Liberal Democracy and Justice in the Constitution of Walter Berns

Walter Berns admits in the preface to his book by that very title that he had all along been writing in defense of liberal democracy.' This is not simply *a post litem motam* declaration, but it does constitute something of a refinement of his earliest writing. Berns is truly a liberal democrat. He takes the two aspects of the term with equal seriousness. "Liberal" is, after all, an adjective with an independent potency. Liberal democracy is not simply more extreme democracy as many who now call themselves liberals seem to suppose. Liberal democracy is democracy modified by-moderated by-liberalism and liberalism is not simply vacuous partisanship for change as though change itself were good. Nor is liberalism properly a lofty neutrality as between "values." The expression "liberal democracy" might be taken as synonymous with "limited democracy" or "constitutional democracy." The critical question is what properly moderates or limits democracy, for only complete fools or value-free social scientists believe that the majority is always right. Enlightened support of liberal democracy is dependent on the critical analysis of both liberalism and democracy.

The American experiment in liberal democracy, with one grievous exception, has been successful for two centuries. It has been so successful that we have nearly forgotten that democracy, as such, is not good. One need only remember the grievous exception to appreciate this fact. The trick is to keep the right balance between the liberal things which moderate democracy and democracy itself. As Publius put it, the problem is to find "a republican remedy for the diseases most incident to republican government"(Federalist 10).

That for nearly forty years Walter Berns has had to write in defense of liberal democracy shows, however, that it is indeed on the defensive.

To write in defense of liberal democracy is to be a partisan of sorts. Berns is a spirited partisan. He had served as a Naval officer during World War II, the great war against the then-principal adversary of liberal democracy. He came back from that war anxious to set things right. There were great numbers of men in the late 40s and early *50s* crowding the universities, many supported by the "G.I. Bill," who were filled with generous public spirit. It is remarkable that a scant ten years later John F. Kennedy thought it necessary to exhort people to ask not what their country could do for them but what they could do for their country.

It seemed then, and still seems to me, that this passion to set things right is the only legitimate base for social science. But it cannot be left at that. Many contemporaries of Berns fell in with evil companions. The two principal academic currents of the time were historicism and behaviorism. While straightforward expressions of these follies are now less easy to find, their emanations still dominate academic thought and, worse, they have poisoned ordinary political discourse.

These two currents of thought taught increasing numbers of young men and women that they were fools to want to set things right because, after all, nothing was by nature right or wrong. There were three outcomes, three products of the confrontation between common sense and these currents. First, a great drove of insipid, colorless, uncultivated, tenure-seeking, second-generation, behaviorist drudges took the places of their ill-advised, but enormously more decent and measurably more intelligent, mentors. These drabs asserted the twentieth century equivalent of the campaign statement of Stephen Douglas that he didn't care whether slavery was voted up or voted down. At least Judge Douglas stood on a kind of moral ground when he said that. The relativists of our time excuse themselves by explaining that they just want to "play with the data." The mystery is why philanthropists and taxpayers should have paid them, and paid them well, to teach that politics and human good are

uninteresting and unimportant and that the appropriate response to the world is a perfect neutrality as between the good and the bad, the noble and the base, the just and the unjust and between freedom and slavery. The coordinate mystery is why thousands of students should have listened patiently to the argument that argument proves nothing of importance and that it was, somehow, important to know that.

The second of the three offshoots of the relativist perversion of inquiry was "relevance" and the "new left." It was this that engulfed the universities in the 1960s and 70s, including the Cornell that Berns chose to leave in 1969. The behaviorists had marketed the view that there is a radical disjuncture between "facts" and "values." That purported disjuncture was the root of their lofty neutrality in the struggle between things others mistakenly regarded as good and evil. A whole generation of students was repelled by that horde of translucent academic clerks who taught value-free social science. At bottom, however, they accepted the false dichotomy between facts and values and, since the facts looked pretty dull, they opted for "values." The tougher ones made up the "new left." These were the ones whom the late Allan Bloom described as products of a strange mixture of Marx and Nietzsche. The weaker of them carted their values in through cults and narcotics and through the specious notion that "doing one's own thing" was doing the human thing. Great numbers of college-"educated" people embraced "mind-altering drugs," along with magic, fortune-telling, tarot cards, witchcraft, satanism, astrology, and a host of other things which, when I was a little boy, my teachers had confidently assured me had been left behind at the close of the middle and darker ages.

Walter Berns was one of the lucky, smaller third group. "Lucky" is the right word because, even though he is a man of exceptional talents, he is not so singular as not to need a teacher. Good teachers are scarce, but. great teachers are rather like allergies in that those who have never had one don't really believe they exist. Just as those who haven't experienced allergies think those who have are just "fussy," so the garden-variety products of American education regard those who speak of a great teacher with profound respect as almost servile and lacking in "creativity." Of them, Berns would have

to say what Romeo, escaping the coarse jibes of Mercutio and Benvolio, says: "He jests at scars that never felt a wound." Berns had a great teacher: Leo Strauss. Berns studied at Reed College, the London School of Economics, and the University of Chicago. Robert Horn and Herman Pritchett taught constitutional law at Chicago. Horn had not fallen under the twin sillinesses of the American academy and Pritchett had made only faint concessions to behaviorism, but neither confronted the fundamental problems of historicism and behaviorism. It was Leo Strauss who opened the nearly shut door of philosophy. It was from Leo Strauss that Berns learned to reject the pretensions of both history and science. Through this he tamed his moral enthusiasm and tempered it with genuine open-mindedness and genuine inquiry. He learned the open-mindedness that one might learn from Aristotle, not the mock open-mindedness of dogmatic relativism which self-defeatingly is open-minded even with respect to bigotry. Strauss was, in turn, aware of his good fortune in having magnificent students like Joseph Cropsey, Ralph Lerner, Allan Bloom, Herbert Storing, Martin Diamond, and Walter Berns, to mention only a half-dozen. Strauss knew that his adopted country was a splendid place because it gave him young men like these and because it provided the most thoroughgoing freedom to philosophize known to human history.

Berns and many others learned that it was not hopeless naivete to believe that there truly were better and worse countries. They learned that it was not abysmally Midwestern to love one's country, that gratitude and patriotism were not tantamount to Nazism (which, for some unexplained reason, was regarded as bad by those who were confident that nothing was good or bad). And they learned from each other. The combination of measured and considered acknowledgment of the goodness of their country and keen scholarship led to a great archaeological dig which, liberated as it was from the prevailing academic prejudices, re-examined the fundamental principles of the American regime, the true character of its Founding, and the great crises in its history.

Walter Berns, while a part of this archaeological enterprise, was at the same time immediately concerned with the present. With the

depth of his analysis and its solid grounding in political philosophy he has combined a meticulous and lawyer-like treatment of constitutional law cases. Political philosophy is a seductive, and then a jealous, mistress. A whole courtload of white-wigged judges cannot provide the intellectual satisfaction of a single Thomas Hobbes or Niccolo Machiavelli, not to speak of a Plato or aXenophon. Nonetheless, Berns has stayed at his post, reading thoroughly and patiently the output of the United States Supreme Court, even though the intellectual and even the lawyer-like quality of that output has steadily decreased *(Future, x).* [2]

Berns has given us two comprehensive books on the First Amendment, a constitutional casebook intended for use in American government courses, a short but comprehensive book on the general nature of the American political order, a couple of smaller books including one on the death penalty, and over sixty journal articles, book chapters, and smaller pieces in journals and periodicals. Twenty-two of these articles are collected in *In Defense of Liberal Democracy* (1984). The present review will give its chief attention to the two books on the First Amendment, the book on the American political order, and that collection of articles, drawing on his other works as may be necessary. The best place to start is with the earlier First Amendment book.

Freedom, Virtue and the First Amendment was published in 1957[3] while Berns was at Yale University. It reviews the problem of censorship from John Milton's *Areopagitica* to the twentieth century, examines what had come to be called the "clear and present danger test," exposes "preferred position" as a version of the already-discredited doctrine of "substantive due process of law," adumbrates the difficulties in treating freedom as though it were simply a good, simply an end, and relates freedom to virtue, to loyalty, and to justice.

The preface asserts that most jurists and constitutional lawyers have failed to recognize that freedom as a principle is problematic *(Freedom, v).* [4] So begins a critique of liberalism and libertarianism. Berns reminds us that this critique does not compel an alliance with the so-called conservative movement *(Freedom, vii).* Since many even professedly scholarly readers tend to partisanship, and since it

is difficult for partisans to acknowledge that anyone might rise above partisanship, they are inclined to incredulity by this disclaimer. Still, even though one might well rise above liberal democracy in order to critique it, it is questionable whether one can write in defense of liberal democracy, as Berns later says he had been doing all along, without standing on some sort of political ground.

To rise above partisanship is the work of political philosophy, Berns offers a critique of Daniel Boorstin who he says had suggested that the solution to the evidently unphilosophic character of Americans was the development of a "clear philosophy of democracy." Since philosophy is the activity of a very few, it is clear that no people is, as a people, philosophic. Berns reminds us that political philosophy aims at political understanding *(Freedom,* 19).[5] That means an ascent above any political order. That is, political philosophy aims to understand the just political order, not simply to vaunt a given one. What is more, failure to transcend a political order issues in failure to understand that order on its own terms. This is the failure of the American Civil Liberties Union. As Berns properly characterizes the position of the ACLU, it holds that "censorship is bad and never to be condoned; city councils must be taught that the Constitution means what it says about speech and press and religion and assembly" *(Freedom,* 21). Whether it was the ACLU or Mr. Justice Black who first resurrected this formula in order to misapply it is not clear *(Future 97).* That it is a misapplication is clear. It is true that the First Amendment says that Congress shall make *"no"* law respecting the one or prohibiting or abridging the other things, but to bullyrag the city councils about it is to overlook the fact that it is *Congress* and *not* the city councils that the amendment proscribes. It is the strictness of their rendering of the "no" and the sponginess of their rendering of "Congress" that makes the ACLU and Justice Black so destructively wrong. Berns touches on this matter-the application of the first eight amendments through the medium of the due process clause of the Fourteenth-frequently, but for the most part, he accepts that application at least for the sake of argument *(Freedom 29, 76, et passim).*[6] It may be that even to do so for the sake of argument is to yield too much.

So far as I know, the Court has not yet held both that the speech and press provisions of the First Amendment are applicable through the Fourteenth to the states *and* that the "no" in the First Amendment is to be taken in the most strict sense. It would be beyond folly so to hold. It would not be unimaginable to hold that the First Amendment means very strictly that Congress may make no law whatsoever that touches in any way on speech or press. The minute, however, that the Court commits the folly of holding the First Amendment to be applicable to the states, the absurdity of holding that no government may in any way affect speech or press becomes obvious. In his later book on the First Amendment, Berns shows us the movement of the Court toward that absurdity in *Cohen v. California,* a case involving the use of offensive language in a courtroom.'

