

Judicial Review of Congress Before the Civil War

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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 See *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393 (1856), *superseded by U.S. CONST.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).

Judicial Review Of Congress Before The Civil War

Robert A. Licht



Judicial Review Of Congress Before The Civil War:

The U.S. Supreme Court and the Judicial Review of Congress Linda Camp Keith, 2008 This book examines from a behavioral perspective the U S Supreme Court s exercise of the power of judicial review over Congress across two hundred years of the Court s history testing the major competing theories in political science the attitudinal model and the strategic approach through systematic empirical analysis Exploring the major trends in the Court s use of this power over time the book examines a broad range of questions concerning the countermajoritarian nature of this power and provides an analysis of each of the individual justices behavior along several dimensions of the power such as the use of judicial review to protect minority rights against majority intrusion The book concludes that the Court has shown a high level of deference to Congress with notable historic highs and lows and generally that the exercise of the power has been less countermajoritarian than is usually assumed Its analyses find the strongest level of support for the attitudinal approach to judicial decision making but also concludes that strategic concerns cannot be dismissed especially for the more recent Courts

The Oxford Handbook of the American Congress Eric Schickler, Frances E. Lee, 2013-03-14 No legislature in the world has a greater influence over its nation s public affairs than the US Congress The Congress s centrality in the US system of government has placed research on Congress at the heart of scholarship on American politics Generations of American government scholars working in a wide range of methodological traditions have focused their analysis on understanding Congress both as a lawmaking and a representative institution The purpose of this volume is to take stock of this impressive and diverse literature identifying areas of accomplishment and promising directions for future work The editors have commissioned 37 chapters by leading scholars in the field each chapter critically engages the scholarship focusing on a particular aspect of congressional politics including the institution s responsiveness to the American public its procedures and capacities for policymaking its internal procedures and development relationships between the branches of government and the scholarly methodologies for approaching these topics The Handbook also includes chapters addressing timely questions including partisan polarization congressional war powers and the supermajoritarian procedures of the contemporary Senate Beyond simply bringing readers up to speed on the current state of research the volume offers critical assessments of how each literature has progressed or failed to progress in recent decades The chapters identify the major questions posed by each line of research and assess the degree to which the answers developed in the literature are persuasive The goal is not simply to tell us where we have been as a field but to set an agenda for research on Congress for the next decade The Oxford Handbooks of American Politics are a set of reference books offering authoritative and engaging critical overviews of the state of scholarship on American politics Each volume focuses on a particular aspect of the field The project is under the General Editorship of George C Edwards III and distinguished specialists in their respective fields edit each volume The Handbooks aim not just to report on the discipline but also to shape it as scholars critically assess the scholarship on a topic and propose directions in which it needs

to move The series is an indispensable reference for anyone working in American politics General Editor for The Oxford Handbooks of American Politics George C Edwards III

