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SOVEREIGNTY AND THE SACRED: THE ESTABLISHMENT CLAUSE IN INDIAN COUNTRY

Rodney K. Smith[†*]

I. INTRODUCTION

Shortly after arriving in Montana, to serve as Dean of the School of Law, I had the opportunity to visit six of the seven tribal colleges in the state. As I visited each of those colleges, I was struck by the pervasive role of religion in sustaining the culture that makes those colleges special, places with the capacity to significantly increase access to higher education for the Native American population. On my tour of the various colleges, blessings were given, prayers were spoken and sung, and a sense of reverence seemed to prevail at each institution. Realizing that those colleges receive substantial federal funding,[1] I reflected on the issue of whether the Establishment Clause of the First Amendment should extend to Indian Country. I knew that my friends, who are committed to the concept of the separation of church and state, particularly in instances involving the receipt of government funds, would be troubled by the pervasiveness of religion at the tribal colleges and throughout the public sector in Indian Country. No distinct lines between the sacred and the secular were being drawn at the colleges that I visited, and Establishment Clause principles in action were conspicuous by their absence.

In this essay, I examine the role, if any, of the Establishment Clause in Indian Country. In analyzing this issue, I first briefly summarize the historical role of the Establishment and Free Exercise Clauses of the First Amendment in Indian Country. In that section, I note that the Free Exercise Clause has been applied in Indian Country, but that the Establishment Clause has not. In the next section, I examine various justifications that have typically been given for refusing to invoke the Establishment Clause in dealing with issues of religious freedom in Indian Country. I then conclude that those justifications may

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1. The amount of this federal aid will grow substantial with the signing into law of the recent bill making 29 tribal colleges land-grant institutions. *See* Scott Jaschik, *President Clinton Signs Law Making 29 Tribal Colleges Land-Grant Institutions*, CHRON. HIGHER EDUC., November 9, 1994, at A32, col. 1.

carry political weight, but they are not theoretically or philosophically sufficient. I then turn to other support for the exclusion of Establishment Clause doctrine in legal analyses related to religion in Indian Country.

II. FREE EXERCISE AND ESTABLISHMENT IN INDIAN COUNTRY: A BRIEF HISTORY

On May 18, 1896, the United States Supreme Court decided *Talton v. Mayes*,[2] involving an appeal by Talton of a death sentence that he had received at the hands of a tribal court. In rejecting Talton's appeal, which questioned the jurisdiction of the tribal court, the Supreme Court held that the Fifth Amendment to the Federal Constitution did not "apply to the local legislation of the Cherokee [N]ation so as to require all prosecutions for offenses committed against the laws of that [N]ation to be initiated by a grand jury organized in accordance with that amendment." The Court noted that, "the powers of local self government enjoyed by the Cherokee [N]ation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which . . . had for its sole object to control the powers conferred by the Constitution on the National Government."[3] Only Justice John Marshall Harlan, Sr., dissented,[4] and did so without written opinion.

The *Talton* principle that the Bill of Rights does not apply in matters of tribal governance in Indian Country, has been adopted in a variety of contexts, including cases dealing with the religion clauses of the First Amendment.[5] For many years, neither

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2. 163 U.S. 376 (1896).

3. *Id.* at 382, 383.

4. It is ironic that Justice Harlan was the lone dissenter in *Talton* and in Plessy v. Ferguson, 163 U.S. 537 (1896), in which the Supreme Court first articulated the separate but equal doctrine in the racial context. That irony is compounded by the fact that *Talton* was argued on April 16th and 17th, and decided (announced) on May 18, 1896, while *Plessy* was argued on April 13th, and also decided (announced) on May 18, 1896. While the timing of both argument and decision in these two landmark cases may be mere coincidence, as may be the fact that Justice Harlan alone dissented, it is intriguing to note that the decisions have some common substantive theme, although with different ramifications. In *Plessy*, the Court is acknowledging that separate but equal racial accommodations satisfy the demands of the Equal Protection Clause of the Fourteenth Amendment; and, in *Talton*, the Court refuses to extend constitutional protections to tribal legislative actions. In both instances, the Court is willing to defer substantially in constitutional rights cases, in one instance to the states and in the other to the tribes.

