the park's resources from degradation.<sup>89</sup> To effectuate this purpose, the preferred alternative, which was adopted as the FCMP, included the following provisions: no new bolts or fixed pitons<sup>90</sup> will be allowed on the Tower; access trails are to be rehabilitated; camouflaged climbing equipment will be required; and certain routes will be closed seasonally to protect raptor nests.<sup>91</sup> The FCMP also discontinued the award of commercial climbing licenses for the month of June and encouraged recreational climbers to refrain from climbing during this period of cultural importance to Native American northern plains tribes.<sup>92</sup> No restrictions are imposed on the general visiting public, who may continue to use all the facilities at Devils Tower even during the month of June. Only commercial climbers that hold inherently revocable licenses granted by the Superintendent are mandatorily restricted during the month of June under the FCMP.<sup>93</sup>

Private recreational rock climbers are asked to voluntarily refrain from climbing Devils Tower so as to allow Native American ceremonial practitioners greater peace and solitude in which to perform their historic summer solstice ceremonies.<sup>94</sup> Such a request is consistent with the National Park Service's long standing support for Christian ministries in the Parks, by allowing the ministries to use park structures and other facilities that are otherwise used for naturalist or interpretive programs.<sup>95</sup> Su-

89. FCMP, *supra* note 8, at 1-4.

90. These are the trappings of technical climbing which are left in the rock.

91. *Id.* at iv-v, 22-29.

92. *Id.* at 22-23. The Park gave all commercial licensees a one year advance notice that, beginning in 1996, commercial climbing guide services would no longer be licensed for the month of June. *Id.* at 22.

93. *Id.*

94. *Id.*

95. In fact, a comprehensive Christian Ministry supplies the National Parks with 300 seminarian interns each year. TO LIVE OVER THE STORE, ESSAYS ON THE EXPERIENCE OF A CHRISTIAN MINISTRY IN THE NATIONAL PARKS (William L. Baumgaertner ed., 1992). In view of this accommodation of the Christian Ministries, it is possible that a failure of Superintendent Liggett to develop a policy to accommodate the contemplated Native American use would be found discriminatory. It may also indirectly contravene the federal government's fiduciary trust duty to Indian tribes. Articulated as the "trust doctrine" in the common law, this responsibility has been found to require the United States to protect Indian culture. See O'Brien, *supra* note 28, at 479-83. The courts have found that "[t]he existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute or regulation, 'reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.'" *Id.* at 479 n.179 (citing United States v.

perintendent Liggett expected that the ethical suasion of mainstream rock-climbing associations, combined with a broader cross-cultural education program regarding Native Americans' historic ceremonial and cultural uses of Devils Tower, would eventually convince virtually all recreational rock climbers to forego climbing the monument during the month of June.<sup>96</sup>

But the long-term plan to accommodate both recreational rock climbing and Native Americans' ceremonial use of Devils Tower was interrupted one year into its operation. Several commercial and private rock climbing interests sued to enjoin the periodic suspension of commercial licenses, alleging that such actions constituted a "subsidy of the Indian religion," an excessive governmental entanglement with religion, and thus violated the Establishment Clause.<sup>97</sup> Judge Downes ruled the prohibition of commercial guides violates the Establishment Clause,<sup>98</sup> and found that the proposal to close Devils Tower to all climbing in June, if the voluntary closure fails to significantly reduce climbing, amounted to a threat that was governmentally coercive of individual action and conduct in favor of Native American religious activities.<sup>99</sup>

#### B. *The Theoretical Inconsistencies of the District Court's Unbounded Establishment Clause Standard*

To reach his holding, Judge Downes implicitly characterized the Native Americans' use of Devils Tower as primarily religious. Accordingly, he goes on to articulate the prevailing Establishment Clause test from the Supreme Court's 1971 decision, *Lemon v. Kurtzman*, but never applies it.<sup>100</sup> Instead, he relies entirely upon the Supreme Court's reasoning in *Lyng v. Northwest Indian Cemetery Protective Ass'n*<sup>101</sup> and the Tenth Circuit's decision in *Badoni v. Higginson*,<sup>102</sup> both of which turned upon the interpretation of the right to religious free exercise. Thus he effectively abolished any governmental opportunity to accommodate Native American or other minority religious beliefs or practices.

Assuming the accuracy of Judge Downes' characterization of Native Americans' use of Devils Tower as primarily religious, the government's

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Mitchell, 463 U.S. 206, 225 (1983)); see also *infra* notes 188-201 and accompanying text.

96. FCMP, *supra* note 8, at 22.

97. Complaint, Bear Lodge Multiple Use Ass'n v. Babbitt, (D. Wyo. 1996) (No. 96-CV-063-D) (on file with author), at 9.

98. *Order*, *supra* note 11, at 11.

99. Judge Downes found the voluntary program was "laudable and constitutionally permissible." *Id.* at 14.

100. 403 U.S. 602 (1971).

101. 485 U.S. 439 (1988).

102. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).



duty to accommodate and preserve Native Americans' cultural access to Devils Tower remains. Therefore, if Native Americans' use is not primarily religious,<sup>103</sup> law addressing religious practice is of questionable applicability to the *Bear Lodge* case. However, even assuming that the activity is primarily religious, Judge Downes failed to apply the appropriate constitutional analysis.

Judge Downes' analysis relied almost entirely upon free exercise jurisprudence, presumably because he considers the Free Exercise and Establishment Clauses to be coextensive. The Supreme Court has never determined that to be the case. Indeed, the Court has found "room for play in the joints, productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."<sup>104</sup> The Court has found ample room within the Establishment Clause for state and federal governments to act in ways that accommodate religious free exercise.<sup>105</sup> Contrary to Judge Downes' analysis, governmental acts need not be totally unrelated to religion since that "would amount to a requirement 'that the government show [a] callous indifference to religious groups.'"<sup>106</sup>

Judge Downes' only nod to Establishment Clause jurisprudence was a recitation of the test from *Lemon v. Kurtzman* which by popular account remains only nominally controlling.<sup>107</sup> Indeed, it may be said to have been supplanted by the Supreme Court which has recently focussed its attention on factors of governmental endorsement of religious activity and governmental coercion of religious belief.<sup>108</sup> Judge Downes never discusses this trend nor applied the resultant tests to the facts of the case.

