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THE RELIGION CLAUSES AND NONBELIEVERS

NORMAN DORSEN*

Initially, I comment on Professor Kurland's introductory quotation from Learned Hand concerning the alleged conflict between "the advocate with a cause" and "disinterested scholarship."¹ Professor Kurland's Article is built around this conflict, and he quotes Learned Hand approvingly; yet it is a nice question whether any scholarship is truly disinterested. It is modest of Professor Kurland to say that he often is not disinterested. It is not easy for any of us to shed our skin—what Justice Holmes is reputed to have called "our can't helps." Some of us may be more overt or less subtle than others, but I have yet to find the disinterested law professor or judge. Justice Felix Frankfurter, at whose knee Professor Kurland sat as a law clerk, was especially prone to exalt disinterestedness as a judicial standard. But if one needs proof of the elusiveness of the goal, one need only consider Justice Frankfurter's energetic and "interested" public career while he was in academic life² or, with particular reference to the subject of this Symposium, compare his judicial opinions under the establishment clause with his opinions concerning free speech.³

Professor Kurland's Article concerns the origins of the religion clauses of the Constitution. It is a splendid portrayal of the relevance of history to contemporary issues. In my opinion, the most important issue that the Article raises is whether

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1. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 839-40 (1986) (quoting L. HAND, *THE SPIRIT OF LIBERTY* 138 (I. Dilliard 3d ed. 1974)).

2. See *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1938* (A. Macleish & E. Prichard, Jr. eds. 1939).

3. I have discussed this inconsistency in Dorsen, Book Review, 95 HARV. L. REV. 367, 380-81 (1981) (reviewing H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981)). Justice Frankfurter's judicial approach is discussed thoughtfully in Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decision-making*, 36 STAN. L. REV. 675 (1984).

nonbelievers—atheists, secular humanists, and agnostics—are protected by the religion clauses. While partly a historical question, it is also an extremely important issue for contemporary American society. Indeed, it has been important for generations. One need merely recall the *Scopes* case,⁴ when the struggle over the teaching of Darwinian evolution led to the American Civil Liberties Union's first major case.⁵

During the early 1950's, the frequent refrain of many people, including some who should have known better, was that our enemies were "godless Communists."⁶ The epithet, incidentally, often was uttered as one word—"godlesscommunists." Today's Moral Majority descends from that dubious ancestry, as well as from the anti-Darwinianism of the late nineteenth century.

Some national leaders stoke the fires, perhaps unwittingly. About two or three years ago President Reagan was asked at a news conference: "What is it, Mr. President, that separates us from our adversaries? Why are we different from the Communists?" Mr. Reagan responded, "Because we believe in God." He did not say because we have a great tradition of freedom in the United States, or because of our Nation's memorable achievements in the arts and sciences. He said we believe in God. What about the tens of millions of Americans who do not believe in God?⁷ Jimmy Carter also must be faulted for encouraging White House "photo opportunities" while he prayed on his knees. Of course, Presidents enjoy the

4. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

5. The current controversy about the teaching of "creation science" is evidence that the issue remains alive. See *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986); see also 55 U.S.L.W. 3419 (U.S. Dec. 10, 1986) (summary of oral argument).

6. George V. Higgins recently reminded us of this history by recalling that the late Richard Cardinal Cushing, Archbishop of Boston, had inveighed against "atheistic, socialistic, godless Communism." Higgins, *Challenging the Kennedy "Magic"*, N.Y. TIMES, Aug. 3, 1986, at 22, col. 4.

7. On another occasion, President Reagan suggested: "[P]olitics and morality are inseparable. And as morality's foundation is religion, religion and politics are necessarily related." N.Y. Times, Aug. 24, 1984, at A11, col. 6. President Reagan's comment led the *New York Times* to respond editorially that "Mr. Reagan has exceeded the bounds of tolerable debate." N.Y. Times, Aug. 25, 1984, at A22, col. 1.

Note that not all of the political forces injecting religion into politics come from the conservative right; "they come from the left as well. Witness the campaign of the Reverend Jesse Jackson." Lowrie, Book Review, 3 CONST. COMMENTARY 255, 259 (1986).

free exercise of religion, but it was apparent that Mr. Carter was seeking beneficial political fallout from public demonstration of his Southern Baptist faith.

