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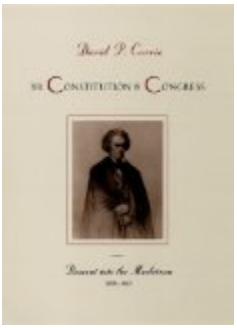
David P. Currie. *The Constitution in Congress: Descent into the Maelstrom, 1829-1861.* Chicago: University of Chicago Press, 2005. xviii + 322pp. $55.00 (cloth), ISBN 978-0-226-12916-7.



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Extrajudicial Constitutional Interpretation in Late Antebellum America

With *The Constitution in Congress: Descent into the Maelstrom*, David P. Currie, the University of Chicago's Edward H. Levi Distinguished Service Professor of Law, presents the forth volume of his ambitious study of extrajudicial constitutional interpretation throughout American History. Subscribers to H-Law will be familiar with Currie's work. He has written a prize-winning, two-volume account of the Supreme Court's constitutional interpretation across the centuries.[1] His current, multi-volume project delves into the arguments presented by representatives, senators, presidents, attorneys general, and, in the case of the present volume candidates for federal office (pp. xi n.1, 201-209). His work has uncovered a multitude of constitutional issues that never came before the Court and has explored the debates that defined the meaning of the Constitution for the first few generations of American policy makers. To date, Currie has produced book-length studies of extrajudicial interpretation under the Federalists, the Jeffersonians, and, most recently, the Democrats and Whigs.[2] Like the previous volume, *Descent into the Maelstrom* deals with the constitutional issues of the Jacksonian era (1829 to 1861 according to Currie's periodization). This book, however, focuses mostly on issues emerging after 1845 and contends mainly with the constitutional implications of territorial expansion and the related debate over slavery during that period.

Currie divides *Descent into the Maelstrom* into three parts (or more accurately, a lengthy prologue followed by two parts). The prologue covers issues concerning slavery and expansion that emerged between 1829 and 1844. In fifty pages, Currie explores the constitutional questions raised by the flood of antislavery petitions presented to Congress in the 1830s, the debate over slavery in the District of Columbia, the efforts to bar the mailing of abolitionist literature, the admissions of Arkansas and Michigan, the colonization movement, and state efforts to expel free blacks from their jurisdictions.

Part 1 takes up the subjects of diplomacy, territorial expansion, and the use of force, both domestically and internationally. Currie analyzes the constitutional arguments generated by the United States's relationship with Great Britain, Denmark, Nicaragua, Columbia, and especially Mexico as well as those raised by the Dorr Rebellion and the admission of Oregon. The highlight of this part centers on the debates over the reach of the president's power as commander-in-chief. Did this authority permit the executive to use the military in a manner likely to start a war? Or did such actions breach the constitutional provision that gave Congress authority to declare war? Neither Currie nor his sources resolve these questions, but his discussion proves fascinating nonetheless.

Part 2 engages the constitutional issues at stake in the deepening sectional crisis. Currie's account covers the legalistic discussions surrounding the Wilmot Proviso, the various components of the Compromise of 1850, the Kansas-Nebraska Act, the Mormon migration into Utah, and secession. All of these issues raised difficult questions concerning the federal government's relationship

to the states and territories and its ability to use force to quell insurrections or to hold the Union together. Exactly what sort of activity constituted an insurrection within the meaning of the Constitution? Which granted powers could the federal government use to forestall secession? Again, these issues remain largely unresolved in the book–although Currie presents a withering critique of President James Buchanan's arguments that the federal government could do nothing to stop succession.

Descent into the Maelstrom, while impressive in its coverage of the numerous constitutional issues that emerged in the three decades prior to secession, exhibits many of the same shortcomings that reviewers have identified generally in *The Constitution in Congress* series.[3] As with his earlier books, Currie refrains from an engagement with theory, even though his work contains obvious relevance to current debates about the composition of the constitutional canon or those exploring alternatives to judicial sovereignty.[4] Historians may well be more troubled by Currie's rigorous effort to separate doctrinal issues from the contexts in which they were in fact embedded. Currie explicitly disavows any intention to participate in historiographical debate (p. xiii); his interest begins and ends with legal doctrine. He thus sees no problem with citing twentieth-century Supreme Court rulings to evaluate the merits of positions taken in nineteenth-century constitutional debates. Currie also pays scant attention to the larger political context in which these debates raged. *Descent into the Maelstrom* covers a period that witnessed the collapse of the Whigs, the emergence of the Republicans, and the increase of southern power within the Democratic Party. Each of these developments was tightly linked to the central issues in the doctrinal debates that Currie so carefully analyzes, and any effort, from a historian's perspective, to examine the one without accounting for the other is flawed at the outset.

None of this criticism, however, should discourage scholars interested in antebellum law from reading this book. It is an impressive achievement. Currie's writing is lively; his self-described "kibitzing" (p. xi, n.1) is entertaining; and his accounts of the debates he covers are unfailingly fair. Like the rest of *The Constitution in Congress* series, *Descent into the Maelstrom* reveals the complexity of constitutional debate in the decades after the founding and underscores the seriousness with which people off the Court approached them.

Notes

[1]. David P. Currie, *The Constitution in the Supreme Court*, 2 vols. (Chicago: University of Chicago Press, 1985-1990).

[2]. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801* (Chicago: University of Chicago Press, 1997); *The Constitution in Congress: The Jeffersonians, 1801-1829* (Chicago: University of Chicago Press, 2001); and *The Constitution in Congress: Democrats and Whigs, 1829-1861* (Chicago: University of Chicago Press, 2005).

[3]. See Henry J. Bourguignon, Review of David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, *American Journal of Legal History*, 42, no. 3 (July 1998): pp. 322-324; H. Jefferson Powell, "The Province and Duty of the Political Departments," *University of Chicago Law Review*, 65, no. 1 (Winter 1998): pp. 365-386; Gaspare J. Saladino, Review of David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, *Journal of American History*, 87, no. 2 (September 2000): pp. 654-655; and Martin S. Flaherty, "Post-Originalism," *University of Chicago Law Review*, 68, no. 3 (Summer 2001): pp. 1089-1111.

[4]. See, e.g., J. M. Balkin and Sanford Levinson, "The Canons of Constitutional Law," *Harvard Law Review*, 111, no. 5 (March 1998): pp. 963-1024; and Larry D. Kramer, "We the Court," *Harvard Law Review*, 114, no. 1 (November 2001): pp. 4-169.

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