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The Supreme Court and Public Prayer: The Need for Restrant. By Charles E. Rice.

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THE SUPREME COURT AND PUBLIC PRAYER: The Need for Restrant. By Charles E. Rice. New York: Fordham University Press. 1964. Pp. xiii, 202. $5.00.

Blest with victory and peace, may the
heav'n rescued land
Praise the Pow'r that hath made and
preserved us as a nation!
Then conquer we must, when our cause
it is just;
And this be our motto:
'In God is our trust.'

Stirring words. Some few may recognize them as from the last stanza of *The Star-Spangled Banner*, by Act of Congress the National Anthem since 1931. Devotional use, however, has been prohibited by the New York State Commissioner of Education since *Engel v. Vitale.*[1] *Reductio ad absurdum*, but, nevertheless, an actual application of the position of the Supreme Court on public prayer.

This and other results from the school prayer decisions are but a portion of the analysis given by the author. His attitude is unequivocal: "The school prayer decisions, handed down by the Supreme Court of the United States in 1962 and 1963, were wrongly decided" (p. ix). Therefore, his analysis is argument. Considering the burden, it is borne well.

The author's criticism is directed to the series of cases more commonly known by their subject matter: the Regents' Prayer decision,[2] and the subsequent single decision of two cases involving Bible reading and recitation of the Lord's Prayer.[3] In preface, the right to critical comment is supported by a strong expression from the late Chief Justice Harlan F. Stone: "When the courts deal, as ours do, with great public questions, the only protection against unwise decision, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it" (p. 4). Further points, as the excision of the decisions is developed, are supported equally as adequately by citation of authority.

Use of applicable authority to support propositions has a degree of novelty not to be overlooked in the present dispute. The opinion of the Supreme Court in the Regents' Prayer decision cites no case law while, according to the author, placing reliance upon abstract

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1 370 U.S. 421 (1962).
2 Engel v. Vitale, *supra* note 1.
3 School District of Abington Township v. Schempp; Murray v. Curlett, 374 U.S. 203 (1963).

logic and marginally relevant historical materials. Although it may be agreed that the rule of stare decisis is not immutable, still inheritance dictates a dignity to be accorded. And if, upon a rare occasion, there may be no cases, there is little dignity in rhetoric alone or to dictum from last year's decision.

It is upon these circumstances that the author builds a comprehensive argument against the validity of the school prayer cases. By careful analysis the decisional antecedents are considered in terms of factual setting and litigation purpose and results. From this, there is developed a clarity in the criticism that the Court's rationale is but rhetoric and its case authority not more than obiter dictum. For those who look upon the decisions as representing the resolution of the issue of total separation of church and state, the author's analysis should prove enlightening. A most striking illustration of what must be recognized as lack of continuity of result is found in subsequent reliance by the Court upon a sweeping description of the meaning of the First Amendment "establishment of religion" clause found in *Everson v. Board of Education.*[4] Yet this former case held constitutional the reimbursement by a township of money spent by parents for transportation of parochial pupils. As observed by the author, "the holding of the case, however, has been overshadowed by its rhetoric" (p. 9).

If continuity of result is lacking and purpose cannot be found, at least the intent of the school prayer decisions seems manifest. Superficially, it is to establish a neutrality among the "two-and-seventy jarring sects."[5] With reason the author again states that the point is wrongly decided. In matters of religion there can be no neutrality, for not to believe is itself a belief. When the Government decrees neutrality, we are warned of the likelihood that official silence will be interpreted as official agnosticism. And despite the Supreme Court's protestation that a "religion of secularism"[6] is not to be established under the First Amendment, such is the predictable result.

Historically, a shibboleth of agnosticism and a state religion of secularism seem far removed from the intent of the Constitutional Convention. Yet, we have been admonished by Thomas Jefferson and others to seek this intent in interpretation. Here the author finds the occasion for his strongest indirect criticism of the Justices of the Court which decided the school prayer cases. Even though first stating that "it is definitely not a purpose of this book to draw into

[4] 330 U.S. 1 (1947).
[5] *Khayyam, Rubaiyat,* Quatrain LIX.
[6] School District of Abington Township v. Schempp, *supra* note 3, at 225.

question in any way the good faith of the Justices of the Supreme Court," there follows, without additional comment, a quotation levelled at another Court: " 'The question arises, how far a court is entitled to indulge in bad history and bad logic without having its good faith challenged . . .' " (p. x).

The agnostic neutrality now thrust by the Supreme Court upon the populus, whereby the belief is that there is no "official belief," appears to the author without foundation in the records of the framers of the Constitution. Insofar as the support of the public prayer decisions leans upon MADISON'S MEMORIAL AND REMONSTRANCE, it is rightly observed that the references used may not be wholly material. Further, it may be noted that the Constitution is not the work of Mr. Madison alone. Others did contribute. Indeed, in the debates, as recorded in Madison's notes, a passing contribution has greater significance than might first have been appreciated. Responsive to Mr. Franklin's motion that the deliberations be preceded by prayer led by Clergy of the City, the prior lack of such ceremony was explained as "Mr. WILLIAMSON, observed that the true cause of the omission could not be mistaken. The Convention had no funds" (p. 38). Amusing, were it not that some might argue today that inaction upon the motion shows an active antipathy of the Convention toward acknowledgement of God.

Later excerpts from Congressional action upon the "establishment clause" of the First Amendment become almost anecdotal in light of recent decision. It is reported that Benjamin Huntington of Connecticut hoped "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all" (p. 43). Interest is expressed by the author in having Mr. Huntington's unvarnished opinion of the school prayer decisions.

Sufficient that the school prayer cases were wrongly decided, (rephrasing the author), "in the undesirable consequences of their continued ascendency, the absurdity of their posture of neutrality, and the inaccuracy of their historical foundation" (p. 131). What solution is to be found? Judicial restraint is proposed as a possibility. Alternatively, the solution is suggested by legislation or constitutional amendment.

Touching upon the former, palpable argument is advanced with reference to *Frothingham v. Mellon*[7] that the standing of parties to sue easily might be challenged in these and a plethora of prospective cases. In addition, to avoid an abrogation of religious heritage

[7] 262 U.S. 447 (1923).

in preposterous dimensions, the Supreme Court might consider reviving the comatose Tenth Amendment to the Constitution. There is even the extreme of retreat from what Mr. Justice Stewart has categorized as "resounding but fallacious fundamentalist logic."[8] Lacking all these, the latter solution of legislation or constitutional amendment remains.

Throughout the solutions suggested, however, there runs a thread of hopelessness woven from a general lack of directed concern. Although this author's efforts may be hoped to stimulate effective consideration of the problems and excesses in the school prayer decisions of the Supreme Court, still one is brought to wonder what the final decision may be—especially if it is to be handed down, instead of by nine jurists, by One.

J. Mark Rhoads*

[8] Sherbert v. Verner, 374 U.S. 398, 414, 416 (1963).

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