grounded in the Constitution so that judges do not become indistinguishable from legislators, thereby undermining the legitimacy of, and public respect for, the Court.

Unavoidably, the Supreme Court is a political institution. The Constitution points to broad objects which cannot be adequately encompassed within a legalistic-historic formulation such as the search for original intention. Nor does the Constitution make an exception of the Supreme Court: as with the other two branches, its independence can and should be politically restrained by the other branches. As Tocqueville noted, in America Supreme Court judges must be statesmen. But they must also be judges, whose training and important, but not exclusive, responsibility for interpreting the Constitution make their work significantly different from that of the other two branches.

Thus the most significant task for scholarship on the Court is, it seems to me, to articulate an alternative jurisprudence to the too narrow, restrictive view of the interpretivists and the open-ended, unrestrained approach of the non-interpretivists. Such a jurisprudence would be grounded in a sufficiently broad understanding of constitutionality to allow the Court ample scope for protecting liberty. At the same time, it would be informed by the broad clauses and objects of the Constitution and the political thought which supports it, including the recognition that the Supreme Court itself embodies, while it is also responsible for helping to resolve, the inherent tension in a liberal democracy between popular government and liberty.

DANIEL A. FARBER[36]

While there are exceptions, most of the major scholarship in the past ten years has focused on constitutional theory. We have seen endless debates about the role of text, original intent, and political philosophy in constitutional law. Yet we seem to have learned little that is new about how to decide constitutional issues.

The originalism debate is a good example. The originalist view is supposedly that the meaning of the Constitution is completely determined by the views of its framers. It is relatively easy to show that if "original intent" is supposed to be a matter of historical fact, it is difficult to define its meaning, ascertain its content, or explain why it should be determinative. (The basic error, of course, is taking "the consent of the governed" to be a matter of simple historical

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fact.) It is almost as easy to show the absurdity of ignoring historical understandings altogether, as if we had all awakened one morning to find that our government was controlled by a piece of parchment in the National Archives.

Of course, nobody sensible takes either of these extreme positions. Reasonable people agree that historical intent informs but does not always control interpretation—the real dispute is about matters of degree rather than pristine theory. Similarly, not even the strongest believers in original intent completely reject the idea of the "living constitution"; even Raoul Berger accepts *Brown* and Richard Epstein is willing to live with the Social Security Act—which goes to show that even the most doctrinaire scholars must at some point recognize historical and political realities.

Ultimately, most of the debate involves how creative judges should be in constitutional cases. Theorists have staked out some untenable extreme positions, but the real question is one of degree: not whether judges should be creative, but how often and how much. Questions of degree tend to be messy and contextual, while theorists thrive on order, elegance, and universality. Yet the question of how courts should decide constitutional cases may be no more amenable to grand theory than the question of how to paint a good picture.

In our fascination with the Big Think theory, we have overlooked some other very interesting problems. To begin with, we have given scant attention to much of the Supreme Court's work. The Court has been doing odd and intriguing things in equal protection cases, for example, but no one seems much interested. Apparently, analysis of the Court's decisions has come to seem unbearably pedestrian to many law professors.

Second, we have slighted the policy issues in constitutional law. For example, some very respectable economists believe that affirmative action in employment either has done nothing to help blacks or has actually hurt them. In all the law review discussions of the legality of affirmative action, it is hard to find a serious discussion of its desirability. Similarly, we find little discussion of the practical effects of busing, or liberalized abortion, or a dozen other major constitutional issues.

Third, our obsession with constitutional theory has tended to emphasize the uniqueness of federal constitutional law. So we have paid little attention to state constitutional law, or even more importantly, the developing body of constitutional law elsewhere in the world. From all the discussions about judicial legitimacy, you would think judicial review was a unique aberration, requiring spe-

cial justification. It would probably be more accurate to say that some form of judicial review is now the norm in democracies.

There are a lot of interesting things for constitutional scholars to look into. Unfortunately (given its prominence in recent years), grand theory doesn't seem to be one of them.

DAVID P. BRYDEN[37]

The other day I received, as an alumnus, a message from Dean Vorenberg of Harvard Law School. Listing some of the school's achievements, he related that Harvard now has "13 courses and seminars in constitutional law, in addition to five sections of the basic 'second-year' course," plus "six courses in the field of international human rights." If this issue of *Constitutional Commentary* survives until the twenty-fifth century, I suspect that the dean's revelation will be interesting to students of twentieth-century American culture.

As Americans, as lawyers, and as constitutional scholars, we take rights very seriously indeed. In a citizen this is sometimes a virtue, but in a scholar it is more often a vice. Many of our readers have never studied the history of liberty except in a constitutional law course. For this and other reasons, they are in perpetual danger of equating the progress of liberty with the progress of law, and the progress of law with the progress of constitutional rights.

We begin with cases; almost inevitably we often treat doctrine as an end in itself, a tendency that is reinforced by normal human laziness as well as the quest for maximum scholarly output. Although we know better, we habitually imply—if only by our silence—that if the Court hadn't acted nothing would have been done about a problem, and that the Court's decision had important consequences. Prior to *Muller*, we imply, working hours were not growing shorter except under statutory compulsion; after *Muller*, our readers are left to infer, the problem was solved. *Miranda*, we presume, created dramatic new realities in the interrogation room. *Griswold*, some imply, was a landmark in the evolution of sexual liberty; I doubt that most law students could even begin to describe the origins—mostly non-legal—of privacy in the home. *Roe* was necessary, says popular mythology, because legislatures weren't reforming abortion laws; and if it is overruled abortion "will be illegal." Such assumptions are often half-truths at best. Left unchallenged, they fortify the American tendency to over-glorify

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