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Three Human Rights in the Constitution, by Zechariah Chafee, Jr.

Francis H. Heller
University of Kansas

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THREE HUMAN RIGHTS IN THE CONSTITUTION. By Zechariah Chafee, Jr. Lawrence, Kansas: University of Kansas Press, 1956. Pp. 245. \$4.00.

Zechariah Chafee died on February 8, 1957. His long and rich life had been dedicated to the promotion of human freedom. Beginning with *Freedom of Speech*, published in 1920, a long series of expositions as well as exhortations on the subject of civil liberty had issued from his pen. In more recent years, his tenure as University Professor at Harvard University permitted him to focus his entire efforts and energies on the topic he considered so supremely important. We owe to this period the three-volume collection of *Documents on Fundamental Human Rights*¹ and the sensitive evaluation of *The Blessings of Liberty*.²

Chafee had increasingly concerned himself with the historic roots of human rights and in 1951-52 he availed himself of two lectureships to expound some of the features of the past which he believed to be meaningful to the present. The first of these two series of talks was delivered at Boston University and has been published under the title *How Human Rights Got Into the Constitution*.³ The present volume is an expansion of the Judge Nelson Timothy Stephens Lectures, delivered at the University of Kansas in 1952. Taken together, the two volumes cast a significant light on the human rights aspects of the Federal Constitution itself.

49. Pp. 273-4.

† Associate Professor of Law, Indiana University.

1. Harvard University Press, 1951, 1952.

2. J. B. Lippincott Co., 1956.

3. Boston University Press, 1952. See 6 WESTERN POLITICAL QUARTERLY 835 (1953).

It is the Bill of Rights that springs to mind almost as soon as the word "liberty" is spoken. It is well for us to be reminded that the un-amended document was not devoid of libertarian provisions. Quite on the contrary! Consider only the list of those discussed by Chafee: habeas corpus (treated in the Boston University lectures), freedom of debate in Congress, the prohibition against bills of attainder, freedom of movement. Add to this the restrictive definition of treason,⁴ and Hamilton's premise in No. 84 of *The Federalist* assumes formidable substance.

It is, of course, a matter of history that Hamilton's argument did not prevail and that a Bill of Rights was promptly added to the Constitution. Patrick Henry or George Mason might not recognize the first amendment in the guise of the *Dennis* decision, or the fourth amendment in the welter of judicial contradictions of the recent past—but they made their point in 1789! Has it helped us? Would we have fared differently if our liberties had depended only on the Constitution proper? Chafee did not argue this question, yet his answer is implicit in the choice of his topic. He was careful to say that the human rights in the Constitution are "of equal value" with those in the Bill of Rights, but his historic overview suggests time and again that necessity as well as wisdom guided the Framers' hands and that the rights they chose to imbed in the Constitution may well be ancillary to the preservation of those others listed in the first eight amendments.

I sense a contrast between this book (and its companion volume) and Chafee's earlier and justly renowned volumes. There, he had been Chafee the advocate; the preface to *Free Speech in the United States*, written in 1941, sounds almost defensive as it notes that "I have often stressed the fact that the ultimate security for free and fruitful discussion lies in the tolerance of private citizens."⁵ In the 1951-52 lectures there is an aura of enlightened compassion for the frailties which lead these same private citizens to forget or to disdain liberty. This is not merely a mellowing induced by age. It is the flowering of a rich and warm mind, enhanced, one conjectures, by the opportunities provided him when, at last, he was able to escape the shackles of the curriculum and the confines of academic typology.

Three Human Rights has intrinsic value as political and legal history; but it is more than history. Chafee himself observed:⁶ "The immediate future of human rights in the United States depends less on our experiences in the immediate past than on the fullness or the emptiness

4. Exhaustively and authoritatively discussed by Willard Hurst in 58 *HARV. L. REV.* 226, 395, 806 (1944-45).

5. P. xiv.

6. P. 2.

of our devotion to the achievements of the remote past." Of course, this does not mean blind traditionalism, nor does it necessarily lead to the enshrinement of Burke or John Adams. Clinton Rossiter has told us that "the Conservative" sees society as a tree, "[risen] to its present strength and glory through centuries of growth."⁷ Chafee likens the present crisis in civil liberties to gales swaying the boughs of the Tree of Liberty and tells us that these boughs draw their strength to withstand the wind from "the depth and toughness of their roots in the past."⁸

The quotation is from Learned Hand—and this is not surprising. For there is much in the present volume that will remind the reader of Hand. And conversely *The Spirit of Liberty*⁹ reflects a philosophy that is largely akin to Chafee's. This may appear incongruous if one recalls that it was Hand who supplied Vinson with the intellectual tools for the emasculation of the clear-and-present-danger test.¹⁰ But it is not suggested here that Chafee and Hand saw eye to eye on matters of legal and constitutional doctrine; the similarity is rather in the approach to doctrine, in the underlying philosophy of government and of law. Both belong to the generation that acknowledged that men were human even when garbed in judicial robes and that the language of law acquired life only through the mouth of such humans. Hand phrased this most eloquently in his "I am an American Day" speech of 1944,¹¹ Chafee expounds the same point by the sheer force of the human drama he unfolds. Thus the development of freedom of debate, so vastly expanded in our age that the question of its limits is often raised, weaves from *Strode's Case*¹² through the tribulations of Peter Wentworth in the reign of the first Elizabeth, the successive controversies involving Sir Edward Coke, Sir John Elliott, to the Petition of Rights, and hence into the Constitution. Chafee perceived conceptual and institutional growth very largely in terms of men: it is from concrete cases that the law derives its doctrines and it is in case situations that the historian of the law discovers the matrix of ideas.

7. CONSERVATISM IN AMERICA, p. 27.

8. Pp. 2-3.

9. Knopf, 1952.

10. *Dennis v. United States*, 341 U.S. 494, 510 (1951), quoting with approval Hand's language in 183 F.2d 201, 212.

11. "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it." *THE SPIRIT OF LIBERTY*, pp. 189-190.

12. Where Parliament wiped out a fine imposed for language used in Commons. 4 Henry VIII, Chapter 8 (1512).

It remains for one immersed in the details of Tudor and Stuart England to critique the specifics of the tales which Chafee here assorts with high literary skill. To one concerned with law and its function in society and with the meaning of civil liberty in our days, the volume—to revert to an earlier figure of speech—is not only an examination of the ground but even more of the tree that this soil nurtured. The “tree of liberty” was Chafee’s first concern throughout his fruitful life. These lectures illuminate but a small part of the subject yet the philosophy that pervades them is the mature and humane idealism which Chafee personified through so many years.

FRANCIS H. HELLER†

† Professor of Political Science, University of Kansas.