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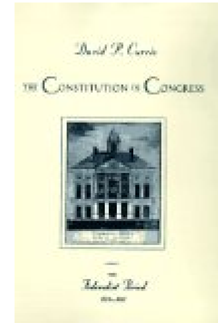
Gerhard Casper. *Separating Power: Essays on the Founding Period.* Cambridge, Mass.: Harvard University Press, 1997. vii + 202 pp. $28.00 (cloth), ISBN 978-0-674-80140-0.

David P. Currie. *The Constitution in Congress: The Federalist Period, 1789-1801.* Chicago: University of Chicago Press, 1997. xv + 327 pp. $39.95 (cloth), ISBN 978-0-226-13114-6.



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Bridging the Disciplinary Divide

Historians and constitutional scholars make competing claims to the history of the Constitution's framing, adoption, and early years of operation–and thus confront one another across a disciplinary divide. Historians regularly berate constitutional and legal scholars for their instrumentalist approach to constitutional history, for seeking to conscript the past in the service of the present. Constitutional and legal scholars retort that historians often engage in mere antiquarianism, deliberately disregarding the relevance of the Constitution's origins to modern constitutional controversies.

In recent years, however, historians and constitutional scholars have launched scholarly enterprises that seek to build bridges across that disciplinary divide. For example, in his Pulitzer Prize-winning *Original Meanings: Politics and Ideas in the Making of the Constitution*,[1] Professor Jack N. Rakove of Stanford University addresses contemporary concerns about using the history of the Constitution's origins in modern controversies and fruitfully mines the work of many legal theorists as well as that of historians. Furthermore, in his ongoing project, *We the People* (the second volume of which has just appeared),[2] the Yale constitutional theorist Bruce Ackerman draws on the work of historians as well as that of his colleagues in propounding what he offers as a historically-sensitive and intellectually-rigorous theory of constitutional interpretation and judicial review. The two works under review, both written by constitutional scholars, also seek to build bridges across the disciplinary divide.

I. Congress as Interpreter of the Constitution

David P. Currie is the Edward H. Levi Distinguished Service Professor and Shure Scholar in the Law School of the University of Chicago and the author of the award-winning two-volume *The Constitution in the Supreme Court*, among other books.[3] In this volume, apparently the first of a companion series, Currie claims that "[j]udicial review of legislative and executive action has been such a success in the United States that we tend to look only to the courts for guidance in interpreting the Constitution" (p. ix). Having chronicled the course of judicial interpretation of the Constitution for its first two hundred years, Currie now proposes to examine the record of constitutional interpretation by members of Congress. He cites two reasons for this enterprise, both of them sound. First, "legislative and executive records are apt to offer a useful preview of later judicial controversy" (p. ix). Second, "[b]efore 1800 nearly all of our constitutional law was made by Congress or the President, and so was much of it thereafter. Indeed, a number of constitutional issues of the first importance have *never* been resolved by judges; what we know of their solution we owe to the legislative and executive branches, whose interpretations have established traditions almost as hallowed in some cases as the Constitution itself" (p. x).

Currie rightly notes that the period central to this volume–the era between the launching of the constitutional system in 1789 and the inauguration of the Jefferson administration in 1801–is especially significant for those who study congressional interpretation of the Constitution. The first six Congresses were the first bodies to confront many unresolved issues of how the Constitution should be interpreted and how the system of government it authorized should operate.

The Constitution in Congress falls into two parts. Part One, covering approximately two-fifths of the book (pp. 1-122), focuses on the First Congress, which met from 1789 to 1791. The importance of this Congress for the history of the Constitution cannot be overstated–not only did it devise and propose the first proposed amendments to the Constitution, including the ten that became the Bill of Rights and the still-controversial Twenty-seventh Amendment, but it also created the first executive departments, framed the Judiciary Act of 1789, and resolved issue after issue having to do with the workings of the untried constitutional system.[4] Part One of Currie's book is a valuable reference guide to this complex history of the First Congress's struggles with the Constitution, which will be indispensable to all historians of that Congress as well as students of constitutional history. Part Two treats the Second through Sixth Congresses in similar fashion, and may well outstrip Part One in its originality and usefulness. Simply put, there is nothing like Currie's book in its detailed and careful examination of the available sources and its tracing of the lines of evolving constitutional interpretation.

