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Book Review of Political and Civil Rights in the United States

Morris D. Forkosch

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wastes were returned to the streams. Projections indicate that by the year 2000 some 889 billion gallons will be used and returned. While 1954 withdrawals amounted to less than a third and waste-ridden returns were less than a fifth of the total; in the year 2000 it is predicted that withdrawals will be a little over four-fifths and polluted returns about two thirds of the nation's entire stream flow.

WILLIAM B. SPONG, JR.
United States Senator
from Virginia

POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES.
 THOMAS I. EMERSON, DAVID HABER, AND NORMAN DORSEN. Boston:
 Little Brown & Co., 1967. Vol. I, pp. xxviii, 1-1355; Vol. II, pp. xiv,
 1356-2217, with Table of Contents and Index. \$45.00.

The term "rights" today is a universally used one. For example, the United Nations General Assembly, on December 10, 1948, adopted and promulgated a Universal Declaration of Human Rights, made it applicable to the "human family"; i.e., to "all peoples and all nations", and to affect "the peoples of Members States" and "the peoples of territories under their jurisdiction." The Constitution of the U.S.S.R. similarly contains provisions concerning rights. The "personal property right of citizens in their incomes and savings from work", etc., are all "protected by law."¹ Our own Constitution, as with many of those

1. Art. 10. There are other Articles which mention rights, e.g., Art. 17 reserving to "every Union Republic" the "right freely to secede from the U.S.S.R. . . ." This, of course, is a political right reserved to a political subdivision. Here the appropriate provisions are found in Chap. X, entitled "Fundamental Rights and Duties of Citizens," comprising Arts. 118-133. The major distinction between these rights and those mentioned in our own Constitution and Amendments may be illustrated by Art. 118's "right to work," which is "ensured by the socialist organization of the national economy," i.e., by the state, or by Art. 125's listing of the rights of freedom of speech, press, assembly, and "street processions and demonstrations" which "are guaranteed by law." See, for analyses of these provisions, HAZARD & SHAPIRO, *THE SOVIET LEGAL SYSTEM* (1962); on criminal procedures, BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* (1966); and on civil procedures, LAFAVE, ED., *LAW IN THE SOVIET SOCIETY* (1965). In the United States the right to work is an individual's own personal (see, e.g., Preamble, where "all men . . . are endowed by their Creator with certain unalienable Rights,") right not to be hindered by the government, *Truax v. Raich*, 239 U.S. 33 (1915), and the rights of free speech, etc., are likewise the individuals, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (especially its Ninth Amendment's references and penumbral rights). Cf., however, Art. IV, § 2, cl. 1 of the Constitution, and Amendment 14, § 1,

of our constituent states, contains analogous provisions, and of the subsequent Amendments, the Bill of Rights, in the present context is, of course, the most famous.

When "rights" are mentioned in these general terms confusion, however, may arise. For example, the U.N.'s Declaration specifically concerns "human" rights, while the Soviet Union's Constitution limits to "Citizens of the U.S.S.R. . . . the [economic] right to work." Our own Constitution does not contain any positive statement of a right; but in the negative provisions of Article I, § 9 (upon the federal government) and § 10 (upon the states) are to be found what Chafee says "are really human rights, since they are exercised by human beings against human beings."³ Further, "the most important human rights provision" is § 9's "privilege of the Writ of Habeas Corpus [which] shall not be suspended . . ."⁴ The Amendments to the Constitution state, of course, not only the human rights of peoples, but also others, for example, political (Fifteenth, Nineteenth, Twenty-third, Twenty-fourth), economic and property (Fifth, Fourteenth), criminal (Fourth, Fifth, Sixth, Eighth, Fourteenth), and "penumbral," e.g., personal, rights, while recent statutes additionally seek to eradicate discrimination, as in the various Civil Rights Acts,⁵ and state laws.⁶ In effect, therefore, "rights" translates into a kaleidoscopic amalgam which, at least for purposes of

sent. 2, first portion, which limit their Privileges and Immunities respectively to state and federal citizens.

