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Recent Books on Civil Liberties

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THE PEOPLE AND THE COURT. By Charles L. Black, Jr.
New York: The Macmillan Co., 1960. Pp. 238. $5.00.
POLITICAL FREEDOM. By Alexander Meiklejohn.
New York: Harper Bros., 1960. Pp. 166. $3.50.
AMERICAN RIGHTS. By Walter Gellhorn.
New York: The Macmillan Co., 1960. Pp. vi, 232. $4.50.
THE SUPREME COURT AND CIVIL LIBERTIES. By Osmond K. Fraenkel.
New York: Oceana Publications, Inc., 1960. Pp. vii, 173. $1.50 (paper).

I have selected these four books because they form a progression from the general to the particular. The first is an analysis of and a defense of the doctrine of judicial review, particularly in its relation to the Bill of Rights; the second is a philosophical study of the First Amendment's guarantee of freedom of expression; the third is an account of how the courts have dealt with recent civil liberties issues; and the last is a bare recital of all civil liberties cases decided by the United States Supreme Court in the last 25 years, with mention also of the most important earlier ones. Since this last work is by me, I will say no more about it than that it was intended to be wholly noncommittal—only in the starring of the cases listed at the end have I permitted myself any editorial expression. And that relates only to whether or not the asserted claim of liberty was upheld by the Court.

Professor Black's book, on the other hand, lays no claim to being dispassionate. He strongly believes in the importance, indeed the necessity, of having a court of last resort which will decide conflicting claims with regard to the constitutionality of laws or other governmental action. He takes the original position that the function of such a court is not merely negative, in declaring what may not be done, but also affirmative, in legitimizing what has been done. While the book is in no way restricted to civil liberties matters, the author dwells at length on them.

Professor Black is intolerant of the view that judges should exercise "self restraint" in their constitutional rulings. He sharply criticizes Professor Thayer for his expression of that view and claims that the authorities relied on by Thayer in no way support the conclusion that judges must uphold congressional action if sustainable by any rational consideration.[1]

Black's view is that the attitude of the judges must vary with the character of the constitutional provision they are called upon to expound. Where the Constitution contains a grant of power, it should be liberally construed so as to permit the government to be effective. But insofar as it contains a positive restriction on power—as, especially, in the Bill of Rights—the restriction should be liberally construed lest a narrow construction deprive the restriction of vitality. He constantly reminds the reader that the purpose of a restriction is to hobble the legislature. He is scornful of the notion that the hobbling should be

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1 BLACK, THE PEOPLE AND THE COURT 193-209 (1960).

reduced to what might seem agreeable to current opinion or reasonable in the light of particular circumstances. He stresses, moreover, the fact that these restrictive provisions "inscribe our highest political ideals."

> . . . . If we construe them away, laughing behind our sleeves at the "perfectly legal" legerdemain with which the trick has been managed, we construe away the dignity and worth of our nation. If we use the weapons in the arsenal of legal technicality to cut them down to mere historical curiosities, niched images for hasty genuflection and disregard, then our talk of "liberty" and "justice" is merely disgusting; we can at best hope to defraud others for a while, as we play the most dangerous of games — that of defrauding ourselves.[2]

The notion that political processes can take care of the guarantees of the Bill of Rights is pure illusion—those who have least political power have most need to invoke the guarantees. He rejects the claim that there is an inconsistency in deploring the "due process" decisions of the "old" Court while applauding the Court when it upholds civil liberties. For the earlier Court was wrong in giving to "due process" a "wild" rather than a broad construction. And he says:

