BOOK REVIEWS


Each of these books on the First Amendment, not unnaturally, quotes Mr. Justice Jackson’s famous words in the flag-salute case:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”

Professor Konvitz’ comment is:

“The broad significance and intent of these pronouncements are beyond attack or even question, but one cannot press some of the propositions without running into trouble” (p. 50).

Professor Bern’s comment is:

“The problem of loyalty, inextricably involved with the problem of the formation of the characters of future citizens, cannot be solved by pretending that the [above] is a true statement” (p. 226-7).

These two reactions reveal much about the character of the two books. Professor Konvitz, without questioning the underlying assumptions of the liberal tradition, has written a careful and somewhat critical summary of existing Supreme Court law. Professor Berns mounts an all-out assault upon the liberal position. Both books are welcome and, each in its own way, useful. Neither, I think, makes a really significant or lasting contribution to the very troublesome problems with which they deal.

Professor Konvitz’ book, as I have said, is essentially a critical summary of the Supreme Court’s decisions in First Amendment cases. It is written for both layman and lawyers and, while it meets the standards of good legal writing, can be understood and appreciated by non-lawyers. The presentation is well organized and the exposition is clear, in some instances perhaps clearer than the material justifies. Enough of the historical background is given to add some depth to the analysis. Full citation of all the cases, and some of the legal and other material, is supplied in footnotes. The critical comment on the cases, while not far-reaching or penetrating, is intelligent and helpful.

It is perhaps unfair to criticize Professor Konvitz for not doing some things he never started out to do. But one cannot help feeling a bit disappointed in a book on Fundamental Liberties of a Free People in which the author confines himself so narrowly. For one thing, by discussing only Supreme Court decisions, the book wholly neglects some of the most important and difficult issues of the day, issues which did not happen to have

\footnote{1 West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).}
been the subject of a Supreme Court decision at the time the book was written. Thus, there is no discussion of that American institution which has had in the past decade perhaps greater impact upon American fundamental liberties than any other,—the legislative investigating committee. Nor is there any reference to the new kinds of issues raised by the Internal Security Act of 1950 or the Communist Control Act of 1954, or, except as to the Douds case, any treatment of the whole problem of political tests or qualifications for obtaining government privileges or benefits, such as a passport or admission to the bar.

Moreover, to treat fundamental liberties exclusively in terms of legal doctrine as enunciated in Supreme Court opinions tends to transform flesh and blood problems into somewhat sterile high level abstractions. Legal doctrine in the civil liberties field needs to be more closely related to the actual world in which it is to function, and to be tested and retested at the level of reality. It is somewhat surprising that we have been so remiss in this respect. For we have had an illustrious model to follow. As long ago as 1920 in his Freedom of Speech Professor Chafee wrote of trial courts, of charges to the jury, of practices in police stations, of what moved a prosecutor to action, of what happened to high court rules in the day to day life of the community. This is a more arduous task than relaxing in an armchair with the Supreme Court reports. But it seems to me essential to real progress in the field.

Nor does Professor Konvitz throw much light upon another important aspect of fundamental liberties,—the role of the judiciary and particularly the Federal judiciary. This has been one of the major sources of disagreement among those who adhere to the liberal tradition and otherwise would not find themselves too far apart. It deserves closer study by experts on civil liberties than it has thus far received.

And, of course, if a student of civil liberties is interested in exploring the frontiers of the problem there is a boundless area for research and speculation in the impact upon traditional doctrines and practices of the great political, social, economic and psychological developments of the modern age.

In spite of these limitations, however, Professor Konvitz' book now provides the best organized and most comprehensive survey available of Supreme Court decisions on the First Amendment. As such it is a commendable and useful work.

Professor Berns' book is, of course, quite different in character. He believes that civil "libertarians" (a horrible word, but largely self-inflicted) are proceeding upon assumptions that are wholly invalid in theory and impossible of application in practice. As I read his book, his view is that the liberal theory embraces the following main principles:

First, freedom of speech (including freedom of speech, press and association) is a right of the individual as against the government.

