American Indian Law Review

Volume 10 | Number 1

1-1-1982

Religion: The First Amendment and the American Indian Religious Freedom Act of 1978

Robin K. Rannow

RELIGION: THE FIRST AMENDMENT AND THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978

*Robin K. Rannow**

The first amendment of the United States Constitution guarantees the free exercise of religion,[1] but this guarantee is not absolute.[2] The courts have repeatedly distinguished between religious beliefs, which are absolutely protected under the free exercise clause, and religious practices, which are not.[3] The government is empowered to limit certain practices and activities if it can establish a state interest of sufficient magnitude to justify the infringement and thereby override the interests claiming protection under the free exercise clause.[4] The courts require more than mere assertions of a state interest to override first amendment protections.[5]

The often close relationship of religious beliefs to conduct make the task of analyzing first amendment claims even more difficult and delicate. Practices and activities claiming first amendment protection must be based upon religious beliefs in order to justify that protection.[6]

In theory, the first amendment guarantees extend to all religions. The first amendment was framed in such a way as to guarantee the widest exercise of religion with no religion being singled out for preferential treatment.[7] Conversely, then, no one religion should be singled out for *less* than equal consideration of first amendment protections. Any governmental action that either

* Third year law student, Catholic University School of Law, Washington, D.C.

1. U.S. CONST. amend. I.

2. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

3. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

4. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172 (10th Cir.), *cert. denied sub nom.* Badoni v. Broadbent, 452 U.S. 954 (1980) (dam and reservoir that were part of a multistate water storage and power generation project outweighed religious interests asserted by Navajos in prayer spot to be flooded by lake); Reynolds v. United States, 98 U.S. 145 (1878) (Mormon religious practice of polygamy outweighed by state interest in morals and well-being of its practitioners).

Compare Wisconsin v. Yoder, 406 U.S. 205 (1972) (state's strong interest in providing secondary education insufficient to override Amish religious beliefs where exemption possible to accommodate both interests).

5. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

6. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).

7. *See* United States v. Ballard, 322 U.S. 78 (1944).

advances or inhibits a particular religion risks violation of the establishment clause of the first amendment.[8]

The first amendment protects the religious beliefs and practices of Native Americans to the same extent it does all other religions. In practice, however, there have been repeated enactments and enforcements of numerous federal statutes and regulations that have seriously restricted the traditional religious rights of Native Americans.[9] Many of these laws advance such worthwhile goals as preserving wilderness areas and protecting wildlife. The Bald Eagle Protection Act,[10] for example, provides criminal sanctions for the unlawful taking, killing, or other prohibited use of bald eagles. This law, although not intended directly to affect Native American religions, was eventually amended to permit the use of eagle feathers essential to certain Native American religious ceremonies.[11]

Government policies have a long and pitiful history of suppressing traditional Native American religious rights, even to the point of actively forcing Native Americans to abandon their traditional customs and religions. A clear example of this was the assimilationist policies of the Bureau of Indian Affairs' boarding schools which endeavored to "save" the children by destroying their identities as Indians.[12]

8. U.S. CONST. amend. I.

9. 123 CONG. REC. S39300 (Dec. 15, 1977), where Senator Abourezk, chairman of the Senate Select Committee in Indian Affairs and sponsor of the Senate Resolution, cited these federal infringements on Native American religious freedoms.

See also H. REP. No. 1308, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as H.R. REP. 1308]; U.S. FEDERAL AGENCIES TASK FORCE REPORT, AMERICAN INDIAN RELIGIOUS FREEDOM ACT (1979) [hereinafter cited as TASK FORCE REPORT] (citing specific instances of government infringements that repressed traditional Native American religions as being "common practice").

10. 16 U.S.C. §§ 668-668d (1940) (providing criminal sanctions for unlawful taking, killing, or other use of eagles).

11. *See* Endangered Species Conservation Act, 16 U.S.C. §§ 1531-42 (Supp. III 1973) (to preserve and protect threatened and endangered species). *See also* National Wildlife Preservation Act, 16 U.S.C. § 1131 (1964) (to set aside and protect wilderness areas for protection and enjoyment of wildlife); National Historical Preservation Act, 16 U.S.C. § 470 (1966) (to preserve and protect designated historical sites).

