Recovering the Congresses' Constitution

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The history of constitutional interpretation is often seen as synonymous with the history of the Supreme Court. The casebooks through which law students are introduced to constitutional law, for example, generally begin with the 1803 decision of *Marbury v. Madison*¹ and the theory of judicial review.² These books implicitly present the period between the ratification of the Constitution and *Marbury* as a vast wasteland in which no constitutional interpretation of any significance took place.³ As applied to the Supreme Court, this characterization is fairly accurate. Apart from *Chisholm v. Georgia*,⁴ which provoked the ratification of the Eleventh Amendment, and *Calder v. Bull*,⁵ which analyzed vested property rights, the Supreme

1. 5 U.S. (1 Cranch) 137 (1803).
4. 2 U.S. (2 Dall.) 419 (1793).
5. 3 U.S. (3 Dall.) 386 (1798).
Court handed down no memorable decisions in the 1790s. The insignificance of the Court was amply demonstrated by the eagerness with which its own members departed when any opportunity presented itself. John Jay, the first Chief Justice, resigned his post to become Governor of New York.\(^6\) Associate Justice John Rutledge resigned in 1791 to become Chief Justice of the South Carolina Supreme Court.\(^7\) Chief Justice Oliver Ellsworth, who served from 1796 to 1800, resigned his position to accept a diplomatic post in France.\(^8\)

I

In *The Constitution in Congress: The Federalist Period, 1789-1801*,\(^9\) Professor David Currie invites us to rethink the accepted wisdom concerning constitutional interpretation in the 1790s. For Currie, the insignificance of the Supreme Court is misleading. He argues that this was an extremely important period, not because of what was happening in the Supreme Court, but because of what was happening in Congress.\(^10\) Congress debated constitutional matters continually and settled many issues of constitutional interpretation that have never been addressed by courts.\(^11\) Currie’s book is a comprehensive study of the constitutional issues debated and resolved by the first six Congresses. The work is organized chronologically, with the lengthiest section devoted to the First Congress.\(^12\)

There is clearly a need for a study of this sort, and Currie’s volume helps fill a significant gap in constitutional scholarship. Although many scholars have made reference to constitutional interpretation in the early Congresses, there has been no general book-length treatment of the topic.\(^13\) The work is a powerful corrective to modern constitutional scholarship’s often myopic focus on the Supreme Court. As a reference guide to constitutional issues of the 1790s, it deserves a place on the shelf of every historian and legal scholar. It is a perfect complement to *The Age of Federalism*, Stanley Elkins and Eric McKitrick’s recent magisterial study of the 1790s.\(^14\)

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7. *See id.*
8. *See id.*
10. *See id.* at ix-x.
11. *See id.* at x.
12. *See Currie,* supra note 9, at 3-122.
For Currie, the First Congress was a sort of constitutional Eden, a paradise of constitutional interpretation unsullied by partisanship or venality.\textsuperscript{15} This innocent, golden age was quickly destroyed by the serpent of party interests, and as Currie puts it, "the emerging parties seemed to vie with one another for the distinction of most thoroughly losing its head."\textsuperscript{16} By the late 1790s, "constitutional questions were resolved in Congress on strict party lines."\textsuperscript{17} At a later point, Currie seems to back away from this depiction of extreme partisanship,\textsuperscript{18} but he articulates most forcefully this decline-and-fall model.\textsuperscript{19}

Currie is a close and careful reader of constitutional text, and the virtues of his previous studies of constitutional interpretation in the Supreme Court—crisp organization, analytical clarity, and wry humor—enhance this volume as well.\textsuperscript{20} His issue-by-issue presentation of constitutional problems reveals a host of thorny questions that were not clearly resolved by the text of the Constitution, but were settled by the early Congresses.

