Book Review

"Who Shall Interpret the Constitution?"

CONGRESS AND THE CONSTITUTION. Neal Devins[†] and Keith E. Whittington,[‡] eds. Durham: Duke University Press, 2005. Pp. vi, 320. $23.95.

Reviewed by Lee Epstein[*]

"Who Shall Interpret the Constitution" is a question the eminent constitutional law scholar Walter F. Murphy famously raised twenty years ago.[1] His answer? Well, of course, the courts—but not only the courts.[2] The President, Congress, and even the people can also lay claim to playing a role in constitutional interpretation. Indeed, to Professor Murphy, that there is no "ultimate constitutional interpreter" is simply "a fact of American political life."[3]

To say that scholars have rallied around Professor Murphy borders on the boring. Volumes devoted to the "Constitution outside the courts" by authors including Louis Fisher,[4] Larry Kramer,[5] Mark Tushnet,[6] David P.

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1. Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 401 (1986). This may be Professor Murphy's most famous essay on the topic, but he raised the general question as early as 1961, in his classic reader with C. Herman Pritchett, *Courts, Judges, and Politics*: "In case the legislature passes a statute which it regards as constitutional but which the Supreme Court regards as unconstitutional, *whose view is to prevail*?" COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 433 (Walter F. Murphy & C. Herman Pritchett eds., 1961) (emphasis added). The theme reappears in other earlier studies by Professor Murphy, most notably his 1962 classic, *Congress and the Court*. The illuminating introduction to *Congress and the Constitution* by Neal Devins and Keith Whittington provides a brief review of Professor Murphy's contributions to this line of inquiry. Neal Devins & Keith E. Whittington, *Introduction* to CONGRESS AND THE CONSTITUTION 1, 6 (Neal Devins & Keith E. Whittington eds., 2005).

2. In his chapter in *Congress and the Constitution*, David P. Currie makes a similar observation. The answer to the question of who interprets the Constitution, he writes, is "[w]hy the courts, of course—first and foremost the Supreme Court . . . but other courts" as well as the President and Congress. David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1896*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 18, 19–20.

3. Murphy, *supra* note 1, at 401.

4. I am especially fond of: LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988). *See also* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN

Currie,[7] and J. Mitchell Pickerill,[8] to name only a few, now fill several of my bookshelves. And surely I'll need to make room for even more. What with George W. Bush's deployment of 108 signing statements to register 505 constitutional objections to various provisions in congressional legislation, no doubt a scholar or two will soon be writing about the President's role in construing the Constitution and statutes.[9]

Into this ever-maturing literature enters *Congress and the Constitution*,[10] an edited volume housing thirteen essays by distinguished legal academics and political scientists alike. Do the authors have anything new to add? Given the already excellent volumes on extra-judicial constitutional deliberation, especially in Congress, that question took center stage as I read *Congress and the Constitution*. But at the end I was convinced: Perhaps more than any other recent work, the essayists make the best case yet that Congress has the means, motive, and opportunity to contribute to constitutional law.

I. Means

While Professor Murphy's views are now commonplace, they are certainly not now (nor were they ever) without their share of detractors. Among the more recurrent complaints is that Congress lacks the institutional capacity—the means, really—to engage in constitutional interpretation. It is thus no surprise that as many as half of the chapters in *Congress and the Constitution* touch on this critique, and taken collectively they offer a welcome corrective.

CONGRESS AND THE PRESIDENT (4th ed., Univ. Press of Kan. 1997) (1985); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273.

5. LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

6. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

7. See, for example, the latest installment of his grand series on constitutional deliberation in Congress, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861 (2005). *See also* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829 (2001).

8. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004).

9. The figures of 108 and 505 come from Philip J. Cooper's study of signing statements issued by President George W. Bush between 2001 and 2005. Philip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRES. STUD. Q. 515, 521–22 (2005). *See also* PHILIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 14 (2002) (examining the various presidential tools available for effecting direct action).

