



## Is the Constitution Suited to Today's Church/State Issues?

By Nathan Schneider, *The Immanent Frame*

Posted on September 8, 2009, Printed on September 16, 2009

<http://www.alternet.org/story/142414/>

*Winnifred Fallers Sullivan is the director of the Law and Religion program at State University of New York's University at Buffalo Law School. In her two most recent books, The Impossibility of Religious Freedom (Princeton, 2005) and Prison Religion: Faith-Based Reform and the Constitution (Princeton, 2009), Sullivan argues that the constitutional frameworks of disestablishment and free exercise are unequal to the task of regulating church/state controversies today.*

*She says that the American church/state division has been made impossible by the shift of religious authority from the institution to the individual, confusing how we define religion and separate it from government.*

*Each book relies on her close examination of a case she participated in as an expert witness, which dealt with religion in a cemetery and in Iowa prisons, respectively.*

**The problems with defining religion play a central role in the argument that you've been developing over your last two books. Why can't we -- as Supreme Court Justice Potter Stewart famously said of pornography -- simply know it when we see it?**

The word "religion" comes out of a particular history. There are various ways of telling that history, but one could say, from the perspective of someone like me who is interested in church/state issues, that the notion that religion is a discrete, bounded aspect of human culture and society is something that emerged in the early modern period, parallel with the emergence of the modern state.

With the secularization of the state and the differentiation of sociocultural formations within society, religion gets reinvented as something separate.

But the context in which that happens shapes what religion means. Politically, it comes to serve the modern state by providing a location in which modern citizens are trained to be moral, functioning members of society. This is a very particular understanding of religion, rooted in a particular kind of Protestant Christianity.

Naturally, once modern societies try to expand that role beyond Protestant Christianity, they begin bumping up against different understandings of where religion ought to fit.

**So this project is primarily located in the situation of a religiously diverse society?**

I regard all societies as diverse. This is especially so in light of a global shift of religious responsibility toward individuals and an acknowledgment, even if it's not politically realized everywhere, of the right of each individual to religious freedom. Then, religious diversity becomes a social fact virtually everywhere, within traditions as well as among traditions.

**Do you see the argument you're making about the impossibility of religious freedom and disestablishment as being as true now as when the Constitution was written?**

Yes, in a sense. There was a consensus about what religion meant in the U.S. at the time of the writing of the Constitution that most people today wouldn't recognize. But remember also that the government -- particularly the federal, national government -- was far weaker and less pervasive a part of people's lives. That's a very important part of this story, too.

**How can the legal system catch up to this critique? Do we need a new First Amendment?**

The First Amendment, of course, includes more than the religion clauses. But for all practical purposes, the religion clauses have very little legal bite these days.

I think the Supreme Court has gotten itself out of the business of managing religious diversity. Religion has become, and in my view appropriately so, an issue of political negotiation. I don't think it can be handled by courts very effectively.

The role of the Constitution in these matters lies in ensuring equal protection of the law for everybody, across many different kinds of cultural differences, of which religion is one. Within the legal context of our national commitment to equal protection, these differences ought to be negotiated politically.

**In both of these books, you are, on the one hand observing the legal process as a scholar, and on the other hand participating in it as an expert witness. How do you think scholars of religion can help guide legal interpretation?**

I think a scholar can act as a teaching expert in court, someone able to inform the judge in a way that allows the judge to make a good decision. However, it is very difficult to execute well, and I do not claim to have done so myself.

It's very easy, as a religion scholar, to be naive about the extent to which your categories and your ways of nuancing the material over which you have a command don't necessarily fit the schematization -- and necessary schematization -- of a particular legal context.

**Has there been tension between you and the lawyers who hire you as you try to explain your position, which may differ from what they want you to say on the stand?**

There's always that period of negotiation. What the lawyers naturally want you to do is to supply a piece of evidence that will persuade the court so their clients will win.

But I have to resist this a bit.

I'm not in charge of what the First Amendment means; that's the judge's job. I can explain how people in religious studies think about and describe what these people are doing.

When I am called by lawyers, I regard it as an extension of my work as a teacher. I haven't done anything that I would call political, though I imagine that the parties on the opposite sides of the cases would say it was. My own intention, actually, is to depoliticize these issues.

