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The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments

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BOOK REVIEW

The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments. EDITED BY ALFRED AVINS. Richmond: Virginia Commission on Constitutional Government, 1967. Pp. 764.

It is always a pleasure to examine a new book, written by an old friend, especially one who has already established a reputation as a very prolific writer, not only of prior books but of many learned articles in law journals.[1] Professor Avins' book represents a tremendous amount of careful editorial work and painstaking care for elaborate detail, which ultimately renders the work much more useful to a general reading audience, students, and teachers. In particular, these readers may be guided by some introductory comments. The importance of the study lies in the fact that the century old reconstruction amendments touch on very sensitive areas of federalism—the relationship between the state and its citizens, which persons also enjoy federally protected rights. These three amendments guarantee personal rights by incorporating the Bill of Rights so as to restrict state competence in such fields as freedom from slavery and involuntary servitude, freedom of speech, and freedom of religion. These amendments also place limitations on state aid to religious organizations, civil and criminal procedure, police practices, crime prevention, state legislative apportionment, voting qualifications, race relations, and school segregation.

The purpose of the book, indeed the aim of the Virginia Commission on Constitutional Government in publishing the text, is ". . . to make the congressional debates on the reconstruction amendments widely available to judges, lawyers, teachers, and students, and give them the opportunity to compare, not only recent decisions, but also those which will be made in the future, with the original understanding and intent of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments."[2]

The Commission further sets forth its aim in publishing the book:

> In this way, these debates, by being made generally accessible, will enable interested persons to determine for themselves whether the judicial decisions as well as legislation, past and future, comport with the reconstruction amendments as originally understood and intended. The reader will thus be enabled to make up his own mind as to whether such decisions and legislation are in accordance with, or contrary to, the Constitution.[3]

In the introduction Professor Avins advances the more specific purpose: to indicate what he feels constitutes the original understanding and intent of the

[1] Many of Avins' prior writings are cited as supplemental reading. *See* Tansill, Avins, Crutchfield, and Colegrove, *The Fourteenth Amendment and Real Property Rights*, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 68 (Avins ed. 1963). In these prior works the author takes a very definite position against the contemporary interpretation of the Reconstruction Amendments.

[2] Virginia Commission on Constitutional Government, *Preface* to A. AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES (1967).

[3] *Id.*

framers. Indeed, this work is conceived as constituting a "debate book," *i.e.*, the actual reproduction of original texts without the addition of commentary, interpretative declarations, or questions, thereby breaking with the frequently used practice in modern texts and case books. Instead, an anthology of speeches has been produced. The publication is strictly a reproduction of original speeches, limited to the three reconstruction amendments. The transcripts of these debates are oftentimes completely inaccessible or at the very least difficult for the average student or lawyer to obtain. Similarly, the original documents are very hard to read, since they are a century old and will soon completely disintegrate.

In the first instance, nearly twenty thousand pages of debates and committee reports were examined, covering the years 1849 to 1875; and, from this huge bulk, seven hundred and forty-three pages of readings have been reproduced. Accordingly, the process of discarding becomes as important as the criteria of inclusion.

This reviewer will not offer the usual criticism—so often unjustly advanced—that the author has not made an original contribution nor provided any new thoughts. Such creativity was never intended by Avins. Nonetheless, he had an express aim in bringing this huge mass of closely related material together, namely to enable the reader to make up his own mind as to whether subsequent legislation and affirming judicial decisions "are in accordance with, or contrary to, the Constitution."[4] However, a thesis—presumably drawn from these debates—is advanced: these three constitutional amendments must be applied by the courts in the same manner as the 13th, 14th, and 15th amendments would have been interpreted, and were supposedly written by the drafters. Despite the statements of impartiality, a definite purpose takes shape.

Aside from this subjective purpose, no attempt is made to influence the reader. In fact, the book's aim is to avoid any and all attempts to persuade, and the criterion of selection does appear to be impartial. The arrangement of the data is chronological, with no aim to organize items according to subject matter, with the result that readers are given the "feel" of the actual debates. Specifically, it was not felt proper to dissect these numerous texts into several segments. The desire to preserve continuity controlled. Moreover, as the debates progressed, ideas also developed in such a manner as to render them inseparable from the period of time in which they were delivered. "The ideas of the framers cannot be understood except in this historical exposition and setting."[5] Naturally, time limits had to be imposed (1849-1875) and a selection made, based entirely on the legal and historical relevance of the pronouncement to the three amendments. Obviously, some data had to be eliminated. Removed from consideration, throughout the selection, was "the question of whether the material so reproduced will support one or another point of view on any current constitutional question."[6] Regrettably, the reviewer is not qualified to check the accuracy of this assertion; but, as the result of his general survey of the text, the statement seems adequate. Of course, every reader, in particular each historian trained in American history, will have to reach his own conclusion. This collection may, therefore, inspire a re-examination of the entire phase of our history, a result probably not foreseen at the time the book was published.

Henceforth, negative reviews of this compilation will, undoubtedly, challenge

[4] *Id.*

[5] Avins, *Introduction* to AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES (1967).