Think of a word that shocks and offends many and, so as not to complicate the matter, don't think of a word that shocks on the basis of religious sensibilities, but rather, one which shocks common decency and civility. Does any reading of history suggest that James Madison, when he introduced into the First Congress what later became the First Amendment, intended to prohibit any government in the United States from curbing the public use of such a word? Did the First Congress so intend? Did the ratifying bodies in the states so intend? Mr. Chief Justice Marshall showed us in 1833, beyond any possibility of doubt, that both the history and the very language of the first eight amendments make it clear that they were intended to apply and do apply only as restrictions on the national government.[8] Indeed, acceptance of this ruling is a precondition for arguing that the Fourteenth Amendment changes that intention and makes those amendments, or some of them, applicable as restrictions on the states. Can anyone who is not simply loony contend that Congressman Bingham or Senator Howard, or the Committee on Reconstruction, or the 39th Congress intended by the language of the Fourteenth Amendment that thenceforth no government in the United States would be permitted to curb the use of the offensive word we are considering? If not them, then can those in the state ratifying bodies be thought to have intended that outcome?

Perhaps one could say that lawgivers sometimes enact more than they intend-that the very force of the language they use ineluctably does something because of its generality which was not in their minds when they enacted. Take, for example, the equal protection clause of the Fourteenth Amendment. It is quite clear that the primary intention of that clause was to protect the freed Negro from invidiously discriminatory state action, but it is equally clear that the clause, because of the generality of its language, cannot be confined to such state actions. But it is just as clear that such state action is wrong *because* it is a species of a larger and more comprehensive class of wrong, and the Framers of the equal protection clause could not, without having themselves been guilty of the invidious discrimination they meant to end, write that clause in narrower language. In other words, there must have been within their intention something larger than the particular evil which led them to put forward that clause. Certainly one need look no further than the Declaration of Independence to see what that larger evil might be. If the application of the equal protection clause to state prohibitions against citizens of oriental extraction bringing suit in a state court for vindication of their property rights were suggested to the Framers of the clause, they would be *compelled* to say, "Oh, yes. That, too." But go through, now, that same historical sequence of First Congress and First Amendment and Thirty-Ninth Congress and Fourteenth Amendment and their respective ratifying bodies and put the *Cohen v, California* question to those several Framers. Candor will not permit any other conclusion than that they would *all say,* "Oh, no! Not that!" In other words, to hold that California may not curb Cohen is not to find meaning hidden within the intentions of the Framers of the First or even of the Fourteenth Amendment, but rather to run emphatically counter to their intentions. It is to make the Constitution say not more than it says but the opposite of what it says. Only Justices Brennan and Thurgood Marshall have pretty straightforwardly said that they don't really care what the Constitution means but that the Court ought to enforce what the Constitution ought to mean. If the Constitution has any meaning, then the *Cohen* decision cannot issue from the Court. What the Court suggests, from its heart of hearts, is

not that the action of California was unconstitutional, but that it was unfashionable. California, to use the shallow language of the late Duke of Windsor, was not "with it" when it tried to curb Cohen. But, as Berns has elsewhere reminded us, the task of the Court is not to see to it that the Constitution keeps up with the times, but to see to it that the times conform to the Constitution *(Taking,* 208, 236).[9]

If the strict reading of the "no" coupled with the spongy reading of "Congress" cannot hold, three other logical possibilities present themselves. One is that the application of the First Amendment to the states compels the common sense interpretation of the speech clause. A second possibility is to say that the speech clause means emphatically and absolutely what it says, but it applies *only* to the United States and the states are, even after the Fourteenth Amendment, free to curb speech according to their own constitutions and laws. The third possibility is to say that the strictures of the First Amendment still apply only to the United States but that judgment and common sense must still be used in construing the speech clause. My present view inclines toward the third of these possibilities, although there is a certain merit in the second one.'°

The Court seems to have taken something like the first of these three positions-that the First Amendment (not to mention some or all of the clauses of the next seven) does limit the states and that some sort of judgment-one is almost inclined to say that *therefore* some sort of judgment-is necessary in construing the particular phrases of that amendment. Berns seems so to have directed his attention to the particular meaning of those phrases as to be too easy on the Court with respect to the incorporation question.

Certainly the attention Berns has given to the meaning of the speech and press terms of the First Amendment is the most essential task, and I believe that his interpretation is altogether correct. That interpretation amounts to the proposition that the First Amendment prohibition against abridgment of speech and press is a prohibition against laws abridging *the* freedom of speech-that is, abridging the principle of freedom of speech theretofore established by the common law as that had been modified by American usage. That amounts to a prohibition against prior restraints but does not prohibit subse-

quent punishment of speech or writing which is injurious either to others or to the common good. Historically, punishable or otherwise actionable speech was seditious speech, obscene speech, speech tending to breach of the peace, private libel, and, problematically, criminal libel. The use of the press to the same ends was also punishable or otherwise actionable.

The earlier book on the First Amendment weighs freedom against virtue. There are two difficulties in this. Freedom is found wanting and virtue is found, so to speak, in constitutionally unlikely places. Berns says, "Freedom in itself has no intrinsic merit" *(Freedom,* 126). This statement, in itself, seems too strong. Slavery is bad. Freedom is a good and it is a constitutional object. As was suggested above, however, what Berns means is that freedom understood simply as the absence of external restraint is not, by itself, good enough. He shows that the Framers understood freedom, including freedom of speech and press, as being for something which is higher and better than freedom. It is that higher and better thing which stands in judgment of freedom and its exercise. What is that higher and better thing and where is it to be found or how is it to be brought into play as that standard of judgment? The short answer to be drawn from Berns is that the higher thing is justice and he shows that the mistake of liberalism is in the simple equation of freedom and justice. His solution to the "where" question, however, raises a problem. He concludes Chapter VII, entitled "The Problem of Justice," thus:

> This means that the purpose of the Supreme Court cannot be described as making justice conform to the Constitution. It is rather to make the Constitution conform to justice. Supreme Court justices seek to make the law of the Constitution conform as closely as possible to what is right as they see the right. As long as they exercise the power of judicial review, there can be no alternative to this *(Freedom,* 162).

This formulation is subject to the same reservation expressed later by Berns when he asserts that the times must be kept in conformity with the Constitution and not the contrary. The question is, who is it that decides what justice is? One need not be a twentieth

century relativist to raise this question. Even Aristotle is open-minded to the possibility that justice will manifest itself differently in different regimes.

It is consistent with the drift of argument in the earlier First Amendment book that Berns several times there uses the term "ideal" *(Freedom,* 134, 161, 163, 171).[1] He says, for example:

> To think of justice, to know the difference between a just and an unjust act, requires inevitably, and ultimately, some notion of an "ideal relation among men." This holds as true for Supreme Court justices as it does for political philosophers.

And he supports this with a footnote which reads:

> The problem of justice, meaning thereby the problem of the ideal relation among men, was subordinated at the moment that freedom assumed its central position in Western political thought *(Freedom,* 163).

If, however, what this footnote says is true (and I believe that it is true), then the problem is not simply that the justices are wrongly plying their trade. It is that a certain truncation of jurisprudential thought is a given of the Constitution, the Constitution which is the progeny of modern, Western political thought. The problem of the problem of justice as Berns presents it here is that while political philosophy must think of that which Berns calls the "ideal," it degenerates into the vice of idealism if it forgets that when engaged in actual political life one is in fact confined by the actual. Berns says:

> In order, then, to perform the role of jurisprudence, that is, to evaluate a law or ruling, it is frequently necessary to transcend the system of which the law or ruling forms a part and to evaluate it according to other criteria *(Freedom,* 161).

That is, it is necessary to make the Constitution "conform" to natural justice. But "natural justice" resides in the realm of the "ideal." Actual justice is never more than some sort of approximation confined by the actual, and one actual differs from another and, in particular, the

Court is the creature of the Constitution which is itself the progeny of that modern thought which puts freedom in the forefront. What Berns seems to ask is that the Court leap over the Constitution, leap over modern political thought, and leap over the actual to "natural justice," to the "ideal." Perhaps that is what the Constitution demands. On the contrary, however, perhaps when we, "the people, in order to . . . establish justice," ordained and established the Constitution, we did not intend to *refer* the problem of justice to the Court which we made within the Constitution but rather believed that by the fact of ordaining and establishing the Constitution we had established that approximation to justice which is all men can hope for in an actual regime. Even if we follow Aristotle, which is perhaps further than we dare go in the present case, it is not so much justice as it is moderation that is the virtue of politics. Constitutional adjudication is not the same as common-law adjudication and, as Hobbes has shown, even the latter may not set the judge free to transcend the sovereign.[12]

Criticizing the Court's reluctance to transcend the Constitution, Berns correctly points out that Frankfurter has come closer than any justice in the modern history of the Court to suggest the abolition of judicial review *(Freedom,* 178). Berns presents the crux of his critique of the Court by *way* of a critique of Frankfurter's distinction between constitutionality and wisdom. Paraphrasing Frankfurter, Berns says:

> Constitutionality is not synonymous with wisdom. Justice is what the Legislature, that great continuing body, that repository of the people's rights, says it is-so long as the legislative definition does not offend some explicit prohibition of the Constitution. The Court's concern must be not with what the Legislature, that majestic representative of the people, does with its power, but with that power itself. It should not raise the question concerning what the Legislature does with its power, but only whether the Legislature is permitted the particular power by the Constitution. Power resides in the people; they delegate it according to the provisions of the Constitution . . . .

> If wisdom does not reside in the people, or in the people's representatives, too bad for the people. The Court cannot guide or educate *(Freedom,* 182).

Conscience forbids me to hide in a mere footnote at this point the admission that at about the same time that Berns wrote this I was making a similar critique of Frankfurter. I have since become kinder and gentler in my view of Frankfurter.[13] Berns rests his critique of the Court on the reminder that there is no way for it to escape the duty to judge, to use judgment. Freedom is not enough. The judges must somehow reach for justice. Justice is a virtue. Berns closes his argument by turning to the "problem of virtue." He reminds us of the quarrel between ancients and moderns:

> That this quarrel between the ancients and the moderns resulted in a resounding victory for the moderns may prove nothing about the merit of either argument, but it certainly put an end to the debate. Freedom reigns as the principle of liberal-democratic politics, that is to say, of all modern politics that is not totalitarian. Yet the record written by the Supreme Court on the basis of the modern principle is sufficiently unimposing to suggest that we resume that debate *(Freedom,* 228-29).

What!? Resume the debate between the ancients and moderns? But this would not be to call upon the Court to construe the Constitution. It would be to call upon it to chuck the Constitution out altogether. As Berns would now be the first to lament, this is pretty nearly what the Court has finally done. The difficulty with the solution Berns offers is that modernity *does* depart from Aristotle by severing ethics and politics. The purpose of the modern regime is, as Berns makes clear in his most recent book *(Taking the Constitution Seriously), not* to engender virtue but to secure rights. We cannot have our political cake and eat it. There is no way to restore Aristotle without renouncing the Declaration. Walter Berns and the late Martin Diamond and I are counted among the students of Leo Strauss. Strauss taught us the essential superiority of ancient over modern political philosophy but, as Diamond understood early on,

the choice in practice was *not* between Madison's Constitution and Plato's city in speech. The *practical* choice was between the Athens which Alexander Hamilton rightly characterized as a wretched place and Madison's Constitution. The business of the Supreme Court is to be true to that Constitution, not to make it better.

