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COMMENT

SACRED RAIN ARROW: HONORING THE NATIVE AMERICAN HERITAGE OF THE STATES WHILE BALANCING THE CITIZENS' CONSTITUTIONAL RIGHTS

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Abstract

Many states' histories and traditions are steeped heavily in Native American culture, which explains why tribal imagery and symbolism are prevalent in official state paraphernalia such as license plates, flags, and state seals. Problems arise for states using Native American artwork when a citizen takes offense to the religious implications of Native American depictions, and objects to having it displayed on any number of items. This Comment will examine the likely outcome of cases involving Establishment Clause and compelled speech claims arising from Native American images and propose a solution for balancing the constitutional rights of the citizens while still honoring the states' rich Native American heritage.

I. Introduction

States have used Native American imagery in their official state paraphernalia for hundreds of years; in fact, some states used these depictions when they were only colonies. King Charles I permitted a charter to the Massachusetts Bay Colony in 1629, which included the authority to use a seal portraying an Indian holding an arrow downward to indicate peace.[1] The current Massachusetts seal, although very different from its original, depicts an Algonquin Native American clothed in moccasins and a shirt, holding a bow in his right hand and an arrow in his left hand, pointed

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1. *The History of the Arms and Great Seal of the Commonwealth of Massachusetts*, WILLIAM FRANCIS GALVIN: SECRETARY OF THE COMMONWEALTH OF MASS., http://www.sec.state.ma.us/pre/presea/sealhis.htm (last visited Sept. 28, 2013).

downward.[2] This has been the Massachusetts official state seal since June 4, 1885, and the seal is also currently displayed on the Massachusetts state flag.[3]

The Florida state seal, also depicted on its state flag, shows a Native American Seminole woman strewing flowers[4]; the state flag of Kansas features Indians hunting American Bison[5]; the Minnesota state flag and seal have an image of an Indian riding on a horse[6]; Oklahoma's flag and seal exhibits an Osage warrior's shield and honors more than sixty Native American groups.[7] More subtle references to Native American culture on state memorabilia include an Indian ear of corn on Delaware's state flag and seal[8], the red border of Wyoming's state flag which represents the Indians who occupied the land long before the settlers came[9], and the simple design of New Mexico's state flag displaying the sun symbol of the Zia people.[10]

Two states feature Native American imagery on their official state license plates: New Mexico and Oklahoma. New Mexico's license plate repeats the same image depicted on its state flag, the Zia sun symbol.[11] The Oklahoma license plate, which used to display the same buffalo shield image used on the state flag and seal, now features the image of deceased

2. *Id.*; *The Massachusetts State Flag*, NETSTATE, http://www.netstate.com/states/symb/flags/ma_flag.htm (last visited Sept. 28, 2013).

3. *The Massachusetts State Flag*, *supra* note 2.

4. *The Florida State Flag*, NETSTATE, http://www.netstate.com/states/symb/flags/fl_flag.htm (last visited Sept. 28, 2013).

5. *The Kansas State Flag*, NETSTATE, http://www.netstate.com/states/symb/flags/ks_flag.htm (last visited Sept. 28, 2013).

6. *The Minnesota State Flag*, NETSTATE, http://www.netstate.com/states/symb/flags/mn_flag.htm (last visited Sept. 28, 2013).

7. *The Oklahoma State Flag*, NETSTATE, http://www.netstate.com/states/symb/flags/ok_flag.htm (last visited Sept. 28, 2013); *The Great Seal of Oklahoma*, NETSTATE, http://www.netstate.com/states/symb/seals/ok_seal.htm (last visited Sept. 28, 2013).

8. *The Delaware State Flag*, NETSTATE, http://www.netstate.com/states/symb/flags/de_flag.htm (last visited Sept. 28, 2013); *The Great Seal of Delaware*, NETSTATE, http://www.netstate.com/states/symb/seals/de_seal.htm (last visited Sept. 28, 2013).

9. *The Wyoming State Flag*, NETSTATE, http://www.netstate.com/states/symb/flags/wy_flag.htm (last visited Sept. 28, 2013).

10. *The Zia Sun Symbol*, N.M. OFFICE OF THE STATE HISTORIAN, http://newmexicohistory.org/multimedia/videos/the-zia-sun-symbol (last visited Sept. 28, 2013).

11. *New Mexico License Plates, 1969-Present*, INDEX OF U.S. LICENSE PLATE PAGES, http://www.15q.net/nm.html (last modified Oct. 10, 2011).

artist Allan Houser's sculpture *Sacred Rain Arrow*.[12] Houser, born in Oklahoma, was of Chiricahua Apache descent, which frequented the subjects of his artwork.[13] The inspiration for *Sacred Rain Arrow* occurred in Houser's youth when an older Chiricahua Apache showed Houser a drawing of a young Apache warrior aiming an arrow towards the sky while kneeling on the ground.[14] The story that inspired the drawing had been told for generations, in which the young warrior had been sent to a medicine man who blessed his bow and arrows.[15] After having his bow and arrows blessed, the warrior knelt down and shot his arrow into the heavens, hoping to carry the prayer for rain to the Spirit World.[16]

One of the few sculptures of Houser's piece *Sacred Rain Arrow* has resided at the Thomas Gilcrease Museum in Tulsa, Oklahoma, for more than two decades.[17] The piece is also displayed at the Smithsonian, and was even used as the centerpiece of the Olympic Village during the 2002 Olympic Winter Games.[18] In the spring of 2008, *Sacred Rain Arrow* was chosen from five finalists to be displayed on the official Oklahoma license plate, which had featured the Osage shield artwork since 1993.[19] The other finalists *Sacred Rain Arrow* beat out for the coveted spot included western images, such as a portrayal of Will Rogers, and other Native American artwork.[20] Now roughly 3.2 million vehicles in Oklahoma bear the image on their license plates.[21]

Although the license plate received an award for Automobile License Plate Collectors Association's best plate of the year in 2009, the new

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12. *Oklahoma License Plates, 1969-Present*, INDEX OF U.S. LICENSE PLATE PAGES, http://www.15q.net/ok.html (last modified Oct. 3, 2011); Greg Horton, *'Rain God' Oklahoma License Plate: Pastor Keith Cressman Lawsuit Approved by 10th Circuit Court of Appeals*, HUFFINGTON POST (Jun. 17, 2013, 3:02 PM EDT), http://www.huffingtonpost.com/2013/06/17/pastor-suit-against-oklahoma-license-plate-ok_n_3455129.html.

13. Kelsy Taylor, *Sacred Rain Arrow Statue Marks History*, GTR NEWSPAPERS, http://www.gtrnews.com/greater-tulsa-reporter/4126/sacred-rain-arrow-statue-marks-history (last updated Aug. 20, 2009).

14. *Id.*

15. *Id.*

16. *Allan Houser (Haozous): Sacred Rain Arrow*, COLO. SPRINGS FINE ARTS CENTER, http://www.csfineartscenter.org/collection-spotlight/houser-sacred.asp (last visited Sept. 28, 2013); Taylor, *supra* note 13.

17. Taylor, *supra* note 13.

18. *Allan Houser (Haozous): Sacred Rain Arrow*, *supra* note 16; Taylor, *supra* note 13.

19. Taylor, *supra* note 13.

20. *New Oklahoma License Plates*, SKYSCRAPERCITY, http://www.skyscrapercity.com/showthread.php?t=566007 (last visited Oct. 22, 2013).

21. Taylor, *supra* note 13.

Sacred Rain Arrow artwork was not introduced without controversy.[22] On an article posted to review the new license plate, readers made online comments calling the plate "racist" for only representing Native Americans, while others were proud of the image, which represents the Native American influence in Oklahoman culture.[23] One Oklahoman, Keith Cressman, was offended by the new license plate design for constitutional reasons.

