Responding To The Supreme Court's Effort To End The Conversation About Religious Exemptions And Welcoming Professor Sullivan Into The Conversation

Rodney K. Smith

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Rodney K. Smith, Responding To The Supreme Court's Effort To End The Conversation About Religious Exemptions And Welcoming Professor Sullivan Into The Conversation, 81 Marq. L. Rev. 487 (1998).
Available at: http://scholarship.law.marquette.edu/mulr/vol81/iss2/18

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
RESPONDING TO THE SUPREME COURT’S EFFORT TO END THE CONVERSATION ABOUT RELIGIOUS EXEMPTIONS AND WELCOMING PROFESSOR SULLIVAN INTO THE CONVERSATION

RODNEY K. SMITH*

I. INTRODUCTION

In her paper, Judging Religion, Professor Sullivan, “propose[s] that religious studies can help lawyers and judges to acknowledge the religiousness of Americans without establishing it.”¹ I am on record as supporting the need to draw on the insights of religious studies and theology in developing a viable constitutional definition and fair process that will help unify free exercise and establishment concepts of the First Amendment,² although I have focused on “conscience” and not “religion” as the operative term in need of definition.³ Through the use of an actual case, Professor Sullivan seeks to demonstrate that scholars in religious studies can be effective “conversation” partners⁴ in judicial decision-making. I agree that religious studies can offer assistance in the judicial decision-making process, although I have previously argued that theology, religious studies, and other disciplines may offer even more assistance initially as conversation partners in the legislative

* Donaghey Dean and Professor of Law, University of Arkansas-Little Rock School of Law. J.D., J. Reuben Clark Law School, Brigham Young University; LL.M., S.J.D., University of Pennsylvania. The author gratefully acknowledges the research assistance of Kathy L. Hall and the secretarial support of Linda Ahlen.

3. Throughout the remainder of the paper, I will largely use the term “religion,” and not the broader term “conscience,” in an effort to remain consistent with the terminology used by Professor Sullivan. When I use the term “religion,” however, the term “conscience” could be substituted for it.
context.5

Professor Sullivan’s article is a solid effort to demonstrate some of the ways in which religious studies can inform the judicial decision-making process. On many occasions, however, as I reflected on the content of the paper, I was left desiring elaboration of certain points made by Professor Sullivan. For example, in acknowledging the challenge of defining religion,6 she asserts that, “The difficulties of tightly defining religion . . . are familiar to religion scholars.”7 After further admitting that, “[t]he amorphous quality of . . . religious lives . . . is not easily susceptible to categorical definition,”8 she adds that, “What is needed is a theory of religion that can take account of these difficulties and provide a language about religion that will serve lawyers and judges.”9 For Professor Sullivan, this helpful language about religion can only be revealed by refusing “to pin cultural forms like religion into brittle crystalline structures . . .”10 and she “view[s] the appropriate relationship of knowledge to power in [religion] case[s] as being one of dialogue and process.”11 Sadly, however, after sharing these insights, Professor Sullivan provides little additional guidance as to the nature of this “dialogue and process . . . .” At this broad theoretical level, the reader is left to wonder how religious studies will aid in developing a viable dialogue and fair process.

At the more practical level, Professor Sullivan again seems to leave the reader in midair. She reveals that the compulsion and motivation tests, that have alternatively been relied upon by lower courts in determining what constitutes a protected act under the substantial burden analysis mandated by the Religious Freedom Restoration Act

5. I have argued that Congress should have the first “bite” at the [definitional] apple: Congress [s]hould conduct hearings to aid in formulating a viable definition [of conscience/religion]. In conducting those hearings, Congress can draw on a wealth of expertise—psychological, theological, legal, and philosophical—in seeking to arrive at an eclectic and viable definition of ‘conscience.’ The courts can thereafter ‘liquidate . . . through adjudication’ the definition supplied by Congress.” Smith, supra note 2, at 685.

6. Jurists and legal scholars have struggled to articulate a viable definition of “religion” for First Amendment purposes, and have made little progress in their efforts. See id. at 675-86.

7. Sullivan, supra note 1, at 453.

8. Id. at 454.

9. Id.

10. Id. In this regard, Professor Sullivan relies upon the work of Larry Rosen who argues against rigid structures. According to Professor Sullivan, Professor Rosen chooses rather to acknowledge “cultural indeterminacy” and “focus . . . on the culture of dealing with that indeterminacy.” Id.

11. Id. at 455.
both "have a Protestant bias." Unfortunately, Professor Sullivan does not explain why this is the case. She also states that "theological questions are begged throughout the testimony and opinions in Sasnet v. Sullivan [the case she discusses]," but she fails to amplify this interesting point. Thus, while I find Professor Sullivan's thesis to be congenial, my major criticism is that she does not provide the kind of specific support for her conclusions that is demanded in deciding legal cases.

As one who largely agrees with Professor Sullivan, I would have benefited from more elaboration of her thesis. Nevertheless, I am convinced that she offers insights, drawn from her religious studies background, that support the proposition that religious studies can provide assistance in legal efforts to determine what constitutes a substantial burden for purposes of RFRA and in defining religion. Her caveat to the effect that jurists unwittingly may apply tests (e.g., the underlying motivation and compulsion tests in RFRA cases) in a manner that prefers a particular religion or group of religions should also cause courts and lawmakers to proceed with caution in applying or giving definition to those terms or other terms essential to analysis in the law and religion area.

