

Judicial Review of Congress Before the Civil War

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TABLE OF CONTENTS

INTRODUCTION	1257
I. BACKGROUND	1261
II. JUDICIAL REVIEW OF CONGRESS	1270
A. FEDERALIST ERA CASES	1270
B. JEFFERSONIAN ERA CASES	1284
C. JACKSONIAN ERA CASES	1307
III. IMPLICATIONS	1325

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. REHNQUIST, *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 See *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393 (1856), *superseded by* U.S. CONST. amends. 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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The Slaughterhouse Cases Ronald M. Labbé, Jonathan Lurie, 2005 While ruling that Louisiana had legitimately exercised its powers the Court s majority went much further to declare that the amendment and its due process and equal protection clauses applied exclusively to the plight of former slaves and thus were unavailable to any other American BOOK JACKET **Introduction to Political Science** Raymond Garfield Gettell, 1910 This Constitution , 1983 **The Constitution and what it Means Today** , 1974 *Current History and Forum ...* , 1923 **An Index to Legal Periodical Literature** , 1924 Covers English language periodical literature relating to law from the late 1700s through 1937 Volumes 1 2 contain citations to articles published in general interest as well as legal periodicals Writings on American History , 1913

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Table of Contents Judicial Review Of Congress Before The Civil War

1. Understanding the eBook Judicial Review Of Congress Before The Civil War
 - The Rise of Digital Reading Judicial Review Of Congress Before The Civil War
 - Advantages of eBooks Over Traditional Books
2. Identifying Judicial Review Of Congress Before The Civil War
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an Judicial Review Of Congress Before The Civil War
 - User-Friendly Interface
4. Exploring eBook Recommendations from Judicial Review Of Congress Before The Civil War

- Personalized Recommendations
- Judicial Review Of Congress Before The Civil War User Reviews and Ratings
- Judicial Review Of Congress Before The Civil War and Bestseller Lists
- 5. Accessing Judicial Review Of Congress Before The Civil War Free and Paid eBooks
 - Judicial Review Of Congress Before The Civil War Public Domain eBooks
 - Judicial Review Of Congress Before The Civil War eBook Subscription Services
 - Judicial Review Of Congress Before The Civil War Budget-Friendly Options
- 6. Navigating Judicial Review Of Congress Before The Civil War eBook Formats
 - ePub, PDF, MOBI, and More
 - Judicial Review Of Congress Before The Civil War Compatibility with Devices
 - Judicial Review Of Congress Before The Civil War Enhanced eBook Features
- 7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of Judicial Review Of Congress Before The Civil War
 - Highlighting and Note-Taking Judicial Review Of Congress Before The Civil War
 - Interactive Elements Judicial Review Of Congress Before The Civil War
- 8. Staying Engaged with Judicial Review Of Congress Before The Civil War
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Judicial Review Of Congress Before The Civil War
- 9. Balancing eBooks and Physical Books Judicial Review Of Congress Before The Civil War
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Judicial Review Of Congress Before The Civil War
- 10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
- 11. Cultivating a Reading Routine Judicial Review Of Congress Before The Civil War
 - Setting Reading Goals Judicial Review Of Congress Before The Civil War
 - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Judicial Review Of Congress Before The Civil War

- Fact-Checking eBook Content of Judicial Review Of Congress Before The Civil War
 - Distinguishing Credible Sources
13. Promoting Lifelong Learning
- Utilizing eBooks for Skill Development
 - Exploring Educational eBooks
14. Embracing eBook Trends
- Integration of Multimedia Elements
 - Interactive and Gamified eBooks

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