5. *See* Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991); Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

the Free Exercise nor the Establishment Clause limited tribal legislative action in Indian Country. The Civil Rights Act of 1968, however, included a rider that changed the *Talton* principle that the Bill of Rights was inapplicable to actions of tribal government. In particular, the rider, sometimes referred to as the Ervin Bill (named after its principal author Senator Sam Ervin), states that: "No Indian tribe in exercising powers of self-government shall—(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances . . . ."[6] With this act, free exercise was to be protected in Indian Country, despite decisions to the contrary rendered in *Talton* and its progeny.[7] Protection against establishment of religion by tribal governments was not included. It is understood, therefore, that except to the extent that either a tribe agrees to be bound by the Establishment Clause or an advocate can transmogrify an establishment argument into a free exercise argument, the Establishment Clause does not apply in Indian Country.

There is another sense in which it might be argued that Establishment Clause limitations should apply in Indian Country. It could be argued that when a tribe receives federal economic support, it becomes a state actor. As a state actor, the tribe, in turn, subjects itself to the Fourteenth Amendment and to the Bill of Rights, which have been incorporated and made applicable to state actors. For example, when the tribal colleges receive federal and state tax dollars to assist them in their educational endeavors, they become agents of the state—state actors. Thus, by receiving that federal and state support, the tribes subject themselves to the limitations, including the Establishment Clause, contained in the Bill of Rights, and incorporated and made applicable to state actors through the Fourteenth Amendment. Support for religious activities on the tribal college campuses would, therefore, be governed by the Establishment Clause. It might be countered, however, that funds were received

6. 25 U.S.C. § 1302(1) (1988).

7. This congressional action was consistent with language in the *Talton* case to the effect that, "True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self-government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States." 163 U.S. at 384. Thus, whatever sovereignty was recognized in *Talton* was subject to being overridden by an act of Congress.

in accordance with the trust doctrine[8] and should not convert the tribes into state actors. The arguments that follow provide political and philosophical support for such a conclusion.

III. WHY THE ESTABLISHMENT CLAUSE SHOULD NOT BE IMPOSED IN INDIAN COUNTRY

A number of arguments can be marshalled to support the proposition that Establishment Clause doctrine should not limit tribal activity. Before turning to those arguments, however, it will be helpful to describe briefly the basic uses to which Establishment Clause doctrine has traditionally been put. As to government aid, it mandates that aid must be given in a neutral manner, that does not evidence a preference for one form of conscience over another.[9] Thus, for example, in the tribal college context, if the Establishment Clause applied, Native American and related religious activity could only be permitted if other forms of conscience (religious and otherwise) were treated in a similar manner. In other words, non-Indian religious activity would have to be given equal treatment, together with Indian religious activity.

In a related sense, the Establishment Clause has been invoked to limit instances in which particular religious practices or rituals are given the stamp of approval of a state or government actor. In the tribal college context, therefore, the tribe would be precluded from endorsing (permitting) particular religious and cultural activities of a religious nature. Thus, blessings, singing and other activities that uniquely reflect Indian culture and religion would be precluded, unless other non-Indian activities were also included on an equal basis.

Finally, when state actors exempt religious activity from the limitations imposed by laws of general applicability, it may be argued that the state is establishing a religion. Because many of these accommodations or exemptions come under the aegis of the

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8. The federal and state governments have a special trust relationship with the tribes, both as a matter of history and of sovereignty. That trust relationship, therefore, might be used to insulate the tribes from legal actions based on the Establishment Clause, on the ground that funds received were payments pursuant to the trust relationship and should not convert that relationship into one that makes the tribes agents of the state. Sharon O'Brien, 36-49 (Jan. 12, 1995) (unpublished manuscript, on file with the *Montana Law Review*).

9. *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 (1993) (examining relevant cases and a doctrinal exegesis).

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Free Exercise Clause, a potential conflict develops between the Establishment and Free Exercise Clauses (i.e., free exercise mandates the very exemptions or accommodations of religion—preferential treatment—that are limited by establishment doctrine). This conflict has been avoided in the tribal context to date, however, because only the Free Exercise Clause has been applied as to matters of tribal governance.

