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The Two Swords: Commentaries and Cases in Religion and Education by Donald E. Boles

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The format for the chapters on the elements and creation of the trust as well as those on the transfer of a beneficiary's interest, the termination and modification of a trust and the charitable trust, is skillfully drawn and appropriately contains the classic cases expositing the genesis and development of trust law. The material in the second chapter may be out of order but is by no means irrelevant. There are cases on trust administration that do provide excellent opportunity for analysis. The appendices contain the most current statutory answers to trust problems and can be most effectively integrated directly into the discussion of the case authorities. In short, then, this reviewer regards this casebook as somewhat limited for use in the current state of most curricula and containing some clearly objectionable features, but at the same time realizes the value of the scholarship represented as well as the historical merit of its approach. For teachers desiring a more positivist approach to trust law in its most traditional sense, this casebook could be regarded as virtually ideal, while for the more value-oriented or analytical-minded, the criticisms discussed previously may well be a serious drawback. In short, as Abe Lincoln once said to R. D. Owen, the spiritualist, "Well, for those who like that sort of thing, I should think that it is just about the sort of thing they would like" or as the old French saying goes, "Chacun a son gout".

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The Two Swords1 is billed as a companion volume to this same author's earlier work, The Bible, Religion and the Public Schools.2 It is essentially a specialized sourcebook covering the full range of situations in which educational administration comes into contact with the legal problems of church and state. The bulk of the book consists of judicial opinions, edited and abridged for the sake of spatial economy and comfortable reading. The connecting commentary is wholly descriptive, confined mainly to a listing of additional relevant cases, with capsule descriptions and some brief quotations. Professor

1 D. Boles, The Two Swords (1967) [hereinafter cited as Boles].
Boles makes no pretense at independent analysis or normative argument, and contributes only the bare minimum historical background essential to bring the given category of cases into focus. This is, in other words, a strictly legal sourcebook. One unusual feature of this volume is Boles' inclusion, after the more important cases, of a short section summarizing the reaction of the press (mainly law reviews and educational journals) to the given decision.

In his preface, Boles claims a very miscellaneous audience: "school administrators and boards, theologians and lawyers, as well as teachers of school law and constitutional and civil rights law." To satisfy such a varied group is rather a tall order, and it is not surprising that he is less than uniformly successful.

The strengths of this book, and they are substantial, are simply stated. First and foremost is the admirable scope and thoroughness of its coverage. Every conceivable church-state problem, it seems, that has arisen in connection with education is considered. The material is organized according to the educational practice or problem involved. Typical chapters are: "Bible Reading, State Distribution of Textbooks," "School Buildings." Typical subsections are: Baccalaureate Programs, Physical Education Programs and Dress, Health Regulations. A commendably detailed table of contents enables the harried school administrator to turn instantly to the material bearing on his particular dilemma.

Boles has had the very good sense not to confine himself to Supreme Court holdings. Most of the historical development of the constitutional principles governing church-state relations has taken place at the state level; to this day there are extensive areas of the law untouched by Supreme Court scrutiny. Boles has taken his cases where he has found them—federal, state, local. The result is a presentation far deeper and richer than that found in the ordinary casebook. Boles includes at least two judicial opinions on every subject and his listing of additional cases is well-nigh exhaustive.

The usefulness of this book is further enhanced by the author's dispassionate handling of his materials. From his earlier book one learns that Boles advocates a strictly applied Establishment Clause. He fully approves, for example, of the recent prayer and Bible reading decisions of the Supreme Court. Hardly a trace of that commitment can be found in the present volume, however, because Boles has worked carefully to produce an informative and instructive reference equally useful to people of all persuasions.

_The Two Swords_ is a boon to those concerned specifically with

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3 D. Boles, _Author's Preface to The Two Swords_ (1967).
education *qua* education—principals, superintendents, school boards, their legal advisers, and outside organizations particularly interested in policing the religious activities of the public schools. It obviously was written with these readers primarily in mind. The material is organized so thoroughly in terms of categories peculiarly meaningful to educators that they, at least, can use it for ready reference, much as they might a dictionary or desk encyclopedia.

