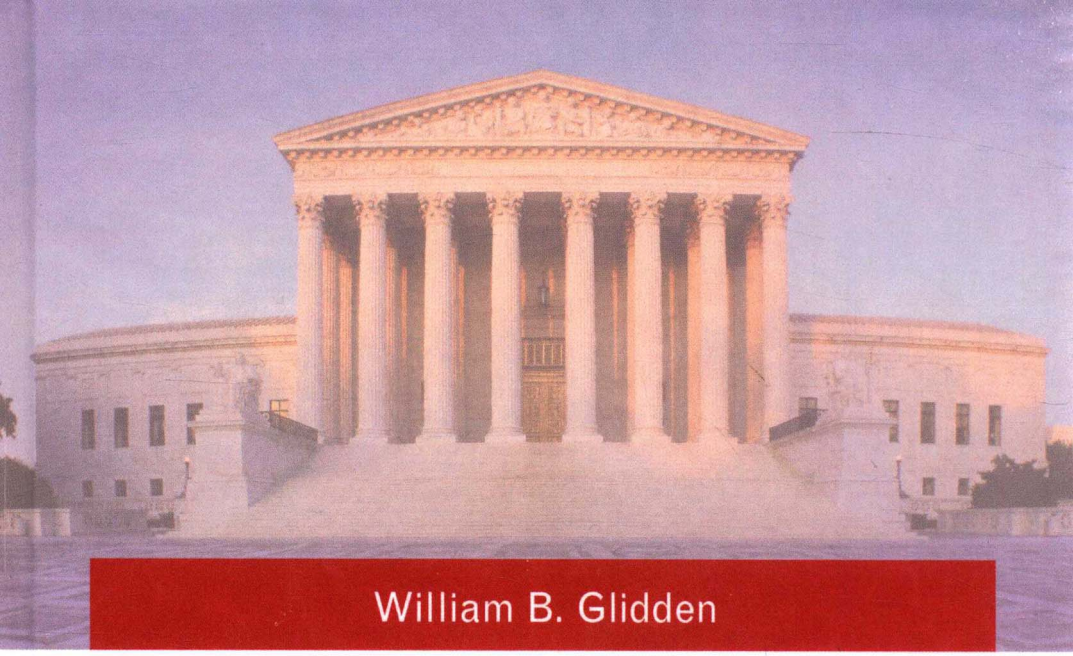

William B. Glidden

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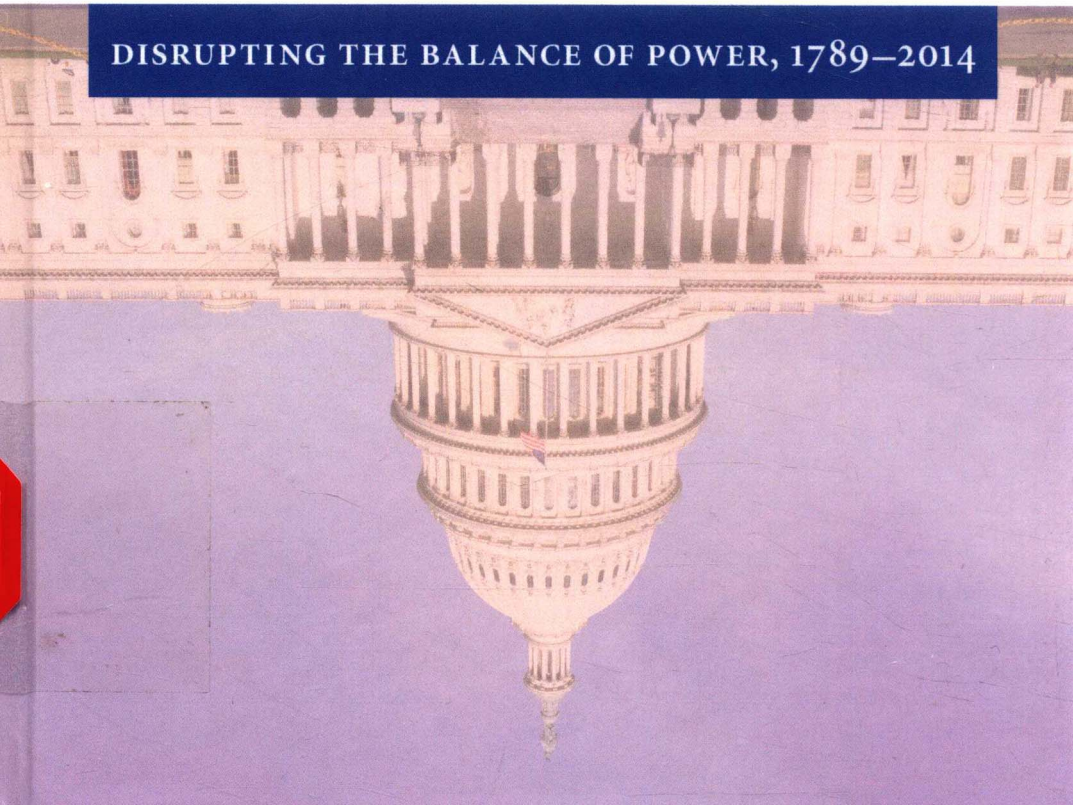