10. CONGRESS AND THE CONSTITUTION, *supra* note 1. In addition to the books I name above, there are scores of articles, too numerous to list here. Two fine examples include: Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

In a thought-provoking essay that manages to frame many concerns at the core of *Congress and the Constitution*, Elizabeth Garrett and Adrian Vermeule detail a set of proposals to enhance Congress's ability to perform its constitutional responsibilities; that is, to ensure that members of Congress (MCs) have adequate information about constitutional issues raised in legislation, to afford MCs the opportunity to deliberate over these issues, to encourage the involvement of experts, and to create a balance between the need to deliberate and the need to enact legislation without delay.[11] Notable among their package of reforms is a call for an Office on Constitutional Issues that would supply advice on legal and political considerations with regard to constitutional matters, as well as for "constitutional impact statements" that would accompany every bill reaching the floor.[12]

No doubt that on each of the dimensions Garrett and Vermeule identify Congress could stand some improvement; I can imagine few arguing that its performance is already optimal.[13] On the other hand, because several of their co-essayists offer an abundance of evidence that Congress already possesses the necessary institutional capacity to engage in constitutional deliberations of a high quality, readers may wonder whether at least some of Garrett and Vermeule's proposals would work to induce only marginal improvements.[14]

Leading the charge, I think, would be Louis Fisher.[15] Defending Congress's prowess in the constitutional context is hardly new terrain for Fisher,[16] but he is in fine form here. In page after page, example after example, he details the assistance provided to MCs by various agencies—his own of course (the Congressional Research Service),[17] but also the Government Accountability Office,[18] the Congressional Budget Office,[19] the Senate Legal Counsel,[20] and the House General Counsel.[21] Supplementing Fisher's account is John Yoo's fascinating *Lawyers in Congress*, which, too,

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11. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 242. I paraphrase here; the authors' proposals are summarized in *id.* at 253–54 and elaborated on in *id.* at 254–65.

12. *Id.* at 254–59.

13. Or, as Garrett and Vermeule put it: "The view that Congress is optimally designed for constitutional deliberation is surely counterintuitive." *Id.* at 251.

14. In her chapter, Barbara Sinclair goes a bit further arguing that at least one of their reforms—the creation of an Office of Constitutional Issues—is "enormously problematic." Barbara Sinclair, *Can Congress Be Trusted With the Constitution? The Effects of Incentives and Procedures*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 293, 310.

15. Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 64.

16. *See, e.g.*, Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 707–08 (1985) (responding to Judge Abner Mikva's contention that Congress lacks the "institutional capacity" to engage in meaningful constitutional analysis).

17. Fisher, *supra* note 15, at 68–73.

18. *Id.* at 65–68.

19. *Id.* at 73–74.

20. *Id.* at 75–77.

21. *Id.* at 77–81.

draws on the author's experience (Yoo served as general counsel of the Senate Judiciary Committee from 1995 to 1996) to allay concerns over whether MCs can gather expert opinions on constitutional matters.[22]

And gather they do. Bruce Peabody, in a chapter on congressional attitudes toward constitutional interpretation, reports that MCs, whether they favor strict deference to the courts on constitutional matters or not (and most do not[23]), turn, yes, to their own staff for counsel but also, increasingly, to the Congressional Research Service and to law professors.[24] The results of Peabody's survey also demonstrate the importance of committee hearings in aiding MCs to sort out constitutional matters[25]—a finding that fits comfortably with other contributions in *Congress and the Constitution*, most notably Keith Whittington's. In one of the volume's most innovative and intriguing chapters, the talented Whittington offers empirical evidence showing that committee deliberations over constitutional matters are not just "fairly routine";[26] they are also hardly limited to the usual suspects—the House and Senate Judiciary Committees.[27] At the end of the day, his careful content analysis, too, casts doubt on claims that federal legislators—or at least their committees—do not have the wherewithal to engage in serious constitutional deliberation.

Again, none of this is to suggest that Garrett and Vermeule are wrong to argue that Congress's institutional capacity cannot be improved; that would border on the ludicrous. It is only to say that, as judged by the essays in this volume, Congress may not be as wanting as some skeptics seem to think.

