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PRIORITIZING MULTIPLE USES ON PUBLIC LANDS AFTER *BEAR LODGE*

ERIK B. BLUEMEL*

Abstract: This Article analyzes the courts' application of First Amendment jurisprudence to Native American cultural activities on federal land. The author concludes that the courts' use of existing First Amendment law has been strained, especially with respect to Native American cultural practices on federal land. The Article analyzes *Bear Lodge Multiple Use Association v. Babbitt* within this context to conclude that First Amendment jurisprudence may not be the most appropriate legal construct for determining whether to allow or protect Native American cultural activities on federal land. Instead, the Article suggests that Native American practices are often best considered cultural, rather than religious, and as such, a First Amendment analysis, which has not been particularly favorable to Native American interests, would not apply. Applying a cultural lens to Native American practices, the Article concludes that federal land managers act well within their prescribed authority when they protect such activities.

INTRODUCTION

"Nature is a recurring motif in the rich cultural tapestry that comprises our national identity and heritage."¹ In an effort to build national cultural identity, the federal government converted many

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¹ Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 414 (2002).

Native American lands into parks and monuments;² the appeal to national pride in public lands was crucial to establishing Yosemite as a preserve.³ Congress noted that

the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development [T]he preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.⁴

Remarkable natural features have been described as American antiquities and protected as landmarks of historic interest, or symbols of American culture.⁵ Devils Tower National Monument, home to Devils Tower, known as Mato Tipi or Bear Lodge to the Tsitsi peoples,⁶ was the first parcel designated as a National Monument under the Antiquities Act of 1906 and was glorified as “such an extraordinary example of the effect of erosion in the higher mountains as to be a natural wonder and an object of historic and great scientific in-

² See generally Nat'l Park Serv., U.S. Dep't of the Interior, *Rethinking the National Parks for the 21st Century* (2001), at <http://www.nps.gov/policy/report.htm> (last updated Dec. 24, 2004); JOHN MUIR, *OUR NATIONAL PARKS* (Sierra Club Books 1991) (1901); Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575 (1998); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

³ See 1 AUBREY L. HAINES, *THE YELLOWSTONE STORY* 158 (1977); ALFRED RUNTE, *NATIONAL PARKS: THE AMERICAN EXPERIENCE* 18–22 (3d ed. 1997). Yosemite became a National Park in 1890. Act of Sept. 25, 1890, ch. 1263, 26 Stat. 650 (1890).

⁴ 16 U.S.C. § 470(b)(2), (4) (2000).

⁵ See generally Antiquities Act of 1906, 16 U.S.C. § 431–433 (2000); see also Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITT. L. REV. 557, 598–601 (1998).

⁶ See Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1449 n.1 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999); see also Lloyd Burton & David Ruppert, *Bear's Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J.L. & PUB. POL'Y 201, 201 n.1, 206–08 (1999); Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757, 771 (2001). This Article will refer to Devils Tower National Monument as Bear Lodge National Monument, or simply as Bear Lodge, in recognition of the original name of the butte as Grizzly Bear Lodge—a name that was disregarded by Colonel Dodge, who renamed it Devils Tower. See NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, *FINAL CLIMBING MANAGEMENT PLAN/FINDING OF NO SIGNIFICANT IMPACT* (1995), available at http://www.nps.gov/deto/deto_climbing/detotoc.html. The National Park Service is considering renaming the area to more accurately reflect its history, an action which this Article strongly endorses. *Id.*

terest.”⁷ Bear Lodge is of great importance not only to American culture, but to Native American culture as well.⁸

Land, generally, is of great cultural significance among many Native American tribes,⁹ some of whom, including the Lakota who inhabit the Black Hills where Bear Lodge is located, refer to the land as “The Heart of Everything That Is.”¹⁰ It can be said of many tribes that “land is constitutive of cultural identity.”¹¹ Often this relationship is forged through stories that are told depicting events occurring at particular sites—stories that help define tribes’ moral code of conduct.¹² Additionally, many public lands are considered sacred to Native American tribes. While some sites are labeled sacred sites, this label has not been attached to all lands of cultural or spiritual significance to Native American tribes.¹³ The quality of being sacred can arise from human activity,¹⁴ or it can inhere in the natural condition of the site.¹⁵ As this Article discusses, sacred sites are not necessarily religious sites for First Amendment purposes, but they are sites of great cultural importance. Revitalization and protection of ceremonial rites and cul-

⁷ Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906); see 16 U.S.C. § 431 (2000).

⁸ See *infra* Part II; see also Joel Brady, Comment, “*Land Is Itself a Sacred, Living Being*”: Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge, 24 AM. INDIAN L. REV. 153, 165 (2000).

⁹ See, e.g., Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 127, 145–46 (1994); Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Píñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1153 (1994).

¹⁰ Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY. U. L. REV. 317, 317 (1998); see Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 55 MD. L. REV. 84, 100–01 (1996); William Greider, *The Heart of Everything That Is*, ROLLING STONE, May 7, 1987, at 37.

¹¹ Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1302 (2001).

¹² *Id.* at 1302–03; see also KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE 38 (1996); LESLIE MARMON SILKO, *The Indian with a Camera, in A CIRCLE OF NATIONS* 7 (John Gattuso ed., 1993).

¹³ See ANDREW GUILFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 67–97 (2000); Thomas F. King, “*Sacred Sites*” Protection: *Be Careful What You Ask for* (May 28, 2002), at http://www.sacredland.org/resources/bibliography/thomas_king.html (last visited Apr. 1, 2005). Nor are those sacred sites considered equal in terms of cultural importance, as there are many different types of sacred sites. See NATIVE AMERICAN SACRED SITES AND THE DEPARTMENT OF DEFENSE ch. 3 (Vine Deloria, Jr. & Richard W. Stoffle eds., 1998), <https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Legacy/Sacred/ch3.html#ch3>.

¹⁴ Richard B. Collins, *Sacred Sites and Religious Freedom on Government Land*, 5 U. PA. J. CONST. L. 241, 241 (2003).

¹⁵ *Id.*; see Vine Deloria, Jr., *Sacred Lands and Religious Freedom*, in FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 203, 207–11 (James Treat ed., 1999).

tural practices is an important means of combating tribal social problems resulting from disassociation with tribes.¹⁶ In fact, it has been noted that “a perception of the land [is] essential to the identity of the [Native American] people.”¹⁷

Native American cultural use of sacred sites is different in nature from the religious use of, for instance, Christian organizations which have often been granted access to public lands.¹⁸ As a result, “American Indian cultural interests in the public lands deserve special consideration, given their unique associations with the land and its resources, and the political and legal obligations arising from the historic treatment of tribes, their treaties, and their continuing sovereign status.”¹⁹ Nevertheless, current First Amendment jurisprudence treats site-specific Native American cultural needs in the same manner as it treats orthodox Christian religious activities, the vast majority of which can be practiced anywhere.

Today, the federal government owns over 600 million acres of land,²⁰ with federal land management agencies responsible for regulating activity on over 730 million acres.²¹ This vast amount of land now under the control of the federal government must be managed to reconcile various competing public and private uses. This is not an easy task, and it is continually becoming more complicated as more uses are being explored and developed. Unfortunately, often Native American and other uses are viewed as completely incompatible.²² While this may be the case in certain exceptional circumstances, this Article seeks to disprove the general notion of competitive exclusion by unraveling the misunderstandings of current Native American practices and to avoid over-reliance on First Amendment jurisprudence, which tends toward exclusionary results.

¹⁶ See STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 110–11 (1988); Brady, *supra* note 8, at 166–67.

¹⁷ Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 276 (1996).

¹⁸ See generally *TO LIVE OVER THE STORE: ESSAYS ON THE EXPERIENCE OF A CHRISTIAN MINISTRY IN THE NATIONAL PARKS* (William L. Baumgaertner ed., 1992).

¹⁹ Zellmer, *supra* note 1, at 414.

²⁰ ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, *MODERN PUBLIC LAND LAW* 1 (2d ed. 2001).

²¹ See ANN M. HOOKER, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 136 (1994).

²² See Charlton H. Bonham, *Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands*, 20 LAW & INEQ. 157, 194–97 (2002) (discussing the application of the theory of competitive exclusion to Native American land disputes).

While other competing uses exist, the greatest threat to Native American cultural interests on federal public lands currently comes from recreational uses, which have been increasing significantly in both type and quantity in recent years.²³ The National Park Service (NPS) has a history of promoting wide recreational use at the expense of other park resources,²⁴ causing one author to state that “[m]anaging recreation on public lands is now a primary goal for federal land management agencies like the National Park Service.”²⁵ Additionally, the Bush administration has put forth an initiative to promote public health through increased visitation and recreational use of national parks.²⁶ This initiative has been adopted by NPS which now provides free access to national parks for a weekend and promotes increased recreational use of the parks.²⁷ This promotion of national parks as recreational getaways increases pressure on Native American cultural resources on public lands.

