

The Province and Duty of the Political Departments

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The Constitution in Congress: The Federalist Period, 1789-1801.
David P. Currie. The University of Chicago Press, 1997. Pp v, 327.

The discussion apparently took up most of the legislative day. The issue before the House of Representatives involved a proposal to prohibit the involvement of certain federal revenue agents in electoral politics other than by casting their own votes. Supporters warned of the threat to free elections posed by official electioneering based on knowledge gained through public service or influence wielded through public office. They denounced the unfair political advantage an unscrupulous President could gain by having subordinates pursue the President's political goals, and they pointed out the vulnerability of government employees to political pressure from their superiors. Indeed, some members called for the extension of the electioneering ban to all revenue agents, or even to all federal employees.

Critics of the proposed ban argued that the proposal would be an unconstitutional denial of the right of free expression, that its exclusion of the affected officials from the sphere of electoral politics was tantamount to a denial of their right to vote itself. The practical result of its adoption, they warned, would be the very corruption of the public service that the proponents of the ban feared: only those so lacking in public spirit as to be suitable tools for an unscrupulous administration would undertake public service at the expense of their public rights to participate fully in the political process.

In response, the proponents of the electioneering ban rejected the charges of unconstitutionality. Some objected to the notion that the ban would even touch on individual rights: the proposal would leave those affected with the same right to vote as any other citizen, and the restriction on political activity would be the result of the individual's free decision to accept government employment. Others conceded that the ban would interfere with free

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speech, but defended the interference as a justifiable balancing of individual right and public necessity.

In the end, the House rejected the proposal.

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These arguments, for and against, are familiar ones. The twentieth century has seen repeated debate over the wisdom and constitutionality of legal restrictions on the participation of public employees in political activity. The Supreme Court has consistently rejected constitutional attacks on such restrictions, but only over vigorous dissents.¹ The majority's reasoning in those cases has been the subject of vigorous criticism by commentators,² and Congress's decision in 1993 to "eliminate[] many of the restrictions that had previously cabined the political activities of federal employees"³ may have been motivated, at least in part, by concern over the validity of such restrictions. But Congress did not repudiate wholesale the arguments supporting restrictions on the political conduct of federal employees: "some political activities remain generally impermissible for all federal employees and some federal employees must continue to observe stringent limitations upon involvement in the political process."⁴ What Justice Douglas once called "this old problem"⁵ has certainly not gone away, and it is a safe bet that future discussion will largely revolve around the contentions, both pro and con, that I outlined above. What could be surprising, however, is the vintage of the arguments, none of which was original to the New Deal-era Congress that enacted the modern federal statutory scheme or to the Supreme Court justices who have since considered the scheme's validity. As with so many other important constitutional issues of contemporary importance—as Professor David P. Currie has now demonstrated—the terms of debate were set two centuries ago by the Congress of the 1790s (in this particular instance, the House of Representatives of the First Congress).⁶ Professor Currie's new

¹ See *United States Civil Service Commission v National Association of Letter Carriers*, 413 US 548, 568-81 (1973) (upholding provisions of federal Hatch Act); *United Public Workers v Mitchell*, 330 US 75, 93 (1947) (same), overruled on other grounds by *Adler v Board of Education of City of New York*, 342 US 485 (1952); *Broadrick v Oklahoma*, 413 US 601, 618 (1973) (upholding state law restriction).

² See, for example, *The Supreme Court, 1972 Term*, 87 Harv L Rev 57, 141-53 (1973).

³ Responsibility for Issuing Revised Hatch Act Regulations, 18 Op Off Legal Counsel No 19, 1994 OLC LEXIS 1, *2-3 (1994) (describing Pub L No 103-94, 107 Stat 1001 (1993)).

⁴ *Id* (citation omitted).

⁵ *National Association of Letter Carriers*, 413 US at 600 (Douglas dissenting).

⁶ The arguments I paraphrase at the beginning of this review were made in the House on January 21, 1791. Those interested in exactly who said what should consult Joseph Gales, Sr. and William Winston Seaton, eds, 2 *Annals of Congress 1789-1791* (Gales and Seaton 1834) ("Annals"), or, of course, Professor Currie's book. See David P. Currie, *The*

book, *The Constitution in Congress: The Federalist Period, 1789-1801*, is the latest installment in an extraordinary project, an attempt to canvass the entire sweep of United States constitutional argument over the past two centuries. The Supreme Court's dealings with the Constitution from the beginning through the appointment of William H. Rehnquist as Chief Justice already have been the subject of two exhaustive and award-winning volumes.⁷ Currie has now turned his attention to the history of constitutional interpretation by the legislative branch of the federal government, and with welcome results. *The Constitution in Congress* displays the same energy and verve that characterized the earlier books, but it is perhaps a contribution of even greater significance. The constitutional law of the Court is relatively well known to lawyers and scholars, although the scope and detail of Currie's books on the Court will repay close attention by even the most learned constitutionalist. But except for a few isolated and well-worn episodes such as the so-called "Decision of 1789" or the House's consideration of what became the Bill of Rights, the history of the First Congress's discussions of constitutional issues is obscure to most of us. The debates of later Congresses have been almost entirely *terra incognita*. Currie's book illuminates this history, and in doing so demonstrates the crucial role of the early Congresses in the formulation of the law of the United States Constitution.⁸

The primary goal of this review is to persuade those who read it to read Professor Currie's book. As encouragement, therefore, in Part I, I discuss a few of the many riches *The Constitution in Congress* has to offer. In Part II—fulfilling the reviewer's obligation to be critical!—I address the limitations of the book. With the stage set, I turn in Parts III and IV to the question of why I be-

Constitution in Congress: The Federalist Period, 1789-1801 62 (Chicago 1997) (All parenthetical page references are to this book.). Currie notes that "the First Congress gave us a concise but cogent preview of the arguments that were to be made many years later with respect to the Constitutionality of the Hatch Act" (p 62) (footnote omitted). See also Linda Grant DePauw, ed, *The Documentary History of the First Federal Congress of the United States of America* (Johns Hopkins 1972).

