Lessons from the Past: Is There Anything New in Constitutional Law?

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MORE THAN A DECADE AGO, on the eve of the 201st anniversary of the completion of work of the 1787 constitutional convention, Justice Antonin Scalia, whose name has become virtually synonymous with the jurisprudential philosophy known as “originalism,” delivered the William Howard Taft Constitutional Law Lecture at the University of Cincinnati Law School. In the address, which was subsequently published in the *University of Cincinnati Law Review*, Justice Scalia praised the originalism enterprise in such problematic terms as perhaps to cast doubt on its very legitimacy. Referring to originalism as “the lesser evil” in the article’s very title, Justice Scalia contended that the “greatest defect” of originalism is the “difficulty of applying it correctly.” Rejecting the silly pseudo-scholarly claims that words themselves have no meaning, Justice Scalia nevertheless found it “often exceedingly difficult to plumb the original understanding of an ancient text.” “Properly done,” he continued, the task requires the consideration of an enormous mass of material – in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material – many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time – somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are...
not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.2

More to the point, it is a task, noted Justice Scalia, that is particularly difficult for a Supreme Court justice to undertake, given the time constraints imposed by the modern Court’s practice of receiving briefing, hearing oral argument, drafting opinions, and rendering judgment all in a single term, with the allotted time between argument and decision ranging from a low of two months to at most nine months. Justice Scalia had no doubt “that this system does not present the ideal environment for entirely accurate historical inquiry.” Nor, according to Justice Scalia, “does it employ the ideal personnel.” And unless the Justice was being uncharacteristically modest, he expressly included himself in that criticism,3 despite the fact that he is by all measures one of the best founding-era scholars to serve on the Court in a century. If even Justice Scalia thinks himself not up to the task, it must be an impossible task indeed.

Happily for Justice Scalia and originalist jurists everywhere, Professor David Currie has for more than twenty years been engaged in a scholarly enterprise that appears designed to provide Justice Scalia and others with just the kind of comprehensive survey of the historical materials that they need to decide cases on originalism grounds within the time constraints imposed upon them by modern judicial practice.

Professor Currie’s odyssey – and the word is an apt description of his monumental undertaking – began with a decade-by-decade survey of the development of constitutional law in Supreme Court opinions, which for generations of law students have all but defined the full scope of constitutional law. That work, first published as a series of historically detailed law review articles, was ultimately compiled into two books that rival the great treatises on constitutional law published in our nation’s history. Indeed, any constitutional law commentator worth her salt could pretty well cover the entire field of relevant Supreme Court jurisprudence by keeping Professor Currie’s two volumes on The Constitution in the Supreme Court4 on the ready-reference shelf next to Joseph Story’s Commentaries on the Constitution of the United States, Thomas Cooley’s The General Principles of Constitutional Law in the United States of America, and William Crosskey’s Politics and the Constitution in the History of the United States.

More relevant to Justice Scalia’s implicit plea for help, though, is the second half of Professor Currie’s enterprise. After nearly a decade of wading through the U.S. Reports and its antecedents, Currie turned – where else? – to the Annals of Congress. Anyone familiar with the physical layout of the University of Chicago Law School, where faculty offices line the perimeter of the law library’s book stacks, can almost envision Professor Currie looking out from his office door and thinking to himself, “Now that I’ve finished this row of shelves, I might as well start on the next.” Perhaps the Constitution in the States will be his next project!

The conventional wisdom is that, for matters of original constitutional interpretation, the first Congresses are undoubtedly the most important. It was those Congresses, after all, that gave us the Bill of Rights, put in place the legislation that would actually turn the grand theories of the Constitution into a workable

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2 Id. at 856-57.
3 Id. at 861.
government, and faced for the first time most of the constitutional issues that have continued to perplex legislators and jurists for more than two centuries. Moreover, it was those Congresses that counted among their members some of the leading statesmen both of the constitutional convention and of the ratifying conventions in the several states—men like James Madison, Roger Sherman, and Fisher Ames who, together with distinguished counterparts in the executive branch like Alexander Hamilton and Thomas Jefferson, gave us some of the most insightful debates about the meaning of the Constitution’s provisions ever to grace the pages of recorded public debate. These debates are ably recorded and analyzed in Professor Currie’s initial foray into alternative sources of constitutional meaning, The Constitution in Congress: The Federalist Period, 1789–1801 (Univ. of Chicago Press, 1997).

