

Michigan Law Review

Volume 66 | Issue 1

1967

Emerson: Political and Civil Rights in the United States

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Recommended Citation

T. A. Smedley, *Emerson: Political and Civil Rights in the United States*, 66 MICH. L. REV. 214 (1967).
Available at: <https://repository.law.umich.edu/mlr/vol66/iss1/11>

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POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES. 3d ed. 2 vols. By *Thomas I. Emerson, David Haber* and *Norman Dorsen*. Boston: Little, Brown. 1967. Pp. xxviii, xiv, 2274. \$45.

In a number of significant aspects, the third edition of *Political and Civil Rights in the United States* is as thoroughly modern a publication as one can find on today's market. First, its subject matter covers the most urgent domestic problems of contemporary American life—issues relating to freedom of expression, religion, and association, to the rights of privacy and the franchise, to academic freedom, and to racial discrimination in its all-too-numerous aspects. Second, its contents consist very largely of source materials which have only come into existence in the past few years—court decisions, legislative enactments, administrative agency pronouncements, and scholarly writings, most of which bear dates within the last two decades. Third, it exhibits strong “inflationary” tendencies—the joint authorship has been expanded from two to three, the size of the publication has been increased from 1,536 pages to 2,274 pages, and the price has been raised from thirty-six to forty-five dollars.

The addition of another co-author to the Emerson-Haber team provides the new edition with the benefit of the fresh perspective of Norman Dorsen, who teaches courses in constitutional law and in political and civil rights, and serves as director of the Arthur Garfield Hayes Civil Liberties Program at New York University. Meanwhile, Professors Thomas Emerson of Yale Law School and David Haber of Rutgers Law School continue the efficient and expert collaborative efforts which produced the first two editions. The growth in the size of the new work was inevitable in view of the vast expansion of the law in the civil and political rights areas during the past decade, and one can readily believe the authors' assertion that they were required to make “many agonizing decisions in the selection process” in order to keep the product within manageable bounds. Taking into account the greater number of pages and the inexorable rise in printing costs, the increase in price was as certain as death and taxes.

A general survey of the contents discloses a moderate amount of reorganization of the material for the new edition. It is now divided into three parts: (1) “Freedom of Expression”; (2) “Academic Freedom, Freedom of Religion, and other Individual Rights” (both of these parts being in volume I); and (3) “Discrimination” (in volume II). Part I follows the same basic pattern as before, beginning with material outlining the theoretical basis and historical development of freedom of expression as an aspect of American liberty. This is followed by two sections dealing with problems of

freedom of expression in relation to national security and internal order. As in the previous edition, defamation and obscenity are covered here. Two new sections have been inserted: one examines the freedom of expression aspects of the exercise of governmental powers to tax and regulate business, to control the political process, and to protect the administration of justice; the other calls attention to affirmative governmental powers which may be employed to remove obstacles to freedom of expression. Overall, this part covers about 900 pages, as against 715 in the second edition. Many new decisions have been added and some of the earlier cases deleted; in addition, a great deal of ground has been covered by use of extensive notes and excerpts from books and law review writings. In the chapters on internal order, defamation, and obscenity, a large percentage of the material is either new in this edition or is presented in substantially revised form, and in the latter two chapters the long summarizing discussions in the notes are particularly effective.

Part II is the miscellaneous division of the publication. The chapter on academic freedom follows the same outline as its counterpart in the second edition, covering in turn the principles of academic freedom, its protection through tenure and contract rights, relevant constitutional protections, and special problems concerning subversive activities. Some new secondary material has been included but the same court decisions are used. A completely new chapter on academic freedom for students has been added to deal with regulatory measures and disciplinary actions related to student protest movements. The freedom of religion chapter contains much the same materials as before on governmental aid to education in private and parochial schools, released-time religious education programs, and flag salute and similar religion-related practices; the editors have, however, included significant new Supreme Court decisions on Bible reading and prayers in public schools, Sunday laws, and conscientious objection to military service. The much-expanded content of the reapportionment section of the franchise chapter is almost completely new, and now contains recent decisions on the one-man-one-vote principle and on gerrymandered voting districts. In addition, the over-all scope of the publication has been extended by the addition of brief but significant new chapters on individual rights within private associations, the right of privacy, and the right to travel. Extension of the scope of coverage and addition of new materials on previously-included subjects has resulted in nearly doubling the number of pages in this part of the new edition, as compared with the space devoted to the same subjects in the second edition.

