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LAW AND RELIGION IN AMERICA: THE NEW PICTURE

WILLIAM B. BALL*

AS TOYNBEE HAS SO WELL TAUGHT US, we can know nothing of the present, without knowing the past from which the present has come. In speaking of the church-state scene in the United States today, we would be taking only a snapshot—and a meaningless one at that—if we were to speak of developments in 1969 solely as developments of 1969. 1969 is mostly a prolongation of tendencies, movements and thinking of the past. But there are some things that are new—some, brand new, and some, mutations of older developments.

We begin by talking about two “pasts.” The first past is the old, old American past. It is a past of Protestantism, the past so well described by Franklin Littell in his study, *From State Church to Pluralism*.¹ It is an almost unbelievable past in terms of its hostility—universal and profound—to Catholicism. This old past has a lot to do with church-state problems and attitudes in our country today. Its great strength and its immense virtue lay in its Protestant Christianity, and it leaves a great legacy of belief, faith and Christian habit to the America of the present. It also brings to the present a vast oral tradition, transmitted from family to family, which still psychologically identifies Catholicism as a thing both evil and, indeed, foreign.

This Protestant past, we must at once point out, is *not* the source of any American tradition of church-state separation. Up until the middle of the nineteenth century, Protestantism (except the radical Protestant groups, such as the Amish) did not emphasize church-state separation. Most of the colonial charters provided for Protestant establishments, and some of these establishments even survived the adoption

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¹ F. LITTELL, *FROM STATE CHURCH TO PLURALISM* (1962).

of the first amendment. In the first 50 years of American history, following the adoption of the Bill of Rights, no state constitution embraced any sort of "Blaine" amendment, and, as to the Federal Constitution, no real definition of the establishment clause was to be given by the Supreme Court until 1947. Up to then it had not been understood to be a clause providing for the "absolute" church-state separation, today such a fighting cause to some people. The first half of the nineteenth century instead showed, if anything, concerts, dependencies and unions of church and state. The studies of Gabel² and of many others reveal a close and friendly cooperation between the Protestant churches and the state, with all manner of public benefits to Protestant institutions (including, in some instances, churches) deemed proper and unquestionable. The Pennsylvania Constitution of 1838 provided, in its thirteenth article, for the use of public funds for church-affiliated schools. Pennsylvania had few Catholics in 1838. Church-state separation became a subject of passion in this country at precisely the time that the Catholic immigrants became a subject of passion in this country. Massachusetts wrote the first "no aid to sectarian schools" language into its constitution at its 1853 convention, the membership of which embraced few, if any, Catholics. The Massachusetts state government at that time, *i.e.*, the governor, all cabinet heads and both houses, were all members, to a man, of the Know-Nothing Party, with

the exception, in a 376 member legislature, of one Whig and one Free Soiler. Following the Civil War the new vogue of absolute church-state separation mounted a great effort to amend the Federal Constitution, in order to provide that no funds could go to any sectarian schools. That model of incorruptibility and public spiritedness, the Grant Administration, had pushed hard for the federal amendment, and was responsible for giving much increase to the support which similar amendments had in the states. The effort at the federal level failed, but in most of the states similar efforts succeeded. Why did the sectarian sponsors of these movements desire to shut out sectarian schools from public benefits? The reason was that the Catholic schools were coming on strong, and the common, or public schools, with their King James Bible-reading, Protestant baccalaureate services and sectarian view of history, were securely Protestant for the future.

The historical fact is that the passion for church-state separation was a very natural development of the anti-Catholic sentiment which had gripped generation after generation in this country since 1620. About every 20 years from the Nativist crusades of the mid-nineteenth century onward, we find new movements cropping up which revivify and give edge to the anti-Catholic sentiment in the nation. In the second half of the nineteenth century, the crusades for "Blaine" amendments succeeded not only in imposing these amendments in state constitutions but succeeded also in *educating* the people to their desirability—always against the background of what were de-

² R. GABEL, PUBLIC FUNDS FOR CHILDREN AND PRIVATE SCHOOLS (1937).

scribed to the people as the “demands” of the “Roman” Catholic Church in order to get money for its “sectarian” ends. The Catholic schools were themselves products not only of conscientious religious preference by Catholics but were also, in a sense, schools of refuge for immigrants who, long after their arrival here, were subject to a full spectrum of hostilities ranging from active persecution to invidious discrimination in employment, housing and education. But there existed, in addition, the movement of the American Protective Association at the end of the nineteenth century, and then the very considerable Ku Klux Klan movement. The Smith campaign of 1928, like the Kennedy campaign of 1960, was the occasion for fresh outbreaks of the deep-seated malady of anti-Catholic prejudice.

