Introduction

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Congress is the first branch of government established by the Constitution. Its priority within the constitutional text reflects the substantive importance that the Founders expected the legislature to have in the political system and its significance within their political theory. It was Congress, armed with the authority provided by popular election, that was expected to enjoy the greatest public support and to dominate national politics. It was Congress that would shoulder the task of making national policy and setting the national political agenda. It was Congress that carried the Founders' hopes for the success of the constitutional experiment, but it was also Congress and its frenetic ambitions that required the most careful attention at the constitutional convention in Philadelphia and the most detailed limitations in the constitutional text. Congress was at the center of the constitutional enterprise.

At the opening of the twenty-first century, Congress remains important and vibrant as a governmental body. While legislatures elsewhere have been reduced to mere sanctioning bodies for executives who do the real work of governance, Congress remains vital. Even so, Congress has not enjoyed great public esteem and is more likely to be seen as a threat to constitutional values than an embodiment of them. It is now, as one study of public opinion found, often regarded as a "public enemy." It routinely ranks a poor third in surveys of public confidence in the three branches.[1] Scholars and citizens alike perceive Congress as an arena of partisan conflict and electoral pandering, hardly as a bulwark of constitutional principles.

There has been little sustained attention to congressional treatment of the Constitution and constitutional issues. It has simply not been part of the research agenda of congressional scholars, who unsurprisingly have been preoccupied with other concerns that are perceived to be closer to the

heart of legislative politics and more amenable to systematic study. Constitutional scholars have generally turned a blind eye to Congress as well. The study of the Constitution has largely been defined within the academy as the study of constitutional law as produced by the courts. From this perspective, Congress is a target of constitutional law, not a producer of it.

After long neglect, the time is ripe for more sustained study of Congress as a constitutional interpreter and responsible constitutional agent. Recent Supreme Court decisions have focused attention on the constitutional powers and responsibilities of Congress, and the sustained judicial inquiry into the relationship between Congress and the Constitution has encouraged a heightened awareness of Congress in constitutional scholars as well. At the same time, a somewhat independent scholarly turn to the "Constitution outside the courts" has opened up space for considering extrajudicial constitutional interpretation and the relationship between nonjudicial political actors and the Constitution. Now that constitutional scholars have begun to look beyond the courts, we believe a more careful examination of the Congress as an institution and a political entity will be needed in order to fully understand, appreciate, and evaluate congressional engagement with the Constitution.

CONGRESS AND THE SUPREME COURT

Judicial review was a political practice largely unknown before ratification of the U.S. Constitution. Indeed, the practice was so exotic that it did not even acquire a name until the beginning of the twentieth century. In its most paradigmatic form, judicial review involves the articulation and enforcement of constitutional constraints against Congress. This was, of course, the power discussed by Chief Justice John Marshall in *Marbury v. Madison*:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?. . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . [and if] the courts are to regard the constitution; and the constitution is su-

> perior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.[2]

By this logic Marshall sought the constitutional and political authority for the judiciary to set aside the work of a coordinate, and more electorally responsive, branch of government. Both Congress and the Court were agents of the Constitution established by the people, and the justices could not "close their eyes on the constitution, and see only the law."[3] Just over a decade after the Constitution was ratified, Marshall already sought to represent Congress as a troublesome constitutional agent, too much prone to forgetting the limits to its own powers. To rely upon Congress as a constitutional interpreter would give "to the legislature a practical and real omnipotence" and "subvert the very foundations of all written constitutions."[4] The seeds had been planted for regarding the legislature as a threat to, rather than a guardian of, the Constitution, and in turn for regarding the judiciary as the "ultimate interpreter" of the Constitution.[5]