The conventional wisdom may not be entirely correct, however. In some ways, the debates that occurred immediately after the election of 1800 are even more significant to our understanding of the framers’ intent than the prior debates. For it was that election—the bloodless “Revolution of 1800,” if you will—that resolved many of the lingering disputes between the broad nationalist vision propounded by Alexander Hamilton and the Federalists, on the one hand, and the more circumscribed, “federalism” vision nourished by Thomas Jefferson, James Madison and the Republicans, on the other.5 Historian William Freehling called the election “the most important political contest in the early republic.”6 Political theorist Harry Jaffa has described the election as the climax of “a decade of party warfare,” noting that it was the first time in known human history “in which the instruments of political power passed from one set of hands to those of their most uncompromisingly hostile political rivals and opponents because of a free vote.”7 Currie himself notes that the “country had been wracked with dissension” before Jefferson’s victory, and “deeply felt differences” persisted even afterwards. Whatever had been the understanding of the national government’s powers that prevailed in the 1790s, therefore, has to be viewed in light of that epochal contest and the alternative vision that triumphed as a result. Currie’s first volume must likewise be read through the lens of his second, The Constitution in Congress: The Jeffersonians, 1801–1829, published earlier this year by the University of Chicago Press.8

And what a lens it is! Currie’s review of the significant debates that occurred between 1801 and 1829 is masterful, and the cross-references to the parallel debates in the first six Congresses (analyzed in volume 1), as well as to later Supreme Court decisions and scholarship (analyzed in the two volumes of The Constitution in the Supreme Court) provide an easy roadmap for anyone trying to replicate the research and all its implications. Moreover, with a few notable exceptions described below (hey, I’m writing a review, not an ad campaign for the book; I had to

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5 That is not to say that the debates in the first Congresses are insignificant in comparison. Many issues were clearly resolved in those debates, and the competing positions were well established in those years as well. But the answer to the question, “Which side of those competing positions prevailed?”, is to be found after the Election of 1800, not before.
8 Like the earlier volumes in this and in Currie’s Constitution in the Supreme Court series, some of the discussion in this volume first saw light in the law reviews, including The Green Bag 2d.
find something with which to disagree!), Currie has demonstrated that Justice Scalia was right. Originalism may be difficult, but it is not impossible. It merely “requires immersing oneself in the political and intellectual atmosphere of the time,” as David Currie has done.

I would add to Justice Scalia’s formulation the “philosophical” understanding of the time, as the few instances of disagreement I have with Professor Currie’s conclusions result from Currie’s refusal to give due regard to the principles of the Declaration of Independence, a document authored by Thomas Jefferson, the very man whom Currie uses to define the period under consideration in this volume of his Constitution in Congress series. Currie’s view of the relationship between the Declaration and the Constitution is summed up in one line in a footnote about a fifth of the way into the book: “the Declaration of Independence had no constitutional rank.” (p. 67 n.7). While his view is a view that is widely accepted today, it did not prevail until well after the Civil War. Abraham Lincoln, for example, in a famous fragment penned a few months before he took office as President, described the relationship between the Declaration and Constitution as follows:

All this [prosperity] is not the result of accident. It has a philosophical cause. Without the Constitution and the Union, we could not have attained the result; but even these, are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart. That something, is the principle of “Liberty to all” – the principle that clears the path for all – gives hope to all – and, by consequence, enterprise, and industry to all.

The expression of that principle, in our Declaration of Independence, was most happy, and fortunate. …

The assertion of that principle, at that time, was the word, “fifty spoken” which has proved an “apple of gold” to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple – not the apple for the picture.10

Currie, in my view, does not sufficiently credit the possibility that many of the interlocutors in the debates analyzed in this volume of his Constitution in Congress project held the same view that Lincoln would later so eloquently articulate.11 Instead, he rejects arguments appealing to the “spirit” of the Constitution

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9 See also p. 112 n.190 (“There was not much to his additional contention that Louisiana could not be taxed without its consent either; the Declaration of Independence was not part of the Constitution.”).