II. Motive(s)

It is of course one thing for members of Congress to have the means to engage in serious (if not optimal) constitutional deliberation and quite another for them to have the motivation to do it. Indeed, questions of motivation loom large in *Congress and the Constitution*—likely because many of the authors believe that motives have implications for the degree and quality of constitutional interpretation within the legislature.

Once again, Garrett and Vermeule provide some guidance along these lines. As they lay it out, three goals are possible: the promotion of (the MC's vision of) good public policy; reelection; a combination of public and

22. John C. Yoo, *Lawyers in Congress*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 131.

23. Bruce G. Peabody, *Congressional Attitude Toward Constitutional Interpretation*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 39, 48 tbl.1.

24. *Id.* at 51 tbl.2.

25. *Id.*

26. Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 87, 105.

27. *Id.* at 106.

personal goals (primarily reelection and policy goals).[28] For better or worse, answers seem to differ (if marginally) from chapter to chapter. The prominent congressional scholar, Barbara Sinclair, for example, clearly sits in the third camp: "I contend that according to both theory and data most members are motivated by multiple goals."[29] This claim is of crucial importance, she argues, because "so long as members pursue good public policy and not solely reelection, they must, for purely instrumental reasons, take into account the constitutionality of the legislation they pass."[30] But if we believe that MCs are motivated solely by reelection concerns, "they can be trusted with the Constitution only if constituents use conformity with the Constitution as a key criterion of electoral choice, certainly *a heroic assumption*."[31]

Maybe. But of far more consequence, it seems to me, is that even if we believe that MCs are "single-minded seekers of reelection,"[32] as some scholars continue to argue, it is still possible to maintain that they will engage in constitutional deliberation of a reasonably high quality. Even accepting Sinclair's "heroic assumption"—the plausibility of which is a matter of some disagreement among the authors[33]—Garrett and Vermeule provide two reasons why an electorally oriented MC may attend to constitutional arguments. One is that even though most MCs desire reelection, some enjoy more "slack" than others with regard to their constituents and so are freer to act on their own vision of good constitutional law.[34] Another is that the "civilizing force of hypocrisy" can give weight to constitutional arguments.[35] By this Garrett and Vermeule mean that even (or, perhaps, especially) reelection seekers must develop credibility within their chambers—an end difficult to achieve if they transparently reverse course on constitutional issues.

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28. Garrett & Vermeule, *supra* note 11, at 245–46.

29. Sinclair, *supra* note 14, at 294.

30. *Id.*

31. *Id.* (emphasis added).

32. *Id.*

33. For example, Garrett and Vermeule, in contrast to Sinclair, suggest that, in fact, constituents may well "punish a representative who appears wholly opportunistic about the Constitution." Garrett & Vermeule, *supra* note 11, at 246. *See also* Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 269, 288–89 (stating that constituents may think it valuable for their congressional representatives to be independent constitutional thinkers, making it possible for some representatives to vote "their constitutional consciences" without harming their prospects for reelection, and in some cases, enhancing them).

34. Garrett & Vermeule, *supra* note 11, at 246–47. Tushnet makes a similar argument: "A member of Congress who satisfies enough constituent interests . . . has some freedom [to advance] the member's vision of the Constitution to the extent that that vision does not conflict with constituents' other interests." Tushnet, *supra* note 33, at 288.

35. Garrett & Vermeule, *supra* note 11, at 247.

To this list, Mark Tushnet, in an extremely lucid essay evaluating Congress's constitutional performance,[36] and Michael Klarman, in a fascinating chapter on the shifting roles of the Court and Congress in the area of civil rights,[37] add yet another: While MCs may be politically motivated, so too are Justices. Not only do the justices' "constitutional interpretations generally reflect the social and political context of their times," as Klarman writes,[38] they also reflect the Justices' ideology and partisanship, as Tushnet implies[39] and so much of the literature in political science demonstrates empirically.[40] To indict MCs for attending to politics when they interpret the Constitution is to level the same charge against judges.

