Post-Originalism

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Congress did not respond to our first presidential election fiasco with speed and vision. But it did respond. The centerpiece of that response, the Twelfth Amendment, suggests what guidance our constitutional inheritance can and cannot offer. The debates surrounding the reform offer rich materials for understanding the Amendment’s purpose, for illuminating certain ambiguities, and for providing failed reform proposals that merit consideration today. Yet like the Amendment itself, they do not resolve—much less prevent—problems that have since invited later disasters, not least the 2000 presidential election. Those attempting to fix what broke during our most recent electoral fiasco ignore this part of our history at their peril. Yet those who think the past already provides a binding solution that we need merely identify and obey are merely kidding themselves.

The earlier fiasco famously arose in 1800 when fellow Republicans Thomas Jefferson and Aaron Burr tied in the Electoral College, and for thirty-six ballots tied again in the House of Representatives until at last Jefferson prevailed. When, three years later, the nation’s lawmakers finally addressed the problem, the solution seemed straightforward enough. Under the original Article II, presidential electors could cast both their votes for persons who happened to be political allies, but they could not make clear whom they preferred for President and Vice President. Why not, then, have the electors simply vote separately for the two offices? This simple reform would become the core of the Twelfth Amendment (pp 39–41).

It soon became clear that this reform would require other changes, and that the Federalists would oppose change in any case. For two months the House and Senate debated the main proposal as well as related questions great and small. Could there even be an amendment if the result might alter the balance of power among the states?

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Would not a separate electoral vote for Vice President insure that only nonentities would occupy the office? Did it make sense simply to abolish the vice presidency? If not, shouldn’t the Constitution make some provision for selecting the Vice President if the Electoral College deadlocked (pp 41–65)? The ratification of the Twelfth Amendment effectively answered these questions in 1804.

Attempts to repair presidential selection nonetheless did not end with the Twelfth Amendment, nor did they await the next disaster. As early as 1813, a North Carolina proposal advocated an amendment requiring states to be divided into equal districts and that one elector be chosen for each, much as Maine does today. Large states, however, balked at giving up their “winner take all” systems, no matter how undemocratic they concededly might be. A flurry of compromise packages emerged and were defeated in the next decade.

When the next presidential debacle came, the voices for reform only grew louder. Even though Andrew Jackson had won both the electoral and popular votes in the 1824 election, his failure to win a majority in the Electoral College threw the choice to the House, which selected John Quincy Adams, son of a former President. For various reasons, however, the various proposals for change came to nothing (pp 335–43). As David Currie sums up, “we still had a lousy system for electing the President. For the tide was at the flood in 1826, but Congress missed the boat. To this day presidential elections remain bound in shallows and miseries that with a little more good will might long since have been left behind” (p 378).

These presidential election fiascos and the ensuing constitutional debates more or less bookend Currie’s latest achievement, *The Constitution in Congress: The Jeffersonians, 1801–1829*. The book is the most recent installment in Currie’s heroic project of writing the history of constitutional argument in the United States. So far, this effort has yielded a definitive two-volume narrative of constitutional interpretation within the Supreme Court. The current work is the second of what promises to be a much longer and even more important treatment of “extrajudicial interpretation” in the other branches—in particular, the branch that wields the legislative powers “herein granted.”

Until very recently, a focus on Congress in this context would have been downright jarring to a legal culture that for better or worse

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3 US Const Art I, § 1, cl 1.

4 Recent years have seen a turn away from the courts in matters of constitutional interpretation. See, for example, Symposium, *The Constitution and the Good Society*, 69 Fordham L Rev 1569 (2001); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton 1999).
remains fixated on the judiciary. Yet concentrating on lawmakers would have struck anyone in the early republic as axiomatic. The founding generation believed that "the most dangerous branch" would inevitably be the legislature and based much of the Constitution on this assumption. Early legislators took the resulting limitations seriously when many of their number took seats in Congress, however much they may have disagreed on the specifics. Currie's first volume on Congress taught us how much of this legacy we have lost, though at least certain debates that arose in the first few Congresses—the Bill of Rights, the Bank of the United States, the Jay Treaty—linger. One of the most rewarding aspects of this new volume is Currie's restoration of compelling constitutional debate in later Congresses that today are all but forgotten by judges, lawyers, and even academics and theorists open to the past.

The debates on electing the President illustrate why modern constitutional professionals should pay attention to the legacy Currie restores, without blindly obeying what that legacy ostensibly commands. In light of our most recent electoral fiascos, not to mention the election of 1876, never have the arguments that Currie recounts seemed more relevant. Especially striking is the self-consciously democratic districting proposal—this from a world a century and a half removed from Reynolds v Sims. Not only do those debates reveal that large states can have just as much incentive as small ones to block reform of the Electoral College, they further show the various compromises mooted at the time almost succeeded and might succeed again. That said, those who might have turned to The Jeffersonians to settle the specific issues the 2000 election raised could only have come away disappointed. On Currie's account, for example, Congress devoted little, if any, time to the question of whether the Twelfth Amendment requires a majority of all the electors, or merely the ones who qualify. Nor did it address the possibility that a state legislature would choose electors when a popular slate was under challenge.

(attacking judicial review and urging a stronger congressional role in constitutional interpretation); Neal Devins and Louis Fisher, Judicial Exclusivity and Political Instability, 84 Va L Rev 83 (1998) (arguing that constitutional meaning emerges from the mediation of independent judicial, legislative, and executive interpretations); Louis Fisher and Neal Devins, Political Dynamics of Constitutional Law 9-16 (West 2d ed 1996) (same).


7 377 US 533, 576 (1964) (holding that the Equal Protection Clause requires that seats in state legislatures be apportioned on a one-person, one-vote basis).

