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The Culture of Disbelief

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The Culture of Disbelief

Abstract
Stephen L. Carter, author of The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion, speaks about some of the same topics covered in his book: whether American leaders and intellectuals take religion seriously, and whether these same leaders take a stand on the importance of religion and how religion functions in the lives of the many Americans who are believers. His approach in this lecture is that of religious affiliation and belief in the Supreme Court confirmation process.

Comments
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THE CULTURE OF DISBELIEF

Delivered Before
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March 21, 1994

By

Stephen L. Carter

Including Questions and Responses
Following the Lecture

Edited by
Carol A. Scheppard
and
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THE CULTURE OF DISBELIEF
E. Ann Matter, Chairperson of the Religious Studies Department, University of Pennsylvania

This afternoon’s lecturer, Stephen L. Carter, is William Nelson Cromwell professor of law at the Yale Law School. Professor Carter has served as a law clerk for Chief Justice Thurgood Marshall, and was appointed by President Bush to the National Commission on Judicial Discipline and Removal. He is widely published, and is especially well known for the book which everyone, including President Clinton was reading last summer, The Culture of Disbelief: How American Law and Politics Trivialize Religion Devotion. The questions raised by this book include: Do American leaders and intellectuals take religion seriously? Do they have a stand on the importance of religion and how religion functions in the lives of the many Americans who count themselves believers? These are questions which have been widely discussed in this academic community this year as part of an on-going discussion about the role of Religious Studies as a discipline at Penn. Professor Carter is, therefore, an especially timely speaker. He will be speaking on The Culture of Disbelief this afternoon and will be approaching his topic from an unusual perspective: the perspective of religious affiliation and belief and the confirmation process. Please join me in welcoming Professor Stephen Carter.

Professor Carter

I want to thank you all for coming and to thank the Religious Studies Department for the invitation to give the lecture as well. When I heard I was going to speak in the Law School as a Law Professor, I thought I should get some law into my talk, which there might otherwise not have been. That is why I chose the perspective that I did. I want to talk about some of the themes of the Culture of Disbelief. I want to talk about some attitudes about religion in our society and what’s wrong with some of those attitudes. I want to pursue that by means of investigating a question that I think has not been sufficiently dealt with. This question is not initially about religion.
I want you to imagine a nominee for the Supreme Court of the United States sitting before the Judiciary Committee answering questions. Is it ever appropriate for the Committee to ask that nominee questions about that nominee’s religion? About what that religious affiliation is? About what that religion may teach? About how religious views may affect decision-making? I think by exploring this question a little bit, we can expose certain themes regarding our attitudes about religion in ways that I hope will be of some interest at this point in history.

Most confirmation hearings, as you probably know, have not included any mention of religion. Once upon a time, the notion that you should ever ask about religion was a device of the Radical Right. A device that they hoped would be successful, though was not, in excluding Louis Brandeis from the Supreme Court for his Judaism. It was a device that they hoped would be helpful although it was not in excluding William Brennan from the Supreme Court for his Catholicism. After that it was pretty quiet for a while. But in the last decade, several times questions have been raised, not in confirmation hearings, but around confirmation hearings about the religious views of nominees.

Probably the most famous case was a nominee, not for the Supreme Court, but for a Federal Court of Appeals, John Newman, formerly trained as a priest, certainly known as a theologian, a Catholic theologian, published widely about theological questions. Some said, when he was nominated for the Court of Appeals, that he should have been asked about his religion, how it influenced his decision-making. In fact he was not asked. The Committee began the hearings with a throw away question from the Chair which went something like this: “Professor Newman, naturally, in your decisions you wouldn’t think of taking into account anything but the Constitution of the United States in laws would you?” He said, “No of course not.” And that was the only question he was asked about that.

Then again, in yet another interesting context, when Robert Bork’s nomination was defeated, one member of the Senate stated on the Senate Floor and later in commercials that were broadcast in his own district in his home state, that he had voted against Bork because he wasn’t sure, but he thought Bork
might be an atheist. That was the explanation he gave on the
Floor and also to his constituents.

The question came up again shortly before the hearing on
Clarence Thomas' nomination when some suggested that
because the church to which he belonged had a strong con-
servative activist tradition, (they didn't know how strong, but
I guess Oliver North was also a member of the same church)
that the Senate should be able to ask about that as well.

What if I suggest a question? In a way to be a bit persuasive.
Of course the Senate should ask. If you have very strong
religious beliefs, they might influence your decision-making.
It makes sense. It had been able to influence Clarence Thomas,
they pointed out, because his conservative activism was, in
some cases, directly opposed to decisions of the Supreme Court.
Shouldn't one inquire?