This Article posits that attempts to resolve competing uses of federal public lands through the inappropriate application of First Amendment “protections” to Native American cultural activities can be detrimental to Native American interests and overly restrictive of non-Native American uses. First Amendment jurisprudence dominates the discourse surrounding Native American resource protection, yet First Amendment jurisprudence is not particularly valuable to compel or encourage agency action to protect Native American resources and cultural interests. Nevertheless, courts, scholars, and agencies have limited their analysis of Native American issues to religious considerations, foreclosing another possible route of protection of sacred sites and associated cultural activities: one based upon cultural protections. This Article seeks to dispel the myth that First Amendment protections are the most protective of Native American cultural interests and counsels for greater use of culture- and tribal relation-based protections.

²³ See *id.* at 199.

²⁴ See AMERICA’S NATIONAL PARK SYSTEM 53–55 (Larry M. Dilsaver ed., 1994).

²⁵ Bonham, *supra* note 22, at 194.

²⁶ PRESIDENT GEORGE W. BUSH, HEALTHIERUS: THE PRESIDENT’S HEALTH AND FITNESS INITIATIVE (June 2002), <http://www.whitehouse.gov/infocus/fitness/fitness-policy-book.pdf>.

²⁷ Press Release, Nat’l Park Serv., U.S. Dep’t of the Interior, NPS Director Lauds President Bush’s Initiative to Promote Improved Health Through Visiting National Parks (June 18, 2002), <http://data2.itc.nps.gov/release/Detail.cfm?ID=267>.

I. FIRST AMENDMENT JURISPRUDENCE OF CULTURAL CLAIMS

Freedom of religion is protected by two clauses in the First Amendment: the Free Exercise Clause and the Establishment Clause. The Free Exercise Clause seeks to allow each individual the opportunity to practice her religious beliefs, while the Establishment Clause seeks to prevent the coercion of an individual into a particular religious belief.

“The two religion clauses are not mutually exclusive, nor are they in perfect equipoise.”²⁸ Some scholars argue, rather forcefully, that the gap between the requirement of accommodation in the Free Exercise Clause and the promotion of religion in the Establishment Clause allows for the protection of Native American religious resources.²⁹ This claim is sound, but is not entirely protective of Native American interests, as “[t]he religion clauses of the First Amendment—protecting free exercise while prohibiting governmental establishment of religion—have not afforded meaningful protection for cultural resources.”³⁰ This is not unexpected, considering that Native American tribes must litigate their interests in the “courts of the conqueror.”³¹ Nevertheless, “[w]hen a Native American sacred site is threatened by federal action, the Native American community has primarily reacted by claiming that such action equals a violation of their First Amendment right to the free exercise of religion.”³²

²⁸ *Walz v. Tax Comm'n*, 397 U.S. 664, 669, 673 (1970) (“The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”); Zellmer, *supra* note 1, at 475.

²⁹ Zellmer, *supra* note 1, at 475–76; see also Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1318 (1996) (“Until desecrating sacred sites is considered a sufficient burden on religion to give rise to a free exercise of religion claim, preserving these sites in their natural state should not be considered a benefit to religion under the Establishment Clause.”).

³⁰ Zellmer, *supra* note 1, at 415; see *United States v. Means*, 858 F.2d 404, 407–08 (8th Cir. 1988) (providing several examples where courts have refused to disturb government land management decisions challenged by Native Americans on Free Exercise grounds).

³¹ See Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745, 750 (1999).

³² David S. Johnston, Note, *The Native American Plight: Protection and Preservation of Sacred Sites*, 8 WIDENER L. SYMP. J. 443, 448 (2002); see Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV'T 19, 22 (1997).

A. Definition of Religious Activity

Defining religion can be a challenge in any dispute about religious freedom. So long as the issue is addressed politically, it is simply one of the terms of political discourse. But when judicial review is sought under statutes or constitutional provisions that protect religion but not culture or other ethical concerns or group interests, the distinction can become crucial to judicial resolution and can in turn raise difficult questions about equal treatment. The issue has special relevance to indigenous religions, which often have less distinct boundaries from culture than does Christianity.³³

Before beginning with a constitutional analysis of the First Amendment, caution must be given to the general applicability of the First Amendment. Most scholars discussing Native American cultural uses of federal public lands do so by reference to First Amendment jurisprudence without significant analysis as to what triggers First Amendment protection. The application of the First Amendment generally requires that practitioners believe in a “Supreme Being”³⁴ or “ultimate concern”³⁵—a being with “sentience beyond the human and capable of acting outside of the observed principles and limits of natural science”—which “makes demands of some kind on its adherents”³⁶ and that practitioners believe that adherence to such demands are extra-temporal “in some meaningful way . . . either by affecting their own eternal existence or by producing a permanent and everlasting significance and place in reality.”³⁷

³³ Collins, *supra* note 14, at 243.

³⁴ *E.g.*, *United States v. Seeger*, 380 U.S. 163, 187 (1965).

³⁵ Jesse H. Choper, *Defining “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579, 594–97; *see also* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1056 (1978).

³⁶ STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 17 (1993).

³⁷ JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY* 77 (1995); *see* Raymond Cross & Elizabeth Brenneman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5, 41 (1997) (noting that the district court’s finding in *Bear Lodge* that the Sun Dance is a religious activity fails the definition established by Choper). In fact, the Sun Dance is “fundamentally non-commemorative in character and non-salvation directed.” Cross & Brenneman, *supra*, at 41.

Not all cultural uses are therefore religious uses.³⁸ In fact, praying to a supreme being would not necessarily constitute a religious activity. Many Native American uses are not easily analogized to that of the “orthodox belief in God” and therefore may not be considered religious uses.³⁹ This is particularly true where Native American beliefs and practices are attached to particular parcels of land.⁴⁰ Additionally, many Native American practices are both cultural and religious in nature, which are difficult to separate for First Amendment analysis purposes.⁴¹

Some scholars have noted that the First Amendment was enacted before American society was aware of its heterogeneity of religious beliefs and before Native Americans were incorporated into the American citizenry.⁴² Attempting to anachronistically apply the First Amendment to Native American cultural activities does not come without a price. In fact, attempting to corral primarily cultural activities into religious activities may have severely negative consequences for Native American interests, where cultural uses may receive greater protections and accommodations than religious protections, as will be seen below.

B. *Free Exercise Jurisprudence*

The Free Exercise Clause is designed to protect individuals from being so restricted by government regulation that the practice of their sincere religious beliefs is unconstitutionally burdened.⁴³ Where a regu-

³⁸ See Vogel, *supra* note 6, at 774.

Cases involving efforts to exempt religiously grounded conduct from the reach of the law of the state as a matter of religious liberty protected by the First Amendment to the U.S. Constitution are typically framed as individual rights cases. Consequently, courts frequently neglect or give less than full consideration to the deep cultural significance of these cases to the communities

Id.

³⁹ See *Seeger*, 380 U.S. at 165–66. However, it has been implicitly argued that defining Native American use of sacred sites as “cultural” opens the door to qualification of the right to use the property by other competing interests. See Tsoie, *supra* note 11, at 1305. This Article argues that this claim, in fact, is not the case, or is no different than what the outcome would be if framed as a purely religious claim.

⁴⁰ See Zellmer, *supra* note 1, at 477; *infra* Part II.A.

⁴¹ See Richard Pemberton, Jr., “I Saw That It Was Holy”: *The Black Hills and the Concept of Sacred Land*, 3 LAW & INEQ. 287, 288–89 (1985); see also DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 754–55 (4th ed. 1998).

⁴² See Zellmer, *supra* note 1, at 490–91; see also CARTER, *supra* note 36, at 133.

⁴³ See Deloria, *supra* note 15, at 203–13; Scott Hardt, Comment, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court’s Free Exercise Analysis*, 60 U. COLO. L. REV. 601, 621–22 (1989).

lation burdens a particular group directly as its purpose, it must withstand strict scrutiny, which requires a narrowly tailored approach to further a compelling government interest to overcome the discrimination.⁴⁴ Where, however, the regulation is neutral with respect to religions, and burdens one religion incidentally, rational basis review applies and the government need only show that the regulation was rational.⁴⁵ However, if a regulation is facially neutral, but is intended to impact religious practices, it will be subject to a more stringent form of review than rational basis review.⁴⁶ Similarly, strict scrutiny also is applied where exemptions from regulations are granted to qualifying non-religious groups, but not to qualifying religious groups.⁴⁷

In the landmark case *Employment Division v. Smith*, the Court held that even where neutral legislative or regulatory restrictions destroy the central tenets of a religion, rational basis scrutiny should nevertheless be used to evaluate the law.⁴⁸ This is because “courts must not presume to determine the place of a particular belief in a religion.”⁴⁹ The idea in *Smith* was that where a neutral regulation incidentally burdens a religious activity, the regulation need only be scrutinized using a rational basis standard.

After *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA).⁵⁰ RFRA applies the strict scrutiny test requiring the least restrictive means to further a compelling government interest wherever “free exercise of religion is substantially burdened.”⁵¹ The Act was ren-

⁴⁴ *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁴⁵ *See Bowen v. Roy*, 476 U.S. 693, 707–08 (1986). If the regulation incidentally burdens not only religious beliefs and practices, but also other fundamental rights, strict scrutiny may be required. *See, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990); *Ala. & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1332 (E.D. Tex. 1993). This issue may be implicated by limiting the right to association as well as the right to religious practice. *See Kevin J. Worthen, One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of “Intimate” Government Entities*, 71 N.C. L. REV. 595, 605–09 (1993).

