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Book Review: Free Man Versus His Government

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BOOK REVIEWS

FREE MAN VERSUS HIS GOVERNMENT. ARTHUR L. HARDING, Ed. Dallas: Southern Methodist University Press, 1958. Pp. xi, 117. $3.00.

This study adds number five to the series of "Studies in Jurisprudence" growing out of the annual conference on legal problems held at the Southern Methodist University School of Law. This volume consists of four essays as follows: "Freedom to Believe" by Merrimon Cuninggim, Dean of Perkins School of Theology, Southern Methodist University; "Freedom to Learn" by Samuel E. Stumpf, Professor of Philosophy, Vanderbilt University; "Freedom of Political Association" by Frederick K. Beutel, Professor of Law, University of Nebraska; and "Freedom to Use Property" by Arthur L. Harding, Professor of Law, Southern Methodist University. In addition to contributing the last-named essay, Professor Harding edits and introduces the entire volume.

Anyone who has attended any of the annual conferences on Law in Society presented by the Southwestern Legal Foundation at the Southern Methodist University or has read the papers presented at these conferences knows that the very best thinkers of this and other countries participate in these programs. In this respect the 1957 conference, from whence these four essays came, was no exception.

The title which has been given this volume is suggestive of the whole political history of man. It implies the seeds of every revolution and the unhappiness of people flowing from well meaning, though ignorant or misunderstanding agents of government, or, perhaps, from just plain mean, selfish, or ambitious controllers of people. To combat this type of government with the hope of being *free* men, people in all times in all countries have attempted to devise instruments by means of which those who governed the people would themselves be governed legally by those whom they were governing. The concept of natural law as an instrument of control was widely proclaimed by many early day political thinkers. From the theories advanced by the natural law exponents, as well as from other sources, came the concept of another type of law by means of which the governed hoped they might control their governors. We know this new law as constitutional law. Regardless of how excellent natural law was in theory, means for its enforcement as *law* were

never successfully devised. The legal architects of the American constitutional *system* and *law*—a law designed as an instrument for controlling the government—realized that it was much easier to create a system of government built on constitutional law than it was to fashion the instruments of procedure through which this law would accomplish its purposes. The failure of the American people to come up with a completely satisfying answer to this problem of enforcement furnishes the base for much thinking which is reflected in this volume of "FREE MAN VERSUS HIS GOVERNMENT."

In his introduction to this volume, Professor Harding succinctly states its main theme when he says the study is designed "to examine certain ideas of Natural Rights in their contemporary setting; to determine what interests are asserted or what liberties are claimed in title of these rights, and to determine to what extent they are accorded recognition in contemporary legal doctrine." A very fine statement of natural law in its historical setting is given by Professor Harding as a basis for understanding the four essays as they stem from contemporary legal doctrine.

Dean Cuninggim rightfully assumes that "freedom to believe" must be more than merely freedom for mental activity—it must include freedom to speak and act. When he answers the question "Who has it?" in terms of this broader meaning, he finds that those who have it most are the Protestant Christians. He then proceeds to show that in both historical and current practices there are seven groups who have it less or least. These groups are the blasphemers, Sabbath-breakers, atheists, polygamists, Jehovah's Witnesses, conscientious objectors, and Catholics. With numerous case citations and references to other studies, the Dean makes out a good case for his thesis. He shows that there has been much confused thinking on the part of lawmakers and law interpreters especially in separating religion from Christian morality.

One would hope that the gap between the freedom of the Protestant Christians to believe and the restricted freedom allowed members of the several groups mentioned is not as great as might be implied from the evidence given by Dean Cuninggim. From the point of view of law, this gap is quite small. Whenever the lawmaker has attempted to put more severe restraints in the field of religion on one group than are placed on other groups, the courts have been rather consistent in striking down the laws. The Jehovah's Witnesses, for example, have lost very few of their cases in court.

It would be difficult to find *legal* discriminations against Catholics. It must be remembered when evaluating any of the four studies in this volume that the basic plan of the American government contemplates a government which will be controlled by two quite distinct instruments of popular control; namely, a *legal* control effected through the courts, and secondly, a *political* control effected through the ballot and petition or lobby. A people must have both types of control to have a democracy. The legal instrument protects the minority; the political instrument enables the majority to give effect to its will through government. No people would have freedom in the true sense of the word unless both these instruments—the legal and the political—were properly functioning. If the Protestant Christians are in the majority, their will should prevail only in those areas subject to political control. If a Sabbath-breaker is in the minority, his will should prevail only in those areas rightfully belonging to the law. Our constitutional architects hoped the line separating the two areas would be properly drawn in the Constitution. Dean Cuninggim shows quite clearly that in the realm of government reserved for the majority, religious minorities are more restricted. As long as imperfect minds make and interpret the law we can expect some of these discriminating political restrictions to find their way into our legal practices even though the subject matter is one dealing with an area supposedly withdrawn from the control of the States' will, namely, religion.

