Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence

Michael W. McConnell

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
LAW’S PERSPECTIVE OF RELIGION AND ITS VIEW OF THE STATE

CHRIST, CULTURE, AND COURTS: A NIEBUHRIAN EXAMINATION OF FIRST AMENDMENT JURISPRUDENCE

Michael W. McConnell*

Lawyers naturally think about the set of issues we call “church and state” on the assumption that legal principles — principally the religion clauses of the First Amendment — are the primary, perhaps the only, normative authority to which we can refer for the organizing principles of society.¹ We develop various formulations (such as the Lemon test,² the “wall of separation,”³ or the “compelling interest test”⁴) and we believe that American society, including the churches, should act in accordance with these legal understandings. Thus, when churches act in a way that does not conform to our legal conceptions — take the example of Catholic bishops excommunicating state legislators for voting in favor of abortion rights — we complain that this endangers democratic values, threatens the separation of church and state, or violates some other principle of

* William B. Graham Professor of Law, University of Chicago Law School. The author wishes to thank friends and colleagues for helpful comments on an earlier draft: Albert Alschuler, Angela Carmella, Alan Freeman, Abner Greene, Elena Kagan, Lawrence Lessig, Robin Lovin, Elizabeth Mensch, Michael Perry, and Daniel Ritchie. This Essay builds upon an oral presentation made at the Bicentennial Conference on the Bill of Rights sponsored by The Center for Church/State Studies, DePaul University College of Law, held in Chicago on December 6 and 7, 1991.

¹. I refer here to “normative authority” rather than to power. In ordinary times, there is little doubt that civil government has the power to enforce its will over the church. But lawyers and religionists share the assumption, which I explicitly adopt here, that there is a difference between power and authority. It is the latter with which I am concerned.


³. Everson v. Board of Educ., 330 U.S. 1, 16 (1947). “In the words of Jefferson, the clause against establishment of religion was intended to erect ‘a wall of separation’ between church and State.” Id.

conduct conceived in constitutional terms. The church is conceived as having a limited right of self-determination — a subordinate normative authority — within a civil order constituted by the Constitution.

This obviously cannot be the perspective of religion. We should render to Caesar the things that are Caesar's, and to God the things that are God's. But everything belongs to God, and only some things to Caesar. From the perspective of religion, the question is: How far does the normative authority of the world extend, and how can this be reconciled with the normative authority of the church? The Constitution is addressed to "Congress"; it does not purport to lay down rules of conduct for the church. This is not to say that the religious perspective requires defiance of the law, for in most religious traditions the law has a certain authority. Caesar's domain is not inconsequential. But it is to say that bodies of believers will reach judgments about these matters on their own: there is no natural subordination of faith to law.

In this Essay, I attempt to view the law of church and state not in terms of the familiar legal categories, but in light of the ways in which the various communities of believers have understood the relation between spiritual and temporal authorities. I will treat the communities of believers, constituted by nonlegal sources of normative authority, as the primary actors and assume that the law responds to their choices, rather than the other way around. In so


6. A particular religious tradition might come to the conclusion that the function of the church is properly dictated by the civil authorities. See infra note 157 and accompanying text for a discussion of Erastianism. But if God is the ultimate sovereign, it is more common to conclude that the functions of God's church cannot be demarcated in any fundamental sense by civil authorities. The spirit blows where it will. John 3:8.

7. Lest the reader consider this statement dangerously anarchic and un-American, see James Madison's argument in the Memorial and Remonstrance Against Religious Assessments, which the Supreme Court has treated as the single most authoritative source for understanding the meaning of the religion clauses of the First Amendment:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.

doing, I make no claim that this is a “better” way to analyze the questions of church and state. I claim only that adoption of this perspective casts some light. For the most part, therefore, the Essay will be descriptive rather than normative. I will not praise, criticize, or analyze legal doctrines, but instead take a close look at what judges and believers have had to say about the relation of religious communities to public life.  

The classic work providing a taxonomy of relations between religious communities and the public sphere from a theological perspective is H. Richard Niebuhr’s *Christ and Culture.* In this book, Niebuhr describes five forms of interaction between the Christian church and the wider society, and examines their theological justifications and roots in church history. I will use his taxonomy to order the analysis. I will then examine legal sources, primarily opinions of the United States Supreme Court, to explore how the legal system has responded to these models.

The nature of the inquiry requires that I make some modifications to Niebuhr’s analysis. As explained in more detail below, two of Niebuhr’s models can be treated together because their legal implications are closely related. One of Niebuhr’s models must be divided into two. More fundamentally, Niebuhr’s analysis is directed to the Christian church while my legal analysis must be directed to a pluralistic society. Thus, instead of “Christ” we must talk of religious communities, and be aware that the various religious communities of the United States provide different answers to the questions of how to live a righteous life. I will use the shorthand expression “church,” but readers should understand that I speak of a church, indeed many churches, not of the Church, and that I include in this expression not just Christian but Jewish, Muslim, Hindu, Buddhist, Native American, and other religions as well. For the most part, I will speak in the theological language of Christianity. This is not to exclude other faiths from the discussion but to give the discussion concreteness. I assume that any religion that makes comprehensive normative claims on its adherents will face the same problem of reconciling those claims to the normative claims of the wider culture.

---

8. In an excellent essay published after this Essay was composed, Angela Carmella uses Richard Niebuhr’s taxonomy as a starting point for a critique of current constitutional doctrine. See Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence,* 60 Geo. Wash. L. Rev. 782 (1992).

9. H. Richard Niebuhr, *Christ and Culture* (1951). My thanks to Daniel E. Ritchie, of Bethel College, for introducing me to this work years ago.
and that the possible answers must bear some resemblance — even if they are not identical — to the answers Niebuhr has identified in the Christian tradition.

Following Niebuhr, I will use the term “culture” to denote the public sphere, the organized community. By this I mean something more than the government and something less than the sum of everything that goes on. Culture, in this sense, does not include the “private” — what we do and believe in our own homes and churches. But it includes the institutions that shape the normative understandings of the community, even when they are not, strictly speaking, “government.” An analogy might be drawn to what is often called, especially in Eastern Europe, “civil society.” When it is relevant to distinguish between the state and the culture, I will make this clear in the particular context.

I. CHURCH APART FROM CULTURE

Niebuhr’s first model of the relation between the normative claims of religion and society is what he calls “Christ Against Culture.” Under this model, the world is considered to be irremediably sinful and to have no normative authority whatsoever. Christians are driven to choose between Jesus and the world; one cannot have allegiance to both. Those who follow this understanding are called “radical” or “exclusive” Christians because their Christianity represents a total rejection of the world.

As it relates to the legal system, the posture of religious exclusivity can manifest itself in two quite different forms. The religious community can either withdraw from the world or it can fight with the world. I therefore have divided Niebuhr’s category into two: “Church Apart From Culture” and “Church In Conflict With Culture.” When churches see themselves as apart from culture, they seek to separate themselves from the wider society, culturally and sometimes even physically. The members of the community typically do not vote or hold office, or otherwise seek to participate in public life. All they ask of the outside world is to be left alone. They do not seek to influence the world directly, except by prayer and conversion, since there is no hope that the unregenerate will escape the snares of the world without the saving grace of God.

