

Religion and Education Under the Constitution (Book Review)

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form for allocating in an agreement a purchase price among classes of assets sold.

One of the best chapters, and there are many of much merit, is on corporations. The author discusses the problem of the transfer of property to a corporation, non-taxable exchanges, reorganizations, liquidations, redemptions of stock, dividends and distributions. In a later edition of this book this reviewer would like to read the author's comments on involuntary conversions. The meaning of earnings and profits is significant in considering the taxability of corporate distributions. There is a good discussion in this chapter on the meaning of "Earnings and Profits."

The author probably had valid reasons for not discussing the personal holding company provisions in the law. One aspect of the problem of the personal holding company arises where a corporation rents its property to a partnership consisting of its stockholders. Such a situation invariably raises the question of the status of the corporation as a personal holding company. This is a pitfall of which stockholders should be aware. The author will undoubtedly wish to treat this situation in the next edition of the book.

The forms illustrated in the chapter on corporations include minutes in case of dissolution, minutes and plan in case of dissolution of subsidiary corporation, and the resolution for declaring a dividend in property.

This reviewer has not attempted to mention all the excellent material to be found in this important tool for the average legal practitioner. Undoubtedly the book fills a need that the lawyer will be quick to see.

BENJAMIN HARROW.*

RELIGION AND EDUCATION UNDER THE CONSTITUTION. By James M. O'Neill. New York: Harper & Brothers, 1949. Pp. xii, 338, index. \$4.00.

Professor O'Neill's scholarly and well documented book bitterly condemns and refutes the interpretation by the present United States Supreme Court of the phrase, "an establishment of religion," as contained in the First Amendment to the United States Constitution. His attack is leveled upon the recent controversial cases of *Everson v. Board of Education*¹ and *Illinois ex rel. McCollum v. Board of Education*,² wherein the Supreme Court construed this prohibition of an establishment of religion as in effect creating a complete separation of church and state. Hence, in the language of the Court, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called. . . ."³

Professor O'Neill contends that such a construction is patently erroneous and historically false. He critically analyzes and dissects the individual opin-

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¹ 330 U. S. 1 (1947).

² 333 U. S. 203 (1948).

³ *Everson v. Board of Education*, 330 U. S. 1, 16, 723 (1947).

ions of the justices in the two decisions and reveals that they are based upon historical misinterpretation and inaccuracy, apparent only to the searching scrutiny of the trained historian. Once having placed the stigma of misinterpretation upon the opinions, he proceeds to prove his contentions with a masterful compilation of historical evidence that has since evoked the highest praise from legal scholars in the field of constitutional law.

He offers in rebuttal his thesis that "the words establishment of religion meant to Madison, Jefferson, the members of the First Congress, the historians, the legal scholars, and substantially all Americans who were at all familiar with the Constitution until very recent years, a formal legal union of a single church or religion with government, giving the one church or religion an exclusive position of power and favor over all other churches or denominations."

Under the above interpretation, a separation of church and state may be said to exist, but only as applied to the union between one church and the government. It follows, also, according to Professor O'Neill, that all religions may be treated equally by governmental support or non-support of all indiscriminately. Either treatment is equally constitutional, although the consistent American practice has been the indiscriminate support of all, rather than the non-support of any.

Professor O'Neill takes violent exception to the position of the Supreme Court in the *McCullum* case, since he claims that the issue is not the constitutionality of either of the aforementioned treatments, but the wisdom of choice of one or the other in the light of current educational necessities in the United States. This choice, he argues, should be made only after full debate and should not be stifled by unwarranted and unjustified interference on the part of the Supreme Court.

The spirited defense and clear-cut statement of position in this treatise have provoked wide-spread comment by reviewers. As is always the case when controversial matters are at issue, this comment has been both favorable and adverse. The stand taken by those critical of Professor O'Neill's assertions is well expressed by Professor Benjamin F. Wright of Harvard University in a review published in the *New York Times*, wherein he states, "He (Professor O'Neill) is probably correct in his assertion that the establishment-of-religion clause had a relatively limited meaning in 1789 and that Madison and Jefferson did not support so sweeping a doctrine of separation in their time as that now accepted by every member of the court.

"The weakness of his position lies less in his conception of the original meaning of the clause than in the assumption underlying the entire argument. This is that the meaning of constitutional clauses is fixed and unchangeable except by formal amendment. Yet surely most of the major developments in American government and constitutional law since 1789 have come through custom and interpretation, not through formal amendment."

In answer to Professor Wright, this reviewer is of the opinion that economic exigencies may not enlarge or restrict constitutional power, although they certainly make necessary the reexamination of first principles. It is admitted that unless progress is blocked by an iron-clad rule of stare decisis, constitutional growth receives a new impetus by economic and social evolution.

Indeed, the Supreme Court's constitutional judgments are more than technical constructions of our organic law: they represent the shaping of a national policy.

There is abundant precedent for interpreting the Constitution in order to cope with emergencies or changed conditions or in order to effectuate new habits of life or thought. Such interpretation, however, must not be inconsistent with the plain unmistakable mandate of the Constitution. This re-examination of first principles because of changing conditions merely allows the Court to refuse to be bound by case precedents that dealt with facts or conditions which have been completely supplanted by a changing world.

It is true that of necessity judicial discretion has a substantial place in the decisions of the Supreme Court. The learned constitutional law authority, Professor Corwin, once emphasized this discretion thus, "Judicial review, from being an instrument for the application of the Constitution, tends to supplant it. In other words, the discretion of the judges tends to supplant it."⁴

Discretion, however, must exist somewhere and additional ideas must be supplied by some agency if controversies are to be determined. Judicial review, as we have it, is a component part of one method of dividing between the executive, the legislature and the judiciary the task of supplying the discretion needed. Whatever method is adopted, a body of interpretation will be developed around the Constitution. This body of interpretation and the method by which it is produced can hardly be said to supplant the Constitution, unless it is inconsistent with it. The idea of inconsistency, then, involves a judgment of the true meaning and, if the true meaning can be accurately ascertained by clear historical evidence as presented by Professor O'Neill, then it is submitted that any other meaning of necessity is inconsistent with the Constitution.

Indeed, if Professor O'Neill is correct, it would seem apparent that the Supreme Court by its present attempts to amend the Constitution in the guise of judicial construction has divorced itself from its former consistent support of constitutional principles. Our hope for the future, then, is that in time to come it may have the resilience and support to enable it to resume its proper position in our scheme of government under the Constitution.

EDWARD THOMAS FAGAN, JR.*

LAW OF TRUSTS. By Ralph A. Newman.¹ Brooklyn: The Foundation Press, Inc., 1949. Pp. XI, 452. \$4.50.

In the preface of this relatively brief work on the law of trusts the author comments upon "what appears . . . to be the inadequacy of judicial thinking in this branch of the law."² Because of the obscurity of the subject, he feels

⁴ CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY*, preface (10th ed. 1948).

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² P. III.