# BEFORE THE CIVIL RIGHTS REVOLUTION

## The Old Court and Individual Rights

John Braeman

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# Before the Civil Rights Revolution

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# Preface

The subject matter of this study is known and unknown. Supreme Court decisions—if not their motivations—are a matter of public record, available on the shelves of any law library. But the record of the Supreme Court vis-à-vis civil rights/civil liberties issues before the 1937 switch-in-time that saved nine has received scant attention. Looking at the case books for constitutional law courses, one would gain the impression that, except for a few isolated so-called landmark decisions, the justices did not deal with such questions in a significant way until at least the Roosevelt Court—or even the 1960s. While this lack of historical perspective may be excusable in texts whose purpose is to instruct would-be new practitioners in the latest developments in the law, constitutional historians have largely been guilty of similar neglect. The predominant note in the work that has been done—such as, for example, on the Court's interpretation of the Reconstruction-era amendments for the protection of the Negro—has been to contrast the Old Court's solicitude for property with its benighted attitude toward human rights and personal freedoms.

The present account is an offshoot of a larger study underway of the post-1937 civil rights revolution. My attention was drawn to the prior developments, partly because of my surprise at the degree to which the Modern Court has quoted earlier precedents in support of what have been regarded as new departures, partly because of my realization that one could not assess the scope of the resulting changes without a base line for comparison. My first chapter examines how the existence of the federal system complicated the definition of what individual rights were guaranteed by the United States Constitution while simultaneously exacerbating the problem of their protection against violation. The second chapter explores the substantive content that the Old Court gave to constitutionally protected rights outside the criminal procedure area. Chapter

three deals with the Old Court's response to what has been, and remains, the most intractable issue in the American polity: race discrimination. Chapter four surveys the Old Court's decision-making in the criminal procedure area, focusing upon the twin questions of the meaning of the criminal law guarantees of the Bill of Rights and the limits imposed by the Constitution upon state autonomy in the administration of criminal justice. The final chapter assays an over-all appraisal that aims to elucidate the values defining the parameters of the Old Court's treatment of civil liberties/civil rights issues.

My conclusions may be briefly stated. The first is that the widely held assumption that the post-1937 justices were writing upon a largely blank slate in this area is mythology. The second—and more significant—is that the Old Court's record on civil rights/civil liberties issues was far from simply one of judicial negativism. On the contrary, much of what the Modern Court has done when viewed in long-term perspective appears incremental expansions upon precedents laid down by the Old Court. Before the first of Franklin D. Roosevelt's appointees took his seat on the bench, the Court had made the crucial breakthrough of applying the First Amendment to the states via the Fourteenth. The Old Court's interpretation of the criminal procedure guarantees of the Bill of Rights remains to this day the governing definition of many of those provisions. And the first step had been taken toward imposing those limitations upon the states. Last—but crucially important—the Old Court developed the enforcement mechanisms upon which the Modern Court has relied for the guardianship of individual rights.

There is no question that from the standpoint of contemporary liberal thinking the Old Court had its blindspots. Examples include its treatment of women, blacks, and aliens. But the changes that have occurred in their legal status reflect primarily changes that have taken place in the attitudes and values of the larger society. Even where the Modern Court has broken with the one-time accepted interpretation, the discarded precedents were not without their influence. As an institution, the Supreme Court maintains its legitimacy by preserving the appearance of continuity to avoid making too visible its policy-making role. Much of the hesitancy, wavering, stops and starts that marked the post-1937 Court's decision-making in the civil liberties/civil rights area—at least until the mid-1960s—reflected divisions among the justices over how fast and how far they could, or should, depart from inherited constitutional doctrine. Nor was the Warren Court immune to the pressure to avoid too sharp breaks with the past. The most important example was its refusal to abandon the state-action requirement for the Fourteenth Amendment. And many of its most innovative decisions strove as much as possible—at times to the point of strain—to appeal to the earlier precedents dealt with in this study.

I wish to thank Professor Philip B. Kurland of the University of Chicago

Law School for his judicious reading of the text. Commiseration is due my wife, who put up (more or less) with the moods—ranging from abstraction to grumpiness with not much between—induced by my writing. I bear sole responsibility for any errors of fact or eccentricities of interpretation.