Thus Judge Downes' errors were three-fold: first, never applied the *Lemon* test to the facts of the case; second, he ignored the evolving governmental coercion and endorsement standards championed particularly by Justices Kennedy and O'Connor, respectively; and third, he proceeded to apply analyses crafted for free exercise questions. While the first and third error constitute a clear rejection of the established tests, the second exem-

103. See generally Hardt, *supra* note 18 (discussing white America's ignorance of the interdependence of Native American religion and culture).

104. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

105. "The limits of permissible state accommodation of religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Id.* at 673.

106. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

107. William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 238 n.48 (1995) (noting that the court did not consistently apply the *Lemon* test to establishment issues in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Marsh v. Chambers*, 463 U.S. 783 (1983)). Marshall refers the reader to Michael S. Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993), "for an account that *Lemon* has been effectively overruled."

108. See *infra* notes 123-138 and accompanying text.

plifies an exceedingly narrow understanding of the state of Establishment Clause jurisprudence. Certainly not an enlightened path for the protection of the rights of religious minorities, the resultant opinion leads the law not into the future, but ties it to a repressive past.

### 1. *The Lemon Test*

The three-part test for Establishment Clause case analysis derived from *Lemon v. Kurtzman*<sup>109</sup> asks whether the challenged governmental action: 1) has a secular legislative purpose; 2) advances or inhibits religion; or 3) fosters excessive governmental entanglement with the religion.<sup>110</sup>

The first prong requires the government to demonstrate a secular purpose in undertaking the challenged action.<sup>111</sup> This prong exemplifies the Court's understanding of the government's secular, constitutional responsibility to accommodate religious practices or beliefs that are protected under the Free Exercise Clause. Indeed, governmental actions that reasonably accommodate individuals' rights to free exercise of their beliefs merely fulfill the governments' secular constitutional duties.<sup>112</sup> Thus, the secular purpose prong ensures that governments are not placed in the impossible cross-fire of the Free Exercise and Establishment Clauses by allowing them to craft accommodative policies that preserve religious freedoms within constitutional parameters.<sup>113</sup>

The second prong of the *Lemon* test focuses upon the governmental action's "primary effect" and asks whether that effect advances or inhibits religion or religious practice.<sup>114</sup> This prong is not violated by governmental action that incidentally advances or advantages religious activity; it only prohibits governmental action which directly sponsors or furthers specific religious activity.<sup>115</sup>

Governmental action that regulates religious organizations' access to public property must be even-handed and must not favor non-religious

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109. 403 U.S. 602.

110. *Id.* at 612-13.

111. *Id.* at 612.

112. See, e.g., *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

113. See *Edwards v. Aguillard*, 482 U.S. 578 (1987), where the Court found that an Arkansas statute that required creationism to be taught whenever evolution was taught did not have the purported secular purpose of advancing academic freedom, but rather fostered a "discriminatory preference for the teaching of creation science and against the teaching of evolution." Devoid of a secular purpose, the statute failed to satisfy the first prong of the *Lemon* test. *Id.* at 588.

114. *Lemon*, 403 U.S. at 612.

115. *Presiding Bishop*, 483 U.S. at 337. "[F]or the men who wrote the Religion Clauses of the First Amendment, the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign . . ." *Id.* (citing *Walz*, 397 U.S. at 668).

organizations' access to public facilities. For example, the Court has found that state universities which grant access to and use of their property to solely non-religious organizations, while barring access to and use by religious organizations, discriminate unfairly against religious interests.<sup>116</sup> In the public high school context, where the potential for students to be pressured into an activity is great, the Court has determined that Establishment Clause requires solely voluntary attendance at religious meetings during non-school hours, and bars school officials from actively participating in such meetings at public high schools.<sup>117</sup> Such prudential limits ensure that voluntary, non-governmentally required participation is the standard for such religious use of public facilities.

The third prong of the *Lemon* test focuses upon excessive governmental entanglement with private religious activity.<sup>118</sup> This prong is now relatively insignificant in the Court's evaluation of alleged excessive governmental involvement with religious groups or action.<sup>119</sup> This is because the federal and state governments rarely directly fund or participate in the inner management of private religious activity.<sup>120</sup>

Superintendent Liggett's accommodation of Native Americans' cultural use of Devils Tower does not violate any of the three prongs of the *Lemon* test. The secular purposes of the closure are many: environmental protection, raptor conservation, and recreation management. Additionally, given that the governmental accommodation of free exercise is also a secular purpose, the closure clearly satisfies the first prong of the *Lemon*

116. *Widmar v. Vincent*, 454 U.S. 263 (1981).

117. *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (finding constitutional the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1994), which bars secondary schools who receive federal funds and maintain a "limited open forum" from curtailing students' "equal access" to facilities based upon "religious, political, philosophical or other content"). The Court emphasized that the statute's limitations upon the participation of school officials in student religious groups was instrumental in the failure to find that the Act worked an establishment of religion. *Id.* at 251.

118. *Lemon*, 403 U.S. at 613.

119. See *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988), where the Court notes the criticism that the "'entanglement' prong" has received due to the "Catch-22" situation caused by necessary governmental monitoring of its programs to ensure that they "comport[] with the Establishment Clause," which itself may cause a governmental entanglement under the third prong of the *Lemon* test.

120. See, for example, *Presiding Bishop*, where the Court held it constitutional to exempt solely religious organizations from complying with anti-discrimination requirements in Title VII. 483 U.S. 327. When confronted with situations where federal policies advantage religious organizations by treating them differently than secular organizations, such as exempting them from tax liability or from compliance with anti-discrimination provisions of Title VII, the Court has found the differential treatment to lessen entanglement. *Id.* at 334 (citing *Walz*, 397 U.S. at 676).

However, even when the federal government provides grants to religious organizations for secular public purposes such as services for and research into premarital adolescent sex and pregnancy under the Adolescent Family Life Act, the Court has not found this to constitute entanglement under *Lemon*. *Bowen*, 487 U.S. at 617. The Court determined that if a religiously affiliated organization receives federal funds for public programs, this does not violate the Establishment Clause if the organization is not "pervasively sectarian." *Id.* at 616.

test. The closure neither advances nor inhibits religion—it, like a university's administrative policy merely provides preferred access to the area to a religious group for one month, and unbridled access to non-religious groups for the balance of the year. Lastly, the closure does not foster excessive governmental entanglement, but rather frees Native Americans from regulatory oversight of the Sun Dance and related ceremonies.

