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Book Review: The Constitution in the Supreme Court: The First Hundred Years, 1789-1888. by David P. Currie.

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page 183, however, her view has changed: she informs us that the Court, "like other governmental institutions has been uncertain about the direction family policy should take." So as a project in self-education Professor Rubin's book is a great success. As an exercise in coherent scholarship it is not.

THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888. By David P. Currie.[1] Chicago: University of Chicago Press. 1985. Pp. xiii, 504. $55.00.

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Constitutional specialists who are not lawyers sometimes apply the term "law office history" to the selective and distorted probing of the past that occasionally passes as legal argument. The late Alfred Kelly once chose the apt title *Clio and the Court: An Illicit Love Affair* for a dissection of some notable examples of this kind of endeavor;[3] and many of us have had fun straightening the historical excursions of judges.

There is, however, a more laudable kind of lawyers' history, which Professor David Currie's large book exemplifies. Professor Currie has written what he calls a "critical history." "My search," he explains, "is for methods of constitutional analysis, for techniques of opinion writing, for the quality of the performances of the Court and of its members." The result, according to the dust jacket, is a study that "analyz[es] the Court's constitutional work from a modern lawyer's point of view." This latter claim, I suspect, is only partly true, and as history the book has faults; but no one can deny that Currie has given us a thorough, systematic, and careful assessment of the constitutional work of the Supreme Court during the period 1789-1888.

Currie's subject matter is the thousand or so cases of constitutional significance during the Court's first century. The organization is conventional, by each Chief Justice's "Court," except that the tenures of John Jay and Oliver Ellsworth (1789-1801) are grouped together. This first period receives fifty-five pages of cover-

1. Harry N. Wyatt Professor of Law, University of Chicago Law School.

2. Roy P. Crocker Professor of American Politics and History, Claremont McKenna College.

3. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119. *See generally* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

age; Marshall's tenure, 137 pages; Taney's, eighty; Chase's, seventy-three; and Waite's, ninety-one. Within each of the book's five parts, topical chapters variously explore jurisdictional decisions, boundary issues (separation-of-powers and federalism), and cases on the powers and limitations associated with specific doctrines, clauses, and amendments (including natural law, the contract and commerce clauses, and the fifth and Civil War amendments). The section on the Chase Court has a separate chapter on problems growing out of the Civil War and Reconstruction.

In the process, nearly all of the major cases receive anywhere from a paragraph to ten pages of discussion. Some less familiar decisions also get extended attention. (How many readers recall *Mossman v. Higginson*, or *Louisiana v. Jumel*?) In places, indeed, more obscure decisions vie for emphasis with the famous ones. *Butler v. Pennsylvania* gets as much space—two pages—as the *Charles River Bridge* case. But Currie would argue, I imagine, that fame is a poor guide to the real importance of a case; and an important virtue of the book is its analysis of the jurisdictional cases (especially the early ones) that were key to the Court's other work and are typically neglected, at least by non-specialists. In total, about 135 cases are discussed at length, with the rest of the thousand receiving passing mention in either the text or footnotes.

I am not troubled by Currie's criteria for evaluating the Court's performance, though they may sound rather old-fashioned to some scholars. He belongs, more or less, within the "reasoned elaboration" school of academic lawyers that emerged after World War II, whose views were expressed in the works of such thinkers as Herbert Wechsler. The ultimate source of the Court's power being the Constitution, says Currie, judges are bound by it and hence must respect its grants to other branches as well as the limitations it establishes. "[T]he judges have no more right to invent limitations not found in the Constitution than to disregard those put there by the Framers," he asserts, for "when a judge swears to uphold the Constitution, he promises obedience to a set of rules laid down by someone else." Although the text and original intent do not settle everything, where they provide ascertainable guidance judges may not legitimately substitute their own predilections. "Beyond this," he writes, "I share the conventional views that judges have an obligation to explain the reasons for their decisions as concisely and persuasively as practicable, and that they should strive for consistency, reserving the right to correct egregious and important errors on relatively rare occasions."

Accordingly, the bulk of Currie's account consists of answers

to such questions as: Were the reasoning of the opinion and the outcome of the case consistent with earlier statements and outcomes? Did the judges adequately explain themselves? Did they display intellectual curiosity? Were they faithful to the constitutional text? Did they follow the original intention where it is clear? Currie's answers to these questions are hard to fault, particularly because he is willing to admit the close calls. (His treatment of the race-related cases arising under the Reconstruction amendments is especially even-handed.)

