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Book Reviews

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BOOK REVIEWS

PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND: A DETAILED AND CRITICAL ANALYSIS OF A HUNDRED COURT CASES, by James E. Curry. Charlottesville, Va.: The Michie Company, 1964. Pp. xxii, 429. $12.50.

What is the proper relationship between church and state? This is a critical issue for our time and it holds a myriad of sub-issues. Curry's book deals with one of these sub-issues: To what extent may the state[1] regulate the religious use of land? Since Curry's book is the first book to treat exclusively with that sub-issue, it is a "landmark" and deserves considerable attention for that reason alone.[2]

One might first ask: Is a 429 page book on this sub-issue justified? I believe that it is. During the more than forty years that courts have been considering church zoning[3] cases many judges and other legal writers as well as lay people have stated the view that churches cannot be excluded from a residential area *on any basis* by direct zoning. Apparently some extend this view to exclusion by indirect action, such as through requiring setback lines, regulating building area and height, and requiring off-street parking. These "absolutist" views[4] have little legal precedent; further it seems that frequently they have been arrived at with little consideration of all relevant factors. Religion, based primarily on faith, readily brings emotion into play; and emotion can color one's analysis rather quickly. The primary thrusts of Curry's book are to dispel the absolutist view, at least to the extent that it purports to rest on legal precedent, and to set forth and evaluate the factors that have been considered by the courts in these one hundred cases. Not everyone will agree with all of Curry's specific conclusions on policy or with his analysis of all of the individual cases and law review commentaries, but this book should cause anyone concerned with legal precedent in church zoning cases to take a long hard

1. Usually the regulation would be through local government units exercising delegated power.

2. There have been five other reviews of this book: Bartley, Book Review, 17 U. FLA. L. REV. 650 (1965); Brindel, Book Review, 40 NOTRE DAME LAW. 492 (1965); Casad, Book Review, 13 KAN. L. REV. 614 (1965); Fagan, Book Review, 11 CATHOLIC LAW. 173 (1965); Green, Book Review, 43 N.C.L. REV. 655 (1965).

3. Curry considers other regulation aspects than zoning and they are clearly involved in the cases; in the review I shall use the term "zoning," generally intending to include all aspects of public regulation of the religious use of land.

4. There are absolutists on the other side saying that any church usage ought to be entirely excludable. These are of less concern since their views have not received much sanction. Curry has no greater liking for them than he has for the anti-exclusion absolutists.

look at a particular case or law review commentary before relying on it as support for the absolutist theory.

The first three chapters are introductory. Chapter one relates the specific topic of this book to other church-state problems and to land use regulation in general. It refers to some of the early cases and literature touching the problem and to the magnitude of church construction today. Chapter two takes an introductory look at the "police power," the power under which the zoning must be upheld if at all, and sets forth three bases of attack that a church might use against the validity of the zoning: (1) The zoning does not bear a substantial relation to the promotion of public health, safety, morals or general welfare and is therefore an improper exercise of the police power resulting in a deprivation of property without due process of law; (2) the zoning treats a substantially identical entity differently and therefore discriminates against the church denying it equal protection of the law; (3) the zoning unduly restricts the free exercise of religion. Zoning might result in a denial of due process even where it bears a substantial relation to promoting public health, safety, morals or general welfare, if it deprives the owner of all practical uses of his property. The result is confiscatory, in effect a "taking" of property without just compensation, and therefore certainly a denial of due process. The situation probably would not arise frequently in church zoning cases since generally the property denied usage for church purposes would be suitable for at least one other valuable purpose. In chapter three Curry specifically attacks the absolutist theories and succeeds in demonstrating rather forcefully the weakness of the claims that these theories are based on legal precedent, although at times he seems to be attacking straws.

