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MODELS OF CHURCH-STATE INTERACTION AND THE STRATEGY OF THE RELIGION CLAUSES

*Ira C. Lupu**

I will begin by laying some groundwork before I comment on Professor McConnell's essay. First, unlike most or all of those individuals contributing to this symposium, I am neither Christian nor institutionally religious in any other way. As the symposium progressed, I sometimes felt like I had wandered into the wrong tent. Recalling the purpose of the Conference helped me reorient myself. In the invitation to participate in this event, Craig Mousin had described the meeting as one in which scholars of theology, divinity, religious ethics, and law might converse across conventional disciplinary boundaries.¹ And, quite consistent with that design, I have been provoked today in new directions, although what I have to say might not reveal that.

Second, I must admit that I had trouble getting my mind around the topic description for this particular panel. The assigned topic is "Law's Perspective of Religion and Its View of the State." I have assumed that the antecedent of "Its" is "Religion." So, as I understand it, we are to focus on law's view of religion's view of the state.

As I squinted at the odd way light passed through the prism created by this formulation, the analogy that came to me was that of asking a husband what he thought of what he thought his wife thought of him. Of course, he could make no sense out of that other than as a question about what he thought of his marriage; that is, what was his view of the relationship given whatever perceptions he had — but they would only be his perceptions — of her view of the relationship.

To some extent, Professor McConnell's remarks helped to ground

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1. See Craig B. Mousin, *Confronting The Wall of Separation: A New Dialogue Between Law and Religion on the Meaning of the First Amendment*, 42 DEPAUL L. REV. 1 (1992).

my approach to the topic. Professor McConnell's comments about models of the church-state relationship do not overtly adopt or critique anyone's perspective; it is not clear to me what, in Professor McConnell's view, reflects law's perspective and what reflects religion's perspective. Rather, and attractively and usefully, Professor McConnell appears to be striving for an Olympian perspective. He attempts first to catalogue objectively the ways in which church and state interact, and then to assess the legal significance of those relational arrangements.

Of course, much recent scholarship in law, literature, and philosophy has reflected skepticism of intellectual efforts to locate objective positions from which to assess or describe social phenomena.² We in the academy have been hearing that, to the postmodern consciousness, there is not very much *there* there. If the critique of objectivity is correct, then Professor McConnell's view is less timeless and universal, and more situated and contingent, than his remarks would suggest. The tension between the objective and the subjective is hardly new in this context. The law of the religion clauses has always combined efforts to render an objective view of constitutional history and purpose with the need to map those judgments onto the contemporary culture of religion and society. Even if there were a consensus concerning religion clause history and purpose, the content of that contemporary culture, and what it may be in the process of becoming, are always contestable matters.

In any event, Professor McConnell has painted with a very broad brush. At the risk of disappointing those who invited me, I am inclined to reach for instruments with fewer and finer bristles. My mistakes are less apparent when I paint in smaller strokes.

Professor McConnell mentions seven models of church-state interaction, but I think there are only *two* models of church-state interaction with which the law is concerned. The first is the model of conflict. The law is generally about conflict and its resolution, so the model of conflict generates a familiar legal perspective on human struggles, social institutions, and their relationship with the state. In church-state clashes, the problem is two-sided: First, disputes between the state and agents of religion frequently result in dangers for religious liberty, and second, such disputes may also threaten injury to the state's legitimate purposes. When, for example, sick

2. See, e.g., Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (critiquing the idea of legal objectivity).

children die after their custodians treat them by religious rather than conventional medical means, the conflict that may follow poses hazards to adherents of such religions and to the child-protecting concerns of the state.³

The second relevant model is that of church-state alignment. This one also has two sides. First, there is ongoing constitutional concern that the state not be overly unified with, or captured by, religious forces. That sort of takeover presents the danger of serious evils: suppressing dissent, overpowering conscience, corrupting religion, undermining religious equality, and ultimately destroying democracy. The other side of the capture problem relates to the degrading effect that state subsidy to religion may accomplish. When the state aids religion, it may do so on terms which undermine the religious community's commitments. If religious communities are financially strapped, or simply interested in growing larger and richer, they become vulnerable to envelopment by the state and seduction by worldly concerns.⁴

