

Book Review

THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789 - 1801. By David P. Currie.¹ Chicago, IL: U. of Chicago Press. 1997. Pp. xv, 327. Hardcover, \$32.50.

*John Harrison*²

Thucydides the Athenian set out to make a record of the struggle between his people and the Peloponnesians that would be a possession for all time.³ In order to do so he resisted (at least he said he resisted) the temptation to seek the applause of the moment.⁴ Something worked. Twenty-four centuries later people are still fascinated by that war, in which the most famous democracy in history was at last utterly defeated, and Thucydides is their primary guide. So far, so good.

Anyone in the year 4400 who wants to learn about the creation of another democracy with great pretensions—this one proclaiming itself a new order for the ages—will want David Currie's book. Having read every constitutional case decided by the Supreme Court in its first two centuries of operation and written two wonderful books about them, Currie realized that he had been dealing with an institutional latecomer.⁵ Although the Court is today generally regarded as the leading expositor of the Constitution, for decades its role was secondary. As of 1840, for example, far more constitutional questions had been debated and resolved in Congress than in the Supreme Court. Moreover, the issues resolved in Congress were probably more fundamental.

1. Edward H. Levi Distinguished Service Professor of Law, University of Chicago.

2. Associate Professor of Law, University of Virginia. Thanks to Pam Karlan for helpful discussion of some of the issues in this review.

3. Thucydides, *The Peloponnesian War*, in Robert B. Strassler, ed., *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War* 16 (Free Press, 1996).

4. *Id.*

5. See David P. Currie, *The Constitution In the Supreme Court: The First Hundred Years, 1789-1888* (U. of Chicago Press, 1985); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* (U. of Chi. Press, 1990).

Knowing that the formative years are formative, Currie has devoted a volume to the first six Congresses—those that sat during what is commonly known as the Federalist period. That period came to an end with the Revolution of 1800 and Currie's account of the Sixth Congress concludes with a quotation from Jefferson's first inaugural address. (p. 295)

Section I of this review describes briefly *The Constitution In Congress: The Federalist Period*. Section II then tries to make use of Currie's work to consider one of the recurring issues in the debate over the usefulness of judicial review: just how likely is Congress to come right out and violate the Constitution?

I. CURRIE, THE CONSTITUTION, AND CONGRESS

Readers of Currie's studies of the Constitution in the Supreme Court will find this book familiar. It is arranged chronologically and for each Congress identifies the most important questions of constitutional construction that the legislature was called on to address. Currie presents the different positions, the arguments that were made for and against them, and Congress' ultimate resolution of the issue. He adds his own substantive comments, citations to the main primary sources from the time that bear on the issue, and frequent prolepses to later times in which the country (including the Court) has seen the question again.

Such repeat readers will also find *The Constitution In Congress: The Federalist Period* familiarly instructive. Currie's laser-like legal analysis, complete mastery of constitutional practice and case law, and grasp of the legal landscape at the time of the framing make him the perfect author of this book. A great historian with a good knowledge of law would have written something different; Currie is great lawyer with a good knowledge of history.

To give the reader a flavor of the book's coverage I will tick off some examples of the issues that Currie discusses and then recount in a little more detail his treatment of two now-obscure debates that raised important constitutional questions. As was inevitable, the First Congress addressed a series of fundamental problems. Perhaps most thoroughly canvassed in the years since is its action concerning the power of the President to remove heads of department. After much to-ing and fro-ing, Congress adopted legislation that recognized a presidential removal power but did not purport to create one. (pp. 36-41) Courts and com-

mentators have subsequently been through this issue in painful detail, without adding much to the debate.