Curry criticises an article for relying on *Western Theological Seminary v. City*[5] to support the statement that ". . . [C]hurches may not be barred from residential zones."[6] First, the quotation from the article is misleading for it attributes the view to the author that the rule is universal. The article author actually said: "After citing *a number of cases* in which it was held that churches may not be barred from residential zones, the court said . . . ."[7] Second, it is not at all clear that the article author was relying on the *Western* case. He made no specific reference to it; one must go to the case under discussion in the article to find any citations at all. Curry's first criticism is "Actually it was not a church that was attempted to be barred . . . but a college."[8] The article

5. 325 Ill. 511, 156 N.E. 778 (1927), 331 Ill. 257, 162 N.E. 863 (1928).
6. Brindel, *Zoning Out Religious Institutions*, 32 NOTRE DAME LAW. 627, 628 (1957); see Curry, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND 29, 30 (1964), hereinafter cited simply as Curry.
7. Brindel, *supra* note 6, at 628. (Emphasis added.)
8. Curry at 30.

author knew that this case did not involve a church for within one-half of a page of the place cited by Curry he refers to the case specifically as dealing with a "religious school."[9] Since he was talking about churches, since this case did not involve a church and since cases involving churches were cited by the court perhaps one should conclude that the article was not referring to this case. Turn about seems like fair play. On page 110 Curry refers to the "Upper Arlington Lutheran high school case." Actually it was not a high school that was involved but a church.

The next eleven chapters present a more detailed analysis of the three bases for attacking the validity of church zoning. Chapter four discusses generally what the courts have said about whether or not the church zoning bears a substantial relation to legitimate public ends and the "balancing of interests" approach thereto. Arguably, the balancing of the churches' social value, apart from the free exercise of religion question, with the extent that public health, safety, morals or general welfare, would be promoted by the zoning should be done by the legislative body and the court should content itself with answering the question: Is there a reasonable basis for saying that the zoning substantially promotes some public end? On the other hand, because of the preferred status of "freedom of religion," balancing it with the exercise of the state's police power might be considered best left to the courts. A third aspect of balancing is that of equity's quest to determine whether it ought on specific facts to issue its discretionary remedy—the injunction. The chapter shows that the courts have not conveniently segregated the three. Also discussed in chapter four is the traditional equitable defense of estoppel.

Chapters five through ten present an evaluation of what various courts have said about certain specific factors: aesthetics; space, light, air and ease of access; fiscal considerations; protection of property value; protection of neighbors; and traffic control. As Curry rightly points out these "justifications" for the exercise of the police power seldom appear alone in a case; several are usually considered, and more than one may be the basis for the decision. Furthermore, there is bound to be overlap in the considerations. Obviously traffic problems and aesthetics affect property value. They are as relevant to the "protection of neighbors" as the specific categories therein considered, "noise," "mere inconvenience," "depressiveness," "disturbances of the peace," and "police, fire, health and sanitary regulations." One can easily argue that affectation of property value is but a consequence from attendant factors such as noise and traffic. But discussion has to be organized somehow and the courts do use these categorizations. Curry's conclusions

9. Brindel, *supra* note 6, at 629.

are that traffic control has the most support from the courts, that aesthetic considerations will offer the best argument for zoning out churches entirely from residential areas and that fiscal considerations may well have much greater significance in the future than they have now. As church building booms, more property goes off the tax rolls and more city services have to be provided; the result is a growing dual loss of revenue to the community.

Chapters eleven through fourteen deal primarily with the discrimination question, eleven treating it generally and the other chapters treating specific aspects. Thus chapter twelve is devoted to spot zoning and reverse discrimination raising the interesting question of what secular uses will be entitled to admission into a district once a church is permitted. Chapter thirteen discusses discrimination between religious schools and "public" schools, and chapter fourteen presents an interesting discussion of "suspicions of prejudice" based either on religious bias or on prior conduct of the individual or group involved. Curry points out that courts have been reluctant to discuss prejudice in the church fact situation and feels strongly that this aspect of the problem ought to be more fully explored by them.

Chapter fifteen explores religious liberty, noting its infrequent use as a basis of attack and suggesting further reliance on it. Curry's suggestion that ordinarily it ought to prevail only when there is no "reasonably accessible alternative site" seems sound. The important distinction brought out is that between the personal right not to be unduly interfered with in the exercise of one's religion on the one hand and the public service that a particular religion performs on the other hand. The first is relevant to this issue; the second is not.