Niebuhr traces this ideal in the Bible to the First Letter of
John,\(^\text{11}\) which advises Christians: “Do not love the world or the things in the world. If any one loves the world, love for the Father is not in him,”\(^\text{12}\) and in patristic thought to Tertullian.\(^\text{13}\) Its great historical exemplar is the medieval monastic movement.\(^\text{14}\) According to this ideal:

The state and Christian faith are simply incompatible; for the state is based on love of power and the exercise of violence, whereas the love, humility, forgiveness, and nonresistance of Christian life draw it completely away from political measures and institutions. . . . Against [the evil of the state] there is no defense except complete nonparticipation, and nonviolent striving for the conversion of all men to peaceful, anarchic Christianity.\(^\text{15}\)

This conception of relations between church and culture is relatively easy for the legal system to accept. It corresponds roughly to the legal metaphor of the “wall of separation” between church and state (though without the secularistic bias that the metaphor frequently seems to import). It points toward a view of the religion clauses with a strong establishment as well as a strong free exercise component. In essence, the public sphere should be entirely “secular,” unaffected by religious principles — and in return, religious communities will be protected from assimilation by exceptions and accommodations. In its mild form, this is the perspective of many traditional civil liberties organizations.\(^\text{16}\) Carried to its logical extreme, it suggests that religious persons are not, and cannot be, full citizens. They cannot participate in public life, for their religious perspective is barred from the secular state, and they are not bound by the obligations of the law. They are strangers in a strange land.\(^\text{17}\)

The leading example of a religious group taking this perspective in the annals of the Supreme Court is Wisconsin v. Yoder.\(^\text{18}\) At issue in Yoder was whether teenagers from the Old Order Amish community could be required to attend school beyond the eighth grade.\(^\text{19}\) The Amish are the quintessential separatist community.

\(^{11}\) Id. at 46-48.
\(^{12}\) John 2:15.
\(^{13}\) Niebuhr, supra note 9, at 51-55.
\(^{14}\) Id. at 56.
\(^{15}\) Id. at 61. Here, Niebuhr is summarizing the thoughts of Tolstoy, whom he considers illustrative of radical Christianity in the modern era.
\(^{16}\) For a recent defense of the position, see Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195 (1992).
\(^{18}\) 406 U.S. 205 (1972).
\(^{19}\) Id. at 207-10.
According to the Court's description, "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence."20 The Amish do not participate in public life and do not wish to be influenced by it. They view the outside world — "the English" — as an alien culture. The reason the Amish opposed education beyond the eighth grade in Yoder was that it would "expos[e] Amish children to worldly influences in terms of attitudes, goals, and values . . . ."21 Since the very conflict between the church and the state in Yoder was over the legitimacy of the Amish decision to remain separate — and to keep their children with them — this illustrates the willingness of our legal system to accept the "Church Apart From Culture." The Supreme Court held unanimously that the Amish have a constitutional right to protection from being "assimilated into society at large . . . ."22 The legal system can accept the proposition that a religious community is a self-contained unit with the right to set its own norms, so long as — in the Court's words in Yoder — it "interferes with no rights or interests of others . . . ."23

Not many religious communities adopt so radical a separation from the world. But many religious traditions take a less extreme version of the same position. They treat personal faith and piety as the central feature of religion, neither allowing the mores of the wider culture to affect their way of life nor attempting to affect the wider culture (except through prayer and evangelism). The posture is one of live and let live. This attitude typically characterized Protestant fundamentalism from its birth as a self-conscious religious movement in the early part of this century until its conversion to political action in the middle of the 1960s.

So agreeable is this model of church-state interaction to the legal mind that at times the Supreme Court Justices speak as if it were the only appropriate model. In Lemon v. Kurtzman,24 the leading case interpreting the Establishment Clause, Chief Justice Burger wrote that "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of

20. Id. at 210.
21. Id. at 218.
22. Id. Justice Douglas's partial dissent did not depart from the unanimity of the reasoning on this point.
23. Id. at 224.
private choice . . . ."26 This seemingly bland statement contains two quite controversial propositions: that the Constitution, rather than the independent decisions of individuals and communities, determines what role religion is supposed to play in the lives of the American people, and that this role is confined to the private sphere. Significantly, the Court asserted these propositions in Lemon without explanation or defense, as if they were obvious and incontestable.

In Grand Rapids School District v. Ball,26 the Court expressed the view that "religion throughout history has provided spiritual comfort, guidance, and inspiration to many,"27 but that "it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions . . . ."28 This reiterates the theme that the role of religion is radically private — essentially to provide comfort and inspiration for its members — and that any wider role in the public sphere is inappropriate. Moreover, it supplies a reason: religion (not just some religions, but "religion") "can divide societies" and "exclude" those of other beliefs. This statement makes excellent sense if the religious world view is radically discontinuous from the perspectives of the rest of the community — if the church is "apart from culture." But there is nothing inevitable about this exclusivist conception of religion.

As will be seen, it is equally possible to understand religion as an organic part of the culture, sharing and contributing to many of its deepest beliefs and presuppositions. Under that view, the Court's statement would be difficult to understand. Every group, institution, and ideology shares some presuppositions of the wider culture; at the same time every group "divides" the society and "excludes" those of other beliefs. Yet the Court would never say that the participation of a secular group or ideology in public life would "serve powerfully to divide societies and to exclude those whose beliefs are not in accord," even if it is true. In treating religion as especially likely to be divisive and exclusionary, the Court implicitly adopts the view that the church is apart from the culture in a more radical sense than is true of other communities of belief.

There are signs that this understanding of church-state relations

25. Id. at 625.
27. Id. at 382.
28. Id.
is fading. In recent cases the Supreme Court has been more willing to accept religious participation in public programs and civic life. The other side of the coin is that the Court is increasingly unwilling to shelter the internal activities of religious communities from outside force. In *Employment Division v. Smith*, the Court sanctioned criminal regulation of Native American religious ceremonies that occur far from population centers and that apparently do not affect outsiders. In *Jimmy Swaggart Ministries v. Board of Equalization*, the Court agreed that the state can collect sales and use taxes when a religious ministry distributes Bibles, sermon tapes, and evangelistic literature to its adherents. In *Jones v. Wolf*, the Court held that state courts are not necessarily required to decide intrachurch property disputes in accord with the religious communities' own rules but may import "neutral principles of law" from the wider culture. As the Court seems less committed to imposing separationism on religious communities that are involved with the culture, it also seems less tolerant toward religious communities that choose to be separate. It is not clear that *Wisconsin v. Yoder* would be decided the same way today.