It is clear, therefore, that if the Establishment Clause doctrine was to apply in the tribal context, it could have a dramatic impact. Tribal religions and cultural activities are often inextricable and frequently are at the center of public activities and ceremonies. To exclude tribal religion from the public sector would make the tribal government secular in ways that contradict the tribal culture. A number of arguments justify the current refusal to extend the Establishment Clause to the tribal context.

The first argument is largely political and is based on the constitutional protection traditionally afforded to tribal sovereignty. Tribal sovereignty was formally recognized in *Worchester v. The State of Georgia*,[10] in which the Court, in an opinion written by Chief Justice Marshall, held that the sovereignty of tribes is limited only by the overriding legislative authority of the United States. Marshall set the stage for the Court's decision when he opined:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.[11]

The Chief Justice then added, "From the commencement of our government, congress has passed acts to regulate trade and intercourse with Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford protection

10. 31 U.S. (6 Pet.) 515 (1832).
11. *Id.* at 542-43.

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which treaties stipulate."[12] Thus, while Congress had power to regulate trade and commercial activity under the Constitution, it did so only in a manner that otherwise recognized tribal sovereignty as a given.

In the context of the *Worchester* case, Chief Justice Marshall concluded:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[13]

Thus, since the founding of our nation, Indian tribes have been subject in some respects to the power of Congress to regulate commerce, but have been otherwise treated as quasi-sovereign nations.

Given this sovereignty, it can be forcibly argued that, as a political matter, the tribes should be permitted to resist application of the Establishment Clause, unless embodied in some act of Congress or in some law promulgated by the tribes themselves. This argument is essentially political. It legitimizes, in a political sense, the power of the tribes to resist imposition of the Establishment Clause in the tribal context. Without more, however, the sovereignty argument is tautological and does not offer justification for such a power of exclusion (sovereignty).

Other philosophical arguments have been formulated to justify the power to resist imposition of Establishment Clause doctrine in the tribal setting. The major argument proffered is based on the need to sustain Indian culture. In *People v. Woody*,[14] a case upholding the right of an Indian tribe to permit use of peyote for religious purposes, the California Supreme Court, Justice Tobriner writing for the majority articulated a cultural justification for its decision:

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12. *Id.* at 556-57. Marshall added that congressional acts evidence that Congress "manifestly consider[s] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States." *Id.* at 557.

13. *Id.* at 561.

14. 394 P.2d 813 (Cal. 1964).

> In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individuals and group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of Indians . . . .[15]

In these sentences, Justice Tobriner seems to make two related points: (1) given the pressure of the dominant national culture, it is imperative that subcultures be protected; and (2) those subcultures need to be protected, not just because they are of ancient origin, but because they enhance both the capacity of individuals to express themselves—they increase the expressive choices available to individuals—and the depth and beauty of our national life.

Both of Justice Tobriner's arguments help justify the right of tribes to resist imposition of Establishment Clause doctrine when it threatens the tribal subculture. First, since the tribal subculture is but a very small part of a far more dominant national culture, it deserves protection, even when that protection permits it a modicum of dominance in its own right. In other words, given the immense pull of the dominant national culture, which is largely European and anglo in its makeup, on all Americans, including Indians, special protection for Indian culture is warranted. To add the force or violence of law,[16] in the form of the Establishment Clause doctrine, to the enormous force exerted by the majority culture would further weaken the role of the tribal subculture in influencing individual, tribal, and national identity.

This need to preserve various expressive choices—cultural, religious and other factors that influence or provide a menu from which individual and community-based choices can be made—is really a part of Justice Tobriner's second argument for preserving tribal culture. When there is but one choice, there is little freedom. Thus, Tobriner would preserve various subcultures despite arguments that they should be subsumed in the national

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15. *Id.* at 821-22.