8 Several prominent members of Congress nonetheless believed that the appointment of electors by state legislatures violated Article II because that provision authorized state legislatures only to fix the manner of appointing electors, rather than appointing electors themselves (p 337 & n 134).
If anything, the same points—history’s usefulness, but also its limitations—apply with even greater force to the rest of the book. The sweep of the work is enormous, covering forgotten controversies that are newly relevant, certain better known but underappreciated disputes, and disagreements that today appear utterly distant. Yet in each instance, the arguments Currie recounts merit consideration but not submission. This follows in part because, as with presidential selection, the concerns of the past echo but do not perfectly replicate our own. It also follows—and here at least the Twelfth Amendment debates are anomalous—because the Congresses of the early nineteenth century were attempting to interpret and work out a Constitution that was already ten, twenty, or thirty years removed from its founding understandings. In this “post-originalist” world, the arguments that this volume reconstructs more greatly resemble our own than provide windows into an “original” understanding. This does not make this installment any less essential. It does, however, provide one more reason to take the legacy Currie recaptures not just seriously, but critically.

This Review considers constitutional arguments that this volume reconstructs and suggests their relevance to the arguments made today. After noting Currie’s methodology, Part I highlights the rich constitutional inheritance he identifies from the controversies that arose during Jefferson’s administration as well as subsequent battles that took place during the emergence of Henry Clay, John C. Calhoun, and Daniel Webster. Part II critically assesses Currie’s approach, pointing out the substantial benefits, as well as certain inevitable limits, to his lawyerly focus. Finally, Part III defends the claim that the legacy Currie offers in this volume provides at best limited material for originalists, but instead suggests a fruitful post-originalist approach that looks to past experience to assess how given constitutional doctrines or mechanisms have succeeded or failed.

I. CURRIE’S PROJECT AND THE JEFFERSONIANS

As the volume that preceded it, The Jeffersonians focuses on constitutional law, yet seeks it in congressional debates, presidential messages, and an array of related sources, rather than in the courts and cases. These materials bear on an array of controversies, some well known, many long since forgotten. During Jefferson’s presidency, the nation grappled with such challenges as Aaron Burr’s treason trial, battles with the Tripoli pirates, and the Louisiana Purchase. Controversies of this sort continued apace under Jefferson’s successors, as the republic faced the War of 1812, the Missouri Compromise, and the set of internal improvements dubbed “The American System.”
A. Currie in Congress (and the Executive)

The legacy, then, is vast, though scarcely more so than Currie's own zeal in reconstructing it. Any attempt to harvest these fields first requires a notion of how extensive they are. As in *The Federalist Period*, the key inspiration turns on the crops that are selected. Having already considered the Supreme Court, Currie has no doubt where the richer possibilities lay. "Look not," he exhorts, "to the judges, who, like blossoms at the whim of the capricious butterfly, pollinate the constitutional fields now and then according to the vagaries of litigation." Instead, "[g]o to school ... with Presidents, with Cabinet ministers, with members of Congress, who grapple with constitutional conundrums every day, in every action they contemplate, in every exercise of their official function" (p 344).

This type of grappling may or may not continue today. Currie, however, has the goods on our early lawmakers. Though he does not spell it out as thoroughly this time, he applies the same method he successfully used in *The Federalist Period*. His search for extrajudicial interpretation accordingly takes him from congressional debates, statutes, resolutions, committee reports, through presidential speeches, veto messages, proclamations, Attorney General opinions, and on to, albeit in a more limited way, correspondence and personal papers. Currie's search, in short, has taken him to nearly all relevant official documents, and many unofficial ones as well.

However in-depth the research, far more striking is the breadth of topics considered—"a cornucopia ... of constitutional controversies we never knew had arisen, of constitutional arguments we never knew had been made" (p 344). Currie divides the cornucopia into two parts: the first covering Jefferson's two terms, the second devoted to the administrations of Madison, Monroe, and Adams. Despite certain differences, the eras were united in producing constitutional disputes on a regular basis.

B. The Jeffersonians Proper

Part I—the Jeffersonian era strictly speaking—in many ways presents the *Constitution in Congress* project with its acid test. During exactly this period the Supreme Court blossomed under Chief Justice Marshall, while many of the giants who graced Currie's initial volume departed from the scene, leaving behind few heirs of comparable ability. Gone were Alexander Hamilton, Fisher Ames, and Patrick Henry;

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10 Currie, *The Federalist Period* at ix (cited in note 1).
yet to come were John Calhoun, Henry Clay, and Daniel Webster. Constitutional argument nonetheless flourished far more extensively outside the Court, in part because the nation still had to work out many basic questions, in part because enough Federalists remained in Congress to force debate, and in part because enough able Republicans could respond.

Consider just some of the issues that produced truly weighty exchanges. When, for example, Jefferson's newly Republican Congress attempted to clip the wings of the Federalist judiciary by abolishing recently created circuit courts, they ran headlong into Article III's guarantee that judges serve "during good behavior." As congressional Federalists pointed out, to abolish these courts "would establish the principle that judges served at the pleasure of Congress and destroy the judicial independence the Constitution guaranteed" (p 14). Not much later, Congress took up a proposal to give the District of Columbia back to Maryland on the ground that "to legislate on insignificant local matters was both a waste of time and an infringement of the principle of self-government" (p 67). On more serious, better known notes, foreign affairs crises raised questions of how far the President alone could go in battling renegade states such as Tripoli (not very) (pp 123-30), whether the judiciary could compel a President's testimony in the Burr treason trial (each side compromised but neither gave way) (pp 133-37), and the legitimacy of a presidential trade embargo authorized by statute (the President acted at the zenith of his powers) (pp 145-55). All this and the Twelfth Amendment, too.

In these and other instances, even the most remote disputes strike immediate chords. And no constitutional dispute was more important at the time, nor seemingly more beside the point now, than the Louisiana Purchase. As Currie recounts, the acquisition of the vast territory produced not a few fundamental questions, and not least on the part of Jefferson himself. The President first voiced concerns about whether the Constitution authorized such a purchase in the first place. The ultimate answer was that the Treaty Clause authorized the purchase because the transfer implemented an agreement between the United States and France. A perhaps more surprising objection questioned whether Congress could admit states outside the nation's original territory. The majority view came to be that the plain meaning of Article IV, which mentioned no limit on Congress's power to admit new states, as well as the original understanding underlying that text, allowed Congress to expand the nation beyond its original territory.