Superintendent Ligget's action is also within the latitude afforded governmental authorities under the evolving Establishment Clause jurisprudence. This made clear in light of Justice Kennedy's proposed coercion test and Justice O'Connor's proposed endorsement test for administering the Establishment Clause.<sup>121</sup> Indeed, the Tenth Circuit Court of Appeals, whose decisions are binding upon the Federal District Court of Wyoming, has apparently adopted the emerging endorsement test as its guiding standard for evaluating Establishment Clause cases.<sup>122</sup>

## 2. Justice Kennedy's Proposed Coercion Test

Justice Kennedy's opinion for the majority in *Lee v. Weisman*<sup>123</sup> identified the palpable presence of government coercion as the key element of a claim under the Establishment Clause. In *Lee*, Justice Kennedy emphasized the context of governmental action in determining whether individuals were somehow coerced to support religious beliefs, by distinguishing between a state-sponsored prayer at a high school graduation and a blessing at the opening of a state legislative session.<sup>124</sup>

When a rabbi delivered a state-provided high school graduation prayer, Justice Kennedy found that the students, though they were not required to attend the graduation to receive their diplomas, were nonetheless coerced into participating in or supporting the religious ideas expressed in the prayer.<sup>125</sup> Justice Kennedy's context-sensitive governmental coercion standard detected an Establishment Clause violation because of the importance of high school graduation in United States culture as "one of life's most significant occasions."<sup>126</sup> He concluded that the local government, by supplying this prayer was "exact[ing] religious conformity from a student as the price of attending her own high school gradua-

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121. See *infra* notes 123-138 and accompanying text.

122. *Defendants' Brief*, *supra* note 17, at 19 (citing *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996) and noting that court also uses *Lemon* test).

123. 505 U.S. 577 (1992).

124. *Id.* at 596-97 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983), where a chaplain's blessing at the opening day of Nebraska Legislature was found not to violate the Establishment Clause).

125. *Lee*, 505 U.S. at 593.

126. *Id.* at 595.

tion."<sup>127</sup> Therefore, the student's silent participation in this religious activity was coerced through school supervision and peer pressure to which high school students are especially sensitive.<sup>128</sup>

By comparison, Justice Kennedy's context-sensitive government coercion standard found no Establishment Clause violation where the state sponsored a prayer at the opening session of the Nebraska state legislature.<sup>129</sup> Given that the affected legislators, who were adults "not readily susceptible to 'religious indoctrination,'"<sup>130</sup> or "peer pressure,"<sup>131</sup> were free to enter and leave the chamber, and the opening prayers were not of a proselytizing nature, Kennedy held that there was little likelihood that any ostensible governmental coercion would effectively overwhelm the legislators' personal capacity for religious choice or autonomy of belief.<sup>132</sup>

### 3. Justice O'Connor's Proposed Endorsement Test

Justice O'Connor's variant of a new Establishment Clause test would bar only governmental action that endorses a particular religion or religious practice. She would hold that governmental endorsement of particular religious beliefs or conduct violates the Establishment Clause because "it sends a message to non-adherents that they are outsiders, [and] not full members of the political community, and [it sends] an accompanying message to adherents that they are insiders, [as] favored members of the political community."<sup>133</sup> Thus, Justice O'Connor determined that religious symbols displayed on or within governmental buildings were an unconstitutional endorsement of religion because of the centrality of these buildings as sites of government power and because the appearance of governmental endorsement results.<sup>134</sup> This endorsement is not as pronounced in public parks, where the nature of the surroundings is inherently public. Thus, religious symbols in public parks have not been found to constitute governmental endorsement of a particular religious belief system or dogma.<sup>135</sup>

127. *Id.* at 596.

128. *Id.* at 593.

129. *See* *Marsh v. Chambers*, 463 U.S. at 794-95.

130. *Id.* at 792 (citing *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) and *Colo. v. Treasurer & Receiver Gen.*, 392 N.E.2d 1195, 1200 (Mass. 1979)).

131. *Marsh*, 463 U.S. at 792 (citing *School Dist. of Abington v. Schempp*, 374 U.S. 203, 290 (1963) (Brennan, J., concurring)).

132. *Marsh*, 463 U.S. at 794-95.

133. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in judgment) (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

134. *See* *County of Allegheny v. ACLU*, 492 U.S. 573, 623-37 (1989) (O'Connor, J., concurring in part and concurring in judgment).

135. *See* *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

Under her governmental endorsement of religion test, O'Connor would permit governmental programs that give religious students equal access to governmental funding<sup>136</sup> and supported religious groups' use of public schools.<sup>137</sup> These she would categorically define as governmental acts that do not endorse any particular religion or dogmatic set of beliefs. Justice O'Connor's endorsement standard would prohibit only those governmental acts that actively promote or advantage particular religious organizations or politically privilege a particular set of religious beliefs.<sup>138</sup>

The proposed closure of Devils Tower violates neither the coercion nor the endorsement test. Native American religious practitioners do not proselytize, nor will their practices create a coercive environment that would cause spectators to be compelled to participate. Moreover, the presence of Native Americans performing religious ceremonies at Devils Tower could not reasonably cause observers to feel as though Native Americans are full members of the political community, but the spectators are not; thus, no governmental endorsement would occur.

### C. *The Theoretical Inconsistencies of Judge Downes' Free Exercise Jurisprudence*

Judge Downes' ironic invocation of the Supreme Court's free exercise accommodation doctrine as limiting Superintendent Liggett's discretionary authority to preserve Native Americans' cultural access to Devils Tower further shows his mistaken interpretation of First Amendment jurisprudence.<sup>139</sup> His interpretation of the Free Exercise and Establishment Clauses in the *Bear Lodge* litigation stems from a fundamental misreading of *Lyng v. Northwest Indian Cemetery Protective Ass'n*<sup>140</sup> and *Badoni v. Higginson*.<sup>141</sup>

Both *Lyng* and *Badoni*, rightly understood, affirm the religious accommodation principle as the governmental means of reconciling the potentially conflicting mandates contained in the Establishment and Free Exercise Clauses. In *Badoni*, Native American plaintiffs claimed that the completion of the Glen Canyon Dam and the consequent creation of Lake

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136. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S.Ct. 2510, 2525-28 (1995) (O'Connor, J., concurring).

