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Book Reviews

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BOOK REVIEWS

AMERICAN CONSTITUTIONAL LAW. By Bernard Schwartz. Cambridge: Cambridge University Press, 1955. Pp. xiv, 364. $5.00.

In this volume, Mr. Schwartz, who is Professor of Comparative Law at New York University, has undertaken to explain to a British public the intricacies of the American Constitution as regards the structure of government and principles of constitutional law. In pursuing this formidable task he has introduced frequent comparisons of British and American institutions and principles so that his book is also of great value to American readers even though professional students of American government will find little that is new. In addition to drawing upon a great mass of secondary sources in Great Britain and the United States the author has utilized English and American cases, Congressional and Parliamentary debates, and committee reports. In the first part of the book Mr. Schwartz is concerned with such fundamental principles of American government as the separation of powers, judicial review, federalism, and the rule of law and the organization and powers of the legislative, executive, and judicial branches of the national government. In the second part which readers in both countries will probably find more valuable, the author treats new developments in American constitutional and administrative law with emphasis upon changes and developments in federalism, the role of the Supreme Court, the rights of Negroes, the impact of the "cold war" upon civil rights, and foreign relations.

As a general treatment of American constitutional law, the book is excellent and will provide a useful text for elementary courses in constitutional law for undergraduate students. It is written in a clear and readable style and is well-enough documented to direct the reader to other sources. Its greatest deficiency is perhaps the omission of a systematic treatment of the role of usage in giving form and meaning to "the living constitution" and, from the standpoint of the foreign reader, the failure to relate the impact of politics and constitutional law upon each other.

There are also a number of minor errors of fact or interpretation. On page 19 the author states that if the holder of an executive or legislative office is appointed to the judiciary "he must relinquish his office." This is not correct as regards executive offices. John Marshall served simultaneously as Secretary of State and Chief Justice in 1801. Since then it has not been customary for judges to continue to hold executive offices although a number of Supreme Court Justices have undertaken special assignments upon Presidential request. Without at all minimiz-

ing sectionalism and parochialism in the United States it is doubtful as a result of the great mobility of population that "Local patriotism and sentimental attachment to the particular State have lost none of their vigor." (pp. 185-86). The implication that acts of the President were not reviewable prior to the *Steel Seizure Case*,[1] is not in line with *United States v. Lee*,[2] or for that matter with *Kendall v. United States*.[3] Between 1937 and the time this book was written two cases, not one as stated on page 212, invalidated sections of acts of Congress. The case overlooked is *Tot v. United States*.[4] It is likely that the author accepts too readily the consequences of the cliche that no one is entitled to government employment in his discussion of the loyalty and security programs of the Truman and Eisenhower administrations. (pp. 262-72). In the administration of these programs the issue is not the right of a person to federal employment, for no one has contended for such a right. The issue is whether the Executive may stigmatize one as disloyal or as a security risk on the basis of anonymous, unsworn testimony of professional informers, paid witnesses, and tale bearers.

Withal, however, Mr. Schwartz has produced a good general treatment of American constitutional law and has drawn useful comparisons and contrasts of the British and American constitutional systems, and the general value of the volume more than overcomes such specific shortcomings as those noted. To have undertaken the task the author set for himself required hardihood; to have executed it well required talent. Mr. Schwartz seems to be generously endowed with both.

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1. 343 U.S. 579 (1952).
2. 106 U.S. 196 (1882).
3. 37 U.S. (12 Pet.) 524 (1838).
4. 319 U.S. 463 (1943).

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THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES. By Richard Hofstadter and Walter P. Metzger. New York: Columbia University Press, 1955. Pp. xvi, 527. $5.50.

ACADEMIC FREEDOM IN OUR TIME. By Robert M. MacIver. New York: Columbia University Press, 1955. Pp. xiv, 329. $4.00.

I.

Perhaps it is uncharitable to recall the Scopes trial to readers of a law review published in Tennessee. It is, however, pertinent, because probably never since then has both general and professional interest in academic freedom been as intense as it is today. Then, the problem was raised against the background of religion. Today, for the most

part at least, it involves political attitudes and affiliations. Much has been written and still more said about the matter. The Supreme Court of the United States has spoken.[1] The American Association of University Professors has pontificated.[2] And the two books which are the principal subject of this review have been written.

Published as studies prepared for the American Academic Freedom Project at Columbia University, the two works are complementary. The first, although too modestly entitled *The Development of Academic Freedom in the United States,* is actually little less than a history of thought in the Western World. With broad strokes the author paints a picture of the development of European universities, the establishment of American colleges and the subsequent rise of the modern university in the United States. The second, narrower in scope but of equal quality, examines academic freedom in relation to public opinion in the United States to the structure of university government and to specific situations involving attacks on this freedom. It concludes with certain philosophical observations regarding the mission of a modern university and some suggestions as to how academic freedom can best be preserved.

