The Constitution in Congress
Paul A. Clark, '05

David Currie is old fashioned; that is his greatest virtue, and his greatest fault, depending on whom you ask. It is hardly surprising, then, that this old-fashioned professor has devoted a large part of his scholarship to analyzing the historical understanding of the Constitution. His multi-volume work, The Constitution in Congress, has often been cited by, among many others, the United States Supreme Court. Most recently, in June of 2005, it was cited by Justice Thomas in his dissent in Raich v. Gonzalez, to argue for an old-fashioned interpretation of the commerce clause. Currie has said that early interpretations help us understand "what the Constitution means." Notice that he does not say "what it meant" or "what it means today." The third volume of his series, The Constitution in Congress: Democrats and Whigs, 1829-1861, was just published (Chicago 2005) and the fourth volume, The Constitution in Congress: Descent into the Maelstrom, 1829-1861, is due this fall. The two volumes overlap chronologically, but together cover the traumatic years from the presidency of Andrew Jackson to the Secession Crisis of 1861.

You say that how Congress and the Executive historically interpreted the Constitution helps us to understand what it means. You obviously regard The Constitution in Congress as more than just history. It seems fair to say that many constitutional experts today do not think that what Hamilton or Madison had to say about the Constitution is particularly relevant, so why should we care what a bunch of obscure Congressmen in the 1840s and 1850s thought about it?

I regard these books as both more and less than history—less because I'm not trying to outdo the historians at their craft, more because my focus is on the law. I'm trying to tell the story of how the Constitution has been interpreted, and a lot of that interpretation took place outside the courts. Why should we care how the Constitution was interpreted in the nineteenth century? Well, for those who think the views of Hamilton and Madison do matter, the closer we can get to them the better. But whether or not one is searching for the original understanding, one can find enlightenment in the executive and congressional records, for a great many excellent arguments were made that remain equally persuasive today. And sometimes the argument was made by an obscure Congressman, which I find encouraging. What matters is the quality of the argument, not who made it.

You have said that in the early nineteenth century everyone agreed that "the Constitution should be interpreted in accordance with the Framers' original intentions" and yet one of your colleagues, Geoffrey Stone, recently called originalism a "vacuous ideology." From your reading of the constitutional arguments in the period when everyone was an originalist, how would you respond to Professor Stone?

My first response is that I am simply reporting what I have discovered: It is an interesting historical fact that most interpreters up until the Civil War (I have gone no farther) believed the Constitution should be interpreted according to the intentions of its Framers. Beyond that, I think the fact that so many people believed it suggests they just may have been right.

After all, they were closer to the Framers than we are. If they thought the original understanding important, it may be the Framers did too. This approach also squares with what Blackstone, the Framers' mentor, said about statutory interpretation: Laws should be construed so as to accomplish their purpose. Both Story and Marshall, of course, said the same thing about the Constitution. More fundamentally, I don't see how one can claim to be interpreting the law if one ignores what we know about what it was intended to mean. If we grant that the Framers had the right to make law to bind us in the future, it seems to me that assumption requires us to try to carry out their intentions, which they could only express in often ambiguous words. "Vacuous" means, among other things, empty. If the point is that the historical record doesn't contain all the answers, I would readily agree; that seems to me no reason for disdaining such help as one can derive from the existing materials—such as the Sedition Act debates of 1798, which contain in condensed form the whole modern theory of freedom of speech.

It is interesting that so many of the constitutional disputes of the nineteenth century were never adjudicated by the Supreme Court—things such as the Nullification Crisis of 1832 and the boundaries of federal power. To those accustomed to having the courts resolve virtually every constitutional dispute it is hard to imagine a system in which federal courts do not even have general federal question jurisdiction and so many issues were left to
political branches. Are the Courts too involved in political disputes today, or were they not enough involved back then?

Don't get me wrong—I'm a great fan of the courts and judicial review. The courts, and especially the Supreme Court, have done on the whole a wonderful job of protecting us against careless or deliberate constitutional violations. One difficulty with the earlier scarcity of Supreme Court review was that issues never really got settled. President Washington signed the first bill to create a national bank. Madison signed another. In the meantime, however, Vice-President George Clinton killed one bill on constitutional grounds, and Presidents Jackson and Tyler would veto three more. And no, I don't think the courts are too involved in political disputes today. Constitutional litigation necessarily entails judicial decisionmaking in areas of political significance, and I am no disciple of Justice Frankfurter's when it comes to ruling ordinary constitutional questions too "political" for judges to handle. What is crucial is that the judges resolve those questions according to the law and not according to their own political predilections. When they start making up limitations that have no basis in the Constitution, as Justice Byron White wisely observed not so very long ago, they come closest not only to illegitimacy but to vulnerability as well. So yes, federal-question jurisdiction is a good thing. But let us not forget that even before the Civil War constitutional questions reached the lower federal courts in diversity cases and were regularly litigated in state courts as well—in both cases with the opportunity for Supreme Court review.

I read in the University Press of Chicago advertisement for volume four that "Currie shows how the Southern Democrats dangerously diminished federal authority and expanded States' rights, threatening the nation's very survival." Yet I wonder if that is not an overstatement. You write at the end of volume three that Southern Democrats were sometimes right in their narrow reading of federal powers. Is the advertisement right, or is the story more complex than that?

The truth is usually more complex than advertisements would lead one to believe. That's why it took six hundred pages to discuss the extrajudicial constitutional controversies of the years from Jackson to Lincoln. Yes, as an original matter I think the South was right as to the limits of the spending power and largely right about the power to dispose of public lands. On the other hand, as I say at the end of volume four, I think they were wrong about protective tariffs, wrong about internal improvements, and wrong about the national bank. Most conspicuously, they were wrong about slavery in the territories, about the legality of secession, and about the power of the United States to suppress insurrections and enforce the laws. For a quick summary of their views take a peek at the Confederate Constitution, which is a carbon copy of our own with a few choice Southern interpretations added. I'm convinced that the narrow Southern view of federal authority was greatly influenced by the slavery question. As John Randolph said in Congress way back in the 1820s, "The government that can build roads can free the slaves."

At the end of volume four you espouse what seems to be a pretty unique constitutional argument against secession based on Article VII, which says that "ratification of the conventions of nine States shall be sufficient for the establishment of this constitution between the states so ratifying." Paradoxically, Article VII allowed States to leave the supposedly perpetual union by refusing to ratify the new constitution in 1787 (or allowed states to leave the union by ratifying the constitution, depending on your perspective). Can you explain your argument?

The Framers viewed the Articles of Confederation as a mere compact that one party could dissolve upon a material breach by another. That's one of the excuses they gave for adopting a mode of ratification that was not in accord with the existing law. At the same time they wanted to make sure nothing of the sort could happen again. One expressly stated reason for requiring ratification by conventions rather than legislatures was to prevent secession even if the Constitution was violated. That's what Madison said in the Convention, and that's what Senator Simmons of Rhode Island brought to Congress's attention during debates on the eve of the Civil War. And so we have returned to the point where our discussion began, with an obscure nineteenth-century member of Congress making an argument against secession far more powerful than anything the Supreme Court could come up with when it faced the issue in Texas v. White. And that, I think, helps us to understand why we should care what obscure Congressmen said about the Constitution 150 years ago: They often had very interesting and important things to say.

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