I start with acceptance of the proposition that there is a profound break between the political philosophy of antiquity and that of modernity. I further accept the proposition that ancient political philosophy is superior as political philosophy. Those who, accepting these two propositions, turn their attention to the American regime, fall into three groups: those who believe that the American regime is altogether modern and therefore worthy only of dismissal; those who believe that the American regime is a mixture of ancient and modern things and therefore partly or potentially good because it is rectified by the admixture of the ancient; and those who believe that the American regime is altogether modern but is, so far as one can hope for in practical affairs, good, and must be understood in its own terms and not teased with the ghosts of antiquity. The earlier Berns book on the First Amendment flirts with the fond hope that the American regime, founded in modern liberalism, can be shored up with a judicial tilt toward virtue. I believe that his later works move toward taking the Constitution on its own terms-taking it seriously.

The First Amendment and the Future of American Democracy is the later of the two books on the First Amendment by Berns. Necessarily, the book covers some of the same ground as that covered in the earlier book, but there are important differences. First, more attention is paid to the Founding period and to explication of the intentions of the Founders; second, the profound difference between the Founders' intent respecting freedom of religion and their intent respecting freedom of speech and press is shown; third, as to freedom of speech and press, the opposition of the Republicans to the Alien and Sedition Laws is explained in the light of the Virginia and Kentucky Resolutions and Berns makes it clear beyond dispute that that opposition had nothing at all to do with any glorious defense of freedom but rather was a defense of freedom only from *national* restraint in favor of the supposed rights of states over

these matters; and fourth, while the insistence that judges rise to philosophic heights and interpret the Constitution in the light of natural justice is not straightforwardly abandoned, it is much attenuated in this second book. The two great contributions of the book are the demonstration of the distinction between freedom of religion and freedom of speech and press and the deflating of the historical gloryspeak about the purported Jeffersonian defense of liberty.

"Enlightened statesmen will not always be at the helm." So cautions Publius in *Federalist* 10. He is there by *way* of explaining that popular government must be saved from its own excesses by some mechanism that is not dependent on the installation and fixed tenure of wisdom. It has never seemed to me, however, that Publius supposes the indefinite prosperity of a country indefinitely administered by knaves or fools. What he meant, I believe, was that a well-constructed popular regime could ride out its mistakes. Enlightened statesmen must *sometimes* be at the helm. Where will we get them? The Founding generation seems to have included a large number of first-rate politicians. Perhaps foundings bring out the best in the best. The critical question is whether a country which lacks any means of preserving and nurturing *a class* of excellent men can manage. Will it simply "ride" on its patrimony of excellence and, if so, how long will that patrimony last? Will it, like Pheidippides in *The Clouds,* throw it away on wine, women, and horses? The alternative to the presence of a class of wise rulers is the assured good character of the population at large. Tocqueville is probably the most noted teacher of the proposition that democracy can only prosper in America if the citizenry in general is virtuous. What will be the source of that citizen virtue? Aristotle's observation that good conduct and good character are almost wholly the product of habituation cannot be gainsaid. Perhaps even a Socrates depends for his virtue first of all on habituation. Surely no lesser person could hope to develop the virtues by sheer ratiocination. For all but a tiny minority of self-sufficient philosophers, that habituation is engendered in the first instance and is continuingly supported by religion. Perhaps Kant was right when he said, "The problem of organizing a state, however hard it may seem, can be solved even for a race of devils, if only they are

intelligent."[14] A state of devils could not last, however. Those devils would soon need conversion if the state were to prosper."

Our political institutions do not arise from, nor are they grounded in, religion. The God of the first paragraph of the Declaration of Independence is *nature's* God. It is not the God of Abraham and Isaac nor the God of Paul. It is *nature's* God, a god subordinate to nature, subordinate to a nature subject to conquest by man. In *1992,* a state governor asserted that America was a "Christian nation." This elicited the response that to say so was to violate the separation of church and state. The counter-rebuttal cites statistics to the effect that "80% of Americans say they are Christians." Well, of course. If you step into an American street with a survey form and offer respondents a choice among Christianity, Judaism, Islam, Buddhism, Shinto, and so forth, *80%* will no doubt answer that they are none of the others and so they are Christian. If you offer "atheist" as a category, hardly anyone will admit to that. But the *80%* figure barely resembles a country in which Madonna prospers and crime does pay, including more than *20,000* murders and more than *80,000* forcible rapes every year, and in which a sizeable and vocal portion of the population calls induced abortion for the sake of convenience a "choice."

Well, we are all miserable sinners. Maybe the statistics of moral deterioration are not disproof of the religious, even the Christian, character of the nation. Certainly it *seems* to us in retrospect that at the time of the Founding most Americans were religious and virtually all of them who were religious were so in some sort of Christian way. But to say this with too much assurance is to miss the point. As Berns clearly shows, there is no religion and surely no Christianity *in* the founding documents. It is only to half-remember to say that American civilization arises out of a desire for religious freedom and then to cite this as proof of the religious foundation of the country, for the freedom of religion from the political order *requires* the freedom of the political order from religion.

Berns shows that the Founders understood both the need for a political order free from religious domination and the need for a moral, and therefore a religious, population. It is a country full of

Christians, and that is good, but it is not a Christian country. As Publius puts it in *Federalist* 51, "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." Maybe Ralph Nader believes in the possibility of people without interests, all clustered in altruistic, not to say eleemosynary, public interest research groups, but the Founders had a more sensible view. And just as it did not occur to them that government ought to be the enemy of interests, it never occurred to them that government ought to be the enemy of sects. It never occurred to them that freedom of religion meant the suppression of religion. More, as Berns shows, the Founders understood the need for government *support* of religion precisely because of the government's need for those qualities in a republican citizenry which depend in the first instance on religion. Thus the constitutional bar against the *establishment* by Congress of a religion and against the prohibition by Congress of the free exercise of religion does not mean a constitutional bar against Congressional support of religion.

How is such support of religion likely to come about without transgression of the bars in the First Amendment? It is not without some interest that the Constitution as proposed by the Convention did not include anything like the First Amendment. Its sole reference to religion merely liberates office holders from the necessity of religious oaths. To understand the Constitution on this score it is necessary to *forget* the First Amendment and all amendments. During the Convention, George Mason twice proposed that some sort of bill of rights be appended. On neither occasion, as far as the records of the Convention reveal, was this proposal even voted down. The Convention simply had better things to do. As Publius said in *Federalist 84,* the Constitution is *itself a* bill of rights. He did not mean by this that it *contained* a bill of rights. The extent to which it *did* contain some listing of rights here and there was *a separate* argument of No. 84. What Publius meant by the Constitution being *itself a* bill of rights is what he meant in No. 10 where he argues that "in the extent and proper structure of the Union" lies the republican cure for the diseases most incident to republican government. What

is meant by "extent," when it comes to checking the Congress in favor of religious freedom, manifests itself in the fact of a multiplicity of sects. This fact is a greater proof than parchment barriers,. Certainly there is in the original Constitution no animus to religion, and as the argument presented by Berns makes altogether clear, the First Amendment does not introduce such an animus.

Berns argues that the coming into being of modern free government is dependent upon the solution of the religious problem *(Future, 26).* That solution consists in rendering religion useful but harmless *(Future, 15).* For religion to be useful it must be encouraged but free. For it to be harmless, the political order must be set altogether free of it. The political utility of religion lies in its capacity to instill in the citizenry, as a liberal-democratic political order in and of itself cannot instill, the moral character on which the liberal democracy depends. Liberal democracy is necessarily parasitic in this respect. Religious belief is, as Tocqueville put it, democracy's "most precious bequest of aristocratic ages.""

To concentrate on the liberation of politics from religion, the second of the two major propositions of the later book on the First Amendment is that religious freedom and freedom of speech and press are different. Religion can be given greater freedom because it is rendered harmless. It is harmless because it rests on *revealed* truth, and there is no revealed truth at the bottom of American political institutions. American political institutions rest on unassisted human reason. Unassisted human reason, according to that modern political philosophy which is the source of the American institutions, rests on the political analogue of geometric axioms-the self-evident truths of the Declaration of Independence *(Future,* 19, *83).* Belief that there is one God, or that there are Two, or that there are Three and that the Three are One is harmless. Anyone may preach what he likes about that, because the institutions are not founded in and do not rest upon revealed truths. But to teach that men are *not* equal in the essential political respects or that they are *not* endowed with rights by nature, some of which are incapable of being alienated, is a threat to the American political order. No constitution can be, and the American Constitution is not, oblivious to speech which flatly

denies the principles on which it rests. In every country, at all times, such speech, seditious speech, is proscribed. The libertarian interpretation of freedom of speech would make the Court the Dr. Kevorkian of the Constitution.

In this later book on the First Amendment, Berns amplifies the treatment of free speech he had offered in the earlier book. The earlier book had refuted the notion that speech which called for the destruction of the constitutional order-including the constitutional protection of free speech-was constitutionally protected. When I first read the earlier book, in about 1960, I was recalled by its argument to a personal experience. I was in 1950 a student at Los Angeles City College. LACC was then a very lively intellectual surrounding and it was full of veterans of World War II. I was perceived by some fellow students as a liberal, which I was then and am now. My wife and I were invited to a dinner with what turned out to be a Communist cell. We were tested for potential membership. One fellow strongly argued that we must "fight for civil liberties." I agreed. Then, he went on, once "we" were in control of things, we would have to suppress civil liberties. I let myself appear to be more confused than I was and allowed as how I couldn't follow the apparent inconsistency. My mentor explained that it would be necessary to prevent a counter-revolution. My wife and I failed the test.

The special contribution of the later First Amendment book is not only its delineation of the different grounds of religious freedom and freedom of speech and press, but also its careful re-examination of the purported basis of the libertarian view of freedom of speech and press. That view, perhaps engendered by Charles Beard's 1913 misreading of the Founding and misinterpretation of the Constitution," is that the whole history of the country has been a history of struggle between revolutionary (that is, liberal) forces and counter-revolutionary (that is, conservative) forces. All along, the liberals have been in favor of utterly unrestrained liberty. (Earlier in the twentieth century, this was understood as utterly unrestrained liberty of speech and press. The understanding matured into a doctrine of utterly unrestrained "freedom of expression" (an expression

unknown to the Constitution). It is indeed a slippery slope from freedom of speech through freedom of expression to the odd notion that action itself is secured against government proscription. Having seen most of my far-fetched prophesies of thirty years ago come true, I am not at all diffident about suggesting that we shall shortly see a claim in favor of human sacrifice carried on between "consenting adults.") This view of history, the view of the continuing struggle between the good liberals and the reactionary conservatives, beginning with the good Jefferson and the bad Federalists, is nonsense. Berns uncovers the whole argument over the Alien and Sedition laws and shows definitively that the Jeffersonians were not at all in favor of unrestrained liberty of speech and press (to say nothing of what is now called "symbolic speech"). The Jeffersonians were in favor of leaving the restraint of speech and press to the state establishments and so to interpreting the First Amendment as an emphatic restraint on the national government. Again, as Marshall showed in *1833,* it was certainly that. What Berns does in this part of his argument is simply to explode the fanciful notion that the Jeffersonians constitute an intellectual ground for the twentieth century libertarian interpretation of the First Amendment. It is in the other parts of his argument, in both of his books on the First Amendment, that Berns explores the other possible bases for that libertarian view, those grounded in argument rather than in history, and shows their defects.