II. CHURCH IN CONFLICT WITH CULTURE

The second model of relations I call "Church In Conflict With Culture." Under this model, the religious community adheres to values and ideals antithetical to those of the wider culture, and sees itself as a counterweight to the (im)moral authority of the state. One hears the language of "spiritual warfare" against the "powers

30. Id. at 890.
32. Id. at 397.
34. Id. at 602.
35. Justice O'Connor has espoused a theory of the First Amendment that overlooks the "Church Apart from Culture" model of church-state relations. She takes the position that the Establishment Clause should be interpreted to forbid "endorsements" of religion, on the ground that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). This presupposes that members of minority religions want to be "insiders." Sometimes they do. But an equally important aspect of religious liberty is to allow the religious community to be outsiders. Justice O'Connor's formulation does not take into consideration the fact that the church sometimes prefers to remain apart from culture.
and principalities" of the world. From Niebuhr's theological perspective, this model is indistinguishable from the first, "Church Apart From Culture," in that the religious community totally rejects the normative authority of the world and lives in radical commitment to the authority of Christ. But from a legal or political perspective the two appear almost as opposites. Under the separatist model, the religious and the political communities live in peaceful coexistence, neither attempting to convert the other. Under the conflict model, the two are adversaries, concerned about many of the same issues and competing for the loyalties of the citizens.

In other ages and in other lands, church-state interaction has frequently been characterized by deadly conflict. During the Middle Ages, the armies of the pope and of the Holy Roman Emperor (the "Guelphs" and the "Ghibellines") fought for control of Rome over a period of many years; the Investiture Controversy and the martyrdom of Becket represented the attempt of civil authorities to control the church; popes used their powers of excommunication (even over entire nations) to assert authority over the civil rulers. In recent times, the communist governments of Eastern Europe and the Soviet Union were committed, at least in principle, to the destruction of religion and of the church as an institution; and the church was the hardiest element of the opposition. The accession of a Polish pope, which created an alternative center of authority for the Polish nation, was a powerful factor in the unraveling of the Communist regime. Figures such as Archbishop Desmond Tutu, Archbishop Oscar Romero, and the Dalai Lama have played similar roles in other regimes.

In marked contrast to their tolerant attitude when those with radically different religious value systems keep to themselves, the courts invariably side with the state and allow the government to use its coercive power to crush religious opposition when they perceive that the church is attempting to hold to its norms not just as a matter of quiet internal governance, but as a challenge to the legitimacy of the rules of the state.

A recent example involves the so-called sanctuary movement, in which churches assisted undocumented aliens from El Salvador to enter the United States illegally in defiance of the immigration

36. See Ephesians 6:12 ("For we are not contending against flesh and blood, but against the principalities, against the powers, against the world rulers of this present darkness.").
The movement did not confine itself to a passive refusal to cooperate with the authorities. Rather, a prominent leader of the movement, a Presbyterian minister, announced that the church “‘can no longer cooperate with or defy the law covertly as we have done,’” organized demonstrations, and actively sought media publicity for the movement’s effort to frustrate enforcement of the law. Even “applying the most exacting scrutiny,” the court of appeals rejected the movement’s claim of constitutional protection, and the participants were convicted of criminal violations. This result was inevitable, because when churches become active opponents of government they must expect the government to treat them as such. “Live and let live” has two sides. As the court noted, “‘[t]he statute under which [defendants] were convicted is part of a comprehensive, essential sovereign policy. We cannot engraft judicial exceptions . . . .’”

A contrasting case involving a similar religious conviction may seem to undermine the claim that the legal system is more willing to tolerate “Church Apart From Culture” than it is “Church Against Culture,” but this impression turns out to be mistaken. In *American Friends Service Committee v. Thornburgh*, the institutional body of the Quaker Church sought a free exercise exemption from the requirement that employers assist in the identification and expulsion of illegal aliens. In their complaint, the church officials stated that they “do not challenge Congress’ authority to make rules for the admission of aliens to citizenship and to control the national borders,” but only to “their ‘conscription’ as border guards which violates their free exercise rights.” Notwithstanding the church’s posture as simply wishing to remain uninvolved with government policy, their claim was rejected by the federal courts. This may seem to contradict my analysis. The court of appeals implied,

37. See United States v. Aguilar, 871 F.2d 1436 (9th Cir. 1989) (involving the criminal prosecution of defendants for smuggling or transporting Central American refugees into the United States).
38. Id. at 1442 (quoting a March 9, 1982, newspaper interview with the minister).
39. Id.
40. Id. at 1468.
41. Id. at 1469 (quoting United States v. Merkt, 794 F.2d 950, 956 (5th Cir. 1986), cert. denied, 480 U.S. 942 (1987)).
42. 718 F. Supp. 820 (C.D. Cal. 1989), aff’d, 941 F.2d 808 (9th Cir. 1991).
43. Id. at 822.
44. Id.
45. Id.
ever, that a different result might have been reached under free exercise doctrine prior to Employment Division v. Smith. Since Smith represents the very recent trend toward abandonment of strong free exercise protection even for the “Church Apart From Culture,” this does not, therefore, undermine the argument here. Indeed, the contrast between the opinion in the sanctuary case, which rejects the church’s claim even under the “most exacting scrutiny,” and the opinion in the American Friends case, which suggests the church would have won under a higher standard of review, confirms my analysis.

Another telling example is the treatment of religious conscientious objection to the draft. Since before the Revolution, American governments have exempted religiously-motivated pacifists from conscription. Such persons represent a markedly different moral vision but pose no serious challenge to the government’s policy. Thoroughgoing pacifism is an otherworldly posture, and few in the wider culture would treat it as a viable option for the United States this side of utopia. The state can exempt pacifists from the draft in recognition of their personal convictions without suffering a serious challenge to the moral authority of the state. The situation is quite different with regard to those who conscientiously object to participation in a particular war on the ground that it is unjust. These objectors present a direct challenge to the moral authority of the government, since the calculus that would lead an individual believer to the conclusion that a war is unjust is no different, in principle, from the calculus that Congress and the President must conduct

46. See 941 F.2d at 810.
47. Even under Smith, the American Friends case should have been resolved in favor of the church for three reasons. First, institutional autonomy stands on a different constitutional footing than do the claims of individual conscience governed by Smith; a church cannot be required to conduct its own hiring in a manner that conflicts with its religious doctrine. For an explanation, see Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 725-26 (1992). Second, while churches may be required, under Smith, to refrain from legal violations, the institutional separation of church and state argues against allowing the state to enlist churches as active enforcers of the law. Third, since the employer sanctions imposed by the law contain exceptions in recognition of hardships faced by independent contractors, household employers, and employers of persons since November, 1986, the government may be under an obligation to accommodate the much greater burden on religious employers whose faith demands that they welcome strangers and aliens. Had the American Friends case been properly decided, the result would contrast even more sharply with that in the sanctuary case.
in deciding to go to war. Accordingly, it is not surprising that Congress has refused to exempt objectors of this sort, nor that the Supreme Court has upheld this policy.\(^49\) When Catholic believers in just war doctrine held that the Vietnam War was an unjust war, this made a position of mutual respect and coexistence between religion and government all but impossible. The objectors went to jail.