If *Marbury* marks the paradigmatic case of judicial review, it also marks the relatively exceptional case. It is famously, if inaccurately, observed that after declaring a minor section of the Judiciary Act of 1789 unconstitutional in *Marbury*, the Court did not strike down another act of Congress for half a century, in the ill-fated *Dred Scott* case.[6] Though the Court has occasionally turned its constitutional fire on Congress, most notably during the standoff over the New Deal, it has far more often used the power of constitutional review against state and local governments. Over its history, the Court has struck down state and local statutory provisions in eight times as many cases as they have in cases involving federal statutory provisions, and many of the Court's most celebrated, and controversial, decisions have come in reviewing state laws. Although such decisions have often generated populist rhetoric about the antidemocratic nature of judicial review and sparked national political controversies, they do not stem from the constitutional principal-agent reasoning laid out by Marshall in *Marbury* but from the less contested logic of national supremacy.

Thus it was all the more striking when the Rehnquist Court embarked on its sustained assault on congressional power. Although the Rehnquist Court has not matched the Hughes Court that attacked the New Deal in intensity and significance, it has made up for that in endurance.[7] The Court struck down more acts of Congress in the 1990s than in any previous decade, including the 1930s. It has established doctrines that promise to continue to pinch Congress into the future. The justices have accompanied all

this with strongly worded opinions denigrating the authority and capacity of Congress to interpret the Constitution.

The Rehnquist Court's offensive against Congress truly began in 1995. In that year the Court struck down federal statutes in four cases, the most since 1983. Of greater note was that in *United States v. Lopez*, the Court for the first time since the New Deal struck down an act of Congress as exceeding federal authority under the interstate commerce clause. Whereas the New Deal Court had established a pattern of deference to congressional judgments as to the extent of federal power relative to the states, *Lopez* suggested that the Court might now look more skeptically at such legislative judgments. That suggestion was given substance over the next several terms as the Court struck down numerous statutory provisions on a range of federalism grounds.

Consider, for example, the Court's decisions involving Section Five of the Fourteenth Amendment. Section Five gives Congress the "power to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. In *City of Boerne v. Flores* (1997), the Court struck down the Religious Freedom Restoration Act (RFRA) as an inappropriate use of the Section Five power. With RFRA, Congress had sought to overturn the effects of the Court's decision in *Employment Division v. Smith* (1990), which changed the standard that the Court used to determine violations of religious free exercise. In *Boerne*, Justice Anthony Kennedy instructed, "[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].' "[8] Indeed, returning to *Marbury*, Kennedy noted, "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts.' "[9] Three years later, in a case involving both the commerce clause and Section Five, Chief Justice William Rehnquist emphasized, "No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."[10]

Unsurprisingly, this new judicial stringency has had the effect of concentrating the scholarly mind on the problem of congressional compliance with constitutional requirements. The new judicial doctrines have themselves met with substantial hostile fire from the law reviews,[11] but more importantly for present purposes, they have also encouraged constitutional

scholars to look more closely at how Congress operates. For some, the main task is to determine why Congress has run afoul of constitutional limitations and how pervasive the legislative deficiency is. It may be possible to identify reforms by means of which Congress can adapt to the new judicial climate and make the consequences of the deficiency less severe. For others, the main task is to rehabilitate Congress, specifically in the eyes of the judges, and demonstrate how the legislature goes about the work of appropriately fulfilling its constitutional responsibilities. From either perspective, the Court's vigilance has prompted renewed examination of the relationship between Congress and the Constitution.

THE CONSTITUTION AND THE COURTS

The scholarly reaction to the federalism cases has reinforced a developing strand of research into the constitutional understandings and actions of political actors outside the judiciary. That literature takes up Rehnquist's off-handed recognition that "[n]o doubt the political branches have a role in interpreting and applying the Constitution." To the extent that this is true, then the *Marbury* logic as recently elaborated by the Court becomes problematic. If the political branches also interpret the Constitution, then it is not so obvious why the Court is necessarily the "ultimate expositor of the constitutional text." Certainly under those circumstances it is not so easy to identify congressional action with the "alteration" of the Constitution. More basically, the engagement of political actors with the constitutional text is largely terra incognita. Scholars have only begun to explore the nature, extent, and consequence of constitutional discourse beyond the courtroom.

