

BOOK REVIEWS

Religion and the Law: Of Church and State and the Supreme Court.
By PHILIP B. KURLAND. Chicago: Aldine Publishing Co., 1962. Pp. 127.
\$3.95.

If, as has more than once been suggested, the United States Supreme Court Reports furnish a revealing reflection of the principal political, economic and social forces at work in the United States at any given time, it is not implausible that some statistically minded student of the temper of the period beginning with the 1940's and extending at least into the 1960's should conclude that it was a time marked first by an increasing repression of religious unorthodoxy, and later by a turn toward the establishment of religion. His conclusion would be based upon the fact that though there had been some sporadic instances earlier, this was the first period when citizens in any number large enough to be deemed significant by reputable sampling techniques found themselves required to invoke in the Supreme Court of the United States the constitutional provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," together with corresponding prohibitions deemed applicable to the states. A perhaps more discriminating scholar might question the inference drawn from the statistics assembled, and suggest that the period was simply one when groups and individuals previously passive grew more restive and less acquiescent in practices previously accepted reluctantly but without complaint.

A third scholar might question the assumption on which these studies were based and suggest that if the United States Reports may in some measure serve to reflect the country, one must be cautious lest distortions created by the mirror itself be taken as an accurate image of what it is thought to reflect. He might call attention to the vagaries of Supreme Court appointments and tenure and all that they imply with respect to the character of the Court at any given time. He might suggest that minds that reached the Court were often not without some tendentious and didactic cast upon arrival, and that it appeared an observable fact that lengthening tenure within the isolation of the Court seemed more often than not to enhance rather than diminish these qualities. He might suggest that some of the issues which in any given period appeared with growing frequency and vigor in the United States Reports were therefore to some appreciable extent synthetic, stimulated, though not entirely created, more from within the Court than from without.

Whatever the cause and significance of the fact that litigation involving,

or purporting to involve, constitutional issues of religion has reached the Supreme Court with unprecedented frequency in the past twenty years or so, and promises to continue, Professor Kurland's small book should be received with gratitude by all who seek enlightenment, understanding and careful analysis with respect to all of the so-called religious cases that have been decided by the Court through the first half of 1961. Since litigation involving religious issues appears not only to generate an uncommon amount of heat while it lasts, but even to project and perpetuate that heat, one might be additionally grateful to Professor Kurland for his demonstration that in a number of cases thought to involve issues of religion those issues have been interjected sometimes needlessly and sometimes almost irrelevantly. One might be grateful, that is, if one were optimistic enough to believe that lawyers and judges would take a lesson from Professor Kurland's scrupulously careful analysis. The more pessimistic will be inclined to believe that such lessons are rarely learned, and that Professor Kurland's demonstration that the emotion-laden issues of religion have been either gratuitously or unnecessarily interjected into litigation in the past is an unhappy prediction that, given the opportunity, they will continue so to be interjected in the future.

Religion and the Law offers, however, even more than an account and analysis of Supreme Court decisions and opinions, excellently as it performs that function. Professor Kurland suggests as well a somewhat more explicit meaning for the freedom of religion and establishment clauses of the first amendment as a neutral principle that may serve as a statement of function and therefore point of beginning to guide decision. He suggests that these clauses are not, as they are often regarded, distinct and separate, but are in fact inseparable and are to be "read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause."¹ At the beginning² and again at the end³ of his book he sets forth this thesis:

The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden. This test is meant to provide a starting point for the solution to problems before the Court, not a mechanical answer to them.

He does not suggest that this doctrine, or formulation, has ever appeared in explicit terms in Supreme Court opinions. But he examines opinions and decisions in the light of this statement, finds some suggestions of the idea in opinions, much in decision that seems to support it, more that is consistent with it, some expressions in opinions that are inconsistent with it, and some, but very little, in decision that is inconsistent. He points out, for example, that if the Court had sanctioned exemption from criminal sanctions for

¹ Pp. 17-18.

² P. 18.