Cressman filed suit November 2, 2011, against Oklahoma state officials alleging that Oklahoma forced Cressman to speak in violation of his First Amendment rights by requiring him to display the *Sacred Rain Arrow* image on his license plate.[24] The district court dismissed Cressman's complaint, and on June 12, 2013, the Tenth Circuit reinstated his claim.[25] The Tenth Circuit held that Cressman's complaint put forth a plausible compelled speech claim because Cressman alleged adequate facts show that the Native American image expresses a particularized message that others are likely to understand, and to which Cressman opposes.[26] Upon remand to the district court, Cressman's case was unsuccessful on the basis that a reasonable observer would not interpret the image to be transmitting a religious message.[27]

Although other suits have been brought protesting depictions on license plates construed as religious,[28] Cressman's case is the first to protest against the Native American religious implications of imagery on any official state paraphernalia. This case could be the beginning of similar cases filed by those offended by the religious attributes of Native American culture on state memorabilia. Cressman's case could have a widespread effect on the future possibility of states using tribal artwork in their official state memorabilia, because so many states use imagery similar to *Sacred Rain Arrow*.

This Comment examines the possibility of lawsuits closely resembling Cressman's, the legal claims likely to support the suits, and how the courts should analyze these types of cases. Part II explains the two legal actions

22. Cressman v. Thompson, 719 F.3d 1139, 1158 (10th Cir. 2013).

23. *New Oklahoma License Plate*, ABOUT.COM, http://okc.about.com/b/2008/08/19/new-oklahoma-license-plate.htm (last visited Sept. 28, 2013).

24. *Cressman*, 719 F.3d 1139.

25. *Id.*

26. *Id.*

27. Cressman v. Thompson, No. CIV-11-1290-HE, slip op. at 4 (W.D. Okla. Jan. 14, 2014).

28. *See* Wooley v. Maynard, 430 U.S. 705 (1977).

that affronted citizens will most likely pursue, the Establishment Clause and compelled speech doctrine. Part III analyzes the likely outcome of these cases, and Part IV offers a balancing approach for courts to use in order to successfully weigh the First Amendment rights of citizens against the interests of the states in preserving their rich Native American culture.

II. History of the Establishment Clause and Compelled Speech Doctrine

The text of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[29] Out of this text have risen two constitutional limitations on the government: the Establishment Clause and the compelled speech doctrine, which are the two doctrines most likely to be used by citizens wanting to assert claims against their respective states for being forced to display Native American depictions in violation of their religious beliefs on various state memorabilia.

A. Development of the Establishment Clause Jurisprudence

Before incorporation of the Fourteenth Amendment, the Establishment Clause was rarely litigated in the Supreme Court.[30] The Supreme Court itself has referred to the First Amendment religion text as "opaque."[31] Years after incorporation, the Court used a straightforward, two-prong test that asked first whether the action by the government had a religious purpose, and second if the action had a religious effect.[32] The Supreme Court developed the three-part *Lemon* test in 1971.[33]

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29. U.S. CONST. amend. I.

30. Frank J. Ducoat, *Inconsistent Guideposts: Van Orden, McCreary County, and the Continuing Need for a Single and Predictable Establishment Clause Test*, RUTGERS J.L. & RELIGION, 3 (Spring 2007), http://lawandreligion.com/sites/lawandreligion.com/files/Ducoat.pdf (volume 8, part 2).

31. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

32. *Id.*

33. *Id.* The Supreme Court uses three different approaches to Establishment Clause cases: strict separation, neutrality, or accommodation & equality. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1236-37, 1240 (4th ed. 2011). The strict separation approach is described by Thomas Jefferson's metaphor of a wall separating church and state. *Id.* at 1236. This is unattainable, because it would result in an impossible standard, which would not allow the government to provide routine services such as police or fire assistance to the church. *Id.* at 1237. The neutrality approach mandates the government to be neutral to religion, and not favor one religion over another or secularism over religion. Id. The

In *Lemon v. Kurtzman*, the subjects of constitutional debate were a Rhode Island state statute that provided a salary supplement for nonpublic schoolteachers, and a Pennsylvania state statute that provided reimbursement for salaries, textbooks, and other materials for certain secular subjects in nonpublic schools.[34] The Court stated that the Establishment Clause was meant to give protection from three main evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[35] In order to fulfill its duty to protect the public from these evils, the Court's test asked first, if the state has a "secular legislative purpose"; second, if its "principal or primary effect [n]either advances nor inhibits religion"; and last, whether the statute fosters "an excessive government entanglement with religion."[36]

The Court held the Rhode Island statute failed the *Lemon* test because by providing the salary supplements to nonpublic teachers, the government entangled itself with religion; the Court came to this conclusion by reasoning that a dedicated religious teacher would have difficulty maintaining religious neutrality.[37] The lines between the secular and religious classes were very blurred, and even with the best of intentions a teacher would find it difficult to maintain a complete separation between secular teaching and religious doctrine.[38] The Pennsylvania statute failed the *Lemon* test because the government had to monitor the courses given compensation and establish the cost between secular and religious educations, which entangled the state with religion.[39] The statute also allowed state financial aid to go directly to religious schools, which caused further entanglement.[40]

Although *Lemon* has perhaps been considered the principal Establishment Clause test, three years after the case was decided the Supreme Court held that the factors in *Lemon* were "no more than helpful

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"symbolic endorsement" test developed in Van Orden v. Perry measures the neutrality of the government. *Id.* at 1237, 1240. Finally, the accommodation or equality approach acknowledges the importance of religion in society, and would have religion accommodated in the government. *Id.* at 1240. The only way the establishment clause would be violated under this approach would be if the government established a church, required religious participation, or favored one religion over another. *Id.* at 1242.

34. *Lemon*, 403 U.S. at 607, 609.
35. *Id.* at 612.
36. *Id.* at 612-13.
37. *Id.* at 602, 618.
38. *Id.* at 618-19.
39. *Id.* at 621.
40. *Id.*

signposts."[41] In *Lynch v. Donnelly*, Justice O'Connor proposed the "endorsement test" in her concurrence, which incorporates the same prongs from the *Lemon* test but interprets them in a different light.[42] The endorsement test essentially combines the *Lemon* purpose and effect prong to inquire into whether the government's purpose is to endorse or disapprove of religion, and whether the effect, notwithstanding purpose, is to convey a message of endorsement or disapproval as understood by the reasonable observer.[43] Justice O'Connor explained endorsement as "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community . . . [d]isapproval sends the opposite message."[44] Justice O'Connor also emphasized, "it is only practices having that effect [of government endorsement or disapproval of religion], whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."[45]

The Court applied the endorsement test in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, in which the subjects of debate were the display of a crèche in the county courthouse and an eighteen foot Chanukah menorah placed next to a forty-five foot Christmas tree by the entrance to the City-County Building in Pittsburgh; a sign was displayed in front of the tree and menorah stating "Salute to Liberty."[46] The Court stated that endorsement is not self-defining, but "derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause."[47] The Supreme Court held that because the crèche was displayed singularly in a prominent area of the building with nothing to detract from its religious message, it would be seen as an "unmistakable message that [the city] supports and promotes the Christian praise to God that is the creche's religious message."[48]

The Court acknowledged that the menorah was a closer constitutional question, but stated the menorah had a religious and secular meaning, and

41. Hunt v. McNair, 413 U.S. 734, 741 (1973).

42. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984).

43. *Id.* at 690; Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989).

44. *Lynch*, 465 U.S. at 688.

45. *Id.* at 692.

46. *Cnty. of Allegheny*, 492 U.S. at 578, 581-82, 587.

47. *Id.* at 593.

