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Judging Congress

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JUDGING CONGRESS

MICHAEL J. GERHARDT*

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INTRODUCTION

The timing of the *Boston University Law Review* symposium, “The Most Disparaged Branch: The Role of Congress in the 21st Century,” could not have been better. Occurring, as it did, in the immediate aftermath of the historic 2008 presidential election, the symposium followed an event that overshadowed the newly-elected Democratic Congress, threatening to push Congress back to the margins of constitutional commentary and to prevent it from escaping its status as the most disparaged branch of the federal government. Our panel’s discussion of whether Congress is capable of conscientious, responsible constitutional interpretation provides the possibility of a long overdue rehabilitation of our understanding of congressional constitutional interpretation. If the panel’s answers can show that Congress is actually capable of such constitutional interpretation then we will have gone a long way toward ameliorating, or perhaps undoing, the propensity of scholars and others to disparage Congress as a constitutional actor unworthy of respect or parity with the other branches of the federal government.

This Essay suggests that while the purpose of our panel is laudable, it is ultimately misguided. First, I suggest that we are being asked the wrong question. The proper question is not whether Congress is capable of conscientious, responsible constitutional interpretation but rather how the institutional capacity of Congress to interpret the Constitution compares with that of the other two federal branches. Second, I suggest that a debate that took place more than two decades ago on this question provides a useful starting point for contemporary analysis of the comparative institutional capacity of Congress to interpret the Constitution. Third, I suggest the research necessary to construct a sound, positive account of Congress’s relative capacity to interpret the Constitution. While these first three points are descriptive, I

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conclude with a brief normative standard for evaluating the quality of congressional constitutional interpretation. My positive account of Congress's capacity for constitutional interpretation has normative consequences; it rules out certain ideals and possibilities. With these consequences in mind, I suggest the same standard as the one James Bradley Thayer proposed more than a century ago: reasonableness.¹ We simply should ask what would be reasonable to expect from Congress in the field of constitutional interpretation. My tentative answer, which might sound to some people worse than intended, is that it should *not* be the same outcome as what we would expect from either the President or the federal judiciary. Congress is a different institution and, of course, a legislative one at that. Thus, we cannot expect Congress to function in the same manner as the other federal branches. We need to formulate reasonable expectations for a legislative body as large and as constitutionally and historically constructed as Congress. Thus the most important consideration is not whether, according to some abstract analysis or standard, Congress is a conscientious, responsible interpreter of the Constitution. What should matter is not trying to make Congress into something it is not nor can ever be, but rather improving our understanding of how Congress actually performs its constitutional functions and how to improve that functioning.

I. THE RIGHT QUESTION

The launching pad for our discussion – and for the question of whether Congress is a conscientious interpreter of the Constitution – is James Bradley Thayer's seminal 1893 article, *The Origin and Scope of the American Doctrine of Constitutional Law*.² In that article, Thayer makes two important claims about congressional constitutional interpretation. First, he maintains that, among the three branches of the federal government, Congress is the principal interpreter of the Constitution.³ Second, Thayer claims that Congress has the institutional capacity to engage in conscientious constitutional interpretation.⁴ But, as I believe Thayer recognized, these claims are not necessarily connected or interdependent. It is possible for a public actor to have principal authority to interpret the Constitution but still be prone to mistakes or to doing a less than perfect job of it. It is also possible for a public actor to have some authority, but not the principal authority, to interpret the Constitution but nevertheless have the institutional capacity to do a perfectly good, or quite respectable, job of it.

The fact that I do not find Thayer's two basic claims to be interdependent

¹ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 148 (1893).

² *Id.*

³ *Id.* at 136 (“[I]t is the legislature to whom this power is given, – this power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country . . .”).