Presidential removal power was only one of the many points of government structure that the Constitution did not address specifically. Of similar importance was the federal courts' jurisdiction. Currie is hampered here by the fact that the Judiciary Act originated in the Senate, which debated in closed session in those days and kept no official record of its debates, but he finds illuminating things to say. (pp. 47-34) Then there was a raft of other matters, some quite important, some minor. Many had to do with Congress itself, including contested elections, (pp. 17-19) the apportionment of seats in the House, (pp. 128-135) the House's appropriation power when the President made a treaty that called for spending money, (pp. 211-217) congressional authority to investigate the executive branch, (pp. 163-164) and whether Senators and Representatives were subject to impeachment and removal, rather than just expulsion by one house. (pp. 275-281)

A constitution's most important structural rules are those that identify the persons entitled to exercise power, because those are the rules that must be applied without the guidance of people who hold power. Currie recounts the Sixth Congress' treatment of the momentous question of disputed presidential elections. Only once has there been a serious question as to the electoral votes, but the possibility that it could happen was in 1800 and remains today a nightmare, as the events of 1876-1877 demonstrate it should be. Without a President the machine comes to a halt. The Constitution's procedures for making laws and treaties and for appointing to principal offices assume that there is a President or someone authorized to exercise the powers and duties of the office.⁶ The Constitution authorizes Congress to deal with vacancies in the presidency created by removal, death, resignation, or inability to perform, Art. II, sec. 1, para. 6, but not vacancies caused by a failure to elect. (p. 294 n.474) As for the provision under which the House of Representatives elects a President if none receives a majority of the electoral votes (Art. II, § 1, para. 3 in 1799, today the Twelfth Amendment), it does not kick in until the House has been informed of the electors' action. A dispute about who the electors are, or who they voted for, could entail a dispute as to whether the choice had devolved upon the House.

6. See U.S. Const., Art. I, § 7 (law making); Art. II, § 2, para. 2 (appointment).

In 1800, apparently anticipating a possible dispute over the selection of presidential electors, Senator James Ross of Pennsylvania asked that a committee be appointed to consider the problem.⁷ (p. 288) Despite objections that Congress had no power to act on the issue, a committee was appointed and reported a bill under which a "Grand Committee" drawn from both Houses of Congress would resolve disputes over the election of electors. (pp. 288-289) Although both Houses passed versions of the bill, they were unable to reach an agreement and nothing was presented to President Adams. (p. 289)

The debates, as Currie summarizes them, are constitutional reasoning in a nutshell. Does Congress have any power to legislate in this area at all? One might think yes, because it is necessary and proper to the execution of the President's powers that there be a President. As is so often the case with the Necessary and Proper Clause, however, one easily can draw a contrary inference from the fact that Congress' powers with respect to presidential elections are dealt with specifically and are quite narrow: Congress can determine when electors are chosen and when they vote but it cannot control the place or manner of their selection as it can with respect to Representatives and Senators.⁸ *Expresio unius est exclusio alterius.* Moreover, as Currie points out and as participants in the debates argued, one can readily find in the Constitution a purpose of minimizing congressional involvement in selecting the President. If anything is clear from the text and the records of the Federal Convention, it is that as a general matter Congress is not supposed to choose the President. (pp. 290-291)

Currie sides with those who argued that it was up to the States to provide mechanisms to resolve disputes as to their electoral votes. (p. 291) That is where the current statutes come down too, 3 U.S.C. §§ 5, 15, and it is some relief—as long as the States make such provision, and we know who their legitimate governments are.⁹

7. Currie recounts the story according to which Ross was afraid that the Pennsylvania legislature would deadlock and the State's Republican (that is, Jeffersonian) Governor would appoint a slate of electors. (p. 288 n.434)

8. Compare U.S. Const., Art. I, § 4, para. 1 (power over time, place, and manner of choosing Representatives and Senators), with Art. II, § 1., para. 4 (power to determine time for choosing electors and day on which they vote, which must be the same throughout the country).