Whenever I think about this as a kind of dialectic exer-
cise, it would seem at first that one should not inquire, because
the First Amendment says we have religious freedom, and even
without the First Amendment saying that, the Constitution also
tells us that there should be no religious test for public office.
So it seems as though it would be wrong to inquire if, as a threat
to religious freedom, people had to tell us all that stuff.

But that is clearly too superficial and unsatisfactory in the
end. Your religious views, your religious background (if you're
a religious person) are part of what makes you what you are
and who you are. And even though there is, of course, a strong
natural law tradition, explaining in detail the ability to separate
one's religious views from one's reasoning about moral ques-
tions, I think it is fair to say that there are many people for
whom religious understanding is of sufficient importance that
it is not easy to resolve moral questions without partial, or
sometimes complete, reliance on that religious knowledge.
Therefore it is plain that the judge's religious convictions could
influence the way the judge reaches decisions. So, I say we
should ask. Otherwise we won't know how these religious con-
victions are going to affect the decision-making. And if we don't
know that, we don't know if it's a person who belongs in the
Supreme Court or not.

But the trouble with that answer is that it carries the risk
of enforcing a kind of religious orthodoxy. That is, some
religions will get through the questioning, and some religions will not. Unfortunately we have in American society today, in our law and in our culture, far too much experience at penalizing people, or threatening to penalize people, or talking about penalizing people for being members of the wrong religious faiths. There are many areas of the country where the rhetoric of the Christian Nation is very common. A few years ago the head of the Southern Baptist Convention said, "My friend, God Almighty does not hear the prayers of the Jews." There are many parts of the country, and many people who deeply feel that one is not quite fully American if one is not Christian and, indeed, the proper kind of Christian. One hears this rhetoric a lot. Governor Fordice at the Republican Governor's convention in 1992, referred to the United States as a "Christian Nation." When one of his fellow governors tried to make a moderate correction and said, "How about a Judeo-Christian nation?" Governor Fordice said, "If I had meant it, I would have said it." Later Governor Fordice said, "I didn't mean to exclude anybody."

My point is, imagine allowing our screening (a political process) of potential supreme court justices to get caught up in that rhetoric. That seems pretty dangerous. And yet we do have strong traditions of penalizing people for being the wrong religion - not just historically but more recently, the Supreme Court, quite famously, has become a quite unreliable protector of religions that are, in Justice Scalia's coy phrase, "not widely engaged in." Look at some recent cases from the Supreme Court where you've seen this theme of religions that are "not widely engaged in" simply losing out on all possibility of judicial protection.

The Lyng case, decided by the Supreme Court in the mid-1980's, involved a fairly simple set of facts. Some of you are probably familiar with it. The United States Forest Service did what the Forest Service does best - it gave them permission to cut down the forest. And having done that, a permission to build a road through the forest, take the trees down, and carry the trees down the hill. Objections were raised by three Indian tribes who said, "But this is sacred land. If the trees are cut down and the land is spoiled by the road, our ability to practice our belief will be destroyed." They had the quaint
notion in mind that the First Amendment, because it guaranteed religious freedom, must have meant that the government cannot destroy someone’s religion. Well the case went to the Supreme Court of the United States, and the Supreme Court said, “Sorry, you lose. Sorry you lose.” The Supreme Court said, “Look, you lost out in politics.” In effect saying, “You lost fair and square. Don’t come crying here, for relief. The government just couldn’t operate if it had constantly to take into account the religious needs of its citizens and besides, it’s not even your land. It’s the government’s land.”

Now some of us dinosaurs have a more old-fashioned vision of property ownership by government in democracy than that (It’s not your land, it’s the government’s land). But putting that to one side, think of the import of this decision. It is saying to these Native Americans, “Your religion may be devastated, (that’s the Court’s word, not mine) by this decision, but that’s too bad. You simply lose.” Now in my way of thinking that is the equivalent of saying that it’s okay for the government to wipe out or severely damage a religion as long as it does so by accident or indifference rather than by design. We discover that the government, unlike other actors, is not liable for the reasonably foreseeable consequences of its actions.

So again, if you are going to allow the Senate to inquire then you have a second risk of religious orthodoxy. The second risk is that religions that are, once more, “not widely engaged in” may find themselves on the losing end. Therefore the inquiry into religious views will end up penalizing members’ adherence to those religious traditions. This threat of religious orthodoxy could destroy or severely cripple the vitally important role of religions as independent moral voices criticizing government policy. Independent moral voices criticizing policy sometimes for good, sometimes for ill, sometimes listened to, sometimes ignored, but it would be a terrible tragedy to snuff them out.