³ P. 112.

bigamy in favor of those who practiced polygamy in conformity to religious doctrine, it would, in fact, have been creating a favored class in terms of religion and thereby violating the establishment clause as he understands it.⁴

If one were to seek to question any of Professor Kurland's analysis or doctrine one might wonder at the significance of the "or inaction" in his formulation above quoted. Perhaps he means only by "inaction" a specific exemption or exception. If so, one understands, and remembers the caveat about mechanical answers to some of the implied questions of application, as, for instance, in the area of fiscal grants. But "governmental inaction" is a phrase also having other, and even more significant, overtones. Attempts have been made, in periodical literature and elsewhere, to convert constitutional prohibitions into converse constitutional commands, but it seems hardly likely that Professor Kurland should undertake this task, if he was to undertake it at all, *sub silentio*, as it were. Judicial authority may well come to effect the conversion generally after the fashion that it once did in the analogous instance of *In re Debs*,⁵ but those dark pages of the United States Reports one can view only as the inescapable prerogative, and not the sanctioned use, of judicial authority.

But with almost this single exception, or question, Professor Kurland's work is of such a high order of professional and analytical care and accuracy that, allowing room for occasional difference of opinion or emphasis, criticism, if it is criticism, must pass to another level. On that other—shall one say, practical—level, one may pose the bald question of the relevance of this excellent work. The question is not as paradoxical as it may sound. It notes only that Professor Kurland works within the framework of an ancient professional and scholarly tradition of analyzing issues in litigation, and particularly in constitutional litigation, within the sharply focused statement of a specific case. The Court with which he deals, however, shows itself increasingly restive within such traditional limitations, increasingly inclined toward the universal statement or supervisory command, and perhaps in few places more so than in the very cases involving the constitutional issues of religion. If the fact of that attitude is questioned, the majority and concurring opinions in *Engel v. Vitale*⁶—one speaks now only of method, not of result—should be an adequate answer, though other examples are not wanting. One might note also, as a small but possibly significant indication of that attitude, the frequent recurrence of what may be dismissed as only a chance and figurative phrase, but one that appears to have such a character and to have come so close to the habitual as to be indicative of an attitude. I refer to the apparently little-noticed fact that the Justices now almost as a matter of course refer to the fact that they have "struck down," or do "strike down," a statute. If judicial

⁴ P. 22.

⁵ 158 U.S. 564 (1895).

⁶ 370 U.S. 421 (1962).

review, so-called, emanates from Article III one searches there in vain for authority of such dimensions as that phrase suggests.

The question of the function of the judge is of particular significance in cases that may be thought to involve the issue of establishment. It ties in with what so many regard as that dull and technical word "standing," a word that nevertheless serves as the point of division between those who would bestow on judges a broad supervisory power over government, and, on the other hand, those who believe that Article III gives to a small group of men holding office for life a much narrower role in a democratic society. Whether one agrees completely with Professor Kurland's statement of the function of the establishment clause or not, establishment will at least frequently involve some favored treatment. And rectifying inequalities is rarely subject to easy solutions, particularly when the norm is not that of the favored group.⁷

Let us consider a specific simple example. Section 107 of the Internal Revenue Code provides that in the case of a minister of the gospel, gross income does not include the rental value of a home furnished him, or a rental allowance to the extent used to rent or provide a home. This is a much broader exclusion than the very restricted exclusion of value of lodgings provided by section 119 in the case of other employees.⁸ By Professor Kurland's standards, and perhaps by those which the Court may apply, a strong case at the very least can be made for the conclusion that section 107 is inconsistent with the establishment clause. But can a corporation executive or a wage earner occupying a company-owned dwelling rent-free invoke the asserted unconstitutionality of section 107 if the Commissioner of Internal Revenue asserts a deficiency in income taxes against him because he failed to include the rental value of the house in his gross income? Perhaps Professor Kurland thinks he should be able to, for he criticizes⁹ the decision in the *Selective Draft Cases*¹⁰ where persons convicted of draft evasion unsuccessfully invoked the exemption of ministers, students in divinity schools and conscientious objectors whose scruples were based upon their religious creed. But is the matter so clear, even if one assumes that the exemption is in conflict with the establishment clause? Must not a court decide which is the norm, whether a legislature faced with the necessity of choice would surrender the generally imposed burden or the specific and narrow exemption? If it decides that the legislature would undoubtedly retain the generally imposed burden, can it hold the statutory duty thus imposed inoperative? Is the problem not at least roughly analogous to the problem of separability when the operation of some aspects of a statute, or its operation under some circumstances, is found to conflict with the Constitution?

⁷ See, e.g., Note, *Remedies for Unequal Property Tax Assessments*, 46 HARV. L. REV. 1000 (1933).

⁸ See, e.g., Mary B. Heyward, 36 T.C. 739 (1961).

⁹ Pp. 37-38.

¹⁰ 245 U.S. 366 (1918).