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Introduction

Jeremy Waldron, in his book *Law and Disagreement* (1999), observed that in recent years,

> Issues such as the following have had to be dealt with in the United States, as matters of constitutional right: abortion, affirmative action, campaign finance reform, criminal procedure in capital cases, drug use in religious ceremonies, defamation in relation to free speech, gun control, hate speech, homelessness, immigrants' rights, land use restrictions, panhandling, pornography, reapportionment, school prayer, voter registration, welfare, and zoning. We all know that these are matters fraught with difficulty and moral complexity, matters on which reasonable people disagree—including reasonable citizens, reasonable legislators, and reasonable judges.[1]

In view of the inevitability of disagreement about rights among reasonable people, said Waldron, in a functioning democratic society there is no reason to believe that an unelected body of nine people in robes should have the power to strike down legislative judgments with which they disagree, sometimes on a vote of five to four. The practice of rights-based judicial review of legislation often is defended by "pointing to the possibility that democratic majoritarian procedures may yield unjust or tyrannical outcomes. And so they *may*. But so may any procedure that purports to solve the problem of social choice in the face of disagreements about what counts as injustice or what counts as tyranny," including the majority votes of Supreme Court judges.[2]

In his review of Waldron's book, Richard Posner, a federal judge on the Seventh Circuit Court of Appeals and an author of a number of books on constitutional law theory and practice, expressed some sympathy with Waldron's challenge to judicial review. Legislatures are

representative to a degree no single individual (the president) or small body of elected or unelected officials (a court) can be. Legislation can be a solution to the problem posed by the fact that in a complex society, people disagree with each other on many things. "If the legislative process is not a satisfactory method to resolve fundamental disagreements, neither (prima facie at least) is the judicial, but if the legislative process is a satisfactory method of resolving such disagreements, then why do we need judicial review? This question is at the heart of Waldron's book." On the other hand, Posner thought Waldron was "too starry-eyed" about the legislative process. And Waldron exaggerated the power of political philosophy to settle disputes over political institutions. "So far as the American scene of judicial review is concerned," concluded Posner, "the question as to whether judicial review has been on balance a good thing for America may be the only question worth asking once the detritus of philosophers' arguments is swept off the table. Waldron has done a good job of sweeping."[3]

The Supreme Court versus Congress: Disrupting the Balance of Power, 1789–2014, addresses the empirical question that Judge Posner posed in his review of Waldron's theoretical defense of legislative supremacy: Has judicial review in constitutional cases—judicial supremacy, really, since our society has long accepted that the U.S. Supreme Court has the last word on the meaning of the U.S. Constitution—been on balance a good thing for America? From the founding of the republic in 1789 to now, the Supreme Court has struck down all or a portion of an enactment of Congress about 170 times.[4]

The historical review to be presented in this book is both comprehensive and focused. It is comprehensive in covering all of the Court's decisions to strike down a law of Congress. This breadth and depth gives us a good understanding of what has been gained and lost as a result of the Court's judicial reviews of Congress. On the other hand, this book is focused on only the overrides of Congress. It does not deal with the Court's upholding of federal law or upholding or striking down state and local laws in the many thousands of cases where this has occurred. Such a focus allows us to perceive the most significant themes without getting lost in a myriad of details.

This is no mere academic exercise. We will see that the Constitution empowers Congress to control the jurisdiction of all the federal courts to hear cases. By this means Congress could insulate from judicial override its important policy decisions and rights resolutions. Though it has been a long time since this authority has been exercised, the power remains available. The historical record to be laid out in this book will suggest some options that could be pursued to improve our republican constitutional discourse in the future.

