Vanderbilt Law Review

Volume 16
Issue 1 *Issue 1 - December 1962*

Article 11

12-1962

Book Review

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BOOK REVIEW

FREEDOM AND PROTECTION: THE BILL OF RIGHTS. By Andrew D. Weinberger. San Francisco: Chandler Publishing Co., 1962. Pp. ix, 180. $1.75.

Any book that educates the American community to an understanding of and an appreciation for the Bill of Rights serves a laudable end. And conceivably any author is entitled to define his own terms. However, Mr. Weinberger indicates his displeasure with the traditional meaning of the term, "Bill of Rights," as embracing the first ten amendments and sets out to include within his comparable term what he calls "Additional Amendments Dealing with Personal Liberty"[1] thus adding the 13th, 14th, 15th and 19th amendments, as well as "Provisions in the Original Constitution Dealing with Personal Liberty" which he specifies as the article I ban upon bills of attainder and ex post facto laws, and the same article's provision that the privilege of the writ of habeas corpus shall not ordinarily be suspended; the article III requirement of jury trials and its definition of Treason; the article IV privileges and immunities clause; and the article VI ban upon religious test oaths. Since the author feels these constitute the real Bill of Rights, a reader might well question the inclusion of the fourth article's privileges and immunities clause, never intended or applied to protect the fundamental liberties of man. Furthermore, a reviewer is concerned not only with what the author is adding to the accepted meaning of the term, "Bill of Rights," but the orthodox content that he deems unimportant. It is rather amazing to find a person with the author's competence and sympathies remarking that the seventh amendment's right of jury trial in civil cases is "seemingly of no concern today."[2] To the profession and to our citizenry this right is fully as important today as when included in the Bill of Rights.

As one notes the Table of Contents, it becomes apparent the author must have some uncertainty about his own definition of "Bill of Rights," since there is nothing in the book remotely concerned with the thirteenth amendment, the fifteenth amendment, the nineteenth amendment, the bans upon bills of attainder and ex post facto laws, the definition of treason, the ban upon religious test oaths, or the privileges and immunities of the fourth article. If these are truly part of the Bill of Rights as the author claims, the book is rather deceptive in its sub-title, "The Bill of Rights."

1. WEINBERGER, FREEDOM AND PROTECTION 154 (1962).
2. WEINBERGER, *op. cit. supra* note 1, at 4.

Within the various chapters the author has ordinarily blended well written text with representative cases. However, to use as representative of "Religious Liberty" but two cases, *McCollum*[3] and *Everson*[4]—both establishment of religion cases, manifests an unfortunate projection of personal values at the expense of a reader legitimately eager to read of religious liberty. Generally, the brief selections from the cases are carefully edited, but employing in a total of twenty-six cases, nine dissenting opinions and one concurring opinion raises difficulties for the type of lay reader for whom the book was obviously intended. In a few instances the majority opinion is similarly included and the contrast in values and judicial methodologies is perceivable to such a reader. Admitting, of course, that the dissenting opinion has been a most important seed in the harvest of American constitutional law, it is not always the best vehicle for indicating the factual setting in which the litigation arose or narrating the precedents relied upon by the members of the Court who prevailed, both of which would be necessary to the non-professional reader anxious to judge the merits of the two positions.

Although the author's style is interesting and the text moving, there are, unfortunately, some instances in which the reader might be misinformed. Thus, although the "separate but equal" test did not begin to meet its demise until the *Brown* case[5] in 1954, the author states that, "After the Civil War, during the Reconstruction Period, the Court repeatedly held that state-imposed racial segregation was discrimination per se and accordingly a violation of the equal protection clause of the Fourteenth."[6] Again, presumably speaking of constitutional law under the Bill of Rights, the author remarks: "The Quakers and other well-established sects have been upheld in their right to their religious convictions (refusal to bear arms)."[7] Surely the author understands that any exemption from military service to the Quakers "and other well-established sects" is based only at this writing upon congressional favor and not the United States Constitution. Once more, speaking of the sixth amendment's right of the accused to a speedy and public trial by an unpartial jury, to be informed of the accusations, to be confronted by the government's witnesses and to call his own witnesses, and to have the assistance of counsel, and the seventh amendment's right to jury trial in civil cases, Mr. Weinberger asserts: "Each of these provisions is binding on trials in the State courts as well as the Federal courts, but the States are free to determine what cases are to be tried without juries in their

