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## Book Reviews

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## BOOK REVIEWS

POLITICS IN AMERICA. By D. W. Brogan, Harper & Brothers, New York: 1954. Pp. 467.

Ever since Lord Bryce and de Tocquville, Europeans have studied the American Republic with increasing admiration and with the hope of ascertaining the reasons for the successful endurance and prosperity of a continental Republican Democracy, by which the new world is contrasted with the old. The author of this remarkably perceptive study, *Politics in America*, has been a lifelong student of our political ways and an intimate, on the scene observer during his frequent visits to this country. Indeed, this is his sixth volume on America and Americans, of which the present one is the correspondent to an earlier and less sympathetic study, *Government of the People*, which appeared in 1933. Two decades ago, Professor Brogan questioned the ability of our institutions to cope successfully with the major disorders and grave challenges that followed in the wake of the depression. In the present volume the author has happily penetrated to the source of the vitality and resiliency which has made for the continuity of our national constitutional history, and fashioned reliable and responsible American habits which equally react, however slowly, against radical individualism and creeping authoritarianism. The author writes with the warm sympathies of a master of a subject which has captured both his intelligence and genuine affection.

The book is comprised of nine essays written in a spritely conversational style which is borne along with the fluency of endless insights and evaluating reflections. It is not a systematically organized work and its methodology falters in the middle chapters perhaps because of their broader sociological content for which an essayist cannot properly fulfill the demands of empirical tests. In the preface, he states his purpose: "The purpose of this book is simply to make the American political system intelligible. It has no thesis except that the system has its own logic, its own justification, and is, in general, a success. It cannot be easily altered. . . . This system, too, should be studied in its own terms; its successes and failures seen in their American context."

The first chapter, *The Character of the American Polity*, explains, perhaps for his British readers, the reason for this success, namely, the American conception of constitutionalism as a written basic law in the light of whose supremacy the constitutionality of all statutory law may be tested. By far his best chapter (and the longest, one fourth of the book) is the ninth, *President and Congress*. The student of political science will be fascinated with the ease and lucidity of Professor Brogan's penetrating analysis of the relationship between these two branches of the American government and the running comparisons with their English counterparts. In this volume, the author, now grown into an intimate appreciation of the uniqueness of the American system, has become prudently cautious about the governmental alterations he had so freely urged upon us two decades ago. Then he wrote:

"The American government is so organized that it is difficult to do anything at all, impossible to do some things and difficult or impossible to undo things once they have been done, without what may well be disastrous delay." \*

Today, deeply impressed that our Federal government is a "going concern" and a remarkable "success"—he quotes Gallileo, "*e pur si muove*"—he protests that its uniqueness is an inherent quality of the system and must remain inviolable. The operation of the American Constitution as paramount law has engendered a distinctly

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\* Brogan, *Government of the People* 381 (1933).

American way, national habits of government, and that sane moderate reaction and bounce to problems which is convincing evidence of the substantive identity and potential elasticity of a fundamental law which is both supreme and comprehensive. The intervening chapters on *Party System*, *Race and Politics*, *Machines and Bosses*, and *Politics and Morals* disclose an amazingly detailed knowledge (though not as profound as that displayed in the other two chapters) of American politics and the intense interest with which the author has probed the meaning, motives, and motivations behind the interplay and congeries of influences which weave the multicolored quilt of our national political experiences. Those who have read this volume before this year's national conventions undoubtedly understood and enjoyed these events and the campaigns that followed with more knowledgeable familiarity and discernment. From behind the scenes of political machinations and the great American shows there emerges the salutary fact of stability and progress, amenable to a prevailing consensus which has marked the American citizenry with the quality of the character of the constitutional system.

"And the American voter, politician, publicist, professor is far more soaked in the presuppositions of the present system, far more broken into its ways than, perhaps, he realizes. Good political habits—and American habits are, on the whole good (no more can be said of British habits)—are too rare a thing to be thrown away in the world of today. The American people are right not to let the best be the enemy, not only of the good, but even of the slightest improvements that the system is capable of without changing its basic character." (p. 387).

Students of American politics and of political science owe Professor Brogan a cheerful debt of gratitude. He has made learning a delight. They may, thanks to him, discover the great wonder of the American experiment and appreciate with increased admiration its distinct uniqueness. His brilliant, witty style is not likely to prove a cure for insomnia. It is a fond hope that Americans may come to know and admire their country as this English observer has.