9. Sometimes, of course, it may be tricky to tell who is the government of a State. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

After separation of powers the great category in American constitutional law is federalism. I was mildly surprised to learn that one of the central questions of federalism, Congress' power to regulate and direct the States as such, came up fairly rarely. Perhaps the early Congresses had quickly internalized the fundamental switch from the Articles of Confederation, under which Congress acted on the States, to the Constitution, under which it acts primarily on individuals directly. The issue did arise from time to time, (e.g., pp. 228-229) and while Congress did not seek systematically to direct the States or conscript them to carry out federal law, it did impose administrative and ministerial duties on state officers. (e.g., pp. 65-66 n. 81, 87)

Congress does more than structure the government, of course. It passes substantive laws. It is an axiom of the Constitution that whatever Congress does must be affirmatively authorized; this is a system of enumerated power. Hence the question repeatedly arose whether some proposed legislation was within a constitutional grant, and Currie discusses various appearances of that issue. Indeed, that is probably the issue he discusses most often. (I have not actually counted.)

Likely the most famous enumerated-powers questions from this period are two big-ticket items: the First Congress' legislation authorizing the Bank of the United States (pp. 18-80) and the Sixth Congress' Alien and Sedition Acts. (pp. 253-262) They are hardly alone, however, and I will discuss in a little more detail a lesser known dispute that was another nutshell for constitutional argument.

Codfish got Congress tangled up in a constitutional net. (pp. 168-169) New England's cod fisheries, said the Massachusetts legislature, needed help. They were victims of discriminatory tariffs and subsidies for their competitors. (Some things do not change.) Secretary of State Jefferson proposed retaliatory regulations and duties, but that approach would entail foreign policy costs. What else might Congress do?

Today we would find the answer obvious: Congress could give money to the codfishers, assuming it could come up with some reason why aiding them would further the common defense or general welfare.¹⁰ But that was not at all obvious then, and was indeed the subject of heated debate. When Representative Barnwell of South Carolina anticipated contemporary doc-

10. See *United States v. Butler*, 297 U.S. 1 (1936).

trine by urging that Congress could tax and spend for any purpose that would advance the general welfare, (pp. 168-169) Representative Madison of Virginia jumped all over him, denying the existence of any such power. (p. 169) Madison, however, then proposed a sophistry that would enable the codfish lobby to get what it wanted. While Congress could not simply give the codfishers money, it could rebate to them the duties on imported salt used to cure their catch. (p. 169) As Currie notes, (p. 169) that somewhat undercut Madison's position. If the purposes for which Congress may spend are limited, but neither the purposes for which it may tax nor the purposes for which it may rebate a tax are limited, a lot of spending for the general welfare is going to be possible. Maybe Madison just wanted to ensure that the codfish steamroller did not set an especially dangerous precedent by actually using the word "bounty."¹¹

Currie engages in a fair bit of editorializing, but identifies it as such. At no point did it seem to me that he was spinning the presentation in a way favorable to his own conclusion, and the issues he deals with include several with which I am independently familiar. I identified only one substantive mistake in the book, and it was about what happened in the 1990s, not the 1790s. As Currie explains, Congress in 1789 sent a package of twelve proposed constitutional amendments to the States. (pp. 110-115) The third through twelfth proposals were quickly adopted and became known as the Bill of Rights. The second of those twelve had a more interesting history, eventually being ratified by three-fourths of the States in 1992. Whether that long drawn out process was in keeping with Article V is a subject of much debate. Currie appears to believe that the so-called Twenty-Seventh Amendment is an imposter. (p. 111 n.437) He is especially annoyed that "Congress cravenly passed a resolution declaring it the law of the land." (Id.) Congress did not do that. The Senate passed a resolution so declaring and the House passed a similar resolution, but the two were not identical and neither body ever voted on the other's version.¹² Congress, which as David Currie knows better than most of us is a bicameral body, did nothing. Blame for cowardice, or praise for devo-

11. I was disappointed to find that despite their importance to constitutional history our piscine friends of the cod persuasion do not have their own entry in the index. (p. 317)

12. Compare S. Con. Res. 120, 102d Cong., 2d Sess. (1992), with H. Con. Res. 320, 102d Cong., 2d Sess. (1992). The Twenty-Seventh Amendment and the Article V process are discussed in detail in Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lesson of the Twenty-Seventh Amendment*, 103 Yale L. J. 677 (1993).