Comforting as it is to know that the Eighth Circuit belongs in the United States after all, the modern implications of these arguments go further. For starters, Currie's discussion moots recent, loose talk voiced during the Clinton impeachment that his earlier namesake
blithely violated the Constitution in securing the Louisiana Territory. Beyond this debater's point, reconsideration of the treaty argument directly addresses one of today's more pointed scholarly debates, lending powerful support to defenders of *Missouri v Holland* and the proposition that treaties may augment congressional authority not otherwise enumerated. Likewise, the debate over admission of states from new and potentially alien territories prefigured a more dramatic version of this problem in the *Insular Cases*, as well as modern debates over how far outside our borders the Constitution can and must apply.

C. The Rise of Clay, Calhoun, and Webster

With Part II, *The Jeffersonians* strikes more immediate chords still. The subtle shift is not due to Jefferson's successors. Two of them, Madison and John Quincy Adams, may have been brilliant, but only Monroe—"the least talented of the three"—had an effective presidency (pp 161-62). Rather, the triumvirate of Clay, Calhoun, and Webster entered the stage, helping win back for Congress the lead in determining the national agenda, and justifying every block quotation that Currie awards them. More important, the basic issues were more urgent and perennial. One large set involved war, "not least the question of congressional and presidential powers" (p 163). An even larger set of questions centered on the scope of federal authority in light of westward expansion and national consolidation. Then, as now, never

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11 See, for example, *Censure Clinton and Settle Scandal*, News Tribune C12 (Nov 8, 1998) (stating that "the Constitution ... didn't explicitly permit Thomas Jefferson to negotiate the Louisiana Purchase, either"). But see John Ellis, *Let's Buy Siberia: Don't Laugh, It's a Great Idea*, Boston Globe A27 (Oct 8, 1998) (arguing that Clinton could avoid impeachment by doing something as popular as the Louisiana Purchase, such as buying Siberia).

12 252 US 416, 432 (1920) (rejecting the proposition that the Tenth Amendment limits the treaty power).


14 The Supreme Court, in a series of decisions that have come to be known as the *Insular Cases*, created the doctrine of incorporated and unincorporated territories: *De Lima v Bidwell*, 182 US 1 (1901); *Dooley v United States*, 182 US 222 (1901); *Armstrong v United States*, 182 US 243 (1901); *Downes v Bidwell*, 182 US 244 (1901). See Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 Const Commen 241, 251–57 (2000).

15 See, for example, *United States v Verdugo-Urquidez*, 494 US 259, 268–69 (1990) (holding that the Fourth Amendment protection against unreasonable search and seizure does not apply to property owned by a nonresident alien and located in a foreign country).
far behind debates over national power were explosive disagreements about race and equality.

Though often a disaster on the ground, the War of 1812 was relatively bloodless in constitutional terms. Currie notes that the unpopular conflict produced surprisingly few assaults on civil liberties (pp 165–66). Instead, substantial debate arose over federal control of the militia, one of several issues that led to the huffing and puffing of the Hartford Convention (pp 167–90). By far the most important point, however, had been settled at the outset when President Madison obtained a declaration of war against Great Britain from Congress. The understanding this action reflected carried over to later skirmishes with Spain over Florida (pp 191–200). In the end, Currie’s careful review of these matters enables him to declare what John Hart Ely and others¹⁶ assume:

[T]he express position of every President to address the subject during the first forty years of the present Constitution was entirely in line with that proclaimed by Congress in the celebrated War Powers Resolution in 1973: The President may introduce troops into hostilities only pursuant to a congressional declaration of war or other legislative authorization, or in response to an attack on the United States (p 218).

The reach of federal power would produce no similar consensus. The matter came to a head with regard to westward expansion and the ongoing admission of new states. With the partial exception of Louisiana, the admission of the first five states during this period “was a breeze” (p 255).¹⁷ The breeze became a tornado with Missouri. Thanks to its central position, Missouri starkly presented the question of whether the West would be slave or free states. The famous Compromise provisionally answered this question through the admission of Missouri as a slave state, Maine as a free counterbalance, and a federal statute prohibiting slavery in the remaining territory of the Louisiana Purchase north of Missouri’s southern border.

¹⁶ See, for example, John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath 64 (Princeton 1993) (proposing a revised War Powers Act that “restores the original and constitutionally mandated presumption, requiring that congressional authorization precede military action on our part unless there are compelling military reasons precluding it, in which case the president may request authorization from Congress contemporaneously with his order commencing military action”).

¹⁷ Relatively minor issues did arise. One of the more interesting turned on Indiana’s attempt to appoint presidential electors before it had clearly become a state. This bid theoretically raised the issue of whether Congress’s Twelfth Amendment power to “count” electoral votes entailed the power to determine their validity. The issue was not pursued and Indiana’s votes were counted (pp 226–27).
Interestingly, Currie points out that almost no one at the time made the *Dred Scott* argument challenging Congress’s power to ban slavery in the territories. Instead, the debate centered on the doctrine of unconstitutional conditions. Initially, Northern opponents of slavery sought to allow Missouri into the Union with the proviso that the state ultimately phase out the peculiar institution. As Currie notes, the proposal created “a basic tension . . . between two constitutional principles” (p 243). On one hand, effective regulation of an internal state matter helped undermine the idea that the central government was one of limited powers. On the other, Congress’s authority to condition admission of states on measures that it could not impose directly follows from its clear authority to admit new states under Article IV. As it happened, Congress evaded choosing between the two principles, not to mention further sectional strife, through the compromise that resulted (pp 232–49).

The problem of federal authority assumed more familiar form during the heyday of the “American System,” Henry Clay’s aggressive legislative program to promote a stronger and more integrated national economy. The plan was threefold: rechartering the Bank of the United States; federal construction of roads, canals, and other internal improvements; and finally, a protective tariff. In each instance, “states’ rights” advocates opposed the measures as exceeding Congress’s authority (p 250).