12. *See* New Rider v. Board of Educ. of Indep. School Dist. No. 1, 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973) (Douglas, J., strongly dissenting to denying certiorari where such substantial constitutional issues are involved). The case concerned the suspension of three Indian students for failing to comply with the school's hair-length regulation. The court of appeals affirmed the lower court's dismissal of plaintiffs' suit on the basis that the regulation was neutral on its face and as applied. The court went on to say that the constitutional claims (free speech and the free exercise of religion) were insignificant where the regulation can be shown to have a rational relation to legitimate

Whether intended or not, infringements often resulted from beliefs and attitudes of non-Indians who questioned whether traditional Native American religions were truly "religious." Ignorance, suspicion, insensitivity, and neglect have been translated into attitudes effectively granting Native American religions less than equal consideration and protection under the first amendment.[13] These religious and cultural biases held by non-Indians have been reflected in both legislative enactments and judicial decisions. There is a need to extend the understanding and respect afforded the other differing religious beliefs practiced in this nation to the traditional religious beliefs of Native Americans.

Congress addressed this need in the American Indian Religious Freedom Act of 1978.[14] There had been no consistent federal policy about Indian religions, caused, in many instances, by unawareness of the nature of traditional Native American religious practices. The result was the failure to accord these practices the same status as "real" religions.[15] The purpose of the Act is "to insure that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion."[16]

The preamble of the Act recognizes the "inherent right" of Native Americans freely to exercise their religion. The preamble also identifies instances in which this right has been abridged under a variety of federal laws without considering their effect on Native American religions. The Act then declares that it is the sense of Congress that

---

state interests. While the court discussed mostly the free speech implications, it suggested that it couldn't assume the responsibility of determining whether the students' religious beliefs were sincere.

Compare Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975), a similar case in which the court did consider the sincerity of religious beliefs as they applied to the wearing of long braids. The court found the prison's hair-length regulation impermissibly infringed on Indian plaintiff's religious beliefs.

13. A widely known example of the drastic results of fear and misunderstanding of Native American religions was the Wounded Knee Massacre in 1890, in which soldiers killed almost three hundred men, women, and children performing the Ghost Dance. This dance was simply a part of a nonviolent religious movement that prophesied a new and better world for the Indians. D. BROWN, BURY MY HEART AT WOUNDED KNEE (1971).

14. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. § 1996 (Supp. III 1979).

15. H.R. REP. No. 1308, *supra* note 9, at 4.

16. *Id.* at 1.

> 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 traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[17]

The Act identified infringements by the federal government of native religions and divided them into three general areas: denials of access to certain physical locations (analogous to denying a person entrance into his church or temple), restrictions on the use of substances that have religious significance and that are necessary to perform the rites of the religion (such as peyote), and actual interference in religious events (even if only caused by simple curiosity), including ceremonies requiring strict isolation.[18]

Hopi Tribe v. Block[19] identified three duties federal agencies must comply with, under the Act, in formulating new regulations and procedures: evaluate their policies and procedures with the goal of protecting Indian religious freedoms; refrain from prohibiting access, possession, and use of religious objects and the performance of religious ceremonies; and consult with Indian groups in regard to any proposed actions. In *Hopi Tribe*, the Hopi and Navajo plaintiffs made both constitutional and statutory challenges to an authorization by the Department of Agriculture to expand the Arizona Snow Bowl, a recreational facility located in the area of the San Francisco Peaks. The Peaks are of special significance to both tribes' religions.[20] The Indian plaintiffs sought to prevent further expansion, and also to secure removal of the existing facilities, claiming that operation violated their first amendment guarantees in the free exercise of religion because of the sacred nature of the mountains.

The court granted the government's request to bar the plaintiffs' claim for removal based on laches.[21] The court further re-

17. 42 U.S.C. § 1996(1). See text of Act in Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and the Drowned Gods*, this issue.

18. H.R. REP. No. 1308, *supra* note 9, at 3.

19. No. 81-0481, 8 I.L.R. 3073 (D.D.C. June 15, 1981), *aff'd*, No. 81-1912 (D.C. Cir. May 20, 1983). Plaintiffs' bases for relief were the first amendment free exercise clause, the American Indian Religious Freedom Act, breach of a fiduciary duty owed, the National Environmental Policy Act, the Endangered Species Act, Multiple-Use Sustained-Yield Act, Administrative Procedure Act, and the National Historical Preservation Act.