⁴ *Id.*

(or for one to follow logically or inexorably from the other) leads me to think that we ought to be answering a different question of principal concern in Thayer's article: the question of Congress's relative capacity to interpret the Constitution. The principal matter of concern to Thayer – and particularly to me – is *not* whether Congress is capable of conscientious constitutional interpretation. That is a normative question, and I am agnostic at least for present purposes on the appropriate standard for measuring the quality of Congress's capacity to interpret the Constitution. The critical question is a descriptive one – namely, how does Congress's capacity to interpret the Constitution compare to that of either the presidency or the federal courts, including the Supreme Court. Thayer's answer was that Congress did no worse a job than that of the Court.⁵ Hence, he suggested, based on this descriptive account and the fact that members of Congress, unlike federal judges, are politically accountable, the normative proposition that the Court should defer to any congressional constitutional interpretations that were reasonable.⁶

In other works, I have suggested that the Supreme Court is not necessarily supreme within the whole domain of constitutional interpretation and that Congress has at least as important a role in interpreting the Constitution.⁷ In the next two Parts of this Essay, I suggest that while there is good reason to believe Thayer correctly claimed that Congress has the institutional capacity to undertake conscientious constitutional interpretation, we remain relatively ignorant about the relative ability, or quality, of congressional constitutional interpretation.

II. THE DEBATE: A QUARTER-CENTURY LATER

While Thayer was among the first scholars to seriously consider Congress's comparative ability to interpret the Constitution, he has not been the last. In fact, the timing of this symposium on Congress as the most disparaged branch coincides with the twenty-fifth anniversary of a debate waged in the pages of the *North Carolina Law Review* over the question of Congress's institutional capacity to interpret the Constitution. On one side of the debate was Judge Abner Mikva, who harshly criticized Congress's institutional capacity for conscientious constitutional interpretation.⁸ Mikva's critique surprised many

⁵ *Id.* at 148 (describing the judicial function as “merely that of fixing the outside border of reasonable legislative action,” thereby complementing Congress's role as the primary constitutional interpreter).

⁶ *Id.* at 144 (pointing to the judicial standard of review in upholding rational congressional actions).

⁷ Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 715 (2008) [hereinafter Gerhardt, *Non-Judicial Precedent*] (arguing that precedents created by non-judicial actors are often stronger than those produced by courts).

⁸ Abner Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 590 (1983).

people because he had been a well-respected member of the House of Representatives before his appointment to the U.S. Court of Appeals for the District of Columbia. Nevertheless, Mikva, citing three examples of constitutional deliberation, argued that constitutional interpretation by members of Congress was suspect, and often poor, because Congress was not structured to allow for conscientious constitutional interpretation, and because most members of Congress were not lawyers, did not have the time or interest to delve deeply into the constitutional questions before them, and were forced, for one reason or another, to rely on their staffs (or other congressional members) for assistance in constitutional interpretation.⁹

Two years later, Lou Fisher, a well-respected separation-of-powers specialist with the Congressional Research Service, published a response to Mikva.¹⁰ Fisher argued that congressional constitutional interpretation was not only better than Mikva had suggested, but in fact was relatively good because members of Congress often seriously engaged with constitutional issues and received excellent institutional support on constitutional matters from their professional staffs (including many lawyers) as well as from the Congressional Research Service, committee staffs, expert witnesses, and the Offices of the Legislative Counsel of both the House and the Senate.¹¹

Interestingly, legal scholars have paid scant attention to the Mikva-Fisher debate. In the twenty-five subsequent years, academic commentaries on congressional constitutional interpretation have rarely referenced the debate, much less discussed it at any length. This is a shame since the subject of congressional constitutional interpretation has hardly gone away in the intervening years. Indeed, congressional constitutional interpretation has only grown in importance, and Mikva's and Fisher's arguments still resonate with both critics and defenders of Congress's institutional capacity to interpret the Constitution. Perhaps what is less appreciated is that their debate reflects the ongoing problems with commentaries on congressional constitutional interpretation, problems that we need to overcome if we are to better understand the relative capacity of Congress to interpret the Constitution. It turns out that the arguments made by both Mikva and Fisher are still illuminating but are not without problems.

For instance, Mikva's comments were based on anecdotal, not empirical, evidence.¹² His three examples can raise, but not settle, questions about

⁹ *Id.* at 609 ("Both institutionally and politically, Congress is designed to pass over the constitutional questions, leaving the hard decisions to the courts.").

¹⁰ Lou Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985).