tion to duty, should go to the Archivist of the United States, who as Currie correctly notes (*id.*) proclaimed the amendment ratified.¹³

II. NO WRONG ANSWERS

Why might one think that judicial review of acts of Congress is a good idea? The answer must be that the courts are likely to correct congressional misinterpretations and violations of the Constitution at an acceptable cost. That in turn requires the conclusion that the courts are substantially more likely than Congress to be right about the Constitution. That is not obviously true. Currie reports that the members of the First Congress, although of course often influenced by their views about desirable policy, performed their function of constitutional interpretation "both capably and conscientiously." (p. 122) That is about all one can hope for from a court, and more than one sometimes gets.

One way to distract attention from this difficult comparison is to convene the parade of horribles, describing the ways in which Congress might blatantly violate the Constitution and silently assuming that of course a court would never do *that*. That is the rhetoric of *Marbury*. Chief Justice Marshall had a very nice question before him in that case. It is not clear whether Congress may add to the original jurisdiction of the Supreme Court. I tend to agree with Marshall but many do not. The Chief Justice, however, did not discuss such situations in explaining that the Constitution provided for judicial review and (as David Currie elsewhere points out) making the reader want to agree with him.¹⁴ Instead, Marshall postulated a statute that virtually had the words "This Is An Ex Post Facto Law" written on top of it.¹⁵ He obscured the comparative question that so be-devils sophisticated normative advocates of judicial review by discussing cases in which anyone but a liar or a fool would agree as to what the Constitution requires.

13. The section on the Bill of Rights also contains a proofreading error. The text indicates (p. 114) that there is a footnote 4457. Currie's documentation is ample, but not that ample. It should be 457.

14. See Currie, *Constitution in the Supreme Court* at 71 (cited in note 5).

15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803). According to Marshall, a reading of the Constitution denying judicial review "would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual." *Id.* at 178.

It is easy to see why Chief Justice Marshall used the examples he did. If Congress really were to pass an actual bill of attainder, a statute directing that a named individual should be executed forthwith, most people would agree that it was unconstitutional and that something should be done about it. If one also went along with the suppressed premise that the courts were likely to do something about it, because they somehow were immune from whatever had driven Congress to such extremes, one might indeed think that judicial review was a good idea under those circumstances. And having come in for a penny one might be in for a pound, agreeing that the courts should decide dicey questions too, like Congress' authority to add to the Supreme Court's original jurisdiction.

On the other hand, if one thought that Congress was very, very unlikely to adopt an actual bill of attainder one might well think that taking precautions against that eventuality was not worth much trouble. If the trouble included the costs of judicial review, through which indirectly selected and largely unaccountable lawyers resolve ostensibly legal questions on the basis of their substantive views, one might stop worrying what to do about the pathological situation.

At this point *The Constitution In Congress: The Federalist Period* enters with some evidence from real life. The Congresses Currie discusses did not enact any clearly unconstitutional statutes or take any other clearly unconstitutional action. None of their decisions, such as the provision reflecting presidential removal power, rested on a clearly incorrect reading of the Constitution. While one can agree or disagree with their resolution of the many knotty problems they faced, one cannot point to an instance in which they reached a conclusion that no reasonable person could agree was consistent with the Constitution. No bills of attainder passed.

Before concluding that this evidence weakens the case for judicial review insofar as that case is based on a concern that Congress might pass blatantly unconstitutional laws I need to deal with several natural objections. The first is that the Sixth Congress, at least, did openly violate the Constitution when it passed the Alien Act and the Sedition Act.

Much as we might like to believe otherwise, the constitutionality of the Sedition Act was at worst a close question. It was not a plain departure from the principle of enumerated federal power. Protecting the President and Congress from false and

malicious criticism is much like protecting them from assassination, and is well calculated to enable them to do their jobs; it thus carries their powers into execution. Nor does criminalizing libel of federal officers and institutions make much of an inroad into the legislative sphere normally occupied by the States, precisely because it is about criticism of federal officers and institutions. The States remained in charge of protecting their own officers and their own citizens from calumny. Nor was the Sedition Act a plain violation of the First Amendment. It did not impose a prior restraint, and it incorporated the principal American modifications of the common law of seditious libel: the defense of truth and jury determination of fact and law. (p. 261 n.198) Its opponents may have been right on the constitutional question, but they were not obviously right.