2. ART. 118, as do Arts. 119-121, 123-128, while 122 mentions "Women in the U.S.S.R.," and 129 "affords the right of asylum to foreign citizens . . ." Arts. 130-133 speak of the "duty of every citizen of the U.S.S.R. . . ."

3. CHAFEE, *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 1, 51 (1952). This writer does not agree with Chafee that, for example, habeas corpus can be "exercised [only] by human beings against human beings," for in selective service, immigration, arrest or confinement, and other cases it is a human being against the government even though nominally one may sue the person holding him. This, however, is not greatly important here. See also news item, *N.Y. L. JOURNAL*, July 27, 1967, p. 1, col. 3, that ex-Premier Moise Tshombe's wife was presenting "a petition for world habeas corpus to the Human Rights Commission of the United Nations," although a spokesman for that body expressed its inability and lack of jurisdiction to do or accomplish anything.

4. *Ibid.* Except, as § 9, cl. 2 concludes, "when in Cases of Rebellion or Invasion the public Safety may require it," on which see, e.g., RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 176-185 (rev. ed. 1951).

5. *Griswold v. Connecticut*, *supra* note 1.

6. E.g., New York's Executive Law, Art. 15, creating in 1945 a State Commission for Human Rights, i.e., anti-discrimination, on which see generally *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581, *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 204 N.E.2d 627.

legal understanding and judicial application, must be first analyzed before we "seek to limit our area of study."⁷

The question of "rights," in general and not in particular, antedates our Constitution; and, to bring it swiftly ahead, the human element was not really settled until the Civil War and its Amendments reversed *Dred Scott*.⁸ It was not until World War II that legalistic and political distinctions began to be required and to be made so that the congeries of mass rights was sorted, distributed for application, and sought to be enforced. For example, during the war desegregation in the armed forces was (somewhat) accomplished. Beginning with 1945 fair employment practice laws began to be enacted locally, state-wide, and finally nationally, and in 1947 the Report of President Truman's Committee on Civil Rights gave tremendous impetus to the various movements.⁹ Of course the McCarthy decade was also beginning; and Truman's 1947 Executive Order 9835¹⁰ began the federal employee loyalty program which, when taken in conjunction with the Supreme Court's *Dennis* opinions,¹¹ found all three branches of the federal gov-

7. See, e.g., FORKOSCH, CONSTITUTIONAL LAW 286-287 (1953): "We daily speak of civil, political, economic, social, and other rights. Brandeis, early in his career, wrote on the right to privacy and, when upon the bench, felt that 'the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.' There is a hodge-podge of rights, then, from which different people may draw different claims, so that we must immediately seek to limit our area of study. . . ." See also note 15, *infra*, and on the hodge-podge see further Carr, ed., *The Supreme Court as Protector of Civil Rights*, 275 ANNALS, May, 1951 with contributions by Fellman on Freedom of Expression (p. 61), Pfeffer on Freedom of Religion (p. 75), Fraenkel on Criminal Justice (p. 86), and Marshall on Equal Protection of the Law (p. 101); if the issue had deleted "Civil" from its title, these various (and other) rights so discussed might have been easier understood. See also Sellin, ed., *Internal Security and Civil Rights*, 300 ANNALS, July, 1955 and, for a 30-year predecessor of current faculty campus teaching and research rights, Cheyney, ed., *Freedom of Inquiry and Expression*, 200 ANNALS, Nov. 1938 pp. 144-166 by Shils, esp. 153-156.

8. *Dred Scott v. Sandford*, 19 How. 393 (1857).

9. It may not be amiss to point to the Japanese Relocation Cases, e.g., *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Korematsu v. United States*, 323 U.S. 214 (1944), although cf. *Ex parte Endo*, 323 U.S. 283 (1944), and see also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), as perhaps the greatest (and necessary?) violation of human, civil, political, economic, and other rights visited upon a selected portion of the people in this country. EMERSON, ET AL., of course, omit military necessity from their coverage.

10. 12 Fed. Reg. 1935, March 21, 1947, later superseded by Pres. Eisenhower's Exec. Ord. 10450, 18 Fed. Reg. 2489 (1953), which made the "loyalty" program a "loyalty-security" one.