¹¹ *Id.* at 727-31.

¹² See Mikva, *supra* note 8, at 590 (describing three examples of congressional deliberation on constitutional matters including Congress's consideration of the Fair Labor Standards Amendment of 1974, the Senate's deliberation of a legislative veto provision to the Administrative Procedure Act, and congressional discussion of appellate review in the

Congress's institutional capacity to interpret the Constitution. Moreover, Mikva might not have been a completely dispassionate analyst. As a sitting judge at the time he wrote his commentary, Mikva conceivably had a vested interest in reaching the conclusion he did – namely, that federal judges (like himself) should not defer to interpretations of the Constitution by Congress but instead should reach independent interpretations of the pertinent constitutional issues. Mikva was a distinguished public servant, excellent judge, and brilliant lawyer, but his critique of Congress's capacity to interpret the Constitution is prone to being dismissed as too self-interested.

There are arguably similar problems with Fisher's response.¹³ First, the fact that there are resources available to assist members of Congress with constitutional interpretation does not tell us anything about the relative quality of those resources or the interpretations based on their use. It is possible that these resources are not as good as Fisher suggests. Moreover, we have little or no idea of how often members (as opposed to their staffs) actually avail themselves of these resources, and we particularly lack an understanding of their impact on congressional constitutional interpretation. Second, Fisher's analysis, like that of Mikva's, might be too self-interested to warrant confidence. After all, Fisher was defending the very institution of which he was – and remains – a vital part. Third, Fisher's analysis could have benefitted from more empirical analysis. Indeed, one important question raised by the Mikva-Fisher debate is what kind of data would help us to better understand and to evaluate the institutional capacity of Congress to interpret the Constitution.¹⁴ Merely describing the resources available to assist with congressional constitutional interpretation does not tell us much about either how such interpretation compares with that of the other branches or why courts should defer to it.

The former of these two questions is the descriptive question of principal concern to me in this Essay. It requires a sounder, positive account of the relative institutional capacity of Congress to interpret the Constitution. Such an account requires more information than we have at present on congressional constitutional interpretation. Thus, in the next Part I consider the other information necessary to better understand and evaluate the relative institutional capacity of Congress to interpret the Constitution.

III. WHAT WE NEED TO KNOW

While legal scholars over the past twenty-five years have not done as much as they could to update the Mikva-Fisher debate, they have not been completely unproductive, and we have learned a few things about Congress's capacity to interpret the Constitution. In this Part, I briefly consider the state

1970 Organized Crime Control Act).

¹³ I hasten to add that Lou Fisher is a friend of mine and a first-rate constitutional analyst.

¹⁴ See Fisher, *supra* note 10, at 708; Mikva, *supra* note 8, at 590.

of our knowledge – and particularly what more we need to know – of the institutional capacity of Congress to interpret the Constitution.

The first thing to acknowledge is that since the publication of Lou Fisher's 1985 response to Judge Mikva the world of constitutional law and Congress's role within it have not remained static. Indeed, the past twenty-five years have featured as much constitutional activity in Congress as there has been during any other comparable period of time. I need not provide a comprehensive recounting of all those activities here, but even a small sampling reveals the breadth and depth of congressional constitutional activity: the impeachment and removals of three federal district judges in the late 1980s;¹⁵ the contentious Supreme Court confirmation hearings for Robert Bork in 1987¹⁶ and Clarence Thomas in 1991;¹⁷ the appointment of Chief Justices of the United States in 1986¹⁸ and again in 2005;¹⁹ congressional decision-making during the 1990s regarding unfunded mandates, major health care and welfare reform, and the impeachment and trial of President William Jefferson Clinton;²⁰ Congress's responses to the President's increasing use of signing statements;²¹ and Congress's response to the worst down-turn in the economy since the Great Depression.²² Moreover, the September 11, 2001 terrorist attacks against the United States provoked numerous responses from Congress, including, inter alia, the following: debating and issuing a joint resolution supporting the President's use of military force in both Afghanistan and Iraq;²³ the funding of military invasions of (and operations within) those two countries;²⁴ enactment of the PATRIOT Act;²⁵ legislation restricting habeas corpus and otherwise governing the conditions and interrogations of people captured and held in detention as a result of the terrorist attacks;²⁶ and the strident debates within

¹⁵ See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 37, 40 (2d ed. 2000).