⁴⁶ *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993).

⁴⁷ *See id.*

⁴⁸ *See Smith*, 494 U.S. at 883, 886–87. The centrality test, however, has not been applied to Western religious tenets, and therefore, Native American religious activities must achieve a higher threshold of importance to receive protections than Western religions. *See Brady, supra* note 8, at 160; *Johnston, supra* note 32, at 448–49.

⁴⁹ *Smith*, 494 U.S. at 887.

⁵⁰ Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000). The Act was specifically intended to negate the *Smith* decision. *See Bonham, supra* note 22, at 170, 170 n.99.

⁵¹ 42 U.S.C. § 2000bb(b)(1).

dered inapplicable to the states under the Fourteenth Amendment,⁵² but nevertheless remains applicable to federal actions.⁵³

While no courts have analyzed Native American religious or cultural claims related to the use of or access to federal public lands under RFRA,⁵⁴ the courts have historically found that government regulation of Native American uses of or access to public lands for religious purposes did not violate the Free Exercise Clause.⁵⁵ Additionally, according to Justice O'Connor in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, locating Native American religion at a particular site "could easily require *de facto* beneficial ownership of some rather spacious tracts of public property."⁵⁶ "The decision in *Lyng* effectively marked the end of Native American attempts to employ the Free Exercise Clause to protect Native American religious sites on public lands . . ."⁵⁷ *Lyng*, however, recognized that where vindication of a constitutional right affords no greater remedies than vindication of parallel statutory rights, judicial restraint should counsel against

⁵² *City of Boerne v. Flores*, 521 U.S. 507, 519, 536 (1997).

⁵³ *E.g.*, *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Kikumura v. Hurley*, 242 F.3d 950, 958 (10th Cir. 2001); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 831 (9th Cir. 1999); *Adams v. Comm'r*, 170 F.3d 173, 175 (3d Cir. 1999); *In re Young*, 141 F.3d 854, 856 (8th Cir. 1998); *Alamo v. Clay*, 137 F.3d 1366, 1368 (D.C. Cir. 1998).

The Religious Land Use and Institutionalized Persons Act of 2000 § 7, 42 U.S.C. § 2000cc (2000), directly follows the substantive standards established under RFRA, but it applies those standards to states under the Spending and Commerce Clause power rather than through the remedial power of the Fourteenth Amendment, §§ 2000cc-1(b)(1), 2000cc-1(b)(2). While it has been called into constitutional question, it has nevertheless survived most challenges thus far. *See Madison v. Riter*, 355 F.3d 310, 322 (4th Cir. 2003); *Charles v. Verhagen*, 348 F.3d 601, 611 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1069–70 (9th Cir. 2002). *But see Cutter v. Wilkinson*, 349 F.3d 257, 260, 263–68 (6th Cir. 2003).

⁵⁴ Some cases, however, have raised Native American claims regarding the cultural use of eagles. *See United States v. Hardman*, 297 F.3d 1116, 1118–20 (10th Cir. 2002). For other non-Native American cases recently heard, see *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001), and *Kimbrough v. Cal.*, 2 Fed. Appx. 893 (9th Cir. 2001).

⁵⁵ *E.g.*, *United States v. Means*, 858 F.2d 404, 407 (8th Cir. 1988); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441–42 (1988); *Wilson v. Block*, 708 F.2d 735, 745 (D.C. Cir. 1983); *Crow v. Gullet*, 706 F.2d 856, 858–59 (8th Cir. 1983); *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980); *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1165 (6th Cir. 1980); *Miccosukee Tribe v. United States*, 980 F. Supp. 448, 464 (S.D. Fla. 1997); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1486 (D. Ariz. 1990); *Inupiat Cmty. v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982), *aff'd*, 746 F.2d 570, 571–72 (9th Cir. 1984); *see also* BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND 1–7 (1999); Zellmer, *supra* note 1, at 480.

⁵⁶ *Lyng*, 485 U.S. at 453.

⁵⁷ *Bonham*, *supra* note 22, at 165.

deciding the constitutional issue.⁵⁸ As a result, *Lyng* may mean that RFRA claims will preclude ever reaching the constitutional issues in religious cases.

C. Establishment Clause Jurisprudence

On the other hand, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions”⁵⁹—accommodation is especially “crucial in the Native American context, where governmental suppression of minority religious practices, not their accommodation, has been the rule.”⁶⁰ The Establishment Clause seeks to ensure that government treats all religions equally, without favoritism. Therefore, where a “governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices,” the action may violate the Establishment Clause.⁶¹

The well-known and long-applied test formulated in the *Lemon v. Kurtzman* case requires three things to avoid running afoul of the Establishment Clause: (1) the action must not be religious in purpose; (2) the action’s effect must primarily affect non-religious interests;⁶² and (3) the action must not excessively entangle the acting government entity with religion.⁶³ The issue in Establishment Clause cases when determining a religious purpose is differentiating between the removal of burdens to practicing religions and the conferral of special benefits on religious groups.⁶⁴ This line may be difficult to establish with any precision or clarity.⁶⁵ Protecting Native American religious and cultural interests in public lands through the removal of burdens on such inter-

⁵⁸ See *Lyng*, 485 U.S. at 446.

⁵⁹ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

⁶⁰ Cross & Brenneman, *supra* note 37, at 40.

⁶¹ *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

⁶² Under this prong is the requirement that the action not place an undue burden on non-beneficiaries of the action. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 11–15, 18 (1989); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987). Although not clearly defined, an undue burden generally exists when the burdens are grossly disproportionate to the benefit to the religious beneficiaries. *Bullock*, 489 U.S. at 15, 19 n.8; see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). Determining undue burden and religious benefit while refraining from any evaluation of the religious importance of the particular tenet affected seems impossible to achieve in practice.

⁶³ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

⁶⁴ See *Zellmer*, *supra* note 1, at 499–503.

⁶⁵ See *id.* at 503.

ests is considered a secular purpose and is not considered to confer any special benefits on Native American religious practitioners.⁶⁶ Therefore, the difference is crucial whether the legislation seeks to remove a burden from or confer a benefit upon religious activity, especially since removing a substantial burden from the exercise of religion will likely be upheld regardless of the impact upon non-beneficiaries.⁶⁷ Viewing federal ownership of Native American sacred sites as a burden upon Native American cultural or religious practice is one important step toward protecting those cultural uses of federal public lands. Regulation which adversely affects non-religious entities under such circumstances actually serves to remove a burden established upon federal ownership and the designation of the lands as public and available to all citizens.

In determining what interests are primarily affected by a law or regulation, courts must look to the importance of the interests affected as well as the type of interest affected. As a result, while Free Exercise jurisprudence rejects consideration of the importance of religious tenets to the religion,⁶⁸ courts have been far more willing to consider such issues in Establishment Clause cases. Additionally, the second prong of the Establishment Clause requires that all similarly situated groups be treated similarly.⁶⁹ However, where no other groups are similarly situated, “[t]he proper inquiry is whether Congress has chosen a rational classification to further a legitimate end,” not a strict scrutiny standard.⁷⁰ Native American tribes, as unique and semi-autonomous political entities,⁷¹ are not similar to other religious groups.⁷² Equal protection considerations can therefore be avoided

⁶⁶ See *id.* at 415.

⁶⁷ See, e.g., *Bullock*, 489 U.S. at 14–15; see also *Bear Lodge Multiple Use Ass’n v. Babbitt*, 2 F. Supp. 2d 1448, 1454–55 (D. Wyo. 1998), *aff’d*, 175 F.3d 814 (10th Cir. 1999).

⁶⁸ See *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) (“[C]ourts must not presume to determine the place of a particular belief in a religion . . .”).

⁶⁹ See *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 846 (1995) (O’Connor, J., concurring) (“Neutrality, in both form and effect, is one hallmark of the Establishment Clause.”); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (“The government must be neutral when it comes to competition between sects.”).

⁷⁰ *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338–39 (1987); see *Zellmer*, *supra* note 1, at 506–07.

⁷¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 350, 380–81 (1832) (finding that Native Americans had not surrendered their right of self-government).

⁷² See, e.g., *Rupert v. U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 34–35 (1st Cir. 1992); *Pe-yote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1216–17 (5th Cir. 1991); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). *Mancari* creates objectionable standards by which to determine Native American tribe membership (e.g., blood relations) that have since fallen into disfavor. See *Winslow*, *supra* note 29, at 1322. Membership in tribes is now more aptly

when establishing policies favoring Native American tribes due to their unique political status.⁷³ Federal Native American law, in fact, is centered on this unique political status.⁷⁴ This unique status is especially keen with respect to Native American cultural practices—and religious practices that are significant to tribal culture—as there is a legitimate government interest in tribal culture, which allows the application of preferential treatment to Native American practices without violating the Establishment Clause.⁷⁵

Regarding the excessive entanglement prong, it has been widely recognized that “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”⁷⁶ Indeed, forcing such a separation would be “callous indifference” to religion and therefore inappropriate.⁷⁷ One of the difficulties in Establishment Clause cases, then, is determining where the line is drawn between creating a sufficient relationship so the religion can flourish and excessively entangling government activities

determined by reference to political status. *See id.* However, the application of non-religious doctrines is not without its own drawbacks, since regulation harming Native American tribes’ religious practices, if viewed through a non-religious lens, would not require strict scrutiny. *See id.* at 1323–24.

