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Book Review. Cases and Materials on Constitutional Law by John P. Frank

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mechanics of the election and a translation of the electoral law in an appendix. Dr. Radkey relegates to an inadequate footnote a statement of the mechanics of the whole thing of which he is writing. Why does Dr. Radkey think mechanics unimportant? The list system of voting which was used is foreign to American readers, and it is often alleged in our press to be the cornerstone of the new type of dictatorship which makes periodic efforts to demonstrate that it rules with the consent of the governed. Why does Dr. Radkey not consider the effect of proportional representation on the vote, and the age requirement for the franchise? Elections can be rigged through the electoral procedure and are not to be evaluated for honesty only in terms of physical pressures brought at the polls.

A decade ago Harry Dorosh in his study of the Constituent Assembly entitled *Russia's Struggle for Democracy*, which was based upon far less research than that of Dr. Radkey, discussed some of these matters of legal concern. Dr. Radkey's ignoring of them presents this reviewer with an occasion to raise his perennial complaint that historians pay too little attention to the texts of laws and the skill of lawyers in affecting the course of history. Perhaps a lawyer may be permitted to say that elemental forces are not all that control historical development. Dr. Radkey has seen the possibility that the presence or absence of Roman law concepts may have had profound influence upon the thinking of the Russian peasant and hence on the outcome of the Revolution. One wishes, however, that he might have appreciated that lawyers are not always working on the periphery and that histories cannot be considered complete which skim over their handiwork.

JOHN N. HAZARD.*

CASES AND MATERIALS ON CONSTITUTIONAL LAW. By John P. Frank. Chicago: Callahan & Company. Pp. xxviii, 1054 (1950). \$8.75.

Following a pattern set by many authors of recent casebooks, Professor John P. Frank of Yale has written a review of his *Cases and Materials on Constitutional Law*¹ in advance of publication. This practice not only enables the readers of *The Journal of Legal Education* to learn something of new teaching ways, but also gives them a standard whereby to measure an author's performance against his announced intention.

In his advance review Professor Frank has told us that he is abandoning the doctrinal arrangement in his organization of materials because the doctrines themselves are mere by-products of the great social issues and problems which have given rise to constitutional litigation. He insists doctrine is important, but that doctrinal arrangement is a poor way to acquire doctrinal skill. His materials will be focused upon an institution, the Supreme Court of the United States, and upon the basic social and economic difficulties together with proposed legislative remedies which give rise to constitutional questions. Doctrines which play similar roles will be studied in close connection with each other. Students will also be introduced to a large sampling of the non-case materials increasingly important in public law and will be acquainted with the methods of constitutional advocacy and decision.

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1. Frank, *Constitutional Law: Changes on the Horizon*, 3 J. LEGAL EDUC. 110 (1950).

In his casebook Professor Frank has sought to achieve his objectives in part by arranging the contents historically. The material in the book is divided into sections based on time periods. Within each period, under the title Protection of the Commercial Interest, the commerce clause, the contracts clause, and, in the four most recent periods, the due process and equal protection clauses, are studied against the background of text materials. These texts, in part written by the author and in part portions of the illustrative non-case literature, fill in the principal social and economic characteristics of each period, and also acquaint the students by brief biographical sketches with the leading judges then sitting on the Supreme Court. Each time period, save one, also contains a section entitled, The Rights of the People, in which questions of civil rights and civil liberties are posed. Three sections at the end of the book deal with three areas which raise contemporary issues largely unresolved by the Supreme Court of the United States. Notes following almost every case not only add, in many instances, to the students' understanding of the setting in which the case was decided, but also contain incisive statements of doctrinal analysis.

In my opinion, Professor Frank's skillful use of an historical arrangement is a very effective way of achieving most of his objectives—at least, when the discussion centers about the portions of the Constitution usually involved when regulations of business are tested. As the nation developed and as its economic problems changed, clashing ideas about the proper role of government in the economy were reflected in the constitutional opinions of differing Supreme Court justices. The law which emerged reflects the economic problems, the ideas, and the justices. A course of study, if reasonably realistic, ought to include materials bearing on these three factors. They are more revealing than doctrines in predicting the outcomes of cases. Functionally similar doctrines drawn from different sections of the Constitution present the court with alternative grounds for decision. Due process will do as well as equal protection; perhaps the contracts clause may furnish the opportunity for Court intervention. During given historical periods constitutional doctrines tend to achieve a kind of consistency with things more fundamental. A Court which believes deeply that the power of the government to intrude in economic affairs should be limited will find state statutes unconstitutional as violations of due process or as violations of the commerce clause (negative aspect), and will strike at federal regulations under the commerce clause (affirmative aspect) as well as under the Fifth Amendment. Hence, awareness of ideas, economic problems, and the justices themselves, in addition to the doctrines created, strengthens student understanding of the Court and its role.

