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## DISAGGREGATING "CHURCH" AND "CULTURE"

Mark V. Tushnet\*

Michael McConnell's typically provocative attempt to map the possibilities for First Amendment jurisprudence uses a group of metaphors drawn from H. Richard Niebuhr.<sup>1</sup> I believe the map's accuracy would be enhanced if the points where Niebuhr's metaphors are unsuitable for First Amendment jurisprudence were more carefully elaborated. This would disaggregate both the "church" and the "culture" to which Niebuhr and McConnell direct attention. After sketching how that could be done, I will suggest that this more elaborated view offers a different perspective on the "Church Apart From Culture" category with which McConnell opens his discussion.

As McConnell notes, Niebuhr's categories are not themselves suitable for First Amendment jurisprudence because Niebuhr was concerned only with the Christian church whereas First Amendment jurisprudence must deal with the fact of religious pluralism.<sup>2</sup> That observation, however, may be more damaging to McConnell's enterprise than he acknowledges. When Niebuhr discusses "the [Christian] church apart from culture" and the like, he can also properly have in mind a single entity, the Christian church, counterposed to, or interacting with, every other social institution in the public sphere. This includes other churches, the government, the mass media, and other public bodies. Of course, Niebuhr's analysis requires that the single Christian church have available to it a range of possible ways of relating to those other institutions. However, his discussion necessarily takes place within the tradition of the Christian church, which is understood to be a single tradition whose members participate in dialogue with each other.

In contrast, when we consider a religiously pluralist society, it is

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1. Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191 (1992) (analyzing First Amendment jurisprudence based on metaphors presented in H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951)).

2. *Id.* at 193.

exceedingly difficult to formulate a single stance of how the "other" relates to the rest of society. The most direct analogy to Niebuhr suggests that we ought to consider the different ways a plurality of churches could relate to the culture. For obvious reasons, this type of analysis is unpromising. Precisely because there is a plurality of churches, there will be a plurality of ways of relating to Niebuhr's "culture." At most, we would end up with lists of particular churches that relate to culture in each way. Indeed, much of Professor McConnell's discussion proceeds in that way. He offers examples of different churches some of which have stood apart from culture, some of which have stood in conflict with culture, and so on down through Niebuhr's various categories.<sup>3</sup>

That enterprise is interesting, but I am not sure what lessons about First Amendment jurisprudence we are to draw from it. Having seen the problem of pluralism from the side of the churches, perhaps we ought to be receptive to arguments that First Amendment jurisprudence should be similarly pluralistic. However, there are two difficulties with that suggestion. First, the course of Establishment Clause litigation demonstrates that some forms of interaction necessarily exclude others.<sup>4</sup> Indeed, churches end up on different sides of Establishment Clause controversies because some see the government's position as rejecting the claims of religious pluralism. Second, and probably more important, the argument for pluralism that I have constructed by analogy to Niebuhr comes, if at all, from within the pluralism of religious traditions. Similarly, I think the First Amendment argument for pluralism must come from within the scope of our constitutional traditions. Under this analysis, McConnell's pluralist modification of Niebuhr would then be a thought-provoking analogy, but not much more.

Furthermore, in describing the category "Church Apart From Culture," McConnell suggests that arguments against a wider role for churches in the public sphere are misguided because "it is equally possible to understand religion as an organic part of the cul-

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3. *Id.*

4. *See, e.g., Lee v. Weisman*, 112 S. Ct. 2649 (1992) (invalidating the inclusion of nonsectarian invocations and benediction in the form of prayer in public school graduation ceremonies). Allowing this type of interaction between the state and religion would exclude from the graduation ceremony students who felt that participating would force them to pray in a manner their consciences would not allow. *Id.* at 2658. Prohibiting it excludes those who believe it necessary to solemnize such an important event in their lives in the manner that other important events are solemnized.

ture . . . ."<sup>5</sup> I would think, though, that it is not only "equally possible" to understand religion in that way; it is necessary to understand it in that way. Conversely, to contend that "the religious world view is radically discontinuous from the perspectives of *the rest of the community*"<sup>6</sup> is incoherent. In a religiously pluralist society, there is no "rest of" the community at all, just different segments of the community with different perspectives.<sup>7</sup>

The pluralist modification of Niebuhr is one form of disaggregating his categories. For the purposes of Niebuhr's dialogue within the Christian church, setting up the categories to counterpose "the church" to "the public sphere" is entirely sensible. McConnell's assumption of pluralism means that for First Amendment purposes, "the church" must be disaggregated. McConnell's descriptions reveal the obvious first step: distinguishing between mainstream and nonmainstream religions. Having done so, we will place on McConnell's map one area where the public sphere accommodates mainstream religions, another area where it takes a stance of conflict with nonmainstream religions, still other areas where it is aligned with mainstream religions and some nonmainstream ones, and so on down through Niebuhr's categories. This map will dissipate some of the descriptive confusion in McConnell's account; for instance, he indicates that sometimes the Court uses the "Church Apart From Culture" model, and sometimes it uses the "Church and Culture Accommodating" model.