The distinctive feature of these cases is that the religious community insisted not only that it was obliged to adhere to a standard of conduct that differs from the government's, but that the wider society should conform to the religious standard as well. The sanctuary movement and the just war opponents to the Vietnam War did not share the vision of the monastics or the Amish, that the religious community is governed by the commands of God and the rest of the world by its own natural sinfulness. Rather, they believed that the commands of God apply to the entire society and that it is their responsibility, as Christians, to uphold His authority. In the ensuing struggle between church and culture, the law stands on the side of the culture.

This is not meant as a criticism of the courts. How could they act otherwise? The courts are an arm of the state. To be sure, they are the arm of the state most receptive to the claims of individuals and outsiders and least committed to enforcement of the political program of the state. But when the moral authority of the state is genuinely challenged on a matter of importance, there is no doubt on which side the courts will come down. Churches are permitted to preserve their own value systems (within limits) so long as they remain apart from culture. When they engage in conflict with the culture they must expect to find the courts arrayed against them as part of the apparatus of the state, and the Constitution of no assistance.

Even when the religious community tries to keep to itself, the state will often treat it as an adversary if the disagreement is over one of the fundamental tenets of the official culture. I suspect this is because of a fear that the mere existence of a community living according to a different creed will undermine the attempt of the state to order the society. Perhaps the most dramatic example was the late nineteenth-century conflict between federal authorities and the Mormon Church over the issue of polygamy. At the high point

\(^{49}\) See Gillette v. United States, 401 U.S. 437 (1971) (upholding the conviction of defendants for failing to report for duty in the armed forces during the Vietnam conflict).
of the conflict, Congress passed and the Supreme Court upheld legislation punishing those who obeyed Mormon ordinances regarding marriage,\textsuperscript{50} revoking the legal charter of the Church and seizing its property,\textsuperscript{51} and denying anyone who professed belief in Mormon creeds the right to vote.\textsuperscript{52}

Two cases involving racial discrimination further illustrate the point. In \textit{Berea College v. Kentucky},\textsuperscript{53} a religious college during the heyday of Jim Crow laws was punished for disobedience to the state's laws requiring segregation — and the Court took the side of the state. More recently, in \textit{Bob Jones University v. United States},\textsuperscript{54} a religious college opposed to interracial dating was punished for being in violation of "public policy" — and again the Court took the side of the state.\textsuperscript{55} At one level, these results seem inconsistent; but at another level they are of a piece. Society's values change, but the primacy of the state over the religious opposition remains constant.\textsuperscript{56}

The decisive point in \textit{Bob Jones University} was that the religious community challenged the correctness of a moral conviction to which the legal and political system is deeply committed, and on which the prestige of the modern Supreme Court is largely based. The Court repeatedly emphasized that eradication of racial discrimination in education is "a most fundamental national public policy"\textsuperscript{57} and that the contrary practice of Bob Jones University "violates deeply and widely accepted views of elementary justice."\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{50} Reynolds v. United States, 98 U.S. 145 (1878).
\item \textsuperscript{51} Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).
\item \textsuperscript{52} Davis v. Beason, 133 U.S. 333 (1890).
\item \textsuperscript{53} 211 U.S. 45 (1908).
\item \textsuperscript{54} 461 U.S. 574 (1983).
\item \textsuperscript{55} Analysis of the case is complicated by the fact that it involved revocation of tax-exempt status, rather than direct criminal or civil sanction, and there are hints in the opinion that a direct sanction might not be constitutional. \textit{Id.} at 603-04 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets."). In other contexts, however, denial of tax benefits for the exercise of constitutional rights is treated as equivalent to direct sanction. Speiser v. Randall, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.").
\item \textsuperscript{57} \textit{Bob Jones Univ.}, 461 U.S. at 593; see also \textit{id.} at 592-94 (referring repeatedly to "fundamental public policy"); \textit{id.} at 604 ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . .")
\item \textsuperscript{58} \textit{id.} at 592; see also \textit{id.} at 598-99 (referring to "an educational institution engaging in practices affirmatively at odds with this declared position of the whole Government").
\end{itemize}
Justice Jackson once wrote that "freedom to differ is not limited to things that do not matter much." The actual practice of the Court belies his statement. Whenever religious communities (or other sources of dissent from official policy) challenge the government on an issue that "matters much" to the government, the dissidents lose. I know of no exception.

III. CHURCH ALIGNED WITH CULTURE

Niebuhr's next category is "The Christ of Culture." Under this model, Christians identify their values with the "finest ideals, the noblest institutions, and the best philosophy" of the culture. Those who follow this understanding Niebuhr calls "cultural Christians." Cultural Christians "feel no great tension between church and world, the social laws and the Gospel, the workings of divine grace and human effort, the ethics of salvation and the ethics of social conservation or progress." On the one hand, according to Niebuhr, "they interpret culture through Christ, regarding those elements in it as most important which are most accordant with his work and person . . . ." On the other hand, "they understand Christ through culture, selecting from his teaching and action as well as from the Christian doctrine about him such points as seem to agree with what is best in civilization." They present the faith not in opposition to, but in light of, the intellectual and moral currents of the day.

Under this model, the religious community evolves in consonance with the fundamental normative understandings of the wider culture. The church is monarchical in the age of kings and democratic in the age of democracies. When Darwin's theory of chance variation and natural selection becomes widely accepted among scientists, the church adjusts its interpretation of the book of Genesis. When the equality of women gains popular acceptance in the wider culture, the church opens its positions of leadership to women and embraces feminism as part of its doctrine. The ethical pronouncements of the church and of the New York Times editorial page are difficult

60. Niebuhr, supra note 9, at 83-115.
61. Id. at 103.
62. Id. at 104.
63. Id. at 83.
64. Id.
65. Id.
to tell apart. The church is aligned with the culture. The church remains distinctive as a community of worship, but it has no distinctive ethics.  

Moreover, the influence runs both ways. The church is understood to be one of the most important determinants of the culture. Church bodies issue policy statements on the great issues of our time, and they expect to be treated as moral authorities — in effect, as the ethical specialists for the culture. They do not see themselves as outside critics, but as the voice of conscience of the community, expressing the highest ideals of our culture.

The position of “Church Aligned With Culture” is not incompatible with the role of the social or cultural critic, for cultural Christians frequently see their position as in opposition to the vulgar attributes of the wider society. According to Niebuhr:

The cultural Christians tend to address themselves to the leading groups in a society, they speak to the cultured among the despisers of religion; they use the language of the more sophisticated circles, of those who are acquainted with the science, the philosophy, and the political and economic movements of their time.

Thus, in a society characterized by cultural divisions and conflict, one might find cultural Christians on both sides of the conflict: some adhering to the cultural norms of the many, some adhering to the cultural norms of the elite. In modern American society, we see examples of both.