¹⁶ See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. (1987).

¹⁷ See *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 102nd Cong. (1991).

¹⁸ Editorial, *The Hearings on Justice Rehnquist*, CHI. TRIB., Aug. 5, 1986, at 14.

¹⁹ Todd S. Purdum & Robin Toner, *Roberts Hearing Reveals Divisions*, INT'L HERALD TRIB., Sept. 14, 2005, at 7.

²⁰ See GERHARDT, *supra* note 15, at 177-94.

²¹ Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. (2006).

²² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

²³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁴ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 6, 121 Stat. 1844, 2446-56 (2007).

²⁵ USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

²⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2006 (2006) (codified at 10 U.S.C. §§ 948a-950w and scattered sections of 10, 18, 28, and 42 U.S.C.), *invalidated by* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

the Senate over the constitutionality of the filibuster from 2003 to 2005.²⁷ This litany of examples ought to be a dramatic reminder of the extent to which Congress renders constitutional judgments.²⁸

While this extensive activity does not tell us much, if anything, about the relative quality of congressional constitutional interpretation, its enormous variety is itself significant. The sheer extent of the constitutional judgments that are made in Congress in enacting legislation – far more extensive in a given year compared to the Supreme Court in deciding cases – suggests that Congress does have the institutional capacity to make these judgments.²⁹ Moreover, these activities provide legal scholars and others with ample opportunities to study the institutional capacity of Congress to interpret the Constitution. Somehow Congress manages to produce such judgments. These activities are, in other words, the very things we need to study if we are interested in refining our understanding of the institutional capacity of Congress to interpret the Constitution.

A second thing we probably understand better today than we might have twenty-five years ago is the ramifications of viewing Congress as either an “it” or a “they.” Just as the Court should be considered a “they” and not an “it,”³⁰ we may consider Congress to be a “they” and not an “it.” If we think of Congress as a group of people – 425 in the House of Representatives and 100 in the Senate – then the complexity of what Congress is and what Congress does becomes more apparent. From such a perspective, congressional decisions, even those involving constitutional interpretations, could not be sensibly likened to those of a single, rational individual. Group decision-making is likely to produce outcomes that are hard to reconcile and may reflect compromises among people whose preferences are bound to vary in terms of intensity and priority.³¹ Moreover, thinking of Congress as a “they” would attach more significance to the process through which decisions are reached and thus is likely to emphasize the importance of the acts of particular

²⁷ David D. Kirkpatrick, *Deal Draws Criticism from Left and Right*, N.Y. TIMES, May 24, 2005, at A18.

²⁸ For a discussion of these and other examples of non-judicial precedents, see Gerhardt, *Non-Judicial Precedent*, *supra* note 7, at 738-40, 745-53 (cataloging the various ways that institutions create precedents).

²⁹ *See id.* at 736-45 (chronicling the various ways Congress makes constitutional decisions); *see also* Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 985-87 (2005) [hereinafter Gerhardt, *The Limited Path Dependency*] (explaining how scholars should understand a more nuanced and moderate view of precedent in constitutional law).

³⁰ *See, e.g.*, Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. L. 549, 550 (2005) (arguing that analytical problems arise by viewing the judiciary as a single entity rather than a collective body).

³¹ *See* Gerhardt, *The Limited Path Dependency*, *supra* note 29, at 955-57 (using rational choice theory to explain how Presidents’ efforts to influence Court decision-making are rarely effective).

individuals – for example, committee chairs who wield inordinate influence in scheduling committee hearings and votes, or members who might exhibit either relative ignorance of various issues being discussed or a relative lack of engagement, preparation, or attendance.