The Alien Act seems to me a closer call. As Currie explains, its most troublesome component was Section 9, which authorized the President to expel from the country any alien whom he found dangerous to the peace and safety of the United States or whom he had reasonable grounds to suspect was engaged in any treasonable or secret machinations against the government. (p. 255) There was no provision for judicial proceedings.

Three serious constitutional objections can be leveled against the Alien Act, none of which is a plain knock-down. First, it had an enumerated powers problem. Congress has power over foreign commerce and naturalization, but no explicit power over non-citizens resident in the country. The 1798 Act, however, was not about aliens in general. It was about aliens who threatened national security. While there must be some limits to Congress' power to protect the country's institutions, or the principle of enumeration is meaningless, expelling specific individuals who are reasonably believed to threaten the nation is quite plausibly necessary and proper to a functioning government. Many years later, of course, the Supreme Court was to take an even broader view of congressional power here, finding that Congress has inherent authority to regulate the admission of aliens and their privilege of remaining in the United States.¹⁶

Second, the Act had delegation problems. It gave the President wide latitude in deciding which aliens to deport. Nevertheless it was not clearly a transfer of the legislative power to the executive. Under the Alien Act the President had to make

16. See *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

judgments as to threats to the peace and safety of the United States. He was to apply the same criteria in making military policy as commander in chief, a preeminently executive function. Unless one wants to say that the Commander in Chief Clause is actually an exception to the separation of legislative and executive power the way the Veto Clause is, one can readily characterize the decisions called for under the Alien Act as executive.

Finally, the Act provided for removal without judicial proceedings. Once again, that was not plainly unconstitutional. For one thing, because the Act did not suspend the writ of habeas corpus, any alien taken into custody by the executive would have been able to obtain a judicial decision concerning the order of detention. The extent to which the executive's decision would have been treated as conclusive is not clear from the statute. In any event, it was quite plausible to say, as at least one Federalist did, that for aliens residence in the United States was a privilege and not a right, so that full judicial process was not required before it could be taken away.¹⁷ (p. 257)

Thus even the Alien Act was not an obvious violation of the Constitution. It was, one can infer from Currie, the dickest statute Congress passed during the period he studied. Nothing else was that close to the line.

Now for the second objection. Suppose that none of the early Congresses did anything plainly unconstitutional. One might think that fact irrelevant on the ground that they were not seriously tempted to. There is some force to this point, and once again I say only that the behavior of the first six Congresses gives us some reason to believe that Congress is unlikely to act in a way plainly contrary to the Constitution. Still, the 1790s presented some real temptations to take some blatantly unconstitutional step, all of which were resisted.

As should not surprise us, the events surrounding the Sedition Act provide a leading example. The Federalists in Congress did not try to attaint anyone, even though they easily enough could have made up an enemies list. If the Anti-Federalists had really meant all that they said during the ratification debates concerning the tyrannical tendencies of the new central government, they should have been astonished by their opponents' moderation. The government was on the verge of war with

17. As Currie notes, (p. 257) the Supreme Court has from time to time employed the rights-privilege distinction in finding that Congress has substantial power over the procedures through which aliens are kept out of the country or removed from it.

France and faced, many of its leaders believed, a disloyal opposition that was in the French pocket. That is the kind of situation that brings out the worst in rulers, but the worst it brought out of Congress was still arguably within the Constitution.

