

**CONTEMPORARY DEBATES ON CIVIL LIBERTIES:  
ENDURING CONSTITUTIONAL QUESTIONS.** By  
Glenn A. Phelps<sup>1</sup> and Robert A. Poirier.<sup>2</sup> Lexington, Mass.:  
Lexington Books of D.C. Heath and Company. 1984. Pp.  
237. \$14.95

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This anthology focuses on what the editors describe as "thirteen famous Supreme Court cases and the enduring questions of civil liberties that they raise." For each case Professors Phelps and Poirier have provided their own introduction, followed by two scholarly essays, one supporting and the other opposing "the central proposition posed by the case."

As one might expect in a work designed for adoption by other teachers, they have chosen obvious cases: for religious liberty, *Engel v. Vitale* and *Yoder v. Wisconsin*; for freedom of speech, *Schenck v. United States*, *Miller v. California*, *New York Times v. Sullivan*, and *Zurcher v. Stanford Daily*; for criminal procedure, *Miranda v. Arizona*, *Mapp v. Ohio*, and *Gregg v. Georgia*; for equal protection, *Regents v. Bakke*, *Frontiero v. Richardson*, and *San Antonio v. Rodriguez*; and the abortion case of *Roe v. Wade*. Their choice of essays is also defensible. They assist the reader in joining the debate on these cases by pairing, for example, Alexander Bickel with Hans Linde on the clear and present danger doctrine; Irving Kristol with Walter Gellhorn on censorship; Abe Fortas with Ernest van den Haag on the death penalty; Henry Abraham with John Livingston on reverse discrimination; Thomas Emerson with Paul Freund on the Equal Rights Amendment; and Frank Michelman with Ralph Winter on economic discrimination.

A case can be made that the editors should have selected other decisions (for example, *Bates v. Arizona* and the important question of the constitutional protections to be afforded to commercial speech) or different essays (Steven Schlesinger's writings on the exclusionary rule, law review articles by John Hart Ely or Terrance Sandalow on reverse discrimination, and selections from Robert Cord or Michael Malbin on the establishment clause come immediately to mind). Such criticism, however, amounts to little more

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than a complaint that Phelps and Poirier did not edit the book that the reviewer would have edited. Their choice of cases and essays is defensible, and their anthology generally succeeds on that level.

Nevertheless, the book fails on a more fundamental level. It does not achieve the editors' explicit objective in undertaking this project in the first place. They lament that "students usually lack sufficient ammunition in their intellectual arsenals to go beyond general assumptions" and announce that their objective is to "arm readers with the kinds of evidence and reasoning helpful to a resolution" of some of the enduring constitutional questions in civil liberties. However, what they arm the reader with—at least in their introductory essays—is a bag of clichés to sling harmlessly at the dominant general assumptions of today's constitutional jurisprudence. For example, they assert without elaboration that the Declaration of Independence is an inappropriate source of instruction on the meaning of equality or the equal protection clause because the framers believed that "it was not mankind that was created equal but *men*." They would thereby deprive us of the guidance provided by what Abraham Lincoln called the "father of all moral principle among us" as we address the vexing questions of racial, sexual, and economic discrimination. Likewise, the editors suggest that regulating obscenity and pornography has become increasingly difficult because of the public's demand for "more sophisticated entertainment," thereby implying that those who favor antipornography laws are unsophisticated. With equal superficiality, they summarily dismiss the "bad tendency" test in free speech and press cases. Why not arm readers with the fact that a prominent contemporary jurist (Robert Bork) has embraced this test? Or that President Lincoln relied on a similar notion when he queried: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?"<sup>4</sup>

The problem is not hard to discern: Professors Phelps and Poirier, though they aspire to equip students to challenge orthodoxy, are themselves captives of the prevalent jurisprudential assumptions. As a consequence, they tend more to fortify than to challenge the conventional wisdom.