In addition to applauding Professor Sullivan's suggestion that the insights from religious studies can be utilized more effectively in legal decision-making, I am pleased that she recognizes the need for a more interdisciplin ary dialogue or conversation regarding definitional and other legal issues in the church-state context. She also recognizes that, if religion is defined too subjectively, everyone could "make up his own religion." Consequently, Professor Sullivan suggests that focusing on "dialogue and process," as opposed to trying to develop a structure and crystalline definition, can aid courts in dealing with practical legal issues


13. Professor Sullivan argues that, "While both tests, as presented in [the case she discusses], have a Protestant bias, the objective [compulsion] test because of its focus on belief and the subjective [motivation] test because of its focus on the individual, neither test is surprising . . . ." Sullivan, supra note 1, at 448-49.


15. I prefer the term "dialogue" to "conversation," the term employed by Professor Sullivan. "Dialogue" is somewhat more formal than "conversation," and reflects the formality of the legal decision making process, but it is also generally interchangeable. In this comment, I will hereafter use the term "dialogue" rather than "conversation."

in the law and religion area. Again, I largely agreed with this general observation, when I noted that:

[James Madison’s] call for a series of particular discussions and adjudications implies a role for all branches of the government. The legislative and executive branches should be involved in the discussion of what [conscience or religion] means, drawing on the expertise of theologians, philosophers, psychologists, sociologists, and lawyers. Formulating ... a meaningful definition ... requires participation in an interbranch [and interdisciplinary] dialogue.¹⁷

I also heartily share Professor Sullivan’s observation that a fair process—a process that listens and responds with sensitivity and empathy¹⁸ to the subjective conversation of the party seeking protection for her “religion”—is critical in itself and as a means of “liquidating”¹⁹ a meaningful legal language over time. However, that process must be further explicated.

In the remainder of this paper, I offer some comments, provisional as they may be, to provide more of the detail I wish that Professor Sullivan would have included, as to a number of matters raised in her paper. Of course, in doing so, my observations are necessarily general and, therefore, fall prey to the very criticism of lack of elaboration that I offer in response to Professor Sullivan’s initial suggestions. I trust, nevertheless, that my comments add a bit to the interesting dialogue initiated by Professor Sullivan. In that spirit, the remainder of this comment will be divided into the following parts: Part II will discuss the Supreme Court’s recent decision in the Flores case, which limited religious liberty by holding that RFRA is unconstitutional;²⁰ Part III will

---

¹⁷. Smith, supra note 2, at 682.
¹⁸. Professor Sullivan does not use the term “empathy,” but her paper certainly seems to imply that level of sensitivity to the arguments offered by prisoners and others who are asserting a religious reason for certain action. A meaningful “language about religion” can only be derived from an empathetic dialogue, in which the party asserting a religious right is able to articulate her position fully and before a tribunal committed to trying to understand that position.
¹⁹. “Liquidating” is borrowed from James Madison’s statement that: “All new laws, though penned with the greatest skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.” THE FEDERALIST NO. 37, at 229 (J. Madison) (Clinton Rossiter ed. 1961) (emphasis added).
²⁰. Much of Professor Sullivan’s paper was based on Sasnet v. Sullivan, 908 F. Supp. 1429 (W.D. Wis. 1995), a lower court case, which was decided under RFRA. Her points, regarding the role of religious studies, remain somewhat relevant despite the Supreme Court’s holding in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), but the Supreme Court certainly has restricted the instances in which questions of the sort discussed in Professor
examine some meritorious characteristics of "religion" that deserve Constitutional protection; Part IV will next discuss the substantial burden test and the need for an empathetic process; Part V will briefly examine the issue of the interaction between religious liberty and cultural preservation, which Professor Sullivan characterizes as the conflict between "cultural independence [and] the right of religious freedom;" and, some concluding comments will be made Part V.

II. THE AFTERMATH OF CITY OF BOERNE V. FLORES: NO END TO THE CONVERSATION

In writing for the Court in Flores, Justice Kennedy held RFRA to be unconstitutional and opined that, "Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal[-state] balance." This blow for religious liberty claims against laws of general applicability may not be fatal. However, indeed, Justice Kennedy's opinion suggests two major ways in which the adverse implications of the decision for religious liberty can be mitigated.

First, Justice Kennedy acknowledges that:
While the line between measures [like RFRA] that remedy or prevent unconstitutional actions and measures that make a substantive change in governing law is not easy to discern, and

Sullivan's paper will have to be resolved.

21. Professor Sullivan raises, but does not respond in any depth to the following quandary:

In Chiapas, in Southern Mexico, debate is had in modern Mayan communities seeking to preserve their traditions as to whether they are better served by demanding the right to cultural independence or the right to religious freedom. Understanding themselves as dedicated to preserving a culture allows Mayans certain rights as a community over against dissenting individuals which the language of religious freedom does not permit, because religious freedom in Mexico is a right that belongs to an individual. Indian communities, like other smaller religious communities, like Hasidic communities, wish to be able to discipline their members for heterodoxy. They cannot do that if a member can assert an individual right to religious liberty.

Sullivan, supra note 1, at 458-59. This seeming conflict between cultural preservation and religious freedom is of significance in many places throughout the world. In Russia, for example, the Parliament recently passed a law that would limit religious freedom for many minority religionists on the ground that those minority religions undercut tradition Russian culture, which is largely based in Russian Orthodoxy. See, e.g., Peggy Lowe, Religion Law Worries Catholic Priests in Russia, DENVER POST, Oct. 11, 1997, at B6, and infra, notes 62-63, and accompanying text.

Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.\(^2\)

Later in the opinion, he notes that:

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.\(^4\)

These comments leave open possibilities for revitalizing RFRA at the Congressional level. Congress might even build a record indicating that laws of general application often harm religions in significant ways. It might also develop a record that demonstrates that legislative bodies may be insensitive, if not hostile, to requests for exemption on religious grounds by those politically uninfluential religious groups.\(^5\) In building such a record, Congress could call on testimony from religious studies scholars, who can establish, as Professor Sullivan seems to suggest, that even facially general laws may have a religious bias. That bias may be inherent in the law itself, as is certainly true of Sunday closing laws, which favor majority religionists but disfavor some minority

23. *Id.* at 2164 (emphasis added).

24. *Id.* at 2171.

25. In this sense, legislative bodies that refuse to grant an exemption for minority religions often omit to act out of hostility or mere indifference to the politically uninfluential religious group. It is unlikely, however, that the same legislative body would omit to act, by granting an exemption, in the case of a larger, influential religious group. I acknowledge, however, that this admission of institutional insensitivity may be difficult to draw out of Congress, because it accentuates a weakness in the legislative process. Such an act of institutional humility, however, might help placate the Court's sense that Congressional adoption of RFRA constituted an arrogant usurpation by Congress of the Court's authority. That humility might, as well, help eliminate the possibility of an institutional crisis in constitutional governance that may result if the Court and Congress continue their "in your face" dialogue that has characterized their interaction over the issue of religious liberty in the past few years (i.e., Congress disagrees with the Court's decision in the Smith case and responds by telling the Court the test that it must use to decide cases in the area and the Court responds by emphatically denying Congress authority in the area). As escalation of this "in your face" dialogue may contribute to public cynicism about each Branch and threaten the legitimacy of our constitutional form of government.
religionists, or it may be evident in a more subtle sense. Laws of general applicability appear on their face to be religiously neutral. However, that may not be the case. A general law that had the effect of harming a politically influential religious group is unlikely to be adopted in the first instance. Politically influential religious groups can oppose the law itself or simply seek an exemption from it. Thus, it is unlikely that a law of general applicability that would harm a politically influential or major religious group would ever be adopted. Minority and less influential religious groups, however, do not have similar access to legislative power and are, therefore, subject to being regulated by laws of general application in ways that majority or influential religious groups are not. Uninfluential minority religionists, therefore, do not have the power to prevent a general law that adversely impacts them from being passed nor do they have the power necessary to obtain an exemption to it.

To document this type of religious inequity or discrimination, Congress could develop a detailed record with examples and testimony from a variety of experts indicating the implicit discriminatory nature of the lawmaking process itself. The preference for major or influential religious groups in the making of laws of general applicability, if meticulously documented, should provide a basis for using the enforcement power of the Fourteenth Amendment to rectify the harms done to minority religions through that process. Congress could also assert that it was enforcing the establishment provision of the First Amendment, which requires that laws preferring one religion or a group of religions be declared constitutionally impermissible. In this regard, Congress would demonstrate that the lawmaking process

26. Blue laws or Sunday closing laws have been found to be constitutionally permissible, but they clearly have some inherent bias against sabbatarians, Muslims, and other religious groups that recognize a holy day other than Sunday. Similarly, it has been forcefully argued that the polygamy laws passed by Congress in the Nineteenth Century were actually hostile even though they appeared to be facially neutral. See discussion regarding Congressional antipathy to the “Mormons” as a major factor in the drafting of facially neutral laws against polygamy discussed in Edwin B. Firmaige & Richard Collin Mangrius, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1896 (1988).

27. Exemptions of this sort are constitutional in light of the Supreme Court’s controversial decision in Employment Division v. Smith, 494 U.S. 87 (1990).

28. This inability to obtain an exemption may itself evidence a measure of discriminatory intent or indifference on the part of the legislature. It is unlikely that a larger religious group would similarly be denied such an exemption.

29. The magnitude of harms that have been or might be the product of the lawmaking process associated with laws of general applicability should be detailed in the record, as well.
associated with laws of general applicability is itself suspect on establishment grounds. If Congress were able to achieve this evidentiary objective, through extensive hearings, the dicta from Justice Kennedy’s opinion seems to imply that the Court would permit Congress to pass a law like RFRA.

Second, it is clear, after the Court’s decisions in Smith and Flores, that the states remain free to enact laws like RFRA, particularly if they do so under the authority of their state constitutions. In this regard, a uniform law, along the lines of RFRA, might be developed and submitted to all state legislatures for adoption. While mustering support in all the states appears to be a daunting task, it is common for uniform laws to be adopted in other contexts. The fact that RFRA was supported by a broad array of groups that cover the political spectrum and was overwhelmingly adopted by the House and the Senate certainly indicates that there is significant support for such a uniform law in all the states. A Uniform Law of Religious Liberty, for

---

30. It is a matter of accepted constitutional law that states may, under the auspices of their own state constitutions, increase protection for human rights, including religious liberty. In the words of Professors Nowak and Rotunda:

State courts are the final interpreters of state law even though their actions are reviewable under the federal constitution, treaties, or laws. The supreme court of a state is truly the highest court in terms of this body of law . . . . This power is an extremely important one, for it means that state courts are always free to grant individuals more rights than those guaranteed by the Constitution, provided it does so on the basis of state law. The federal Constitution establishes minimum guarantees of rights. Granting additional liberties does not violate its provisions. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 16 (5th ed. 1995).

31. The Uniform Law Commission and the American Law Institute regularly engage in the development and recommendation of uniform legislation. They generally work in private as to public law areas, but they might be willing to assume this responsibility. If they are not willing to assume this responsibility, others might do so. For example, the very coalition that developed RFRA in the first instance might submit it to the states, in its current form or with some minor revisions in light of objections raised to it.