48. *Id.* at 600.

when considering the setting the effect was an "overall holiday setting."[49] However, the Court recognized endorsing two religions has the same constitutional effect as endorsing one, and questioned whether the integrated display of the tree, menorah, and the sign had the effect of endorsing the Christian and Jewish faiths, or whether it would simply be seen as a secular celebration of the holiday season.[50] The Supreme Court held that because the Christmas tree was not a religious symbol, and because the city did not have an emblem with lesser religious implications to represent the Chanukah holiday (whose religious effect was further diluted by the sign) the display did not fail the endorsement test.[51]

The two most recent Establishment Clause cases both decided by the Supreme Court on June 27, 2005, albeit very differently, are *Van Orden v. Perry* and *McCreary County v. American Civil Liberties Union of Kentucky*. Each case considered whether displays of the Ten Commandments on government property violated the Establishment Clause.[52] The Supreme Court is likely to apply these cases to those concerning Native American symbolism in official state memorabilia because of the similarities. Native American artwork and images displayed on state items often have religious meanings or associations like the Ten Commandments displayed on government property have religious meanings or associations.

In *Van Orden v. Perry*, a plurality opinion, a monument inscribed with the Ten Commandments on the Texas State Capitol grounds, which had been in place for more than forty years, fell within the limitations of the Establishment Clause.[53] Chief Justice Rehnquist was joined by Justices Scalia, Kennedy, and Thomas in finding that to apply the *Lemon* test would be illogical, and its analysis was "driven both by the nature of the monument and by our Nation's history."[54] The four justices also stated that in applying the Establishment Clause its cases point in two directions: one face looks toward the powerful role played by religion and religious traditions throughout the history of the Nation, and the other face considers

49. *Id.* at 613-14.
50. *Id.* at 616.
51. *Id.* at 616-18.
52. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).
53. *Van Orden*, 545 U.S. at 677, 679.
54. *Id.* at 686.

the fundamental assumption that governmental intervention in religious matters can cause a danger to religious freedom.[55]

In their analysis of *Van Orden*, the justices acknowledged that although the Court has sometimes used *Lemon* as the governing test in Establishment Clause cases, not all the justices agree on the test, and in some cases the Court has simply not applied *Lemon* at all, or applied the *Lemon* test after deciding a challenged practice was unconstitutional under a different Establishment Clause test.[56] The decision not to impose the *Lemon* test in *Van Orden* was made because of the monument's passive nature, and the justices instead reflected on the role of religion in the United States' history, starting with George Washington's issuance of a Thanksgiving Day Proclamation to be devoted to prayer and thankfulness to God.[57] The justices seemed to indicate that the *Lemon* test is inappropriate in cases concerning longstanding practices within the government that may have religious origins or implications; this is evidenced by their discussion of how opening legislative sessions with prayer and religious images in the Supreme Court and around the nation's capital is constitutional.[58]

Chief Justice Rehnquist and those in concurrence with him clarified that there are limitations to the displays of religious messages or symbols by the government, citing the case *Stone v. Graham*.[59] In *Stone*, the Supreme Court held displaying the Ten Commandments in every public classroom was unconstitutional, but the justices in *Van Orden* differentiated the classroom displays from the Texas monument by explaining that the monument was a much more passive use of the Ten Commandments.[60] The four justices noted that the petitioner walked by the Texas monument for years before bringing suit, and that the monument represented both Texas political and legal history.[61] The monument served a dual purpose of representing both religion and government, and because having religious content does not singularly run afoul of the Establishment Clause, the justices found the monument to be constitutional.[62]

Conversely, in *McCreary County v. ACLU of Kentucky*, the American Civil Liberties Union (ACLU) sued to enjoin displays featuring gold-

55. *Id.* at 683.
56. *Id.* at 685-86.
57. *Id.* at 686-87.
58. *Id.* at 687-88.
59. *Id.* at 678.
60. *Id.* at 690-91.
61. *Id.* at 691.
62. *Id.* at 691-92.

framed, large copies of the Ten Commandments in two courthouses in different Kentucky counties.[63] The displays were modified to add eight smaller, historical documents with religious references as the single shared element, such as the "endowed by their Creator" passage of the Declaration of Independence.[64] The district court issued a preliminary injunction against the original displays, and the counties revised the displays for the third time.[65] The third display, named "The Foundations of American Law and Government Display," was comprised of nine framed, equally sized documents including the Commandments, Star Spangled Banner lyrics, and the Declaration of Independence.[66] On motion from the ACLU, the district court included the third display in the injunction.[67] The Sixth Circuit affirmed, and the Supreme Court upheld the Sixth Circuit's ruling.[68]

Although the two counties asked the Court to disregard the purpose in displaying the pictures, because the "official purpose is unknowable" and any search for it would be in vain, the Supreme Court held that the purpose of the counties in displaying the Ten Commandments in courtrooms may be considered, and that the "development of the presentation should be considered when determining its purpose."[69] The Court held the second display had an impermissible purpose because of the religious focus, and that the third display also had an impermissible purpose because the revision was simply for a "litigating position."[70] The Court also explained its decision by noting that when analyzing the third display "[n]o reasonable observer could swallow the claim that the [c]ounties had cast off the [religious] objective so unmistakable in the earlier displays."[71]

The Court reaffirmed the "touchstone for [its] analysis is the principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion,'" and the value of the *Lemon* test.[72] The Court maintained that looking at purpose is important to prevent the government from forgoing neutrality and acting with the intention to favor a religious point of view, and emphasized that

63. 545 U.S. 844, 851-52 (2005).
64. *Id.* at 844.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 845.
69. *Id.* at 850-51.
70. *Id.* at 870-72.
71. *Id.* at 872.
72. *Id.* at 860-61.

examining purpose makes practical sense.[73] The Court also stated there was no indication that when looking at purpose the test would be fatal every time in claims involving violations of the Establishment Clause.[74] In fact, the Court noted the test was not fatal very often, because the government did not usually act with the "predominant purpose of advancing religion."[75]

The two counties in *McCreary* also argued the purpose in this case should only be inferred "from the latest news about the last in a series of governmental actions," disregarding how close they may be in subject and time.[76] The Court rejected this notion, and stated that "the world is not made brand new every morning," and that the counties wanted an "absentminded objective observer," not one who is accustomed with past government actions and proficient in assessing what context the policy arises from.[77] The Supreme Court held that purpose must be weighed heavily under the Establishment Clause and considered in the light of context.[78] The Court restated the importance of neutrality, but also made it clear that the Court's holding did not mean sacred text could never be used in a governmental display without violating the Establishment Clause.[79]

The two very different avenues the Court took in deciding its most recent Establishment Clause cases are a clear portrayal of the confusion and lack of clarity in this area of the law, as well as evidence of the differing opinions among the justices in the application of the *Lemon* test. The Supreme Court has made no clear test for Establishment Clause purposes and until it does decide to adopt a majority test, the lower courts will continue to wade through the murky waters of this doctrine.

B. Creation of the Compelled Speech Doctrine

The Supreme Court introduced the compelled speech doctrine in 1943 when the Court held in *West Virginia State Board of Education v. Barnette* that the government could not force a student to recite the Pledge of

73. *Id.* at 860-62. The Court also noted that appellate courts across the country examine purpose daily, and that "eyes that look to purposes belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862.

74. *Id.* at 863.

75. *Id.*

76. *Id.* at 866.

77. *Id.*

78. *Id.* at 874.

79. *Id.*

Allegiance.[80] The school policy at issue in *Barnette* stated that if a student did not comply and recite the pledge they would be expelled from the school, and the student's parents or guardians would be liable to prosecution and possibly fined up to fifty dollars or jailed for thirty days.[81] In *Barnette*, the Court held that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their therein," and declared the school's practice to be unconstitutional.[82]

The Court expanded its reasoning in *Barnette* in the 1977 case *Wooley v. Maynard*, which, like *Cressman*, involved speech on a license plate.[83] In *Wooley*, an action was brought for injunctive and declaratory relief against the New Hampshire statutes criminalizing the obstruction of the words "Live Free or Die" on its state license plates.[84] This gave the Court an opportunity to further develop the compelled speech doctrine.