Second, in any system of government this freedom possesses the highest value, is the ultimate good. Since the only just society is one based
upon freedom of speech, freedom is identical with justice. In other words, "theory that emphasizes freedom is good, the rest is bad" (p. 164).

Third, the basic problem of government is the struggle between liberty and authority. Any state restriction upon freedom is an act of a tyrannical government, and the function of the courts in all First Amendment cases is to protect the individual against the hostile state.

Fourth, since freedom of speech is the ultimate good it must be protected regardless of its merits, that is, regardless of whether the speech is good or evil in terms of achieving justice. It is freedom without guidance of moral principle.

Taking these as the tenets of the liberal's position on freedom of speech, Professor Berns attacks them as erroneous and dangerous, as principles which would prevent the achievement of the good society. In the first place, he says, no individual can have rights against his government. Government and society cannot be separated, for this implies that the law has nothing to do with morality. "Man is by nature not an individual with inalienable rights, but a political being, who can achieve his nature, his end, only in the polis, if at all" (p. 247).

Moreover, the principal purpose of government, Professor Berns urges, is to establish justice, which he defines as "the ideal relation among men". But justice is often incompatible with freedom. Hence freedom in itself has no intrinsic merit; freedom, to be of value, must be associated with moral principle. From this it follows that the only freedom which should be recognized is freedom to do good. Otherwise freedom is license.

The liberal view, he contends, makes the end of government merely a process, on the theory that from this process (neutral as to moral principle) will come the truth. The liberal position is thus based upon faith in progress (though liberals never say what progress is), and progress in turn depends upon the assumption that man is inherently good and rational. But the assumption of progress is untenable; man is not good or rational. Hence noxious doctrine may win out, though liberals do not entertain this possibility.

Furthermore, Professor Berns argues that, except in cases of threats to the nation's security (that is, where the government itself is directly threatened) the basic issue in free speech cases is not liberty versus government. Rather the problem is one of preventing tyranny emanating from private individuals or groups who abuse their freedom. It is one of the principal functions of government to eliminate this tyranny, by restricting such forms of freedom, since this is necessary to establish justice and promote civilization. Liberal concentration on distrust of government conceals this other problem, which is of greater relevance. Hence we cannot achieve justice if we view the problem of government as basically one of liberty versus authority.

From these premises, Professor Berns concludes that courts cannot make sound decisions in First Amendment cases (that is, cannot achieve justice) without distinguishing between good and evil speech. It may be wise policy to allow bad speech if it does no harm, but not if it might lead
to disorder or "to widespread acceptance of the [speaker's] ideas" (p. 125). In other words, it is sound policy to limit speech "if it is done in the name of moral principle" (p. 225). Freedom of speech, in short, is freedom to engage in good speech not evil speech.

Professor Berns' argument is, of course, not new. It is the classic anti-democratic and authoritarian position. This review is no place to undertake a comprehensive analysis of liberal and authoritarian doctrine. But it is in place to point out that Professor Berns' analysis is of little value in furthering the debate because it misconceives the liberal position and the whole problem of assuring freedom of speech in a democratic society.

Most liberals, I suppose, would agree with Professor Berns that the major problem of a society is the achievement of justice, in the sense of the ideal relation among men. Having reached this point Professor Berns seems to think he has arrived somewhere. The only problem then is to determine what justice is. This he believes will require some study, particularly of a factual nature, but he is not too concerned. He knows the difference between Lincoln and Senator McCarthy (p. 224). That at least is a good starting point, but he still has a long way to go. So have we all.

Moreover, there is another aspect of the problem which is equally difficult. Who is going to determine what is justice and what is not? Here Professor Berns has no doubts. His answer is: the government in power. It is the function of government to promote justice and government must do this through laws and through supervising those institutions and practices in society which develop character. True, a John Winthrop or a Goebbels may get into power. But it is the obligation of the citizen to see that they do not. This is a relatively minor problem for him. The main problem, he says, is to get the consent of the governed to comply with the decision of good governors.

