SACRED STANDARDS: HONORING THE ESTABLISHMENT CLAUSE IN PROTECTING NATIVE AMERICAN SACRED SITES

Anastasia P. Winslow*

* Patent Attorney, Plevy & Associates, Edison, N.J., formerly Visiting Assistant Professor, University of Illinois at Urbana-Champaign, College of Law. LL.M., 1996, University of Illinois at Urbana-Champaign, College of Law; J.D., 1989, *valedictorian*, Seton Hall University School of Law; B.S. 1985, *magna cum laude*, Seton Hall University. An earlier version of this Article served as the author's LL.M. thesis. The author wishes to extend her warmest thanks to Professor and Graduate Advisor Laurie A. Reynolds for commenting on drafts of this Article.

INTRODUCTION

"What isn't sacred to Native Americans? How about Yellowstone, how about the Grand Canyon? Let's say I would like to have Mt. Eddy or the Marble Mountains as my church. Would you give it to me?"

—City Councilman Jerry White, Mt. Shasta City, California, on the designation of Mt. Shasta as a National Historical Site.[1]

"This is not Indian land, this is public land....They say it's a 17-mile-long church. Well, the Vatican has a road going through it ... ."

—Mayor Martin Chavez, Albuquerque, New Mexico, on city plans to open a road cutting through the Petroglyph National Monument.[2]

Public officials have recently made the above comments, openly defying Native American religions. Yet our political climate generally has been turning toward religious tolerance.[3] In 1993, President Clinton publicly praised Stephen L. Carter's book, *The Culture of Disbelief*,[4] in which Professor Carter argues that religion has been marginalized in American public life and should be more openly accommodated.[5]

Consistent with a climate of religious tolerance, on October 6, 1994, President Clinton signed into law the American Indian Religious Freedom Act

1. Edward Silver, *The Scenic Slopes of Mt. Shasta Have Sparked a Battle Among Residents Who Count on It to Feed Their Bodies and Souls*, L.A. TIMES, Sept. 7, 1994 (Home Edition, Life & Style section), at 1E1. *See also Tug of War on Mount Shasta Historic Designation Has Developers, Preservationists Gearing Up for a Fight*, S.F. CHRON., Oct. 9, 1994 (Sunday Punch section), at 3 (noting that "[v]irtually the entire cast of elected officials in Mount Shasta City and Siskiyou County, including the area's Republican Congressman, are opposed" to the designation of Mount Shasta as a National Historic Site).

2. *See* Tim Korte, *Petroglyph Monument at Center of Road Battle*, PHILA. INQUIRER, Mar. 5, 1995, at A5. *See also Progress vs. Petroglyphs, Planned Road Just Might Draw Blood From Stone*, L.A. TIMES, Mar. 1, 1995, at 30A; *Petroglyphs Stand in Way of Progress but Tribes Urge Respect for Ancient Etchings*, HOUSTON POST, Mar. 5, 1995, at A13.

3. *See, e.g.*, Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 556 (1991) ("[T]he concept of accommodation has been rapidly gaining ground as the central motif of religion clause thought.").

4. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 83 (1993).

5. *But see* Kathleen M. Sullivan, Review, *God As a Lobby*, 61 U. CHI. L. REV. 1655, 1657 (1994). Professor Sullivan criticizes Carter's arguments, however, as being on a "mutual collision course." In fact, religious historians report that America is now more religious than ever and that the concept of church-going colonists is based on nostalgic illusions. *See, e.g.*, ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA 1776–1990, at 22, 24 (1992) ("Americans are burdened with more nostalgic illusions about the colonial era than about any other period in their history.... There has been general agreement [among religious historians] that in the colonial period no more than 10 to 20 percent of the population actually belonged to a church.").

(AIRFA) Amendments of 1994,[6] which protect the religious use of peyote by Native American tribal members. Relating only to peyote use, these Amendments do not protect sacred sites, which remain unprotected. While the AIRFA Amendments were pending, Congress considered a bill which included protection for sacred sites, that is, The Native American Cultural Protection and Free Exercise of Religion Act of 1994.[7] This bill failed.

Thus, while religious tolerance generally has been gaining ground, Native Americans continue to struggle to protect their sacred sites. In this vein, one may wonder why the sacred-site bill proved problematic when, in contrast, the peyote law was successful. Legislative history suggests that the chief pitfall to the sacred-site bill was the Establishment Clause to the First Amendment.[8] Traditionally, the Establishment Clause has proscribed laws that have a religious purpose or effect or which excessively entangle the government with religion,[9] and the sacred-site bill was questioned as promoting religion.[10]

The peyote legislation, in comparison, also could have been viewed as promoting religion. Yet the Establishment Clause did not pose a bar to that legislation, because the religious benefits there were limited to members of federally recognized tribes.[11] With this limitation, the peyote legislation was passed on the theory that the Establishment Clause to the First Amendment did not apply in its traditional sense due to the tribes' special relationship with the federal government.[12] The sacred-site bill, however, was not limited to sites honored by members of federally recognized tribes. Instead, it applied to sacred sites that traditionally have been significant to Native Americans generally.[13] Thus, a modified Establishment Clause analysis was considered inappropriate in assessing the constitutionality of the sacred-site bill, and the bill failed as being constitutionally suspect.[14]

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6. 42 U.S.C. §§ 1996–96a (1994).

7. S. 2269, 103d Cong., 2d Sess. (1994). *See also* S. REP. NO. 411, 103d Cong., 2d Sess. (1994).

8. U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion ....").

9. *See infra* section II.A.

10. Both the Department of Justice and the Department of the Interior questioned the constitutionality of the bill under the Establishment Clause. *See* S. REP. NO. 411, 103d Cong. 2d Sess. 27–34 (1994). On the other hand, the Committee on Indian Affairs argued that Senate Bill 2269 addressed past religious discrimination and was designed to protect Native American culture, since Native American culture and religion are inextricably intertwined. *Id.* at 6–8.

11. The AIRFA Amendments apply to Indians, and the term "Indian" is defined as "a member of an Indian tribe." 42 U.S.C. § 1996a(c)(1) (1994). The term "Indian tribe" is defined to include any "tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village,...which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* § 1996a(c)(2).

12. In the House Report leading to the amendments, the Committee on Natural Resources relied upon the tribes' special status to argue that the peyote legislation does not offend the First Amendment. H.R. REP. NO. 675, 103d Cong. 2d Sess. 8–9 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2404, 2410–11 (1994) ("The Federal Government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the Establishment Clause to that relationship.") (quoting *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991)).

13. Senate Bill 2269 defined a "sacred site" as an area that is sacred by reason of the traditional practices or ceremonies associated with it and its significance to a Native American religion. *See* S. Rep. No. 411, 103d Cong., 2d Sess. 8–9 (1994).

14. *See Definition of Indian Tying Up Indian Bill*, BOSTON GLOBE, Apr. 3, 1994, at

The failure of Senate Bill 2269 and the continued need for sacred-site protection raise at least two key issues involving the Establishment Clause's applicability to laws protecting sacred sites. First, there is the question whether the Establishment Clause (applied in its traditional sense) should pose a bar to this legislation. Second, assuming the Establishment Clause is a bar, there is the question whether the standards traditionally applied under the Establishment Clause should be modified, and if so, how they should be modified. These are unsettled questions. To date, a handful of courts have considered applying a modified Establishment Clause analysis to laws protecting Native American religions, and they have reached diverse opinions.[15]

In seeking to address these questions, this Article is divided into three parts. In Part I, Native American religious views are explored and compared with mainstream Christian views. This discussion is significant in providing a foundation for the discussion in Parts II and III of this Article. Then, in Part II, traditional Establishment Clause rules are addressed, including the purpose behind the Establishment Clause and how that Clause has applied to Native American sacred sites, looking to history and present-day jurisprudence. In Part III, modified Establishment Clause rules are analyzed.

A focus of inquiry in this Article is whether sacred-site protection must depend upon the tribal status of the religious participants, which was the stumbling block to Senate Bill 2269. Ultimately, I conclude that modified Establishment Clause rules are dangerous, inconsistent with the purposes behind the Establishment Clause, and should be avoided: the preferred approach is to apply traditional Establishment Clause rules which, if applied consistently, should pose no barrier in protecting Native American sacred sites. But in any event, it is unnecessary and deleterious to religious freedom to limit the scope of religious legislation to Native American tribal members only, as the government should have no role in defining or influencing membership criteria for religious groups, whichever they may be.

I. CHRISTIAN AND NATIVE AMERICAN RELIGIONS COMPARED

Under the Establishment Clause, the government is barred from promoting a religion or from favoring religion over non-religion.[16] What constitutes religious promotion could depend, however, upon what is deemed religious support as opposed to support for a secular event or interest.[17] Thus, in this section, Christian and Native American views are discussed, particularly as they relate to nature and humans' relationship to the environment.[18]

National/Foreign 4. The Department of the Interior suggested that the statutory benefits should be limited to members of federally recognized tribes, like the peyote legislation, because then the benefits could be characterized as political, as opposed to religious, in nature. S. REP. NO. 411, 103d Cong., 2d Sess. 27–34 (1994).

15. *See infra* section III.B.

16. *See infra* section II.A.

17. *Compare* Cammack v. Wahie, 932 F.2d 765, 766, *cert. denied*, 112 S. Ct. 3027 (1992) (9th Cir. 1991) (Good Friday as a paid holiday serves the secular purpose of providing a long spring weekend), *with* Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (Good Friday as a paid holiday violates the Establishment Clause).

18. Christianity is chosen for comparison because it has always dominated American society. Recent reports show that eighty-two percent of Americans identify themselves as

Before comparing Native American and Christian religions, however, a few caveats must be stated. First, it is difficult to describe one Native American religion, because Native Americans identify themselves by tribe, and many beliefs differ by tribe. Native American religions reflect traditions that have existed in the Americas for over 30,000 years, and a rich plurality of traditions have evolved.[19] Similarly, there are many Christian denominations in America, though generalities can be stated.[20]

Second, 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."[21] For Native Americans, the spiritual life is not separate from the secular life. Native Americans do not honor Sabbath days, and they generally do not extend special religious significance to particular days of the year.[22]

Third, Western thought has influenced present-day Native American religions, a process called acculturation.[23] Many traditional religious practices have been erased if not subdued, two examples being polygamy and mourning with self-mutilation.[24] The extent of acculturation may differ by tribe, and influence from non-Indians has even caused tension within tribes among sociological full-blood and mixed-blood groups.[25]

With these caveats, Christian and Native American views on God, human nature, the environment, time and space, individuality, substance use, and universal truths will now be compared.

A. On God

Christians believe in one God with human male qualities.[26] The creation

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Christians. CARTER, *supra* note 4, at 279 n.2. In 1787, about seventy-five percent of Americans had roots in Calvinism, and the rest were affiliated with Anglican, Baptist, Quaker, Catholic, or Lutheran denominations. *See* A. James Reichley, *Religion and the Constitution, in* RELIGION IN AMERICAN POLITICS 3–13 (Charles W. Dunn ed., 1989). Due to this Christian dominance, in 1892, the United States Supreme Court expressly pronounced in a unanimous opinion that "this is a Christian nation." Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

19. *See* JOSEPH EPES BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN 1 (1982) (reporting that traditions have existed for 30,000–60,000 years); RON ZEILINGER, SACRED GROUND: REFLECTIONS ON LAKOTA SPIRITUALITY AND THE GOSPEL 9 (1986) (reporting that the oldest human remains on American soil have been dated at 48,000 years).

20. *See, e.g.*, HAROLD BLOOM, THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION 44–58 (1992) (describing a unified American religion).

21. BROWN, *supra* note 19, at 2; *see also* SILVESTER J. BRITO, THE WAY OF A PEYOTE ROADMAN 16–17 (1989).

22. JOHN MANCHIP WHITE, EVERYDAY LIFE OF THE NORTH AMERICAN INDIAN 140 (Holmes & Meier Publishers, Inc: NY, 1979).

23. *See, e.g.*, Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 785–86 (1992) (discussing the acculturation process); *see also* WHITE, *supra* note 22, at 178 (discussing how peyotism may involve a mingling of the Great Spirit with Jesus Christ).

24. HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 10 (Christopher Vecsey ed., 1991). The Catholic missionaries historically enjoyed less success in fostering acculturation than other Christian missionaries, especially among the Navajo. The Navajo considered the Catholic Holy Eucharist to be an abhorrent act of cannibalism. BROWN, *supra* note 19, at 25.

25. PAUL B. STEINMETZ, PIPE, BIBLE, AND PEYOTE 165 (1990).

26. Robert A. Bridges & Bernard Spilka, *Religion and Mental Health of Women, in* RELIGION AND MENTAL HEALTH 46 (John F. Schumaker ed., 1992) (Christians' perspectives of God are "uncompromisingly male monotheistic.").

story in Genesis says "God created *man* in *his own* image,"[27] and in the New Testament, Jesus Christ appears in a human male form. Though the Christian God is manifested through the Father, the Son, and the Holy Spirit, all are considered one with God.[28] Christians are therefore monotheists.

In contrast, Native Americans' concept of a supreme deity traditionally has not followed the exclusive monotheistic pattern of the Christian religion.[29] Native Americans have used an adjective, not a noun, to refer to their concept of God, reflecting an indefinable presence.[30] For example, the Dakota have used "Wakan" to refer to God, and the Lakota have used the word "Wakantanka," but these terms are adjectives conveying a sense of mystery or the mysterious.[31] Anthropologists and missionaries have concluded that "Wakantanka" did not originally refer to a *personal* supreme being but to a *class* of gods, and they see the term as embodying a totality of existence. Christian groups translated these terms to the "Great Spirit," apparently seeking a noun form.[32]

Moreover, there is evidence that Native Americans traditionally have been polytheists, with some gods and goddesses ranking higher than others.[33] Indian gods and goddesses have taken the shape of animals (including birds and reptiles) and natural objects (including the sun, moon, stars, winds, mountains, woods, lakes, rivers, and the like).[34] These natural gods and goddesses have been worshipped side by side with other gods and goddesses having a human form,[35] and human and animal forms may co-exist. For instance, the Lakota tradition includes a story of the White Buffalo Woman, a goddess who transforms from the shape of a woman into the shape of a buffalo.[36]

Today, it is reported that many Native Americans believe in Jesus Christ as the son of God.[37] However, Native Americans do not necessarily view Jesus Christ in the same way as Christians. For example, one scholar states Native Americans view Christ as having been rejected by the white man and accepted as their Savior.[38] Thus, Native Americans have had a different sense of God

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27. *Genesis* 1:27 (emphasis added).
28. *See, e.g., John* 10:30 ("I and my Father are one"); *Matthew* 1:23 ("Behold, the virgin shall be with child,...and they shall call his name Emanuel, which is interpreted 'God with us.'").
29. STEINMETZ, *supra* note 25, at 40.
30. VINE DELORIA, Jr., GOD IS RED 92–93 (1973).
31. STEINMETZ, *supra* note 25, at 40.
32. *Id.* at 40–41.
33. WHITE, *supra* note 22, at 140.
34. *Id.* at 144.
35. *Id.*
36. *See* ED MCGAA, MOTHER EARTH SPIRITUALITY: NATIVE AMERICAN PATHS TO HEALING OURSELVES AND OUR WORLD 1–6 (1990); *see also* ZEILINGER, *supra* note 19, at 24–27.
37. BRITO, *supra* note 21, at 16; STEINMETZ, *supra* note 25, at 39.
38. WHITE, *supra* note 22, at 178. Notably, in *Sacred Ground: Reflections on Lakota Spirituality and the Gospel*, Ron Zeilinger, a non-Indian author, attempts to reconcile the Lakota tradition with Christianity. With regard to Jesus Christ, however, he states:

> There is no equivalent in Lakota history to the appearance of Jesus Christ in the history of mankind as a divine savior. It never occurred to them that a man might receive such honor from God as to be raised up to the status of Wakantanka. There is a feeling for the holiness of the material world, but this is not derived from its being made holy because of an incarnation by God.

ZEILINGER, *supra* note 19, at 21.

than Christians; their sense of the Great Spirit has been closely tied to the natural world around them, whereas the Christian sense of God has related to the human male form.

B. On Human Nature

Christianity has at its roots the fall of man. In the Christian creation story, mankind fell from the grace of God and was driven out of the Garden of Eden.[39] In describing human nature, the Christian Bible states, "God saw that the wickedness of man was great in the earth, and that every imagination of the thoughts of his heart was only evil continually."[40] Also, because Eve (woman) had encouraged Adam (man) to eat from the tree of knowledge, God cursed her.[41] Similarly, the New Testament suggests that Jesus Christ had a negative attitude about human nature and the goodness of man.[42] Native Americans, however, view all parts of creation as good; there has been no fall of man, and humans are considered cooperative and respectful of the rest of creation.[43]

C. On the Environment

Christianity counsels that humans are superior to all other creatures on Earth, and the Christian calling may encompass an assumption of control and dominion over the earth and living creatures. For example, in the Christian creation story of Genesis, man (Adam) was created first, and then the animals and woman were created when God did not wish man to be alone.[44] The serpent was cursed for inducing woman to eat from the apple tree,[45] and the serpent has become symbolic of evil. Animal sacrifices are common in the Old Testament.[46] Moreover, God expressly cursed the ground for man's sake, and he instructed man to control the earth: "Be fruitful and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."[47]

In comparison, in Native American religions, human beings are not considered superior to other creatures or the natural world. Under tribal creation theories, the animals were created first and helped create the land.[48]

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39. *Genesis* 3:23.
40. *Id.* 6:5.
41. *Id.* 3:16 ("I will greatly multiply thy sorrow and thy conception.").
42. *See, e.g., Matthew* 15:18–20 (In speaking to his disciples, Jesus says that "those things which proceed out of the mouth come forth from the heart; and they defile the man. For out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false witness, blasphemies."); *John* 2:23–24 (When Jesus performed miracles, people believed in Him, but "Jesus would not entrust himself to them, for he knew all men.").
43. DELORIA, *supra* note 30, at 96.
44. *Genesis* 2:19–24.
45. *Id.* 3:14 ("And the Lord God said unto the serpent,...thou art cursed above all cattle and above every beast of the field.").
46. *See, e.g., Numbers* 7:38–88; *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (noting animal sacrifice in the Old Testament).
47. *Genesis* 1:28, 3:17 ("cursed is the ground for thy sake"). Also, in the story of Noah, God stated that the fear of man shall be upon every living creature, and all living beings were delivered into man's hands. *Genesis* 9:2.
48. For example, in the creation story of the Algonquins (eastern woodland Native Americans), the land initially was located underneath the sea and aquatic animals and mammals were present. An Earth Maker figure asked the aquatic animals for help in bringing land above the sea. The animals took turns diving down to the bottom of the sea, seeking to find a grain of earth from which the land could be made. After much suspense, the fourth being (often the

Thus, humans may be seen as owing their creation to animals, which have a closeness to the Great Spirit.[49] Additionally, animals may be considered superior to humans beings, because they are better adapted to their environment than humans in that they need no clothes to survive and are better equipped to obtain their food.[50]

Thus, there is a stark contrast between Native American and Christian attitudes toward nature and the environment. Christian teachings discuss the environment as a commodity to be used and controlled, whereas Native Americans see the world as a place of gods, spirits, and living beings.[51] Under tribal religions, all of creation, whether animated or not (plants, streams, and mountains), have their own spirits and potential for life, and Native Americans pray through these spirits in much the same way that Christians pray to God through Christ and the saints.[52] Animals and the natural world are seen as providing a link between humans and the Great Spirit.[53]

Another factor which may contribute to differing views under Christian and Native American religions with regard to the environment is that Christianity teaches that man is doomed from shortly after creation until the end of the world. The Christian Bible preaches that with the end of the world, Jesus Christ will come again, and the second coming of Christ will be the Judgment Day.[54] Therefore, Christians look forward to the end of time as that is hopefully the date of their resurrection into heaven, and they may pray that the end should come quickly,[55] an attitude that is not conducive to preserving natural resources.

