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Louis Fisher. *Defending Congress and the Constitution.* Lawrence: University Press of Kansas, 2011. 384 pp. $39.95 (cloth), ISBN 978-0-7006-1798-2; $24.95 (paper), ISBN 978-0-7006-1799-9.

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A Legal and Historical Case for a Vigorous Congress

Louis Fisher spent most of his long and productive career serving the U.S. Congress in the capacity of senior specialist in Separation of Powers with the Congressional Research Service in the Library of Congress. Now retired from the library, he remains a prolific writer. *Defending Congress and the Constitution* summarizes many of the themes that Fisher has covered in his published scholarship over the last forty years (the footnotes are liberally sprinkled with references to Fisher's prior work). The work lives up to its title. Fisher is intent on defending a central place for Congress in the constitutional arrangement of government. He believes that Congress is the most underappreciated branch of the federal government. The judiciary and the executive branches each have their staunch admirers. It is not difficult to find academics in law or political science supporting expansive powers for either the courts or the executive. But Fisher finds the defenders of a vigorous Congress to be in short supply–and he is attempting to fill this gap.

While this book makes extensive use of history and precedent, it is a work of political science more than a work of history. It is arranged topically, not chronologically. The first three chapters deal with foundational issues of constitutional interpretation. Fisher argues that each branch of government has the responsibility to consider the constitutionality of its actions for itself. He spends an entire chapter on *Marbury v. Madison*, the famous 1803 case establishing the judiciary's power to review the constitutionality of congressional legislation. Fisher does not object to judicial review; what he objects to is judicial supremacy, the notion that the courts are the final arbiters of constitutionality. He argues that this idea was foreign to the founding era and the early Republic. To the extent that dicta in *Marbury* seem to support judicial supremacy, they should be disregarded as political posturing.

Fisher argues that Thomas Jefferson's idea of "coordinate construction" (in which each branch of government is responsible for construing the Constitution) was historically the more widely accepted meaning of the Constitution in the early Republic. This effectively sets up the basic roadmap for the rest of the book, in which Fisher proceeds to examine a range of issues in which Congress has had to confront claims of judicial supremacy and finality or issues of executive power: federalism, individual rights, religious liberty, investigation and oversight of executive actions, budgetary issues, and national security policy. Across all the issues, Fisher advances three basic arguments. First, the judiciary never has been the final arbiter of the Constitution's meaning. Working through the annals of American history, Fisher recounts one case after another where the elected branches made their own determinations of constitutionality without consulting the courts. He documents many more examples where the elected branches pushed back against judicial interpretations and where dialogue between Congress and the courts led to new positions. Second, the power and authority of the executive branch can be dramatically checked by Congress, if it exhibits the will to use its vast and potent powers. Fisher contests the historical and constitutional interpretations put forward by advocates for expansive executive power. Third, not only is Congress positioned by the Constitution to be the most influential branch of the federal government, but it also has the potential to be a much greater force for good in the constitutional system than it is typically given credit for.

Fisher's historical examples are drawn from the entire span of American political history. He is intimately familiar with the workings of Congress, and his insight make this book a helpful reference for anyone working on separation of powers issues involving Congress. Yet while Fisher grounds his arguments in history, this is never primarily a work of history. Professional histori-

ans will find Fisher's contextualization thin, rarely reaching outside the realm of law and politics narrowly defined. Fisher points to the Wheeling Bridge cases of the 1850s as an example of how court decisions and legislative actions operate in dialogue. But readers should not expect to find discussions of the economic transformations that provide background to the case.[1] Similarly, Fisher argues that legislatures have protected individual rights when courts have failed to do so. As an example, he highlights the nineteenth-century enterprise to allow women to practice law, specifically the efforts of Myra Bradwell to practice in Illinois and Belva Lockwood to practice in federal court. These women were rejected by many courts but successful in state legislatures and the U.S. Congress. Did this have something to do with differences between the courts and the legislature in regard to their views on gender? Or was it related to differences as to which branch of government was best suited to advance social change (as the Illinois Supreme Court suggested in its decision in the *Bradwell* case [1977])?[2] Fisher does not attempt to explain. This should not be surprising, and it is not necessarily problematic. Fisher's arguments are at heart political and legal rather than historical.

More problematic are the occasions when Fisher's bird's-eye survey obscures analytical distinctions that really are relevant to his argument. One example occurs when he argues that Congress has been at least an equally important player with the courts in protecting religious liberties. Fisher considers the Air Force yarmulke case of the 1980s. The Air Force prohibited Captain Simcha Goldman, an Orthodox Jew and ordained rabbi, from wearing a yarmulke while on duty. Goldman argued that this regulation violated his free exercise rights under the First Amendment. But the Supreme Court disagreed. It upheld the Air Force regulation in a 1986 decision.[3] Congress quickly passed legislation that allowed members of the military to wear apparel to satisfy the tenets of a religious belief so long as it did not "significantly interfere with the performance of the member's military duties." Fisher comments, "There was never any question that Congress possessed authority to trump the Court," citing Congress's constitutional power to "make rules" for the military (p. 155). True; but if the point is that Congress is better than the Court at protecting rights, the comparison is hardly fair to the Court. The Court had to decide a very specific constitutional question: did the regulation violate the First Amendment? It may or may not have decided the question properly as a matter of constitutional doctrine. But it did not have power to simply rewrite the military rules. Congress, by contrast, exercised its power over military rulemaking to change a regulation it did not like. There is a world of difference between the two. Yet these distinctions are sometimes lost in Fisher's terse analysis.

Despite its limitations, *Defending Congress and the Constitution* is an important work. It summarizes (if sometimes too concisely) a wealth of historical material and a range of legal arguments in favor of a vigorous Congress. It should prompt scholars of the separation of powers to think harder about the importance of Congress vis-à-vis the executive and judicial branches.

Notes

[1]. Compare, for example, Elizabeth B. Monroe, "Spanning the Commerce Clause: The Wheeling Bridge Case, 1850-1856," *American Journal of Legal History* 32 (1988): 265-292.

[2]. See, for example, Nancy T. Gilliam, "A Professional Pioneer: Myra Bradwell's Fight to Practice Law," *Law and History Review* 5 (1987): 105-133; and Robert M. Spector, "Woman against the Law: Myra Bradwell's Struggle for Admission to the Illinois Bar," *Journal of the Illinois State Historical Society* 68 (1975): 228-242.

[3]. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

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