The issue is accented at present. For example, in 1984, during consideration of the Education for Economic Security Act,⁸ Congress initially included a ban on the teaching of secular humanism in schools given federal aid under the Act.⁹ Congress quietly dropped this provision when the Act was extended,¹⁰ but the message was clear. Other examples could be cited to give concrete point to Professor Nichol's opening remarks. I am speaking of the fact, and I regretfully do not hesitate to use the word "fact," that the religious right's agenda, if consummated, would sharply curtail American liberty. Among other things, that agenda would censor library books, introduce government-sponsored prayer in public schools, outlaw abortion, and reduce enforcement of laws prohibiting discrimination against racial minorities, women, and gay people.¹¹ The gains of a generation, and more, could be swiftly erased.

Whether nonbelievers are protected by the religion clauses is a serious matter for the vast number of Americans who never have been able to persuade themselves, often despite heroic effort, that there is a deity—an active god. Can there be doubt about the prejudice against professed atheists? What would be the reaction at a PTA meeting in Cincinnati or Tulsa if a parent began a speech by saying, "I don't believe in God, but. . . ."? Are career promotions at Exxon, IBM, and Westinghouse unconnected to a person's churchgoing habits? Are teachers in Savannah and Wichita and Manchester hired wholly without regard to their

8. Pub. L. No. 98-377, 98 Stat. 1267 (1984) (codified as amended at 20 U.S.C.A. §§ 3901-3915, 3921-3923, 3961-4074 (West Supp. 1986)).

9. Section 709 of the Act, as initially passed, provided: "Grants under this title may not be used for consultants, for transportation, or for any activity which does not augment academic improvement, or for the courses of instruction the substance of which is secular humanism." Pub. L. No. 98-377, § 706, 98 Stat. 1267, 1301 (1984) (codified at 20 U.S.C.A. § 4059 (West Supp. 1985)). This provision was amended in 1985 to drop the language concerning secular humanism. National Science, Engineering, and Mathematics Authorization Act of 1985, Pub. L. No. 99-159, § 264, 99 Stat. 887, 902 (codified at 20 U.S.C.A. § 4059 (West Supp. 1986)).

10. See EDUCATION WEEK, Nov. 6, 1985, at 11, col. 4; *supra* note 9.

11. The National Coalition Against Censorship in New York City maintains a complete file of such instances.

membership in the community of the Judeo-Christian heritage? The matters I have referred to relate to both public and private discrimination. We may be living through a new sort of McCarthyism, except unfortunately it is not so new. In many parts of the country there has long been deep antagonism toward those who announce that they do not believe in God or in the kind of god that most Americans profess to worship.

Professor Kurland's Article says that no evidence indicates that the Framers were concerned with freedom for irreligion; it was man's relation to his god for which they sought protection.¹² Assuming this is true, what should we infer? Professor Kurland is ambivalent. On the one hand, he criticizes Mark DeWolfe Howe, correctly in my view, for endorsing a limited, "evangelical" separation of church and state.¹³ On the other hand, he also observed in an early draft of his Article, with a dash of humor, that in a world where the tenets of neither Richard Posner nor Duncan Kennedy hold sway, "mindlessness is second only to godlessness."¹⁴ This metaphor casts light on the standing of godlessness. Professor Kurland's ambivalence is dissipated only partially by his welcome conclusion that it is desirable to keep government out of religion and religion out of government.¹⁵

How do we resolve the uncertainty about the status of nonbelievers under the religion clauses? The Attorney General would rely, apparently exclusively, on the Framers' original intention. In a speech to the American Bar Association, Mr. Meese prescribed a "jurisprudence of original intention" that would accept the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.¹⁶ This approach would lock into our

12. Kurland, *supra* note 1, at 856.

13. *Id.* at 856-57. Professor Howe's work, published in 1965, continues to be influential, as Dean Gerety's recent discussion shows. Gerety, Book Review, 38 STAN. L. REV. 595 (1986) (reviewing M. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965)).