Finally, as Berns shows, the radical view of freedom is self-canceling *(Future,* 210). We began with a First Amendment which understood the limits of free speech and the need for religion and we have moved to the point of a First Amendment which guarantees "freedom of expression" and forbids assistance to religion.

We might learn in an elementary physics course that we cannot study location and acceleration at the same time. To study one we must abstract from the other. All serious study is of this kind. To examine one thing with sticking care, we must abstract from the whole of which it is a part. That abstraction, perforce, introduces a certain distortion. The definitive and persuasive treatment of the *meaning* of the First Amendment necessarily slights the question of

the *application of* the amendment. Berns well understands the folly *of* the incorporation doctrine. He seems to accept it at times, *arguendo.* On the whole, however, he seems simply resigned to it. It is as though, to borrow a thought from the common law deference to precedent, it is too late in the jurisprudential day to undo what the Court has done about the application *of* the first eight amendments to the states by way *of* the Due Process Clause *of* the Fourteenth. But, more, I do not think that Berns takes as harsh and unrelenting aview *of* incorporation as I do. To borrow, for opposite purpose, from Mr. Justice Douglas, I would cite his insistence that "happily, all constitutional questions are always open."[18]

I believe that Berns is less insistent than I on the incorporation question because he does not *quite* abandon in his later book on the First Amendment the demand *of* the earlier book that the justices be guided by some view *of* natural justice. Confronting the question *of* "Freedom *of* Expression and Public Morality," Berns gives a general statement *of* his sensible argument on the general meaning *of* the First Amendment this way:

> This country managed to live most *of* its years under rules, conventional and legal, that forbade the public use *of* profanity-in the press, in public forums, in films, on radio, in television; and it would be an abuse of language to say that its freedom was thereby restricted in any important respect. Now, suddenly, and for reasons that ought to persuade no one, we are told that it is a violation *of* the First Amendment for the law to enforce these rules; that however desirable it might be to see them preserved, there is no way for the law to do this except by threatening the freedom of all speech *(Future,* 200).

Berns readily admits that censors are usually dull folk and often are overzealous in the performance *of* their duties. *"Of* course," he says, "there will be cases where the power to judge speech by its substance will be abused, but the answer to this is Supreme Court review." No! Since the overwhelming number *of* cases involving censorship are state cases and since, by my view, *nothing* in the first eight amendments is, *ex vi termini,* included in the Due Process

Clause of the Fourteenth Amendment, the answer to the problem of blue-nosed censors is not Supreme Court review. The price of judgment is misjudgment. The cure for misjudgments of this kind is not the denial of the power of judgment. Several years ago, earnest students of mine insisted that I could not properly judge the censorship question without reading *Lady Chatterley's Lover. So* I read it. I cannot say that I found the book as powerful a social argument as its defenders claimed it to be. On the other hand, had I been a censor, I would not have banned it, but I am not the sort who usually ends up as a censor. But I thought then, and I still think, that the suppression of *Lady Chatterley's Lover* would be no great social or literary loss. If Lawrence had been compelled to make his argument in a more subtle and indirect way, it would not have been such a great burden. Those who could read well would understand. As for the others, it doesn't make any darned difference.

In Defense of Liberal Democracy , published in 1984, *is* a gathering of twenty-two pieces written over a twenty year period. The earliest, Chapter 15, "Racial Discrimination and the Limits of Judicial Remedy," was done in 1963. The latest items are several things done in 1983: Chapter 2, "Judicial Review and the Rights and Laws of Nature;" Chapter *3,* "The New Pacifism and World Government;" Chapter *5,* "How to Talk to the Russians;" Chapter *6,* "Taking the United Nations Seriously;" and Chapter 13, "The Trouble with the ERA." Of these, the longest is "Judicial Review and the Rights and Laws of Nature." It runs about 13,000 words. The earliest piece, in 1963, had run about as long. These two are comprehensive and systematic pieces written in an altogether scholarly way on the jurisprudence of the Supreme Court. Two others, Chapter *8,* "Beyond the (Garbage) Pale, or Democracy, Censorship, and the Arts" (1971) and Chapter 14, "The Constitution and the Migration of Slaves" (1968), are also comprehensive and scholarly. There are several pieces that fall in the category of excellent journalism. The shortest, Chapter 20, "The Nation and the Bishops," (about 1500 words) appeared in *the Wall Street Journal* in 1982.

Chapter 1, "The Constitution as Bill of Rights," and Chapter 2, already mentioned, on judicial review and natural rights, make up

Part I of the book, titled simply "The Constitution." The other twenty chapters are sorted out into four other parts titled "Foreign Politics," "Domestic Politics," "Racial Politics," and "Religion and Politics." Part I treats thematically of the Constitution as a whole and shows it as the embodiment of modern natural rights doctrine and as the primary and most thorough enactment of natural right in history. Chapter 1 reasserts Hamilton's argument in *Federalist* 84 that no bill of rights need be added to the Constitution because it was itself, "in every rational sense and to every useful purpose a bill of rights." It is that because sound, representative government founded on the principles of the Declaration of Independence does more to secure rights than a long list of "parchment barriers." The evidence Berns marshals is compelling. John Marshall had shown irrefutably in 1833 that the first group of amendments were adopted solely as restraints on the United States.[19] Not even the most extravagant of the Court's nonsense has been able to dent that. Berns reminds us that during the first 135 years of the country's history there were only fifteen cases in which governmental action was held to be contrary to a provision of the first ten amendments. There were only nine such cases in the whole of the nineteenth century *(Defense, 5).* Berns shows the character of the not-yet-amended Constitution as the principal guarantor of rights by tracing its principles back to the political philosophy of Hobbes and Locke.[20]

To say that the Constitution is founded on the political philosophy of Hobbes and Locke is to raise several questions. As was shown above, Berns properly rebuts the notion that the Constitution is "founded in" Christianity, or indeed, in religion of any sort. It is commonplace, however, also to argue what may be called the "historical" view-the view that the Constitution is simply some sort of continuation of the glories of English popular government, or English law, or an extended English struggle for rights. Except for the fact that the Constitution uses the English language, and sometimes uses English legal language, however, it rests a great deal more on the two English philosophers mentioned than it does on English legal history. Lawyers, of course, will be the last to admit this. They were antiquarians before history was invented. Thus every the least

excuse brings forth a torrent of citations from Coke upon Lyttleton. The problem with the lawyers is that they tear the Constitution apart, snatching up a clause here and a clause there to serve their clients' interests. Usually when a lawyer mentions the Constitution, he is *not* thinking of the Constitution itself but of an *amendment* to it and he virtually never thinks of the Constitution as a whole. If one thinks back, however, to the great cases interpreting the Constitution itself-Gibbons against Ogden and McCulloch against Maryland, for example-the extent to which the Constitution rests on English philosophy rather than on English law or history is apparent. Even in *Youngstown Sheet and Tube Co. v. Sawyer,* Justice Black's assertion that eminent domain belongs emphatically to the legislative power is based *not* on the history of English practice but on Black's own view of the *nature* of legislative power. Conversely, Justice Vinson's dissent in that case rests not on the history of English royal prerogative but on Locke's exploration of the *nature* of executive prerogative. Further, one can only dismiss Hobbes and Locke as "products" of English history by ignoring their mountainous genius and their revolutionary originality. We cannot resist pointing out here that the Constitution is, in fact, a revolutionary document and the hesitant party-lauded throughout this century as our liberal saviors-that demanded amendments, including a bill of rights, is *really* the conservative party, the party which, mistrusting the liberal philosophy of the Constitution, wants to rest on a throwback to English tradition.

Berns keeps a perfect balance between history and philosophy in his interpretation of the Constitution. The chapter on judicial review and the rights and laws of nature shows this as he confronts the new jurisprudence of active judges and Ronald Dworkin's "fusion of moral theory and judicial power." When the *old* judges "found" the law, they looked to the old doctrine of natural law which was a doctrine of moral duties. The *new* natural law, the natural rights doctrine of Thomas Hobbes, is a law of amoral rights. The new natural rights doctrine is, however, inseparable from Hobbes's doctrine of sovereignty, a doctrine tamed by Locke into the doctrine of legislative power. The new judges want to have their moral cake

and eat it. They accept the doctrine of rights, which emphatically rejects the notion of a higher moral law (notwithstanding the cluttered nonsense of Edward S. Corwin on this matter[21]) but they insist on "finding" the law anyhow-they insist on finding new rights even though the very doctrine of natural rights asserts flatly that each of us has by nature every right conceivable. The problem is that it is by *nature* that we have these rights and, as Hobbes amply showed, *nature is* a war of every man against every man where life is solitary, poor, nasty, brutish, and short. We *leave* nature for a better place-civil society-and our ticket out of that hell is purchased by our giving up all of our rights except those that cannot without self-contradiction be given up. If society as a whole wants to give some of those rights back it can surely do so, but it is certainly not the business of judges, who wrongly think themselves innovators and benefactors, to "find" rights and dish them out and by so doing lead us back into nature, back away from civil society, from civility, from civilization. Because they do not see that the natural rights doctrine of modernity is not an incremental continuation of, but a radical departure from, the traditional, Christianity-laden natural law, or because they are willful and perverse, or for these and other reasons, they push us back toward that dreadful "state of nature" from which we gladly escaped by alienating to a strong government all but our very few inalienable rights. As Berns shows, we do not need Dworkin's scheme for it was "we, the people" who made our own "fusion" of moral theory and power when we, in the exercise of that greatest of all legislative powers, gave ourselves and our posterity the Constitution. The "legislative powers [t]herein granted" were granted emphatically to the legislature, not to the moral purity and philosophic wisdom of the judiciary. If there is *anything* the American Constitution can be said to shout from the housetops it is that the American people had had done with the wisdom and moral purity of a superior class of beings. As Berns puts it, the vanity of the judges leads them to exercise what Hobbes had called "private judgment." This exercise is in violation of the covenant we made with each other in order to escape the horrors of the state of nature *(Defense,* 41).

Of the five chapters composing Part II, dealing with foreign

politics, four are on the United Nations, three directly and one less so. The most delightful of these, and perhaps the best, is Chapter 4, "Where the Majority Rules: A U. N. Diary." It should stand as a model for journalists covering that corrupt parody of a deliberative body. His wit and candor are the only antidotes for the poison which the U.N. injects into what would perhaps otherwise be a genuine possibility of preserving and fostering human rights. It is misguided optimism to suppose that the demise of the Soviet Union will cure the underlying problems of the U.N. Of course, the journalists will not be guided by the example of Berns. They are too blinded by the partisanship which they share with the other products of our universities. The folly of that partisanship can best be grasped by reading Chapter 3, "The New Pacifism and World Government."

