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Book Reviews

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Religion, The Courts, And Public Policy. By Robert F. Drinan, S.J., McGraw-Hill Book Company, New York: 1963. Pp. 261. $5.95.

In this scholarly and lucid book, the Dean of the Boston College Law School is troubled by the fear that the Supreme Court, in its decisions under the Establishment and Free Exercise Clauses of the First Amendment, may interfere with the place which, he believes, religion should be granted "in the public life of a newly pluralistic land". He traces the background of Church and State relationships in the United States, and discusses areas of cooperation, such as tax exemption for churches and similar institutions, draft immunity for divinity students and clergymen, government salaries for chaplains and tax support for church-related social welfare agencies. He analyzes the decisions of the Supreme Court on Church-State issues and the implications of the opinions, majority, concurring and dissenting. Even the questions of the Justices during oral argument are cited for the light they may shed on the outcome of the cases.

Fairly and objectively, Dean Drinan discusses the attitudes of various members of the Protestant, Catholic and Jewish religions on the delicate issues which the Supreme Court has had before it. He points out the paradoxes and inconsistencies that characterize the basic relationship of our American society to religion and the vast unexplored areas in which American thought has not crystallized and the judicial process has not been focused.

Much of the book is concerned with the issues and decisions in the field of religion in the public schools. Dean Drinan wrote after the Regents' prayer case[1] but before the Bible reading and Lord's Prayer decisions.[2] There are penetrating chapters on the legal questions presented with respect to State aid, direct or indirect, for what are generally termed parochial schools, but which the Dean prefers to call church-related educational institutions. He recognizes and explains the divisions of

[1] Engel v. Vitale, 370 U.S. 421 (1962).

[2] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

thought and the emotional reactions on benefits to pupils in such schools, exemplified by the 5-to-4 Supreme Court decision sustaining the constitutionality of State aid for bus transportation.[3] He presents the arguments against excluding the children of church-related schools and their parents from the financial benefits which he suggests are inherent in the American philosophy that every child should have a free education, and he contends that the granting of tax money to finance a small part of the secular program of such institutions could not undermine the public school or weaken national unity.

Despite his views on this phase of the Church-school controversy, Dean Drinan analyzes the Supreme Court decisions with the fairness and objectivity of the legal scholar. He points out that the Supreme Court in the 172 years from 1791 to 1963, has considered only 11 cases involving religious problems in publicly maintained schools. His discussion of the *McCollum*[4] and *Zorach*[5] opinions dealing with released-time in public schools, with their differences of emphasis, is particularly illuminating. In a separate chapter, he considers the Supreme Court's decisions in the cases involving Sunday laws in the light of history and the views expressed on behalf of the different religions.

The Dean concludes that there are vast non-controversial areas where an almost universally accepted understanding on Church-State matters exists in the American mind. He points out that seldom if ever before have there been nations without the existence of deep social and often legal barriers between the members of different religious faiths. In his view, a central question of the relationship between Church and State is the extent to which our country has relied and should continue to rely on "the invincible but real moral influence of the churches and synagogues of America". He recommends to all citizens to consider that the basic problems involved go far deeper than the legal issues.

In his discussion of the Regents' prayer case[6] the Dean tends to agree with the Supreme Court's decision, because the author of the prayer was a State official. Presupposing the Court's subsequent holdings that Bible-reading and recital of the Lord's Prayer in the public schools are

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[3] Everson v. Board of Education, 330 U.S. 1 (1947).

[4] Illinois ex rel McCollum v. Board of Education, 333 U.S. 203 (1948).

[5] Zorach v. Clauson, 343 U.S. 306 (1952).

[6] *Supra*, n. 1.

unconstitutional, he feels that even under such decisions "it seems unlikely that the basic nature or role of the public school in our society would be substantially changed." Indeed, he remarks, the elimination of these symbols of religion might serve to dramatize the fact that the substance of religion has been absent from public education for many decades. It is the impact of such decisions on the legally unresolved questions in the broader fields of Church-State relationship that he fears.

The Dean points out that some of the controversy over the *Engel* case could be calmed by a study of a footnote to Justice Black's opinion, which states that there is nothing in the decision inconsistent with the fact that school children and others are encouraged to express love for our country by reciting historical documents, such as the Declaration of Independence, which contain references to the Deity, or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being; or with the fact that there are many manifestations in our public life of our belief in God.[7] Dean Drinan finds consolation in this footnote, even though Mr. Justice Douglas, in his concurring opinion, and Mr. Justice Stewart, in his dissent, both feel that the footnote does not save the practices referred to from the thrust of the ruling.

To an even greater extent, the opinions in the Bible-reading and Lord's Prayer cases[8] emphasize their restricted scope. Mr. Justice Clark, in the majority opinion, states that nothing said therein indicates that a study of the Bible or of religion, "when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment".[9] In his concurring opinion, Mr. Justice Brennan asserts that, while the State must neither favor nor inhibit religion, "hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood."[10] The concurring opinion of Mr. Justice Gold-

[7] *Supra*, n. 1, 435.