NOTES

1. Waldron, *Law and Disagreement*, 227–228.
2. Ibid., 247.
3. Posner, "Review of Jeremy Waldron, *Law and Disagreement*," 582–584, 590, 592.
4. I have compiled my list of cases from Congressional Research Service, *Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*. The summing-up final chapter adds a discussion of a few prominent cases from 2011 through 2014 that reflect continuing themes and complete the analysis of Supreme Court overrides of Congress.

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From the Founding to the Civil War

During the American Revolution after adopting the Declaration of Independence and encouraging the states to establish new governments, the Continental Congress drafted the nation's first constitution. Titled the "Articles of Confederation and Perpetual Union between the States," this form of government was so weak at its center that it offered little more than a mechanism to achieve some enhanced cooperation among 13 separate republics. Article II, for example, stipulated that each state "retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Article III said that the states were entering into a "league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare."

In the 1780s it became increasingly difficult for the Confederation Congress (there was no executive or judicial branch) to generate workable arrangements among the states on issues of regional or national significance. States imposed discriminatory burdens on interstate commerce, pursued land acquisitions in disputed western territories, and within their own borders violated the rights of minorities, such as merchants and creditors. A number of the state governments enacted paper money laws or debtor relief acts or refused to carry out treaty obligations relating to Tory property confiscated during the war. No external force existed to counteract these state oppressions.[1]

In 1787 a convention of delegates, which had assembled in Philadelphia to develop some reform suggestions for the states to consider, soon moved beyond their mandate and proceeded to draft a new Constitution with a real government at its center. This new government would have the power to act directly upon individuals (in contrast to the Confederation Congress, which could only issue

directives to the states after achieving agreement from its membership of equal state delegations and was without authority to enforce its directives once issued). Articles I, II, and III of the Constitution established legislative, executive, and judicial branches of authority and set forth their powers and limitations. Article I vested the nation's legislative power in Congress, which could, for example, lay and collect taxes, pay debts, provide for the common defense and general welfare, borrow money, regulate commerce with foreign countries and among the states, coin money, establish post offices and roads, promote the progress of science and the arts, declare war, raise and support military forces, exercise exclusive legislation over the nation's capital, and make all laws "necessary and proper" to carry into effect these powers and all other powers vested in the government of the United States or any department thereof.

Article II vested the executive power in the president, who would be the commander in chief of the armed forces and would have the power, with the advice and consent of the Senate, to make treaties and appoint ambassadors, Supreme Court judges, and certain other public officials; the president was also charged generally with taking care that laws are faithfully executed. Article III vested the judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Supreme Court would have original jurisdiction in cases affecting ambassadors and other public ministers as well as those in which a state was a party and would have "appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."

Article VI established three important points. First, the Constitution and laws and treaties of the United States shall be the "supreme Law of the Land." Second, the members of Congress and of the state legislatures as well as all executive and judicial officers of the United States and of the states shall be bound by oath or affirmation to support the Constitution. And third, the judges in every state shall be bound by the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This was a clear call for judicial review of state laws to ensure their compliance with the Constitution and laws of the United States.[2]

During the campaign for ratification, opponents of the Constitution, who became known as Anti-Federalists, worried about the powers being conferred on the new federal government. The "consolidated" government could tax and spend, regulate foreign commerce and commerce among the states, wage war, and ultimately do anything that it decided might be "necessary and proper" to "promote the general welfare" of the country.

The Federalist sponsors and supporters of the Constitution defended it, saying that the federal government would exercise only those powers expressly or by implication delegated to it. And in the performance of its assigned tasks, the government was structured in such a way as to ensure a deliberative and just operation. An extended republic with a multitude of interests, sects, and parties, a bicameral legislature, an independent executive with veto power, staggered and filtered elections, and an independent judiciary appointed by the president with the advice and consent of the Senate, all written down, constituted a set of screening mechanisms designed to preserve popular sovereignty while protecting private rights. Meditation, moderation, deliberation, and shared responsibilities were the intended hallmark features of the form of government constituted in 1787. For the founders of the republic, Daniel Elazar has summarized, "locating all sovereignty in the people as a whole, while dividing the exercise of sovereign powers among several governments[,] . . . was a means of checking despotic tendencies, majoritarian or otherwise, in both the larger and smaller governments, while preserving the principle of popular government."[3]