JOSEPH F. COSTANZO, S. J.†

VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By Thomas Reed Powell. Columbia University Press, New York: 1956. Pp. 215.

As one of the great many unwashed of the world, I once cried when I was told by my widowed mother that she could not afford to send me to Harvard Law School and ordered me to double register at Andrew D. White's University Law School, named for that democratic Quaker, Ezra Cornell who dared to give college degrees to plumbers and farmers allergic to Greek and Latin, not to mention women. My tears were wasted. At Cornell, in summer school, I took classes with both Scott and Frankfurter, and studied under so many distinguished visiting and Cornell Professors in my almost four years there, that I have always thought my failure to attend at Cambridge was a blessing in disguise.

Nevertheless, as generations of Harvard Law School students have regaled me with their classroom joy of having Thomas Reed Powell teach them Constitutional Law, I have come to regret deeply not knowing a teacher who so greatly inspired so many. It was his great sense of humor, and the impudence of George Bernard Shaw, I am sure, that has made him so beloved. I would hazard the guess that "T.R.P." found it difficult to behave in class and that this caused his students to love him. And it probably accounts for Harlan Stone's bringing him to Columbia Law School and assuring William D.

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Guthrie that he was "sound," when Stone knew "darned well" that Powell was not, from Guthrie's "point of view." (p. 46).

Turning to this lovely little book of Powell's last lectures, I reluctantly concur with what Professor Paul A. Freund, Powell's replacement at Harvard, says in his Foreword: "There is in these chapters an echo of that sharp gaiety and uninhibited candor that made companionship with T.R.P. a bright delight." Freund says beautifully that Powell's ". . . wisdom, like that of Socrates himself, was sheathed in playfulness" and he reminds us that Vermonter Robert Frost has said: "The way of understanding is partly mirth." (p. XI).

To one who knew not Powell except from his students and his law review articles, this book of lectures is a great disappointment. Even though I teach constitutional law and am interested in the cases, Powell's recitation of the facts of one case after another is a dull as dishwater. Freund is a master of understatement when he says there is only "an echo" of the real Powell. I would say it was merely an echo of an echo.

But when you hear it, you recognize it and thrill to it whether you agree or not. Speaking of Holmes, whom Powell adores, his real self emerges to take a vicious crack at those of us who do not admire Oliver Wendell as he did. Speaking of Holmes' view that a practical solution is often preferable to a logical or philosophical distinction, Powell comments: "Such a point of view is anathema to a group of contemporary writers of a certain eschatological (the word must be spelled and pronounced correctly) persuasion who fill the law reviews with denunciations of Holmes because he is skeptical about the dictates of 'natural law,' so-called. Pious prattlers of an unanalyzed doctrine, they miss the greatness, the wisdom and the ethical values of Holmes." (p. 36).

As for the Constitution, T.R.P. assures you that "like Topsy, it just 'grewed.'" (p. 3). And he pays his disrespect to ". . . some twentieth-century official remarks from some Supreme Court Justices who seek to impress upon us in effect that it is not *they* that speak but the Constitution that speaketh in them." Powell says: "Somehow this reminds me of the biographer who wrote of Gladstone that his conscience was not his guide but only his accomplice." (p. 28). And he adds: "It will ever remain a mystery to me how intelligent jurists can make these professions of nonparticipation in the judicial process." (p. 28).

Powell's impishness is momentarily displayed when he discusses decisions of Chase and Johnson of the Marshall Court that indicate that laws which violate natural law are unconstitutional. In the course of his quoted remarks, Johnson, J. said that ". . . a principle . . . will impose laws even on a deity"<sup>1</sup> and this prompts T.R.P. to say: "Unhappily there seem to be issues of jurisdiction and procedure here, which Mr. Justice Johnson leaves without explication. It must be doubted whether mandamus will lie. In my book, the writ runneth not so high." (p. 31).