All of these tensions were, of course, much enlivened by Catholic reactions to Protestants and to Protestantism. Anti-Protestantism became a strong thing in many Catholics, and by the spirit of the Counter Reformation, Catholics would undoubtedly have created Catholic-Protestant tensions, even had the intense anti-Catholic hostility of Protestants not existed.

So much for the first “past” which has enormous relevance to the development of our law today—obviously. It certainly gives the lie to the fogged-up view of American history preached by separationists, that James Madison wanted “absolute” church-state separation, and so did all the other good folk in the country, but that when the Catholics got here in force they really wanted to Romanize all institutions and make the state their servant. The opinion

of the Maryland Court of Appeals in *Horace Mann League v. Board of Public Works*,³ and the dissents in *Board of Education v. Allen*,⁴ reveal a superb combination of the thrust of the old prejudice mixed in with the latter nineteenth century and Pfefferine view of church-state separation.

The second “past” is a past that began about the year 1955, just before Vatican II, and continued for about the next 12 years. The opening of this period was in the reign of Good Pope John. It began, in American intellectual circles, as a sort of travesty on ecumenism, a kind of interfaith *opera buffa*, with lawyers hogging the main roles. Most churches—and rather particularly the Catholic Church—did not believe in interfaith dialogue in those days, and the Catholic clergy played very limited and cautious roles in those early discussions. The National Conference of Christians and Jews was regarded by most bishops as outside the pale, Paul Blanshard was riding high, the Barden Bill fracas was just in the background, and Eleanor Roosevelt was still very much in the foreground. But there was indeed the magical effect of Pope John, and soon the charisma of John F. Kennedy. John Courtney Murray’s *We Hold These Truths*⁵ had sudden and very wide impact. There came the great national conferences sponsored by Ford Foundation and the National Conference of Christians and Jews, the National Study Conference of Church and State sponsored by the Na-

³ 242 Md. 645, 220 A.2d 51 (1966).

⁴ 392 U.S. 236, 250 (1968) (dissenting opinions).

⁵ J. MURRAY, *WE HOLD THESE TRUTHS* (1960).

tional Council of Churches, and many other meetings at which church-state issues began to be explored by Protestant, Catholic and Jew in common. Shortly thereafter, the great Council at Rome was to have further effect on attitudes in the United States.

That is the second "past," and it, too, has bearing upon the developments we are witnessing this year. It focused very largely on the school aid issue, and that was its limitation. But it also witnessed Americans of different faiths coming together, learning to know one another personally, and being willing to discuss at least some of the most sensitive of topics. Undoubtedly, that period has created much enlightenment which can only serve the good of the nation and religion in the future. However, that period seems now to have pretty much drawn to a close. Perhaps this is because the "parochial school aid" issue is now so far into legislatures and courts that no further dialogue is going to change anything. Perhaps it is because the big issues have really been talked out and final disagreements arrived at. Or perhaps it is because, with the publicizing of the charge of religion's irrelevance, the issues do not seem as important as they did to many people in the past.

At any rate, today it is well that we keep in mind both of these "pasts." As we discuss some areas of church-state relations in 1969, we will see both of these "pasts" influence the present.

In this overview of church-state problems of the present, we will try briefly to cover four areas. As will be seen, the term "church-state" is a very loose use of words.

"Law-religion" relationships is better, because some of these issues involve matters broader than the church and broader than the state, while some do not include the church at all.

Education Aid

The question of aid to education in religiously affiliated schools continues to be the most difficult and most extensive of all law-religion problems in the nation. In this area the force of the old, old past is at maximum. Charges, fabrications, false information and expressions of prejudice fashioned in the nineteenth century continue to be the ammunition with which the Catholic position is attacked. The development of the law, however, remains essentially salutary. In June 1968, the Supreme Court of the United States, in *Board of Education v. Allen*,⁶ upheld, against establishment and free exercise objections, the constitutionality of the New York State Textbook Loan program, whereby secular textbooks are lent to children in parochial schools. The background of this case is very important to examine. The briefs of the plaintiffs and their amici curiae, e.g., American Jewish Congress, American Civil Liberties Union, Anti-Defamation League of B'nai B'rith, New York Council of Churches, demonstrate that they concentrated on the following main points: (1) that parochial schools are really, in legal effect, "churches": everything that goes on in them is religiously "permeated," and therefore they cannot be said to perform any kind of public function, as opposed to