I don't think that the culture-wars version of the First Amendment has been very helpful for anybody. It produces caricatures of religion and caricatures of people that are not very helpful.

**Both books take very ordinary American examples as indicative of both a national and global predicament. Why are these American cases so instructive? And have you explored international alternatives that we might take as instructive as well?**

Well, the U.S. is viewed as exemplary in these issues around the world, so the cases do translate surprisingly well. The effort to enforce laws that protect religious freedom is a global project now, to some extent.

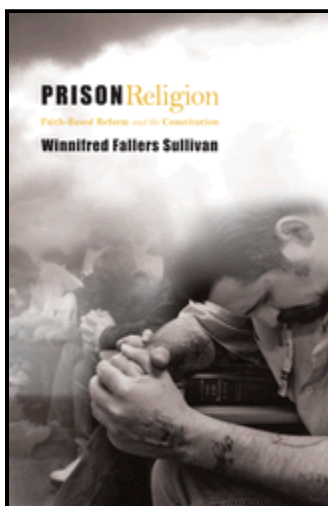
That said, the perception in the U.S. of U.S. exceptionalism on these issues is making the argument stale and circular. There are actually tremendously interesting things going on -- for example, in the E.U. -- in terms of the legal management of religious diversity. But most Americans are not aware of them, and I find that very frustrating.

**Things that could help us change our system?**

Things, at least, that can help us understand better how our system grew out of a specific set of historical circumstances that we might have outgrown in some respects.

When people talk about the First Amendment religion clauses, they talk about the founding moment, and then they skip to the present, or they skip to 1940, leaving out tremendous changes in law and government in the U.S., not to mention a complete transformation of American religion. That history is missing from most people's account of the religion clauses, as if it's self-evident that there's this thing called religion and nothing about it has changed since 1787.

**In *Prison Religion*, you reveal how the American, secular prison system has largely given up on rehabilitation. Yet, at the end of the trial, the judge rules that the religious rehabilitation program has to close. Do you think we can afford to turn down those who offer to help in ways that the government won't?**



Let me make clear that I honor the service of the volunteers and the staff at Prison Fellowship Ministries, which is doing work that most Americans don't want to think about, let alone do. And I think they've become more professional over time.

But clearly it is not enough for church volunteers to come and be nice to prisoners. Prisoners need an array of serious professional interventions. This is not something that can be done simply by people who are well-meaning.

As a society, it's tremendously cynical, and a real abdication of our responsibility, to say that we aren't going to spend the money to do this -- that these people are basically throw-away people who deserve only an amateur substitute for what really needs to be done in terms of education, job training and medical and mental health care.

These are all interventions that we do know how to do. We just aren't willing to spend the money. And there is a growing acknowledgment that there should be fewer prisoners and fewer prisons. This is another area where we can learn from other countries.

**The connection between American penal theory and religious ideas, as you document, goes way back before Prison Fellowship Ministries. I wonder if, in the American context, bringing about a system more open to the kinds of reforms you're talking about might have to happen in theological terms.**

Looking at why we incarcerate more people in this country than any other country in the world -- by a long ways -- requires serious self-examination.

In my view, there is a tie between our exceptionalism in terms of religion and our exceptionalism in terms of mass incarceration. Some kinds of solutions being tried in other countries, I think, are not open to Americans.

We have so much religious diversity, and we don't have the history of an established church that can provide a location and an umbrella under which to reinvent ourselves as a multireligious society, as progressive reformers in Britain are trying to do.

On the one hand, I want to remind religious folks of that. On the other, I want to say to the secularists that, look, you have lost the game. You didn't provide a language and an understanding of the human person that's adequate.

So, to a certain extent, these religious reformers are right. Personal transformation, particularly in Americans' eyes, is understood as something that is spiritual or religious. It's about more than fixing people in an engineering sense. I think that secularists are going to have to make bridges toward these spiritual communities and languages. People get better when they're treated as whole human beings, and religion is one way in which that wholeness is imagined, culturally.

