What the ACLU thinks about religion

by William A. Donohue

This month's feature article is an edited excerpt from Catholic League president William A. Donohue's forthcoming book, *Twilight of Liberty: The Legacy of the ACLU* (Transaction Press, Rutgers University, New Brunswick, NJ). It may be obtained from the publisher and will be offered in this newsletter as soon as it is available.

When the Constitution was written, creches were permitted on public property and blasphemy was punishable by death. Now we've banned the creches and provided public funding for blasphemy (via the National Endowment of the Arts). The inversion has much to do with a profound shift in the tastes of the cultural elite and with the tenor of contemporary legal arguments. According to Rev. Richard John Neuhaus, president of the Institute on Religion and Public Life, the single most important change to occur has been the reinterpretation of the establishment clause of the First Amendment; it is quite different from what was originally intended.

The First Amendment begins, "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof." Both of the clauses, Neuhaus contends, "are in service of religious freedom." It might even be said, he adds, that "there is really only one religion clause or provision, made up of two parts, each related to the other as the end is related to the means. The free exercise of religion is the end, and nonestablishment of religion is an important means instrumental to that end." If this is the case, then there is no inherent conflict between free exercise and no-establishment, no need to "balance" one against the other.

Neuhaus' complaint is that the two parts of the religion clause have been inverted by constitutional scholars and, to a lesser extent, by the courts. He cites Harvard Law professor Laurence Tribe as an example. Tribe holds that there is a "zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests. This carved-out area might be characterized as the zone of permissible accommodation." Neuhaus calls Tribe's inversion both "astonishing" and a good illustration of the problem: "Professor Tribe allows – almost reluctantly, it seems – that within carefully prescribed limits, the *means* that is no-establishment might permissibly accommodate the *end* that is free exercise."

The gravamen of Neuhaus's charge is this: freedom of religion has been jeopardized by inverting the religion clause to mean that the establishment provision should be given primacy. Why? Increasing statism has weakened the autonomy of religious institutions, as well as other mediating associations, thus creating the perverse condition that "wherever government goes, religion must retreat." In the minds of many people, Neuhaus instructs, "the religion clause is essentially a protection *against* religion rather than *for* religion." It is a matter of some concern that there are those who would seize on this idea to deny many expressions of religious freedom, all in the name of servicing the First Amendment.

Perhaps no group exemplifies this negative mindset more than the American Civil Liberties Union. Founded in 1920, the ACLU has from the very beginning been hostile to any public expression of religion. Indeed in its first annual report, it listed its defense of every First Amendment freedom – speech, press and assembly – except freedom of religion. Fixated on church-state issues, the ACLU rarely has much to say about freedom of religion.

Perhaps no church-state issue rankles as many people each year as much as ACLU objections to creches and menorahs on public

property. As much as any issue, this one shows just how much First Amendment interpretations have changed. Throughout most of U.S. history, creches and menorahs were placed on public property without court challenge and were never considered to be in violation of the Bill of Rights. But now not a December passes without the ACLU going into federal district court filing a lawsuit against a municipality for allegedly breaching church-state lines.

Congress has long declared Christmas to be a national holiday, so it was not unusual when the Christians in Pawtucket, Rhode Island, decided to honor the holiday by placing a creche in a public square. Rhode Island, which was founded by Roger Williams in 1636 on the principle of religious freedom, has a long tradition of erecting Nativity scenes and has encountered little, if any, resistance for doing so. But in 1980 a woman phoned Steven Brown, director of the ACLU in Providence, saying she was offended by the placement of a creche – one that had been routinely installed for forty years – on a parkland near the Seekonk River in Pawtucket. Her complaint wound up in the Supreme Court four years later.

The Reagan Administration supported the pro-creche forces by arguing before the Supreme Court that any prohibition on the creche would be tantamount to "cultural censorship." The ACLU countered by claiming that the creche violated the establishment clause. The Union lost in a 5-4 decision. The ruling, formally known as *Lynch v. Donnelly,* but which has come to be known as "the reindeer decision," said that the creche passed constitutional muster because it was surrounded by Santa and his reindeer, "a clown, an elephant, and a teddy bear." Though the pro-creche side one, few were happy with this line of reasoning. But there were other statements made by the majority that did cut to the heart of the issue.

Chief Justice Warren Burger, writing for the majority, restated the high court's position in *Lemon v. Kurtzman* by saying that "total separation [of church and state] is not

possible in the absolute sense." The Chief Justice further noted that the metaphor of a "wall" existing between church and state, though a useful figure of speech, "[was] not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." But it was the majority's full embrace of a social conception of liberty that really defined its position: "No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." ACLU fears that the creche's religious symbols might beckon the day of an established church were labeled as "far-fetched indeed."