# Before the Civil Rights Revolution

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# 1 Individual Rights in a Federal System

The Supreme Court of the United States holds a unique position among the world's judicial bodies. In form the justices simply decide controversies between opposing litigants. From the start, however, the Court was deeply involved in broader policy making. One way of doing this was via statutory interpretation. Disputes over the scope and/or meaning of a statutory provision grow out of the clash of interests between different parties. The Court's answer will thus favor one or the other view of what the policy should be. But the Court's major impact has come from its power to declare a law, an official action, or a lower court judgment in violation of the Constitution. One group of constitutional issues that comes before the tribunal consists of questions about the distribution of power among different government organs (e.g., whether a given power belongs to Congress or to the president, to the national government or to the states). A second group revolves around the limitations upon governmental power (i.e., whether a particular power has been exercised properly or even exists). Deciding such questions makes the Court, Felix Frankfurter has written, "for all practical purposes, the adjuster of governmental powers in our complicated federal system."[1]

A long, inconclusive, and largely futile debate has gone on over whether the framers of the Constitution had intended the Supreme Court to review the constitutionality of governmental actions or whether that power had been "usurped."[2] What can be said without dispute is that the text of the Constitution offers scant guidance to understanding what the role of the Court has become. The so-called supremacy clause in Article VI stipulated that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." There is no question that the purpose was to affirm the superiority of the Constitution to state

laws and constitutions and acts of Congress not "made in Pursuance thereof." But the Constitution did not say what governmental organ should interpret and enforce that higher law. Article III simply provided that the "judicial Power of the United States . . . shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

In what became the classic rationale for the power of the Supreme Court to declare acts of Congress unconstitutional, Chief Justice John Marshall in *Marbury v. Madison* relied partly upon this text. He pointed out that the supremacy clause legitimized only acts of Congress "made in *pursuance* of the constitution." And noting that the judicial power of the United States extended to all cases arising under the Constitution, he asked: "Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into?" But the major thrust of his argument rested upon what he saw as the inescapable logic of a written constitution. "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Accordingly, "essentially attached to a written constitution" was "that an act of the legislature, repugnant to the constitution, is void." The question still remained, why should the primary responsibility for deciding if a law conflicted with the Constitution belong to the judiciary? Marshall's answer was: "It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[3]

Commentators have differed over whether Marshall was asserting a judicial monopoly of constitutional interpretation.[4] The decision as such was not incompatible with the alternative so-called tripartite theory of constitutional interpretation "that each of the three departments has equally the right to decide for itself what is its duty under the constitution."[5] At issue in *Marbury* was the scope of the judicial power—a question appropriate under the tripartite theory for the Court to decide. More important, Marshall appeared to suggest that judicial determination of constitutional questions was limited to cases affecting "individual rights," and did not extend to the exercise by the other branches of their "political powers."[6] In his famous 1819 decision in *McCulloch v. Maryland* upholding the constitutionality of the Second Bank of the United States, he affirmed that Congress had the primary responsibility under the "necessary and proper" clause[7] for adapting the "great outlines" of the Constitution to the changing needs of society. "Let the end be legitimate," he declared, "let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[8]

On the other hand, there is no question that Marshall assumed in *Mar-*

*bury*—at the minimum—that the Court had final say on which questions were political and which were judicially reviewable. There was similarly in *McCulloch* the unstated premise that the Court would decide if an act of Congress was "appropriate," "not prohibited," and "consist[ent] with the letter and spirit of the constitution."[9] His younger colleague on the bench, Joseph Story, in his influential 1833 *Commentaries on the Constitution of the United States*, made explicit what Marshall had left implied: that the Court was the constitutionally established "final and common arbiter . . . to whose decisions all others are subordinate."[10] By the late 1840s, there appeared a broad consensus among the parties in the debate over the power of Congress to prohibit slavery in the territories that the judiciary was the proper agency to answer the question.[11] Taking up the invitation in the *Dred Scott* case, Chief Justice Roger B. Taney proceeded to strike down the Missouri Compromise's prohibition of slavery in the Louisiana Purchase north of 36° 30'. Our duty, Taney explained, was to interpret the Constitution, "with the best lights we can obtain on the subject, and to administer it as we find it." The framers had decreed the constitutional protection of slave property. "No . . . change in public opinion or feeling . . . should induce the court to give to the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted."[12]

Whatever the ambiguities in Marshall's position about the scope of judicial review over the actions of the coordinate branches of the national government, there was no doubt where he stood on its role vis-à-vis the states. In 1810, he assumed in *Fletcher v. Peck* that there was no possible argument about the Court's power to strike down acts of the state legislatures given a Constitution, "the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass."[13] In 1816, the Court affirmed in *Martin v. Hunter's Lessee* its authority to review state court decisions dealing with claims based upon federal law. "It was foreseen," Justice Story wrote,

> that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power [of the United States], by the very terms of the constitution, is to extend. . . . It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals.