Yet, in each instance the expansive nationalist interpretation prevailed. President Madison, for example, came to support the Bank that he had opposed in Congress mainly on the ground that its intervening operation itself served as a source of constitutional legitimacy (pp 254–58). For his part, President Monroe agreed with his predecessor that internal improvements could neither be based upon the same type of intervening custom nor upon Congress’s commerce, military, or postal powers. Roughly anticipating a modern dichotomy, Monroe nonetheless came to approve internal improvements based on the Spending Clause (pp 279–81). Finally, the 1828 “Tariff of Abominations” would (in Currie’s next book) again raise the explosive issue of state authority to nullify federal law. On the merits, however, text, original understanding, and subsequent practice made the

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18 *Scott v Sanford* ("Dred Scott"), 60 US (19 How) 393 (1857).
19 US Const Art IV, § 2, cl 1.
21 See, for example, *South Dakota v Dole*, 483 US 203, 211 (1987) (stating that even though Congress lacked the power under the Commerce Clause to impose a national minimum drinking age, conditioning highway funds on states lowering the drinking age was a proper use of the spending power).
22 US Const Art I, § 8, cl 1.
case for Congress's power to enact the tariff overpowering, as Madison himself argued (p 289). Taken together, the components of the American System may have fallen well short of the New Deal. The basic form of justification, however, was unmistakably present.

Beyond these doctrinal points, only at the end does The Jeffersonians clearly let the period's other foot drop. In the conclusion, Currie confesses his surprise at the vehemence of southern opposition to innocuous internal improvements that could only have benefited the region. The answer, of course, was that "[i]f Congress can build roads and canals, it can emancipate slaves" (p 347). During the Missouri controversy, the specter of federal power as a threat to slavery had been made explicit. Some Yankee zealots had even asserted that Congress could abolish slavery not just in the territories, but in the original states as well. This connection in turn led southerners to embrace "an absurdly narrow" interpretation of federal authority to counter "an absurdly broad one" (p 348). That may well be. But, at least as a matter of fundamental justice, it seems clear that southern opposition of national power—to preserve local enslavement—did not complement the better angels of our nature.

II. THE "LAWYER'S LENS" AND ITS LIMITS

Currie's approach to the vast landscape is sui generis. As in his earlier volume, he disclaims "any pretension to improve upon the work of historians and political scientists who have studied this period" (p xii). Instead, the work seeks "to examine the same material through a lawyer's lens" (p xii). Anyone familiar with Currie's earlier work knows that this strict lawyerly focus yields substantial riches. On this chosen turf, it would be hard to imagine any treatment more comprehensive, clear, or insightful than either The Federalists or The Jeffersonians. Inevitably, the same lawyer's lens that accounts for the book's distinctive virtues confines its vision as well. In the end, however, the view is more than wide enough and penetrating enough both in its own right and as a basis for others to broaden further.

A. The View Beyond the Courts

Given the book's legal orientation, perhaps its most original strength is the counterintuitive but inspired decision to look beyond the courts. Currie rightly contends that "those who think about the Constitution from a legal perspective" tend to concentrate too heavily on judicial decisions (p xi). By contrast, historians such as Jack Rakove have pointed out that most answers to constitutional questions have been worked out politically, in part because text, structure,
and original understanding resolve so little, and in part because the judiciary played an ancillary role throughout much of our history.\textsuperscript{23}

As Part I suggests, the law professor’s achievement confirms the historian’s point. This is not to say that the judiciary was unimportant, as Currie’s earlier work on the Supreme Court demonstrates.\textsuperscript{24} But recall the issues during this period that did not darken judicial chambers: presidential selection (in marked contrast to today\textsuperscript{25}), the Louisiana Purchase, the Embargo, the War of 1812, the Missouri Compromise, and federal construction of roads and canals are merely the most salient among the many constitutional controversies Currie describes. Next to all this even the great, contemporaneous Marshall Court pales.

B. Sharp Focus

Good lawyering more obviously accounts for several of the volume’s other assets, especially its presentation. Currie keeps the flood of issues from drowning the reader through exacting organization. Each thematic chapter is in turn divided into as many as a dozen headings or subheadings. Within these, moreover, the exposition is invariably tight, precise, and lucid. In the best sense, \textit{The Jeffersonians} has the clarity of a (dimple your own chad) Laurence Tribe or Theodore Olson brief.\textsuperscript{26}

But more lively. Whether a legal focus helps or hurts good writing may be a debatable point in most instances. In this case, however, Currie’s prose yields one of \textit{The Jeffersonians’} signal delights. Taken more or less at random, here is Currie on the Twelfth Amendment: “[C]onstitutional changes are seldom so simple as they seem; displace a single brick and you may end up rebuilding the entire facade” (p 65). On Jefferson: “Democracy, liberty, and enlightenment: not a bad epitaph for a man with feet of clay. From the ankles up, he’s still in my Pantheon” (p 158). On Madison’s veto of internal improvements: “President Madison did what? He vetoed the Bill. The Bill he had asked—no, browbeaten Congress—to pass” (p 265). And on summing up, he writes, “I shall not repeat what I have said in the chapters that precede this conclusion; if you want to read it again, read it again.”

\textsuperscript{23} Jack N. Rakove, \textit{Original Meanings} 201–02 (Vintage 1996).

\textsuperscript{24} See generally Currie, \textit{The First Hundred Years} (cited in note 2).

\textsuperscript{25} See \textit{Bush v Gore}, 121 S Ct 525 (2000) (per curiam).

(pp 346–47). In other words, Currie writes with wit, punch, and pizzazz. Even the most intrepid student of the Constitution might find almost 350 pages of relentless constitutional argument rough going at points. Thanks to Currie’s zest, those points are few and far between.

One further reward, with even closer links to the bar, is the book’s razor sharp legal analysis. Currie breaks down and sets forth the arguments made in their most basic, logical units, with perhaps the ironic result that the reader has a better overview of certain positions than did at least some of the congressmen cited. Currie also critiques the legal positions he recounts, handing down usually convincing decisions with the acumen of a first-rate judge. Such critical assessment in turn reinforces the initial factual exposition of the arguments that Congress and the President made.