Powell apparently re-read Marshall's opinions before delivering these lectures in April and May of 1955. A bit earlier that year, on the anniversary of *Marbury v. Madison*<sup>2</sup> (February), he gave a lecture at William and Mary College as part of its Marshall Bi-Centennial Celebration. This accounts for his frequent detailed reference to Marshall's opinions and his delightful conclusion that: "For all his firm convictions" Marshall "left fairly wide scope for play in the constitutional joints." (p. 31). What a delightful way to put it!

It is interesting to hear Powell say that despite his years of teaching Marshall's opinions, he failed to understand the significance of *Gibbons v. Ogden*<sup>3</sup> or *Brown v.*

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1. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810).

2. 5 U.S. (1 Cranch) 137 (1803).

3. 22 U.S. (9 Wheat.) 1 (1824).

*Maryland*<sup>4</sup> until he did these James S. Carpenter Lectures at Columbia. He asks: "Was it my feebleness of mind, were even judicial majorities somewhat errant or even perverse and foolish? The supposedly great teachers of common law subjects were able to paint pretty pictures and perfect geometric patterns. Why couldn't I do it in public law as they did it in private law?" (p. 33).

During the Marshall Bi-Centennial some of us have had fun speculating how John Marshall would have voted on the New Deal laws during the crisis in the Court in 1937. Powell declares he does not know, but says: "It is for me enough that Marshall's superb opinions afforded texts in support of many exercises of national authority for purposes undreamed of in his day." (p. 56).

As a phrasemaker one can see that T.R.P. was a genius. "The *Lochner* case was later overruled by the *Bunting* case without being mentioned at its own funeral." (p. 39). Noting that *Lochner*,<sup>5</sup> because not cited, could be quoted with approval by Mr. Justice Sutherland in the *Adkins*<sup>6</sup> case, Powell remarks: "It is judicial heads that count. Five Supreme Court heads of the particular moment voted [in *Adkins*] the condemnation [of the federal minimum wage bill for women], although 35 of the 45 judges who sat in all courts on the question voted for its validity." (p. 40).

One of the most interesting parts of the Powell lectures is his discussion of Mr. Justice Roberts. As T.R.P. saw it, Roberts in his early opinions assured the railroad men in declaring unconstitutional their pension act, and the farmers in declaring "Triple A" unconstitutional, "that it was the men of 1789 and not he who saved them from Congressional charity," that he was "almost an automaton" as his only duty as a Judge was "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." (p. 42). Powell remarks that the railroad men and the farmers must have been amazed to learn that the dissenters (Chief Justice Hughes, and Justices Brandeis, Stone and Cardozo) "were not bright enough to know it" and "must have been without the right kind of precision instruments for measuring angles, areas and corners." (p. 43).

Speaking ad hominem, T.R.P. says:

"The thesis which underlies the title of this series of lectures ["Vagaries and Varieties in Constitutional Interpretation"] could be amply supported by the kaleidoscopic voting of Mr. Justice Roberts during his judicial career. He saw a somewhat flickering white light on the road to Damascus after the election of 1936 and before the proposal of the so-called Court plan of 1937. The light grew stronger and steadier later. Yet in his last two terms he was in dissent in 93 out of the 181 cases in which the court was divided. In one third of the dissents he was alone . . . . Thus in these two periods before and after 1937, not only was the court divided against itself, but considering his full fifteen years of service, Mr. Justice Roberts might be said to have been divided against himself." (pp. 81-82).

It is surprising to observe Powell's saying:

"Taney's mind seems to me markedly neater than that of Marshall, and his arguments are less open to refutation. Marshall was more intricate, more philosophical, clever at turning sharp corners, and his elocution is more sonorous than Taney's—gifts which doubtless are literary virtues but not necessarily judicial ones. Marshall was a nation builder, which Taney was not. As a creative statesman Marshall built superstructures on the foundation laid by the Fathers, but Taney in my view kept closer

4. 25 U.S. (12 Wheat.) 419 (1827).

5. *Lochner v. New York*, 198 U.S. 45 (1905).

6. *Adkins v. Children's Hospital*, 261 U.S. 525, 548 (1923).

to that foundation than did Marshall, with always the tragic exception of his *Dred Scott* enormity as to the absence of national power to forbid slavery in the territories." (p. 151).