16. Professor Gedicks describes the violence that can be done in the lawmaking process, in the religion/cultural area. *See*, Frederick M. Gedicks, *RFRA and The Possibility of Justice*, 56 MONT. L. REV. 95, 105-13 (1995). This violence, coupled with the power of the dominant culture, clearly can inhibit, and perhaps even incapacitate, the role of tribal subcultures in contributing to individual and tribal identity.

legal and broader culture. He does so on the ground that increasing cultural choices in fact increases freedom and expressive choices available to individuals. The existence of groups of fellow participants or believers, including membership in tribal subcultures, helps maximize one's expressive capacity in a collective manner. For example, when students gather together in a tribal college that reflects tribal culture/religion, their expressive capacity is maximized in much the same way that the whole is always greater than the sum of its parts.[17]

Justice Tobriner's final point—that maintenance of vibrant subcultures enhances the beauty and depth of our national life—may merely beg the question. The mere existence of variety may contribute to beauty, but it does not necessarily do so. It can also contribute to a dissonance that is anything but beautiful. One must explain why multiple cultures contribute to beauty and depth in our national life. To better understand the way in which the protection of subcultures may enhance the beauty and depth of our national life, it will be helpful to draw upon a distinction between deliberative and dedicated cultures, that has been elucidated by Professor Lipkin.[18]

In his article, Professor Lipkin distinguishes between deliberative and dedicated cultures in an elaborate manner. He summarizes the distinction as follows: "Deliberative cultures resolve the problems of cultural conflict and change by appealing to the values of rationality and autonomy, while dedicated cultures resolve these problems by appealing to the values of constancy and closure."[19] Lipkin acknowledges, however, that, in drawing

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17. *See, e.g.*, Howard M. Friedman, *Rethinking Free Exercise: Rediscovering Religious Community and Ritual*, 24 SETON HALL L. REV. 1800-1801 (1994), for a related argument. Professor Friedman suggests that "it makes sense to see the Free Exercise Clause as primarily concerned with the ability of religious groups to command the loyalty of their adherents through a system of beliefs and practices . . . . This is not to denigrate concerns over protection of individual conscience. Most religious claims of conscience are connected to the belief systems of organized religious groups." *Id.* at 1801. Cultures, including religious ones, provide us with expressive choices. When we express such choices as part of a group we expand our capacity for influence and action.

18. *See generally* Robert J. Lipkin, *Multicultural Constitutionalism: Liberalism and the Distinction between Deliberative and Dedicated Cultures*, (Jan. 1, 1995) (unpublished manuscript, on file with the *Montana Law Review*).

19. *Id.* at 3. He adds, later in his article:

> The deliberative attitude incorporates deliberative rationality and deliberative autonomy. Deliberative rationality is a critical process of giving reasons for and against substantive positions about the ends and means of cultural inquiry. It also includes questions of identity, scope and order of reasons. Fallibilism and revision concerning both means and ends are defin-

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this distinction, he does not mean to "suggest that any mature culture can be exclusively constituted by one or the other."[20] Rather, he distinguishes between cultures that are "predominantly" deliberative or dedicated.[21] After arguing that the dominant culture in our country is liberalism, a deliberative culture, Lipkin asserts that deliberative cultures including our dominant culture "cannot explain and justify tolerating dedicated cultures in the sense of appreciating or respecting their values."[22] The dominant liberal or deliberative culture is unable to justify dedicated cultures, as things of beauty or depth because they are based on a different paradigm. This inability may explain why Justice Tobriner was unable to do more than simply state that respect for subcultures will lead to enhanced depth and beauty in the national arena.[23]

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ing features of deliberative rationality. Like any culture, dedicated cultures employ deductive and inductive reasoning, but serious re-evaluation of cultural norms or values occur rarely, if at all. Moreover, though we can imagine cultures that deliberate about means, but not about ends, true dedicated cultures have dedicated means also. Dedicated cultures are concerned with predictability, order and closure, and therefore restrict both the quality and quantity of appropriate cultural reasoning. Consequently, though reasoning occurs in dedicated cultures, the depth and breadth of the reasoning if severely limited.

The difference between deliberative and dedicated cultures also rests in the deliberative culture's commitment to autonomy and fallibilism. Through self-regulation, deliberative autonomy guides the reason-giving process both for the individual and for the society. The members of a deliberative culture continually engage in the criticism and correction of cultural and personal values. The members individually and collectively seek evidence to discredit their values.