Part III, "Domestic Politics," is composed of six chapters dealing with censorship, capital punishment, President Carter's assessment of the nation's morale, the electoral college, sexual harassment, and the Equal Rights Amendment. In dealing above with the two books on the First Amendment, we have already commented on the examination of censorship by Berns. That examination is, however, extended in "Beyond the (Garbage) Pale, or, Democracy, Censorship, and the Arts," which appears here as Chapter 8. Berns acknowledges the difficulty in defining the distinction between art and trash. What is clear is that those Professors of Literature who deny such a distinction in order to defend trash before the courts do by that denial put themselves out of a job. In the course of acknowledging the difficulty in defining the distinction, Berns reminds us that obscenity, in and of itself, is not necessarily bad *(Defense,* 141). It may be essential to some serious and worthy works. It is surely necessary to a lot of worthy-one might say necessary-comedy. As I would not censor *Lady Chatterley's Lover, so* I would surely not censor Aristophanes, even though he scandalously and maliciously traduces Socrates, who, as Plato makes Phaedo say, was of his time the "best and the wisest and the most just." Aristophanes is most heartily obscene and to bowdlerize his works would be to wreck them. The obscenity is essential to them. But nobody who has a taste for obscenity itself and who is otherwise in his right mind would buy

Aristophanes *for* the obscenity. This begins to define the distinction between art and trash. Comedy is superior to tragedy, however. It is closer to philosophy in its workings. We are compelled to wonder if comedy does not somehow atone for obscenity.

Though I would not censor Lawrence or Aristophanes, and surely Berns would not, *someone* might do so. What then? I criticized Berns above for still holding in his second First Amendment book to the view implicit in the earlier one that the cure for narrow-minded censors is Supreme Court review. Perhaps Berns has equivocated on this point. I know that I have taught *Youngstown Sheet and Tube Co. v. Sawyer* at least a dozen times and each time I teach it I change my mind. Sometimes I agree with the majority and sometimes with the minority. Within my own soul I am, like the Court, split 6 to 3 on the legitimacy of Truman's seizure of the steel mills. Maybe Berns stands this way with respect to the vexing questions of censorship. His second book on the First Amendment was published in 1976. *In Defense of Liberal Democracy* was published in 1984, but the chapter on censorship was originally published in 1971, five years before the second book on the First Amendment. In that 1971 article Berns had already taken the view, more tolerant of the legislative power and therefore of the probability of narrow-minded errors by censors, that the cure lay in a kind of patient forbearance of such errors. He closed that article, now Chapter 8 in *In Defense of Liberal Democracy,* in the following way:

> [C]ensorship, because it inhibits self-indulgence and supports the idea of propriety and impropriety, protects political democracy; paradoxically, when it faces the problem of the justified and unjustified use of obscenity, censorship also serves to maintain the distinction between art and trash and, therefore, to protect art and, thereby, to enhance the quality of this democracy. We forgot this. We began with a proper distrust of the capacities of juries and judges to make sound judgments in an area that lies outside their professional competence; but led by the Supreme Court we went on improperly to conclude that the judgments should not be made because they cannot be

made, that there is nothing for anyone to judge. No doubt the law used to err on occasion; but democracy can live without *Mrs. Warren's Profession,* if it must, as well as without *Fanny Hill-or* to speak more precisely, it can live with the error that consigns *Mrs. Warren's Profession* to under-the-counter custom along with *Fanny Hill.* It remains to be seen whether the true friend of democracy will want to live in the world without under-the-counter custom, the world that does not know the difference between *Mrs. Warren's Profession* and *Fanny Hill.*

"Revenge," Francis Bacon begins his essay on that topic, "is a kind of wild justice." The penological doctrine of deterrence and rehabilitation which has prevailed since Beccaria has fixed its attention on the wildness of revenge and has forgotten that it is, indeed, a kind of justice. The wildness is transformed into justice when the action is taken out of the hands of the aggrieved individual and made a matter for society. Berns shows us in Chapter 9, "For Capital Punishment," that retribution or revenge is and ought to be a component of civil justice. If the victims among us are deprived of civilized revenge, they will be forced to resort to revenge in the stricter sense, private revenge. If society itself is deprived of the satisfactions of civilized revenge, it will be driven to lynch justice, and lynch justice is a contradiction in terms. Justice gives way altogether to wildness. The more "rights" the courts weave from whole constitutional cloth, the more we shall be driven back into the state of nature. It may well be that the West was not nearly as wild as fiction has portrayed it, but the Wild West as it has been portrayed is a state-of-nature morality play. We ought to see by it whither we go if government fails in its responsibility for retributive justice. So Berns shows us that to argue that capital punishment does not deter crime, whether that be true or not, does not answer the question. We need capital punishment to satisfy a perfectly sensible and absolutely ineradicable human demand for retribution. If we don't get retribution one way, we shall get it the other. It is not simply that capital punishment is preferable to the wildness of private revenge. It is that, but it is more. No one would call it good in itself. It is a necessary evil.

But it is good in relation to the crimes it answers. It is a marvelous curiosity that those liberals who do not believe in God and therefore cannot believe that man is made in the image of God still want to speak of the "dignity of man" as an argument against capital punishment *(Defense,* 144). If man's dignity comes not from God it must perforce come from nature, but if a man perverts his nature he loses his dignity. He degrades himself. The liberal view of justice does not even want to be troubled with nature. To speak of nature is to admit the possibility of perversion. To deny nature, or, at least, to be careful not to speak of it, is to invite perversion itself to demand rights. This is, of course, what it is presently doing.

All the old crimes are by the liberal view of justice forgiven. Perversion is legislated as merely an alternative (See how value-free social science stays the course!) and demands an equal place in public esteem. Long-continued adultery and persistent violation of narcotics laws are no longer bars to elective office. But the *new* crimes-Oh, my! Chapter 12, "The Ministry of Love," deals with sexual harassment. Since this was written in 1980, sexual harassment has become the crime of the century. Laws against blasphemy, obscenity, pornography, disorderly conduct, and disturbing the peace may be struck down as unconstitutionally void for vagueness, but there is nothing vague about sexual harassment. It is whatever the complainant says it is. Enormous sums are spent by dead-serious panels investigating *ex post facto* charges based on an "evolving" standard. Careers in government service otherwise evidently honorable are held in trembling jeopardy. Little schoolboys in a suburb of the nation's capital are warned that teasing little schoolgirls will not be tolerated, and, to play on an old joke, mistakes will go down in their permanent records. In "The Ministry of Love" Berns gives a clear historical account of the back-handed way that the word "sex" was inserted in the Civil Rights Act of 1964 and the subsequent growth of the jurisdiction and the imagination of the Equal Employment Opportunity Commission. Driven by feminist enthusiasms, the government is fast decreeing that males and females are not at all different. It is now nearly punishable to hail jokingly the difference. Berns sets the matter out clearly this way:

> In the sexual harassment literature there is no such thing as romance; there is [sic] only commercial or power relationships-marriage, prostitution, or harassment-in which women are required to exchange "sexual services for material survival." And there are no significant natural differences between men and women. That, the feminists say, is the trouble with the law: it reinforces the pernicious and unscientific view that there is an essential difference between men and women, and it is this view that is responsible for sexual harassment. It allows men, indeed, it encourages men, to define women on the basis of their sexuality, whereas, according to nature, the differences between man [sic] and women are insignificant. One's sexual identity is determined by social factors-as [Catherine] MacKinnon puts it, the most salient determinants of sexuality "are organized in society, not fixed in `nature'"-and these social factors must be eliminated by changing the laws (*Defense,* 187-88) .

Berns then refutes with sufficient evidence the feminist assertion that the Constitution itself is "sexist." But there is no arguing with a zealot. As an older authority put it, "Answer not a fool according to his folly" (Proverbs 26:4), or, as the folly itself would now put the same caution, "Answer not a fool according to their folly."

Part IV, "Racial Politics," is composed of four chapters. The best of these is Chapter 14, "The Constitution and the Migration of Slaves," published originally in the *Yale Law Journal* in 1968. It is exemplary of the thoroughness of Berns' scholarship in dealing with comprehensive issues of the Constitution. It is my own view that the Constitution establishes *a national* government which, to accommodate the nay-saying party at the Convention, is laced with an occasional federal principle. The word "federal" is studiously avoided in the text. There is, strictly speaking, no such thing as a "federal government." There may be a single government, in which case it is not a federation, or there may be a federation of governments, in which case there is not one government: there are several. Some of my friends who style themselves "conservatives" like to take what the

winning party at the Convention was for and what the losing party was for and add them together and divide by two to find the meaning of the Constitution. That meaning, however, is first found by noting that the winning party in fact *won* and it won because the attempt at federation in America was "the cause of incurable disorder and imbecility in the government" *(Federalist 9).* Concessions were made, and as Abraham Lincoln steadfastly held, they must be honored. This does not amount, however, to an annulment of the whole Convention and a reversion to the principles of the Articles of Confederation. By the same token, the word "slavery" is studiously avoided in the text, although some four clauses in the text make concessions to slavery. White or black racists to the contrary notwithstanding, the Constitution was from the beginning, despite those concessions, an anti-slavery document and it is so consistently with the principles of the Declaration of Independence. We cannot allow ourselves to forget that the same nay-sayers demanded concessions in all three matters-"federalism," slavery, and rights-and it is a species of historical doublethink to make those nay-sayers the heroes of a morality play sustaining human rights.

The particular clause Berns examines is the one at the opening of Article I, Section *9:*

> The Migration or Importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight... .

Berns shows that those with an interest in slavery tried to make that clause appear to be something other than a mere concession to slavery at the expense of the general power of Congress over commerce. If one accepts the large view of commerce set forth by Webster and then by Marshall in Gibbons against Ogden that commerce is all conversation, all intercourse, and that "among the several states" means a great deal more than "between the states "

Constitution-then it becomes clear, as Berns shows, that Congress was empowered to keep slavery confined until 1808 and fully

empowered to strangle it after that date. That it became politically impossible, especially after 1798, to marshall the Congressional forces that would have led to vigorous action against slavery is only another facet of the agony of the house divided. It disproves no part of the argument Berns presents. Layer after layer of gloryspeak, doublethink, and revisionism have tried to obscure the meaning of the Civil War. Those who fought it knew that it was about slavery and freedom. More! The whole history of the country for its first 90 years is a history of the tension between the specific concessions to slavery and the general anti-slavery character of the Constitution.