⁷ David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (Chicago 1985); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* (Chicago 1990). The first volume won the Benchmark Book Award for 1985-1986. As with *The Constitution in Congress*, portions of these volumes appeared in law reviews before being published as complete works.

⁸ Currie is not, of course, the first scholar to take a broad interest in the early Congresses' dealings with the Constitution. Particularly worthy of mention are Charles S. Hyneman and George W. Carey, whose *A Second Federalist: Congress Creates a Government* (Appleton-Century-Crofts 1967) remains a valuable collection of excerpts with commentary from congressional debates from 1789 to the early 1820s.

lieve Currie's book is of the greatest importance for contemporary constitutional discussion. By uncovering the centrality of Congress to the Constitution's past, I conclude, Currie has pointed the way toward a renewed engagement, on the part of the Congress and the President, in the shaping of the Constitution's future.

I

In the preface to *The Constitution in Congress*, Professor Currie points out the volume of material relevant to his project that is produced by Congress and the executive branch: "from statutes and legislative hearings, reports, and debates to presidential messages, proclamations, and opinions of the Attorneys General, to mention only a few" sources (p ix). He wryly notes the resulting labor-intensive nature of his work: "The very profusion of this material means that one must often do a good deal of sifting in order to uncover the treasure. Yet that was equally true at Sutter's Mill, and here too there is plenty to be uncovered." (p ix). One of the greatest virtues of Currie's book, and perhaps the hardest to convey in a review, is the thoroughness of his sifting and the amount of gold he has discovered.

The Constitution in Congress identifies and analyzes what Currie himself terms the "breathhtaking variety of constitutional issues great and small" that were addressed by the political branches during the first twelve years of government under the present Constitution (p 296). The majority of these issues, and of the attempts by Congress and the executive to resolve them, will probably be new to most readers. We learn, for example, about the constitutional difficulties the First Congress encountered in addressing the seemingly "humble problem of how to comply with Article VI's requirement that its members be 'bound by oath or affirmation to support this Constitution'" (pp 13-15). The business of establishing a new post office led the Second Congress to debate the validity of delegating legislative powers to an executive officer and the relationship between charging a fee for a public service and freedom of the press (pp 146-51). At the beginning of the Third Congress, the House of Representatives extensively debated the constitutionality of seating a representative from the Southwest Territory as a nonvoting delegate (pp 200-03).⁹ The correct

⁹ Currie notes that the debates over seating the Southwest delegate went unmentioned in the recent decision upholding the House's 1993 grant of voting rights in the Committee of the Whole to territorial delegates (p 203 n 237) (discussing *Michel v Anderson*, 14 F3d 623 (DC Cir 1994)), a decision that draws distinctions by fiat that the members of the Third Congress debated substantively.

interpretation of the Emoluments Clause of Article I, Section 9,¹⁰ a matter of recurrent concern for the executive branch,¹¹ was the subject of vigorous disagreement in the Sixth Congress (pp 281-84).

The care with which Currie has surveyed his material is matched by the precision with which he draws his conclusions about the meaning of congressional debates and actions. While one is seldom in doubt as to Currie's own constitutional views, one is never given reason to fear that those views are being read into the 1790s. Currie is particularly scrupulous not to misstate the ambiguity of some debates and events. Currie gives, for example, a careful analysis of the "illuminating" arguments in the House and before the Senate over the constitutionality of impeaching Senator William Blount (pp 275-81), but admits that "[u]nfortunately, we do not quite know why" the Senate dismissed the impeachment (p 275); the common later assumption that the Senate based its action on the conclusion that members of Congress are not "officers of the United States" within the meaning of the impeachment provisions may well be right, but it cannot be proven (pp 280-81).

Currie's results, furthermore, are not of merely antiquarian interest. Many of the topics the members of Congress addressed in the 1790s, to be sure, are ones we no longer debate at the end of the twentieth century. Even after *United States v Lopez*,¹² congressional authority to prevent the introduction of disease from foreign vessels seems unquestionable, although the Fourth Congress not only doubted, but apparently rejected, the applicability of the commerce power to the subject (pp 227-28). But to a surprising extent, the 1790s discussions speak directly to 1990s problems. One of many possible examples from Currie's book will, I hope, whet the reader's appetite.

As mention of the *Lopez* decision probably reminded the reader, the past few years have seen a dramatic resurgence in the Supreme Court's interest in enforcing the limits on Congress's powers that derive from their enumeration in Article I and from the federal structure of the Republic.¹³ This judicial development

¹⁰ "[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State." US Const, Art I, § 9, cl 8.

¹¹ See, for example, Foreign Diplomatic Commission, 13 Op Atty Gen 537 (1871); Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op Off Legal Counsel No 9, 1993 OLC LEXIS 9 (1993).

¹² 514 US 549, 567-68 (1995) (holding the federal Gun-Free Schools Zone Act to be beyond the scope of the commerce power).

¹³ In addition to *Lopez*, see, for example, *Seminole Tribe v Florida*, 116 S Ct 1114, 1131-

has been paralleled by expressions of heightened concern over the bounds of federal authority in both Congress and the executive branch.¹⁴ At the same time, all three branches continue to act with great frequency on the assumption that the federal government's legitimate range of concerns encompasses all matters involving the general welfare.¹⁵ This evident desire to identify some legal limits to Congress's authority without entirely overthrowing the New Deal-era validation of activist national government lends heightened interest to the 1790s efforts to reconcile the exercise of federal power with the preservation of state governmental autonomy.

