HENRY J. ABRAHAM

FOURTH EDITION

FREEDOM AND THE COURT

CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES

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HENRY J. ABRAHAM

JAMES HART PROFESSOR OF
GOVERNMENT AND FOREIGN AFFAIRS
UNIVERSITY OF VIRGINIA

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Preface to the Fourth Edition

Although the four-and-a-half years that have elapsed since the publication of this work's third edition had brought only one change in the membership of the Supreme Court of the United States—the appointment of Sandra Day O'Connor as of the fall term 1981—far-reaching, indeed seminal, changes informed the Court's interpretations and molding of constitutional law between 1977 and 1981. These developments have brushed or embraced all components and segments of that law; but none has seen such extensive, indeed, dramatic, perhaps even radical, extension or transformation as the "equal protection of the laws" realm of the Fourteenth Amendment, with particular reference to race and gender. This new (fourth) edition of the book, which has continued to be used widely and approvingly, takes account of these and other fundamental alterations in the status of civil rights and liberties in our land, as pronounced by its highest tribunal. Completely updated and thoroughly rewritten, this latest edition is current through the Court's entire 1980–81 term (ending in July of 1981), thus taking account of contemporary holdings of the "Burger Court."

Once again I happily acknowledge the profound debt I owe to a host of colleagues and students whose constructive criticism, aid, and counsel have been as welcome as they have been indispensable. Their encouragement and support are responsible for the present undertaking. I am also deeply grateful for financial research assistance tendered so generously by the Joseph and Rebecca Mitchell Foundation and the Robert W. and Patricia T. Gelfman Fund. A special note of recognition and appreciation goes to my 1979–81 research assistants, Peter M. Dodson, Linda McClain, and Vincent M. Bonventre, whose conscientious, efficient, and loyal labors were essential to the enterprise.

Charlottesville, Virginia H.J.A.
September 1981

Preface to the Third Edition

The favorable reception accorded to the first and second editions of this book prompted the undertaking of this third. Although the scope and approach of the new work are the same as that of its predecessors, the passage of time—however brief in the annals of constitutional development—has mandated changes, often major, on almost every page, indeed the rewriting as well as enlarging of most chapters. The new edition has been completely updated through 1976, thus taking account of the latest posture of the "Burger Court."

Again, I am profoundly grateful to the numerous colleagues and students whose thoughtfully constructive criticism and support of the first and second editions encouraged me to undertake the third. And I should like to add a special note of gratitude to my 1974–76 research assistant, Bruce Allen Murphy, whose superb, faithful work was essential to the revision's completion.

Keswick, Virginia H.J.A.
January 1977

Preface to the Second Edition

The favorable reception accorded to the first edition of this book prompted the undertaking of this second, which appears almost five years later. Although the scope and approach of the new work are the same as that of the original, the passage of time–however brief in the annals of constitutional development–has mandated changes on almost every page and the rewriting as well as enlarging of certain chapters, particularly IV, V, VI, and VII. The new edition has been completely updated through December 1971, thus taking account of the latest posture of the "Burger Court." There are two procedural innovations: the addition of an appendix containing excerpts from the Constitution dealing with civil rights and liberties, and a separate "name" index (alongside "general" and "case" indexes).

I am profoundly grateful to the numerous colleagues and students whose thoughtfully constructive criticism and support of the first edition encouraged me to undertake the second. And I should like to add a special note of gratitude to my 1970–72 research assistants, Norman H. Levine, Mark A. Aronchick, Frank C. Lindgren, Andrew B. Cohn, and Michael E. Marino.

Wynnewood, Pennsylvania H.J.A.
February 1972

Preface to the First Edition

This is essentially a study of the lines that must be drawn by a democratic society as it attempts to reconcile individual freedom with the rights of the community. No single book could cope with the entire field of civil rights and liberties, and no attempt is made to do so here. Rather, it has been my aim to analyze and evaluate the basic problem of drawing lines between individual rights and community rights and to venture some conclusions or suggestions in those spheres that constitute the basic rights and liberties: freedom of religion and the attendant problem of separation of Church and State; freedom of expression; due process of law, particularly procedural safeguards in criminal law; and political and racial equality. The three introductory chapters—the third comprising a thorough analysis of the problem of Amendment Fourteen and "incorporation"—are designed to focus the study and to stress my belief that it is essential to recognize and comprehend the significant role the judicial branch of the United States Government, with the Supreme Court as its apex, has played in defining and strengthening the basic rights and liberties that accrue to us from the principle of a government under constitutionalism, a government that is limited in its impact upon individual freedom.

