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The Supreme Court on Freedom of the Press by William A. Hachten

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*Latreccchia*²⁹ and *State v. Davis*³⁰ miss completely the points of those holdings, while the discussion of the 1943 Justice Department circular³¹ is positively misleading as to both the extent of local defiance of *Barnette*³² and the departmentally recommended approach to such recalcitrants.

In short, this is a book of substantial merit and of substantial flaws. For the school administrator, the school lawyer, and others primarily interested in the validity of various specific school practices as against religious objections, it should serve as an invaluable reference and guide. It was written with them in mind, and is very successfully done. By this very fact, it is much less handy for the legal scholar and political scientist. As a body of raw source material, however, it is of great worth, making available a wealth of cases and attendant bibliography never before compiled within one volume. For all its defects, it is a valuable addition to the literature in this field.

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THE SUPREME COURT ON FREEDOM OF THE PRESS. By William A. Hachten. Ames, Iowa: Iowa State University Press, 1968. Pp. 316.

William A. Hachten, author of this book, is Professor of Journalism at the University of Wisconsin. The preface indicates that he studied constitutional law while working on his doctorate at the University of Minnesota. His stated purpose in writing this book is not primarily to describe the current state of the law regarding the press, but rather to explain "the ideas and principles underpinning the freedom of our system of mass communications as they have been enunciated in decisions of the Supreme Court of the United States."¹ He attempts to accomplish this by presenting extensive excerpts from Supreme Court decisions, concurring and dissenting as well as majority opinions, interwoven with his own commentary. Professor Hachten admits that he is biased in favor of the Black-Douglas position on freedom of ex-

²⁹ BOLES at 150.

³⁰ *Id.* at 151.

³¹ *Id.* at 163.

³² 319 U.S. 624 (1943).

¹ W. HACHTEN, *THE SUPREME COURT ON FREEDOM OF THE PRESS* viii (1968) [hereinafter cited as HACHTEN].

pression and warns the reader that the views of these Justices may be over-represented² (which they are).

The basic theme of the book is the move toward greater freedom of the press, but Professor Hachten finds in the Supreme Court's decisions implied admonitions that a free press must also be a responsible press. His ultimate conclusion is that "a press that uses its freedom with courage, restraint, and responsibility need not fear curtailment by the Supreme Court of the United States."³

The contents of the book clearly indicate that Professor Hachten is not a lawyer writing for the benefit of lawyers, but is, rather, a journalist with some modest grounding in constitutional law writing for the benefit of laymen. Still, viewing it from a non-technical standpoint, the book has deficiencies which make it a less than an authoritative work on the constitutional underpinnings of freedom of the communications media.

Although the author tells us that he does not attempt to cover "the whole spectrum of the First Amendment,"⁴ he seems to equate the constitutional law of freedom of speech with that of freedom of the press, relying on Professor Chafee's view that there is no significant difference between these two freedoms.⁵ Accordingly, he deals with such cases as *Dennis v. United States*,⁶ *Yates v. United States*,⁷ *Barenblatt v. United States*,⁸ *Terminiello v. Chicago*,⁹ and *Whitney v. California*.¹⁰ His use of these cases is confusing. For example, he devotes eight pages to excerpts from the *Dennis* opinions. He then disposes of *Yates* in a half page in which he states that the "Supreme Court found two decisive differences between this and the *Dennis* case and set aside the convictions"¹¹ and quotes two short paragraphs of Justice Black's dissenting opinion. The effect of this, of course, is that the significant change in law worked by *Yates* is undisclosed. Similarly, the further erosions of the *Dennis* doctrine in more recent years are totally ignored.

There are shortcomings even in those portions of the book which relate directly to freedom of the media. For example, in a chapter titled *Freedom From Prior Restraint: Censorship*, the author dis-

² *Id.* at ix.

³ *Id.* at 308.

⁴ *Id.* at 7.

⁵ Z. Chafee, *GOVERNMENT AND MASS COMMUNICATIONS* 34-35 (1947).

⁶ 341 U.S. 494 (1951).

⁷ 354 U.S. 298 (1957).

⁸ 360 U.S. 109 (1959).

⁹ 337 U.S. 1 (1949).

¹⁰ 274 U.S. 357 (1927).