From the beginning, Currie informs us, Congress acted on the nationalist assumption that it could employ an enumerated power to achieve ends unrelated to the power's apparent purpose. Early in the First Congress, for example, tariff and tonnage laws were proposed and adopted that had the promotion of domestic agriculture, industry, and shipping as an explicit goal. Some proponents justified the laws as revenue measures—which in form they were—while others based the authority to enact them in the For-

32 (1996) (holding that Congress cannot strip the states of sovereign immunity in federal court pursuant to the Indian Commerce Clause or, apparently, any Article I power); *New York v United States*, 505 US 144, 161 (1992) (holding that the commerce power does not authorize Congress to "commandeer" the states' political processes).

¹⁴ Recent volumes of the Congressional Record are replete with invocations of the constitutional limits on congressional power. See, for example, 143 Cong Rec H 3096, H 3099 (May 21, 1997) (remarks of Representative Donald Manzullo) (opposing a bill because "[i]t is not a Federal matter. . . . There is absolutely no connection with interstate commerce. . . . [Amending the bill to limit it to situations involving interstate commerce] would give a jurisdictional basis so that this Congress can constitutionally act within the parameters of what we are bound by. That is the Constitution."); Id at H 3100 (remarks of Representative Melvin Watt) ("We have no jurisdiction. It is unconstitutional, probably, for us to do that, to take an issue that has no connection with the Federal Government and turn it in such a way that we preempt all State law."). At the time of writing, there is a bill before Congress, styled the "Tenth Amendment Enforcement Act," that would commit Congress, whenever legislating, to make specific citations to the constitutional source of its authority and factual findings supporting its legal conclusion. See S 2156, 104th Cong, 2d Sess (Sept 28, 1996), in 142 Cong Rec S 11720, S 11724 (Sept 28, 1996).

In 1987, President Reagan issued an executive order requiring the executive branch to be guided by "fundamental federalism principles" in the formulation and administration of regulations and in proposing legislation to Congress. See Exec Order No 12612, 3 CFR 252, 253 (1987). His successors have made similar public statements of the importance of adhering to the constitutional limitations on national authority. See, for example, Exec Order No 12803, 3 CFR 296, 296-97 (1992) (President Bush) (directing regulation of federally financed "infrastructure assets" in ways "consistent with the principles of federalism enumerated in Executive Order No. 12612"); White House press briefing, 1994 WL 28008, *3 (Feb 3, 1994) (statement of President Clinton's deputy assistant for domestic policy) (explaining that an administration-supported bill "respects the principles of federalism in which the President, as a former governor, deeply believes").

¹⁵ See, for example, *South Dakota v Dole*, 483 US 203, 207 (1987) (holding that Congress may use its spending power to accomplish purposes involving the general welfare).

ign Commerce Clause; under either rationale, Congress was using an enumerated power to address matters on which it could not directly legislate (pp 56-60). Currie's summary of the constitutional significance of the debates over and passage of the tariff and tonnage measures precisely states the logical implications of Congress's actions without overreading them: "At the very least . . . [the statutes] demonstrate that the First Congress took a broad view of the purposes for which it could regulate commerce; and those who would later argue that the tax power could be exercised only for revenue purposes would have a good deal of explaining to do." (p 60).

As Currie sometimes observes, the proponents of broad federal authority frequently had respectable bases for their positions in the constitutional text.¹⁶ But "[i]ssues of states' rights were never far beneath the surface during the 1790s" (p 150), and rightly so in Currie's judgment: giving a broad interpretation to the power-granting provisions of Article I "confer[s] a power that, as experience has taught, goes far to break down the Constitution's carefully crafted limitations on federal authority" (p 69). The potential for this result was identified at once, and throughout the 1790s the means for avoiding it were often debated.

Members of Congress often maintained, unsurprisingly, that the enumerated powers must be given a fairly literal reading as a simple matter of fair construction of the text, although they sometimes made the more sophisticated argument that overly broad constructions would undermine the limiting force of enumeration itself.¹⁷ The latter point is one that (with suitable adjustment for very different assumptions about the baseline of express powers) the Supreme Court recently revived in the *Lopez* decision.¹⁸

Not all debate over the limits of congressional power was conducted in a textual modality. Although legislation enacted by the First Congress ostensibly imposed duties on state officials without known constitutional objection (for example, pp 86-87) (requirement that state officers prosecute criminal offenses occurring on Indian lands), thereafter the contention was made with some frequency that the Constitution does not empower Congress to co-opt the machinery of state government in order to carry out

¹⁶ See, for example, p 59 ("[S]o far as the text is concerned, Article I could easily be read to permit Congress to levy taxes in order . . . to promote 'the general welfare'—in other words, for any reason that was good for the nation as a whole.").

¹⁷ See, for example, p 72 (spending power not a power to loan federal funds); p 79 (power to borrow money not a power to create a bank from which to borrow funds); p 150 (power to create a system of carrying the post not a power to create a system of passenger transportation).

¹⁸ See 514 US at 557-58.

federal policy (for example, pp 137-38, 158 n 194, 228-29): the constitutional doctrine of *New York v United States*¹⁹ has a basis, albeit an ambiguous one, in the deliberations and actions of the early Congresses. In contrast, the argument that state sovereignty can actually render invalid an exercise of federal power that is within the sphere of Congress's delegated powers—an argument periodically advanced and then abandoned by the Supreme Court²⁰—is not a prominent feature in the debates of the 1790s. When Congress is affirmatively authorized to act, the witness of the early Congresses suggests that state sovereignty must yield, which is, to be sure, a strong argument for being careful in defining when in fact the Constitution authorizes Congress to act.

