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Book Reviews: Freedom and the Court

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FREEDOM AND THE COURT. By Henry J. Abraham.* Oxford University Press, New York. 1977. Pp. 482. Reviewed by Eugene J. Davidson.†

The third edition of *Freedom and The Court*[1] supplies an updated, comprehensive review and analysis of the progress Americans have made in the protection of their basic rights and liberties.[2] As in prior editions, the book does not seek to cover the entire spectrum connoted by the term "freedom." Rather, the author confines himself to personal Rights, concepts which, as general propositions, the vast majority of Americans invariably proclaim as being sacred. Unfortunately, as Mr. Justice Holmes observed, "[g]eneral propositions do not decide concrete cases."[3] Therefore, one of the demanding issues confronting this nation has not been simply whether a line should be drawn between the individual's rights and the community's rights, but how and where such a line should, or perhaps can, be drawn. The statement, "[b]ut 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" (p. 3), is as true today as it was when written by John Stuart Mill in 1898.

Freedom and The Court provides a scholarly, yet highly readable, presentation of the present posture of this "fitting adjustment" and the tortuous road travelled by the Supreme Court to reach the current position. The first segment, composed of chapters I, II, and III ("Introduction," "The 'Double Standard,'" and "The Bill of Rights and Its Applicability to the States"), acts as the necessary predicate for the remainder of the book, which focuses on four specific Rights: due process, freedom of expression, religious freedom, and racial equality. While most readers will be attracted to the four Rights chapters, the first three chapters should not be passed over lightly. Indeed, the brief first chapter identifies a philosophy that many liberals and conservatives alike seemingly fail to comprehend, or if they do comprehend, fail to accept, unless, of course, they are complaining of their adversaries' noncomprehen-

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1. The first edition was published in 1967; the second edition in 1972.
2. The terms *rights* and *liberties* which are used interchangeably in the book are referred to as *Rights* in this review.
3. Lochner v. New York, 198 U.S. 45 (1905).

sion or nonacceptance.[4] This philosophy is that Rights and social order are inseparable; while we must be zealous of the dissenter's rights, the dissenter too must recognize the majority's rights. Tyranny by the minority is as pernicious as tyranny by the majority. The rule of law requires respect for the law. In language worthy of a Holmes, Professor Abraham writes,

> 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 (p. 5).

The second chapter is of utmost importance to an understanding of the dichotomy in the Court's approach to economic or proprietary Rights as compared to its approach to personal Rights. In describing what he correctly labels as a "double standard," Professor Abraham demonstrates that at one time or another the Court has favored either property Rights or personal Rights, but not both at the same time. In earlier days, the former were prized over the latter so that social experiments (*e.g.*, child-labor regulations, minimum wage laws) were given short shrift. With the advent of the New Deal Court, this posture changed so that today the Court views with equanimity legislation affecting proprietary Rights, assuming the legislation to be constitutional unless proved to the contrary, but views as suspect efforts to interfere with what have been termed basic human freedoms (*e.g.*, speech, press, worship, due process in criminal trials).[5] One may speculate on whether this dichotomy in judicial constitutional analysis is fully perceived by the legal profession, let alone the general public, and how much fruitless litigation has ensued as a result of this failure.

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4. This chapter also briefly addresses the role of the Supreme Court in acting as arbiter of the freedom issue. While this book is not the place for a full exposition of this judicial feat, the issue is of more than passing interest and readers are referred to Professor Abraham's book "The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France" (3d ed. 1975).
5. Four justifications for this "double standard" are:
   (1) The crucial nature of basic freedoms;
   (2) The explicit language of the Bill of Rights;
   (3) The appropriate expertise of the judiciary; and
   (4) Discrepancy in access to the political process (pp. 24-32).