In this strength of the book lies also its principal weakness. In devising a reference specially suited to the needs of those interested in education, Boles has had to arrange his material in a way that must prove at best confusing and probably quite irritating to those whose principal interest is in the law. From the standpoint of legal analysis, the cases in this book follow no rational pattern at all. Unrelated legal holdings are used side by side because they happen to touch the same aspect of school routine; closely tied cases are sent asunder because of the differing administrative labels attached to the educational practices involved. The chapter entitled "Flag Salute" provides a typical example. The bulk of the chapter deals with free exercise problems raised by the compulsory ceremony as applied to conscientious non-saluters like Jehovah's Witnesses; the balance of the chapter deals with the establishment issue raised by the recent insertion of "under God" in the pledge of allegiance. *Sheldon v. Fannin*, a direct offspring of the second flag salute case, and raising exactly the same free exercise issue, does not appear in this chapter at all because the precise dispute arose out of conscientious objection to standing for the singing of the national anthem. It appears instead in the chapter on curriculum, subsection "National Anthem." *Dearle v. Frazier* is in all important respects a Bible reading case, but because it involved a suit to compel institution of Bible study, the case winds up in the chapter on curriculum. *Meyer v. Nebraska* and *Pierce v. Society of Sisters* are an obvious stable entry; they are based on exactly the same legal principle and neither has much to do with religion. Whatever the merits of including them at all, it is clearly unsatisfactory to have the companion cases split into separate chapters. The chapter entitled "Curriculum" is a hodgepodge of incompatibles, including *Sheldon v. Fannin* (free exercise), *Dearle v. Frazier* (establishment), *Meyer v. Nebraska*

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6 102 Wash. 369, 173 P. 35 (1918).
7 262 U.S. 390 (1923).
8 268 U.S. 510 (1925).
10 102 Wash. 369, 173 P. 35 (1918).
(neither),

compulsory R.O.T.C. (free exercise), the Scopes “monkey case” (establishment?),

miscellaneous religious objections to particular school programs such as dancing class (free exercise), religious education provisions in divorce decrees (both?) and—a sort of crowning irrelevancy—a brief modern history of the status of conscientious objection to military service from World War I to the Seeger\(^\text{13}\) case. Some of the oddities of arrangement seem to violate even the author's own school-oriented rules of classification. Commonwealth v. Bey (compulsory school law versus Moslem parent wishing to keep child home on Friday)\(^\text{14}\) may be distinguishable from ordinary compulsory education cases, but would seem properly to belong in the same chapter. It is senseless to place it under the label "Religious Holidays" and then insert the case in the middle of a chapter on school buildings. Equally bewildering is the placement of Vidal v. Girard's Executor,\(^\text{15}\) in which the Supreme Court rejected a challenge to a will setting up a private school from which all sectarian instruction was to be excluded, with Justice Story's panegyrics on the virtues of Bible reading; this one wound up in the chapter on compulsory education.

I should hasten to add at this point that the kind of error previously referred to is far from rare. Rational casebook organization is a slippery business at best, and the difficulty of the task increases radically as coverage of an area approaches exhaustiveness with the attendant inclusion of fragmentary and "unique" fringe material. Even leading law school casebooks are likely to contain organizational blunders. The problem here, however, is less one of difficulty and simple error than one of incompatible approaches. To encase this material in a set of neat categories suitable for school administrators is to present the scholar with a sort of legal smorgasbord—a wealth of valuable but raw data. It is simply a matter of not being able to have it both ways.