⁷³ *See, e.g.*, *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977); *Mancari*, 417 U.S. at 551; *see also* Zellmer, *supra* note 1, at 416–17 (noting that equal protection concerns can be overcome with respect to both federally and non-federally recognized tribes, though the level of scrutiny applicable may vary depending upon the tribe’s particular political relationship with the United States).

⁷⁴ Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 192 (2001).

⁷⁵ *See, e.g.*, *Rupert*, 957 F.2d at 34–36 (finding a rational relationship to exist between allowing federal tribes to use eagle feathers for religious purposes and the government’s interest in tribal culture). Collection of eaglets for religious purposes by the Hopi tribe is allowed, despite restrictions on such takings on other groups. *See* Protection of Bald and Golden Eagles, 16 U.S.C. §§ 668–668d (2000); Migratory Bird Treaty, 16 U.S.C. §§ 703–711 (2000). NPS did not allow such an exemption until 2001, when it promulgated regulations allowing such unique religious uses for the Hopi. *Compare* 36 C.F.R. § 2.2(a) (2001) with Religious Ceremonial Collection of Golden Eagles From Wupatki National Monument, 66 Fed. Reg. 6516, 6517 (Jan. 22, 2001) (codified at 36 C.F.R. pt. 7). As would be expected, the proposed regulation conflicted with other interested parties who feared a snowball effect that might allow taking of other “wildlife such as bison, black bears, and birds of prey from inside parks” *See* Todd Wilkinson, *Tribal Religion Clashes with Eagle Protections*, CHRISTIAN SCI. MONITOR, July 5, 2000, at 1. For further discussion of the Wupatki dispute, *see* generally Brent Gunson, *Cultural Tug of Wars: An Analysis of the Legal Issues Involving the NPS Proposed Rule to Allow Taking of Golden Eagles at Wupatki National Monument for Religious Purposes*, 22 J. LAND RESOURCES & ENVTL. L. 399 (2002).

⁷⁶ *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984); *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

⁷⁷ *Lynch*, 465 U.S. at 673; *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

with religious groups. As a result, “the context of a particular case, including historic circumstances, special relationships, the coercive impact of the government action, and the location of the activity at issue is of critical importance.”⁷⁸

Additionally, a compelling government interest exists in maintaining historical and cultural attachments to the land. Actions which enable Native American tribes to maintain such attachments will likely overcome the Establishment Clause hurdle, even if analyzed under a strict scrutiny standard. Where non-Native Americans are completely excluded from visiting a sacred site or where Native American religious practitioners solely control the use of the sacred site either directly or through veto power of otherwise lawful activities, however, the government may have excessively entangled itself with religion.⁷⁹ This is almost never the case, for agencies act as mere custodians of Native American cultural resources and to remove barriers to practicing ceremonial rites created by federal ownership of the land.⁸⁰

Despite the opportunity to protect Native American religious uses on federal public lands, the *Lemon* test has proven a mixed bag when it comes to the protection of Native American religious resources on federal public lands.⁸¹ The foregoing discussion illustrates that each of the three prongs of the *Lemon* test has been misapplied with relation to Native American religious claims on federal public lands.

Recently, the *Lemon* test has fallen out of favor,⁸² with new tests to determine violations of the Establishment Clause, such as the endorsement and coercion tests, emerging. The endorsement test looks at the groups benefited by the government action, the nature of the action, and the relationship between the religion and government created by the action.⁸³ Essentially, the endorsement test has collapsed the three *Lemon* test requirements into a single test that evaluates all three requirements together for their collective effect.⁸⁴ It

⁷⁸ Zellmer, *supra* note 1, at 497.

⁷⁹ See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 695–96 (1994); Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 126–27 (1982); see also Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980) (dictum); Zellmer, *supra* note 1, at 416.

⁸⁰ Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998), *aff’d*, 175 F.3d 814 (10th Cir. 1999).

⁸¹ See generally John H. Garvey, *Is There a Principle of Religious Liberty?*, 94 MICH. L. REV. 1379 (1996).

⁸² See William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 237–38 & nn. 47–48 (1995); Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 797 (1993).

⁸³ Agostini v. Felton, 521 U.S. 203, 233 (1997); Lynch v. Donnelly, 465 U.S. 668 (1984).

⁸⁴ See Mitchell v. Helms, 530 U.S. 793, 808 (2000).

evaluates whether government action endorses a particular religious belief,⁸⁵ “send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”⁸⁶

The coercion test seeks to identify whether government action coerces support for a religious belief.⁸⁷ Key components to the coercion test are the context and the characteristics of the affected population. For example, applying the coercion test, the Court found no Establishment Clause violation where the Nebraska state legislature opened with a prayer, since the population was composed of adults “not readily susceptible to religious indoctrination” or pressure,⁸⁸ but it did find a violation where a public high school graduation was started with a prayer since graduation is an important event in life and students are more susceptible populations.⁸⁹

Although the endorsement and coercion tests seek to simplify the test used to determine establishment of religion, it is unclear how these tests will treat Native American religious claims. As a result, Native American activists seeking to protect religious activities on federal public lands might be wary of Establishment Clause cases until one test emerges dominant and its contours are better defined. Although the impacts of the emerging tests are uncertain at this point, the affirmative obligations imposed by the Establishment Clause do provide an important avenue by which Native American activists might compel agency action to accommodate their religious practices. However, the following analysis of the *Bear Lodge* case illustrates the difficulty in relying upon confusing and unsettled First Amendment jurisprudence as a means to protect Native American cultural interests.

⁸⁵ Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 712–21 (1994) (O’Connor, J., concurring).

⁸⁶ Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring).

⁸⁷ See Lee v. Weisman, 505 U.S. 577, 592–94 (1992); County of Allegheny v. ACLU, 492 U.S. 573, 660–61 (1989) (Kennedy, J., concurring in part and dissenting in part).

⁸⁸ Marsh v. Chambers, 463 U.S. 783, 792, 794–95 (1983) (internal quotation marks omitted).

⁸⁹ Lee, 505 U.S. at 595.

II. BEAR LODGE: A CASE STUCK IN THE PAST

A. Background

Bear Lodge is where, according to Kiowa legend, seven Native American sisters, escaping the clutches of some hungry bears, jumped onto a small rock.⁹⁰ The girls, trapped by the bears, prayed to the rock for aid.⁹¹ The rock answered their prayers by growing to the sky, where the girls became the stars of the Big Dipper.⁹² The distinctive columns and lines of the site are attributed to the bears, which clawed at the girls as the rock grew.⁹³ Numerous Native American cultural ceremonial practices are performed in and around Bear Lodge and many tribal stories and moral lessons are taught by reference to the site.⁹⁴

As a result, Bear Lodge is protected for its value as a sacred site to northern plains tribes.⁹⁵ It is located in the Black Hills, an area of high spiritual importance to those tribes.⁹⁶ The Black Hills were re-

⁹⁰ Nat'l Park Serv., U.S. Dep't of the Interior, *Devils Tower: First Stories*, at <http://www.nps.gov/deto/stories.htm> (last updated Dec. 22, 2004); see also Bonham, *supra* note 22, at 175; Brady, *supra* note 8, at 165; Burton & Ruppert, *supra* note 6, at 201. Of course, the Kiowa legend is not the only tribal legend associated with the site. See Nat'l Park Serv., *supra*, for other legendary stories associated with Bear Lodge.

⁹¹ Bonham, *supra* note 22, at 175; Brady, *supra* note 8, at 165; Burton & Ruppert, *supra* note 6, at 201.

⁹² Bonham, *supra* note 22, at 175; Brady, *supra* note 8, at 165; Burton & Ruppert, *supra* note 6, at 201.

⁹³ Bonham, *supra* note 22, at 175; Brady, *supra* note 8, at 165; Burton & Ruppert, *supra* note 6, at 201.

⁹⁴ See Bonham, *supra* note 22, at 175–76.

⁹⁵ See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1449 n.1 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999); see also NAT'L PARK SERV., *supra* note 6, at 62 (indicating that Bear Lodge is eligible for listing on the National Register of Historic Places but that "NPS protects a site that is eligible for the National Register in the same way as if it were actually listed."); NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, FINAL GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT: DEVILS TOWER NATIONAL MONUMENT 66 (2001) [hereinafter NAT'L PARK SERV., GMP], http://www.nps.gov/deto/gmp_final/pdf/final_gmp.pdf (recommending the Sun Dance grounds for listing on the National Register of Historic Places to better protect the grounds and allow for continued ceremonial practices); Burton & Ruppert, *supra* note 6, at 206–08 (discussing its value as a sacred site); George L. San Miguel, Nat'l Park Serv., *How Is Devils Tower a Sacred Site to American Indians?* (1994), at <http://www.nps.gov/deto/place.htm> (last updated Dec. 22, 2004).