But shifting the perspective, as per Mark Tushnet's suggestion on the day our panel met, to viewing Congress as an "it" can be equally if not more useful.³² To begin with, the quality of any particular individual's performance becomes irrelevant. If we understand the House and Senate each as institutions, rather than as groups of people, then it does not matter whether some, most, or all members are unprepared or ignorant in the context of constitutional analysis. Instead, what matters is what *it* does as well as what are *its* rules, standard procedures, formal resources, and outputs. If we know these rules and other features of Congress, we can develop an understanding of how the institution operates. Indeed, viewing Congress as an "it" helps illuminate the prerequisites that must be met in order for certain actions to take place. What particular individuals do matters less than the nature of the rules and procedures for decision-making and whether, or to what extent, they have been followed. Both the reasons for the rules and the consequences of complying with them are what count. Thus, if we think of Congress as an "it" and not a "they," one does not have to worry about whether Senator Arlen Specter voted for a particular bill because he thought the courts might strike it down,³³ or whether Senator Ted Stevens did not base his votes to remove three judges in the 1980s on his own study of the pertinent records but rather on his preference simply to follow the leads of several other senators whose views he respected or chose to emulate.³⁴

The utility and pertinence of the information that we gather to analyze congressional constitutional interpretation depends largely on the perspective of the analyst. For instance, assume a scholar argues that Congress's capacity to interpret the Constitution is not what it used to be and bases his assertion on the fact that more members of Congress in the past did their own work (and wrote their own speeches) than do today. This assumption might well be valid, but it is of limited relevance. True, it tells us something about the relative quality of certain individual performances within the Congress, but given that

³² Viewing Congress as an "it" for the purpose of constitutional analysis helps explain why congressional actions in the aggregate demonstrate actions seemingly lacking in consideration of the Constitution's restraints. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 118 (2008).

³³ See Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 499 (2009).

³⁴ This reference to Senator Stevens is based on a survey I conducted as a special consultant for the National Commission on Judicial Discipline and Removal. Michael J. Gerhardt, *The Senate's Process for Removing Federal Judges*, in 1 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 139 (1993) (summarizing the results of a comprehensive questionnaire completed by twenty-one senators).

the workload of members of Congress has exponentially increased over the last 160 years, none of us should be surprised to find that at least some, if not most, members of Congress rely on their staffs and other resources more than they used to. Indeed, the increased workload helps to explain why these resources exist. From the institutional perspective (i.e., the perspective of Congress as an “it”), we are no longer interested in individual performance or motivation but rather the basic patterns of what Congress does (and does not do) over time. This includes but is not limited to the levels of participation in committee and floor debates, the numbers of speeches addressing or making constitutional points, the responsibilities of committee and other staffs in the House and the Senate, the productivity of committees including its outputs, and the number of laws – and other matters – on which each chamber of Congress acts as a whole during a given session. These patterns are objective data on congressional constitutional activity.

The persistent disparagement of Congress derives in part from not just how analysts perceive Congress but also how they perceive the other branches of the federal government. It is possible that some people look down on Congress because they are looking at it from the perspective of another branch, which might well be inclined, for its own self-serving reasons, to look down on the other branches. It is also possible that opinions of the institutional capacities of the different branches might depend not just on analysts’ experiences (i.e., for whom they have worked), but also their ambitions (i.e., whose favor they would like to curry or for which branch they would like to work). Understanding Congress requires, in other words, appreciating the nature and ramifications of our own biases, preferences, and experiences.

A third thing we know we need to do in order to fully appreciate Congress’s institutional capacity to interpret the Constitution is not to overstate the significance of the phenomenon that Professor Tushnet describes as “judicial overhang.”³⁵ It is important to appreciate that relatively little of the realm of constitutional activity in Congress is actually subjected to judicial review, and the relatively little that is subjected to judicial review is usually upheld.³⁶ Among the more notable congressional decisions that have usually *not* been subject to judicial review are oversight, funding, impeachments, removals and convictions, expulsions, rule-making within the House and the Senate, treaty ratifications, and nominations.³⁷ Judicial overhang is not, nor ever has been, pertinent to any of these areas of political and constitutional decision-making. Nor do I expect it to be.

But, there is more. The political salience of different subjects is likely to

³⁵ See Tushnet, *supra* note 33, at 504 (describing the idea that Congress will engage in scant constitutional interpretation because of the belief that the courts are in place to correct any errors).