11. *Dennis v. United States*, 341 U.S. 494 (1951), i.e., the first-strong Communists here found guilty of violating the conspiracy provisions of the Smith Act, 54 Stat. 671, 18

ernment retreating in the face of mass hysteria and, in effect, surrendering the constitutional rights of the accused. At such a period in our history, and before the Warren pendulum initiated the swing reversing this rights retreat, Professors Emerson and Haber began a pioneer law class in this area and, in 1952, got up a volume of "Collection of Legal and Related Materials" (title-page) on and limited to "Political and Civil Rights in the United States."

In the context of this background the authors, in their introductory remarks, very properly confessed "to a strong bias in favor of political and civil rights",¹² proceeded to organize the "materials . . . in terms of problems rather than of legal doctrine", and "approached these problems . . . principally from a legal point of view." In other words, this was to be a ground-breaking and law-shattering volume. In a Foreword, Robert M. Hutchins called it "the only comprehensive collection of cases and materials on the most important subject in the world today."¹³ Two years later there was a second printing, and in 1958 a second edition, but now in two volumes and expanded from 1172 to 1486 pages. The new Preface by the same authors (Haber was now at Rutgers) repeated their earlier bias, again noted "the absence of any comprehensive legal treatise covering the field of political and civil rights", and, in effect, mourned the still "essentially unresolved" problems originally presented so that "our effort in this revised edition is the same as before." Today another two-volume, revised, third edition is before us, but with Norman Dorsen of N.Y.U. as a third member of the team. The number of pages has been increased to 2217,¹⁴ the publisher has been changed from Dennis & Co. to Little Brown; and, physically and in typography and in make-up, this new edition is much "slicker" than before. The emphasis, however, is still "primarily from the legal point of view", although now a possibly important change in approach, if not immediately in substantive content, may be noted, namely, from the earlier "legal treatise[s] covering the field of political and civil rights" to the present

U.S.C. § 2385 (1940). Cf., however, *Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589 (1967), and *Bond v. Floyd*, 385 U.S. 116 (1966).

12. Later Mr. Justice Goldberg's review, 41 *GEORGETOWN L.J.* 288 (1953), concurred in this strong bias.

13. P.iii, although *see* CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* (1947) which, though not the same, could well be here considered as a minor predecessor. *See*, further, the reports, analyses, etc. by the American Jewish Congress and the N.A.A.C.P. in the years prior to 1952 (and subsequently).

14. Parenthetically, costs and prices have also increased, from an original \$7.50, to \$36.00, and now \$45.00.

“fundamental rights of the individual in modern society.”¹⁵ But, as with the second edition, the new one continues to delete the materials found in the first edition on criminal proceedings, as well as omitting now as in the earlier two editions “an adequate treatment of the rights of aliens, and virtually all consideration of political and civil rights in periods of emergency, problems of military law, and human rights in the world community.” Nevertheless, the authors have added “chapters on the rights of individuals in private association and the right of privacy, as well as a fuller treatment of discrimination.”

The 1952 original volume was uniformly hailed as filling “a serious gap in the legal literature and fill[ing] it splendidly,”¹⁶ as well as being “remarkable in its coverage and the thoroughness of its documentation,”¹⁷ although one critic questioned the authors’ basic assumptions or principles.¹⁸ It is these “fundamental principles of a democratic society” which, unfortunately, are no longer explicitly given in this third edition since the Introduction (repeated verbatim in the second edition) is now omitted. The first two editions were basically patterned upon them and, save for elaboration or deletion here not of moment, the new edition does not differ overmuch. These basic principles in the 1952 Introduction were: All members of society “are entitled to security of the person . . .”; “the individual, pitted against the overwhelming power, prestige and resources of the government, is entitled to equalizing rights . . .”; “all citizens should have the right to participate in government through the exercise of the franchise . . .”, and “that all individuals should have the right to influence the political process through full freedom of political organization and political expression. . . .” Further, “[t]he theory of freedom of expression extends beyond

15. Concerning the 1952’s “key words in the title” one reviewer queried: “What are ‘civil rights’ and how do they differ from ‘political rights’? Indeed, how do both differ from ‘civil liberties’? The confusion is, of course, not merely the authors’. Perhaps one useful and readily-applied distinction is to define civil rights as those denied to any person because of his membership in any racial, religious or ethnic group. The term ‘civil liberties’ can then be reserved for all other rights, from habeas corpus to the right of privacy. . . .” Maslow, *Review*, 53 *COL. L. REV.* 290, 291 (1953). See also note 7, *supra*, and note 20, *infra*.