Nowhere are these abilities deployed to greater effect than Currie’s analysis of the Missouri question. Here he considers the general objection against Congress conditioning a state’s admission on its elimination of slavery, then disassembles it into no less than six discrete components. To take one, Currie examines the “seductive argument” that the Tenth Amendment prohibited Congress from conditioning a state’s admission on the regulation of slavery for the same reason that Article IV prohibited a requirement that a new state accept only one seat in the Senate (p 241). As Representative Alexander Smyth of Virginia argued, “[I]f you cannot stipulate for the exercise of a power prohibited, you cannot stipulate for the exercise of a power withheld” (p 241). But as Currie confidently points out, “Smyth’s analogy is flawed. Unlike the first amendment, the tenth takes nothing from Congress that the list of enumerated powers confers” (p 241). For good measure, he rightly concludes that the same distinction has long been recognized in the analogous case of treaties, “which are limited by affirmative restrictions on federal authority ... but not by the enumeration of legislative powers” (p 241). Even the best mainstream historians—in particular, those who labor in university history departments—are seldom this rigorous.

C. Lawyering’s Limits

The lawyer’s lens nonetheless does have another side. So firm is Currie’s gaze on the core legal matters that related concerns of politics, ideology, economics, race, and gender often remain outside his field of vision. At a minimum the resulting view may omit developments that place the legal issues in a larger perspective. For example,

27 US Const Art I, § 3, cl 1.
Jeffersonian suspicion of a strong, centralized government in part reflects an older tradition harking back to colonial resistance to Parliament, but in part also has something to do with the protection of slavery. Getting a better fix on which concern dominated may in turn help us determine how broadly the arguments against national power should be understood.

For those who deny the distinctiveness of the law—one side of the perennial “internalist” versus “externalist” debate in legal history\(^\text{29}\)—the problem is more basic. According to this view, legal arguments cannot be taken on their own terms by definition. This would go double given that the legal arguments Currie discusses were made by legislators and executive officers, two types of public servants not known for distinguishing legal from other considerations.

Even if Currie accepted these assumptions, he might well reply with Voltaire that the best should not be the enemy of the good.\(^\text{30}\) And surely it is a Herculean enough feat to get the constitutional arguments that the historical actors self-consciously made straight. That said, a more sustained look in certain directions would almost certainly benefit the project without creating the need for several more volumes. One way involves sources. It is one thing to eschew improving upon the relevant work of historians and political scientists. And certainly no one has a greater claim of mastering the applicable primary sources. *The Jeffersonians* nonetheless overlooks many more recent works on the period that could only cast additional light on the primary sources. More importantly, certain considerations so clearly apply to certain debates that they should be welcomed rather than kept at arm’s length. Most obviously, you don’t have to be a radical “externalist” to see how race and slavery drove formal constitutional argument even when not acknowledged. As noted in Part I, *The Jeffersonians* makes this connection to the debates over the American System in its conclusion. Currie’s discussion of those debates could only have been richer still had the point been a thread throughout.

### III. How Currie Matters

Yet, in the end, so what?\(^\text{31}\) Why should modern constitutional professionals—lawyers, judges, scholars—pay attention even to this, most


\(^{31}\) The eminent historian Bernard Bailyn was legendary for asking this oddly lawyerly question when students would submit accounts of various historical events. Consider Bernard
legally oriented, constitutional history? The question seems all the more pressing given that this volume covers not the hallowed founding, nor even its immediate aftermath, but instead such epochal events as the admission of Indiana to the Union.

Currie thinks that they should pay attention. Too concerned with setting forth the history itself, he has little time for theoretical justifications. He nonetheless makes clear that he rejects both those lawyers and historians who prefer to rule separately their respective domains.\(^3\) Instead, Currie's project is a significant part of a continuing trend to build bridges between the disciplines.\(^3\) Perhaps the book's most sustained defense of this enterprise comes toward the end, when Currie maintains that the material he has presented "will not always give you answers":

Constitutional questions that are worth disputing have no answers. Look rather for insights, for wisdom, for guidance, for the raw materials that inform judgment, and you will not be disappointed. For constitutional interpretation is a matter of informed judgment, and there is nothing like the extrajudicial debates of the early years to inform our judgment as to what the Constitution means (p 345).

Much like the arguments he breaks down, these sentiments profit from further consideration.

A. The Irrelevance of Originalism

The most charged link between law and history, of course, is originalism. Based on the notion that a lawgiver's intent is determinate and binding, originalism also presents the past at its most "authoritarian."\(^3\) In contrast to his more skeptical closing remarks, Currie begins the book on a note of apparent approval. Turning to his previous volume, he notes that one reward of looking beyond the courts is that "it was in the legislative and executive branches, not in the courts, that the original understanding of the Constitution was forged" (p xi).\(^3\)

At least for The Jeffersonians, however, any commitment to originalism—or at least to providing data to enable others to apply the

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32 See, for example, Bruce Ackerman, 1 We the People: Foundations 166 (Belknap 1991).


35 Quoting Currie, The Federalist Period at 296 (cited in note 1).
doctrine—is neither apparent nor real. Nor could it be. Currie's closing remarks suggest the problem lies with an inescapable indeterminacy. On one level this may seem odd in light of Currie's many confident "judgments" regarding who had the better of a particular controversy. Yet for all his legal bent, Currie is simply too familiar with history's competing voices, its contradictions, its plain sloppiness to believe that it will often yield clear answers.

But an even more fundamental hurdle in using *The Jeffersonians* as a tool for originalism turns on timing. In theory, originalism privileges the intent of the lawgiver—here conventionally "We the People of the United States"—as it posits the law because the whole point is to bind those who later operate under the norms that result. As the Supreme Court has recognized, the acts of early Congresses or executive officials can be used to infer the "original intent." After all, many of those involved in framing or ratifying the document played prominent roles in its initial implementation. Nor, without more evidence, is there any reason to think that the first few years of a regime would produce changes suggesting the original actors would have radically altered their original commitments. Much, if not most, of the material Currie covered in *The Federalist Period* arguably provides plausible evidence of original understanding.