II

In the introduction I promised the reader some comments about the limitations of Professor Currie's book—no mean promise to fulfill about so admirable a piece of scholarship. But limitations there are. The most important I point out without intending any criticism, because it is not a fault but a necessary condition of the enterprise itself: Currie's book is a *guide* to Congress's debates, not a restatement of the debates themselves, and reading it is not a substitute for turning to the original sources. To be more precise, reading the book is not always a substitute. At times—the First Congress's debate over restricting federal employees' political activities is a good example—the discussion is so rich, but reported in so telegraphic a fashion in the *Annals of Congress*, that Currie's summary encapsulates virtually all of interest (p 62). More commonly, however, Currie provides a syllabus of the issues discussed that is sufficient to lead the reader to and through the original debates without attempting to relate every detail of what are sometimes remarkably detailed discussions. The reader with a particular interest in, say, the meaning of the First Amendment will want to turn to the *Annals'* lengthy account²¹ of the House's

¹⁹ 505 US 144 (1992).

²⁰ For the latest round of articulation and rejection, see *National League of Cities v Usery*, 426 US 833, 852 (1976) (advancing the argument), overruled by *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 531 (1985). In light of the *Garcia* dissenters' promise to try again, as it were, see 469 US at 580 (Rehnquist dissenting), there is no reason to think the debate is over. *New York v United States*, it should be noted, does not rest on this sort of claim: the Court's opinion in that case was careful to describe congressional "commandeering" of the states' political mechanisms as beyond the sphere of authority delegated to Congress, not as the violation of a state "right" or "immunity" parallel to the individual constitutional rights protected by Article I, § 9 and the Bill of Rights. 505 US at 155-56.

²¹ See 8 *Annals* at 2093-2114, 2115-16, 2133-71 (cited in note 6).

raucous consideration of the 1798 Sedition Act, with his or her copy of *The Constitution in Congress* open to Currie's useful outline (pp 260-62).

Professor Currie scarcely could have proceeded with this undertaking at all if he had attempted to delineate every feature of the discussions he analyzes. I am not as sure that another quality sometimes found in the book is equally intrinsic to his project. In the preface, Currie explains his goal, not "to improve upon" the extensive work historians and political scientists have done on the early Congresses, but

to discuss the same material from a legal perspective, for constitutional questions are, among other things, legal questions. I am interested in congressional and executive interpretations of the Constitution precisely because and to the extent that they contribute to the development of legal doctrine; from that point of view they have not received the attention they deserve (p x).

Currie's intention is to write constitutional history as a lawyer, which, as Philip Bobbitt recently has reminded us, is a quite different enterprise from history written as history, and must be judged therefore by different criteria.²² Currie writes out of the conviction "that both Congress and the Executive have a great deal to tell us about the Constitution" (p x); in other words, that things said by the long-dead statesmen of the 1790s are relevant to the present-day task of interpreting the Constitution at the end of the 1990s.

Amen to that. As I shall explain in the next section of this review, I am in complete accord with Currie's convictions on the matter. But Currie's appropriate focus on the legal side of the materials he surveys, and his equally appropriate (ultimate) goal of serving constitutional interpretation now, sometimes lend his analysis an unnecessarily narrow flavor. Currie's reader is unlikely to grasp the fact that the constitutional arguments over Congress's legal authority to charter a national bank were wrapped in a wider ideological debate over the meaning and preservation of a free constitutional order.²³ While Currie does a mas-

²² Bobbitt writes of lawyers' constitutional history that "one should not read [it] for a scholarly article by a historian. It is more, and less. Law review articles are examples of criticism and it is by the standards of criticism that they should be judged." Philip Bobbitt, *Reflections Inspired by My Critics*, 72 *Tex L Rev* 1869, 1892 (1994) (footnote omitted). (I perhaps should add that Bobbitt is referring in particular to some of my own work, but his point is perfectly general.)

²³ Currie discusses the bank bill debates at pp 78-80. For the ideological context of the debates, the best discussion in my judgment remains Lance Banning, *The Jeffersonian Per-*

terful job of summarizing the legal arguments and partisan wrangling in the early congressional discussions of Article I, Section 8's reference to "the general welfare" (see pp 59-60, 69-73, 188-89, 222-25), I believe that he understates the role a broader, principled nationalism played in expansive readings of congressional authority.²⁴ Again, the role of what G. Edward White has labeled the "coterminous power theory"²⁵ in the constitutional debate over a federal common law of crimes goes almost unmentioned in Currie's brief references to that issue (pp 179-80, 273 n 299).

In response to these complaints, one might argue that Currie's declared interest in this book is not in ideology or political theory but in law. That response, however, is somewhat beside the point. The early Congresses were participants in the very process that created later distinctions among ideology, theory, politics, and law. The presence of what now appear to us to be non-legal elements in early constitutional debates are not, or not necessarily, lapses in logic: they may indicate rather that the speaker

suasion: Evolution of a Party Ideology (Cornell 1978).

²⁴ In discussing a 1796 debate over Congress's power to provide disaster relief for fire-devastated Savannah, for example, Currie dismisses "the wily Federalists" who argued in support of congressional authority as "hoping to slip this one by on sympathy grounds, only to employ it mercilessly as a precedent later on," while their constitutional arguments amounted to "muttering vaguely about restoring commerce, revenue, and defenses" (p 224) (footnote omitted). The arguments Currie thus depreciates do not seem exceptionally vague to me. The supporters of the relief bill reasoned that since Savannah

was a considerable commercial city, and by that fire a very material part of our revenue was sunk, and if [Savannah] could not obtain necessary assistance, it would be felt more than the grant of this sum to its support. It would be the general interest of the Union to restore that trade as soon as possible.

6 *Annals* at 1716 (cited in note 6) (remarks of Representative William L. Smith). Surely this was a tolerably clear claim that, in constitutional terms, the relief bill was a necessary and proper means to restoring federal revenue and perhaps to the enhancement of interstate and foreign commerce as well.