From law's perspective, Professor McConnell's model of the "Church Apart From Culture" makes little sense. The contemporary state has common concern for all of its citizens. Because the state is always cognizant of homicide, for example, the state is going to be concerned with homicide in the religious community — by its members against each other, by outsiders against its members, by its members against outsiders — in precisely the same way that the state is going to be concerned with homicide involving persons with no connection to that religious community. The state will react, and conflict is likely, if the religious community says, "No, our rules about homicide are different than yours and we want to enforce our own," or if the religious community says: "Our rules about homicide are the same as yours, but we consider ourselves sovereign. You cannot enforce your rules on our territory." Jurisdictional barriers of the latter type may of course be masks for substantive variations in the relevant law or enforcement patterns.

3. See, e.g., *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (holding that the prosecution of a mother on charges of manslaughter and child endangerment for treating her critically ill child with spiritual rather than medical means did not violate the Free Exercise Clause of state or federal constitutions where the child's medical condition was life threatening), *cert. denied*, 491 U.S. 905 (1989).

4. My initial Conference remarks on this subject focused solely on the danger of the church capturing the state. I would like to thank Stan Ingber for reminding me that capture is as two-way a path as conflict.

When a religious community assumes that sort of "apartness," state officials are likely to become especially troubled. Physical "apartness" alone produces no conflict; normative apartness is where the trouble starts.⁵ The question of Native American tribal jurisdiction over reservation territory, and tribal sovereignty over substantive criminal law applied on such territory, is an intriguing example of this sort of problem.⁶

In more primitive times and places, it may have been possible to keep conflict of this kind at a minimum and to keep apartness at a maximum. The state we currently inhabit, however, is pervasive in its regulatory concern. It is concerned with many economic aspects of a church's institutional activity, including fund-raising and labor relations. The state is also concerned with domestic relations, including who marries whom, how spouses treat one another, how families educate their children, and what constitutes abuse or neglect of children. As soon as the state's purposes extend pervasively into all matters of economic and domestic life, it is impossible for religious communities to remain apart from the state.⁷ Inevitably, church and state will clash.

A key element within Professor McConnell's continuum of models is the concern for "influence" — the church influencing culture, and the church aligned with culture. But here the law is legitimately mindful only of influence which reaches the point of significant capture. Most efforts by the church to shape culture — for example, by the presentation of moral arguments, dissenting from prevailing social or political views, through various means of communication — are strenuously protected by legal principles concerning freedom of expression. Although Professor McConnell correctly observes that our constitutional law has occasionally been hostile to this proposi-

5. See generally Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (suggesting that we create and maintain a normative universe of right and wrong, of lawful and unlawful, of valid and void, and in the context of the narrative we give these legal institutions or prescriptions meaning).

6. See, e.g., *United States v. Antelope*, 430 U.S. 641 (1977) (holding that Congress may, consistent with the Constitution, subject an Indian who commits a crime against a non-Indian on Indian territory to federal criminal jurisdiction, while leaving to state jurisdiction crimes committed by non-Indians against other non-Indians on Indian territory).

7. See Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 751 (1992) ("[A]s all examples of religious accommodation tend to demonstrate, we cannot simply leave religion alone, because in an interdependent and complex society, religion cannot leave us alone.").

tion,⁸ those moments have been few and have very much faded in importance.⁹ When the church tries to capture the state and turn it to some sectarian end, however, the alignment concern grows to a matter of legal and constitutional significance.¹⁰

No doubt, all of Professor McConnell's suggested models contribute to our social, cultural, political, and theological understanding of church-state interaction. For most constitutional lawyers' purposes, however, only conflict and capture matter. Accordingly, we have two religion clauses in the First Amendment. The Free Exercise Clause, at least in theory — it has not worked out so well in practice lately¹¹ — is designed to mediate conflict between the state on the one hand, and religious communities and individuals on the other. The Establishment Clause is designed to police and limit captures. Those are the law's two concerns, and those clauses are the Constitution's embodiment of them.

Having so narrowed the inquiry, I want to re-expand it by turning to the Madisonian concern, in no way limited to religion, about the role of factions in the Republic.¹² Madison worried about the danger

8. Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 216-17 (1992).