137. See, e.g., *Board of Educ. of the Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990) (O'Connor, J., for the majority).

138. See *Board of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687, 712-21 (1994) (O'Connor, J., concurring in part and concurring in judgment).

139. *Order, supra* note 11, at 7-10.

140. 485 U.S. 439 (1988).

141. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

Powell, as well as the growing tourist presence at Rainbow Bridge, destroyed and desecrated their sacred sites, in violation their rights under the Free Exercise Clause.<sup>142</sup> The district court granted summary judgment for the governmental defendants because the Native American plaintiffs had no property interest in the monument, and their free exercise interest was not as strong as the federal government's interest in operating both the Dam and the Rainbow Bridge Park.<sup>143</sup> On appeal, the Tenth Circuit rejected the district court's first basis for granting summary judgment, stating that though property rights have been considered as one factor in a free exercise determination, the focus of such an inquiry should be whether "the government [has] manage[d] property in a manner that does not offend the constitution."<sup>144</sup> Nonetheless, the court found that the federal government had a compelling interest in managing the Dam and the Park in a manner consistent with over-all federal objectives that outweighed the appellee's interest in free exercise in the area.<sup>145</sup>

The Tenth Circuit's desultory discussion of the Establishment Clause stemmed from the plaintiffs' attempt to bar *all* visitors from the park, *year-round*.<sup>146</sup> In dicta, the court opined that if the plaintiffs were found to have a free exercise right which would compel the federal government to restrict all visitor access, then such a complete closure may constitute a governmentally sponsored establishment of religion.<sup>147</sup> Given that the *Bear Lodge* litigation raises the issue of whether the federal government may discretionarily preserve Native Americans' cultural access to their sacred sites on public lands, through a periodic closure, pursuant to the agency's statutorily imposed preservation duties, the Tenth Circuit's decision in *Badoni* offers little guidance.

*Lyng v. Northwest Indian Cemetery Protective Ass'n*<sup>148</sup> represents the controlling law regarding public land managers' duty and power to protect Native Americans' cultural and ceremonial access to sacred sites on public lands. There, the Court majority agreed with the Native American plaintiffs that the proposed governmental action would fundamentally impair, perhaps even destroy, the exercise of their religious ceremonies and practices at sacred sites within the high country of Northern Califor-

142. 455 F. Supp. 641, 643 (D. Utah 1977).

143. *Id.* at 644-45.

144. 638 F.2d at 176.

145. *Id.*

146. *Id.* at 178-79.

147. *See id.* at 179 (emphasis added). Protecting Indian religious practices from curiosity seekers, casual observers, and administrative rules and regulations is the only practical way that religious freedom can be assured to Indian tribes and Native groups. It is not the establishment of their religion because their religions, not being proselytizing religions, seek to preserve the ceremonies, rituals and beliefs not to spread them.

148. 485 U.S. 439 (1988) (O'Connor, J. writing for the majority).

nia.<sup>149</sup> The *Lyng* majority further found that the North American Indian Cemetery Protective Association had an interest in the pristine nature of the National Forest land in question, but held that the interest was not great enough to override the government's interest in developing the area.<sup>150</sup>

The *Lyng* court effectively lowered the level of Free Exercise scrutiny of governmental activity that involves a public land manager's routine or internal decisions in allocating public resources among permissible land use purposes.<sup>151</sup> Thus, any incidental burden on plaintiffs' religious practices that arose from these otherwise routine public land management decisions did not rise to the level of a Free Exercise Clause violation. The *Lyng* Court held that the accommodation of free exercise did not require the government to regulate its lands other than the way the executive agency saw fit, in the tradition of the sometimes tremendous deference given to other branches of government in this area.<sup>152</sup> This deference to public land manager authority is counter-balanced by the Court's declara-

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149. *Id.* at 451.

150. *Id.* at 451-52.

151. 485 U.S. at 452. This departure from the strict scrutiny of the compelling governmental interest test and balancing tests for governmental activity that burdens, even indirectly, religious practice has, in the mind of some commentators, singled out native religion for markedly different and disadvantageous treatment. In an article written soon after the Supreme Court's holding in *Lyng*, Scott Hardt concluded that the Ninth Circuit Court in particular had, with the exception of its addition of both a centrality and a coercion inquiry to its analysis, accurately adopted the extant precedent by applying a strict scrutiny test to the Forest Services' proposed actions. *See* Hardt, *supra* note 18, at 640-41 (referring to *Lyng*, 764 F.2d 581 (9th Cir. 1985)). Hardt found that the Supreme Court's abrupt change of course from this compelling interest test (and a somewhat more obscure balancing test) to an inquiry into whether a burden upon religion is prohibitive or "merely" preventative, was a tremendous shift from an inquiry into the legitimacy of governmental action to an inquiry into the centrality of the practice to the religion. *Id.* at 651-57. This changed focus caused disparate and unfavorable treatment which belied the Court's claimed even-handedness. The result failed to ensure the equal standing of various religions by foreclosing Native Americans' ability to attain hegemonic dominion over public lands, or religious servitudes, but instead resulted in a facially uneven analysis. *Id.* at 657.

Hardt concludes that the result of this changed analysis—which requires that governmental actions cause individuals to violate tenets of their religion, or penalize individuals for religious exercise—not for restricting access to a place of worship—burdens Native American religion much more than western religion. In view of the doctrinal importance of place in Native American religion, in contrast to that of event commemoration in western traditions, the test discriminates against native worship. *Id.* at 653-57.