An enlightened Christian view of the environment might be reconciled, at least partially, with Native American views. That is, Christians could deem themselves the earth's stewards or shepherds, assigned with the task of protecting God's creation, as the Christian Bible identifies the earth as belonging ultimately to God.[56]

D. On Time and Space

Christians generally view time in a linear perspective. There was the beginning (when God created the world from nothingness); there is the middle

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muskrat) brought some earth to the surface with his paws, after he had spent four days under the sea. The Earth Maker then used this earth to make the land. Humans were created later. *See* BROWN, *supra* note 19, at 85–86, 124.

49. *Id.* at 125.

50. WHITE, *supra* note 22, at 144. Though Native Americans recognized they had to kill animals for food, they mourned and prayed for the animals thus sacrificed. *See, e.g.*, ERNEST THOMPSON SETON & JULIA M. SETON, THE GOSPEL OF THE REDMAN 85 (1963) (prayer for the dead deer, "Little Brother").

51. VESCEY, *supra* note 24, at 21.

52. BROWN, *supra* note 19, at 38; STEINMETZ, *supra* note 25, at 43–47; VESCEY, *supra* note 24, at 21.

53. BROWN, *supra* note 19, at 38.

54. *See, e.g.*, *Thessalonians* 4:16–17 (At the end of the world "the Lord himself shall descend from heaven with a shout"; upon this second coming, "the dead in Christ shall rise first," and then those who are "alive and remain shall be caught up together with them in the clouds to meet the Lord in the air."). *See also Matthew* 24 (Jesus discusses with his disciples the end of the world and his coming again).

55. HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 119 (1974).

56. *See, e.g.*, *Psalms* 24:1–2 ("The earth *is* the Lord's and the fullness thereof; the world and they that dwell therein.").

(life on earth); and there will be the end (the second coming of Christ and the end of the world).[57] Native American religious philosophy, on the other hand, is heavily influenced by a cyclical perspective of time.[58] Lakotas believe that the "circle or hoop is one of the really great symbols,"[59] and tipis were made in circles to reflect Native Americans' view of time, space, and nature.[60] The world is seen as a single continuous stream of life, and many Native Americans believe that the spirits of the dead are present on earth and existing in the experiences of ordinary people.[61]

Concepts of time may affect peoples' attitudes toward industrialization. People applying linear concepts of time see process as progress.[62] Thus, progress may be identified with an increase in the number of factories built, products sold, and forests cleared. Also, people viewing time linearly are given a basis to assume a sense of superiority over populations viewing time cyclically, because linear concepts of time are more recent than cyclical concepts, which have ancient origins.[63] Linear-orientated populations may see themselves as moving ahead, while others are moving in circles, and they may classify other populations as Second or Third World.[64]

E. On Individuality

Religion in America is highly individualized; it is seen as the private affair of the individual. Likewise, the Christian attitude dominating our nation when formed was firmly committed to the individual conscience, and this influenced the drafting of a Bill of Rights emphasizing individual freedoms.[65] However, Native Americans emphasize the community; they are more concerned with communal involvement in ceremonies and community relationships.[66]

F. On Substance Use

Most Christian religions preach against substance use, be it the use of alcohol or other drugs, although wine is used in a sacrament in some Christian religions, such as in the Catholic faith. Studies show that in American society

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57. *See, e.g.*, ROY W. BATTENHOUSE, A COMPANION TO THE STUDY OF ST. AUGUSTINE 268 (1955) ("The world does not revolve in eternal cycles but moves onward to a divine goal.").

58. BROWN, *supra* note 19, at 4. For example, in the Algonquins' creation myth, the land is not made out of nothingness, but it is created within a cyclical perspective; the land always existed but was first underneath the sea and was then brought above its surface. *See Id.* at 85–86.

59. ZEILINGER, *supra* note 19, at 62.

60. *Id.* (The sun, moon, and earth are round, and seasons come and go "each one following the other like a great circle.").

61. DELORIA, *supra* note 30, at 81, 108; STEINMETZ, *supra* note 25, at 50. To illustrate, one author tells a story about an old Native American man who related very well to a child. The man was asked how it was that he was able to get along so well with the child. He answered: "The child is a person who has just come from the Great Mysterious, and I who am an old man about to return to the Great Mystery. And so in reality we are very close to each other." BROWN, *supra* note 19, at 120.

62. *See* BROWN, *supra* note 19, at 116–19.

63. *Id.*

64. *Id.*

65. BERMAN, *supra* note 55, at 95. *See also* BLOOM, *supra* note 20, at 15, 26–27 (observing that the American religion emphasizes solitude with God and Jesus Christ).

66. DELORIA, *supra* note 30, at 81.

salience of religion affects substance use, even after controlling for other factors, such as age, gender, income, race, demographic influence, and parental presence or absence.[67] Religiosity predicts the onset of substance use itself (not considering abuse), better than self-esteem, grade-point average, school ability, or student participation in co-curricular or community activities.[68] Conservative Protestants have the lowest use rates, with Catholics having a much higher rate, and liberal Protestants falling somewhere in between.[69]

Indian religions strongly depend "on visions, dreams, and a very exacting and demanding ceremonialism, all of which are primarily concerned with communicating with various spirits and maintaining the natural and cultural orders."[70] All Plains tribal groups stress the importance of a vision quest—a quest to receive one's personal guardian spirit, accomplished with solitary retreat involving fasting and sacrifice.[71] Similarly, the Cherokees in North Carolina to this day practice a vision quest ritual.[72]

Peyotism, however, is probably the most familiar example of the use of drugs in Native American religions. Under this faith, the peyote herb is itself considered sacred.[73] Peyotism initially emerged as a means to help Native Americans deal with the suffering caused by Euro-American abuses; instead of sending a holy person (such as Jesus Christ, Mohammed, or Buddha), the Great Spirit delivered this holy herb, through which users can communicate directly with the Great Spirit and be strengthened.[74] Today, some groups emphasize Christian beliefs in the peyote ceremony, equating peyote with the incarnation of the Holy Ghost; during the ceremony, passages may be read from scriptures in the Christian Bible, especially among Peyotists in the northern plains and

67. Peter L. Benson, *Religion and Substance Use, in* RELIGION AND MENTAL HEALTH 211–18 (John F. Schumaker ed., 1992) (study dealt only with onset of use and not treatment of misuse or religious use).

68. *Id.* at 215.

69. *Id.* at 216. Some posit that the American policy of discouraging substance use evolved in response to the high demands for mind-altering substances created by the stresses resulting from linear concepts of time, a Western philosophy. BROWN, *supra* note 19, at 116–17. Concepts of time and space are central in defining peoples' quality of life. People concerned with linear concepts of time look to the past and future and tend to be distracted from the spirituality of one's being at any given moment. *Id.* Mind-altering substances may be seen as providing relief from the anxieties this philosophy produces and from the declining humanism caused by technological progress. *Id. See also* PETER T. FURST, IN THE MAGIC LAND OF PEYOTE 56 (arguing that "it is the intellectuals, those most sensitive to the anxieties of modern civilization, who are particularly attracted to the drug [LSD]").

70. Deward E. Walker, Jr., *Protection of American Indian Sacred Geography 104, in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM, *supra* note 24, at 100–15.

71. BROWN, *supra* note 19, at 15.

72. The Cherokees in North Carolina seek the vision quest, which involves three days of fasting in the woods with no human contact, followed by a ceremony in which the subject is required to drink a liquid with unspecified hallucinogenic ingredients. Interview with Joe Wolf, proprietor of Native American Craft Shop, Cherokee, North Carolina (Mar. 16, 1995).

73. BRITO, *supra* note 21, at 14–15.

74. It is inaccurate to base protection of Peyotism upon the theory that the religion has been practiced by Native American tribes for thousands of years. Peyotism grew in this country near the end of the nineteenth century when Native Americans were forced onto reservations. OMER C. STEWART, PEYOTE RELIGION: A HISTORY 53 (1987). The Native American Church was formed in 1918 to fight suppression of the Peyotism. *Id.* at 224. While there are reports of Peyotism having been practiced in the sixteenth century in Mexico and southern Texas (the natural growth area for the herb), it spread to the North American tribes beginning in about 1890. *Id.* at 26, 53–61. Thus, the religion has been practiced by Native Americans for approximately 100 years.

western Great Lakes areas.[75]

G. On Universal Truths

Many Christians accept their theory of creation as historical fact. Fundamentalist groups have pushed to have "creation science" taught in high-school biology classes along with the theory of evolution.[76] Christians also rely heavily on dogmas, creed, doctrines, and the written word of the Holy Bible. However, tribal religions do not insist that their version of creation is a historical recording or that it leads to conclusions about man's nature.[77] Most Native American religious traditions have been passed on by word of mouth; "[t]here is no Indian bible written by an Indian...."[78]

In sum, there are inherent conflicts between Christian and Native American faiths, most notably as they relate to the environment. Under Christian teachings, God is identified with a male human form; animals are placed beneath humans on a hierarchical scale; the natural world is considered a place to be controlled and dominated (whether for the sake of industrialization or protection as stewards); and time is viewed linearly, such that process and development are associated with progress. Also, these views are considered universal truths, such that non-adherents may be condemned and considered needy of conversion to achieve salvation.

Native Americans, on the other hand, define the Great Spirit in terms of an indefinable presence that is connected to the natural world; they consider animals and nature as godly, with the natural world reflecting a place full of gods, spirits, and life on an equal, if not superior, level to human beings; they apply a cyclical perspective of time, seeking to maintain a natural order; and they do not expect all peoples to adhere to their views. They also stress community life and involvement, as opposed to individual relations with one's God.

These conflicts provide insight in understanding the difficulties Native Americans have faced in seeking sacred-site protection. Consider, for example, the comments preceding this Article. The officials attempt to analogize sacred sites with churches and to apply Western views of property use and ownership toward those sites. The comment "would you give it to me" misconstrues the nature of Native Americans' sacred site claims, as Native Americans do not claim they are entitled to individually own a sacred site. Similarly, though Christians might not be offended that "the Vatican has a road going through it," this has no bearing on whether Native Americans would be offended by the placement of a road through one of their religious sites. Moreover, one can perceive antagonism and incredulity in these comments, which is likely attributable to beliefs in progress and universal truths.

This culture clash is manifested not only in political or social attitudes, but in our laws as well. The law implicitly embodies the religious premises of the dominant culture, yet those premises often may be at odds with the views held by Native Americans. In the next sections, the traditional Establishment

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75. BRITO, *supra* note 21, at 15.

76. *See also* Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a statute that required "creation science" to be taught along with theories of evolution).

77. *See* DELORIA, *supra* note 30, at 101.

78. SETON & SETON, *supra* note 50, at xv.

Clause rules and the purpose behind the Establishment Clause are discussed. Then, how those rules have applied to Native Americans is explored, looking to history and present-day law.

II. TRADITIONAL ESTABLISHMENT CLAUSE RULES AND THEIR APPLICATION TO NATIVE AMERICAN SACRED SITES

A. An Overview of the Traditional Rules and Purposes Behind the Establishment Clause of the First Amendment

The Supreme Court has eschewed bright-line answers in Establishment Clause cases.[79] There is no single Establishment Clause test.[80] Recently, a majority of the Court has steered away from applying a formula and instead has emphasized the concept of neutrality, most notably in permitting religious organizations to obtain equal access to public fora.[81] But traditionally, the most commonly invoked standard providing guidance in deciding these cases is the three-part test of *Lemon v. Kurtzman*.[82] The *Lemon* test has been widely criticized,[83] even by members of the Supreme Court,[84] but it has nevertheless served as a guiding precedent for over twenty years and in over thirty Supreme Court cases.[85] Supplementing *Lemon*, an equal protection test may be invoked in evaluating denominational preferences,[86] and the courts may defer to the longstanding history of a practice in deciding whether it threatens Establishment Clause principles.[87]

Under *Lemon v. Kurtzman*, for a law challenged under the Establishment Clause to be constitutional, it must (1) have a secular purpose; (2) have primarily a secular effect; and (3) not involve the government in excessive entanglement with religion.[88] To illustrate, in *Lemon*, the Court struck down two laws that authorized state governments to reimburse private schools for the cost of salaries, textbooks, and instructional materials and to pay private schools to supplement teachers' salaries not in excess of fifteen percent.[89] Although the

79. *See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 595 (1989) (each case must be judged in its unique circumstances); Lynch v. Donnelly, 465 U.S. 668, 678–79 (1984) ("The Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'").

80. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2499 (1994) (O'Connor, J., concurring) ("Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test.").

81. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2521–24 (1995) (equal access to school funds for Christian newspaper); Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2447, 2450 (1995) (equal access to Capitol Square for religious display); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (equal access to school facilities for Christian views on child care). *See also Grumet*, 114 S. Ct. at 2487 ("A proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of 'neutrality' toward religion.").

82. 403 U.S. 602 (1971).

83. Lupu, *supra* note 3, at 566 n.29.

84. *See Lamb's Chapel*, 113 S. Ct. at 2149–50 (Scalia & Thomas, JJ., concurring).

85. *See Grumet*, 114 S. Ct. at 2494–95 (Blackmun, J., concurring).

86. *See* Larson v. Valente, 456 U.S. 228, 244–46 (1982).

87. *See* Marsh v. Chambers, 463 U.S. 783, 795 (1983).

88. *Lemon*, 403 U.S. at 612–13.

89. *Id.* at 607.

statutes required that the funds be used for secular purposes, the Court found the surveillance needed to ensure that the funds were properly used would have resulted in excessive entanglement between church and state under the third *Lemon* prong.[90]

Lemon does not proscribe all support for religious-related activities, however. For example, *Everson v. Board of Education of Ewing*[91] has been reconciled with *Lemon*, although in *Everson*, the Court approved a program to reimburse parents for their children's bus fares to attend Catholic schools.[92]

Likewise, property tax exemptions for places of religious worship were upheld in *Walz v. Tax Commission.*[93] There, the Court found that the exemption's purpose was not to sponsor religion but to benefit public-interest groups, to avoid latent dangers inherent in the taxation of religious groups, and to abstain from demanding that the church support the state.[94] Also, in *Walz*, the Court found the exemption *avoided* entanglement that otherwise would be implicated with taxation.[95] And in *Lynch v. Donnelly*,[96] the Court held it was permissible for a city to place a crèche in a park during Christmas season, because the crèche depicted the historical origins of an event recognized as a traditional holiday. In reconciling the display of the crèche with *Lemon*'s purpose prong, the Court held that government action need only have a secular purpose, not an exclusively secular one.[97]

Eleven years after *Lemon*, the Court decided *Larson v. Valente,*[98] and added a new element to the Establishment Clause analysis. There, the Court invoked an equal protection test in applying the Establishment Clause, holding that a law granting a denominational preference is not valid, unless it is supported by a compelling governmental interest and is narrowly tailored to further that interest.[99] More specifically, in *Larson*, the Court struck down a law that required charitable organizations to register and report on their fund-raising activities. The law exempted religious groups that obtained fifty percent or more of their funds from members. The Court found the law on its face created a denominational preference, because it distinguished between member-supported churches (more likely well-established churches), and nonmember-supported churches (more likely newer churches).[100] Furthermore, the Court found this favoritism failed the compelling interest test, because it was speculative to suppose that non-members needed greater protection from abusive fund-raising activities than members.[101]

Although the Court in *Larson* did not expressly apply the *Lemon* three-prong test, after applying an equal protection analysis, the *Larson* Court discussed its concerns for entanglement. For example, once the Court invalidated the record-keeping law, it continued to discuss how the law at issue

90. *Id.* at 620–24.
91. 330 U.S. 1 (1947).
92. *Id.* at 17–18.
93. 397 U.S. 664 (1970).
94. *Id.* at 673–75.
95. *Id.* at 674–75.
96. 465 U.S. 668 (1984).
97. *Id.* at 681 n.6.
98. 456 U.S. 228 (1982).
99. *Id.* at 247–48.
100. *Id.* at 246–47.
101. *Id.* at 251–52.

created a risk of politicizing religion.[102] The Court added that it considered the third *Lemon* prong—the entanglement prong—to be directly implicated, and it reviewed evidence showing that the lawmakers considered how the exemption at issue would affect various religious denominations when they passed the law.[103]

Thus, *Larson* can be viewed as supplementing *Lemon*. It does not necessarily establish an independent test, however, that can be applied without considering *Lemon's* entanglement prong, because *Larson* considered entanglements; lower courts have recognized this.[104] Lower courts, for example, have considered both the equal protection test of *Larson* and entanglement concerns;[105] they have declined to apply *Larson*;[106] and they have incorporated *Larson*'s equal protection approach within the purpose and effects prong of the *Lemon* test, thus retaining entanglement as the third prong of the test.[107] This latter approach seems most reasonable and consistent with Supreme Court precedent;[108] it also is consistent with the Court's pronouncements that evenhandedness is required to uphold a law in the face of an Establishment Clause challenge, but is not necessarily sufficient.[109]

The view that *Larson* does not obviate the need to consider entanglement is reinforced with the Court's most recent denominational preference case, *Board of Education of Kiryas Joel v. Grumet*.[110] In *Grumet*, the Court addressed a law which created a school district along the lines of a village which exclusively housed practitioners of Satmar Hasidim, a strict form of Judaism.[111] The State of New York created the school district for the purpose

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102. *Id.* at 252–254.

103. *Id.* at 252. Notably, Justice Brennan (who authored the *Larson* opinion), five years later commented that the *Lemon* three-part test had been applied consistently in every case except Marsh v. Chambers, 463 U.S. 783 (1983), suggesting that *Larson* should be interpreted as following the *Lemon* test. *See* Edwards v. Aguillard, 482 U.S. 578, 582 n.4 (1987).

104. *See* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 102–03 (1990) ("The Lemon test of the establishment clause is applied to most instances of allegedly disparate treatment of religious groups, while there is very little constitutional case law directly applying the equal protection clause to religious minorities.").

105. *See* Salvation Army v. Department of Community Affairs, 919 F.2d 183, 202 (3d Cir. 1990) (addressing both equal protection and entanglement with respect to regulation of boarding home for the poor; the Salvation Army claimed the regulation resulted in denominational preferences because similar homes run by nuns, priests, and rabbi were not so regulated).