SHARED RESPONSIBILITY FOR CONSTITUTIONAL INTERPRETATION

The subject of judicial review surfaced late in the ratification campaign when Anti-Federalist Richard Yates of New York complained that the federal judiciary would be "an engine for consolidating national powers at the expense of the states."[4] Alexander Hamilton responded in Federalist Paper No. 78, calling the judiciary the "least dangerous" branch. It possessed neither the purse nor the sword and would depend upon the executive branch to execute its decisions. Moreover, the federal judiciary would be a potential ally of the states and the people if Congress should overstep its bounds. In limited constitutions it is the duty of the courts to declare acts contrary to the "manifest tenor" of the constitution void. This does not mean that the judiciary is superior to the legislature. "It only supposes that the power of the people is superior to both, and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."[5]

Hamilton continued his discussion of judicial review in Federalist Papers Nos. 80 and 81. Critics complained that the "authority of the supreme court," a separate and independent body, "will be superior to that of the legislature. The power of construing the laws, according to the *spirit* of the constitution, will enable that court to mould them into

whatever shape it may think proper, especially as its decisions will not be in any manner subject to the revision or correction of the legislative body."[6] Hamilton replied that no word in the Constitution empowers the national courts to construe laws according to the "spirit of the constitution."[7] Nor is there any merit to the complaint that the Supreme Court is an independent body of magistrates rather than being a part of the legislature, as is the case in the Parliament of Great Britain and in some of the states. It is unlikely that legislators who have passed a law infringing the Constitution would be disposed "to repair the breach, in the character of judges."[8]

In any event, Hamilton assured the critics, Congress will be able to uphold its authority. If the courts abuse their powers, three sorts of remedies are available. First, errant judges can be impeached. Second, although a legislature cannot reverse a judicial determination made in a particular case, it can "prescribe a new rule for future cases." And third, if "some partial inconveniences" nevertheless do result from the national judiciary's exercise of its powers, "it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniences" (Hamilton's emphasis).[9]

Chief Justice John Marshall echoed Hamilton's Federalist Paper No. 78 argument when he said in *Marbury v. Madison* (1803) that the Court, if asked to enforce a law of Congress that upon inspection it finds conflicts with the Constitution, must set aside the federal statute and instead obey the Constitution, which by its terms is the "supreme law" of the land. Mr. Marbury and several others had applied to the Supreme Court for a writ of mandamus to compel President Thomas Jefferson's secretary of state to deliver to them their justice of the peace commissions. Marshall ruled that the 1789 Judiciary Act's grant of power to the Court to issue such writs conflicted with Article III of the Constitution. He therefore denied the application.[10]

Only once more in the antebellum period did the Supreme Court declare an act of Congress void. *Dred Scott v. Sandford* (1857) held that a black man could not be a "citizen" within the meaning and protection of the Constitution, eligible to bring a diversity lawsuit under Article III. In dictum the Court went on to opine that Congress could not ban slavery in any of the territories, as it had done in the Missouri Compromise of 1820. This legislation deprived slave owners of their right to travel with their slave "property" into all the nation's common territories, in violation of the Fifth Amendment due process clause.[11]

While the Court interpreted the Constitution in its activity of deciding cases, so too did the president and his cabinet, Congress, the states, political parties, and members of the general public. Politics included

disputes about the meaning of the Constitution, and the Court's voice was merely one among many. James Madison reflected mainstream opinion when he wrote that each of the branches of the federal government "must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation."[12]

President Jefferson pardoned all persons who were in jail for violating the 1798 Sedition Act and explained to a correspondent:

> The Judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it, because that power has been confided to him by the Constitution. The instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the Judges the right to decide what Laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislative and Executive also in their spheres, would make the Judiciary a despotic branch.[13]

President Andrew Jackson vetoed a bill to create a national bank on constitutional grounds, even though the Supreme Court and Congress had previously concluded that Congress possessed the power to charter a bank. His veto message said: "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[14]

On March 4, 1861, in his first inaugural address, President Abraham Lincoln said that although the Court's decision in *Dred Scott* controlled the parties to the litigation, it should not be considered binding on the government generally or on the country. "[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[15] The next year Congress banned slavery in the territories and the District of Columbia, notwithstanding the dictum in *Dred Scott*. And in 1866 Congress declared in the Civil Rights Act that all persons born in the United States are citizens of the United States, without regard to their race or color, thereby reversing the holding of *Dred Scott*.[16]

Mark Tushnet has written that for many decades the nature of judicial review in the United States was "uncertain." Although *Marbury* confirmed that the Supreme Court had the power to declare unconstitutional a statute enacted by Congress, the scope of the *Marbury* power, and its relation to the Constitution-interpreting roles of the other branches, remained contested. "At some point" in the 19th century the idea that all branches of government (not just the judiciary) have the responsibility to interpret the Constitution did weaken. "Judicial review changed from the means by which the courts expressed their view of the Constitution's meaning, in a system where other institutions expressed their own independent views, to a mechanism for lodging responsibility for constitutional interpretation in a single institution, the judiciary."[17]

