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Justice Reed and the First Amendment (The Religion Clauses). By F. William O'Brien.

Kevin Kennedy

JUSTICE REED AND THE FIRST AMENDMENT (THE RELIGION CLAUSES). By F. William O'Brien, S.J. Washington, D. C.: Georgetown University Press, 1958. Pp. XI, 264.

This book is a study of the church-state decisions of the Supreme Court since 1938. The author pays particular attention to the opinions of Justice Reed, who came on the bench that year, and in doing so brings into sharp focus the justice's attitude toward the applica.ion of the religion clause of the First Amendment.

For the first four years of this period the judges were in general agreement. It was not until the Court heard the case of *Jones v. Opelika*[1] that it can be said Reed's position became clearly defined. An ordinance required agents, dealers and distributors of books to pay a license fee of ten dollars or less per annum. A member of Jehovah's Witnesses selling religious tracts on the street refused to pay the fee, was convicted, and the Supreme Court in a 5 to 4 decision affirmed. Dissenting Justices Stone, Black, Douglas and Murphy held the ordinance to be an infringement of the free exercise of religion. Justice Reed, however, wrote that the courts must respect the power of the states to regulate orderly living and that the ordinance was a legitimate nondiscriminatory regulation and not a capricious law of censorship.

In the years that followed, Justice Reed, in cases after case, criticized his colleagues on the Court for showing lack of judicial restraint in condemning legislation merely because they disagreed with its wisdom or its desirability.

The author points out a paradox in that Justices Black, Murphy and other "liberal" justices in the New Deal era preached the doctrine of judicial restraint in passing on legislation involving economic liberty but reversed their position in the next decade in striking down ordinances where there was only a remote chance that personal liberties would be infringed. Reed espoused the principle of judicial restraint while he was Solicitor General in the thirties and did not abandon this principle over the years he served on the Court.

Father O'Brien points out that Reed championed the rights of the majority when threatened by a small minority. *Kovacs v. Cooper*[2] involved an ordinance absolutely prohibiting the use on public streets of loud-speakers emitting "loud

1. 316 U.S. 584 (1941).
2. 336 U.S. 77 (1949).

and raucous noises." Justice Reed pointed out that freedom of speech is not an absolute right and must give way when it collides with the right of other citizens to "peace, privacy and convenience."

The author, Father O'Brien, is a member of the government faculty of Georgetown University. The book represents a valuable contribution in the field of Constitutional Law. It is not only the result of painstaking research but also careful and perceptive analysis. The work is divided into three parts, a discussion of the cases involving the free exercise clause, the establishment clause, and a critique on the constitutional principles of Justice Reed.

In his conclusion the author observes that the Court has begun to swing back from the extreme position it took in the *McCollum*[3] case where it cited its dicta in the *Everson*[4] case that a state cannot pass laws which give any aid to religion. He says that Justice Reed's dissent in the *McCollum* case became the foundation for Justice Douglas' opinion in the *Zorach*[5] case, which found the New York State "released time" statute to be constitutional, and which blunted the *Everson* dicta in the following words:

> "We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[6]

KEVIN KENNEDY
Member of the New York Bar

3. McCollum v. Board of Education, 323 U.S. 203 (1948).
4. Everson v. Board of Education, 330 U.S. 1)1847).
5. Zorach v. Clauson, 343 U.S. 306 (1952).
6. *Id.* at 313, 314.