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## Chafee, Jr.: The Blessings of Liberty

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## RECENT BOOKS

THE BLESSINGS OF LIBERTY. By *Zechariah Chafee, Jr.* Philadelphia and New York: J. B. Lippincott Co. 1956. Pp. 350. \$5.

The delightful thing about Professor Chafee's writings on civil liberties is that he generally manages to introduce a note of freshness and individuality, a sense of genuine reexamination and rediscovery, into the subject. This characteristic is markedly true of his latest volume, *The Blessings of Liberty*, which, although it is primarily a collection of individual pieces previously published in various periodicals or delivered on particular occasions, has as a unifying conception the personal attitude of Zechariah Chafee toward the outstanding current problems of civil liberties.<sup>1</sup> The total effect is that of listening to an urbane and scholarly gentleman, with not inconsiderable experience in the give and take of commissions, committees, and other aspects of government and university administration, who sits down one evening among friends, lights his pipe, and delivers himself of a rather discursive monologue upon various subjects which have been troubling him. For a reviewer who is fundamentally in agreement with the point of view expressed, and thoroughly charmed by the manner of expressing it, the delicate task is to avoid the extremes of sycophantic praise and captious criticism. Perhaps one way out is to pretend that we too are sitting with Mr. Chafee listening to his monologue, occasionally throwing in a query or a comment, to express a passing doubt, or to provoke some further elaboration or merely to emphasize agreement.

It is a tribute to Mr. Chafee's intellectual courage that he dares to begin by asking what are some rather obvious but extremely difficult questions; for example, "What is democracy?" and "Why I like it." His answers to neither of the questions is susceptible of simple summary. Thus he suggests that a large measure of self-government through the electoral process is an essential element. But just how far the franchise should extend and through what means it should be exercised has varied so widely both in time and place, even among western democracies, as to emphasize the difficulty of a doctrinaire definition. As for "Why I like it" Mr. Chafee suggests two answers: (1) "I cannot conceive of any alternative which would be tolerable," (p. 60) and (2) "It is no accident that democracies have arisen in communities with a strong religious consciousness, in the broadest sense of religion to embrace all kinds of faith in the brotherhood of men and their equality before the Spirit of the Universe, however conceived." (p. 61)

In more specific terms, how far does this carry us toward agreement with the position taken by Mr. Justice Douglas in speaking for the Court in *Zorach v. Clausen*: "We are a religious people whose institutions pre-

<sup>1</sup> The subjects covered, in addition to those mentioned more specifically later, are the recommendations of the American Bar Association for a loyalty oath for lawyers (chapter 6) and the exercise of the "Right Not To Speak" (chapter 7).

suppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."<sup>2</sup>

Mr. Chafee does not address himself specifically to the question of released time—the issue in the *Zorach* case—even in his chapter on religious liberty. He does, however, make a comment on the general question of religious instruction in the public schools which is worth remembering, at least as a qualification to what Mr. Justice Douglas says: "Sometimes nostalgia for what we have given up creeps over us. Men sometimes lament, for instance, that our public schools are godless. Suppose we admit frankly that this is a loss to the public schools, that one very important part of our nature has to be wholly neglected in the place where we receive much of the shaping of our characters and minds. It is a price to pay, but we must look at all which we have bought thereby. We cannot reject a portion of the bargain and insist on keeping the rest. If the noble ideal of the Puritans had persisted, there would be no godless schools in Massachusetts and there would be nobody in her churches except Congregationalists. Through the choice which all of the United States has made, it becomes possible for men of many different faiths to live and work together for many noble ends without allowing their divisions in spiritual matters to become, as in the old days, unbridgeable chasms running through every aspect of human lives." (p. 266)

Another one of the difficult questions which Mr. Chafee attempts to answer is, "Does free speech really tend to produce truth?" (c. 4) In considering this question Mr. Chafee pays particular attention to the view that public discussion is for the most part a cacophony of special interest pleading which serves only to enhance rather than resolve controversy. He does not, however, address himself to the more penetrating argument that speech which attacks the foundations of a free society—which openly asserts, and seeks to gain adherents for, the proposition that democracy should be discarded and some form of authoritarian society established—is itself not within the constitutional protection of freedom of speech because it rejects the premises upon which the constitutional protection is founded.<sup>3</sup> We

<sup>2</sup> 343 U.S. 306 at 313-315 (1952).