James Madison comes off badly in the account Berns gives, and I am persuaded that his treatment of him is just. The later Madison is simply not the Madison of *Federalist* 10. Jefferson and Madison were both anti-slavery men. As Harry Jaffa has somewhere pointed out, it was the invention of the cotton gin in 1793 that revivified the otherwise dying institution of slavery. When Jefferson, as Secretary of State, replied to Eli Whitney's application for a patent for the cotton gin, he expressed, as a farmer, a desire to see the invention work.[2] It would indeed be a mean thing to accuse Jefferson of simply abandoning his anti-slavery views in favor of a money profit, and Berns does not even come close to doing that, but a more circuitous linkage is not to be dismissed. Berns shows that Madison allowed himself to be drawn under the forceful leadership of Jefferson and so to abandon his nationalism in favor of Jefferson's strengthening localism. Here and in his treatment of the Alien and Sedition Laws in the second First Amendment book he shows that the cooperation of Jefferson and Madison in the 1798 Resolutions set the country on a course which made the Civil War the only possible solution to the problem of slavery. Those with an interest in it found, about a third of the way into the nineteenth century, that slavery was a "positive good." Earlier on, for those who shared a belief in the Declaration, the thing was, as the Constitution found it, unspeakable.

Part V, on "Religion and Politics," is composed of five chapters dealing with the Supreme Court misinterpretation of the First Amendment, Father Daniel Berrigan, the bishops and the bomb, Jehovah's Witnesses, and, finally, a chapter that does not fit into this

part or any of the others, called "Thinking About the City." This last chapter has, unlike any of his other writings, a kind of resignation about it. As large as it looms, the slavery question is not the whole definition of the Constitution. There are other tensions, and it may be that the very vitality of the country issues from those tensions. The chapter on the city touches perhaps the deepest questions of American life, deeper than the questions of federalism, structure, and even rights. It is appropriate that Berns should have left the tensions unresolved because they are in fact so, but he ends the book by saying:

> The modern city is prosaic because modern life is prosaic. The question-what is the city?-is a reflection of the fact that modern life is prosaic and of our dissatisfaction with that fact in our day.

It is not possible to have been a student of Leo Strauss without becoming keenly aware of the cost of modernity, but the recovery from modernity will also be at great cost. The religious zeal and ethnic enthusiasm witnessed everywhere as the twentieth century draws to a close are unleashing horrid and terrifying forces which may well define the twenty-first century. These are certainly not prosaic things. But the origin of a post-modern period will rest on a yet-unseen philosophic genius of the rank of a Plato or a Machiavelli. Walter Berns does not suffer from megalomania. He is not, and knows that he is not, the epochal intellect. He cannot, nor can we, complain about that. Still, for a book so full of practical wisdom and splendid scholarship to end on such a note of wistful resignation leaves a void. Perhaps Berns meant this to be a reminder of the distance between politics and political philosophy.

The best thing in Part V is Chapter 19, "The Essential Soul of Dan Berrigan," which exposes the mock-martyrdom, the moral posturing, the intellectual shallowness, and the vain dishonesty of that renegade priest who shamelessly taught a generation of youngsters to wash their hands of liberal democracy.

Some make the facile error of excusing Berrigan as an "idealist," but Allan Bloom rightly said that idealism was the most destructive

force in politics. It teaches people to yearn for what cannot be and so, when they are disappointed, transforms them into bitter spoilers. From the first there have been Americans who maligned their own country, but the 20th century has brought forth the greatest number and the most severe sort of these maligners. Joseph Cropsey once keenly remarked that Senator Joseph McCarthy had "given anti-communism a bad name," but only someone stampeded by reaction to McCarthyism could deny that one of the great forces behind the twentieth century hatred of America by Americans has been an inclination, and particularly an academic inclination, toward Marxism. Now that Mandan communism is dead except in Pyongyang and Havana and among unteachable Western intellectuals, it would be a mistake to suppose that the maligning will have died with it. There are other causes. Short of some crypto-Freudian explanations involving a kind of communal self-loathing, laying the blame on idealism may be the easy way out of the problem. The pupils of the pupils of the idealists, however, maybe explained, if not excused, by reference to their sheer ignorance and by their beguilement by seductive information industry and amusement industry charlatans who undermined their respect for their ancestors, and so for their country and its history. It would be amusing to note the message of these charlatans that *we, now,* are the moral generation and that *all* of our ancestors were gluttons, racists, and oppressors; *we,* being without sin, are the Public Interest Research Group destined to effect some sort of final solution for the problems of mankind. It would be amusing, that is, if one had never read Mr. Chief Justice Taney's opinion in the case of *Dred Scott v. Sandford*[23] where he, with poker-faced sobriety, explains that *we, now,* in 1857 would never think such a benighted thing, but the Court is constrained to follow the true meaning of the Constitution which was written by men who uniformly believed that "negroes of the African race" were not truly human and were entitled to none of the "rights, privileges, and immunities" which, to secure for themselves, those bad old 18th century Framers had made that Constitution. If anyone believes in Taney's profession of innocence here, he only proves that Barnum was right. One who recognizes Taney's self-serving dishonesty but

believes his characterization of the Framers to be true is simply ignorant. One who believes that *both* Taney and the Framers were guilty but that his own generation is not, is both ignorant and dangerous. The most recent book by Berns, *Taking the Constitution Seriously,* sets the record straight. For thirty-five years I have been telling students that the single best book ever written on American politics is *The Federalist* and that the second best is Tocqueville's *Democracy in America.* Because *Taking the Constitution Seriously* speaks directly to all of the present misunderstandings-and because it rests on a solid mastery of Tocqueville-I believe I would now have to name it as the second best, or at least as the one book after the *Federalist* most urgently needed to be read.

As slim as it is, given its compass, *Taking the Constitution Seriously is* Berns's *magnum opus:* it is the culmination and the compendious statement of all of his scholarship; it puts forward and never forgets the relationship between the Declaration and the Constitution; it covers all the vital attributes of the Constitution; it shows a thorough and accurate grasp of the relation between the Declaration and Constitution on the one hand and the works of Hobbes and Locke on the other; and it answers beyond the possibility of re-rebuttal virtually every silliness of twentieth century revisionism.

Berns quotes Publius, who remarked that it seemed to have been "reserved to the people of this country ... to decide the important question whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." Berns, *in* his turn, remarks that after two hundred years "we are in a position to say that, under some conditions, some . . . are so capable, but most are not" *(Taking, 12).*[24] He goes on to show that many countries now have written constitutions but that most of these are very fragile. "Why we Americans should be an exception to this dismal rule is an interesting question *(Taking, 13)."* The answer is not simply, as many would assert, luck. It is in the excellence of the Framers and of the Constitution they framed. This is, of course, a higher class version of what every schoolboy used to

know. But it is not just truculent patriotism that makes Berns say this. He is not ignorant of the revisionism that now teaches every schoolboy that his country is not really praiseworthy and that its constitution is either bad or meaningless. He calls attention to historians who insist that the appeal in the Declaration to the laws of nature is not to be taken seriously, that the Founders were, "just like us, happy moral relativists." The problem is that, "[i]ncapable of serious thought themselves, these writers are unwilling to believe the serious declarations of others *(Taking, 17)." Why* are they incapable of serious thought? Berns does not distract us with a careful inquiry into the causes of their incapacity, though he could no doubt make such an inquiry. Perhaps the roots of the problem are Marx and Freud, those twin determinists of our time, each of whom teaches that no one is ever to be taken seriously. The historian cannot say that the devil made him do what he did. He can only say that his mother or his class made him do it. For some reason he cannot see that to say so would be to admit that we ought not to take *him* seriously either. He cannot see that because he has not grasped what that most reflective of determinists, Nietzsche, taught about science and history. He is, in fact, the vanguard of Nietzsche's last man. Or, maybe this is all too generous an explanation. Maybe it is simply because of the democratization of the university that higher education has become merely subsequent schooling, and so it is not only boorish industrialists but also their prissy academic critics who have prospered without learning to read.

This latest book consists of six chapters and an appendix. The first chapter covers the constituting of the American people; the second covers the constituting of their government; the third covers-and not simply in temporal sequence after the first two-the constituting of democracy. The fourth chapter deals with the relation between constitutionalism and the religious problem; the fifth with constitutionalism as such; and the sixth with the "deconstructing" of America. The appendix dissects the most insidious of those deconstructions, Garry Wills's *Inventing America.*

The chapter entitled "Constituting the People of America" states that "before there could be a government of the United States there

had to be a people of the United States" *(Taking,* 22), and at first glance this seems to make perfect sense. Behind it is acceptance of the altogether modern distinction between "state" and "society." Berns is not unaware of the problems with this distinction, but he seems to accept it as necessary here. This leads him to (or follows from) his acceptance of what he shows as Madison's position that there were two compacts *(Taking,* 23). Not until the next chapter-that entitled "Constituting the Government of the United States"-does he make it clear that the first compact was the Declaration of Independence *(Taking,* 67). In this earlier chapter, it is possible to wonder whether the event which constituted the people of the United States had been the Declaration or had been the earlier, 1774 convening of the first Continental Congress. Indeed, given acceptance of the distinction between society and state, it seems hard to resist the earlier date. The Declaration was, after all, an issue *from* the (second) Congress. The need in the first place for some notion of two compacts arises from recognition of the fact that the Declaration does not establish a government. It is the Constitution that constitutes. The Declaration merely declares: it declares the *right,* by nature, of the people of the United States to constitute for themselves a government. It is just this right and its demonstration in the Declaration that legitimates the Constitution. Without the Constitution, the acts of the Congress established under it would not truly be law, and if it were not for the *right* made manifest in the Declaration, the Constitution of the United States would be no more than a seditious insult and an attempted usurpation of the rightful authority of King George and his heirs. Thus, the Constitution is unintelligible without reference to the Declaration and one of the great beauties of Berns's book is that it clarifies and never loses sight of the dependence of the one upon the other.

The slight indistinctness of whether the people of the United States were constituted in 1774 or in 1776, however, remains. Perhaps the difficulty lies in the idea of two compacts. Perhaps Berns, and even Madison, has gone astray on this. It is, after all, a denial of Hobbes's proposition that there can be no contract *between* the people and their sovereign, no second compact. There can be no

second compact because the people are constituted out of the inchoate state of nature and at the instant of their constitution, and by the very act of that constitution the sovereignty is created. *Before* there was a sovereignty, they were not *a* people, capable of acting as one and of contracting. They *became* a people by giving up their rights-except for the inalienable ones, for the sake of securing which they gave up all the others-to a sovereign. Now that they *are* a people, they have no inalienable rights left and therefore they have no bargaining chips. Without bargaining chips, they cannot contract. They have nothing to offer up. In fact, all that they have that is negotiable, the sovereign has *for* them. He represents them. He is them.[25]

This is, as all would agree, pretty harsh doctrine. Berns wants us to see that *constitutional* government is *limited* government, and he therefore relies on the modification of Hobbes by Locke. I am of the view, however, that Locke does not differ from Hobbes in this matter as much as he would have us think that he does. First of all, what Hobbes calls the "sovereignty," Locke calls "the legislative power," and my analysis of the eleventh chapter of Locke's *Second Treatise,* the chapter entitled "Of the Extent of the Legislative Power," is that the appearance of a strict set of limits on the legislative power melts into the mists as the chapter progresses. To see this it is only necessary to look at the United States Constitution and to recognize that nothing-nothing, that is, except self-restraint-keeps the people of the United States from amending that part of Article V of the Constitution that provides that no amendment to the Constitution may deprive a state of its equal suffrage in the Senate without its consent. There is a legislative power in the narrower sense and this may indeed be limited by the people who vest it in a legislature. But there is what Locke calls the "supreme power" which is the ultimate power of the people to give itself the law, that is, the ultimate legislative power. It is this that in Locke takes the place of the "sovereignty" in Hobbes.