16. Hyman, Book, 66 *HARV. L. REV.* 1346 (1953).

17. Freund, Book, 62 *YALE L.J.* 506 (1953).

18. Barrett, Book, 101 *U. OF PA. L. REV.* 432, 433-434 (1952), the reviewer terming “highly questionable” the opening statement in the Preface, that “The American people today are in broad agreement concerning the basic values and fundamental principles of a democratic society.” At 434. See also Roche, Book, 38 *CORNELL L.Q.* 483 (1953).

the political sphere and embraces all forms of expression." Separately, "the principle of academic freedom . . . foster[s] that self-criticism and intellectual progress which is vital to the progress of a modern industrial society." The last two principles concern "[f]reedom of religion and the relations of church and state . . .", and "the concept of equality of legal status and opportunity for all individuals. . . ."

In 1967 the format has changed, as has the emphasis, but the overall approach of the authors still remains true to their first volume. To illustrate, the above first principle of security of person is treated today in Chapter XV (and part of V); the second on equalizing rights against the government has been altered considerably but is basically in Chapter XIX; the third on the exercise of the franchise is now in Chapter XVI (and part of V); the fourth on the right to vote is in Chapters XIV and XVI; the fifth on freedom of political organization and expression is found in Chapters I-III, and the sixth on all forms of expression is in Chapters IV, VI-VIII; the principle of academic freedom is in Chapter IX, and religion, etc., in X; the last principle, of equality and opportunity for all individuals, makes up the entirety of the second volume, albeit a shifting of chapters (mentioned below) is found, as well as new treatments in several areas not before covered. In other words, the new treatise is basically the original and its successor, slightly re-vamped by a shifting of content, and brought up to the fall of 1966 in scope and in coverage.

As of its 1967 publication date, therefore, do the new volumes continue to fill today's needs and requirements? The unqualified answer is yes.¹⁹ However, since the first two editions appeared in 1952 and 1958 the world has muchly changed, the constitutional law of this nation has been shaken in this area, and during the past three summers other problems have arisen. These new problems are somewhat treated in the new edition, e.g., new Chapter V on "Other Social Interests", and also what is discussed in Chapter IX, § E's new subdivision on "Academic Freedom for Students." Also, very greatly expanded coverage is given to discrimination, e.g., from an original one chapter of about 40

19. Two suggestions may, however, be made. First, that a later three, or four, volume (comprehensive?) set of cases and materials covering human and other rights besides the political and civil ones would, obviously, be even better, although within the limits of their self-imposed coverage, there is a slight effort to disclose these others; and, second, that because publication costs and sales do enter this picture, the coverage be continued as here so that students (and others) be not priced out of the market, with other rights being covered separately (or collectively) in other volumes.

pages, then increased to 380 pages, this subject now is given the entirety of Vol. II consisting of over 750 pages.²⁰ One must hasten to add, however, that a physical shifting of earlier chapters to the new second volume on discrimination has also occurred, e.g., former Chapters I and II are now XV and XVI (and see XIV), and the national educational aspects, as with others, are now treated more comprehensively, e.g., geographically in separate chapters.²¹ Thus while a good many of today's problems are pointed up somewhat and some are covered slightly, those within the ambit of the title's language are dealt with both extensively and intensively, e.g., the discrimination aspects just mentioned.²²

This broad and yet deep coverage may be illustrated somewhat by reference to the contents. The first volume has two Parts, while the second volume consists entirely of a third Part. The first Part is devoted to Freedom of Expression, and the second to Academic Freedom, Freedom of Religion, and Other Individual Rights. These broad topics are then further divided. Thus the first Part consists of eight Chapters, of which Chapter I gives the "Theoretical Framework",²³ and II gives the "Development of Freedom of Expression in the United States." The particular aspects then are discussed in successive chapters through VII,

20. See also, e.g., the first edition's Chap. V, B., p. 651, and the second's Chap. IV, B., p. 844, both devoting less than one page to the "Right of Privacy" which is now expanded into Chap. XII, of 24 pages; and see further the earlier very little concerning the present 39 pages devoted to "Individual Rights Within Private Associations" (Chap. XI). See also note 15, *supra*.

