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# Freedom of Speech and Press in America, by Edward G. Hudson

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FREEDOM OF SPEECH AND PRESS IN AMERICA. By Edward G. Hudon. Washington: Public Affairs Press. 1963. Pp. xiv, 224. $4.50.

In his highly readable[1] volume containing just 179 pages of text, Mr. Hudon does an excellent job of tracing the theories which through history have underlain the decisions of the Supreme Court of the United States interpreting the free speech and press provisions of the First Amendment to the Federal Constitution. The book neither attempts to discuss the cases in detail nor to praise or condemn, except quite incidentally. Its primary purpose is to discover whether any of the tests of constitutional validity that successively have prevailed in the Court has been more successful than the others, and whether the Court has now arrived at a stable basis of decision.

The answer to both of the foregoing questions is in the negative, but the author concludes with a suggested constitutional test based on the specific beliefs of the fathers of the country, which he thinks may provide a sound basis for decision. His suggestion is closely allied to the views so eloquently set forth by Mr. Justice Black in several noteworthy opinions during the past five years and in his 1960 James Madison lecture at the New York University Law Center.[2] The bibliography which

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1. There are a number of typographical errors in the book, which better proofreading would have caught, and on page 83 the coined word "glimly" appears, perhaps substituted for "dimly." On p. 126 the statute involved in Beauharnais v. Illinois, 343 U.S. 250 (1952), is misstated as one designed simply "to punish libel of an individual"; but in general the author's capsule summaries of cases are remarkably clear and correct.

2. Black, *The Bill of Rights,* 35 N.Y.U.L. Rev. 865 (1960).

accompanies each of the fourteen chapters, in addition to footnote citations, facilitates reference to other pertinent literature, including recent books and articles, all of which has been taken into account by the author.

The first four chapters of Mr. Hudon's book discuss the common law background of free speech principles and the conceptions of constitutional freedom which prevailed on this side of the Atlantic prior to the adoption of the Bill of Rights. The author finds that the English libertarian objection to prior restraint on speech and press was enlarged in this country to a body of natural law principles which postulated freedom from other forms of governmental restriction as well. This expansion was, however, not given effect in the decisions of the Federal courts under the Alien and Sedition Laws, which sanctioned criminal punishment for utterances that could not have been prevented by law. The result was that as late as 1907 the Court could assert in *Patterson v. Colorado*,[3] through Mr. Justice Holmes, that the free speech and press provisions of the First Amendment "do not prevent the subsequent punishment" of such publications "as may be deemed contrary to the public welfare." Only in *Near v. Minnesota*[4] in 1931 and *Grosjean v. American Press Co.*[5] in 1936 did the Court finally and clearly state through Chief Justice Hughes and Mr. Justice Sutherland that the common law view had been broadened in this country—specifically in the First Amendment, now made applicable to the States through the Fourteenth Amendment as well as to the Federal Government—so as to outlaw governmental interference of various kinds with the constitutionally guaranteed freedoms.

In the period immediately following World War I, the theory that the abuse of free speech might be punished, which built upon the common law of seditious libel, was briefly dominant; but it yielded later to the clear-and-present-danger theory which was initially advanced in 1919 by Mr. Justice Holmes.[6] This theory was long in gaining ground, and it was not until after a "decade of flux" in the 1930's that the Court in *Thornhill v. Alabama*[7] finally adhered to it by a clear majority. Vigorous objections were afterward made to it by Mr. Justice Frankfurter.[8] It was supplemented in later cases by the "preferred position" which the Court assigned to the First Amendment freedoms in constitutional adjudication;[9] but its dominance was brief. It was applied to attempted

3. 205 U.S. 454 (1907), cited p. 54.
4. 283 U.S. 697 (1931), cited p. 55.
5. 297 U.S. 233 (1936), cite p. 55.
6. The test is whether the exercise of freedom in each case is of such a nature and takes place in such circumstances "as to create a clear and present danger" of "substantive evils" which the legislature "has a right to prevent." P. 70.
7. 310 U.S. 88 (1940), cited pp. 87-88.
8. Pp. 107-08.
9. Pp. 87, 92-93, 102.

punishment for contempt of court and to interference with public assemblies and labor organizing activities;[10] but in 1950, *Dennis v. United States*[11] drastically altered its nature, and it has not since been made the basis of decision.

Contending now for supremacy in the Court are the view taken by Mr. Justice Black, joined most clearly by the Chief Justice and Mr. Justice Douglas, and the so-called "balancing" process[12] whereby the relative social importance of the constitutional freedom asserted in a particular situation and of the evil that is sought to be prevented by legal interference with the freedom must be weighed against each other. The weakness of "balancing" lies in its failure to supply any rule of decision. Like the clear and present danger test, however, it could be supplemented (as it has not been as yet) by the "preferred position" doctrine and by specific rules of decision based on a judgment as to types of situations instead of in each case separately, whereby, for example, prior restraint of written or printed publications or punishment for political utterances might be banned. If "balancing" were so supplemented, its outcome might not be vastly different from the results of Mr. Justice Black's view, which attempts to attach a precise over-all legal meaning to the words, "Congress shall make no law . . . abridging the freedom of speech, or of the press." In this view, "no law" is taken literally, but possible exceptions to free speech or press, such as libel, obscenity, or incitement to crime, are left to be defined.