Berns seems to solve the problem by insisting that we don't *have* a "government," separated from the people in the United States. We have, instead, merely an administration. The people have given up

nothing. The people *keep* the government in their own hands. This seems to me as-how may this be said?-as too principled an explanation. I believe that the true explanation is rather as Berns states it in the chapter entitled "Constituting the Government of the United States." It is that Locke does not solve this problem in principle because it cannot be solved in principle. Locke and the American Constitution solve the problem *in practice (Taking,* 74). This is the whole meaning of the notion of *Federalist* 10 that it is in the extent and proper structure of the Union that there is to be found a republican cure for the diseases most incident to republican government. This is, after all, what Berns means in Chapter *5,* "Constitutionalism as Such," when he defines constitutional government as government by process, government by due process, indirect government-sedate, formal, patient government rather than impatient and impassioned government *(Taking,* 184-85).

The notion of two compacts, and the distinction between state and society that underlies it, contradict Aristotle's distinction between form and substance of a political entity. To speak of a society prior to its state is to speak of the form of a formless thing. Hobbes does not quite abandon this aspect of Aristotle when he fashions for us the notion of a state of nature. At the instant when the inchoate mass of individuals (who had been atoms floating separately in moral space) give up their rights, both the state and the society, those twin inventions of modernity, come into being. I do not believe that Locke quite changes this, because Locke counters Hobbes in this simply by denying that the state of nature goes away once and for all when the sovereignty is created. The state of nature, so to speak, hovers. This is the meaning of the last four chapters of the *Second Treatise* and of the right of revolution explained there. This is, of course, what the Declaration itself means when it states the right of a people to alter or abolish its government. This is why it would make sense to speak of the Constitution itself as *a revolutionary* act in that it is an act of the people which abandons its previous political order and, going back to first principles-that is to say, to its primordial and natural right to give itself the law- reorders itself *de novo.* This is a tough nut to crack. Maybe one could say that both "state" and society came

into being with the 1774 convening of the Continental Congress. The origin of the United States, the "first compact," then, is that act and not the Declaration. The Declaration is merely the manifestation of the natural justice of that 1774 act. It is not the beginning of the United States, but it is the beginning document of the United States. It loses nothing of its force and dignity if it is so regarded. It is still the statement of the true justification in nature itself of the coming into being of the United States. One would then have to say that the "state" which came into being in 1774 was an altogether shaky one. The Declaration, again, does not constitute, it merely declares. Thus, the first *written* constitution, but not the first constituting of the United States, is to be found in the Articles of Confederation. That constitution, too, was defective. The Constitution of 1787 was then, not the *second* compact as Madison, and then Berns, would have it. It is simply *a new* compact. The 1776 Declaration does not go back to, but it clearly states, first principles. Whether it be thought that it is the action of 1774 or the Declaration of 1776 that *constitutes* the United States, it would have to be said that the Constitution reconstitutes it but does so with perfect fidelity to the eternal, the undeniable, the self-evident truths of the Declaration.

The present nonsense about "animal rights" is nothing short of alarming. It has its roots in the sentimentality fostered by Rousseau which makes man not a reasoning, but a compassionate, being. The new nonsense is alarming because it can only end in treating animals like people or treating people like animals. Berns shows clearly that animals can have no rights because rights are related to government. Governments are instituted *among men* to secure rights. Animals cannot secure rights because they cannot constitute government and they cannot constitute government because they cannot reason and they cannot speak. It is altogether uninteresting in this regard to cite research showing that dolphins and apes "communicate." Aristotle had not said that man was a political animal because he *communicated.* He said that man was a political animal because he was rational, and other animals, though they were social (and though they communicated) were not political because they were not rational. They cannot *argue* about the good and the bad, the noble and the

base, the just and the unjust. As Leo Strauss once put it, dogs just do doggy things and there is no changing that. As Hobbes had put it, "To make covenant with brute beasts is impossible; because not understanding our speech, they understand not, nor accept of any translation of right; nor can translate any right to another; and without mutual acceptation there is no covenant." [2fi] Berns makes it very clear that this does not mean that men are free to treat animals inhumanely, but we are reminded that if they did so, they would indeed be inhumane but would not thereby be vegetables or minerals. If the animal rights folks can show me that they can persuade lions to respect my rights, I shall be prepared to entertain anew the proposition that I ought to respect theirs. It is *wrong* for a man to treat an animal cruelly, but the wrong lies not in a violation of the animal's "rights." The traditional doctrine of natural right was a doctrine not of amoral rights but a doctrine of moral duties. The modern doctrine, begun by Hobbes, denies the possibility of genuine moral right and wrong. In its place it puts the view that wrong consists in nothing whatever except the violation or abridgment of a right. But that doctrine was a doctrine relating to men alone. That is why the modern doctrine of natural rights is as well called the doctrine of human rights, or the "rights of man." We remember a playmate who liked to pull the wings off of flies. We knew that was wrong, so we found a new playmate. But it never occurred to us to speak of flies' rights.

One of the most satisfying parts of Chapter 1 is Berns's treatment of Tories, Indians, Blacks, and "Jews, Turks, and Infidels." The Tories *could* have become part of the people of the United States but their loyalty to the crown was identical with their excluding themselves from that people. The case of "Jews, Turks, and Infidels" is solved by the Constitution for the United States as such, but not surely so for the several states. It is solved for the United States for the reasons stated in Chapter 4, "Constitutionalism and the Religious Problem." That chapter does not differ in important respects from Berns's previous treatment of the matter, with which we dealt above. Indians and Blacks present problems that differ from the others and from each other. It is not until the Fourteenth Amendment that the

problem is solved *in principle* for the Blacks and for Indians as individuals, but, of course, not for Indians as tribes. Despite the current rage for "diversity," America is composed of individuals who have rights, not of corporate entities, or tribes, or "communities." The Indian tribes have rights *vis-a-vis* the United States not as *parts* of the United States but as distinct tribes or nations separate from but co-located with the United States. Those rights are to be met by a curious adaptation of the principles of international law. To claim a *constitutional* right, the Indian individual must renounce his attachment to, though not his affection for, his tribe just as a Greek or a Scot must utterly renounce his attachment to Greece or Scotland. In 1893, my father came from Scotland to the United States. Five years later he became a citizen of the United States, a part of the people of the United States, having in open court, as his naturalization certificate attests, "taken and subscribed the oath required by [the] laws to support the Constitution of the United States and to renounce and abjure all allegiance and fidelity to every foreign Prince, Potentate, State, or Sovereignty whatever, and more particularly all allegiance which he may in anywise owe to the Queen of Great Britain and Ireland of whom he was heretofore a subject." Once sentiment is moderated by clarity and reflection, it can be seen that the Indian can be a member of the tribe *or a* member of the United States. He cannot by virtue of being a part of the United States be not a part of it. He may have tribal rights under the international law which the Constitution acknowledges, but he cannot have tribal rights *as* constitutional rights. The two are utterly incompatible.

Well, as was said, the Fourteenth Amendment solves the problem of the Indian and the Black in principle. As we said, the problem of limited government may be solved not in principle but only in practice. Contrariwise, the problem of the full incorporation of the Blacks and of those Indians who "leave the reservation" into the people of the United States is easily and definitively solved in principle but continues to be painfully difficult to solve in practice.

The other matter in *Taking the Constitution Seriously* to which we must attend is that of democracy and majority rule. Berns reminds us, as had Diamond, that simply establishing democracy was

not the goal of the Framers. Now this is the sort of thing which, in keeping with the revisionism of the twentieth century, is treated as proof that the Framers were anti-democratic, by which it is meant that they were in favor of rule by some privileged minority. This is not a near miss. It is a completely false view of the Founding. In the 1960s, the New Left, while it had the wrong answer, came closer to knowing the right question when it demanded "participatory" democracy. If by "democracy" one means popular rule or rule ultimately by the considered judgment of the majority, the Framers were not against democracy; they were against participatory, or direct or simple, democracy. The traditional answer to the problem of the excesses of democracy-the cruelty and rapine of the majority-was the "mixed regime." The mixed regime, a mixture of the vices of the many poor and those of the few rich, with such admixture of the virtues of the good few as one might be lucky enough to find, was the solution offered in the third and fourth books of Aristotle's *Politics* to the problems of the vices of the few rich or those of the many poor. That solution, in literature, persisted even up to, and including, Machiavelli's *Discourses.* Despite Montesquieu's opinion that he had found in the English constitution the separation of powers, what he had really found was the relative perfection in practice of the mixed regime. He found the separation of powers there because he was able to identify the "executive power" with the crown. (By the way, Montesquieu has *two* executive powers in his scheme: that which is concerned with domestic law and that which is concerned with the laws of nations. These correspond exactly with what Locke had called the executive power and the federative power. And, also by the way, these two executive powers are, while distinct, vested in the same hands in the United States Constitution and this is just as Locke said it made sense to vest them.)

Two vital things have happened since Montesquieu viewed the "separation of powers" in the English Constitution. First, the crown has utterly given up its executive power to the Cabinet, which is a collection of ministers that, only as a fiction, serves at the pleasure of the crown.. In fact, it is a mere committee of the House of Commons. Second, to the extent that one views English government as mani-

festing not the separation of powers but the mixed regime, it is progressively losing its mixture. The crown is completely disabled politically, and the House of Lords is hardly more than a high-toned debating society. As the 20th century closes, the debate in the House of Lords is more intelligent, more impartial, and more moving than that in the House of Commons, but the consequences of that debate don't amount to a hill of beans if there is a determined majority in the Commons.

At the time of the American Founding, as Berns reminds us, the materials for the establishment of a mixed regime were absent. There was no acknowledged upper class to which a lower class showed deference. The tendency toward popular government was much older than the coming-into-being of America, whether one puts that coming-into-being at *1774 or* 1776. The prohibitions in sections 9 and 10 of Article I of the Constitution against titles of nobility is intended to preserve that classlessness which is the ground of the necessity of a wholly republican solution to the problem inherent in republican, that is to say, popular, government.

