

Prayer and Paradox

The Supreme Court and Public Prayer: The Need for Restraint,
by Charles E. Rice. *New York: Fordham University Press, 1964. 202 pp. \$5.*

UP TO the year of Grace 1961 the constitution of the State of Maryland required that candidates for certain offices swear to a belief in God as a condition of appointment. One Torcaso, who would not swear, and was for that reason denied a notaryship, took his protest to the Supreme Court. Holding for Torcaso in 1961, Mr. Justice Black spoke for the Court as follows:

... (N)either a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those *religions founded on different beliefs*.... (Emphasis supplied.)

This rising suggestion that no-God "religions" had now achieved parity with theistic faiths was further sharpened two years later when the

Court prohibited the Lord's Prayer and Bible-reading in public schools on appeal by the Unitarian Schempp *et al.* and the atheist Murray *et al.* In a concurring opinion Mr. Justice Brennan explained that the nation is "more heterogeneous religiously" than at the time of the First Amendment, "including as it does substantial minorities not only of Catholics and Jews, but as well of those who worship according to no version of the Bible and those who worship no God at all..." For Justice Brennan it followed that the common heritage of modern American young people is "neither theistic or atheistic but simply civic and patriotic..." This, says the author of the earnest if pedestrian study under review, "is the neutrality the Court pursued in the school prayer cases."

Merely on logical grounds—he has also formidable objections of another order—this reasoning troubles Professor Rice, who teaches constitutional law at Fordham University. Think, he says, of a thoughtful child who notes the reference in the Declaration of Independence to a Creator who endowed man with unalienable rights. "Is there a God?" the child asks his teacher. If the teacher, a State agent, says "No," then she is siding with the atheists and violating the Constitution. If she says "Yes," then she is violating the Constitution by siding with the theists. If she says "I don't know" or "the State of which I am an agent doesn't know," then she is siding with the agnostics—who, as Professor Rice argues persuasively, are merely another non-theistic sect. To Rice the lately minted rule of so-called neutrality is really neutrality against religion.

It is a good debater's point; but is there really any use in scoring debaters' points off the Court's decisions in the prayer cases? Few of their defenders would seriously defend these rulings on logical grounds. Elsewhere Rice himself points out that in the very case in which Justice Brennan describes our "heritage [as] neither theistic or atheistic," both he and the opinion-in-chief repeat the famous affirmation that "we are a religious people whose institutions presuppose a Supreme Being." Does it do any good to ask Justice Brennan if our "heritage" excludes our "institutions?" The short of the matter is that the prayer decisions were acts of judicial will—well-meaning acts to be sure, but acts of will, not merely rejecting the "page of history," which Justice Holmes urged as the first reliance in deciding great cases, but scanting even the logic to which Holmes gave second place. And Rice

sees the most unpromising consequences as the rule extends in further cases, including the probable outlawry of the tax exemptions on which the churches rely.

What, then, can be done? Professor Rice is not for acquiescence. Echoing Lincoln on *Dred Scott v. Sandford*, he believes the prayer decisions were improperly made and he goes for reversing them. It is in his search for a technique of reversal that he wavers. Congress could of course exclude such cases from the Court's future jurisdiction. But that would leave the present decisions standing as to present causes and controversies. Besides, he wonders, would a willful Court accept the Congressional limitation?

Professor Rice concludes that a constitutional amendment is the answer. He is mindful, however, of the hazards involved even there. To tamper with the clear language of the First Amendment might be to tempt further judicial inroads, even more unforeseeable, on cherished religious uses. And again there is no reason to suppose that Justices such as the present majority would find new language any clearer than that which they have just construed. That language, after all, was crystalline to several generations of great lawyers. "Congress shall make no law respecting the establishment of religion," says the relevant clause of the First Amendment. In 1853 the Senate Judiciary Committee read this limitation as follows: "They [the founders] intended by this amendment to prohibit 'an establishment of religion' such as the English church presented, or anything like it." In 1898 Thomas Cooley, a leading constitutional scholar, explained that "by establishment of religion is meant the setting up or recognition of a state church..." Or, as Edward S. Corwin, McCormick Professor of Jurisprudence at Princeton University, paraphrased it in 1949: "That is, Congress shall not prescribe a national faith, a possibility which those States with establishments [established churches] of their own... probably regarded with fully as much concern as those which had gotten rid of their establishments."

It is this First Amendment establishment clause which the current Court applied by way of the Fourteenth Amendment to the States in the prayer decisions. Yet its real meaning was as clear when the contemporary Justices detected Archbishop Laud *redivivus* in a Bible verse read in a classroom as it was to the 1853 Congress and to Cooley and to Corwin. As suggested, attempts by new language to correct the Court's

misreading of the old language offers no guarantee whatever against more misreading. The practical course is to await change in the Court's mind or in its membership, or both, with the latter quite possibly contributing to the former; and in the meantime to push a many-faceted testing of the present rule, so that by the classic process of judicial inclusion and exclusion it may be refined toward the vanishing point. There was, after all, in the prayer decisions powerful dissent by Mr. Justice Stewart. His activist brethren who proclaim the elasticity of the Constitution would be—at least, *should* be—the last to argue that dissent from them is less sure of ultimate triumph than the older dissents which they have so often converted into the law of the Court.

If Professor Rice's recommendations are thus questionable, his narrative account of the prayer controversies is solid topical history. Moreover, his Appendix A presents a sequence of godly invocations in pre-Independence documents, from *Magna Carta*, 1215, to the Mecklenburg Declaration, 1775. Appendix B quotes divine references in the several State constitutions (Hawaii and Alaska not excepted) and Appendix C those in the inaugural addresses of Presidents of the United States. Appendix D is the text of Lincoln's proclamation of a day of prayer in 1863. This sampling of the mountainous evidence from which the Court now turns its face is followed by a full index to the whole book.

Reviewed by C. P. I V E S