Niebuhr traces the “Christ of Culture” to the earliest days of the Hebrew church, which “sought to maintain loyalty to Jesus Christ without abandoning any important part of current Jewish tradition,” and later to the Gnostics. The position flowered when the Roman Empire became Christian. Christianity was merged with the insights of Greek philosophy to produce the impressive intellectual synthesis of the High Middle Ages. With the Enlightenment came efforts such as Locke’s *The Reasonableness of Christianity* and

66. Id. at 88-89.
67. Id. at 104.
68. Niebuhr identifies elements of cultural Christianity in a wide variety of theological positions, including liberal Protestantism, fundamentalism, Marxist Christianity, and cultural Catholicism. Id. at 102-03.
69. Id. at 85.
70. Id. at 85-89.
71. Niebuhr particularly associates the position with Abelard. Id. at 89-90.
Kant’s *Religion Within the Limits of Reason Alone*.\(^7\) The movement reached its climax, according to Niebuhr,\(^4\) with the era of cultural Protestantism, which lasted in the United States at least until the Second World War. During this time, mainline Protestantism was the dominant influence on American political and cultural life, and the conviction that faith and culture are compatible dominated Protestant theology.

It seems inevitable that the law would be ambivalent about the legitimacy of the “Church Aligned With Culture.” On the one hand, insofar as the law is based on the shared beliefs and traditions of the people, there is no way to avoid the fact that in many respects, the law will coincide with and reflect religious beliefs. As Justice Douglas said for the Supreme Court in *Zorach v. Clauson*,\(^5\) “[W]e are a religious people whose institutions presuppose a Supreme Being.”\(^6\) On the other hand, the constitutional commitment to an official equality among religious denominations makes close identification between government policy and any one religious tradition problematical.

Constitutional arguments regarding the alignment of church and culture were presented most directly in *Harris v. McRae*,\(^7\) the litigation challenging the constitutionality of legislation prohibiting the use of federal Medicaid funds for the performance of abortions. Among other arguments, opponents of the law contended that Congress’s decision “incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences,”\(^8\) in violation of the Establishment Clause requirement that laws have a “secular purpose.” The Court rejected this argument, reasoning that a statute does not violate the Establishment Clause “because it happens to coincide or harmonize with the tenets of some or all religions.”\(^9\) More interestingly, the Court commented that the refusal to fund abortions “is as much a reflection of ‘traditionalist’ values towards abortion, as it is an embodiment of the views of any particular religion.”\(^10\) This suggests

---

73. IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE (1934).
74. NIEBUHR, supra note 9, at 94.
75. 343 U.S. 306 (1952).
76. Id. at 313.
77. 448 U.S. 297 (1980).
78. Id. at 319.
79. Id.
80. Id.
that when church becomes so aligned with culture that it appears to be an inseparable part of the "tradition," the distinction between worldly values and religious tenets ceases to exist. Since on many — maybe most — moral questions the church is aligned with the culture, it is not fruitful to attempt to confine the laws to secular premises.

The alignment of church and culture can also be seen in cooperation between governmental and religious institutions to achieve a goal they have in common. *Bowen v. Kendrick* is a recent, forthright recognition of this model. In *Kendrick*, the Court approved the use of religiously-affiliated grantees in a program designed to discourage teenage pregnancy by encouraging sexual self-discipline. The lower court had held that this was unconstitutional since the issues of sexual morality and religion could not be disentangled. This did not concern the five-Justice majority of the Supreme Court, which noted that "[o]n an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions." Indeed, the Court thought it "quite sensible for Congress to recognize that religious organizations can influence values . . . ." Nor was the involvement of religious organizations in a government-funded program a violation of the Constitution. The Court noted approvingly that there is a "long history of cooperation and interdependency between governments and charitable or religious organizations . . . ." In other words, the Court found it not "surprising" that the church would be aligned with the culture on sensitive and important questions of moral conduct, "sensible" for Congress to recognize and support the role of the church in influencing values, and appropriate for church and government to have a relationship of "cooperation and interdependency."

Similarly, in *Lynch v. Donnelly*, the Court concluded that inclusion of a nativity scene in a city's December holiday display was not unconstitutional, essentially because the religious aspects of Christ-

81. 487 U.S. 589 (1988). The author argued the case as counsel for intervening parents in support of the program.
82. *Id.* at 593.
83. *Id.* at 598-99.
84. *Id.* at 612-13.
85. *Id.* at 607.
86. *Id.* at 609.
mas are a legitimate part of the way this culture celebrates the sea-
son. Even Justice O'Connor, whose opinion has received more
favorable reviews in the literature than that of the majority, reached
essentially the same conclusion on the ground that a "long-stand-
ing" and "non-sectarian" symbol does not communicate a message
of endorsement. If this makes sense at all, it must be on the
ground that when a religious tradition is intertwined with the cul-
ture for so many years that it ceases to be noticed as "sectarian," it
has a legitimate place in the public sphere.

Needless to say, this model of church-state interaction is contro-
versial. To many legal minds, the role of religion becomes problem-
atic precisely when it becomes aligned with culture. Since no more
than one religion or group of religions can be so thoroughly assim-
ilated, this gives the churches that are so aligned a privileged status
in our culture. Thus, in Grand Rapids School District v. Ball, the
Court held that "the symbolic union of government and religion in
one sectarian enterprise . . . is an impermissible effect under the
Establishment Clause." In Edwards v. Aguillard, the Court held
that it is unconstitutional for the public school curriculum to be tai-
lored to reflect the religious convictions of one of the major religions
of the State — something other ideological interest groups (from
environmentalists to AIDS activists to Afrocentrists) routinely strive
to achieve. Religion is special. The Constitution is held to require
the government to hold the more prominent religions of its people at
arms length — to create a distinction between church and public
culture.

It is one thing to recognize that, as a matter of empirical fact,
there exists a substantial degree of alignment between the public
culture and the values of the mainstream religions of the United
States, and another thing to decide whether this presents a constitu-
tional problem. Under one point of view — that reflected in Harris
v. McRae and Bowen v. Kendrick — it is not only normal but
unavoidable in a democratic society that the government will reflect

88. Id. at 687.
89. Id. at 693 (O'Connor, J., concurring).
91. Id. at 392.
93. Id. at 593-97.
94. 448 U.S. 297 (1980).
the values of the mainstream, which in this case is religious. Under another point of view — that reflected in *Grand Rapids School District v. Ball* and *Edwards v. Aguillard* — part of the countermajoritarian thrust of the Constitution is to sever the links between official government action and the religious provenance of the majority's values.

**IV. CHURCH ACCOMMODATED BY CULTURE**

Niebuhr's next two models of the relation between the normative claims of religion and society he calls "Christ Above Culture" and "Christ and Culture in Paradox." The theological differences between these positions are profound, but the constitutional and legal arrangements that they entail are sufficiently similar to warrant combined consideration here.