[8] *Supra*, n. 2.

[9] *Supra*, n. 2, 225.

[10] *Supra*, n. 2, 296-7.

berg, with whom Mr. Justice Harlan joins, states that it seems clear to him from the opinions in the present and past cases, that "the Court would recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teaching of religion, in the public schools."[11] These statements refer to some of the areas of Church-State cooperation discussed by Dean Drinan which he fears may be interfered with in future decisions of the Court; and while future decisions cannot be forecast on the basis of language in which agreements on the resolutions of specific situations are expressed, these dicta may, to some extent, allay the apprehensions which Dean Drinan and many others feel.[12]

That there is so fortunate an euphoria in our religiously pluralistic society, does not mean that the euphoria will necessarily continue under circumstances which cannot now be foreseen, or lessen the responsibility of the Supreme Court to adhere to what it finds to be the meaning of the First Amendment in the decision of specific controversies. Even today, organizations of virulent bigotry function openly. Persecutions because of religion have not been confined to the eras before the First Amendment was adopted. In history, periods of religious amity have often been succeeded by violent intolerance. In our own State, the Toleration Act was followed by the establishment of a State Church and the passage of some of the most oppressive anti-Catholic laws of Colonial times.

The course of decisions under the Establishment and Free Exercise Clauses of the First Amendment is only at its beginning. In the words of Mr. Justice Frankfurter in his concurring opinion in *Illinois v. Board of Education,* "This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case."[13]

Some of the future decisions of the Supreme Court under the religious guarantees of the First Amendment, like some of the past cases, may hold unconstitutional laws and practices which many believe beneficial; others may leave undisturbed important areas of Church-State coop-

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[11] *Supra,* n. 2, 306.

[12] See Pollak, *Public Prayers in Public Schools, Foreword to The Supreme Court 1962 Term,* 77 Harv. L. Rev. 62 (1963).

[13] *Supra,* n. 4, 212.

eration, as have some of the cases to which Dean Drinan refers. Whether we agree or disagree with the result of a particular case, to the extent that the Court makes effective the "spacious conception" of the Establishment and Free Exercise Clauses, it buttresses our liberties.

REUBEN OPPENHEIMER

Professional Staff Of Congress. By Kenneth Kofmehl. Purdue University Studies: West Lafayette, Indiana, 1962. Pp. 282. $6.00.

The heart of this book is an analytical study of the professional staff for Congress as it was reorganized and expanded under the Legislative Reorganization Act of 1946. The author explored the 80th through 82nd Congresses by means of interviews and documentary examination. From this study, conducted under a grant from the Purdue Research Foundation, he garnered information on many aspects of the organization, procedure, objectives and accomplishments of the various staffs.

To aid the general reader, the author sets the stage in Part One, wherein he includes an informative chapter on the composition of the standing committees. Part Two is concerned primarily with the staffs of these committees and provides a solid basis for understanding how committee staffs in general operate. Part Three considers individual Congressional office staffs, the author using the Senate chamber as illustrative, and provides an interesting look into the working group with whom the member of Congress surrounds himself.

Another Part of the book deals with the Office of the Legislative Counsel, an important and remarkably well run staff within Congress. It is this staff which is called upon to assist in writing the bulk of the legislation.

In each of the book's Parts, and in a final Part, the author sums up, drawing together the discussion. A "postscript" chapter is added to bring the study up to near publication date.

Professor Kofmehl makes two particular references which will be of especial interest to the lawyer. First, in discussing the qualifications of committee aides, he devotes

one long paragraph to stating the advantages of a legal education for a committee staff member. (pp. 85-86) It must be realized, of course, that the nature of the committee itself often is determinative of qualifications. For example, on the Joint Committee on the Economic Report one naturally finds staff members who hold degrees in economics. Of fifty-two professional aides to committees in the 82nd Congress interviewed, twenty-two held LL.B. degrees and three also had LL.M. degrees.

The other reference of particular interest to lawyers is the discussion of the criticism, leveled principally by political scientists, that there are far too many lawyers and not enough social scientists on the committee staffs. Professor Kofmehl, who is himself an associate professor of government at Purdue University, devotes several pages to refuting this argument. (pp. 92-96)

The scope of the study includes, among other elements, salaries, hiring and firing procedures, work on legislation, interstaff relationships, the practice of earmarking staff members for the majority and minority members of the committee, and the resulting problems attending such a practice. Each of the fourteen chapters is well documented, the average number of notes running to approximately thirty per chapter. They are collected in the back of the book, a not unusual practice but one which many readers generally find inconvenient because of the constant flipping back and forth while reading. This is particularly true in this case, because many of these notes are merely authority for statements or statistics and the number of general information notes for each chapter is minimal.

While the book is hardly bedside reading, it is a comprehensive study of the nature and functioning of congressional staffs, which play such an influential role in the lives of all Americans. It will be welcomed particularly among the political scientists and is a fine reference for the professional contemplating this type of government service.

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