In the wake of the Pawtucket decision came more controversy, this time in New York. After two menorahs appeared on city property in December 1984, the Catholic League for Religious and Civil Rights petitioned the city to allow a Nativity scene at the Columbus Circle entrance to Central Park. It was permitted, with the proviso that a display sign designating sponsorship be affixed (the same conditions as the menorah display). Lawyers on both sides agreed that the fate of the menorahs and Nativity scene would turn on a Supreme Court ruling that was soon to be decided regarding the placement of a creche on public property in Scarsdale, New York.

In 1981, the Scarsdale Village Board voted to withdraw permission to allow a private group to erect a Nativity scene in the local park, thus reversing a 25-year-old tradition. The sponsoring Creche Committee sued and lost in district court. It appealed the case and won in the second circuit. In 1985, the Supreme Court, in a 4-4 decision, voted to sustain the appeals court ruling, holding that Scarsdale could not ban the privately owned creche even though it was not surrounded by secular symbols. Why? A tie vote leaves many unanswered

questions, and while it affirms the lower court ruling, it does not serve as precedent. Some maintained that the existence of a disclaimer sign displayed next to the creche, indicating private ownership, was critical. Others saw it as sustaining freedom of expression.

To add to the confusion, in 1986 the Supreme Court denied review to a 2-1 ruling of a federal appeals court that a creche could not be displayed on the front lawn of the city hall in Birmingham, Michigan. The court ruled that the display did not have the redeeming features found in the Pawtucket and Scarsdale situations: neither secular figures nor a disclaimer sign accompanied the Nativity scene.

Pittsburgh was the site of the most controversial ruling on this subject. In 1989, the Supreme Court held that a Nativity scene inside the Allegheny County Courthouse was unconstitutional, but a menorah on display outside the City-County Building was acceptable; the menorah was surrounded by secular figures, but the creche was not. The courthouse Nativity scene was placed on the grand staircase of the building and was adorned with a banner reading “Glory to God in the Highest.” The 18-foot-high menorah, however, was placed on the steps of the building, next to a 45-foot-high Christmas tree and a sign saluting liberty. These were the kinds of distinctions the high court found meaningful.

The ACLU, which opposed both displays, found Justice Harry Blackmun’s majority decision unpersuasive but was nonetheless “delighted” with a split victory. “The display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity,” wrote Blackmun, but “the creche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear.” Interestingly, Justice Sandra Day O’Connor, while conceding the secular context of the menorah, nonetheless called it a “religious symbol,” and not an icon of “cultural diversity,” thus indicating that we have not heard the last

word on this ISSUe.

Columnist George F. Will, adhering to a social conception of liberty, accused Justice Blackmun of wielding a “theological micrometer” and ridiculed the ACLU for rescuing Pittsburgh “from a seasonal menace that must be slain annually.” Will then raised the larger issue: “This is the sort of howitzer-against-gnat nonsense that consumes a society that is convinced that every grievance should be cast as a conflict of individual rights and every such conflict should be adjudicated.” But that is exactly how the ACLU perceives its mission. It firmly believes that it must intervene to save liberty by extending the reach of the law, interpreted civil libertarian style, into every crevice of society. When Will charges that the ACLU did not act to protect its members from injury but “to force the community into behaving the way the ACLU likes,” he affirms the thesis being made here: it is not liberty that really drives the ACLU, it is power – the power to bring mediating institutions under the aegis of the state.

The whole issue of a creche or menorah on public property got a new twist when the ACLU began to see degrees of difference between a religious symbol placed in a city park and one located on or near a city building. In 1989 the ACLU was successful in getting the Court of Appeals for the Second Circuit to accept its argument that it would be unconstitutional to allow the display of a menorah in a park in Burlington, Vermont. What was unusual about the ACLU’s position was its reasoning. It found the display unconstitutional “mainly because of its position [the menorah’s] with City Hall in the background.”

The following year in Pittsburgh the local affiliate made the same qualification. Explaining why the ACLU is less tolerant of religious displays in city-owned buildings than in parks, attorney Robert Whitehill offered, “The City-County building is the seat of government. If I want to pay my taxes, I go there.” Parks, he held, were public forums. While the ACLU may

find merit in such distinctions, it is less than certain that the courts – never mind the Founders – would. Moreover, the ACLU's ability to draw distinctions between city-owned buildings and public parks is demonstrative of its custom of seeing the world through the lens of power. In the end, however, the debate is all but academic: the ACLU sues no matter what public property a religious symbol is placed on.

Even when a city displays religious ornaments made by senior citizens, the ACLU gets enraged. In 1990, in the Capitol rotunda in Harrisburg, Pennsylvania, a Christmas tree was put on display, adorned with about 1,000 ornaments made by senior citizens. Three of the ornaments were made in the shape of a cross, and that was enough to send the ACLU into federal district court. It lost in its bid for a temporary restraining order, as the presiding judge found no basis for the Union's complaint. Now had the senior citizens decided to immerse their crosses in a jar of their own urine – much the way the celebrated artist Andres Serrano did – perhaps the ACLU would have defended their action as freedom of expression (they might even have qualified for a federal grant) . Apparently the ACLU feels that the only religious symbols that should be allowed on public property are ones that have been sufficiently defaced and blasphemed.