For example, Washington's Neutrality Proclamation of 1793 raised significant questions about the president's powers in the sphere of foreign relations. Washington's proclamation stated that the United States would remain neutral in the war between Great Britain and the revolutionary government of France.\textsuperscript{21} Constitutional questions arose about the source of his authority to issue the proclamation. As Thomas Jefferson pointed out, Washington's statement that the United States was not at war with Great Britain or France seemed to usurp Congress's specific authority to "declare war."\textsuperscript{22} One possible response was that advocated by Alexander Hamilton. The president's power to issue such proclamations, Hamilton argued, was included in the "executive power" that was "vested" in the president by Article Two.\textsuperscript{23} This argument, however, was highly controversial, and it

\textsuperscript{15} See Currie, supra note 9, at 116-22.
\textsuperscript{16} Id. at 125.
\textsuperscript{17} Id.
\textsuperscript{18} See id. at 296 ("[T]he quality of argument remained astoundingly high and on the whole there is considerable cause for satisfaction with the results.").
\textsuperscript{19} Summarizing Currie's argument is made more difficult by his failure to provide a true introduction or conclusion to the mass of discrete issues that he presents. He devotes the last half of his three-page conclusion, for example, to a glowing appraisal of George Washington's commitment to the Constitution. See id. at 296-98. But cf. id. at 134-35 (observing that the solution Washington "forced upon Congress in 1792 cannot comfortably be reconciled with the constitutional requirement that states be represented in the House according to their respective numbers"); id. at 214-15 (arguing that Washington's refusal to release treaty information to the House of Representatives rested on an "extravagant" and untenable constitutional claim).
\textsuperscript{21} See Currie, supra note 9, at 174.
\textsuperscript{22} See id. (discussing U.S. Const. art. I, § 8, cl. 11).
\textsuperscript{23} See id. at 177 (discussing U.S. Const. art. II, § 1).
raised questions of executive authority that have yet to be resolved authoritatively. A more promising avenue was the provision that the president "take care that the laws be faithfully executed." Hamilton also justified the Neutrality Proclamation on this ground, possibly in accordance with a widespread view that the law of nations was a part of the law that the president was obligated to enforce. Whatever the ultimate justification for it, this early precedent firmly established the president's power to issue such proclamations, and the legitimacy of this power now goes unquestioned.

Currie's sensitivity to sources of authority often leads him to raise constitutional issues when none appears to have been raised at the time. Readily accepted decisions, no less than those that were fiercely debated, are highly informative of what the early Congresses thought the Constitution meant. In January of 1794, for example, Congress added two stripes and two stars to the national flag to recognize the new states of Vermont and Kentucky. The Continental Congress had adopted a national flag in 1777, but there is nothing in Article One of the Constitution specifically authorizing Congress to create or alter the national flag. Where, then, did Congress acquire this apparently unquestioned authority? One possible explanation is that the power to create and modify these symbols derived from Congress's authority to govern the armed forces, since flags were necessary to distinguish friends from foes on a battlefield. But it goes without saying that flags have a much larger significance and are closely associated with national identity. No state was in a position to prescribe a national flag, and Congress must have simply assumed that this power was inherent in nationhood.

II

The soundness of any historical interpretation, of course, depends in large part on the integrity of the sources upon which that interpretation rests. Currie draws the bulk of his research from the Annals of Congress. For years the Annals have gone largely unques-
tioned as a complete and accurate historical source. They were first published in 1834 by the Washington firm of Gales and Seaton, and consist of contemporary newspaper accounts of congressional proceedings. These accounts are composed almost entirely of reports of the House of Representatives, as the Senate did not allow its proceedings to be reported until 1795. The accuracy of many of these reports is now less clear. Numerous obstacles lay in the way of accurate transcriptions of congressional debates. It was often difficult to hear members' speeches. A competent stenographer could seldom note everything that was said and consequently had to reconstruct the debates at a later point on the basis of incomplete shorthand notes. These difficulties, among others, are well illustrated by the case of Thomas Lloyd's Congressional Register, the newspaper that was the primary source for the first two volumes of the Annals. Lloyd, a severe alcoholic, had been readily bribed by Federalists to exclude Anti-Federalist speeches from his earlier reports of the Pennsylvania ratifying convention. A published photocopy of one page of Lloyd's original manuscripts in the Library of Congress reveals the qualities of mind that Lloyd brought to his labors. In addition to notes of arguments, the page includes an upside-down drawing of a horse, a sketch of a member of Congress, and an outline of a mysterious character wearing a large hat. It is no wonder that contemporaries denounced the quality of Lloyd's reporting. James Madison stated that the Register exhibited "the strongest evidences of mutilation and perversion" and warned that it was "not to be relied on." Elbridge Gerry noted that sometimes the Register attributed to members views exactly opposite of those they had advanced. Modern-era scholarship has revealed that what Lloyd published bore only the slightest resemblance even to his own notes. Marion Tinling, the most careful scholar of Lloyd's work, concludes that Lloyd subjected many speeches to a "good deal of