One tacit assumption of contemporary constitutional jurisprudence is the belief that rights and liberties are protected only by the Bill of Rights and the fourteenth amendment and that the Constitution itself—because of the powers it confers—is a threat to these rights and liberties. Professor Gerald Gunther's *Constitutional Law*

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4. Letter to Erastus Corning and others, June 12, 1863, in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 260, 266 (R. Basler ed. 1953).

casebook is illustrative. After introducing the judicial function, Professor Gunther divides the recently-published eleventh edition of his widely used and respected work into two parts: *The Structure of Government: Nation and States in the Federal System*, which focuses exclusively on the way powers are distributed by the original Constitution; and *Individual Rights*, which addresses only its amendments. Gunther is not alone; the same can be said of other casebooks, as well as of C. Herman Pritchett's *American Constitution*. For decades, graduate students in political science have prepared for their qualifying examinations in constitutional law by studying this influential and popular treatise, which includes a chapter entitled *The Constitutional Basis for Protection of Individual Rights*. The reader quickly learns that the basis of individual rights is not the Constitution itself but the Bill of Rights and the fourteenth amendment. The implication in Pritchett as well as in Gunther is clear: the original Constitution affords no protection to individual rights and is, in fact, deficient in this respect, inasmuch as amendments have been necessary to secure these rights.

Modern constitutional jurisprudence implicitly rejects the proud claim of *The Federalist* No. 84 that the constitution is "in every rational sense, and to every useful purpose, a bill of rights." Of course, there's nothing wrong with believing that Hamilton was mistaken and a Bill of Rights was indeed necessary. The assumption that needs to be challenged is the idea that the distribution of power in the original Constitution has little or nothing to do with securing individual liberty. Phelps and Poirier fail to arm their readers with the reasoning of, for example, the second Justice Harlan, who repeatedly reminded us that liberty is secured not by the "parchment barriers" of the Bill of Rights but rather by the Constitution's political principles and institutional arrangements. As he declared in 1964: "We are accustomed to speak of the Bill of Rights . . . as the principal guarantee of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. [The Framers] staked their faith that liberty would prosper in the new nation not primarily upon declaration of individual rights but upon the kind of government the Union was to have."<sup>5</sup>

Madison, of course, was the principal sponsor in the first Congress of a series of amendments that when ratified became the Bill of Rights. Once he had secured congressional approval of these

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5. John Marshall Harlan, "The Bill of Rights and the Constitution," address at the dedication of the Bill of Rights Room, U.S. Subtreasury Building, New York City, August 9, 1964.

amendments, he proposed to his colleagues that they be incorporated into the body of the Constitution itself. He declared that “there is a neatness and propriety in incorporating the amendments into the Constitution itself; in that case, the system will remain uniform and entire; it will certainly be more simple when the amendments are interwoven into those parts to which they naturally belong.”<sup>6</sup> He saw no tension between the original Constitution and these amendments; rather he saw the latter as “expressly declar[ing] the great rights of mankind secured” under the former.<sup>7</sup> The Constitution and the Bill of Rights had, he believed, the same objective, and he saw no need to introduce a distinction between them, which he believed placing the amendments elsewhere would do. While Madison generally had his way concerning the Bill of Rights, on this particular matter he did not.<sup>8</sup> Roger Sherman argued that the amendments should be added at the end of the Constitution—to attempt to “interweave” them into the Constitution itself would, he declared, “be destructive of the whole fabric. We might as well endeavor to mix brass, iron, and clay. . . .”<sup>9</sup> George Clymer agreed; he argued that the amendments should be kept separate so that the Constitution “would remain a monument to justify those who made it; by a comparison, the world would discover the perfection of the original, and the superfluity of the amendments.”<sup>10</sup>

The Congress ultimately agreed with Sherman and Clymer, but

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6. Speech in the House of Representatives, August 13, 1789, in 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 708 (J. Gales ed. 1834). See Letter to Alexander White, August 24, 1789, in 5 THE WRITINGS OF JAMES MADISON 418-19 (G. Hunt ed. 1904).

It became an unavoidable sacrifice to a few who knew their concurrence to be necessary, to the dispatch if not the success of the business, to give up the form by which the amendments when ratified would have fallen into the body of the Constitution, in favor of the project of adding them by way of appendix to it. It is already apparent I think that some ambiguities will be produced by this change, as the question will often arise and sometimes be not easily solved, how far the original text is or is not necessarily superceded, by the supplemental act.

7. Speech in the House of Representatives, June 8, 1789, in 1 ANNALS OF THE CONGRESS OF THE UNITED STATES, *supra* note 6 at 432.

8. It is interesting to consider what our constitutional law would be like today if there had been no Bill of Rights. Its focus would presumably be to a far greater extent than it is today on the powers of the government. We might expect a more searching examination by the Supreme Court of whether federal legislation that seems to conflict with cherished individual liberties is indeed “necessary and proper” to the exercise of granted powers. We might expect a fuller articulation than we usually receive of whether, in Marshall’s term, “the end” aimed at by given legislation “is legitimate.” Might this not foster a healthy concern with the problems of *governing*, a healthy sense of responsible self-government?