So, it would seem we shouldn’t ask. We shouldn’t ask because religion is valuable and important. So valuable and so important that we can’t risk the kind of imposition of religious orthodoxy it would have if the Senate were to inquire.
The only problem is we know from contemporary legal and political philosophy that religion is not, in fact, important. We know from contemporary philosophy that religion is one of those biases that public-spirited citizens ought to cast aside before entering into the political fray. Certainly before coming into the public square to debate policy, you need to leave your religious views, like your other preconceptions, behind. They are sufficiently unimportant that you should split yourself off from them, and only in that way can you be a good and upstanding citizen. This in turn suggests that religion can be left behind. That is, if this separation of self from religion is desirable, it must also be possible. Desirable and possible.

Now the trouble is that although once more, I emphasize, there are certainly religious traditions that do indeed insist on the importance of that separation, there are others that do not. So if we take the view that religion is sufficiently unimportant that we can and should leave it aside, therefore we need not ask, then we’ll miss all of the religious influence, if it happens that this judge, this would-be justice, is a member of one of those religious faiths, one of those religious traditions that does not emphasize the separation, or if this individual for other reasons is not comfortable making that separation in her/his own life. This is sometimes referred to as the problem of bracketing, of bracketing this part of the self from the rest of the self. You’ve got to decide whether it is desirable to do that, whether it’s possible or not. But one must bear in mind that there are many people for whom, not only is it grossly insulting to be told that before you are fit to enter into public policy debate you must leave behind that which is most important to you about yourself, it is also not unlike telling the individual to leave behind an arm and a leg. It is saying to the individual, “Remake yourself; become someone else, and then you are prepared.” Besides we know that lots of public officials don’t bracket their convictions. Surveys tell us that over 90% of the members of Congress rely in an important way on their religious convictions before they vote.

Now surveys can be a bit troubling. Imagine a member of Congress and a surveyor calls up your office and says, “Do you rely on your religious convictions?” Well, if you say, “no” do you know what’s going to happen? Just like those cases I
was telling you about—the gentleman who said he voted against Bork because he thought he was an atheist. Your opponent is going to say, "My opponent isn't religious." So the surveys in terms of Congress you can't rely on too heavily, I suppose. I don't mean this, by the way, as any kind of derogation of the Congress—just a bit of practical political thought there.

But we know that people rely on their religious convictions, sometimes importantly. Thurgood Marshall said, more than once, that the reason for his not sticking up for the death penalty in the face of several hundred reports saying it was constitutional, was religious. He said he drew his inspiration directly from the Ten Commandments and he said this on many occasions.

So we should ask. It seems we should ask. That is, if it really is true that there are many people who have difficulty making that separation, whether it is desirable or not, we should ask. We should try to find out....What are we trying to find out? Are we trying to find out, if we ask, whether this individual can make the separation? We want to ask the Neumann question. We want to say, "Of course you won't be influenced by anything but the constitution and the law of the United States will you?" And the nominee says, "Of course not." Is that all we want to know? Or do we want to know more? Do we want to know the particular details of this individual's religion, so we can weigh them up, so we can say, "Well, if these details creep in, that would be a terribly dangerous thing and that's why we're voting no on this nominee." Let's think about which of those would want to know.

Courts and scholars have increasingly suggested, sometimes in a casual way, other times in a rigorous way, that the fact that a legislator relies on religious motivation is sufficient for declaring a statute to be unconstitutional. In a separate related fear [it's not the same fear and it's important to distinguish them] that when the Legislature, for example, adopts a restrictive abortion statute and some members are motivated by religious conviction, it is not simply the religious motivation, but the fact that the religious motivation is leading to the imposition of a religious world vision on others. These are commonplaces of the literature. And they are certainly fed by the rhetoric of such events as those of the 1992 Republican
National Convention which certainly, I think it would be fair to say, filled the air with the kind of rhetoric that gives religious motivation a bad name. Fears that are fed by the speech of one popular evangelical preacher who told his followers that "we must march on the ballot boxes until we elect representatives who walk humbly with their Lord," by which, of course, he meant, "will enact our political program."

These are frightening images. Frightening images. Easy to see why we want to ask this judge, "What exactly are your religious convictions?" Of course, it's worth mentioning that the evangelical preacher who told his followers to march to the ballot boxes until they elect representatives who walk humbly with the Lord was Martin Luther King Jr.