Maynard and his wife were members of the Jehovah's Witnesses faith, and considered the motto "Live Free or Die" as contrary to their political, moral, and religious beliefs, which caused the couple to cover up the saying on their jointly owned family vehicles.[85] Maynard was issued a citation and given a twenty-five-dollar fine for committing a felony by covering up the motto.[86] One month later, Maynard was charged with the same violation and fined fifty dollars, and spent fifteen days in jail.[87] Before trial for his second violation, Maynard received a third violation of the same offense and was convicted as "continued for sentence" and received no additional punishment to the fifteen days he spent in jail.[88]

The District Court held that Maynard was engaging in symbolic speech by covering up the state motto on his license plate, and that the interest of New Hampshire in enforcing its defacement statute was not great enough to justify restricting Maynard's constitutionally protected expression.[89] The Supreme Court decided not to examine the symbolic speech issue, but

80. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2418 (2004).

81. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626-29 (1943).

82. *Id.* at 642.

83. Wooley v. Maynard, 430 U.S. 705 (1977).

84. *Id.* at 709.

85. *Id.* at 707.

86. *Id.* at 708.

87. *Id.*

88. *Id.*

89. *Id.* at 713.

instead considered the objection of the Maynards to displaying "Live Free or Die" on their license plates.[90]

The Court began its analysis by reaffirming its decision in *Barnette*, and observed that the New Hampshire statute required the appellees to "use their private property as a 'mobile billboard' for the State's ideological message."[91] It was unpersuasive to the Court that most citizens would agree with New Hampshire's motto; the First Amendment's protection extends to the right of citizens to have a different ideology than the majority of the population, and the "state [cannot] constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[92]

The Court looked at New Hampshire's countervailing interest to see if its interest was sufficiently compelling to warrant the requirement for the appellees to display the motto on their license plates.[93] The interests of the state were to "(1) facilitat[e] the identification of passenger vehicles, and (2) promot[e] appreciation of history, individualism, and state pride."[94] The Court held that the purpose of identification could be achieved by more narrow means.[95] When considering the second interest of the state, the Supreme Court held that although the state may circulate state pride, individualism, and respect for history, this interest could not outweigh an individual's First Amendment right to avoid portraying this message, and affirmed the judgment of the district court.[96]

The Supreme Court continued to develop the compelled speech doctrine in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, (GLIB).[97] In *Hurley*, gay, lesbian, and bisexual descendants of Irish immigrants formed the respondent organization GLIB in order to march in Boston's St. Patrick's Day parade, and were denied by the organization that orchestrated the parade, the South Boston Allied War Veterans Council (the Council).[98] The Council was comprised of individuals from different South

90. *Id.*

91. *Id.* at 715.

92. *Id.* at 713, 715.

93. *Id.* at 716.

94. *Id.* New Hampshire also argued that because the motto was only on passenger vehicles and not commercial or other vehicles, the motto allows police officers to more readily identify if passenger vehicles have the requisite plates. *Id.*

95. *Id.* at 716-17.

96. *Id.* at 717.

97. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

98. *Id.* at 560-61.

Boston veterans groups.[99] The GLIB obtained a court order to be able to march in the parade, but was refused again the following year, and the organization filed suit against the Council.[100] The state trial court rejected the Council's contention that the parade was private, and found that the Council's refusal was in violation of the state's public accommodations law, and in contrast with purpose of St. Patrick's Day, which is to celebrate diversity.[101]

The Supreme Court of Massachusetts affirmed, and the Supreme Court granted certiorari.[102] The Court noted while the Council presented a First Amendment claim, the respondents did not, but the activity disputed was within the nature of protected speech, and that it would decide accordingly.[103] The Court discussed the form of speech parades fall under, and held that parades are a form of expression by the "inherent expressiveness of marching to make a point."[104] The Court also held that the protected expression in a parade is not limited to its songs and banners because the Constitution "looks beyond written or spoken words as mediums of expression."[105] The Supreme Court held that a "speaker has the autonomy to choose the content of his own message," and reversed the Massachusetts Supreme Court decision, finding the public accommodation law application to the parade unconstitutional.[106]

III. Effects of the Establishment Clause and Compelled Speech Doctrine on State Sponsored Native American Imagery

When Keith Cressman brought his claim against various Oklahoma public officials for being compelled to display the *Sacred Rain Arrow* artwork on his vehicles' license plates, he posed a unique issue to the court, which had not yet been considered. Cressman's case was ultimately decided against him upon remand to the district court, which may discourage others from bringing similar claims. However, close examination of his case, including analysis of the lower court's decision and how the Tenth Circuit reached its decision to reinstate the case, could lead to success of future claims.

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99. *Id.* at 560.
100. *Id.* at 561.
101. *Id.* at 562.
102. *Id.* at 563, 566.
103. *Id.* at 566-67.
104. *Id.* at 568.
105. *Id.* at 569.
106. *Id.* at 573, 581.

A. Cressman v. Thompson

Keith Cressman, a Methodist minister at St. Mark's United Methodist Church in Bethany, Oklahoma, believes there is "one true God," and that it is a sin to concede any other god.[107] In August of 2008, Cressman learned that the Oklahoma standard vehicle license plate had been given a new design, and the new plate would be introduced in January of 2009.[108] Upon seeing Houser's artwork displayed on the license plate, Cressman "discerned that [it] depicted and communicated Native American religious beliefs in contradiction to his own Christian religious beliefs."[109] Cressman researched the piece of art, and learned of the inspiration behind the sculpture.[110]

From Cressman's perspective, the piece "retells the story of a Native American who believes in sacred objects[,] in multiple deities and in the divinity of nature[,] and in the ability of humans to use sacred objects to convince gods to alter nature."[111] Cressman does not wish to display the image on his vehicle's license plate because he believes its message will communicate ideas about Native American culture and practices which contradict his sincerely-held religious beliefs; Cressman would rather remain silent in consideration to images and messages he cannot endorse or accept.[112] Cressman stated, "The underlying narrative of this story, and of the license plate where the story is depicted, communicates the promotion of pantheism, panentheism, polytheism, and/or animism and promotes those particular Native Americans' social and cultural practices that accept these religious ideas."[113]

Initially, Cressman avoided the license plate featuring *Sacred Rain Arrow* by purchasing a specialty license plate, which cost an additional thirty-seven dollars, and had a thirty-five dollar renewal fee.[114] In an effort to reduce his cost, Cressman purchased a cheaper license plate, which was eighteen dollars more than the standard plate with a sixteen dollar and fifty cent renewal fee.[115] After deciding he did not want to pay extra fees for a

107. Cressman v. Thompson, 719 F.3d 1139, 1141 (10th Cir. 2013); Horton, *supra* note 12.
108. *Cressman*, 719 F.3d at 1141.
109. *Id.*
110. *Id.* at 1141-42.
111. *Id.* at 1142.
112. *Id.*
113. Cressman v. Thompson, 871 F. Supp. 2d 1176, 1183 (W.D. Okla. 2012).
114. *Cressman*, 719 F.3d at 1142.
115. *Id.*

specialty license plate, Cressman looked into whether he could simply cover up the picture of the artwork on his plate.[116] After visiting the Motor Vehicle Division of the Oklahoma Tax Commission in Oklahoma City and an officer with the Department of Public Safety, Cressman discovered that covering up the image would violate title 47, section 1113 of the Oklahoma Statutes, which provides: "The license plate, decal, and all letters and numbers shall be clearly visible at all times."[117] A violation of this section is a misdemeanor, punishable with a fine of up to $300.[118]

1. Dismissal by the Lower Court

Cressman continued to pay additional fees for specialty license plates on two vehicles, and in March 2010, he sent letters to several different officials in various departments, requesting a remedy for his situation.[119] Cressman received no responses for these letters, and subsequently filed a 42 U.S.C. § 1983 civil rights lawsuit against various public officials in the United States District Court for the Western District of Oklahoma, alleging the violation of his rights with consideration to the freedom of speech, due process, and the free exercise of religion under the First and Fourteenth amendments.[120] Cressman filed a motion for a preliminary injunction to enjoin the defendants from administering section 1113, and alternatively requested the court to compel the defendants to provide specialty license plates to Cressman at no further cost.[121]

In order to determine whether Cressman's request for a preliminary injunction would be granted, the district court first considered whether Cressman was substantially likely to succeed on the merits.[122] The court held that while it did not doubt the genuineness of Cressman's religious beliefs, he did not meet his burden of showing he had been compelled to

116. *Id.*

117. 47 OKLA. STAT. § 1113 (2011), *quoted in Cressman*, 719 F.3d at 1142-43.