As with "church," I think "culture" must also be disaggregated. In a pluralist society, different churches will have various forms of interaction with a range of other social institutions. For present purposes, I find it helpful to identify three such institutions: the government, popular culture, and high culture.<sup>8</sup> Some churches may be

5. McConnell, *supra* note 1, at 197.

6. *Id.* (emphasis added).

7. I think part of the difficulty here arises because McConnell does not carefully define "culture." His definition includes "the institutions that shape the normative understandings of the community" but excludes "what we do and believe in our own homes and churches." *Id.* at 194. From this definition, I think it directly follows that the "Church Apart From Culture" position will be incoherent, because churches, defined as outside culture, necessarily "shape the normative understandings" of some people in the community. Therefore, churches *are* necessarily part of culture.

8. See generally LAWRENCE W. LEVINE, *HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 241 (1988) (categorizing cultural groups and institutions as either "high" or "popular"). Levine notes that institutions of popular culture are often equated with accessibility; that is, their ideas, rituals, and attitudes are easily accessible to the masses. In contrast, institutions of high culture are characterized by inaccessibility, their language, knowledge

"apart from" the government but "aligned with" the institutions of popular culture, others may be "in conflict with" the institutions of high culture but "aligned with" the government, and so on through the various permutations.

This disaggregation is important because without it the threat to churches from any particular institution may readily be exaggerated. For example, government denials of tax-exempt status for some churches might look less discriminatory if they were seen as an aspect of church interaction with the entire range of social institutions. The shock value of such a denial is also dissipated if the institutions of popular or high culture provide material or ideological support for those churches affected by the denial.

McConnell's failure to disaggregate "culture" may rest on his judgment that, whatever the conceptual possibilities may be, the institutions of the public sphere in the contemporary United States have enough basic commitments on church-related issues in common to justify treating them as "culture" in the large. His opening sentence, that "[l]awyers naturally [assume] . . . that legal principles . . . are the primary, perhaps the only, normative authority to which we can refer for the organizing principles of society,"<sup>9</sup> seems to rest on that judgment. The argument I have developed so far rejects that proposition in some ways.

I confess to wondering about the accuracy of McConnell's observation. One can always find some lawyers asserting that church leaders violate the principles of liberal society when they take public positions on social issues that touch on matters of concern within their faith traditions. Yet one can also find lawyers asserting exactly the opposite, that such actions are entirely consistent with liberal principles.<sup>10</sup>

Lawyers sensitive to the varied sources of normative authority in pluralist society understand that the relations among those sources of authority can be extremely complex. From my vantage point, for example, it seems that the institutions of high culture, including the leading institutions of legal education, are "in conflict with" most

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requirements, and rituals are not easily assimilated by the public at large. *Id.* at 230-41. Levine states that certain professions, such as professors, lawyers, engineers, and scientists, have rituals and knowledge requirements qualifying them as institutions of "high culture." *Id.* at 241.

9. McConnell, *supra* note 1, at 191.

10. For a more extended presentation of my views on this issue, see Mark V. Tushnet, *The Limits of the Involvement of Religion in the Body Politic*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 191* (James E. Wood, Jr. & Derek Davis eds., 1991).

churches. In contrast, the institutions of popular culture are "aligned with" mainstream churches, and the institutions of government mostly "accommodate" mainstream churches.<sup>11</sup>

I wonder what normative implications we might draw from this more complex map of interactions. In a religiously pluralist society, *any* particular pattern will constitute an endorsement of the normative stance of some churches and a rejection of the stance of others. Therefore, the only way to devise proper First Amendment jurisprudence is to determine which pattern is normatively desirable. Again, the fact that a proposed pattern is consistent with the normative stance of a church cannot count against its adoption. This is a point made most obvious, as McConnell says, by the Supreme Court in *Harris v. McRae*.<sup>12</sup> *Harris* rejected the claim that a statute could violate the Establishment Clause if it was consistent with religiously derived judgments of specific churches.<sup>13</sup> In addition, and although this is a more difficult issue, I believe that there is no reason to rule out religiously derived arguments for the normative correctness of some particular pattern of interaction. In any event, with McConnell's map in hand, and aided by his discussion, we are at least in a position to conduct the normative battle on a known terrain.