106. Church of Scientology v. City of Clearwater, 2 F.3d 1514, 1536, 1541 (11th Cir. 1993) (finding impermissible entanglement because charitable organization regulations involved close surveillance of all church expenditures and refusing to apply *Larson*); Droz v. Commissioner of IRS, 48 F.3d 1120, 1124 (9th Cir. 1995) (refusing to apply *Larson* to challenged exemption from Social Security regulation for *certain* religious groups where the exemption passed the *Lemon* test).

107. Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1399 (4th Cir. 1990) (applying *Larson* under the effects prong of *Lemon*). *See also Church of Scientology*, 2 F.3d at 1541 (suggesting that *Larson* complements *Lemon*).

108. *See, e.g.*, Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). *See also infra* notes 110–13 and accompanying text.

109. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2541 (Souter, J., dissenting) ("Evenhandedness is therefore a prerequisite to further inquiry into the constitutionality of a doubtful law, but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny").

110. 114 S. Ct. 2481 (1994).

111. 114 S. Ct. at 2485.

of providing educational opportunities to handicapped Satmars within their community, protecting them from having to mingle with children of other faiths.[112] This law benefitted one religious group and, therefore, created a denominational preference. Yet the majority did not apply the compelling interest test of *Larson*. Instead, it emphasized the impropriety of fusing government and religion, and it struck the law down for delegating political power to a religious group which might be exercised to favor that group over others.[113] These are entanglement concerns.

Lastly, in *Marsh v. Chambers*,[114] the Court did not apply *Lemon* at all. Instead, it relied upon the longstanding history of opening legislative sessions with prayer to find that the practice posed no significant danger of eroding government neutrality or threatening the values underlying the Establishment Clause.[115] The prayers preceding the legislative sessions in *Marsh* were recited by a *state-paid* Presbyterian chaplain. Nevertheless, the Court opined that even paying for the prayers was rooted in historical practice.[116] Justifying its reliance upon history, the Court stated that it shed light on what the drafters had intended for the Establishment Clause to mean.[117]

In other cases, the Court has considered historical practice, though not to the exclusion of the remaining *Lemon* factors. For example, in *Walz v. Tax Commission*, the Court relied upon the historical practice of granting tax exemptions for religious groups to find that the exemptions did not connote a sponsorship of religion or result in excessive entanglement between church and state.[118]

Thus, there is no set Establishment Clause standard for all cases, but rather, which approach the Court will take inevitably depends upon the circumstances of the individual case. The *Lemon* three-part test has provided guidance, but an equal protection analysis has also been applied in assessing evenhandedness, and history has been considered in assessing the likely impact of a practice. But whatever standard is applied, the basic purpose served by these Establishment Clause rules is to protect religion from government and government from religion. For example, the Supreme Court has stated that the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government *and to degrade religion.*"[119]

Some commentators might argue that the sole purpose of the Establishment Clause is to assure that all religious denominations are treated equally.[120] Equality among religions is certainly a key aim under the Establishment Clause, as is clear from *Larson*.[121] Neutrality is not, however,

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112. *Id.* at 2495
113. *Id.* at 2487–2492
114. 463 U.S. 783 (1983).
115. *Id.* at 786, 791.
116. *Id.* at 794.
117. *Id.* at 790.
118. 397 U.S. 664, 676–78 (1970).
119. Engel v. Vitale, 370 U.S. 421, 431 (1962) (emphasis added).
120. *See* James McBride, *There is No Separation of God and State: The Christian New Right Perspective on Religion, in* CULTS, CULTURE AND THE LAW 205, 206 (Thomas Robbins et al. eds., 1985).
121. *See* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over

the sole concern. The Supreme Court has rejected denominational pluralism as the intent of the founders.[122] Religion cannot be favored over non-religion, and the government is not permitted to promote or inhibit religion with the only condition being that it does so evenhandedly.[123]

With the Establishment Clause, the framers sought not only to encourage equality among religions but also to protect religion from governmental coercion or influence. The framers supported religion, but they believed the nation would be both more religious and more patriotic if there were a separation between church and state.[124] Indeed, empirical evidence supports the view that a separation between church and state promotes a more religious society; historical evidence shows that in societies involving government-sponsored faiths, religious indifference is more common and there are fewer active preachers than in the United States.[125]

This is not to suggest, however, that there should be no mingling of government and religion, no matter how subtle or indirect.[126] Religion, culture, and law dialectically interact,[127] which can be seen in our laws. American

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another.").

122. *See School Dist. of Abington v. Schempp*, 374 U.S. 203, 216 (1963) ("[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another.").

123. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2540 (1995) (Souter, J., dissenting) (neutrality "does not alone satisfy the requirements of the Establishment Clause, as the Court recognizes when it says that evenhandedness is only a 'significant factor' in certain Establishment Clause analysis [sic], not a dispositive one"); *Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2487 (the government may not favor "religious adherents collectively over nonadherents"). *See also* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 691 (1992) (arguing that linguistically it is improbable that equal protection was intended to apply to the religion clauses).

124. For example, in drafting the Establishment Clause, James Madison, the main author of the Bill of Rights, was concerned with "maintaining the purity and efficacy of Religion." *See* Lee v. Weisman, 505 U.S. 577, 590 (1992) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments (1785), in* 8 PAPERS OF JAMES MADISON 301 (W. Rachal et al. eds., 1973)). George Washington warned that religion and morality are indispensable to political prosperity, and Thomas Jefferson believed that religion is "the alpha and omega of the moral law." *See* Reichley, *supra* note 18, at 4 (quoting Annals of America (Chicago: Encyclopedia Britannica, 1968), vol. 3, 612). These views were like the views of other framers, who believed that "government rests on moral values that spring ultimately from religion." *Id.* at 1, 3. *See also* Edwards v. Aguillard, 482 U.S. 578, 606 (1987) (noting the religiosity of the Founders); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1118 (1994) (discussing Washington's views).

125. *See* FINKE & STARK, *supra* note 5, at 19. There are two economically based reasons why governmental involvement in religion tends to inhibit its development. First, just as monopoly firms can be lazy, government-sponsored religious organizations can be drained of "their 'exertion, their zeal and industry.'" *See id.* at 39 (quoting Adam Smith). Second, religious plurality is needed, because one religion cannot satisfy all people's needs, preferences, and concerns; some people may prefer a religion which is strict, worldly, or exclusive, while others may prefer a religion which is more permissive, unworldly, or inclusive. *id.* at 18. Religion should be permitted to develop to suit people's demands, not to comply with governmental directives. *See id.* at 17 ("[W]here religious affiliation is a matter of choice, religious organizations must compete for members and...the 'invisible hand' of the marketplace is as unforgiving of ineffective religious firms as it is of their commercial counterparts.").

126. *See* William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L. J. 293, 309–10 (1986) (arguing that it is impossible to remove all governmental influence upon religion).

127. *See* BERMAN, *supra* note 55, at 14, 78, 137.

society has always been dominated by Christians,[128] and American law embodies Christian values. The Supreme Court has upheld bans on polygamy,[129] on homosexuality,[130] and on the wearing of yarmulkes in the military,[131] and it has permitted Sunday closing laws[132] and laws promoting Sabbath observance.[133] In each of these cases, the Court's rulings were aligned with Christian values but opposed to minority faiths that might engage in different practices; Native Americans, for example, do not honor Sabbath days.[134]

Not only can a religious influence be seen in the case law, but religion has played a major role in shaping our legislation as well. Christian churches have directly swayed the enactment of thousands, if not tens of thousands, of our laws.[135] Commentators opine that minority faiths will fare worse if forced to rely upon the political process for religious accommodation.[136] Justice Scalia in the majority opinion in *Employment Division of Oregon v. Smith*[137] concluded that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[138]

Thus, our laws implicitly reflect the values of mainstream religions, most notably Christianity. The Establishment Clause does not necessarily proscribe this implicit endorsement, however. Rather, the Supreme Court has held that the advantage a religion receives by reason of laws that "happen to coincide" with its tenets is not considered a benefit for Establishment Clause purposes.[139] Mainstream religions are therefore placed at a relative advantage under generally prevailing law, and this advantage is not considered violative of the Establishment Clause. But what the Establishment Clause proscribes is an official sponsorship of religion. The Clause forbids even the appearance of favoritism toward religion and messages which convey the sense that government is endorsing a religion.[140] A difficulty in Establishment Clause

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128. *See supra* note 18.
129. Reynolds v. United States, 98 U.S. 145 (1878).
130. Bowers v. Hardwick, 478 U.S. 186 (1986).
131. Goldman v. Weinberger, 475 U.S. 503 (1986).
132. Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).
133. Estate of Thornton v. Caldor, 472 U.S. 703 (1985).
134. *See supra* note 22 and accompanying text. *See also* Verna C. Sanchez, *Whose God Is It Anyway?: The Supreme Court, the Orishas, and Grandfather Peyote*, 28 SUFFOLK U. L. REV. 39, 40, 55, 60 (1994) (arguing judges implicitly embody western values of our culture).
135. CARTER, *supra* note 4, at 86 (citing MARK SILK, SPIRITUAL POLITICS: RELIGION AND AMERICA SINCE WORLD WAR II 99–100 (1988)). *See also supra* notes 18, 129–34 and accompanying text.
136. *See* Brownstein, *supra* note 104, at 164 (religious majorities do not need free exercise to protect their beliefs from general laws, but the political process will more likely ignore the religious requirements of lesser known faiths). *See also* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 162 (1986) ("[I]t is impossible to deny that religion plays and has played a major role in shaping the realities of life, culture, and politics."); Marshall & Blomgren, *supra* note 126, at 308–10 (discussing governmental influence upon religion and vice versa).
137. 494 U.S. 872 (1990).
138. *Id.* at 890.
139. *See* Lynch v. Donnelly, 465 U.S. 668, 682 (1984) (noting that it is not a benefit under the Establishment Clause if governmental action "happens to coincide or harmonize with the tenets of some religions").
140. *See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 593–97

jurisprudence inheres in drawing the lines between religious endorsement, religious accommodation, and the harmony that inevitably will persist between law and religion. Although the Establishment Clause probably cannot be applied to avoid all interaction between law and religion, in carrying out the purposes of the Clause, courts can strive to avoid inequalities among religious groups. If a law is at odds with minority faiths, harmonizing the law with those faiths in most cases probably provides no greater benefit to the minority groups than is ordinarily provided to mainstream religions under generally prevailing laws.[141] The accommodation in this instance is more likely directed toward neutrality and equalizing the disparities among religions than it is a sponsorship of a faith.

Additionally, since a chief objective of the Establishment Clause is to ensure that religion can flourish without governmental restrictions,[142] courts can strive to minimize the government's influence upon religious development. Religion, after all, is not static. It changes. New sects are formed, they develop into churches, churches become accultured, new sects break off, and this process follows a cycle of formation, change, and renewal.[143] While this process invariably is influenced by dominant culture and governmental regulation,[144] it is best left to flourish under free market principles, without governmental restrictions or directives.[145]

B. The Establishment Clause as Applied to Native American Sacred Sites

1. A Historical Overview: An Express Interaction Between Law and Religion

The history of our nation's treatment of Native American religions reflects much more than a subtle interaction between law and religion. Rather, this history reflects an express connection between Christianity, the government, and Native Americans. Historically, the government explicitly endorsed and attempted to impose Christianity upon Native Americans, expressing a desire to convert Native Americans to this religion. And a subtle connection has existed as well, affecting property rules and other laws and governmental policies that have had the effect of dispossessing Native Americans of their sacred sites.

Initially, the first hostilities against the Native Americans were justified in the name of Saint Peter and upon the Christian calling to rule the world and convert the "heathens."[146] In the next centuries, the Puritans supported their

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(1989) (holding that the Establishment Clause prohibits the *appearance* of favoritism toward religion and messages which convey the *sense* that government is endorsing religion).

141. *See* Texas Monthly v. Bullock, 489 U.S. 1 (1989) (concluding that religious accommodation is a secular interest that does not offend the Establishment Clause).

142. *See supra* note 119 and accompanying text.

143. *See* FINKE & STARK, *supra* note 5, at 40–43 (discussing the sect-to-church developmental process). *See also* Carmella, *supra* note 23, at 785–86 (discussing the acculturation process and its commonality to religious traditions, as religious bodies continually evaluate the wider society to determine that aspects of the culture should be fostered, appropriated, transformed, tolerated, or rejected).

144. *See supra* notes 126–34 and accompanying text.

145. *See supra* notes 124–25 and accompanying text.

146. In 1513, the Crown of Spain promulgated the *Requerimiento*, a charter that Spanish conquistadors were required to read aloud to any group of newly discovered Indians before

invasion of the American continent on basically the same premise, that is, on "the revealed word of God, in the Bible, ordaining that man occupy the earth, increase, and multiply."[147] And the Calvinists who dominated America in the late eighteenth century had strong beliefs in the individual conscience and in "the duty of Christians to reform the world."[148]

This background laid the groundwork for *Johnson v. M'Intosh*,[149] in which Chief Justice Marshall held that Native Americans possessed only a right of occupancy in their lands that the United States could obliterate at will. In developing this rule (the discovery rule), Justice Marshall noted the Europeans justified their invasion of the continent with the spreading of Christianity.[150] Marshall acknowledged that, as a general rule, when title to land is acquired through force, the conquered shall not be wantonly oppressed; however, he said this theory did not apply to Native Americans, because in his opinion they were "fierce savages" who relied upon the forest for subsistence and who, if left "in possession of their country, w[ould] leave the country a wilderness."[151]

Johnson thus authorized the removal of Native Americans from their homelands, with its underlying premise being the subjugation of so-called heathen peoples for the sake of civilization and Christianity.[152] *Johnson* applied linear perspectives of time, which translated to an attitude of superiority over a population living in non-industrialized conditions.[153] Moreover, Marshall's reasoning suggests that wilderness is an undesirable state, following a Western perspective that the environment should be controlled and dominated.[154]

During the century following *Johnson*, Native Americans lost possession of many sacred sites when forced onto reservations,[155] though this action was

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commencing hostilities. It read, in part:

> Of all these nations God our lord gave...St. Peter...the world for his kingdom and jurisdiction.... [W]e ask and require that you...acknowledge the Church as the ruler and superior of the whole world.... But if you do not do this,...with the help of God we shall forcefully enter into your country and shall make war against you in all ways...that we can....

DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW, CASES AND MATERIALS 48–49 (1993) (citing The Requerimiento, *reprinted in* THE SPANISH TRADITION IN AMERICA 58–60 (Charles Gibson ed., 1968)).

147. *See id.* at 58 (quoting Chester E. Eisinger, *The Puritans' Justification for Taking the Land*, 84 ESSEX INST. HIST. COLLECTIONS 181, 135–43 (1948)).

148. BERMAN, *supra* note 55, at 66.

149. 21 U.S. 543 (1823).

150. *See id.* at 573 ("[T]he character and religion of [the Indians] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity.").

151. *Id.* at 590.

152. *Accord* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993) ("[T]he justifications for colonization...recognized by the Supreme Court [involved]...impos[ing] Christianity upon the heathen, to make more productive use of natural resources, and so on."); Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 308 (1993) ("[T]he Christian subjugation of non-Christian peoples is the underlying premise of the *Johnson v. McIntosh* ruling.").

153. *See supra* notes 57–64 and accompanying text.

154. *See supra* notes 44–55 and accompanying text.

155. Barbara S. Falcone, *Legal Protections (or the Lack Thereof) of American Indian Sacred Religious Sites*, 41 FED. B. NEWS & J. 568, 570 (1994).

not viewed as religious persecution. Instead, missionaries considered it their religious duty to "elevate" Native Americans through education and conversion to Christianity,[156] and they professed that Native Americans had to be isolated from whites to become christianized.[157] Some reservations were managed by Christian groups.[158] Reservations became a training ground for Native Americans, with a principal aim being their conversion to Christianity.[159] Native American children were removed from their homes, forced to attend church services, and sent to Christian boarding schools supported with federal funds and staffed with teachers supplied by Christian groups.[160]

Christian groups also became directly involved in developing national policy regarding Native Americans, particularly in the late nineteenth century. While opposing a military rule over Native Americans, church groups convinced President Ulysses S. Grant to implement a peace policy in 1869 in which they played a major role. Under this policy, a Board of Indian Commissioners was established and staffed by persons nominated by major churches,[161] and the Commission was involved in setting national policy.[162] These officials urged the federal government to educate and "civilize" the Native Americans, including converting them to Christianity.[163]

During the period from 1880 to 1930, it was express governmental policy to prohibit the practice of Native American religions.[164] In 1882, Interior Secretary Henry Teller banned all "heathenish dances" and other Native American ceremonies due to their "great hindrance to civilization."[165] A

156. LAWRENCE C. KELLY, FEDERAL INDIAN POLICY 9, 14 (1990).

157. The supporters of the removal policy argued that "only if the Indians were removed beyond contact with whites could the slow process of education, civilization, and Christianization take place." GETCHES ET AL., *supra* note 146, at 125 (quoting FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834, at 244–48 (1962)).

158. In 1869, President Grant gave management of some reservations to Quaker groups which had a relatively free reign in directing the work for a full decade. ERROL T. ELLIOT, QUAKERS ON THE AMERICAN FRONTIER 249 (1969).

159. Falcone, *supra* note 155, at 570. *See also* United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("[T]he reservation...is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.").

160. KELLY, *supra* note 156, at 79–80; Russell L. Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 371 (1986). *See also* JAMES A. SWAN, SACRED PLACES: HOW THE LIVING EARTH SEEKS OUR FRIENDSHIP 126 (1990) ("Many, many Indian children were taken away from their homes in the 1800s and early 1900s and led to believe that their old ways were evil. Floyd Westerman, a Sisseton-Wapeton Lakota, talks about how, when he was growing up in a white school, he was told that if he got caught speaking Lakota, his head would be cut off.").

161. *See* KELLY, *supra* note 156, at 79–80. In 1869, President Grant wrote to various Quaker groups, stating that "any attempt...for the improvement, education and Christianization of the Indians...will receive from him, as President, all the encouragement and protection which the laws of the United States will warrant him in giving." ELLIOT, *supra* note 158, at 248–49 (quoting letter from Headquarters, Army of the United States, Washington, D.C., to Quaker groups (Feb. 15, 1869)).

162. Though initially the purpose of the Commission was to ensure Native Americans received their treaty provisions, it ultimately guided federal Indian policy. KELLY, *supra* note 156, at 65.

163. *Id.* at 64–65.

164. *See* Barsh, *supra* note 160, at 369–72 (reviewing federal denouncements and restrictions on Native American religious practices).

165. *See* Sharon O'Brien, *A Legal Analysis of the American Indian Religious Freedom Act*, *in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM, *supra* note 24, at 28.