118. *Cressman*, 719 F.3d at 1143.

119. *Id.*

120. *Id.*

121. *Id.*

122. Cressman v. Thompson, 871 F. Supp. 2d 1176, 1180-81 (W.D. Okla. 2012) (stating that in order to be granted a preliminary injunction, a plaintiff "must show that four factors weigh in his favor: '(1) [he] is substantially likely to succeed on the merits; (2) [he] will suffer irreparable injury if the injunction is denied; (3) [his] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.'" (quoting Awad v. Ziriax, 670 F.3d 1111, 1125 (10th Cir. 2012) (quoting in turn Beltronics USA v. Midwest Inventory Distrib., 562 F.3d 1067, 1070 (10th Cir. 2009)))).

engage in speech and to "be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[123]

The court distinguished Cressman's case from *Wooley* by finding that the speech involved in Cressman's was symbolic instead of a written or verbal expression.[124] The court stated that for symbols or conduct to fall within the realms of the First and Fourteenth amendments, they must be "sufficiently imbued with elements of communication," by showing that Oklahoma's "intent [through its use of the Native American image] [was] to convey a 'particularized message' along with a great likelihood that the message will be understood by those viewing it."[125]

The court supported its finding that the image did not convey a particularized message by examining the circumstances in which Cressman discovered the meaning of the image.[126] The court held "nothing on the tag indicates that the image is based on a sculptur[e]," and that "while [Cressman] clearly links the image to the sculpture and legend, nothing on the license plate, itself, makes or suggests that connection."[127] The court acknowledged Cressman's independent research was the basis for his knowledge of the image's meaning, and held that even if a reasonable observer knew of the image's origin, the court would still not find the observer likely to associate the driver of a car featuring this license plate with the image's religious affiliations.[128]

The court also found that even if Cressman had shown other people might interpret the license plate to be communicating a message concerning Cressman's religious beliefs, the court would still conclude that Cressman had not been coerced to speak in violation of his constitutional rights because a reasonable observer could not garner a religious meaning from the image or impute such meaning to the driver.[129] The court followed the Supreme Court's caution that it "cannot accept that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[130] Because the objective observer viewing the symbol would not likely understand a particularized message from the symbol, the court held that the State of Oklahoma was

123. *Id.* at 1181.
124. *Id.* at 1182.
125. *Id*.
126. *Id.* at 1183.
127. *Id.*
128. *Id.*
129. *Id.* at 1184.
130. *Id.* at 1185.

not attempting to promote an ideological point of view to the public, unlike the speech in *Wooley*, and dismissed Cressman's complaint.[131]

2. Reversed by the Tenth Circuit

Cressman appealed the lower court's decision, and the Tenth Circuit considered whether the district court erred in dismissing Cressman's complaint for failure to state a First Amendment compelled speech claim.[132] The Tenth Circuit (1) addressed the Supreme Court's precedence of symbolic speech and compelled speech claims under the First Amendment, (2) analyzed Cressman's complaint to assess whether it stated a plausible compelled symbolic speech claim, and (3) addressed the defendants' argument that the image was government speech that does not involve the First Amendment.[133]

After reviewing *Wooley*, *Hurley*, and several other Supreme Court decisions concerning compelled speech claims, the court agreed that Cressman was compelled to exhibit the image on his license plate "because he must choose between (1) prosecution and criminal penalties for covering up the image and (2) paying additional fees for specialty license plates that do not display the image."[134] The court also recognized that Cressman's claim was different than the claim in *Wooley* because it was based on an image instead of written words, and considered whether the image was symbolic speech that requires First Amendment safeguarding; after answering affirmatively, the court considered whether Cressman's requirement to display the image violated his First Amendment rights under the compelled speech doctrine.[135]

The court acknowledged that the Supreme Court has "long recognized that its protection does not end at the spoken or written word."[136] The Supreme Court has protected expressive conduct such as wearing an armband to express particular views and the burning of an American flag to make a political demonstration.[137] The Tenth Circuit noted the origin of the Supreme Court's "particularized message" language was in *Spence v. Washington*, and concerned a flag hung upside down with peace symbols attached to both sides, which was found to be conveying a particular

131. *Id.*
132. Cressman v. Thompson, 719 F.3d 1139, 1144 (10th Cir. 2013).
133. *Id.* at 1147.
134. *Id.* at 1147-48.
135. *Id.* at 1148.
136. *Id.*
137. *Id.*

message.[138] This language reappeared in *Texas v. Johnson*, a flag burning case, which was also held to communicate a particular message likely to be understood.[139]

Spence and *Johnson* both asked whether symbolic speech was permeated with elements of communication by considering whether there was "(1) an intent to convey a particularized message, and (2) a great likelihood that the message would be understood by those who viewed the symbolic act or display."[140] In *Hurley*, the Court suggested these factors are not required prerequisites for symbolic speech; the Supreme Court stated, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[141] The Tenth Circuit did not deliberate over the effect of *Hurley* on the *Spence-Johnson* factors, but simply recognized that these factors may be a too high of a standard at times for First Amendment protection.[142]

After reviewing the Supreme Court's discussion of compelled and symbolic speech, the Tenth Circuit analyzed whether Cressman pled a plausible First Amendment compelled speech claim arising from symbolic speech.[143] The court held that Cressman's complaint met the more stringent *Spence-Johnson* factors when accepting all the factual allegations in Cressman's complaint as true, which stated that observers would understand that the plate conveys messages about Native American culture, including their religious beliefs.[144] Cressman sufficiently showed that the license plate image was symbolic speech, and the district court erred in rejecting Cressman's allegations as true.[145] The Tenth Circuit next considered whether Cressman plausibly stated a claim for compelled speech protection.[146] Because Cressman alleged the image was ideological speech,

138. *Id.* at 1149.
139. *Id.*
140. *Id.*
141. *Id.* at 1150.
142. *Id.*
143. *Id.* at 1152.
144. *Id.* at 1153-54.
145. *Id.* at 1155.
146. *Id.*

based on Native American religious beliefs, the Tenth Circuit ruled that his claim should survive.[147]

The Tenth Circuit also briefly considered the appellees' argument that the image was government speech which does not implement First Amendment scrutiny, and that the Supreme Court had implicitly limited *Wooley*.[148] The court cautioned against suggestions that the Supreme Court had overruled or narrowed its cases, and noted that the Court had the opportunity to do just that in later cases, but refused to do so.[149] The Tenth Circuit held that the "relevant question is whether Mr. Cressman is 'closely linked with the expression in a way that makes [him] appear to endorse the government message," and that *Wooley* answered this question by finding that license plates act as mobile billboards which adequately connect the driver of the vehicle to the speech, which in turn raises compelled speech issues.[150] The Tenth Circuit reversed the lower court's dismissal of Cressman's claim and denial for this motion to grant a preliminary injunction, and remanded the case back to the district court.[151]

Judge Paul Kelly Jr., dissented from the majority opinion, based on his belief that the complaint did not contain adequate factual allegations to show beyond speculation that Cressman was entitled to relief.[152] Judge Kelly discussed the context of the image, which in Oklahoma he argued would be seen as a historical or cultural message because of the state's integral Native American culture.[153] According to Judge Kelly, Cressman's allegations that the image was an ideological message were simply unreasonable inferences, and therefore the district court's ruling of the complaint's dismissal should have be affirmed.[154]

3. Denied Relief Once Again by the District Court

Upon remand, the district court considered whether the image conveyed a particularized message or whether it at least gave the appearance of some type of religious implication or theme, and found that it did not.[155] The court's reasoning relied heavily on Cressman having to independently