The Judicial Construction of Hong Kong's Basic Law Lo Pui Yin, 2014-02-13 China has granted Hong Kong a high degree of autonomy through the Basic Law under the principle of one country two systems Hong Kong's legal system under the Basic Law is based on the common law and is administered by independent courts By interpreting the Basic Law Hong Kong's courts have reviewed legislation and executive decisions and have achieved a second founding of the Basic Law as an enforceable constitution This book is the first comprehensive account of how the Hong Kong courts gained this vital power of judicial review Through an analysis of important court cases since 1997 the book also examines how the Hong Kong courts maintain their relationships with the executive and legislature and with China's Central Authorities which have been sceptical of these achievements Hong Kong's unique status as a common law jurisdiction within socialist China poses risks of integration this book concludes that the best choice lies in maintaining and developing a cosmopolitan judicial outlook This book will become the definitive account of the judicial role in Hong Kong after 1997 Writing with great flair Dr Lo provides a richly contextual story of judges making great use of a novel legal arrangement to tread new ground This thorough work of scholarship is a must read for students of Hong Kong law as well as those interested in China and comparative judicial politics more broadly Tom Ginsburg Leo Spitz Professor of International Law University of Chicago Law School Lo Pui Yin has written a comprehensive and sophisticated introduction to the major cases and jurisprudence of the Hong Kong courts Engaging important current controversies he offers a powerful defence of the present system of constitutional review resting on Hong Kong's common law tradition Mark Tushnet William Nelson Cromwell Professor of Law Harvard Law School This is a thoughtful and scholarly account of an important topic the construction of the Basic Law by the HKSAR courts This is a question of vital importance to Hong Kong but it should also be of interest and importance to Mainland legal scholarship Moreover the comparative constitutional lawyers across the world will be intrigued by this rigorous and perceptive account of the bridge between the common law of Hong Kong and the legal system of the PRC Christopher Forsyth Professor of Public Law and Private International Law University of Cambridge Lo Pui Yin has produced a monumental book of great learning profound research and insightful reflections on the efforts of Hong Kong's judiciary in maintaining the rule of law within the framework of the Basic Law developing its jurisdiction and jurisprudence with great skill learning and now a bit of tact Lo's mastery of the case law is unrivalled and his legal and political analysis masterly Yash Ghai Emeritus Professor University of Hong Kong and author of Hong Kong's New Constitutional Order

The Oxford Handbook of American Political Development Richard M. Valelly, Suzanne Mettler, Robert C. Lieberman, 2016 Scholars working in or sympathetic to American political development APD share a commitment to accurately understanding the history of American politics and thus they question stylized facts about America's political evolution Like other approaches to American politics APD prizes analytical rigor data collection the development

and testing of theory and the generation of provocative hypotheses Much APD scholarship indeed overlaps with the American politics subfield and its many well developed literatures on specific institutions or processes for example Congress judicial politics or party competition specific policy domains welfare policy immigration the foundations of in equality in American politics the distribution of wealth and income race ethnicity gender class and sexual and gender orientation public law and governance and representation What distinguishes APD is careful systematic thought about the ways that political processes civic ideals the political construction of social divisions patterns of identity formation the making and implementation of public policies contestation over and via the Constitution and other formal and informal institutions and processes evolve over time and whether and how they alter compromise or sustain the American liberal democratic regime APD scholars identify in short the histories that constitute American politics They ask what familiar or unfamiliar elements of the American past illuminate the present Are contemporary phenomena that appear new or surprising prefigured in ways that an APD approach can bring to the fore If a contemporary phenomenon is unprecedented then how might an accurate understanding of the evolution of American politics unlock its significance Featuring contributions from leading academics in the field The Oxford Handbook of American Political Development provides an authoritative and accessible analysis of the study of American political development

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Is the Supreme Court the Guardian of the Constitution? Robert A. Licht, 1993 This book examines the controversy surrounding the conventional wisdom that the Court is the guardian of the Constitution and the ultimate defender of our liberties

Congress Reconsidered Lawrence C. Dodd, Bruce I. Oppenheimer, Ruth Bloch Rubin, C. Lawrence Evans, 2025-01-28 Since its first edition *Congress Reconsidered* was designed to make available the best contemporary work from leading congressional scholars in a form that is both challenging and accessible to undergraduates With their Thirteenth Edition Lawrence C Dodd Bruce I Oppenheimer and C Lawrence Evans and now Ruth Bloch Rubin from the University of Chicago continue this tradition as their contributors focus on how various aspects of Congress have changed over time With a strong focus to the historical development of political institutions in their role in preserving democratic government this bestselling volume remains on the cutting edge with key insights into the workings of Congress

The Oxford Handbook of the U.S. Constitution Mark V. Tushnet, Mark A. Graber, Sanford Levinson, 2015 The Oxford Handbook of the U S Constitution offers a comprehensive overview and introduction to the U S Constitution from the perspectives of history political science law rights and constitutional themes while focusing on its development structures rights and role in the U S political system and culture This Handbook enables readers within and beyond the U S to develop a

critical comprehension of the literature on the Constitution along with accessible and up to date analysis Whether a return to the pristine constitutional institutions of the founding or a translation of these constitutional norms in the present is possible remains the central challenge of U S constitutionalism today