152. *Lyng*, 485 U.S. 439. The majority states that the courts are not equipped to "reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours." *Id.* at 452. The Court instead relegates "[t]hat task, to the extent that it is feasible, [to] the legislatures and other institutions." *Id.* *See also* Goldman v. Weinberger, 475 U.S. 503 (1986) (Court effectively exempted the military from free exercise claims when it subordinated the plaintiff's right to wear a yarmulke to the military's compelling interest in uniformity); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (Court used intermediate scrutiny to determine that prison regulations that infringed upon prisoners' prayer schedules were "reasonably related to legitimate penological interests").



tion that "nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen."<sup>153</sup> Thus, Justice O'Connor suggests, "[t]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like these engaged in by the Indian respondents."<sup>154</sup>

Superintendent Liggett's regulatory action implements the *Lyng* decision by preserving the Native Americans' traditional cultural access to a well-established sacred site at Devils Tower. Though her action does represent a clear break with the majority culture's traditional hostility to Native American culture and religion,<sup>155</sup> it also effectuates a permissible interpretation of her statutory preservation duties consistent with the *Lyng* accommodation principle. Public land managers may, under *Lyng*, consider Native American cultural access to sacred sites in their revision of their land use or management plans. Superintendent Liggett's action shows that the federal government's ethnocentric disregard of Native American culture and religion need not continue to rule the National Park Service's decision-making process.

#### D. *Historical Inconsistencies of Judge Downes' Interpretation of the Establishment Clause*

Judge Downes' historical error lies in a misapplication of the Establishment Clause as a means to analyze core Native American cultural practices using an alien system of laws and conduct. Granted, the Framers of our Constitution themselves differed fundamentally regarding the meaning attributable to that great "constitutional experiment" to balance religious rights and liberties. Their range of opinions on the issue of religious liberty spanned the spectrum of contemporary opinion and reflected the idealism of the eighteenth century theologians as well as the skepticism of pragmatic contemporary philosophers.<sup>156</sup> Though a reduction of the myriad philosophical motivations of the Framers is difficult if not impossible, they may be categorized into the representative viewpoints of puritan, civic republican, evangelical and enlightenment traditions.<sup>157</sup>

153. *Id.* at 453.

154. *Id.* at 453-54.

155. Compiled exhaustively by Sharon O'Brien, these policies include Protestant proselytization and conversion, the Bureau of Indian Affairs' reliance upon missionaries and other arms of the Christian church in efforts to assimilate Native Americans, extermination of the buffalo, and the criminalization of Native American cultural practices. O'Brien, *supra* note 28, at 454-55.

156. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 376 (1996).

157. Accordingly, Witte acknowledges the fluid relationship between these perspectives and recognizes that he has identified only these four categories for ease of analysis. *Id.* at 377. Witte goes on to note the limited utility of the search for the "original intent of the drafters," noting that James

Although coming from vastly differing ideological foundations, these four distinct viewpoints united in their common advocacy of the adoption of the Establishment Clause so as to guarantee a separation of church and state that would prevent the persecution of religious minorities.<sup>158</sup> But it was not the position of any of these traditions to establish an antagonistic relationship between governmental and religious communities in America.<sup>159</sup> Instead they commonly supported a vision of cooperation between an autonomous government and a vibrant, but private sphere of religiously-motivated activity.<sup>160</sup>

This overlapping consensus among otherwise sharply divergent religious views evidenced the importance of spiritual devotion in citizens' private lives. This consensus of views likewise sought an effective constitutional means by which to constrain the federal government from imposing a particular sort of worship which would lead to the oppression, corruption and taxation of the people.<sup>161</sup>

The Framers were mindful of the religious persecution experienced by their ancestors in Europe in the form of forced participation in the state religion.<sup>162</sup> The state religion of England in the three centuries before the American Bill of Rights was drafted was alternatively Protestant and Catholic, according to the religious inclinations of the sovereign.<sup>163</sup> The ruling government-established sect subjected English citizens to fines, imprisonment, torture, and death for such offenses as "speaking disrespectfully of the views of . . . government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them."<sup>164</sup>

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Madison had "urged interpreters to look not to the drafters' intentions," but, "to the text itself [and] the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses." *Id.*

158. *Id.* at 403-05 and generally.

159. *Id.*

160. *Id.*

161. *Id.*

162. Cheryl A. Hance, *Rosenberger v. Rector and Visitors of the University of Virginia: Will the Real Establishment Clause Test Please Stand Up?*, 5 WIDENER J. PUB. L. 549, 555-59 (1996).

163. Hance places the beginning of this unrest at 1534, when Parliament ended the Roman Catholic Church's control over England and declared King Henry VIII the head of the Church of England. *Id.* at 555-56. This constituted a dramatic change for a population that was predominantly Catholic. Dissension of any kind was harshly suppressed. King Henry's reign was followed by that of his daughter, Mary, who re-established Catholicism as the state religion, thereby launching a religious clash that would last for the next century and a half. *Id.*

164. *Id.* at 556-57 (quoting *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 9 (1947)). Sensitive to the power of the church, the colonists, when assessed taxes to support the churches within the colonies, determined that freedom of religion could only be secured if the government were "stripped of all power to tax, to support, or otherwise to assist any or all religions." *Id.* at 557-58 (quoting *Everson*, 330 U.S. at 11).

Understandably, the Framers wanted to ensure that this could not occur in an America built on the principle of religious tolerance.<sup>165</sup> Thus, James Madison, one of the premier architects of our Constitution and Bill of Rights, asserted when enacting the Establishment Clause that the people were concerned about the possibility that “one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel other[s] to conform.”<sup>166</sup> Madison was joined in this concern by Thomas Jefferson, who had helped draft the Virginia Establishment bill, and who tacitly acknowledged that the threat of governmental coercion to practice minority religion was minimal, and consequently minority religions in particular were intended by the Establishment Clause to be protected from state-sponsored suppression.<sup>167</sup>

Although modern Establishment Clause scholarship has challenged the interpretive force that should be accorded to the relatively sparse indications of the Framers’ intent on this issue, especially in view of the enactment of the Fourteenth Amendment,<sup>168</sup> governmental protection of religious minorities has remained the touchstone principle of the Supreme Court’s interpretation of the Establishment Clause since 1947.<sup>169</sup> Al-

165. *Id.* at 557-59. James Madison and Thomas Jefferson passionately championed the battle against this type of governmental power. Madison believed there was “not a shadow of [a] right in the general government to intermeddle with religion.” *Id.* at 558. Jefferson believed that “a wall of separation” between the church and the state was the only way to maintain a just government. *Id.*

166. Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN’S L. REV. 245, 259 (1991) (citing 1 ANNALS OF CONG. 731 (J. Gales ed., 1789)).

