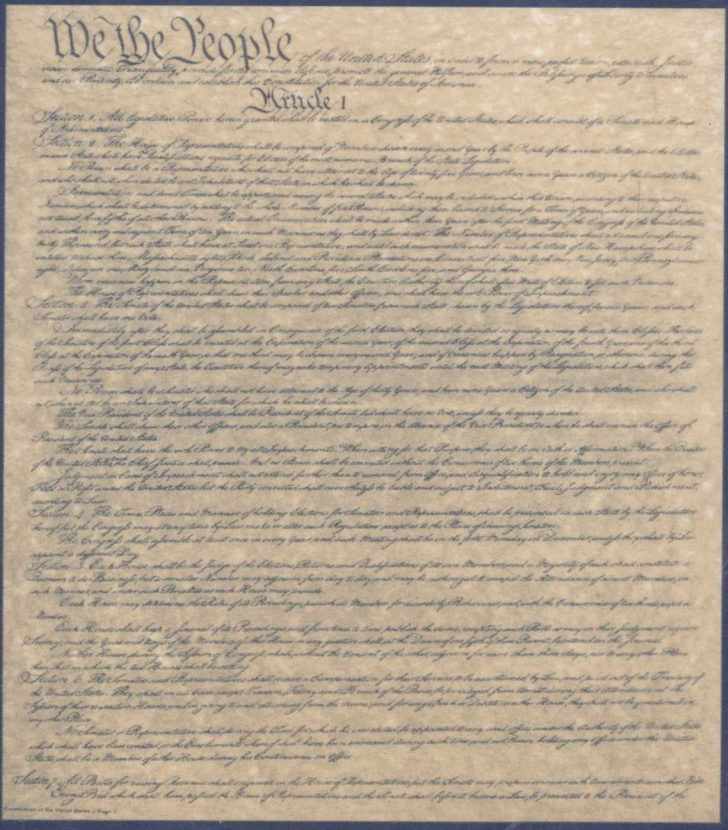
CIVIL RIGHTS & LIBERTIES

TOWARD THE 21ST CENTURY



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Toward the Twenty-first Century

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CIVIL RIGHTS AND LIBERTIES

To my Mother and Father

PREFACE

During the planning and writing of this book, several events of great importance took place. In 1990, one of the Court's most influential and progressive justices, Justice William J. Brennan, Jr., retired after serving 34 years on the bench. While Americans quietly celebrated the bicentennial of the Bill of Rights, Justice Thurgood Marshall, the first African American to serve on the Court, retired in 1991 after 24 years on the Court. For many, Marshall's retirement marked the end of the civil rights era—an era that began with the Birmingham and Selma marches, reached its zenith with *Brown v. Board of Education,* and ended with President Bush's appointment of Clarence Thomas. Of course, few will soon forget the extraordinary events surrounding the Thomas confirmation hearings of that year.

In 1992, the U.S. Supreme Court was dominated by justices appointed by three conservative Republican presidents and was on the verge of moving on an even more conservative path, overturning or narrowing many of the Warren and Burger Courts' landmark rulings, including one of the most controversial rulings of all time—*Roe v. Wade.* However, the 1992 election of Democrat Bill Clinton to the White House will likely have an impact on this conservative trend. President Clinton will have an opportunity to make appointments to the Supreme Court and to the lower federal courts, as well as to shape civil rights and liberties through his selection of executive department officials, such as Attorney General, Chair of the Equal Employment Opportunity Commission, Secretary of Health and Human Services, and others. Thus one of the themes of this book is change. Is the long-delayed counterrevolution in civil rights and liberties finally upon us? Or, contrary to the fears of civil libertarians, will the principle of *stare decisis,* or respect for precedent, prevent radical change?

The main purpose of this book is to introduce undergraduate students and other interested readers to the Supreme Court's landmark rulings on civil rights and liberties. Contained herein is an analysis of the facts, legal issues and constitutional questions, outcome, reasoning, and significance of major rulings that have shaped the nature and scope of our fundamental freedoms.

Readers should note that the key to understanding constitutional law is not having the right answers but asking the right questions. It is a simple task to associate the right to privacy with *Griswold v. Connecticut* or the abandonment of the separate but equal doctrine with *Brown v. Board of Education.* Far more important and challenging, however, is the task of identifying the constitutional or legal questions raised by each case. Thus, you should pay close attention to the major constitutional questions that are highlighted in each chapter. Only in this way can you fully understand the reasoning or logic underlying the Court's opinion.