The chapter on the Bill of Rights not only analyzes the landmark cases,[6] but also explores in depth the variant tests employed by the Court's leading members in those cases. These positions (*i.e.,* Frankfurter's "does it shock the conscience" test, Holmes's "does it make you vomit" test, Cardozo's "fundamental principles" test, etc.) are distilled into four[7] distinct theories: "Selective Incorporation" also dubbed "Honor Roll of Superior Rights" as expressed in Cardozo's *Palko v. Connecticut*[8] decision; "Fair Trial" or "Case by Case" advocated by Frankfurter, and, in the author's guarded opinion, currently favored by Burger, Blackmun, Rehnquist and Powell; "Total Incorporation" originated by Harlan, the elder, and adamantly proclaimed by Black; and "Incorporation Plus," an extension of Black's theory, espoused by Murphy and Rutledge in the former's dissent in *Adamson v. California.*[9] This chapter is typical of the author's somewhat unusual — albeit interesting and informative — style which coordinates the legal analysis of the cases with a consideration of applicable historical, political, and societal factors. As a result, the reader sees the "whole picture" of the Court as the people's protagonist and principal guardian in their struggle for life and liberty.

The four specific Rights chapters focus on the still evolving process of line-drawing. This line-drawing is complicated by the nature of these Rights. As described in the book, the tak of line-drawing is difficult because the concept is ambiguous in due process, elusive in freedom of expression, delicate and emotional in religion, and subject to deep-seated prejudices regarding race. Notwithstanding the complexity of the task, the book succeeds in both clarifying the underlying issues and identifying the lines that have been drawn. In the process, the author demonstrates how the line-drawing was achieved and reinforces his thesis that, of the three branches of government, the judiciary is the natural line-drawer because both the legislative and executive segments are too prone to political expediency and popular passion.

It should be noted that the author's treatment of race Rights differs from the treatment of the other three Rights. The chapters on due process, speech, and religion begin with discussion of the guidelines or considerations that are basic to an understanding of the topic covered in the chapter, and then continue with the relevant

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6. *See, e.g.,* Adamson v. California, 332 U.S. 46 (1947); Gitlow v. New York, 268 U.S. 652 (1925); Butchers' Benevolent Association v. Crescent City Live-Stock Landing and Slaughter-House Co., 83 U.S. (16 Wall.) 36 (1873); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
7. The author notes that "close students . . . can determine . . . eight or nine such positions" (p. 96).
8. 302 U.S. 319 (1937).
9. 332 U.S. at 123-25.

legal, political and societal considerations. The chapter on race begins with a presentation of the dilemma — race in an enlightened democratic society should not present the line drawing problems indigenous to the other three Rights, but theory does not necessarily govern practice. The chapter then concentrates primarily on the problem from a historical and, to a lesser degree, political perspective. Even the legal analysis is essentially a review of the historic march of *University v. Murray*,[10] *Missouri* ex rel. *Gaines v. Canada*,[11] *Sweatt v. Painter*,[12] *Brown v. Board of Education*,[13] *Shelley v. Kraemer*,[14] etc. The final portion of the chapter, entitled "State Action and Beyond: A True Dilemma" (pp. 415–38), and more particularly the last three pages entitled "Coda" (pp. 438–40), assess the issue of when private action becomes "state action" so as to permit invocation of the fourteenth amendment. This in turn poses a most fundamental question — how far racial egalitarianism? — a question with which the American public and the Supreme Court have yet to come to grips.

Before concluding, mention must be made of the interesting trivia scattered throughout the book. Such items as Frankfurter having been referred to as "the Emily Post of the Supreme Court" (p. 22), Holmes's statement that "if my country wants to go to hell, I am here to help it" (p. 30), and his belief that in the area of civil rights the average American was not very enlightened and, thus, in those cases, judges "should not be too rigidly bound to the tenets of judicial self-restraint" (p. 30), as well as Professor Abraham's explanation of the term "Jim Crow" (pp. 344–45), make this very readable book all the more so.

This edition is worthy of praise as an important and learned contribution on a plethora of subjects including, among others, the development of individual rights, the development of the fourteenth amendment, and the role of the Supreme Court as the arbitrator in the individual rights-state control imbroglio.

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10. 169 Md. 478, 182 A. 590 (1936), in which the Court of Appeals of Maryland ordered admission to the University of Maryland Law School.
11. 305 U.S. 337 (1938).
12. 334 U.S. 1 (1948).
13. 339 U.S. 629 (1950).
14. 347 U.S. 483 (1954).