As usual, I am indebted to many colleagues for stimulation, criticism, and encouragement. I am particularly grateful to Professor Alpheus T. Mason of Princeton who read the entire manuscript; to Professors David Fellman of Wisconsin and Rocco J. Tresolini of Lehigh who were generous discussants; and to my departmental colleague, Charles Jasper Cooper, who proved a valued "sounding board" down the hall. My research assistant, Judy F. Lang, was a delightful and industrious aid. Dr. Joan I. Gotwals of the Van Pelt Library kindly provided me with a "secret annex" in which I could work in quiet seclusion. Mrs. Dorothy E. Carpenter typed the manuscript cheerfully and conscientiously. Byron S. Hollinshead, Jr.,

Helen M. Richardson, and Mary Ollmann of Oxford University Press provided indispensable professional assistance. And my wife Mildred and our sons Philip and Peter, to each of whom earlier books were happily dedicated, made it all worthwhile.

Wynnwood, Pennsylvania H.J.A.
March 1967

Contents

Freedom and the Court

CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES

chapter I Introduction

Although, as David Fellman points out, the American people, both in political theory and in public law, have been committed for more than two hundred years to the "primacy of civil liberties in the constellation of human interests,"[1] these civil liberties do not exist in a vacuum or even in anarchy but in a state of society. It is inevitable that the individual's civil rights and those of the community of which he is a part come into conflict and need adjudication.[2]

It is easy to state the need for a line between individual rights and the rights of the community, but how, where, and when it is to be drawn are questions that will never be resolved to the satisfaction of the entire community. In John Stuart Mill's perceptive words in his *On Liberty and the Subjection of Women:* "But though the proposition is not likely to be contested in general terms, the practical question, where to place the limits—how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done."[3] Liberty and order are difficult to reconcile, particularly in a democratic society such as ours. We must have *both,* but a happy balance is not easy to maintain. As a constitutional democracy, based upon a government of limited powers under a written constitution, and a majoritarianism duly checked by carefully guarded minority rights, we must be generous to the dissenter. Again citing Mill, "all mankind has no right to silence one dissenter . . . [for] all silencing of discussion is an assumption of infallibility." Even near-unanimity under our system does not give society the right

[1] *The Limits of Freedom* (Brunswick, N.J.: Rutgers University Press, 1959), from the Foreword (unpaginated).

[2] Although some would object, the terms "rights" and "liberties" are used interchangeably in this book. They are to be distinguished from all the other rights and freedoms individuals may enjoy under law because they are especially protected, in one manner or another, against violations *by governments.* (In Canada, the term "civil *rights*" refers exclusively to *private* law—the legal relationship between person and person in private life.) See J. A. Corry and Henry J. Abraham, *Elements of Democratic Government,* 4th ed. (New York: Oxford University Press, 1964), pp. 234–39.

[3] (New York: Holt, 1898), p. 16.

to deprive the individual of his constitutional rights. As Judge Jerome Frank observed, "The test of the moral quality of a civilization is its treatment of the weak and powerless."[4] "The worst citizen no less than the best," once wrote Mr. Justice Hugo L. Black, dissenting from a Supreme Court reversal of some trespassing convictions, "is entitled to equal protection of the laws of his state and of his nation"[5]—and the citizen of whom he spoke was a defiant racist. Who or what he was is irrelevant, of course; indeed, in Mr. Justice Frankfurter's often-quoted words: "It is a fair summary of history to say that safeguards of liberty have been forged in controversies involving not very nice people."[6] The basic issue was memorably phrased by Mr. Justice Robert H. Jackson in the *West Virginia Flag Salute* case,[7] in which the Supreme Court struck down, as violating the freedom of religion guarantees of the First and Fourteenth Amendments, a compulsory flag salute resolution adopted by the West Virginia State Board of Education. As Justice Jackson put it, those "who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." He elaborated in characteristically beautiful prose:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . . The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; *they depend on the outcome of no elections.*[8]

While these words raise as many questions as they state valid principles, they nevertheless point out the irreducible basis for our thinking about civil rights and liberties.