III. Opportunity

While disagreements (again, even if rather trivial) emerge among the authors over the means and motives of members of Congress in the constitutional context, not so surprisingly a resounding consensus exists over whether Congress has the opportunity to engage in constitutional deliberation. Professor Currie sets the stage when he argues, "[n]ot only did the early Congress almost always interpret the Constitution before the courts . . . in many cases congressional debates provide our *only* official discussion of constitutional issues, for many crucial constitutional controversies have never been judicially resolved."[41] To shore up the point that legislatures of the nineteenth century had ample opportunity to "play[] a central part in shaping our understanding of the Constitution,"[42] he provides numerous examples small and large, including an absorbing case study of constitutional issues surrounding the secession of the states.[43]

Professor Currie's meticulous analysis leaves little room for doubt about the early years. And his co-essayists leave even less about more contemporary eras. I already have mentioned Whittington's investigation, revealing the pervasive injection of constitutional questions into committee

36. Tushnet, *supra* note 33.

37. Michael J. Klarman, *Court, Congress, and Civil Rights*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 173.

38. *Id.* at 174.

39. *See* Tushnet, *supra* note 33, at 288 ("Just as courts operate under structures and with incentives particular to them, which commentators believe incline courts to provide reasonable constitutional interpretations, so too may Congress.").

40. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 10 (1998) (arguing that Justices make choices through strategic behavior); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

41. Currie, *supra* note 2, at 22.

42. *Id.* at 33.

43. *Id.* at 27–33.

proceedings. Running along similar lines are Michael J. Gerhardt's and J. Mitchell Pickerill's contributions.[44]

Professor Gerhardt, undoubtedly among the most astute observers of the federal appointments process,[45] provides equally keen insights here to demonstrate how the Senate's procedures and practices have affected the meaning of the Constitution. Space does not permit me to do justice to his rich contribution to *Congress and the Constitution*, but I was especially taken with his analysis of the ways senators influence constitutional interpretation via confirmation proceedings—for example, by attempting to exact promises from judicial nominees, which may or not have the desired effect on the particular candidate but can surely affect future decisions of the judicially ambitious (e.g., lower court judges).[46]

Professor Pickerill, a rising star in political science, sets his sights on a somewhat different substantive target—congressional responses to judicial decisions—but no less than Gerhardt does he show that the federal legislature has the means, motive, and opportunity to engage in constitutional interpretation and, more importantly, that it often takes full advantage of those opportunities. Of the seventy-four Supreme Court decisions (between the 1953 and 1996 terms) striking down federal laws, Congress responded to an extraordinary 62% (n=46).[47] Rarely did legislators repeal the statute (ten out of the seventy-four)[48] but neither did they typically challenge the Court's interpretation; more likely, they amended or revised the law to conform or, at least, to make some "concessions," to the judicial decision.[49]

Also documenting this back and forth between Congress and the courts is an essay by the dynamic duo of William N. Eskridge, Jr. and John Ferejohn.[50] Whether individually or in collaboration, these scholars have made profound contributions to the study of inter-branch dynamics[51] and

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44. Michael J. Gerhardt, *The Federal Appointments Process as Constitutional Interpretation*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 110; J. Mitchell Pickerill, *Congressional Responses to Judicial Review*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 151.

45. *See, e.g.*, MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2000); Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003); Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001).

46. Gerhardt, *supra* note 44, at 116–18.

47. Pickerill, *supra* note 44, at 159 tbl.2. To be more precise, the seventy-four observations in Pickerill's data set are a combination of Supreme Court decisions striking down federal laws and the laws actually struck down. *Id.* at 156.

48. *Id.* at 159 tbl.2.

49. *Id.* at 162.

50. William N. Eskridge, Jr. & John Ferejohn, *Quasi-Constitutional Law: The Rise of Super-Statutes*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 1, at 198.

51. Eskridge's seminal papers include William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) and William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991). Likewise, no one working in the area of Court–Congress relations can afford to miss John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S.

continue in that tradition here. Yes, they too show that Congress can and often does engage in constitutional interpretation, but, more centrally, they make a compelling argument that MCs can create (quasi-) constitutional law through the enactment of "super-statutes"—laws that are "trump[ing]" like constitutional law but may be somewhat less immune to modification by judges or the legislators themselves.[52] While it is not entirely in Congress's control to transform a law into a super-statute—the public and the other branches have important roles to play[53]—it is indeed the legislature that initiates the process by deliberating and eventually passing laws designed to respond to pressing problems of the day.