⁶ 392 U.S. 236 (1968).

private religious function; (2) that, under the five-to-four holding in *Everson v. Board of Education*,⁷ it is conceivable that "health" and "welfare" services can be rendered to children attending parochial schools, but it is clear that education of such children cannot be publicly aided; (3) that the test which the Supreme Court had announced in *Abington School District v. Schempp*,⁸ (i.e., that the test of the constitutionality of the Bible-reading statute was whether it served a secular legislative purpose and achieved a primary effect advancing religion) could not be applied in a case in which public funds were being used to support education in religiously affiliated schools.

The Supreme Court, in *Allen*, rejected all three contentions, and this is a most important point to understand about the *Allen* decision. As to the first point, it declared in the clearest possible terms that parochial schools serve public purposes and perform public functions, as well as serving religious purposes and performing religious functions:

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind

of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.⁹

This disposed, once and for all, of the charge that parochial schools inevitably and inexorably "permeate" their teaching with religion, so that any such teaching has nothing other than a *primary* effect of *advancing* religion.

As to the second contention, the *Allen* decision rejected the notion that "welfare" does not include education. The whole point of the decision was that it upheld state aid to education taking place in religiously affiliated schools. The silly attempt of the plaintiffs, in a welfare-oriented society, whose every major leader has said that education is *welfare's* top priority, to say that the state may support the "health" of a parochial school child but not his mind, is absurd as well as anti-intellectual. Professor Paul Freund, of Harvard Law School, in a short article in the *Harvard Law Review*,¹⁰ pushes this same point. Why did the eminent *Harvard Law Review* publish this replay of a former speech at this particular time, when, as enemies and opponents of parochial school aid are well

⁷ 330 U.S. 1 (1947).

⁸ 274 U.S. 203 (1963).

⁹ 392 U.S. at 247-48.

¹⁰ Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

aware, *Allen* will be used in test cases as major authority? Moreover, Freund largely misstates the facts of the Pennsylvania Nonpublic Elementary and Secondary Education Act. The plaintiffs in the present Pennsylvania litigation have cited Freund's article in support of their position. This may be one more fascinating aspect of the great game of what some label "associational jurisprudence."

As to the third point, the Court took the test that it had laid down in *Schempp* and applied it directly to the facts of *Allen*. It cannot now be doubted that this is the test which will be followed in all subsequent cases.

We have taken time to spell out these three points, because they are being raised in the new litigations which are now taking place in the states of Pennsylvania and Connecticut. They have absolutely no validity, but it will be very necessary, in the structuring of defenses in these litigations, to make sure that the courts understand that they have no validity.

This year test litigation is seen in several states to deny aid to parochial school children—Ohio, Pennsylvania, Connecticut and Montana coming at once to mind. At the same time, in 29 states, legislative efforts, of one sort or another, are being made to get aid for religiously affiliated education, which is everywhere in crisis in the United States. Defenses in these suits will be centered on *Allen*, though defenses based upon equal protection and free exercise issues are also available. It is now clear that the opponents of aid to parochial education are going to attempt to dismiss *Allen* as what the plaintiffs' brief in a recent test case

calls a "memorandum decision." Some memorandum decision! The position of these and similar plaintiffs amounts essentially to an effort to achieve an overruling of *Allen* through massive emphasis on arguments such as those they raised in the New York case. We can look forward to a period of at least two years in which various statutory methods of achieving a measure of state aid to the education of children in parochial schools will be undergoing the legislative process and tests in court. Whether any one of these—be it purchase of service, tuition grant or other means—is upheld in the courts will rest in part on the quality of the briefs and advocacy on the part of counsel on both sides, in part on the quality of the legislation so far as its drafting is concerned, in part on the climate of public opinion, and in part on the objectivity of the judges.