33. It might be wise to limit the nature of the rights of prisoners under such a uniform act, in order to limit opposition from the Attorneys General of various states. Of course, this could be done in some states and not in others, depending on the reaction of Attorneys General in some states. This would also have the effect of limiting the specter of a “heavy litigation burden on the States” bemoaned in Justice Kennedy’s opinion. City of Boerne v. Flores, 117 S. Ct. 2157, 2171 (1997). Of course, it might also be possible for the states to
adoption in the states, would no doubt be constitutional and would secure the very liberties sought to be protected under RFRA.34

These two and other possible legislative responses to the Court’s opinion in *Flores* make it clear that RFRA, in some form, should not be declared to be dead. Even if the Supreme Court, at first blush, seems to have intended to deny Congress a place at the table in the dialogue about the availability of religious exemptions to laws of “general” application, Professor Sullivan and other scholars in the religious studies area may yet offer assistance on two fronts: (1) They can help revitalize RFRA at the federal and state levels by offering support for the proposition that laws of general applicability can often have some inherent religious bias, as a matter of process and substance; and (2) Once RFRA in some form is revitalized, at the State or Federal level, they can help in the ongoing interpretive dialogue that will necessarily ensue.

Justice Kennedy’s unsupported claim that permitting parties to seek exemption from laws of general applicability on religious grounds would place a “heavy burden on the States” might also be verified or rejected by state experience under a state RFRA. Justice Kennedy seems to be arguing that the no exemption doctrine under *Smith* would make for more clarity in the law and would, therefore, limit the number of cases filed. This is a claim that needs empirical verification. It is conceivable that, over time, doctrine under a state RFRA provision would become sufficiently clear that there would be a reduction in the number of cases litigated, because exemptions would be more readily given and parties would not be required to prove intent to discriminate against religion or some hybrid claim, as is currently required under *Smith*. This empirical question—whether the *Smith* doctrine or a RFRA law would stimulate more litigation activity—may also be tested at the federal level, given that the President has indicated that the Administration is taking the position that RFRA continues to apply as against the federal government.35 It can be hoped, in this regard, that the President will be aggressive in ensuring that religious claims are

contradict Justice Kennedy’s empirical conclusion that heavy litigation burdens would necessarily attend RFRA or a law like it. Justice Kennedy offers no empirical support for his assertion, and it may simply be overstated.

34. It must be acknowledged, however, that state courts might raise separation of powers questions similar to those raised by the Supreme Court in the *Flores* decision. See id.

35. William Marshall, attorney in the White House Legal Counsel’s Office, indicated that President Clinton is taking the position that RFRA continues to apply to the federal government in a talk given at a conference at the University of Arkansas at Little Rock on Friday, September 19, 1997.
protected at the federal level and that such protection will, in fact, limit the incidence of litigation.

III. CHARACTERISTICS OF RELIGION THAT WARRANT PROTECTION

As previously noted, it has proven difficult (if not impossible or improbable) to develop a viable definition of "religion" or "conscience." In an analogous context, Professor Hyland notes the difficulty of defining "sport," but proceeds to "depict its distinctive characteristics—what qualities are especially striking or strong in these activities." Similarly, more can be gained in terms of the definitional dialogue suggested by Professor Sullivan if we focus on setting forth the distinctive characteristics of religion, as opposed to endeavoring to provide a definition that will cover all religions. Additionally, setting forth those distinctive characteristics of religion, in an open-ended sense, suggests a series of reasons why society benefits from providing broad protection for religious exercise. I would have welcomed some comments by Professor Sullivan in this regard, but she did not make such an offering. I will, therefore, suggest for the purpose of opening a dialogue on this significant topic that there are a number of characteristics of religion that elucidate what should count as "religion" and also justify for recognizing a vibrant version of religious liberty.

At the outset, I acknowledge that not every religious act partakes of all of these characteristics, but an examination of these characteristics does seem to offer support for protecting religious liberty. An examination of such characteristics can also be of assistance to jurists and lawmakers as they engage in the dialogue regarding what acts should be protected under the rubric of the First Amendment's religion provision or related provisions. For the purposes of this commentary on Professor Sullivan's paper, the discussion regarding each characteristic will be brief. I will focus on religion, but much of what is said may characterize acts of conscience, as well.


37. I do not purport to be arguing that this list of characteristics is necessarily exhaustive. There may certainly be other characteristics that can be offered. Nevertheless, I offer this short list as illustrative. I discuss these characteristics and the benefits of "religion" in much greater detail elsewhere. See Rodney K. Smith, The Role of Religion in Progressive Constitutionalism, 4 WIDENER SYMPOSIUM J. (forthcoming 1998).
A. Religious Exercise as a Responsibility-based Right

Religious liberty is responsibility-based, which differentiates it from many other rights, which seem to be based on individual preference or license. Religious acts are often a matter of obligation. Many religions are based on a notion of covenant—the believer binds herself to Deity and agrees to follow certain commandments or precepts. Following such commands or precepts is not always easy or convenient. Indeed, it is sometimes difficult and often requires personal sacrifice. In a world that appears to be increasingly hedonistic and bent on shifting responsibility to others, there is something refreshing and meritorious in protecting a right that is responsibility-based. The taking of responsibility, which is necessary to the functioning of any society, is a value that deserves protection under law.