Reconstructing the National Bank Controversy Eric Lomazoff,2018-11-07 The Bank of the United States sparked several rounds of intense debate over the meaning of the Constitution s Necessary and Proper Clause which authorizes the federal government to make laws that are necessary for exercising its other powers Our standard account of the national bank controversy however is incomplete The controversy was much more dynamic than a two sided debate over a single constitutional provision and was shaped as much by politics as by law With *Reconstructing the National Bank Controversy* Eric Lomazoff offers a far more robust account of the constitutional politics of national banking between 1791 and 1832 During that time three forces changes within the Bank itself growing tension over federal power within the Republican coalition and the endurance of monetary turmoil beyond the War of 1812 drove the development of our first major debate over the scope of federal power at least as much as the formal dimensions of the Constitution or the absence of a shared legal definition for the word necessary These three forces sometimes alone sometimes in combination repeatedly reshaped the terms on which the Bank s constitutionality was contested Lomazoff documents how these three dimensions of the polity changed over time and traces the manner in which they periodically led federal officials to adjust their claims about the Bank s constitutionality This includes the emergence of the Coinage Clause which gives Congress power to coin money regulate the value thereof as a novel justification for the institution He concludes the book by explaining why a more robust account of the national bank controversy can help us understand the constitutional basis for modern American monetary politics

Originalism as Faith Eric J. Segall,2018-09-17 *Originalism as Faith* presents a comprehensive history of the originalism debates It shows how the doctrine is rarely used by the Supreme Court but is employed by academics pundits and judges to maintain the mistaken faith that the Court decides cases under the law instead of the Justices personal values Tracing the development of the doctrine from the founding to present day Eric J Segall shows how originalism is used by judges as a pretext for reaching politically desirable results The book also presents an accurate description and evaluation of the late Justice Scalia s jurisprudence and shows how he failed to practice the originalism method that he preached This illuminating work will be of interest to lawyers law students undergraduates studying the Court law professors and anyone else interested in an honest discussion and evaluation of originalism as a theory of constitutional interpretation a political weapon and an article of faith

The Supreme Court A to Z Kenneth Jost,2012-03-14 *The Supreme Court A to Z* offers accessible information about the Supreme Court including its history traditions organization dynamics and personalities The entries in *The Supreme Court A to Z* are arranged alphabetically and are extensively cross referenced to related information This volume also has a detailed index reference materials on Supreme Court nominations a seat chart of the justices the U S Constitution online sources of

decisions and a bibliography to help simplify research The fifth edition of The Supreme Court A to Z has been thoroughly updated to incorporate coverage of significant new cases and recent changes on the bench and includes more than 350 alphabetized entries Presented in an engaging reader friendly design this edition includes Biographies of recently appointed Associate Justices Elena Kagan and Sonia Sotomayor plus revised biographies for recently retired Associate Justices David Souter and John Paul Stevens Updated entries on key issues and concepts including abortion campaigns and elections civil rights class action due process freedom of the press reapportionment and redistricting school desegregation and war powers A new entry on media and the Court which highlights the Court s online presence New feature boxes on 2011 decisions Updated seat charts of the justices online sources for finding decisions and a selected bibliography An appendix with historic milestones of the Court The Supreme Court A to Z is part of CQ Press s five volume American Government A to Z series The series is useful to anyone who has an interest in national government and politics

The Supreme Court and Judicial Review in American History Kermit L. Hall, 1985

The Oxford Handbook of U.S. Judicial Behavior Lee Epstein, Stefanie A. Lindquist, 2017 The Oxford Handbook of U S Judicial Behavior offers readers a comprehensive introduction and analysis of research regarding decision making by judges serving on federal and state courts in the U S Featuring contributions from leading scholars in the field the Handbook describes and explains how the courts political and social context formal institutional structures and informal norms affect judicial decision making The Handbook also explores the impact of judges personal attributes and preferences as well as prevailing legal doctrine influence and shape case outcomes in state and federal courts The volume also proposes avenues for future research in the various topics addressed throughout the book