3. McCollum v. Board of Educ., 333 U.S. 203 (1948).
4. Everson v. Board of Educ., 330 U.S. 1 (1947).
5. Brown v. Board of Educ., 347 U.S. 483 (1954).
6. WEINBERGER, *op. cit. supra* note 1, at 17.
7. WEINBERGER, *op. cit. supra* note 1, at 22.

courts."[8] Of course, there is no case holding the right to a speedy trial is binding upon the states, no decision recognizing the right of confrontation under the fourteenth, and, worst of all, the right to counsel in state courts under present *Betts v. Brady*[9] doctrine is limited to the exceptional case where to deny counsel would be in effect denying the defendant a fair trial. Once again, the lay reader who perceives from the author that the fifth amendment is available in "any case, civil or criminal"[10] would probably surmise it is available in state proceedings, which conclusion is certainly not supported by present authority.

Throughout the work, it must be said, there is an unfortunate inclination to speak in generalities that do not adequately capture the decision cited. For example, in referring to *Speiser v. Randall*[11] and *First Unitarian Church v. Los Angeles*,[12] the author indicates to the reader that, "ideas are not to be controlled by granting or withholding tax exemption."[13] As admirable as is Mr. Weinberger's philosophy, the cases simply do not stand for such a bald proposition. Understandably, in writing law for an audience untrained in the law, there may be an urge to avoid the "technical," but the obligation of clarity and accuracy remains great. Perhaps, there is a lack of understanding by the author of the facts of some of the principal cases he discusses. For example, he treats *Niemotko v. Maryland*[14] and states that "the Court invalidated the ordinance."[15] A careful reading of the record will disclose there was *no* ordinance involved in the case whatsoever. But, principally, as suggested above, it is the author's willingness to indulge in rather superficial and disturbing generalizations that is the most serious fault of the work. Thus, citing the *Thornhill* case,[16] he tells the reader: "At one time it was held that picketing was an absolute right . . . ."[17] Certainly, the Supreme Court never held this to be absolute any more than it has so ruled other of the first amendment freedoms. And there is a certain naivete in a too literal reading of case law. For example, from the later picketing cases, Mr. Weinberger states: "And when picketing for the purpose of communicating social protest seeks an objective subversive of established State policy, it too may be enjoined."[18] Some

8. *Id.* at 41.
9. 316 U.S. 455 (1942).
10. WEINBERGER, *op. cit. supra* note 1, at 47.
11. 357 U.S. 513 (1958).
12. 357 U.S. 545 (1958).
13. WEINBERGER, *op. cit. supra* note 1, at 103.
14. 340 U.S. 268 (1951).
15. WEINBERGER, *op. cit. supra* note 1, at 116.
16. Thornhill v. Alabama, 310 U.S. 88 (1940).
17. WEINBERGER, *op. cit. supra* note 1, at 144.
18. *Ibid.*

reader might perhaps ask if a state, by announcing a policy against improving working conditions, could successfully ban picketing for such an objective. The author might well have explored with his audience conditions under which the Supreme Court will defer to state policy in this area.

Inter alia, the Appendix includes the Declaration of Independence which admittedly deserves to be brought to the attention of the American people rather regularly, but it seems only remotely part of a treatment of "The Bill of Rights."

This little book of less than 200 pages may serve as an introduction to the fundamental freedoms and our basic procedural safeguards. Although the author obviously treasures these values and is properly critical of the decisions of the past twenty years which have unnecessarily denied freedom in the name of protection, his somewhat careless treatment of the facts in the cases he has chosen, his misinterpretation of some of the leading cases, and a too frequent indulgence in generalizations not supported by decision, all may unfortunately deter the layman's interest in and dedication to the values which we have attempted to perpetuate for our society in the Bill of Rights.

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