The liberals, however, are not willing to accept this disposition of the matter. They believe that the problem of society is not only to decide what is just and moral, but to assure that the decision be made by the common consent of those who make up the society. In order to do this there must be freedom of speech. In this sense freedom of speech is a basic principle of a democratic society, which must be defended at all costs. And freedom of speech, if it is to mean anything at all for this purpose, must mean freedom to urge not only views held by those in power but all views, whether they appear immoral to the governors or not. Society as a whole, not government, decides what is wisest and just. This can be done only if all citizens, not only those who accept the prevailing notions of what is good, have the right to full freedom of discussion. This course has its dangers, as liberals freely admit, but it is the only possible course for a democratic society.

Professor Berns is thus quite wrong in saying that liberals are not concerned with justice, but only with freedom of speech. Of course liberals are concerned with justice. They are also concerned with freedom of speech, both as an end in itself (an end Professor Berns apparently considers of no value) and as a process for achieving a democratic solution.
of the problem of justice. By ignoring completely the question of how justice in a society is to be determined, Professor Berns misrepresents the whole basis of the liberal position.

The liberals have given a good deal of thought as to how this fundamental right to participate effectively in the decisions of society can be maintained and protected. They have developed certain institutions and certain doctrines to achieve this end. Among these are the concept of a written constitution, specific limitations on the power of government, judicial review by an independent judiciary, an independent bar, and specific legal doctrines such as the preferred status of First Amendment rights, the prohibition of prior restraint, the clear and present danger test, the rule against vagueness, the rule that a statute be narrowly drawn, limitations on guilt by association, and others. There is considerable difference of opinion among liberals, including the justices of the Supreme Court, as to how these institutions and doctrines should operate in practice. But taken as a whole they represent a major contribution to legal and political science. Professor Berns, if I understand him rightly, would scrap this body of doctrine in favor of a general notion of "natural justice" and "citizenship education, moral education" (pp. 192, 253).

Similarly, Professor Berns' contention that the liberals over-emphasize the conflict between liberty and authority overlooks the operation of a democratic society. True, the problem of liberty versus government is different from what it was in Jefferson's day, when the main function of government was to preserve internal order and national security. But the fact that many restraints are sought to be imposed on freedom of speech by the government, not for the purpose of preserving government itself from overthrow by force and violence, but for protecting the interests of particular groups in society, does not mean that the restriction is not just as much an interference with the democratic process. Any obstruction to the mechanism for solving problems by democratic procedure, whether for the purpose of preserving the government itself or whether imposed by the government on behalf of a particular segment of the population which happens to be represented or influential in government, is equally in conflict with democratic methods and should be resisted.

Because of Professor Berns' failure to recognize the basis of the liberal position his discussion of theory is not addressed to the real issues and remains little more than a sterile assertion of ancient doctrine. His attempt to buttress his position by analysis of liberal theory in practice, as evidenced by certain Supreme Court decisions, seems to me equally unrewarding.

From a technical viewpoint this analysis leaves much to be desired. It is cloudy, often inaccurate or misleading, and lacks an understanding of legal doctrines and procedures. To give but two examples: In discussing the principle that First Amendment rights should enjoy a preferred position in constitutional interpretations Professor Berns argues that this is wholly inconsistent with the present Court's position on legislation dealing with property rights, passing off the distinction as "merely the subjec-
tive preference of the justices” (p. 102); he ignores completely, or is not familiar with, a great body of legal literature which suggests a very real and objective basis for the differentiation. Again, Professor Berns includes Mr. Justice Black among the justices who favor the clear and present danger test (pp. 65, 67); he apparently does not realize that Mr. Justice Black does not accept the clear and present danger test as the measure of government interference with First Amendment rights. In the end the analysis of legal doctrine amounts to little more than a polemic.

It is, however, somewhat beside the point to pick flaws in Professor Berns’ legal discussion. For he does not seriously attempt to analyze the decisions in terms of liberal theory. Rather he weighs the decisions in the light of his own assumptions that only free speech which is employed for good ends deserves protection and that the only standard of decision should be “natural justice.” Of course the Supreme Court’s opinions do not make sense in terms of authoritarian doctrine. But this hardly demonstrates that they are not sound in terms of seeking a just and democratic solution.

