

1955

## CONFUSION TWICE CONFOUNDED BY JOSEPH H. BRADY. – LEGISLATIVE DRAFTING BY REED DICKERSON. – CYCLOPEDIA OF TRIAL PRACTICE BY SIDNEY C. SCHWEITZER OF THE NEW YORK BAR-4 volumes.

Francis J. Powers

C. Murray Bernhardt

John Warren Giles

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Francis J. Powers, C. Murray Bernhardt & John W. Giles, *CONFUSION TWICE CONFOUNDED BY JOSEPH H. BRADY. – LEGISLATIVE DRAFTING BY REED DICKERSON. – CYCLOPEDIA OF TRIAL PRACTICE BY SIDNEY C. SCHWEITZER OF THE NEW YORK BAR-4 volumes.*, 5 Cath. U. L. Rev. 203 (1955).

Available at: <https://scholarship.law.edu/lawreview/vol5/iss2/9>

This Book Review is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

## BOOK REVIEWS

CONFUSION TWICE CONFOUNDED BY JOSEPH H. BRADY. South Orange, New Jersey: Seton Hall University Press, 1954. Pp. 192. \$3.00.

The "establishment of religion" clause of the First Amendment is the subject matter of this study. Analysis of the use of history by the Court in its decisions in the *Everson* and *McCullum* cases constitutes the major portion of the work. Adoption of the "establishment" provision also is sketched. The author heads the Department of Social Studies in Seton Hall University.

Monsignor Brady's main point is that the effects of the rationale of the decisions and opinions in the New Jersey school bus case in 1947 and in the Illinois released time religious education case in 1948 have completely altered the meaning of the "establishment" clause. This current distortion of the provision, he writes, contradicts the intention of its framers and the consistent practices of over a century and a half of our national history.

The principles of no public aid to religion and the concept of a wall of separation between church and state—both found in *Everson-McCollum*—are the chief targets for the author's sharp refutation. Monsignor Brady asserts that according to its own language, the circumstances of the time in which it was adopted, and in constant practice the "establishment" clause "meant and means that Congress may not pass any law to set up a single church or religion enjoying formal, legal, official, monopolistic privileges through a union with government. That is all it meant and can mean now; to add everything to it, to include in it, e.g., a ban on the expenditure of public money for religious purposes, or to make it mean the complete 'separation of church and state,' is to abandon the First Amendment. . . ."

Treatment of the mis-application of Jefferson's metaphor of a "wall of separation between church and state," is especially good. This figure of speech appeared in a letter from Jefferson, while President, to the Baptists of Danville, Connecticut. A letter of the same date from Jefferson to his Attorney General, Levi Lincoln, explains the purpose of the message to the Baptists as a "condemnation of the alliance between Church and State, under the authority of the Constitution. . . ." The intent of Jefferson is made clear in his own words. As Monsignor Brady states, it was no more than a paraphrase of the "establishment" clause, "nothing more than an endorsement of disestablishment, through a figurative reference to the 'no establishment' clause of the federal Constitution." If the metaphor must be used, he concludes, it should be given the meaning attached to by its author.

Madison's views, as well as those of Jefferson, played an important role in shaping the minds of the justices in *Everson-McCollum*. But Monsignor Brady casts Madison in a different light than did the justices. He attributes to Madison the view that the "establishment" language meant "not the denial of power to the national government to use public funds for religious purposes or aid to religious groups," but meant simply "the denial to the national government . . . of the power to set up . . . an establishment of religion, to confer on one religious sect, to the disadvantage of all others, any official status or privileged position." To read into the First Amendment anything else "is to contradict the significant things that Madison said, did, and wrote. . . ."

This enlistment of Madison in unqualified support of the broad conclusions of the author probably will not be generally received without challenge. Even if one were to concede the author's claim that the *Remonstrance* and its writer's role

in the Virginia disestablishment struggle were irrelevant in determining Madison's views on the connotations of the "establishment" clause of the First Amendment, there is much in Madison, not touched on here, which might be advanced to support different conclusions.

Stirred by the ardency of controversy, the author has not spared the Court or individual justices. It is a forceful polemic, similar in approach to the argument set out in Appellees' Brief in the *McCollum* case, and in Parson's *First Freedom* and O'Neill's *Religion and Education Under the Constitution*. Monsignor Brady's work will be well received by those who believe that the "establishment" clause should be understood in its literal meaning in the context in which it was adopted.

FRANCIS J. POWERS, C.S.V.\*

LEGISLATIVE DRAFTING BY REED DICKERSON. Washington, D. C. Little, Brown & Company, 1954. Pp. xvi, 149. \$4.95.

Mr. Dickerson's contribution to the small but growing bibliography on the subject of legislative drafting is, despite its slender proportions, perhaps the most useful thing that has appeared to date in the field. This is not to say that a reading equips the reader with all he need know to become a finished practitioner of the art, for indeed no manual to date does more than merely introduce the neophyte to a skill whose mastery can be gained only by years of experience.