³⁶ See Gerhardt, *Non-Judicial Precedent*, *supra* note 7, at 745-52 (arguing that there are various mechanisms at work that limit the scope of constitutional review in the courts).

³⁷ See *supra* notes 28-29 and accompanying text.

make a difference in congressional performance, though the precise difference is not so clear. On the one hand, the prospect of extensive public scrutiny is likely to focus the attention of members of Congress. Members of Congress are likely to pay more attention to highly politically salient matters, such as presidential impeachments. It is reasonable to assume that members of Congress will work hard on matters on which they believe the public is watching. Moreover, there is some evidence to suggest that members of Congress will pay less attention to matters they believe will make little or no difference to their re-elections. Such was the case, for instance, in several Senate impeachment trials of the 1930s, in which attendance was extremely poor because senators did not think the trials were pertinent to their re-elections.³⁸ Consequently, the Senate amended its standing rules to create a special impeachment trial committee consisting of twelve senators who would be responsible for gathering evidence, taking testimony, and writing a report for their colleagues.³⁹ The Senate invoked this rule in each of the three removal trials it was obliged to hold during the 1980s, but it chose not to invoke the rule in President Clinton's trial because senators perceived that their constituents wanted them to personally participate in a trial with the potential to oust a President of the United States.⁴⁰

On the other hand, the fact that an issue lacks political salience does not necessarily mean that members of Congress will simply check out or ignore it altogether. There are some issues – trademarks and copyrights for instance – on which some members of Congress might have special expertise to which their colleagues might defer. Moreover, the absence of a spotlight might actually lead some members of Congress to pay more attention to the actual merits of an issue and less attention to the political ramifications. Indeed, some issues might not be politically salient to a wide constituency but rather to particular segments or sections of the country. For instance, the subject of alternative fuels might not be of interest to voters in some parts of the country but it might be a serious concern to voters in other parts of the country.⁴¹ The point is that judicial overhang might simply be one of many factors that might enter into the calculus of members of Congress and sometimes it might be overshadowed or displaced by other factors. Hence, it is important to verify how much and in what specific ways judicial overhang affects the capacity of Congress to interpret the Constitution. The suggestion that judicial overhang might be a disincentive for some members of Congress to become more

³⁸ See GERHARDT, *supra* note 15, at 37-39 (discussing Senators' "general lack of interest" in impeachment proceedings and citing as an example the 1933 impeachment trial of Judge Louderback where only three senators were present).

³⁹ COMM. ON RULES AND ADMIN., U.S. SENATE, RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS, S. DOC. NO. 110-6, at 210 (2007).

⁴⁰ GERHARDT, *supra* note 15, at 180-85.

⁴¹ For example, voters in Iowa may be particularly interested in legislation related to fuels developed from corn.

engaged is not a fact but an assumption that sorely needs testing.

Moreover, it is an unproven assumption that members of Congress will naturally or necessarily defer to courts on questions of constitutional law. It is possible that members of Congress will defer when they agree with (or are indifferent to) what the courts rule. But, there is a long history of members of Congress vigorously defending their entitlement to have an independent say about what the Constitution means. Indeed, it is not hard to find examples of Congress deciding to take certain actions – such as enacting legislative vetoes⁴² and criminalizing flag burning⁴³ or partial-birth abortions⁴⁴ – that appear to be flatly inconsistent with judicial rulings. Such examples ought to lead us to examine more systematically how often Congress acts contrary to the Court and does not just side-step or act with apparent indifference to the prospect of judicial review.

IV. EVALUATING CONGRESS

In this final Part, I briefly consider the normative question of how to evaluate congressional constitutional interpretation. The short answer is that it depends on whether one views Congress as a “they” or an “it.” If, for instance, we think of Congress as a “they,” then we could ask six questions. First, we could ask about the relative quality of the constitutional decision-making of the members of Congress. To answer this question, we need to consider the skills required to do good or excellent work in Congress. Presumably, these include, *inter alia*, drafting statutes, speech-writing, building coalitions to forge legislative majorities, delivering goods and services to their constituents or states, hiring good staff, and knowledge of, or expertise in, constitutional law and the rules, procedures, and history of Congress. For each of these skills, we can develop standards and then assess how well each member of Congress measures up to these standards.