On the assumption that a review is more than a summarization, no attempt will be made to describe the content of either of these works in detail. In passing, however, one should note the fascinating description of medieval universities in Professor Hofstadter's portion of the first volume. Their place in the curiously complex world of guilds and other social institutions is described in highly interesting fashion. The very real independence of the universities is pointed out and several instances showing the great prestige of some of them are cited. The successful contest between the University of Paris on the one hand and Blanche of Castile and the papal legate on the other is one of the more dramatic examples.

But the most significant aspect of the medieval period for the purposes of this discussion is that academic freedom, as we understand the term today, was apparently not of much concern to the scholar of that time. The university had a great deal of institutional freedom in the sense that it could and often did withstand criticism both by church and state. But in terms of the freedom of the individual professor there seem to have been some limiting factors.

It should be remembered that the idea of religious toleration did not evolve until after the Reformation and Counter-reformation. Thus, as long as scholarship tended to be concerned largely with religious and philosophical matters, it was generally assumed that it should

1. Slochower v. Board of Higher Education, 350 U.S. 551 (1956).
2. *Academic Freedom and Tenure in the Quest for National Security, A Report of a Special Committee of the American Association of University Professors,* 42 AAUP BULL. 49 (1956).

conform to the authoritative dogmas of the time. Dissent, although it existed, tended to be cautious and there is little if any indication that freedom to disagree was thought of as a matter of right.

But with the emergence of modern science contemporaneously with the Reformation, the problem became more acute. The controversies of the Reformation brought about as a by-product a decline in the influence of universities and a corresponding increase in control by church and state. At the same time, scientific thought was challenging many of the orthodox concepts of religion. Perhaps because of the greater control over universities, scientific investigation seems to have been carried on in this period by individuals having little or no connection with academic communities.

The great universities of Europe then, had no well-defined concept of academic freedom to transmit to the colonial colleges of North America. From the time these institutions were established until the nineteenth century, there seems to have been a gradual liberalization of thought which was part of the trend of the times. A great retrogression is said to have taken place after that period, however, with the multiplication of small, denominational colleges, many of them with low standards and offering no opportunity for advanced work. The relatively low status of the faculty, interference by ill-informed and opinionated boards of trustees and the pressure of public opinion all united to produce a situation where freedom of investigation and expression was restricted or, perhaps, even nonexistent.

One might fairly conclude from the Hofstadter and Metzger work that academic freedom as an important concept in intellectual life really did not develop fully until the emergence, first in Europe and later in the United States, of modern universities, dedicated not only to teaching through the use of received materials but also to the discovery and dissemination of new truths. That this should be true is quite natural, since the problem of freedom does not ordinarily arise unless and until someone is deprived of it. Only where there is controversy, and then only where the subject matter is important, is there likely to be any serious attempt to limit discussion. Only where the voices of dissent are sufficiently strong to make themselves heard will resistance be effective. In academic life, these combinations of circumstances will be found primarily in institutions where research is taking place and where relatively fearless and independent faculty members are employed.

II.

Modern times, as everyone knows, have brought many problems, and it is with these rather than the historical aspects of academic freedom that we are chiefly concerned. Professor MacIver has dealt with many of them in an admirable manner. Rather than to follow

his outline, however, it seems more useful to arrange the remainder of this discussion around a few propositions which seem to emerge from a consideration of his book together with the historical volume and the recent report of the American Association of University Professors. It should, perhaps, now be pointed out that this reviewer has been concerned with university administration for the past several years. It is hoped that this circumstance will not create a conclusive presumption of incompetence in the minds of the readers of this journal. Perhaps nearly twenty years of service on various university faculties will also be weighed in the scales.

At any rate, the first proposition which should be asserted is that academic freedom is not the private possession of any individual faculty member, nor, indeed, of the teaching profession as a class. Perhaps the phrase itself is responsible for some confusion as to this. Actually, academic freedom is part of a much larger concept, as Professor Hofstadter points out.[3] To identify it so closely with the teaching profession is to obscure its importance to society as a whole. Freedom of inquiry, whether in the class room, the laboratory or the market place is an essential attribute of a free society. If this truth were more generally recognized, there would be a greater acceptance of the concept by persons not related to educational institutions.

Another principle necessarily implied by the first, is that the exercise of academic freedom entails certain responsibilities and properly may involve certain penalties if the privilege is abused. This is fully recognized by Professor MacIver in his admirable chapter on the rights and responsibilities of the educator.[4] Although no one in academic life would be inclined to doubt the validity of the proposition, lack of emphasis on it has perhaps tended to lead the general public to a belief that the academic profession will tolerate if not encourage completely irresponsible activities on the part of faculty members.