20. 8 I.L.R. at 3074.

21. *Id.* at 3074, 3079.

jected plaintiffs' request to enjoin further development under separate analyses of the first amendment and Religious Freedom Act claims.[22]

The American Indian Religious Freedom Act does not require that Native American religious considerations always prevail. This would risk violating the establishment clause of the first amendment. In light of the Act, however, the court failed to give the Native American religious beliefs asserted their proper consideration and protection within the balancing test of the first amendment free exercise clause.

The First Amendment Right

In determining whether state action impermissibly infringes upon protected first amendment free exercise rights, the courts apply a two-step analysis. It must first be determined if the action actually places a burden on the free exercise of religious rights protected. Upon finding such an infringement, the court then balances these first amendment rights with the interests the government asserts to justify that infringement.[23]

The application of this two-step process has resulted in inconsistent interpretations and holdings in regard to traditional Native American religions.[24] In *Sequoyah v. TVA*, the Sixth Circuit appeared to apply this two-step process in a challenge by Cherokee plaintiffs to the flooding of the Little Tennessee Valley that asserted the sacred nature of the land.[25] Plaintiffs' claim included relief under the first amendment free exercise clause and the American Indian Religious Freedom Act. The court found that plaintiffs failed to meet the first part of the test because the in-

22. *Id.* at 3074-76.

23. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

24. *But see* Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980), in which Navajo plaintiffs claimed that the government's management of a multistate dam and reservoir project impermissibly infringed upon the free exercise of plaintiffs' religion. The flooding covered a prayer spot that plaintiffs asserted was sacred to them. The Tenth Circuit affirmed the lower court's finding that the governmental interests outweighed the religious interests of the plaintiffs. In finding the government's interest compelling under the second step of the first amendment test, the question of whether such action involved an infringement on plaintiffs' free exercise rights (the first step of the test) was not reached. There are possible implications with respect to the courts' power to review the ultimate constitutionality of the government's actions when the test, although articulated correctly, is applied in reverse.

25. 620 F.2d 1159 (6th Cir. 1980).

terests at stake were cultural rather than religious.[26] The court, however, found infringements would be justified by Congress' authorization to the Tennessee Valley Authority to construct the Tellico Dam notwithstanding "any other law."[27] Regardless of the court's interpretation of this statutory language, no mention was made about the power of the court to declare the language in conflict with the Constitution.

Two problems clearly surface in the application of this test to Native American free exercise claims. First, the lack of a clear definition of what is "religion" and "religious" is especially critical when dealing with traditional Native American religions that are so different from the recognized major world religions. When the religion itself is difficult to recognize, an added problem is the proper weight to be given it when balanced with the purported state interests justifying the infringement.

There is authority that the courts lack the power to decide what a religion is.[28] Such power, it is argued, would permit a court to adopt an informal state religion, a violation of the establishment clause. However, the Supreme Court has been willing to define what constitutes "religious beliefs" entitled to first amendment protection.[29] An essential part of this analysis requires consideration of the nature of the religious practice or right asserted and its relationship to those protected beliefs.[30] Understanding this relationship is essential to assure that proper weight is given when religious conduct is balanced against governmental interests, rather than beliefs alone.

Courts have defined this relationship in different terms. Greater weight is given to those practices and rituals that play a

26. *Id.* at 1164-65.

27. *Id.* at 1161 (congressional authorization in language of Energy and Water Developmental Appropriations Bill, Pub. L. No. 96-69).

28. Kolbeck v. Kramer, 84 N.J. Super. 569, 202 A.2d 889 (1964).

29. In reversing peyote possession convictions under a state dangerous drugs statute, the California Supreme Court determined that the history of the Native American Church and peyotism supported the Indian defendant's defense under the first amendment. The ceremonial use of peyote by members of the church was found to be central to the exercise of those religious beliefs. People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964).

For an in-depth analysis of the Amish religion's history to determine that the state's compulsory education law infringed upon the beliefs of the Amish respondents, *see* Wisconsin v. Yoder, 406 U.S. 205 (1972).

30. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (denial of application of appellant for unemployment compensation because she refused to work on Saturday was a violation of her free exercise rights which required her to violate a "cardinal principle" of her religion).