My point is not to quibble over Currie's usually adept characterizations of individual arguments, but rather to suggest that he seems somewhat opaque to the presence in Congress of a substantial body of opinion that rested on an approach to the Constitution rather different from Currie's assumptions about the centrality of "the Constitution's carefully crafted limitations on federal authority" (p 69). A good example of this early nationalism, one I do not believe Currie discusses, is Richard Bland Lee's 1794 speech on "the intention of the Constitution," in the course of which Lee insisted that Congress's "various powers" were to be interpreted in light of the people's intent in adopting the Constitution to remedy generally the ills of 1780s American society. See 4 *Annals* at 258-67 and especially 261-62 (cited in note 6).

²⁵ G. Edward White, *Recovering Coterminous Power Theory*, 14 *Nova L Rev* 155, 156 (1989). Professor White argues, convincingly in my judgment, that most founding-era constitutionalists assumed that "in any 'effective' republican form of government, the power of the judiciary would necessarily be coterminous with the powers of the legislature, and vice versa." *Id* at 160.

did not accept a twentieth century definition of the difference between law and politics. Precisely because his purpose is to enable the 1790s debates to inform 1990s legal argument, Currie's project demands that he take a broader view of his subject than on occasion he seems to do.

A reviewer intent on finding grounds for complaint could also round up the usual suspects. Professor Currie omits some matters that I would have included, for example, the executive's 1794 invocation of constitutional privilege to justify withholding some diplomatic papers demanded by the Senate.²⁶ He downplays some of the 1790s episodes that most interest, well, me: he gives almost no space to one of the proof texts of presidential power over foreign affairs, John Marshall's famous speech in 1800 in which he described the President as "the sole organ of the nation in its external relations."²⁷ Indeed, as a general matter, Currie sometimes seems relatively uninterested in executive branch thinking. His comments about the cabinet opinions on the validity of the national bank act (the opinions "echoed" and "expanded on" arguments made in Congress) (p 80) understate greatly the originality and importance of the opinions. And from time to time I disagree with the normative views on the Constitution's meaning that Currie expresses. But these are quibbles: read with an awareness of Currie's goals, *The Constitution in Congress* is a marvelous *vade mecum* to our now-distant constitutional origins.

III

Suppose it to be true, as Currie asserts, that the First Congress employed "[m]ost of the tools we recognize today" (p 117), and that "[t]he quality of [its] constitutional debates . . . was impressively high" (p 118). Assume, as Currie argues, that between 1789 and 1801, "Congress and the executive resolved a breathtaking variety of constitutional issues great and small" (p 296). So what, the skeptic yawns, what difference does any of that make for us, today? Oh, it might look good in a brief or article to support one's argument with a suitable quotation from some early congressional debate, but that is window dressing, the sort of attractive but ultimately dispensable polish a classy lawyer gives his or her work whenever possible. It doesn't get to the heart of any cur-

²⁶ The best discussion of the event is in Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 83-85 (Ballinger 1976). Currie does not seem to address it.

²⁷ *Speech, March 7, 1800*, in Charles T. Cullen, ed, 4 *Papers of John Marshall* 104 (North Carolina 1984). Currie mentions the speech in an unrevealing footnote (p 274 n 308).

rent constitutional controversy, where what matters are Supreme Court opinions and, just maybe, historical data about the views expressed in the Philadelphia convention and during the struggle over ratification.

The first line of response to our skeptic's challenge is that the early congressional debates are themselves witnesses to the Constitution's original meaning. "[T]hey cast light upon contemporaneous understanding of the Constitution" (p 120); "They also afford important evidence of what thoughtful and responsible public servants close to the adoption of the Constitution thought it meant. . . . [which] is surely of interest not only to historians but also to anyone trying two hundred years later to figure out what the Constitution means." (p 122). As Currie notes, the efforts by members of the 1790s Congresses to understand and apply with fidelity the Constitution that many of them helped write or ratify have traditionally enjoyed respect as important "originalist" evidence of the instrument's meaning (pp 120-22). The odd chronological literalism that sometimes grips lawyers debating original meaning—whereby anything from before ratification counts and nothing after does—makes no sense. Thus, to whatever extent originalist arguments are important, the material Currie surveys is directly relevant to current discussion.

This argument seems to me entirely correct, although as the reader will have detected, I am not sure that originalist arguments do often make much difference. But in form they are treated seriously, and on many issues, as Currie also notes, the debates and decisions of the political branches are all we have, case law being nonexistent (p x). Currie has, moreover, a second and more sweeping response to the skeptic: "It was in the legislative and executive branches, not in the courts, that the original understanding of the Constitution was forged." (p 296). The early debates and decisions by Congress and the executive are not only evidence of original meaning to be used by others in "the development of legal doctrine" (p x), they are themselves the earliest attempt to create precedent and forge doctrine and should, Currie implies, be treated as such. As with early judicial precedent, the reasoning and results of early congressional precedent will often act not to resolve current problems, but to channel the lines of argument that we should take seriously. They are not, however, less useful for that. (For a good example of this in action, see Currie's discussion of the Second Congress's debates over presidential succession at pages 139-44.)

Currie's third response to our skeptic flows from his claim that the political branches created the "original understanding" of constitutional doctrine:

One element of that understanding was the identification of a list of critical issues on which there were irreconcilable differences of opinion. Battle lines were clearly drawn on such recurring questions as the permissible degree of delegation of discretionary authority, the interpretation of the general welfare provision, and the application of the necessary and proper clause. All these conundrums still plague us, however the Supreme Court may for the moment have resolved them (p 296).

This is an extremely important point, if it is correct, and worth pausing over for a moment. In the beginning, on issues of great importance for the functioning of the Constitution, the "able and diligent officers sworn to support it and charged with the responsibility to put it into practice" (p 122) found themselves in radical disagreement. Built into the earliest development of a law of the Constitution is, Currie asserts, conflict over matters of moment, issues of principle.