The recent literature has important antecedents, produced by political scientists, which often did focus on Congress as a constitutional interpreter. Donald Morgan's *Congress and the Constitution: A Study of Responsibility* in 1966 was nearly unique in examining a wide range of cases that traced congressional responsibility for constitutional interpretation over the course of American history. Morgan was particularly distressed to find a decline in the acceptance of such congressional responsibility and the rise of "judicial monopolism" by which the "legislative function could receive definition solely in relation to policy" while the Constitution was understood to be "technical, and too abstruse for any but lawyers in the courtroom and judges on the bench to discuss with sense."[12] The consequence,

Morgan feared, would in the short term be an increasing judicial "activism, not only in its one remaining significant constitutional area—individual rights—but in all areas of interpretation," and in the long term that "the Constitution becomes not a way of political life in a democracy, but a rote-learned traffic code, to be evaded wherever expert opinion discovers loopholes."[13] Morgan's analysis included the results of a survey conducted in 1959 of congressmen about their attitudes toward the congressional role in interpreting the Constitution and proposals for institutional reform to improve congressional responsibility. Rather different has been the prolific output of Louis Fisher, a constitutional scholar at the Congressional Research Service. Fisher's work has often focused on the development of constitutional law in particular areas, but he has emphasized the participation of nonjudicial actors in shaping that law. Fisher has called attention to the interbranch "constitutional dialogues" and "constitutional conflicts" that have shaped law and practice over time.[14] In doing so, Fisher has been a particular advocate for the effectiveness, and even necessity, of "constitutional interpretation by members of Congress."[15] Also of note is Walter Murphy's article "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," which asserted the "fact of American political life that all public officials . . . often have to interpret the Constitution."[16] Reviewing the multiple possible answers that have been offered to the question of "WHO shall interpret the Constitution," Murphy argued for a "modified version of departmentalism," which denied that there was an "ultimate constitutional interpreter" and urged instead a shifting set of constitutional interpreters.[17] The article was important in its own right in again raising and defending the old Jeffersonian doctrine that held each branch of government to be independently responsible for constitutional interpretation and that had periodically risen to prominence ever since the early days of the republic.[18] It also reflected the preoccupations of a number of political scientists and lawyers loosely connected to Murphy and Princeton University, who would produce a number of works exploring "constitutional politics."[19]

More recent work on the Constitution outside the courts has given less particular attention to Congress as a constitutional interpreter, but it has effectively opened a vast new territory of research that should include more detailed examinations of the legislature. Early on, and most prominently, Bruce Ackerman's theory of unconventional constitutional amendments emphasized historical moments of constitutional politics that altered the inherited Constitution.[20] Ackerman has constructed an impressive nor-

mative and empirical argument for the claim that "we the people" have periodically empowered elected officials to transform the Constitution. Such moments of extraordinary constitutional deliberation on the part of elected officials eventually give way to a more normal politics of routine judicial interpretation and enforcement of the revised constitutional commitments. Congress plays an important role in that historical narrative, but the legislature is not Ackerman's particular focus. Stephen Griffin has likewise emphasized the Constitution as a "text-based institutional practice" that extends beyond the "legalized Constitution" interpreted and enforced by judges and recognizes the significance of the actions of other government officials in altering the effective constitution of the nation.[21] Keith Whittington has distinguished between the legalistic "interpretation" of constitutional meaning, primarily in the courts, and the political "construction" of constitutional meaning, primarily outside the courts, and has argued for the importance and distinctiveness of such constitutional constructions in shaping constitutional understandings and practices.[22] Larry Kramer has argued for a recovery of what he calls the early American practice of "popular constitutionalism," by which constitutional meaning is largely settled within the political arena, and Robert Post and Reva Siegel have called for "policentric interpretation of the Constitution by myriad political actors."[23] Mark Tushnet's "populist constitutional law" would dispense with judicial review entirely and emphasize the "thin constitution" of principles and values that are well recognized in the political arena.[24] Case studies have emerged examining how legislatures, including Congress, construe and extend constitutional meaning.[25]