The former position is similar to "Christ of Culture," in that believers accept the ordinary morality and natural reason of the culture insofar as they go. But they also recognize obligations to a higher standard, not based on the values of the secular world. The demands of the two spheres are of a different nature, but are not in conflict. The Christian will be the best of citizens, and something more. He "must . . . first of all be a good man in accordance with the standard of good culture. Sobriety in personal conduct is to be accompanied by honesty in economic dealings, and by obedience to political authority." But he will also be self-sacrificing, forgiving, and humble, and pursue the "life of love of God for His own sake." Niebuhr calls those who follow this understanding "synthetic Christians" because they seek to adhere to both Christian values and the values of the world, in full recognition of the difference between these values. The synthesist "neither seeks to reinterpret the figure of Jesus so as to make him wholly compatible with the speculative systems of the day, nor does he reject as worldly wisdom the philosophy of the [wider culture]." Niebuhr associates this position especially with Clement of Alexandria and Thomas

---

98. NIEBUHR, supra note 9, at 116-48.
99. Id. at 149-89.
100. Id. at 127.
101. Id.
102. Id. at 128.
103. Id. at 123-28.
Aquinas.\textsuperscript{104}

"Christ and Culture in Paradox" is based on the proposition that the Christian cannot escape his attachment to the sinful world and owes it a certain allegiance, but that the demands of the world and the demands of God are in inherent tension with one another. "[M]an is seen as subject to two moralities, and as a citizen of two worlds that are not only discontinuous with each other but largely opposed."\textsuperscript{105} The only ultimate resolution of this struggle is redemption through the death and resurrection of Jesus. Those who follow this understanding, are called "dualists," since they emphasize the conflict between the City of God and the City of Man. As Niebuhr explains, "the dualist joins the radical Christian in pronouncing the whole world of human culture to be godless and sick unto death"\textsuperscript{106} but "the dualist knows that he belongs to that culture and cannot get out of it."\textsuperscript{107} Niebuhr associates this position especially with the Apostle Paul\textsuperscript{108} and Martin Luther.\textsuperscript{109}

These perspectives, more than the others, lie at the intellectual foundation of the First Amendment. Niebuhr comments that "[d]ualism appears in practical measures and theoretic justifications for the separation of church and state."\textsuperscript{110} Citing Roger Williams as "the symbol and example of such dualism in America," Niebuhr describes Williams as "reject[ing] the synthetic and conversionist attempts of Anglicanism and Puritanism to unite politics and the gospel, both because the union corrupted the gospel by associating spiritual force with physical coercion, and because it corrupted politics by introducing into it elements foreign to its nature."\textsuperscript{111} The demands of civil and spiritual kingdoms are not the same, but the individual is a citizen of both.

The jurisprudence of the Free Exercise Clause can be seen as the legal response to the dualist and synthetic models of interaction between faith and civil society. From a constitutional point of view, "Christ Above Culture" states the ideal: the American polity should be such that every citizen can be a full and equal participant in civil

\textsuperscript{104} Id. at 128-37.
\textsuperscript{105} Id. at 43.
\textsuperscript{106} Id. at 156.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 159-67.
\textsuperscript{109} Id. at 170-79.
\textsuperscript{110} Id. at 183.
\textsuperscript{111} Id.
society without being forced to sacrifice his religious identity. Insofar as government is responsible for creating worldly norms that conflict with religious dictates, the objective of the constitutional order is to reduce the degree to which "Christ and Culture" are "In Paradox." Thus, Madison argued that those entering into the social contract do so with a "reservation" of their "allegiance to the Universal Sovereign." 1112 By restricting the powers of government, the United States would minimize the tension between the demands of earthly and spiritual authority. I call this model "Church Accommodated By Culture" because the central question it addresses is how the government can reduce the conflict between civil and spiritual authority by making special accommodations of religion.

Modern First Amendment law presents three different answers to the accommodation question: (1) that accommodation is required to the maximum degree consistent with the compelling interests of the state (particularly maintenance of public peace and order); (2) that the political branches are permitted to pursue a policy of accommodation, but are not required to do so by the Constitution; and (3) that the Constitution forbids accommodation of religion. 1113

The first position prevailed in the Supreme Court from at least 1963 until 1990. The leading case was Sherbert v. Verner. 1114 Sherbert involved a Seventh-Day Adventist who lost her job and was unable to find another, on account of her unavailability for work on Saturdays. 1115 Under state law, unemployment compensation is not provided to persons who refuse to accept "suitable work" when it is offered. 1116 The worldly standard required work, and the religious standard required rest on the sabbath. Both standards had authority, but the two were in conflict. The Supreme Court responded to this situation by holding that the state could not structure its unemployment compensation system in such a way as to force the believer "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other

---

112. Memorial and Remonstrance, supra note 7; see also Everson v. Board of Educ., 330 U.S. 1, 64 (1947) (Rutledge, J., dissenting).
113. For my analysis of the legal issues, see McConnell, supra note 47, at 685; Michael W. McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1.
115. Id. at 399-400.
116. Id. at 401.
Rather, the state was forced to accept religiously-motivated refusals to accept employment as within the category of "good cause." So defined, the state law ceased to conflict with the religious requirement, and the claimant was able to live in obedience to both.

In 1990, the Supreme Court abandoned this interpretation of the Free Exercise Clause in *Smith,* holding that the Constitution "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'." In that case, a state law prohibited ingestion of peyote, which is part of the central religious ceremony of the Native American Church. The Court held that the state is under no obligation to create an exception or accommodation for this religious use. This position is not based on a disagreement about the desirability of accommodation as a governmental practice, but on the institutional question of which branch of government — legislature or judiciary — should make decisions of this sort. After *Smith,* accommodation is not a constitutional right, but a matter of legislative policy; legislatures are free to make religious exemptions or accommodations if they wish. "[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required ...." Thus, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* the Court upheld a statute exempting religious organizations from the provisions of the Civil Rights Act of 1964 that prohibit discrimination on the basis of religion. The Court stated that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."

Some commentators argue that accommodation of religion is un-

117. Id. at 404.
118. Id. at 401.
120. Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
121. Id. at 874-76.
122. Id. at 890.
123. Id.
125. Id. at 335.
This position is difficult to summarize in a few words, but it rests fundamentally on the proposition that the law ceases to be impartial when it makes exceptions for particular citizens on account of their private beliefs. As Justice Frankfurter put it in his dissenting opinion in the flag salute case, "[t]he constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."\textsuperscript{127}

One can see this position as a denial that the First Amendment has any relevance to the problem posed by religious dualists. If believers are able to synthesize the authorities of church and state, that is fine; if not, it is their problem.

From the theological perspective of "Christ and Culture in Paradox," the Frankfurterian anti-accommodation position has much to commend it. The tension between faith and law, according to this perspective, is "the fundamental and ever-present situation,"\textsuperscript{128} for "[a]ll human action, all culture, is infected with godlessness . . . ."\textsuperscript{129} The feeble attempts of government to accommodate religious convictions cannot rectify, but can only disguise, this situation. Indeed, there is something unseemly about approaching the seat of government to ask for an accommodation, for the central feature of the godly life is refusal to flinch from living out the implications of the paradox. The believer's willingness to suffer the earthly consequences is to the glory of God. No one ever said that following the cross would be without cost.