Nevertheless, the author's literate treatment of the basic precepts in draftsmanship betrays a personal experience which he successfully conveys in a well-organized fashion. As he warns in the introduction to the work, his intention is to provide only the rudimentary answers, and that he has accomplished. His description of the mental attitude of the draftsman at the project's outset, the importance of a full understanding of the particular legislative problem which is faced in each case, the organization of the material in a systematic and coherent form, its final written expression, and the ultimate stylistic polishing if time permits the luxury, will all correspond to the experience of those who have made the profession a career. The "do's" and "don'ts" in chapter VII must be handled with caution for, while they are ritual in many instances, a slavish devotion will hamper more than benefit the draftsman whose legislative assignments may cover a varied field. It is sound practice to establish such standards to govern the operation of a staff which has a single major assignment, such as the revision of statutes relating to the armed forces (Mr. Dickerson's responsibility for the past few years), for in such an undertaking it is essential that a central form be visible throughout the finished product. But for the draftsman whose assignments cover a wide range of topics such as those met by the craftsmen in the offices of the House and Senate Legislative Counsels, a greater freedom of expression is necessary, and the "do's" and "don'ts" are largely affected by the necessities of the particular legislation, the whims of sponsors, the sometimes eroding effect of hasty amendments, and the ultimate judicial determinations.

---

\* C.S.V., M.A., LL.M., S.J.D., Former Chairman, Department of Politics, Catholic University of America. Presently Assistant Provincial, Clerics, Congregation of St. Viator, Arlington Heights, Illinois.

A further word as to certain useful functions of the book: Chapter II provides a helpful bibliography constituting the draftsman's essential tools. Appendix A contains a brief description of the place in our federal laws occupied by the statutes at large, the United States Code, and the revised statutes, all indispensable knowledge. The table of state constitutional provisions in Appendix B presents a ready reference to state constitutional provisions covering matters of recurring significance. Both a subject index and an index of words and phrases increase the book's utility for the practical draftsman.

Any volume on the subject suffers from deficiencies. Mr. Dickerson's offering has probably more merit than any prior work in the field. What he says, he says well. It could be said better only at the cost of a vastly enlarged book or set of books, which would, by the case method, lead the reader by the hand through a number of actual drafting problems. Perhaps such an approach would be too tedious for the average reader. So in net effect Mr. Dickerson has taken a significant step forward and sets the stage for something of a more elaborate nature when the relatively few experts who have spent their lives in the pursuit of succinct semantics find the time and energy to devote to a task of great value and importance.

C. MURRAY BERNHARDT\*

CYCLOPEDIA OF TRIAL PRACTICE BY SIDNEY C. SCHWEITZER OF THE NEW YORK BAR—4 volumes. Baker Voorhis & Co., Inc., 1954. \$50.00.

My friends, the booksellers, tell me that this momentous work is "selling like hot cakes" and the younger members of the Bar say that it is a set of books which has been a tremendous help to them in the preparation and trial of their cases. What the more blasé older trial lawyers have to say about it, this writer cannot testify, but will risk the surmise that it has great utility even for the most experienced.

Mr. Schweitzer prefaces his examples of proper proof on specific matters with a chapter on preparation for trial. This chapter consists of 132 pages and covers advice ranging from a proper interview with your client, at the outset, to the important finale of settlement negotiations. These pages contain short but pertinent advice on such subjects as loss of earnings, the determination of jurisdiction, the Federal Employers Liability Act, Workmen's Compensation Laws, and cases on Admiralty jurisdiction. Pages 51 to 131 are devoted to the all-important and ever-growing field of accident cases, including the vital element, namely the determination of the extent of damages. Valuable advice is included on the preparation of medical testimony and discovery proceedings.

The real burden of the three volumes of the text concerns itself with proof of specific matters, and it is in these pages that the trial lawyer will find out how to prove almost anything under the sun from bloodstains to ancient documents. Take for example, the proof of books of Account, generally. The author states clearly the prevailing rule in the majority of jurisdictions that entries made in

---

\* Commissioner, United States Court of Claims, Washington, D. C.

books in the ordinary course of business at the time of the transaction they record, or close thereto, are admissible in evidence, where properly authenticated. The footnote then proceeds to record cases of twenty-eight jurisdictions supporting this general rule. Then, the author proceeds to set down clearly the proper questions to be asked the witness in order to insure having the books of account in question, duly admitted in evidence. He calls attention in the text that "mere production of the books of account is not sufficient to allow their introduction in evidence. They must be properly identified and authenticated." Important admonitions of this character on evidential points are scattered through all three volumes. So much for the value of this work to the average practitioner, especially those practicing alone without a battery of assistants.

Does the work have any utility for the law student, struggling with the memorization of the complicated rules of evidence? Does it have any utility for the Professor of Evidence? Although this writer has never taught evidence, he will venture an affirmative answer. The rules of evidence in practically every situation contemplated by the Bar Examination of the several states are set down in these books and the practical application of these rules are there. If a student can see at a glance the practical application of these rules in the Court Room, the rules are bound to make a lasting impression upon him. There is definitely here a wealth of material for the Professor to make clear the application of evidentiary rules.

Is the index adequate? Definitely "yes" and of course, there is an arrangement for supplementation in each volume. It is predicated that many a young lawyer, after reading a number of these sections on "proof of specific matters," will lose his aversion, if he has one, to litigated matters, and want to get into the open forum and try out these formulae which Mr. Schweitzer has seemingly made so crystal clear.

JOHN WARREN GILES\*

---

\* Member of the Bar of New York and Chicago, Visiting Professor of Law, Catholic University of America.