Second, we could ask how well members of Congress fulfill their duties as representatives. Generally, these duties may be acting as agents to implement the wishes of their constituents, to reflect the diverse interests of their districts or states, and to act in the best interests of their constituents. One could then assess how well each representative or senator performs one, or all, of these functions.

Third, we could follow David Mayhew’s lead in evaluating the leadership of members of Congress in affecting the public sphere.⁴⁵ Like Mayhew did, we

⁴² See Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal – Do Nothing*, 48 ADMIN. L. REV. 109, 115 (1996) (demonstrating that legislative vetoes remain a widely adopted legislative tool despite contrary Supreme Court decisions).

⁴³ See *Eichman v. United States*, 496 U.S. 310, 319 (1990) (striking down a federal flag desecration statute nearly identical to a state statute previously struck down by the Court).

⁴⁴ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (upholding the federal partial-birth abortion ban nearly identical to a state statute struck down by the Court).

⁴⁵ See DAVID R. MAYHEW, *AMERICA’S CONGRESS* 1-6 (2000) (chronicling the

could examine how often each member of Congress has attempted to take affirmative leadership in Congress, and whether it has been to propose or push legislation or to advance or support some other congressional initiative.⁴⁶ Once we calculated these numbers, then we could ask how many times the House or Senate followed the member's lead. This would give us some idea of a particular member's relative effectiveness as a leader in Congress.

Fourth, we could ask about the role of congressional *stare decisis*. In particular, we could ask to what extent members of Congress follow prior congressional constitutional interpretations and/or their own prior constitutional decisions. This question is directed at uncovering data on the fidelity of each member of Congress to prior constitutional decisions. It is also directed at assessing the path dependency of such decisions, i.e., the extent to which they constrain a member's subsequent decision-making.⁴⁷ Similarly, we could ask about the extent to which members followed judicial precedent.

Fifth, we could assess how well each member of Congress employs the different modes of constitutional analysis. This would require gathering all the public statements of members of Congress and analyzing the quality of constitutional analysis in each. This might also entail asking whether a member got a particular constitutional question right.

Last but not least, we could ask what kinds of support or assistance members of Congress need to improve their constitutional interpretation. Of course, the answer depends in part on the relative quality of the resources currently available to assist constitutional interpretation and of the constitutional interpretation itself. It also depends on the criteria we use to evaluate the quality of these two things.

If, however, we viewed Congress as an "it," we would ask some of the same as well as some different questions. The first is what would be a reasonable expectation to have about Congress as a legislative body. It is not reasonable to expect Congress, at least at the institutional level, to act like either the judicial or executive branches. But the question remains what should we expect from Congress as an institution charged with various constitutional authorities and responsibilities? One possibility is to examine how one Congress measures against another Congress, while another possibility is to develop, as I suggested above, a positive account of how Congress actually makes constitutional decisions. In developing this account, we should

contributions of various important congressional members throughout history and introducing a means for examining public opinions as affected by individual congressional member action).

⁴⁶ *Id.* at 168-75 (introducing an analysis of "action patterns" in the careers of members of Congress and noting that relatively few individual congressional members have careers involving spearheading multiple major congressional actions).

⁴⁷ On the limited path dependency of judicial and non-judicial precedents, see Gerhardt, *Non-Judicial Precedent*, *supra* note 7, at 784 ("Shifting perspective from judicial to non-judicial precedent illuminates that the Court is supreme within a much narrower realm than that in which non-judicial precedents are made.").

distinguish between the interpretation of the Constitution (i.e., the role of the judiciary in answering questions about constitutional meaning) and constitutional construction (i.e., the culmination, or consequences, of congressional efforts to implement constitutional ideals or values). The quest to illuminate Congress's capacity to interpret the Constitution neglects to take into account the fact that the notion of constitutional construction better captures the essence of what Congress is doing when it is addressing or confronting questions of constitutional meaning. While constitutional construction is infused with politics, this does not mean that it is irrelevant to the development of constitutional practices and understanding over time. As Keith Whittington suggests:

Political practice helps define what we understand the Constitution to mean, but it does not arise through anything like interpretive argument and does not exist in the form of constitutional law. The idea of construction helps us understand how constitutional meaning is elaborated even when government officials do not seem to be talking about the Constitution, or are not saying anything at all.⁴⁸

He explains further that the “defining features of constitutional constructions are that they resolve textual indeterminacies and that they address constitutional subject matter. Thus, some political debates are properly characterized as constitutional even if explicit references to the terms of a specific written constitution are rare or nonexistent.”⁴⁹ The point is that the constitutionally-significant activity in Congress looks and sounds different than it does in the courts. We should not only factor these differences into our understanding and appraisal of Congress but also recognize that constitutional construction itself needs to be the focus of our inquiry.

Next, we could ask about the extent to which Congress acts in accordance with, or independent from, the Supreme Court. This is a question not just about whether Congress demonstrates fidelity to Supreme Court decisions but also whether, or to what extent, constitutional history matters to Congress. This requires in turn that we examine the extent to which Congress produces or follows constitutional history (and what it considers, or takes into account, as such). Moreover, we could ask whether Congress has developed the capacity to follow constitutional law. Of course, this question requires that we clarify what we mean by constitutional law. It is commonplace to equate constitutional law with the decisions of the Supreme Court, but one thing to consider is what Congress treats as constitutional law.

Finally, we could ask the same question for Congress as an “it” as we do for the members of Congress as a “they” – did Congress get it right? In some ways, this is both the easiest and hardest question. It is the easiest because asking it does not require any knowledge of Congress. It is also easy because

⁴⁸ KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 7 (1999).

⁴⁹ *Id.* at 9.

an analyst might presumably use whatever he or she thinks is the proper test for determining the right outcomes of constitutional questions. Yet, the history of constitutional theory teaches us nothing if it fails to teach us that every theory of constitutional law is imperfect. The question is either which is the least imperfect or which of the imperfect theories of constitutional law should be used and why. Luckily for me, I need not answer that question because it is well beyond the scope of this symposium.

CONCLUSION

The question of the relative institutional capacity of Congress to interpret the Constitution turns on many factors. It depends on, *inter alia*, whether we conceive of Congress as either a “they” or an “it,” as having the same or different capacity for constitutional interpretation than the other branches, as performing particular functions of representation, as making the correct constitutional decisions, as engaging with the different modes of constitutional argumentation, as developing or utilizing the appropriate resources to assist with conscientious constitutional argumentation, as being faithful to or independent from the Court, and as acting consistently with its rules, procedures, traditions, and prior constitutional decision-making.

What we learn about Congress’s capacity to interpret the Constitution from the answers to these inquiries has tremendous ramifications for constitutional law. It is important for raising (or perhaps maintaining lowered) respect for Congress as one of the three principal constitutional actors at the federal level. It is important to the perennially important question of how much deference does, or should, the courts give to congressional constitutional interpretation. Thayer’s answer was that the federal courts should defer to Congress a great deal.⁵⁰ But his answer depended on a presumption, and not the fact that Congress is at least as good as the courts in interpreting the Constitution.⁵¹ Moreover, Thayer’s answer did not depend on whether such deference was either compelled by, or consistent with, the Constitution itself. The question of whether the Court should defer to congressional constitutional interpretation further depends on the Supreme Court’s own responsibilities and capacity to interpret the Constitution, neither of which are concerns of this symposium. Thus, the question of whether the Court should defer to congressional constitutional interpretation is not a question we can answer, since it depends on information we do not have and on matters beyond the scope of our immediate project. Our immediate project is to compare the capacity of Congress to that of the other branches to interpret the Constitution. This is, as I have said, an old question, but it says a lot more about the legal academy than Congress that it is a question that legal scholars have not yet answered.

⁵⁰ See Thayer, *supra* note 1, at 144.

⁵¹ For a modern defense of this view, see ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 57-62 (2008).