The Supreme Court must issue written opinions, satisfying the nation that its rulings are rooted in constitutional principles and established legal precedent. It is not enough for the Court to decree that new restrictions on speech are permissible—it must explain how its solution to the dispute is compatible with the Constitution. Examining opinions from the standpoint of constitutional questions will help you better understand the logic behind the expansion and narrowing of rights and liberties, the legal mechanisms employed in this process, and the competing social, economic, and political interests affecting landmark Supreme Court decisions.

Although this book is an analysis of Supreme Court opinions rather than a casebook, it does contain numerous short excerpts from some of the more influential, eloquent, or controversial Court opinions. These excerpts illustrate the handiwork of powerful legal minds that have shaped our society, and also remind us that the "Court" is not an abstraction that mechanically produces opinions but is a group of distinct human beings with divergent points of view. I encourage you to pause and reflect on these brief quotations. The full text of these opinions can be found in either the *United States Reporter* (cited U.S.), the *Supreme Court Reporter* (cited S.Ct.), or Law Week (LW). For example, the famous 1962 school prayer case *Engel v. Vitale* is cited as *370 U.S. 421 (1962).* This tells you that the opinion can be located in volume 370 of the *United States Reporter* on page 421.

Chapter 1 provides a brief introduction and overview of some of the important theoretical and legal concepts that will appear throughout the other chapters. It examines the tension between individual rights and the needs of society, reviews the anatomy of a Supreme Court opinion, and outlines the institutional operations of the Court. If you are interested in a more detailed analysis of the operation and politics of the Supreme Court, consult any of the excellent texts available on judicial politics in general or on the Supreme Court in particular.

The substantive discussion of civil rights and liberties begins in Chapter 2, where we examine the scope and limits of freedom of expression under the First Amendment. The guiding constitutional question in this chapter is as follows: When is it permissible for the government to restrict speech that pushes the limits of our tolerance, threatens order and national security, and is offensive to the majority of citizens?

Chapter 3 discusses obscenity. Is the communication of sexually oriented ideas or images protected by the First Amendment? How does the Court go

about the difficult task of determining when such material is obscene and therefore not protected?

Chapter 4 focuses on freedom of religion and freedom from religion. The first part of the chapter inquires into the extent of our religious liberty under the free exercise clause. It asks: When is it constitutional for the state to ban certain forms of religiously motivated conduct? We then turn to examine issues arising under the establishment clause, such as school prayer, Bible reading, the teaching of creation science, and state aid to religion.

Chapter 5 examines the due process rights of society's most unpopular minority: persons accused of criminal behavior. Topics include the nationalization of the Bill of Rights; searches and seizures, including warrantless searches, electronic eavesdropping, and aerial surveillance; the right to counsel; self-incrimination; and the Eighth Amendment's prohibition of cruel and unusual punishment.

Chapter 6 analyzes the growth and development of the right of privacy and how this right affects such issues as abortion, "the right to die," drug testing, and the rights of homosexuals.

Chapter 7 traces the development of the Court's interpretation of the equal protection clause of the Fourteenth Amendment from finding remedies for race and sex discrimination, including sexual harassment, to issues such as affirmative action and quotas.

Chapter 8 addresses the question being raised throughout the book: Is the Court in the midst of a dramatic shift in judicial philosophy and a wholesale abandonment of the celebrated rulings of the Warren and Burger eras?

This book does not pretend to be an exhaustive account of the Court's landmark rulings on civil rights and liberties; important cases have been left out and certain issues have been neglected. Rather than proceeding from a shopping list of cases and topics, I endeavored to organize the book around those issues, controversies, and opinions that in my judgment are highly representative of the developments and changes in civil rights and liberties during the Warren, Burger, and Rehnquist eras.

I would like to express my indebtedness to my constitutional law students and to my colleagues in the political science department at Sam Houston State University; especially to Professor R. H. Payne, for his encouragement and support. I would also like to thank Professor W. Robert Gump of Miami University for his inspiration and friendship. Finally, I am grateful for the support of Marcus Boggs, editor-in-chief, Melonie Parnes, project editor, Maria Hartwell, acquisitions editor, and others at HarperCollins Publishers.

John C. Domino

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CHAPTER ONE

INTRODUCTION

A bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference.

Thomas Jefferson, Letter to James Madison, December 20, 1787

It is emphatically the province and duty of the judicial department to say what the law is.