21. Shifting has occurred in several other substantive aspects, e.g., in the second edition the 1958 case of *N.A.A.C.P. v. Alabama*, 357 U.S. 449, is found in Chap. VII on Discrimination, B. Education, 4. Resistance to Desegregation, whereas now it is shifted to Chap. V on Other Social Interests, A. Taxation and Business Regulation.

22. Insofar as the entirety of the second volume is devoted to this subject one may query whether the authors are suggesting that the future's main thrust is here. This reviewer feels that jobs (economic rights) and education (right to a quality education) are in the future's requirements, with not only the negative aspects requiring attention (as vol. II is mainly geared to analyze) but also the economic and political philosophy inherent in the 1946 Full Employment Act (Council of Economic Advisers) and somewhat massive federal aid to schools, with implementation necessitating more Congressional and Executive cooperation than heretofore.

23. When I first saw the 1952 volume I was delighted to find Milton's *Areopagitica* opening the chapter beginning those devoted to freedom of speech; in the new placement I am thrilled that it leads all the rest in now being found at page 1 of volume I. So, too, with *MILLS, ON LIBERTY*, even though, as with the former, only slight excerpts are included. This, indeed, may be one of the insidious values of these volumes, that they subtly infiltrate the (sub)consciousness of the reader and (hopefully) impel him on to more of the same (or related). Fortunately, the volumes abound in such references and other excerpts.

e.g., national security, internal order, etc., while the last chapter goes into "Affirmative Government Controls."²⁴ The second Part contains Chapters IX through XIV and these respectively cover academic freedom, freedom of religion, individual rights within private associations, the right of privacy, the right to travel, and the right of franchise. A carping reviewer may object to calling the Privacy coverage deep because only twenty-two total pages are devoted to it, of which sixteen comprise the opinions in *Griswold*²⁵ and six are devoted to notes; but to this reviewer the latter give so many references to statutes, books, articles, and cases that perhaps not much more could be said.²⁶ The third Part²⁷ may also be so scrutinized but cannot be overly-faulted. As noted above, some chapters were transferred to it from the former editions but new ones have been added. One may write that its ten chapters (XV-XXIV) spread before the reader a miniature panorama of the theory and history of discrimination, together with its modern versions, not only in the private sector but also in the governmental, national and local, and that the attack upon these manifestations is here disclosed on all fronts. Thus one's right to security of person is discussed at the outset with, of course, the Civil War amendments and their immediate post-war and then post-World War II applications gone into. Then voting discrimination is likewise so covered, as is the educational discrimination against the blacks (two chapters); next comes a study of discrimination in the administration of justice, including federal-state relations. Discrimination in employment is one of the longest chapters in the two volumes, and rightly so,²⁸ followed then by chapters on discrimination in housing, public accommodations, and transportation, with health and welfare services closing the work. It is this reviewer's hope that these volumes, and all like it, will soon become outmoded. But, on the basis of history and current events, and what probably will occur

24. Unfortunately, this last deals only with the broadcasting industry, and mainly with the controls exercised by the Federal Communications Commission, so that its 33 pages appear too stiff an editorial price to pay when additional governmental controls in other areas might also have been referred to.

25. *Griswold v. Connecticut*, *supra* note 1.

26. I would personally have liked to have seen more coverage given to the implications and consequences of the proposed central (computer) storage of facts (Federal Data Center) on all individuals, garnered by all governmental (and private) agencies, with each person's "dossier" available to the government; the only mention is in the final sentence of par. 4, at p. 1261.

27. Prof. Dorsen "had special responsibility" (vii) for this Part.

28. See note 22, *supra*.

in the next decade, the suggestion is made that a new fourth edition be revised and broadened as already indicated.

MORRIS D. FORKOSCH
Professor of Law
Brooklyn Law School