Yet the legal perspective must be different. The spiritual implications of dualism are beyond the jurisdiction of the law, but the civil consequences are not. From a certain theological perspective, dual-

\textsuperscript{126} See, e.g., Steven G. Gey, Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. Pitt. L. Rev. 75 (1990); Mark V. Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 Sup. Ct. Rev. 373; cf. Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. Penn. L. Rev. 555 (1991) (arguing that legislative accommodation of religion is unconstitutional and that accommodation of religious institutions is never permissible, but that some limited accommodations of individual claims of religious exercise are constitutionally required).


\textsuperscript{128} Niebuhr, supra note 9, at 153.

\textsuperscript{129} Id. at 154.
istic — hence divided — loyalties may be beneficial, but from a civil perspective, divided loyalties can only weaken the commonwealth. "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority," to borrow Madison's language.\textsuperscript{130} It is much better, from the legal perspective, to reduce such tension where possible, so that persons of many different faiths are equally welcome to live out their lives in harmony, not struggle, with the rest of the community. It is one thing for the believer to affirm that obedience to God's will imposes costs; it is something else for the believer's fellow citizens to say that they will be the instruments of penalty and punishment. It may be unseemly for the believer to ask for accommodation. It is not unseemly for his fellow citizens to provide it.

V. CHURCH INFLUENCING CULTURE

Niebuhr's fifth model is called "Christ the Transformer of Culture."\textsuperscript{131} This is based on the proposition that the church can be a blessing to the world by reconciling it to the divine will. Under this conception, the church as the body of Christ continues the work of the incarnation; it is the Word of God made flesh and dwelling among men, bridging the gap between a holy God and a sinful world.\textsuperscript{132} Those who follow this understanding Niebuhr calls "conversionists." The conversionist's view of the relation between faith and culture is similar to that of the dualist, but where the dualist stresses the need to live in paradox until God recreates the worldly order, the conversionist seeks to reclaim and uplift the world. Their difference, then, is not in their understandings of the faith, but in their views of the corrigibility of the culture. Under the conversionist view, the "culture is all corrupted order rather than order for corruption . . . . It is perverted good, not evil; or it is evil as perversion, and not as badness of being."\textsuperscript{133} The "problem of culture is therefore the problem of its conversion, not of its replacement by a new creation . . . ."\textsuperscript{134} Niebuhr states that conversionism represents "the great central tradition of the church,"\textsuperscript{135} and associates it in

\textsuperscript{130} Memorial and Remonstrance, supra note 7, at 10-11.
\textsuperscript{131} Niebuhr, supra note 9, at 190-229.
\textsuperscript{132} See id. at 192-93.
\textsuperscript{133} Id. at 194.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 190.
particular with the gospel of John\textsuperscript{136} and the teachings of Augustine and Calvin.

This model, which I call "Church Influencing Culture," is extremely familiar to anyone acquainted with the American political experience. From the American Revolution\textsuperscript{137} through abolitionism and temperance, to today's controversies over nuclear war, civil rights, abortion, and welfare, the churches have been among the most visible participants in debates over public justice.\textsuperscript{138} The church is neither so closely aligned with the culture that it fails to be critical nor so disaffected from the culture than it must either fight or drop out. Under this model, the religious community and its members are fully as entitled as their fellow citizens to participate in public life and work to achieve their ideals in the public sphere. As the Court noted in \textit{Walz v. Tax Commission}:

\begin{quote}
\textquotedblleft Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.
\end{quote}

The strongest judicial statement on behalf of this model of church-state interaction is Justice Brennan's concurrence in \textit{McDaniel v. Paty}.\textsuperscript{141} \textit{McDaniel} involved a state law that barred members of the clergy from legislative office.\textsuperscript{142} The law was defended on the theory that this would "prevent those most intensely involved in religion from injecting sectarian goals and policies into the lawmaking process, and thus . . . avoid fomenting religious strife or the fusing of church with state affairs . . . ."\textsuperscript{143} Justice Brennan responded that this position "manifests patent hostility toward, not neutrality respecting, religion . . . ."\textsuperscript{144} He recalled that "church and religious groups in the United States have long exerted powerful political

\textsuperscript{136} Id. at 196-206. "God so loved the world that he gave his only Son, that whoever believes in him should not perish but have eternal life. For God sent the Son into the world, not to condemn the world, but that the world might be saved through him." Id. at 197 (quoting \textit{John} 3:16).

\textsuperscript{137} A particularly interesting source is \textit{Political Sermons of the American Founding Era}: 1730-1805 (E. Sandoz ed., 1991).


\textsuperscript{139} 397 U.S. 664 (1971).

\textsuperscript{140} Id. at 670.

\textsuperscript{141} 435 U.S. 618 (1978).

\textsuperscript{142} Id. at 620.

\textsuperscript{143} Id. at 636.

\textsuperscript{144} Id.
pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education.”

According to Brennan, “[r]eligionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.”

In a similar vein, Justice Scalia has noted that “political activism by the religiously motivated is part of our heritage.” “We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved.” He commented that “[t]o do so would deprive religious men and women of their right to participate in the political process.”

More frequently, however, the courts have treated religious involvement in the formation of public policy as presumptively undesirable. According to the Court in Lemon v. Kurtzman, “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect . . . . The potential divisiveness of such conflict is a threat to the normal political process.” Thus, until recently, the mere existence of political divisiveness was treated as an independent ground for holding aid to religiously affiliated organizations unconstitutional, and even now it can be treated as “evidence” of a constitutional violation. That is a powerful deterrent to religious participation in politics.

The most radical position in opposition to religious influence on public policy can be found in the argument that otherwise constitutional legislation must be struck down if it is predicated on religious teachings. In Webster v. Reproductive Health Services, Justice Stevens observed that the “intensely divisive character of much of

145. Id. at 641 n.25.
146. Id. at 641.
148. Id.
149. Id.
150. 403 U.S. 602 (1971).
151. Id. at 622.
152. Lynch v. Donnelly, 465 U.S. 668, 689 (O'Connor, J., concurring) (“Political divisiveness . . . may be evidence that . . . a government practice is perceived as an endorsement of religion.”).
the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate,"154 referring to amicus briefs submitted by some sixty-seven different religious organizations in the case, on both sides of the abortion question. Given the theological nature of the abortion debate, Stevens argued that the state legislature could not "inject its endorsement of a particular religious tradition into this debate"155 — thus suggesting that the Constitution insulates the political process from the influence of the church. He did not explain how — given the presence of religious groups on both sides of the issue — the state could avoid endorsing one side or the other.

In academic circles, the proposition that civil law must not be based on religious arguments is remarkably common, embracing such names as Rawls, Dworkin, Nagel, Ackerman, Sullivan, and (for a time) Tribe.156 The Supreme Court, however, has never accepted this proposition, and it is difficult to see how — in a democratic polity in which many of the citizens look to religious sources for guidance about questions of public justice — it could ever be employed systematically as a legal principle.