167. Witte, *supra* note 156, at 372 n.2, citing Thomas Jefferson, Notes for a Speech in the Virginia House of Delegates, in 1 THE PAPERS OF THOMAS JEFFERSON 537-39 (Julian P. Boyd ed., 1950) (arguing that the 1785 Virginia statute establishing religious freedom “meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan, the Hindoo [sic], and Infidel of every denomination”).

168. The Supreme Court incorporated the Establishment Clause as against the states without fanfare in *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15 (1947). However, the decision did not settle the controversy over the appropriate interpretation of the effect of the Fourteenth Amendment’s passage upon the Establishment Clause. Kurt Lash, *The Second Adoption of The Establishment Clause: the Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1141-42 (1995). Nevertheless, the Court’s incorporation of the Establishment Clause opened the door to inquiries pertaining to equal protection and due process, not just when assessing whether the government has infringed a free exercise interest, but also when assessing whether individuals are to be afforded a differing level of protection from an Establishment Clause violation when governmental activity is supportive of minority religion. Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMP. L. REV. 95, 118-19 (1996).

169. In 1947, the Court decided *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, in which it adopted an analysis of the establishment of religion grounded in the principle of separationism. The Court supported this interpretation by relying upon only two commentators: Jefferson, who did not participate in the framing or adoption of the Establishment Clause, and Madison who, though he did participate in its ratification, was only one of the original framers. John Joiner, Note, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court’s Establishment Clause Jurisprudence*, 73 DENV. U. L. REV. 507, 555 (1996). In so doing, the Court ignored the limited governmental tolerance

though the Court has never settled on a consistent interpretive standard for Establishment Clause administration, Justice Scalia has recently affirmed an interpretation of the Establishment Clause's objective of protecting religious minorities.<sup>170</sup>

The Supreme Court's current accommodation principle from *Lyng* bridges the governmental gap that historically rendered Native Americans' cultural practices vulnerable to government-sponsored persecution and suppression. By encouraging public land managers' to voluntarily consider Native American cultural access in their land use and management planning, the Court once again voted for a workable accommodation in the public land law context between the Free Exercise and Establishment Clauses. Superintendent Liggett's action, under *Lyng's* guidance, represents a practical and rational means by which public land managers can balance non-Indian recreational uses of public resources and Native Americans' demand for cultural access to their historic sacred sites such as Devils Tower.

*E. Why a Strict Separationist Interpretation of the Establishment Clause Frustrates the Preservation of Native American Cultural Resources*

Judge Downes' strict separationist reading of the Establishment Clause transforms it into a doctrine without boundaries. His interpretation virtually abolishes any governmental opportunity to accommodate Native Americans' cultural or ceremonial uses of our nation's public lands. Under Downes' holding, any adversely affected public recreational user may veto the government's accommodation of Native Americans' ceremonial or cultural uses of public lands regardless of the minimal nature of the alleged injury suffered by that recreational user.<sup>171</sup>

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of religion inherent in the support of the evangelical, civic republican, puritan and enlightenment movements. The court also ignored the remaining Framers' intentions. Instead, the Court crafted an absolutist test that makes compliance difficult to accomplish and hypocrisy hard to avoid. See Witte, *supra* note 156, at 426-27.

170. Justice Scalia embraced this principle when dissenting from the majority's finding that the New York legislature established government religion by creating a school district comprised entirely of one sect of Hasidic Jews, to ensure funding for Hasidic children with special needs. See *Kiryas Joel*, 512 U.S. at 732 (Scalia, J., dissenting). He criticized the majority's application of the Establishment Clause to this "minority sect" in view of the realistic scope of the Hasidic faith. *Id.* Scalia suggests that the Hasidic community, rather than a religious organization with potential hegemonic power, was a cultural grouping that became a political grouping through the act of the New York Legislature, and consequently the Hasidics were beyond the scope of the Establishment Clause. *Id.* at 743

171. Judge Downes' interpretation of the Free Exercise and Establishment Clauses harks back to the era when courts applied a rule that simultaneously "required and forbade" governmental accommodation of minority religious practices. Garvey, *supra* note 52, at 1381 (comparing *Sherbet v. Verner*, 374 U.S. 398 (1963) with *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) and suggesting a more tolerant approach).

Further, his interpretation departs fundamentally from the religious toleration principle that informs the contemporary Supreme Court's interpretation of the Establishment Clause.<sup>172</sup> Public land managers, as well as other governmental officials, will be crippled by Judge Downes' seemingly unbounded catalogue of potential governmental accommodations of minority religious practices or activities that amount to unlawful governmental coercion of belief or direct governmental sponsorship of a particular religion.<sup>173</sup> For example, Judge Downes' strict separationist interpretation of the Establishment Clause would seemingly outlaw a wide range of existing governmentally supported religious activities—military chaplains,<sup>174</sup> tax exemptions for churches,<sup>175</sup> and unemployment compensation for sabbatarians.<sup>176</sup>

There is little to be gained by cannibalizing the governmental accommodation doctrine. That doctrine trusts the legislative branch to "balance" the seemingly contradictory commands of the Free Exercise and Establishment Clauses via the reasonable governmental accommodation of minority religious beliefs and practices. This accommodation is crucial in the Native American context, where governmental suppression of minority religious practices, not their accommodation, has been the rule.<sup>177</sup>

But there are also compelling internal inconsistencies that counsel against accepting Judge Downes' interpretation of the Establishment Clause. First, Judge Downes' interpretation fails to impose any practical restriction on the definitional reach of that key phrase, religious activity. He does not explain his disregard of the federal government's uncontroverted ethnographic and historical evidence that establishes Native Americans' long-standing cultural use, and not necessarily religious use, of

172. Religion, "viewed from the inside" of a minority religious community is about how one lives a complete life in such a community. Legal or practical burdens on those religious practices don't merely imply a lack of respect for those practices but make it much more difficult to "live the way one ought to." Garvey, *supra* note 52, at 1382.