The very strength of the book—its superb analysis of opinions—creates several weaknesses. The larger environment of the period scarcely enters the picture; the cases, discussed seriatim despite being topically grouped, are repeatedly introduced with only the barest statements of legally relevant facts. By the time *Marbury* appears, for example, the reader is familiar enough with the Court's (often-ignored) prior encounters with judicial review, but has little sense of what gave the case its contemporary political significance. Elsewhere, Currie effectively challenges common interpretations of *Luther v. Borden* as embodying the political question doctrine, but reduces the charged social-political atmosphere of Rhode Island in the 1830's and 1840's into this juiceless passage:

> Sued in a federal diversity case for breaking into Luther's house, Borden defended on the ground that he had been carrying out orders of the Rhode Island government to suppress rebellion. Luther responded that the government for which Borden acted no longer was the legitimate government of Rhode Island.

We learn that *Hall v. DeCuir* involved "a law forbidding racial segregation in public conveyances," but are told nothing about the rich insights it offers into Louisiana's fluid postbellum system of race relations.[4] Although the Civil Rights Cases emerge as "famous," Currie does not discuss whether, all things considered, they much affected the course of people's lives.[5] And so forth—on and on and on.

Discussions of specific Justices are similarly limited. The

4. Glimpses emerge in the majority and dissenting opinions in DeCuir v. Benson, 27 La. Ann. 1 (1875), but for the real treasure-trove, see the lengthy testimony in the trial proceedings, available in the case file for *id.*, Case No. 4829, Louisiana Supreme Court Archives, Earl K. Long Library, University of New Orleans, and mostly reproduced in the Record submitted to the U.S. Supreme Court in Hall v. DeCuir, 95 U.S. 485 (1878) which is available on microfilm.

5. It is at least arguable, for example, that an opposite outcome in the cases—that is, validation of the Civil Rights Act of 1875—would *not* have posed a barrier to transportation segregation either under the common law of common carriers or pursuant to state legislation, so long as carriers observed the equal-but-separate formula. *See* C. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION ch. 6, "The Transportation Law Environment: Access by Leave, Not Right" (forthcoming, Oxford University Press, 1987).

judges produce legal logic (or fail to do so), but one might gather they were born from jurisprudential wombs, some the happy issue of unions of logic and precedent, others congenitally given to "conclusory" argument (to use one of Currie's favorite pejorative terms), opaqueness, and inconsistency.[6]

To be sure, meeting these objections would have required a different (and even longer) book than the one Professor Currie evidently set out to write. Then too, his footnotes refer the interested reader to sources that do address such contextual issues. Still, good history engages the reader, and I suspect that many "modern lawyers," not to mention ordinary mortals, would have their interest better whetted—and their understanding of the cases better served—had Currie translated his obvious command of the relevant literature into a less disembodied account.

Less defensible, or at least more surprising, is another omission. Besides slighting its historical context and significance, Currie largely fails to relate the Court's work to the broader *legal* environment, to the law as delineated especially by members of what very loosely may be called the Hurstian school of legal history.[7]

Here let one example suffice. Currie is clearly correct in challenging the all-too-common notion that in the last decades of the nineteenth century the Court employed the fourteenth amendment to strike down state police measures in a wholesale fashion, but the reader gets little sense of the overall growth of regulation in the period and its acceptance by other courts. With antebellum origins that were far more extensive than the utterances on the subject by the Marshall and Taney Courts, the police power was an increasingly pervasive legal reality by the 1880's as state authorities attempted to cope with a variety of perceived social ills.[8] Precisely because Currie takes legal arguments so seriously and analyzes

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6. For a contrasting approach, see, e.g., G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1976).

7. For an overview and critique of Professor Hurst's own work, see, e.g., Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOC. REV. 9 (1975); Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744 (1970); and for an indication of who and what might be included within a very loosely defined Hurstian school of legal history, see Scheiber, *American Constitutional History and the New Legal History: Complementary Themes in Two Modes*, 68 J. OF AM. HIST. 337 (1981). Probably all attempts to fashion labels for historical schools are doomed to failure, and I would prefer not to have to defend rigorously the application of "Hurstian" to a group in which I would include both Scheiber and Morton J. Horwitz. Scheiber's term, the "New Legal History," is broader, but "new" histories keep succeeding one another, with no little confusion about what the label means.