The turn to examining the Constitution outside the courts has provided both normative theories suggesting its attractiveness and empirical investigations indicating its reality. Such scholarship has demonstrated the importance of nonjudicial actors in altering, preserving, interpreting, applying, and enforcing the Constitution. Existing studies have touched on the importance of ideas and institutions, constitutional entrepreneurs and average citizens, presidents and legislators, social movements, political parties, and interest groups, as well as courts and lawyers, in the American constitutional enterprise.

Among the tasks for the future is a detailed analysis of specific institutions and actors that engage the Constitution. Congress is a particularly important site for extrajudicial constitutional interpretation, and it is often crucial for both raising new constitutional controversies and settling old ones. The Rehnquist Court's challenge to the contemporary Congress gives

immediate relevance to the question of whether Congress is best understood as a subordinate or a coordinate interpreter of the Constitution, and to the resources and constraints affecting constitutional deliberation in Congress. Making sense of Congress will clearly be central to our understanding of constitutional politics.

CONGRESS AND THE CONSTITUTION

This book assesses Congress's role in interpreting the Constitution and points the way forward to substantial research that still needs to be done in this area. By bringing together some of the leading law professors and political scientists who study Congress and the Constitution outside the Court, the thirteen chapters in this book highlight the ways in which Congress thinks about the Constitution, the relationship between Congress and the Supreme Court, the judiciary's role in checking Congress, and possible reforms to the current system.

The methodologies employed and conclusions reached vary significantly from one chapter to the next. Some chapters are historical accounts of how Congress has considered constitutional issues; others employ statistical models to assess Congress's interest in constitutional questions; still others look toward personal observation, the political science literature, or economic analysis to sort out the incentives that animate Congress. Moreover, there is an extraordinary range of opinion as to whether Congress takes the Constitution seriously and whether the system can be reformed to create greater incentives for lawmakers to pay closer attention to constitutional issues. Whatever the methodology or conclusion, all chapters underscore the pervasive role that Congress plays in shaping the Constitution's meaning. For example, a chapter on pre–Civil War interpretations of the Constitution reveals that nearly every constitutional question was debated in Congress. Likewise, a study of recent House and Senate committee consideration of constitutional questions reveals that nearly every congressional committee has held hearings which prominently featured constitutional issues.

The pervasiveness of constitutional issues in Congress helps explain the design of this book. Rather than organize the book around discrete policy issues (civil rights, federalism, budgetary policy) or subunits within Congress (individual committees, party leaders), the chapters almost always take a broader view of Congress as an institution. Several chapters are

wide-ranging, largely positive accounts of the workings of Congress—lawmakers' attitudes toward Congress's role as a constitutional interpreter, offices within Congress that help lawmakers learn about constitutional issues, Congress's willingness to use its confirmation power to shape constitutional decisions by both the executive and the courts, mechanisms by which lawmakers respond to Court rulings, the frequency with which committees consider constitutional questions, and the responsibilities of lawyers in Congress. Other chapters assess the deliberative quality of Congress, especially the quality of Congress's interpretation of the Constitution (and whether courts are likely to do a better job than Congress). Finally, some chapters examine relations between the Court and Congress, including the nexus between judicial and legislative action and how the courts should take the inner workings of Congress into account.

The book is loosely divided into three units, with many chapters touching on issues raised in more than one. The initial chapters take a broad view of Congress's interest in constitutional interpretation and the resources available to Congress. Chapters in this unit also consider how Congress makes use of hearings, its confirmation power, and committee lawyers to learn about constitutional questions and to shape constitutional values. The second part of the book considers relations between the Court and Congress. The initial chapters in this part are largely positive accounts of how lawmakers respond to Court decisions. Subsequent chapters are more normative, proposing ways for the courts to evaluate Congress's work product. The last part of the book, although grounded in concrete evidence, is more speculative. The quality of Congress's handling of constitutional questions and how the current system can be reformed are the subject of these chapters.