Not sharing this view, I suspect Powell does not either, as later on he says:

"Taney insisted that it had become established that the states enjoy a concurrent power over commerce. If we might compare the decisions of this era in terms of their results without caring about the theory or what I may dub the *lexogamy*, we might be better satisfied than we are when wading through the too voluminous and too numerous opinions. Their composition must have taken a long time if the authors had to write them out in long hand." (p. 152).

At one time Powell assumed that ratification of the Constitution by conventions instead of by the state legislatures made it unconstitutional under article XIII of the Articles of Confederation. (p. 214). Because the national government was organized before Rhode Island or North Carolina ratified, he says there was secession by eleven states and that they coerced Rhode Island and North Carolina to ratify. (p. 214). After the war between the states similar coercion was applied to the six unreconstructed states to make them ratify the Fourteenth Amendment. (p. 215). "Another blot on the Constitutional escutcheon is the assumed consent of Virginia to the creation of West Virginia as an independent state." (p. 215). T.R.P. also thinks the separation of the thirteen colonies from the Mother country "... contained elements of the extralegal" but with Shavian wit he resigns himself to all these illegalities and concludes his lectures by saying:

"Fortunately, even in tracing the titles of real estate, there is not infrequently needed the saving grace of prescription. Prescription may need to be invoked in making acceptable the course of constitutional history and of constitutional law." (p. 215).

What a grand person and what a great teacher Thomas Reed Powell must have been. So challenging! So witty! I wish in his last lectures he had allowed his wit to flash more, but as I am sure he would be the first to tell you, had he not died in the late summer of 1955, that this is a very peculiar review in that I have ferreted through his "lucubrations on constitutional powers" (p. 157) to bring to you the flavor of his wit and leave the rest for us dull professors to consult when we want to analyze this leading case or that, and need the invaluable help of Powell's penetrating mind.

ARTHUR JOHN KEEFFE†

THE BIRTH OF THE BILL OF RIGHTS 1776-1791. By Robert Allen Rutland. The University of North Carolina Press, Chapel Hill: 1955. Pp. 243.

Robert Allen Rutland, formerly a newspaperman and research associate with the State Historical Society of Iowa, and presently on the staff of the Graduate Department of Journalism, at U.C.L.A., has fulfilled a long unrequited need for a volume detailing the historical process whereby the Federal Constitution was invested with the Bill of Rights. He combines the objectivity of the research scholar—he holds graduate degrees from Cornell and Vanderbilt universities—with the reporter's expert recording of human events, motives, and motivations. With remarkable restraint he neither seeks to establish a thesis for the reader's acceptance nor project personal interpretations. Not until the last chapter does the author point to a lesson for our times which the history of the Bill of Rights has fashioned for our counsel.

In the preface, the author states his purpose: "This book represents an effort to draw together in one volume the story of how Americans came to rely on legal guarantees

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for their personal freedom." (p. v.). The first nine chapters fully realize this worthy objective. In a summary survey, the author makes brief references to the English statutory and common law provisions for personal rights which the colonists brought to the New World as their heritage. The Magna Carta of 1215 is historically significant and symbolic for the future of constitutionalism in detailing in writing certain contractual rights, privileges and immunities against the whim of arbitrary government. The writ of habeas corpus was slowly converted from its original purpose of summoning before the bench whomsoever the Court chose, to become, in the late seventeenth century, an instrument for releasing a person unlawfully imprisoned. The early jury of information became in time adjudicators of fact. The Statute of Merton of 1236 secured the right of the accused to counsel unless charged with felony or treason. The first Statute of Westminster of 1275 proscribed excessive fines and bails. The petition of Rights of 1628 and the Bill of Rights of 1689 reasserted the supremacy of law over the royal prerogative. Press censorship, which the Licensing Act of 1662 established, gave way gradually to the advantages of a free press in a parliamentary cause. *Lilburne's Case*<sup>1</sup> before the Star Chamber in 1637 is renowned for its claim of privilege against self-incrimination which an act of Parliament in 1641 acknowledged. Freedom of religion in England was a distorted product of the Reformation and all the divisive and antagonistic forces which religious upheaval disgorged. Not until the Tolerance Act was the worship of Protestant nonconformists legalized. The Common law rights, as Sir Edward Coke listed them in his *Second Institutes* (1642), included due process of law, habeas corpus, imprisonment for cause, trial in vicinage, and the prohibition against double jeopardy.

