

Book Review

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Recommended Citation

Book Review, 23 Md. L. Rev. 101 (1963)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol23/iss1/10>

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Book Review

Religion And The Law Of Church And State And The Supreme Court. By Philip B. Kurland, Aldine Publishing Co., 1962. Pp. 127. \$3.95.

This book is very timely both because it attempts to elucidate and clarify one of the more controversial issues on the political scene which transcends party labels and divides Americans of different religious persuasions. Treatises published on this subject are written either by Catholics, who, because of the potential gain for their parochial schools, advocate for increased aid or by proponents of the public school system who set out to find any help for parochial schools unconstitutional because they feel an educational dollar going to a private school hurts the public school system and therefore is misdirected. The author, realizing this dilemma, says in his preface, "Not only have emotion and reason produced a conflict that has blunted the distinction between constitutionality and desirability, but so, too, have expediency and responsibility been in opposition, with the same result." (p. 8).

Professor Kurland gives the purpose of his book: "The contents of this volume are devoted solely to the constitutional question: the meaning and application of the religion clauses of the First Amendment, as construed by our highest judicial authority, the Supreme Court of the United States." (p. 8). He proves his qualifications for the difficult task of distinguishing between constitutionality and desirability in this passage: "My own reading of the cases leads me to the conclusion that aid to parochial schools is not unconstitutional, so long as it takes a non-discriminatory form. I am at least equally convinced that the segregation of school children by religion is an unmitigated evil. As a judge, I should have to vote to sustain the constitutionality of such legislation; as a legislator, I should have to vote against its passage." (p. 9). He requests the readers to keep in mind Justice Brandeis' dictum, "'We must be ever on guard lest we erect our prejudices into legal principles.'" (p. 9).

The author does not search for the historical origin of the First Amendment but tries to establish its interpretation and limitations by analyzing Supreme Court decisions

which report concrete and factual situations. The book starts out with early Mormon cases and quotes from these cases which establish severe limitations to the "free exercise provisions", a trend which has been of course reversed since then.

The case of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) Mr. Kurland cites "as the most abused citation in the construction of the First Amendment." In 1922 the State of Oregon established the statute that made it compulsory to attend public schools only. This statute was challenged by a parochial school and a military academy and when it came up to the Supreme Court, the Court decided that Oregon has no right to put these schools out of business and parents have the right to send their children to private schools. The author maintains that *Pierce* rests clearly on the protection of the business and property rights of these schools. While it is true that the First Amendment is not involved here, it establishes a basic principle in Church and State relationship, namely, that the parent has a right to send a child to a parochial school; thus it is quite appropriate to consider the *Pierce* decision within the framework of Church and State relationship. In *Cochran v. Board of Education*, 281 U.S. 370 (1930) the Supreme Court held it permissible for the state to supply free text books to parochial school children when it is the policy of the state to provide free text books to all children attending schools. By citing this case the author establishes the principle that aid to a church related school is not unconstitutional as long as the child is the primary beneficiary and the assistance given is available to all children. This policy was also echoed in *Everson v. Board of Education*, 330 U.S. 1 (1947) where bus transportation for parochial school children was held constitutional if provided to all school children. Another fundamental case to clarify the church-state relationship is the Providence Hospital case (*Bradfield v. Roberts*, 175 U.S. 291 (1899)) where an agreement between the United States and the Providence Hospital was challenged. This agreement provided that the Government should pay for the erection of a hospital building, providing that it would take in poor patients regardless of religious beliefs. The complaint was that the hospital was a private eleemosynary corporation, controlled by the Catholic Church, and therefore, any monies paid in pursuance of the contract was a violation of the separation clause. The Court dismissed the complaint and the author interprets this decision as follows:

“United States was purchasing services or accommodations from private sources, the seller cannot be disqualified — anymore than it can be qualified — on the ground of religious beliefs. If it were shown that the effect of these services through sectarian facilities in fact resulted in persuasion of the beneficiaries toward the adoption or retention of the Catholic faith, or if it were shown that influence, subtle or direct, were exerted to these ends, or if it were shown that the monies paid substantially exceeded the value of the services rendered, a different result would be required. Proof of these facts might be difficult, though no more difficult than for those asserted in the *School Segregation* cases. But the allegations of the *Bradfield* complaint, or the fact that the recipient of the monies from the United States was a sectarian organization, should not suffice to invalidate the contract, whether it be a contract for services or for tangible goods. And this was the conclusion reached by the Court in sustaining the payment by the United States of trust funds to Catholic schools voluntarily attended by Indian beneficiaries of the trust.” (p. 34, fns. omitted).

Professor Kurland gives a masterful and meaningful commentary on the flag salute cases where the Supreme Court within a three year period reversed itself completely.

Almost a quarter of the book is devoted to examination of Supreme Court decisions dealing with limitations of the Freedom of Religion provisions where local ordinances require a license or other permissive acts before an individual may propagate or solicit funds for his sect. The author is somewhat bothered by decisions which could be read as giving the Freedom of Religion clause more preferred status than the Freedom of Speech or Freedom of the Press provisions of the First Amendment.

Justice Jackson concurring in *Douglas v. Jeannette*, 319 U.S. 157, 179 (1943) seems to give an answer to this problem when he says, “[T]he history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. . . . It was to assure religious teaching as much freedom as secular discussion, rather than to assure a greater license, that led to its separate statement.” (p. 65). Throughout the book the author is concerned that the freedom clause of the First Amendment should not be treated apart from the separation clause because he feels that too strict an

interpretation of the separation clause could easily infringe on the free exercise provision of the Amendment.

The book makes excellent reading for the layman as well as the student of Constitutional Law because it treats comprehensively and objectively each area where Church and State meet. It does not have the final answer to many of the problems because forthcoming decisions may give new interpretation to an old principle. The recent decision outlawing the Regents' prayer and the forthcoming decision in the Maryland case challenging the recitation of the Lord's Prayer in the public schools and the Pennsylvania case challenging Bible reading in public schools may further clarify or confuse this issue. As background material Professor Kurland's book should be a very valuable aid.

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