What follows is a thumbnail sketch of the book's chapters:

David Currie's "Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861" underscores how, during the early republic, " 'the whole business of legislation [was] a practical construction of the Constitution.' "[26] Currie argues that judicial deference to congressional interpretations of the Constitution is inseparable from Congress's willingness to seriously consider the constitutionality of its handiwork. During the nation's early years, Congress's performance, while variable, was often first-rate. For example, a case study on Congress's consideration of the constitutionality of state secession in 1861 reveals that Congress sometimes does a better job of considering constitutional issues than the Supreme Court.

Lawmakers' attitudes about their responsibility to interpret the Constitution and the degree of deference that they owe to Supreme Court rulings are the subject of Bruce Peabody's "Congressional Attitudes toward Constitutional Interpretation." The heart of this chapter is a survey of members of the 106th Congress (1999–2001). Among other things, Peabody's survey suggests that today's lawmakers seem less interested in constitutional issues than members of earlier Congresses were and, correspondingly, that today's lawmakers are not especially upset with the Rehnquist Court's decisions striking down federal statutes. In reaching this conclusion, Peabody revisits Donald Morgan's similar study of the 1959–61 Congress (when the Warren Court's rulings on desegregation and other issues prompted an intense response from Congress, especially from Southerners). Specifically, Peabody finds that members of Congress who once thought that courts should defer to Congress now think that Congress and the courts should both interpret the Constitution, with neither branch necessarily deferring to the views of the other.

Lawmakers interested in asserting their institutional prerogatives often turn to congressional staff agencies for assistance. Lou Fisher, in "Constitutional Analysis by Congressional Staff Agencies," examines how the Government Accountability Office (formerly the General Accounting Office), the Congressional Research Service, the Congressional Budget Office, and House and Senate counsel help members of Congress come to grips with the constitutionality of their handiwork. Fisher makes use of numerous examples and mini–case studies to illustrate how these staff agencies can help members independently interpret the Constitution and, in so doing, protect their institutional prerogatives. At the same time, Fisher concludes that congressional staff agencies will be "largely marginalized" if members do not want to defend their institution.

Hearings are another way that lawmakers both sort out the constitutionality of legislation and signal their interest in constitutional questions. Keith Whittington's "Hearing about the Constitution in Congressional Committees" reviews and draws tentative conclusions from committee hearings in the 1990s. Whittington's study, although highlighting the predominant role played by the judiciary committees, reveals that constitutional issues played a prominent role in at least one hearing of every major House and Senate committee. More significantly, a committee is far more likely to hold hearings about a judicial decision that undermines its legislative agenda than a more far-reaching decision that does not. For example, the Republican-controlled Congress is not unhappy with the Rehnquist

Court's federalism revival and, as such, few hearings have been scheduled to assess (let alone assail) recent decisions striking down federal statutes.

The enormous power that committees wield in shaping constitutional values is also considered in Mike Gerhardt's "The Federal Appointments Process as Constitutional Interpretation." By reviewing ways that the Senate (typically acting through its committees) has exercised its confirmation power, Gerhardt highlights how it is that Congress seeks to impose its constitutional views on the courts, the presidency, and government agencies. The Senate Judiciary Committee, for example, has blocked the confirmation of judges who do not hold certain points of view that the committee deems critical. Also, the committee has secured promises from nominees to adhere to positions that the nominee would not otherwise support. Beyond judicial appointments, Gerhardt considers the nomination of executive branch officials, who help set the Court's agenda and whose interpretations of the Constitution are sometimes binding (when the issue is nonreviewable in the courts).