This paradoxical feature of the deliberative attitude derives from the conviction that cultural values are reliable only when they are continually tested. In a dedicated culture the role of criticism is diminished greatly. No explicit (and rarely implicit) cultural imperatives exist requiring or permitting members to criticize, revise, and reform society. Indeed, criticism, revision, and reform may be severely restricted or expressly forbidden.

Id. at 11-12 (footnote omitted).

20. *Id.* at 7.

21. *Id.* at 8.

22. *Id.* at 39. He adds:

At best liberalism can justify multicultural constitutionalism as an accommodation or compromise. At worst, liberalism is incompatible with dedicated cultures because its commitment to the deliberative attitude inclines it toward justifying dedicated cultures only in deliberative terms. This creates a tendency to interpret and justify dedicated cultures in terms not shared by the members of the given culture resulting in distortion of the culture and condescension towards its members. When tolerance is unlikely, liberalism is inclined towards reforming or eliminating dedicated cultures in its drive to become the *culture* of cultures.

Id. at 39-40.

23. As Professor Lipkin aptly points out, deliberative cultures find it difficult to

Indigenous cultures, including tribal cultures, are often predominantly dedicated in their nature. While generalizations are ever suspect,[24] most tribal cultures are based on a paradigm that differs greatly from the dominant deliberative culture.[25] Rather than being based on rationality and autonomy, dedicated cultures are often based on constancy, closure and community. In order to see beauty and depth in such a culture, one committed to the deliberative cultural paradigm must disregard her cultural paradigm and seek to understand another. This is less of a rational exegesis and more of an immersion or participation in the dedicated culture.[26] Such immersion or participation is often made all the more difficult, however, because many dedicated cultures are not open to outsiders. Nevertheless, it may be precisely the shedding[27] of one's cultural paradigm for another that

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even tolerate dedicated cultures, because their beauty and depth are different in nature. Indeed, given that the dominant deliberative culture can naturally find beauty and depth in its own kind (cultures that are deliberative), it is less capable of justifying a sense of respect or relish for differing cultural paradigms.

24. Indian religions and cultures "cannot be discussed as a monolithic system of beliefs and practices." O'Brien, *supra* note 8, at n.15.

25. *See, e.g.*, DOUG BOYD, ROLLING THUNDER (1974). ROLLING THUNDER depicts the largely dedicated nature of the culture of which traditional Indian "medicine man" is a part. The author describes how he (a scientist) first had to disregard his deliberative—scientific—sense of nature, to begin to understand the life of a traditional Indian "medicine man." As the scientist shed his predominant deliberative paradigm, or at least opened himself up to another more dedicated world view or culture, he began to see beauty and depth in that culture. Indeed, given that the culture presents a different cultural paradigm, not just a variation of themes cast by our dominant deliberative culture, he came to appreciate unanticipated depth and beauty in that culture.

Boyd seems to have recognized this different paradigm early in his interaction with Rolling Thunder. He points out that, for Rolling Thunder, "knowing is being . . . . The meaning of all this is that when Rolling Thunder talks about 'a right time and place for everything—you have to live it to understand it,' he is talking about becoming part of the right time and the right place." *Id.* at 71.

26. Boyd acknowledges that, from his time with Rolling Thunder, he had "learned that the rational mind is not the source of new insights. The rational mind can be expanded to accommodate new learning, but it does not undertake learning." *Id.* at 111. This for Boyd, then, may be the "beauty and depth" that attends experiencing a new cultural paradigm—a paradigm that in some sense may be said to transcend rational discourse.

27. "Shedding" is undoubtedly too strong of a term, because it is unrealistic to assume that one can ever completely shed her predominant paradigm, without some significant conversion-like process (i.e., to shed would be to depart entirely). Such a conversion-like process is rare, however. It is enough, perhaps, that one struggles to be free of the shackles of her cultural paradigm for a period long enough to enable her to gain enhanced understanding of both the nature and substance of another paradigm. Shedding may, therefore, be appropriate in much the sense that a snake sheds its skin, only to have it reappear in a slightly different form. The difference is so slight that the shedding does not transform (or in our metaphor, convert) so much

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provides the opportunity to experience ultimately the beauty and depth that Justice Tobriner speaks of in the *Woody* case.

