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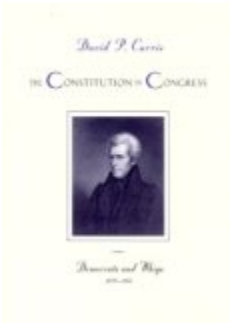
David P. Currie. *The Constitution in Congress: Democrats and Whigs, 1829-1861.* Chicago: University of Chicago Press, 2005. xxii + 346 pp. $39.00 (cloth), ISBN 978-0-226-12900-6.



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Published on H-Law (July, 2005)

Partisan Exegesis

David P. Currie is the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago Law School, and this volume is the third installment of his ambitious agenda to examine extra-judicial constitutional interpretation by Congress and the federal executive branch from the founding, presumably, until the present. The book, however, is the first of his series that I have read, and for several reasons I have found it a very difficult book to review. First, the book jacket touts it as "an invaluable reference for legal scholars and constitutional historians alike." I am neither. Rather I am a political historian who has long taught the years covered by this volume, and I have also written a huge tome on the Whig party, at least some of which Professor Currie apparently slogged through. Particularly for the audience of this list, I fear that my non-expertise in certain legal and constitutional areas puts me at a disadvantage. That is, I simply may not recognize some of Currie's interpretive breakthroughs.

Second, I best know the years between 1840 and 1861, but Currie instantly admits in his preface that the title of this volume is misleading. He has saved all the debates over slavery, slavery extension, and secession for a fourth volume in the series, a volume to which he constantly refers in notes but one that was unavailable to me. His rationale for this division of labor–other than the unwieldiness of a single volume on the whole period–stems from a clear chronological division in public policy disputes. From 1829 to 1845 the central theme of political/policy history was the Democrats' successful gutting of every element of Henry Clay's American System. That program advocated a national bank, protective tariffs, and federal subsidies of internal improvements or, as an alternative, the distribution of the revenue from federal land sales to the states so that they might fund their own internal improvement projects. To a political historian, little of this is news, but I must stress that Currie has unearthed the Democrats' constitutional justifications, in most cases bogus he concludes, for this Democratic negativism.

The third, and most significant obstacle for me in reviewing this book, is that it has no clear central thesis either to adumbrate or to assess. At the end of the book, as at the beginning, Currie insists that "we confirm the lesson of earlier installments in this series that members of Congress, Presidents, and other executive officers have a good deal to tell us about the Constitution that we cannot afford to ignore" (p. 279). And, indeed, this book does. Certainly I learned much from these pages, and I cannot imagine that a law professor with no familiarity with the pre-Civil War United States beyond the Nullification Crisis will not as well. But this is hardly a thesis to hold a book together. Instead, Currie's intention here, as apparently in his previous volumes, is to be encyclopedic: to discuss every constitutional argument made during congressional debates or explanations for actions from the executive branch in the period of years he investigates. In short, this is meant as a reference work, not a monograph with a coherent argument. To this non-expert he succeeds, but also makes his work very difficult to review critically. Hence I shall confine myself to summarizing briefly what he says and to give my own reaction to it as

a political historian, however uninformed I undoubtedly am as a legal or constitutional scholar.

The book has two sections. The first, occupying about two-fifths of the text, is labeled "Death of a System" and is devoted to Jacksonian Democrats' legislative annihilation of Clay's American System. Here Currie dismisses Jackson's constitutional case against the recharter of the Bank of the United States (BUS), in his veto message in July 1832, as balderdash, but he stresses that Jackson was correct in insisting that the President had every bit as much right as the Supreme Court in assessing the constitutionality of congressional legislation. In short, however dispositive the Supreme Court's decision in *McCulloch v. Maryland* (1819) may have been concerning the second BUS chartered in 1816, it had no jurisdiction over Jackson's veto of the recharter bill in 1832. Currie also emphatically upholds the constitutionality and legality of Roger B. Taney's (Jackson's third pick as Treasury Secretary) decision to remove federal deposits from the BUS in his proclamation of September 1833. The wording of the original charter, Currie points out in what was indeed news to me, allowed him to make that removal despite reports from congressional committees that the federal deposits were secure in Biddle's Bank.

In contrast, Currie rejects the validity of the Democrats' other constitutional arguments against the remainder of Clay's American system: federal subsidies for internal improvements or, alternatively, federal distribution of revenues from federal land sales to the states; and a protective tariff. On the former he stresses that Democrats plausibly, if incorrectly, argued that federal lands must be considered equivalent to federal funds in the treasury. Hence, if there was no constitutional authority to spend federal funds directly on internal improvements, there was no constitutional authority to do so indirectly by giving land revenues or land grants to the states. Nor did Democratic complaints, and especially those of South Carolina Nullifiers, about the unconstitutionality of protective tariffs hold much salt. Indeed, from my point of view, the single best chapter of the book, which is curiously ensconced under the title "Customs," provides a terrific analysis of the Nullification Crisis. But the bottom line, as Currie repeatedly notes, is that Democrats had the political power to get their way on Clay's system, no matter the dubiousness of some of their constitutional arguments.