Courts too steer clear of some congressional interpretations of the Constitution (impeachment and congressional investigations, for example). Congress also interprets the Constitution in areas where the Court has yet to speak. These matters are the subject of John Yoo's "Lawyers in Congress." In sorting out how Congress exercises these responsibilities, Yoo calls attention to the contextual nature of congressional lawyering. In particular, congressional lawyers often put the brakes on overzealous congressional investigations and, in so doing, defend constitutional freedoms when courts will not. In sharp contrast, because Congress is not responsible for implementing the law, congressional lawyers are often willing to push the bounds of Supreme Court doctrine when engaging in the "creative role" of drafting legislation.

What then of instances where the Court strikes down federal legislation? Does Congress simply accept these defeats or does it revisit the issue through new legislation, including legislation challenging the Court's ruling? In "Congressional Responses to Judicial Review," Mitch Pickerill calls attention to the frequency with which lawmakers respond to the Court's exercises of judicial review. Pickerell also identifies the varied ways in which Congress responds to judicial invalidations, including the enactment of legislation and the approval of proposals to amend the Constitution. More strikingly, Pickerill's analysis suggests that Congress rarely challenges the correctness of Court rulings, but that nevertheless those rulings are rarely final in regard to the policies at issue in the litigation.

Congress often responds to the Court, but it does so primarily by modifying bills to accomplish legislative purposes while taking into account the Court's reasoning.

Congressional responses to Court decision making are also the subject of Mike Klarman's "Court, Congress, and Civil Rights." In examining the causal connection between *Brown v. Board of Education* and civil rights legislation of the mid-1960s, Klarman argues that the Court's decision played a profound but indirect role in motivating Congress. Specifically, rather than embrace civil rights reform because they thought *Brown* correctly decided, lawmakers acted reflectively—responding to the ugly and embarrassing southern backlash against the decision. Klarman also explains why it is that the Court is sometimes ahead of Congress on civil rights, while at other times Congress has taken the lead.

Relations between the Court and Congress are also examined in Bill Eskridge's and John Ferejohn's "Quasi-Constitutional Law: The Rise of Super-Statutes." The focus of their chapter is the power of Congress to enact legislation that is, like the Constitution, "fundamental and trumping." Pointing to the Sherman Act, the Civil Rights Act of 1964, and other "super-statutes," Eskridge and Ferejohn argue that Congress sometimes enacts legislation that penetrates "public normative and institutional culture." Moreover, because of the difficulties of amending the Constitution (and because fundamental law should connect with the people and popular needs), Eskridge and Ferejohn claim that courts should view these statutes as quasi-constitutional. By suggesting that Congress can shape fundamental law through the normal legislative process, "Super-Statutes" is a call for lawmakers and judges to see the legislative process as a mechanism for shaping the transcendent values that define our nation.

The question of whether Congress seriously studies issues that implicate constitutional norms is taken up in Neal Devins's "Congressional Fact Finding and the Scope of Judicial Review." In sorting out the judiciary's role in checking Congress, Devins compares the strengths and weaknesses of Congress and the courts. His examination suggests that courts should defer to Congress only when Congress has the institutional incentives to take fact finding seriously. Through case studies on federalism, separation of powers, and affirmative action, Devins argues that Congress's interest in getting the facts right is issue-specific. On separation of powers, Congress has the incentives to review its factual premises and correct errors; on federalism and affirmative action, Congress may be more interested in rewarding interest groups than in getting the facts right.

In "Institutional Design of a Thayerian Congress," Beth Garrett and Adrian Vermeule tackle the related issue of whether Congress's capacity to interpret the Constitution can be improved by making incremental changes to the lawmaking process. Arguing that legislators (while keenly interested in reelection) often act in the public interest, Garrett and Vermeule claim that the seriousness with which lawmakers think about constitutional issues may well be tied to the institutional design of the lawmaking process. For example, after showing how constitutional questions are shortchanged in "fire alarm" systems (in which affected interests monitor bills and tell lawmakers about perceived shortcomings), Garrett and Vermeule advance several reforms intended to facilitate lawmakers' consideration of constitutional questions. Their reforms include the raising of "constitutional points of order," the creation of an Office of Constitutional Issues, and mandatory committee findings on the constitutional implications of proposed legislation.