If I am correct in believing that the executive or wage earner would probably not succeed in his own tax case by invoking the conflict of section 107 with the establishment clause, would he, or any other taxpayer, have standing to mandamus the Commissioner of Internal Revenue to assert deficiencies against all ministers who have been enjoying the largesse of section 107? If the function of a plaintiff is only to serve as a catalyst of judicial supervisory action, one answers in the affirmative. Those who would assign to judges a more limited function would be unable to find standing to institute or maintain such a proceeding.

If one regards problems of standing as picayune and tedious, a will to surmount them may indeed find a way, as is clearly demonstrated by *Engel v. Vitale*.¹¹ That opinion involving the prescribed recital of a prayer in the public schools of New York apparently accepted "the fact that its observance on the part of the students is voluntary."¹² Nevertheless we are told that the establishment clause was "made applicable to the State of New York by the Fourteenth Amendment of said Constitution."¹³ This is not the first time that similar statements have been made, but the statement is easier to make than to demonstrate in a fashion relevant to the case at hand. If one assumes that the reference is to the due process clause, the textual statement is, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Assuming substantive content for that clause, one would think that if, as we have frequently been told, the Constitution means absolutely what it says, then some finding of infringement on life, liberty or property would be necessary as the basis of the action, if the plaintiff is to have any standing to maintain an action based upon this constitutional prohibition. Perhaps it is no longer necessary. One notes that Justices frequently write that plaintiffs have been "deprived of due process." Is this merely ellipsis of statement, or is it indicative of an attitude that attention is now to be directed more, or exclusively, at the bad thing with which the defendant is charged than at the interest of the plaintiff?

Of course it may be said, if saying makes it so, that liberty is infringed, and the liberty of all is involved, when government does anything unfortunate. Justice Black says even more: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."¹⁴ It may be plain to the Supreme Court. It is questionable whether it has been so plain to millions of persons in Great Britain during recent decades. Is the coercive effect of section 107 of the Internal Revenue Code entirely plain?

¹¹ 370 U.S. 421 (1962).

¹² 370 U.S. at 430.

¹³ 370 U.S. at 423, quoting from *Engel v. Vitale*, 10 N.Y.2d 174, 176 N.E.2d 579 (1961).

¹⁴ 370 U.S. at 431.

This is not to say that the decision in *Engel v. Vitale* can not be supported, but only to question establishment as its basis. There are those who would discount the proclaimed voluntary nature of the prayer ceremony, and find in a psychic coercion to conform a resulting infringement of freedom of religion, and therefore of liberty. This is not the occasion to inquire whether courts are equipped to measure coercion of this type, or whether political liberty and religious liberty are of such different nature that a school may not offend equally when it dismisses children to applaud a parade featuring a political figure. Nor should one now inquire whether portraits of political figures who happen to hold, or to have held, public office would, if displayed on school-room walls, constitute an unconstitutional political hagiology.

Since Professor Kurland's admirable book deals only with cases thus far decided, he does not touch one religious problem looming over the horizon. With the concept of state action expanding, and probably to be expanded, in other areas, will its course not inevitably intersect the questions of religion? One of the establishments occupying part of the premises of the Wilmington Parking Authority was, we are told,¹⁵ a bookstore. Passing the problem of its freedom to choose the literature it might sell, could it sell religious books at all? Could it limit its selections to the denominational preference of the proprietor? Christmas carols and Christmas symbols are perhaps now suspect in the public schools. Will they soon be equally suspect in retail establishments?

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¹⁵ *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 720 (1961).

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Render unto Caesar: The Flag-Salute Controversy. By DAVID R. MANWARING.
Chicago: University of Chicago Press, 1962. Pp. x, 321. \$5.50.

Professor David Manwaring's meticulous study of the adventures of the Jehovah's Witnesses in their campaign against the compulsory flag salute arrives at a propitious moment. Advocates of prayer and Bible reading in public schools, currently smarting under the Supreme Court's recent ban on the New York "non-sectarian" formula,¹ are demanding that such invocations of divine grace be legitimized on the ground that an appropriately non-partisan prayer does not violate the separation of church and state. The notion behind this seems to be that a neutral prayer (perhaps addressed "to Whom it may concern"?) is actually a secular exercise, a component in the American version of Rousseau's "civic religion." In other areas too—most notably education—the Supreme Court has been called upon to clear away the fog that conceals the location of that "impenetrable wall" separating the secular from the religious jurisdictions in American life. As Philip Kurland demon-

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