Pre-revolutionary American colonial history discloses a marked tendency to commit this English heritage to written codes, to improve upon its imprecision, and to advance beyond it. By charters, royal and proprietary grants, or by compacts drawn by the people themselves, an American experiment in personal freedoms was fashioned to meet the distinctly New World aspirations. Obviously, freedom of press and speech, so instrumental for the cause of the Revolution, established themselves with greater ease than in England and the causes for seditious libel were narrowly drawn. The vague boundaries of cruel and unusual punishments were more clearly defined. In recounting the sluggish struggle for religious freedom, the author for some unaccountable reason scarcely even mentions the Catholic Cecil Calvert's Toleration Act for the benefit of all christians in Maryland. The immediate exemplar for the many bills of rights which the newborn states would either prefix or incorporate into their state constitutions was Virginia's Declaration of Rights of 1776, the work of George Mason, who looms as the foremost champion in this history of legal securities for personal liberties. Despite an emphatic prevailing insistence on the circumscription of power by a written bill of rights, disparities between the theory and practice provoked Madison, like many others, to observe: "Repeated violations of these parchment barriers have been committed by overbearing majorities in every State,"; and of his own state: "In Virginia I have seen the bill of rights violated in every instance where it has been exposed to a popular current." (pp. 81-82). Under the Articles of Confederation the safeguard of personal liberties was wholly a state concern. Congress, however, in providing for the Northwest Territories, set some norms for the states yet to come, and marked the turning point toward a future national provision for the security of personal rights.

At the Convention in Philadelphia, the representatives of the Confederate States labored to construct a sovereign Federal Government compatible with the integrity of the member states. Not until the eleventh hour did George Mason raise his voice

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1. 3 How. St. Tr. 1315 (Star Chamber, 1637).

in protesting the absence of a Federal Bill of Rights. His "objections to the Constitution of the Government" alerted a genuine concern among many for such a provision, as well as affording the Antifederalists argumentative reason for their cause. Providentially the wise counsel and astute statesmanship of young Madison prevailed for amendment *after* adoption as against amendment *prior* to ratification, and the "hold out plan" of Jefferson, who wrote from France. This great compromise and its fulfillment under Madison's conscientious and judicious promotion, won the confidence which the New Republic sorely needed.

In the last chapter the author in a cursory survey points to the times and conditions when bills of rights are most vulnerable—times of war and when anxiety for internal security prevails: the Alien and Sedition Laws, Lincoln's personal suspension of the writ of habeas corpus at the outbreak of the Civil War, the effect of the *Slaughterhouse Case*<sup>2</sup> on the Federal application of the Fourteenth Amendment, the injustice inflicted on American citizens of Japanese descent in the last World War, and the troublesome doubts evoked by the use of the privilege of the Fifth Amendment before Congressional Investigating Committees inquiring about subversive activities. Since 1920, the Federal Government has assumed under its protective mantle the freedoms of the First Amendment as they have been made restrictive of State action through the "liberty" and "due process" clause of the Fourteenth Amendment. The determined resistance to desegregation conclusively establishes the lesson which the author champions, a lesson which history itself has fashioned for our counsel, namely, bills of rights are no more than parchment barriers unless they draw their inward efficacy from moral persuasion and an enlightened public opinion.

This is an admirable book which every student and lecturer of American constitutional history should use. By way of postscript, the reviewer reluctantly, in the light of the rich merits of the volume, but nonetheless hopefully chooses to challenge a hard-to-die historical fallacy which the author uncritically repeats in the first pages of his otherwise learned book:

"Thus the American Revolution had its seeds in the Puritan Revolt of English forbears, with the avowed goal of giving citizens the freedoms won a century earlier in the mother country. Indeed, the Puritan Revolt furnished a philosophical basis for the American events of 1765 onward . . ." (p. 1).

The prime leaders who oposed the autocracy of the Stuarts in the events leading to the famous Petition of Right, were men who were equally opposed to Puritan theories: Sir Edwin Sandys, Sir Edward Coke, John Selden, Sir John Eliot, and Denzil Hollis. It was these forerunners of the Whigs, the heirs of Bracton and Fortescue, who gave direction to the evolution of that English constitutionalism in terms of which Lord Somers and his associates justified the Revolution of 1688, and Burke defended the constitutional ideas in the War of Independence. Burke and Lord Acton traced the identity of the Old Whigs, whom they carefully distinguished from the New Whigs, Fox, Price, and Priestley. One would think that the vaunted claims of Puritan liberties and constitutionalism would silence before the brutal fact of a military Protectorate and the wholehearted rejection of the Commonwealth by the Restoration.