The Constitution in Congress is not without its problems for historians, however. For one thing, Currie often insists on appending morals to his fables, as it were; he cannot resist drawing consequences for present-day doctrinal controversies from his accounts of the battles within the early Congresses. The most glaring example occurs early in his book, in the decision by the first House of Representatives to appoint legislative chaplains and open its sessions with prayer. Currie interprets the decision from the perspective of the Supreme Court's decision in *Marsh v. Chambers* (1983) holding that the naming of legislative chaplains does not violate the establishment clause of the First Amendment (pp. 11-13). Here, and elsewhere in this volume, Currie's position has two weaknesses. He tends to assume that these early Representatives and Senators approached the task of interpreting the Constitution with the single-minded seriousness of purpose and disinterested perspective that we associate with judicial interpretations of the document. Most historians would point out in response, however, that often these Representatives and Senators either were not aware of the potential doctrinal consequences of their decisions or that they were actuated by motives rooted in partisan considerations at least as much as, if not more than, disinterested consideration of the issue of constitutional interpretation and its consequences. Often, Currie makes a hasty bow in the direction of political context, but far more often he treats the early congressional interpretations of the Constitution in a political vacuum. These shortcomings of Currie's interpretative stance lessen the value of his work for historians of the constitutional system and the political development of the early American republic.

II. Uncertainties and Adaptations: Interpreting Separation of Powers

In contrast to Currie's volume, which surveys the whole range of issues of constitutional interpretation as grappled with by the first six Congresses (though the executive branch occasionally makes a walk-on appearance in Currie's pages), *Separating Power: Essays on the Founding Period* examines one category of issues of constitutional interpretation as dealt with by all the institutions of the early federal government. Although not as thorough or self-consciously rigorous as W.B. Gwyn's *The Meaning of the Separation of Powers*[5] or M.J.C. Vile's *Constitutionalism and the Separation of Powers* (now available in an expanded edition published by Liberty Fund),[6] Gerhard Casper's small, elegant volume is a valuable contribution to the field.

It is tempting to suggest that Currie's and Casper's books herald a new "Chicago school" expounding the virtues of historically-informed constitutional interpretation. (When we add in Rakove's *Original Meanings*, which is the work of a historian who, though not associated directly with the University of Chicago, grew up in that city and regularly describes himself as a Chicago Cubs fan and a Daley Democrat, the temptation is almost irresistible.) Casper, now the President of Stanford University, long taught constitutional law at the University of Chicago and was a coeditor with the late Philip Kurland of the *Supreme Court Review*. In the volume under review, he now collects five gracefully written and thoughtful essays, all of them previous published in law reviews (see Casper 191 for publishing details) on the problem of separation of powers in the founding period.

Casper warns the reader, "The chapters in this volume were conceived as essays and claim to be no more." Quoting Justice Felix Frankfurter, Casper further notes

that "the essay is tentative, reflective, suggestive, contradictory, and incomplete. It mirrors the perversities and complexities of life" (p. 6). In some ways, his comments have to do with the substance of the doctrine of separation of powers in the Revolutionary, Confederation, and early national periods as well as the form of his writings. Challenging several modern constitutional theorists who insist that the framers and ratifiers of the Constitution approached issues of separation of powers with theoretical strictness and bright-line precision, Casper instead argues that problems of separation of powers posed a host of difficulties for the Revolutionary generation, that these constitutional thinkers often did not approach these problems with the academic rigor beloved of those modern scholars who invoke them for one or another position on modern issues of separation of powers and checks and balances. Rather, as he notes, "the very centrality of the separation of powers doctrine in the last quarter of the eighteenth century quickly produced a sharpened sense of its uncertainty as the 'first constitutional generation' encountered specific tasks of governmental organization and statecraft. Indeed, the doctrine itself mirrored the complexities of life and its symbolisms. It was 'tentative, reflective, suggestive, contradictory, and incomplete.' It did not provide a clear-cut major premise for syllogisms concerning the organization of government. A review of early theory and practices suggests that we should be reluctant to tie separation of powers notions to their very own procrustean bed" (p. 6).