Storing, *The Constitution and the Bill of Rights*, in THE AMERICAN FOUNDING: POLITICS, STATESMANSHIP, AND THE CONSTITUTION 37 (R. Rossum & G. McDowell eds. 1981) (emphasis in the original).

9. Speech in the House of Representatives, August 13, 1789, in 1 ANNALS OF THE CONGRESS OF THE UNITED STATES, *supra* note 6, at 707.

10. *Id.* at 710.

the results have not been what Clymer predicted. By placing the amendments at the tail of the Constitution, a significance has been given to the Bill of Rights that neither Madison nor the other members of Congress intended. Madison regarded the Constitution as the fundamental protector of rights and liberties, securing them from the threats of too much governmental power (tyranny) and too little (imbecility and anarchy). He also viewed the Bill of Rights as expressly declaring the rights that the Constitution secured. In contemporary constitutional jurisprudence, however, the Bill of Rights tail has come to wag the constitutional dog. Clymer's reason for appending the amendments at the end of the Constitution has been turned on its head, with the original Constitution now assumed to be "superfluous"—if not an actual threat—to the protection of rights and with "perfection" now ascribed to the Bill of Rights—or more specifically, to activist judges interpreting (or better, "noninterpreting") its provisions. Since Phelps and Poirier share this assumption as well, they provide their readers with no evidence or reasons to take the original Constitution seriously or to trust in its principles and institutional contrivances for our political salvation.

Another assumption of contemporary constitutional jurisprudence is the legitimacy of the incorporation doctrine. With the exceptions of *Schenck v. United States* and the equal protection cases, every case included in this anthology has significance only because of the incorporation doctrine. Yet while the editors briefly allude to incorporation in their discussion of *Miranda*, they never arm their readers with the fact that these cases raise what the editors consider to be "enduring constitutional questions" only because the Supreme Court has held that the fourteenth amendment incorporates particular provisions of the Bill of Rights, thereby making them applicable to the states. They never add to the reader's "intellectual arsenal" evidence that Wisconsin's mandatory school attendance law, New York State's Regents Prayer, or California's anti-obscenity statute pose no enduring constitutional problem unless and until the first amendment is understood to apply to the states. Phelps and Poirier take it for granted that the first amendment applies to the states, no doubt because they uncritically embrace still another dominant general assumption of contemporary constitutional jurisprudence: that the Constitution is simply what the Court says it is.

While the question of the proper role of the Court is central to the debate over "the role of rights and liberties in a democratic society," Phelps and Poirier never so much as allude to it—the judicial legislation of *Miranda v. Arizona* passes unobserved, as does the tre-

mendous potential for judicial activism that ratification of the Equal Rights Amendment would have created. In their discussion of *Frontiero* and the Equal Rights Amendment, the editors describe those who sought to achieve the goals of the ERA not through the formal amendment process of Article V but through judicial policymaking as "constitutional purists." That strange description attests to how fully the editors have succumbed to the dominant assumptions of constitutional jurisprudence. It also encapsulates the reason their book fails to achieve its stated objective of arming readers with evidence and reasoning to think about the hard questions of civil liberties. By attributing constitutional purity to those who would dispense with the Constitution, Phelps and Poirier not only display a contempt for the Constitution but provide evidence that they lack the ammunition to augment any reader's intellectual arsenal.

**PROTESTERS ON TRIAL: CRIMINAL JUSTICE IN THE SOUTHERN RIGHTS AND VIETNAM ANTIWAR MOVEMENTS.** By Steven E. Barkan.<sup>1</sup> New Jersey: Rutgers University Press. 1985 Pp. x, 198. \$25.00.

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In *Protesters on Trial*, Professor Barkan addresses the relations between protest movements and the legal system. He focuses on the impact that legal procedure (in particular criminal prosecutions) had on two key social movements (southern civil rights and Vietnam antiwar). "To what degree, and under what conditions," he asks, "may the law and legal order serve as vehicles of harassment of social movements or, conversely, aid their efforts to change the status quo?" By showing how various factors (such as protester needs and the strategies of officials) affect litigation strategies of defendants and the movements they endorse, Barkan shows how the rule of law is also a force in its own right which legal authorities may deploy to achieve other than neutral ends.

Two types of trials are important to the "resource mobilization" of protest groups: trials in which the defense simply seeks acquittal using normal legalistic defenses, and political trials in which the defense seeks publicity. In political trials, use of defense

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