8. *See, e.g.*, M. KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA, 343-472 (1977). For a sweeping early review of judicial encounters with the police power, see Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROC. OF THE AMER. PHIL. SOC. 359 (1900).

them so masterfully, he could have effectively shown the place of the Supreme Court in the broader web of doctrinal tension between "public rights" and the "rule of law," to use Harry N. Scheiber's formulation.[9] Substantial footnote references aside, however, Currie gives us little beyond an internal analysis of Supreme Court opinions and hence misses a splendid opportunity to examine the relation of doctrinal debates to the policy goals embodied in and fostered by the period's legal order.[10]

As a historian, I am also troubled by the anachronisms that so frequently appear as Currie indicates how future cases elaborated, contested, or resolved points incompletely or unsatisfactorily handled in the case immediately under discussion. If the instances of this technique are not literally countless, there are more of them than I would care to count, and the result is not always illuminating. In the course of Currie's discussion of *McCulloch v. Maryland*, for example, we read, "Though much sweat is often shed over general principles, as it was in *McCulloch*, it is not news that they seldom decide actual cases," at which point footnote 40 appears and takes this form: "*See, e.g.*, Associated Indus. v. Department of Labor, 487 F.2d 342, 349 (2d Cir. 1973) (doubting whether it made any practical difference whether regulations of the Occupational Safety and Health Administration were reviewed under the 'arbitrary and capricious' standard or the 'substantial evidence' rule). *See also* . . . ." Though a lawyerly footnote, this does not, I submit,

9. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217 (1984).

10. A particularly good occasion might have been the discussion of Mugler v. Kansas, 123 U.S. 623 (1887), and Powell v. Pennsylvania, 127 U.S. 678 (1888). *See* D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, 375-78 (1985). Justice Harlan wrote the Court's opinion in each case, upholding a prohibition on the manufacture and sale of alcoholic beverages in *Mugler* and on the manufacture and sale of oleomargarine in *Powell*. Currie correctly notes that the *Mugler* opinion appears to admit that there were *some* fourteenth amendment limits to the police power, while in *Powell* Harlan ignored the hint. If anything, it can be argued that on the face of his opinion in *Mugler*, Harlan more boldly tried to have it both ways, despite the pro-regulation gloss he soon placed on *Mugler* in *Powell*. But did contemporaries read the opinions in this fashion? Looking for background to police power-due process cases at the state level would help give a sense of the extent to which lawmakers and lawyers of the period saw *Mugler* and *Powell* as embodying conflicting notions of legal empowerments and limits and of how they related the cases to legislative policy goals at the state level. Also, I suspect, the state cases would help clarify why analysis of the police power entered into discussions of the due process limitations of the fourteenth amendment, and thus help resolve why "the Court's own opinions began to speak in . . . police-power terms [as advanced in earlier dissents by Justice Field] without even explaining what they had to do with the fourteenth amendment." D. CURRIE, *supra*, at 375 (footnote omitted). I offer some related comments on the fourteenth amendment and the police power during the period in C. Lofgren, *supra* note 5, ch. 4, "The Constitutional Environment: Lost Origins and Judicial Deference."

take us very far in understanding the Bank Case as an event in the year 1819.

Similarly, in the midst of a careful analysis of Roger Taney's opinion in *Dred Scott*, after noting Taney's use of the fifth amendment's due process clause, Currie remarks that "even the threshold question whether the amendments applied to the territories was disputable: fifty years later the Court would hold that some of them did not apply to certain other possessions . . . ."[11] Or consider Currie's remark in his discussion of the relatively obscure case of *Woodruff v. Parham*, in which the Court, speaking through Justice Miller, upheld a tax on goods sold at auction, even though they had come from other states and were sold in their original packages. The tax, Miller stressed, was non-discriminatory and to invalidate it would be to impose discriminatory burdens on local manufacturers. "All of this must strike a responsive chord in the modern reader," writes Currie, "for much of what Miller said about the commerce clause in *Woodruff* has survived: discrimination is almost always contrary to the clause, but interstate commerce may be required to pay its way." The footnotes cite twentieth century cases. Such stuff is interesting and most historians (including me) have done the same thing from time to time. But it is not exactly history.