There are additional reasons why resistance to applying Establishment Clause doctrine may be warranted. If the postmodernists are correct in asserting that there are inherent limitations to rational discourse,[28] which is at the basis of the deliberative cultural paradigm, then the pursuit of truth, if a worthy pursuit at all, might well be directed more to an examination of dedicated cultural paradigms. At any rate, given the limits of the deliberative process, nothing justifies giving additional weight to the dominant deliberative culture. Since the deliberative culture predominates in much of Western civilization, there is at least an implicit societal preference—the preference that comes when any culture predominates—for the deliberative culture. As noted previously, because the predominant culture places pressure on (coerces, if you will) participants in dedicated subcultures to conform or at least to defer to the predominant culture, there is little need to invoke legal doctrine like the Establishment Clause to further inhibit the capacity of the subculture to develop.

A final related argument may be marshalled in favor of the proposition that the Establishment Clause doctrine should not be imposed in Indian Country. Given that the world is a shrinking place and we will have to deal in a global context with a variety of dedicated cultures that reject Establishment Clause values, we would do well to permit tribes to provide us with a laboratory in which to observe the development of human potential in a dedicated cultural context. This argument that the tribes can provide us with a fruitful testing ground is little more than a warmed-over version of the argument for federalism that has been put forth to permit experimentation at the state level. It is different only as a matter of degree, in that it permits experimentation at,

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as it causes the skin to assume a new hue, a hue that might not be had were it not for exposure to a new cultural paradigm. There is, of course, beauty and depth in slight changes, even when such changes are not transformative. Indeed, it may be well that the changes come more in the form of insights than in the form of transformation, because it is hardly a given that one should shed her culture/religion as a whole and be transformed or converted to another culture, although if we are genuinely committed to expressive choice, the possibility of transformation or conversion must remain a real possibility. It is enough generally, however, that one's own life takes on added depth and beauty for having been exposed to another cultural paradigm. Understanding will inevitably result.

28. *See* Gedicks, *supra* note 16, at 96-101. Gedicks makes a powerful argument to the effect that there are inherent limitations to the rational, adjudicatory endeavor in the very context of religious liberty.

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perhaps, the most fundamental level, the level of culture.

The confirmed separationist, who believes that the Establishment Clause doctrine is inherently good and that the mix of religion with the public sector is always bad, will no doubt disagree, asserting that individual liberty will be depleted and that we will be engaging in experimentation at the expense of the liberty of individual Native Americans and unwilling taxpayers who contribute to the funding of the experiment.[29] A partial response to this objection is simply that free exercise and other rights provisions do apply in Indian Country, and may be invoked by individual Native Americans and others directly exposed to the religious aspects of the tribal culture to protect their personal choices and to resist the most coercive aspects of that culture.

IV. CONCLUSION

I commenced this essay with my experience in traveling to six of the seven tribal colleges in Montana. During those visits, I was exposed to repeated instances when the religion pervasive in the tribal cultures was evident in a public context. Prayers were uttered, songs were sung, and blessings were offered. A sense of reverence attended those affirmations and exercises of the tribes' culture. In the course of this essay I have offered a series of arguments as to why the Establishment Clause doctrine should not be invoked to inhibit these expressions of tribal culture. Those reasons dictate that we give broad latitude to and recognize the sovereignty of the tribes, despite what might be characterized as periodic Establishment Clause violations.

At one stop, a tribal college President commended our group for coming to listen and not speak. Everyone in our group was edified, I believe, by lessons learned in silence. In many Indian cultures, there is an emphasis on time and place. Now is the time for silence, from the standpoint of enforcing the Establishment Clause doctrine in Indian Country—a time to permit the sacred and the sovereign to be one.

29. It is interesting to note that establishment or separationist concerns do not have much impact on the designation of foreign aid. As quasi-sovereigns, tribes may well be due similar deference on political grounds, as well.