Taking as settled the authority of the Supreme Court to declare "proceedings of the executive and legislative authorities of the states . . . found contrary to the constitution . . . of no legal validity," Story held that state judges were subject to the same check "if they should unintentionally transcend their authority, or misconstrue the constitution."[14]

The Court's exercise of judicial review did not pass without challenge. The heaviest attack was directed against its review of state court decisions.

Bills were repeatedly introduced in Congress to strip the Court of its jurisdiction to hear such appeals.[15] Adherents of the tripartite theory of constitutional interpretation similarly protested the Court's assumption of oversight over the actions of the other branches of the national government. Thomas Jefferson fumed that *Marbury* gave to one of the three branches "alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. . . . The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist or shape into any form they please."[16] When vetoing the recharter of the Bank of the United States, Andrew Jackson denied that *McCulloch* had settled its constitutionality. "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."[17] In reaction to *Dred Scott*, Abraham Lincoln warned in his first inaugural address that "if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers."[18]

The Court's success in winning acceptance of judicial review owed much to the deeply ingrained American belief in natural law and natural rights: that there were certain universal principles of right that government could not violate. Colonial protests in the years preceding the Revolution assumed the existence of a higher law of "common right and reason" limiting legislative power—and even suggested that such fundamental law was judicially enforceable.[19] Further support for judicial review came from the new conception which emerged from the Revolution that a written constitution embodied the will of the sovereign people.[20] Whatever the source—the older natural law tradition or the newer popular sovereignty model—most state judges by the eve of the Civil War appear to have accepted the authority (or to be more accurate, the *duty*) of the courts to intervene when the actions of temporary popular majorities transcended "the constitutional limits of the legislative power."[21] Perhaps most important in establishing the Supreme Court's special position was the necessity of a single umpire to resolve the conflicts growing out of the federal system. "So long . . . as this Constitution shall endure," Chief Justice Taney declared for a unanimous bench, "this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force."[22]

One last factor was indispensable: the political astuteness shown by the Court. *Marbury* set the pattern, as Marshall coupled the enunciation with broad principles with avoidance of a direct confrontation with the executive branch. *Dred Scott* was a misstep that made the Court the target of hostility from the soon-to-be-triumphant Republican party. But the Republicans' aim—notwithstanding Lincoln's remarks in his inaugural address—was to change the membership and conduct of the Court rather than its structure

and functions.[23] Nor did the Court give further provocation that might have spurred a broader attack. The justices skirted any challenge to the government's conduct of the Civil War.[24] In the war's aftermath, the Court under Chief Justice Salmon P. Chase's leadership artfully avoided conflict with Congress over its southern reconstruction program while simultaneously taking the opportunity in other areas to lay down precedents aggrandizing its power.[25] Starting in the 1890s, and picking up momentum in the progressive era, dissenters unhappy with what appeared the Court's too tender solicitude for property rights launched a renewed attack upon its having final say on constitutional questions.[26] New York governor (and future Chief Justice) Charles Evans Hughes, however, expressed what had become the dominant view with blunt candor: "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and property under the Constitution."[27]

The question thus became, for what purposes did the Court exercise its power? Over the course of the Supreme Court's history, different themes have appeared to predominate in its decision-making. During the period of the ascendancy of Chief Justice John Marshall, the Court gave allegiance to three interrelated values: the expansion of its own power; the supremacy of the national government over the states via a broad interpretation of the commerce and necessary-and-proper clauses; and the protection of property rights largely though not exclusively through the contract clause. Under his successor Roger B. Taney, the Court was more respectful of state autonomy, less respectful of established vested rights. During and after the Civil War, the justices grappled with the issues arising out of that conflict: the scope of presidential and congressional war powers; the transformed relationship between the states and the national government; and the Reconstruction-era legislation for the protection of black rights. From roughly the mid-1880s on, the dominant issue became how far business should be protected against government regulation—with the years 1921 through 1937 marking the high point of the enshrinement of laissez-faire as the law of the land.[28]

The confrontation between the justices and the New Deal—climaxing in Franklin D. Roosevelt's Court-"packing" plan—forced the Court to beat a strategic retreat that was turned into a rout by the new Roosevelt appointees to the bench. The upshot was to give a virtually free sway to government economic regulation.[29] But simultaneously the Court undertook as its new major role "to protect against hasty and prejudiced legislation the citizen's freedom to express his views," to uphold "the right to a fair trial," and "to give voice to the conscience of the country . . . against local prejudice and unfairness."[30] The Modern Court has become pre-eminently a "civil rights court." Of the 160 decisions with written opinions in the 1935–1936 term, only two dealt with civil rights and liberties. The balance shifted so rapidly that by the 1959 term 27 percent of the 117 plenary decisions dealt with such matters. By the first half of the 1970s, 43 percent of the Court's plenary

decisions had as their principal issue an alleged deprivation of individual rights guaranteed by the Constitution; in addition, a large proportion of the decisions on procedural issues, statutory interpretation, and federal-state relations involved civil liberties/rights questions. Nor has the change been simply quantitative. Along with vastly expanding the scope of long-recognized freedoms, the Court "broke new ground by giving constitutional recognition to rights not previously supported by decisional laws."[31]