Now I mention this because I fear that when I read the scholarship and read the court decisions that suggest that religious motivation by supporters makes legislation unconstitutional, you do risk throwing the Civil Rights Movement and its massive protest wing out the window. In 1964, when a coalition of religious leaders showed up to testify in favor of the Civil Rights Act of 1964, segregationist senators rose in trembling fury to declare that these ministers did not understand the simple fact of the separation of church and state because they were trying to impose a moral truth and thereby resolve a political issue. In 1957, the Roman Catholic Archbishop of Louisiana threatened to excommunicate members of the state legislature who supported a pending bill that would broaden the scope of school segregation.

The reason I mention this is not at all because I would equate the Civil Rights Movement with any of today's political preachers of the so-called "religious right." It's rather because I worry about this casual habit of suggesting that religious motivation is what makes a statute suspect, rather than looking at what the statute does to explain whether it's a good or a bad statute. So when I read, as I sometimes do, that it is a violation of, or at least shows no respect for the separation of church and state when religious leaders campaign, say against abortion, I hear the echoes of that same argument—not as popularly pressed—but certainly pressed about the Civil Rights Movement. Of course, it's true. {Others have different views}. I don't feel that the anti-abortion movement is a successor of
the Civil Rights Movement, as it was claimed. That’s not the point. The point is that the use of religious rhetoric, if the movement is wrong, is not what makes the movement wrong. Nor could it possibly be the case that the fact that members of the Legislature use religious rhetoric means a statute is unconstitutional. If anything, our history demonstrates the contrary. You can scarcely find an important social movement in our history that has not had important vital and loud religious leadership. This is true, not only for the Civil Rights Movement, or even more famously the Abolitionist Movement, but it is also true of the Progressive Era; it is true of the early Labor Movement; it is true of a variety of anti-war movements; it is true of the 19th-century Women’s Suffrage Movement. You can look all through American History and find important social movements where the religious voice was an important part. Of course, you can also search those eras and find a religious voice in opposition to the movement. But I am not suggesting that the religious voice, if I were mentioning simply people that want to talk in the public square about what their religion teaches, I am not suggesting that that voice is invariably or even usually on the right side of history. I am only suggesting that in the past we’ve always accepted by its very presence both sides of the issue, the importance of that voice in oral and political debates. I don’t think the presence of that voice, even in legislative motivation, in any way violates the separation of church and state.

Of course, I do believe in the separation of church and state (although two members of the Supreme Court say that they do not). I believe in it very strongly, but it is important to recognize what it is and what it does. It is a vital tool for protecting religious freedom including the freedom of one not to be religious. In a very strong sense, the reason, for example they can’t have organized classroom prayer in public schools, even though I recognize that surveys show that between 62% and 81% of American voters say they favor it, but the reason you clearly can’t have it is you can’t have the state teaching kids how to pray or when to pray or even whether to pray. Now, I as a religious parent would not want the state telling my children that. There is a lot that the separation of church and state would clearly forbid without suggesting that it in any
way forbids reliance of a legislator on all of that legislator’s convictions in deciding how to vote.

Now of course, when I say that a legislator may rely on his/her convictions in deciding how to vote, I don’t mean to suggest that everything that comes out of that reasoning process is constitutional. You don’t know until you look at the statutes. But I have strongly felt for a long time that our courts would much better work when they look at the result of the legislative process and decide whether it is constitutional or not, rather than try to read the minds of the legislators in deciding whether something is constitutional or not. The Court has rarely done as much damage to a good cause as it has done to the cause of civil rights in insisting that in deciding whether legislation is constitutional or not, you have to look at the motivation of the legislators. So the civil rights plaintiff has to prove, not simply that legislation has a discriminatory effect that the state could have foreseen and did nothing about, but has to prove that legislations are actually motivated by racial animus. (The courts always say “racial animus” instead of racism. I’m not sure why). That’s a very high burden of proof which is virtually impossible to meet. And the courts, in my judgment a bit too gleefully, have declared that burden unmet in one case after another over the last seventeen or eighteen years.

Similarly here, it does not make sense to me, to try to mind read legislators because you have their output to look at. You can look at what they do and then decide. To give you an example of what I mean, think again about the context of public schools. Let us begin with the proposition, even though some here may not share it, that organized classroom prayer in public school is unconstitutional. Suppose that the Legislature then adopts another bill. The Legislature says, “All right—we’re not going to have prayer in public schools. We’re going to post the Ten Commandments on the wall without comment.” Constitutional or not? Well one way to resolve it would be to say, “Well, why did they do that? Let’s see if we can find some legislative history and try to figure it out.” That’s one way to do it. Another way to do it, however, and much more straightforward, would be to say this, “Well maybe the school is just trying to teach strong positive values and there’s nothing wrong with that. That’s constitutional.” But the first two commandments, I
think, don’t seem quite to fit. And so we therefore say, "You can post some of the Ten Commandments, but clearly not all." Well, it may seem unusual, but that’s clearly a correct answer. And it does not require you to go and look into the mind of anyone to decide if this is proper or not. But the Courts get into terrible messes on these matters, I fear, when they try to read the minds of legislators.