Some readers may lodge a further complaint: that application of Currie's criteria of judicial excellence to an earlier period is legitimate only if it can be shown that the thoughtful lawyers of that period employed similar standards. Professor Currie could have tackled this issue more directly, but he does offer a defense of his approach, albeit implicitly. The judges, he repeatedly shows, taxed each other for their argumentative lapses, and the best of them reflected on their enterprise.

In particular, Joseph Story and Benjamin R. Curtis shine forth in this respect. If overshadowed in the usual accounts by John Marshall, whose talents Currie by no means belittles, Story avoided the great Chief Justice's bad habits[12] and gave us this "simple statement of the proper approach to constitutional interpretation":

> And, perhaps, the safest rule of interpretation, after all, will be found to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation

11. In fairness, Currie goes on to remark that *prior* to *Dred Scott* the Court had also limited the application of the Constitution in the territories. But the pervasiveness of anachronistic references is suggested further by the fact that the sentence preceding the one quoted in the text refers to both *Lochner v. New York* and *Roe v. Wade*. *See* D. CURRIE, *supra* note 10, at 271-72.

12. "[I]t is difficult to find a single Marshall opinion that puts together the relevant legal arguments in a convincing way." D. CURRIE, *supra* note 10, at 197.

> and force, consistent with their legitimate meanings, as may fairly secure and attain the ends proposed.[13]

Curtis, although serving on the Court for only six years, displayed "awesome analytic powers" and in his *Dred Scott* dissent—"one of the great masterpieces of constitutional opinion-writing"—"delivered a classic statement on constitutional interpretation":

> [W]hen a strict interpetation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[14]

(Not so incidentally, the leading student of *Dred Scott* describes Curtis as a "sound constitutional conservative . . ., following established precedent along a well-beaten path to [his] conclusions.").[15]

The comments from Story and Curtis prompt a final question. It is one thing for Currie to seek original understandings. For all the sophisticated debate over the issue, there remains considerable force to the notion that the Constitution's provisions (and amendments) should mean what they originally meant if the document is indeed a law that is binding on transient lawmakers and judges. For purposes of my final question, at least, the point can be accepted arguendo. But why focus on the Philadelphia Convention as a source of authoritative original meaning? Like so many others, Currie here and there searches its records to determine whether his judges were true to the Constitution.[16] But by its own terms, the Constitution gains its force from the ratification process.[17] Its truly authoritative original meaning was the one given it by the people who took part in the ratification proceedings. These people by and

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13. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 610-11 (1842).

14. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1857).

15. D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 414 (1978). Currie might have made his point even more forcefully by quoting more of the paragraph by Curtis. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 620-21 (1857).

16. The hold of "framer intent" is suggested by Currie's remarks in the course of discussing the Court's refusal, in 1793, to give the president an advisory opinion:

> Today we might shore up these conclusions [of the Justices] by reference to the debates in the constitutional convention. . . . The official journal of the convention, however, was withheld from public scrutiny until 1819, and Madison's notes were unavailable until after his death in 1836. Thus the Justices were deprived of a valuable aid to construction during the critical formative years.

D. CURRIE, *supra* note 10, at 12-13 (footnotes omitted). *Accord*, Currie's comment on the Prize Cases, quoted in note 18, *infra*.

17. U.S. Const. art. VII. Currie quotes and cites comments from the ratification debates, but without according them any precedence as authority. *See, e.g.*, D. CURRIE, *supra* note 10, at 44 n.96, 70 n.42.

large were unfamiliar with the maneuvers and successive proposals and votes in the Philadelphia Convention. For this reason, it seems inappropriate to read the Constitution in light of the Convention's proceedings. Consider, for example, the meaning commonly wrung out of the fate of a council of revision apropos advisory opinions and judicial activism, or out of the change in the wording of Congress's war powers (as a support for presidential authority). Most of the ratifiers could not have been swayed in their understanding of the Constitution by either of these bits of legislative history from the Convention, for the simple reason that they were unaware of them. Nor did the attempts *within* the Convention to define ex post facto laws and direct taxes and to explain the contract clause determine the understandings people had of the pertinent provisions of the finished document when it was before the ratifying conventions. (I select these examples because they appear in Currie's account.)[18]