Mr. Stumpf in his essay, "Freedom to Learn," very thoughtfully and quite skillfully points out the ever present conflict that exists on the one hand, between the right of and necessity for the individual to learn in order to form good judgments or vote intelligently, and, on the other, the right of and necessity for society to preserve the stability of its institutions. Plato's allegory of the cave is utilized in showing why people will work so hard to put curbs on the freedom to learn, while, at the same time, they are investing time and money in education and research in their efforts to seek truth and understanding.

Any civilized man knows that we must have both freedom to learn and stability in our society. Both must be preserved through law. Mr. Stumpf explains how this preservation is sought in various types of educational and legal systems, and what political theorists from the time of Plato to the present have theorized on this subject. He has done this as only a philosopher steeped in a knowledge of political and legal thought could do. The layman, the agent of govern-

ment, the student of law, and the social and political philosopher will find much here that will add to his learning.

"Freedom of Political Association" is not listed as one of the basic freedoms in our Bill of Rights. Yet, no people could be expected to control successfully their agents of government unless permitted freely to associate for political purposes. A political association which was compelled to reflect the will of government would be a poor device for use by a people expecting to control that government by peaceful or legal means.

After establishing that the Constitution provides for the right of the people to assemble peaceably and petition for redress of grievances, Professor Beutel indicates that the "right" (not privilege) to vote more or less follows. Although acknowledging that the original Constitution left the matter of voting qualifications to the states, he maintains that the later amendments have largely federalized the "right" to vote. After mixing constitutional provisions and state and federal laws and court decisions with actions and policies of private groups and organizations as these deal with political associations, Professor Beutel concludes that court decisions are not much help in understanding the subject. After all, "what is important are the social factors."

In discussing *Nixon v. Herndon*[1] the case in which the so-called Texas White Man's Primary Law was declared unconstitutional, a stronger case could have been made for its invalidity on the ground that it illegally interfered with the rights of the Democrats to form a party and seek the votes of the Negroes. Of course, this law was void on the grounds used by the Supreme Court, but a greater danger to the freedom of political associations would exist if the government could by law forbid a large group of people like the Democrats from forming their own party with members of their choice than would exist if it compelled the admission of individuals to an association where the members of the association did not want them. For the benefit of those who might not be acquainted with Texas politics, it could be pointed out that it would be difficult to find a Democratic candidate for a public office who did not welcome the Negro's vote.

The purpose and function of constitutional law as opposed to the function and purpose of statutory law are utterly confused in this essay. For example, the author indicates that the actions of individuals and private groups as well as actions of agents of govern-

[1] 273 U.S. 536 (1927).

ment are controlled by constitutional provisions. Also, when the Supreme Court held in *Collins v. Hardyman*[2] that the federal courts had no civil remedy for the breaking up of political meetings, he indicated that this is not good law because the fourteenth, fifteenth, and nineteenth amendments give Congress the power to regulate all subjects with which these amendments deal. One should read this essay more as a student of sociology and less as a student of government and law.

Professor Harding, in his study on the "Freedom to Use Property," undertakes to describe the historical origin and nature of the rights of private property, then to explain the current prevailing ideas on this subject, and finally, to indicate some of the trends we might expect in the future regarding the legal right to use property. He does each of these with a thoroughness and an understanding that only a scholar fully grounded in a knowledge of political, religious, and legal history could do. He traces the changing concepts of the ownership and use of property from the early church fathers through feudalism, the scholastics of the Middle Ages, and the political and legal thinkers of the nineteenth century on down to the present day. There were those who held that the ownership and use of private property is a natural right; others like Locke and later Karl Marx connected property with the labor which produced it; then there were some like St. Thomas Acquinas who would use it mainly for the good of society. Economic changes of the nineteenth century brought forth the idea that private property was essential because it would result in more productivity, and through the Darwinian concept of "the survival of the fittest" would produce a better race of man. The American mind became a sort of melting pot for these varying and often conflicting ideas on the ownership and use of property. The practices of our legal system dealing with property reflect this blending of ideas.

After laying a proper foundation for the answer to the question, Professor Harding asks, "Is the legal institution of private property in danger of destruction?" His answer is *No!* Then by specific references to laws and their application he shows that private property is in a stronger position now than formerly. This, he believes, is true because the laws now used in regulating the use of property contemplate more consideration for those now living as well as those yet unborn than did the earlier laws. This means that more emphasis is put on the public or social use of property, and less emphasis is

[2] 341 U.S. 651 (1951).

placed on its purely private use. Professor Harding believes that by shifting this emphasis we are protecting the system from the dangers of Communism.

So much thought has gone into the preparation of these four essays and into the editing of them, that it is difficult to do them justice by a brief review. They should be read and studied by all students and persons who are interested in freedom and government.

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