14. Kurland, *The Origins of the Religion Clauses of the Constitution* 3 (Mar. 29, 1986) (unpublished manuscript).

15. Kurland, *supra* note 1, at 858-59.

16. Address by Edwin Meese to the American Bar Association, Washington, D.C., at 17 (July 9, 1985).

Mr. Meese's interpretive theory was met with a barrage of hostile comment, including statements by two Supreme Court justices. *The Constitution of the United States:*

Constitution meanings based on a spurious specificity of the Framers' intent. Among other deficiencies, it would run counter to John Marshall's never-contradicted assertion that the Constitution was not frozen in time, but instead was an instrument "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."¹⁷ Further, as Professor Kurland recognizes, evidence of different meanings can be garnered for almost every disputable proposition, especially if we look for authority not only to the delegates to the 1787 Convention but also to those who attended the state ratifying conventions and the First Congress.¹⁸ "Original intention" cannot solve the problem of constitutional interpretation.

Instead, we must turn, as the Supreme Court has so often, to the purposes of the clause at issue, and to the values that underlie it. This approach is consistent with established constitutional theory. If one considers the equal protection clause of the fourteenth amendment, one finds no historical evidence that it was designed to protect women, aliens, or extramarital children,¹⁹ yet the

Contemporary Ratification, Address by Justice Brennan at Georgetown University, Washington, D.C. (Oct. 12, 1985); Address by Justice Stevens to the Federal Bar Association, Chicago, Ill. (Oct. 23, 1985); The Role of Advice and Consent in Constitutional Interpretation, Address by Senator Biden to the Georgetown University Law Center, Washington, D.C. (Nov. 6, 1985); see Schwartz, *Meese's 'Original Intent': A Constitutional Shell Game*, THE NATION, Dec. 7, 1985, at 607.

17. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original); see also B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921) ("The great generalities of the constitution have a content and a significance that vary from age to age."); W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1908) ("[T]he Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age.").

18. Kurland, *supra* note 1, at 841. Evidence of a desire to protect individuals other than theists through the first amendment also exists. As Jefferson observed, his Act for Establishing Religious Freedom "was meant to be universal . . . to comprehend within the mantle of its protection *the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination*. AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 133 n.1 (W. Blakely rev. enl. ed. 1911) (emphasis in original).

19. Indeed, after a comprehensive analysis, Professor Bickel wrote that the "obvious conclusion to which the evidence, thus summarized, easily leads is that section I of the fourteenth amendment, . . . as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation." Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955). Consistent with the analysis of the religion clauses proposed here, Bickel recognized that the "congressional un-

Supreme Court applies heightened scrutiny to legislation that discriminates against these groups because evolving views of equality, consistent with the constitutional text and with the purposes of the equal protection clause, demand it.²⁰

Similarly, the core purpose of the religion clauses applies to nonbelievers as well as to believers. The key objective in both situations is to safeguard minorities and outsiders with respect to religious beliefs—an objective consonant with the overriding goal of the Bill of Rights to protect vulnerable groups in American society, thereby assuring that there are no outsiders in our polity. This principle has special force with regard to the religion clauses, which were designed to eliminate religious persecution and strife.²¹ Justice Stewart made the point comprehensively while dissenting in *Abington School District v. Schempp*:²²

What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government.²³

Thus, Professor Kurland correctly concludes that we can be confident of the intended direction of the first amendment: “the enhancement of individual freedom” and the establishment of “an equality among persons.”²⁴ But he also says that the objective of that equality was to permit each individual to “choose without interference how to commune with his god.”²⁵ Once again, ambiva-

derstanding” was not dispositive as to the “long-range effect, under future circumstances, of provisions necessarily intended for permanence.” *Id.* at 59.

20. The leading cases are *Craig v. Boren*, 429 U.S. 190 (1976), and *Reed v. Reed*, 404 U.S. 71 (1971), in the area of sex discrimination; *In Re Griffiths*, 413 U.S. 717 (1973), and *Graham v. Richardson*, 403 U.S. 365 (1971), in the area of alienage; and *Trimble v. Gordon*, 430 U.S. 762 (1977), and *Levy v. Louisiana*, 391 U.S. 68 (1968), in the area of extramarital children.

21. See, e.g., Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969), cited in *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

22. 374 U.S. 203 (1963).

23. *Id.* at 319-20; see also Dorsen & Sims, *The Nativity Scene Case: An Error in Judgment*, 1985 U. ILL. L. REV. 837, 856-61 (deploring the Court’s insensitivity to the purpose of the religion clauses in upholding town’s purchase and public display of creche at Christmas).

24. Kurland, *supra* note 1, at 860.

25. *Id.*

lence. What about people who choose not to commune with a "god" in identifying their deepest values and faith? Justice Robert Jackson, in one of the most seminal passages in American constitutional law, wrote that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, *religion*, or other matters of opinion."²⁶ There is no more important constitutional value.