MARBURY V. MADISON (1803)

As mentioned, *Marbury* was the first case to strike down a law of Congress as being in conflict with the Constitution. It appeared from the affidavits filed in the case that on March 3, 1801, his last day in office, President John Adams had appointed William Marbury and several other men to be justices of the peace for the District of Columbia, but in the rush of business the commissions evidencing the appointments were not delivered. The next day Thomas Jefferson assumed the office of president and instructed his secretary of state to not deliver the justice of the peace commissions.[18] Marbury and the others eventually sued in the Supreme Court for a writ of mandamus to compel the secretary of state to give them their commissions. Chief Justice Marshall in his opinion for the Court said that the essence of liberty consists in the right of every individual to claim the protection of the laws whenever the individual receives an injury. The government of the United States has been termed a government of laws, not a government of men. It will cease to deserve this appellation if the laws furnish no remedy for the violation of a vested right, in this case the right of Mr. Marbury and his colleagues to receive their commissions.

This being a plain case for a mandamus to compel the secretary of state to deliver the commissions, said Marshall, it only remained to inquire whether the Supreme Court could issue the writ. The 1789 Judiciary Act authorized the Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter

of the description, said Marshall, so if this Court cannot issue a writ of mandamus to such an officer, it must be because the law is unconstitutional.

Article III says that the "Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction." Counsel for Marbury and the others argued that because Article III's assignment of original jurisdiction to the Supreme Court has no negative or restrictive words, Congress could assign original jurisdiction to the Court in cases other than those specified in the article. Marshall rejected this idea, reasoning that if Congress could add to the Court's original jurisdiction, the distribution of jurisdiction made in the Constitution would be mere form without substance.

For the Supreme Court to be able to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction. It is the essential criterion of appellate jurisdiction that "it revises and corrects the proceedings in a cause already instituted, and does not create that cause." Although a mandamus may be directed to courts, to issue such a writ to an officer for the delivery of a paper is the same as to sustain an original action for that paper and therefore seems to belong to original and not appellate jurisdiction. The statutory authority given to the Supreme Court to issue writs of mandamus to public officers seems not to be warranted by the Constitution.

The question then becomes whether an act repugnant to the Constitution can become the law of the land. The Constitution is either a superior, paramount law, unchangeable by ordinary means, said Marshall, or it is on a level with ordinary legislative acts and can be altered when the legislature shall please to alter it. Certainly those who framed our written Constitution contemplated it as forming the fundamental and paramount law of the nation, and so the theory of every government must be that an act of the legislature repugnant to the Constitution is void. If the courts are to regard the Constitution and if the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which both apply. There are many other parts of the Constitution that illustrate this subject, continued Marshall. It is declared that "no tax or duty shall be laid on articles exported from any state." If a duty on the export of cotton or tobacco is imposed, ought the judges close their eyes on the Constitution and see only the law? The Constitution says that no person "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." If the legislature should change the rule and declare "*one*

witness, or confession *out* of court," sufficient for conviction, must the constitutional principle yield to the legislative act?

These and other examples that might be offered make it apparent that the framers of the Constitution intended it as a rule for the "government of *courts*, as well as of the legislature," Marshall insisted. Why otherwise does the Constitution direct judges to take an oath to support it? It is also worthy of observation that in declaring what shall be "the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank." This phraseology confirms the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void "and that *courts*, as well as other departments, are bound by that instrument" (Marshall's emphases). Case dismissed.[19]

Although *Marbury* is famous for Chief Justice Marshall's argument for judicial review of acts of Congress, the law struck down was constitutional under any fair reading of its terms. The problem was not the law but the way it was employed. Counsel for Marbury and his colleagues was Charles Lee, who had been the attorney general of the United States in the administration of President Adams. Lee made two separate, inconsistent arguments on behalf of his clients.[20] First, he claimed that Congress could prescribe the forms of process by which the Supreme Court exercises its appellate jurisdiction, and it had done so in Section 13 of the 1789 Judiciary Act when it said, after prescribing some rules for the Court's original jurisdiction, "The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[21]

Lee was obviously correct when he said that Congress had included mandamus as a permissible process for the Supreme Court in its exercises of appellate jurisdiction, but he was in the wrong court to be making this argument at that time. He should have taken his clients to the Circuit Court for the District of Columbia, which would have had original jurisdiction of the case. Then if Lee could not obtain mandamus from that court, he could have appealed to the Supreme Court for relief.