9. Chief Justice Burger midwifed the idea that participation by religious institutions in political debate was a constitutional vice. *Lemon v. Kurtzman*, 403 U.S. 602, 611-25 (1971). Later, however, he helped strangle it. *Lynch v. Donnelly*, 465 U.S. 668, 678-79, 685-86 (1984). See generally Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980) (detailing the sources of the rule of interpretation known as the "political divisiveness" test, whereby the Court invalidates legislation if it might tend to create "political division along religious lines," and offering two reasons for abandoning the test).

10. Because we have thus far been very restrictive about aid to religious institutions, the second capture concern — state capturing church by subsidy and conditional entitlement — has been of less worry. Those restrictions are, however, in the process of breaking down. See *Bowen v. Kendrick*, 487 U.S. 589 (1988). In *Bowen*, the Court held that the Federal Adolescent Family Life Act, which authorizes federal grants to public and private organizations or agencies for services and research in the area of premarital adolescent sexual relations and pregnancy, and requires involvement of, among others, religious and charitable organizations, does not violate the Establishment Clause. *Id.* at 600-18; see also *Lupu, supra* note 7, at 764-66 (discussing the changes in Establishment Clause principles suggested by *Bowen*). Because *Bowen* appears to permit a significant amount of state aid to religion, the concern about unconstitutional conditions on such aid may soon be revitalized. But see *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding a regulation imposing a restrictive condition on abortion-related speech by medical personnel to pregnant female clients in federally funded family planning clinics). *Rust* may signal the demise of any serious judicial concern with rights-restricting benefit conditions, at least so long as the condition attaches only to the use of the monies and not to the behavior of benefit grantees more generally.

11. *Employment Division v. Smith*, 494 U.S. 872 (1990), is widely viewed as signalling the demise of federal constitutional mediation of most forms of such conflict.

12. THE FEDERALIST No. 10, at 129 (James Madison) (Benjamin Fletcher Write ed., 1961).

of government being captured by groups that might use the power of the state to tyrannize others.¹³ Are churches different from other kinds of factions in the extent or quality of this danger?¹⁴ Are churches different from political parties, labor unions, business groups, or any other group whose leaders and members view themselves as having common interests and which seek to capture the state to achieve their own purposes, even if it means imposing some harm on third parties?

That the First Amendment contains separate and distinct clauses pertaining to religion suggests that the Founding Generation believed that there was a difference between churches and other factional entities. Political parties are free to try to capture the state; ordinarily, that is primary among the purposes for which political parties exist. Such parties criticize state policy and administration when they are out of office, and then seek to gain power and take the machinery of the state and turn it to their own ends. Nothing in the Constitution explicitly restricts this behavior, and rights of expression and association protected by constitutional law facilitate ordinary efforts by parties to seize the reins of government. The Framers, however, obviously thought — and many contemporary Americans continue to believe — that religious factions represent a different kind of phenomenon than political parties or other kinds of associations.

One of the central authorities in Judeo-Christian religion provides a provocative avenue into the distinction between religion and other association-inspiring causes. The text of the Ten Commandments — its decalogical character neatly parallel to the Bill of Rights — serves up an insight in its very first command, and, in so doing, helps to explain the First Amendment to the Constitution.

My research turned up two versions of the First Commandment. They are not identical, but each in its own way suggests insights into the difference between religion and other forms of faction. *The New Oxford Annotated Bible* version of the First Commandment is: "Then God spoke all these words, 'I am the Lord your God, who brought you out of the land of Egypt, out of the house of bondage. You shall have no other gods before me.'"¹⁵ *The New English Bible*

13. *Id.*

14. See William P. Marshall, *The Public Square and the Other Side of Religion*, 44 HASTINGS L.J. (forthcoming 1993).

15. *Exodus* 20:1-3 (The New Oxford Annotated Bible with the Apocrypha).

has a somewhat different version: "God spoke and these were his words, 'I am the Lord your God who brought you out of Egypt, out of the land of slavery. You shall have no other god to set against Me.'" ¹⁶

Both of these versions of the First Commandment reveal the power and danger of religious commitment; its claims on loyalty are overwhelming. The first version — "no other gods before Me" — says, in effect, "Me first!!" Even if it is acceptable to have other gods — a question elided in this version — this translation of the Commandment establishes an unyielding rule of priority. In case of conflict between the God-Author of the Commandment and other gods, the God-Author says "Me first!"