Think of Edward vs. Aguillard which was the case that struck down the teaching of scientific creationism alongside evolution in the public schools. Well that seems a perfectly sensible result, but not for the reason the courts gave. The courts at every level, including the Supreme Court fell into the same trap and said, "Well, if you look at the record, you’ll see that there was a clear religious motivation for this." They look at citations of legislative history. They quoted from the views of the authors of peace books. All of this to try to prove what was in the minds of the median legislator who voted in favor of the bill. Well, this is a terribly roundabout way to try to solve a very simple problem. If you dispose the scientific creation problem into steps: Step #1—it’s not good science. If it’s not good science what is it doing in a biology classroom? Is there a constitutional problem? Yes, because it’s not teaching science and if you look at it as a curriculum rather than look at the motivations of those who supported it, you’ll find that as a curriculum it’s teaching a set of religious truths. Therefore, it’s unconstitutional because, what I said before, the state can’t teach religion. It’s a very easy case to resolve and it wouldn’t matter, you see, if the legislators voted for it because this is their religious conviction or because they were persuaded it was true. That would make no difference. That is the point I am afraid the Court missed in that case and in other cases, as well. Call that the long way of saying that the separation of church and state have an awful lot of bite without having to worry about the motivation of people who support statutes.

But of course, we’re not talking about legislative statutes. Let’s go back to the original hypothetical. We’re talking about the judgments of the Supreme Court. I suppose you could say judges are different. It is one thing to say a legislator can have a religious motivation or rely on a religious conviction, but you don’t want a judge to do that. We have rules, that you handle
judiciary decision-making very tightly, and surely relying on the judge’s religious convictions would violate those rules. Which is another way of saying that we should ask the question after all. Judges aren’t supposed to rely on their personal religious convictions. You can think of it as a syllogism which would work like this: judges should avoid reliance on preconceptions or biases; religion is a preconception or a bias; therefore, judges should avoid reliance on religion. It’s a very straightforward syllogism. And you can look at it from the point of view of a litigant. A litigant doesn’t want to think, “I’m being penalized because this judge, based on religion, has already made up his mind or her mind about how to vote on this case. I won’t get a fair hearing. That wouldn’t be quite right.” Although we don’t have to go as far as one judge in Long Island, who in order to avoid having a jury be biased told the prosecutor who, as many Christians do, had gone to church that morning and gotten ashes imposed on his forehead (it being Ash Wednesday), that he had to wipe the ashes off, otherwise the jury might be biased by knowing that he was the kind of person who would have ashes imposed on his forehead on Ash Wednesday. You don’t have to go that far to recognize that it can be unfair, or be perceived as unfair, if you’re arguing before his judge who has already made up his mind or her mind because of religious conviction.

The only trouble with that argument is that it is not immediately clear that a litigant is more concerned if a judge has made up his mind or her mind on the basis of religious conviction, than if the judge made up her mind or his mind on the basis of conviction of any other kind. The litigant doesn’t want to think that the judge has already decided to rule the other way. The reason I mention this is that ordinarily in confirmation hearings we do explore the judges’ biases. But if you think about the hearings we have we don’t explore them in order to exact from the judge or the would-be justice the promise not to rely on them. We explore them so that if we share them, we can vote, “Yes.” If we don’t share them, we can vote, “No.” Therefore, if religious biases are like any other biases, we should ask the question, and if we don’t have any objections we should vote favorably and if that enforces a religious orthodoxy of some kind, that’s just too bad.
Of course, that's only correct if you think religious knowledge affects the mind in the same way that other knowledge affects the mind. Is it the result of the same kind of bias or a different kind of bias? Another way of putting that, I suppose, is that what we need to know is whether the judicial decision-making process will be differently affected by religious convictions than by convictions of other kinds. Now maybe we can only get that knowledge on a case by case basis. For some people the effects are the same, for some people the effects are different. Maybe that's true; we can't have a prophylactic rule. If that's the case, we can only find out if we ask. But if we ask, we run into the barrier I mentioned right at the beginning. The Constitution strongly suggests we shouldn't ask. So the question I've been going through all this time is, "Should we ask or not?" Well, let me give you my answer. Fine—out of time. I'm done, thank you very much.