I am reminded of Isaiah Berlin's essay, *The Hedgehog and the Fox*,²⁷ in which the fox knew many things but the hedgehog knew one big thing. The big thing here is the necessity and justice of protecting all minorities and dissenters in their conscientious beliefs relating to religion. There should be little doubt under this standard that nonbelievers, outsiders par excellence, deserve constitutional protection. Or as Justice Jackson said in another connection, "I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups."²⁸ Similarly, in terms of institutional function, it is the federal judiciary's special province, relatively insulated as it is from majoritarian political control for this very purpose,²⁹ to protect those who adhere to minority religions or who do not profess a religion.

A model analysis is Justice Harlan's concurring opinion in *Welsh v. United States*.³⁰ In that case, the petitioner had been convicted of refusing to submit for induction into the Armed Forces despite his claim of conscientious objector status under section 6(j) of the Selective Service Act of 1948.³¹ That provision exempted from military service persons who by reason of "religious training and belief, [were] conscientiously opposed to participation in war in any

26. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added).

27. I. BERLIN, *THE HEDGEHOG AND THE FOX* (1953).

28. *Douglas v. City of Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring). For a probing discussion of the relationship between religious and nonreligious speech, see Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 852-56 (1984). See generally Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1072-83 (1978) (arguing that the protections of the free exercise clause should be extended broadly).

29. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); see Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1116 & n.45, 1127-28 (1977).

30. 398 U.S. 333 (1970).

31. Ch. 625, tit. I, 62 Stat. 604 (as amended by the Universal Military Training and Service Act, ch. 144, tit. I, § 1, 65 Stat. 75, 86 (1951)).

form."³² "Religious training and belief" was defined in the Act as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" but not including "essentially political, sociological, or philosophical views or a merely personal moral code."³³ The United States Court of Appeals for the Ninth Circuit had affirmed the conviction, concluding that the petitioner's beliefs were not sufficiently "religious" to fall within section 6(j).³⁴ The Supreme Court reversed. Four justices, following *United States v. Seeger*,³⁵ interpreted section 6(j) to mean that a registrant's conscientious objection to all war was "religious" if his beliefs were held with the strength of traditional religious convictions.³⁶

Justice Harlan, concurring, first concluded that section 6(j) could not be construed properly as exempting from military service all those who in good faith opposed all war. In his view, textual analysis and legislative history proved that Congress used the words "by reason of religious training and belief" to limit religion to its theistic sense.³⁷ Accordingly, he had to face the constitutional question "whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress."³⁸ Justice Harlan stated:

The "radius" of this legislation is the conscientiousness with which an individual opposes war in general, yet the statute, as I think it must be construed, excludes from its "scope" individuals motivated by teachings of nontheistic religions, and individuals guided by an inner ethical voice that bespeaks secular and not "religious" reflection. It not only accords a preference to the "religious" but also disadvantages adherents of religions that do

32. *Id.*, tit. I, § 6(j), 62 Stat. at 612.

33. *Id.*, 62 Stat. at 613. The Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100, amended the Universal Military Training and Service Act by deleting the reference to a "Supreme Being," but the 1967 Act continued to provide that "religious training and belief" did not include "essentially political, sociological, or philosophical views, or a merely personal moral code." *Id.* § 7, 81 Stat. at 104 (codified as amended at 50 U.S.C. app. § 456(j) (1982)).

34. *Welsh v. United States*, 404 F.2d 1078 (9th Cir. 1968), *rev'd*, 398 U.S. 333 (1970).

35. 380 U.S. 163 (1965).

36. *Welsh*, 398 U.S. at 340-44.

37. *Id.* at 345-54 (Harlan, J., concurring).