Part III quite naturally accounts for a large percentage of the increase in the bulk of the total publication, since it deals with

all of the significant legal questions arising out of racial discrimination. It consists of 860 pages, whereas the same subject matter in the second edition consumed 520 pages. The initial chapter poses the currently urgent issue of the extent to which the federal government has the power and the duty—but nothing about the *competence*—to protect the right to security of the person from violence, coercion, harassment, and gross or subtle forms of intimidation at the hands of private citizens and public officials. Then follow chapters devoted to legal problems arising from discrimination in voting, education (distinguishing between problems in the South and in the rest of the nation), the administration of justice, employment, housing, public accommodations, transportation, and health and welfare services. Most of these materials originated within the past decade; and they are drawn from a wide variety of sources which even a scholar with a large library at his disposal would find difficult to discover by his own research efforts—federal and state court decisions, legislation, administrative agency actions, civil rights commission reports, testimony before congressional committees, articles in legal and non-legal periodicals, excerpts from newspapers, sections of the proposed Model Anti-Discrimination Act, and so forth.

In judging the merits of the publication, it is only fair that we try to test it against the purposes which motivated the editorial endeavor that created it. In the preface to the third edition the authors state that the present work had its origins in an effort to collect teaching materials for law school courses dealing with political and civil rights; that later the further object developed to provide a law book which would be helpful to practicing lawyers professionally involved in these expanding areas of the law; and that ultimately the desire arose to produce a reference work useful to members of all intellectual disciplines who may assist in the solving of human rights problems and to the general reader who wishes to become informed regarding the fundamental rights of the individual in modern society. The prefatory statement also points out that the materials are organized “in terms of problems rather than of legal doctrine,” because the intent was “to emphasize the concrete issues at stake and to bring to bear on those issues all relevant considerations, whether from legal or other sources.”

One who examines these volumes closely enough to become aware of their pattern and contents will be struck by either the work's strengths or its weaknesses, depending on his own primary interests and purposes. The person whose main concern is with constitutional theory may wish that some provision had been made to lead him to the materials bearing on the meaning of “equal protection of the laws,” the scope of the “state action” concept, and so forth. The person who is impressed with the primacy of the protec-

tion of civil rights demonstrators from restrictions imposed by municipal traffic-regulation and peace-keeping ordinances may find that undue emphasis has been placed on the national security section in part I, and that too little space has been allotted to the internal order chapter. And so on. Still, in view of the authors' purposes and the spatial restrictions under which they labored, the choice of materials seems highly commendable.

As a collection of materials for a law school course, *Political and Civil Rights* has the strong merits of completeness of coverage, clarity in organization, and variety in perspective. However, there may also be two shortcomings in this regard. First, unless the instructor who uses the work is allotted more time than most of us can garner for courses in this field, he will have an acute problem of selection—but this has become a regular occupational hazard of law teaching in an age in which 2,000-page casebooks often are proffered for use in two-hour courses. Second, forty-five dollars is a fairly stiff outlay for books for a single course, even for a law student. An effort to meet both of these problems has resulted in a Student's Edition—a somewhat abridged version of the official third edition—which omits the sections on academic freedom and discrimination in transportation and reduces the amount of materials in most of the other sections. The Student's Edition is still a two-volume publication totaling 1,754 pages, but volumes I and II may be purchased separately for ten dollars and eight dollars, respectively.

