

ments still emerge through obsolescent language. Currie's *SELECTED ESSAYS* demonstrate how courts have thus managed to arrive at eminently reasonable results, hobbled though they were by a lexicon that had not proved serviceable but had yet to be renounced.³⁷

Now that judges read scholarly works as regularly as scholars read opinions, one can be sure that Currie's extraordinary insights will absorb many a judge hitherto baffled by conflicts. They will note, as conduct becoming a scholar of the first rank, how forthrightly he disclaims perfection and reveals the doubts and questions that hagride his reflection.³⁸ No one could acknowledge more freely that his work is work in progress. No one could set forth more generously what he has learned, unlearned, and relearned.

It is no longer the same old fusty panorama in conflict of laws since Brainerd Currie's landing. He arrived upon the scene unheralded and changed it grandly for the better. Every court in the land is in his debt.

ROGER J. TRAYNOR*

RELIGION AND AMERICAN CONSTITUTIONS. By Wilber G. Katz.¹ Evanston, Illinois: Northwestern University Press, 1964. Pp. 114.

RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY. By Paul Blanshard.² Boston: Beacon Press, 1963. Pp. 265.

Few areas of American law are as emotionally charged as the relationship between government and religion. This fact renders political solutions to many problems in the area extremely difficult, and accentuates the importance of careful and dispassionate legal analysis. Professor Katz's book consists of the 1963 Rosenthal lectures at Northwestern University School of Law. At that time, the author was chairman of the National Commission on Church-State Relations of the Protestant Episcopal Church. Although brief, the book covers all the significant aspects of the church-state problem.

³⁷ See, e.g., CURRIE, *op. cit. supra* note 6, at 50, 138-39, 181, 350, 575-76, 695, 729.

³⁸ *Id.* at ch. 9, pp. 571-72, 593, 599, 627, 739.

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Scholarly in the best sense, it is written in a graceful and readable style, and on the whole constitutes one of the best treatments of the subject I have read.

As the title suggests, there is some discussion of state constitutional decisions and provisions, but by far the larger part deals with federal constitutional law, principally those problems arising under the "no establishment" clause. In the first lecture, Katz summarizes the legislative history of the clause, concluding that "the only thing we really *know* about the original meaning . . . is that it forbade Congress to disestablish as well as to establish religion."³ Contrary to the assumption of many, it would seem to follow that this is an area in which original intention of the Founding Fathers is of little aid in formulating a legal solution for contemporary problems. Thus, Katz identifies the three principal positions which are advanced today as the proper meaning to be ascribed to the clause. First, there is the Supreme Court's "no aid to religion" rule supporting the principle of full neutrality. This principle requires "the government to be neutral not only between sects but also between believers and nonbelievers."⁴ The other two views attack the neutrality principle, but from opposite directions. One urges that government may give affirmative aid to religion so long as it does not accord any preference to a particular religion. Another view would require strict or absolute separation, denying even those incidental aids resulting from measures which are not designed to promote religion and which do not restrict their benefits to religious groups. Katz examines these three positions in the context of Sunday closing laws and the granting of religious exemptions, concluding in the latter case that the neutrality principle "should not be interpreted as forbidding all specifically religious exemptions."⁵

The second lecture appraises the problem of religion and the public schools. Katz believes that the Supreme Court's prayer and Bible reading decisions are soundly based on the neutrality principle. He cautions, however, against applying the principle with "pedantic absolutism." Noting the conflict between those who would resist all religious incursions, as opposed to those who would apply the *de minimis* maxim, Katz says that

³ KATZ, RELIGION AND AMERICAN CONSTITUTIONS 11 (1964).

⁴ *Id.* at 13.

⁵ *Id.* at 20.

I do not believe that all minor religious observances in public schools need be resisted, but only those which clearly have the shape of an entering wedge. Indeed, I might not have criticized the Supreme Court had they left to the supporters of religion the job of repealing the Regents' prayer.⁶

In dealing with the problem of released time, Katz advocates a balancing of "the degree of aid . . . against the degree of limitation of the free exercise of religion which would result if the program were invalidated."⁷ He thinks the Court was right in *McCollum v. Board of Educ.*⁸ and wrong in *Zorach v. Clauston*.⁹ Expressing the view (shortly thereafter affirmed by the Supreme Court) that "the First Amendment does not forbid objective teaching about religious beliefs in public schools so long as there is no purpose to inculcate such beliefs,"¹⁰ he advocates the study of religion at both private and public schools. Conceding that the problem of maintaining neutrality in such instruction would be more difficult at the elementary levels, he emphasizes that religious study is an important aspect of a liberal education, particularly at the university level.