Comes a point, however, this is no longer so. The "Decision of 1789," in which Congress decided not to place limits on the President's ability to remove executive officials, may tell us about the attitudes concerning the removal power that were likely present two years earlier, during ratification. The same supposition no longer attaches even as early as the 1801 debate over the elimination of federal courts, the first controversy *The Jeffersonians* considers. Not only were the personnel far different from the previous decade, party polarization and transition had worked significant changes in the original landscape. And what applies here only applies that much more strongly to the recharter of the Bank, internal improvements, or conditioning the admission of a state on the elimination of slavery. To use this material as a marker for original intent would result in the same error Justice Scalia committed when he cited nineteenth-century state court decisions on disproportionate punishments as evidence for the original

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37 See *Printz v United States*, 521 US 898, 907 (1997) (holding that Congress may not compel state executive officials to enforce federal regulatory programs, partly on the basis that the Constitution was originally understood to allow federal "conscription" of state judges, but not executives or legislatures).

meaning of the Eighth Amendment.\(^3\) By the period covered in *The Jeffersonians*, we are in a post-original world.

Mostly. The present volume does provide some fodder for originalists: at least one chapter's worth for the traditional variety who look only to the time at which a constitutional provision was enacted; a bit more for those who posit deliberative constitutional change outside the mechanisms created in Article V. In each instance, the recurring theme of presidential selection provides the subject matter.

For traditional originalists, there is the story of the Twelfth Amendment. Here reformers played by the rules laid down for the amending process, succeeded in claiming the mantle of "We the People," and produced the only textual change made to the Constitution until the Civil War. To the extent that text remains unclear, Justice Scalia—or in the spirit of Currie's project, President George W. Bush or Senate Majority Leader Trent Lott\(^4\) —would turn to precisely the debates Currie recounts to satisfy their theory of interpretation. Strictly speaking, those debates would not in themselves be sufficient since more sophisticated originalist theory holds that the most relevant intent lies with the ratifiers, who in this instance were the state legislatures, rather than the congressmen who proposed the change.\(^4\)

As noted in the Introduction, Currie's treatment suggests that these debates unfortunately had little to say about the concerns raised in the 2000 presidential election.

### B. Constitutional Moments, Constitutional Custom

For another type of originalist, the Twelfth Amendment debates would be only the beginning. Pioneered by Bruce Ackerman, this school holds that considered, structured constitutional change can take place outside the formal amending process of Article V so long as the underlying goals of that process have been realized.\(^4\) A reform

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\(^3\) See *Harmelin v Michigan*, 501 US 957, 983–85 (1991) (Scalia) (citing state court decisions from 1824–1900 as evidence that the Cruel and Unusual Punishments Clause was not originally intended to proscribe disproportionate punishments).


\(^4\) On this view, the operative intent during the founding rested with the ratifying conventions rather than the "framers" of the Federal Convention. See Charles A. Lofgren, *The Original Understanding of Original Intent*, 5 Const Commen 77, 83–84 (1988). See also *M'cCulloch v Maryland*, 17 US 316, 403 (1819) (stating that "[f]rom these [ratifying] Conventions the constitution derives its whole authority").

\(^4\) See Ackerman, *We the People: Foundations* at 266–94 (cited in note 32) (arguing that de facto constitutional amendment is accomplished when the Supreme Court upholds "transformative statutes" contrary to prior constitutional understanding but marked by widespread deliberation and strong public support). See also Bruce Ackerman and David Golove, *Is NAFTA*
movement that, among other things, achieves sustained supermajorities after ample debate may properly claim its achievement as higher law even without approval by two-thirds of Congress and three-quarters of the state legislatures. On this view, the Twelfth Amendment represents not a discrete constitutional change but the culmination of the founding. Ackerman himself has suggested that the substance of this finale reflects the acknowledgment of political parties, a reorientation toward truly limited government, and a shift toward a presidentialist model of government. Much in The Jeffersonians would be relevant to all these assertions: from Jefferson's assault on the judiciary, to qualms expressed over the Cumberland Road, back to the issue of presidential selection. The Ackerman brand of originalism, moreover, would be open to other episodes of discrete constitutional change in the controversies Currie describes.

As has been often pointed out, without care Ackerman's form of originalism can slide into a type of Burkeanism. Multiply enough of the instances in which "We the People" effect constitutional change and pretty soon it starts to look like such change occurs all the time. This makes even more of the past authoritative, if not authoritarian. At the very least, evolving practice and custom becomes a significant source of constitutional meaning. Madison himself at times reflected this view. As Currie points out, Madison justified supporting the Second Bank precisely on the ground that three decades of acceptance had rendered the institution legitimate (pp 255–57 & n 52). As a theoretical matter, custom has its own problems. Not least among these are the questions of what counts as the relevant custom, at what level of generality, and for how long. The Jeffersonians affords the method only limited comfort in any case. For all its coverage of un-

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43 See Bruce Ackerman, America on the Brink (forthcoming 2003).
44 See, for example, Eben Moglen, Review, The Incompleat Burkean: Bruce Ackerman's Foundation for Constitutional History, 5 Yale J L & Hum 531, 547–53 (1993) (arguing that Ackerman's "organic constitutionalism" is Burkean, despite Ackerman's emphatic disavowals).
45 Reliance on custom has been famously articulated not just by Chief Justice Marshall in M'Culloch v Maryland, 17 US 316, 401–02 (1819), but by Justices Frankfurter and Jackson as well. See Youngstown Sheet & Tube Co v Sawyer, 343 US 579, 610 (1952) (Frankfurter concurring); id at 637 (Jackson concurring).
46 Eighteenth-century English law not only identified custom as a source of binding legal norms, but also elaborated rules for resolving the bases on which it was to be identified. See John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights 72–73 (Wisconsin 1986). More recently, the Supreme Court famously debated the level of generality problem in relation to identifying relevant constitutional tradition under the Fourteenth Amendment. Compare Michael H. v Gerald D., 491 US 110, 127 n 6 (1989) (Scalia) (arguing to apply the most specific relevant tradition in identifying rights), with id at 139 (Brennan dissenting) (arguing for a higher level of generality).
folding constitutional development, a striking feature of the book is the multiplicity of voices, not their unity. In this regard, Currie was right to point out the lack of definitive answers after all. In the end, it is probably a good thing that Currie's book does not lend itself to originalism or other authoritative applications of history. Such applications seldom end happily. Not that seldom means never. Putting aside the theoretical objections, historians can sometimes yield sufficiently definite answers that lawyers in turn apply in a good faith, credible manner. More typical, however, is the Court's performance in *Alden v Maine*. There it made the sweeping assertion that state sovereign immunity was so much a part of the founding's legal fabric that people at the time did not really need to mention it. As it happens, one of the few sources supporting this proposition was not a monograph or dissertation on the subject, but a brief passage from *The Federalist Period*. To an extent, Currie's otherwise provocative "judgments" tend to encourage this type of thing. To a greater extent, though, the *Alden* episode just goes to show that the quest for authoritative sources subjects even the most careful works of history to misuse.