JOSEPH F. COSTANZO, S. J.†

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2. 83 U.S. (16 Wall.) 36 (1873).

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FREEDOM'S FETTERS, THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES.  
By James Morton Smith. Cornell University Press, Ithaca, New York: 1956.  
Pp. 464.

Written and spoken ideas may lead to action; therefore, any political organization which permits criticism of its policies, structure, methods, or even personnel may have planted the seeds of its own destruction. The action which may be provoked by written and spoken ideas, on the other hand, might promote improvement within the political framework without destroying it. If criticism of an existing political organization were effectively prohibited, a political status quo would be maintained and the organization would not develop to meet the needs of society. Every political organization should, therefore, permit the maximum amount of freedom to criticize consistent with its preservation. The difficult issue is to determine the point at which freedom to criticize should not be permitted.

Mr. Justice Holmes in applying the Espionage Act of 1917 stated, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>1</sup> The point beyond which criticism will not be permitted is aptly described, but the location of this point is elusive in particular factual situations. It is much easier to look at factual situations from a hindsight point of view and evaluate the determination of the point beyond which criticism should not have been permitted, than it is to locate such a point in a current situation. Correctly locating such a point in a current situation is an indication of political wisdom.

Although the author states in the Preface: "This work was undertaken without any particular regard for present-day implications," such implications are apparent. The external threat during the administration of President John Adams was France; the fear that some alien residents and some citizens would assist France and attempt to overthrow the United States Government constituted the internal problem. In order to counter this supposed threat the Federalists, who controlled both Houses of Congress, enacted the Alien Enemies Act, the Alien Friends Law, and the Sedition Law.

The author traces these acts through the legislative process and points out the Constitutional issues involved. The Jeffersonian Republicans anticipated the possibility of suppression of freedom of speech and press and fought their passage at every opportunity. Although some of the Constitutional arguments of the Republicans are convincing in the light of present day interpretations of the Constitution, these arguments failed to prevent the Federalists from accomplishing their purpose.

The enforcement of the Sedition Law constitutes a black mark in our judicial history. The law was used to suppress and to attempt to intimidate the Republican opposition to the Federalist party. Although the major enforcement effort was directed against the press, the ridiculous extreme of the situation is illustrated by the fact that an inebriated patron of a tavern was prosecuted and convicted for stating that he didn't care if those who were firing a cannon in celebration of the arrival of the President fired through John Adams' posterior section. (p. 270-74).

In many of the cases the trial judge's comments upon the evidence were so argumentative and prejudicial against the defendant that it would constitute reversible error by modern standards. Likewise the trial judge's rulings on Constitutional issues were shocking when compared with present day practice.<sup>2</sup> Lawyers will wonder how such

1. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

2. In the trial of James T. Callender, for example: "Judge Chase interrupted Callender's counsel to deny that the charges in the indictment were merely opinions and not facts falsely stated. Discarding judicial restraint, he bluntly branded Callender's book as false; the

injustices could occur under our judicial system. The fact that the Federalists had been in office since the formation of the new government and had appointed the Judges constituted one factor. The fact that our republic was in its infancy, and the Judiciary had not yet established a tradition of independent, objective fairness is another explanation.<sup>3</sup>

The historical setting and development of the Alien and Sedition Laws as well as the descriptions of the trials are excellent. Some lawyers may be slightly disappointed that certain aspects of criminal procedure, for example, *voir dire* and the selection of juries, are not covered, but the book is primarily a historical study and not a technical law book. Nevertheless, it is certainly recommended reading for lawyers as well as laymen. Not only will the reader enjoy the discussion of outstanding legal issues which confronted our nation in its infancy, but this book will tend to impress the reader with the value of fundamental rights which are sometimes taken for granted.

CHARLES HARPER ANDERSON†

THE RIGHT TO LIFE. By A. Delafield Smith. The University of North Carolina Press, Chapel Hill: 1955. Pp. 204.