Aside from its inherent value as pure reference and bibliography, the aspect of The Two Swords of most interest to the political scientist is the inclusion of press reaction to the major decisions. Here again, the result is mixed. At his best (e.g., reaction to Abingdon School District v. Schempp),\(^\text{16}\) Boles gives us a sharply drawn analysis of press response, identifying and contrasting the main currents of opinion and illustrating these with appropriate sample quotations. Weaknesses seem to stem from his uncertainty about just why this material is to be in-

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\(^{11}\) 262 U.S. 390 (1923).


cluded in the first place. The information is not marshalled toward any particular purpose, scholarly or otherwise.

In sharp contrast to the handling of judicial decisions, the citation of journal articles is far from exhaustive; often there are just one or two citations, coupled with a very general reference to the tenor of press comment elsewhere. While the most elaborate treatments include both law review and educational journal comment, many deal only with law review reactions and no reason is offered for the discrepancy. In his treatment of *Minersville School District v. Gobitis*,17 on the other hand, Boles confines his presentation of the voluminous law review response to a pitifully short paragraph with two rather unrepresentative citations. A supplementary section on the reaction of "other" journals comprises a random and cursory collection of references to educational journals, religious journals, general circulation magazines, newspapers, etc. Even in some of the more elaborate sections (e.g., *Gobitis*,18 and law review reaction to *Engel v. Vitale*19), there is a striking failure to organize the expressions of opinion into coherent categories, resulting in a bewildering string of contradictory quotations providing no overall impressions.

Finally, the editing of the opinions, while generally quite good, has some eccentricities which may irritate the legal reader. There is a tendency to omit identifying references which would greatly clarify the actual line-up on the court, for instance the apparent disappearance of Justice McReynolds from *Gobitis*20 and of both Reed and Roberts from *Barnette*21 the failure to identify dissenting and concurring justices in *Engel*22 and dissenting justices in *Everson v. Board of Education*;23 the failure to acknowledge the existence of a dissent in *Meyer*.24 A different but overlapping error is exemplified by the omission of all separate opinions in *Everson*,25 *Engel*26 and *Schempp*,27 and all that part of Frankfurter's *Barnette*28 dissent which dealt with the church-state issue. The brief legal references in the commentary are not uniformly precise. For example, to mention an area where I can claim some special competence, the one line descriptions of *Matter of*

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18 Id.
20 310 U.S. 586 (1940).
21 319 U.S. 624 (1943).
24 262 U.S. 390 (1923).
28 319 U.S. 624 (1943).
Latrecchia and State v. Davis miss completely the points of those holdings, while the discussion of the 1943 Justice Department circular is positively misleading as to both the extent of local defiance of Barnette and the departmentally recommended approach to such recalcitrants.

In short, this is a book of substantial merit and of substantial flaws. For the school administrator, the school lawyer, and others primarily interested in the validity of various specific school practices as against religious objections, it should serve as an invaluable reference and guide. It was written with them in mind, and is very successfully done. By this very fact, it is much less handy for the legal scholar and political scientist. As a body of raw source material, however, it is of great worth, making available a wealth of cases and attendant bibliography never before compiled within one volume. For all its defects, it is a valuable addition to the literature in this field.

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William A. Hachten, author of this book, is Professor of Journalism at the University of Wisconsin. The preface indicates that he studied constitutional law while working on his doctoral at the University of Minnesota. His stated purpose in writing this book is not primarily to describe the current state of the law regarding the press, but rather to explain "the ideas and principles underpinning the freedom of our system of mass communications as they have been enunciated in decisions of the Supreme Court of the United States." He attempts to accomplish this by presenting extensive excerpts from Supreme Court decisions, concurring and dissenting as well as majority opinions, interwoven with his own commentary. Professor Hachten admits that he is biased in favor of the Black-Douglas position on freedom of ex-

20 Boles at 150.
21 Id. at 151.
31 Id. at 163.
32 319 U.S. 624 (1943).

1 W. HACHTEN, THE SUPREME COURT ON FREEDOM OF THE PRESS viii (1968) [hereinafter cited as HACHTEN].