B. Religious Exercise as Other-directed

In a related sense, religious exercise is often other-directed. It is directed to Deity or caring for others, in accordance with the commandments or precepts of one’s religion. Most Christians and other religionists, for example, take seriously their obligation to serve others. As dramatically illustrated by Mother Teresa's life of service, such religiously motivated service helps those in immediate need and offers a sense of hope to those who are touched by the goodness or spirit of her great work. In a world often plagued with selfishness, this characteristic of other-directedness offers evidence that religious exercise may merit special protection. Other-directedness may also provide a basis for more of the sort of cohesion that is necessary for a society to persist than does self-centeredness. Even if this were not the

38. Sadly, one need look no further than modern tort law to see how parties often shift responsibility to others or otherwise fail to accept responsibility for their acts. See, e.g., Timothy D. Lytton, Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law, 78 CORNELL L. REV. 470 (1993).

39. What at first appear to be obligations may in fact prove to be great blessings. In my religion, I am “commanded” to visit and offer aid to those in need on a regular basis. Over the years, I have been greatly blessed by following the command. I have made many friends and have felt the joy that necessarily attends assisting another. How true it is that often the greatest beneficiary in each act of service to another is one’s self.

40. Mother Teresa might be criticized in some circles for her acts of charity, see, e.g., Robert A. Sirico, Mother Teresa's Critics Attack Private Acts of Charity, THE LAS VEGAS REV.-J., Oct. 6, 1997, at 11B, but her service and other-directedness is generally conceded to be of benefit. Certainly, not every religious act is other-directed; and, even when the act is other-directed, it might not be productive of good in the same sense that Mother Teresa's other-directed actions are. The concept of service to others, however, seems to be a value generally worthy of protection or promotion.
case, the promotion of means of serving others would seem to be a social good that merits protection.

C. Religious Exercise and Community

Other-directedness often gives rise to another characteristic of religion: A capacity for community creation. Religionists often join with other believers, and occasionally non-believers, to form close knit and often self-sustaining communities. Of course, as is the case with many of the characteristics of religion, this community-building aspect may have its darkside.41 Many religionists form communities that are insular and sometimes even antagonistic to other groups. This insularity or antagonism often presents problems in our pluralistic world. Nevertheless, this community-building characteristic is meritorious in at least two senses: (1) It helps individuals cope with the alienation that often attends solitary life in our complex and often impersonal contemporary world; and (2) It reinforces the need for individuals to join together to achieve common ends in a more effective manner and to gain meaning from relating to others. This commitment to community may, therefore, be in some measure transferable to society generally and may be a social good in that sense, as well as being a social good in terms of helping individuals deal with the implications of the complex and often impersonal world in which we live.

D. Religion and Reverence

Another related characteristic of much religion is a sense of attendant reverence—for example, reverence for Deity and reverence for creation. Reverential awe and the respect that it engenders is a value that may be on the decline generally in contemporary society. A sense of reverence adds meaning to one's life and seems to have some capacity to deal with the alienation that often attends life. It may also lend itself to a certain respect or reverence for others that may be critical in any community, political or otherwise. While skepticism may be generally be healthy, when it prevails, and negativism becomes pervasive, it can be destabilizing in its effects.42 Reverence may be an effective counter-balance to the pervasive negativism that often characterizes contemporary society.

41. See infra at Part III.G., for a discussion of the "darkside" of religion.
42. Negativism and general irreverence in radio and other media programming may, for example, contribute to declining commitment on the part of the citizenry to the political system itself.
E. Religion as a Special Epistemology

One of the significant and sometimes unique characteristics of religion is epistemological in nature. Religious knowledge is often extra-rational in some respects. In discussing religious decision making, Obert C. Tanner captures this epistemological difference when he notes: "Here is a fact, yet one which defies intellectual analysis. It is a strange thing that an experience so decisive as to influence a person's total life and commitment should yet be described as ineffable, unutterable, indescribable, and unexpressible." 43

Elder Dallin Oaks, a former President of Brigham Young University and a dean at the University of Chicago's Law School, also describes a certain interaction between reason, the tool of much of secular decision-making, and revelation, which is a significant form of gaining knowledge in the religious context:

[R]eason screens revelation and revelation confirms or overrules reason. As concerns sacred knowledge, it is just as important for reason to have the first word as it is for revelation to have the last word. I believe this is one meaning of the Lord's command for his people to "seek learning, by study and also by faith." 44

In a related sense, I have previously noted that:

Even matters of conscience that are secular in nature often seem to be the combined product of a dynamic between religious faith or personal inspiration and reason. Reason and personal inspiration are tools that assist in the pursuit of truth and the peace and purposefulness that attend conscience. Postmodernists, with their emphasis on context and their distrust of reason standing alone, provide a helpful insight—conscience and the pursuit of meaning might not solely be the product of reason. The person of conscience might ultimately have to act on faith and reason, although faith, as such, may not be religiously based. . . . Transcendent or ultimate truths (truths central to one’s self definition [and, perhaps, worldview]), are discovered through a dynamic that includes an interplay among reason, faith, and context. 45

The epistemology that often attends religious choices and commitments of conscience provides a means of making decisions that is beyond the scope of reason alone, as we know it.

43. OBERT C. TANNER, ONE MAN'S SEARCH 151 (1989).
45. Smith, supra note 2 at 671, n.94.
I once had a colleague who was committed to animal rights as a matter of conscience. My colleague has used the tools of reason to deal with the issue of how we should treat animals. Reason has aided her in her search for answers to actual issues that arise almost daily in that context, but reason alone is not dispositive, as evidenced by the fact that other "reasonable" people have not reached the same conclusions. My colleague, therefore, after amassing all the evidence that can be marshaled through reason, is left to decide the issue on some more introspective basis. She labors over the evidence until she comes to a sense of peace regarding it. At that point, she is able to resolve the issue in her own mind and heart. While not necessarily labeled as a religious epistemology, I suspect that many decisions related to difficult issues not susceptible to clear-cut resolution through reason are made by employing just such an epistemology. An epistemology of this sort may not be exclusively religious in nature, but it surely describes the religious decision making process in many respects. In a sense, reliance on religious texts that were themselves derived from a revelatory experience or some other form of communication with G-d is but a product of an epistemology quite different from the epistemology that purportedly characterizes most secular decision making.

