WINNIFRED FALLERS SULLIVAN
THE IMPOSSIBILITY OF RELIGIOUS FREEDOM
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Reviewed by Lisa Nicolosi

Introduction
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The opening words of the First Amendment to the United States Constitution — together known as the religion clauses — have inspired heated debate and evolving interpretations of religious freedom in the U.S. The first religion clause, referred to as the establishment clause, is itself a source of legal dispute. Until 1940, the establishment clause had not been incorporated into the Fourteenth Amendment to bind individual state action, while today’s Supreme Court understands the establishment clause to limit state action as well as national. Is incorporation against the states here proper, or was the establishment clause implemented to protect state-endorsed religion from federal oversight? In other words, did the Framers really contemplate a separation of church and individual state, or merely a separation of church and federal state? Does the establishment clause seek primarily to protect the state or the individual? In either event, when does government action rise to the level of “establishment”?

Likewise, the complementary — or oppositional — free exercise clause is often the subject of different interpretations. Is religiously-motivated behavior constitutionally protected in the face of neutral laws of general applicability? Supreme Court decisions have answered these questions differently at different times, and the Court is often met with wide criticism from legal scholars and professionals. At times, the Court has found protection in the First Amendment for religiously-motivated behavior that runs afoul of generally-applicable legislation or regula-
tion. In 1990, the Court dramatically reversed course in Employment Div. v. Smith, holding that religiously motivated peyote use, a prohibited practice, was not exempted for the purposes of unemployment insurance eligibility. Scalia, writing for the majority, boldly (and some have argued, disingenuously) asserted: "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." Congress, in obvious disagreement, sought to circumvent the Court's decision legislatively, a move the Court swiftly and resoundingly rejected. But, regardless of the current judicial climate, prior to the determination of religion clause applicability, one question must always be answered: What behavior or belief rises to the level of legal recognition and consequent constitutional protection? In other words, what is religion?

In her book, The Impossibility of Religious Freedom, Winnifred Fallers Sullivan uses her experience as an expert witness in a Florida free exercise case to ultimately reach the conclusion that religious freedom, as articulated in the U.S. Constitution and interpreted by the courts, is an impossible achievement. Sullivan thoroughly chronicles the events of the captivating weeklong Florida trial, concluding that religious freedom as contemplated by the First Amendment cannot genuinely or completely be given effect by the court system. In order to invoke the Constitution's shield in free exercise cases, the court must first, she argues, determine whether the behavior or belief rises to the level of legal recognition and consequent constitutional protection. In other words, to examine whether religiously-motivated activity enjoys protection under the First Amendment, the court must determine if the activity is genuinely motivated by religion. In interrogating the legitimacy of "religious" behavior in this first instance, the court fundamentally destroys the very idea of religious freedom. By requiring authentication of the religious motivation, the court extends the free exercise clause only to behavior that is legitimated by virtue of external "proof": sacred texts, clerical pronouncements, widespread adherence, or historical tradition. The court does not, and, Sullivan contends, cannot broaden the reach of the free exercise to all unsubstantiated subjective claims of religious motivation, lest all laws be subject to exception. Moreover, subjective claims cannot be substantiated; that is, it would be impossible to prove the existence of a claimant's religious belief. Even if the free exercise clause were contained to substantiated subjective beliefs, the legal system would be riddled with unworkable exception. Therefore, in order to address free exercise claims, the courts are
forced to award only those claims that can be “legitimated” by external evidence; ultimately, only the “legitimate” religious institution, not the individual manifestation, perseveres.