In the final lecture, Katz examines the question of state aid to religious schools. After discussing the *Everson v. Board of Educ.*¹¹ case, he states that "it is by no means clear that the 'no establishment' clause forbids inclusion of religious schools in general aid programs. The principle of neutrality . . . would permit such inclusion."¹² Later, he asserts that "religious schools may not be singled out for preferential aid, but they need not be excluded from a program of general aid, notwithstanding the fact that their inclusion results in indirect aid to religious teaching and practice."¹³ As a matter of legislative policy, Katz thinks the question is not whether we should encourage parochial schools, but whether we should continue to discourage parochial schools.

While the government should not promote religion, it not only may, but should, try to avoid restraining or burdening religious choices. And if groups wish to have parish schools, there seems to

⁶ *Id.* at 46.

⁷ *Id.* at 48.

⁸ 333 U.S. 203 (1948) (religious instruction program unconstitutional).

⁹ 343 U.S. 306 (1952) (released time program constitutional).

¹⁰ KATZ, *op. cit. supra* note 3, at 51-52.

¹¹ 330 U.S. 1 (1947) (school buses for parochial students constitutional).

¹² KATZ, *op. cit. supra* note 3, at 66.

¹³ *Id.* at 74.

me a presumption in favor of so molding government fiscal policies as not to handicap that choice.¹⁴

Katz thinks the answer turns on the attitude of the Catholic church, and hence the Catholic schools, toward the beliefs of non-Catholics and religious liberty generally. His own answer is: "Ten years ago I thought that the ambiguity of the Catholic stand on religious freedom might be sufficient reason for the withholding of equality in programs of aid to education. Today, I am certain that it is not."¹⁵

Shortly after the lectures were delivered, the Court decided the cases of *School Dist. of Abington v. Schempp*,¹⁶ *Murray v. Carlett*¹⁷ and *Sherbert v. Verner*.¹⁸ An epilogue discusses these decisions.

The book by Mr. Blanshard is quite different. It was written for popular rather than professional consumption, and is consequently journalistic in style. This is not to suggest that Blanshard is as ignorant and misleading as most journalists are when they write of law. To the contrary, Blanshard is a lawyer himself and handles the legal aspects in knowledgeable fashion. But the book is not confined to legal issues. It contains a summary of the church-state issue in American history, extended discussion of contemporary disputation, background information about the various Supreme Court decisions, and a sampling of the reaction to those decisions from leading voices in press, pulpit, and politics. Appendices include the Supreme Court's prayer and Bible-reading decisions and a list of important church-state cases.

Reading the two books together for a joint review, I was interested in the differences of opinion between Katz and Blanshard. Most notable is their attitude toward the Catholic church. Blanshard expressed his view several years ago in a widely-discussed book, *AMERICAN FREEDOM AND CATHOLIC POWER*,¹⁹ and has not departed from that position. He therefore considers the Catholic church a most improper recipient of government financial aid. Differing with Katz on the constitutional issue, Blanshard states that "the Supreme Court's opposition to across-the-board tax support for

¹⁴ *Id.* at 77.

¹⁵ *Id.* at 85.

¹⁶ 374 U.S. 203 (1963) (classroom reading of Bible verses unconstitutional).

¹⁷ 374 U.S. 203 (1963) (classroom reading of Bible verses and recitation of Lord's Prayer unconstitutional).

¹⁸ 374 U.S. 398 (1963) (disqualification of Sabbatarian for unemployment benefits unconstitutional).

¹⁹ (1958).

sectarian schools is about as clear as anything can be in the absence of a case directly in point."²⁰

The author appears to recognize that satisfactory solutions may be difficult to obtain for many problems in church and state relations:

In a sense there are no solutions to these fundamental church-state controversies As long as religion endures and is considered vital by men, some continuing controversy about its relation to the schools is as certain as the rising and the setting of the sun.

In a pluralistic society, however, there must be a *modus vivendi* for church and state in the schools, a mechanism for accommodation and compromise enabling men to reduce controversy to a minimum and to get on with the business of education in reasonable peace.²¹

As I read Blanshard, however, he would come close to being a member of the strict or complete separation school of thought. It is doubtful that this approach can accurately be considered an accommodation or compromise. Furthermore, as Katz points out, "no one can hope completely to remove religious controversy from public life by interpreting the First Amendment in strict separation terms."²² But it remains to be seen whether the neutrality principle as applied by the Supreme Court can better minimize the conflict. Certainly church-state questions are not ones to which there are any easy or universally acclaimed answers. Rather, they constitute a problem which, like so many others, must be lived with and managed instead of finally solved.

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THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER. By Richard A. Falk.¹ Syracuse, New York: Syracuse University Press, 1964. Pp. xvi, 184.

In recent years Professor Richard A. Falk has gained increasing preeminence in the difficult area of international law and relations

²⁰ BLANSHARD, RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY 130 (1963).

²¹ *Id.* at 168.

²² KATZ, *op. cit. supra* note 3, at 17.