33. See id. at xxiii-xxviii.
34. See Currie, supra note 9, at 207.
36. See id.
38. See id. at 37.
39. Id. at 36 (quoting James Madison).
40. Id. at 38 (quoting James Madison).
41. See id. at 38.
42. See Tinling, supra note 35, at 530.
embellishment” and that it is impossible to know “how much of any speech was actually drawn from memory and how much was invention.”

Currie only once hints that these problems in the documentary record even exist, yet for the historian, these problems are deeply troubling. An historical argument that rests on an uncorroborated statement in the Annals must be treated with extreme skepticism. For historians of the First Congress, many of these concerns can be alleviated by examining the documents collected in the Documentary History of the First Federal Congress. These volumes contain the reports of newspapers, as well as Lloyd’s original notes, and if a speech or argument is consistent across these sources, its validity can be assumed. For subsequent Congresses, there is no similar scholarly resource, and the historian must delve more deeply into the parallel sources to confirm the material in the Annals. Currie’s work must be read with this substantial caveat about his sources in mind.

Additionally, the relationship between partisanship and constitutional interpretation may not be as clear-cut as Currie suggests. It is not at all surprising that congressional action on constitutional issues followed a decidedly partisan pattern in the late 1790s if we recognize that those parties were in part defined by their differing interpretations of the Constitution. Although a variety of factors contributed to the unexpected split between the Federalists and the Democratic-Republicans in the 1790s, none was more critical than their differing views on what sort of government and nation the Constitution had established. The Federalists championed a strong central government and sought to foster growth in manufacturing and industry. The Democratic-Republicans, by contrast, sought strictly to limit the power of the central government and envisioned a rural America of small farmers and craftsmen. At the heart of these differences was a profound disagreement over the extent of the powers the Constitution granted to the federal government. James Madison and Alexander Hamilton, coauthors of The Federalist, found themselves on opposite sides of this dispute, as did many others who had played a prominent role in the drafting and ratification of the Constitution. Madison, who in Federalist No. 10 had denounced the

43. Id. at 531.
44. See CURRIE, supra note 9, at 11 n. 31.
45. DOCUMENTARY HISTORY, supra note 32. Currie states that he has used these sources “where necessary,” but he rarely refers to them in his discussion of the First Congress. CURRIE, supra note 9, at ix.
46. See ELKINS & MCKITRICK, supra note 14, at 92-131.
47. See id. at 195-208, 282-92.
effects of faction, later found himself reluctantly embracing partisanship to deter Hamilton's ambitious political agenda. What this suggests is not that partisanship was perverting constitutional interpretation, but that differing constitutional interpretations were leading to the emergence of partisan politics.

A thorough analysis of the relationship between partisanship and constitutional interpretation would have taken Currie far afield from his avowed focus on "legal doctrine." Nonetheless, legal doctrine does not develop in an historical vacuum, and historians cannot take Currie as the final word on the Constitution in Congress. A full history of constitutional thought in the 1790s remains to be written. Such a work would need to examine a wider array of sources and firmly situate the congressional debates within the larger political context in which these disputes played out. It might consider, for example, the relation between constitutional interpretation and the ideals of republicanism that other scholars have examined. It might trace the political context in the various states from which the members of Congress were selected and assess how, if at all, members responded to constitutional interpretations in the state legislatures. A critical analysis of the methods of interpretation employed by members of Congress would be a welcome addition to the literature.