Court and Code of Indian Offenses were established, through which Native American dances, ceremonies, plural marriage, and use of intoxicants were outlawed.[166] Native Americans could be imprisoned if found participating in their traditional rituals, and males were required to cut their braids.[167]

These express bans against Native American religious practices were not repealed until the 1930s, when John Collier became Commissioner of Indian Affairs. Yet Christian groups continued to separate Native Americans from their traditional sacred practices long after the bans were lifted.[168] They have since acknowledged the historical role they played in stifling Native American religious traditions. In 1987, representatives of nine Pacific Northwest Christian Churches delivered a letter of apology to a delegation of regional Native Americans, stating:

> This is a formal apology on behalf of our churches for their longstanding participation in the destruction of traditional Native American spiritual practices. We call upon our people for recognition of and respect for your traditional ways of life and for protection of your sacred places and ceremonial objects. We have frequently been unconscious and insensitive and have not come to your aid when you have been victimized by federal policies and practices. In many other circumstances we reflected the rampant racism and prejudice of the dominant culture with which we too willingly identified. During the 200th Anniversary year of the United States Constitution we, as leaders of our churches in the Pacific Northwest, extend our apology.[169]

This apology was preceded by a Congressional recognition of religious persecution. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), providing that after August 11, 1978, "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions...."[170] The statute was based on express findings that there had been a history of intolerance toward Native American religions, particularly with regard to denying access to sacred sites, restricting the use of peyote, and interfering with religious events.[171]

With AIRFA's passage, President Carter appointed a task force to review federal policies and issue recommendations for change. In August 1979, the task force submitted its report to Congress, making five legislative proposals, recommending eleven changes in federal policy, and identifying 522 instances

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166. *See* Omer C. Stewart, *Peyote and the Law, in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM, *supra* note 24, at 44.

167. *See id. See also* Falcone, *supra* note 155, at 570 (noting that in 1883, the BIA criminalized native religious practices and ceremonials, including the Sundance, the Potlatch, and the practices of medicine men; these were classified as "heathenish dances and ceremonies" which were called "barbarous" and a hindrance to civilization); Robert J. Miller, Note, *Correcting Supreme Court "Errors": American Indian Response to* Lyng v. Northwest Indian Cemetery Protective Ass'n, 20 ENVTL. L. 1037, 1039 (1990) (noting bans on hair length and ceremonials) (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 175–76 (1942)).

168. Falcone, *supra* note 155, at 571.

169. SWAN, *supra* note 160, at 163–64 (reproducing letter from Christian religious leaders to tribal councils and traditional spiritual leaders of the Indian and Eskimo peoples of the Pacific Northwest (Nov. 21, 1987)).

170. 42 U.S.C. § 1996 (1978).

171. *See* S. REP. NO. 709, 95th Cong., 2d Sess. 2–4 (1978); H.R. REP. NO. 1308, 95th Cong., 2d Sess. 2–3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1262, 1263–64.

where government infringed upon Native American religious practices.[172] The report had little impact, however.[173]

Historically, therefore, the Establishment Clause's proscription against government-sponsored religion was not honored for Native Americans. Government funds historically have been used to seek to convert Native Americans to Christianity, and Western views on property ownership and control were invoked to divest Native Americans of their sacred sites. The religious persecution, while being imposed, was not considered a threat to religious freedom; Western ideas of religion were invoked to characterize Native American beliefs as non-religious and primitive. Native Americans, though deeply religious, were considered heathens for following markedly different religious tenets. Additionally, in passing AIRFA, Congress found it appropriate to recognize the history of religious persecution and single out Native American religions for special treatment, a step that has not been taken with regard to other religious groups.

2. Present-Day Establishment Clause Jurisprudence on Sacred Sites

After AIRFA was passed in 1978, Native American groups brought a series of actions seeking to gain access to sacred sites and protect them from development. In these actions, claims were invoked under both AIRFA and the Free Exercise Clause to the First Amendment. For example, in *Sequoyah v. Tennessee Valley Authority*,[174] Cherokees sought to enjoin the construction of the Tellico Dam on the Little Tennessee River, claiming the dam would flood sacred homelands. In *Badoni v. Higginson*,[175] the Navajo sought to order the government to lower a reservoir that partially flooded the Rainbow Bridge National Monument, a sacred site; to issue regulations controlling tourist behavior at the monument; and to temporarily close the monument to the public, on notice, for religious ceremonies. And in *Wilson v. Block*,[176] Navajo and Hopi Indians sought to enjoin the clearing of fifty acres of forest for expanding a ski resort in the Coconino National Forest.[177]

In these actions, Native Americans were unsuccessful. Little was said about the Establishment Clause, because the courts found the plaintiffs could not overcome the compelling interest test of the Free Exercise Clause. Ordinarily, to establish a First Amendment free-exercise claim, a claimant must show that the government action being challenged places a substantial burden on the practice of his or her religion. Once a substantial burden is proved, the

172. *See id.* at 572. *See also* 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, 155–56 (1994).

173. Hooker, *supra* note 172, at 156 (noting that as of 1993, only one recommendation had been implemented: "the Native American Graves Protection and Repatriation Act regarding the theft and interstate transport of sacred objects").

174. 620 F.2d 1159, 1162 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

175. 638 F.2d 172, 175–76 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

176. 708 F.2d 735 (D.C. Cir. 1982).

177. *Id.* at 738. *See also* Crow v. Gullet, 541 F. Supp. 785, 791 (D.S.D. 1982) (Hopi tribe sought to protect the Bear Butte State Park from the construction of roads, parking lots, and bridges); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 185 (D. Alaska 1982) (Inupiat people of Alaska's north slope sought to quiet title in portions of the Beaufort and Chukchi seas), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985).

government must establish that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest.[178]

In the sacred-site cases, however, the substantial burden standard was heightened.[179] Courts required Native Americans to come forward with factual proof that the sites were *central* and *indispensable* to their religions, that is, that their religions could not be practiced without them.[180] However, as applied to Western religions, the centrality test had been rejected,[181] and claimants were protected from even indirect burdens on their religious practices.[182] Some courts rejected the sacred-site claims summarily, stating that free exercise rights could never supersede the government's interest in land management.[183] And in *Badoni*, the court did not decide whether there was a substantial burden on a religious practice, because it found the government had a compelling interest in the dam construction at issue.[184]

Since Native Americans' free-exercise claims were rejected, the Establishment Clause was neither determinative nor a focus of the courts' analyses.[185] Some courts referred to it, nonetheless. In *Wilson*, the court suggested (without deciding) that if it had accepted the free exercise claim, the Establishment Clause would not pose a bar, because the Establishment Clause cannot bar relief that is required under the Free Exercise Clause.[186] Conversely, however, other courts commented that the Establishment Clause provided an additional basis to deny sacred-site protection. These courts opined that protecting sacred sites or regulating the public's use of them would be analogous to the government erecting a religious shrine in violation of the

178. The compelling interest test for First Amendment claims has now been codified under the Religious Freedom Restoration Act. *See* 42 U.S.C. § 2000bb(a)(3) (1993).

179. *See* Scott Hardt, Comment, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601, 657 (1989) ("[P]ersons practicing Western religious traditions are protected from even relatively minor burdens on their religious practices, while American Indians are not protected from government actions that essentially destroy entire religious traditions.").

180. *See, e.g.*, *Wilson*, 708 F.2d at 744; Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

181. *See* Hernandez v. Commissioner, 490 U.S. 680, 698–99 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 714–16 (1981) (though the state supreme court found plaintiff was seeking protection for "personal philosophical" reasons, the court reversed, stating it is not within the judicial function to question his beliefs; "[c]ourts are not arbiters of scriptural interpretation").

182. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 410 (1963) (state must modify unemployment compensation system to accommodate needs of Seventh Day Adventist who was opposed on religious grounds to working on Saturdays); *Thomas*, 450 U.S. at 717 (Jehovah's Witness entitled to unemployment compensation though he quit his job on the ground that his religious beliefs prohibited him from working on a weapon's production line).

183. *See, e.g.*, Crow v. Gullet, 541 F. Supp. 785, 791 (D.S.D. 1982); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 189 (D. Alaska 1982).

184. Badoni v. Higginson, 638 F.2d 172, 177 n.4 (10th Cir. 1980).

185. *See, e.g.*, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (not mentioning the Establishment Clause). *See also* United States v. Means, 858 F.2d 404, 407–08 n.6 (8th Cir. 1988) (in a footnote the court suggested that the grant of a special use permit to Native Americans for the religious use of the Black Hills would raise Establishment Clause issues, but it declined to resolve those issues as the permit request was denied).

186. Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983).

Establishment Clause.[187] The *Lemon* three-part test was not applied in any of these cases.

Despite the stringent barriers that were imposed on Native Americans' free-exercise claims, in *Lyng v. Northwest Cemetery Protective Association*,[188] centrality and indispensability were shown, and Native Americans initially achieved some success with the lower courts. In *Lyng*, the government had planned on constructing a six-mile road cutting through a National Forest in northwestern California. The Forest Service's expert recommended that no road be built, because the area was indispensable to the religious practices of three Native American tribes, and the road construction would "cause serious and irreparable damage to the sacred areas."[189] Nonetheless, the Forest Service rejected that recommendation, and it also rejected alternative routes for the road that would have avoided the sacred areas.[190]

The district court in *Lyng* issued an injunction against the road construction. The Ninth Circuit Court of Appeals affirmed, holding that the road construction did not further a compelling state interest and would violate the tribes' free-exercise rights. Further, the Ninth Circuit opined that abandoning the road project would not create a religious preserve in violation of the Establishment Clause, but it would simply preserve the land in its natural state.[191]

The Supreme Court reversed, basing its analysis on the Free Exercise Clause. The *Lyng* majority acknowledged that it had previously scrutinized indirect burdens on the practice of religion, such as the denial of employment benefits for refusing to work on one's Sabbath.[192] It distinguished those cases, however, on the reasoning that they involved governmental coercion. The First Amendment, the Court said, involves "'what the government cannot do to the individual, not...what the individual can exact from the government.'"[193] The Court held that even if the road would destroy the tribes' religion, it did not constitute a burden on their religion in the constitutional sense, because it did not "coerce" the tribes into violating their religious tenets.[194]

In rejecting the tribes' claim, the Court also stressed that the government has the prerogative to decide what to do with its own land. It expressed a fear that recognizing the claim could give rise to extended religious servitudes on government property.[195] With regard to claims that had been asserted under AIRFA, the Court held that the Act reflects only a policy statement and does

187. *See Badoni*, 638 F.2d at 178–79; *Inupiat*, 548 F. Supp. at 189; *Crow*, 541 F. Supp. at 794.

188. 485 U.S. 439 (1988).

189. *Id.* at 442. As the dissenting Justices noted, the road was "marginally useful" and would have rendered it impossible for these Native Americans to practice their religions. *Id.* at 477 (Brennan, Marshall, Blackmun, JJ., dissenting).

190. *Id.* at 443.

191. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 586 (9th Cir. 1985) (rejecting Establishment Clause barrier out of hand on the reasoning that preservation of land in its natural state is not an endorsement or advancement of religion but a position of neutrality), *rev'd sub nom. on other grounds*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).

192. 485 U.S. at 450.

193. *Id.* (quoting *S*herbert v. Verner, 374 U.S. 398, 412 (1963) (Douglass, J., concurring)).

194. *Id.* at 452.

195. *Id.* at 452–53.

not confer rights or create a cause of action.[196] No mention was made of the Establishment Clause.

Since the *Lyng* majority stressed governmental interests in land management, the case could be interpreted to mean that the First Amendment cannot be invoked to challenge the government's use of real property. Indeed, this interpretation of *Lyng* was expressed when the Religious Freedom Restoration Act (RFRA) was passed in November 1993.[197] In particular, in the Senate Report leading to RFRA, Native American free-exercise claims were singled out for special treatment.[198] Through the report, Congress was assured that RFRA would not create a cause of action on behalf of Native Americans seeking to protect sacred sites. The Senate Report stated that RFRA would not overrule *Lyng* and that, under *Lyng*, "strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources."[199]

Thus, under Supreme Court precedent and now under RFRA, sacred-site claims have been resolved with the proposition that government land use cannot be challenged under the Free Exercise Clause. The Establishment Clause has not been a principal issue, since no religious benefits have been granted.

This approach does not accommodate Native Americans' reverence for sacred sites, but it is consistent with Western views on religion and the environment. Under Western thought, people have control and dominion over the environment, not vice versa, and process and development are seen as progress.[200] Under these views, preserving land is not a religious act, but rather, developing land is more consistent with religious dogma than preserving it. Thus, Western views toward religion and property management have been invoked in determining that desecrating a site is not a burden on religion under the Free Exercise Clause. By the same token, then, Western views on religion and property management should be applied to determine that preserving land in its natural state is not a benefit to religion under the Establishment Clause.

In this vein, commentators have argued for an interpretation of the Establishment Clause that would reflect Western views on religion and maintain consistency in applying the Religion Clauses to sacred-site claims. In particular, they have urged that sacred-site protection reflects secular interests in land

196. *Id.* at 455. In reaching this holding, the Court reiterated statements that had been made by Senator Udall, the bill's sponsor, in urging the bill's passage; in particular, Senator Udall had stated that the bill did not "confer special religious rights on Indians" and "has no teeth in it." *Id.* (citing 124 CONG. REC. 21,444–21,445 (1978)).

197. Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified at 5 U.S.C. 504, scattered sections of 42 U.S.C.) (1993).

198. S. REP. NO. 111, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 n.19. RFRA was passed in response to Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990), a case involving the use of peyote in Native American religious ceremonies. The Act expressly criticizes *Smith* as having "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4) (1993). Nonetheless, the Senate Report applauded Justice O'Connor's concurrence in *Smith* in which she opined that states have a compelling interest in regulating peyote use which overrides Native American free-exercise claims. 1993 U.S.C.C.A.N. at 1896. The report also cited *Lyng* as a pre-*Smith* case unaffected by RFRA. *Id.* at 1898 n.19.

199. 1993 U.S.C.C.A.N. at 1898.

200. *See supra* notes 44–55, 62–64, and accompanying text.

preservation, cultural diversity, and religious accommodation,[201] the latter being a secular interest under Supreme Court precedent.[202] Additionally, protecting sacred sites addresses a long history of religious persecution—persecution which both Congress and religious groups have acknowledged and which has had the direct result of dispossessing Native Americans of their sacred lands.[203]

Under *Lynch*, only a secular interest is needed to pass the *Lemon* purpose and effects prong, not an exclusively secular interest.[204] Considering that the Supreme Court could perceive a secular and historical interest in the display of a crèche,[205] the secular interests advanced in support of sacred-site protection should be considered amply sufficient to withstand an Establishment Clause challenge. Furthermore, as commentators have argued, protecting sacred sites for everyone does not result in excessive entanglement between church and state, because all it does is grant access to a public forum and maintain the status quo.[206] Therefore, there is no Establishment Clause problem applying the traditional *Lemon v. Kurtzman*[207] three-part test.[208]

Besides looking to secular purposes in land preservation, deference could be given to the longstanding history of preserving these lands to find that continued preservation does not threaten the values underlying the Establishment Clause.[209] Undeveloped sites historically have existed in their natural states without threatening religious establishment. Most Americans upon

201. Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19, 52 (1993); Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. REV. L. & SOC. CHANGE 373, 395–397 (1993); Robert C. Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 814 (1992); Barsh, *supra* note 160, at 377; Kristen L. Boyles, Note, *Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act*, 76 CORNELL L. REV. 1117, 1144–48 (1991); Donald Falk, Note, Lyng v. Northwest Indian Cemetery Protective Ass'n: *Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 ECOLOGY L.Q. 515 (1989).

202. *See* Texas Monthly v. Bullock, 489 U.S. 1 (1989).

203. *See supra* notes 151–71 and accompanying text.

204. Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984).

205. *See id.*

206. *See generally supra* note 200.

207. 403 U.S. 602 (1971).

208. *See id.* at 612–13; *see also supra* notes 88–97 and accompanying text. Some commentators nonetheless liken Native Americans' *exclusive* use of sacred sites to Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). There, the Court held that a church cannot have veto power over the decision to issue a liquor license in its neighborhood. *See* Ward, *supra* note 200, at 814; Boyles, *supra* note 200, at 1146–48. However, the decision to issue a liquor license is more permanent than temporarily allowing Native Americans exclusive access to public fora, and it also does not involve countervailing free-speech and free-exercise rights. Native Americans' use of sacred sites is more analogous to granting users of public fora the freedom to associate with whom they choose and exclude undesirable messages. *See* New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 368 (S.D.N.Y. 1993) (city violated free speech rights of Hibernians by ordering them to include homosexual group within their parade down Fifth Avenue, New York, because "compelled access...both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"). *See also* Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989) (arguing Native Americans should have the inherent right to the undisturbed use of sacred sites).

209. *Cf.* Marsh v. Chambers, 463 U.S. 783, 795 (1983), discussed *supra* at notes 114–17.

seeing preserved park land probably do not conclude that the government is endorsing a religion, but rather, they likely conclude that the government is preserving land for secular environmental reasons. Moreover, Congress in the past has set aside park land for Native Americans, expressly stating the land could be used for religious purposes,[210] and every Indian reservation is, in effect, a government-supported enclave through which Native American culture and religion are preserved.[211]

Furthermore, there is a secular and historical interest in preserving sites that traditionally have been religiously significant to our indigenous peoples. Even Christian churches have received governmental protection from development, though from a Western perspective, a church is a more prominent religious symbol than undeveloped land. There are a number of National Historic Parks that have included Christian churches, including the St. Paul's National Historic Site in Mount Vernon, New York; the Old Swedes' Church National Historic Site in Philadelphia, Pennsylvania; and the Christ Church in Boston, Massachusetts, an active Episcopal Church.[212]

Thus, the traditional Establishment Clause rules should not bar sacred-site protection, provided consistency is maintained in defining what is a religious benefit under both Religion Clauses. Even if the religious nature of preserving sacred sites were acknowledged, the Establishment Clause should not pose an absolute bar to protecting them in all cases. Blanket rules have not been invoked under the Establishment Clause,[213] and the Supreme Court has held that religious accommodation is a secular interest that does not offend the Establishment Clause.[214]

In other words, there are two approaches that could be taken in protecting Native American sacred sites under traditional rules. On the one hand, Western views on religion and the environment could be invoked under both Religion Clauses, affording no free-exercise claims but also raising no Establishment Clause barrier. Alternatively, the religious nature of preserving sacred sites could be recognized, in which case Native Americans would be permitted to challenge government land-management decisions under the First Amendment, and Establishment Clause concerns would be addressed on a case-

210. *See* Hooker, *supra* note 172, at 139–40 (discussing congressional action setting aside in trust for the Indians 48,000 acres surrounding the Blue Lake in the Carson National Forest; 185,000 acres in the Grand Canyon National Park; and the El Malpais lava flows in New Mexico).

211. The Establishment Clause does not apply on Indian reservations, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (citing Talton v. Mayes, 163 U.S. 376 (1896)), and most reservation land is owned by the government and held in trust for the tribes. In 1968, Congress enacted the Indian Civil Rights Act, requiring that the tribes provide basic constitutional guarantees to their members, but the Establishment Clause was excluded from the Act. 25 U.S.C. § 1302 (1968).

212. *See* NATIONAL PARK FOUND., THE COMPLETE GUIDE TO THE NATIONAL PARKS 161–62, 228, 262 (Prentice Hall Trade 1990–91). *See also* Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers*, 24 N.M. L. REV. 331, 339–42 n.45 (1994) (noting that various Christian religious facilities are owned and operated by the National Park Service, including the Old Swedes Church, the St. Joseph's Roman Catholic Church in Philadelphia, and chapels in the Grand Canyon, Yellowstone, and Yosemite National Parks).