Having said that, let me say that while I'm answering your questions I'll also be interested in your answers. That is, the question I've raised in this paper genuinely puzzles me. I honestly don't have an answer. I've looked at the suggested answer and I think it's maybe wrong. I'm genuinely interested in your thoughts on the correct answer to this question. Especially those of you who, I can tell from your faces, think it's an easy question—that there's obviously a correct answer. I'll be especially interested in hearing from you and as well from any other questions people want to ask.
Questions and Responses

When you talked about creationism in the classroom you said that the problem is not about religion, it's that creationism is bad science. I want to suggest the opposite which I think goes to the question about asking about religion. If you say that creationism is bad science, I want to say well wait a minute, it's bad religion isn't it? Aren't you saying that people who support creationist science have a simplistic notion of God, not a sophisticated and articulate notion of God which says that good science is consonant with secular reason? Isn't that really what you're saying? I mean, if there's a God, there's a God and again it's a religious question.

Carter
Fair enough. I personally believe that not only is the science of creationism bad science, but the methodology that underlies it is bad religion. That's my view. I would not want to see the Supreme Court write that as its opinion. That's because my question would then be how does the Supreme Court resolve the question given that the one thing the Court should not do is to take sides in a theological dispute of that kind?

How can it not if there is a God, and if you believe in God, how can you fail to be theological?

Carter
Well, let me ask that question by quoting a different problem that often arises. I have a very strong view that the right of parents to raise their children in their chosen religion is one the state should very carefully nurture and interfere with rarely except for the most extreme reasons. Now when I say that the question that always arises naturally is: what about people who for religious reasons want to deny their children the medical care that physicians think the children desperately need? Now, it is a very common case; there are always tragic cases. My answer is a very simple one, is that when the child's physical well-being is at hazard, clearly the state's interest is sufficiently compelling to override the cliental interest. But, having said
that, I make no claim that that is an answer that is neutral on
the truth or falsity of the parent's religious belief. The courts
always say it's neutral, but it is not clear that it is. Consider
the case of a Seventh Day Adventist. Now most Adventists
don't believe this, but some do. Some Adventists believe that
accepting blood transfusions would violate the prohibition on
ingesting blood, and that would lead to eternal damnation, and
it doesn't matter if you consent or not. Now if you believe that
as a parent, if you deny your child a blood transfusion the doc-
tors say your child needs to live, your child is going to die.
So the state comes and the state dissolves the parental rights
over the child, appoints a guardian who orders the transfusion
and then grants the parental rights again. Now the courts
always say we have to be neutral toward this religious claim,
but it's not really neutral, because if the claim is true then the
court has made a very wrong decision. If the claim is true, then
as a result of the court decision, the child will be denied etern-
al salvation. Therefore the court decision, which claims to
be neutral, clearly treats the claim as false. So it is of course
correct, that you cannot have any form of secular authority,
such that the answer in questions of this kind can be entirely
neutral, certainly not one that can be explained as neutral to
those against whom the court rules.

But in some cases such a decision can be neutral. Right? I'm curious
about the possibility that the matter of neutrality should enter into
these judicial decisions at all. For example, Jehovah's Witnesses
believe that what is important is that the recipient be actively pro-
testing the transfusion. In that case the religious links are diverted.

Carter
Well, my understanding of the Jehovah's Witness view is that
it's not just to try to be actively protesting. The active protest
is against the role of the court. That's why the transfusion of
an unconscious witness, for example, clearly violates that
vision.
But in the case of a child who is unable actively to protest?

Carter
Right, any time the reason that the Jehovah’s Witnesses form a so-called “ring around the bed” is precisely because the child can’t be trusted to protest sufficiently. Of course it’s correct that you could work out a statement in terms of theology where the state’s answer won’t affect the eternal questions for the person involved, but sometimes that’s not true. Its not true in the case of those who believe in eternal damnation, or in the case of the Native American Carlton Lyng. That was not neutrality. Not from their point of view and not, in many respects from the courts point of view. And when it is possible, I certainly would prefer that courts not involve themselves in decision-making of that kind.

