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THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986. By *David P. Currie.* Chicago: University of Chicago Press. 1990. Pp. xiv, 668. $70.

This volume concludes David P. Currie's historical study of the U.S. Supreme Court as constitutional interpreter.[1] Volume I, which covered the years 1789-1888, was published in 1985.[2] Volume II, like Volume I, is organized around the tenures of Chief Justices. The Fuller Court (1888-1910) receives eighty-one pages (pp. 3-83); the White Court (1910-1921) forty-four pages (pp. 87-130); the Taft Court (1921-1930) sixty-nine pages (pp. 133-201); the Hughes Court (1930-1941) sixty-nine pages (pp. 205-73); the Stone Court (1941-1946) fifty-eight pages (pp. 277-334); the Vinson Court (1946-1953) thirty-five pages (pp. 337-71); the Warren Court (1953-1969) eighty-five pages (pp. 375-459); and the Burger Court (1969-1986) 139 pages (pp. 463-601). Within each of these gross divisions the discussion is organized largely by legal subject matter, defined rather generally.

As Currie explained in Volume I, his purpose in writing these books was to analyze and criticize the constitutional doctrine of the Supreme Court, focusing especially on methods of constitutional analysis, opinion-writing techniques, and the quality of the overall performance of the Court and its members.[3] This focus makes Currie's book unique among full-scale constitutional histories. An ample supply of articles and monographs criticizes the analytic approaches and opinion-writing techniques of Supreme Court Justices throughout the Court's history. But the comprehensive single or multi-volume history of the Supreme Court is generally much more *institutional* in its focus and development. As such, most histories of the Supreme Court are better described as political or social histories rather than histories of legal analysis. Good examples of writing in this genre are most of

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1. David P. Currie is Edward H. Levi Distinguished Service Professor and Arnold & Frieda Shure Scholar, University of Chicago Law School.

2. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888 (1985).

3. CURRIE, *supra* note 2, at xi.

the volumes of the Holmes Devise *History of the Supreme Court,*[4] and Charles Warren's now-classic *The Supreme Court in United States History.*[5] Currie's book is best read not as a competitor with these but as a complement to them.

This book is a treasure house of information for anyone interested in the process of judicial reasoning — not only in how Justices engage each other in a particular case, but also in how they seek to make the pen flow without too many skips or erasures from one decision to the next. Scientific genius and judicial genius are opposites in this one essential respect: the scientific genius makes an incremental discovery but convinces the world that the accomplishment is a radical breakthrough; the judicial genius issues a decision that turns the world upside down, but convinces his readers that it is fully consistent with — indeed, compelled by — all that went before. For example, the facts of *Illinois Central R.R. v. Illinois*[6] "looked for all the world like" (p. 10) those of *Fletcher v. Peck,*[7] where the Supreme Court held that the contract clause forbade a state from reneging on its own land grant even where the grant had been the product of legislative corruption and fraud. In *Illinois Central,* however, the land lay under water, thus enabling Justice Field to discover the "public trust" exception to *Fletcher:* the sovereign owns certain public lands only as trustee for its citizens, and has no power to alienate these lands.[8] "The words flow easily off the pen," Currie notes (p. 10). A jurist does not need heroic reasoning to conclude that a trustee's actions are voidable or void when they violate the terms of the trust. Of course, in this case there was no trust at all, for the public "trust" was entirely a legal fiction.

Close attention to the language of opinions enables Currie to conclude that economic substantive due process came from absolutely nowhere (p. 41). Justice Peckham's remarkable conclusion in *Allgeyer v. Louisiana,*[9] that the state's regulatory power "does not and cannot extend to prohibiting a citizen from making contracts [regulating insurers] outside of the limits and jurisdiction of the State"[10] even if the property to be insured was located within the state, was simply without precedent. Currie concludes that Justice Harlan, though a dissenter in the Court's most famous substantive due process case, *Lochner v. New York,*[11] was nonetheless one of those most guilty in

4. THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1971) [hereinafter HOLMES DEVISE HISTORY].

5. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1932).

6. 146 U.S. 387 (1892).

7. 10 U.S. (6 Cranch) 87 (1810).

8. *See Illinois Central,* 146 U.S. at 452-62.

9. 165 U.S. 578 (1897).

10. 165 U.S. at 591-92.