213. *See supra* notes 80–119 and accompanying text.

214. Texas Monthly v. Bullock, 489 U.S. 1 (1989). *See also* Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1982) (noting in discussing a sacred site claim that where government action violates free exercise, the Establishment Clause poses no bar to judicial relief).

by-case basis, allowing some accommodation. But whichever of these two approaches is invoked, consistency should be maintained. 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. Different views on what is a burden on (or benefit to) religion should not be applied at the same time. To do so is to apply a double-edged sword to Native American claims for religious protection, with the inevitable result being denial of religious freedom for Native Americans.

Moreover, recognized sacred-site claims should not impose a significantly greater burden upon the government than other free-exercise claims. Sacred-site claims have been rejected on the ground that government resources cannot be tapped to accommodate religion, but government resources have been available to other groups for both secular and religious purposes. For example, the Supreme Court recently held that state university funds must be made equally available to all, even if that means the government is providing financial support for the publication of a Christian newspaper.[215] Tax exemptions for religious organizations have been in place for more than 200 years, which have the same financial effect as direct monetary subsidies. Whenever the government exempts activity from regulation because of its religious nature, it extends a benefit to religion,[216] as regulatory benefits can be as financially rewarding as more tangible benefits. Yet religious groups have been afforded regulatory benefits, such as exemptions from the laws against discrimination.[217] As a further illustration, since 1921, the Forest Service has granted a special use permit to the United Church of Christ, enabling it to use twelve acres of land in the Black Hills National Forest for a religious camp with five to eighteen structures on the site.[218] While the Eighth Circuit excused this use by opining that the permit would not have been granted today,[219] in 1980 the permit was renewed for an additional twenty-year period.[220]

Moreover, courts have enforced free exercise claims, as codified through RFRA, to enjoin enforcement (or require modification) of public health and safety laws, such as public school regulations prohibiting the carrying of knives;[221] state law requiring recitation of a loyalty oath as a condition to public employment;[222] and prison regulations regarding hair length,[223] head coverings,[224] and strip searches.[225] RFRA has been applied to

215. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995).

216. *See* Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346–47 (1987) (O'Connor, J., concurring).

217. *Id.*

218. *See* United States v. Means, 627 F. Supp. 247, 267 (D.S.D. 1985), *rev'd*, 858 F.2d 404 (8th Cir. 1988), *cert. denied*, 492 U.S. 910 (1989).

219. *Means*, 858 F.2d at 409 n.9, 410 n.12.

220. *Means*, 627 F. Supp. at 267.

221. *See* Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) (affirming district court's decision to grant a preliminary injunction against enforcement of a no-knives policy for Khalso Sikhas school children who wanted to wear ceremonial knives called kirpans to school).

222. *See* Bessard v. California Community Colleges, 867 F. Supp. 1454 (E.D. Cal. 1994) (ruling favored Jehovah's Witnesses whose religion prohibited swearing an allegiance to any entity other than God).

223. *See* Hamilton v. Schriro, 863 F. Supp. 1019 (W.D. Mo. 1994), *rev'd*, 74 F.3d 1545 (8th Cir. 1996), *cert. denied*, 1996 WL 395698 (U.S. Oct. 7, 1996). *See also* Hebrans v. Coombe, 890 F. Supp. 227 (S.D.N.Y. 1995) (Hasidic Jew inmate who settled claim regarding

modify zoning regulations requiring permits for homeless or feeding shelters[226] and to accommodate prisoners (who are offered church services), though the federal prisons are owned and operated by the federal government. All these cases involve, directly or indirectly, the use of government resources.

In comparison, for the most part, sacred-site legislation would enable Native Americans to access National Park land, perhaps undisturbed by tourists, and to have their free-exercise rights considered and preserved to the extent feasible when the government undertakes land-management decisions. The latest sacred-site bill (S. 2269), would have provided limited protection to Native American sacred sites from adverse impact by federal activities, and it would have established standards and administrative procedures for resolving access and federal land-management issues.[227] Even if one ignored that Native Americans were dispossessed of their sacred lands when forced onto reservations, the request for sacred-site protection is not substantively more burdensome than that already provided to other groups.

Perhaps a fear inhibiting sacred-site protection is that, if granted, too many people would assert free-exercise claims for the purpose of laying stake to government property, thus crippling the government. But this fear is unfounded. Any First Amendment claim would be subject to the compelling interest test. The government could not be crippled: to act it would only need a compelling interest.[228] Also, under traditional rules, centrality is not an issue, but courts could look to the historical reverence given a site and its connection to Native American heritage in determining whether a religious practice is bizarre.[229] Presently used sacred sites have been field-verified,[230] and site lists

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facial hair length entitled to attorneys' fees of $55,540.36). *But see* Phipps v. Parker, 879 F. Supp. 734 (W.D. Ky. 1995) (rejecting claim by Hasidic Jew who was forced to receive a short haircut while in a segregation unit).

224. *See* Luckette v. Lewis, 883 F. Supp. 471 (D. Ariz. 1995) (inmate belonging to the Freedom Church of Revelation entitled to wear a headcovering). *See also* Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994); Lawson v. Dagger, 844 F. Supp. 1538 (S.D. Fla. 1994), *rev'd*, 85 F.3d 502 (11th Cir. 1996).

225. *See* Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994). Yet under RFRA's legislative history, the states' interest in regulating peyote use is considered more compelling to override Native American's freedom of religion, though at least 28 states have exempted religious peyote use from their controlled dangerous substance laws. *See* H.R. REP. NO. 675, 103d Cong., 2d Sess. 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2404.

226. *See* Western Presbyterian Church v. Board of Zoning Adj., 862 F. Supp. 538 (D.D.C. 1994) (enjoining enforcement of ordinance against a Presbyterian Church which would have required that the church obtain a variance for a homeless feeding program). *But see* Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995) (dismissing RFRA claim of plaintiff who was denied a permit to operate a food bank and homeless shelter). Before RFRA was passed, First Amendment challenges to land-use laws were generally unsuccessful. *See* New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (reversing district court's decision to enjoin enforcement of law requiring local public schools to approve private schools in their jurisdiction), *cert. denied*, 494 U.S. 1066 (1990); Salvation Army v. Department of Community Affairs, 919 F.2d 183 (3d Cir. 1990) (refusing to enjoin enforcement of licensing regulations for a religiously motivated boarding home under the First Amendment free-exercise clause).

227. S. REP. NO. 411, 103d Cong. 2d Sess. (1994).

228. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172, 176–77 (10th Cir. 1980).

229. *See* Church of Lukumi Babalu Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("Given the historical association between animal sacrifice and religious worship,...petitioners' assertion that animal sacrifice is an integral part of their religion 'cannot be considered bizarre'.") (citing Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 n.2 (1989)).

230. *See* Walker, *supra* note 70, at 108–110 (identifying 30 sacred sites and noting that

or other objective or historical evidence could be consulted in determining whether a claim has been asserted in bad faith.

Moreover, the fear of excessive claims would not arise if sacred-site protection were granted by statute, as Congress could designate specific sites for protection.[231] If sacred sites were valued in our dominant culture to the same degree as they are valued in Native American culture, an abundance of claims would not be a fear. The government, for example, grants special use permits allowing development on national park land for other purposes, such as creating ski resorts,[232] though not all would agree that this is the most desirable use for national park land.

In short, it seems apparent that the unavailability of sacred-site protection is not the product of an unwavering application of general rules under the Religion Clauses. Instead, this failure has resulted from the application of inconsistent standards in deciding Native Americans' sacred-site claims, with Western views on religion being applied under the Free Exercise Clause, and Native American views being invoked under the Establishment Clause. Moreover, the lack of sacred-site protection is not due to a uniform rule that resources cannot be used to accommodate religion, as resources are available to accommodate other groups. Rather, this is the product of a culture clash.

This culture clash is evident not only from the inconsistent treatment given to sacred-site claims, but also from the type of protection Native Americans have received. Notably, Native Americans have had greater success in protecting religious practices that involve the use of animal parts, such as eagle feathers. The Department of the Interior has a detailed set of regulations by which Native Americans wishing to receive eagle parts and feathers for religious purposes can apply to receive them from a depository.[233] These religious benefits are consistent with Western views that man is superior to animals and controls and dominates the earth.[234] However, Native Americans have had less success with regard to sacred sites, as in this instance, there is a conflict between Native American and Christian views on the natural world, land management, property ownership, and time and space (the meaning of "progress").[235] Those embracing Western perspectives may have difficulty identifying with the religious nature of sacred sites.

In comparison, peyote use has now received protection through AIRFA Amendments. Though the use of drugs may conflict with the values of Christian

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the existence of 300 sites had been confirmed by on-site inspections).

231. Over the past 10 years, various bills have been introduced to provide sacred-site protection through AIRFA Amendments or separate legislation. None was successful. *See* S. 2269, 103d Cong., 2d Sess. (1994); S. 1021, 103d Cong., 1st Sess. (1993); S. 1124, 101st Cong., 1st Sess. (1989); S. 2250, 100th Cong., 2d Sess. (1988). *See also* Simpson, *supra* note 200, at 22 (discussing S. 1021 as the fifth attempt in as many years to provide sacred site protection).

232. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 756 (D.C. Cir. 1983).

233. *See* 50 C.F.R. § 22.22 (1984). However, under the depository for eagle feathers, it can take up to two years to fill requests, and one court has concluded it is "unnecessarily intrusive and hostile to religious privacy." United States v. Abeyta, 632 F. Supp. 1301 1304 (D.N.M. 1986) (dismissing charges of violating the Bald and Golden Eagle Protection Act for possession of golden eagle carcass for religious purposes). *See also* Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (dismissing charges for the taking of a moose out of season on religious grounds).

234. *See supra* notes 44–47 and accompanying text.

235. *See generally supra* notes 44–64 and accompanying text.

groups, perhaps peyote use can be understood through association with the Holy Eucharist. Also, the ingestion of peyote, while performed in a ceremony, is an individual act, which may seem familiar to the dominant culture which views religion as an affair between the individual and God.

III. A MODIFIED ESTABLISHMENT CLAUSE ANALYSIS AS A MEANS OF PROTECTING NATIVE AMERICAN SACRED SITES

A modified Establishment Clause theory has emerged as a means to uphold religious legislation for members of Native American tribes. In the legislative history relating to the latest sacred-site bill (S. 2269), the Department of the Interior suggested that the law should be limited to members of federally recognized tribes, because then the law could be characterized as political in nature, and a modified Establishment Clause theory could be applied.[236] This approach assumes that traditional Establishment Clause rules bar laws protecting Native American sacred sites, which need not be the case, as discussed in Part II.

But regardless of one's view on traditional Establishment Clause rules, a modified Establishment Clause analysis revolves around whether *Morton v. Mancari*[237] should be extended from equal protection to Establishment Clause analysis. In *Mancari*, the Supreme Court held that the equal protection guarantee of the Fifth Amendment does not apply to laws that make Indian-based distinctions in the same way as it applies to laws making other racial classifications.[238] To date, a few commentators have argued that *Mancari* should be extended to the Establishment Clause to uphold laws protecting sacred sites and other aspects of Native American religions; however, negative implications of this rule have not been fully explored.[239]

Before courts and commentators began to consider extending *Mancari* to religion, commentators had mixed reactions to *Mancari* as applied to equal protection itself.[240] In the equal protection context, *Mancari* has been invoked not only to uphold economic privileges for Native Americans, but also to deny Native Americans the right to claim that classifications harming them violate equal protection.[241] Thus, before sacred-site laws (and laws protecting Native American religions generally) are relegated to having to depend upon modified constitutional standards, the benefits *and harms* that could result from this analysis should be analyzed. A careful analysis of *Mancari* in the context of religion is warranted, addressing its likely impact and the propriety of extending the case to the Establishment Clause context.

In the following three sections, I will embark upon that analysis. First, in Section A, I will discuss the impact *Morton v. Mancari* and its progeny have

236. *See supra* notes 7–14 and accompanying text.
237. 417 U.S. 535 (1974).
238. *Id.* at 553–54.
239. *See* Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451, 476–83 (1995); Simpson, *supra* note 200, at 47–50; Trope, *supra* note 200, at 399–400. *But see* Ward, *supra* note 200, at 821–22 (noting that the trust doctrine can be particularly offensive to Native American interests, because it is disempowering).
240. *See, e.g., infra* notes 250–54 and accompanying text.
241. *See, e.g., infra* notes 253–70 and accompanying text.

had on equal protection which sheds light on the impact the case might have if extended to the Establishment Clause and sacred-site laws. Next, in Section B, I will discuss the theories courts have developed on whether *Mancari* applies to claims arising under the Establishment Clause. Although these theories have evolved primarily in dealing with peyote use, as opposed to sacred-site laws, they are helpful in illustrating the steps the courts have taken in extending *Mancari* to the Establishment Clause. Lastly, in Section C, I will analyze the theories discussed in Section B, assessing whether these theories are sound in themselves but also particularly as applied to laws protecting Native American sacred sites.

A. The Impact of Mancari *and Its Progeny on Equal Protection*

Mancari established a modified equal protection analysis for laws singling out Native Americans for special treatment. In *Mancari*, several non-Indian employees of the Bureau of Indian Affairs (BIA) challenged a section of the Indian Reorganization Act[242] which granted a hiring preference to Native Americans.[243] The non-Indian employees claimed that the preference was a race-based classification that violated the Due Process Clause of the Fifth Amendment.[244] Though by statute the preference extended to "qualified Indians," a BIA rule limited the preference to individuals who were members of federal tribes and had "one-fourth or more degree Indian blood."[245] Nonetheless, the Court found the preference reflected a political classification, not a racial one.[246]

While finding the classification political, the Court also addressed the issue of whether and to what extent the special treatment was appropriate. First, the Court relied upon the Indian Commerce Clause[247] and the historical relationship between the tribes and the federal government to find that it is appropriate for the federal government to pass laws singling out Native Americans for special treatment.[248] Second, the Court found that this particular statutory preference was legitimate, because it furthered the nonracially based goal of enabling Native Americans to participate in self-government.[249] And third, the Court enunciated a standard to be used in evaluating Indian-based classifications, holding that legislation singling out Native Americans will be upheld provided the special treatment "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[250]

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242. 25 U.S.C. § 472 (1988).

243. Morton v. Mancari, 417 U.S. 535, 538 (1974).

244. Although the Fourteenth Amendment applies only to the states, the Fifth Amendment Due Process Clause contains an equal protection component which forbids the federal government from engaging in racial discrimination. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the federal government is required to desegregate schools under the Fifth Amendment). *See also* Weinberger v. Wiesenfeld, 420 U.S. 636 (1974) (holding that a gender-based distinction violated the Due Process Clause of the Fifth Amendment).

245. *See* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 794 n.132 (1991) (quoting 44 BIAM 335, 3.1).

246. *Mancari*, 417 U.S. at 553 n.24.

247. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power...to regulate Commerce...with the Indian tribes").

248. *Mancari*, 417 U.S. at 551–52.

249. *Id.* at 553–54.

250. *Id.* at 555. Though *Mancari* dealt with federal law, the standard it announced was later applied to state law where Congress authorized the state to legislate regarding Native

Mancari has engendered a substantial and continuing debate.[251] Most commentators have agreed that it is disingenuous to label Indian-based classifications as entirely political,[252] since realistically the term "Native American" has a racial component.[253] A few commentators have nevertheless agreed with the result reached in *Mancari* on the reasoning that, if strict scrutiny were applied to Indian legislation, much federal action designed to benefit the tribes would be jeopardized.[254] However, most commentators have opined that, while *Mancari* in isolation could be viewed as a victory for Native Americans, the case opened the door for discrimination against them: *Mancari* has been applied to deny Native Americans the right to claim that distinctions

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Americans. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501 (1979).

251. *See* Williams, *supra* note 244; Carole Goldberg–Ambrose, *Not "Strictly" Racial: A Response to Indians as Peoples*, 39 UCLA L. REV. 169 (1991); David C. Williams, *Sometimes Suspect: A Response to Professor Goldberg–Ambrose*, 39 UCLA L. REV. 201 (1991); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 286–88 (1984); Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 125–31 (1987); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 101–18 (1981); Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

252. *See* Goldberg–Ambrose, *supra* note 250, at 173 ("it is foolish to call classifications involving tribal Indians anything other than 'race-plus'"); Williams, *supra* note 244, at 793 (the claim that the term "Indian" is not racial is "clearly false" and "seems so obvious as not to warrant elaboration"); Newton, *supra* note 250, at 286 (Indian-based distinctions are race-based and should be strictly scrutinized); Clinton, *supra* note 250, at 1014 (characterizing Indian-based distinctions as political is "disturbing"); *see also* Judith Resnik, *Dependent Sovereigns: Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671, 696 n.116 (1989) (suggesting the political characterization is "doubletalk"); George Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199, 217 n.87 (1979) (political characterization is defective); Robert M. O'Neill, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925, 972–73 n.55 (1974) (political characterization is a "pretense"). *But see* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 614 n.63 (1975) (apparently favoring the classification on the theory that because Indians can only be defined by their race, race-based distinctions are appropriate); Johnson & Crystal, *supra* note 250, at 597–98 (apparently agreeing that the classification is political, as long as it is tied to tribal enrollment).