On the other hand, sometimes when the courts don’t involve themselves another problem arises. They bend over so hard to be neutral that they end up treating religious groups worse than other groups. One case that comes to mind of that kind is a case that involved the Christian Science Church. As many of you may know there are essentially two ways to obtain a copyright. You can apply and go through all of the formalities or you can go to the Congress and say, “Vote me a copyright,” and Congress will adopt a special bill that grants a copyright simply known as a trademark. For example the US Olympic Committee Logo and the Boy Scouts and Girl Scouts of America logos - those were all granted as trademarks by special acts of Congress and there are a few dozen copyrights that were granted that way as well. The First Church of Christ Scientists went to Congress and said, “we want you to vote us a copyright on Mary Baker Eddy’s work, Science and Health with a Key to the Scriptures.” I believe because the original copyright had expired. And Congress said, “Sure.” Voted the bill. The dissident group of Christian Scientists was at that time publishing copies without permission from the main church of Science and Health with a Key to the Scriptures, and they were immediately sued by the main church. They defended on the grounds that the Congressional grant of the copyright was unconstitutional because the Congress was taking sides
in a theological dispute. The DC Circuit upheld this view and
struck down the statute and said that the government could
not take sides in such a dispute. That violated the Establish-
ment Clause.

There is a certain appeal to that answer. It has a certain
appeal, but there are two problems. One problem is that that
means there is a privilege extended to all other groups that
religious groups are denied. You ask to command the Establish-
ment Clause to treat religious groups worse than other groups.
The second problem, and the more interesting one perhaps,
is that other branches of government, namely the courts, in-
tervene in such disputes all the time. In my own denomina-
tion, the Episcopal Church, whenever a dispute really happens,
and a congregation decides to secede the Episcopal Church,
the Bishop immediately rushes in and says, "Wait a minute,
that's not your land. You can't take the land and building with
you, that's our land." And so it's litigated and the courts always
rule, in fact, for the Bishop, and in voting for the Bishop they
say, "We are not getting involved in a religious dispute, we
are reading the contract between these two people, and that's
what the contract says." They don't say it, but what they are
really doing is reading Canon Law, but that's another issue.
The point is that you have a court in our government that IS
intervening in solving a religious dispute, so in fact the court's
intervening, so why shouldn't the Legislature be able to in-
tervene as well?

You said that you were prepared to allow intervention in the care
of an Adventist child where the child's physical welfare is at stake.

Carter
Yes, I do that with no sense of joy, but with a sense of tragedy.

Well, I am puzzled by your category of "physical welfare," and
how that may be understood in any non-theological way. It emerges
as a category as distinct from "spiritual" and that is a Western
and a Christian distinction.
Carter

It is, and I will confess to those biases. I will confess that this category comes out of either my modern Christian life, or my modern secular life. That is correct. The trouble is that if you decide intervention to enable the state to prevent a harm to the child’s spiritual well-being, then you essentially eliminate the ability of the parent to raise the child in a religion because it is easy to quite quickly have an orthodoxy that says “this and this and this”, or if the tenets of good spiritual upbringing should be something different, that clearly is harmful to the child, therefore you as the parent can not teach “this, this, and this.” I confess that I find that too frightening to even contemplate, although I am often told that I need to contemplate it seriously. But I don’t claim that any of my own biases suggest drawing the line where I draw it. Nor do I claim that this is a line I am entirely satisfied with, but the thoughts of other places to draw the line are, for me, a bit scary.

I thought I might have an answer to your question. But I don’t understand parts of it. I don’t know what it means to question religion. One option is that Supreme Court nominees are scared to death of the fear of the sound byte. That I would say, “I’m a Baptist,” and then that’s all they would ask and say, “I don’t need to know anymore.” They wouldn’t ask what I believe, they’d ask what the label is that I associate with, even though I may not accept all the tenets of that label. That’s number one. Number two is where we draw the line with respect to religion and science. As we get into cosmology, greenhouse warming and global warming, many scientists believe that this is bad science when in fact it is a form of religion: that there’s nothing that we can really demonstrate given the winter we just had [winter 1994] that the earth is in fact warming up, but a lot of people believe that to be a religious belief—it is not science. Where do you go from there? You sort of say, “That’s science and this is religion.”

Carter

Let me say just two things. On your second point—drawing the line between science and religion—in my book, I go into
a formal, although not lengthy, definition of religion which I do not need to go into here. I would just like to say that what I try to avoid is a view which I realize is commonly shared suggesting that all it takes is someone believing something strongly enough for that person to represent a religion. I like Whiteman’s line which said that the problem with that view is that it does not permit the atheist to have atheistic convictions. But, putting that to one side, the first question. One of the fears I have about the question, is the problem of stereotyping. For example, in the summer of 1991, after Thurgood Marshall retired, one black activist was heard to say, “There are too many Roman Catholics on the Supreme Court already, I hope there’s not another one nominated.” Now, if that were said about African Americans (take one of my own identifications) we would call that bigotry. If it’s not appropriate to ask the question that I mentioned, then it’s clearly bigotry if you say, but I want to too, and get out of saying that it sounds like bigotry—it sounds like hypocrisy to me. But somehow, we have a much greater tolerance, for casual derogations of religious groups than for racial and other ethnic groups. And I think that part of the reason for that is not hostility for religion, I think it comes in part from a sense that somehow religion is tied to one’s beliefs and actions in a way that maybe race isn’t, at least not so functionally. The trouble with trying to get at that problem through that kind of gross stereotyping is precisely what you suggest; that it is okay to inquire—it becomes a matter of adding levels of sound bytes/stereotyping on top of everything nominees have to go through anyway. For that reason also I think it is quite dangerous.