Role of the Judiciary

The framers of our Constitution chose a limited majority rule, but majority rule nonetheless; while tyranny by the majority is barred, so also is tyranny by a minority. And the law must be obeyed—until such time as it is validly altered by legislative, judicial, or executive action or by constitu-

[4] *United States v. Murphy,* 222 F. 2d 698 (1955), at 706.
[5] *Bell v. Maryland,* 378 U.S. 226 (1964), at 328.
[6] *United States v. Rabinowitz,* 339 U.S. 56 (1950), at 69.
[7] *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943).
[8] *Ibid.,* at 638, 642. (Italics supplied.)

tional amendment. Notwithstanding the numerous philosophical arguments to the contrary, disobedience of the law is barred, no matter which valid governmental agency has pronounced it or what small margin has enacted it. *It must be barred.* Liberty is achieved only by a rule of law–which is as the cement of society. Government cannot long endure when any group or class of persons–no matter how just the cause may be or how necessary remedial action may seem to be–is permitted to decide which law it shall obey and which it shall flout. "Dissent and dissenters have no monopoly on freedom. They must tolerate opposition. They must accept dissent from their dissent," Mr. Justice Abe Fortas observed well.[9] Civil disobedience has often been invoked and will indubitably continue to be invoked–but those who invoke it must be willing to face the consequences. Moreover, in Professor J. A. Corry's words, civil disobedience must be *civil* not uncivil disobedience, with the basic aim persuasion, not violence.[10] No one knew this and practiced it with more conviction than the assassinated Dr. Martin Luther King, who once noted tellingly: "I believe in the beauty and majesty of the law so much that when I think a law is wrong, I am willing to go to jail and stay there."[11] And so he did, on numerous occasions.

Under our system of government some agency of course must serve as the arbiter of what is and what is not legal or constitutional. The Founding Fathers did recognize and call for the creation of an arbiter, not only between the states and the national government but also between any level of government and the individual. There was no unanimity on who might arbitrate; and the records of the debates in the Constitutional Convention now available to us demonstrate that nearly every segment of the incipient government framework received at least some consideration for the role of arbiter: the states themselves, Congress, the executive, the judiciary, and several combinations of these. But it was fairly clear that the role would fall to the judiciary and that it should include the power of *judicial review*, which authorizes the Supreme Court to hold unconstitutional, and hence unenforceable any law, any official action based upon a law, and any other action by a public official that it deems–upon careful reflection and in line with the taught tradition of the law and judicial restraint–to be in conflict with the Constitution.[12]

Scholars continue to argue the authenticity of the power of judicial re-

[9] The phrase also appears in his definitive book on the subject, *Concerning Dissent and Civil Disobedience* (New York: New American Library, 1968), p. 126. (Fortas resigned from the U.S. Supreme Court in mid-1969.)

[10] See his 1971 CBC Massey Lectures, *The Power of the Law* (Toronto: CBC Learning Systems, 1971), p. 41. The July 1977 looting during New York City's "blackout" is an obvious example of such a totally "uncivil" response.

[11] As quoted in *The New York Times,* October 16, 1966, p. 8e.

[12] See my *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France,* 4th ed. (New York: Oxford University Press, 1980), Ch. 7.

view. That so many doubts and challenges are raised is due preeminently to the failure of the American Founding Fathers to spell it out in the Constitution *in so many words*. Yet the records of the Philadelphia Constitutional Convention of 1787 indicate that the idea or principle of judicial review was a matter of distinct concern to the framers who, after all, had little use for unrestrained popular majoritarian government; that judicial review was indeed *known* to the colonists because the British Privy Council had established it over acts passed by colonial legislatures; that at least eight[13] of the ratifying state conventions had expressly discussed *and* accepted the judicial power to pronounce legislative acts void; and that prior to 1789 some eight instances of *state* court judicial review against state legislatures had taken place. The language of both Article Three and the famed "supremacy clause" of Article Six clearly imply the necessary but controversial weapon. Research by constitutional historians such as Charles A. Beard, Edward S. Corwin, and Alpheus T. Mason indicates that between 25 and 32 of the 40 delegates at Philadelphia generally favored the adoption of judicial review.[14] And although it remained for Mr. Chief Justice John Marshall to spell it out in 1803 in *Marbury v. Madison,*[15] the issue has been decisively settled by history—the debate over the legitimacy of judicial review is now an academic exercise.