The seriousness with which Congress thinks about constitutional questions is also the subject of Mark Tushnet's "Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies." In part, Tushnet explains how judicial review distorts Congress's consideration of constitutional issues. For example, lawmakers may engage the Court in a constitutional dialogue, enacting legislation that is inconsistent with the Court's standards in order to push a change in doctrine. By contrast, when there is no possibility of judicial review, Congress is a freestanding interpreter. On war powers and impeachment, for example, Congress acts on its own, not in the shadow of judicial precedent. By looking at Congress's performance on these two issues, Tushnet argues that Congress seems to do as well as the courts, "at least when Congress acts free of the judicial overhang."

Barbara Sinclair likewise concludes that Congress is institutionally well equipped to interpret the Constitution. In "Can Congress Be Trusted with the Constitution? The Effects of Incentives and Procedures," Sinclair defends Congress's constitutional performance by looking to lawmakers' incentives and the inner workings of the legislative process. In particular, Sinclair explains why lawmakers seek to enact good public policy and how it is that the legislative process promotes fact finding and deliberation. And while constitutional issues may not be front and center in these legislative deliberations, Congress is still better positioned than the Court to set the national agenda on issues implicating federalism and the separation of powers. Sinclair therefore rejects one of the underlying premises

of the Rehnquist Court's rulings limiting congressional power, namely the Court's skeptical view of lawmakers' incentives and work product.

By calling attention to the critical role that Congress can play and has played in shaping constitutional values, this book underscores the limits of Court-centered understandings of the Constitution. For one thing, lawmakers cannot lose sight of the Constitution. On some issues, the courts have not spoken and are not likely to speak. On other issues, the courts have spoken. But Congress can countermand the Court through legislation or use its confirmation power to shape the Court's direction. For identical reasons, the Court cannot lose sight of Congress. Not only can Congress check the Court, but the Court's willingness to defer to Congress is often tied to the Court's sense of the seriousness with which Congress approaches its constitutional responsibilities.

Doubts about the modern Congress have certainly fueled the Rehnquist Court's willingness to revive federalism and otherwise strike down federal statutes on First Amendment, separation of powers, and other grounds.[27] Moreover, justices who are ideologically predisposed to limit lawmakers' prerogatives are motivated to point the finger at Congress for overstepping its enumerated prerogatives. At the end of the Court's 2000 term, Justice Antonin Scalia (never hinting that the Court is sharply divided) complained that "Congress is increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution."[28] Scalia also warned that the Court might increasingly strike down federal statutes "if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution."[29]

In sorting out the veracity of Scalia's broadside, this book provides ample evidence of both the quality of Congress's constitutional handiwork and Congress's interest in the Constitution. Also, by highlighting how lawmakers' incentives and institutional design contribute to Congress's consideration of constitutional issues, this book calls attention to the risk of making overgeneralizations about Congress. Congress's performance may be tied to whether judicial review is available, whether lawmakers agree with the Court's decision, whether interest groups trigger necessary fire alarms, and several other variables.

More than anything, this book calls attention to the pivotal role that Congress plays in interpreting the Constitution and the need for additional research in this area. Reflecting that the study of Congress and the Con-

stitution is still nascent, the book is more a wake-up call than a definitive statement. And while it raises more questions than it answers, we anticipate that subsequent studies will be more definitive. Increasing interest in both the Constitution outside the Court and the decisions of the Rehnquist Court limiting congressional prerogatives will undoubtedly result in more comprehensive research on the topics addressed here. This is as it should be, for Congress's role in shaping constitutional values may well be as important as the Supreme Court's.