"central role" to or are a "cornerstone" of the exercise of the particular religion.[31] While "absolute necessity" is stricter than the first amendment balancing test requires, greater weight is given to practices that are more essential to the exercise of protected religious beliefs.

Regardless of how important the practice or ritual is to exercising one's religious beliefs, it must be rooted in the claimant's religion.[32] Although a court cannot inquire into the veracity of the religion itself, it will look closely at the bona fides of the asserted religious beliefs.[33]

A very real problem for Indian tribal plaintiffs is that the courts, in determining what constitutes a sincerely held religious belief, are accustomed to applying first amendment protections in terms of Christian-Judeo religions. Traditional Native American religions are not organized in the same way. The churches or temples, the clergy, the regular meetings, and the sacred writings that symbolize many recognized world religions are generally not characteristic of Native American religions. Different methods of exercising one's religious beliefs should not make them automatically suspect in the eyes of the law and thereby unprotected by the first amendment.[34] It is also important to be aware that although some similarities exist, there are many native religions, not merely one.[35] The variety in the methods of worship by the different tribes and clans should not detract from their authenticity. These differences have made it sometimes impossible for non-Indians, including those in branches of the government, to perceive them as being "real."[36]

31. Reynolds v. United States, 98 U.S. 165-66 (1878); Frank v. State, 604 P.2d 1068, 1071-72 (Alaska 1979) (use of moose meat the "cornerstone" of funeral potlatch ceremony deeply rooted in religious beliefs of Athabascans); People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 817, 821, 40 Cal Rptr. 69, 73, 77 (1964) (ceremonial use of peyote plays "central role" in religion and goes to "essence" of religious expression).

32. *See, e.g.*, Frank v. State, 604 P.2d 1068, 1072-73 (Alaska 1979).

33. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Frank v. State, 604 P.2d 1068 (Alaska 1979); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

34. The Supreme Court, in United States v. Ballard, concluded that it was forbidden to inquire into the genuineness of the "I Am" religious beliefs asserted. However, the jury was properly instructed, in the lower court, to determine whether those beliefs were sincerely held. 322 U.S. 78, 87 (1944) ("Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.").

35. *See generally* J. HURDY, AMERICAN INDIAN RELIGIONS (1970); R. UNDERHILL, RED MAN'S RELIGIONS (1965); READER IN COMPARATIVE RELIGION: AN ANTHROPOLOGICAL APPROACH (W. Less & E. Vogt eds. 1974).

36. H.R. REP. No. 1308, *supra* note 9, at 4.

In some cases, courts have been able to recognize the uniqueness of native religions. The clearest example is the series of cases recognizing the right of Native American Church members to use peyote in religious ceremonies. The leading case, *People v. Woody*,[37] reversed a peyote possession conviction because the statute impermissibly infringed upon Native American Church members' free exercise of religion. The court applied the first amendment two-step analysis, determining that the ceremonial use of peyote was permissible for bona fide religious purposes.[38] Not all traditional Native American religions are as readily recognizable as the Native American Church, which has some of the trappings of an organized religion.

A number of factors have been repeatedly considered by the courts to assist in determining whether an asserted religious practice or activity is based upon a bona fide religious belief. The Supreme Court, in *Wisconsin v. Yoder*,[39] described and applied many of the factors courts have consistently used in determining whether the religious beliefs asserted were sincerely held by the parties. At issue was a conviction of members of the Amish religion for violating the state's compulsory education law when they refused to allow their children to attend school beyond eighth grade. The Court held that the law violated the free exercise of the Amish religion notwithstanding the reasonable and important social interests asserted by the state in enforcing the law.[40] The Court closely examined the history of the religion, its relationship to its believers' way of life, and how important those beliefs were to the continued survival of the religion. In addition, the Court relied on the testimony of experts in the court below for enlightenment concerning the rituals and tenets of the religion.[41]

When considering the governmental interests advanced to justify infringements, courts have looked to the possibility of less burdensome alternatives to meet those legitimate interests.[42]

37. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal Rptr. 69 (1964).

38. 61 Cal. 2d at 721, 394 P.2d at 821, 40 Cal Rptr. at 76.

39. 406 U.S. 205 (1972).

