Political and Civil Rights in the United States, by Thomas I. Emerson and David Haber (1952)

John B. Sholley
University of Washington School of Law

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advantageous to have corporate earnings retained, even though this results in liability under Section 102, with subsequent withdrawal of the income in the form of a long term capital gain.

This study is concluded with a number of appendices, the most useful for a lawyer being a complete legislative history of the statutory policy now lodged in Section 102. There is also a comprehensive bibliography which would be useful to an attorney faced with a Section 102 problem.

Dr. Hall has performed a valuable service in collecting so effectively a wealth of material bearing upon this controversial tax provision. Although his study is primarily intended to assist Congress in framing future tax policy, it contains much of interest and value to the tax attorney.

K. N. Hall

POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, by Thomas I. Emerson and David Haber. Buffalo: Dennis and Co., Inc., 1952, pp. 1209. $7.50.

Although not so described on its title page, this is essentially a casebook and is an amplification of materials prepared by the editors for a course offered by them at Yale Law School. In addition to cases, the great majority of which are decisions of the United States Supreme Court, there are numerous excerpts from legal and non-legal literature designed to provide a factual background for the problems considered in the cases, and to supplement the doctrinal analyses and arguments of the opinions. Then there are digests of a host of recent cases, and finally, extensive bibliographies of the literature, legal and nonlegal, on each of the areas covered in the book. These last two features are designed, most successfully, to meet the needs of the practicing lawyer, or any other person who wishes to pursue a particular subject further.

The aim of the book, according to its editors, "is to throw light upon those institutions, rules and procedures of our society which keep the system functioning on a democratic level, which permit our people to solve their problems through the exercise of democratic choice, which, in short, form the ground rules for the practice of democracy." (p.v.) That is a pretty ambitious undertaking, and we are immediately told that only some of the "ground rules" are to be considered. In general, it appears that the book covers only those areas where controversies currently flourish and legislative and judicial battles rage. Even so, limitations of space compelled the omission of several important and "live" problems; notably the treatment of aliens, "emergency" restrictions, and military law. (p. xv) The topic "Restrictions on Aliens" is covered briefly in slightly more than three pages of editorial exposition (pp. 522-6), excellent as far as it goes. This subject deserves treatment as a major topic on a parity, for example, with racial discrimination in housing, for the cruelty with which some aliens are now being treated at the command of Congress and with the approval of the Supreme Court (see, e.g., Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952); U.S. v. Spector, 343 U.S. 169 (1952)) is a most revealing—and disturbing—sign of the times.

As the title indicates, the topics which are covered in the book may be divided into two categories which overlap to a certain extent. In addition to the right of franchise, under which head are treated the various means whereby Negroes have been prevented or discouraged from voting, and the inequalities resulting from outdated apportionment of legislative districts and discriminations against minority parties, the category of "political rights" includes, in the classification of Professors

*Member of the Washington Bar.
Emerson and Haber, the "right of political organization and political expression," or, in other words, the extent of the power of government to define, punish or discourage sedition. This grouping, which includes a substantial part, but only a part, of problems usually placed under the heading of "freedom of speech, press, and assembly," has the great virtues of clearly distinguishing between the various purposes for which governmental restrictions are imposed, and of emphasizing the great variety of methods whereby governmental pressure can be exerted, ranging from old fashioned criminal sanctions, through the denial of sundry "privileges" to "subversives" screened out by test oaths or public employee loyalty investigation programs, to the refinements of legislative investigations, whereby suspected persons are subjected to widely publicized slander and to the hazards of prosecution for contempt or perjury. The editors conclude their treatment of sedition fittingly by reprinting major portions of the Internal Security Act of 1950.

The second grand category, "civil rights," is a catch-all of diverse matters, similar only in that all are deemed "ground rules" of democracy currently under attack or challenge, and that, by and large, the value of the included rights is not based on economic factors. This area is the subject of seven chapters. The first, entitled Right to Security of the Person, deals with the power of the federal government to protect this right against invasion by private persons or governmental officers. The second chapter treats fairness in criminal procedure, but only three topics are fully developed, police brutality, right to counsel, and searches and seizures. Several other aspects are covered by brief editorial statements.

The right of non-political communication is covered in two chapters, of which one covers the power to restrict socially harmful communications, and the other, much longer, covers control over the various media of communication, the soap box, the sound truck, motion pictures, and radio. The editors also include considerable material on the trend toward monopoly in communication industries and suggested methods of securing the presentation of differing views on issues of public importance.