11. 198 U.S. 45 (1905).

bringing substantive due process to the Court (p. 81). Harlan had suggested a generation earlier in *Mugler v. Kansas* that a state liquor law was constitutional because it was reasonable,[12] thus intimating that the Supreme Court had the authority to pass on the substantive reasonableness of regulatory acts. As a result, concludes Currie, "although on its facts *Lochner* was a notable break with precedent, in the larger sense it was the predictable outgrowth of a long and consistent development" (p. 49).

Currie repeats that theme throughout this book. A look backward through thousands of pages of Supreme Court constitutional decisions will almost invariably yield a paragraph here or a phrase there to support practically any view. Insights into how the Supreme Court engages in this kind of legerdemain over protracted periods of constitutional development are the most important contributions of this book. One generation's carelessly chosen words, stated with little foresight about possible consequences, become the precedential foundation for a subsequent doctrine that turns the Constitution on its head. Harlan's statement that the approved statute in *Mugler* was "reasonable" was nothing more than a judicial slip of the tongue — or perhaps a little window-dressing. Harlan's central conclusion in that decision was that

> if, in the judgment of the legislature, the manufacture of intoxicating liquors . . . would tend to cripple . . . the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question.[13]

But the substantive due process Justices failed to honor the Court's long-recognized obligation to defer to legislative judgments of fact, and looked only at Harlan's rather careless additional suggestion that the statute at issue seemed reasonable to him.[14] From this the *Lochner* Court derived precedent for the view that the determination of reasonableness lay with the Court.

Even *Roe v. Wade*,[15] the controversial Burger-era decision recognizing a woman's right to terminate her pregnancy, effected only a marginal increment in the *rhetoric* of constitutional opinion, whatever it may have done to the law. Indeed, Currie locates the origins of *Roe* more than a century earlier, first in *Dred Scott*[16] and later in *Lochner*, both of which made substantive due process credible by establishing "that substantively unreasonable laws deprived persons of life, liberty, or property without due process of law" (p. 466). *Roe*'s rhetoric could

12. 123 U.S. 623, 663 (1887).

13. 123 U.S. at 662.

14. 123 U.S. at 661-62, 671-75.

15. 410 U.S. 113 (1973).

16. Scott v. Sandford, 60 U.S. 393 (1857).

also be found in numerous decisions recognizing an implicit constitutional right of privacy that was now merely extended to a woman's decision to seek an abortion. This list of justificatory cases included not only *Griswold v. Connecticut,*[17] but also *Skinner v. Oklahoma,* which had cited as fundamental the "right to have offspring" in striking down a compulsory sterilization statute.[18] By the time Justice Blackmun was finished, he appeared satisfied that judicial precedent virtually dictated *Roe*'s outcome.[19] As Currie amply demonstrates, precedent did no such thing, although judicial language could be read to suggest just about anything (pp. 468-69).

The most unsettling thing about this book is the lack of historical context. The standard histories of the Supreme Court, such as Charles Warren's and the Holmes Devise series,[20] consider the Court in large part as a political institution. As a result, presidential elections, the judicial appointment process, and sectional struggles and wars all become part of the Supreme Court's own "history." Indeed, these books are mainly political and social histories, viewed from the perspective of the Supreme Court as a policymaking institution rather than, say, the White House or Congress. Charles Fairman's volume in the Holmes Devise series, for example, is largely a history of Reconstruction politics in which the Supreme Court acts as a mediator; the language of the opinions itself is given relatively little attention.[21] And Charles Warren's two-volume history[22] is notable for its *lack* of close analysis of the language of Supreme Court opinions.

For a reader who is closely familiar with the political background, this lack of context may not be a problem. But a picture of the substantive due process era that fails to talk about Progressivism or the labor movement, or a history of the Warren and Burger courts that fails to include much context about the civil rights movement, seems in a sense both incomplete and misleading, particularly for those whose training in history is not strong.

But this judges Currie's book too harshly for failing to do something that it never set out to do and which is amply done elsewhere. *The Constitution in the Supreme Court* is not an attempt to deal with the Court as a political institution, or as one of the three branches of government, but rather as a maker of constitutional doctrine. Indeed, the Court itself operates publicly on the premises that (1) interpreting

17. 381 U.S. 479 (1965).

18. 316 U.S. 535, 536 (1942).

19. *See Roe,* 410 U.S. at 152-53.

20. WARREN, *supra* note 5; HOLMES DEVISE HISTORY, *supra* note 4.

21. *See* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-1888, PART I (6 HOLMES DEVISE HISTORY, *supra* note 3). Fairman's treatment of the *Slaughter-House Cases* is typical: 49 pages of social and political history, including history of the litigation in the lower courts, *id.* at 1301-49, and 15 pages analyzing the Supreme Court's opinion, *id.* at 1349-63.