I now want to shift focus and examine in more detail a single part of the terrain. Consider an alternative understanding of the category "Church Apart From Culture." Here the church stands completely independent of other social institutions. It is not that church and other institutions are "separated," which conveys an image of institutions occupying but dividing the same terrain. Rather, the church and other institutions simply do not occupy the same terrain. Each says to the other, "You do in your jurisdiction what you think appropriate, and we will do in ours what we think appropriate."

The normative judgment that animates this version of "Church Apart From Culture" is that culture, the state in particular, makes

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11. See WADE CLARK ROOF & WILLIAM MCKINNEY, *AMERICAN MAINLINE RELIGION: ITS CHANGING SHAPE AND FUTURE* 107-16 (1987). (discussing how the constituencies of church denominations change as their social characteristics and relation to society change). Roof and McKinney observe that a new "knowledge class," consisting of scientists and professionals, has emerged during this century. This group is secularized in viewpoint, desiring a less prominent role for religion in society. This viewpoint is at odds with the more popular and mainstream religions which tend to be more conservative in attitude, desiring that religion play a stronger role in society. *Id.* at 114-15.

12. 448 U.S. 297 (1981).

13. *Id.* at 319-20 (holding that the fact that abortion funding restrictions coincide with Catholic religious tenets does not, without more, contravene the Establishment Clause).

no valid normative claim whatever on the believer.<sup>14</sup> Of course other institutions, the state in particular, make demands of believers, and believers must accommodate themselves to those demands. This accommodation, however, is merely prudential.

To McConnell, the Supreme Court's decision in *Employment Division v. Smith*<sup>15</sup> exemplifies a rejection of the "Church Apart From Culture" position. In *Smith*, the Supreme Court held that laws prohibiting the use of peyote do not violate the Establishment Clause of the First Amendment when applied to religious groups using the drug in traditional religious ceremonies.<sup>16</sup> To me, however, it exemplifies the position itself. In my version of First Amendment jurisprudence, each institution defines its jurisdiction for itself. Under those circumstances, conflicts between the church and other institutions are inevitable. The church makes a moral claim on its members, asserting that the matter lies within its jurisdiction. The state makes a contradictory moral claim, asserting that the matter lies within *its* jurisdiction. In *Smith*, the state says, "This, the regulation of drug use, comes within our jurisdiction. We have decided what's appropriate, and that's the end of it."

However, my presentation still leaves open an important interpretive point. Who are the "we" who decide what is appropriate? For the majority in the *Smith* case, the "we" is the legislature of Oregon; for the critics of that decision, the "we" is akin to "the people of the United States as they have expressed their will in a Constitution that overrides transient preferences in order to serve the more enduring values of religious liberty." Thus, defining the "Church Apart From Culture" category as I do does not imply that the *Smith* decision was right or wrong. Evaluating the decision from the "Church Apart From Culture" perspective requires further elaboration of the interpretive question.

One way to develop my position is to point out that it plainly allows both the culture and the government to decide to forego the exercise of authority within its jurisdiction. Thus, it does not preclude government accommodations of religion.<sup>17</sup> Yet believers who

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14. In the Jewish tradition, this is one interpretation, though not the only one, of the legal principle "the law of the land is the law." For a more detailed discussion of this interpretation, see GIL GRAFF, *SEPARATION OF CHURCH AND STATE: DINA DE-MALKHUTA DINA IN JEWISH LAW 1750-1848* (1985).

15. 494 U.S. 872 (1990).

16. *Id.* at 890.

17. For present purposes it is unnecessary to distinguish between permissible accommodations

take the "Church Apart From Culture" position ought to be quite skeptical about such accommodations. Believers who seek such accommodations from the state are in the position of supplicants to the state. They are, metaphorically, idolaters.

Yet, as McConnell points out: "It may be unseemly for the believer to ask for accommodation. It is not unseemly for his fellow citizens to provide it."<sup>18</sup> Even so, believers who take the "Church Apart From Culture" perspective might still be uncomfortable even with accommodations they do not seek. When culture grants such accommodations, it lowers the price we have to pay for our beliefs. It may thereby diminish or trivialize the beliefs in our own eyes.