40. *Id. See also* Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980) (experts testified as to the history and nature of Cherokee beliefs regarding the area at issue as the birthplace and capital of the religion); Frank v. State, 604 P.2d 1068 (Alaska 1979) (testimony by anthropological experts on the nature of the Athabascans' religion and the role of moose meat in the funeral potlatch ceremony).

41. 406 U.S. at 210.

42. In supporting the creation of an exemption for the Amish from the state's compulsory education law to accommodate their religious beliefs, such an accommodation could be permitted without constituting government sponsorship or active involvement in

While aware of the danger of acting contrary to the establishment clause, courts have upheld exceptions to protect the important values embodied in the first amendment free exercise clause.[43]

Scope of the Act and Hopi v. Block

In enacting the American Indian Religious Freedom Act, Congress clearly recognized that despite the protections of the first amendment to the free exercise of *all* religions, the religious freedoms of Native Americans have not received the same consideration and protection. The Act was passed as a remedial measure to correct the past history of little or no recognition of traditional Native American religious practices.

The scope of the Act, however, is limited. While infringements come from many sources, this act applies only to federal agencies and related activities.[44] The Act's purpose is to ensure that policies and actions of federal agencies potentially affecting the religious practices of Native Americans comply with first amendment protections afforded all religions.

One of the three major areas of infringement identified by Congress was the lack of access to sacred sites.[45] Much of this land is federally owned and managed, but possession of the land is only one consideration, not a controlling factor.[46] The government must manage that property in compliance with the mandates of the Constitution.

Like many world religions, many Native American religions consider certain geographical sites as having religious and sacred importance.[47] Many of the world's religions hold places sacred, such as the Wailing Wall in Jerusalem, the Vatican in Rome, Mecca, and cemeteries. Native American first amendment claims involving land, nevertheless, are difficult when the court balances

---

a particular religion. Wisconsin v. Yoder, 406 U.S. 205, 234-35 n.22 (1972). *See also* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975), where the Eighth Circuit held that a state prison's hair-length regulation impermissibly infringed upon Indian plaintiff's free exercise of religion. The wearing of long braided hair was found a tenet of plaintiff's religious beliefs, and the court found that the interests advanced by the penal administration could be served as well by "viable, less restrictive means."

43. *See* Wisconsin v. Yoder, 406 U.S. at 220-21.

44. H.R. REP. No. 1308, *supra* note 9, at 1.

45. *Id.* at 2.

46. *See* Sequoyah v. TVA, 620 F.2d 1159, 1164 (6th Cir. 1980); Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980).

47. *See generally* J. FORBES, RELIGIOUS FREEDOM AND THE PROTECTION OF NATIVE AMERICAN PLACES OF WORSHIP AND CEMETERIES (1977); HURDY, *supra* note 36; UNDERHILL, *supra* note 35.

religious claims against purported governmental interests justifying use of the land. Both the courts and Congress have acknowledged there are some Native American religions whose beliefs and practices may be totally dependent upon a particular geographic location.[48] *Hopi Tribe v. Block*, however, illustrates the difficulty courts have in understanding the essential role that land and particular locations play in certain Native American religions.[49]

The area of the San Francisco Peaks, at issue in *Hopi*, has great historical and religious significance to the Hopi Indians. It is one of four high points surrounding the Hopi village of Oraibi. These high points are considered to be Cloud Houses of the spirits of the four major clans of the Hopi which guard Oraibi.[50] The San Francisco Peaks are believed to be the home of the Katcina Clan. "Katcinas" are believed to be spirits sent by the Creator to help and guide the other clans down the road of life.

The Hopi Indians have resided in the area of the Peaks since at least the mid-twelfth century, at which time the parental village of Oraibi was settled. It has been continuously inhabited ever since.[51] The Hopi way of life is deeply religious. It is based upon a plan of world creation and travel down the road of life requiring observation of the tenets of the Hopi religion.[52] The values and beliefs are expressed through an intricate annual cycle of

48. Although denying plaintiff's claims concerning the religious importance of the particular areas at issue, the court recognized that some "particular geographic locations figure more prominently in Indian religions and culture" than in most other religions. Sequoyah v. TVA, 620 F.2d 1159, 1164 (6th Cir. 1980). *See also* H.R. REP., *supra* note 9, at 2; TASK FORCE REPORT, *supra* note 9 (traditional religious rites and ceremonies of some Native American religions may require performance at a particular place, time, and manner).