22. *See* WARREN, *supra* note 5.

the Constitution is a matter of applying certain rules that have been accepted for a long time, and of discovering the intent of the Framers; (2) precedent guides the current decision; and (3) with respect to constitutional issues, the Court does not defer to the purely political views of the other branches of government, and certainly not to popular opinion. Many observers today would agree that none of these propositions actually describes the way the Court comes to constitutional decisions. In fact, the Supreme Court's constitutional interpretation has always been greatly affected by contemporary political, social, and economic developments.

Nonetheless, taking the Court at face value as a "neutral" interpreter of the Constitution creates the opportunity for some sharp insights into the process of justification that the Court is condemned to go through. While the Supreme Court is, quite simply, a political institution, it would have us believe that this is not so; most of the time the Court maintains that it is simply engaged in faithful adherence to rules and decisions previously laid down. Currie's book is best read as a study of this rationalization process. More eclectic histories of the Supreme Court as a policymaking institution give a much thinner account of the Supreme Court's endeavors to smooth out the lumps in our political and social history.

Although there is no shortage of constitutional histories of the Supreme Court, and certainly no dearth of legal analyses of constitutional decisionmaking, these two modes of criticism have generally traveled down parallel rather than intersecting paths. The histories are by and large concerned with the impact of Supreme Court decisionmaking on American society (or vice versa). For the most part, histories include little legal analysis in the lawyer's sense. By contrast, a good deal of legal analysis is ahistorical, seeking right answers and treating time only as the trail that leads to them or connects them together. Such writing is most generally organized by subject matter, and is more concerned with the reasoning process that gets one to what appears to be a single right answer than with the unstated political concerns that operate to camouflage and discredit equally reasonable alternatives.

One can certainly overstate the case with respect to both the histories and the legal analysis, but the basic generalizations are good ones. Histories of the Supreme Court are not histories of judicial analysis. Substantive legal analysis is fundamentally analytic rather than historical. This book, by contrast, is a chronological evaluation of the record of Supreme Court Justices as constitutional interpreters. As such, it needs a set of premises as to what constitutes good constitutional interpretation, and in Volume I Currie has provided them. First, "[s]ince the Constitution is law, the judges have no right to ignore

constitutional limitations with which they disagree."[23] Second,

> the same clause that makes the Constitution the "Law of the Land" gives identical status to federal statutes enacted "in Pursuance thereof." Whatever this may signify as to the status of laws that contradict the Constitution, it lends added strength to the unmistakable inference that when Congress has acted within the powers granted by that instrument, it is not for the courts to interfere."[24]

As a result, "judges have no more right to invent limitations not found in the Constitution than to disregard those put there by the Framers. In short, when a judge swears to uphold the Constitution, he promises obedience to a set of rules laid down by someone else."[25] Third, "judges have an obligation to explain the reasons for their decisions as concisely and persuasively as practicable, and . . . they should strive for consistency, reserving the right to correct egregious and important errors on relatively rare occasions."[26]

But this set of principles raises a vexing question about the status of this book as constitutional *history* rather than mere chronology. If Currie's list constitutes the criteria for evaluating constitutional analysis, history is relevant in only one or two technical senses. First, as time passes we may uncover new evidence of the Framers' intentions with respect to some provision. Second, since the Constitution is amended from time to time, and the new amendments must be construed, the constitutional law of, say, the 1870s has a different content from the constitutional law of, say, the 1830s. Beyond this, however, constitutional interpretation should be timeless. In that case it would be far better to organize these volumes strictly around the individual clauses of the Constitution, with subheadings to cover the various issues that have come up under each.[27] Why bother with chronology?

Although Currie never says so explicitly, the justification for a chronological rather than entirely analytic treatment of Supreme Court constitutional analysis must be twofold. First, the development of the meaning of individual constitutional clauses is frequently focused in a brief period of time. For example, the modern interpretation of the Full Faith and Credit Clause results largely from a series of decisions made around the turn of the century.[28] The modern law of

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23. CURRIE, *supra* note 2, at xii.

24. *Id.* (discussing U.S. CONST. art. VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . .").

25. *Id.*

26. *Id.* at xiii.