What he is saying is we want to know is what does your faith say to you about this legal question and that legal question, not what your label is. It’s the label that’s meaningless. The question isn’t what religion are you? It’s what sort of influences will affect your judgment.
Carter
I, of course, agree with you. That’s why I think the point is that for a lot of people, certainly those in the news media, the reporting of the label is all that one would hear. But let me ask you since you’ve raised a question, when you say what sort of influences would affect your judgment, you would say it’s okay to ask that question, would you?

You said that’s something that is asked, didn’t you?

Carter
Well, it’s sort of asked, but it’s never directed at any time to religion, and it’s never answered in terms of religion. In preparation for the book, I just finished writing about the confirmation process, so I read over an awful lot of information on it, and not a single one, with one exception, was answered in those terms. That single one was William Brennan who was asked about his call system. He got the John Kennedy question in fact, and he got the Joe McCarthy vote. In deciding on important questions, one questioner wanted to know if he would follow the orders of the Pope or not. Brennan said no. But I think you’re right. That’s what we want to get at. What I’m interested in is—putting your question a different way—if we do treat one’s religious convictions the same as other convictions in the hearing room, and so we’re free to inquire about how those would affect decision-making because that’s what we need to know, are there any important values about religion that are being threatened if we treat it just like everything else?

Going back to your larger talk, I’d like to address the general hostility surrounding people bringing their religious beliefs to bear in governmental decisions—what you were describing as the opinion among political activists and politicians and, I’d say, a lot of your colleagues in the legal profession. For me, it is a perverse and strange reading of the Establishment Clause which translates the constitutional prohibition against Congress establishing a state religion into a mandate for state imposed atheism. You have to leave your
religious views at the door if you’re going to enter the arena of public policy. For me I find that such a perverse distortion of the simple language of the Establishment Clause. Do you think in the next ten or twenty years the constitutional protections of religious freedom will be sufficient?

Carter
Well, before I get to the question let me talk about the premises for a minute. I certainly agree with you that there have been distortions, and bad ones, of the Establishment Clause. I wouldn’t say that they amount to an effort to impose atheism. I do think that what has happened though is that too many scholars have tried to find a kind of mandate of secular reasons that states where only certain voices are relevant and not others, and that’s a bad thing. I think, though, that it has to be said that one of the reasons for that is a lot of fears of what can happen. The religious voice has a lot of history in this. Now we can certainly take the redemptive view and say that there is much that has been done that was evil and that there is much that has been done making up for that evil. But, one has to recognize that people have legitimate views about what the religious voice means or stands for. It’s not a ridiculous fear. It may be that the theories of how it works in the Establishment Clause are problematic, but the fears are not ridiculous. The fact of the fear doesn’t mean the fear is properly addressed by trying to design a vision of the public square such that some people are allowed to enter and some are not. After all, people have tortured and murdered for equality and freedom and justice and that doesn’t mean that those are values that you can’t argue for.

But also, I genuinely believe that religion is not like secular ideologies. It’s distinct, not only in the role it plays in the life of an individual human being, but it is distinct also, and needs to be nurtured especially, because of the role of communities of worship in weaving together what they would consider a better moral vision for the world. Now sometimes these ‘better moral visions’ are worse. Sometimes they’re better. In a society that works so hard in enforcing a kind of conformity of views, it’s tremendously important to have the strength of
the religious view. Any number of religious communities stand apart as moral critics. I would hope, as a religious person to be able to have this sort of role to play. This doesn’t mean that this is what always happens or even what usually happens. This is something we have to nurture. It is a tremendously important source of dissent and of power. If we don’t nurture it, if we create a secular space that seems better off without these communities of dissent, then I do really worry a lot about the problems of majority tyranny. You end up with an unmediated relationship between the citizen and the state with no other centers of power. So many have been squeezed out already, it would be criminal to squeeze out the religious centers of power in dissent.