1964

Book Review (reviewing Robert F. Drinan et al., Religion, the Courts, and Public Policy (1963))

Philip B. Kurland

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
space relevant to the emergence of a legal order; but it is premature to treat such a legal order on the same level as would be appropriate in a less exotic sphere.

Richard Posner *


To the outsider, there would seem to be two sets of spokesmen for the Catholic position on church and state in the United States. The one is represented by the eminently reasonable, persuasive — indeed, charming — priests and laymen like Father John Courtney Murray and John Cogley. The other voice speaks in strident tones and doctrinaire language that makes the non-Catholic think of Spain and Colombia. The latter is the voice, for example, that spoke so sharply in condemnation of the Supreme Court’s judgments in the school-prayer cases, the same judgments that an earlier generation of Catholics had sought and won in some state courts.

Dean Drinan obviously belongs with the first group. But he reveals, as Father Murray revealed before him, that if reason is the first method for reaching his audience, authority is always available to sustain a position that is not otherwise convincing. In this volume, Drinan catalogues the current areas of church-state controversy in the United States and proceeds, with admirable forensic talents, to proofs of the validity of the Catholic position as to each. Essentially, the proofs are of two different kinds. One is concerned with the details of legal controversies, the cases and arguments with which courts must deal in order to resolve the litigation before them. The second is an appeal to what is obviously regarded as a higher command, a request for conduct that is not governed by the limitations of the first amendment of the Constitution. Certainly any Catholic interested in the legal position of the Church on these questions must read this book. Certainly, too, any non-Catholic who would enter the lists in opposition must read it, lest he find himself disarmed before the contest is even under way.

An assay of Father Drinan’s legal arguments is too difficult to expound in a book review. His extensive brief can really be adequately treated only by an opposing polemic of at least equal length. An example of the problem is suggested by Drinan’s reliance at the outset on memoranda opinions of the Court dismissing appeals from judgments of state courts sustaining the validity of tax exemption for churches.

*Member of the New York Bar.

1 Dean and Professor of Law, Boston College Law School.
3 See, e.g., People ex rel. Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910).
4 See Murray, We Hold These Truths (1960).
for want of a substantial federal question (pp. 8–11).\(^5\) Certainly it has long since been apparent that Supreme Court disposition of cases that do not deal with the merits, especially in this area, are short-lived precedents at best.\(^6\) But there are further complications. If this dismissal amounts to substantial authority, what then of the Court’s failure to reverse state court injunctions against tuition payments, bus rides, and textbooks for parochial school pupils (see pp. 130, 141–53, 155–60)? It is to Drinan’s credit that he does not attempt to distinguish the adverse memoranda rulings from the favorable ones on the ground that the former involved petitions for certiorari and the latter came up by appeal. For one thing, state court judgments favorable to Drinan’s thesis would almost always come up by appeal since they would involve decisions in which the state courts rejected the claims of those asserting rights under the Constitution; judgments adverse to his position would almost necessarily take the certiorari route because they would result from state court action sustaining the federally grounded claim. But perhaps more important, the time has probably come when it must be recognized that dismissals of appeals by the Supreme Court are no less discretionary rejections of a hearing than are denials of certiorari, the jurisdictional statutes and rules of the Court to the contrary notwithstanding. It is not, as some would claim, that denials of certiorari have risen to the level of decisions on the merits, but rather that dismissals for want of a substantial federal question have sunk to inscrutable decisions not to entertain the appeal.

I do not suggest these details to dispute Drinan’s conclusions about the validity of tax exemption for churches, but only to show the complicated arguments that would have to be considered if one were to deal with Drinan’s legal arguments in detail. Indeed, on my own notions of the proper construction of the first amendment,\(^7\) I should agree that such tax exemptions can certainly be justified, if not required, by the similar exemptions given other nonprofit enterprises.

If detailed criticism of Drinan’s legal analysis is not meet here, it is even more inappropriate to attempt to value his first principles, principles that, for him, override the mere legalities that stand in the way of government subordination to religion. Suffice it to say that I cannot accept the proposition with which he begins this volume and on which all the remainder of his argument rests: “The separation of church and state does, of course, exist in America, as it must in every nation where the spiritual needs of man and the dictates of his conscience are deemed to be superior to the temporal demands of the state” (p. 5). Nor am I prepared to join in his conclusion, quoting Reinhold Niebuhr: “In every church-state controversy, it is well that all parties realize that in our

---


\(^7\) See KURLAND, RELIGION AND THE LAW (1962).
society the 'working principles of justice . . . transcend reason and lie rooted in the religious conceptions of the meaning of existence'” (p. 232).

Nonetheless, I must credit Father Drinan with a volume extraordinary among writings that deal with the problems of church and state in the United States because of its fair treatment of the views of his antagonists and its full disclosure of legal authorities pro and con. Despite Father Drinan's eloquence, however, I am still of the view that religious doctrine is not superior to civil authority and that controversies of the kind that this volume considers must be resolved by reason rather than faith.

PHILIP B. KURLAND *


Kimball and McClellan have written an excited book full of overtones of urgency in favor of education. For the preschool child they emphasize three kinds of learning: first, that “love is possible, even to modern man” (p. 285); second, “a vague and permeating sense of dissatisfaction with himself and his environment” (p. 286); and third, “a clear sense of the distinction between the inside and outside of things” (p. 287). For the first years of school, they urge more experiments to determine whether a discipline based on “ritual, incantation and unquestioning acceptance” (p. 292) may not be replaced or supplemented by greater participation by youngsters in the educational process. The authors ask whether social interaction among the children might not be employed in the process so that “the basic forms of discipline in the adult culture could become the operative forms of disciplines in a childhood peer culture” (p. 292). For secondary schools and colleges they emphasize instruction in four disciplines, although they disclaim any suggestion that the four disciplines should serve as a basis for curriculum organization. The four disciplines are: logic and mathematics; experimentation; natural history; and finally “the discipline of esthetic form” (p. 301). These ideas are advanced with a seriousness which belies their lack of development. One wonders why their promulgation should entitle a book to admission into the select circle of non-law books reviewed in the Harvard Law Review. Perhaps greater significance is to be found in the breathless way in which the authors view what they regard as the crisis of our culture.

According to the authors, the crisis of our culture is reflected in the lack of commitment of Americans to the social system they serve or to any institution in a sufficiently meaningful way. The results of this lack of commitment include an unsatisfactory cult of self-fulfillment

* Professor of Law, The Law School, The University of Chicago.

1 Professor of Anthropology and Education, Columbia University.

2 Professor of Education, Temple University.