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Religion and American Constitutions, by Wilber G. Katz

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BOOK REVIEWS

RELIGION AND AMERICAN CONSTITUTIONS. By Wilber G. Katz. Evanston: The Northwestern University Press. 1963. Pp. 318. $3.50.

Dissociation of religion from government is a comparatively novel idea. Most of our forebears in colonial America, in England, and elsewhere until two centuries ago were confident that God, or a collection of gods, benign or malign, ruled man. Hence a sensible ruler decided what divinities controlled matters, and prudently allied himself with the ruling supernatural powers, wisely and for his subjects' own good constraining his people to concur in acceptable ritual of praise and propitiation. Any idea that each subject should be free to make up his own mind as to what sort of God regulated man's affairs or what would please Him was clearly a ridiculous concept. Was every peasant or tinsmith as good a theologian as the ruler's learned doctors? Should the ruler allow his silly vassals to offend the Almighty, causing that irritable and all-powerful Ruler to visit on the whole people murrains, wars, famines, meteors, the Black Death?

About 1775—one suggests a date somewhat at random, conscious of a half-century's probable error—a great many men on the English-speaking western Atlantic seaboard had at length come to the conclusion that certain of the premises of theocracy were so debatable that compulsory commitment to any was impracticable. Hence arose that difficult and intricate disentangling we lightly call "separation of Church and State." This dissociation was painful and slow; for the two had been fused for so long, and religious ideas had for so many millennia pervaded our ancestral society, that no sudden constitutional resolution could entirely divorce the one from the other.

I illustrate the predicament with an example recently presented in the public schools of an American city. The principal of a junior high school decided that his young charges were capable of more mature work in social studies than had customarily been required. He found that in a nearby university eminent scholars had written a history of western civilization suitable for use in a college survey course. The good principal decided to try it for his junior high school pupils. The books were provided at taxpayers' expense. The authors of the text had decided, reasonably enough, that a history of western civilization necessarily should include some account of the origins and development of and differences within the Christian church, and the book contained a respectful, scholarly, and

dispassionate exposition of these matters as the authors saw them. Some of the junior high pupils had never seen anything quite like this; they very naturally told the story at home.

The principal was distressed, shortly, to have a visit from a group of clergymen among whose parishioners were the parents of their junior high pupils. Their church, the visiting clergy told the principal, had firm convictions as to its own origin and authenticity. They announced that it was none of the public schools' business to "teach religion," or to "teach about religion" (unfortunately two newspapers reported this story in these two different ways). Dispassion, detachment, scholarly judgment, the unhappy principal perceived, all involved a taking of sides. To affirm that any proposition is rationally debatable is to undermine unquestioning faith in it. The principal sent for the publicly-owned books, proposing to cut out the offending chapter from each copy.

"Book mutilation" forthwith became a *cause celebre* in the unfortunately divided town. A well-known society dedicated to civil liberties marshalled its forces against the offending principal. They upbraided the Board of Education for its principal's intellectual flabbiness. The Board directed the principal not to deface the publicly owned books. Unfortunately for the development of case-law, but happily for community peace, neither side brought any lawsuit; and thus we do not know what the Supreme Court would have told us about church, state, and history.

A bystander who is a partisan of neither cause wonders how in this situation the poor principal best could achieve harmonious application of the principal of dissociated religion and government. I think that if I were on the school board perhaps I should have, in the next school year, timidly abandoned the ill-fated experiment and substituted some bland and innocuous course in civics. The inseparable intermingling of religious and lay concepts in much of the educational *corpus* would have been demonstrated to me. Far more than the innocuous ritual discussed in the *School Prayer Cases,* a dispassionate analysis of the merits of the Reformation, impressed on pupils with all the prestige of their teacher, driven home by examinations, could offend the faith of pupils and parents. Yet we clearly should not abandon the study of all history in public schools. Separation of church and state calls for more than a sweeping resolve; it requires a continuing series of difficult policy choices, in which consistency and absolutes are impossible.

Professor Wilber Katz of the University of Wisconsin School of Law chose this difficult reconciliation for the theme of his 1963 Rosenthal Lectures at Northwestern University. Mr. Katz is one of the most reasonable, uncontentious, and courteous scholars now expounding the

theory of the First Amendment's religious clauses. In this latest book, containing his three lectures and an epilogue,[1] he advocates a "principle of full neutrality" by the state.[2] He defines his meaning of this term by contrasting examples: he notes that Bishop Pike differs from him in urging that "government may properly aid religion as long as it does not favor a particular church," while other objectors "demand strict separation, not mere neutrality." Professor Katz' position, one gathers, is somewhere between these two.