The second version of the First Commandment — "You shall have no other god to set against Me" — suggests a slightly different relationship, one we might understand as capturing an antirivalry spirit: "You can have other gods. Just keep them in separate spheres, please, and don't make them My rivals. And then there will be no conflict; then they won't be set against Me."

As we have seen, however, this second version, captured in the images of apartness, separate spheres, the garden and the wilderness,¹⁷ does not map well against contemporary life. When the state and religious communities come into conflict — as they inevitably will if religious communities are normative and seriously self-conscious about what they do — the idea of separate spheres just does not work very well. There will be conflict and rivalry, and there will inevitably arise the problem of competing loyalties.

Reflecting on these dynamics against the backdrop of the "Me First!" version of the First Commandment enables us to see why we need religion-specific clauses in the Constitution. Throughout this Conference, speakers have been talking about the sovereignty of God. Those claims are set against the competing claims of the sover-

16. *Exodus* 20:1-3 (The New English Bible with the Apocrypha).

17. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 5-10 (1965) (suggesting that Roger Williams represented a "strain of thought" for which the wall of separation between church and state was intended to protect the church from the corrupting influence of the state, but not to shield the state from the church). Howe took his title from an image coined by Roger Williams of Rhode Island — "[W]hen they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made his garden a wilderness, as at this day." *Id.* at 5-6. See also Timothy L. Hall, *Roger Williams and the Foundation of Religious Liberty*, 71 B.U. L. REV. 455, 481-82 (1991) (crediting Williams as the father of the modern "Secular City," as does Howe).

eignty of the state and those who act in its name.

We all understand the dangers of expansive sovereignty claims. Think about totalitarian political parties. There are many reasons why German National Socialism, and Chinese- or Soviet-style Communism, stir our fears. Part of that apprehension arises from our reaction to the totalitarian party that makes "Me first!" claims in every matter of behavior and belief. For reasons that derive both from nationalism and from love of liberty, we in this society are not very hospitable to "Me first!" claims by intermediate associations. For better or worse, we are more inclined to accept "Me first!" claims from the state, or, more typically, from ourselves. Labor unions and civic associations and other kinds of factions thus do not ordinarily say, "Me first!" They make claims on loyalty, but they are usually prepared to yield to the demands of the state at one pole and the deeply felt needs of their constituent members at the other. Typically, such associations make such claims only in rare, crisis-oriented moments.

Religion is different.¹⁸ Religious leaders are more likely than other associational leaders to make ultimate truth claims and to demand ultimate loyalties, all in the name of Higher Authority. Because religious factions may not be able to assert these claims and demands while simultaneously maintaining allegiance to the state, such factions present unusually difficult problems for government. The loyalty conflicts engendered by church-state disputes over normative matters may be serious, not easily compromised, and both socially and psychologically stressful.

Indeed, state establishment of a church or churches may seem attractive for this very reason; instead of setting up a problem of dual loyalty, they try to solve it by uniting its antagonists. For those outside the official church, however, establishments aggravate and multiply the problem of conflicting loyalties. How can one maintain allegiance to a state which officially rejects one's own religious

18. So are families, but they tend to be numerically small; when religion threatens to make them larger, thereby creating a double-barreled problem of higher loyalty, the state knows exactly how to intervene aggressively. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (upholding a lower court's rejection of a free exercise claim and concluding that the bigamy conviction of a Mormon leader was proper despite his claim he engaged in polygamous marriages for religious reasons). Professor Gedicks's Conference remarks about Mormon polygamy and the federal government's response to it in the Western territories poignantly captured this experience. Fredrick M. Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992). *See also* RICHARD A. POSNER, *SEX AND REASON* 254 (1992) ("Polygamy conduces to the creation of powerful families, offsetting [state] power . . .").

creed? Moreover, if the church or its adherents maintain any legacy of independence, the problem of conflicting loyalties does not disappear even for those on the inside.

There are a number of constitutional strategies one might advance to deal with the linked problems of conflict, alignment, and the pressure of dual loyalties. One might seek to write and interpret the Constitution so as to increase the likelihood that the society would contain a few, relatively quiet, large, bureaucratic churches, all of which had been essentially co-opted by the state. Interpretations of the Establishment Clause that freely permitted financial aid to religious institutions, coupled with interpretations of the Free Exercise Clause that permitted substantial regulation of such institutions, would be a means of promoting such arrangements. The state would pursue this strategy by subsidizing religion and simultaneously tying the subsidy to conformity with policies designed to minimize the danger of church-state conflict.