Nor does Professor Berns undertake a serious realistic analysis of the results of the decisions by demonstrating in concrete terms whether justice, or the ideal relation among men, has been achieved. Such an analysis would require a full exploration of political, social, economic and psychological factors, as well as the dynamics of the administration of law. This he does not attempt.

But Professor Berns’ study does serve one useful purpose. It demonstrates with startling clarity the implications of accepting authoritarian premises rather than attempting to perfect liberal doctrine. The Constitution would be interpreted by the general standard of “natural justice” (p. 197). Censorship of publications would be based upon the government’s decision as to whether the content was good or bad (pp. 44, 47, 221). Newspapers and individuals would be held in contempt for offering “gratuitous advice” to the court (p. 68). The wall of separation between church and state would be breached, as by allowing released time, whenever the government considered religious instruction to promote good character (p. 255). Freedom of speech would be extended to good men, but not normally to bad men (pp. 219-20). The liberal concept that “the citizen may do whatever he is not told not to do” would be replaced by the earlier doctrine that “he may do what he is told to do” (pp. 241, 244). “The law cannot assume that men will be civilized if left free” (p. 247). And finally:

“Since the difference between regimes [societies] is a moral difference, and citizenship is relative to the regime and since we must be ever alert to maintain the identity of a good man and a good American, it follows necessarily that the education of a good American citizen is moral training. When this citizenship education is seen fully, as it must be seen, it is a training that extends far beyond the walls of a schoolroom, to encompass such factors as the books future citizens read, the games they play, the entertainment they are provided with, and so on. Not only is it a training that cannot be left to chance, but
the customs and agencies relating to this training must be supervised by the laws—supervised as little as possible, perhaps, but to whatever extent the situation requires” (pp. 220-1).

The contribution made by Professor Berns thus appears to be a negative one but, in disclosing the current implications of authoritarian doctrine, a useful one.

THOMAS I. EMERSON*


Professor Shepherd’s Contracts and Contract Remedies has for some time now ranked among the first rate casebooks for the basic course in Contracts and is, understandably, used widely. The fourth edition of the work credits Professor Harry Wellington of Yale Law School with co-authorship. Much of the material in the new edition is identical with that of its predecessor but there are some significant additions and deletions. Also, the authors have altered considerably the syntax of the material.

In some areas of the law the rate of development is so rapid and change in doctrine so significant that frequent revision of casebooks in those areas is not only justified but is required.¹ The development of the law of contracts is deliberate and few startling cases of great moment are decided in any one decade. A new edition of a contracts casebook would not therefore be justified if its sole purpose was to illustrate old law from more recently decided cases. Fortunately most of the new casebooks in contracts which have appeared on the scene in the past ten years and also the recent revisions of older casebooks have attempted to accomplish more than that.² The reasons for revision of the volume being reviewed are pedagogic.³ Continuous experimentation in the classroom with course content as well as with the order and manner of presentation of materials led the editors to cast the book in its present mold.⁴

There are four significant changes in the new edition. First, and probably most significant, is the shift of the section on the nature of conditions from Chapter VII, entitled The Performance and Breach of Contract,⁵ to a place following the former first section of the book which dealt with the making and interpretation of promises. This new section is called Conditions (Promise Modifiers).⁶ Second is the re inclusion of case ma-

---

* Professor of Law, Yale Law School, New Haven, Connecticut.

¹ E.g., Constitutional Law, Administrative Law and Conflict of Laws.
² See, e.g., Fuller, Basic Contract Law (1947), Kessler and Sharp, Contracts (1953).
³ This word is not used in the derogative sense, i.e. pedantic.
⁴ Preface ix.
⁵ The Performance of Contracts is now the title of Part IV and Breach of Contract and Contract Remedies is the title of Part VI.
⁶ This follows a section called, simply, Promises contained in the chapter The Operative Elements of Simple Contracts.