NOTES

1 John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy* (New York: Cambridge University Press, 1995), 32.
2 Marbury v. Madison, 5 U.S. 137, 176–78 (1803).
3 *Id*. at 178.
4 *Id*.
5 Powell v. McCormack, 395 U.S. 486, 521 (1969), quoting Baker v. Carr, 369 U.S. 186, 211 (1962).
6 Mark Graber has demonstrated that the Supreme Court did in fact enforce constitutional constraints against Congress in a series of obscure land grant cases decided between *Marbury* and *Dred Scott*. Mark A. Graber, "Naked Land Transfers and American Constitutional Development," 53 *Vanderbilt Law Review* 73 (2000).
7 In this regard, the Rehnquist Court most closely resembles the early Burger Court, which also struck down a historically large number of federal laws over the course of several years.
8 City of Boerne v. Flores, 521 U.S. 507, 519 (1997).
9 *Id*. at 529.
10 United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).
11 This hostile reaction may reflect the tendency of law professors to agree with the substantive objectives of the laws invalidated by the Court. See Barry Friedman, "The Cycles of Constitutional Theory," 67 *Law and Contemporary Problems* 149 (2004).
12 Donald G. Morgan, *Congress and the Constitution* (Cambridge: Harvard University Press, 1966), 334, 335.
13 *Id*. at 337, 338.
14 E.g., Louis Fisher, *Constitutional Dialogues* (Princeton: Princeton University Press, 1988); Louis Fisher, *Constitutional Conflicts between Congress and the President*, 4th ed. (Lawrence: University Press of Kansas, 1997); Neal

Devins and Louis Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004).

15 Louis Fisher, "Constitutional Interpretation by Members of Congress," 63 *North Carolina Law Review* 707 (1985).

16 Walter F. Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," 48 *Review of Politics* 401 (1986). Twenty-five years earlier, Murphy chronicled the Supreme Court's sensitivity to Congress's disapproval of judicial decisions. Walter F. Murphy, *Congress and the Court* (Chicago: University of Chicago Press, 1962).

17 Murphy, "Who Shall Interpret?," 401, 417.

18 On the political circumstances for this periodic appearance of departmentalism, see Keith E. Whittington, "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning," 33 *Polity* 365 (2001).

19 See Sotirios A. Barber and Robert P. George, *Constitutional Politics* (Princeton: Princeton University Press, 2001).

20 The argument was first presented in Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution," 93 *Yale Law Journal* 1013 (1984). The fullest statement is Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1991, 1998).

21 Stephen M. Griffin, *American Constitutionalism* (Princeton: Princeton University Press, 1996), 56.

22 Keith E. Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999).

23 Larry D. Kramer, *The People Themselves* (New York: Oxford University Press, 2004); Robert C. Post and Reva B. Siegel, "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family Medical Leave Act," 112 *Yale Law Journal* 1943 (2003).

24 Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

25 See, e.g., Susan R. Burgess, *Contest for Constitutional Authority* (Lawrence: University Press of Kansas, 1992); Neal Devins, *Shaping Constitutional Values* (Baltimore: Johns Hopkins University Press, 1996); John J. Dinan, *Keeping the People's Liberties* (Lawrence: University Press of Kansas, 1998); Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"* (Durham: Duke University Press, 2000); Colton C. Campbell and John F. Stack Jr., eds., *Congress and the Politics of Emerging Rights* (Lanham, Md.: Rowman & Littlefield, 2002); Louis Fisher, *Religious Liberty in America* (Lawrence: University Press of Kansas, 2002).

26 David P. Currie, "Prolegomena for a Sampler," at 20 (quoting Representative Theodore Sedgwick of Massachusetts).

27 For a discussion of how increasing populist distrust of Congress has fueled the Rehnquist Court's federalism revival, see Christopher H. Schroeder,

"Causes of the Recent Turn in Constitutional Interpretation," 51 *Duke Law Journal* 307 (2001).

28 Stuart Taylor Jr., "The Tipping Point," 32 *National Journal* 1810, 1811 (2000).

29 *Id*.