The danger of this strategy is that once a church gets sufficiently large and bureaucratic, it may be in a position to seek political power: it will have popular support, resources, widely known leaders, and efficient organization, and the danger of capture may suddenly be reversed. The church may begin to co-opt the state, instead of the other way around.

The best way to minimize the danger of capture in either direction is to structure constitutional arrangements so as to increase the likelihood of having a multiplicity of sects. This is the vision of James Madison,¹⁹ who had borrowed it from Adam Smith.²⁰ Certain interpretations of the religion clauses will reinforce this strategy. For example, constitutional law incentives to channel aid to individuals rather than religious institutions will increase the possibility of religious mobility and schism.²¹ Doctrines that produce

19. THE FEDERALIST No. 15, at 358 (James Madison) (Benjamin Fletcher Write ed., 1961) ("In a free government the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.").

20. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 744-46 (Edwin Cannan ed., 1937) (1776) (arguing that nonestablishment promotes a multiplicity of sects, as well as equality and harmony among them).

21. See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1983) (holding that the state educational tax deduction for school expenses, including parochial school tuition, does not violate the Establishment Clause); see generally Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 U. CONN. L. REV. 739, 749-53 (1986) (explaining that recent cases have drawn a distinction between aid to religious institutions and aid to individuals who attend such

free exercise rights in individuals and small religious associations, but not in large, bureaucratic religious institutions, will similarly enhance this strategy.²²

The model of sect multiplicity conjures an image of lean, mean, zealous sects. Indeed, after listening to the presentations at this Conference, I will henceforth envision Stanley Hauerwas as the personification of such religious groups. These sects are not large, not bureaucratic, and not co-opted. Unfortunately, such sects may not want to stay lean. The members of each may be convinced that they, and only they, know the True Path. They may seek to proselytize, and they consequently may have some trouble getting along with each other. That is, a world of lean, mean, zealous sects may not be a world of mutual respect and toleration; it is rather more likely to be characterized by perpetual religious strife.

A society so riven with religious combat would not be one in which most of us, Hauerwas excepted perhaps, would be very comfortable. Moreover, the church-state conflict in such a world would probably be intense, socially troublesome, and unending. Indeed, organizing a state at all in such a world might be impossible; the necessary commonality among individuals and groups might be completely lacking.

Perhaps the Madison-Smith vision is one of sects that are lean, but neither mean nor zealous toward others. So long as humans are free to organize, express themselves, and adopt differing answers to life's ultimate questions, however, one should expect that proselytizing zeal and animosity will be a likely byproduct of a multiplicity of sects. After a stretch in a society inhabited by such groups, we might begin to long for a few large, bureaucratic, co-opted churches, despite the risk of state capture they present.

To be sure, many cultural forces will influence the shape of our institutional religious arrangements far more powerfully than the content of constitutional law. It would be absurd to believe that American religious forms are essentially determined by the interpretations of the religion clauses we adopt. Nevertheless, I do believe that constitutional interpretations matter, at least at the margin. As a result, I am willing to give constitutional law a smidgen of credit

institutions).

22. See generally Ira C. Lupu, *Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987) (criticizing free exercise exemptions for institutions).

for the mix of religious arrangements we do have — some large and bureaucratic, some lean and intense, and many between. All can survive, and most can flourish in proportion to the support provided by their adherents. It would be a mistake in constitutional strategy — one that we have so far avoided — to adopt a view of either or both religion clauses that strongly privileged any of these types of arrangements over the others. What some have seen as incoherence in the constitutional law of religion may thus represent a shrewder calculus of statecraft than has heretofore been recognized, or may reflect a wise, invisible, and providential hand guiding decision.

The optimum constitutional strategy, I am convinced, must be simultaneously respectful of religious liberty and sensitive to the dual danger of religious combat in the society and religious takeover of government at any level. A mix of legal rules reflective of all those ends should always be our target. Even if we all agreed on these general aims, however, we would reasonably expect unceasing argument concerning the soundest choice of rules and the best combination among them.

