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Book Review

BOOK REVIEW

FREEDOM OF ASSOCIATION, by Charles E. Rice, New York University Press, New York City, 1963, 202 pages. Price: $6.00.

A law school teacher of my acquaintance once told me that the most difficult problem in legal writing in constitutional law is one of originality. So many people like to write in this area that it is all too easy to slip into the complaisant attitude of swallowing whole what the courts or other writers have said without grappling with any of the really difficult problems which still exist. The opportunities to engage in stereotyped copying without probing below the surface are so tempting that banalities flow all too easily from the pen. When this is added to the temptation to enlarge the study by tangents of questionable relevancy, the result may be merely a mediocre exposition of of what everyone with a nodding familiarity with the area already knows. Regrettably, *Freedom of Association* illustrates these pitfalls all to well.

One of the most noticeable aspects of the book is its inclusion of material of the most dubious relevance. For example, at the beginning there is a section on ancient philosophers, starting with Plato.[1] Conceding that the framers of the Constitution were familiar with these writers, how does this prove that they derived their ideas from such sources? One could just as logically have discussed the Koran, the Bible, or the Code of Justinian. Moreover, if there is to be such a philosophical tangent, one would at least expect to find the fact that in *Meyer v. Nebraska*[2] the Supreme Court rejected Plato's ideas. Strangely, this is lacking. Moreover, the fact that the framers of our Constitution failed to include so many of these philosophies therein, and instead, both in the body of the instrument and in the amendments, busied themselves with highly pragmatic and sometimes quite specific provisions is the clearest evidence that a consideration of these philosophies is really irrelevant. American legislators are generally a pragmatic group, and even in cases which lend themselves to philosophizing, such as the thirteenth amendment, have preferred to reject foreign ideals in favor of homespun legislation.[3]

If the author felt it desirable to survey foreign fields, one would have thought that the numerous decisions on freedom of association rendered under

1. RICE, FREEDOM OF ASSOCIATION 2 (1963).

2. 262 U.S. 390, 401-02 (1923).

3. See, *e.g.*, Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Anti-Discrimination Legislation*, 49 CORNELL L.Q. 228, 235 (1964).

the Indian Constitution of 1949, which contains a specific provision guaranteeing such freedom, would have constituted a more fertile field for analysis than the generalizing of some ancient philosopher. The Indian courts have for some years been considering American decisions in this field in an attempt to arrive at their own formulation. Surely, this is an area worthy of discussion.

Another example of irrelevancy is the discussion of the proposal that the Constitution forbids Congress from "creating any company with exclusive advantages of commerce."[4] No doubt this was a reaction to the East India Company and the Hudson Bay Company. What such tidbits of information have to do with freedom of association is difficult to see. Likewise, it seems that the question of the Mormon practice of polygamy[5] at best has only a tenuous connection with the subject of the book. Other examples abound. The author has succumbed to the temptation to throw in everything but the proverbial kitchen sink.

The book also seems to constantly stretch the concepts of freedom of speech and freedom of religion to cover freedom of association. The instances of this are numerous.[6] In particular, it seems nothing short of fanciful to contend that birth control is related to freedom of association, yet a discussion of this is likewise found in the book.[7] The author appears to justify the inclusion of these cases on the basis that somehow, better decisions could have been reached on a freedom of association rationale. How this could have been done is never made clear, and in this reviewer's estimation, such a rationale is wholly foreign to a large number of cases discussed at length in the book. The fact that it is difficult to write a whole book about *N.A.A.C.P. v. Alabama*[8] scarcely justifies the addition of matter largely extraneous to the topic. Indeed, half the book seems surplusage.

The relevant material is dealt with superficially. A good example of this is the author's discussion of *Association for the Preservation of Freedom of Choice v. Shapiro*,[9] undoubtedly the leading case in New York on freedom of association. This reviewer has more than a nodding familiarity with that case since he was attorney for the successful appellant. The author cites the case for the proposition that "there is a fundamental right to form [associations] . . . ."[10] This is about the one proposition really not involved in the

4. RICE, *op. cit. supra* note 1, at 35. *Cf.* East India Co. v. Sandys, Skin. 223, 90 Eng. Rep. 103 (1685).

5. RICE, *op. cit. supra* note 1, at 48.

6. See, *e.g.*, *id.* at 50, 55, 61, 66, 68-69, after which it seemed unnecessary to keep a further count.

7. *Id.* at 68-69.

8. 357 U.S. 449 (1948).

9. 9 N.Y.S.2d 376, 174 N.E.2d 487 (1961).