Free Exercise

A number of problems are coming to a head in the courts, in which the chief argument will rest on the application of the free exercise clause. At least four free exercise areas are highly visible at the moment: education, cultic life, tax exemption, and conscientious objection. As previously mentioned, in connection with the defense of the "school aid" suits, attention should be given to the free exercise issue. It is very clear that, in an economy in which massive governmental welfare spending is supplanting most forms of private spending for education, and in which taxation and inflation have risen to radical new levels, a new look has to be taken at the free exercise clause—and, indeed, at the equal protection

clause—when we come to discuss the constitutionality of programs to aid education in religiously affiliated schools. It is very clear that people exercise religious liberty by sending their children to religiously affiliated schools. If that is an exercise of religious liberty, then the state may not, either directly *or indirectly*, interfere with that exercise of religious liberty. The manipulation of the taxing and spending powers to deny to any person or any parent a free educational choice based on religious conscience—where the education sought meets reasonable state requirements—is not only a denial of the free exercise of religion and of the equal protection of the laws but indeed may be viewed as a taking of property, through taxation, without due process of law. These constitutional positions are now in the exploratory stage, but it is not unlikely that they will be advanced as elements in the defense of some of the current litigations.

A very important problem of free exercise is posed by the plight of the Amish people in Wisconsin and of Mennonite and Amish people in several other states, one of these being in the criminal prosecution against Amish farmers in Wisconsin in the case of *Wisconsin v. Yoder*.¹¹ Involved is an important tenet of Amish belief that children not attend high school—whether it be an Amish high school or a public high school. This is an emanation from the Amish beliefs respecting adult baptism and separation from the world. The state of

Wisconsin has brought criminal complaints against three Amish farmers who have refused to send their children to high school—indeed in a situation in which the only high school available is a public high school. The defense is built precisely on the doctrine announced by the Supreme Court of the United States in *Sherbert v. Verner*¹² in 1963. There the Court, quoting from its opinion in *Thomas v. Collins*,¹³ said that, while the state may interfere with the exercise of religious liberty, it may do so only under extraordinary circumstances: “Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”¹⁴ At the trial, a great deal of testimony from public officials was produced which showed that the Amish in Wisconsin have in no manner constituted any danger whatever to the state. Evidence from the sheriff was also produced that the Amish had committed no crime in the area and testimony from the County Director of Social Services that they do not produce any burdens to the public in terms of indigency or delinquency. An important question is whether the state has met its burden of proof in this case showing that the Amish, in keeping their children out of high school, have presented any danger whatever to the community. This is a straight case of religious liberty which likely will eventually be settled by the Supreme Court of the United States, if necessary, so that these good people will be protected in such exercise of religious liberty. Obviously, this case has implica-

¹¹ Nos. 5455, 5456, 5457 (Green County Cir. Ct., Nov. 13, 1969), *appeal docketed*, (Wis. Sup. Ct., Feb. 5, 1970; renumbered No. State 170, 171, 1969 Term).

¹² 374 U.S. 398 (1963).

¹³ 323 U.S. 516, 530 (1945).

¹⁴ 374 U.S. at 406.

tions respecting other minority religious groups, some of which have very little protection. For example, the Anabaptist groups are practically the only Protestant groups in the country which have ever really adhered to the principle of church-state separation. These people want to be apart from the state and society and live Christian lives as they believe Christ desired them to live. We will know a lot more about the true nature of our society when we see how these cases are decided. Undoubtedly, LSD religions, snake cults and other off-beat groups, which claim to be religions will seek the protection of a successful ruling, should it be achieved, in the Amish case. Each such case can certainly be decided on its merits as it arises.

A second important free exercise area, then, will very possibly pertain to the *avant garde* religious groups. We have referred briefly to the old radical religious groups, but not too far from them in some respects will be the new American cults with new forms of worship, or new core concepts of conduct. These groups will not necessarily be theistic religious groups. There has been some publicity of late concerning the growth of so-called "civil religion" among the young. These religious groups will undoubtedly be able to claim status as religions due to the effect of the Supreme Court's decision in *Torcaso v. Watkins*,¹⁵ in which the Court defined the term "religion," as used in the first amendment, to include other than theistic religions—specifically mentioning secular humanism,

ethical culture, Buddhism and Taoism. It is very clear that, under Supreme Court decisions, to claim religious liberty, one need not belong to an organized body or express theistic religious concepts. The term "religion" is one of very great latitude, and that must be kept in clear focus as we think of the "hippie" type religions, the older Pentacostal groups and, indeed, the education afforded in the public schools. Constitutionally, "religion" means nothing other than one's value-holdings. And, remembering that, we must not forget the establishment clause. In a free society, secular humanist values of the state may no more be imposed through the use of tax-raised funds than can any other religious values. And that is something to contemplate as state after state is moving in the direction of state imposed sex education.

