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DePaul College of Law

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QUESTIONS AND ANSWERS TO PANEL 3

QUESTION: I see a contradiction in some of the points you have made. When Professor Tushnet suggested that possibly we should use a different terminology such as civil community, your response was: Well, you were not sure that made a whole lot of difference; the civil community really gets represented through state institutions, be they the legislature or whatever. At an earlier point you reminded us that courts are also institutions of government. Also, while using Niebuhr's models, you changed them and at the end went on to say, "Well, Niebuhr says, 'Leave it to the religious community.'" That which model is chosen is really your reaction of the religious community and the community that responds to the religious community. And finally you said, "No normative choice needs or should be made by the state. We should leave it to the religious community to determine which of these models to choose." There is some contradiction there. If in fact which model is chosen is a reaction of the religious community and the others outside of the religious community to the religious community, does not that reaction include not only the unstructured response you were talking about, but also the structured response? Legislation can push the response into one model or another. Court actions can push the response into one model or the other. Does not a normative choice need to be made — inevitably need to be made — to the extent that the civil community is being responsive?

MICHAEL MCCONNELL: Well, is this the contradiction you had in mind? That when answering Professor Tushnet, I resisted the distinction between the state and the civil society; but in the end of my talk, I appealed to a distinction between state and civil society by saying that the choice among these models ought to be left to civil society and believers and not to the state? I think I accept that charge; but, so amended, what I said still stands. But I think that is a very helpful clarification.

QUESTION: If you accept the charge, then one of the statements does not seem to be able to remain. If you accept the charge, then as the civil society responds, that will be shown through actions of

courts and/or legislatures. And should the Constitution be saying something to us about which of the models courts and legislators should be channeled towards in making their response? Or legislators and courts are not in essence part of this civil society? That the civil society is this sort of amorphous, nonstructured institution which the Constitution says nothing about? I am not sure how you could accept my statement and then keep both of your responses at the same time.

MICHAEL MCCONNELL: I may be too much of a lawyer here, but in constitutional law when we ask the question: "Should the Constitution be interpreted any particular way?," we are addressing a question that applies to the state and, indeed, specifically to the law, and not one that applies to the civil society — even though I believe that ultimately the values of the law came from civil society. In some sense this may be a long term/short term problem, and also a question of the audience. In an immediate sense, my audience is lawyers and courts and I ask them, insofar as they are custodians of the law, not to try to resolve this problem. In a longer sense, my audience has to be civil society, I say to them: "Insofar as you think that the law ought to resolve this, it should not; but this is one of those matters that ought to be resolved on a decentralized basis and not through legal institutions." I do not want to say — in fact, it would be completely contrary to my general political philosophy to say — that there is no coherent distinction between the state and the civil society. I believe in limited government, which is to say that I believe that more ought to be on the civil society side and less on the government side.

DOUGLAS STURM: I have always read the religion clauses of the First Amendment as a statement pointing in two directions: towards the practice of religion *and* towards the practice of politics. In a sense, the religion clauses constitute a warning. We must be ever cautious about both church and state, about both the community of the spirit and the coercive community. Both have a propensity for perversity. Both can be inhuman. Both can destroy. Both can dehumanize and degrade.

On the other hand, both the practice of religion and the practice of politics are expressions of vital dimensions of our humanity. We have, so far in our discussions during this Conference, avoided the central question of philosophical anthropology: What does it mean to be human? Attending to this question will not, to be sure, solve

all the nitty-gritty issues we have been discussing, but it might provide a context for our consideration of them.

In that connection, we might, for instance, approach the issue Professor Lupu posed: Why, in the First Amendment, is religion singled out because religion, at its best, is a paradigmatic case of the searching of the human spirit for truth, for beauty, for goodness, for holiness? It is a paradigmatic case of the human spirit breaking the conventions and boundaries in its wonderings and imaginings. It is a paradigmatic case of the human spirit probing the deepest mysteries of life and joining with others in its seeking and in its affirmations about those mysteries. Respecting that movement of the human spirit, we must, at the same time, respect those who have doubts about the process: atheists and nihilists, cynics and the indifferent. We must respect them, for the human spirit cannot be, in this process, coerced. This is what lies behind the Free Exercise Clause: We must respect the movements of the human spirit in this dimension because that is at least part of what it means to be human. When enlivened and awakened to the depths and mysteries of life, we cannot rest satisfied with what we have been and are in our ordinary existence. And we often join with others, organizing ourselves in various ways, as we engage in that searching and wondering. To me, the religion clauses of the First Amendment constitute an acknowledgement of and a deep respect for this dimension of our human character.

As to political association, while we must, given any sensitive reading of our history, acknowledge the perversities of politics, we should also acknowledge its proper place in our common life. I am not like Stanley Hauerwas or, say, Jacques Ellul who seems always to see the state as a threat. At its best, government, as William Penn affirmed, has a positive purpose. As religion is a paradigmatic case of the search of the human spirit for things ultimate — the good, the true, the beautiful — so government is a paradigmatic case of the effort to organize ourselves in communities through which we can empower and enable all persons to engage in that search. Government thus has a more limited purpose than religion. But this means it can go too far; it can overreach its proper boundaries. Moreover, instead of empowering all citizens, it can function to sustain established forms of economic and social injustice. So it does in the United States with its vast gulf between the rich and the poor, with its long history of racism and sexism. That is the pervers-

sity of government. But in contrast to the perversity of government stands its proper purpose: to serve as institutional means of providing the economic, cultural, and social conditions for the flourishing of the human spirit.

In sum, we must be ever cautious about the perversities of both religious institutions and governmental forms. At the same time, our task is to bend the religious and the political forces in our midst to accomplish what they were intended to accomplish, namely, to enable us to be the best we can be.