This different epistemology warrants protection for at least three reasons: (1) In the case of difficult questions, questions that have not been susceptible to clear resolution through the exclusive medium of reason but that must be resolved in at least a provisional sense, the epistemology of religion and conscience may provide us with the necessary provisional closure that ultimately permits society to move

46. I intentionally have used an example of "conscience" rather than "religion" to demonstrate this point. I have done so to illustrate that acts of conscience may be similar, in this and other respects, to religious acts. Of course, I could have easily used a religious act to demonstrate the point. For example, Martin Luther King, Jr.'s decision to remain active in the Montgomery Boycott was religiously motivated, in an epistemological sense. See Rodney K. Smith, Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?, 43 CASE W. RES. L. REV. 917, 954-56 (1993).

47. It must be conceded, however, that there are similarities between the epistemology that characterizes the secular and that which typifies the sacred. Professor John Witte, Jr., for example, has argued that:

Law and religion are methodologically related. Both have developed analogous hermeneutical methods, modes of interpreting their authoritative texts. Both have developed logical methods, modes of deducing precepts from principles, of reasoning from analogy and precedent.

John Witte, Jr., Law, Religion, and Human Rights, 28 COLUM. HUM. RTS. L. REV. 1, 6 (1996). The origin of the text in the religious context is quite different, however, as an epistemological manner, from the epistemology that gave birth to secular laws and texts.
forward; (2) Use of this "religious" epistemology may provide us with more than a tenable answer to difficult questions—it may provide us with a sense of personal peace or edification that enables us to be truly committed to our answers,\textsuperscript{48} and (3) This form of decision making may in fact lead us to truth in ways that reason alone cannot and is, therefore, deserving of protection.\textsuperscript{49}

\textbf{F. Religious Exercise and Personhood}

It is clear that religion is a very significant source of personal meaning. One can laugh at the story of a purported survey done of a major university's graduates, that revealed that 75\% of them considered themselves to be religious, whereas only 25\% thought that religion was important in their lives, precisely because it is hardly conceivable that a truly religious person would consider her religion to be of little importance. The very nature of religion is that it tends to describe that which is essential to one's own definition of self. Religion and possibly other related forms of conscience generally reflect that which is of greatest moment in the human spirit of the believer. As such, religion should be protected. Professor Robin West put this well recently when she raised the following rhetorical question: "What becomes of a theory of justice based upon consistency and plumb-line and untempered by nurturance, when it slights the nurturing impulse to bring members of the community to their highest potential and cultivate the greatness in the human spirit?"\textsuperscript{50} Professor West is right in calling for nurturing "greatness in the human spirit," which is often reflected in religion and the commitment of conscience, for two reasons: (1) A society that fails to respect this essential aspect of the personhood of its citizenry fails in its claim to being a just society; and (2) This respect may itself facilitate the pursuit of truth and justice (i.e., as the citizenry, or a portion thereof, seek after the "greatness of the human spirit," they

\begin{itemize}
\item \textsuperscript{48} See Smith, supra note 46, at 952-57, for a more detailed discussion of the concept of edification.
\item \textsuperscript{49} Decision making through religious inspiration or conscience may in fact lead to truth, when reason alone cannot. Indeed, even a skeptic would have to concede that it is possible that the epistemology of religion may yield truth. Once that point is conceded, this different epistemology should be protected. Of course, the darkside of answers received in this manner—religious epistemology has resulted in good and bad—counsels some caution in protecting the epistemology. In a sense, the establishment clause of our Constitution may be read as limiting the excesses of the epistemology of religion, satisfying our need for caution in protecting religious epistemology. See infra at Part III.G.; see also infra notes 43-46 & 47 and accompanying text.
\item \textsuperscript{50} Robin L. West, Justice and Care, 70 ST. JOHN'S L. REV. 31, 40 (1996).
\end{itemize}
may find it in some measure and be able to share it with others to the betterment of all who will hear).

G. The Darkside of Religion

Just as there are benefits that are inherent in religion, there is a darkside that often manifests itself. Any one with a sense of history knows that much suffering has been and continues to be religiously motivated. The same is painfully true, as the Twentieth Century attests, of ideology. Hitler and Stalin, for example, brought considerable death and suffering in the name of ideology.

Religion, however, is legally constrained under the establishment provision of the First Amendment to the United States Constitution in ways that ideology is not. Religion may, in a partisan way, win the hearts of the people, but it cannot be directly enshrined in our governmental affairs in the same way as ideology. Under the establishment provision, government simply may not prefer one religion over another, or religion generally over other matters of conscience, although religious arguments may be translated into secular (more ideological) arguments and raised in that form in the public square.\textsuperscript{51}

The establishment provision seems to have done its work well, in this regard, in our nation and have constrained much of the darkside of religion, particularly combined with a compelling state interest or similar standard for free exercise purposes. Ideology and other forms of political decision making have not been similarly constrained. Of course, one need look no further than the loss of life and suffering caused by some small religious groups in our country, to see that suffering continues to be religiously motivated from time to time. That suffering, however, has been privatized, largely perhaps through the establishment provision, and has been of a lesser magnitude than that occurring in our nation’s history in the interest of an ideological or political viewpoint. Indeed, on balance, if one were able to amass such statistics, I am confident that the good done by religion (e.g., the feeding of the hungry and the caring for the needy) would far outweigh the harm done in the interest of religion, particularly given legal constraints that are in place to limit the darkside of religion in the United States.