⁹⁶ See JOHN G. NEIHARDT, *BLACK ELK SPEAKS: BEING THE LIFE STORY OF A HOLY MAN OF THE OGLALA SIOUX* 230 (1932); Derek de Bakker, Note, *The Court of Last Resort: American Indians in the Inter-American Human Rights System*, 11 CARDOZO J. INT'L & COMP. L. 939, 963–64 (2004); see also Pemberton, *supra* note 41, at 288. See generally John P. La Velle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40 (2001);

served in the Treaty of Fort Laramie of 1868,⁹⁷ but that treaty was abrogated by Congress upon the discovery of gold in 1877.⁹⁸ Not too long after the abrogation of the treaty, the Sun Dance, a traditional Sioux ceremony performed at the top of Bear Lodge, was made punishable by withholding rations for up to ten days for a first offense; for subsequent offenses rations were withheld for fifteen to thirty days or violators were imprisoned for up to thirty days.⁹⁹

Bear Lodge is a site important to the ceremonial Sun Dances and is a place where religious leaders go on Vision Quests, quests that involve individual searches for spiritual guidance in their daily lives.¹⁰⁰ The Sun Dance is performed by a few leaders, and Vision Quests are conducted by individuals; both cultural uses require peace, quiet, and serenity.¹⁰¹ These cultural uses are of vital importance to tribes that practice the Sun Dance and Vision Quests, including the Cheyenne River Sioux tribe: “[B]y going there, we are nurturing ourselves and preserving our culture Our traditional, cultural and spiritual use of *Mato Tipila* is vital to the health of our nation and to our self-determination as a Tribe.”¹⁰² Without question, Bear Lodge is of importance both to the historical and contemporary spiritual values of numerous plains Native American tribes.¹⁰³

B. Management Plan

Recognizing the importance of Bear Lodge to plains tribes’ cultures, NPS decided to regulate use of the rock tower to protect tribal

Wilmer Stampede Mesteth, *Panel VII: Environmental Justice & the Sacred Black Hills: Healing the Wounds of History*, 7 GREAT PLAINS NAT. RESOURCES J. 86 (2002).

⁹⁷ See Treaty with the Sioux—Brulé, Oglala, Minicongjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, Apr. 29, 1868, art. 2, 15 Stat. 635 (describing the land reserved for the Native Americans which is known as the Black Hills).

⁹⁸ DEE BROWN, BURY MY HEART AT WOUNDED KNEE 273–313 (1970) (recounting the gradual breakdown of relations between Native Americans and the United States government after the discovery of gold on the land).

⁹⁹ U.S. DEP’T OF THE INTERIOR, REGULATIONS OF THE INDIAN OFFICE 106 (1894); see also Cross & Brenneman, *supra* note 37, at 8.

¹⁰⁰ *Bear Lodge*, 175 F.3d at 816; see also San Miguel, *supra* note 95.

¹⁰¹ See *Bear Lodge*, 175 F.3d at 816, 819; Cross & Brenneman, *supra* note 37, at 41.

¹⁰² Aff. of Romanus Bear Stops in Opp’n to Mot. for Prelim. Inj. ¶¶ 16, 20, *Bear Lodge*, 175 F.3d 814 (10th Cir. 1999) (No. 96-CV-063-D), *quoted in* Zellmer, *supra* note 1, at 459 (second alteration in original).

¹⁰³ NAT’L PARK SERV., GMP, *supra* note 95, at 66; see also NAT’L PARK SERV., *supra* note 6, at 9 (citing Dakota, Lakota, and Nakota Nations Summit V, Resolution No. 93–11, Kyle, S.D., June 1993).

ceremonies and vision quests.¹⁰⁴ This regulation was necessary to protect tribal rituals from the adverse effects of ever-increasing recreational and commercial climbing on the rock tower.¹⁰⁵ In 1973, 312 recreational climbers ascended the tower.¹⁰⁶ By the mid-1990s, that number had grown to 6000 annually.¹⁰⁷ The increasing interest in climbing has been phenomenal in recent years. Although the first technical climb of the tower was achieved in 1937,¹⁰⁸ between 1992 and 1995 the number of climbing routes on the tower increased by sixteen percent, and “[d]uring the 1980s, 117 new routes were established”¹⁰⁹ These routes cover approximately fourteen percent of the rock face.¹¹⁰ Although climbing has grown in accessibility and popularity in recent years, climbers still only approximate 1.3% of all visitors to the Bear Lodge tower.¹¹¹

Recreational climbing impairs Native American use of the site by undermining cultural education of tribal children who “see people ‘playing’ on such an important” site.¹¹² It also disrupts the peacefulness and quietude necessary for spiritual journeys and other ceremonial practices. Finally, climbing bolts and anchors “seriously impair[] the spiritual quality of the site.”¹¹³ This diminished spiritual quality has caused the Native American spirits to leave, making the site a less valuable place of worship.¹¹⁴ Climbers have also removed sacred prayer bundles, which are important to establish individual relationships between practitioners and spirits.¹¹⁵ To complicate matters, however, climbing on Bear Lodge is not merely considered a recrea-

¹⁰⁴ NAT’L PARK SERV., *supra* note 6, at 24. NPS itself recognized that “[u]ntil very recently, the importance of American Indian cultural values at Devils Tower has been neglected by the NPS.” *Id.*

¹⁰⁵ *See id.* at 22–24.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ Nat’l Park Serv., U.S. Dep’t of the Interior, *Devils Tower Climbed*, at http://www.nps.gov/deto/first_climb.htm (last updated Dec. 22, 2004).

¹⁰⁹ *See* NAT’L PARK SERV., *supra* note 6, at 4.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 4 (calculating the average between 1989 and 1994).

¹¹² *See* Brady, *supra* note 8, at 166.

¹¹³ *Bear Lodge Multiple Use Ass’n v. Babbitt* 175 F.3d 814, 818 (10th Cir. 1999).

¹¹⁴ *See* NAT’L PARK SERV., *supra* note 6, at 8.

¹¹⁵ *See id.*; *see also* *Bear Lodge*, 175 F.3d at 818; Burton & Ruppert, *supra* note 6, at 208; Jeffrey R. Hanson & David Moore, *Applied Anthropology at Devils Tower National Monument*, 44 PLAINS ANTHROPOLOGIST 59–60 (1999).

tional activity, but is expressly recognized as a historical activity and “part of monument culture” dating back one hundred years.¹¹⁶

NPS created a management plan¹¹⁷ to attempt to balance the competing interests in the tower by building consensus among the competing users.¹¹⁸ It allows for restrictions on climbing where climbing adversely affects the Native American sacred site or cultural practices.¹¹⁹ In fact, the management plan was enacted to protect Native American cultural uses of Bear Lodge as a place of “historical, architectural or cultural significance at the community, State or regional level”¹²⁰ One of the site’s primary values is the cultural significance of the site to Native American tribes¹²¹ and the management plan states explicitly that “[r]ecreational climbing at Devils Tower will be managed in relation to the tower’s significance as a cultural resource.”¹²²

The climbing plan was incorporated into the park’s revised general management plan.¹²³ The revised general management plan notes that “[m]odern recreational use, developments, and climbing on the Tower are sometimes in conflict with American Indian traditional cultural values. High levels of development, visitor use, and

¹¹⁶ See *Bear Lodge*, 175 F.3d at 818; NAT’L PARK SERV., MANAGEMENT POLICIES 2001 § 8.2.2 (2000) [hereinafter NAT’L PARK SERV., MANAGEMENT POLICIES] (noting that rock climbing, while a legitimate recreational activity, may not “be appropriate or allowable in all parks; that determination must be made on the basis of park-specific planning”), available at <http://www.nps.gov/policy/mp/policies.pdf>; Hanson & Moore, *supra* note 115, at 54; see also NAT’L PARK SERV., *supra* note 6, at 2 (“National Park Service *Management Policies* recognize rock climbing as a legitimate recreational and historical activity in the park system.”).

¹¹⁷ NAT’L PARK SERV., *supra* note 6, at iii.

¹¹⁸ See Cross & Brenneman, *supra* note 37, at 24–25. Recreational climbers agreed to the management plan through its representative, The Access Fund. Bonham, *supra* note 22, at 180 n.175, 182–83.

¹¹⁹ See NAT’L PARK SERV., *supra* note 6, at iii. The revised NPS Management Policies remove the consumptive use prong and add “unreasonabl[e] interfere[nce] with: The atmosphere of peace and tranquility, or the natural soundscape maintained in wilderness and natural, historic, or commemorative locations within the park.” NAT’L PARK SERV., MANAGEMENT POLICIES, *supra* note 116, § 8.2.

¹²⁰ See WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris, 603 F.2d 310, 321 (2d Cir. 1979) (internal quotation marks omitted).

¹²¹ See *Bear Lodge*, 175 F.3d at 819.

¹²² NAT’L PARK SERV., *supra* note 6, at i; see also NAT’L PARK SERV., GMP, *supra* note 95, at 189.