The priority of ratifiers over framers is inherent not only in the logic of the matter but also in contemporary comments. In Pennsylvania, James Wilson remarked:

> [T]he late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution, proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint; it is laid before them to be judged by the natural, civil, and political rights of men. By their FIAT, it will become of value and authority; without it, it will never receive the character of authenticity and power.[19]

Madison said the same thing in *The Federalist Papers* (themselves a product of the ratification process),[20] and he explained the priority of the ratifiers over the framers more directly several years later:

> As the instrument came from them [the members of the Philadelphia Convention] it

18. D. CURRIE, *supra* note 10, at 12-13 (advisory opinions), 36 & n.40 (direct taxes), 44 & n.96 (ex post facto laws); 70 & n.42 (judicial review), 135 (obligation of contracts), 274 (presidential war-making authority). Currie admits that with respect to the meaning of direct taxes, ex post facto laws, and the contract clause, the Convention debates are not illuminating. That he would rest considerable weight on them if they were more informative is suggested by his remarks on advisory opinions, quoted in note 16 *supra*, as well as this comment about the Prize Cases: "[Justice] Grier neglected to cite the Convention history that would have placed his conclusion beyond dispute: the original draft empowering Congress to 'make' war was altered to the present form on Madison's and Gerry's motion, 'leaving to the Executive the power to repel sudden attacks.' " D. CURRIE, *supra* note 10, at 274 (footnote omitted). Indeed, whether the Convention debates on the point are themselves quite so clear in meaning is debatable. *See* Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675-77 (1972).

19. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION [Ratification of the Constitution by the States: Pennsylvania] 483-84 (M. Jensen ed. 1976) (Wilson's speech in the Pennsylvania Ratifying Convention, Dec. 4, 1787).

20. *See* THE FEDERALIST No. 40, at 263-66 (J. Madison) (J. Cooke ed. 1961).

> was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.[21]

No wonder Justice Story later spoke of using "*all* the lights and aids of contemporary history."

But this makes the process of deciphering original intent a more difficult business, and a rather more interesting one, not only because it requires a much larger corpus of directly related records, but also because it involves complicated problems in the legal-intellectual history of an age.[22] I shall not hold my breath, however, until the day Convention history ceases to be the usual guide. Certainly Currie, in turning to the framers, has not violated the scholarly custom.

As these comments suggest, Professor Currie's book does not do everything. But what it does, it does exceptionally well. As a reference work for constitutional teachers, it is a gold mine.

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21. 5 ANNALS OF CONGRESS, col. 776 (J. Gales ed. 1834) (Madison's speech in the House of Representatives, April 6, 1796). *Cf.* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 935-41 (1985). Professor Powell agrees that Madison gave priority to the ratifiers over the framers, but argues that Madison's dominant approach to constitutional interpretation, in common with that of most of his contemporaries, was not intent-based in our sense of the term—that is, as signifying what the framers and ratifiers themselves intended. Powell claims instead that to the extent Madison and his contemporaries discussed intent, it was primarily intent based on inferences from the Constitution itself, from the document's expressed purpose, and perhaps from the general conditions to which it was a response. (In this inferential sense, "intent" becomes in our terms a kind of constructive intent rather than a historical reconstruction from legislative history.) I have not examined all of the evidence Professor Powell reviews in his important article, but in checking his sources relating to Madison's understanding of the use of intent, as well as those from the 1796 debate in the House of Representatives over proper methods of constitutional interpretation (which accompanied the debate over House access to executive documents bearing on the Jay Treaty), I note several instances in which, as I read the evidence, Powell does either or both of two things. One approach he takes is to interpret attacks on use of the proceedings of the Philadelphia Convention as attacks on use of intent as reconstructed from the ratification proceedings and their context. The other is to minimize the force of comments that endorse use of the latter sort of intent. However, this gets to matters too distant from Currie's book to pursue here.

22. For an example of the learning that needs go into the enterprise, see F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985). Professor McDonald's study does not extend to a systematic reading of the Constitution as the ratifiers would have understood it, but it dips into the issue of how they viewed the contract clause. *See id.* at 274-75.