

INTRODUCTION

Division, Unification, and Reconstruction

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After Paterson's death, no New Jerseyan was named to the Supreme Court until Joseph P. Bradley was appointed by President Grant. By then, the Court had passed through two distinct periods. Between 1801 and 1837, the Marshall Court firmly established the foundations of judicial power. In *Marbury v. Madison*,¹ it established its authority to resist threats from the national executive and legislative branches. In *McCulloch v. Maryland*,² the Court determined for all time that Congress, not the state legislatures, would determine what was necessary and proper for carrying out the functions of the national sovereignty. In these and other cases, the Court established itself as the final arbiter of the respective zones of influence of national and local governments. Furthermore, in the Marshall era, the Court's outlook invariably favored national rather than local power. By 1837, however, the festering issue of the irreconcilable labor systems north and south of Chesapeake Bay was already beginning to render the National Government largely impotent. While the country was expanding in size, in population, and in industrial power, thus increasing the need for national solutions, the dispute over incompatible labor systems reduced the National Legislature to a state of perpetual deadlock. Indeed, for a good part of the period between 1837 and the Civil War, the members of Congress produced more assaults and batteries on each other than they produced legislation.³

Beginning in 1837, the appointive process brought to the Court Justices whose outlooks were far less national than those of the Marshall Court. Perhaps the Taney Court, no matter what it did, could not have made the constitutional system work in a way that might have avoided the Civil War. Nevertheless, its decision in the *Dred Scott* case⁴ made that war inevitable. In *Dred Scott*, the

¹ 5 U.S. (1 Cranch) 137 (1803).

² 17 U.S. (4 Wheat.) 316 (1819).

³ The most notorious assault and battery was that in 1854 by Congressman Preston S. Brooks on Senator Charles Sumner, which incapacitated Senator Sumner for three years. See M. STOREY, CHARLES SUMNER 145-46 (1900).

⁴ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) [hereinafter cited as *Dred*

Court held that Congress lacked the power to exclude slavery from a Federal territory.⁵ The Continental Congress, even before there was a Constitution, had excluded slavery from the Northwest Territories in the Northwest Territory Ordinance. Furthermore, the First Congress reenacted this ordinance as a Federal statute.⁶ In the Missouri Compromise, Congress had again exercised the power of excluding slavery from some Federal territories.⁷ Thus, in *Dred Scott*, the Court held unconstitutional a power that the National Government had exercised even prior to the ratification of the Constitution. It therefore demonstrated that the power of judicial review, so firmly established by the Marshall Court, could be abused in the hands of irresponsible judges.

War followed, and during that war, the Court did nothing to enhance its standing with the public, at least in those victorious states of the North. Subsequently, the fourteenth amendment overruled the additional holding in *Dred Scott* that Americans of African descent were ineligible for citizenship.⁸ This was the second instance in which a Supreme Court decision was overruled by the amending process.⁹

In a series of cases after the war, the Court, dominated by Justices who regarded themselves as Democrats, generally sided with President Johnson with respect to the issues of reconstruction.¹⁰ Thus, by the end of the Johnson Administration, public esteem of the Court was at its all-time low point. Since the North had won the war principally because of the superiority of its transportation system and its industrial base, it was not too surprising that when Grant came to power he would turn, for a Supreme Court nominee, to a lawyer who had spent his professional career representing the great railroads that traversed the northeast corridor between New York and Philadelphia. Joseph P. Bradley was not Grant's first choice, but he was certainly an obvious one.

Scott]. See generally D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

⁵ See *Dred Scott*, 60 U.S. (19 How.) at 454.

⁶ See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (obsolete).

⁷ See Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548 (obsolete).

⁸ See U.S. CONST. amend. XIV, § 1.

⁹ The first case was *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

¹⁰ See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