253. Most of the tribes have a racial requirement for tribal membership. Only 26 out of 320 tribes and 226 native entities do not have a blood-quantum membership requirement. *See* L. Scott Gould, *The Congressional Response to* Duro v. Reina: *Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 60 n.23 (1994) (citing BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, unpublished report of Tribal Enrollment Division (July 1991)). The 26 tribes which do not have blood requirements maintain descendancy requirements. *See id.*

254. *See* Goldberg–Ambrose, *supra* note 250, at 170, 173, 188. Professor Goldberg–Ambrose argues that the Indian Commerce Clause in Article I of the Constitution authorizes Congress to legislate specifically with regard to Native Americans and that an "invigorated notion of the trust responsibility" is the appropriate vehicle for reviewing such federal laws. *See id.* at 188. She expressly agrees with the result in *Mancari* arguing that, if strict scrutiny were applied, "there would be no more reservations, no more tribal governments, no more special education and health benefits for tribal Indians [etc.]...." *Id.* at 170, 173. *See also* Wilkinson & Volkman, *supra* note 251, at 614 n.63 (racial classification of Indians might jeopardize Title 25 which is dedicated to laws regulating Indian affairs); George Rutherglen & Daniel R. Oritz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 467 n.2 (1988) (opining that the rule in *Mancari* is "explicable, if not justifiable," on the grounds that Native American issues often arise in geographical isolation, on or near Indian reservations, and that Indians are a relatively small minority of the population).

either benefitting *or harming* them should be strictly scrutinized.[255]

Indeed, *Mancari*'s progeny suggests that while initially the case protected Native Americans' self-governance, more recently it has been applied as a sword rather than as a shield with regard to equal rights. The Supreme Court first applied *Mancari* in *Fisher v. District Court.*[256] In *Fisher*, Native Americans filed an adoption proceeding in state court, but the biological parents (also Native Americans) moved to dismiss the case, arguing that the tribal courts had exclusive jurisdiction; the state court certified the question to the tribal courts, which held their jurisdiction was exclusive.[257] The Montana Supreme Court disagreed, finding that it would deny the plaintiffs equal protection (at least under the state constitution) to deprive them of access to a state forum based on their race.[258]

The United States Supreme Court reversed. Addressing the equal protection concerns, the Court recognized that Native Americans were being denied access to forums to which non-Indians have access. Nonetheless, the Court held that "such disparate treatment of the Indian is justified because it is intended to benefit the class of which he [or she] is a member by furthering the congressional policy of Indian self-government."[259]

Fisher has been criticized as denying Native Americans equal protection;[260] however, the Court's reasoning in *Fisher* was based on policies of Indian self-governance and consistent with the position of the tribe itself. But one year after *Fisher*, the Court decided *United States v. Antelope*,[261] extending *Mancari* beyond self-governance. In *Antelope*, two Indian defendants were tried in federal court under the Major Crimes Act[262] and convicted of first-degree murder under a felony murder rule. Had the defendants been non-Indians, they would have been tried in state court. In state court, the government would have

255. *See* Gould, *supra* note 252, at 96 n.182 (invocation of the plenary power doctrine "invited the risk, later fulfilled, that *Mancari* would be turned against Indians and tribes"). *See also* Williams, *supra* note 244, at 866–69 (arguing that the legislation should be strictly scrutinized to determine whether the Indian-based classification is consistent with self-determination, in intent and effect); Newton, *supra* note 250, at 286 (though *Mancari* was initially promising, it was transformed into a rule of deference to congressional power over Native Americans); Ball, *supra* note 250, at 126 ("when the Court upheld this special treatment of Indians to their advantage, it laid the groundwork for later approval of special treatment to their disadvantage"); Johnson & Crystal, *supra* note 250, at 626 (arguing that strict scrutiny should be applied to determine whether the legislation bears a rational relationship to the trust responsibility); Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1083 n.149 (1989) (theories rejecting equal protection are dangerous and may be applied to justify discriminatory action toward Indians, as in child custody disputes); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1139 n.12 (1990) (commenting that it "is more than a little ironic that the Americans who were here first have essentially the same equal protection guarantees as non-resident aliens").

256. 424 U.S. 382 (1976).

257. *Id.* at 383–84.

258. *Id.* at 385.

259. *Id.* at 390–91 (citing Morton v. Mancari, 417 U.S. 535, 551–55 (1974)).

260. *See, e.g.*, Atwood, *supra* note 254, at 1083. *See also* Ball, *supra* note 250, at 128–29 (suggesting that the *Fisher* Court applied inconsistent rules regarding tribal sovereignty and equal protection to reach a poorly reasoned result).

261. 430 U.S. 641 (1977).

262. Codified as amended at 18 U.S.C. § 1153 (1994). The Major Crimes Act grants the federal courts exclusive jurisdiction over cases involving Indian defendants and certain enumerated crimes, regardless of whether the victim is Indian or not. *Id.*

been required to prove premeditation and deliberation to get a first-degree murder conviction, since the state had no felony murder rule.[263] The Court of Appeals for the Ninth Circuit held the convictions violated equal protection, because the defendants were seriously disadvantaged based on their race.[264] Reversing, the Supreme Court held that the rule of *Fisher* and *Mancari* is not limited to Indian self-governance.[265] The disparate treatment was justified here, the Court explained, because the Indian defendants were subject to federal jurisdiction due to their tribal enrollment and political status as separate peoples, not due to their race, and all persons subject to federal jurisdiction were treated similarly.[266]

It is difficult to interpret *Antelope* as anything but detrimental to the equal rights of Native Americans, as it denied them the right to invoke equal protection for classifications harming them.[267] Moreover, if *Antelope* left doubt on whether Native Americans could assert equal protection claims for harmful classifications (either individually or as tribes), that doubt was later erased.

For example, in *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*,[268] Native American *tribes* brought an equal protection claim, arguing that the state's jurisdictional rules were race-based and resulted in a complicated checkerboard pattern of jurisdiction on their reservation.[269] The Court rejected the tribes' claim, stating that Indians' unique status allows Congress to pass legislation singling them out for special treatment, even if the legislation might otherwise be constitutionally offensive.[270] Significantly, in rejecting the tribes' claim in *Yakima*, the Court upheld the state's assumption of jurisdiction and *limited* the tribes' right of self-governance.[271] Then in *Duro v.*

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263. *Antelope*, 430 U.S. at 644.

264. *Id.*

265. *Id.* at 646–47 ("Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government.... But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications.").

266. *Id.* at 648–49. The Major Crimes Act only applies, however, to cases involving Indian defendants. 18 U.S.C. § 1153 (1994). Thus, the Court's reference to "all persons subject to jurisdiction" could only mean "all Indians." Lower courts have held that the Indian defendant need not be a tribal member to be subject to federal jurisdiction under the Act. United States v. Ives, 504 F.2d 935, 953 (9th Cir.), *vacated*, 421 U.S. 944 (1974); *Ex parte* Pero, 99 F.2d 28, 30 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939). In *Antelope*, the Court expressed no view on the correctness of these decisions, as the defendants before the Court in that case were tribal members. *See* 430 U.S. at 647 n.7.

267. *Accord* Gould, *supra* note 252, at 98 (opining that in *Antelope*, the Court turned *Mancari against* Native Americans); Williams, *supra* note 244, at 868 (criticizing *Antelope* as discriminatory and unconnected to Indian self-governance); Ball, *supra* note 250, at 130 (opining that *Antelope* reflected a turning point with regard to the application of *Mancari*, because here the Court applied *Mancari against* the tribes). *But see* Goldberg–Ambrose, *supra* note 250, at 179–80 (opining that *Antelope* was not the product of discrimination but the product of extending federal jurisdiction to on-reservation offenses).

268. 439 U.S. 463 (1979).

269. Specifically, *Yakima* involved a dispute over a state's assertion of jurisdiction over an Indian reservation under Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (1953). Eighty percent of the reservation land was held by the federal government in trust for the tribes, and twenty percent was owned in fee by Indians and non-Indians. The state asserted jurisdiction over all non-Indians, be they on trust lands or allotted lands and over all Indians on allotted land, but not over Indians on trust lands. *Yakima*, 439 U.S. at 469, 498.

270. 439 U.S. at 501.

271. See also Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 141 (1980), where the Court upheld a state tax on cigarette and tobacco products as

Reina,[272] the Court explicitly stated what had previously been implied, that is, that *Mancari* means the federal government has "broad authority to legislate with respect to enrolled Indians as a class, whether to impose *burdens or* benefits."[273]

In sum, this history of *Mancari* and its progeny demonstrates the evils of exempting legislation regarding Native Americans from scrutiny under the Constitution. Under today's precedent, *Mancari* means the lifting of traditional constitutional guarantees in exchange for a more expansive trust doctrine and, concomitantly, a greater congressional plenary power. The trust relationship has been applied to grant the federal government nearly absolute power over Indian affairs, as no federal legislation governing Native Americans has been struck down.[274] *Mancari* continues that trend by relaxing constitutional restrictions to expand the deference given Congress in passing legislation concerning Native American tribes.

Thus, if we are to relax constitutional standards to provide religious benefits to Native American tribal members, the flip side is that Native American tribal members may be stripped of essential rights they otherwise might have had under the Constitution.[275] For example, an essential right guaranteed by the Establishment Clause is the protection of religion and its autonomy from governmental involvement, a right that is designed to protect religion from degradation and to promote its growth.[276] But applying *Mancari* applied to the Establishment Clause likely would mean greater deference given to Congress in regulating the religions practiced by members of federally recognized tribes, in terms of both protecting and restricting those religions and directing how, and by whom, they may be practiced.

B. Theories Invoked in Extending Mancari *to the Establishment Clause*

To date, a handful of courts have considered extending *Mancari* from equal protection to the Establishment Clause. This topic has not arisen in the sacred-site context; rather, in sacred-site cases, the Establishment Clause has not

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applied to on-reservation sales to non-Indians and nonmember Indians, though not to tribal members. Additionally, the Court permitted the state to seize all the tobacco products destined for the reservation on the theory that the Indians were not paying the nonmember taxes and the state's interest in collecting the taxes outweighed the tribes' right to self-governance. *Id.* at 161.

272. 495 U.S. 676 (1990).

273. *Id.* at 692 (emphasis added). In *Duro*, the Court held that a tribe's criminal jurisdiction does not extend to Indians who are not members of the tribe seeking to assert jurisdiction. The Court found that the customs among the tribes vary widely, such that an individual's status as an Indian would not indicate that the individual would consent to the authority of any particular tribe. *Id.* at 695 ("the tribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home"). In 1991, Congress passed legislation superseding *Duro* and granting tribes jurisdiction over nonmember Indians. *See* Gould, *supra* note 252, at 62.

274. *See* Frickey, *supra* note 254, at 1139 (noting that no federal Indian legislation has been struck down).

275. It is, indeed, unlikely the Supreme Court would find the Constitution applies differently to laws benefitting as opposed to harming Native Americans in any context; the Court now applies strict scrutiny for benign racial classifications. *See* Adarand Constructors, Inc v. Pena, 115 S. Ct. 2097 (1995) (holding that the same standards must be applied in evaluating the propriety of laws benefitting minorities and harming them; both benign and harmful racial classifications must be strictly scrutinized and supported by a compelling governmental interest).

276. *See, e.g.*, *supra* notes 119–25 and accompanying text.

been a principal issue.[277] In a few sacred-site cases, courts relied upon the Establishment Clause as an *additional* basis to reject Native American claims regarding sacred sites, but in these cases, no consideration was given to a modified Establishment Clause analysis.[278] Additionally, the issue generally has not arisen in cases involving claims or defenses *by* Native Americans or their tribes. In only one case was a modified Establishment Clause theory applied to an argument asserted by a Native American, but there, the issues were resolved *against* the Native American.[279]

Thus, the courts have not invoked the modified Establishment Clause theory to provide religious protection to Native Americans. Rather, this theory has been applied principally in cases involving non-Indians prosecuted for peyote or marijuana use. These non-Indian defendants have challenged the constitutionality of a federal regulation exempting members of the Native American Church from the federal drug laws for their religious use of peyote (the NAC exemption).[280] Basically, these defendants claimed they too were entitled to invoke the exemption because otherwise, the exemption would be unconstitutional.[281] To uphold the NAC exemption against these attacks, some courts invoked the modified Establishment Clause theory.

The NAC exemption has been challenged basically on two grounds: 1) that it establishes the Native American Church as a government-sponsored religion and discriminates against individuals who use peyote but who are either not members of the Native American Church or not members of federally recognized tribes;[282] and 2) that it establishes Peyotism as a government-

277. *See supra* notes 185–87, 192–96 and accompanying text.

278. *See* United States v. Means, 858 F.2d 404, 407–08 n.6 (8th Cir. 1988); Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 189 (D. Alaska 1982); Crow v. Gullet, 541 F. Supp. 785, 794 (1982). Notably, with the exception of *Means*, each of these cases also involved claims under AIRFA, and they arose before the Supreme Court held that AIRFA affords no cause of action; thus, the courts were reviewing the applicability of the Establishment Clause to congressional legislation protecting Native American religions. Yet there was no consideration given to modifying the Establishment Clause standard under *Mancari* as a means of providing greater religious freedom to Native Americans.

279. *See* United States v. Carlson, 959 F.2d 242 (9th Cir. 1992), *cert. denied*, 505 U.S. 1227 (1992) (Yurok tribal member unsuccessfully sought an exemption for religious marijuana use).

280. Specifically, the regulation states that

> [t]he listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

21 C.F.R. § 1307.31 (1994).

281. *See, e.g.*, United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991), *appeal dismissed*, 968 F.2d 21 (10th Cir. 1992); United States v. Warner, 595 F. Supp. 595, 599–600 (D.N.D. 1984). One leading case, Rupert v. Director, U.S. Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992), discussed the applicability of *Mancari* to religious legislation in connection with an exemption to the Bald Eagle Protection Act, 16 U.S. C. § 668–668d (1994 & Supp. 1996)

282. *See, e.g.*, Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342 (N.D. Tex. 1988), *aff'd sub nom.*, Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991); Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973); Native American Church of N.Y. v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979) (Native American Church of New York—unaffiliated with the Native American Church), *aff'd*, 633 F.2d 205 (2d Cir. 1980).

sponsored religion and discriminates against individuals who use illegal substances other than peyote (usually marijuana) for religious purposes.[283] Therefore, the attacks can be categorized into church-based attacks and substance-based attacks. There has been a difference of opinion on the church-based attacks,[284] while the substance-based attacks have been uniformly unsuccessful,[285] although there was a dissent in one substance-based case, *Olsen v. Drug Enforcement Administration*.[286]

The leading case extending *Morton v. Mancari* to the Establishment Clause is *Peyote Way Church of God, Inc. v. Thornburgh*.[287] There, the plaintiff, Peyote Way Church of God, Inc., (Peyote Way) was a religious organization incorporated in 1979 by Immanuel P. Trujillo, who had been a non-Indian member of the Native American Church before 1966, but never had a tribal enrollment number.[288] Peyote Way had about 150 members who worshipped peyote as a deity, much like members of the Native American Church worship peyote. Peyote Way's doctrine considered the nonreligious use of peyote sacrilegious, and the church maintained records on the time, place, and amount of peyote its members used.[289]

Peyote Way asserted equal protection and Establishment Clause claims to argue that the NAC exemption should apply to it. Addressing these claims, initially the court recognized that the exemption on its face applies to all Native American Church members, regardless of tribal affiliation.[290] However, it opined that, since in *Mancari* the Court looked to BIA regulations in deciding whether the statutory preference was political, it could "look to the evidence to determine whether NAC membership presupposes tribal affiliation...and thus effects a political classification."[291]

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283. *See, e.g., Carlson*, 959 F.2d at 242 (Yurok tribe member unsuccessfully sought exemption for marijuana); Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (D.C. Cir. 1989) (Ethiopian Zion Coptic Church member unsuccessfully sought exemption for marijuana); United States v. Rush, 738 F.2d 497 (1st Cir. 1984) (same), *cert. denied*, 470 U.S. 1004 (1985); Native American Church of N.Y. v. United States, 468 F. Supp. at 1247 (Native American Church of New York sought an exemption for peyote and other psychedelic drugs and was unsuccessful regarding the other drugs).

284. *See* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d at 1210 (holding that the regulation applies only to enrolled members of tribes with twenty-five percent or more Native American blood and reflects a political, not a religious, classification). *Accord* United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984) (holding that defendants who claimed they were members of the Native American Church but who had no Native American blood were *not* entitled to invoke the exemption and had no valid equal protection, Establishment Clause, or due process claims). *Cf. Boyll*, 774 F. Supp. at 1333 (disagreeing with *Peyote Way* and holding that it would violate equal protection and the Free Exercise Clause to restrict the NAC exemption to Native Americans).

285. *See* cases cited *supra* note 282. In Native American Church of N.Y. v. United States, 468 F. Supp. 1247, the court rejected the church's claim for an exemption regarding psychedelic drugs besides peyote, but accepted its claim that the peyote exemption should not be limited to the Native American Church.

286. 878 F.2d at 1458. In *Olsen*, a member of the Ethiopian Zion Coptic Church had petitioned the Drug Enforcement Administration for an exemption regarding religious marijuana use, and the dissent argued for a remand to the DEA to consider Establishment Clause issues. *Id.* at 1468–72 (Buckley, J., dissenting).

287. 922 F.2d 1210 (5th Cir. 1991).

288. *Id.* at 1212.

289. *Id.* at 1212–13.

290. *Id.* at 1215.

291. *Id.* In *Mancari*, the statutory preference extended to "qualified Indians," but a BIA

The *Peyote Way* court then looked to the Articles of Incorporation of the Native American Church. The Articles stated that to be a church member, one must have twenty-five percent Indian blood *or* be a spouse of a church member, and that further membership requirements would be set forth in the church's by-laws.[292] The by-laws, as quoted by the court, said nothing about the need for tribal enrollment. Instead, they indicated that to be a NAC member, one must have at least one-quarter Native American blood. Based on these by-laws, the court expressly "h[e]ld...that NAC membership is limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry."[293]

Once the court held, as a matter of law, that NAC membership was limited to tribal members, it quickly dispensed with Peyote Way's equal protection and Establishment Clause arguments. On equal protection, the court held the NAC exemption was rationally related to a legitimate governmental objective of preserving Native American culture. Therefore, the court found, under *Mancari*, the exemption could be restricted to Native American tribal members.[294]

On establishment, the *Peyote Way* court relied upon *Larson v. Valente*[295] to hold that the Establishment Clause requires an equal protection analysis.[296] Without delineating the applicable standard, the court held that "[t]he unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation between church and state ordinarily required by the First Amendment."[297] The majority acknowledged that the NAC exemption applied to one specifically named church; however, it accepted the government's explanation that this was done because the NAC was the only tribal organization of which it knew that used peyote in bona fide religious ceremonies.[298] Chief Judge Clark dissented, arguing that the federal government's paternalistic interest in Native Americans cannot convert a religious exemption into a political one.[299] Also, he argued, *Morton v. Mancari* and the preferential hiring of Indians in the BIA cannot support a law respecting an establishment of religion. Judge Clark would have applied strict scrutiny because, in his view, the NAC exemption served a purely religious purpose and should be analyzed in the same way as other laws creating religious preferences.[300]

The reasoning in *Peyote Way* was nevertheless followed and expanded

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rule limited the preference to Indians who were tribal members and had 25% or more Indian blood. *See supra* note 244 and accompanying text. There is no analogy, however, between looking to federal regulations to define the meaning of a law and looking to church records, which is what the court did in *Peyote Way*.

292. *Peyote Way*, 922 F.2d at 1215.
293. *Id.* at 1216.
294. *Id.*
295. 456 U.S. 228 (1982). *See also supra* notes 98–113 and accompanying text.
296. 922 F.2d at 1217.
297. *Id.*
298. *Id.*
299. *Id.* at 1220 (Clark, C.J., dissenting).
300. *Id.* Judge Clark would not have extended the exemption to Peyote Way, however; instead, he suggested he would have invalidated it altogether. *See also* Richard C. Stanley & Thomas M. Flanagan, *Constitutional Law*, 37 LOY. L. REV. 631, 676–77 n.265 (1991) (favoring Judge Clark's dissent and arguing that "*Morton v. Mancari*...does not appear to justify the result reached by the majority in *Peyote Way*").

upon in *Rupert v. Director, U.S. Fish & Wildlife Service*.[301] There, the plaintiff was a pastor of a church that strove to follow Native American customs, and he sought a permit to use eagle feathers for religious purposes.[302] When his permit application was denied, he sued the Fish and Wildlife Service, arguing that the government was violating the Establishment Clause in granting permits to tribal religious practitioners but not to non-Indian religious practitioners.[303] More specifically, he argued that the government could ban everyone from using eagle feathers, but once it decided to grant a religious exemption from the ban, it was required to treat all religions equally.[304]

The *Rupert* court first held that although the plaintiff alleged an Establishment Clause violation, his claims should be analyzed under equal protection principles, because in effect he was arguing that the law created a denominational preference. Next, the court held that since equal protection principles applied, *Morton v. Mancari* applied. While recognizing it was extending *Mancari* to legislation that "arguably creates a *religious* classification,"[305] the court responded that Congress has an obligation to protect Native American culture and religion. Thus, the court found, the exemption should be upheld if rationally related to legitimate governmental objectives. The governmental objectives here were twofold: 1) to preserve Native American culture, and 2) to protect a dwindling eagle population.[306] With little discussion, the court concluded that the "fit" between the regulatory classification and these governmental objectives was snug and might even survive strict scrutiny.[307] Thus, Rupert's First Amendment claim was dismissed.