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Five Legal Revolutions Since the 17th Century Jean-Louis Halpérin, 2014-07-22 This book presents an analysis of global legal history in Modern times questioning the effect of political revolutions since the 17th century on the legal field Readers will discover a non linear approach to legal history as this work investigates the ways in which law is created These chapters look at factors in legal revolution such as the role of agents the policy of applying and publicising legal norms codification and the orientations of legal writing and there is a focus on the publicization of law The author uses Herbert Hart s schemes to conceive law as a human artefact or convention being the union between primary rules of obligations and secondary rules conferring powers Here we learn about those secondary rules and the legal construction of the Modern state and we question the extent to which codification and law reporting were likely to revolutionize the legal field These chapters examine the hypothesis of a legal revolution that could have concerned many countries in modern times To begin with the book considers the legal aspect of the construction of Modern States in the 17th and 18th centuries It goes on to examine the consequences of the codification movement as a legal revolution before looking at the so called constitutional revolution linked with the extension of judicial review in many countries after World War II Finally the book enquires into the construction of an EU legal order

and international law In each of these chapters the author measures the scope of the change how the secondary rules are concerned the role of the professional lawyers and what are the characters of the new configuration of the legal field This book provokes new debates in legal philosophy about the rule of change and will be of particular interest to researchers in the fields of law theories of law legal history philosophy of law and historians more broadly **Advanced Introduction to Comparative Constitutional Law** Mark Tushnet,2014-03-28 Mark Tushnet a world renowned scholar of constitutional law presents an introduction to comparative constitutional law through an analysis of topics at the cutting edge of contemporary scholarship Debates on the Federal Judiciary ,2013 **The Doctrine of Judicial Review** Edward Samuel Corwin,1914

Guide to Congress CQ Press,2012-08-10 The new edition of this comprehensive two volume reference has been thoroughly revised and expanded by expert CQ Press writers with years of experience covering Congress to offer a complete institutional history of Congress along with updated insight and analysis on the 2008 and 2010 shifts in power of the U S Senate and House of Representatives The 35 chapters of *Guide to Congress* Seventh Edition are divided into eight subject areas that cover all aspects of the U S Congress Origins and Development of Congress from the constitutional beginnings of the legislative branch to the histories of the House and Senate and their power shifts eras of partisanship and unity influential leaders and working relationships with presidents New coverage includes analysis of the tug of war between House Democrats and the George W Bush administration on Iraq war withdrawal timetables updates on criminal investigations of House members including William J Jefferson of Louisiana and Charles Rangel of New York and analysis of the Tea Party Movement and new Republican majority Powers of Congress including powers to tax spend and borrow to conduct foreign policy and investigations to confirm and impeach to regulate commerce to amend the Constitution and to select the president Updated material includes analysis of the George W Bush administration s use of immunity from questioning by congressional committees analysis of the signing of the new START treaty with Russia marking a cornerstone of U S relations with the country coverage of the War on Terror including the killing of bin Laden in a U S raid in Pakistan and perspective on the negotiations to raise the federal debt ceiling in 2011 Congressional Procedures detailing the party and leadership structures rules and the legislative process the committee system assignment and procedures and congressional staff Revised coverage profiles the methods styles and legislative successes and defeats of House Speakers Pelosi and Boehner and Senate majority leader Reid The Guide also analyzes the new hyperpartisanship emerging in Congress and provides updates on congressional travel reforms and aide statistics and trends Pressures on Congress including influence from constituents political parties the president the Supreme Court lobbyists and the media New material explores the use of social media to communicate with constituents examines the role of the new Consumer Financial Protection Bureau and analyzes the Obama administration s relationship with Congress Housing and Support covering the U S Capitol House and Senate office buildings the Library of Congress and organizations such as the Government

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