In 1900, the first John Marshall Harlan accused his brethren of regarding "the protection of private property . . . of more consequence than the protection of the life and liberty of the citizen."[32] And at the height of the impasse between the justices and the New Deal, the historian Charles A. Beard answered the rhetoric glorifying the Court as the shield of individual freedom with the blunt rejoinder that the Court "has not been very hot in its defense of personal liberties and rights."[33] Most commentators since have reaffirmed this negative appraisal of the Old Court's record. "[I]n the area of civil liberties," John P. Roche has written, "there has been a qualitative jump between the views of our legal ancestors and those of our contemporaries. . . . [W]hat we today think of as civil liberties largely date from definitions adopted in the 1930s."[34] Even so knowledgeable a constitutional historian as Robert G. McCloskey pictured the post-1937 Court as writing upon a nearly blank slate.

> America has regarded itself as the land of the free since at least 1776, and the Constitution has been revered as the palladium of freedom since its inception. But although the literature of American democracy is rich in libertarian generalities, this rhetoric of individual rights had rarely been translated into concrete legislative prescriptions and judicial doctrines in the nineteenth or even in the early twentieth century. . . . Thus the modern Supreme Court inherited only a few scattered and incomplete theoretical and doctrinal tools to handle the problems of civil and political rights with which the justices were now confronted.[35]

Reality was more complex. When the Court made its famous switch-in-time that saved nine, there was a substantial body of case law on the books interpreting the constitutional guarantees of individual rights. Nor was that record simply one of judicial negativism. Viewed in long-term perspective, many of the expansive readings of individual rights adopted by the post-1937 Court represented incremental extensions from the existing precedents. In a number of key areas—most notably regarding the meaning of the criminal procedure guarantees of the Bill of Rights—earlier decisions continue to this day to provide the governing principles. There is no question that from a contemporary standpoint the record of the Old Court has major gaps, even blindspots. Those limitations, however, in large part reflected the dominant values and attitudes of the time—just as the new ground broken by the Modern Court has owed much to changes underway in the larger society.

As Robert H. Jackson admitted when pillorying the Old Court for its hostility to governmental regulation in the economic sphere, "the picture would not be complete if we did not acknowledge that the Supreme Court has rendered civil liberties decisions of substantial value." That "record has been a variable one," he acknowledged, since no institution can "completely escape the climate in which it lives." On balance, however, "the Court has generally been sympathetic . . . toward the older liberalism of the eighteenth century . . . embodied in the Bill of Rights."[36]

The first prerequisite for keeping in perspective the record of the Old Court is to remember how few guarantees of individual rights were included in the Constitution as drafted. The delegates at Philadelphia saw as their primary task to delineate the operating machinery of the new national government. They were not insensitive to the possible dangers to personal liberties from the abuse of governmental powers. But their major reliance for safeguarding against that threat was the diffusion of powers built in the structure of the system between the states and the national government and among the three branches of the national government. Accordingly, only a handful of explicit protections were written into the text. Article I, Section 9 stated that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" and that "[n]o Bill of Attainder or ex post facto Law shall be passed." Article III, Section 2 stipulated that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," while Section 3 defined treason narrowly and required for conviction confession in open court or "the Testimony of two Witnesses to the same overt Act."

A second point to be kept in mind—and probably the single most important fact shaping the Old Court's approach to individual rights—was that the United States was a federal system. At least until the New Deal, the states and their political subdivisions were the agencies of government that most directly touched the daily lives of the average citizen. While the framers of the Constitution took pains to underline that the national authority when exercised within its proper sphere would be supreme, the document included few explicit restrictions upon the states. Article IV, Section 2 declared that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article I, Section 10 prohibited the states from passing "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." But the Article IV privileges-and-immunities clause had—and continues to have—no more than "limited" importance as "a barrier against some discriminations by a state against citizens of other states."[37] And though the contract clause was of major significance in the pre–Civil War period for the protection of vested property rights, its importance had largely faded by the late nineteenth century.[38]

In *Calder v. Bull*—one of the earliest Supreme Court decisions—the Court