Finally, it must be recognized that university administrations have responsibilities in connection with the protection of academic freedom and in interpreting the concept of such freedom to those who support institutions of higher learning. This point, perhaps not so generally accepted as the others, deserves consideration in some detail.

The position of the president of an American university is unique in the academic world. This fact is probably the result of what our authors call "The American Pattern" which took shape very early in the educational history of this country and which has persisted until the present time. Typically, the American university is, in legal form, a corporation. The directors or trustees who comprise the governing

3. HOFSTADTER, 61.
4. MACIVER, 223.

body hold title to the property of the institution and employ the president, who is the chief administrative officer. Only rarely are faculty members appointed to the board, and frequently the corporate charter prohibits them from serving. Faculty appointments are usually made by the authority of the board upon the recommendation of the president who, in turn, is advised by the deans and department heads. The power to terminate appointments is also theoretically vested in the board.

One can readily see that as far as the legal structure of the institution is concerned, practically no powers are vested in the faculty who, in a literal sense, are nothing but employees of the corporation. The reason suggested for this situation is that the early American colleges had virtually no professional teachers of maturity and high reputation and were little better than academies in many cases. In struction in the sense of drill was the rule and few questions of educational policy arose. Thus, the actual management of the institution was left to the president, who more likely than not was a clergyman rather than a professional educator, and to the board.

This situation made it quite possible for governing boards to assume dictatorial powers with respect to faculty activities. Even today the use of such powers is not uncommon. One of the greatest dangers to academic freedom lies in the fact that governing boards may and sometimes do exercise a virtual censorship over faculty members.[5]

Returning to the position of the president, it will be seen that depending on the confidence the board has in him, he is in a position either to protect or virtually deny the privilege of academic freedom to members of his faculty. An effective president will do his best to further the recognition of the privilege and to interpret it to the members of his board as well as to the public at large. In this connection, one of his tasks is to create an environment in which freedom of discussion is encouraged and to develop mechanisms through which the faculty may achieve proper recognition in the development of educational policies.

A system which will give full effect to the principle of tenure is essential but is by no means the only device which is needed in this connection. Fortunately, in spite of the legal organization of the usual university, many enlightened administrations have succeeded in developing means of increasing faculty participation in university affairs. Among others, the creation of university senates to consider broad questions of policy, proper systems for consultation regarding appointments and promotions and devices for bringing faculty members into relationships with the boards may be mentioned. All of these things tend to create mutual confidence and understanding and to

5. MACIVER, 268.

the extent they are intelligently utilized the environment in which academic freedom can flourish is created.

It should not be supposed, however, that the president alone can bring all of this about. He needs the constructive cooperation of the faculty. In this connection, the work of the American Association of University Professors has been tremendously helpful. The history of the association and an account of its achievements are described in Professor Metzger's portion of the historical work. In spite of the many problems which it has encountered, the association has grown in influence and has, generally speaking, gained the confidence of university administrations, although there has been some recent criticism both by administrations and faculties of the affected institutions, of the recent handling of certain cases involving loyalty investigations.[6] The principles of academic freedom and tenure developed by the association have received widespread acceptance among American universities.

But, as has been indicated, the protection of academic freedom is concerned not only with internal arrangements but with external relations as well. This is particularly true today for at least two reasons. One is that modern universities are expensive to operate and require large subsidies from public or private funds. The other has to do with the recent preoccupation with "loyalty" which has led to extensive legislative investigations and which has involved a number of faculty members. Professor MacIver's brilliant discussion of these matters under the heading "The Climate of Opinion" is one of the most valuable portions of the Academic Freedom Project.

As a result of these factors, universities are under constant pressure by organizations and individuals whose principal concern seems to be the retention of the status quo. Here a failure to understand the essential nature of academic freedom from the standpoint of the public interest has undoubtedly had a very serious effect on free inquiry and discussion. Fortunately, there are many signs of a return to sanity but it cannot be denied that an unhealthy atmosphere of fear and mistrust has been created in many institutions of higher learning and that public confidence in education has been shaken.

This brings us to the most difficult problem which university administration must face. A university president has obligations not only to his faculty. He also has the duty of protecting the good name of his institution and of safeguarding its reputation as a truly free educational enterprise. Both of these responsibilities can be fulfilled if he refuses to be thrown into panic by loose and unsupported charges of disloyalty among members of the faculty. He can and should protect his faculty when it appears that they are living up to their obligation

6. *Supra* note 2, at 49.

to be fair, scientific and impartial even though their views may be unacceptable to others. But if, after proper investigation, it is discovered that a faculty member is not observing these obligations but rather is in fact engaging in activities defined by law as subversive he must, if he is to perform his duty, take action against the offender.