According to the third major objection, Congress was kept in check by a widely shared expectation that there would be judicial review. That there was such an expectation Currie documents. (p. 120) But so what? Judicial review is just another constitutional rule, like the ban on bills of attainder. Indeed, it is famously less clear that the Constitution provides for judicial review than that it bans, for example, unapportioned direct taxes.¹⁸ A Congress that would attaint someone would have no scruple about getting the judges out of the way if it could. And if the President, the army, and ultimately the people were prepared to go along with an attainder, which is blatantly unconstitutional, it is hard to imagine why they would care if the courts reminded them of that fact. If you can swallow attainder you can swallow no judicial review. American political leaders who can defy the Constitution can defy the courts, which take their authority from the document and not the other way around.¹⁹

Finally, there may be a problem with putting too much stock in this particular piece of evidence. Currie covers a period in which the Constitution of 1787 with its first ten amendments reflected living political realities, consensus on some issues and deals on others like the States' equal suffrage in the Senate. Maybe Congress avoided doing anything openly unconstitutional because of the underlying politics, not because of the independent principle that the Constitution is the law.

There is something to this point, but its importance should not be overstated. While every provision in the Constitution does not today represent a real consensus or a real settlement,

18. Article I, Section 9, paragraph 4 forbids unapportioned direct taxes, but there is no judicial review clause.

19. It is worth remembering that this point about Congress, whatever its force, is not an argument against the entire institution that we know as judicial review. It is not an argument against the judicial role that the Supremacy Clause primarily identifies, that of refusing to enforce unconstitutional state actions. State governments may well be much more likely to pass plainly unconstitutional legislation than is Congress, and one might think the courts better than the States at resolving nice questions. Nor is this an argument against judicial enforcement of constitutional rules that apply directly to the executive branch. What Congress does tells us little about what the Collector of the Port of New York is likely to do, or about the extent to which the President is likely to keep track of the Collector. But insofar as we are concerned about the straight-up *Marbury* question, Currie's book gives us some reason not to worry that Congress will decide to give each State three Senators.

the principle that the Constitution is law very likely represents the latter and quite possibly the former. So while we should not abruptly generalize from the early days, we also should not simply throw the information away. Government always rests on consensus and settlement.

III. FAME AND THE FOUNDERS' STUDENTS

Currie is a fan as well as a fair commentator, clearly regarding the people of the Federalist period as his fellow Americans. In this story that begins with the First Congress, his hero appears to be the First President, "the indispensable focal point, the glue that held the uncertain enterprise together." (p. 297) Currie here emulates Representative John Marshall of Virginia, who on the great man's death submitted to the House a resolution "dubbing him (really!) 'first in war, first in peace, and first in the hearts of his countrymen.'" (p. 275 n.313) Shortly thereafter Congress adopted legislation that provided for appropriate ceremonies, recommended commemorations to the citizenry, and called for a monument to be erected. (Id.)

Currie has some fun at this point by keeping his eye on the constitutional-law ball: "It seems churlish to question any of this, but that is what this book is about. A resolution passed by the same Congress to provide a medal to the Captain of the 'Constellation' suggests that recognition for services rendered may be necessary and proper to the functioning of public offices (not least, to attract qualified persons and encourage their best efforts). In any event, the monument was to be erected in the District of Columbia, over which Congress had the power of 'exclusive legislation.'" (Id.)

The first proposed rationale, however it might work today, was in that context a good means-end story under the Necessary and Proper Clause. According to Douglas Adair, "the lust for the psychic reward of fame, honor, glory, after 1776 becomes the key ingredient in the behavior of Washington and his greatest contemporaries."²⁰ Hamilton seems to have thought much of the love of fame, which he called "the ruling passion of the noblest minds."²¹

20. Douglas Adair, *Fame and the Founding Fathers* 8 (Norton, 1974).

21. Federalist 72 (Hamilton) in Jacob E. Cooke, ed., *The Federalist* 488 (Wesleyan U. Press, 1961).

David Currie's work, here and elsewhere, might lead us to question Publius. If Currie is an indication, the ruling passion of the noblest minds might be the pleasure of finding things out.²² Or maybe the two can go together. Thucydides wanted to get at the truth so that he could make something that would be a possession for all time; he apparently hoped that his by-line would survive with it. There are worse things to be famous for.

22. I borrow that phrase from Richard Feynman.