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50 Id at 713–15, 724–25, 741–46.

51 Id at 720, 721, quoting Currie, *The Federalist Period* at 196 (cited in note 1). Both the Court's assertion and the passage on which it relies specifically deal with how the reaction to *Chisholm v Georgia*, 2 US 419 (1793), reflected an ostensibly widespread and ongoing commitment to state immunity from suit. These assertions, however, do not do adequate justice to the complexity of these topics nor the substantial literature challenging these conclusions. See, for example, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum L Rev 1889, 1934–38 (1983) (disputing the traditional argument that the Eleventh Amendment was adopted to restore the original understanding that the states were immune from suit without their consent and arguing that the Eleventh Amendment does not constitutionalize sovereign immunity); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan L Rev 1033 (1983) (arguing that the framers of the Eleventh Amendment did not intend to forbid the exercise of federal jurisdiction over private suits against the states).
C. Post-Originalism: An “Experiential” Alternative in Constitutional History

But if this is right, the “so what” question returns. Only now it takes the form: so what’s the use of constitutional history in a post-originalist world? The query becomes doubly pressing if reliance on custom—the other main candidate for authoritative history—seems problematic. Of course one can always round up the usual platitudes about history “enhancing our understanding” and “providing helpful background.” However enjoyable, reading The Jeffersonians, let alone the rest of Currie’s opus, requires more than a little investment. And Currie’s own investment is exponentially greater. What makes the book worth a lawyer’s while if it will not settle modern constitutional questions authoritatively?

Currie zeroes in on an answer in speaking of constitutional interpretation as judgment informed by, among other things, history. The more precise justification, however, runs through the debates that he reconstructs. Return to the issue of presidential selection. Not only was Congress self-consciously responding to the immediate history of the 1800 deadlock. In doing so it also invoked earlier examples, such as the procedural precedents afforded by the Eleventh Amendment (p 58). Call this post-originalist approach to constitutional history “experiential.” Hamilton much earlier extolled the method, urging, “Let experience, the least fallible guide of human opinions, be appealed to for an answer to these [constitutional] questions.”

He illustrated what he meant by seeking to distinguish relevant historical successes from failures in considering Sparta, Athens, Rome, Carthage, Venice, Holland, Britain, Spain, North Carolina, Pennsylvania, and Massachusetts—all in the same essay.

For reasons unclear, this experiential use of history has long since lost the central place it held in the early Republic. It differs from originalist approaches by refusing to treat the past as an oracle to be obeyed once we figure it out. Yet the type of post-originalist, experiential method posited here also differs from “Burkean” interpretations by declining to stress the importance of evolving custom as a

53 Id at 57–59.
54 This reliance on history as an oracle most obviously characterizes those whom James Fleming has termed “narrow originalists,” such as Judge Bork and Justice Scalia. James E. Fleming, Fidelity, Basic Liberties, and the Specter of Lochner, 41 Wm & Mary L Rev 147, 154 (1999). But at root it no less describes the work of scholars at once more liberal in orientation and more serious about historical scholarship, including Bruce Ackerman and Lawrence Lessig. See generally the approaches taken in Ackerman, 1 We the People: Foundations (cited in note 32); Lawrence Lessig, Translating Federalism: United States v Lopez, 1995 Sup Ct Rev 125.
principal source of constitutional norms. For those for whom the mention of history conjures up images of musty, long-dead reactionaries, an experiential approach to the constitutional legacy that Currie recaptures might usefully be thought of as a temporal version of the far more trendy field of comparative law. Just as looking to other legal systems may suggest workable (or not) alternatives, so too does looking at previous versions of our own.

As with comparative law, a good deal turns on the proximity of the items compared. At one end of the spectrum, in temporal terms, is continuity. Intervening change must not be so radical as to make futile any attempt at translating a past experience or arrangement to contemporary terms. In this regard, return to the introductory matter of presidential selection. Recall in particular the proposed reforms that were rejected just in time to guarantee our second great election fiasco, the 1824 victory of John Quincy Adams in the Electoral College despite the popular victory of Andrew Jackson. Again as Currie recounts it, one “statesmanlike” compromise envisioned that electors would be chosen in districts of equal population—the North Carolina proposal previously discussed in the Introduction—but if they could not agree on a President, one should be chosen by a joint session of Congress, with each member having one vote. In this way the large states would yield the advantage they had in choosing electors on an “at-large” basis. Yet the small states would give up the preference they enjoyed in the House choosing a President through equal state suffrage (pp 337–40).

The point here is less the wisdom of the proposal than its intelligibility. The nation of course has changed enormously since the 1820s.