49. 8 I.L.R. 3073 (D.D.C. June 15, 1981), *aff'd*, No. 81-1912 (D.C. Cir. May 20, 1983).

50. It is believed that when the Creator destroyed the world to punish it, the few chosen to survive because they had remained faithful were sent on four migrations across the country until settling in the area of Oraibi (in Arizona). This area, surrounded by four high points, is considered the crossroads of these migrations. Three of these points are presently known as Navajo Mountain, Mesa Verde, and the San Francisco Peaks. F. WATERS, BOOK OF THE HOPI 3-113 (1963).

51. *See generally* Titiev, *The Religion of the Hopi Indians*, in READER IN COMPARATIVE RELIGIONS, *supra* note 35, at 532.

52. The Hopi religion has similarities to Christian religions. The Creation parallels Genesis in the Old Testament. This was followed, in the Hopi religion, by the Three Worlds, which were each subsequently destroyed by the Creator when the people fell away from their religious ways. It is presently the Fourth World and Hopi ceremonialism is important in much the same way that the Bible is to Christian religions to guide daily living. WATERS, *supra* note 50, at 3-23, 125-250.

ceremonies that pervade every aspect of Hopi life. The purpose of these religious ceremonies is to preserve the knowledge given by the Creator upon the emergence of the people from Mother Earth and to carry out the plan of creation.[53]

Upon emergence, the Hopi first settled the village of Oraibi. The various clans then settled into their own villages in the area surrounding Oraibi. While there is a similar pattern to the cycle of Hopi ceremonies, each village carries on its own independent cycle based upon ceremonies that have been entrusted to the care of the different clans.

The Katcina Clan, believed to inhabit the San Francisco Peaks, was unlike the other people who emerged. As spirits merely taking the forms of humans, the katcinas are believed to be the guides and teachers of the history and meaning of the creation, much like the disciples of Christ. They are more than mere objects in the ceremonies. They are participants who help dramatize the values and beliefs of both Hopi religion and culture.[54]

The ceremonial cycle has greatly diminished over the years. A significant contributing factor was contacts with non-Indians and their efforts to christianize the Indians. Government policies of assimilation, allotment, and termination also took their toll on the Hopi religion and culture. Despite these obstacles, the Hopi religion and the annual cycle of ceremonies is still practiced.

There is no question that the belief of the sacredness of the Peaks is founded in the Hopi religion and that this belief is sincere. Applying the factors set out in *Wisconsin v. Yoder*,[55] there is ample history relating the nature of the religion and the role of the Peaks as home of the katcinas. The participation of the katcinas in the Hopi religion is also an integral part of the religious ceremonial cycle—"central" to the exercise of the Hopi religion.

In denying the Hopi plaintiffs' claim to remove the facilities,

53. As the Creator destroyed each of the first three worlds, the faithful were protected inside the earth. The earth is believed to be a living entity—Mother Earth—the "womb" from which the faithful were "born" (emerged). The Creator then sent katcinas to guide the people on their migrations to the land chosen for settlement in and around the village of Oraibi. The premise of the Hopi ceremonialism is that it will carry out the plan of the creation by someday unifying all the Hopi clans in their homeland around Oraibi. *Id.* at 3-112, 122-250. *See also* M. TITIEV, THE HOPI INDIANS OF OLD ORAIBI: CHANGE AND CONTINUITY 255-83 (1972).

54. The importance of the Katcina Clan, according to Hopi prophesy, is such that when all else is forgotten and gone, the katcina dances will be the last of Hopi rituals to go. WATERS, *supra* note 50, at 67-71, 122-250.

55. 406 U.S. 205 (1972).

the court pointed out that the Hopi (and the Navajo) have continued to practice their religions despite the existence of the facilities; they have not been prohibited from exercising their religious beliefs in other areas of the Peaks.[56] The court discussed the plaintiffs' request to enjoin further development under the first amendment separately from their claim under the Act. All agreed that the three duties created by the Act were complied with by the federal agencies involved.[57] In light of the purpose of the Act, however, the court failed to give the identified religious interests their proper consideration under the first amendment balancing test.