It may be doubted whether the results in particular cases actually have turned or will turn on a choice between the two tests as so far developed. A "balancing" by Mr. Justice Black as strongly supports constitutional freedom in the individual instance as his conception of the area in which "no law" suppressing freedom may be enacted.[13] His brethren who favor "balancing," on the other hand, can differ as readily with him concerning the line between libel or indecency and protected speech,[14] or whether motion pictures are a form of speech or press equally protected with other forms,[15] as they can over the weight of in-

10. Pp. 98-105.

11. 341 U.S. 494 (1950), cited pp. 111-22.

12. Pp. 122, 157-58. See Frantz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963), for a perceptive discussion of the issue so raised.

13. Barenblatt v. United States, 360 U.S. 109 (1959), dissenting opinion of Mr. Justice Black; Konigsberg v. State Bar of California, 366 U.S. 36 (1961), dissenting opinion of Mr. Justice Black.

14. Beauharnais v. Illinois, 343 U.S. 250 (1952); Roth v. United States, 354 U.S. 476 (1957).

15. Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). In Giboney v. Empire Storage Co., 336 U.S. 490 (1949), Mr. Justice Black wrote the opinion of a unanimous Court sustaining a State's outlawry of peaceful picketing in the course of an

terests on each end of the balancing beam. Mr. Hudon suggests that the "natural law" of freedom as the fathers of the country saw it, which extended to some matters of detail, may supply answers to a good many questions.[16]

Surely the views of the fathers are important in reaching conclusions; but as Mr. Justice Brennan has pointed out with reference to the establishment of religion clause, the preservation of inherited values under changed conditions is more fundamental than adherence to specific early views, even when these can be ascertained.[17] There are, moreover, many matters, such as the limits of political activity and free speech by civil servants[18] and members of the armed forces of a modern state, or censorship of so vivid and accessible a portrayal of conduct as the motion picture,[19] which the fathers knew not of. Unless all "speech" by government personnel must be wholly "free" or motion pictures are equated to newspaper editorials, difficult choices of policy must be made by the Supreme Court when governmental regulation of these forms of expression comes up for judgment.

Mr. Hudon does not consider the question, as yet inadequately discussed either on the Court or off, of whether the same method of decision or test of validity applies to judging the constitutionality of compulsion upon witnesses to answer questions in investigations as to determining whether a statute can stand. The most acute controversies with respect to "balancing" and the alternative to it have arisen in cases involving investigations.[20] If an inquiry or the requirement that witnesses answer is a "law" and if inquiry into opinion, utterances, or association is automatically foreclosed whenever resistance is encountered, or even if inquiry is stopped whenever it appears that the required disclosure might injure the reputation of the witness or of someone else, legislative access to information is cut off without consideration of the possible need for it, on the basis of a rule which was fashioned to meet quite different situations. A "balancing" process of decision, supplemented by

unlawful but, in economic terms, arguably justifiable boycott; for "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502.

16. Pp. 175-77. Mr. Hudon is careful to state that not all questions could thus be answered; the advantage would be that a central area of freedom would be considered completely inviolable, even though its boundaries might be in dispute.

17. School District of Abington Township v. Schempp, 374 U.S. 203 (1963), dissenting opinion of Mr. Justice Brennan, at 234-42.

18. United Public Workers v. Mitchell, 330 U.S. 75 (1947).

19. Times Film Corp. v. City of Chicago, 336 U.S. 490 (1949).

20. Barenblatt v. United States, 360 U.S. 109 (1959); Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

specific rules such as might establish immunity of political or religious affiliation or of educational discussion from compulsory disclosure,[21] involves, on the other hand, the articulation of a basis of decision in terms of the interests presently at stake.

The basic question is whether answers are to be mainly reached within a framework of received but flexible principle or mainly found within a body of law that is assumed to have been enacted with considerable precision. Neither approach can dispense with the need, in close cases, for the Justices to bring their highest statesmanship to bear in reaching new answers to new questions. The values to be applied are those inherited from the founding of the Republic; but the maintenance of civil liberties rests in the last analysis on the devotion of the Justices to them and on their sensitivity to the requirements of maintaining them in a fast-changing world. By illuminating the inheritance from the fathers with such clarity as recorded history permits and tracing its fate during two centuries of development, Mr. Hudon has aided the solution of many problems that lie in the future. His book merits close reading.

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21. In Konigsberg v. State Bar of California, *supra* note 20, at 64, Mr. Justice Black suggests that, at the least, the First Amendment free speech and press provision should absolutely secure "the right of the people to discuss matters of religious or public interest;" in Sweezy v. New Hampshire, 354 U.S. 234 (1957), at 261-66, Justices Frankfurter and Harlan, who make the "balancing" approach, conclude that government may not intrude into discussion in academic halls "except for reasons that are exigent and obviously compelling" or invade the "political autonomy" of the citizen except for reasons that are "compelling." See also Barenblatt v. United States, *supra* note 20, at 129.

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