

REVIEWS

POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES. By Thomas I. Emerson and David Haber. Buffalo: Dennis & Co., 1952. Pp. xx, 1209. \$7.50.

PROFESSORS Emerson and Haber have given us a volume of materials on political and civil rights that is remarkable in its coverage and the thoroughness of its documentation. The basic organization is neither historical nor doctrinal nor institutional, but deliberately factual, a series of human freedoms and controls as the ordinary citizen would conceive them. The nine chapters of the book take up, in order, security of the person, fairness in governmental procedures, the right of franchise, political organization and expression, communication which is harmful or untruthful, control over places and methods of communication, academic freedom, freedom of religion, and discrimination in housing, education, transportation, public accommodations, and employment. The materials are drawn from a rich quarry of sources; in addition to a modicum of judicial opinions, there are excerpts from the classics of civil liberties, Milton and Mill, from commentators legal and non-legal, from Pope Leo XIII and Max Weber, from the self-censorship code of motion picture producers and the declaration of principles of academic freedom by the American Association of University Professors. There are copious references to decided cases and to recent occurrences, and there are voluminous bibliographies throughout.

It would be evident, even without the editors' prefatory remarks, that the book is designed for a variety of readers—law students, lawyers, social scientists, and citizens at large. To some extent the heterogeneity of the audience has affected the accents employed by the editors. In the hands of law students, for example, even more generous printing of the text of statutes and ordinances, and particularly of draft statutes and ordinances, would be highly useful, to develop the legislative faculty, to test the practicability of court-imposed standards, and to probe the soft spots in the law. For legal instruction such materials could well displace, if necessary, some of the more purely informational and cumulative accounts of current events in the area of civil rights. As the book stands, however, its usefulness is very great indeed. For seminars in civil rights it provides problems, data, and leads for investigation and reports. The lawyer with a civil rights case, or the law clerk to a judge in such a case, would be irresponsible if he failed to consult this repository, and he would be well-advised to consult it first. And its contents ought to be familiar to lawyers whose concern with the subject is less direct but, by reason of the very nature of the profession, no less real and urgent.

If the book leaves one with any regret, it is that the editors have adhered so exclusively to the arrangement by factual topics. The pictorial realism

achieved by that arrangement might have been given greater perspective had the editors allowed themselves to focus also on institutional problems. Underlying the whole subject are issues of ways and means, of the roles that should be played by courts, by legislatures local and national, and by other agencies of civilization. These problems are implicit throughout. To have made them more explicit by independent and concentrated attention would, it seems to me, have given the book even greater philosophic depth and even more utility for lawyership. One or two illustrations may point my meaning.

In the Foreword, Robert M. Hutchins has aptly observed: "These cases and materials will force the reader to re-think the most fundamental questions: the purpose of human life and of organized society; the relation of man to the state; the conflict between freedom and security; and even, as in the opinion of Chief Justice Vinson in *United States v. Dennis*, the nature of truth itself."¹ One of the most fundamental questions we have been forced to re-think, certainly after the restrictive-covenant cases, is the relation of private and public power in the restriction of human freedoms. One aspect of the problem is the meaning of "state" action under the Fourteenth Amendment, and this the editors have developed in the first chapter, on security of the person, but only insofar as it pertains to freedom from violence. By this scrupulously "non-doctrinal" arrangement the problem is given, paradoxically, an unduly technical orientation. Not until we reach a section on discrimination by realtors and landlords, at page 1013, do we come to grips with *Shelley v. Kraemer*; and likewise the cases on company-towns, on primary elections, and on radio reception in busses, all of which have some light to throw on the basic problem, are relegated to their several topical chapters. All legal private power is in a sense delegated public power; in building a fence or making a will or forming a corporation or renting rooms to guests at a hotel, each of us is acting as a little sovereign. How far is it proper and desirable that constitutional guarantees be imposed to limit our freedom of action in these and other capacities? These inquiries will doubtless be familiar to the law student who has had a general course in constitutional law before using this book; but it is the non-legally trained reader, inclined to be most impatient with "legalistic" analysis, who would profit most from systematic exposure to these legal-philosophic problems which transcend the separate categories of human rights.

Lawyership, too, I have suggested, would be promoted by a somewhat less exclusive focus on the topical subject-matter, and more general consideration of institutional devices. As this is being written, the most important civil-rights cases presently pending are those involving segregation in public schools. How could a lawyer most effectively reach the minds of judges on that issue? What problems are most vexing; what data most helpful? I venture to think that reports of tests made by psychologists, as ex-

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hibited in the chapter on discrimination, assessing the "psychodynamics" and "ego attitudes" of Negro and white school children, are not likely to prove compelling on the judicial mind. The judge of good will is apt to be satisfied with his own intuition for the proposition that companionship in learning makes for fellowship in life, perhaps remembering *Lycidas*:

"For we were nursed upon the selfsame hill,
Fed the same flocks, by fountain, shade and rill."

Nor is he likely to need much help in disavowing the unctuous language in *Plessy v. Ferguson*² to the effect that if the enforced separation of the races stamps the colored race with a badge of inferiority it is only because the colored race chooses to put that construction upon it. What the judge stands most in need of from the advocate, or so it may be guessed, is counsel on the problems of judicial administration which would be presented by a decree requiring desegregation. What would be the problems of supervision, for example, in the re-creation of school districts in residentially segregated communities? Again, the problems transcend the specific subject matter. They call to mind experiences and analogies such as antitrust decrees, "umbrella" receiverships, petitions for the supervision of elections, and efforts to secure judicial review of gerrymandered electoral districts. If for one reason or another the Court is loath to overrule the "equal but separate" doctrine, could the Court drop the whole problem at the door of Congress, under Section Five of the Fourteenth Amendment? What analogies are there for congressional supersedure of constitutional doctrine, in such fields as just compensation, intergovernmental immunities, state regulation of commerce, and illegally obtained evidence in state trials? This is not to suggest that a book on civil and political rights must be a book on law in general. It is only to insist that a "civil rights" lawyer, like a patent lawyer, may be exceptionally effective in the degree to which he perceives the more general in the particular; that sometimes, and judiciously, a "doctrinal" approach may be the most "functional"; and that more cross-lights from within and without the field of civil rights would make this searching study even more illuminating.

But these are really suggestions for a second edition. Meanwhile we can only be grateful to Professors Emerson and Haber for putting their learning and energies so lavishly and devotedly at our service. If the bar would turn as eagerly to this volume in idle hours as to a book, say, of judicial humor, or as assiduously in working days as to a commentary on the latest revenue act, the profession would give some evidence, which many of our lay friends are seeking, that its historic concern for human freedom has not abated.

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2. 163 U.S. 537, 551 (1896).

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