This assertion, which I believe Currie's scholarship handsomely supports, is of fundamental significance for contemporary constitutional law. Deeply embedded in modern constitutional discussion is the desire for the elimination of interpretive uncertainty and the exercise of discretion that such uncertainty appears to invite. Most work in constitutional theory is overtly motivated by the search for a method or technique that would answer this longing, and the same goal is a prominent feature of the constitutional judgments of Justice Scalia, the most theoretically oriented member of the current Supreme Court. But if Currie is right, then the law of the Constitution is inescapably riven on certain issues. Our constitutional landscape cannot be rendered entirely smooth; to borrow a remark Chief Justice Rehnquist recently made, at times "[t]he Constitution mandates . . . uncertainty."²⁸

This fact does not, of course, obviate the constant need to resolve particular constitutional issues, although it does provide one good reason for lowering the level of rhetorical violence to which we have become accustomed both in judicial opinions and in the law reviews. Even a firm and principled belief that the other side is completely wrong could be tempered by the memory that the

²⁸ *Lopez*, 514 US at 566.

earliest interpreters of the Constitution often felt the same way about one another. Fundamental disagreement does not mean that one side or the other in the dispute is crazy or unprincipled; instead, it may simply mean that there is a point of disagreement located within the law of the Constitution itself. The early congressional debates may serve as a guide to those matters on which we need never expect complete agreement because they involve conflict between principles of perennial constitutional importance. Our anxiety over constitutional uncertainty and conflict should be eased by a recognition of their legitimacy.

IV

In the conclusion to the part of his book devoted to the First Congress, Professor Currie briefly answers a different skeptical response to his work: the claim that members of Congress and the executive make constitutional arguments for purely tactical reasons, as a means to achieving or avoiding ends they desire or reject on other grounds. He properly concedes the considerable truth in the claim: "Members of the First Congress were not wholly disinterested interpreters of the Constitution. Each had a political philosophy of his own; each had constituents to represent." (p 121). (At the end of the book, Currie remarks that "[a]fter the relative honeymoon of the First Congress, debates became more partisan," and adds wryly that as a result he is "less confident that many of the participants were dispassionately seeking to determine what the Constitution meant.") (p 296). But Currie rejects the cynical conclusion that the constitutional discussion in the political branches was a meaningless facade:

[L]egal realism has not prevented us from taking the reasoning of judges seriously or from evaluating it on its own merits. Nor is it true that legislators, any more than judges, *always* consult only their own preferences or self-interest; there are plenty of examples of public officials who take seriously their oath to support the Constitution (p 121).

Even constitutional arguments put forth insincerely "were designed to persuade the impartial observer and thus help us to understand the range of interpretations that would have appeared plausible when the Constitution was new" (p 122).

I am not certain to what extent Professor Currie intends to confine his defense of the meaningfulness of political-branch constitutionalism to the past: some, but not all, of what he says he puts in the present tense. But I take his book, at a minimum, to provide powerful support for the claim that constitutional argu-

ments in Congress and the executive branch ought to be taken seriously in the present, by the courts, the political branches, and the public.²⁹ It is, to appropriate a phrase, the province and duty of the political departments, within their respective spheres, to say what the law of the Constitution is.³⁰

Critics of that claim usually rest much of their case on the assertion that partisanship, expediency, and the corrupting impact of money render political branch constitutional argument irretrievably hypocritical. There is no denying the influence of each of those factors, but the first two, at any rate, were powerfully at work in the 1790s as well. (The details can often be found in Currie's meticulous analyses.) The assumption that constitutional arguments by members of Congress or officers of the executive branch are invariably makeshifts entitled to no respect does not follow, and the ease with which it is made reflects, I believe, an unfounded and unfortunate denigration of politics and the elected branches of American government.

An insistence on the importance of constitutional discussion within the political process need involve no hostility to judicial review or, indeed, to recognition of the special role of the United States Supreme Court in the articulation of the law of the Constitution. The members of the First Congress, as Currie reminds us, not only took their constitutional responsibilities seriously, but also "[r]epeatedly and without contradiction, acknowledged that the constitutionality of their actions would be subject to judicial review" (p 120). The quality of constitutional discussion in the political branches today is considerably higher, in my judgment, than many academic lawyers acknowledge.³¹ But the remedy for the undeniable problems in that discussion is more discussion, subject to greater scrutiny by critics and, when well done, greater deference from the courts. The courts' enforcement of the Constitution is hedged with explicit norms of judicial restraint designed

²⁹ A number of scholars have championed this claim in recent years. See, for example, Sanford Levinson, *Constitutional Faith* 50 (Princeton 1988) ("[I]t is crucial to the maintenance of a constitutional order that individuals believe themselves obligated to be conscientious adjudicators even in the absence of coercive constraints provided by courts.") (footnote omitted). On the theme of this Part, the work of Philip Bobbitt and Lawrence G. Sager is especially important. See, for example, Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 Mich L Rev 1364, 1383 (1994) ("[T]here are as many kinds of precedent as there are constitutional institutions creating them."); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw U L Rev 410 (1993).