Chief Justice John Marshall, *Marbury v. Madison,* 1803

❖ CIVIL RIGHTS AND LIBERTIES

Our bicentennial celebration of the Bill of Rights in 1991 was all but eclipsed by the dissolution of the Soviet Union and the disappearance of communism in Eastern Europe. While some Americans held bicentennial forums and others attended displays of historic documents, Russians, Estonians, Lithuanians, and many others were engaged in a struggle for basic human rights and freedoms. The events still unfolding in Eastern Europe and the former Soviet Union serve as poignant reminders that civil rights and liberties are fundamental to human dignity and an open democratic society.

Americans take their rights seriously, but unfortunately also take them for granted. Although terms such as *liberty, freedom,* and *rights* are integral parts of the language of our civil religion and political culture, very few Americans understand how they have come to enjoy these protections. As shown by the apathy toward the bicentennial of the Bill of Rights and political events in general, most citizens are perfectly happy to pass through life without reflecting upon their constitutional protections. Reflect for a moment on the nature of liberty and the extent of your rights. What does it mean to be at liberty to choose a belief system and speak your mind or to choose a career and a life plan? *Liberty* can be defined as the condition of being free from restrictions or

constraints, while *rights* can be understood as the legally defined boundaries between liberty and the legitimate authority of *government.*

However, we are not at perfect liberty to do as we please, for rights cannot exist without concomitant duties. If we are to live in a truly "civil" society, we must agree to respect the rights of others and subject our activities to reasonable governmental restrictions enacted for the good of society. One needs only to witness a loud and ugly political demonstration or be forced to endure a heckler at a speech or concert to understand this fact. The fundamental question that guides our inquiry into the subject of rights and liberties is what constitutes a reasonable restriction on these rights and liberties? Looking at the question from another perspective, how extensive are our rights and liberties? What is the proper balance between individual liberties and the needs of society as reflected by the principle of majority rule?

Although it is often used interchangeably with *liberties,* the term *civil rights* has recently come to connote acts of government intended to protect disadvantaged classes of persons or minority groups from arbitrary, unreasonable, or discriminatory treatment. Civil rights can be understood as the rights of equal treatment under the laws—the right of full citizenship, if you will.

The framers of the Constitution established a representative democracy based on the principle of limited majority rule. While not a perfect system, representative democracy empowers the majority of citizens to determine how government should establish justice, provide for the common defense, and promote the general welfare. But as history teaches us, in the absence of meaningful and enforceable constitutional rights, the power of the state knows no bounds, and ultimately sacrifices the needs of the individual on the altar of national security, order, and efficiency. The framers of the Bill of Rights knew that the simple existence of democratic principles such as free and open elections and majority rule did not guarantee that the rights and liberties of individuals would be respected; indeed, one of the major objections to the Constitution was that it did not place sufficient safeguards on the extremes of majority rule. Of course, certain protections were present in the original Constitution: a jury trial was required in federal cases, ex post facto laws were forbidden, and the writ of habeas corpus could not be suspended in times of peace. But the Constitution did not contain specific guarantees of the fundamental individual liberties that we take for granted, such as speech, assembly, and religion.

Alexander Hamilton and other opponents of a national bill of rights argued that since most state constitutions contained a bill of rights, the inclusion of a national bill of rights would be not only redundant but dangerous. In *The Federalist* (No. 84), Hamilton reasoned that the passage "Congress shall make no law . . . abridging the freedom of speech, or the press. . . " might actually imply that the national government had the power to regulate speech or press as long as it did so without "abridging" those liberties. Nevertheless, on December 15, 1791 a national bill of rights—largely the work of James Madison—was ratified and added to the Constitution. Madison knew that the precise meaning of the rights and liberties found in the first ten amendments

would always be subject to vigorous debate, but the adoption and ratification of the Bill of Rights would guarantee that the legal recognition of those rights was safely beyond the reach of majoritarian forces.

The Constitution and Bill of Rights rest on the idea that persons are by nature free and independent beings who join with others in order to enjoy the benefits of civil society and rule of law. As a basic ideal of our society, the rule of law demands that public officials act on the basis of generally applicable laws and principles, not on personal whim or prejudice. Another benefit of living in accordance with the social contract is the legal codification and enforcement of fundamental human rights. The framers did not proceed from the assumption that rights are to be granted to the people by the government, but from an understanding that rights exist independently of civil society and government. The First Amendment does not read, "The People shall enjoy freedom of speech and press," but rather, "Congress shall make no law . . . abridging the freedom of speech, or the press. . . ." Thus, the Bill of Rights codifies rights that are fundamental to a liberal-democratic polity and stipulates constitutional limits on government authority.