The next topic, academic freedom, is one which as yet is only on the fringe of the law in the ordinary sense, for it will be a very rare case in which a court will redress an infringement of this freedom. Hence it is an area with which lawyers as such have had little concern. The editors apparently believe that lawyers should be concerned because of the importance of education in a democracy, and, perhaps, because of the possibility that legal protection may be extended to teachers in the future, as it has been to labor organizations within the past generation. In any event, the editors devote 118 pages to this topic, including nearly twenty pages of extracts from the faculty opinions delivered in the tenure cases of 1948-9 at the University of Washington.

The chapter on freedom of religion concentrates on the extent to which the United States Constitution forbids a state to assist religion in the operation of its public school system, a question complicated no little by the difficulty of finding any legally protected "right" in the complaining pupil or his parent. (See, e.g., Doremus v. Board of Education, 342 U.S. 429 (1952)). The fact that the Supreme Court was able to find that the Illinois "released time" program deprived a parent of "liberty or property without due process of law" suggests that judicial ingenuity may be equal to the challenge presented by attacks on academic freedom, assuming, of course, what now seems rather unlikely, a strong judicial urge in that direction.1

1 For partial confirmation of this suggestion, see Wieman v. Updegraff, 73 S. Ct. 215 (1952), decided after submission of this review. The court held that a teacher in a state college has a constitutional immunity from denial of further employment for statutory reasons which are "patently arbitrary or discriminatory," here, the refusal to take an oath negating past membership in any organization listed by the Attorney
Discrimination, chiefly racial, in matters of housing, education, transportation facilities, and employment opportunities is the subject of the final chapter.

Considered as a whole, the book presents one striking feature which is shared by all of its otherwise rather diverse topics. I refer to the "currency" or "liveness" of the problems which are fully treated. Of the sixty-odd principal cases, one half were decided within the last five years and two-thirds within the last nine years; and the last two years are represented by as many cases as is the entire period prior to 1936. This indicates that law in these areas is in the process of change or development, is dynamic rather than static, which means, of course, that the law is responding to what might be called social pressures.

The particular response evoked may take the form of executive, legislative or judicial action. In large areas the written law has remained unchanged for over eighty years, but has been revived after a period of neglect, as, is true of the Federal Civil Rights Acts, or has been reinterpreted by the courts, as is the case with the use of the Fourteenth Amendment to protect the freedoms of speech, press and religion against state interference. On the other hand, most of the problems involved in the present widespread campaign against sedition—or subversion, as it is now the fashion to term it—arise from legislation enacted since the invasion of Poland by Hitler.

When we observe the directions in which the law appears to be evolving in the various areas portrayed in this book, we are struck by the fact that it is moving to enlarge freedom in some aspects and to diminish it in others. Does this mean that basically inconsistent social pressures are at work? It would appear so, but it is submitted that the inconsistency is typically American. Our fundamental philosophy of government has always been libertarian and equalitarian, but we are inclined to insist that our emotions of the moment be embodied in law even at a large cost in terms of freedom, witness national prohibition. Our fears of the dire consequences which might flow from treating the Negro as a first class citizen have diminished, and the law is moving toward according him that status. Our pity for an accused denied a fair trial is beginning to outweigh our fear that he is indeed a guilty menace to society; our hatred of hardened criminals is being counterbalanced by rage at the cruelty of police officers—or so, at least, the Supreme Court now reads the command of the sovereign people as announced in the Constitution.

Perhaps it is wrong to assume that the Supreme Court follows, rather than leads, public opinion in respect to the matters just mentioned, but there is no doubt whatever that the extensive legislative attack upon communism reflects popular fear and hatred, widespread and intense, and that the Supreme Court in upholding the validity of this legislation is influenced rather strongly by this fact. We should not be surprised at this development, even though we may properly view with alarm the apparent public support of such strong attacks upon the most basic of all freedoms in a democracy, that of holding and expressing political opinions.

The victory of government over individual freedom in the campaign against sedition appears to be complete. The great questions now are, is the victory permanent, and what will be the collateral impact upon other areas of political and civil rights. These are great questions, "the most important subject in the world today," in the opinion of Robert M. Hutchins (p. iii), who has written a foreword for the book.

Although the editors confess a strong bias in favor of freedom (p. xv) they treat the problems with objectivity. The materials are carefully selected and well edited,
and present a well balanced picture of the present state of the law in the areas covered. The extensive case citations and bibliographies provide guidance for further reading or research. The book would doubtless make an excellent base for a law school course, its primary purpose. Unlike most casebooks, it should also make interesting and stimulating reading for lawyer or layman. The editors are to be congratulated for a timely job well done.

JOHN B. SHOLLEY*

*Professor of Law, University of Washington.