In his first lecture Mr. Katz points out that our American doctrine of separation is unclearly specified in several constitutional documents. The relevant constitutional phrases differ *inter se*—in the two clauses of the First Amendment which renounce federal legislation "respecting an establishment of religion" or "prohibiting the free exercise thereof"; in the Fourteenth Amendment's prohibition against state denial of due process and equal protection; and in variously formulated state constitutional clauses, which thank God for His guidance and beneficent provision for man and then, in the same documents, go on to forbid any expenditure of public funds for religious institutions. These rather intricate prohibitions make government a puzzling business. Mr. Katz takes to task Dean Griswold of Harvard for his Leary Lecture at the University of Utah in 1963,[3] in which Mr. Griswold argued for less absolutism in church-state cases, in substance contending for what Holmes called a little play in the joints of the machinery of government in order that it may work. I am a little puzzled to see where Mr. Katz greatly differs from this in his results. He supports the constitutionality of measures such as chaplaincies in the armed forces, in prisons, and in state hospitals on the ground that they tend "not to promote religion but to avoid limiting religious freedom."[4]

Mr. Katz's second lecture discusses religion in the public schools, the most perennially troublesome problem in American church-state relations. He concludes that a formula adopted by the Civil Liberties Union is a good statement of "neutrality": that Bible-reading and organized prayer is indoctrination, but that "teaching *about* religion" is legitimate.[5] As appears from the example which I related earlier in this review, the dis-

1. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963) [hereinafter cited as KATZ]. In the epilogue the author discusses Abington v. Schem, 374 U.S. 203 (1963), and Shorbort v. Verner, 374 U.S. 398 (1963), thus bringing the subject down through the decisions of June, 1963.
2. KATZ at 13.
3. Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions,* 8 UTAH L. REV. 167 (1963).
4. KATZ at 21.
5. *Id.* at 54.

tinction in effect is a difficult one. Instruction in history, biology, or literature, no matter how far from any desire to evangelize, may indoctrinate much more effectively than some routine liturgical formula like the New York "Regents' Prayer" which the Supreme Court held unconstitutional in *Engel v. Vitale*.[6] I concur cordially with Professor Katz in his view that public education, even on the grade-school level, cannot avoid some consideration of the religious element in our history and culture; and like him I certainly would not condone the use of social studies as a device for intentional evangelization. But I do not see this religious element as clearly "neutral"; rather some tendentiousness toward religious influence I should think is justified by countervailing policies, which in the balancing process of constitutional adjudication the Court would find outwishing the policy of separation. Cannot *Engel* be reconciled with acceptance of a respectably dispassionate course in social studies, for example, by reasoning that where the prime objective of the governmental activity in question is lay—as it is in teaching history, or in furnishing at public cost R.O.T.C. instruction or chemical apparatus for a Church-college, or in requiring cessation of commercial work on Sunday, or in taking children alike to public and parochial schools in buses—the incidental aid to religion is permissible as the dominant purpose is not piety; but where the activity is purely liturgical, as in school prayers, it is barred? This reasoning, with a judicious use of *de minimis*, would solve a good many church-state problems. It would not solve all; for example, constitutional tolerance of the opening prayers in the Congress would require some other theory—possibly the idea that another class of public activity, which the Dean of the Yale Law School recently called "ceremonial deism,"[7] can be accepted as so conventional and uncontroversial as to be constitutional. Perhaps this is only another aspect of the *de minimis* principle.

So thinking, I turn to Professor Katz' third lecture entitled "Religious Schools—The Price of Freedom," in which he takes up the acute question of public aid to parochial schools. He points out that some state constitutions explicitly forbid this public support; but he feels that his principle of neutrality legitimates the constitutionality of non-preferential federal support of church-connected educational institutions.[8] Constitutionality assumed, Mr. Katz, with diffident doubts, comes out in favor of the aid as a matter of policy because it tends to unburden free religious

6. 370 U.S. 421 (1962).

7. I quote Dean Rostow from my memory of his spoken words, I hope correctly. The phrase occurred in his Meiklejohn Lecture at Brown in May, 1962, which is yet unpublished.

8. KATZ at 74.

choice.[9] The constitutional justification for such aid could also be stated as the theory that parochial schools carry part of the burden of universal compulsory education; that this is a lay purpose in our society, and that any incidental aid to religion no more renders the whole unconstitutional than some incidental inhibition of religious orthodoxy renders unconstitutional a well-rounded public school course in history.

In judgment Mr. Katz and I come out together. Our respective reasoning would not be entirely alike, which is probably not very important. My difficulty with "neutrality" as a guiding principle is that, for me, it does not guide very well. A good many governmental activities affecting religion seem to me tolerable as a matter of constitutionality, and reasonably sound in policy, but do not seem neutral in effect. Of this the high school history course, of which I told in the early part of this review, offers a good example. One is driven to giving weight to governmental motivation; constitutionalism is not a mathematical process but a weighing of tendencies to see whether underlying constitutional aspirations are promoted. Of this, Professor Katz presents admirable demonstrations.

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STATE AND LAW: SOVIET AND YUGOSLAV THEORY. By Ivo Lapenna. New Haven: Yale University Press. 1964. Pp. xi, 135. $5.00.

In his study of the political doctrine of communism,[1] Hans Kelsen concluded that after more than thirty years of communist rule the Soviet ideologists proved to be unable to work out an original theory of state and law based on the Marxian concept of society. In its tortuous development toward classlessness and the utopian paradise of full communism in which state and law would wither away, the Soviet Union in the period of Stalin bogged down amidstream, being incapable of moving further ahead and not daring to turn back. Making use of what he referred to as "Marxian dialectics," Stalin declared himself in favor of the strengthening of the proletarian dictatorship as a preparation for the withering away of the state. Later, he explained this sophistry, which violated the basic tenets of Marxism, first by justifying the necessity of the state as an instrument of defense against internal and external enemies of the Soviet regime, then by insisting that the withering away of

9. *Id.* at 77-78.

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1. HANS KELSEN, THE POLITICAL THEORY OF BOLSHEVISM 34 (1948).