Since the enactment of the "Judges' bill" in 1925, the Supreme Court has been complete master of its docket. The bill gave to the Court absolute discretionary power to choose those cases it would hear on a writ of *certiorari,* a discretionary writ granted only if four justices agree to do so. In theory, certain classes of cases do reach the Court as a matter of "right," i.e., those that come to it on writs of *appeal;* but even here review is not automatic since the tribunal itself must decide whether the question presented is of a "*substantial* federal nature." Its original jurisdiction docket is so small as to be dismissed for the purposes of this discussion.[16]

Since 1937 the overwhelming majority of judicial vetoes imposed upon the several states and almost *all* of those against the national government have been invoked because they infringed personal liberties, other than those of "property," safeguarded under the Constitution. This preoccupation with the "basic human freedoms"[17] is amply illustrated by the statistics

[13] Virginia, Rhode Island, New York, Connecticut, Massachusetts, New Jersey, North Carolina, and South Carolina.

[14] See particularly Beard's "The Supreme Court—Usurper or Grantee?," 27 *Political Science Quarterly* 1 (1912).

[15] 1 Cranch 137.

[16] See Abraham, *op. cit.,* Ch. 5, pp. 180–99, on matters of jurisdiction.

[17] See Chapter II, *infra.* As seen in these pages, they comprise the five enumerated by the First Amendment; the guarantees of procedural due process in the pursuit of criminal justice; and racial, political, ethnic, and sexual equality. (They are also known as the "cultural freedoms.") And the trend of public attitudes in the latter 1960s and evolving 1970s seemed to give fresh emphasis to the concept of privacy,

of the docket of the Supreme Court and the application of its power of judicial review.[18] More than half of all cases decided by the Court now fall into this category of "basic human freedoms." Whereas in the 1935–36 term only two of 160 written opinions had done so, in the 1979–80 term the ratio had increased to 80 out of 149.[19] A glance at the historical development of this majoritarian philosophy should help us to focus our study.

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personified by such Supreme Court decisions as those dealing with birth control and abortions. (See especially *Griswold v. Connecticut,* 381 U.S. 479 [1965], *Roe v. Wade,* 410 U.S. 113 and *Doe v. Bolton,* 410 U.S. 179, both 1973, respectively, and their progeny.)

[18] In 1976 a total of 5,320 civil rights suits were brought in *federal* courts against *employers* alone—a 1,500 per cent increase from 1970! "I am old enough to know," commented the then 75-year old United States District Court Judge Oren R. Lewis in the fall of 1977 during a discrimination case in his Alexandria, Va., courtroom. "When I first came on the bench [in 1960] I never had a discrimination case. Now that is almost all you have." (*The Washington Post,* November 15, 1977, p. A-1.)

Another indicator: Between its enactment in 1871 and 1920, only 21 cases were brought under the former year's Civil Rights Act that authorizes suits against "every person" who "under color of law" violates the civil rights of another. In 1976 a total of 17,543 such suits were filed—a figure that has continued to increase steadily! (See A. E. Dick Howard, "I'll See You in Court: The States and the Supreme Court." Monograph, published by the National Governors' Association Center for Policy Research, Washington, D.C., 1980.)

[19] Some additional representative statistics: 1965 (39 of 120); 1966 (55 of 132); 1967 (77 of 156); 1968 (70 of 116); 1969 (51 of 105); 1970 (77 of 141); 1971 (82 of 132); 1972 (86 of 164); 1973 (85 of 156); 1974 (63 of 137); 1975 (76 of 144); 1976 (87 of 160); 1977 (84 of 142); 1978 (88 of 138); 1980–81 (71 of 123).