Suppose, however, that the question arises as to the retention of a member of the Communist Party on the teaching staff. The AAUP has suggested that such membership alone should not be sufficient to justify a discharge and that the individual should be protected unless it can be shown that in fact his membership affected the objectivity of his teaching.[7] It is difficult to see how any conscientious administrator could accept this position. As Professor MacIver points out, membership in the Communist Party necessarily involves a commitment to use deceit as an instrument for attaining the ends of the party and thus repudiates the principle of objectivity on which the whole justification of academic freedom rests.

On the other hand, mere accusation cannot be taken as proof of guilt. Furthermore, as the Supreme Court of the United States has pointed out, the mere fact that one has asserted the protection of the self-incrimination clause does not in itself establish guilt.[8] In these circumstances, however, the duty of disclosure on the part of the faculty member should clearly exist, so that the administration can make an informed judgment on the facts of the case.[9]

One might go on for many pages in the discussion of these questions but enough has been said to indicate some of the reasons why the matter of academic freedom is far from simple. Basically, as has been suggested, there will always be contention and misunderstanding regarding the privilege until its true nature is understood. Much needs to be done to make both the lay public and the teaching profession itself aware of the reasons for protecting academic freedom, its permissible limits and its correlative obligations. The two volumes which have been considered here representing as they do probably the first thorough and truly scholarly attempt to come to grips with the problem are contributions of the greatest importance in attaining these ends.

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7. *Supra* note 2, at 58.
8. Slochower v. Board of Higher Education, 350 U.S. 551 (1956).
9. *Supra* note 2, at 60.

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MILITARY JUSTICE IN THE UNITED STATES. By Robinson O. Everett. Harrisburg: Military Service Publishing Company, 1956. Pp. 338.

Mr. Everett has tried to walk the tightrope—fatal to many lawyer-authors—of preparing a book that is both appealing to the layman and useful to the attorney. To an amazing degree, he has been, I think, successful.

The late Judge Paul W. Brosman, in the foreword, describes the book aptly as a "concise and lucid presentation of the principles and practices of military penal law." As Judge Brosman noted, Mr. Everett is well qualified—he has served in the Armed Forces as investigating officer, trial counsel, and defense counsel; he was a Commissioner for the United States Court of Military Appeals; and he is now a practicing attorney dealing first-hand with military law problems.

The best audience for this book consists of non-legally trained officers and men in the Armed Forces who have direct or indirect contact with military justice. There are still many of these who have not been properly prepared for preparation, trial and review of courts-martial. The result is too often inadequate comprehension of the system and, thereby, inability to accomplish properly any particular task. This book is practical enough to be helpful and yet not too technical to be understandable to these individuals. Wide dissemination within the Armed Forces, while probably unlikely, is surely, therefor, to be hoped for.

The author does not, of course, intend that this book cover every detail of military justice. It runs 338 pages—as compared, for example, to 1043 in General Snedeker's more comprehensive *Military Justice Under the Uniform Code*.[1] However, Everett's book will be more useful to the practicing military attorney than Snedeker's will to the non-lawyer. Everett has discussed the Code in detail together with a very large number of the applicable decisions of the Court of Military Appeals. The court-martial system is covered step-by-step, from investigation through trial and appellate process to collateral review. Punitive and rehabilitation practices are also discussed. In short, the book will give the military practitioner, if not the complete answer to every problem, at least orientation and a good beginning, and should be very valuable to those who, without adequate library facilities, must prepare and try special and even some general courts within small or mobile commands.

Mr. Everett has fortunately managed to avoid taking sides in many controversies that rage in this field. He presents, concisely and capably, the arguments used in relation to "command control" and military jurisdiction over discharged servicemen and civilians, as well as other

1. Little, Brown and Company, 1953.

controversial aspects of military criminal law. This detachment should and does enhance the usefulness of the text.

Because of the author's apparent effort to make this a terse albeit complete survey of military justice, it is inevitable that some more technical areas are treated rather lightly. This may be disappointing to the scholar or to the practitioner seeking answers to refined points, but it in no wise destroys the book's value. Indeed, to have given comprehensive treatment to all such areas would have seriously blunted the book's primary impact.

Short of quibbling about the inclusion, exclusion or treatment of minor legal points, little more can or need be said. It may, therefore, be permissible for me to join Mr. Everett in expressing regret at the untimely passing of Judge Paul W. Brosman of the Court of Military Appeals, who wrote the foreword to this book.

As one who, like Mr. Everett, worked closely with Judge Brosman, I can safely say that his grasp of this subject and his eloquence in expressing his viewpoints were only exceeded by his devotion to advancing the cause of true military justice. Never an extremist, he was often the "swing man" of the court as well as the moderator who kept the court and the heads of the military legal departments from drifting too far apart.

If, as Mr. Everett states in his book, military justice has come of age, it is in great part due to the work of Paul Brosman as judge, officer, arbiter, and scholar. I sincerely hope that the gap he has left will be filled and that the middle ground between the demands of military discipline and the need for ordinary judicial concepts, for which he labored, will find another as capable protagonist.

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