VI. THE NEGLECTED MODELS: "CHURCH CONTROLLING CULTURE" AND "CULTURE CONTROLLING CHURCH"

It is somewhat surprising that Niebuhr neglects to discuss two models of the relation between Christianity and culture that have been prominent in the past even if not much in evidence today. Per-

154. Id. at 3085 (Stevens, J., concurring in part and dissenting in part).
155. Id.
haps Niebuhr found both positions so unattractive that they did not warrant discussion. One such model is theocracy: the view that the church is entitled to control civil society. For parallelism, this might be called “Church Controlling Culture.” It differs sharply from the model considered in the preceding section (“Church Influencing Culture”) because in a theocracy a single church has actual political authority, whereas in the preceding model the various faith communities have only the power to persuade. The other — sometimes called “Caesaro-Papism,” or in the English tradition “Erastianism” — is the view that the church is subordinate to the civil authorities. It might be called “Culture Controlling Church.” This model exists, in mild form, in the Church of England, where the Queen is the nominal head of the church and the Prime Minister selects the Archbishop of Canterbury. Fear of this model was a primary motivating force behind the enactment of the Establishment Clause and the disestablishment of religion in the various states.

The legal response to these models is clear: both are core violations of the religion clauses. But since neither model has any significant presence in the current climate of opinion, there is little occasion for judicial enforcement of constitutional norms in these contexts. The closest examples have been cases in which religious organizations have wielded a kind of civil authority through ownership of property, and cases in which the government has seized control of church assets to prevent alleged fraud.

**CONCLUSION**

It is evident that the Court has not settled upon any one model of church-state relations. Under different circumstances, the Court em-

---


158. There are exceptions to everything. The Erastian model seems to have its modern expression in the military chaplaincy, which has been upheld against constitutional challenge. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985). It is understandable that in the military, where all life is regimented, even religion would be under official military control. In the absence of military chaplains, the men and women in the armed services might be denied the opportunity for religious worship.

159. See, e.g., Larkin v. Grendel’s Den, Inc., 459 U.S. 116 (1982) (holding unconstitutional a statute granting the governing bodies of churches the power to prevent the issuance of liquor licenses to establishments within close proximity to church property).

160. See, e.g., People ex rel. Deukmejian v. Worldwide Church of God, Inc., 178 Cal. Rptr. 913 (Cal. Ct. App. 1981) (stating that it was unconstitutional for a state-appointed receiver to assume control of a church’s assets to ensure that they were properly used).
braces different models, seemingly without recognizing the inconsistencies. Even individual Justices take sharply different positions under different circumstances. Is it possible to do better?

At first blush, it would appear that the first and second models, "Church Apart From Culture" and "Church In Conflict With Culture," present lesser establishment difficulties than the others. It is not plausibly an establishment of religion for the government to refrain from interfering with the internal beliefs and practices of a separatist religious community. The difficulties arise only when the state chooses to treat this model of church-state relations as the only appropriate form of church-state interaction, or when the religious community seeks to enter the wider culture without forfeiting its protections. Similarly, the model of "Church in Conflict With Culture" bears little resemblance to establishment. One of the great contributions of religion to politics is to foster dissent from majority will. One thinks of churches standing for abolition of slavery, in opposition to child labor, in support of desegregation in the South, in opposition to unjust wars, and in favor of hospitable treatment of aliens. For churches to serve as a moral counterweight to government obstructs authoritarianism. The only legal question here is to what extent the Free Exercise Clause serves as a shield for religious communities in opposition to the government. Of course, the churches sometimes defend positions that seem repugnant — at least to the majority. The price of maintaining the independence of churches to resist unjust governmental action is that they will have the independence to resist just governmental action as well.

The third and fifth models, "Church Aligned With Culture" and "Church Influencing Culture," are generally thought to be the most troublesome. The ideal of a secular state runs deep; a majority of Americans believes that religion and politics do not mix. Yet the connections between the "Church Aligned With Culture," the "Church In Conflict With Culture," and the "Church Influencing Culture" are close enough to warn against too quick a condemnation. If the church may dissent from public policy — as virtually everyone agrees — does it not follow that the church may also influence government policy? If the great political contribution of religion is to dissent from unjust governmental action (that is to say, governmental action that the religious community thinks is unjust), then it would be paradoxical to contend that the wider society could not be persuaded, or that successful persuasion violates the
Constitution.

But if the society may be persuaded sometimes, can there be anything wrong if religions that the majority of the people find persuasive influence public policy on a wide range of issues? If the government gives no institutional advantage to mainstream churches, is there any problem if those churches find themselves aligned with the culture, and hence with the state? If the vast majority of Americans is affiliated, at least loosely, with religion, how could their religiously informed conceptions of right and wrong help but guide them in their capacity as citizens?

The fourth model, "Church Accommodated By Culture," has raised serious academic questions, most of which I consider misguided. The most serious objection is that accommodations will not be equal across denominations. But once it is recognized that secular government policy can cause profoundly unequal effects across denominations in the absence of accommodation, the objection ceases to have much force. It is an imperfect world, and we should not let the best be the enemy of the good.

Richard Niebuhr's conclusion in Christ and Culture is that there is no single Christian answer to the relationship of Christ and culture, and that the question must be left to "the free decisions of individual believers and responsible communities." This will be a subject of intense debate within the various churches. Many a church has been divided over whether and how to participate in debates in the public arena. Niebuhr helps us to understand the profound theological content of these debates.

By the same token, for the state to seek to impose one model of church participation in public affairs would be a serious mistake. The Establishment Clause forbids certain institutional connections between government and religious institutions — most notably, preference for one religion over another, or religion over nonreligion. But it does not purport to tell the churches of America what public role to take, or the citizens of America how they should resolve the conflict, if any, between the values of the culture and what they perceive to be the demands of God. These issues represent fundamentally theological or ecclesiological choices, to be made by the people in their capacities as believers and citizens — not by the law.

161. See supra notes 126-27 and accompanying text.
162. For my reasons, see McConnell, supra note 47.
163. Niebuhr, supra note 9, at 233.
Indeed, to presuppose or to impose one model can itself be seen as an establishment of the corresponding theological position. Much of the incoherence of Supreme Court doctrine may be traceable to the Justices' assumption in particular cases that they understand the proper relation between church and culture, and to read that understanding into the Constitution. They seem not to recognize that their judgments reflect controversial ecclesiological presuppositions as much as — or more than — a grounded understanding of the law. The courts should recognize the existence and the legitimacy of each of these models and leave to the churches and the culture the choice among them. The First Amendment limits the power of the state to intermeddle in religion, not the rights of religious persons as believers and as citizens.

The religion clauses are framed on the premise that citizenship in the nation is compatible with membership in the religious community. The question arises: How can the rights and duties of citizens be reconciled to the obligations and blessings of faith? In my view, within broad limits, the best answer is that given by Niebuhr: We must work it out for ourselves. The First Amendment does not answer the question for us.