147. *Id.* at 1156.
148. *Id.*
149. *Id.* at 1156-57.
150. *Id.* at 1157.
151. *Id.* at 1158.
152. *Id.*
153. *Id.* at 1159.
154. *Id.*
155. Cressman v. Thompson, No. CIV-11-1290-HE, slip op. at 4 (W.D. Okla. Jan. 14, 2014).

research the image to learn of its origin and associate the art with religion; the court found this evidenced the conclusion that the ordinary person would not facially recognize the image as having a religious message.[156] The court also justified its decision by noting that the image was not an exact replica of *Sacred Rain Arrow* because the warrior in the image on the license plate held his arrow at approximately a sixty-degree angle in comparison to the almost vertical arrow in the original image.[157] The court found that this slight change could deter viewers from assuming Oklahoma was intending to emit the same message as the sculptor originally intended.[158]

The district court emphasized "the essential question is what a reasonable observer of the image on the license plate would understand from it."[159] The court acknowledged that *Hurley* indicated the *Spence-Johnson* test could be too stringent in some instances, and in order to assess what message a reasonable observer would understand from the image, the court must look not at "whether there is a 'great likelihood' that a particular message would be understood, but simply whether it is reasonably likely that it would."[160] In applying this standard, this district court held that a reasonable observer would not likely understand a message being conveyed by the image because "without further research it is simply a depiction of an Indian shooting a bow and arrow."[161] To support this contention, the court referenced *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[162]

B. Compelled Speech Claims Brought by Affronted Citizens Protesting the Display of Native American Artwork Could Likely Be Successful

Cressman was ultimately unsuccessful with his compelled speech claim, but other similar cases could very likely be successful if the basis of the claim has a more overtly religious message. The district court was reluctant to readily accept the replica of *Sacred Rain Arrow* on the Oklahoma license plate as expressing a clear religious message, but this will not deter plaintiffs bringing other cases based on artwork that facially has religious attributions. In the interest of balancing the state's Native American culture

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 5.
160. *Id.*
161. *Id.*
162. *Id.* at 4.

and Cressman's First Amendment rights the court reached the correct decision, but its analysis in getting there did not coincide with Supreme Court precedent.

The district court did remedy an oversight made by the Tenth Circuit. Although the Tenth Circuit discussed the "particularized message" and "likelihood the message would be understood" factors for symbolic speech from *Spence* and *Johnson*, and the suggestion from *Hurley* that at times these factors are too high of a bar, it did not consider a recent Supreme Court case which addressed this issue and could be highly probative to the issue of Native American artwork being viewed as speech.[163] The district court in *Cressman* briefly referenced the case, but instead of undermining Cressman's argument like the court intended it to, this case could positively impact other compelled speech cases concerning Native American imagery.

In 2006, the Supreme Court decided *Rumsfeld*, which considered whether the Solomon Amendment, which at the time precluded the Department of Defense from issuing federal funds to any institution of higher education that effectively prevented military recruiters from entering their campuses, violated law schools' First Amendment rights of speech and association.[164] The Forum for Academic and Institutional Rights, Inc., (FAIR) is an association of law schools and faculties who promote full academic freedom and oppose discrimination, including discrimination to others based on sexual orientation.[165] In furtherance of this policy, FAIR members wanted to restrict military recruiting on their campuses because of the policy adopted by Congress regarding homosexuals in the military; however, because their funding would be withheld, the schools were forced to choose between their nondiscrimination position and receiving federal funding.[166]

FAIR sought a preliminary injunction against the Solomon Amendment, and was denied by the district court, who found that forcing upon the schools "an unwanted periodic visitor" did not "significantly affect the law schools' ability to express their particular message or viewpoint."[167] The Third Circuit held the Solomon Amendment infringed upon the schools' constitutional rights based on the unconstitutional conditions doctrine because the schools were torn between receiving federal funding and

163. Cressman v. Thompson, 719 F.3d 1139, 1153-54 (10th Cir. 2013).

164. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52-53 (2006).

165. *Id.* at 52.

166. *Id.*

167. *Id.* at 53.

asserting their First Amendment rights.[168] The case was reversed and remanded for the lower court to enter a preliminary injunction against enforcing the Solomon Amendment, and the Supreme Court granted certiorari.[169]

The Supreme Court discussed the unconstitutional conditions doctrine and held that the Solomon Amendment would violate this doctrine if Congress could not otherwise require these schools to give equal access to their students to military recruiters when compared to other employers.[170] The Court noted that the Solomon Amendment regulated the conduct of the schools, not their speech, but then considered the reasoning by the Third Circuit that (1) in supplying the military recruiters' services the law schools were being compelled to speak, (2) military recruiters were speaking while on campus, and (3) if the statute regulated conduct, the conduct was expressive and regulating would infringe on the law schools' First Amendment rights.[171]

The Court rejected the Third Circuit's ruling that the Solomon Amendment impermissibly controlled speech, but then considered whether the expressiveness of the conduct controlled by the statute fell within the protection of the First Amendment.[172] In analyzing this issue, the Court referred to *Johnson* but instead of using the "particularized message" language the Court stated, "we have extended First Amendment protection only to conduct that is inherently expressive."[173] The Court looked at the conduct the law schools claimed expressed disagreement with the military (military recruiters interviewing away from the law schools) and reasoned that this conduct could be explained for a variety of reasons, such as, there was no space to interview at the law schools, or that independently the recruiters decided to interview somewhere else.[174] The Court held that the "expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it," and reversed the Third Circuit's decision.[175]

This decision did not expressly render the factors in *Spence* and *Johnson* invalid, but rather expanded them. The district court analogized this case to

168. *Id.* at 54.
169. *Id.* at 55.
170. *Id.* at 59.
171. *Id.* at 60-61.
172. *Id.* at 65.
173. *Id.* at 66.
174. *Id.*
175. *Id.* at 66, 70.

Cressman, and found that because the message Cressman opposed required research, it too fell short of First Amendment protection. This is an erroneous application of *Rumsfeld* because of the extreme factual differences in the cases and because it does not take into consideration former Supreme Court case *Hurley* that easily answers this question. In *Rumsfeld,* the conduct being questioned was the absence of military recruiters at a law school, compared to the artwork in Cressman's case. The issue in *Rumsfeld* was whether a message was being communicated at all, while in Cressman's case there was clearly a message, though perhaps interpreted varyingly by different viewers.

The Supreme Court in *Hurley* explicitly stated the requirement of a particularized message to be too high of a bar in some instances because it would not protect the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[176] This seems to indicate that the Supreme Court views artwork as inherently expressive.[177] Plaintiffs in future cases opposing Native American artwork could use *Rumsfeld* and *Hurley* to show that art is expressive and that in considering all of these factors, the artwork should clearly be seen as speech, and implicate First Amendment concerns.

In its compelled speech precedent, the Supreme Court has not addressed the issue of whose viewpoint courts should use when assessing speech that does not have an explicit message like "Live Free or Die" as in *Wooley*. The district court adopted a reasonable observer standard, which seems to coincide with previous Supreme Court rulings, including R*umsfeld*. The language used in *Rumsfeld* is "inherently expressive," and for something to be considered inherent it must "belon[g] to the basic nature of someone or something."[178] To know the "basic nature" of something, it is logical to look at how the ordinary person would categorize an object, so this seems consistent with using a reasonable observer standard in interpreting the artwork's message or lack thereof. This standard does not conflict with former Supreme Court cases, and can be a workable measure in conjunction with "inherently expressive" when dealing with abstract content such as artwork. The *Spence-Johnson* factors in Cressman's case were ultimately unsuccessful because of the ambiguity surrounding the artwork and its disputed message. Because "Live Free or Die" was actually written out on

176. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

177. *Id.* at 568.