There may also be another justification for historical study. In answer to some correspondence about Professor Frank's book, a friend of mine has recently written, "I have an objection of a general character. Roman law used to be taught in Germany and France as a system. After the adoption of codes which absorbed much of it but repealed all previous statutory and decisional law, the most enlightened scholars of Roman law shifted to a purely historical treatment of the subject. There is some intimation in an historical approach that the subject is dead. It seems to me that our constitutional law has not yet reached the point at which a subject becomes history." I wonder. Is it too much to say that some aspects of the subject are dead? No teacher of constitutional law who

has tried to devise a sane examination question designed to raise speculation concerning the outer limits of federal commerce power can fail to agree that the issue of the commerce clause, in its affirmative aspects (for the moment at least), is dead. No state economic regulatory legislation has violated substantive due process since 1937. The equal protection clause of the Fourteenth Amendment has been equally inactive in so far as the clause is applicable to statutes regulating economic affairs. Again, the contracts clause of the Constitution has shown no signs of vitality in recent years. If we are to give our students some feeling of the issues which have torn an earlier day; if we are to show them how the Supreme Court can stand as a road block in the midst of a government's attempt to pull out of near economic chaos, we (for the moment) will have to resort to history to do the job. In short, it may be true that to study a subject historically is to admit that it is dead; yet for some aspects of constitutional law, this qualification for historical study has been met.

Indeed it seems to me that Professor Frank's historical treatment of civil rights and civil liberties, much livelier constitutional issues today, does not come off nearly so well as his selection of material on the Protection of the Commercial Interest. First of all, unlike the materials on protection of the commercial interest, a common set of problems is not carried through by Professor Frank from one time period to the next. For example, The Marshall Era (Chapter 2) contains in the section Liberties of the People, the Sedition Act of 1798 and some contemporary reactions to it; The Taney Era (Chapter 3) contains readings on some problems of Negro slavery and cuttings on American nativism and anti-Catholicism; Chapter 4 presents three diverse civil and political rights cases, together with *Ex Parte Milligan*, upon the question of the power of the military; yet Chapter 5 contains no civil liberties section at all, and only in Chapter 6 do we pick up cases dealing with free speech under the First and Fourteenth Amendments. Thus, Professor Frank shows us something of the recurring nature of civil rights and civil liberties issues by these selections from history, but in general the history is not directly related to modern development. A book, even a casebook, constructed on historical bases is in some sense itself a history, and a history involves the adoption of some sort of principle on which to build the story of the past. For his commercial materials, Professor Frank has chosen to follow a pattern of the past drawn largely from the work of Charles A. Beard and his non-Marxian appreciation of the effects of economic influences. To me, the present and past civil liberties questions do not hang well on that thread. To this extent, the civil liberties and civil rights cuttings are not only peripheral to later developments, but are also peripheral to the scheme of development in each section of the book. Secondly, because the most exciting constitutional discussions of the day concern civil liberties, we have less interest in their history than in probing the merits of the issues raised.

Bar examinations do not examine on the basis of cases decided by the Taney Court. Does Professor Frank's casebook adequately discharge an obligation of reasonable coverage? I have made some comparisons and I estimate that 75 to 80 per cent of the doctrinal materials covered in older standard books are also presented in this new book. The crisp-styled notes are successfully employed to extend the range of the subject matter. Any danger of leaving a student doctrinally illiterate will arise not from the book but from the teacher who, while using it, dawdles in the early chapters.

Everyone who reviews another's casebook finds faults of omission and inclusion. Personal interest, Professor Frank has said, dictated his choice of topics for the section on Contemporary Problems. By the same standard, I would not have included the materials on Freedom of Communication which raise questions springing from economic monopoly of the means of communication. I would have selected material on what seems to me the most pressing civil liberties problem of the day: Communism's Challenge and the Constitution.² The multitude of loyalty oaths, of anti-subversive bills, of legislative investigations, of government loyalty programs presents the most difficult constitutional questions today. They are, to me, far more exciting than the general topic of how groups or individuals are deprived, by their poverty, of the rights of expression and communication which economic power and managerial position guarantee to the few. Of course, lack of opportunity to spread ideas is serious, but more immediately and perhaps more seriously, we face active repression on the ground of political idea and belief. I would like to discuss with my class the constitutional questions which these repressions raise.

MONRAD G. PAULSEN*

UNRAVELING JUVENILE DELINQUENCY. By Sheldon and Eleanor Glueck. New York: Commonwealth Fund. 1950. Pp. 504. \$5.00.

After ten years of research, the Gluecks are ready to talk about their one thousand boys. Five hundred delinquents and five hundred non-delinquents were compared over this period and their statistically significant differences noted. Against the experience of these thousand boys and the significant causative factors squeezed out of their comparisons, Professor Sheldon Glueck and Dr. Eleanor T. Glueck believe that the background of a boy whose social adaptability is as yet unknown can be projected and an accurate prediction made of his chances for delinquency.

Unraveling Juvenile Delinquency traces the tangled behavior strands of many carefully selected Boston boys. Traditionally investigated causative factors such as neighborhood, intelligence, and racial origin were controlled in this study by hand-picking the boys from the same type of underprivileged neighborhoods and matching them as to age, general intelligence, and national origin. The Gluecks come to this work already recognized throughout the world as careful scientists, original thinkers, and master explorers in the field of criminal behavior. This is, therefore, an important book and merits careful study.

In and of itself the construction of the book is noteworthy. Almost a third of the text is devoted to explaining the technique for the research project. In this section the Gluecks describe how the boys were picked and matched, how their personal and family backgrounds were explored, and how they were tested and examined by way of a physique study, medical examination, intelligence and achievement tests, Rorschach tests,

2. This happy phrase is the title to an article by Cohen & Fuchs, 34 CORNELL L. Q. 182, 352 (1948).

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