

thus not the *coup de grace* it was intended to be. Mr. Justice Black's activism, whatever its merits or demerits, cannot be condemned by demonstrating the weaknesses in Mr. Justice Sutherland's activism. It must be attacked in its own right.

The choice between activism and restraint is not a choice between good and evil, or right and wrong. Either may be fatal if taken in large doses to the exclusion of tempering quantities of the other, and the choice between these approaches requires a careful eclecticism together with a delicate and thoughtful balancing of competing interests. Professor Mendelson is apparently content to define the only acceptable occasions for the exercise of activism as those occasions in which Mr. Justice Frankfurter saw fit to employ it. That is rather shallow analysis, and that is why his book is ultimately so dissatisfying.

Ironically, he has provided the ideal closing sentence for a review of his own work. Speaking of activist doctrine, he declares: "There is more subtlety, more depth, and more complexity in our culture than such one-sided polemics dream of."<sup>23</sup> There is, indeed. The "conflict in the Court" is one of great subtlety, depth, and complexity, and is not adequately to be understood on the basis of the one-sided polemic that Professor Mendelson has offered us.

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RELIGIOUS PERSPECTIVES IN AMERICAN CULTURE: Volume 2 of the four volume RELIGION IN AMERICAN LIFE. Princeton: Princeton University Press, 1961. Pp. 427.

*Religious Perspectives in American Culture* is meant for readers innocent of sophistication in constitutional processes. It spreads thin ink over education, theology, politics, sociology, statistics, history, economics, and law and overflows into the unrelated topics of religion in the arts: in fiction, novels, poetry, music and in architecture. The mere range of these topics and the insignificant portion devoted to legal analysis invite shallowness. But the main fault of this book is that its shallowness is selective. It passes for an objective, authoritative study, an oversimplified view of our constitutional history and church-state relations. The doctrine of Separation of Church and State is thus criticized without seriously considering either the majority view of the Supreme Court or the views of some of the more extreme proponents of Separation. In the end, the reader faces a city of one way streets. Discretion keeps one from questioning and delicacy prevents him from even guessing the reason for such editorial policy.

Will Herberg's essay on "Religion and Education in America" argues for federal aid to parochial schools and advances the proposition that "if the public

23. P. 127.

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school is to retain the support of the American people . . . it cannot remain religionless."<sup>1</sup> The changing relations between religion and education suggest that "whereas in the first period of our history education was conceived as serving the needs of religion, and in the second the two were regarded as parallel but separate enterprises equally worthy of support, today the original relation has been reversed."<sup>2</sup> Herberg argues that religion is relevant to education. He asserts that it is too important to be left to parents and to churches and, arguing for religion in public education, concludes, in H. L. Mencken's phrase, that since roses smell good they must make better soup than cabbages. Herberg does not attempt to offer solutions (the perplexing question of how religion can be introduced into public schools "is beyond the present context of discussion").<sup>3</sup> He suggests merely that "perhaps some combination of teaching about religion and creating a pro-religious atmosphere in the schools with coordinated instruction in religion by outside religious bodies will have to be worked out," but the lines "are by no means clear."<sup>4</sup> In addition, we are cautioned against superficiality of common core approaches and syncretistic solutions and admonished that the solution must stay within constitutional bounds.

Herberg agrees that under the Constitution, religion in public schools may never be "sectarian." But, what is "sectarian"? For some eighteenth century Protestants "non-sectarian" meant "Protestant" rather than "Methodist," "Baptist" or "Presbyterian." This remains sectarian to a Catholic who prefers "Christian" as a more inclusive concept which, in turn, is markedly sectarian to Jews. Further dilution of the concept may have curious effects when Flagellant or Dughobor practices are considered, or the term is applied to Agnostics. This clearly is not Herberg's intent. He simply expands the basis for religious conformity. His "Three Church America" makes "non-sectarian" sound like "whatever is accepted by the three main churches in America, the Protestants, the Catholics and the Jews." Smaller churches are ignored and the broader the conformity of the numerically strong churches, the greater their isolation. The real meaning of the first amendment, according to Herberg, is the prohibition of the establishment of one church over the others, of discrimination among churches and, above all, of going "too far."<sup>5</sup> Seemingly, it is not "too far" for Herberg to describe and sanction a three-church establishment with built-in discrimination against other minority churches and the secularists. It is here that Herberg differs from the prevailing view of Mr. Justice Black, that aid to *all* churches is as unconstitutional as aid to any one church. Where for Mr. Justice Black religion teaching in public schools would be unconstitutional

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1. P. 50.