27. But, of course, in that case we would end up with a treatise on constitutional law something like Laurence Tribe's. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

28. *See* pp. 55-76. Most prominent among the decisions are Huntington v. Attrill, 146 U.S. 657 (1892), and Fauntleroy v. Lum, 210 U.S. 230 (1908).

criminal procedure was largely rewritten during the second half of the Warren era (pp. 446-51).

Second, Justices have deviated from the interpretive principles that Currie puts forth as often as they have adhered to them. Good examples, in Currie's estimation, are the "liberty of contract" cases that characterize the *Lochner* era (pp. 4-54) or some of the civil liberties decisions of the Warren and Burger eras, especially the abortion decision.[29] A chronological study of constitutional analysis, then, is in large part about judges who are led astray and who deviate from basic, long-accepted canons of statutory interpretation. In a few instances even Currie finds some deviation desirable, if not irresistible. For example, he treats *Plessy v. Ferguson,*[30] the Fuller Court's separate-but-equal decision, in two embarrassed sentences, acknowledging that it was dictated by precedent and little more than a sign of the times (p. 40). He might have added that the debates over the Fourteenth Amendment provided almost no justification for striking down Jim Crow railroad car laws; the Court was reading the amendment as it had been written. On more than one occasion Currie admits that an instinctively morally correct decision was nonetheless justifiable on no other ground than substantive due process. In that category belong *Meyer v. Nebraska,*[31] striking down a statute that criminalized the teaching of German to school children; *Pierce v. Society of Sisters,*[32] striking down a statute that effectively outlawed private schools; and *Bolling v. Sharpe,*[33] applying the Fifth Amendment Due Process Clause to condemn school desegregation in Washington, D.C., given that the federal government was not bound by the Equal Protection Clause. The Warren Court, Currie admits, made the country "a decidedly better place" (p. 454). He only laments that it had to play fast and loose with the Constitution in order to do it (pp. 454-59).

But the same considerations favoring chronological over purely analytic treatment of the Supreme Court's constitutional analysis also suggest why the relevant *history* must be broader, at least giving an account of the relevant social, economic, and political context as it analyzes judicial language and argument. The Supreme Court's development of a particular clause of the Constitution tends to be compressed into rather brief time periods because external events drive the Court in that direction. It was not mere coincidence that the Fugitive Slave Clause, in the Constitution for seventy years, underwent most of its Supreme Court interpretation during the twenty years preceding

29. *See* pp. 465-71 (discussing Roe v. Wade, 410 U.S. 113 (1973)).

30. 163 U.S. 537 (1896).

31. 262 U.S. 390 (1923); *see* p. 153.

32. 268 U.S. 510 (1925); *see* p. 154.

33. 347 U.S. 497 (1954); *see* p. 378.

the Civil War.[34] Nor did the great freedom of speech cases of the Holmes era (pp. 115-25) merely coincide with World War I and the Russian Revolution. Nor did the desegregation decisions (pp. 377-84, 415-28) merely coincide with the civil rights movement or the environmentalist revolution in the social sciences. The timing of Supreme Court decisions is driven by events. Unavoidably, the *content,* particularly the rhetoric, of those decisions is driven by events as well.

Further, the judicial urge to make policy or act legislatively — something that Currie most generally abhors — is not expressed in a random fashion. Judges themselves are creatures of time, the product of particular milieus, and this invariably shows up in their constitutional reasoning. Substantive due process was nothing more than classical political economy.[35] The Warren-era establishment and free exercise decisions reflect a greatly heightened awareness of American religious diversity — something that the dominant intellectual traditions had previously suppressed — as well as a new-found cultural relativism that tended to give equal weight to alternative religious beliefs, or to the alternative of no religion at all.[36] The result in such cases was a radical reinterpretation of the Constitution; but Currie gives us the conclusion without the premises. In short, Currie makes his critique of Justices' refusal to follow the rules laid down all too easy by not taking seriously the impact of events and external ideas on the Supreme Court. The picture that emerges is of Justices as successive generations of monks living in an isolated abbey, interpreting and reinterpreting the same ancient text, without so much as a radio linking them to the outside world. But the Supreme Court has never been such an institution, and we would not be a better nation if it were.

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34. *See* CURRIE, *supra* note 2, at 241-45.

35. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 169-204 (1991).

36. *See, e.g.,* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (bible reading in public school), discussed at p. 445; Engel v. Vitale, 370 U.S. 421 (1962) (prayers in public school), discussed at pp. 411-12; Torcaso v. Watkins, 367 U.S. 488 (1961) (oath of belief in God required for public employment), discussed at p. 411.