Not all courts, however, have applied the reasoning adopted in *Peyote Way* and *Rupert*. In *Olsen v. Drug Enforcement Administration*,[308] for example, the court suggested that the same treatment should be given to all religions. There, the court dealt with a substance-based attack. The plaintiff, a priest with the Ethiopian Zion Coptic Church, petitioned the Drug Enforcement Agency for an exemption from the controlled dangerous substance laws for the religious use of marijuana.[309] He sought a limited exemption for the use of marijuana 1) at set times and places followed by eight hours of inactivity, and 2) by those church members who were beyond the age of majority and had undergone a confession ritual.[310] Asserting Establishment Clause and equal protection challenges,[311] plaintiff argued that his church's use of marijuana

301. 957 F.2d 32 (1st Cir. 1992).
302. *Id.* at 33. The Bald Eagle Protection Act prohibits the possession of eagle feathers but contains an exemption that authorizes the Secretary of the Interior to grant Indians permits to possess eagle feathers for religious purposes; to be entitled to a permit, an applicant must be an Indian authorized to participate in bona fide tribal ceremonies. *Id.* (citing 50 C.F.R. § 22.22 (1995)).
303. The plaintiff in *Rupert* had formed the "tribe of the Pahana," but he was not a Native American. *Id.*
304. *Id.* at 34.
305. *Id.* at 35.
306. *Id.*
307. *Id.* at 35–36.
308. 878 F.2d 1458 (D.C. Cir. 1989).
309. *Id.* at 1459.
310. *Id.* at 1460.
311. The court found it inconsequential whether the argument was labeled as based on equal protection or the Establishment Clause, opining that "in cases of this character,

should be treated like the Native American Church's use of peyote.[312]

In an opinion written by Justice Ginsburg, the District of Columbia Circuit Court of Appeals did not view the NAC exemption as creating a denominational preference. Instead, the court focused on drawing the line between marijuana and peyote. The court found that the different treatment for the drugs was justified due to the pervasive demand for marijuana in the United States. In particular, the court noted that between 1980 and 1987, the DEA seized roughly twenty pounds of peyote, but over fifteen million pounds of marijuana.[313] Significantly, however, the court added that if the DEA had previously granted the Native American Church an exemption for marijuana, it would be required to treat the churches evenhandedly and could not "contain the exemption to a single church or religion."[314]

In his dissent in *Olsen*, Judge Buckley argued that the NAC exemption created a denominational preference. He expressly rejected the notion that Native Americans' unique status affected the religious character of the exemption.[315] This unique status turned on their political relationship with the federal government, he argued, not on the uniqueness of Native American culture and religion.[316] Thus, he argued that the same standard—strict scrutiny—should be applied in analyzing this preference as with other denominational preferences. Under strict scrutiny, he was unconvinced that the high demands for marijuana adequately explained why a very limited exemption for the religious use of that drug could not be granted, given the few people to whom the exemption would have extended.[317] Therefore, he would have remanded the case for further consideration of the Establishment Clause issues.

Beyond this, at least one court has explicitly rejected *Peyote Way*. In *United States v. Boyll*,[318] the court dismissed an indictment against the plaintiff, a non-Indian, who was charged with illegally importing peyote. Though the plaintiff claimed he was a member of the Native American Church, the government was prosecuting him on the reasoning that the NAC exemption extended only to Native Americans. Rejecting this reasoning, the *Boyll* court opined that it would offend the "very heart of the First Amendment" "to

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establishment clause and equal protection analyses converge." *Id.* at 1463 n.5.

312. *Id.* at 1463.

313. *Id.*

314. *Id.* at 1464 ("Were the DEA to consider a marijuana exemption, equal protection (and/or the establishment clause...) would indeed appear to command that it do so evenhandedly."). Notably, the court then acknowledged the unique relationship between the federal government and the Native American tribes and expressed no opinion on whether this relationship could justify a law granting a denominational preference. *Id.*

315. *Id.* at 1468–69.

316. *Id.* at 1469 (quoting DRUG ENFORCEMENT ADMIN., *Peyote Exemption for Native American Church*, 403, 419 (Memorandum Opinion for the Chief Counsel, Dec. 22, 1981).

317. *Id.* at 1470. The Ethiopian Zion Coptic Church was a Jamaican church which had several thousand members in Jamaica but only between 100 and 200 members in the United States. *Id.* at 1459. In comparison, there are about 250,000 members of the Native American Church. Other courts have suggested, however, that if marijuana could be used for religious purposes, a much larger number of people would claim the exemption and that "[f]or all practical purposes, the anti-marihuana laws would be meaningless." United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985).(quoting Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969)).

318. 774 F. Supp. 1333 (D.N.M. 1991), *appeal dismissed*, 968 F.2d 21 (10th Cir. 1992).

exclude individuals of a particular race from being members of a recognized religious belief."[319] It cited *Peyote Way* as *some* evidence that Congress did not intend for the exemption to apply to non-Indians, but it then rejected that conclusion based on the plain language of the exemption, legislative history, and constitutional concerns.[320]

Lastly, a unique approach was taken in *Kennedy v. Bureau of Narcotics & Dangerous Drugs*.[321] In that case, the Church of the Awakening, a California church, petitioned the Bureau of Narcotics for a religious exemption for peyote.[322] *Kennedy* was decided before either *Mancari* or the passage of AIRFA. However, the court recognized that Indians and non-Indians were at times treated differently and assumed that the use of peyote was more important for members of the Native American Church than for members of the Church of the Awakening.[323] In *Kennedy*, the court looked to the purpose behind the drug laws in determining the validity of the NAC exemption. Noting that peyote is banned to protect the public health, the court found the NAC exemption irrational, because the government does not have a greater interest in protecting the health of non-Indians than it does in protecting the health of Indians.[324] Thus, the court declared the exemption invalid under substantive due process law, as it was not rationally related to a legitimate governmental objective. However, it then held that the Church of the Awakening was not entitled to the exemption because to exempt that church would continue the constitutional infirmity: the line drawing would continue along church lines instead of along lines related to health interests.[325]

In sum, courts have differed on whether *Mancari* should be extended to the Establishment Clause, with the dispute arising mainly in the context of drug use by non-Indians. Some judges reject an extension of *Mancari*, arguing that Congress' interest in Native Americans tribes as *political* bodies cannot support a *religious* preference, and that all religious practitioners should be treated equally, regardless of race or affiliation. They assert that the government should not exclude individuals from practicing a religion or provide religious benefits based on race.[326]

On the other hand, those courts extending *Mancari* to the Establishment Clause have applied the following reasoning: 1) laws benefitting the religious practices of Native American tribal members create denominational preferences; 2) in analyzing denominational preferences under the Establishment Clause, an equal protection analysis applies; 3) since equal

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319. *Id.* at 1340.

320. *Id.* at 1339. *See also* Native American Church of N.Y. v. United States, 468 F. Supp. 1247, 1251 (S.D.N.Y. 1979) (reviewing legislative history to find that the NAC exemption is not limited to the Native American Church but extends to any church that could prove it is, in fact, a bona fide religious organization that makes use of peyote for sacramental purposes and regards the drug as a deity).

321. 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

322. *Id.* at 416.

323. *Id.*

324. *Id.* at 417.

325. *Id.* Judge Crocker concurred but would have ruled that the different treatment was justified by the importance the churches placed on peyote; NAC worshipped the drug itself, whereas the Church of the Awakening used peyote "as a means to an end." *Id.* at 418 (Crocker, J., concurring).

326. *See, e.g., supra* notes 298–300, 313–19 and accompanying text.

protection applies, *Mancari* applies, meaning the law should be upheld if rationally related to Congress' unique obligation toward Native Americans; and 4) the government has a legitimate objective in preserving Native American religion.[327]

This reasoning is inherently circular and result-oriented. Essentially, courts are saying that a rational relationship test applies because the government has an interest in preserving Native American religion, and the rational relationship test is satisfied, also because the government has an interest in preserving Native American religion. The result achieved in these cases is deference to Congress, without a provoking inquiry into the ramifications of the rule or the propriety of invoking it in the context of religion. That inquiry is the focus of the next section, which considers in particular whether it is appropriate to apply this four-step analysis to sacred-site laws.

C. The Equal Protection-Establishment Clause Problem: The Propriety of Extending Mancari *to the Establishment Clause as a Means of Protecting Native American Sacred Sites*

Courts have applied a four-step reasoning in deciding to extend *Morton v. Mancari* to the Establishment Clause as a means of upholding the NAC exemption.[328] Before concluding that this same reasoning should apply to sacred-site laws (an assumption made in the legislative history of S. 2269),[329] two issues must be addressed. First, there is the question whether this four-step reasoning is sound in itself—a much debated question, as reflected in the courts' diverse analyses and dissents.[330] And second, there is the question whether this same reasoning should apply to laws protecting sacred sites. Thus, each of the four steps the courts have taken will now be analyzed, addressing both the soundness of the reasoning and its applicability to sacred-site laws.

Step 1: Do Laws Protecting Native American Sacred Sites Create Denominational Preferences?

The word "denomination" means a particular religious group.[331] A denominational preference is one which distinguishes among religious groups, not one which extends benefits on the basis of a set of beliefs.[332] In *Larson v. Valente*,[333] for example, the Court addressed a law that required charitable organizations to register and report on their fundraising activities; the law exempted religious groups that obtained fifty percent or more of their funds from members. The Court found the statute on its face created a denominational preference, because it distinguished between well-established churches and newer churches.[334] The distinction, however, had nothing to do with the church members' beliefs.

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327. *See, e.g., supra* notes 291–97, 300–06 and accompanying text.
328. *See, e.g., supra* note 326.
329. *See supra* notes 11–14.
330. *See, e.g., supra* notes 296–322 and accompanying text.
331. WEBSTER'S NEW WORLD DICTIONARY 602 (3d ed. 1968).
332. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971) (a statute favoring those "conscientiously opposed to participation in war in any form" did not create a religious preference or violate free exercise rights of those opposed to "unjust wars," because the statute served the secular purpose of excluding persons not suitable for service based on their beliefs).
333. 456 U.S. 228 (1982).

The courts were probably correct, therefore, in finding that the NAC exemption on its face created a denominational preference. The NAC exemption applied to the Native American Church.[335] It did not apply to those who practiced Peyotism. Instead of extending benefits on the basis of a set of beliefs, the NAC exemption was distinguished based on religious affiliation. Under traditional Establishment Clause principles, the NAC exemption should have been suspect for evenhandedness.

On the other hand, the same does not hold true for the latest sacred-site bill (S. 2269). This bill would have generally granted a preference to those believing certain sites are sacred. The law would have applied equally to all denominations. It did not distinguish among church groups. All persons belonging to all religious denominations would have been entitled to invoke the protections of the bill, provided they honored those sacred sites that traditionally have been honored by Native Americans. If the bill had been limited to members of federally recognized tribes, as suggested by the Department of the Interior,[336] then it would have more closely approximated a denominational preference, as then it would have tended to distinguish between select groups of individuals.

To illustrate the distinction between affiliation and belief, suppose a law was enacted exempting religious groups from gender discrimination laws for their priest or pastor assignments. Even if predominantly one faith—say, for example, the Catholic faith—invoked the exemption, the exemption would not create a denominational preference, because the exemption would be distinguished based on beliefs, not based on affiliation with a religious group. On the other hand, if the exemption applied only to the Catholic Church, then it would reflect a denominational preference. This distinction is a valid one, as in the former case, the government is accommodating religious beliefs that cannot be practiced under generally applicable laws. In the latter case, however, the government is sponsoring one religious group and is inhibiting the development of new sects or churches that may wish to follow the same set of beliefs or practices as the favored group. Thus, in the former case, the government is accommodating religion, whereas in the latter case, it is favoring one religion and inhibiting the growth of others.[337]

Moreover, it is incorrect to assume that all laws protecting Native American religions in general create denominational preferences. All members of federally recognized tribes do not practice the same religion,[338] and all Native Americans do not honor sacred sites.[339] All Native Americans do not belong to the same denomination. Each law should be considered individually, and a law should not be considered a denominational preference for accommodating the religious beliefs or practices of minority faiths in general, without distinguishing among church groups or affiliation. Thus, the latest sacred-site bill (S.2269) should not have been considered constitutionally suspect for creating a denominational preference, and this step of the analysis

334. *Id.* at 246–47.
335. *See supra* note 280.
336. *See supra* note 14.
337. *See also supra* notes 125–45 and accompanying text.
338. *See supra* notes 19–20 and accompanying text.
339. *See* Kristen L. Boyles, Note, *Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act*, 76 CORNELL L. REV. 1117, 1142–43 (1991).

should not have been applied when that bill was defeated.

Step 2: Does an Equal Protection Analysis Address Establishment Clause Concerns Raised by Laws Protecting Sacred Sites?

The cases applying *Mancari* to the Establishment Clause in analyzing the NAC exemption accept that an equal protection analysis alone is sufficient to address Establishment Clause concerns. For this proposition, the cases rely upon *Larson v. Valente*.[340] Looking only to equal protection in the establishment context does not, however, comport with Supreme Court precedent, nor the policies underlying the Establishment Clause.

First, with regard to the precedent, the cases addressing the NAC exemption appear to be the only cases in which *Larson* has been applied as creating an *independent* test sufficient to *validate* a law challenged under the Establishment Clause, without also considering entanglement. Even in *Larson*, the Court did not limit itself to equal protection, but it thoroughly addressed concerns for political divisiveness and religious gerrymandering.[341] In *Larson*, the Court *invalidated* a law for not being evenhanded, but it did not suggest that an evenhanded law would be valid in all cases.[342] In other contexts, lower courts have not relied exclusively upon *Larson*, but they have also considered the entanglement concerns addressed by the third *Lemon* prong.[343] And most recently, the Supreme Court has analyzed a denominational preference with reference primarily to entanglement, not equal protection concerns.[344]

Second, with regard to the purposes underlying the Establishment Clause, evenhandedness is a key concern under the Clause, but it is not the only concern.[345] A wholly neutral law (or one which meets an equal protection challenge), may still interfere with a religious group's right to manage its internal affairs, a premise that has been consistently recognized in Establishment Clause jurisprudence.[346] Consider, for example, the neutral laws against discrimination. If these laws were enforced against religious groups, even if they were wholly neutral and applied evenhandedly, they could still interfere with the groups' freedom to define their internal hierarchy, select their own leaders, and prescribe terms for membership in their institutions. Thus, religious groups have been granted exemptions from these neutral laws, and the Supreme Court has upheld these exemptions, stating that they *avoid* entanglement.[347]

Moreover, the government may interfere with the autonomy of a religious group not only when it seeks to regulate that group, but also when it grants benefits to that group. Benefits may, for example, come with strings

340. 456 U.S. 228 (1982).
341. *Id.* at 252–54. *See also supra* notes 98–104 and accompanying text.
342. *Id.* at 251–52. *See also supra* notes 98–104 and accompanying text.
343. *See supra* notes 104–09 and accompanying text.
344. *See supra* notes 110–13 and accompanying text.
345. *See supra* notes 119–25 and accompanying text.
346. *See supra* notes 109, 119–25 and accompanying text. *See also* McConnell, *supra* note 136, at 158–61 (arguing that neutrality is insufficient to address Establishment Clause concerns, as facially neutral laws can conflict with religious free exercise and interfere with the autonomy of religious organizations).
347. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (upholding religious exemption from Title VII as it effectuated a more complete separation between church and state).

attached. A political body may use conditional benefits to seek to influence or shape religious organizations to further its own purposes. Thus, Establishment Clause concerns (and particularly entanglement concerns) may be implicated in this context as well, as the government is interfering with religious development and with the formation of sects, churches, or other religious groups under free market principles.[348]

Therefore, in analyzing legislation concerning Native American religions, it is insufficient to simply conclude that equal protection (and *Mancari*) applies, and that the legislation is valid on those grounds. That approach ignores the entanglement concern. It ignores the concern that the federal government could be controlling or influencing the development of Native American religions.

For example, the NAC exemption embroils entanglement concerns, yet some courts have upheld the exemption with the modified Establishment Clause theory. Under this theory, the federal government is permitted to limit lawful receipt of a sacrament of a Native American faith to members of federally recognized tribes. Since peyote is considered a sacrament, as compared with Christian faiths, this is analogous to the government drawing lines as to who may receive the Holy Eucharist. Indeed, in *Peyote Way*, the court's reliance upon *Mancari* led it to expressly *hold*, as a matter of *law*, that an individual can only be a member of the Native American Church if he or she has twenty-five percent Native American blood and is a tribal member.[349]

Who can become a member of a church (be it the Native American Church or any other church), and who can freely participate in that church's religious ceremonies is a religious judgment, however. A religious organization's claim to autonomy is indeed strongest when it deals with the organization's internal affairs and the relationships that exist between the organization and its members or potential members.[350] Neither Congress nor the courts should be deciding who may participate in Native American Church activities.[351]

The line-drawing in which Congress has engaged is harmful not only for delineating membership and participation criteria for Native American religious groups, but also because, with time, it may tend to restrict or influence the development or growth of Native American religious beliefs. For

348. *See* Lee v. Weisman, 505 U.S. 577, 607 (1992) (Blackmun, J., concurring) (noting that governmental benefits to a religious group may disadvantage the benefitted group); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1382–83, 1391 (1981) (government support that comes with "strings attached" involves active involvement of the government in church affairs and raises Establishment Clause concerns). *See also supra* notes 125, 142–45 and accompanying text.

349. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1216 (5th Cir. 1991).

350. *See* Laycock, *supra* note 347, at 1403 (right to autonomy is strongest when it involves a group's relationship with its members); *Amos*, 483 U.S. at 341 (Brennan and Marshall, JJ., concurring) (religious organizations have an interest in autonomy and must be free to "select their own leaders [and] define their own doctrines...." (citing Laycock, *supra* note 347 at 1389)).

351. *Accord* United States v. Boyll, 774 F. Supp. 1333, 1340 (D.N.M. 1991) ("It is one thing for a local branch of the Native American Church to adopt its own restrictions on membership, but it is entirely another for the Government to restrict membership in a religious organization on the basis of race.").

example, in *People v. Woody*,[352] decided before the NAC exemption became effective in 1966, the court commented that the Native American Church claimed no official prerequisites to membership, no written membership rolls, and no recorded theology.[353] Likewise, the plaintiff in *Peyote Way* claimed that when he was a Native American Church member before 1966, he saw many church members who were non-Indians.[354] Yet in *Peyote Way*, the court suggested that after the government passed the NAC exemption in 1966, the NAC changed its membership criteria to require that church members also be members of federally recognized tribes and have twenty-five percent or more Indian blood.[355] This history reflects a government influence upon church-membership criteria.