The five essays collected in *Separating Power* examine a series of constitutional and political problems, some of them familiar and others seemingly obscure, but all providing valuable illumination of the task confronting the Revolutionary generation of Americans as they tried to give meaning to a doctrine that many of them espoused in theory but struggled with in practice. In his first essay, Casper examines ideas of separation of powers in the era of constitution-making from 1776 through 1789; though much of the ground he covers will be familiar to readers of Gwyn and Vile, his distillation of the problems is valuable for its lucidity. Casper's second essay examines the conduct of government in the Washington Administration, including such issues as how the executive and legislative branches communicated with each other, the establishment of the executive departments, and the consequences for separation of powers of the Washington Administration's attempts to resolve the problems of the Algerian captives. His third essay provides a valuable and illuminating treatment of issues of government appropriations of funds in the early national period. His fourth essay examines Thomas Jefferson's struggles with separation of powers as politician, Cabinet Member, Vice President, and President, showing the difficulties that this doctrine and its permutations posed for one of the most enigmatic statesmen of the Revolutionary generation. Finally, he examines the Judiciary Act of 1789 and its consequences for the federal judiciary's place in the Constitution's scheme of separation of powers and checks and balances.

Specialists in the history of the early American republic will find more the comfortingly familiar than the startling and unfamiliar in Casper's pages, but they will benefit from his engagingly modest and reflective examination of these questions, so different from the more polemical and insistent tone of the modern law reviews' debates over separation of powers. Further, Casper is more sensitive and attuned to the political dimension of questions of constitutional interpretation in this early period than Currie is. It should be noted, however, that the essays in *Separating Power* occasionally bear some of the flaws of their first appearances in law reviews.

Historians have often had reason to complain of the ways in which law-review articles on historical subjects are lacking as historical scholarship. Whether because legal scholars themselves tend to focus on primary sources rather than interpretations in scholarly literature, or because the student editors are more comfortable (on the analogy between primary historical sources, on the one hand, and statutes and cases, on the other hand), Casper's essays tend to slight or overlook the valuable resources to be found in the historiography of the early national period and the first years of the constitutional system. Casper cites far more law-review articles from modern debates on separation of powers than he does historians' treatments of the workings of government. (To a lesser extent, the same problem afflicts Currie's *The Constitution in Congress*.) Moreover, Casper unfortunately often uses outmoded editions of primary sources, whereas such modern editions as the *Documentary History of the Ratification of the Constitution*, the *Documentary History of the First Federal Congress*, and the *Documentary History of the Supreme Court of the United States* would have provided him not only with accurate and reliable texts of primary sources but also with valuable guidance as to how historians have evaluated those sources and the stories they tell.

Conclusion: The Promise of Bridging the Gap

These, however, are comparatively minor caveats, and should not detract from the intrinsic value of these

fine books and from the promise they hold of a future in which historians and constitutional scholars continue to address and enlighten one another across the narrowing disciplinary divide.

Notes

[1]. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996; Vintage paperback, 1997).

[2]. Bruce Ackerman, *We the People: I. Foundations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991); Bruce Ackerman, We the People: II. Transformations (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998). Volume III, tentatively subtitled *Interpretations*, is in progress.

[3]. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (Chicago: University of Chicago Press, 1985); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* (Chicago: University of Chicago Press, 1990).

[4]. For a succinct treatment, see Charlene Bangs Bickford and Kenneth R. Bowling, *Birth of the Nation: The First Federal Congress, 1789-1791* (Madison, Wis.: Madison House, 1989).

[5]. W. B. Gwyn, *The Meaning of the Separation of Powers*, Tulane Studies in Political Science, IX (New Orleans: Tulane University Press, 1965).

[6]. M. J. C. Vile, Constitutionalism and the Separation of Powers (Oxford: Clarendon Press of Oxford University Press, 1967; expanded ed., Indianapolis: Liberty Fund, 1998).

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