III

Intertwined with Currie's historical arguments is a legal argument that is never fully articulated but is always lurking beneath the surface of his text. In the conclusion to Part One, Currie notes that what members of Congress "thought is surely of interest not only to historians but also to anyone trying two hundred years later to figure out what the Constitution means." The present tense is suggestive. Currie seeks to establish not just what the Constitution meant but what it means, and he believes that the actions of the early Congresses are instructive on this issue. Regrettably, Currie never clearly

48. THE FEDERALIST NO. 10 (James Madison).
49. See ELKINS & McKITRICK, supra note 14, at 257-302.
50. CURRIE, supra note 9, at x.
51. See generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (tracing the influence of the "Country" ideology on 18th-century American political thought); ELKINS & McKITRICK, supra note 14 (arguing that American political divisions in the 1790s paralleled the "Court-Country" division of Georgian England and that the acceptance of partisanship was the final transformation of the civic humanist conception of virtue); DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA (1980) (relating republicanism and political economy in late-18th- and early-19th-century America); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) (arguing that the United States Constitution represents both the culmination and termination of classical republican thought).
52. CURRIE, supra note 9, at 122 (emphasis added).
explains the arguments supporting this belief. The implicit argument seems to lie along the following lines: Because the Constitution left many issues unresolved, there was a brief window of opportunity for Congress and the president to resolve these issues in one way or another. The First Congress was a "sort of ongoing constitutional convention," as were subsequent Congresses during this formative period. The interpretations of the early Congresses can thus serve as firm resolutions of ambiguous constitutional text. Priority, of course, belongs to the First Congress, and the interpretive value of congressional action diminishes with each passing Congress. Such an argument would allow Currie to avoid both the implication that the Constitution is a continually evolving document the meaning of which changes over time, and the view that congressional action is important only insofar as it provides evidence of the understanding of the Constitution at the time of ratification.

Whatever Currie's ultimate justification for arguing that the early Congresses have much to tell us about what the Constitution means, his text leaves a fundamental question unanswered. How is one to distinguish a valid constitutional interpretation from this period from an invalid one? This would not be a problem if Currie held fast to the view that congressional action is determinative. However, he often announces that particular constitutional interpretations were wrong. For example he claims that legislation enacted by the Second Congress and signed by President Washington relating to the distribution of seats in the House cannot be "comfortably reconciled" with the Constitution. The Third Congress's "unforgivable" decision to transfer the duties of an incompetent federal district judge to the Circuit Court made "a mockery of the constitutional guarantee that federal judges hold office 'during good behavior.'" A few pages later, Currie tells us that seating a delegate from the Southwest Territory was not "impossible to reconcile ... with the Constitution." Why does the transfer of the judge's duties fail this reconciliation test? It does not seem "impossible" to reconcile this transfer with the Constitution, which gives Congress the power to ordain and establish inferior courts and define their jurisdiction. Why is this early gloss on that provision by the Third Congress not

53. Id. at 3.
54. CURRIE, supra note 9, at 134-35.
55. Id. at 199-200 (quoting U.S. CONST. art. III, § 1).
56. Id. at 203.
57. See U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

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instructive on what that provision means? Currie also asserts that the Sedition Act of 1798 violates the First Amendment, but that hiring legislative chaplains does not—because that is what the early Congresses did.

There is a strong sense that Currie is trying to have it both ways. The claim that congressional action carries inherent authority is severely undercut by Currie’s normative evaluation of that same action. Of course, one does not have to choose between the Scylla of acquiescence to everything the early Congresses did and the Charybdis of ignoring relevant institutional history. As Currie’s own assessments of constitutionality make clear, the actions of the early Congresses can be only one component, and perhaps not even a highly determinative component, of what the Constitution means. The role of this history in constitutional interpretation will depend on the larger theories of interpretation that each interpreter brings to the Constitution. Much ink has been spilled on the subject of legislative history, but the issue Currie raises is not about legislative history as such. His is a different and more subtle claim about the authority of congressional interpretations of the Constitution prior to 1800. The book’s subtitle, The Federalist Period, 1789-1801, suggests that we may hear more from Professor Currie on the subject of the Constitution in Congress. A clear statement of the constitutional theory underlying his arguments would be most welcome in a subsequent volume.

—Carlton Larson

58. See CURRIE, supra note 9, at 262.
59. See id. at 12-13.