The Act is a remedial measure to assure equal consideration and protection of traditional Native American religious rights under the first amendment. The Act does not mandate that Native American religious claims always prevail.[58] It does recognize the right to the same consideration as other religions when balancing against the government's asserted interests under the first amendment.[59]

In deference to the remedial nature of the Act, the court should have given greater weight to the sacred beliefs of the Hopi concerning the Peaks. The court stated that the government has neither forced the plaintiffs to take on other religious beliefs in conflict with their own, nor choose between their beliefs and some public benefit.[60] The Hopis believe the Peaks to be the home of the katcinas—the spirits that play a central role in the Hopi religion—and thus the role of the Peaks in the history and nature of the Hopi religion makes the area highly sacred. Any development that resulted in the destruction of the Peaks as a home of the katcinas would be analogous to the destruction of an institution representing a Christian religion. If the land on which a church or a temple is located is seized under the doctrine of eminent domain, however, that church or temple may be rebuilt elsewhere. This is not possible where the land itself is the "institution." If such an institution is destroyed, there is the serious threat of destroying the religious beliefs that are the basis of the Hopi religion, in effect, forcing them to abandon their religious

56. Hopi v. Block, 8 I.L.R. 3073, 3075 (D.D.C. June 15, 1981), *aff'd* No. 81-1912 (D.C. Cir. May 20, 1983).

57. *Id.* at 3076.

58. *Id.* at 3074.

59. TASK FORCE, *supra* note 9, at 13.

60. Hopi v. Block, 8 I.L.R. 3073, 3074 (D.D.C. June 15, 1981), *aff'd*, No. 81-1912 (D.C. Cir. May 20, 1983).

beliefs. Moreover, the interests with which these constitutionally protected beliefs must compete are not something of such vast public interest as, for example, a reservoir that might provide water to a large, arid area of land.[61] The development at issue in *Hopi* is a *recreational* facility. Surely the great value this nation places on the free exercise of religion—a right fundamental to the founding of this country—should be given more weight when balanced against mere recreational development.

The government also asserted in *Hopi* that granting plaintiffs' relief would violate the establishment clause of the first amendment.[62] This argument is often asserted to reject traditional Native American free exercise claims.[63] The government, in managing federal properties, must be able to "accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life."[64] However, doesn't the balancing test of the first amendment free exercise clause incorporate consideration of less burdensome alternatives? Since *Sherbert v. Verner*,[65] the Court has appeared to interpret the first amendment balancing test as requiring the government to accommodate religious practices by creating exceptions to policies which infringe.[66]

In *Wisconsin v. Yoder*, the Supreme Court spoke strongly of the need to preserve the "doctrinal flexibility" of the first amendment and apply the religion clauses sensibly and realistically to guarantee protected religious freedoms.[67] The Court weighed

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

62. Hopi v. Block, 8 I.L.R. 3073, 3075 (D.D.C. June 15, 1981), *aff'd* No. 81-1912 (D.C. Cir. May 20, 1983).

63. The government sought conviction under state laws forbidding the hunting of certain wild animals out of season, which included the moose Athabascan defendants killed for their ceremony. Frank v. State, 604 P.2d 1068, 1074 (Alaska 1979). *See also* Wisconsin v. Yoder, 406 U.S. 205, 234-35 n.22 (1972); Sherbert v. Verner, 374 U.S. 398, 409-10 (1963). *But compare* Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980) (rejected idea of creating exception to accommodate need for complete privacy in ceremony asserted by Navajo because found no legal basis to guarantee such privacy under the first amendment).

64. Otten v. Baltimore & O. R.R., 205 F.2d 38 (2d Cir. 1952), *quoted in* Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).

65. 374 U.S. 398 (1963).

66. *Id.*

67. Exception developed for the secondary education of Amish children could prevent "the danger to the continued existence of an ancient religious faith." And the creation of such exceptions should not be avoided even where other alternatives might be developed, but at great sacrifice to the exercise of religious freedoms protected by the first amendment. 406 U.S. at 218 n.9.

both the interests asserted by the state of Wisconsin and the burden of permitting an exception to the statute to accommodate the Amish religious beliefs. It held that such an exception should be made to protect the Amish way of life, founded on religious beliefs different from the majority of contemporary society.[68] It is diversities such as these that are expounded as contributing to the greatness of this country.