[6] *Id.*

the accuracy of the choices made; further, it will certainly be argued that other sources should have been included. Such calls for future research can be endless, even though meritorious. Different approaches can be taken to the same problem areas. But if this book is to be sharply attacked (as it surely will be), the main criticism must necessarily be directed against the subjective criteria of selection, as determined by the author. Nonetheless, disagreement—and strong negative emotions of the type felt by the reviewer—should be directed against the senators who delivered the speeches, and not against the book, the author, or this reviewer. The book merely reproduces original addresses as they were delivered.

The main contribution of the book is that a great deal of primary material has been brought together in a readily available source; consequently, the author's purpose has been achieved. A great deal of diverse data is now available in a single location. Previously, "persons interested in analyzing the legislative history of the reconstruction amendments [were] forced to wade through an enormous quantity of extraneous matter in order to cull out the pieces of pertinent debate."[7]

Regardless of the chronological approach, an excellent subject index makes it easy for the researcher to locate data on specialized topics. For example, the reviewer tested the Index on "Chinese, discrimination against," and "Banishment of freed Negroes," largely because of his special interest in these phases of discrimination.[8] In summary, the information gathered proved to be most helpful. Further, the Table of Cases and Authorities and the Senate Index, are quite valuable to any researcher attempting to locate specific examples rapidly. Both lawyers and historians will appreciate being able to observe the interpretation of judicial opinions within the political arena. In particular, the Senate Index provides brief biographical sketches concerning the actors in this "Great Debate." These two indices constitute the type of referencing often overlooked by busy authors.

The *Note to Teachers* and the *Reader's Guide* might be helpful if it were only possible to read the small print. Moreover, many of the reproduced congressional debates are extremely hard to read—if not impossible—simply because of the poor state of preservation of the original documents. Indeed, this book may never become controversial, for the reason that very few persons will be able to undertake an exhaustive reading and still retain "proper eyesight."

As a final point, this reviewer hopes it will not be considered improper to give a subjective evaluation. Specifically, the following explanation indicates why an "internationalist," working in academic circles on behalf of international (and regional) human rights conventions,[9] can use the information contained in this

[7] *Supra* note 2.

[8] *See* M. KONVITZ, EXPANDING LIBERTIES: FREEDOMS GAINS IN POSTWAR AMERICA (1966), and Gormley, Book Review, 44 J. URBAN L. 520 (1967). *See infra* note 11.

[9] *Contra*, the material in the book under review, W. GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 1-16 (1966); D. King & Gormley, *Toward International Human Rights*, 9 WAYNE L. REV. 294 (1963); Gormley, *The Emerging Protection of Human Rights by the International Labour Organization*, 30 ALBANY L. REV. 13 (1966).

The emphasis of the reviewer's work is to protect individuals and groups by means of regional law, *e.g.*, C. MORRISSON, THE DEVELOPING EUROPEAN LAW OF HUMAN RIGHTS (1967); and, finally, by a fully developed international law of human rights. *See e.g.*, Schwelb, *The International Convention of the Elimination of all Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996 (1966). See also the reviewer's discussion of the moral force of International Law in Gormley, *The Status of the Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement*, 10 How. L.J. 33 (1964).

volume throughout his future work. One supporting federally protected civil rights is saddened to see one of the lowest ebbs to which our own political and judicial[10] institutions have fallen.[11] It is submitted, racial hatred is not only found in Nazi and fascist-type or communist states, but has dominated much of America's official thinking.[12] Tragically, our courts have also sunk to a low level, with the result that constitutional guarantees—as we conceive of them today—have not always been effectively protected by our common law system. A civil rights supporter will also find a great deal of data, which can profitably be used to support his cause. In this regard, historical information, of which the reviewer had not been previously aware, proves the degree of prejudice previously existing within this country. Notwithstanding some study of American history, the reviewer never realized the plight of minority groups, although he approached the examination of this book with preconceived beliefs. Much of the tragic history of racial discrimination has again been brought to light, for the purpose of re-examination. Oftentimes, such historical fact is lost under the pressure of contemporary controversies, *i.e.*, in the present era the necessity to oppose Nazi and communist racial hatred at the United Nations level.

The book concludes with the date 1875, the adjournment of the Forty-Third Congress; consequently, no attempt is made to deal with the subsequent history of the debates. Realistically, such a cut off is within the proper province of any author; he has the unqualified right to select the scope of the book, including its date of termination, and the above observations have not sought to criticize these prerogatives. The subsequent constitutional development of the amendments, therefore, is not deemed to be within the scope of the undertaking. Instead, each reader is challenged to render his prsonal evaluation concerning dynamic interpretations of our expanding constitutional rights. This reviewer is, perhaps, reaching conclusions not intended by the publisher; however we all have the right to use these original speeches in support of future work.

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[10] The reviewer, while teaching constitutional law and a seminar in jurisprudence, has frequently discussed *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944) as prime examples of the depths to which our own legal system has sunk, during periods of racial hatred. The reviewer's beliefs—based on concepts of natural law—are best summarized by Justice Murphy, *Korematsu*, 323 U.S. at 233 (dissenting opinion) and especially at 236 n.2. Furthermore, the reviewer submits, these racially oriented decisions are even more reprehensible than *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), for the reason they were handed down in the 1940's, at which time we were at war fighting Nazis and should have progressed beyond such discrimination.

[11] This point is continually stressed in the reviewer's courses in jurisprudence and constitutional law.

[12] *E.g.*, AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 133, col. 2 (1967).

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