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as related to problems of jurisdiction, especially pertaining to that zone where public and private law overlap. In his recent book, he has amalgamated and revised some of his earlier contributions to the literature of international law as the basis for a sophisticated inquiry into this fascinating and perhaps neglected field.

The simplest means of understanding Falk's polemical thesis, as he phrases it, requires a definition of the concepts contained in the book's title: domestic courts, international legal order, and the role of those courts. By "domestic court," Falk simply means a nationally constituted and controlled court, that is, one established under the organizing public law of a nation-state for the purpose of applying and developing a body of rules which it has been constitutionally charged to administer. A fair inference from the book is that Falk is largely concerned with appellate courts in western democratic nations. The "international legal order" is the decentralized world community, together with the structures, processes and procedures of diverse and contending public order systems; the constant action and interaction of these systems produces behavioral patterns which may reflect universal or regional consensus on jurisdictional limitations, usually on some basis of reasonableness. Generally speaking, Falk clearly and succinctly restates the pioneer efforts of McDougal² (his mentor) and Lasswell³ without ridiculing the many jurists who have not understood this new approach to international law.

With these concepts in mind, Falk's view of the role of domestic courts in the international legal order may be closely examined.

[T]he decentralized quality of international law places a special burden upon all legal institutions at the national level. Domestic courts are agents of a developing international legal order, as well as servants of various national interests; this double role helps to overcome the institutional deficiencies on a supranational level.⁴

Domestic courts are an area in which attitudes toward international law are disclosed and general impressions formed.... [T]he operation of courts should be governed by the structural characteristics of international society rather than by transient foreign policy considerations.⁵

² Professor Myres S. McDougal, Sterling Professor of Law, Yale University.

³ Professor Harold D. Lasswell, Phelps Professor of Law and Political Science, Yale University.

⁴ FALK, *THE ROLE OF THE DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 65 (1964).

⁵ *Id.* at 11-12.

From this one might conclude that Falk is pleading merely for more attention to the foreign element in a municipal law case which exhibits an international law aspect. In other words, Falk may be interpreted to mean that our principal needs are better written and better organized opinions, with greater judicial attention to the relationship between international and municipal law. Even this primitive idea, if accepted, would represent an important advance in many countries operating under the British judicial system. It would tend to liberate the courts from antiquated dualist concepts as well as reduce the apprehension accompanying most ventures into the unknown terrain of public international law.

Falk, however, means much more than this. Again, in his words:

In a divided world, there will be a divided law. Under such conditions, rules of deference applied by domestic courts advance the development of international law faster than does an indiscriminate insistence upon applying challenged substantive norms in order to determine the validity of the official acts of foreign states.⁶

[Deference,] by which a court forecloses inquiry into the validity of challenged action by validating action simply because the actor was a foreign state [is] . . . a way of institutionalizing respect for diverse social and economic policies, thereby affirming the possibilities of law—in the sense of stable expectations—amid antagonism.⁷

What Falk suggests, therefore, is the application of conflicts methods to the area of public international law. He is dissatisfied with traditional jurisdictional principles which attempt to isolate single features of transnational problems for purposes of justifying the assertion of state control. Those methods are too artificial to cope with modern complexities. What Falk wants is a total appraisal of the reasonableness of every claim in order "to allow a decision-maker to give more persuasive explanations of particular delimitations of legal competence."⁸ The domestic court must routinely consider at least the main characteristics of the nature of the world community when inquiring into the reasonableness of a jurisdictional claim. Respect is to be accorded rival social systems that act within their own sphere of competence. The court is not to be regarded merely as the creature of the state in which it sits.

⁶ FALK, *op. cit. supra* note 4, at 6-7.

⁷ *Ibid.*

⁸ *Id.* at 33.

These basic ideas are tested in the context of the *Sabbatino* case^o and the sovereign immunity concept. Although this discussion occupies a substantial portion of the book, the reviewer feels that there has been sufficient treatment elsewhere of these topics.

How, then, is one to assess Falk's work? The book is not a major work, but instead may be called a *ballon d'essai*, experimental and stimulating. It is the introduction to a theory rather than a detailed development of the theory itself. In this characteristic lies the main fault of the book, for the average lawyer may not be entirely captured by the preliminary chapters devoted to the theory of things. He will be anticipating, instead, a treatment of the relevant difficulties with which courts have been struggling. More preferable, perhaps, would have been a short introductory statement on objects and purposes, free of footnotes and followed by the *Sabbatino* and sovereign immunity discussion. Concluding chapters could have then examined the generalizations in light of a variety of substantive problems. This would have given the book a reality, a sense of proportion and an impact not now evident. It would also have facilitated the application of Falk's theory to related fields.

This reviewer cannot overlook, however, the enthusiasm of his response to Falk's ideas in this book. The dust-jacket says that he "challenges all those who contribute to judicial outcome in international law cases before domestic courts." That is an understatement.

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^o *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

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