On occasion, ACLU activists rush to judgment in ways that prove embarrassing. This happened in 1991 when ACLU attorneys in Pittsburgh hurried to protest the display of a 40-foot-tall figure of Jesus Christ in the same City-County building involved in the earlier Supreme Court case. "The statue was so enormous, so unbelievably big, I concluded it wasn't possible the city would put it up," commented Union attorney Robert Whitehill. He was right. The statue of Christ was displayed as part of a Hollywood movie filmed in Pittsburgh, "Lorenzo's Oil." City officials agreed to put the matter to rest by erecting a sign informing citizens of this fact.

It is because the ACLU has assumed the role as First Amendment

police that it is drawn to answering false alarms. Its overall record suggests an organization far more concerned about erecting an impregnable wall between church and state than anything else, and that is why there are virtually no instances where the ACLU has responded to false alarms regarding freedom of religion. The following are indicative of its freedom-from-religion approach to the First Amendment; it views all of them as unconstitutional.

- the right of churches and synagogues to be tax-exempt
- prayer, including voluntary prayer, in the schools
- release time, the practice whereby public school children are released early so that they may attend religious instruction
- shared time, the practice whereby parochial school children in need of remedial instruction (most are poor and non-white) are afforded remedial work by public school teachers in the parochial schools
- religious invocation at graduation ceremonies
- the right of religious-based foster care institutions that receive municipal funding to select and teach the children according to their own precepts
- the right of religious day care institutions to receive federal funding even when the institutions agree neither to teach about religion or to display any religious symbol
- a public school performance of the play “Jesus Christ Superstar”
- the distribution of Gideon Bibles on public school grounds
- the right of Congress to maintain its chaplains
- the right of prisons to employ chaplains
- the right of the armed services to employ chaplains
- a city employees’ Christmas pageant at the local zoo
- the right of private schools to have access to publicly funded counselor

- all blue law statutes
- the singing of “Silent Night” in the classroom
- the right of Christian anti-drug groups to cite their belief in Jesus before public school students
- public expenditures for bus transportation for parochial students
- all voucher plans and tuition tax credits
- the inscription “In God We Trust” on coins and postage
- the words “under God” in the pledge of allegiance
- the words “In God We Trust” on the city seal of Zion, Illinois
- a commemorative Christmas postmark, offered by the community of Nazareth, Texas, with an inscription depicting a Nativity scene
- government census questions on religious affiliations
- the building of a wooden platform by the city of Philadelphia for an address by Pope John Paul II
- formal diplomatic relations with the Vatican
- kosher inspectors on the payroll of Miami Beach
- a nine-foot underwater statue of Jesus Christ placed three miles off the coast of Key Largo
- a custom in Milwaukee County whereby delinquent tenants could not be evicted during the two weeks around Christmas
- a “Motorists Prayer” printed on the back of a state highway map in North Carolina
- the word “Christianity” in the town seal of Milledgeville, Georgia
- a plaque with the Ten Commandments in the courthouse in Cobb County, Georgia
- the right of a state district judge in North Carolina to open his court session each morning with a prayer
- the right of public school coaches to lead their teams in a prayer before a game
- the right of the *Christian Science Monitor* to fire a lesbian
- the right of the sheriff in Pierce County, Washington,

to hire volunteer chaplains to provide crisis intervention services
- legislation that would criminalize damage to religious buildings and artifacts
- the right of two campus singing groups from Washington State Uni- versity to perform in area churches
- the right of a nun to wear a habit while teaching in a public school
- the right of a school board to prohibit an Islamic public school teacher from wearing her turban while teaching
- the right of the armed services to prohibit the wearing of a yarmulke while in uniform
- the right of Catholic schools not to hire homosexuals
- the right of the Salvation Army not to hire homosexuals
- the right of a judge to order a person found guilty of drunk driving to attend meetings of Alcoholics Anonymous

In short, there is hardly a public expression of religion that the ACLU has not sought to censor, and in the few cases where it has risen to the defense of religious liberty (for example, the Jewish soldier and the Islamic teacher), it has shown itself to be considerably inconsistent (for example, the nun schoolteacher).

Why is the ACLU so nervous about religion? Largely because of its atomistic vision of liberty. It sees freedom emanating from the state, in the form of individual rights, finding it difficult to conceive of an alternative conception of liberty. Religion, to the ACLU, is seen quite rightly as an obstacle to the reach of government. And by casting government as the basis of freedom, religion must surely be seen as a problem. This is an impoverished view, and it is one that serves neither religion nor the process of liberty.