¹¹ HACHTEN 34.

cussed, in this order, *New v. Minnesota*,¹² *Roth v. United States*,¹³ *Kingsley Books v. Brown*,¹⁴ *Smith v. California*,¹⁵ *Bantam Books v. Sullivan*,¹⁶ *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*,¹⁷ *Mishkin v. New York*,¹⁸ *Ginzburg v. United States*,¹⁹ and *Mills v. Alabama*,²⁰ most of which do not involve any issue of prior restraint. The evolution of the obscenity doctrine between *Roth* and the 1966 cases is ignored, except for the fact that *Jacobellis v. Ohio*²¹ is discussed nine chapters later under the heading *Freedom of Motion Pictures*. In the chapter on motion pictures, the discussion of *Times Film Corporation v. Chicago*²² is separated from the discussion of *Freedman v. Maryland*²³ by three pages in which *Jacobellis* is discussed, and the discussion of *Freedman* is in no way related to *Times Film*.

Strangely, despite its obvious relevance to freedom of the press, the author is seemingly unaware of *Valentine v. Chrestensen*,²⁴ in which the Supreme Court held that a prohibition against distribution of commercial handbills could not be circumvented by incorporating a political protest in the handbill. This decision, suggesting as it does a distinction for first amendment purposes between commercial and non-commercial publications, is a potentially pregnant basis for a new line of development of first amendment law.

In addition, it should be noted that the book includes many rash oversimplifications which, to a lawyer at least, would cause somewhat raised eyebrows. The author characterizes the "preferred position" concept of the first amendment as "basically the law today."²⁵ He states that the "judicial evolution" whereby the fourteenth amendment was expanded to include the rights of the first amendment "was not completed until 1925 in the *Gitlow* case."²⁶ He characterizes the

¹² 283 U.S. 697 (1931).

¹³ 354 U.S. 476 (1957). The discussion of *Roth* ignores the position of Justice Harlan that a different standard may be applicable in the adjudication of state and federal obscenity cases. Likewise, Chief Justice Warren's position that the central issue is the conduct of the defendant rather than the obscenity of the publication is not reflected.

¹⁴ 354 U.S. 436 (1957).

¹⁵ 361 U.S. 147 (1959).

¹⁶ 372 U.S. 58 (1963).

¹⁷ 383 U.S. 413 (1966).

¹⁸ 383 U.S. 502 (1966).

¹⁹ 383 U.S. 463 (1966).

²⁰ 384 U.S. 214 (1966).

²¹ 378 U.S. 184 (1964).

²² 365 U.S. 43 (1961).

²³ 380 U.S. 51 (1965).

²⁴ 316 U.S. 52 (1942).

²⁵ HACHTEN 13.

²⁶ *Id.* at 21.

"Court's current position on Blackstone's prior restraint dictum" as being "well expressed" in Chief Justice Warren's dissent in *Times Film*.²⁷

Finally, it must be pointed out that the author's more or less indiscriminate excerpting from majority, concurring, and dissenting opinions is confusing, misleading and does not present anything approaching an accurate portrayal of the law. An obvious example of this is found at page 226 where, under a paragraph headed *Any Film Censorship is Called Unconstitutional*, this proposition is supported solely by the Black-Douglas concurring opinion in *Superior Films v. Ohio*.²⁸

The basic defect of the book is that the author does not "tell it like it is," but rather as he would like it to be. It is doubtful that lawyers or law students would find the book to be of any value.

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A PURE THEORY OF LAW. By Hans Kelsen. Berkeley: University of California Press, 1967. Pp. 356. \$7.50.

In normal expression the term law tends to carry a deceptively familiar meaning; the term jurisprudence a somewhat forbidding connotation of exploration of the philosophical deep. By most standard measures, the contrast holds. Yet not only does the juridical underlie the legal order, but riddles its every aspect. A profound simplicity irradiates from the child's reaction of "why" to a command, a simple query ever relevant to all aspects of the legal imperative. Consequently law as a field requires refinement, not so much to glean the dross of reality as to allow intelligible perception of its supple internal system of validation. This immensely difficult task, itself an exercise in the highest orders of jurisprudence, Dr. Hans Kelsen endeavors to undertake in *A Pure Theory of Law*.¹

His work does not pretend to be some metaphysical thunder out of Sinai, nor any interpretive social scientific prism refracting the legal order as reactive adjustments to cultural context, nor indeed any kind of revealed gospel dispensed from profound preconceptions of prin-

²⁷ *Id.* at 42.

²⁸ 346 U.S. 587 (1954).

¹ H. KELSEN, A PURE THEORY OF LAW (1967).