55 By “Burkean,” I do not mean the position that what has come to be always ought to be. Rather, I employ the term to mean a reliance on incremental change as an important and legitimate normative source. In the context of U.S. constitutional law, a “Burkean” approach in this sense views text and structure as starting points, but sees the more relevant basis of constitutional doctrine as the provisional resolution of problems and controversies as they have been worked out not just by the courts, but by the political branches and the public as well. This approach, which has roots in the common law, has a rich tradition. See note 45. Perhaps the leading scholar currently at work on developing and updating a theory of constitutional custom is Larry Kramer. See, for example, Larry Kramer, Fidelity to History—and Through It, 65 Fordham L Rev 1627, 1631–41 (1997) (discussing the role of custom in constitutional law); Larry Kramer, What’s a Constitution for Anyway?: Of History and Theory, Bruce Ackerman and the New Deal, 46 Case W Res L Rev 885, 908–11, 928–29 (1996) (same).

For the historical record, this type of more nuanced reliance on incremental change better comports with Edmund Burke’s own approach than does the caricature that casts him as an antidemocratic apologist for the status quo. See generally Conor Cruise O’Brien, The Great Melody: A Thematic Biography of Edmund Burke (Chicago 1992) (arguing that the dominant theme of Burke’s career was assault on the abuse of power rather than defense of the status quo).

56 See Vicki C. Jackson and Mark Tushnet, Comparative Constitutional Law (Foundation 1999). In this regard, it is perhaps no accident that a historian such as Mark Tushnet also has gravitated toward comparative law.
simply in constitutional terms, let alone in economics, technology, and demographics. Still, the compromise districting proposal, not to mention many of the arguments pro and con, could be introduced in Congress tomorrow. The same institutions exist. So too do many, if not most, of the effects they produce. If anything, what is striking about the proposal is how advanced it appears even today. As Currie notes, the reform proposal reflected "how far the prevailing understanding of the electoral process had evolved since the Constitution was adopted," especially toward the notion that presidential electors should be considered little more than "conduits for popular opinion" (p 338).

In the post-originalist project, discontinuity also has its place. Were past and present part of a seamless web, history would do little more than confirm (or not) that a particular practice achieved its purposes desired then and now. The compromise districting proposal highlights the benefits of discontinuity precisely because it went down in defeat. Since constitutional law proceeded down another path, the proposal by definition offers an alternative. What makes the districting package especially intriguing is that the changed circumstances cut the other way. Ordinarily, a practice from another time—or place—appears difficult to import in direct proportion to its temporal or geographic distance—in this (temporal) case, pre-Jacksonian 1820s America. Yet in this instance, a compromise reform which would appear to be a nonstarter in our modern, pluralist democracy did not fail by much in a republic still disproportionately dominated by elite white male slaveowners.

More typical are proposals whose time did come and has since left. In these instances, discontinuity reveals that a mechanism no longer furthers the purpose for which it was created, or that the purpose itself has become irrelevant. The path that presidential selection actually took is a case in point. To an originalist, the Electoral College is rock solid. Not only is it there in the text, "ample historical evidence sets out its genesis. Much of that evidence, however, also indicates that the framers put the contraption together largely to insure that individuals of continental distinction would be chosen President. To a post-originalist, developments in communications, transportation, and mobility have so completely eclipsed the Electoral College’s initial purpose that even if it did not have a significant downside, it now comes near the head of any list of constitutional antiques to scrap through an Article V amendment at the very least. The conclusion

57 US Const Art II, § 1, cls 2–4.
58 See, for example, Max Farrand, ed, 2 The Records of the Federal Convention of 1787, 56–57, 63–64 (Yale rev ed 1966) (speeches by Madison and others).
only gains strength given the Electoral College's notorious antidemocratic features that were evident even in the era Currie recounts.

Defenders of the Electoral College might point out that the institution's antidemocratic effects are simply the price to pay for the further ostensible founding value of safeguarding "states' rights" in much the same fashion as does equal state suffrage in the Senate. Yet this merely puts on the table a much larger post-originalist question. Even assuming that a strong version of "states' rights" was a founding value, to what extent has this commitment served such goals as preventing tyranny and promoting self-government—ends, then and now, invoked to justify it? This is an enormous question. Just for that reason, it is the kind of inquiry that could not be answered without projects such as Currie's. And while Currie may or may not agree with the suggestions, The Jeffersonians is suggestive. With the Alien and Sedition Acts safely consigned to the previous volume, little that Currie recounts here smacks of federal tyranny or infringement of fundamental rights. Instead, separation of powers and direct representation at the federal level appear to be doing a fair job of preventing those horribles. Conversely, the grim association of state sovereignty and slavery is already painfully evident, the key new point Currie pauses to make express in his conclusion. In contrast to the doctrines at the national level, in other words, a critical analysis of our constitutional development may well reveal that federalism on balance has not only failed to promote ordered liberty as advertised, but instead has undercut it.

These particular suggestions may be on the mark or horribly misguided. What matters more for now is that this kind of post-originalist inquiry proceed on these and other constitutional sacred cows.


61 At least on originalist grounds: "Thus it was the unworthy cause of slavery that led Southerners to embrace an absurdly narrow interpretation of federal authority, in order to ward off an absurdly broad one" (p 348).

CONCLUSION

What Professor Currie would think about these applications is another matter. In one sense, *The Jeffersonians*—and indeed Currie's entire project—is the mirror image of a book such as Robert Bork's *The Tempting of America*. The latter work strongly sought to justify originalism while scarcely citing any works of history. Currie's more rigorous study concentrates so thoroughly on reconstructing the constitutional arguments back then that it spends little time arguing how the results should apply to debates now. Though history and theory are by no means exclusive, *The Jeffersonians* does not have much to say about old-fashioned original intent and still less about the type of "post-originalist" use of history that I have just sketched.

Currie nonetheless makes passionately clear his belief that the cornucopia he has assembled "is by no means of merely antiquarian interest; . . . it is striking how much of it is directly relevant to controversies of the present day" (p 344). Too many modern constitutionalists appeal to the past too often based upon too many theories for Currie not to be right. However it is put to use, *The Jeffersonians* may not be the final word about constitutionalism in the early republic. But it will long be an essential one. Modern constitutional historians and lawyers alike can only look forward to Currie's next installment, a volume that promises to consider the constitutional polemics that almost destroyed the Union that the Constitution established.

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64 See Flaherty, 95 Colum L. Rev at 524–25 (cited in note 47).