<sup>3</sup> This view is presented with particular cogency in Auerbach, "The Communist Control Act of 1954: a Proposed Legal-Political Theory of Free Speech," 23 UNIV. CHI. L. REV. 173 (1956). However, Professor Auerbach confines his argument to the constitutional level and as a matter of policy reaches the conclusion that complete suppression of the Communist Party in our own country at this particular time is unwise. The distinction

might rephrase Mr. Chafee's general question in terms of this particular one: Do we dare to subject the proposition that freedom of speech is the best test of truth to its own test? Perhaps the answer is too obvious to be worth stating. If we are not prepared to take this risk, what reason do we have for not accepting the proposition itself? The explanation given to justify such an apparent inconsistency has been that with respect to most questions of public policy a mistake once made is not irrevocable; if further experience, debate and reflection reveals the mistake, the decision may be revoked and corrected. Not so of the issue between freedom and authoritarianism; if the authoritarians win the argument and take hold of the powers of government, their first move is to suppress dissent and end the debate, thus making impossible, short of war or revolution, a return to freedom. It will be noted that the argument, thus stated, does not take into account the alternative risk—the extent to which the basic conceptions of freedom gain strength from being exposed to intellectual attack and lose vitality by being isolated from them. Here we deal with imponderables which outrun experience, even though reference is frequently made to the triumph of Nazism in Germany and Communism in Czechoslovakia as examples of devastating results of toleration of intolerance. These examples would be more persuasive if there were any reason to believe that an attempt to outlaw Nazi doctrine in Germany or Communist doctrine in Czechoslovakia would have led to any different result. In each case did not the triumphs of the authoritarians come because the existing government failed to protect the power which was legally its own—without any suppression of freedom of speech or peaceful association—but which it lacked the will to protect because of internal or external pressures?<sup>4</sup> The experiences of Germany and Czechoslovakia are indeed terrifying examples of the truth that a theoretical commitment to freedom and the existence of democratic forms of government may not be sufficient to protect such institutions from destruction. That is hardly synonymous with saying that the best way to protect them is to attempt to silence the kind of criticism which challenges the foundations of freedom.

The foregoing probably sounds like an extremely theoretical discussion of a pretty abstract question. Nevertheless, it is intimately related to the particular manifestations of restriction or protection of freedom—depending upon how you look at them—with which Mr. Chafee is concerned. For example, the Subversive Activities Control Act of 1950, more familiarly

between constitutional and policy considerations in the area of freedom of speech obviously defies adequate discussion in a footnote. Nevertheless it is hazarded that where the considerations relate primarily to the protection of freedom itself—to the prevention of abuses which seem inevitably to develop once any form of suppression is attempted on the basis of what is good or bad doctrine—we are dealing with constitutional fundamentals: Compare Rostow, "The Democratic Character of Judicial Review," 66 *HARV. L. REV.* 193 (1952).

<sup>4</sup> See, e.g., HALPERIN, *GERMANY TRIES DEMOCRACY* (1946).

known as the McCarran Act, imposes various handicaps, restrictions and disabilities upon organizations found to be devoted, both in principle and in activity, to the establishment within the United States of a totalitarian dictatorship under the general control of the world Communist movement. Putting aside relatively inconsequential quibbles as to the real effect of the sanctions of the statute—whether they operate merely to disclose the true nature of the prescribed organizations or to destroy them by onerous conditions—it is plain that the primary justification for the statute, if there is one, is that the organizations within its ambit, are devoted to the destruction of the foundations of a free society. To supporters of the statute surely this alone would be sufficient to justify complete suppression of the organizations and punishment of the individual members. Insofar as the statute does not go all the way in either regard it is a model of self-restraint on the part of the democracy which is being attacked. For Mr. Chafee, on the other hand, such legislation represents a threat to one of the most vital aspects of a vibrant democracy, namely voluntary associations through which men translate their private views into effective instruments of public opinion.