173. In addressing Jesse Choper's separationist nonestablishment position that all tax support for religious entities, for example, is violative of the Establishment Clause, Garvey, though he does not concede, suggests that the current regime of private property interests make this a complex matter. However, Garvey asserts that in a society wherein the government owns all the land, the government would be compelled to support religious entities to fulfill its duty to accommodate religious free exercise. *Id.* at 1385. Native Americans were compelled to cede their vast western land holdings to the federal government, including many of their most important cultural and ceremonial sites. Absent action by federal land managers to preserve Native American cultural access to these sites, Native Americans will be in the position of perpetual supplicants to the federal government that has a virtual monopoly on their cultural and religious resources. *See id.* at 1384-85.

174. Though the Court has never addressed this practice, the government may be arguably compelled to provide the service to accommodate free exercise. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1157 (2d ed. 1988).

175. Upheld in *Walz v. Tax Comm'n.* 397 U.S. 664 (1970).

176. Upheld in *Sherbert v. Verner*, 374 U.S. 398 (1963).

177. PRUCHA, *supra* note 5, at 1126.

Devils Tower. Unlike his fellow judges or religious freedom scholars, Judge Downes declines to meaningfully define "religious activity."<sup>178</sup> Instead, he casually accepts the plaintiffs' characterization of the Native Americans' cultural or ceremonial use of Devils Tower as tantamount to religiously motivated activity.<sup>179</sup>

But Judge Downes' characterization of Native American ceremonial activities, such as the Sun Dance, as equivalent to religious activity fails the definitional test offered by perhaps the leading religious freedom scholar in America.<sup>180</sup> Professor Jesse Choper argues that an action is religious in nature if its practitioners intend it to have extra-temporal consequences.<sup>181</sup> That is, Choper would define an activity as "religious" if it "extends in some meaningful way beyond [the actor's lifetime], either by affecting [her] eternal existence or by providing a permanent and everlasting place in reality for all persons that follow."<sup>182</sup> The well-documented nature of the Sun Dance ceremony, and the related Native American ceremonial practices that are at stake in the Devils Tower litigation, demonstrates that it is fundamentally non-commemorative in character and non-salvation directed.<sup>183</sup> Thus, those Native American cultural ceremonies that Judge Downes characterizes as essentially religious in purpose fail to meet Professor Choper's rather narrow reading of the Establishment Clause.<sup>184</sup>

Other religious freedom scholars likewise demand a well-bounded judicial definition of religious activity because an its converse would conflate that sphere so as to include the broad and amorphous category of private ideological convictions that are independently protected under the Free Speech and Association Clauses of the constitution.<sup>185</sup> Judge Downes ignores the fact that Superintendent Liggett's regulatory action was motivated in part to preserve the important culturally affiliative practices of the inter-tribal Native American ceremonial users of Devils Tower.

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178. Judge Downes simply concludes that no "legitimate distinction can be drawn in this case between the 'religious' and 'cultural' practices of those American Indians who consider Devils Tower a sacred site." See *Order*, *supra* note 11, at 3.

179. *Id.*

180. Defining religious activity is especially important in the governmental accommodation context because the Supreme Court strives to provide reasonable latitude for the protection of minority religious practices. Garvey, *supra* note 52, at 1383-84.

181. *Id.*

182. *Id.*

183. Getches asserts that Native American ceremonial and cultural practices "remain exotic and incomprehensible to the courts . . ." He further criticizes the imposed Anglo-American dichotomy of "religion" versus "culture" as fundamentally misleading when applied to Native American ceremonial and cultural practices and belief systems. See *GETCHES ET AL.*, *supra* note 25, at 740.

184. Garvey, *supra* note 52, at 1383-84.

185. *Id.* at 1381.

## F. Summary

Judge Downes' interpretation of the "religious activity" and "governmental coercion" elements of the Establishment Clause threatens the Framers' dual commitment to a principle of religious tolerance and a vibrant sphere of private religious activity. Native American ceremonial activities at Devils Tower, regarded by expert ethnographers as primarily culturally affiliative activities, are uncritically swept up into his definition of religious activity. Downes then leverages his definition into an Establishment Clause violation by concluding that Superintendent Liggett's periodic closure of Devils Tower to commercial rock climbing amounts to illegal government coercion of private religious belief. If his interpretation stands, long-standing relationships between the National Park Service and mainstream religious organizations may well be jeopardized.

## V. CONSIDERING AN ALTERNATIVE FRAMEWORK FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES IN THE 21ST CENTURY

The Devils Tower litigation progressed to a hearing before Judge Downes on April 18, 1997, on the plaintiffs' request for a permanent injunction to prevent the National Park Service from implementing its proposed Final Climbing Management Plan.<sup>186</sup> Regardless of the decision reached, disputes over Native Americans' right of cultural access to ceremonial or sacred sites on public lands will undoubtedly grow as public land managers seek to implement their newly acknowledged cultural preservation duties. At this time, we propose an alternative analytical framework that may help avoid, or at least moderate, these expected disputes between non-Native American recreational or other public lands user groups and Native American ceremonial practitioners.

This framework has two elements: 1) Legal: The public land managers' duty to preserve Native Americans' right of cultural access should be scrutinized under the rational basis test declared by the Supreme Court in *Delaware Tribal Business Comm. v. Weeks*,<sup>187</sup> and 2) Policy:

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186. This on-going litigation continues to provoke heated editorial comment, pro and con. The editorial page editor for the Casper Star-Tribune, Mr. Charles Levendosky, charged the NPS with "capitulating" to the Mountain States Legal Foundation "even before the full merits of the case were argued," by recently amending its climbing management plan to remove the mandatory ban on commercial rock climbing during the month of June. Mr. Levendosky criticized the agency as advocating a "double standard" of religious accommodation: a mandatory closure to public visitors of selected Christian religious sites during religious services, such as the Ebenezer Baptist Church where Martin Luther King, Jr. was co-pastor with his father (now a National Historic Site), while requesting only voluntary compliance by commercial and recreational rock climbers during the Native Americans' religious or ceremonial services at Devils Tower. See, Charles Lendosky, *Respecting Sacred Sites: Why Not Accommodate Indians at Devils Tower as We Accommodate Christians Elsewhere?*, ROCKY MOUNTAIN NEWS, May 18, 1997, at 1B, 5B.