2. Pp. 11-12.

3. P. 51.

4. P. 50. In another publication, Herberg himself suggested that "effective" released time requires four or five hours a week. See, *Symposium—Religious Education and General Education*, Religious Education, May-June, 1953.

5. P. 41.

even if all churches agree on it, for Will Herberg it should be proscribed, if at all, only because all churches cannot agree on it.

Herberg is probably right in stating that suspicion is one of the chief reasons for public backing of Separation of Church and State. But he is wrong in urging it as the sole reason and in disparaging it as a throwback to other eras. "Perhaps," say the editors in their well-meaning introduction, "the Biblical faith that 'the kingdoms of this world shall become the kingdom of the Lord and his Christ' is a fairy-tale fantasy," but "many Christians and *Jews(1)*, however, have believed it a right reading of historical existence. . ."<sup>6</sup> (emphasis ours). It may be medieval backwardness to suspect the average teacher in our schools of conscious prejudice or, indeed, of religious ignorance, but why should we trust them objectively to teach religion if we cannot rely on the editors of *Religion in American Life*?

Herberg challenges the famous dictum in *Board of Education v. Minor*, that "united with government religion never rises above merest superstition; united with religion government never rises above merest despotism. . ."<sup>7</sup> This, he says, audaciously implies that all religions except American Protestantism are superstitions and all governments but ours are despotisms. However, established churches obviously tend to call on state power for help in enforcing their practices and beliefs. And churches with a political stake in governments continuously face the dilemma between matters moral and matters politically expedient. If our freedom as well as our unprecedented acceptance of religion are due, *inter alia*, to Separation of Church and State, it would seem that the court in the *Minor* case might have erred in overemphasis, but Herberg is guilty of the worse offense in overlooking the factual forest for semantic trees.

The historical setting for the first amendment occupies much of Herberg's argument. But in the following essay, Wilber Katz argues, rightly, that historical argument "is highly inconclusive. What the historical studies show primarily is that in the field of law, as in religion itself, controversy becomes so charged with emotion that objectivity is difficult to maintain."<sup>8</sup> The argument that strict Separation should be rejected on the basis of its widespread violation (*e.g.* chaplaincy in the armed forces) resembles debunking of speed limit laws on the ground that ambulances are not covered by it and occasional speedsters remain unapprehended.

Wilber G. Katz addresses himself to the fluid line of experience corroding dogmatic doctrines of Separation and Freedom of Worship. "[T]he basic American principle of church-state relations is neither separation of church and state nor impartial benevolence towards religion; it is the principle of religious liberty, which requires strict government neutrality with respect to

6. Introduction to 1 RELIGION IN AMERICAN LIFE, THE SHAPING OF AMERICAN RELIGION at 8 (1961).

7. Pp. 25-26, citing 23 Ohio 211, 13 Am. Rep. 233 (1872).

8. P. 57 & n.12. This did not prevent Katz from providing us with an historical analysis of his own. See also 1 RELIGION IN AMERICAN LIFE, *op. cit. supra* note 6, at 322 and 405.

religion."<sup>9</sup> Having said that much, Katz proceeds to support his thesis with arguments singularly open to the corrosion of experience. His argument is strongest when opposing the doctrine of Separation of Church and State. Indeed, a large portion of his essay is devoted to the enumeration of practices inconsistent with "strict" Separation. His neutralism, however, like that of most neutralists, simply tends to serve a convenient cloak for secret commitments. Its gist: that the State abstain from activity which will keep religion out of public schools and aid from parochial institutions. Katz endorses the since amended Douglas dictum that we are a "religious people." He simply does not deal with the mutually exclusive situations where freedom to worship seems to require, but freedom from worship is violated by, given religious programs in public schools. In justice to Katz, he labors under the disadvantage of writing prior to the *Torcaso*<sup>10</sup> case, the *Sunday Laws*<sup>11</sup> cases, the *Bible Reading*<sup>12</sup> and the *Prayers in Public Schools*<sup>13</sup> cases. This causes an inescapable fault in footnoting Katz's prejudices. In the end he pummels a dead horse of absolutism with absolutism of his own.