38. *Id.* at 356.

not worship a Supreme Being. The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This in my view offends the Establishment Clause and is that kind of classification that this Court has condemned.³⁹

Nonbelievers are protected by the religion clauses of the Constitution not because secular humanism is a religion, which it is not, but because when the government acts on the basis of religion it discriminates against those who do not "believe" in the governmentally-favored manner. In considering this issue, one should recall the grand tradition of humanism in Western civilization. Professor Graeme Forbes of Tulane University recently did so in responding to a statement by Secretary of Education William Bennett that "[o]ur values as a free people and the central values of the Judeo-Christian tradition are flesh of the flesh and blood of the blood."⁴⁰ Professor Forbes wrote:

Evidently, the Secretary thinks there is an intimate relationship between our values and those of that tradition, but most of his former colleagues [as a professional philosopher] would greet

39. *Id.* at 357-58 (footnote and citations omitted). *Welsh* demonstrates that the issue of protecting nonbelievers under the religion clauses has bite. In some cases, the free speech clause of the first amendment provides all the protection that is necessary, *see, e.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634-36 (1943), but, as *Welsh* demonstrates, that will not universally be the case. *Cf. Torcaso v. Watkins*, 367 U.S. 488 (1961) (requirement that state officials declare their belief in the existence of God violates art. VI, cl. 3 prohibition against a "religious Test" as a "Qualification to any Office").

By the same token, as the Court stated in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *Id.* at 225 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). It is difficult to see how this standard easily can be met, and it has been rejected regularly—in *Zorach* and *Schempp*, for example, and most recently in *Commonwealth v. Snider*, No. 83M293 (Va. Cir. Ct. Dec. 12, 1983), *appeal petition denied mem.*, No. 840377 (Va. Nov. 21, 1984), *appeal denied mem.*, 106 S. Ct. 2911 (1986) (fine for violating state compulsory attendance laws upheld against claim that public schools establish religion of secularism). For useful discussions, see J. SWOMLEY, *RELIGIOUS LIBERTY AND THE SECULAR STATE* ch. 8 (1987); Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 OHIO ST. L.J. 333 (1986).

40. Rasky, *Bennett Vows Aid to Church Schools*, N.Y. Times, Aug. 8, 1985, at A18, col. 4 (quoting Secretary Bennett).

with derision the thesis that there is some conceptual or logical dependency of moral values or ethical principles upon the theological doctrines characteristic of the tradition. Stealing and killing are not wrong because God forbids them; presumably, God forbids them because they are wrong. The grounds of moral value do not lie in divine commands.

Perhaps all Dr. Bennett meant was that in some historical or cultural way, the values that support the institutions of a free society are derived from the Judeo-Christian tradition. Among the central freedoms distinguishing free societies from their opposites are freedom of inquiry, of expression and tolerance of a variety of philosophical, religious and political outlooks. The idea that we owe such values to the Judeo-Christian tradition is ludicrous. We owe them to the Enlightenment.⁴¹

These words remind us that we in the United States are pluralistic respecting ultimate beliefs. Profound values exist apart from a devotion to a god. Indeed, those who discriminate against nonbelievers flout the principle of religious tolerance that they often profess.

For some time I have worn two hats, as a law professor for twenty-five years, and as president of the ACLU for ten. The ACLU has been accused of being antireligious. That is not true. Apart from the presence on our board of directors of ministers and professors of religion, we have gone to court to defend free exercise of religion in dozens of cases.⁴² The overriding principle, as in the

41. Forbes, *Letter to the Editor*, N.Y. Times, Aug. 27, 1985, at A22, cols. 4-5. It is somewhat reassuring that, some time later, Secretary Bennett observed that "one does not have to assent to the religious beliefs that are at the heart of our common culture to enjoy its benefits." In *Defense of the Common Culture*, Address by Secretary Bennett to the American Jewish Committee, Washington, D.C. (May 15, 1986).

42. *E.g.*, *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986); *McDaniel v. Paty*, 435 U.S. 618 (1978); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided Court per curiam sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985); *see also* Letter from Rev. Richard C. Halverson, chaplain for the United States Senate, to William Olds, executive director of the Connecticut Civil Liberties Union (Aug. 1, 1986) (referring to a *Washington Post* article dated July 27, 1986, which reported that the ACLU had defended "the right of a private citizen in Stamford, Connecticut, to hold prayer meetings in his home." Rev. Halverson continued: "As an evangelical, I know that the ACLU is a popular target for criticism, but I personally believe you have had and will continue to have a great role in the area of human rights and civil liberty. This is not the first time I have heard of the ACLU becoming an advocate for people involved in religious issues where their rights were clearly violated.").

case of free speech, is that the liberty of all sectors of the community must be protected. One part is the religious community, and we shall continue to protect its rights. But there is another tradition—the tradition of the Enlightenment, of humanism. The Constitution requires us to recognize that the religion clauses protect the heirs to that tradition as well.