

Judicial Review of Congress Before the Civil War

KEITH E. WHITTINGTON*

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INTRODUCTION

There is a standard story about the exercise of the power of judicial review by the U.S. Supreme Court before the Civil War. In this story, the Court was primarily focused on establishing the Constitution's, the federal government's, and the federal Judiciary's own supremacy over the states. It was a time for contracts, commerce, and the limitations on state power. Judicial review of Congress was exceptional and idiosyncratic. There was *Marbury v. Madison* in 1803, Chief Justice John Marshall's great maneuver to establish the power of judicial review,¹ and then there was *Dred Scott v. Sandford* in 1857, Chief Justice Roger Taney's great folly that attempted to impose a pro-slavery reading on the Constitution and instead became the Court's "self-inflicted wound,"² and there was little else.

The standard story is wrong. The U.S. Supreme Court was more active in

* William Nelson Cromwell Professor of Politics, Princeton University. © 2009, Keith E. Whittington. I thank Emily Zackin for research assistance, and Bruce Ackerman, Akhil Amar, Rachel Barkow, Frank Colucci, Roy Flemming, Barry Friedman, Mark Graber, Dirk Hartog, Don Herzog, Jerry Mashaw, Bill Novak, Rick Pildes, Scot Powe, Richard Primus, Cristina Rodriguez, Mark Tushnet, and Mariah Zeisberg, and the participants at the Princeton Law and Public Affairs Retreat, the Michigan Constitutional Law Workshop, the NYU Public Law Workshop, and the Yale American Politics Seminar for helpful comments.

1. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Marshall's "establishment" of judicial review in *Marbury* is commonplace. See, e.g., WILLIAM H. REHNQIST, *THE SUPREME COURT* 99–100 (1987); JEAN EDWARD SMITH, *JOHN MARSHALL* 2 (1996); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 7 (1988).

2. See *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393 (1856), *superseded by U.S. CONST. amend. XIII, XIV*. The "self-inflicted wound" characterization is that of Chief Justice Charles Evans Hughes. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50 (1928).

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