> These matters have been perplexing because of the background, prior to the middle thirties, of excessive judicial solicitude for the interests of business and for the preservation of the laissez-faire process. A strong and tenacious presumption of constitutionality is justified in cases of this type. The extension of due process to prevent economic regulation was a tour de force to begin with; its justification ran to the effect that to take away a man's or a company's property, or to limit the free use of that property, *without any rational basis,* was "confiscatory," "arbitrary," and hence denied due process of law. The showing of the *absence of a rational basis* was thus a vital part of the bringing of a case of this sort under the due process clause. Beyond question, a court should assume that legislation has a rational basis until the contrary clearly appears; that is one concrete meaning which most of us would give, I should suppose, to the concept of deference to the legislative branch. Notoriously, the old Court did not in practice, at least in many cases, actually indulge this assumption; indeed, it nullified legislation when a rational basis was rather clearly shown.
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> This led many people to cry for a return to a "presumption of constitutionality." In context, what they pretty surely meant was a return to the presumption that legislation had a rational basis — that it bore some arguable relation to a permissible social end. But they expressed their protest in general terms that plague us today.
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> For all this has no application (to continue our example) to the problem of free speech. It doesn't make any difference whether a law "abridging the freedom of speech" has a rational basis or not, any more than it does whether a law abolishing trial by jury in the federal courts has a rational basis, as it well might have. Both laws are expressly forbidden, without any reference, express or implied, to the tenability of the policy arguments by which they might be supported. Most laws suppressing free speech, and all such laws which could pass Congress, have a rational basis, in the sense that some rational men may believe their enforcement

2 *Id.* at 100.

> would do good. The suppression of free speech seems quite evidently rational to all but a small fraction of humanity. The framers of the First Amendment were not foolish enough to be unaware of this. They committed our nation to take a chance on a higher rationality.[3]

While Professor Black admits that some reservations must be imported into the language of the free speech guarantee, Professor Meiklejohn resolutely maintains the contrary. However, he, to some extent, accomplishes the same end by a limitation on the character of the freedom that is guaranteed without exception. In his view it is only the freedom necessary to preserve the public interest in the fullest discussion of political matters. Expression directed to a private interest, be it of the lobbyist, the union member, the Witness of Jehovah, or the commercial organs of expression, are not protected by the First Amendment, but only by the due process clauses of the Fifth and Fourteenth Amendments. This formulation leaves a large area open to public regulation, too large a one in my view.[4] And it creates a logical difficulty with regard to state legislation restricting political expression. This is not protected by the absolute language of the First Amendment which restricts only Congress. State laws come under scrutiny by federal courts only by virtue of the due process clause of the Fourteenth Amendment. Does that acquire a different meaning depending on the character of the state legislation being considered and, if so, by what justification? Professor Meiklejohn doesn't say—indeed, it does not appear that he is conscious of the difficulty.

Part of Meiklejohn's book consists of articles and letters dealing with academic freedom, congressional committees, and the privilege against self-incrimination. In one of these he criticizes Mr. Justice Frankfurter's concurring opinion in the *Dennis* case[5] that the Bill of Rights laid down no new principles, but simply embodied guaranties and immunities inherited from our English ancestors. This, he says, seems to him to "sap the very foundation of our American political system," which instituted a relation between the people and the legislature unknown to the English ancestors, as, for instance, that "Congress shall make no law respecting an establishment of religion." [6] Professor Meiklejohn stresses the essential character of the federal government as one of limited powers, both in the explicit language of the Constitution and by the specific restrictions of the Bill of Rights.

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3 *Id.* at 220-21.

4 A position shared by Professor Paul G. Kauper of the University of Michigan School of Law. In a letter to the NOTRE DAME LAWYER of July 6, 1960, Professor Kauper said:

> My criticism of Meiklejohn is that he is too rigid and artificial in the distinction he draws and in suggesting a legal pattern that will take account of these distinctions. I think that the attempt to draw a line for the purpose of the distinction he establishes is much more difficult than Meikeljohn appears to concede. Rather than follow Meiklejohn's idea that speech relating to public issues is protected by the First Amendment whereas the other types of speech are protected by the Due Process Clause, I would say in view of the difficulty in making these distinctions that the First Amendment is relevant with respect to all these problems, but in application of the balancing process I would attach greater or less weight to the particular freedom asserted depending on the purpose to which it is directed. Letter in the files of the NOTRE DAME LAWYER. (Ed.)

5 Dennis v. United States, 341 U.S. 494, 524 (1951).

6 MEIKLEJOHN, POLITICAL FREEDOM 101-02 (1960).

Professor Gellhorn's book is quite different from the preceding two. It is based on lectures given at Tokyo University. These were revised in the hope that the result would be acceptable to laymen without the simplification generally found necessary for such an audience, an endeavor in which Professor Gellhorn has succeeded wonderfully. Here are chapters dealing with military and civilian criminal trials and the specific safeguards affecting the latter, with freedom to speak and freedom to remain silent, with legislative investigations, freedom of movement, and desegregation.