That republican solution, as Berns delineates it, is the consequence of the "new science of politics." That consequence is an array of new devices, and it is vital to note that devices or mechanisms take the place of the moderating influence of classes. The greatest of all these devices is representation. It is not that representation is new. What is new is the total absence of the direct action of the majority. Now every action of the majority is refined by being filtered through the medium of representation. The other vital mechanisms are the establishment of a surely independent judiciary, the separation of powers between the executive and the legislative, and the civilizing influence of the checks and balances within the legislative power. And, as Publius especially adds to the list, the enlargement of the orbit of government. That is, a large territory and population are not only not incompatible with, they are absolutely essential to preventing a single faction from being at the same time an absolute majority. At times Berns seems to explain these mechanisms as keeping the majority from having its way. My own view is rather that they compel the coming-into-being of a majority which is already moderated by

process and by compromise, and then and only then is the majority allowed to have its way. This means that a majority formed up out of a great variety of factions and sects, and therefore out of a population whose religious views are toned down and whose interests are splintered by the existence of a free and vigorous commerce, will be allowed to have its *considered way.* A simple majority is an impassioned majority and passionate rather than considered rule is cruel and destructive. The people as a whole, in their most sober moment, know this and so they voluntarily shackle themselves with these mechanisms. It maybe that for a man sobriety is the rule and drunken madness the exception, but for a people the reverse is true. Although he appears at times to argue that the Constitution *blocks* the majority, Berns comes closer to stating the matter as I think it should be stated when he says that "the purpose of representation is to promote or permit government by constitutional rather than simple majorities *(Taking,* 143)."

Taking the Constitution Seriously is the distillation of a lifetime of constitutional scholarship. The reader can extrapolate from many of its arguments to some previous, more detailed work. It does, however, display clearly his movement away from the demand in his first book for a jurisprudence that cured the Constitution with virtue and natural justice. This latest book is, so to speak, a reconcilement with the limited ends of the Constitution. Perhaps those earlier demands were a manifestation of that heady idealism which at the outset of this review I maintained was the only proper ground of scholarship but which, without its transformation by sober scholarship, can remain the volatile and destructive force which, as I noted, Berns's lifelong friend and colleague, Allan Bloom, showed it to be. Likely enough that early, heady idealism was in part the consequence of the exposure through the medium of Leo Strauss to that rich atmosphere of genuine political philosophy genuinely studied. That genuine political philosophy can make one intellectually drunk, but the genuine study of it is its proper sobering influence. The generous bequest of Strauss was that he introduced his pupils to both, and it may be said that it is better to have sobered up than never to have been drunk at all.

I have heard Berns criticized because of his apparent move to "mere majoritarianism." Perhaps I have become even more of a simple majoritarian than has Berns, because to this complaint I have to put the question, "What would you have?" If one is not prepared to trust the majority, he must either compel it be more trustworthy or he must trust something else. The only other thing is some minority or other. The few rich cannot be trusted, and, as Aristotle already noted, the presence of a trustworthy few who are good and wise is a sometime thing, and their presence in a political setting which would defer to their rule is a very rare thing indeed. Since in America there does not exist, as a class, a few of this sort and since there certainly does not exist the political setting which would defer to such a few, there is not even the basis for a mixed regime, not to speak of an aristocracy. We are stuck with popular government. This is what the Framers clearly saw, and they found a cure which, as Berns well shows, has given us the best and the most stable and the most free and the most satisfying and the most self-curing government in the history of the human race.

The whole of *Taking the Constitution Seriously is* adequate answer to those who would fault Berns's majoritarianism. Chapter IV, entitled "Constitutionalism and the Religious Problem," recapitulates his demonstration, discussed above, that the very possibility of constitutional government-which this country perfected-rests on the demotion of religion to something that occupies us a half-day a week. Our consuming passion is consuming -that is, commerce, acquisition, comfort. Those rather silly, left-wing complainants who denigrate "property rights" are reminded by Berns that there are no property rights in the Constitution; there is only the human right to have property and not only is this a human right but its vigorous fulfillment is the condition of a peaceful, mutually compromising, self-governing people.

Chapter VI, entitled "Deconstructing America," answers a variety of other critics of the American political order. Most importantly, it dissolves the heresy that judges ought to make or find new rights *(Taking, 200)* and it shows that for the Court to pretend to do so is for it to lead us back into that state of nature where life is solitary,

poor, nasty, brutish, and short and from which we gladly fled into the arms of civil order *(Taking,* 229). There is an extensive discussion of the Fourteenth Amendment which insists that the Due Process clause only restricts state courts and the Equal Protection clause only restricts state executives. This compels me to re-examine a view which I published at the same time as *Taking the Constitution Seriously* which includes the argument that the Equal Protection clause does limit state legislatures. But for one thing, I could be satisfied with either Berns's interpretation of the Fourteenth Amendment or my own. That one exception is that I believe that Berns has simply accepted as irreversible the absorption of most of the first eight amendments into the Due Process clause of the Fourteenth Amendment. My own view, as I indicated above, is that nothing, absolutely nothing, is by its very terms swallowed up out of the first eight amendments into the Fourteenth. [27] Perhaps this view is quixotic. Or, perhaps it is simply another reminder of the tension between scholarship and citizenship.

The Appendix to *Taking the Constitution Seriously* looks like an afterthought, rushed along with the rest to the printers. Had Berns had the chance, he might have incorporated it into the last chapter, because Garry Wills is, above all, a deconstructionist of the American political order. That Appendix is a critique of Wills's *Inventing America.* In November of 1992, Berns published in *Commentary a* review of Wills's *Lincoln at Gettysburg.* Here Wills had once again denatured the Declaration of Independence by rendering it much as Mr. Chief Justice Taney did in *Dred Scott.* It is quite enough to say here that, both in that Appendix and in the 1992 review, Berns refutes by clear reference to Lincoln's earliest writings the assertion by Wills that Lincoln had trumped up in 1863 the whole notion that the Declaration made all men out to be equal and that that was the very foundation of the American political order. And, by reference to Jefferson's latest writings, Berns refutes the silly view of Wills that Jefferson had never believed in all that natural rights rot and had disowned the editorial destruction by the Continental Congress of his original Declaration. Berns calls Lincoln "America's poet" *(Taking 22),* but he does not mean by that what Wills would have us

believe, that Lincoln made things up.

This is a general view of the work of Berns which I believe is, if not in its soundness at least in its scope, sufficient. In focus, Berns's work is, as was said, part of that great archaeological dig into and resurrection of the meaning of the Founding. In substance it is characterized by the most comprehensive scholarship and by the keenest analysis. In form it is clear and straight. It is utterly without sententiousness. There are other authors, some of whom both Berns and I admire, whose work is, in my view, marred by a kind of flight into obscurantism. Perhaps this is because they doubt their own scholarship and take refuge in a kind of literary winking and eyebrow-raising. Or perhaps it is because they do trust their scholarship and do not really want to go where it is taking them. There is none of this in Berns. He never flinches and he is never ostentatiously esoteric.

In writing on the Constitutional Convention, Berns tells us that there was no persiflage *(Taking, 96).* Maybe not, though I seem to remember hearing that when Franklin proposed calling in a clergyman for daily prayers, Hamilton mumbled that they needed no foreign powers intervening. But it is clear, at least from the written record, that the members approached their work with due sobriety: Berns's work is also marked by due sobriety, but, thankfully, his wit sometimes seasons it.

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NOTES

It is a requirement of form if not of reason to declare that this review expresses only the opinions of the author and in no way represents the official views of the government of the United States or of any agency or department thereof.

1. *In Defense of Liberal Democracy* (Chicago: Regnery [Gateway Editions], 1984). Herein cited as *Defense.*

2. See Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976), p. *x.* Herein cited as *Future.*

3. *Freedom, Virtue and the First Amendment* (Baton Rouge, LA:

Louisiana State University Press, 1957). A paperback edition was published in 1965 in Chicago by Gateway Editions, Henry Regnery Co. References herein will be to the 1965 paperback edition. Herein cited as *Freedom.*

4. Cf. Robert F. Sasseen, "Freedom as an End of Politics," *Interpretation* Vol. 2, No. 2 (Winter 1971), 105.

5. The critique is of Boorstin's *The Genius of American Politics.*

6. Berns says, at page 76, that the effort to get the Court to rule that the Fourteenth Amendment incorporated the Bill of Rights "proved successful in 1925 in the case of *Gitlow v. New York,"* 268 U.S. 652, "so far as the First Amendment is concerned." I think that it was not really until 1931 that the Court so ruled, and I suspect that Berns, if pressed, might amend his 1957 statement slightly. What the Court (Mr. Justice Sanford) said in *Gitlow* was, "For present purposes we may and do assume that freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and `liberties' protected by the due process clause of the 14th Amendment from impairment by the States." In other words, the Court said that even if the First Amendment did apply to the states, New York still might punish Gitlow. By sleight-of-hand, the Court in *Near v. Minnesota* (Mr. Chief Justice Hughes) asserted, "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." 283 U.S. 697 (1931). But if *Gitlow* does not leave the matter open to doubt, the English language is incapable of expressing doubt. Cf. *Future,* 166.

7. *Cohen v. California,* 403 U.S. 15 (1971). See Berns, *Future,* Chapter 5, and especially pp.188-201.

8. *Barron v. Baltimore,* 7 Pet. 243 (1833).

9. *Taking the Constitution Seriously* (Lanham, MD: Madison Books, 1992, first published by Simon and Schuster in 1987). Herein cited as *Taking.*

10. In the Introduction to my *Frankfurter and Due Process* (Lanham, MD: University Press of America, 1987), in order to make the strongest possible case against the incorporation doctrine, I did

in fact take the second of these positions, although for thirty-five years I have had the third possibility in mind.

11. Freedom, 134, 161, 163, 171.

12. Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England,* ed. Joseph Cropsey (Chicago: University of Chicago Press, 1971).

13. Op. cit., n. *15, supra, ix.*

14. Kant, Immanuel, *Perpetual Peace,* ed. Lewis White Beck (New York: Liberal Arts Press, 1957; Macmillan, 1989), *p. 30.*

15. See my "The New Republic in More's *Utopia," Political Science Quarterly,* Vol. 84, No. *3* (September 1969), *387,* and particularly at pp. *408-409.*

16.Democracy in America, Vol. *2,* Second Part, Ch. 15, about the tenth paragraph. See *Future, 34.*

17. See Dennis G. Stevens, "On Charles Beard's Constitution," *Political Science Reviewer,* Vol. 21 (Spring 1992), 219.

18. Concurring in *Gideon v. Wainwright, 372* U.S. *335* at *346* (1963).

19. See n. *13, supra.*

20. Cf. my "The Constitutional Completion of the Liberal Philosophy of Hobbes and Locke," *Political Science Reviewer,* Vol. *17* (Fall 1987), *267.*

21. See my "The Constitution and What it Meant to Corwin," *Political Science Reviewer,* Vol. 10 (Fall *1980),* 1.

22. November 16, 1793. See Adrienne Koch and William Peden, ed., *The Life and Selected Writings of Thomas Jefferson* (New York: Modern Library, 1944), *526-27.*

23. 19 *How. 393,* at 409-411, (1857).

24. The quotation is from *Federalist* 1.

25. Thomas Hobbes, *Leviathan* [1651], ed. by C. B. Macpherson (New York: Penguin Books, 1985), Ch. 18, p. *230.*

26. Leviathan, Chapter 14, a little more than half way through.

27. See the same text cited in n. 10, *supra.*