The Congress has also suggested, with regard to the access of Native Americans to sacred sites, that there should be no reason why regulations and enforcement policies could not be revised to allow access for religious purposes without contradicting the intent of the laws.[69] Such accommodation of religious freedoms does not necessarily constitute an establishment of traditional Native American religions over other religions in violation of the establishment clause. The courts, the Congress, and the state legislatures have demonstrated that apparent conflicts between the laws and Native American religions can be resolved without any such violation.[70]

The first amendment balancing test, as applied by the Court, is designed to weigh all the interests asserted and possible accommodations to protect first amendment religious freedoms. In light of the American Indian Religious Freedom Act and case law, the *Hopi* court should have properly considered fashioning an alternative to assure that further development would not permanently destroy the nature of the Peaks as a spiritual home of the katcinas—a clear threat to the continued existence of the Hopi religion. One possible solution could be the setting aside of part of the Peaks, by the Department of Agriculture as managing agency of the facilities, to remain the undisturbed "home" of the katcinas.

Conclusion

Freedom of religion is one of the most fundamental rights

68. *Id.* at 216-17.

69. 123 CONG. REC. S39300, 95th Cong., 1st Sess. (1977) (remarks by Sen Abourezk, sponsor of American Indian Religious Freedom Act). *See also* H.R. REP. 1308, *supra* note 9.

70. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (Court held it was the duty of the state to accommodate the Saturday Sabbath of plaintiff under state unemployment compensation law in light of first amendment religious freedom guarantees); Wisconsin v. Yoder, 406 U.S. 205 (1972); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); Bald Eagle Protection Act, 16 U.S.C. § 668a (1940) (exception to accommodate Native American religions without violating establishment clause expressly authorizes use of bald eagle feathers for bona fide religious purposes of Indian tribes).

guaranteed by the religion clauses of the first amendment. Yet, the histories of both the legislatures and the judiciary clearly demonstrate the need to understand traditional Native American religions. It requires a conscious effort to redefine our concepts of what religion is to assure that traditional Native American religions receive the same recognition and protection accorded other religions under the first amendment.

A great variety of religious beliefs are adhered to in this country, and many of them would be perceived as irreligious to other parts of the world. Our courts have, however, time and again demonstrated their ability to recognize bona fide religious beliefs and practices deserving protection under the first amendment.[71] Traditional Native American religions should not be denied the same consideration simply because they too are different. As the California Supreme Court stated:

> In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of Indians who honestly practice an old religion. . . .[72]

Religious freedom is guaranteed to all religions under the first amendment. Congress, however, perceived the need to enact a bill directing federal agencies to bring their policies and procedures into compliance with the first amendment as those policies applied to traditional Native American religions. It specifically identified the history of infringements on these first amendment freedoms which needed to be remedied. While conceding that the Act applied only to federal agencies, Senator Abourezk, as sponsor of the bill, believed that eventually it would be realized that Congress was saying that it would not tolerate restrictions of anybody's religious freedom, including Indian religious freedom.[73]

The Act cannot mandate that traditional Native American

71. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1968); United States v. Ballard, 322 U.S. 78 (1944).

72. People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964).

73. *American Indian Religious Freedom Act: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 2 (1977) (remarks of Sen. Abourezk).

religions be given greater consideration. However, when considering first amendment free exercise claims of these religions, the traditional first amendment test should be applied in light of this remedial legislation. By this Act federal agencies should be on notice that they are to give traditional Native American religions their proper consideration when balanced against any purported interests of the government justifying an infringement of religious freedoms.

Traditional Native American religious interests should not be denied their proper weight on the basis of potentially violating the establishment clause. Numerous legislative and judicial examples can be found to show that such conflicts between Native American first amendment rights and various laws and regulations can be resolved and still be in compliance with both of the religion clauses. It is a delicate line between the interests that the establishment and the free exercise clauses seek to preserve. Not all conflicts will have a workable resolution. Where possible, the development of workable exceptions may involve both administrative and enforcement problems, as well as the need to change some of the policies of the agencies involved. The Act not only contemplated this but specifically mandated that such changes take place if necessary to comply with the first amendment. These exceptions must be made to accommodate the highly valued religious freedoms of the first amendment. If sufficient and sincere consideration is given to all the interests involved, the protection of traditional Native American religious beliefs can be achieved without rising to the level of an establishment of a state religion. It will merely be fulfilling the government's constitutional obligation to assure the same protection to *all* religions under the first amendment.