This is especially true when accommodations are granted as a result of balancing competing social interests, and even more intensely when the courts rather than legislatures grant exemptions. Consider how the discussion of a proposed accommodation goes in the balancing mode: "Although important to believers, the practice we are thinking of accommodating really is not all that important to society; that is, the rest of us really do not think that the practice really is all that important. We therefore can accommodate it — a practice we regard as relatively trivial — without impairing our pursuit of our more important social goals."<sup>19</sup> The rhetoric of such discussions consists of a passing acknowledgement of the practice's importance to those peculiar believers who find it important, coupled with a practical minimization of its importance.

The problem is exacerbated in adjudication because, as McConnell says, "The courts are an arm of the state."<sup>20</sup> However, the judiciary also has one special characteristic. Unlike legislators, when judges issue decisions, they explain what they are doing. McConnell

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of religion, those chosen at their discretion by legislators, and mandatory accommodations, those imposed by courts interpreting the Constitution. In the present context the permissible/mandatory distinction raises only questions about how the state chooses to organize itself, questions about which the "Church Apart From Culture" perspective offers no answers (because they are questions that arise solely within the jurisdiction of the state).

18. McConnell, *supra* note 1, at 214.

19. Sometimes the need for accommodation arises because of a mindless application of a general rule, not because anyone actually engaged in balancing and found the social goal more important than an accommodation. The Air Force regulation in *Goldman v. Weinberger*, prohibiting the wearing of headgear indoors and its application preventing Jewish officers from wearing a yarmulke, exemplifies such mindlessness. 475 U.S. 503 (1986). The Supreme Court decision was not mindless however; although the Court upheld the regulation as applied, it balanced accommodating an individual serviceman's religious beliefs with the military's perceived interest in maintaining a uniform appearance. *Id.* at 509-10.

20. McConnell, *supra* note 1, at 202.



demonstrates that courts will never accommodate religious practices on issues that are important to the government. Judicially imposed accommodations will therefore occur only when the judges believe, contrary to what legislators may believe, that the issues and practices are relatively unimportant. The rhetorical structure of the judges' explanation is likely to be straightforward: "The practice to be accommodated is really quite trivial; we do not understand why anyone is getting excited about it." The "anyone" here is formally directed to the legislature, but in practice it is directed at the believers as well. In short, proponents of the "Church Apart From Culture" view might be concerned that explicit judicial accommodations of religious practices will ultimately undermine the sturdy independence of the church that they wish to defend.

McConnell's response is that in the absence of accommodations, government decisions will have "profoundly unequal effects across denominations."<sup>21</sup> This, McConnell asserts, will offset the inevitable inequality in developing accommodations, and he argues that "the best [ought not] be the enemy of the good."<sup>22</sup> Yet, from the "Church Apart From Culture" perspective, it is unclear that accommodations are "the good." The argument for accommodations, particularly for judicially imposed accommodations, typically ignores the cost that arises when legislators, or even more important here, judges, articulate their reasons for their actions. Legislatures can act mindlessly; courts must explain what they are doing. In *Smith*, the state legislature communicated nothing about the relative value it placed on drug control and religious practice when it adopted a general ban on drug use.<sup>23</sup> In contrast, Justice O'Connor's concurring opinion did offer such an explanation. In essence, she said that although she regretted imposing this burden on religion, the imperatives of the war on drugs were so great as to overcome the burden.<sup>24</sup>

Because courts are arms of the government, they are likely to offer such "explanations" with some regularity. It is true that some religious practices a bit removed from the mainstream will receive judicial protection. However, practices further from the mainstream

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21. *Id.* at 220.

22. *Id.*

23. See *Employment Div. v. Smith*, 494 U.S. 872, 892 (1990) (O'Connor, J., concurring) (stating that under the reasoning of the majority, the government could prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as the prohibition was generally applicable).

24. *Id.* at 908.

will not be protected. In effect, government action will intrude upon these practices, and by explaining the necessity of the intrusion, the courts will set the force of articulate government power against religious practice. Thus, a proponent of the "Church Apart From Culture" view might well conclude that the benefits to be gained from the occasional judicial accommodation of religious practices are outweighed by the costs that arise when courts are licensed to engage in discussions about every possible religious practice.

I must conclude by noting that McConnell has provided a map of the terrain. In the first part of this response, I have suggested how the resolution of the map might be increased by disaggregating "church" and "culture." Treating the analysis as a description, we might well conclude that sometimes our society has found itself in one part of the territory and sometimes it has found itself elsewhere. Therefore, the map by itself offers no normative guidance. However, the second part of the response sketches an argument about where we ought to go, map in hand. That argument necessarily draws on normative resources outside the scope of McConnell's intriguing presentation.<sup>25</sup> The major work to be done requires using those resources.

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25. To the extent that McConnell offers normative judgments, he too draws on such resources.