\textsuperscript{51} Professor Michael Perry has written thoughtfully about this subject and has concluded that religious arguments can only be relied upon in the making of public policy, when they are translated into reasoned, secular arguments. \textit{Michael John Perry, Religion in Politics} (1997).
In addition to the particular arguments previously raised supporting protection for religious exercise, therefore, it should be acknowledged that the darkside of religion—its capacity to wrest control of public power and cause suffering—is legally limited in ways that ideology is not. Religion, therefore, given its inherent worth and the fact that its role in the wielding of public power is limited, surely is deserving of substantial protection, including protection in the form of exemptions from laws of general application. Ideology and political expression, on the other hand, are not so limited; and, in terms of an equitable balance, may not deserve exemption from laws of general application, in the same way that religious exercise does.  

IV. WHEN IS RELIGION BURDENED: SOME COMMENTS ON SUBSTANCE AND PROCESS

If RFRA is revitalized, at the state or federal level, as suggested in Part II of this comment, courts and perhaps lawmakers will have to wrestle with the issue of when religion is "substantially burdened," such that it merits legal protection.  

Professor Sullivan addresses this issue in some depth in her paper. In doing so, she refuses to opt for a single test; rather, she concludes that religiously motivated as well as religiously compelled behavior should be protected. Again, I am in full agreement with Professor Sullivan.

It is generally conceded that religiously compelled behavior—behavior that is clearly required if a believer is to be obedient to the obligations mandated by an established religion—should be protected. It is less clear, however, that religiously compelled behavior—behavior that is more subjective and individualized (not based on the

---

52. Professor William Marshall has argued that various forms of expression and religion should be equated. William P. Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 MINN. L. REV. 545 (1983). It is not surprising, therefore, that he concludes that religious exemptions from laws of general applicability are not justified. William P. Marshall, Defense of Smith & Free Exercise Revisionism, 58 U. CHI. L. REV. 508 (1991). It is clear, however, that Professor Marshall's conclusion is not equitable. It does not equate religion with ideology and expression; rather, it disfavors religion. Under Marshall's view, religion may not, on establishment grounds, wrest control of the government, but ideology may. It seems imminently fair, therefore, given the privatization of religion, that religious exercise be given exemptions from laws of general applicability.

53. Other interpretive issues will have to be address (e.g., when are government interests sufficiently compelling to justify limiting the free exercise of religion), as well.

54. Sullivan, supra note 1, at 445-46.

55. This is the more restrictive test and is easier to apply, enabling courts to avoid assessments of individual sincerity, although they must be convinced that the individual is a member of a religion that requires the act involved in the case.
requirements of an established religion) in nature—should be protected, because concerns have been expressed regarding the incapacity of courts to deal with personal religious sincerity, in a subjective sense.

Jurists out of fear that they might do harm to some individuals by failing to recognize what are in fact sincere beliefs, may be guilty of committing an even greater harm—the harm of failing to permit a party to be given an opportunity to argue for the sincerity of her belief. Indeed, even if the party is not able to persuade the court that her religious act is sincerely motivated, she would surely prefer the opportunity to try than to have no opportunity whatsoever to prove her case. It must be conceded, however, that proving the sincerity of an individualized belief is typically more difficult than proving that one is adhering to the tenets of an established religion. Therefore, it will admittedly be more difficult for individuals to prove subjective motivation than to demonstrate compulsion.

There is another sense in which compulsion and motivation may require some difference in treatment. Behavior that is compelled, in the sense that failing to act would be to violate a covenant between the individual and her Deity, may deserve greater solicitude than does religious behavior that is motivated by one's religious beliefs but is not compelled by those beliefs. The line is not always clear, but an illustration should help clarify the point. A Catholic may believe that she is required to attend Mass and may prefer, perhaps even on religious grounds that do not rise to the level of obligation, to attend Mass at a particular time. The attendance at Mass is compelled, but the preference of times is not. Courts should provide greater solicitude when an act is compelled or required than when it is merely preferred. In this regard, I would suggest that the compelling state interest test, which requires that a Court find that the government have a compelling interest that is being applied in the least restrictive manner before it can regulate the religious activity, must be used in cases of religiously compelled exercise. If problems, of manageability or substance,
developed in implementing the compelling interest test in cases of religiously motivated, as opposed to compelled, actions, Congress could revisit the statute and amend it to provide for a balancing test in the case of religiously motivated actions. That test would not require that the government prove a compelling state interest. It would suffice if the government’s interest outweighed the religiously motivated act. This, again, highlights the virtue of a statute, as opposed to an amendment, for the purposes of constitutional dialogue.