Sullivan’s experience at trial and trial-informed religious freedom discussion are coherently divided into five distinct, yet remarkably cohesive sections. Sullivan deliberately and effectively plots the reader’s course in a style that avoids confusion and instead lends itself to a comfortable and engaged reading. The narrative traces the weeklong course of Warner v. City of Boca Raton, a Florida federal suit that sought First Amendment protection of gravesite displays in a Boca Raton public cemetery under the free exercise clause. The eleven named plaintiffs, representing different faiths (all Judeo-Christian), were in technical violation of the cemetery’s regulations prohibiting grave markers or displays that were not flush with the ground. Each plaintiff asserted that their nonconforming displays were religiously motivated and thus constitutionally protected. The City, in response, sought to show that the plaintiffs had been made aware of the regulations before selecting the cemetery. More importantly, the City argued that the plaintiffs’ displays were not sufficiently religious and did not trigger constitutional scrutiny. Under the City’s theory, because religion was not involved, but instead purely personal and aesthetic preference, the City need only show that the regulation served a legitimate government interest. In this vein, the City maintained that limiting grave displays to plaques flush with the ground reduced lawn maintenance costs.

The first section, Outlaw Religion, sets the stage for the federal trial that will serve as the grounding for Sullivan’s legal theory. The local environment in Boca Raton, Florida – the community from which Warner sprung – is thoroughly explored. In order to illustrate the contemporary socio-religious and political climate that provoked the clash and subsequent litigation, the last century’s urban development is recounted, from migration patterns to aesthetics and zoning. Additionally, the section outlines the substantive effect of the legislative precursor to the lawsuit, the Florida Religious Freedom Restoration Act (FRFRA), signed into law in reaction to and immediately following the Supreme Court’s rejection of the federal Religious Freedom Restoration Act (RFRA). The section closes with the background specific to Warner: plaintiff histories, the history and regulations of the public cemetery under scrutiny, and the facts culminating in litigation.

The second section, The Trial: The Plaintiffs, presents the testimony offered by the eleven Warner plaintiffs both in trial and by deposition.
It is here that the reader is introduced to each plaintiff's individual claim, as the trial begins to take shape. The plaintiffs' testimony proves instrumental to the book's argument; each plaintiff seats the source of their respective religious motivations in family and community tradition and lore, as opposed to sacred texts, widespread adherence, or hierarchical pronouncements. The judge admits that he does not doubt the existence of the plaintiffs' deeply-felt personal convictions. Instead, the litigation turns on whether personally-held religious belief is legally sufficient to warrant constitutional protection, or if external legitimation is instead required.

The third section, *The Trial: The Other Witnesses*, recounts the testimony of all other Warner witnesses: among others, the three religion experts for the plaintiffs — including the author — and the two religion expert witnesses offered by the City. As should be expected, the plaintiffs' experts — including the author — attempted to validate the religious nature of the threatened cemetery displays, relying in large part on historical practice and tradition. The City's experts predictably assumed oppositional stances, arguing that the religious texts, teachings, and rules were devoid of any reference to gravesite requirements. The assortment of religion expert witnesses presented by the litigants included a rabbi and four professors of religion, one of whom is also a priest.

In the fourth section, *Legal Religion*, Sullivan recounts the trial's closing arguments and the district judge's final opinion. It is here that Sullivan finally begins the project of her piece: a reflective analysis of the implications of the trial she so painstakingly presented. Rearranging the trial testimony she previously provided by tactic and degree of success, Sullivan attempts to separate the testimony that was given legal weight from that which wasn't, from there hypothesizing the distinction's motivation. Sullivan, at the most basic level, argues that First Amendment protection is conferred by the judge on the basis of recognition, intelligibility, and perceived legitimacy.

The fifth and final section, *Free Religion*, is surprisingly abbreviated, as Sullivan reaches her destination: the post-Warner location that informs her theoretical argument. It is here that the project's purpose is realized. However, the few pages devoted to the finale leaves the reader feeling somewhat shortchanged; after wading with Sullivan through every moment of a weeklong trial, the reader would naturally expect an equally thorough examination of her ultimate assertions. Instead, the closing section shifts style abruptly, lofting ideas and allegations with somewhat loose footing. While the foundation for the project is meticu-
ously laid and the reader carefully guided, the grand finale – perhaps theoretically sound but unexpectedly underdeveloped – falls short.