A third free exercise area relates to tax exemption. *Walz v. Tax Commission of the City of New York*¹⁶ has now been taken up for review by the Supreme Court of the United States. In that case the plaintiff has alleged that the Real Property Tax Law of the State of New York, and the provision of the New York Constitution which gives rise to the exemption statute, violate the first and fourteenth amendments of the Federal Constitution. Plaintiff has further alleged that he pays a real property tax and is a religious person though not a member of a religious organization. He contends that the law in question forces him to make contributions to organized religions. If the

¹⁵ 367 U.S. 488 (1961).

¹⁶ 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711 (1969).

Supreme Court goes ahead and actually renders a decision in the *Walz* case, and if that decision is in favor of the plaintiff, the implications for churches in the United States will be tremendous. It is to be hoped that the defense of this case will be rested solidly on the free exercise clause. The theory here should be that there can be *no* exercise of religion in any form in which it now has clearly vested rights, without tax exemption of places of religious worship. It would be vain to rest the defense against the claims made by *Walz* on defenses appropriate to suits in which public aid to the achieving of public objectives through religiously affiliated institutions is contested. There is an enormous constitutional difference between any form of tax support to public objectives achieved by private institutions and the matter of exemption from taxation. The two are not unrelated, but they are different. Without attempting here to go over the whole ground of the *Walz* case, it is enough to say that a new legal chapter relating to the field of tax exemption is unfolding. This is evident in the revisions being made in the constitutions of several states, the broadening of the taxing power of the states and the narrowing of historical areas of tax exemption for churches.

Finally, we should consider briefly the subject of conscientious objection. Again, we are faced with profound questions relating to free exercise and the definition of religion. The recent opinion of Judge Wyzanski in *United States v. Sisson*¹⁷ is most important. Here the court arrested

judgment on a jury's conviction and ruled in favor of a *non*-religious conscientious objector, on first amendment grounds, stating:

When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. . . . When the law treats a reasonable, conscientious act as a crime it subverts its own power. . . . It impairs the very habits which nourish and preserve the law.¹⁸

Here is a very interesting development relating to the definition of religion.

Censorship—Public Morality

A third area which we should briefly examine is that of censorship. This is another famous old law-religion battleground, but the battleground is just about empty. Sheriffs, bishops, judges and legislators have all taken flight since the decisions of the Supreme Court in such recent cases as that involving "Fanny Hill."¹⁹ Even the victors have walked off the field, there being nothing left against which to lead a charge. Decency groups will soon be pleading that we bring back suggestive literature or good old movies like "The Moon Is Blue" or "The Miracle." Pornography is nowhere because it is everywhere. It has lost all status. The American Civil Liberties Union (ACLU) has gotten its

¹⁸ *Id.* at 910-11.

¹⁹ A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966).

¹⁷ 297 F. Supp. 902 (D. Mass. 1969).

wish, or rather, the American people have gotten ACLU's wish. This is not the freedom to see what one wants to see, not the much vaunted "freedom to know," not the crusader's "freedom to read"—but the unleashing of the full panoply of *financial power* to blind the people. It is financial power which is the amazingly unnoticed but absolutely dominant factor in a deliberate remaking of the attitudes of the people toward sex (and thus toward human life). Almost any book review section of the Sunday *New York Times* provides a stunning example of this. The theatre of grace, rationality, perception and wit is going dark and, coming on, bright and garish, in its place, is the Roman Theatre—no theatre at all but a place of blood and cruel exploitation of the human body. "We can't legislate morality," muse the dotty old ladies of the ACLU as they behold commercial power doing worse evils to children than did industrial power of a century ago. The recent decision of the Supreme Court, upholding the constitutionality of age classification,²⁰ has evidently had no effect whatever. The public is careless with its future, and it has no concern over this abuse of financial power.

This leads us to discuss another area of the life of the state in which the church has always had an active interest, the area of sexual morality. The slogan here (which is now starting to move legislatures and will soon be featured in briefs of lawyers in court) is that religious groups should not—for example, in opposing infanticide—"impose their morality" on others. That

²⁰ Ginsberg v. New York, 390 U.S. 629 (1968).

is to say, that clergymen and other churchmen, as well as those who believe in non-belief, may—in the name of their personal moral convictions—urge putting pressures on legislators to legislate an end to capital punishment, in favor of every woman's "right" to an abortion, and against bingo, booze and horses, but that *these* are not to be considered "imposing one's morality." Rather, this is merely the "free expression of opinion in a democracy," the merely "forthright expression of concerned citizens standing up to be counted."