¹²³ See NAT’L PARK SERV., GMP, *supra* note 95, at 1 (“The previous *General Management Plan* for Devils Tower was approved in 1986. . . . That plan did not address current issues related to greatly increased visitation, the degradation of natural systems, changing regional land uses, and conflicts among various user groups.”). “This *General Management Plan* reaffirms the climbing plan.” *Id.* at 4. The revised General Management Plan was issued after *Bear Lodge* was decided.

crowding at the base of the Tower are not consistent with the spiritual nature of the area.”¹²⁴ The final climbing plan calls for a voluntary cessation of recreational climbing during the month of June to be enforced by the climbers themselves, during which time the Sun Dance and other major Native American cultural ceremonial practices are performed.¹²⁵ It also prohibits the addition of new bolts or fixed pitons necessary for lead climbing, though it does allow for the replacement of such bolts or pitons as authorized by receipt of a permit.¹²⁶ The management plan also calls for a cross-cultural education program about the site, which intends to “lead to a better understanding about climbing and the sacred site issue and the values of American Indians, climbers, and the general public.”¹²⁷

The original plan prohibited the issuance of commercial use licenses for climbing guides in the month of June,¹²⁸ but this prohibition was challenged and eventually rescinded.¹²⁹ The revised climbing management plan instead provides the option to establish a mandatory closure if the plan is ultimately determined unsuccessful.¹³⁰ While the standards set for “success” appeared to be quite high, requiring perhaps complete voluntary compliance,¹³¹ the voluntary clo-

¹²⁴ *Id.* at 3.

¹²⁵ See NAT’L PARK SERV., *supra* note 6, at 22–24. June is the largest climbing month for Bear Lodge, with an average of 1120 climbers each year between 1989 and 1994. *Id.* at 20. August, May, and July were the months with the next highest average of climbers, with 1095, 1005, and 985, respectively. *Id.*

¹²⁶ See *id.* at 24–25 (noting also that piton climbing has diminished in popularity).

¹²⁷ *Id.* at 22.

¹²⁸ See *id.*

The reasons for the June closure are not tied directly to religious ceremonies at Devils Tower, however, the summer solstice, which occurs in June, is a very culturally significant time to American Indians. The 30-day June period was selected as a compromise in the modern world. A predictable voluntary closure fixed on a modern calendar month has a better chance to be communicated and understood and to be successful than dates based on a shifting lunar calendar.

Id. at 24. While the language “modern calendar” is supremely offensive, given that modern-day Native American practitioners rely upon lunar calendars, as does a majority of the global populace at least in some respects, the rationale does make sense when attempting to compel action from climbers that do not subscribe to a lunar calendar. Therefore, the selection of the date, while perhaps seeming more restrictive than necessary to achieve compliance, may, in fact, be more likely to succeed than a shifting calendar.

¹²⁹ See *Bear Lodge Multiple Use Ass’n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998). *aff’d*, 175 F.3d 814 (10th Cir. 1999).

¹³⁰ *Id.*

¹³¹ See NAT’L PARK SERV., *supra* note 6, 22–24 (noting that NPS would establish benchmarks for determining what “success” would mean, but also stating that “[t]he voluntary

sure has nevertheless achieved a high level of compliance.¹³² As a result, the General Management Plan, revised in 2001, did not modify the climbing plan.¹³³ After the Supreme Court denied *certiorari* in *Bear Lodge*, NPS decided to leave well enough alone and did not seek to amend the management plan.¹³⁴

C. District Court Analysis

The management plan was challenged under the Establishment Clause.¹³⁵ The plaintiffs, a commercial rock climbing association and its members, made three major claims, charging that NPS had endorsed or established Native American religion through: (1) the coercive effect of the threat of a mandatory ban on climbing during the month of June; (2) an interpretive program that expands the Bear Lodge narrative from one of climbing history to both climbing and Native American history and cultural importance; and (3) the coercive effect of signs discouraging hikers from wandering off the trail out of respect for Native American culture.¹³⁶ The district court dismissed the latter two claims due to lack of standing.¹³⁷ The court

closure will be fully successful when every climber personally chooses not to climb at Devils Tower during June out of respect for American Indian cultural values. This is the ultimate goal of the voluntary June closure.”). The climbing management plan, then, does not indicate what level of success would be required to enable the triggering of a mandatory closure—which would be one of a multitude of options NPS could take if the voluntary closure is deemed unsuccessful. *See id.* A survey of climbers indicated that 67% of climbers would continue climbing the tower knowing that their actions would show disrespect to Native American practices. *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 818–19 (10th Cir. 1999). This survey was apparently mischaracterized by the court, as the question asked whether climbers would stop climbing altogether throughout the entire year, not whether climbers would be willing to forego one month of climbing. *See Br. for Intervenors in Opp’n. to Pet. for Writ of Cert., Bear Lodge Multiple Use Ass’n v. Babbitt*, No. 99-1045, 2000 WL 34014041 at *14 n.15 (U.S. 2000).

¹³² *See Br. for Intervenors in Opp’n. to Pet. for Writ of Cert., Bear Lodge* (No. 99-1045), 2000 WL 34014041 at *6 (noting an 85% decline in recreational climbing in June).

¹³³ NAT’L PARK SERV., GMP, *supra* note 95, at 27 (noting that “most climbers abide by a voluntary climbing ban during June” with “[c]limbing [being] managed according to a climbing management plan that was approved in 1995.”).

¹³⁴ *See Bear Lodge Multiple Use Ass’n v. Babbitt*, 529 U.S. 1037 (2000) (denying certiorari); Press Release, Nat’l Park Serv., U.S. Dep’t of the Interior, Supreme Court Refuses to Hear Challenge Against Devils Tower National Monument Climbing Management Plan (Mar. 27, 2000) (“There will be no changes to the way climbing is managed at Devils Tower National Monument. The monument will continue to follow the approved climbing management plan.”), http://www.nps.gov/deto/pr00_supreme_court.htm.

¹³⁵ *See Bear Lodge*, 2 F. Supp. 2d at 1451.

¹³⁶ *See id.*

¹³⁷ *Id.* at 1453.

spent most of its time analyzing whether the voluntary climbing ban was a violation of the Establishment Clause.¹³⁸ It found the climbing management plan to be a valid exercise of power and accommodation of Native American religious practices,¹³⁹ but the court reached that finding through improper analysis and overly restrictive means.

The district court applied a First Amendment analysis to the climbing ban for no clear reason. Despite the fact that the climbing plan did provide an explanation of why the month of June was selected—as a compromise not directly tied to religious practices, but rather to the effectiveness of cultural education programs¹⁴⁰—the court claimed that the climbing plan “does not identify any other reason [other than the cultural significance of the month of June to Native American tribes] for the June ‘voluntary closure.’”¹⁴¹

The district court noted that it was not convinced that culture and religion were separate for Native American groups,¹⁴² but it failed to recognize the overwhelming and uncontested consideration of cultural rather than religious importance of the site and ceremonial rites noted in the climbing plan itself.¹⁴³ It also failed to conduct an analysis of the cultural practices as meeting a definition of “religious activity.”¹⁴⁴

On the face of the climbing plan, it is difficult to claim outright that the regulation had a religious purpose. Nevertheless, the court stated that it “must look beyond the plain language establishing the climbing ban and examine its purpose and effects in order to determine if it is appropriate accommodation or if it breaches the necessary gap between state and religion fusing the two into one.”¹⁴⁵ Where the purpose of the regulation is secular, only a rational relationship must exist between the regulation and its purposes.¹⁴⁶ The district court recognized the secular purposes, yet analyzed those purposes as if they were religious.¹⁴⁷

¹³⁸ *Id.* at 1453–57.

¹³⁹ *See id.* at 1456–57.

¹⁴⁰ *See* discussion *supra* note 128.

¹⁴¹ *Bear Lodge*, 2 F. Supp. 2d, at 1450.

¹⁴² *Id.* at 1456 (“The organizations benefitted . . . are not solely religious organizations, but also represent a common heritage and culture.”).

¹⁴³ *See supra* Part II.B.

¹⁴⁴ *Bear Lodge*, 2 F. Supp. 2d at 1456 (failing to consider the definitional religious activity as applied to this case).

¹⁴⁵ *Id.* at 1454.

¹⁴⁶ *See supra* Part I.C.

¹⁴⁷ *See Bear Lodge*, 2 F. Supp. 2d at 1455–56; *see also* Br. for Intervenors in Opp’n. to Pet. for Writ of Cert., *Bear Lodge Multiple Use Ass’n v. Babbitt*, No. 99-1045, 2000 WL

The district court recognized that if the case was to operate on a constitutional level, it was about the permissible limits of accommodation—an Establishment Clause claim—rather than determining what accommodation is required—a Free Exercise Clause claim.¹⁴⁸ However, the court nevertheless analyzed the claims raised under Free Exercise, rather than Establishment Clause, jurisprudence.¹⁴⁹ In its analysis, the court relied upon *Badoni v. Higginson*—a First Amendment case stating in dicta that “[e]xercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area,”¹⁵⁰—to require that any accommodation not affect the general public’s use of the park.¹⁵¹ The dictum in *Badoni* stated that if a Free Exercise right would restrict all visitor access to a site year-round, protection of such a right might violate the Establishment Clause.¹⁵² The dictum, while of little guidance in non-total closures, seems difficult to maintain under emerging First Amendment jurisprudence, since if visitor access is restricted, no coercion of beliefs could be effected under the coercion test.¹⁵³ This application of Free Exercise jurisprudence implies a belief that the limits of allowed accommodation and protection of religion are coterminous.¹⁵⁴ This, however, is not the case, as discussed earlier in this Article.¹⁵⁵ Additionally, the court, constrained by precedent in the Tenth Circuit,¹⁵⁶ applied both the endorsement test established by Justice O’Connor and the *Lemon* test,¹⁵⁷ which is considered by some authors to be an “unnecessarily rigorous form of scrutiny.”¹⁵⁸

34014041, at *26–28 (U.S. 2000) (discussing how the purposes and effects of the regulation are secular).