In addition to the five main sections, the book provides a sampling of images of the disputed displays and three extensive appendices. Appendix A provides all constitutional and legislative material relevant to the case at both the state and federal level. Appendix B contains the expert reports from the five expert witnesses extensively examined throughout both the trial and Sullivan’s text. In Appendix C, Sullivan includes the district judge’s full opinion as Appendix C.

*The Impossibility of Religion*, in the simplest sense, seeks to convince its audience that, because “religion” cannot be reduced to coherent definition, the free exercise clause is internally impossible in the American legal system. In the moment that the legal inquiry demands to define religion, the guarantee of religious freedom is lost. Because the law requires an examination of claimed religious motivation in order to offer the Constitution’s protection, religious freedom, as a legally protected constitutional guarantee, is undermined and impossibly achieved. In other words, religious freedom is possible, but cannot be guaranteed if its protection requires its definition.

Defining religion for the purposes of offering legal protection – defining legal religion – necessarily distinguishes between that which is religious and that which is not, that which is a manifestation of faith and that which is purely cultural. In making these distinctions, the project of freedom is immediately foreclosed, as the definition necessarily creates a realm of the “unprotected,” the behavior that is not acknowledged as religious enough to fall under the sweep of the free exercise clause. “Not religious enough” generally means “not attributable to a larger, classical, hierarchical religious structure that can be turned to by the court to validate the actions of its followers.” Therefore, the free exercise clause offers constitutional protection only to the traditional religious structure, not to the individually felt belief. Absent the “objective” validation of the religious institution, the “subjective” religious motivations of the individual are legally insignificant. This, as Sullivan rightly argues, is far from individual religious freedom.

The book’s ultimate flaws first become evident in the fourth section, reaching the point of project frustration in the conclusion; Sullivan’s ambitious endeavor is revealed as first unmanageable and finally an exercise in futility. The argument falters somewhere between her articulate and insightful observations and the resultant proposal, which, upon further reflection, suggests a change only in terms.
Sullivan seems initially perplexed by the *Warner* judge’s decision declining to extend constitutional protection to the plaintiffs’ cemetery displays. The two expert witnesses for the City, she notes, both offered the court rubrics for considering the suit, a case of first impression respecting the FRFRA. None of the plaintiffs’ experts suggested an appropriate test for the court to employ. In the end, the judge ultimately resorted to a test of his own fashioning, though his reasoning largely relied on a test provided by an expert for the City. The test sought to protect only that behavior that (1) could be linked to an authoritative sacred text, (2) had been consistently affirmed in classic constructions of religious doctrine and practice, (3) had been traditionally and continuously observed by the faith, or (4) demonstrated consistent adherence by members of the faith everywhere. In other words, according to the *Warner* court, only religiously-motivated behavior accompanied by coherent and legitimate external validation should enjoy constitutional protection.

Sullivan argues that the judge’s decision to fashion a test favoring the City—ultimately and entirely disregarding the plaintiffs’ expert testimony, including her own—evidences the judge’s personal conviction that the plaintiffs’ experts were unreliable, and that his own definitions of religion would instead suffice. Sullivan’s palpable frustration—a reaction to being largely ignored by the *Warner* court—informst and inspires her argument against the possibility of a functional free exercise clause, leading to two errors in her argument.