Finally, Katz notes with disapproval Howe's theory that the doctrine of Separation is itself a sectarian concept of Protestant origin. "Those who support the thesis that each man should be left free by Government to follow the faith which his mind and heart prefer, very generally, if not invariably, have in religion, abandoned the belief that an ultimate truth has been revealed for all and, as truth, is binding on all . . . Behind our constitutional provisions there may lie, therefore, an attitude, if not a religious faith itself, which is predominantly Protestant in spirit."<sup>14</sup> This notion is discussed and excitingly presented in another essay in this volume, William Lee Miller's "American Religion and American Political Attitudes." Miller points out that the attitude of voluntarism, anti-authoritarianism, and individual persuasion underlie not only Separation but all other first amendment areas. There is no doubt that non-protestant religions of the United States present a challenge to Protestantism and, in turn, are influenced by it. The present day acceptance of political voluntarism establishes the common denominator of "American" for Protestants, Catholics, Jews, Agnostics, and all the other shades of persuasion. Between *Pierce v. Society of Sisters*,<sup>15</sup> establishing the right to maintain parochial schools, and the line of cases establishing public education without religious

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9. P. 54. Katz modestly states that his "comprehensive legal principle" of state neutralism toward religion "may not be the one most widely accepted," which is quite exuberantly correct. P. 53.

10. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

11. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

12. *Schempp v. School Dist. of Abington Township*, 201 F. Supp. 815 (E.D. Pa. 1962), *appeal filed*, 30 U.S.L. WEEK 3387 (U.S. May 24, 1962) (No. 997).

13. *Engel v. Vitale*, 370 U.S. 421 (1962).

14. P. 65. See also 1 RELIGION IN AMERICAN LIFE, *op. cit. supra* note 6, at 332.

15. 268 U.S. 510 (1925).

coercion of any sort, our range of free choice is extended beyond a single, exclusive pattern. American voluntarism, whatever its sources, becomes the background for commitment.

"How is your wife?" asked a man. "As compared to what?" answered the other. Compared to the available legal studies, *Religious Perspectives in American Culture* is but average, both opinionated and expensive. It is opinionated—as compared to such studies as *Religion in America* (Meridian Press), the paperback featuring a multi-author, many-points-of-view approach at its very best. It is expensive vis-à-vis the four pamphlets of the Center for the Study of Democratic Institutions which combine balanced, fresh presentations with the unbeatable allure of free copies. This is not to say that the essays in the book under review are inferior to those in other publications; they are not. The trouble is that the editors stand their case on one foot only. With such subjective presentation of true problems, the impact of the materials is lessened and "parts" fail to add to an objective "whole." It is this error in judgment that at times makes one feel that we are sadly impaled on a steer's horns of a dilemma with lots of bull in between.

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#### THE PROMISED LAND OF SCIENCE

TOWARD A REASONABLE SOCIETY: THE VALUES OF INDUSTRIAL CIVILIZATION. By C. E. Ayres.<sup>1</sup> Austin: University of Texas Press, 1961. Pp. 301. \$4.75.

APATHY and lack of purpose deeply trouble mid-century Americans. Life constantly gets "better," but seemingly ever less satisfying. Today's youth, despairing of finding meaningful careers, talk of seeking in marriage, in leisure activities, and in their personal lives a sense of purpose which society does not provide. In the glittering world that science has built, they have somehow lost the way.

In *Toward A Reasonable Society*, C. E. Ayres attempts to set us on the path once more. Mr. Ayres, a distinguished economist, contends that values and purpose can indeed be found in an industrial-technological civilization, and that values so derived are far more meaningful than the much mourned lost faiths of prior ages. His book provides an important opportunity to assess the promise of the scientific way of life.

True values, Mr. Ayres begins, derive from (and only from) the "life process of mankind." In the activity of knowing-and-doing we learn what is best for us, whether the question is which mushrooms can be eaten, or what kind of government we need for the next fifty years. Values are operational

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