¹⁴⁸ See *Bear Lodge*, 2 F. Supp. 2d at 1455 n.6; *supra* Part I.B–C.

¹⁴⁹ See Cross & Brenneman, *supra* note 37, at 27; Grimm, *supra* note 32, at 20–21.

¹⁵⁰ 638 F.2d 172, 179 (10th Cir. 1980).

¹⁵¹ *Bear Lodge*, 2 F. Supp. 2d at 1455.

¹⁵² *Badoni*, 638 F.2d at 179.

¹⁵³ See generally *Lee v. Weisman*, 505 U.S. 577 (1992); *supra* Part I.C.

¹⁵⁴ See Cross & Brenneman, *supra* note 37, at 30–31 (discussing the interaction between the courts’ use of Free Exercise and Establishment Clause tests).

¹⁵⁵ See *supra* Part I.

¹⁵⁶ See *Bauchman v. W. High Sch.*, 132 F.3d 542, 552 (10th Cir. 1997) (holding that when uncertainty surrounds the scope of the endorsement test and Establishment Clause analysis, they must both be applied in conjunction with the entanglement criterion of the *Lemon* test).

¹⁵⁷ See *Bear Lodge*, 2 F. Supp. 2d at 1454; *supra* Part I.C.

¹⁵⁸ Zellmer, *supra* note 1, at 514 (addressing the courts’ use of both the *Lemon* test and accommodation tests while also imposing a prohibition on other uses of the public land at *Bear Lodge*).

The district court, while ultimately finding in favor of the climbing management plan, illustrates the problems with reliance on First Amendment jurisprudence generally. Conflation of Free Exercise and Establishment Clause jurisprudence is an easy mistake to make. The opinion also illustrates the dangers in relying on the “courts of the conqueror.”¹⁵⁹ In an oral statement, Judge Downes “questioned whether the tribes’ effort and time might not be better spent remedying Native American social ills like alcoholism.”¹⁶⁰ The court apparently failed to comprehend the *amici* claims that loss of cultural identity through cultural appropriation and degradation of sacred sites contributes significantly to such preventable and curable social illnesses.¹⁶¹

The court’s language has been criticized for chilling political action to protect Native American interests, narrowing public land managers’ discretion to act, and incorrectly interpreting First Amendment jurisprudence.¹⁶² The district court “implicitly characterized the Native Americans’ use of Devils Tower as primarily religious.”¹⁶³ It has been argued that the district court’s “interpretation fails to impose any practical restriction on the definitional reach of that key phrase, religious activity. [The court] does not explain [its] 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 Devils Tower.”¹⁶⁴

The district court opinion did, however, have some saving graces. It recognized that “[t]he organizations benefitted by the voluntary climbing ban, namely Native American tribes, are not solely religious organizations, but also represent a common heritage and culture. As a result, there is much less danger that the Government’s actions will

¹⁵⁹ See Sager, *supra* note 31, at 750 (quoting *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823)).

¹⁶⁰ Bonham, *supra* note 22, at 188 & n.244.

¹⁶¹ *Id.* see also Brady, *supra* note 8, at 166.

¹⁶² Cross & Brenneman, *supra* note 37, at 10.

¹⁶³ *Id.* at 27.

The Defendants attempt to characterize these measures as relating solely to American Indian culture and being wholly separate from any religious practices. The Court is not persuaded that a 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.

Bear Lodge, 2 F. Supp. 2d at 1450 n.2.

¹⁶⁴ Cross & Brenneman, *supra* note 37, at 40–41.

inordinately advance solely religious activities.”¹⁶⁵ Nevertheless, the court stated that “any subsequent effort to resuscitate this ill-conceived [climbing] ban would only serve to impair the Defendants’ credibility with this Court.”¹⁶⁶ It is not clear whether the court referred to the particular ban, which was potentially objectionable, or to any type of ban.¹⁶⁷ Although the court improperly viewed the ceremonial practices at Bear Lodge as religious, it was not blind to the cultural importance of those practices. However, the court did not acknowledge the unique political status of Native American tribes or the federal government’s obligations toward tribes.

D. Circuit Court Analysis

The Court of Appeals for the Tenth Circuit dismissed all claims due to a lack of standing, finding that the possibility of imposing a mandatory climbing ban was hypothetical and not an injury-in-fact.¹⁶⁸ This outcome, while correct under existing precedent, does not deny the possibility that a voluntary closure with a less “remote and speculative possibility” of a mandatory closure might coerce compliance, causing injury.¹⁶⁹ This Article posits the view that any scheme voluntary on its face not made mandatory through secondary direct en-

¹⁶⁵ *Bear Lodge*, 2 F. Supp. 2d at 1456.

¹⁶⁶ *Id.* at 1452. Climbers and the cultural ceremonies could co-exist, and therefore a month-long mandatory closure might create undue hardship on the climbers, especially since the ceremonies last only a week or two. Compare *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985), with *NAT’L PARK SERV.*, *supra* note 6, at i–v. However, it has been argued that “[w]here the government’s ownership of the area poses obstacles, both physical and psychological, to American Indian access and use of an area that had once been tribal lands, accommodations are justified.” Zellmer, *supra* note 1, at 515. This Article does not go so far as to claim that subjective feelings of psychological interference are sufficient to justify accommodation. Nevertheless, this Article does note that most park enabling statutes and land management agencies recognize the importance of quietude to the proper enjoyment of the lands. This recognition provides a more objective, if highly discretionary, foundation upon which to base claims for accommodation.

¹⁶⁷ Denying agencies the ability to ban activities wholly is deemed by most courts to be overly restrictive of agency authority. See *Br. for Interveners in Opp’n. to Pet. for Writ of Cert.*, *Bear Lodge Multiple Use Ass’n v. Babbitt*, No. 99–1045, 2000 WL 34014041 at *23–25 (U.S. 2000) (noting that Arlington National Cemetery allows private religious services to be closed to the general public, citing 32 C.F.R. § 553.22(c)(3), (f), (g) (2003), in addition to cases where NPS allows other private religious services and has the authority to prohibit incompatible uses).

¹⁶⁸ *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 821–22 (10th Cir. 1999).

¹⁶⁹ See *id.* at 821; see also *Br. for Interveners in Opp’n. to Pet. for Writ of Cert.*, *Bear Lodge Multiple Use Ass’n v. Babbitt*, No. 99–1045, 2000 WL 34014041, at *13 (U.S. 2000) (noting that the reasonableness of fear may be important to standing, though calling plaintiffs’ fears unreasonable).

forcement mechanisms should establish no actual and concrete injury sufficient to provide standing to complainants. The court evaded the issue of whether a mandatory closure, if implemented, would constitute sufficient harm to create standing, and if so, whether or not the mandatory closure would be a proper exercise of regulatory authority.¹⁷⁰ By evading these questions, the court was able to avoid the First Amendment discussion altogether, finding other grounds to protect Native American cultural interests.

Nevertheless, the court made some errors in how it viewed the Native American cultural activities at Bear Lodge—the same mistake made at the district court level. For instance, the court overly emphasized the religious importance of the tower to the Native Americans.¹⁷¹ The court referred to creation stories, the Sun Dance, and Vision Quests as religious activities.¹⁷² Those activities would fail to meet standard definitions of religious activities,¹⁷³ yet the court took for granted the sincerity of the tribes' "religious practices."¹⁷⁴

Despite this mischaracterization of the Native American cultural practices at Bear Lodge as religious, the court recognized the importance of not over-relying on First Amendment jurisprudence.¹⁷⁵ The court identified numerous statutes, executive orders, park enabling statutes, and NPS regulations which counsel for the protection of Native American cultural interests.¹⁷⁶ The court stated that "NPS must protect the values for which Devils Tower National Monument was established. . . . [O]ne of the primary bases for the Tower's designation as a National Monument is the prominent role it has played in the cultures of several Native American tribes of the North Plains."¹⁷⁷

Although the court provided agencies some protection when deciding to protect Native American interests,¹⁷⁸ the protection is uncertain and highly contextual. It is not clear how far removed the threat of a mandatory closure must be for a voluntary closure to pass muster.

¹⁷⁰ See *Bear Lodge*, 175 F.3d at 821–22.

¹⁷¹ See *id.* at 816–17.