**One of your posts on [Social Science Research Council's] the *Immanent Frame*, you title with the claim, "We are all religious now." Can you explain what that can mean, for instance, to the 15 percent of Americans who claim to have no religious affiliation, or to the New Atheists?**

Yes, I mean it to refer to the phenomenon I will be describing in my new book, a new openness to seeing Americans as naturally "faith-based," enabled, I believe, by a convergence between a broad range of humanistic critiques of scientific understandings of the person, social scientific and biological; social and political movements that originated in the mid-20th century; and a contemporaneous shift in religious authority and anthropology from the church to the individual.

The exclusivity of materialist/medicalized understandings of the entire range of human capabilities and experience, as well as ecclesiastical capacity to insist on orthodoxy and particularity, are both fast eroding in the face of these changes. It's a next step in the radical disestablishment of religion in this country.

This shift toward locating authority in the individual means that it's much easier for people to move among religious communities, religious ideas and religious practices in a much more ambiguous way, a way that is less determined by someone outside oneself.

If people want to call themselves atheists, that's fine with me, and I'm not telling them they're not atheists. What I'm saying is that I think it is becoming socially, politically and legally the case that people are understanding themselves in terms of a new revival of a holistic image of the human being as, in some sense, basically spiritual.

I think that many people who would not call themselves religious would also at least assent to that notion.

**You've written several other times for the *Immanent Frame* as well. Do you consider that scholarship, or advocacy, or teaching? When you sit down to write for the *Immanent Frame*, how do you approach it?**

I think of it more in terms of scholarship -- a collegial conversation among academics, one that reaches beyond the academic communities in which one normally circulates. People who are used to discussions that are more narrowly philosophical, or historical, or anthropological are forced to find terms that might

engage other kinds of discussions.

What I try to do is to find words that speak across these boundaries and offer a perspective from my little corner of the academy. It has been definitely a positive experience.

**You've been regularly reading the site?**

I keep up with it pretty well. Some of it is more interesting to me than others. And it doesn't seem to me that, as a conversation with anybody outside those who write on it, it has been terribly successful. But I don't always read the comments.

Besides, I'm not sure that that is the measure of whether it is successful, ultimately. The *Immanent Frame* has been an experimental forum in interesting ways. It has been able to respond in some cases to historical events, like the Mumbai bombing, for instance, and had some of the most impressive writing on the Mumbai bombing at the time.

But then, also, it can be more typically academic with review forums about certain books. Both of those have been successful.

**How did you come to study the intersection of law and religion, with such rare expertise in both? Was it your plan from the beginning? How did you get here?**

There was no plan. I've always been interested in religion, since I was a small child. I went to law school in the '70s, like lots of people did, just because that was something to do. I practiced law for six years.

After I quit practicing law to have my kids, I went back to school. To catch up on theology, I went to Catholic Theological Union. In the course of doing research on church-and-state law in the United States, it struck me how most of the writing on the subject was done either by religion people who knew nothing about law or by law people who knew nothing about religion.

I thought it would be useful to qualify myself to talk about religion. For me, there was an "ah-ha" moment in the first course I took at the University of Chicago Divinity School, a course taught by Larry Sullivan about the modern study of religion.

I thought to myself, "Wow, what would happen if there were talk like this about religion in legal contexts?" Over the last 20 years I've often done the reverse as well, trying in religious studies to talk the way lawyers talk.

**After years teaching in religion departments, you're back at a law school again. Has anything surprised you there?**

When I was in law school in the '70s, there was virtually no study of religion in law school. The First Amendment meant free speech, unapologetically. Now that I've come back to teaching in a law school 30 years later, everybody's teaching about religion, and there's a Jewish Law Students Association, a Muslim Law Students

Association and a Christian Law Students Association. There has been a proliferation of religion.

**What are you working on now? What's next?**

I'm not doing any more books on single cases. I'm working on a new book that's going to try to describe the legal regulation of religion below the level of the Constitution, in regulatory cases in the United States. So that includes how religion is being regulated in hospitals and, more generally, how chaplaincies are multiplying in this country: municipal chaplaincies, crisis chaplaincies, hospital chaplaincies, even school and workplace chaplaincies.

The government increasingly sees citizens as pastoral-care clients, as persons in need of spiritual care, and I want to describe the law that makes this possible. It's still very much about how the law manages and regulates this system in which the citizen has become a pastoral-care client.

This is one of the manifestations of the religious now.

*Nathan Schneider lives in New York City and writes about religion. He blogs at the [Row Boat](#).*

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