The Bill of Rights was adopted to protect the citizens of the states from the mischief and excesses of the new federal government; it was not intended to limit the powers of the state governments. Most states already had some form of bill of rights to protect citizens from overzealous sheriffs, preachers, or tax collectors. In fact, James Madison modeled the Bill of Rights after the legal and constitutional provisions found in Virginia and other states. As we shall see in our discussion of due process, it was not until the middle of the twentieth century that the Supreme Court "nationalized" the Bill of Rights by selectively applying provisions of the first ten amendments to the states through interpretation of the Fourteenth Amendment.

❖ AN INDEPENDENT JUDICIARY

The idea that an independent judiciary is central to the enforcement of individual rights did not originate with the adoption of the Constitution. It is deeply rooted in the English common law tradition of the neutral judge or magistrate who has little to gain or lose by issuing or withholding a warrant or by ruling in favor of the farmer over the rancher in a property line dispute. But the framers sought to maximize this ideal by establishing a constitutionally independent and coequal judicial branch, thus ensuring that rights and liberties would not ultimately depend on the will of the legislature or executive. In Britain and the Continent, most judiciaries are subordinate to Parliament or the executive and are not institutions of equal prestige and influence. Subjects or citizens have constitutional rights, but how these rights are enforced depends on the power and discretion of public officials. In Great Britain, for example, when political expression or dissent poses no real threat or controversy, the government is generally extremely tolerant. But when speech

embarrasses public officials or strikes at the very heart of majority sensibilities, the government is not quite so tolerant. This is true even in other countries where freedom of expression is protected by a constitution or codified in law.

Unlike Articles I and II of the Constitution, which offer relatively detailed discussions of congressional and presidential powers, Article III merely pronounces that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In addition to granting coequal and independent status to the judiciary, the framers further guaranteed its integrity by giving federal judges life tenure, "during good Behavior," and a salary "which shall not be diminished during their Continuance in Office." Article III also grants the Court irrevocable original jurisdiction, in cases affecting ambassadors, public ministers, or consuls, or in cases in which a state is a party. More importantly, the Court's power to hear appeals—its appellate jurisdiction—is also granted by Article III, but "with such Exceptions and under such Regulations as Congress shall make."

In practice, however, the Supreme Court is dependent on Congress and the executive in many ways. Through the power to appoint justices, the president can influence constitutional law. And though it happens rarely, the Senate may refuse to confirm a president's nominee to the Court and the House may refuse to appropriate funds needed for judicial and administrative salaries. Furthermore, since it lacks executive powers, the Court also depends on the political branches to enforce its rulings.

At the core of the Supreme Court's authority and prestige is the principle of judicial review—the power to declare unconstitutional any state or federal law, judicial ruling, or executive action that is in conflict with the Constitution. The origins of judicial review cannot be directly traced to the enumerated powers of the Supreme Court in Article III, but to *Marbury v. Madison,* 1 Cranch 137 (1803), one of the most significant cases in American history.

Marbury v. Madison came to the Court in the midst of a struggle between the Federalists and Jeffersonian Antifederalists, a struggle destined to affect the future of the new republic as well as the role and power of the Court itself. The case originated when newly installed President Jefferson, an Antifederalist, ordered his Secretary of State, James Madison, to refuse to honor the commissions of several federal judges appointed by President Adams in the last hours of his Federalist administration. William Marbury was among those injured persons to bring suit after he was denied his commission as a justice of the peace for the District of Columbia. Under Section 13 of the Judiciary Act of 1789, which expanded the Court's original jurisdiction, Marbury was able to take his case directly to the Supreme Court rather than proceeding on appeal from a federal district court. Angered by Adams's "midnight appointments," Jefferson planned to use an adverse ruling as an excuse to call for the impeachment of Chief Justice John Marshall (1801–1835) and other Federalist judges, thereby weakening the last stronghold of the Federalists.

In a decision that was a shock to the Jefferson administration, Chief Justice Marshall ruled that although Marbury had been injured by a president act-

ing above the law, the Court could offer no remedy under Section 13 of the Judiciary Act. The Court could not hear Marbury's case under its original jurisdiction, set forth in Article III, since Marbury was not a foreign minister or ambassador or a citizen of a state suing the citizen of another state. By expanding the Court's original jurisdiction beyond that set forth in Article III, so that the Court could hear cases such as Marbury's, Congress enacted a statute that altered and conflicted with the Constitution, the highest law of the land. Marshall succinctly reasoned that if it is the role of a court to interpret the law and determine what the law means, and the Constitution is the highest law in the land, then it is the duty of the Supreme Court to say what the Constitution means and, if necessary, to strike down laws or actions repugnant to the highest law.