I agree with Professor Sullivan that subjective religious acts should be protected, requiring assessment of sincerity. However, attention must also be given, as Professor Sullivan also suggests, to developing a fair process. Additionally, that process should be overseen by judges who are empathetic and willing to take seriously claims of religionists, whose claims may seem foreign and perhaps even pernicious. These judges might be administrative or judicial in nature. Indeed, given that the President has indicated that the federal government considers itself bound to adhere to the mandates of RFRA, it may be necessary for administrative personnel to deal with such claims. They do must be sensitive to those who appear before them, asserting a religious claim, and efforts should be made to ensure that this sensitivity becomes a part of the decision making process.58

When I was engaged in the practice of law, I regularly appeared before a judge who was a long time family friend. I often felt that he was bending over backward to understand and even empathize with the other side’s claims when I appeared before him. I know that he was trying to be fair, and wanted to be personally assured that he was not unfairly favoring my position. Given the power with which we are bound by our own cultural, intellectual and religious paradigms (paradigms as strong as the friendship that bound me to the judge), it is imperative that judges and others involved in assessing religious claims be very sensitive to their own potential prejudices and, as a consequence, endeavor to empathize or at least fully understand in a respectful manner religious claims that differ from their own religious, cultural or intellectual beliefs.

V. RELIGIOUS LIBERTY AND CULTURAL PRESERVATION

Professor Sullivan raises but refuses to take a position on the issue

58. Sensitivity of this sort could be developed through a combination of administrative statements regarding the role of those hearing such claims and through actual training.
of cultural preservation versus religious liberty.\textsuperscript{59} She raises the issue in the context of the desire of some Indians in Chiapas to maintain their culture, in the face of religious proselytizing.\textsuperscript{60} A similar issue has recently been raised in Russia, where the Parliament passed a law to restrict religious liberty in Russia on the ground that Russian religious culture was being undermined by the proselytizing efforts and the presence of certain minority religions.\textsuperscript{61} This effort was largely initiated by the Russian Orthodox Church, which many Russians equate in some measure with Russian culture.\textsuperscript{62} Many Muslim nations make similar cultural arguments in restricting religious liberty.\textsuperscript{63}

A general caveat is also in order. A recent study argues that the cultural diversity argument [generally and not just as to religious culture] often plays into the hands of the state and is used to rationalize the arbitrary exercise of power that cannot be justified by claims of philosophic or cultural distinctiveness. It is critical in any human rights discourse that a clarification and differentiation be made between legitimate cultural specificity that is deeply imbedded in diverse belief systems and values, and the state's exploitation of this contention.\textsuperscript{64}

Although she does not so argue, it may be that Professor Sullivan is unwilling to take a position on this issue on the ground that it is so contextual in nature that it must be decided on an individual, case by case, basis. I am somewhat sympathetic to this viewpoint. Indeed, on similar grounds, I have argued that the requirements of the establishment provision or value should not be enforced in Indian country.\textsuperscript{65} Indian religion is often so inextricable from Indian culture in many respects that it would cause significant harm to the culture to require a separation of the Indian religion from the public sector in Indian country. I caution, however, that individual Indians should be

\textsuperscript{59} Sullivan, \textit{supra} note 1, at 458-59.
\textsuperscript{60} Id.
\textsuperscript{61} See, e.g., Daniel Williams, \textit{Faith-Curbing Bill Becomes Law in Russia}, WASH. POST, Sept. 27, 1997, at A16.
\textsuperscript{62} While attending a conference on religious liberty in Central and Eastern Europe, I heard a Russian Orthodox Priest make a version of this argument. He argued that Russia and its culture was in captivity during the communist reign and the Church needed time to reacquaint itself with its people and restore their religious identity and culture.
permitted free exercise of religion on the reservation. That free exercise would, in turn, permit proselytizing among Indians, as a means of facilitating their individual religious choices. Under this balance, where legitimate cultural concerns are evident, the Indian religion and culture is permitted to remain pervasive, but is not permitted to be exclusive. A similar solution may be in order in Chiapas, but I would hesitate to provide the majority religion with exclusive rights, rights which would entirely trump individual religious liberty.

In the case of Russia and other nations that seek to impose a single religion on their people on cultural preservationist grounds, I can reluctantly accept some form of established religion, but I certainly would oppose the imposition of an exclusive religion. Of course, even if only an established and not an exclusive religion is mandated, the kinds of risks discussed previously regarding the darkside of established religions should be anticipated.66

In the American system, with the possible exception of Indian country, I believe that we would do well to maintain our current unwillingness to trump religious liberty on cultural grounds. This position is justified for a number of reasons. First, culture itself is extremely powerful. As a member of a minority religion, I know how difficult it can be to maintain one’s religious commitment in the face of a culture that is both pervasive and powerful. It takes courage as well as commitment to act on religious grounds counter to one’s dominant, national culture. I believe that the dominant culture needs no more of a trump card than the one it naturally has. If a trump card is given, it surely should not be any greater than permitting an established but not exclusive religion. Even this should occur only in instances when it can in fact be demonstrated that the religion is inextricable with the culture, that the culture would be harmed, and that the harm to the culture outweighs the value of individual religious liberty.

VI. CONCLUSION

Professor Sullivan’s paper contributes much to the dialogue regarding religious liberty. Although many of her insights are underdeveloped, as are my own in my commentary on her paper, she has made a case for lawmakers and judges drawing more heavily on the expertise of scholars in religious studies. Even though, based on the Smith and Flores decisions, a majority of the current Supreme Court

66. See infra Part III-G.
appear disinclined to protect religious liberty, except when it is intentionally and directly being discriminated against, there is some reason for cautious optimism that voices like those raised by Professor Sullivan will yet be taken seriously. Congress and certainly the States can do much to put the dialogue about religious liberty back on track.

In this paper, I have tried to supplement Professor Sullivan’s arguments in a manner that further demonstrates that religious liberty is really worthy of protection and should be a topic of serious discussion at every level and within every branch of our government. I remain confident that, despite its arrogance in asserting a childlike claim that it must have the last word on major free exercise issues, the Supreme Court will not be permitted to end the very conversation about religious liberty that Professor Sullivan and I join in supporting.