10. RICE, *op. cit. supra* note 1, at 110.

case, since it was conceded on both sides. Even the respondent judge conceded that "the sponsors of the proposed membership corporation are completely free to associate for the purposes they spelled out in the proposed certificate."[11] The only real question in the case was whether the state could treat some organizations as "second-class" groups to which it could deny the benefits of a general incorporation law which most groups enjoyed for the asking.

The New York Court of Appeals, in answering this question in the negative by a 5-to-2 vote, relied exclusively on some law review articles. Of these, the two by McAulay & Brewster[12] and by Vance[13] had the greatest impact. Indeed, the court of appeals virtually lifted its rationale from the latter penetrating study. It is therefore surprising not to find mention of these articles at all. Likewise, Robinson's valuable study[14] is nowhere mentioned although averted to in the court below. Considering the fact that the author found space for such items as *Enforceability of Ante-Nuptial Contracts in Mixed Marriages*[15] and *Connecticut's Birth Control Law*,[16] lack of space should certainly not have prevented citation of these items.

The question of whether a state must give benefits such as incorporation to dissenting organizations is one of considerable practical importance and was central to the case. This problem is not touched upon even though its resolution involves knotty problems requiring hard thinking. Instead, the author slides over the problem as if it were non-existent and wraps it all up in a general commendation of pressure groups in the United States. This is surface-scratching carried to its ultimate extreme.

The author's treatment of *Railway Mail Ass'n v. Corsi*[17] is another illustration of superficiality.[18] His justification for this decision is that "the recognition of unions as collective bargaining agents involves a delegation to them of state power."[19] The really salient fact in *Corsi* was that the "union" there had no such power because the Post Office Department does not bargain collectively with its employees. The association could not call a strike or use any of the other normal weapons of unions. Under these circumstances, it was not really a union but rather a fraternal or professional association of

11. Matter of Association for the Preservation of Freedom of Choice, Inc., 18 Misc. 2d 534, 535, 188 N.Y.S.2d 885, 887 (1959).

12. *In re Application of the Association for the Preservation of Freedom of Choice*, 6 How. L.J. 169 (1960).

13. *Freedom of Association and Freedom of Choice in New York State*, 46 CORNELL L.Q. 290 (1961).

14. *Freedom of Association*, 58 COLUM. L. REV. 619 (1958).

15. 50 YALE L.J. 1286 (1941), RICE, *op. cit. supra* note 1, at 71.

16. 70 YALE L.J. 322 (1960), RICE, *op. cit. supra* note 1, at 68.

17. 326 U.S. 88 (1945).

18. RICE, *op. cit. supra* note 1, at 80.

19. *Id.* at 81.

government employees. Surely, compelling such an organization to accept members raises far more difficult and far-reaching questions than does the same action as applied to a union with virtually delegated governmental power.

Discussing constitutional law without reference to the legislative history of the pertinent constitutional provision is fashionable these days when the legislative history runs contrary to the position asserted. However, when the legislative history favors the position taken, it is surprising to find it ignored in favor of exclusive reliance on the cases. Surely, a statement by the framer of the first section of the fourteenth amendment that it was intended to erase a case prohibiting association of people based on sundry grounds of state policy[20] should occupy a central place in the book. Yet nowhere is it mentioned.

The foreword tells us that this book was submitted as a J.S.D. thesis. Normally, such theses are required to be more than a mere compendium of cases or restatement of existing law. Frequently they are required to be an "original contribution to learning." There is an assumption not infrequently found in the graduate divisions of law schools that subjects with "academic sex appeal," particularly constitutional law, more readily lend themselves to such original contributions than do mundane or obscure areas of the law. This assumption is contrary to fact. Such subjects are so frequently written about, or over-written about, that it really requires deep understanding to contribute anything original. If there is anything original in the book under review, it has escaped this reviewer's attention.

Moreover, this reviewer found the author's discussion so bland that it can only be concluded that, like the proverbial politician, he is "in favor of house, home, and mother, and against sin." Surely, all lawyers are in favor of freedom of association, equally with freedom of speech, religion, the press, etc. Notwithstanding the well-known fact that lawyers will disagree on almost anything, this reviewer found himself unable to seriously disagree with any of the book's conclusions. The only thing controversial in the entire book is the implication in the foreword that the book is "controversial."

The author has shown both diligence in collecting the material he has used and promise in legal writing. It is a pity that his efforts were not directed into more productive areas of inquiry.

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20. See the statement of Rep. John A. Bingham about Moore v. Illinois, 55 U.S. 13 (1852) in Cong. Globe, 42d Cong., 1st Sess. 84 (1871).

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