¹⁷² *Id.*

¹⁷³ See discussion *supra* Part I.

¹⁷⁴ *Bear Lodge*, 175 F.3d at 816–17.

¹⁷⁵ See *id.* at 817–18, 819.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 819.

¹⁷⁸ See *id.* at 817–18.

CONCLUSION

Culture is not merely comprised of religion. Culture is the “material, spiritual, and artistic expression of a group that defines itself . . . as a [distinct] culture, both according to daily lived experience and according to practice and theory.”¹⁷⁹ Culture is important to the group not merely as a means for the group to express itself, though this is also of great importance as it includes “language, literary and artistic traditions, music, customs, dress, festivals, ceremonies” and other modes of expression,¹⁸⁰ but also has its own intrinsic value.¹⁸¹

Courts and scholars tend to analyze culture as coextensive with religion, and vice versa, relying upon Free Exercise and Establishment Clause jurisprudence in the protection of Native American cultural interests.¹⁸² However, this is troublesome when courts and scholars simply assume that cultural activities constitute religious activities, without analyzing whether the activity meets the definition of a religious activity.¹⁸³ “Native Americans typically view religion more in terms of culture than in terms of what most Americans consider religion. Notably, no traditional Native American language has one word that could translate to ‘religion.’”¹⁸⁴

The failure of courts and scholars to distinguish between culture and religion is not harmless. It results in two very important outcomes. First, it redefines cultural activity as religious, negating tribes’ ability to define their own practices. This re-definition of cultural practices by external sources constitutes cultural appropriation and harms tribes’ ability to sustain the vitality of their cultures.¹⁸⁵ For instance, where ceremonial practices are recast solely in terms of religious practices, and religious practices are seen as individualistic in nature, the importance of the ceremonial practice to the community

¹⁷⁹ Jonathan Hart, *Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 137, 138 (Bruce Ziff & Pratima V. Rao eds., 1997).

¹⁸⁰ Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 *SOC. RES.* 491, 498 (1994).

¹⁸¹ RONALD DWORKIN, *LIFE’S DOMINION* 70 (1993).

¹⁸² See generally *Bear Lodge*, 175 F.3d at 816–17 (discussing Sun Dances and Vision Quests as religious practices).

¹⁸³ See *id.*

¹⁸⁴ Winslow, *supra* note 29, at 1295.

¹⁸⁵ See Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 *ARIZ. ST. L.J.* 299, 307, 310 (2002); Hart, *supra* note 179, at 137–38; Vogel, *supra* note 6, at 776–77.

is diminished. Since government has an explicit mandate to support Native American culture, this is intolerable.

A second and more direct outcome also results from characterizing cultural activities as religious activities: the invocation of First Amendment jurisprudence. The Establishment Clause prescribes the upper limits to which the federal government may accommodate religious activities. However, no such limit exists for cultural activities, except as required by the Equal Protection Clause, which is largely surmountable in the unique case of Native American tribes.¹⁸⁶ As a result, characterizing Native American cultural activities as religious may limit the protections available to them.

A more pragmatic concern with characterizing Native American cultural activities as religious is that the First Amendment has not historically been a friend to Native American interests. Native American Free Exercise claims have universally been denied. While RFRA may improve Native Americans' chances of achieving victory in court, RFRA's impact is uncertain and limited to religious activities.¹⁸⁷ Therefore, Native American activists choosing to protect cultural interests under RFRA may see some level of cultural appropriation and may still be pursuing a second- or third-best resolution.¹⁸⁸ Additionally, the new Establishment Clause standards mean that "proponents of Native American sacred sites and religious freedom on public lands can never entirely predict with accuracy the type of test a particular court will employ."¹⁸⁹

While courts often have mistakenly applied religious masks to cultural activities, some cultural activities are religious in nature.¹⁹⁰ In those cases, however, the courts also mistakenly find those religious activities not to be religious for First Amendment purposes.¹⁹¹ Despite meeting the definition of religious activities, these activities have not been recognized as religious because courts have failed to understand the site-specific nature of some Native American religions.¹⁹² This site-

¹⁸⁶ See Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. (forthcoming 2005).

¹⁸⁷ See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2000).

¹⁸⁸ Cf. Hooker, *supra* note 21, at 137 ("American Indians have had to rely on the Free Exercise Clause of the First Amendment to support their claims.").

¹⁸⁹ Bonham, *supra* note 22, at 166-67.

¹⁹⁰ See Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 816-17 (10th Cir. 1999).

¹⁹¹ See, e.g., Inupiat Cmty. v. United States, 746 F.2d 570 (9th Cir. 1984); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1164-65 (6th Cir. 1980); Crow v. Gullet, 541 F. Supp. 785, 790-94 (D.S.D. 1982).

¹⁹² Burton & Ruppert, *supra* note 6, at 204-05.

specificity precludes Native Americans from practicing their religious beliefs on non-sacred lands—a stark contrast to the Judeo-Christian religious beliefs upon which the Free Exercise Clause was founded.¹⁹³ Destruction of sacred sites should be properly analogized to Judeo-Christian holy lands because worship and prayer occur there and destruction of those holy lands, while not literally destroying the opportunity for religious worship, does impose time, place, and manner restrictions on religious practices such that the practices become less meaningful.¹⁹⁴

In Free Exercise cases, courts often have noted that Native American religious beliefs would be substantially burdened or even “devastated” by federal undertakings on public lands, but finding in every case that a “compelling” government interest outweighed religious protection.¹⁹⁵ This illustrates the dilemma faced by Native Americans seeking to protect their cultural practices—despite the allure of constitutional protections, it often is best to seek cultural, rather than religious, protection of Native American sacred sites and cultural activities.

Bear Lodge is just a microcosm of the conflicts over uses that might arise on public lands. It does, however, represent the largest growing conflict of management of public lands—the conflict between Native American cultural uses and increasing recreational uses. *Bear Lodge* “will most likely not be the last time a federal court will evaluate a conflict between resource user groups on public lands and balance the interests of Native American religious activities against recreation interests and federal land management agency decisions.”¹⁹⁶

In fact, the management plan of Rainbow Bridge National Monument was challenged based on strikingly similar claims.¹⁹⁷ The

¹⁹³ Kristen A. Carpenter, *In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases*, 37 NEW ENG. L. REV. 619, 623–24 (2003).

¹⁹⁴ See JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 23 (2002).

¹⁹⁵ See, e.g., *Lyng v. Northwest Indian Cemetary Protective Ass’n*, 485 U.S. 439, 451–52 (1988); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.6 (6th ed. 2000); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756–57 (1992); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

¹⁹⁶ Bonham, *supra* note 22, at 160.

¹⁹⁷ Complaint, *Natural Arch & Bridge Soc’y v. Nat’l Park Serv.*, No. 2000CV-0191J (D. Utah 2000) (claiming that NPS, through voluntary pleadings, denied tourist access to portions of the monument); Bonham, *supra* note 22, at 189. Rainbow Bridge, a separate unit in the NPS system, is managed under the Glen Canyon National Recreation Area. Nat’l

Rainbow Bridge, a nearly 300-foot-high arch—the largest natural, freestanding sandstone arch in the world—is sacred to the White Mesa Ute, San Juan Southern Paiute, Kaibab Paiute, Hopi, and Navajo tribes.¹⁹⁸ While the policy at Rainbow Bridge was discouragement,¹⁹⁹ after the *Bear Lodge* suit park managers changed the park signs discouraging individuals from walking under the Bridge to more clearly indicate that the request is purely voluntary so as to avoid Establishment Clause challenges.²⁰⁰

The Rainbow Bridge example illustrates that, although *Bear Lodge* had its failings, it nevertheless provided strength and security to federal land managers in regulating recreational behavior. The question remains whether voluntary efforts to protect Native American cultural practices will be sufficiently successful. More important, however, is that *Bear Lodge* does not address the large range of private and public interests which might conflict with Native American cultural uses and does not avoid the pitfalls of applying First Amendment jurisprudence to what are, essentially, cultural claims.

Park Serv., U.S. Dep't of the Interior, *Rainbow Bridge National Monument*, at <http://www.nps.gov/rabr/home.htm> (last updated Mar. 14, 2003).

¹⁹⁸ DAVID KENT SPROUL, *A BRIDGE BETWEEN CULTURES: AN ADMINISTRATIVE HISTORY OF RAINBOW BRIDGE NATIONAL MONUMENT* ch. 2 (2001), available at <http://www.nps.gov/rabr/adhi/adhi.htm>; Nat'l Park Serv., *supra* note 197; see also Bonham, *supra* note 22, at 189–91.

¹⁹⁹ This discouragement included “erecting barriers, posting signs requesting visitors not to walk under the Bridge, and staffing roaming Park Service rangers to explain the need to not walk under the Bridge.” Bonham, *supra* note 22, at 190 (citing Chris Smith & Elizabeth Manning, *The Sacred and Profane Collide in the West*, HIGH COUNTRY NEWS (Paonia, Colo.), May 26, 1997, http://www.hcn.org/servlets/hcn.Article?article_id=3424).

²⁰⁰ SPROUL, *supra* note 198, ch. 8; see also Bonham, *supra* note 22, at 192.