The Right to Life

The trend of recent decisions of the Supreme Court of the United States is emphatically in favor of protecting the right to life. For 30 years we have seen this in the area of those decisions which dealt with such subjects as the power of the Government to protect women and children under sound labor laws and in many decisions affecting the working man in his right to earn a decent living. We see also the great evolution of decisions at long last vindicating, in so many areas, the human rights of Negroes. Most recently there have been extremely important Supreme Court decisions relating to the right of racial intermarriage,²¹ the right to basic education without racial discrimination,²² and voting rights for Blacks.²³ There was the great decision upholding open housing in *Jones v. Alfred H. Mayer Co.*,²⁴ and we have

²¹ Loving v. Virginia, 388 U.S. 1 (1967).

²² Green v. County School Board, 391 U.S. 430 (1968).

²³ Katzenbach v. Morgan, 384 U.S. 641 (1966).

²⁴ 392 U.S. 409 (1968).

seen, all the while, the vigilance of federal courts throughout the country in assuring that desegregation orders are carried out with respect to school districts. Closely related to the right to life, not only of black people but of poor people everywhere in the country, has been the development of the criminal law in the areas of due process and equal protection. While there has been a great hue and cry against the Supreme Court on account of its decisions in the area of criminal due process, there can be no doubt that, taken as a whole, these decisions are protective of the rights of individuals helpless against the state. Conversely, the administration of the criminal law has been rendered far more difficult by these decisions, but when put in clear focus—and removed from expressions of left wing hysteria against so-called “police brutality”—the decisions withstand analysis, if it is fairness to individuals that we have in mind. We must also consider the growing concern of the Supreme Court over the right of privacy—a right which becomes more important each day in an increasingly socialized society. While some criticism has been expressed concerning the Connecticut birth control case, *Griswold v. Connecticut*,²⁵ this decision, even with its multiple and discordant opinions, shows an active and earnest concern on the part of the Court to protect the privacy of marriage and family.

In another area of the “right to life,” serious trouble imminently threatens. Closely related to commercially changed attitudes respecting sex (and reflected in

literature and on the stage) are the movements in favor of so-called “liberalized” abortion laws and the movement for population control. Just as the abortion movement is being carried on a wave of false propaganda—but very widespread and intensive—so the movement for population control is being similarly carried forward. As constitutionalists, we must take particular note of the fact that the population control movement is aimed precisely at *control*. Let there be no doubt about that. The general theory which lies behind this movement may be expressed as follows: “Voluntary, if voluntary works—otherwise coercion.” It is regrettable that this entire issue, several years ago, was confused with the issue of the morality, under Catholic teaching, of birth control. The issues are very distinct and have nothing to do with each other. The questions to be raised about population control are not constitutionally different (except for their being infinitely more serious) than questions which might be raised about price control, flood control, or any other known form of governmental control of some form of human activity. The only aspect of Catholic doctrine affecting this question is the question of due process of law. But when we begin to talk about the use of governmental power actively to promote *anything* in the area of human conduct, we are approaching the edge of constitutional questions. Where governmental promotion is actively used in order to induce human beings to cease from procreating, can anyone doubt that we are *into* a constitutional problem of great magnitude? Up to now the going slogan concerning governmental “family planning” programs has been that it is

²⁵ 381 U.S. 479 (1965).

merely "to afford badly needed health services to those who need them and can't afford to pay for them." However, how could this possibly become a program which would ever head off the assumed population explosion? All of the hearings before the congressional committees revealed that the poor, to whom these programs are beamed, do not usually elect to "avail" themselves of the services offered. And that accounts for the fact that recently, President Nixon's chief advisors on population have been counseling coercive measures. They have talked in terms of tax penalties and very serious civil disabilities to those who refuse to limit their families in accordance with the state's wishes. While the population control movement is now in high gear and at last has the full backing

of a national administration, it is not so much as being questioned by people who are interested in civil liberties. We can only hope that a public questioning of the movement will develop, and if that is so, then we can feel certain that test litigation can likewise be developed whereby to vindicate—before it is too late—natural rights of human beings in one of the most vital areas of human life.

This has been the briefest of overviews, touching upon some of the problems, a few of the statutes and some of the cases in which law and religion meet on the American scene at the present time. We think that the law can continue to perform one of the important functions which St. Thomas Aquinas ascribed to it—that of education.