The book is infused with an enlightened liberalism. On the issue on which the other two authors have differed, Professor Gellhorn tends to agree with Black that restraint is justified if it is "clearly and closely related to the protection of some identifiable public interest," but that "the public interest in free speech is itself so very great that it cannot easily be outweighed by some competing interest." He discusses this problem at length in relation to Smith Act prosecutions. After noting the misgivings aroused by *Dennis* and the partial "clarification" in *Yates*[7] he concludes:

> The sounder course, dictated by decisions that preceded *Dennis*, is to disregard advocacy and teaching, even though its ultimate goal may be acts, unless there is imminent danger that unlawful conduct will be induced. At a particular time and in particular circumstances a speaker may properly be deemed an actionist. Realistically considered, there can in fact be such an offense as inciting a riot; there can in fact be such an offense as organizing violent steps that are calculated to disturb public order or to lead to overthrow. The use of one's vocal cords or of one's typewriter may, therefore, properly be regarded as punishable action in some situations. Those situations, however, do not arise when there is still ample opportunity for the force of words to be dissipated by other and better words, or by feasible defensive measures, or (most significantly) by the course of events that the speaker does not control. The man who urges an angry mob to follow him into action, then and there, is creating an immediate threat to public safety. But a man who urges an audience to follow him into action when the time is ripe, at some uncertain date in the future, is not a present menace, though he may be a profound irritation. Two things argue against dealing with him or his kind at that stage. First, society should conserve its energies, using them only for real rather than supposititious problems. Second, when immediacy of danger is not the test, the boundaries between permissible and impermissible talk become too hard to draw. When that happens, the people at large are discouraged from talking at all about things that matter deeply, lest they be adjudged to have overstepped the lines. A free society can better stand the risks of talk than the risks of silence.[8]

In his discussion of the freedom to keep silent, Professor Gellhorn deals with the flag salute cases, the various loyalty oath requirements, the privilege against self-incrimination, and immunity statutes; but he does not discuss the problems which have arisen in the last two areas because of the federal nature of our government.

7 Yates v. United States, 355 U.S. 66 (1957).
8 GELLHORN, AMERICAN RIGHTS 83-84 (1960).

In a brief epilogue, Gellhorn assesses the work of the courts in the field of civil liberties. He points out the difficulties inherent in "amorphous" principles such as "due process of law" and says their meaning is "built upon" the Constitution:

> The master builders — the judges — drew inspiration for the building design elsewhere than from the simple language of the forefathers. Sometimes they had recourse to history, which lays bare a record of evils against which the Constitution-makers presumably sought to create a shield. Sometimes, perhaps more often, the inspiration came from the judges' own perception of values.
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> Whose values were thus perceived? The judges disclaim any intent to be uninhibited subjectivists when they apply soft words to hard facts. They purport to recognize not their own inner hopes and fears, but, rather, the aspirations of society at large. When the words of the Constitution are not given precision by context and usage or by history or by binding precedents, then the judges must "gather meaning not from reading the Constitution but from reading life." [9]

And he eloquently concludes:

> America can remain a land in which majorities of the moment are forbidden to tyrannize political minorities, a land in which what happens to an individual is deemed important to the community as a whole, a land in which means as well as ends are matters of moral concern, only if Americans want this kind of land. The Supreme Court cannot decree its preservation. The Supreme Court can only reflect the expressed or latent convictions of all those who in the aggregate are America. Charles Evans Hughes, in a widely quoted aphorism he no doubt regretted having uttered, once declared that the Constitution is what the Supreme Court says. So it is. Back of the Supreme Court, however, providing the ethical current that animates its decisions, is the massive though sometimes formless body of public sentiment. In the end, the Constitution always becomes what the People of America will it to be. That is why liberty is everybody's business.[10]

9 *Id.* at 197-98, quoting from FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT 310 (1928).

10 *Id.* at 200.