The choice between these two opposed positions is again a choice between dangers. Which is the greater danger: that organizations devoted to the destruction of freedom will, if legally undeterred, gain enough adherents substantially to threaten freedom; or that the legal instruments supposedly fashioned to protect freedom will operate so as to hamper the healthy functioning of democratic institutions. Logic does not provide the answer. Mr. Chafee undertakes to find it in judgment informed by experience. He is satisfied that "Actual experience amply justifies the expectation that the vague characterization of 'Communist-front organizations' in this law will be used to cripple or suppress many organizations which serve very desirable purposes, even if they do include some leftist people among their supporters." (p. 155). Some of the work of the Un-American Activities Committee and comparable state committees undoubtedly supports Mr. Chafee's concern. On the other hand, there is at least room for argument that the administrative procedures required by the statute, as well as the provisions of judicial review, will tend to obviate the more obvious excesses attributable to such committees. Nevertheless, the fundamental question remains whether we are more inclined to trust the market-place of ideas or some agency of the government to distinguish the genuine from the spurious among programs ostensibly offered for the greater satisfaction of our wants or greater enjoyment of our freedom or greater realization of our ideals. For it is perhaps a factor of some significance in this inquiry that people are seldom invited, in so many words, to choose slavery in preference to freedom; rather they are offered a road of apparent liberation from real or fancied oppression. This suggests that there may be a practicable middle ground between the government's standing idly by while democracy runs the risk of being duped to its destruction,

and the government's undertaking the responsibility of definitely labeling and virtually outlawing the siren call from Moscow, or any other capital of totalitarian ideology. For example, as Mr. Chafee mentions, truly objective disclosure requirements might be imposed upon all propaganda organizations competing for public favor, so as to enable prospective members or contributors more intelligently to choose between them, in much the same fashion as appropriate disclosure requirements are applied to securities competing for public favor in the market-place of finance.

As the McCarran Act itself illustrates by its emphasis upon a world Communist movement under foreign domination or control, the present crisis—if indeed there be one—in regard to freedom at home, is in no small part a reflection of a sense of crisis in our international relations. Nor is this a unique development, either in our own history, or in the comparable English experience.<sup>5</sup> It is therefore peculiarly appropriate that Mr. Chafee's last two chapters should be concerned with the United Nations and freedom on the international scene—particularly with the Covenant on Human Rights and the Conference on Freedom of Information. Since Mr. Chafee was personally involved in working professionally on both of these projects, his views are to some extent a reflection of personal experience. Particularly interesting in the light of recent events are Mr. Chafee's comments regarding his intellectual contacts with the satellite members of the Soviet bloc. Of the Poles and the Czechs he says: "Although at the Conference they echoed the Russians' ideology, I found their cultural background much closer to ours and could carry on an animated conversation with them on plenty of safe topics. Time may show that the Soviet system *overextended*, as the business men say, when it obliged Poland and Czechoslovakia to take orders from Moscow." (pp. 309-310) Even as this review is written, the air waves are full of reports of the latest upheavals in the satellite countries. But for this discussion the important issue is not whether Mr. Chafee is so soon to be proved a good or bad prophet. More important is his suggestion that hope of real communication and exchange of ideas even with the Russians must not be abandoned. Thus Mr. Chafee dares to say: "The big problem as I see it is to bring the Union of Socialist Soviet Republics into the common heritage of Western thought. . . . My guess is that the process will not be a one-way street running solely in our direction. They will learn from us, but we shall also learn from them." (p. 310) This may be taken as a plea as well as a prophecy—a plea for recognition and acceptance of the elementary fact that the exchange of ideas is indeed a two-way street; that if we hope to penetrate the iron curtain with the ideals and attitudes of western democracy, we must take the risk of penetration of our own culture by the Soviet brand of "democratic" ideals. Recent events,

<sup>5</sup> See Sutherland, "British Trials for Disloyal Association during the French Revolution," 34 CORN. L. Q. 303 (1949).

particularly those in Hungary, may make this bitter medicine to take, but realistically considered, they provide all the more reason to persevere resolutely in "cultural exchange" as the only feasible way of bringing the Soviet Union "into the common heritage of Western thought."

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