Sullivan’s first error begins with her explanation for the court’s chosen test. Sullivan acknowledges that none of the plaintiffs’ experts offered the court a rubric suitable for the decision required, and provides a detailed discussion of the two tests offered by the City. However, she fails to give this distinction sufficient weight in explaining the court’s test. Jumping from the experts’ testimonies and reports to the judge’s ultimate decision, she argues that the court found the expert witness testimony, without any additional sacred text or religious rule, largely irrelevant. Instead, in relying in large part upon the rubric offered by the City, the court showed deference to expert opinion—simply not the author’s expert opinion, or the opinion of her colleagues. Moreover, in a case of first impression, the court is likely to request and draw from the tests argued by the parties, yet the plaintiffs offered none upon which the court could rely. Here, the court’s reliance on the City’s test could be attributed as much to the failure of the plaintiffs to offer alternatives as to the judge’s disinterest in expert testimony.
Sullivan's next error lies in her failure to interrogate the meaning of her own location in the trial as an expert witness. She argues that the court refused to give credence to the expert witness testimony of herself and her colleagues, opting instead look to religious rules, sacred text, and the judge's personal convictions. Regardless of the truth of this claim, she insinuates that the outcome would have been more religiously free had the judge fully considered Sullivan's testimony. Here, Sullivan fails to locate herself in the religious hierarchy or consider her own legitimizing effect.

In other words, Sullivan's status as an expert of religion is similarly flawed. Her presence does no more to protect the individually-felt beliefs of the plaintiffs than religious law or text. As she readily admits, the expert witnesses testified about historical practices in an attempt to legitimize the plaintiffs' current rituals. While Sullivan adamantly spoke of the impossibility of religious freedom in response to a court that requires definite terms and verification, she failed to locate herself as part of that process. An individual's subjectively-held religious beliefs are forced into socially-intelligible legitimacy and historical validity in the first instance by resorting to validation by expert authority, and in the second instance by a court that confers protection only to that which has been legitimized.

Ultimately, the book succeeds in demonstrating by example the inherent impossibility of a religious freedom that relies upon the legal system for effect. Sullivan is able to articulate her reasoning and soundly support her thesis with the Warner case study. Sullivan seamlessly transitions from narrative to argument, conveying a complex argument with relative ease. In proving the impossibility of religious freedom, Sullivan crafts a convincing case.

However, perhaps because the fifth and final section seems hurriedly abrupt, Sullivan misses the mark on her proposed course of action. Because the free exercise clause is specific to "religion," she argues, it is necessarily unworkable without defining its boundaries and thus excluding unsubstantiated faith. She then begins to outline her proposed solution: a shift to a protection of a more general "equality." Most religious expression, she suggests, can be adequately protected by existing guarantees of freedom of speech, press, and association. For those religious practices that would remain unprotected, the group or individual would continue to petition the court for an exception to the neutral rule of general applicability. However, instead of calling the basis for protection "religion," the petitioner would omit the 'R'
word from the legal lexicon, and proceed largely as before. Not just any whim would be protected, Sullivan assures, as the petitioner would need to prove a history of discrimination and political powerlessness. In practice, however, Sullivan’s solution plays out in the same predictable fashion: the petitioner must legitimate her personal convictions by pointing to a larger system of shared practice.

In fact, Sullivan’s scheme replicates the very structure she resists; by protecting only that which can be supported by a showing of historical existence, the individual as religious subject is again lost in the project of legitimacy. The project divorces itself from religion in name only; the underlying structure of validation remains largely the same. In effect, religious freedom is secularized, with no gain for the uniquely faithful.

While Sullivan’s project succeeds in demonstrating the impossibility of a religious freedom requiring court supervision and interpretation, her endeavor ends more as an exercise in logic than a call-to-action or corrective blueprint. As an examination of the logical perplexities manifest in the current framework, her project delivers, but the reader is left with no alternative to the legal conundrum.

NOTES

1. M.A. Women’s Studies, University of Cincinnati; J.D. expected, University of Cincinnati, May 2010.
2. U.S. Const. amend. I.
4. See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (finding that unemployment insurance benefits were available to a Seventh Day Adventist who, for religious reasons, refused to accept employment requiring Saturday work).
6. Id. at 878-79.
8. 64 F. Supp. 2d 1272 (S.D. Fl. 1999).
9. Examples of non-conforming displays include a Sacred Heart statue, a winged angel, a raised cross, and a Star of David headstone. The plaintiffs testified that the motivation for these displays was informed by religious belief. Pictures of the gravesites are available in the book.