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The Supreme Court and Public Prayer: The Need for Restraint

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BOOK REVIEWS

THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT
by *Charles E. Rice*

Fordham University Press, New York, 1964, Pp. 202. $5.00.

Reviewed by

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From his very first sentence, Professor Rice leaves no doubt in the reader's mind as to his position on the recent "school prayer" decisions of the United States Supreme Court: they were "wrongly decided." He then devotes the next ten chapters to an examination of the historical background and the possible effects of the decisions, the concepts of judicial restraint and alternative legislative solutions. In the process he affirms that the Supreme Court has substituted agnosticism in place of theism as the religious position of the federal government. He concludes that the situation is grave enough to warrant immediate and strong support for a constitutional amendment to offset these decisions. In addition to historical passages quoted throughout the text, Professor Rice adds appendices containing references to God in colonial public documents, state constitutions and presidential inaugural addresses.

To be sure, Professor Rice has chosen a most timely topic for his volume. Unmistakably, judicial decisions in recent years have shown a marked tendency to depart from the established religious pluralism which had dominated the World War II era. The position of the federal government, for example, as evidenced by recent Supreme Court rulings, is in a state of "agonizing reappraisal." However, it would be a mistake to evaluate the Court's rulings in the religious area without relating them to the evolution which is taking place in all aspects of individual liberty and governmental restraint. The "school prayer" decisions are *not* as meaningful as the philosophy or fundamental attitude of the Court and the future decisions which this outlook may generate. Again, a step removed from the Court's treatment of prayer and religion is the future of the broader *moral* element in state and local legislation. Is there a danger that the Court in the foreseeable future may preclude the various legislatures from considering public morals as a basis for legislation – except where the state can scientifically demonstrate a definite connection between the proscribed activity and subsequent, overt anti-social behavior?

The social upheaval which followed in the wake of the Cold War and the semiannual storms which have broken over the Court's rulings have made the task of the constitutional law critic immeasurably more difficult. If one takes the bench to task for an isolated decision on a particular subject, he may be criticized as seeking to implement a subjective preference grounded in a religious, sectional or political bias. This opprobrium has befallen many critics of

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the desegregation and subversive-activities opinions. On the other hand, if one laments a trend or common thread running through the Court's decisions, he may be listed as being overly conservative, overly liberal or otherwise subject to excess in his convictions. Nevertheless, the Supreme Court would be the last institution to abjure responsible criticism. Moreover, unless society is to resort to a constitutional amendment whenever there appears to be an "incorrect" decision or line of decisions, the Court must be amenable to outside evaluation of its work product. Here again, however, as in the case of constitutional amendments, criticism must have more to recommend it than mere majority disapproval of what the Court has decided or written. Majoritarianism, favorable to a good cause at one point in time, is too easily turned to other ends in more difficult times.

It cannot be gainsaid, however, that public beliefs and practices, distilled and aged in the form of public morality and tradition, lack the elements of abruptness and irrationality that characterize mere majority whim, and that the Justices of the Court must, of necessity, pay heed to the context in which their decisions operate. An obligation also exists to give due weight to the reasoned counsel of critics. Finally, the Court must not take refuge in the position that absolute and dogmatic doctrines of Church and State can solve all or most of the problems of pluralism, atheism and agnosticism in the most satisfactory manner. Man-made theories of politics and general welfare have never achieved such unerring certainty; resort must be had to the factual minutiae and social repercussions of each individual decision.

Professor Rice's volume deserves a reading on this basis, if not complete acceptance, by all who have expressed an interest in, or concern over, the Court's prayer rulings. As indicated, he has ventured into the sea of Supreme Court controversy in a small, two hundred page vessel. Despite this obvious limitation, he has assembled a series of insights worthy of consideration, if only to formulate a basis for agreeing or disagreeing with the positions stated therein.