MICHAEL MCCONNELL: Let me respond to that. You raise two points. One is about to whom the First Amendment is directed; and the second has to do with why religion is singled out. I think it is simply wrong to say that the First Amendment is directed at both church and state. That certainly is not what it says. What it says is: "Congress shall make no law . . ." And indeed, I would consider it to be a gross overstepping of the authority of the people of the United States had they purported to act through their Congress and the various states in ratifying the First Amendment to instruct the churches at all. It is not within the authority of the people to be instructing the churches about what they should do. There are laws which will keep not only churches but everyone else — equally, without discrimination, without singling out churches especially — from doing particular evil things. But the church as the church is not within the jurisdiction even of the sovereign people of the United States.

And that relates to your second point: Why is religion singled out? Why is it that that statement can be uniquely made? I would appeal to the text that you yourself read to us this morning, which was Madison's explanation for this. I see two themes within it. One is that the government is no judge of spiritual truth. So this has to do with the competency of government. With regard to ordinary public policy — how much pollution control should we have? Should we go to war with Iraq? Should we build a road here? What kind of law should be passed with respect to this, that, and the other thing based upon various utilitarian calculuses — the state is the appropriate decisionmaker for that. The state has competence to decide that. Those are the decisions that we make together as a political community. The state has no authority with respect to religious truth; and when it speaks to religious truth, no one has any reason to pay any attention to it whatsoever. And the second theme — ac-

according to Madison — is that when people enter into a civil society, they come into it with preceding obligations to what he calls the “Governor of the Universe.” It is not because of humanness that this is true. It is because of the sovereignty of God. The prior obligations of the people to the ultimate sovereign derive from God’s nature, not human nature — which the government is simply incapable of understanding, and which is prior to the government. Yes, we are going to protect ourselves as a political community against the excesses of religious communities when they do things that are evil. We are going to do that just as we protect ourselves against other evil things. But, no, the reason religion is singled out is that the government is not allowed to move into that sphere. It is not that the church is in any way limited by the First Amendment; it is not limited by the First Amendment. It is the government that is limited by the First Amendment.

QUESTION: I want to emphasize what I think is the dark side of what you were talking about. Because I am very bothered by it. I think it is a fundamental disagreement with what Professor McConnell seems to be saying. He is talking as if, I guess, we are in Eastern Europe making a constitution in which we have seen the state separate from civil society. But the First Amendment, as I understand it, grew out of historic experience of the Anglo-American people; and I trace it back to the Toleration Act in which basically a truce was called, not because the government was operating distinct from civil society but because it was captured. And that in the Western world, probably the greatest cause of internecine conflict and murder was grounded in religious difference. I think the First Amendment speaks to that very strongly. And so, with Professor Lupu’s comment: Why is it there? And looking for — maybe it is an overstatement, but — a difference in kind about religion and totalitarian governments. Holmes told us, “Look to differences in degree.” And all you have to look to is historical experience. At their time the degree that had become a difference, in terms of society’s slaughtering itself, was religion. And so, people were being whipped in the colonies not because the state was the way a conservative today looks at it, but because the state was captured by particular religions that were whipping other religions. And I look at the First Amendment as a truce asking us to stop that.

MICHAEL MCCONNELL: If anything was an establishment of religion to the people as of 1789, it was the Church of England. And I

would submit to you that the Church of England did not represent the church capturing the state, it represented the state capturing the church. I do not want to offend any of my Anglican friends by recounting the history of the formation of that church; it is well known to all of us. But the whippings that went on in Virginia were not at the instigation of the church in Virginia, they were at the instigation of the gentry in Virginia who had control over both church and state and used both as an instrument of social control. There were some places in this country in which it is easier to say that the church had control over the state. This was much closer to the model in Massachusetts; although even there, I think that the tables were as frequently turned. But it is interesting that the establishment was not overthrown in New England. In the place where the establishment seemed to be serving the church, rather than the other way around, the establishment survived; and indeed, it survived in Massachusetts until 1834. It was the places where the state had taken over the church that were the object of disestablishment in this country.

CHARLES STRAIN: I think Professor Marshall started us off on a very productive tack. In connection with the last speaker's comments, I suggest that if we look critically at the Enlightenment's version of the history of Europe that we will find that the Thirty Years War was not so much a product of religions steering states toward nefarious ends but quite the reverse. That war involved emerging nation-states prosecuting their nationalist aims in the guise of religion. This leads me back to the original point that there is a balance of danger intrinsic to the institutions of religious communities trying to develop a thoughtful form of self-criticism. Niebuhr's book, *Christ and Culture*,¹ is directed to the religious communities and it says to them in effect: "Look, there are multiple ways in which the religious community is involved in the world and in society, and there are strong points and weak points in each of these models. It is not just a question of deciding between them but really thinking through those strengths and weaknesses." Now, if that kind of a voice were to become salient within religious communities, then some of the dangers that they represent would be counteracted by a dialectic within the community itself. I am concerned that in the Supreme Court's reasoning from case to case

1. H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951)

there is no equivalent to Niebuhr's critical awareness. In this case it would be an awareness of the models of the state in its dealings with religions that they are working out of and of the limits of those models. I think that part of Professor McConnell's talk was leading in that direction: that perhaps there ought to be something like Niebuhr's book that the Justices ought to have in mind when they begin to weigh these various cases, so that they can see the dangers in their own positions. Perhaps I will leave it with a question. Do you see evolving in the Court itself some judicial equivalent of Niebuhr?

MICHAEL MCCONNELL: Unhappily, I do not. It is so dispiriting to see Justices latch onto a particular formula and then just stick with it even after it has become apparent to any reasonable observer that it is counterproductive. And they also seem completely incapable in one case of thinking about the implications of what they say in some other context.