The book then reverts back to some general considerations. Chapter sixteen treats the role of precedent. Curry sharply criticizes courts for basing their opinions on "fragments" of prior legal opinions instead of on the full opinions, but he does a substantial amount of fragmentizing on his own throughout his book. Most of it he does by choosing extremely narrow grounds for explaining a court's decision, labeling it holding and characterizing the rest as dicta or, by what seems to be one of his favorite phrases, as "makeweight."[10]

Chapter seventeen discusses the presumption of legality and the burden of proof. The primary problem here discussed is whether or not the courts will apply the usual presumption in favor of the validity of zoning to church zoning or put the burden immediately on the governmental body to substantiate its validity. Chapter

10. See discussion *infra*, at notes 14-28.

eighteen deals with the interpretation of zoning board regulations including relevant consideration of the necessity for standards, the use of conditions, strict and liberal approaches to interpretation, and severability. Zoning ordinances frequently refer to "churches" or to "religious" use. The problem of determining their meaning is treated separately in chapter nineteen. An interesting question that arises is how much the court should look to the doctrines of the particular group involved to determine whether one of its activities is "religious." Chapter twenty dealing with the relevance of private opinion is divided into two basic parts, a consideration of "neighbor consent clauses" in zoning ordinances and a consideration of "extra-legal private pressure" brought to bear on zoning board members, judges and others connected with the zoning process. A brief summary and conclusion comprises chapter twenty-three. Chapters twenty-one and twenty-two are a rehash of the cases discussed previously; in chapter twenty-one the state cases are summarized by state, with twenty-seven states involved, and in chapter twenty-two the relevant federal cases are discussed with some discussion of why there are so few of them.

The preceding material covers 336 pages of the book. The remaining 92 pages are devoted to (1) a chronological table of references or what serves as footnotes;[11] (2) an alphabetical list of references under the separate headings of "books"; "periodicals, etc."; "articles, addresses, etc."; "authors"; "religious denominations"; "municipalities"; "states"; and "cases";[12] and (3) a subject index.[13] The unusual manner of footnoting and the failure to refer to cases by standard case names probably will be confusing to lawyer readers at first. The index is good; query if all the tables serve a useful purpose. One thing that the table on "religious denominations" shows is that there have been 21 cases involving Catholics, 17 cases involving Jews, 13 cases involving Jehovah's Witnesses, 9 cases involving Baptists, and 8 cases involving Lutherans. No other denomination had five or more cases.

Although Curry generally does well in criticizing the absolutist rules, in attacking those who have purported to find precedent for their absolutist views, and in offering some new insights into the basic problem, he does not do so well in his affirmative analysis of precedent. Several illustrations must suffice although more are available.

Curry says of *State v. Joseph*[14] that "the court's ruling was based on certain representations made by zoning officials to the church. From these representations the church concluded that a

11. Approximately 23½ pages.
12. Approximately 21½ pages.
13. Approximately 44½ pages
14. 139 Ohio St. 229, 39 N.E.2d 575 (1942).

specified lot would be suitable for the project and bought it. As a result, the court held that the church could not properly be excluded. Most of Justice Bettman's observations were not necessary to the decision and therefore not binding as precedent."[15] Now, the *Joseph* case has been cited frequently in support of the absolutist theory that churches cannot be totally eliminated from a residential area. All that the court said directly with respect to this proposition was "we seriously question the constitutionality of any enactment that seeks flatly to prohibit the erection of churches in residential districts. But we believe that under a proper and natural construction of the language of the ordinance here involved, *this question does not arise.*"[16] Thus Curry is on sound ground when he criticizes those who espouse an absolutist view from this case. The ordinance permitted churches by special permit of the zoning commission and village council. The church argued that its exclusion bore no substantial relation to the police power purposes—public health, safety, morals and general welfare—and that the village had given a preliminary approval on which the church had relied to its detriment so that the village ought to be estopped. What the Court said concerning the estoppel argument was "Although this resolution was subsequently repealed and declared to have been 'advisory only,' and although its adoption may not, under the circumstances, rise to the dignity of an estoppel, it does at least give a strong indication that in the minds of a majority of the respondents there was no very clear repugnancy between the erection of a church in a class I district, and the general pattern of uses prescribed in the ordinance."[17] In other words, what the court does with the village's earlier action is not to hold that it works an estoppel but to treat it in effect as opinion evidence on the question whether or not the exclusion of the church bears a substantial relation to the promotion of public health, safety, morals and general welfare. The court then proceeds to examine the village's argument:

> Their principal objections flow from the fact that at regular intervals the church will bring together large groups of people, thereby allegedly causing increased noise and confusion, increased traffic congestion and parking difficulties, and an increased influx of strangers into the community. It is also said that erection of a church would adversely affect property values of adjacent land.[18]

First the court disposes of the adverse affect to adjacent property values argument by saying that it is not a separate ground but is the result of the other factors—noise, traffic. The court finds

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15. Curry at 10.
16. 39 N.E.2d at 520. (Emphasis added.)
17. *Id.* at 521.
18. *Id.* at 523.

the noise argument insignificant because the church had agreed not to install bells or chimes, and "people going to and from church are not customarily rowdy or boisterous," and on three sides there are streets with a minimum dedicated width of 50 feet and much of the land in the vicinity is vacant. The traffic argument fails because (1) the church has streets on three sides; (2) there was an express agreement to set aside 25 percent of the lot for parking; and (3) the traffic would occur generally only on Sunday morning when other traffic would be less and children would not be going to school. Thus "health and safety" have failed to sustain the zoning. The court then considers "morals" and finds it incongruous to use morals as a ground for excluding the church when churches have "traditionally occupied the role of both teacher and guardian of morals." And since "churches in fitting surroundings are an inspiration" putting them in nonresidential areas cannot be supported as being for the general welfare. The net result is an inescapable conclusion that the court found the exclusion of this church was not justifiable as bearing any substantial relation to the promotion of public health, safety, morals or general welfare. Why then does Curry conclude "that decision, it will be recalled, relied principally on the misrepresentations of the zoning officials on the basis of which the church had invested its money in the disputed tract. But as a makeweight for its conclusions, the court said the following: (quoting the court's comment regarding no support for the zoning on general welfare grounds) . . ."?[19] Undoubtedly Curry reaches this conclusion because of what the same court said in a later case: "Reduced to its lowest terms, the decision in that case [*Joseph*] was based upon the extremely important and unusual fact that the relator had been misled by the zoning and village commissions . . . ."[20] It could of course be argued that this restrictive language was unnecessary, the court having already found that using the land for "school" purposes "would substantially and permamantly injure the appropriate use of the neighboring property and lower its value."[21] In the church case the court found no reasonable relationship to the police powers, here it did; the cases could be distinguished on that basis. Three of the six judges who decided the church case approved this statement in the latter case, two were no longer on the bench and one rejected it. Any thorough discussion of the reasons for the holding in *Joseph* ought to bring all of this out; various parts are brought out by Curry here and there but not sufficiently to set off the impact from his two comments quoted earlier.

Curry rightly criticizes an article which relied on *Ellsworth v.*

19. Curry at 216.
20. State v. Baxter, 148 Ohio St. 221, 74 N.E.2d 242, 244 (1947).
21. *Id.* at 244.

Giercke[22] to support the statement "That an ordinance totally excluding churches from a residential neighborhood is invalid, has been clearly resolved."[23] As he points out, the court did not discuss the total exclusion aspect at all but specifically said "For the foregoing reasons we hold that the ordinance involved herein is unconstitutional and discriminatory in so far as it excludes the building of churches within a class 'A' residential district."[24] What were the "foregoing reasons" that the court gave? The court quoted with approval from the *Joseph* case the following:

> Churches in fitting surroundings are an inspiration. . . . To require that churches be banished to the business district, crowded alongside filling stations and grocery stores, is clearly not to be justified on the score of promoting the general welfare.
>
> We do not believe it is a proper function in government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions.[25]

This language suggests a conclusion that there was no showing that the zoning could be justified as substantially promoting the general welfare. It is not clear whether justifications based on public health, safety or morals were argued. The court went on to say:

> Under this zoning ordinance an owner of property within the district involved may maintain horses, cows and swine on his premises and store fertilizer as long as it is not 'stored within fifty feet of the lot line of any adjoining owner.'[26]

This language supports the conclusion that the ordinance was discriminating against churches. Arguably, we now have "reasons." (1) There was no showing that the zoning promoted any legitimate public ends under the police power; therefore it denied due process. (2) The zoning discriminated against churches; therefore it denied equal protection. But Curry in explaining the decision converts "reasons" to "reason" when he says: "The exclusion was held unconstitutional not because it was total but because it was discriminatory."[27] He makes this conversion explicit later when he quotes the above language concerning swine and continues inside quotation