³⁰ See *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

³¹ For examples, see the congressional discussions cited in note 14 and any random sample of constitutional opinions by the Department of Justice.

to avoid excessive interference with the democratic process. Such norms are entirely proper. For example, think of the rule that a court will invalidate most economic and social legislation as a violation of equal protection only when a challenger proves that it lacks any conceivable rationale as a means to a legitimate end. However, as often has been observed, they are norms of underenforcement. Our constitutional order presumes the need for enforcement of the fundamental law by the political branches, unfettered as they are by a need to defer to the political processes which they embody. "[I]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."³²

V

But do the political branches at the end of the twentieth century actually have the capacity to emulate the Congresses of the 1790s, and if so is it desirable for them to do so? The 1996 National Defense Authorization Act³³ passed by Congress and signed by the President in February 1996 can serve as a test. Section 567 of the bill provided for the mandatory discharge of all members of the armed services diagnosed as HIV-positive, regardless of their physical ability to perform military duties, within six months of the diagnosis.³⁴ The same provision had been present in an earlier bill that was passed by Congress but vetoed by the President, in part on the ground that the discharge provision was "medically unwarranted."³⁵ Upon being presented again with legislation containing the provision, the President announced that he would sign the Defense Authorization Act but that he continued to oppose the discharge provision, not only because he believed it "mean-spirited" but also because "the President has determined that this provision is unconstitutional."³⁶ One of the President's chief legal

³² *Missouri, Kansas & Texas Railway Co v May*, 194 US 267, 270 (1904) (opinion by Holmes).

³³ Pub L No 104-106, 110 Stat 186. The reader should be aware that I was an official in the Department of Justice during the relevant period and that I participated in the Department's provision of advice to the President. The opinions expressed in this review are, nonetheless, mine alone and do not necessarily express the views of the Department of Justice.

³⁴ Subsection (c) permitted the relevant military Secretary to retain an HIV-positive member who would be within two years of qualifying for retirement on the date he or she would be required to be discharged under Section 567. 110 Stat 186.

³⁵ Veto message of Dec 28, 1995, H Doc No 104-155, 104th Cong, 2d Sess (Dec 28, 1995), in 142 Cong Rec H 12 (Jan 3, 1996).

³⁶ White House press briefing, 1996 WL 54453, *1-2 (Feb 9, 1996) (statement of Jack Quinn, Counsel to the President).

advisors explained the basis for this exercise of presidential constitutional review:

[The Department of Justice] advised the President that this provision, which discriminates against a group of healthy and productive members of the Armed Services, would be constitutional only if it serves a legitimate governmental purpose. After consulting with Secretary [of Defense] Perry and the Joint Chiefs, the President concluded that the provision does not serve any valid military or other purpose. Based on the Pentagon's military conclusion, and after consulting with the Department of Justice about the legal effect of those conclusions, the President appropriately determined that the provision is unconstitutional.³⁷

On the basis of his constitutional determination, the President announced that he would adopt three "remedial" measures: (1) the administration would seek swift repeal of Section 567; (2) in the event repeal was delayed and members of the armed services had to be discharged under Section 567, the executive branch would ensure that those discharged received the fullest array of benefits and support available under law; and (3) the Department of Justice would not defend Section 567 against constitutional challenge in court. An administration spokesperson stated explicitly that the executive branch would not decline to enforce the provision.³⁸ In fact, the first "remedy" was successful, and Congress repealed Section 567 before the provision required any discharges.³⁹

The President's actions with respect to Section 567 are a good example of what it would mean for the political branches to base their actions on their own constitutional judgments. With respect to the merits of the constitutional issue, the legal standard in accordance with which the President determined that the discharge provision was unconstitutional was clearly derived from the judicial rational-basis test that I briefly mentioned in Part IV: governmental action must be a rational means of pursuing a legitimate end. As the Supreme Court reiterated in a 1993 decision, the judicial rational-basis "standard of review is a paradigm of judicial restraint":

³⁷ Id at *2 (statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel).

³⁸ Id at *2-3.

³⁹ Pub L No 104-134, 110 Stat 1321-330 (1996), codified at 10 USCA § 1177 (Supp 1996).

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end."

...

The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

...

[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it, while those defending it may rely on any not-irrational justification for the classification regardless of "whether the conceived reason for the challenged distinction actually motivated the legislature."⁴⁰

The reason the Court gives for applying the equal protection principle to most social and economic legislation in such a one-sided and pro-governmental fashion is, expressly, respect for the political process and the political branches. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."⁴¹ But the obvious price that is paid is underenforcement of the underlying equal protection norm: classifications that are in fact foolish, unrelated to public goals, or based on bias and antipathy escape judicial correction so long as the government's lawyers can think up a rationale that is not plainly lunatic or invidious.

Judged by this standard, the argument that a court would have invalidated Section 567 is weak. While the simple fact of being HIV-positive does not render an individual incapable of performing military duties, it would be difficult to claim that it would be irrational for Congress to conclude that treating HIV-positive individuals for combat injuries would require safeguards other-

⁴⁰ *FCC v Beach Communications*, 508 US 307, 313-15 (1993) (citations omitted).

⁴¹ *Id.* at 315 (citation omitted).

wise unnecessary, and that as a consequence their presence in combat units would complicate health care under combat conditions. Nondeployability into combat units is an established basis for military classifications,⁴² and it seems doubtful that a court would have concluded that there was no "reasonably conceivable state of facts"⁴³ justifying Section 567's discrimination. The existence of substantial arguments against the value of the discharge requirement would be irrelevant under the judiciary's version of the rational-basis test. The courts probably would be equally unmoved by the fact that the provision's congressional proponent made remarks that could be construed as showing bias against HIV-positive persons.⁴⁴

In evaluating the constitutionality of Section 567, the President applied the basic norm of equal protection without the screens of deference the courts employ in order "to preserve to the legislative branch its rightful independence and its ability to function."⁴⁵ As Commander in Chief, he concluded that Section 567 would accomplish no military goal not already served in other and better ways, that (in other words) Section 567 was not *in fact* a reasonable means of achieving an appropriate purpose. As the constitutional officer charged with taking care that the laws, including the law of the Constitution, are "faithfully executed," he determined that in the event of litigation the executive branch would not attempt to protect Section 567 by hiding it behind the screens of judicial deference. And as head of a branch of the federal government equal, but not superior to Congress or the judiciary, he concluded that the "remedies" available to him to act on his constitutional judgment did not include a refusal to enforce a

⁴² *Rostker v Goldberg*, 453 US 57, 79 (1981) (upholding exclusion of women from selective service registration on that basis).