This book is a pioneer work in presenting a *legal* approach to society's responsibility to the individual person. So far, much has been written on the importance of a sociological approach to law and jurisprudence has ceased to be an ivory tower, becoming more and more receptive to the findings of the social sciences. With this book the science of law has come into its own. Law has much to take from sociology but it has also much, if not more, to give. According to the author, "The central theme of social reform is to produce a better legal environment, an environment more conducive to the growth of the individual—this is also the goal that made the human race seek a *legally ruled society* in the first place." (Emphasis added.) (Book Jacket). This is the keynote of the whole book.

The author is not a mere speculative philosopher. His reflections and observations are based upon his experiences during a long career of private work and public service. From 1916 he was engaged in legal practice in New York City, and in 1937 he became principal attorney of the newly formed Social Security Board, continuing as Assistant General Counsel when that organization was merged in the new Federal Department.

It is not possible in this review to give a complete synopsis of the thirteen chapters, dealing with the various relations between man and society and the intensely human problems arising from the rapidly developing civilization of modern America. We can only touch upon the main concepts running through the entire book.

The starting point of the author is the fact of a growing interdependence of men, one upon the other. "The technics of civilization grow ever more technical. There is no salvation for us save in the responses of our fellow man. . . . As individuals we no longer draw our support from nature. Human society, with all its complexities of social and economic organization, has intervened. We depend on our fellow men for what we need." (pp. 10-11).

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defendant's bad intentions seemed 'sufficiently obvious' to the judge." (p. 347-48). Judge Chase finally drove defense counsel from the case by his continuous interruptions. (p. 352).

3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), firmly established the principle of judicial review. The Alien and Sedition Laws expired in 1801 with John Adams' term of office.

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In face of such dependence, how can we still preserve our independence? This is the main question for the author. We achieved our independence *vis-a-vis* nature, in spite of our dependence on her, because she is dependable by reason of the laws which she follows with the utmost constancy. So, the author maintains, a similar independence can be preserved in society by virtue of a reinforced Rule of Law. But the democratic way of maintaining the Rule of Law is entirely different from the totalitarian way. In a democracy the state must not act like the super-boss, resorting to police power and physical force in the distribution of wealth. "Law should teach us that it is the fact of having a legal right to what we need, rather than the fact of having produced or secured it by our own efforts, that furnishes the primary condition for preserving human dignity and independence." (p. 7).

The task of public social administration is "to service legal rights," not to dispense gratuities and charities. The author does not propose new measures of law. His principal concern is to articulate the underlying philosophy of the Social Security system, so that it may be carried out in the proper spirit. He regrets that a certain "... hesitancy to put the service of fundamental needs on a legal footing still characterizes most of our social and political activity in the field of human welfare." (p. 108). He likes to see social legislation and its administration "... motivated by the aim of giving the individual a legal status and legal rights commensurate with his needs." (p. 108). The new system will not work smoothly unless it is solidly supported by a sound *ethical* philosophy, which the author sums up as follows:

"Does society come first or the individual? We do not, I think, aid children as a social asset, in any ultimate sense. We must regard the individual as an end in himself. Our ethical justifications do not require reinforcement from social ends. May we not come to realize that society's greatest achievement is a mature, responsible, and highly competent individual?" (p. 110).

Only a lawyer steeped in the tradition of constitutionalism and experienced in the field of social work can counsel us, as the author does, to "... strive to encompass social measures in the scope of our fundamental legal guaranties of equal protection and the right to be heard under law." (p. 118).

The author does not identify the Rule of Law with the rule of thumb. He reminds us of the fundamental distinction "... between rights that money will presumably satisfy and those that it will not satisfy." (p. 119). In servicing personal rights, the author sees the "... need for much more flexible judicial procedure." (p. 148). For, "... personal rights do not lend themselves, in the same degree, to the scientific precisions of property law. Ideal interpretation of them is vital if they are to prevail. Introducing the spirit of reason, sound thinking, and the strength that comes from knowledge of one's right, is essential if the laws establishing personal rights are not to be prejudiced in their operation." (pp. 192-93).