IV. Concluding Thoughts

If Congress has the means, motive, and opportunity to develop constitutional law—which no reader of *Congress and the Constitution* can credibly deny—how well does it do? Tushnet, Currie, and Neal Devins, among others, take a stab at evaluation, and generally come down on the side of "pretty well indeed."[54] Currie's examination of early congressional record leads him to conclude that legislators "often [did] a better job"[55] than the courts, with the congressional record "sparkl[ing] with brilliant insights about the meaning of constitutional provisions."[56] Likewise, based on his investigation into Congress's handling of the Clinton impeachment and its response to the military operation in Kosovo, Tushnet concludes that "Congress can be, and frequently has been, a responsible interpreter of the Constitution."[57] It is not perfect of course—a point underscored by Neal Devins's interesting analysis of fact-finding in courts and Congress—but neither is the Supreme Court, as Tushnet observes.

CAL. L. REV. 353 (1999) or John Ferejohn & Barry Weingast, *Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992). Together, Eskridge and Ferejohn have produced a number of insightful papers, including William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) and William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J. L. ECON. & ORG. 165 (1992).

52. Eskridge & Ferejohn, *supra* note 50, at 199.

53. *See, e.g., id.* at 203–04 (describing the Sherman Act as a "classic super-statute" and describing the feedback loop created by an "economics-focused dialogue" among judges, the executive branch, private attorneys, academics, and legislators and their staffs).

54. Certainly there are some in the academy who might question evaluations of this (or a similar) sort on the ground that they are ideologically driven. *See, e.g.*, Laurence H. Tribe, *The People's Court*, N.Y. TIMES, Oct. 24, 2004, at 32 (reviewing Larry Kramer's *The People Themselves* and implying that legal scholars allow their ideology to infiltrate their scholarship). I tend to agree with Barry Friedman: While some evaluations of extrajudicial constitutional interpretation may be driven by the political agenda of the evaluator, that does little to dampen the value of the insight. Barry Friedman, *The Cycles of Constitutional Theory*, LAW & CONTEMP. PROBS., Summer 2004, at 149.

55. Currie, *supra* note 2, at 22.

56. *Id.* at 24.

57. Tushnet, *supra* note 33, at 288.

Of course, we should be interested in the authors' evaluations—they are the product of expert and informed analyses—but of even greater importance may be the positive implications of their claims. Many come to mind, not the least of which is this: Assuming they have sold us on the extensive role Congress plays in constitutional interpretation, how can we start integrating the authors' insights into our thinking about and the communication of constitutional law?

Here and elsewhere, Professor Tushnet writes of "judicial overhang,"[58] though the idea seems practically quaint in light of the scholarship in this volume. Except, of course, when one starts to examine traditional law review articles focusing on constitutional law, syllabi, treatises, case books, and so on. My own constitutional law book (for undergraduates) contains but sketches of the chief lessons of *Congress and the Constitution*,[59] and others I have consulted are in much the same vein.[60] They house few if any examples of the role played by the early Congress in the development of constitutional law, though Currie's work here and elsewhere provides too many to count. Nor do existing casebooks fully or even skeletally flesh out constitutional deliberation in today's legislature, though Pickerill, Tushnet, and Whittington, among other essayists, provide more than a sufficient number of salient exemplars. In short, the time has come to start practicing what Murphy preached two decades ago—a message that this invaluable volume only reinforces: When it comes to interpreting the Constitution, the courts have no monopoly in practice, and should not in our research and teaching.

58. *E.g.*, TUSHNET, *supra* note 6, at 60; Tushnet, *supra* note 33, at 271–73.

59. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA (3d ed. 1998).

60. Currie makes this point as well. To provide support for his claim that it is courts that "first and foremost" interpret the Constitution, he writes: "Witness the scads of judicial decisions, good and bad, that we all read and almost exclusively assign in courses on constitutional law; witness what is predominantly cited in briefs and oral argument in constitutional litigation; witness the stuff of standard law review articles and treatises on the Constitution." Currie, *supra* note 2, at 19.

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