

JAN KOMÁREK

Judicial Lawmaking and Precedent in Supreme Courts

ABSTRACT. What does it mean for a supreme court to “make law”? When is it possible to say that its decisions are “precedents”? To what extent should a supreme court’s pronouncements be taken into account by others – lower courts and political branches? And how should these other actors reason with such precedents? This article shows how a particular approach to judicial lawmaking and precedent shapes answers to these questions and examines them in relation to the US Supreme Court and the French Cour de cassation. The findings are then used for a critical analysis of the European Court of Justice’s case law. It is suggested that while the US and French systems have found some ways of reconciling judicial lawmaking with the basic premises of their constitutional and political systems (although they are not entirely satisfactory), the EU system is still waiting for an account of the Court’s lawmaking and precedent. The concluding part indicates directions of possible further research relevant for all courts examined.

AUTHOR. D. Phil. candidate, Faculty of Law, University of Oxford. For their comments and suggestions I am grateful to Stephen Weatherill, Michal Bobek, John Bell, Sacha Prechal, Tom Eljsbouts, Giuseppe Martinico, Jacco Bomhoff, the participants at seminars at the Centre for European Legal Studies in the Faculty of Law, University of Cambridge, 11 March 2009, and Sant’Anna School of Advanced Studies, Pisa, 20 April 2009, where earlier versions of this article were presented and particularly the editors the Cambridge Yearbook of European Legal Studies, where an earlier version of this article was published (in Volume 11). The usual disclaimer applies. Comments are welcome at Jan.Komarek@some.oxon.org.

Supreme Courts And Judicial Lawmaking

Alexander Vereshchagin



Supreme Courts And Judicial Lawmaking:

Supreme Courts and Judicial Law-Making Edward McWhinney, 1986 This book gives a broad understanding of the Belgian Constitutional History including a General Introduction the Sources of Constitutional Law its Form of Government The State its Subdivisions Citizenship its Administration of Justice Specific Problems Added features of this publication include a list of abbreviations an extensive glossary maps charts This book is an offprint of the International Encyclopaedia of Laws Constitutional Law *Judicial Lawmaking and Administrative Law*, 2005 The book before carries a broad title In the Dutch literature the terms lawfinding and lawmaking are often used interchangeably From a legal point of view however it makes quite a difference to the position of the court whether lawfinding or lawmaking is meant Why write a book about lawmaking by the courts just in the area of administrative law In administrative law the administration is positioned between the legislature and the judiciary The courts review decisions taken by the administration in implementing the law however where the administration has often been granted a degree of discretion the courts assess the lawfulness of the decision The relation administration judiciary raises so many specific questions that it justifies a book on judicial lawmaking in administrative matters The authors are all members of the research program Public Law of the Ius Commune School **The Law-Making Process** Michael Zander KC, 2025-08-07 This book presents a critical in depth analysis of the law making process Now in its 9th edition this leading textbook presents a complete overview of the law making procedure in the UK Written by Michael Zander KC one of the foremost authorities on the workings of the legal system it combines critical and clear commentary with a well chosen and wide ranging selection of materials so that students have at their fingertips everything they need to know about the law making process Dealing with every stage and all forms of law making it looks at the preparation of legislation its passage through Parliament statutory interpretation the operation of the rules of precedent in judicial decision making the many facets of judicial law making and the machinery of law reform The 9th edition has been updated to include the latest information and commentary about government action case law legislation official reports and a great range of legal and political journals It provides extensive coverage of the law making process post Brexit and analysis of the changing character of the Supreme Court **Judicial Law-Making in Post-Soviet Russia** Alexander Vereshchagin, 2007-06-11 A novel and incisive investigation of the role of judicial precedents and customs in Russian law this book examines the trends in the development of judge made law in Russian civil law since the demise of the Soviet Union Exploring the interrelated propositions that a certain creative element is intrinsic to the judicial function in modern legal systems which are normally shaped by both legislators and judges and that the Russian legal system is not an exception to this rule the author argues that the rejection or acceptance of judge made law can no longer be sufficient grounds for distinguishing between common law and civil law systems for the purposes of comparative analysis Divided into six chapters it covers the principles applied by judges when interpreting legal acts analyzing a number of academic writings on this

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Judicial Authority in EU Internal Market Law Vilija Velyvyte, 2022-11-17 This book examines the role of the European Court of Justice in the regulation of the internal market from a competence perspective However rather than focusing on the Court s role in enforcing the limits of EU competence in the EU s political decision making it explores a related albeit understudied question to what extent does the Court observe the constitutional limits of EU competence and its own institutional powers in the interpretation of EU internal market law laid down in the Treaties The book provides an answer to this question through the analysis of EU free movement case law in light of the constitutional principles that govern the allocation of competences and powers in the EU conferral subsidiarity and proportionality on the vertical level and institutional balance on the horizontal level Why should the Court be bound by these principles What do they mean when applied to judicial practice To what extent are they observed in the free movement case law The book argues that the Court s observance of the four principles has been inconsistent thereby creating substantive and constitutional tensions in the EU s relationship with the Member States and upsetting the institutional balance of powers between the EU legislature and judiciary Shortlisted for the UACES Best Book Prize 2023 Runner up of the 2024 Peter Birks Prize for Outstanding Legal Scholarship

Judging the Constitution Michael W. McCann, Gerald L. Houseman, 1989

Brandeis and the Progressive Constitution Edward A. Purcell, 2000-02-09 During the twentieth century and particularly between the 1930s and 1950s ideas about the nature of constitutional government the legitimacy of judicial lawmaking and the proper role of the federal courts evolved and shifted This book focuses on Supreme Court justice Louis D Brandeis and his opinion in the 1938 landmark case *Erie Railroad Co v Tompkins* which resulted in a significant relocation of power from federal to state courts Distinguished legal historian Edward A Purcell Jr shows how the *Erie* case provides a window on the legal political and ideological battles over the federal courts in the New Deal era Purcell also offers an in depth study of Brandeis s constitutional jurisprudence and evolving legal views Examining the social origins and intended significance of the *Erie* decision Purcell concludes that the case was a product of early twentieth century progressivism The author explores Brandeis s personal values and political purposes and argues that the justice was an exemplar of neither judicial restraint nor neutral principles despite his later reputation In an analysis of the continual reconceptions of both Brandeis and *Erie* by new generations of judges and scholars in the twentieth century Purcell also illuminates how individual perspectives and social

pressures combined to drive the law's evolution **APAIS 1994: Australian public affairs information service** , The Oxford Handbook of U.S. Judicial Behavior Lee Epstein, Stefanie A. Lindquist, 2017-06-08 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. Consultant Editor for The Oxford Handbooks of American Politics George C. Edwards III **Law in a Changing Society** W. Friedmann, 2023-11-15

Whispering the Strategies of Language: An Mental Quest through **Supreme Courts And Judicial Lawmaking**

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