Second, Lee also argued that Congress was not restrained from conferring original jurisdiction "in other cases than those mentioned in the Constitution." This argument was necessary for Lee to show he

was in the right court, but it was based on a false premise. In fact, Congress had not conferred original jurisdiction on the Supreme Court in cases other than those specified in Article III. If the Supreme Court assumed original jurisdiction in *Marbury*, it would not be by virtue of a law of Congress. Rather than make this obvious point, Marshall responded as if Lee's premise were correct; that is, he accepted the premise that Congress had expanded the Court's original jurisdiction and then reasoned that it could not do so without rendering the Constitution's distribution of the Court's jurisdiction a mere form without substance.

Chief Justice Marshall could have referred Mr. Marbury and his colleagues to the Circuit Court for the District of Columbia to pursue their remedy. Of course, if that court had issued a mandamus to Jefferson's secretary of state ordering him to deliver the justice of the peace commissions or if on appeal the Supreme Court had issued such a writ, President Jefferson and Secretary Madison probably would have ignored the order, to the embarrassment of the judiciary. Marshall and Jefferson were personal and political enemies. We have seen that Jefferson and Madison had both affirmed that each branch of the federal government has the duty to support the Constitution according to its own best interpretation. Jefferson believed that the commissions had expired at the end of Adams's term, not having been delivered in time. And Jefferson had not even bothered to send anyone to the Court to argue the administration's case in *Marbury*.[22] Marshall avoided this direct political confrontation with the executive branch while at the same time establishing the principle that the federal judiciary, as well as the other branches, can interpret the meaning of the Constitution and apply it in the performance of its duties.[23]

DRED SCOTT V. SANDFORD (1857)

In *Dred Scott* the Court attempted to resolve two main political controversies that had long troubled the nation, one relating to the status of free blacks in the states and the other involving congressional authority over slavery in the territories. Scott's Missouri master had taken him to live in the free state of Illinois for two years and in the free territory of Wisconsin for two more years and then brought him back to Missouri, wherein he was later devised to Mr. Sandford, a resident of New York. After unsuccessfully litigating in the Missouri courts to obtain his freedom on the theory that he had become a free man by virtue of his residence in a free state and in a free territory, Scott then sued in federal court. His right to sue Sandford in federal court rested on his

contention that he was a citizen of Missouri and that the case involved a controversy between citizens of different states within the meaning of the Constitution and the Judiciary Act of 1789. The defendant denied that the court could exercise diversity jurisdiction, arguing that Scott, as a Negro, could not be a citizen. The federal circuit court upheld Scott's demurrer, thereby implying that he was in fact a citizen within the meaning of the Constitution and the 1789 act, and then held on the merits that he remained a slave under Missouri law. In other words, Scott was an American citizen who was also a slave. He appealed to the Supreme Court.[24]

In his lengthy opinion for the Court, Chief Justice Roger Taney relied on history and logic to show that blacks could not be citizens within the meaning and protection of the Constitution, entitled to all the privileges and immunities guaranteed by that instrument. When the Constitution was framed, blacks were considered subordinate, with no rights except what those who held the power and controlled the government chose to confer on them. For more than a century blacks had been regarded as an inferior class, unfit to associate with the white race in social or political relations, and with "no rights which the white man was bound to respect." When the Declaration of Independence proclaimed that all men were created equal, with inalienable rights to life, liberty, and the pursuit of happiness, the enslaved African race could not have been intended to be encompassed within these words and principles. When the preamble declared that the people of the United States were forming the Constitution to secure the blessings of liberty for themselves and their posterity, it could not have been meant to encompass black slaves. The uniform course of legislation for more than a century had discriminated against blacks in various ways, and to include them now within the concept of "citizen of the United States" would stigmatize the term before the world.

Taney held for the Court that a black man could not be a citizen of the United States within the meaning of the Constitution, qualified to sue in federal court under the diversity jurisdiction granted in Article III. He emphasized the threatening implications for the South that would result from a black man being eligible for U.S. citizenship. For example, Article IV, Section 2, of the Constitution says that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. Some of the states might choose to make blacks citizens of the state, but this could not mean they were "citizens" within the meaning and protection of the Constitution. The slave states would never have agreed to a Constitution with free blacks being designated citizens, since that would have compelled them to receive blacks as citizens from other states, with the full rights of