178. *Inherent*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/inherent (last visited Feb. 4, 2014).

the license plate in *Wooley*, it was easy to establish that the plate was conveying an ideological message, and although the message could be interpreted as historical or cultural based on the origin of New Hampshire, overall the statement would be seen as promoting an ideology. The Oklahoma license plate is much more difficult to analyze because it does not explicitly state an ideological message. As the lower court correctly found, the first impression of the image is simply a warrior shooting an arrow; it does not immediately raise questions about its religious origins.

Even though the district court did not find a violation of Cressman's First Amendment rights, this case will draw the attention of potential plaintiffs objecting to states' use of Native American imagery, and by looking at the lower court's decision, will enable future plaintiffs to present much stronger cases. Although the religious message in *Cressman* was not explicit enough to create a compelled speech violation, other uses of Native American imagery could be interpreted by the courts as having a strong enough religious message to prompt First Amendment protection.

C. Establishment Clause Claims Brought for States' Use of Native American Artwork Will Likely Be Unsuccessful

Although not brought as an avenue for recovery by Cressman, within appellees' brief to the Tenth Circuit lies discussion of why an Establishment Clause claim made by Cressman would be unsuccessful. Any state involvement with religion brings with it Establishment Clause concerns, and with the religious aspects of Native American artwork and the frequency that such artwork is used, this is likely another area of the law which could see a rise in cases brought protesting Native American imagery.

Appellees described Cressman's argument that an image need not be particularized or ideological for First Amendment compelled speech protection as unusual, and a facade for hiding Cressman's real objection to the artwork, which according to appellees is based on a violation of the Establishment Clause.[179] Appellees contended that an Establishment Clause claim based on the *Sacred Rain Arrow* image would be unsuccessful, relying heavily on the Tenth Circuit's decision in *Weinbaum v. City of Las Cruses*.[180]

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179. Appellees' Joint Response Brief at 17-18, Cressman v. Thompson, 719 F.3d 1139 (10th Cir. 2013) (No. 12-6151).

180. *Id.* at 18; *see* Weinbaum v. City of Las Cruses, 541 F.3d 1017 (10th Cir. 2008).

In *Weinbaum*, the Tenth Circuit considered whether the display of three crosses on the city of Las Cruces' official seal placed on various public properties violated the Establishment Clause.[181] The court held that when considering whether artwork violates the Establishment Clause, "the artist's inspiration or intent is irrelevant," and when applying the *Lemon* test, the crosses did not cause a violation because the name Las Cruces literally means crosses.[182] The appellees argue that the same reasoning could be used in Cressman's case.[183]

Appellees contend that under Establishment Clause analysis, a court will look at the government's intent in speaking, and under Free Exercise and Free Speech analysis, a court would look at the person's intent in wanting to speak, which is why Cressman chose to only bring a compelled speech claim.[184] In Cressman's case, the Legislative Task Force chose *Sacred Rain Arrow* for tourism reasons and to publicize Oklahoma as "Native-America," which is vastly different than Cressman's subjective belief of the religious implications of the image.[185]

Appellees are correct in asserting that a court will look at the purpose of the government in Establishment Clause cases, but are erroneous in assuming that simply because the government did not have the intent to promote religion in Cressman's case it avoided violating the Establishment Clause; this type of analysis is vastly contradictory to the endorsement test. In *McCreary County*, the Supreme Court discussed the role of intent in these types of cases, and acknowledged that purpose was important but should not be the sole focus of the parties involved because the government rarely acts with the express purpose of promoting religion. If there is evidence of the government acting with an illegitimate purpose, a court's analysis could end there, such as in *McCreary*. However, in cases where there is not a showing of the government acting with a forbidden motive, a court's analysis will go beyond the government's purpose when deciding whether there has been a violation of the Establishment Clause and look at the effect of the government's action.

In Cressman's case, the government has clearly provided the image on the license plate because the plates are issued by the state. Under the *Lemon* test, the license plate would most likely not be a violation of the Establishment Clause because the government did not have an improper

181. *Id.*
182. *Id.* at 18-19.
183. *Id.* at 19.
184. *Id.*
185. *Id.*

purpose in placing the image on the license plates; however, it could be argued that the artwork could be seen as having the effect of advancing the Native American religion and therefore fails the endorsement test. Challengers to these types of images on state paraphernalia would argue that by choosing Native American artwork with religious connotations, Oklahoma is essentially promoting or endorsing one religion to the detriment of other religions or non-religion, which would have the effect of making viewers feel like second-class citizens.

The state would counter this argument by urging the court to also look at the context of the government action and decide from the viewpoint of a reasonable observer whether or not the images have the effect of endorsing religion. In Cressman's case, Oklahoma has always used Native American images in its official state items for historical and cultural reasons, and since the reasonable observer has a reasonable memory, they would be well aware of this fact and probably assume *Sacred Rain Arrow* was displayed on the license plates to represent Oklahoma's strong Native American culture. Similarly, the reasonable observer may not have knowledge of the origins of *Sacred Rain Arrow*, and will probably not associate the image with any type of religion.

State officials could also argue that since Native American culture is tied so closely with religion, if the court were to find that the *Sacred Rain Arrow* artwork violated the Establishment Clause, it would effectively put into question all Native American images used by the state which should be protected as a long standing tradition of the states. This argument has persuaded the Court before in cases like *Van Orden*, but it has also failed in other cases, such as *Lee v. Weisman*.[186]

The challenged practice before the Court in *Lee* was the delivering of prayers by members of the clergy during graduation ceremonies for public middle schools and high schools in Providence, Rhode Island.[187] During the specific middle school graduation ceremony analyzed by the Court, a rabbi was invited to deliver the prayers.[188] The rabbi was given a guide to administering the prayers, which suggested the prayers be drafted with "inclusiveness and sensitivity."[189] The principal of the middle school also recommended to the rabbi that the prayers be nonsectarian.[190]

186. 505 U.S. 577 (1992).
187. *Id.* at 580.
188. *Id.* at 581.
189. *Id.*
190. *Id.*

The family protesting the prayer sought a permanent injunction against the Providence public school system to bar it from inviting clergy in the future to deliver prayers at invocation ceremonies, and the district court granted the injunction.[191] The district court came to its conclusion by applying the *Lemon* test, and finding that the school system failed the second prong of the test because the prayers gave the appearance or had the effect of advancing religion.[192] The First Circuit affirmed on appeal, and the Supreme Court granted certiorari.[193]

In its analysis, the Court first looked at the involvement of the school in the prayers. The Court explained that the issue was not whether the school made an effort for the prayer to be acceptable to most people, but rather the legitimacy of the school involving itself with the administration of the prayer when it was to be used "in a formal religious exercise which students, for all practical purposes, are obliged to attend."[194] The Supreme Court found that the involvement of the school resulted in the "imprint of the State" on the prayers; the Court then examined the position the prayers placed students in.[195] The Court recognized that there was high public and peer pressure on students to stand or be respectful during the prayers, and that this pressure was as compelling as requiring the students to participate.[196] Accordingly, the Supreme Court held that placing middle and high school students in this position was inconsistent with the Establishment Clause, and affirmed the First Circuit's ruling.[197]

Even though in *Lee* the Court found the time-honored practice of prayers at public middle and high school graduations unconstitutional, in the case of Native American imagery the Court is more likely to analogize to *Van Orden*. The Native American symbols are even more passive than the Texas monument in *Van Orden* because they are not overtly religious or as widely recognized as the Ten Commandments, and are vastly different than school prayer because the symbols do not result in peer or public pressure on citizens to conform with a religious exercise. Similar to the Ten Commandments, which have been used in various governmental property, these types of Native American images have been used for hundreds of years by many states, not just Oklahoma.

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191. *Id.* at 584.
192. *Id.* at 584-85.
193. *Id.* at 585-86.
194. *Id.* at 588-89.
195. *Id.* at 590.
196. *Id.* at 593.
197. *Id.* at 593, 599.