22. 62 Ariz. 198, 156 P.2d 242 (1945).
23. Sharff, *Religion and the Zoning Laws*, 15 N.Y.U. INTRA. L. REV. 194, 195 (1960); Curry at 34.
24. 156 P.2d at 244.
25. *Id.* at 244.
26. *Ibid.*
27. Curry at 34.

marks: "For the foregoing reason, we hold that the ordinance . . . is unconstitutional and discriminatory."[28]

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LEGAL POSITIVISM, by Samuel I. Shuman. Detroit: Wayne State University Press, 1963. Pp. vi, 265. $8.50.

The theory of law labeled legal positivism as opposed to theories of law known as natural law often has been discussed and frequently misunderstood, even by lawyers. The differences between the two approaches to discovering what law is has been summarized by contrasting the statement of Mr. Justice Holmes, ". . . that truth was the majority vote of that nation that could lick all others,"[1] with the conclusion of St. Thomas Aquinas, that, "Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer law but a perversion of law."[2]

Mr. Shuman's initial effort in this book is to analyze and clarify the differences between these theories of what law basically is. The remainder of this book is divided into two principal parts, which may be called the philosophic discussion, and the philosopher's argument.

The author commences his clarification of the differences between legal positivism and natural law concepts by divorcing legal positivism from analytical jurisprudence. In his view analytical jurisprudence is concerned with the meanings or usages of terms indigenous to law and their relations with one another and to the rest of language. He further holds that analytical jurisprudence is a method of doing jurisprudence, while legal positivism is an explanation of what law is. The author further argues that to be accurately called legal positivism, that theory of law must hold to two basic conclusions: First, that law and morals are separate; and, second, that morals have a certain nature separate from law.

In contrast to legal positivism Mr. Shuman explains that any natural law theory requires a dependence upon a moral or ethical standard outside the statement of law itself. Such external standards must also provide for the satisfaction of necessary conditions before a system of social order can be called a legal system. Inferentially, such conditions would also have to be met before an act of a legislature, a decision of a court, or a decree of an executive could

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28. Curry at 138.

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1. Holmes, *Natural Law*, 32 Harv. L. Rev. 40 (1918).
2. St. Thomas Aquinas, *Summa Theologica*, TREATISE ON LAW, question 95, Art. 2.

properly be called a law. Probable solutions to the problem of obedience to a law which fails to meet such standard are discussed in the book, but are beyond the scope of this review. If the preconditions are "moral" in a strict sense the author asserts that the standard would be found outside the nature of man, that is to say from God. However, if the preconditions are "ethical" in the strict sense the standard would be found within the nature of man as a social being.

Having thus stated the proposition for discussion the author proceeds to his philosophic discussion, which occupies the greater portion of the book. The term "philosophic discussion" is used here to describe Mr. Shuman's formal exposition on the nature of law. This exposition presents answers to the philosophic conclusions of earlier writers on this subject. Whether Mr. Schuman has succeeded in either refuting or affirming the conclusions of these writers depends upon the force of his arguments, and upon the prior conclusions of any particular reader. Mr. Shuman's analysis of the nature of law contained in his chapters entitled, "Ethics and Obligation," and the "Is Ought Dichotomy," and the other chapters in this part of the book appears to be directed principally to accomplished students of philosophy. Throughout his discussion the mention of a philosopher's name or of his treatise was intended to evoke in the reader an appreciation of the given writer's arguments and conclusions on the point under discussion. It should be observed that the method used permits a concise statement of a wide range of differing opinions on the subject, which would be readily understood by the audience for whom it was intended.

In contrast to the part of the book just described, Mr. Schuman's concluding argument in support of a natural law approach to legal philosophy is plainly stated for all to understand. He argues that the operation of a legal system according to a philosophy of legal positivism is a luxury that can be safely indulged in only by a stable society. His historic case in point is the failure of the German legal system to halt or impede Hitler's rise to power, and its failure to resist his "legalization" of policies which can only be described as disastrous to social order in Germany. The Nazi government's systematic extermination of German Jews before and during World War II is the implicit example of such policies.

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