Four chapters, from the ninth to the twelfth, are dedicated to the problems in connection with children. The author stresses on the one hand the importance of appointing private guardians for the "wards of the state," and on the other hand the indispensability of ultimate judicial control. "In the judiciary, and in the judiciary alone, can we hope to establish the necessary consideration for fundamental rights and prerogatives of the individual in harmony with the conditions which the social order requires." (p. 175). But the judiciary can never take the place of a private guardian, and while it holds the private guardian accountable to it, it is the private guardian that can really take the place of the father and mother in the heart of the child. A trained social worker, serving as a private guardian, and working under the authority of the court within the legal framework, may be able to transform a delinquent into a wonderful personality. For, as the author points out, "... *it* is

*not working in an authoritative setting that prejudices professionalism.* Rather it is the *exercise of authority.*" (p. 187).

The author, like a true American, does not believe in forcing anyone, whether child or adult, into the right way of life. The ward must be led patiently and tactfully to see the point, for unless his reason is convinced, to beat him to his knees will only result in greater rebelliousness. Authority there must be, but like the sword it should be kept in the scabbard. The author uses a concrete illustration which to me is worth a hundred pages of theorizing:

"If my foster child refuses to go to school, I can put my arms around him and tell him I love him; I can work over him, climbing the stairs to his bedroom again and again, and if I win, I can start him off to school and he will go there and study, but if I attempt a short cut, or my wife exerts upon him the great force of her irresistible will, he will seize the first avenue of escape, and the teacher will report later that Charles did not attend school that day." (p. 145).

This is an age of involvements. The short cut is like cutting the Gordian knot. The American way is to untie it with patience, love and a great deal of good humor. The process may be slow, but eventually it is bound to conquer all difficulties. The whole outlook of the author is like that of Confucius, who said:

"Lead them by the political power, keep them in order by penalties, and the people will indeed try to avoid the penalties, but they lose their sense of shame. Lead them by moral virtues, keep them in order by good manners, and the people will not only retain their sense of shame but also be reformed at heart."\*

Confucius did not quite succeed, because he did not realize the necessity of a legal framework which safeguards moral education against arbitrary personal government. America, with the help of Christianity on the one hand, and the Rule of Law on the other, may yet succeed in developing the humanism that Confucius and other great humanists of the past have dreamed of. Furthermore, it will be a humanism into which all the wonderful discoveries in the physical and mental sciences will have been assimilated.

The book is one of desiderata. It aims only at a reorientation of our thinking about social problems. We cannot, of course, expect the problems to be thoroughly treated in one volume. But as a book of reorientation, and as a statement of the problems, it is both provocative and suggestive.

There are two points where the author seems to err by exaggeration. One point is that he thinks that as time goes on, police power will gradually give way to the tax power. As a matter of fact, police power will always be needed in many fields excepting, perhaps, social legislation. Moreover, the tax power, important as it is, is after all only a function, which cannot be made into a foundation of a social or legal philosophy. The fact that the courts have justified social legislation by the tax power rather than police power only means that they have to find some technical reason for upholding it. But to a legal philosopher no technical reason can be regarded as the ultimate reason. Tax power is no panacea any more than police power. You can tax the people to death as well as to life. All depends upon justice, reasonableness and conduciveness to the common good of the people. These latter are the real foundation of jurisprudence. I doubt that the author confuses a mere means with the end. But there are certain passages in chapter five that may possibly give a wrong impression.

The other point that calls for some comment is that the author does not seem to do justice to the social function of charities as inspired by true charity or love. The charities are the real harbingers of social legislation. No matter how advanced the law may be, there will always be room for love-inspired charities. Law may legalize

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\* Confucius, *The Analects*, bk. 1, c. 3 (translated by the author).

the charities, but love will still be ministering to the basic needs of man, which will continue to grow in quality as well as in quantity. I do not quite see eye to eye with the author when he says: "Our ethics, our charitable instincts, and our benevolent attitudes should be merged in our laws, and become integrated with them. We need to narrow the gap between the law and ethical action." (p. 115). To say that certain past and present charities should be legalized is one thing; but to say that *our ethics* and *charitable instincts* should be merged in our laws is quite another. The law, however humanly administered, has its limits. Our ethics and charitable instincts can never be merged in our laws, and even if they could, to merge them in the laws would be to kill the goose that lays the golden egg of social legislation.

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