As a research tool for the practicing lawyer, the publication will provide a wide variety of legal and relevant non-legal source materials not readily accessible in even a good law-office library, and it will put him in contact with most of the case authority relating to political and civil rights controversies. Nonetheless, since most of these cases are either referred to only briefly or merely cited in the notes to the principal cases, a set of the *Race Relations Law Reporter* would be of great assistance to the civil rights lawyer in obtaining maximum benefit from volume II.

Whether these books will be of substantial service to scholars in non-legal disciplines and to the general reader remains in some doubt. While hoping to appeal to this wide readership, the authors have conceded that they "have not stinted on the legal technicalities or attempted to simplify the legal issues"; and, since this is primarily a legal publication, they were right in not doing so. Nevertheless, the absence of such concessions will probably have a "chilling effect" on many potential readers who lack legal training. All but the very determined may well be overwhelmed by the prospect of digesting such a great mass of materials, frustrated by the difficulties of attempting to translate into layman's language the legalese frequently employed by judges in constitutional law cases, or overawed by the

task of synthesizing the diversity of opinions expressed by different authorities on the highly controversial issues in this field. The authors could have assisted their lay readers in overcoming these obstacles by inserting more summarizing and explanatory notes like those which appear in the defamation and obscenity chapters; however, the addition of such aids for the uninitiated might have lessened the value of the work as a teaching tool, which, after all, was its initial purpose and will probably be its primary function.

The only really serious defect I have discovered in this publication is that it is already out of date, and indeed was so when it came off the presses. Of course, the authors cannot rightly be criticized for this deficiency, since they could not possibly have avoided it. Nevertheless, because of the speed of developments in the civil rights field, this edition does not contain a number of decisions which substantially modify, or at least raise important new questions regarding, the apparent state of the law. For example, in the past year the Supreme Court of the United States has struck down state miscegenation laws as violative of constitutional rights,¹ stimulated the quest for open housing,² created new uncertainties regarding the right of freedom of assembly in public places,³ and reversed the federal district court's judgment in the Julian Bond case on the ground that Bond's constitutional right of free expression had been violated by the Georgia legislature's refusal to allow him to take the seat to which he was elected.⁴ Similarly, the Court of Appeals for the Fifth Circuit has recently affirmed the conviction of an Alabama citizen for conspiracy to deprive persons of federal constitutional rights, after the same defendant had been acquitted in a state court of a charge of murder growing out of the killing of a civil rights worker near Selma,⁵ and has drawn a new blueprint for the demolition of tokenism in the field of public school desegregation.⁶ Finally, the California Supreme Court has recently handed down a significant decision regarding the qualifications of civil rights "activists" for admission to the bar.⁷ It must once again be noted, however, that reference is made to these new developments not in derogation of the authors' product, but rather as an observation on the times—an

1. *Loving v. Virginia*, 388 U.S. 1 (1967). The Virginia Supreme Court of Appeals' decision is noted on page 2,216 of the work under review.

2. *Reitman v. Mulkey*, 387 U.S. 369 (1967). The decision of the California court is set forth on page 2,039 of the work under review.

3. *Adderley v. Florida*, 12 RACE REL. L. REP. 1651 (1967). See Emerson's comment on this turn of events in 26 NAT'L LAWYERS GUILD PRAC. 1, 2 (1967).

4. *Bond v. Floyd*, 385 U.S. 116 (1966). The district court's opinion is discussed on pages 644-45 of the work under review.

5. *Wilkins v. United States*, 376 F.2d 552 (5th Cir. 1967).

6. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing*, 12 RACE REL. L. REP. 748 (1967).

7. *Hallinan v. Commission of Bar Examiners*, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

era in which unprecedented concern is being shown for the protection of the political and civil rights of the citizenry, but in which not only specific rules and regulations but also broad principles and concepts are undergoing such rapid revision that one cannot confidently define what the scope of these rights will be a few months hence. The only answer to the authors' predicament may be a supplement to the third edition in 1968.

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