187. 430 U.S. 73, 84 (1977) (holding that distribution of government funds to enrolled tribal

Judicial review of federal agencies' actions to preserve Native Americans' right of cultural access or cultural resources should be limited to the court's assessment of the agency's asserted rational nexus between the identified Native American cultural resource and its proposed action that will preserve that resource from potential destruction or unacceptable injury by a competing use.

*A. Law: The Judicial Review Standard that Should Govern Federal Agency Action to Preserve Native American Cultural Resources*

In *Bear Lodge*, the private commercial climbing litigants failed to address the federal government's judicially imposed trust duty to preserve the Native Americans' cultural resources. This omission ignores Congress' recent amendments to several of the existing federal cultural and historical preservation statutes to include the protection of Native American governments and their cultural resources.<sup>188</sup> Indeed, it was Superintendent Liggett's interpretation of the National Historic Preservation Act as well as other controlling federal legislation that prompted her to develop the FCMP to further protect Native Americans' historic cultural access to Devils Tower.<sup>189</sup>

These federal preservation statutes may impose substantive as well as procedural duties on public land managers to incorporate Native Americans' cultural resources in their project planning and in the adoption or revision of resource management plans.<sup>190</sup> Superintendent Liggett exercised her discretion in carrying out her cultural preservation duty so as to preserve Native Americans' cultural access to Devils Tower. The governing statute directs her to preserve the historic customs, traditions and life-ways of local communities that are inextricably intertwined with the protected physical resource.<sup>191</sup> Given the overwhelming ethnographic and historic data that confirmed extensive Native American ceremonial use of Devils Tower, her action to preserve the Native Americans' right of cultural access would seem a reasonable interpretation of her statutory duties.

A well developed body of judge-made Indian trust law provides the framework for evaluating federal agency action that seeks to preserve Native Americans' statutorily protected cultural resources. These judge-made principles prescribe both the appropriate standard and scope of judicial review of federal agency action that purports to preserve Native

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members only did not violate Equal Protection Clause because the decision was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

188. See Stern & Slade, *supra* note 50, at 136-38.

189. FCMP, *supra* note 8, at 5.

190. See Stern & Slade, *supra* note 50, at 138-39.

191. See *id.* (citing 16 U.S.C. §§ 431-433).



Americans' cultural resources, including their cultural access to significant ceremonial or sacred sites on public lands.<sup>192</sup>

The trust doctrine defines the parameters of the *suis generis* legal and political relationship between Native American peoples and the federal government. From its judicial construction in the Court's 1831 and 1832 companion cases, *Cherokee Nation v. Georgia*<sup>193</sup> and *Worcester v. Georgia*,<sup>194</sup> this doctrine has been applied to require the federal executive to act as trustee for the Native American property.<sup>195</sup> It has also resulted in a finding that the federal government has plenary power over Indian peoples and their resources derived from an extra-constitutional federal power that was not constrained, presumably, by the First Amendment and the other special guarantees contained in the Bill of Rights.<sup>196</sup>

Though the plenary power doctrine has been weakened by the Supreme Court, federal legislation exercising this power remains subject only to the rational basis standard of judicial review.<sup>197</sup> Applying this standard of judicial review to Superintendent Liggett's action, a reviewing federal court may only "ascertain the basis for [for the federal agency's] decision, given the possible presence of divided loyalty and to determine whether the decision is consistent with the Secretary's fiduciary duties to his Indian beneficiaries."<sup>198</sup> But that federal court must accept Superintendent Liggett's plausible rationale for concluding that her proposed action will tend to preserve the Native Americans' statutorily protected cultural resources. A leading Indian law commentator concludes that a reviewing federal court must "sustain the [federal agency's] action and avoid further inquiry so long as it was a reasonable one for a fiduciary."<sup>199</sup>

Superintendent Liggett's action to preserve the Native Americans'

192. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 225-28 (1982 ed.).

193. 30 U.S. (5 Pet.) 1 (1831).

194. 31 U.S. (6 Pet.) 515 (1832).

195. Modern courts have held the federal executive branch to the standard of civil trustee. For example, in *Pyramid Lake Paiute Tribe of Indians v. Morton*, the Secretary of the Interior attempted to balance the water rights of the Bureau of Reclamation with the treaty fishing rights of the tribe. 354 F. Supp. 252 (D.D.C. 1972) The court determined that the executive's duty as trustee imposed, as it does in other trust situations, a fiduciary duty upon the executive:

The United States, acting through the Secretary of Interior, 'has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards.' The Secretary was obliged to . . . preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result.

354 F. Supp. at 256 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

196. See *Kagama v. United States*, 118 U.S. 375, 383-85 (1886).

197. See *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. at 85.

198. Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1238 (1975) (citing *United States v. Seminole Nation*, 173 F. Supp. 784, 789 (Ct. Cl. 1959)).

199. *Id.*

cultural access to their significant ceremonial sites at Devils Tower would seemingly meet the Indian trust rational basis standard. The administrative record details the adverse environmental and cultural impacts imposed by unregulated recreational rock climbers' use of Devils Tower.<sup>200</sup> That same administrative record contains substantial and uncontroverted ethnographic and historical data that confirms the Native Americans' significant cultural interest in that site.<sup>201</sup> These factors certainly comprise a rational basis.

*B. Policy: Native American Cultural Resources Represent a Vital Part of Our Common National Heritage*

Cultural resources represent the key resource of a viable, sustainable society or people. Leading cultural anthropologists and legal scholars agree that contemporary Native American societies require a defined legal and physical "space" to ensure the viability of their future cultural and associational existence.<sup>202</sup> Federal Indian policy of the late nineteenth and early twentieth centuries sought to destroy these peoples by restricting them to geographically small reservations and by suppressing their historic ceremonial and cultural practices. Superintendent Liggett and like-minded public land managers, should be encouraged by the judiciary to carry out their statutory preservation duties in a manner that accords with our society's re-valuation of Native Americans' cultural resources, and values cultural resources as a vital and necessary part of our larger, shared cultural life as a great, multi-cultural nation.

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200. FCMP, *supra* note 8, at 10-13.

201. *Id.*

202. Sovereignty "is a means by which indigenous peoples can assert some degree of control over the form, content and direction of their individual and collective identities." Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1347 (1993).

