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Giannella: Religion and the Public Order

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RELIGION AND THE PUBLIC ORDER. An Annual Review of Church and State and of Religion, Law and Society, The Institute of Church and State, Villanova University School of Law. Edited by *Donald A. Giannella.* Chicago: University of Chicago Press. 1964. Pp. x, 338. $6.

One of the many anomalies and even mysteries surrounding church-state relations in America has been the absence, until very recently, of any apparent need for decisional law on church-state issues by the United States Supreme Court. From 1790 until 1947, this nation resolved virtually all of its problems regarding religion and the law without recourse to the nation's highest tribunal.

In its *Everson* opinion in 1947,[1] the Supreme Court for the first time entered the most complex area in the whole range of church-state problems—the relationship between religion and education. In the generation from *Everson* to the Bible-reading cases in 1963, the question of religion and the law became one of the thorniest and most emotional issues in contemporary jurisprudence.

Because of the urgency and importance of America's rapidly developing church-state problems, all of us are deeply indebted to Villanova University School of Law for initiating the publication of an annual critical analysis of contemporary church-state statutory and decisional law. The first volume in this series, here under review, has set a tone of scholarship and ecumenism which will not easily be duplicated or maintained.

1. Everson v. Board of Educ., 330 U.S. 1 (1947).

Two of the most useful articles of the eleven essays in this volume are a summary of church-state literature written by Professor Donald A. Giannella of Villanova Law School[2] and a comprehensive survey of the extra-judicial literature on church and state authored by Professor Thomas J. O'Toole of Georgetown University Law Center.[3] In the former, Professor Giannella devotes some seventy-five pages to a summary of all the significant church-state decisions that were issued in the period from September 1962 to September 1963; this survey does not, however, deal with the decisions relating to Bible-reading and the recitation of prayers in public schools since the able Professor Paul G. Kauper of the University of Michigan Law School has a separate and splendid article on this one phase of recent church-state controversy[4]—an article which will be discussed later in this review.

Professor O'Toole's critical analysis of books issued during the survey year is a complete and candid review of most of the volumes that are relevant to the question of the place of religion in American life. Professor O'Toole concludes that, while most of the authors now writing about church-state problems are adept in describing and dissecting past resolutions of these issues, they do not have this same facility when dealing with the problems of disestablishment and religious pluralism in contemporary society.

Each of the other essays in this unique and important annual review merits the most careful attention and appraisal. Professor Paul Ramsey of Princeton University is the author of an article that deals less with the law as such but, in a certain sense, pinpoints more than any of the other essays the deepest issues with which American law must deal when it seeks to make policy regarding morality and religion. In "Marriage Law and Biblical Covenant,"[5] Professor Ramsey perceptively comments on the unexplored and ambiguous role which the state plays when, by granting a divorce, it "dissolves" a valid marriage. His insights point to the prospective legal controversies which will arise when the contemporary acceptance of the many anomalies in American family law is challenged.

With characteristically critical comments on Protestant thought and conduct, Professor Franklin H. Littell of Chicago Theological Seminary[6] opens fire on "the more turbulent defenders of the old Protestant hegemony."[7] In Professor Littell's judgment, the failure of Protestant groups to fill the vacuum left by the outlawing of a certain Protestant "culture-religion" in American schools may well

2. Pp. 245-320.
3. Pp. 218-44.
4. Pp. 3-40.
5. Pp. 41-77.
6. Pp. 78-98.
7. P. 86.

result in the emergence of "a totalitarian combination of . . . 'non-sectarian religion,' nationalism and . . . racialism."[8] The possibility of such a "demonic thrust" in America can be inferred "if we . . . read aright the experience in other so-called Christian nations during the last two generations."[9]

One of the most searching inquiries in all of recent church-state writings is Columbia University Professor Harold Stahmer's essay entitled "Defining Religion: Federal Aid and Academic Freedom."[10] Not everyone will agree with Professor Stahmer's conclusion that "the principle of neutrality [between government and religion] . . . has the effect of reading both of the religion clauses of the First Amendment in light of the establishment clause at the expense of the free exercise clause."[11] But it would appear difficult for anyone to repudiate Professor Stahmer's assertion that no purely legal definition of religion can resolve "the question of federal assistance to accredited institutions of higher learning since the underlying issue involves an undeniable fundamental question of academic freedom."[12]

Other major essays in this first volume of Villanova's new church-state annual review are authorized by Richard L. Robinstein,[13] Theodore L. Reller,[14] and Milton R. Konvitz;[15] five shorter comments are also included.

The part of this collection that probably makes the most lasting contribution to jurisprudential thought on church-state relations is the brilliant essay, "Schempp and Sherbert: Studies in Neutrality and Accommodation," by one of America's leading authorities on the first amendment, Professor Paul G. Kauper.[16]

It is not widely known or recognized that the Supreme Court, on the very day in June 1963 when it declared Bible-reading in public schools to be unconstitutional, also ruled that South Carolina could not deny unemployment benefits to a Seventh-day Adventist who was unable to secure a job because she could not, in conscience, work on Saturday. It is the latter *Sherbert*[17] decision which Professor Kauper analyzes along with the more famous *Schempp* opinion.[18] Taking these two rulings together, Professor Kauper reasons that neither the concept of neutrality nor the "no-aid-to-religion" norm is

8. P. 87.
9. *Ibid.*
10. Pp. 116-46.
11. P. 139.
12. P. 146.
13. Pp. 147-69.
14. Pp. 170-94.
15. Pp. 99-115.
16. Pp. 3-40.
17. Sherbert v. Verner, 374 U.S. 398 (1963).
18. School Dist. v. Schempp, 374 U.S. 203 (1963).

a viable test. One must add to these theories the emphasis in *Sherbert* where the Supreme Court *required* South Carolina to accommodate its legislative policy to promote or further religious beliefs, activities and interests. The *Sherbert* ruling, in Professor Kauper's judgment, has gone farther than any other decision of the Court "in sustaining a claim under the free exercise clause."[19] *Sherbert,* moreover, makes it clear "that the Court rejects the notion that the religious factor cannot be considered a basis for a legislative classification that results in promoting or giving aid to religion."[20]

In view, therefore, of the enlargement of the concept of religious liberty in *Sherbert* and the new emphasis on neutrality in *Schempp,* Professor Kauper feels that "facing and realizing the implications of *Sherbert* may prove to be the Court's most important future task."[21] Professor Kauper does not, however, assert or imply any necessary contradiction between *Sherbert* and *Schempp.* He asserts rather—as the concluding judgment of his essay—that "perhaps the ultimate lesson to be drawn from the two cases is that the Court regards religious liberty as the central value served by the First Amendment's religion clauses and that it is prepared to follow a policy of wholesome and benevolent neutrality as the means of best serving this value."[22]

Only future history will reveal whether benevolent neutrality as spelled out in *Schempp* can adjust to and accommodate the fulsome religious freedom vindicated in *Sherbert.* All of us will continue to be grateful that Villanova will each year present to the world a volume containing the best critical views on this enormously important subject.

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19. P. 31.
20. Pp. 32-33.
21. P. 40.
22. *Ibid.*