This bracing survey of federal economic policy and the constitutional questions it raised at least in some politicians' eyes, constitutes the first four chapters of Professor Currie's volume. But they are followed by six chapters of mishmash, various topics he feels must be discussed because they raise, however obliquely, questions of constitutional interpretation that he wants to get out of the way before his next volume, which focuses on sectional disagreements over slavery and its extension. However understandable this division of labor may be to him, it is precisely what renders this present volume incoherent and so difficult to review.

These last six chapters cover constitutional disputes about the enumerated powers of the President and Vice President, including John Tyler's succession to the presidency in 1841; congressional debates about the constitutional grounds on which they might impeach federal judges; counter-arguments about expelling various members of Congress, including the notorious South Carolina Representative Preston Brooks who caned Massachusetts Senator Charles Sumner into bloody unconsciousness in the Senate Chamber on May 22, 1856; and congressional dickering over election disputes about their own members and the Speaker of the House.

All these last chapters make the book more inclusive, but less susceptible to a central interpretive argument. But there is no denying that political historians like me can learn much from these very learned chapters. Two examples must suffice. I personally had no knowledge of the apparently long debate in Congress about establishing a federal Court of Claims to relieve Congress from the necessity of passing individual bills of relief on every claim. The constitutional argument against it was twofold. Any such court that awarded claims violated the constitutional mandate that Congress must appropriate funds for all federal expenditures: that is, no federal court could award federal dollars without a specific act of Congress. Second was the argument that claims for payment from the federal government were not "cases" as defined by Article III. Congress dodged these complaints in its law of 1855 essentially by making the Court of Claims an advisory body to Congress. It passed its decisions along to that body, but Congress alone decided whether to appropriate any money to pay off the claim.

The second involves an act I do know about, but not, I confess, as much as Currie knows. In 1842 Congress passed a law that both increased the population count for each Representative in the House and required all states to hold congressional elections in individual districts rather than at-large. The vote on this measure was largely partisan, Whigs for, Democrats against. Several states simply defied it and maintained at-large districts in

1842-43 and 1844-45. I knew both of those things. What I did not know and what Currie shows so convincingly is that Democratic opponents of the bill had argued that it was unconstitutional because it forced state legislatures to draw congressional districts. States had constitutional autonomy they argued, and this act violated that autonomy. Nonetheless the act passed because Whigs, in the only time of the party's history, controlled both houses. Yet, when the next Congress met, after the congressional elections of 1842 and 1843, the new Democratic majority effectively nullified this law by admitting all Representatives chosen at-large, all of whom just happened to be Democrats. From then on, he says, the law was a dead letter. Still, I know of no congressional elections held after 1844-45 that were not on the district basis.

Clearly it is time for a summing up. First, I am not qualified to assess all that Professor Currie maintains. Second, this is meant to be a comprehensive reference work, not a thesis-driven interpretative analysis. Third, and here I say something different, the very topic of this work and its research base–grinding through those interminably boring congressional debates–could have resulted in an extraordinarily tedious book. This book is not, largely because of Professor Currie's lively, colloquial, and downright folksy prose. As I read, I circled numerous pungent, often hilarious phrases that I wanted to document. Limitations of space forbid such quotations; still, this is one good read!

Nonetheless, I must end with a complaint. Currie, while saying he admires Jackson's Whig opponents, gives unduly short shrift to their arguments. He is undeniably correct about the constitutional weakness of the Whigs' endless complaints about Jackson's and, I might add, every Democratic President's and every Democratic governor's, abuse of the veto power. This argument was bogus. But the Whig party formed in the Senate in the winter of 1833-34 around a different motto, announced that spring by Willie P. Mangum of North Carolina, whom Professor Currie incorrectly identifies as a Democrat in 1834. The issue, Mangum said, was not "Bank or No Bank," the Democrats campaign slogan in the presidential election of 1832. Rather the issue was: "Law or no Law; the Constitution or No Constitution." This was a response to Jackson's removal of the deposits, via Secretary of the Treasury Taney, by executive fiat. I have read tons of Whig private correspondence to Mangum and others. There can be absolutely no doubt that incipient Whigs believed this charge. Nor can there be any doubt that it was absolutely essential to building a previously unreachable anti-Jackson coalition among National Republicans, Antimasons, and southern Independent Sates Rights Men, as Mangum and five other southern Senators called themselves when Congress met in December 1833, three months after the announcement of removal. So, as a political historian, I ask why this assertion was not worthy of Curry's evaluation. Certainly it was made in Congress, as were many assertions he deigns to dismiss. Why not this one?

My own guess about the rationale for this slogan lies in the Whigs' hypersensitivity about the separation of powers. The original charter of the second BUS may well have given the Treasury Secretary authority to remove federal deposits for any reason, but the language he quotes from that law says nothing about the Secretary's authority to place federal funds in different banks. But that, of course, is what Taney announced; new federal revenues would be placed in five state banks he had chosen while the remaining federal funds in the BUS would be spent down. Usually considered broad constructionists of the Constitution, Whigs in fact insisted on the strictest construction of Article I, Section 1: "All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." By relocating federal funds in different banks, Taney had legislated by executive fiat. In short, he had violated the Constitution. Moreover, since the law he cited as justification for removal gave him no explicit authority to put federal funds in different private banks, he had acted illegally as well. This, at least, is what Whigs passionately believed.