Though initially ignored or refuted by Jefferson and others, Marshall averted a constitutional standoff with the executive branch and laid the foundation for judicial review. It would take decades of application and usage before this power was firmly established. In fact, the Court would not strike down another act of Congress until *Dred Scott v. Sanford* 54 years later.

In *Dred Scott,* Chief Justice Roger B. Taney struck down the Missouri Compromise and denied blacks their legal personhood, thereby tarnishing the Court's reputation and bringing the nation closer to civil war. But the Court recovered from this self-inflicted wound and has come to enjoy the final authority to strike down or uphold any federal or state statute or governmental action that it judges to be in conflict with the Constitution. Thus, under Marshall's brilliant leadership, the Court firmly grasped the power to shape the scope of governmental powers and determine the proper relationship between the federal government and the states—two issues that dominated the Court's docket until the Civil War.

After the Civil War, as America evolved into a prosperous industrial giant, progressive forces in Congress and the state legislatures enacted laws and regulations intended to curb monopolies, protect workers, and reign in the nation's powerful and exploitive corporations. The Court's docket was soon dominated by constitutional challenges to those laws and regulations. In a string of rulings the Court used the doctrines of economic liberty and liberty of contract—"found" in the due process clauses of the Fifth and Fourteenth Amendments—to strike down restrictions on the rights of corporations and businesses. Eventually, the despair of the Great Depression, the strength of the progressives, and the popularity of President Franklin Roosevelt and the New Dealers proved too powerful for the Court. It reversed its position on the New Deal programs and backed away from economic issues to keep from losing its independence to FDR's controversial plan to increase the number of justices on the Court to fifteen.

The New Deal and the Second World War represent a period during which the Court began to shift its attention away from economic liberty to disputes involving the relationship between the individual and the government (civil liberties) and the rights of racial minorities and women (civil rights). It is in this modern era that the Court embraced the role of guardian of civil rights

and liberties, acting as a counterweight to majoritarian intolerance and the excesses of governmental power.

The Supreme Court must strike a balance between individual rights and society's asserted interest in such things as tradition, public safety, national security, and standards of decency or morality. But as we shall see in subsequent chapters, there are no simple equations or formulas to attain this balance. The Court is struggling to resolve twentieth-century political, economic, and social disputes using a vague, almost cryptic set of guidelines handed down from the eighteenth century. Should it broadly interpret the Constitution to meet the needs of a modern world, or should it attempt to examine modern constitutional problems from the standpoint of the "original intent" of the framers? Another fundamental question focuses on how the Court should apply judicial review. Should the Court be more willing to break from established precedent in order to bring about a desired social or political policy? Should the Court be willing to challenge the authority and discretion of legislatures and executives at both the state and federal levels, or should it show deference to the political process?

❖ HOW THE SUPREME COURT DECIDES

During its term, which runs from October through June, the United States Supreme Court is bombarded with thousands of petitions requesting review of lower court rulings. Most of these petitions come from the 12 United States Courts of Appeals and the 50 state supreme courts. Of course, under Article III of the Constitution, the Court cannot hear a case unless a dispute constitutes an actual legal controversy—one that involves the loss of rights or property. It may not hear a hypothetical case or issue an advisory opinion even upon the request of Congress or the president. Nor may it hear a dispute involving a law or action that is merely a potential violation of constitutional rights. In all but special circumstances, a dispute must present an actual case or controversy before the Court will grant review. Since the passage of what is commonly called the Certiorari Act of 1925, enacted to relieve the Court's overcrowded docket, most of the cases that come to the Court are through writ of certiorari, or "cert." The Act gives the Court nearly absolute discretionary control over its dockets, thereby enhancing its power and prestige. Consequently, the Court hears less than 5 percent of all petitions for appeal, handing down rulings with full opinions in only about 150 cases during its nine-month term. Although the Court issues a lengthy and complex opinion explaining its final decision in a case, the justices are not obligated to make known their reasons to grant or reject an appeal. As a consequence, we know very little about the factors involved in the decision to grant certiorari—a stage in the process that is almost as important as the Court's final ruling, for a refusal to grant certiorari means that the lower court's decision stands.

The justices work closely with their law clerks, typically recent graduates