Similar entanglement concerns would be implicated if Congress were to protect sacred sites but limit the scope of the protection to members of federally recognized tribes. Such a limited law could impact membership criteria for religious groups honoring sacred sites or the criteria required to participate in the ceremonies at those sites, as only members of tribes would have the sanction of the law for participating in the religion. Although tribal members themselves could protect the sites, the limited scope of the legislation would have an exclusionary impact, as others would not be legally entitled to fully participate in the religious groups' activities. The federal government would be drawing lines within religious groups, dictating who should be considered a fully privileged member and who should not be. The exclusionary impact of this line-drawing could even arise within one family, as tribal members may marry non-members or bear children ineligible for tribal status.[356]

Moreover, a sacred-site law limited in scope to tribal members could inhibit religious growth and development; new sects or churches probably would have difficulty evolving even as to the same sacred sites traditionally honored by tribes, because the founders likely would have to be members of federally recognized tribes. Furthermore, some Native Americans revere significant and historical sacred sites but are not members of federally recognized tribes. Under federal law, these Native Americans would receive no protection at all even if, for example, their spouses or children were tribal members and received protection for their religious practices.[357]

Granted, some Native Americans may believe that their religion is best kept within their own tribal community. But under the Establishment Clause, the Native American religious groups should make that decision independently, free from the influence of the federal government. And it is unlikely that all Native Americans share that view. For instance, Ed McGaa, Eagle Man, an Oglala Sioux, has urged that Native American religions be shared:

I believe, like Fools Crow, Eagle Feather, Sun Bear, Midnight Song,

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352. 394 P.2d 813 (Cal. 1964).
353. *Id.* at 817.
354. 922 F.2d at 1215–16.
355. *Id.*
356. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (full-blooded children of a Santa Clara Pueblo mother and a Navajo father were nevertheless ineligible for federal benefits due to the tribes' lineage rules).
357. As of 1977, there were about 32,000 Indians living in 133 Indian communities that were not recognized by the federal or state governments. *See* Gould, *supra* note 252, at 61.

> Rolling Thunder, and a host of other traditional peoples, that it is time that [Native American] spirituality is shared.
>
> Frank Fools Crow, Oglala holyman and ceremonial chief of the Teton Sioux, said in reference to the pipe and the sweat lodge, "These ceremonies do not belong to Indians alone. They can be done by all who have the right attitude...and who are honest and sincere about their beliefs in Wakan Tanka (Great Spirit) and follow the rules."
>
> We do not have any choice. It is one world that we live in. If the Native Americans keep all their spirituality within their own community, the old wisdom that has performed so well will not be allowed to work its environmental medicine on the world where it is desperately needed.
>
> ...I call on all experienced Native American traditionalists to consider coming forward and sharing their knowledge. Come forth and teach how Mother Earth can be revered, respected, and protected.[358]

It is one thing for the government to say that Native American tribes will be guaranteed the freedom to exercise their religion and may designate who may participate in their religious ceremonies, be they tribal members, nonmembers, or even non-Indians. It is quite another thing for the government to announce who has the right to participate in Native American religious ceremonies by enacting laws protecting Native American religions, but limiting the scope of that protection to members of recognized tribes. Such limited laws implicate entanglement concerns—concerns which courts have ignored in invoking an equal protection/*Mancari* analysis in reviewing Native American religious legislation.

Step 3: Do the Basis and Reasoning Behind Mancari *Apply to Religious Establishment and Laws Protecting Sacred Sites?*

Even if courts were correct in relying upon an equal protection analysis (alone) to address Establishment Clause concerns, that does not end the inquiry. The next assumption the courts have made is that, because equal protection applies, *Mancari* applies. Courts have not thoroughly explored whether the basis and reasoning behind *Mancari* are applicable in the context of religion.

In *Mancari*, the Court relied upon the Indian Commerce Clause as the basis for congressional authorization to pass laws singling Native Americans out for special treatment.[359] The courts have not considered this aspect of *Mancari* in extending the case to religion, yet it is doubtful that even a liberal view of commerce could be viewed to include religion.[360] As applied to sacred sites, arguably, one might say that legislation concerning sacred sites relates to commerce, because it relates to places that affect commerce. But if the law were construed that way, then it should be construed as a secular law, that is, a law relating primarily to commerce, and not as a religious law, rendering a modified Establishment Clause unnecessary.

Moreover, the reasoning in *Mancari* has been harshly criticized, and the only position that has been advanced in support of *Mancari* is that it allows the

358. ED MCGAA, *supra* note 36, foreword.
359. Morton v. Mancari, 417 U.S. 535, 551 (1974).
360. Notably, in enacting RFRA, Congress did not rely upon the Commerce Clause, but upon § 5 of the Fourteenth Amendment and its power to enact legislation protecting individual liberty, including the liberty of free exercise of religion under the First Amendment. S. REP. NO. 111, 103d Cong., 1st Sess. 13–14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903.

federal government to provide benefits to Native Americans and to protect their self-determination.[361] These policies are not furthered in the area of religion. For example, *Mancari* and much of Title 25 concern the provision of benefits to Native Americans from a fiscal perspective. Naturally, if non-Indians were entitled to challenge the benefits specifically allocated to Native Americans, then there would be fewer benefits available for Native Americans. In *Mancari*, there were only a definite number of jobs available in the BIA. The more non-Indians who were entitled to claim those jobs, the less jobs there would be for Native Americans.

The same cannot necessarily be said for religion. Religion is not like money. If religion is given to some people, that does not mean there is less for others. In fact, the converse is probably true. Religion often breeds religion. That concept holds true even for sacred sites, of which there is a definite number. If all people in the United States were entitled to revere and protect the integrity of sacred sites, that would not decrease the supply of sacred sites for Native Americans to revere; to the contrary, the probable impact of expanding the scope of the law would be to enhance the likelihood that the sites would be protected from development, as more individuals would have an interest in seeking to preserve them.

Moreover, the latest sacred site bill (S. 2269) protected Native American sacred sites that have been traditionally honored by Native Americans generally, regardless of tribal affiliation. This protection for all Native American sacred sites would not decrease the supply of sacred sites available for tribal members to revere, and it could have no impact on tribal self-governance. Thus, *Mancari*'s reasoning does not extend to sacred-site laws, and it should not have been invoked when S. 2269 was defeated.[362]

Step 4: Is the Compelling Interest or Rational Relationship Test Satisfied by Laws Protecting Sacred Sites for Members of Tribes?

Courts have also concluded that making distinctions in religious legislation based on the tribal status of the religious practitioners is rationally related to Congress' unique obligation toward Native Americans. This conclusion is based on the theory that the equal protection test of *Larson v. Valente*[363] satisfies Establishment Clause concerns,[364] and that, under *Mancari*, a rational relationship test applies instead of the compelling governmental interest test.[365]

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361. *See supra* notes 250–54 and accompanying text.

362. The application of *Mancari* to religious practices could only be rationalized if the subject matter of the legislation were scarce resources that are consumed with use. For example, *Mancari* might make sense with regard to the use of eagle feathers. In the principal case involving eagle feathers, the court suggested that because of the need to protect eagles, the law allowing only Native American tribal members the right to possess eagle feathers for religious purposes would probably pass the compelling interest test. *See* Rupert v. Director, United States Fish & Wildlife Serv., 957 F.2d 32, 35–36 (1st Cir. 1992). *But see* Rosenberger v. Rectors & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2523 (1995) (extension of benefits should be provided on a religiously neutral basis, i.e., "first-come-first-served").

363. 456 U.S. 228, 244 (1982).

364. *But see supra* sections II.A and III.C.2.

365. Commentators disagree on whether a compelling governmental interest test even applies to religious legislation. *Compare* Marshall & Blomgren, *supra* note 126, at 321 (opining that a compelling governmental interest cannot justify a law respecting an establishment of

For a governmental interest to override a law respecting an establishment of religion (be it a compelling or rational interest), the interest must be a secular one, not a religious one.[366] A law protecting Native American sacred sites generally could be viewed as serving secular interests in preserving land, maintaining cultural diversity, remedying past discrimination, and the like.[367] However, a distinction also must be made between two types of laws: (1) laws that generally protect religious beliefs and practices *such as* those followed by Native Americans, without limitation as to who may participate in the religion; and (2) laws that protect religious beliefs and practices followed by Native Americans *but only* for members of federally recognized tribes.

At issue in applying the modified Establishment Clause analysis is whether the line-drawing made in the second situation makes sense and serves a governmental interest. The first set of laws do not distinguish among religious groups or along racial lines, and they serve compelling secular interests in accommodating minority faiths.[368] Any Establishment Clause problems they create depend upon whether the government can justify treating different religious beliefs differently, such as, for example, granting an exemption from the drug laws for the religious use of peyote but not for the religious use of marijuana, a distinction the courts have had little difficulty justifying.[369] However, the second situation creates further Establishment Clause issues, as religious benefits are allocated to select individuals based on tribal affiliation which is substantially related to one's race.[370] Thus, the government must justify the line-drawing itself with a governmental interest.

Some courts have rejected the line-drawing, arguing that a political relationship cannot support a religious preference.[371] Religious preservation can be connected to political prosperity.[372] Nevertheless, Congress' obligation

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religion, as most forms of school aid could be justified under this test) *with* Laycock, *supra* note 347, at 1373–74, 1417 (concluding that no constitutional guarantee is absolute and, therefore, even a church's interest in autonomy can be overridden if there are sufficiently compelling reasons for doing so). Some courts suggest a middle ground, i.e., that a compelling governmental interest may justify a law which has the purpose and effect of promoting religion, but it cannot justify excessive entanglement. *See, e.g.*, Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1538–39 (11th Cir. 1993) (*Lemon* cannot be overcome by a compelling governmental interest). *See also* Dayton Christian Schs. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 959 n.47 (6th Cir. 1985) (state involvement in doctrinal issues is absolutely prohibited). Here, it is assumed that a compelling or rational governmental interest applies.

366. When a law promotes one religion over another, it is not valid unless it is supported by a compelling *secular* purpose. Metzl v. Leininger, 57 F.3d 618, 623 (7th Cir. 1995) (paid holiday on Good Friday was not supported by the secular purpose of giving students a long spring weekend because of the deeply religious nature of the holiday which had not become secularized). However, a generally applicable accommodation of religion to comply with First Amendment free exercise should be considered a secular goal. *See* Board of Educ. of Kiryas Joel Village Sch. Dist v. Grumet, 114 S. Ct. 2481, 2500 (1994) (Kennedy, J., concurring).

367. *See supra* notes 200–04 and accompanying text.

368. *See supra* notes 139–45, 332–33 and accompanying text.

369. See *supra* notes 285–86, 308–14, and accompanying text, where the *Olsen* Court justified the different treatment given to marijuana and peyote based on demand for the drugs, without deciding whether the *Mancari* analysis might apply to a law creating a denominational preference.

370. *See, e.g., supra* notes 252–53.

371. *See supra* notes 299–300, 315–19 and accompanying text.

372. The constitutional framers believed religion is necessary for government to prosper, and it is undeniable that religion has played a major role in shaping our nation's laws and culture and committing the populace to our political and economic system. *See supra* notes 124–39 and

toward the Native Americans is not adequately served by legislation that is limited in scope to tribal members. Such legislation serves to *contain* Native American religions. The Establishment Clause forbids this governmental involvement in religion precisely on the reasoning that it tends to *degrade* religion, not preserve it. If we believe in separation between church and state as a means of preserving religion, which empirical evidence supports,[373] then these beliefs should apply with equal force to Native Americans.

If Congress is to draw lines delineating who will receive legal sanction to fully participate in Native American religions and all their ceremonies, there should be independent interests to support the line-drawing. Consider, for example, the peyote legislation. Peyote is banned for health reasons. Tribal membership is based substantially on race.[374] One has nothing to do with the other.[375] The Drug Enforcement Agency has indicated that historically, Native Americans have used peyote without interfering with the administration of the drug laws.[376] But it is speculative to assume from that factual premise that administration of the drug laws would become problematic if Native Americans could establish their own church membership rules or if non-Indians were entitled to engage in the same religious practices through the formation of new sects and churches.[377]

On the other hand, suppose that Congress enacted an exemption for the religious use of peyote that was generally applicable but which set limits upon the age of the people who could receive the peyote and the quantity of peyote that could be received. One could at least argue that a compelling *secular* governmental interest supported such a law, because the distinction would be related to public health concerns—the concerns which underlie the peyote ban. But an exemption which classifies who may receive the sacrament based on the race or tribal affiliation of the practitioner does not serve the secular goal of promoting Native Americans' political prosperity and self-governance. Instead, it serves to contain Native American religions and subjugate their practice to the will of the federal government.

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accompanying text. Thus, the preservation of Native American religions could be viewed as an attribute of their political sovereignty, especially given the inseparability of Native American culture, religion, and politics.

373. *See supra* notes 124–25 and accompanying text.

374. *See supra* notes 252–53.

375. *Accord* Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415, 415 (9th Cir. 1972).

376. *See* H.R. REP. NO. 675, 103d Cong., 2nd Sess. 14 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2404, 2415.

377. Evidence suggests the contrary. For example, the Peyote Way Church of God had a limited number of members and appeared to engage in a responsible use of peyote, keeping records on how much peyote its members used and censuring the non-religious use of the drug. Peyote Way Church of God, Inc., v. Thornburgh, 922 F.2d 1210, 1212–13 (5th Cir. 1991). The NAC exemption for the religious use of peyote has been in effect since 1966, and though some courts have interpreted the exemption to apply only to members of federally recognized tribes, other courts have not limited the exemption. United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991); Native American Church of N.Y. v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979). *See also In re* Grady, 394 P.2d 728, 729 (Cal. 1964) (extending to individuals other than Native American tribal members the free exercise rights to use peyote for religious purposes). Despite these general exemptions, the administration of the drug laws with regard to peyote use has not been at risk, with the court noting in *Olsen* that 20 pounds of peyote was seized in a seven-year period, as compared with more than 15 million pounds of marijuana. *See* Olsen v. Drug Enforcement Admin., 878 F.2d at 1463.

The latest sacred-site bill was therefore legitimate. It was not necessary to limit its scope to tribal members. Rather, Congress' obligation to preserve Native American religion, culture, and self-governance would have been better served with a law protecting Native American sacred sites in general, without limiting the protection to sites that have been honored by members of federally recognized tribes. A law limited to tribal members would tend to influence membership criteria and intrude upon the autonomy of religious groups, actions which are inconsistent with Congress' obligations toward Native American tribes.

CONCLUSION

Traditional Establishment Clause rules should not pose a barrier to sacred-site protection. Although there is no set Establishment Clause test, challenges under this clause traditionally have been resolved with the three-prong test of *Lemon v. Kurtzman*,[378] while historical practice and equal protection among religious denominations has also been considered. Sacred-site protection serves secular governmental interests in preserving land, accommodating minority religious practices, maintaining cultural diversity, and addressing a history of religious discrimination. Additionally, if one considers historical practices (as has been done in dealing with Christian practices), National Park land historically has remained undeveloped without interfering with the Establishment Clause. Most Americans are not going to conclude upon seeing undeveloped park land that the government is endorsing a religion. Thus, there should be no fear that preserving this land will give the appearance that the government is promoting religion.

The unavailability of sacred-site protection today is not the product of the application of consistent and uniform rules under the religion clauses. Nor is it the product of the Native Americans tribes' status as separate political bodies. It has nothing to do, for instance, with whether a Native American pursuing a sacred-site claim is a member of a tribe or not. Instead, it is the result of a culture clash. Our laws and culture implicitly reflect Western values, which in many ways are diametrically opposed to the values held by Native Americans, particularly as they relate to nature and the environment. This clash has led to uninformed and, at times, even hostile attitudes toward Native American religions, such as reflected in the comments preceding this Article.

If this culture clash were better recognized and the same concepts of religion were applied under both the Free Exercise of Religion and Establishment clauses, then Native American sacred sites would be protected today, even without adopting modified Establishment Clause standards. Since the courts have held desecrating sacred sites is not a sufficient burden on religion to warrant protection under the Free Exercise Clause, then protecting these sites should not be considered a religious benefit under the Establishment Clause. Protecting a sacred site should either be considered religious (based on Native American views of religion), or it should be considered secular (based on Western values). If considered religious, then Native Americans should have a free-exercise claim; if not, there is no Establishment Clause problem. Applying different views on what is a religious benefit or burden under the

378. 403 U.S. 602, 612–13 (1971).

Religion Clauses creates a double-edged sword, which inevitably serves to deny protection for Native American sacred sites.

A relaxed Establishment Clause analysis based on *Mancari* may appear to present an opportunity to protect Native American sacred sites, in light of the present need for protection. However, *Mancari* has not had a favorable impact upon the equal protection rights of Native Americans. Instead, it has been applied to expand the trust doctrine and congressional plenary power, enabling Congress to act either to benefit or harm Native American tribes, despite constitutional restrictions that otherwise would apply. Applying *Mancari* to the Establishment Clause will likely have the same impact: it likely would extend the trust doctrine and congressional plenary power to laws governing Native American religions, and Native Americans would be denied rights sought to be protected by the Establishment Clause.

Although some commentators have embraced an extension of *Mancari* to the Establishment Clause as a means of upholding laws relating to Native American sacred sites and other aspects of their religions (particularly peyote use), courts have differed widely on the appropriateness of this extension.[379] The debate is ardent, and for good reason. To extend *Mancari* to the Establishment Clause, one must conclude that an equal protection analysis alone satisfies all Establishment Clause concerns. That conclusion, however, does not comport with Supreme Court precedent, nor does it fully satisfy the concerns underlying the Establishment Clause. One of the fundamental rights the Establishment Clause seeks to protect is religious autonomy, including the right of religious groups to be free from governmental entanglement, to determine their own membership rules, and to define their own hierarchy within their religious groups.

When the government attempts to delineate who may be a member of a religious group, participate in a religious ceremony, or receive the full privileges of participating in a religion, it is implicating itself in religious doctrine. The Establishment Clause is then threatened. There is little religious autonomy if the federal government may tell Native American tribal members that their religious beliefs and practices will be protected by law, but their friends, family, or anyone else not a tribal member who may want to practice their religions will not be protected. By limiting protection to members of tribes, Congress is essentially stating that Native American tribal members may practice their religions, provided they keep those religions to themselves.

Mancari should not be clutched as the answer for protecting Native American sacred sites. It should not have been invoked in the legislative history pertaining to the latest sacred-site bill. That bill could and should have been passed, and there was no need to confine the scope of the bill to members of federally recognized tribes. Perhaps *Mancari* can, in some cases, be viewed as a bandaid on a gaping wound: *Mancari* may provide some temporary relief, but it will not heal the wound. A more encompassing treatment is needed—a treatment that does not require Native Americans to forfeit Establishment Clause guarantees in exchange for legislation protecting their religious freedom.

379. *See, e.g., supra* notes 326–27.