⁴³ *Beach*, 508 US at 313.

⁴⁴ See 142 Cong Rec H 1207, H 1214 (Feb 1, 1996) (remarks of Representative Robert Dornan). Assuming that former Representative Dornan was expressing invidious motives of his own for advocating the discharge provision, without evidence going to the purpose of Congress as a body his remarks would be a slim basis for a judicial finding that the intent of the legislature itself was invidious. See *Hunter v Underwood*, 471 US 222, 228 (1985):

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

⁴⁵ *Beach*, 508 US at 315.

law enacted by Congress in the absence of judicial precedent making the law's invalidity reasonably clear. Instead, the President's actions invited congressional reconsideration of a provision of law that he deemed unconstitutional. In a similar fashion, the decision not to defend the statute legally would have invited the courts to look beyond the judgment of validity imputable to Congress to the judgment of invalidity explicit in the President's decision.

There are, I think, two major criticisms that can be offered against this example of constitutional decisionmaking by a political branch.⁴⁶ The first would go to the substance of the decision. It is certainly possible to disagree with the judgment of the Joint Chiefs of Staff that Section 567 was "arbitrar[y] . . . unwarranted[,] unwise [and] . . . unnecessary as a matter of sound military policy,"⁴⁷ or with the President's decision that this judgment warranted the conclusion that the provision failed to satisfy equal protection. But such disagreement is the heart of constitutionalism: it is in free and full debate over all of the pertinent facts and legal arguments that the Constitution's norms can most fully be realized. The judiciary's enforcement of many constitutional norms deliberately and rightly refrains from "free and full debate" and for that very reason implicitly demands constitutional decisionmaking by the political branches.

The second criticism would come from our old, legal-realist friend. This story is not about "constitutional norms," the critic sneers, it is about an administration eager to get a major piece of necessary legislation in place while placating a constituency angered by one provision in that legislation. The President's actions were just politics. Principle did not enter into them, any more than it does into congressional speeches mouthing constitutional arguments: Nothing is gained in terms of obedience to the Constitution by such episodes.

There is no successful way to answer a determined cynic, but in this case I think the cynical argument misses the mark almost entirely. *Of course* the actions of Presidents, no less than the speeches of members of Congress, are politics. The legislative and

⁴⁶ The argument that the President has a constitutional duty to veto all bills that include what he or she believes are unconstitutional elements—an argument I find quite powerful—was long ago rejected by the executive branch and, it would seem, the Supreme Court as well. See *The Legal Significance of Presidential Signing Statements*, 17 *Op Off Legal Counsel* No 11, 1993 OLC LEXIS 11, *11-12 (1993) (reviewing the history and concluding for the Department of Justice that the President is not "under any duty to veto legislation containing a constitutionally infirm provision").

⁴⁷ White House press briefing, 1996 WL 54453 at *2 (cited in note 36) (quoting statement of Joint Chiefs).

executive branches are (and are supposed to be) political, responsive as well as responsible to constituents, always alert to issues of policy and expediency. To put matters bluntly, that is what they are for.

But policy and principle, politics and law, are not rigid, mutually exclusive categories. Assume for the sake of argument that the President's motive in declaring Section 567 unconstitutional was entirely a search for political advantage: in doing so he acted subject to the constraints imposed by the desire to be effective. Presidents (and members of Congress) need the cooperation of many others in order to pursue their goals successfully. In this instance, the President needed a constitutional argument that was persuasive enough to enjoy at least surface agreement from his lawyers, other high executive officials, and sympathetic members of Congress. Furthermore, he needed an argument with which he could live, since subsequent behavior inconsistent with the position he staked out would be subject to politically costly criticism. Even hypocritical arguments are meant to persuade, while hypocritical actions have future ramifications. Even if only political goals are in view, constitutional debate within and between the political branches is limited by the need to be plausible and by the institutional interests of the politicians. In short, the cynic's sneer notwithstanding, principle will exact a price even of the hypocrite. And as Professor Currie's book reminds us, judges have no monopoly on genuine concern for the Constitution: "there are plenty of examples of public officials" not in judicial robes "who take seriously their oath to support the Constitution" (p 121).

The point of this Part has not been to persuade the reader that the President was correct about Section 567 or to address the many issues, some difficult, that arise from political-branch constitutional "review." My objective has been the more modest one of describing an incident of constitutional debate from the present that seems similar to the many occasions discussed in Currie's book. The sort of interpretation and enforcement of constitutional norms that Currie found to be characteristic of the earliest Congresses and the first two Presidents is not beyond the capacities of their present-day successors.⁴⁸

⁴⁸ The Supreme Court's invalidation of the Religious Freedom Restoration Act in *City of Boerne v Flores*, 117 S Ct 2157 (1997), on its face a rather pointed rejection of an express congressional effort to act on the legislature's constitutional views, in the end confirms the Court's recognition of the role of the political branches. While the Court firmly repudiated any suggestion that Congress can define the Constitution's meaning contrary to the courts' interpretation and thereby bind the courts themselves, it expressly acknowledged Congress's independent duty to construe the Constitution. "When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own

CONCLUSION

Some readers will not find the argument I have just sketched out appealing, and, as I have noted, Professor Currie himself may well disagree with my conclusion. Few, however, who work through Currie's careful examination of the constitutional labors of the early Congresses and presidents will doubt his conclusion that the political branches played a crucial role in formulating the law of the United States Constitution. Anyone interested in the Constitution will find much in his book to learn and much on which to reflect.

informed judgment on the meaning and force of the Constitution." *Id.* at 2171. In support, the Court quoted a 1789 speech in the House by Madison and went on to note the judiciary's reliance on political branch interpretation. "Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy." *Id.* at 2171-72.