The Supreme Court would probably not find the *Sacred Rain Arrow* artwork used on the Oklahoma license plate an infringement of the Establishment Clause because the government's motive in selecting the image was for tourism reasons and for furthering the view of Oklahoma as "Native-America"; the image does not have the effect of advancing or inhibiting religion because of the subtlety of the religious connotations. The reasonable observer would not view the images as government endorsement or disapproval of religion because they have a reasonable memory of our nation's history in using these depictions in various official paraphernalia.

However, this does not mean that all Native American artwork used by states would pass constitutional muster under the Establishment Clause. If states were to use Native American images in their official memorabilia that had overt religious attributes, especially qualities that would easily be recognized by the public as religious, these depictions would be a violation of the Establishment Clause if citizens felt like those religious qualities were being promoted over their own religion or lack of religion. States can avoid Establishment Clause problems with respect to using Native American imagery by acting with a secular purpose; Establishment Clause violations could also be minimized by the states use of artwork that would be viewed overall as contributing to the recognition of the Native American culture and history of the state instead of using images that would primarily have the effect of advancing or endorsing religion. By carefully selecting the Native American depictions used, states should be able to avoid stepping outside the boundaries of the Establishment Clause; the more concerning issue for the courts will be compelled speech claims.

IV. Balancing the Native American Culture of the States While Protecting the First Amendment Rights of the Citizens

The district court reached the right decision in Cressman's case by finding that the image did not violate his First Amendment rights. The use of Native American images by the states honors their Native American heritage; if these depictions are not used by the states, how will their citizens be reminded of the important role Native Americans have played in developing the United States? Today about only 0.7 percent of the American population, or less than two million people, are enrolled in Native American tribes.[198] Because Native Americans comprise such a

198. Brian Palmer, *How Many People Are At Least 1/32 Native American?*, SLATE (May 25, 2012, 5:51 PM), http://www.slate.com/articles/news_and_politics/explainer/2012/05/

small percentage of the population, taking away tributes by the states to the Native American people would further diminish the recognition of the importance of Native American culture.

A. The Important Role Native Americans Have Played in Contributing to Past and Present American Culture

The Native American people have had a lasting impact on American culture, whether the average citizen realizes it or not. Native Americans first grew many foods Americans eat today, including potatoes, beans, corn, peanuts, pumpkins, tomatoes, squash, peppers, nuts, melons and sunflower seeds.[199] Native Americans even taught European settlers how to successfully farm these crops.[200] Over 2,000 Native American words have influenced or developed words in the English language, such as barbecue, caribou, hammock, mahogany, and hurricane.[201] During World War II, the Marines used the Navajo language as a code because of its tonal qualities that make it extremely difficult to decipher, and although the Japanese were able to understand codes used by the U.S. Army and Army Air Corps, they never understood the Navajo code talkers for the Marines.[202] These Navajo code talkers served in all six Marine divisions, and participated in every assault orchestrated by the Marines in the Pacific from 1942 to 1945; because of the code's success, it was not declassified until 1968.[203]

Many state names are also derived from Native American words: Connecticut is a derivative of the Native American word "Quinnehtuqut" which means beside the long tidal river.[204] Michigan means "great water" and is derived from the Native American word "Michigamea," and

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elizabeth_warren_says_she_s_1_32nd_native_american_how_many_people_have_that_heritage_.html.

199. *Native American Contributions*, http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_024206.pdf (last visited Oct. 20, 2014).

200. *How Has America Been Influenced by Native American Culture?*, WISE GEEK, http://www.wisegeek.org/how-has-america-been-influenced-by-native-american-culture.htm (last visited Jan. 2, 2014); *Native American Contributions*, UTE TRIBE EDUC. DEP'T, http://www. uteed.net/ulgr/aic2.pdf (last visited Jan. 2, 2014).

201. *How Has America Been Influenced by Native American Culture?*, *supra* note 198; *Native American Contributions*, *supra* note 198.

202. *Navajo Code Talkers: World War II Fact Sheet*, NAVAL HISTORY & HERITAGE COMMAND, http://www.history.navy.mil/faqs/faq61-2.htm (last visited Jan. 2, 2014).

203. *Id.*; Gerry J. Gilmore, *World War II Navajo Code Talkers Visit Pentagon, Meet with Pace*, U.S. DEP'T OF DEFENSE (Aug. 10, 2007), http://www.defense.gov/News/NewsArticle.aspx?ID=47020.

204. *Connecticut State Name Origin*, STATE SYMBOLS USA, http://www.statesymbolsusa.org/Connecticut/name_ origin_CT (last visited Jan. 2, 2014).

Oklahoma is a Choctaw word meaning "red people."[205] Altogether more than half of the states' names, twenty-six, have some type of Native American origin.[206] The United States even adopted the same symbol as the Iroquois Nation, the bald eagle.[207] All of these examples of Native American influences exemplify how the history of the United States would be vastly different without the impact of the Native American people.

B. Native American Images Used to Convey the Overall Historical and Cultural Influences of the Native American People Should Not Be Considered a Violation of the Citizens' First Amendment Rights

States are honoring the great influence Native American culture has had in shaping American history and culture by displaying these images; by establishing Oklahoma as "Native-America," the state is showing pride in its history and respect to the Native American people. These are values that will be compromised by claims against imagery such as *Sacred Rain Arrow*, and the courts should be careful in their rulings. It must be recognized that not all Native American images have explicitly religious meanings; although Native Americans are a religious people, in most instances these types of pieces have much greater historical and cultural weight than religious.

As long as the predominant message of such artwork is not religious, the government should not be in danger of violating the Establishment Clause or compelled speech doctrine. The states' purposes are not to promote or endorse the Native American religion, but rather to honor the states' past and to remember the contributions made by the Native Americans. If the states' intentions are not to endorse one religion over another, and if no one is made to feel like a second-class citizen because of the images, the states will be safely within the limits of the Establishment Clause. States should be able to continue using Native American artwork on government property without violating the Establishment Clause; by maintaining a secular purpose in using these images that do not have primarily religious messages, the states can create a harmony between the First Amendment concerns and Native American depictions.

Similarly, with compelled speech cases the courts should look at whether the prevalent message of the artwork is ideological, or if the artwork is merely expressing the overall culture of the Native Americans. In

205. *Native American Contributions*, *supra* note 198.

206. *Native American State Names*, NATIVE-LANGUAGES, http://www.native-languages.org/state-names.htm (last visited Jan. 2, 2014).

207. *How Has America Been Influenced by Native American Culture?*, *supra* note 198.

Cressman's case, although the story behind the image does have some religious meaning, the image was used on the Oklahoma license plate because it was thought to be a representation of the state and its Native American influences. The state was probably aware of the inspiration for the artist who created *Sacred Rain Arrow*, but recognized that its overall message was promoting Native American culture. Upon first examination of the sculpture, there is nothing that seems to indicate that it has religious meaning, unless it is to be assumed that all Native American artwork has religious connotations.

In the other compelled speech cases set out above, the messages being protested against were explicitly against the claimants' beliefs. In *Hurley*, the responding organization was created primarily out of spite against the petitioner, and applied to march in the petitioner's parade. The respondents were hoping for the petitioner to be forced to allow the organization in whose messages it did not believe into the parade to express those views to the public, which would associate the petitioner with the message. In *Wooley*, the message opposed by the Maynards was explicitly written, "Live Free or Die," on their license plate. These two cases are acutely different than *Cressman* because there was such a clear message being emitted in both. In Cressman's case, and in others concerning the use by states of Native American images with religious connotations, the courts should find that there is no recovery under the compelled speech doctrine because of the overpowering cultural and historical significance of these images.

Conclusion

The Native American influences in the culture and history of the United States are something to be proud of and represented to the public like so many states do today. Although states have to be careful not to infringe on any First Amendment constitutional protections, the states should be allowed to continue to use these images and to honor the Native American people. By acting with only the purpose to show pride in their rich tribal heritage, and by using images that do not have overt religious meanings, the states should be able to balance the constitutional interests of their citizens while respecting all that the Native Americans have done for the United States. These images preserve our Nation's history, and will serve as a reminder of the importance of Native American culture for generations to come.