11 Currie sometimes does acknowledge the arguments drawn from the Declaration’s principles. In the debate over the purchase of Louisiana, for example, he notes an argument by Senator Breckinridge that incorporation of the territory as a colonial dependence rather than with an eye toward eventual statehood was “inconsistent with the principle of self-government on which the country had been founded,” and he cites the Declaration of Independence in support of the proposition. (p. 103 and n.120). Of course, here and elsewhere, Currie seems implicitly to reassert that the Declaration has a sub-constitutional status by citing it as “1 Stat 1 (Jul 4 1776).” (see p. 106 n.142; p. 158 n.10). Not even The Bluebook – to which, fortunately, neither Professor Currie nor the University of Chicago Press is a slave – suggests citing the Declaration of Independence from the statute books. Moreover, the fact that the First Congress decided to reprint the Declaration as the very first document in volume one of the Statutes at Large may well demonstrate a heightened status – as organic law – not a sub-constitutional status.
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as “feeble” and altogether “unconvincing.” (e.g., p. 112 and n.189; p. 240 n.171). As a result, I believe he dismisses too quickly some of the most interesting arguments of the period.

What is perhaps most intriguing about the debates covered in this volume is that there is hardly a dispute in contemporary constitutional law that was not prefigured and, indeed, thoroughly vetted, by the Congresses and executive branch departments that held office during the presidencies of Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams. From impeachment to term limits to governmental support of religion to the ongoing tension between Congress's power to declare war and the President's constitutional role as Commander in Chief, it's all here. The vintage congressional debates analyzed in this volume are, as Professor Currie rightly concludes, “a cornucopia – of constitutional controversies we never knew had arisen, of constitutional arguments we never knew had been made,” and “it is striking how much of it is directly relevant to controversies of the present day.” (p. 344).

The debates over the 1803 impeachment of John Pickering, United States District Court Judge for the District Court of New Hampshire, set the stage for the grand morality play that was the impeachment of Bill Clinton. Judge Pickering’s advancing age and alcohol abuse had apparently made him insane, but the very insanity which made him unfit for the bench arguably prevented the Senate from concluding that he had the mens rea necessary to be found guilty of “high crimes and misdemeanors.” (pp. 23-24).

As Professor Currie explores the myriad constitutional issues that arose during the course of the impeachment proceedings, he notes something often overlooked by lawyers and judges trying to give “originalism” its due. The materials from which we often mine the gems of original intent must always be read in the political context in which they were written. Alexander Hamilton’s statement in Federalist 79, for example, that “insanity without any formal or express provision, may be safely pronounced to be a virtual disqualification,” has be read in the “context” of the Antifederalist charge to which he was replying, namely, that the Constitution did not provide for the removal of judges simply on the basis of disability. (p. 30). Hamilton agreed with the Antifederalist charge, and defended the omission because, in his view, the potential for abuse from including disability in the impeachment clause was much more dangerous than not allowing impeachment for mere incompetence. (pp. 29-30). In the end, the Senate finessed the question of whether “insanity” could constitute “high crimes and misdemeanors” by voting to find Pickering “guilty as charged” rather than “guilty of high crimes and misdemeanors,” but not without some serious soul-searching about the proper scope of the impeachment clause, soul-searching that would redound to the benefit of Supreme Court Justice Samuel Chase, who was impeached almost immediately after Pickering was removed from office.

The Federalist Justice Chase was accused of trying to influence a grand jury to bring in an indictment against a particular “seditious printer,” which involved not only an allegedly improper intrusion into the grand jury process but tapped into all the partisan rancor over the constitutionality of the Alien and Sedition Acts as well. At bottom, though, Chase's impeachment has come down to us as politically motivated, and the Senate's vote not to convict as a great victory for the principle of judicial independence. Mere disagreement over policy, or even about the correctness of judicial decisions, was not to be grounds for impeachment for another sixty-five years, and even then the precedent set in the Chase case helped prevent the Senate from convicting President Andrew Johnson. While the
removal of judges who manifestly refuse to apply the law remained a technical possibility, the bar for making that claim had been raised sufficiently high that the inherent potential for abuse was greatly minimized.

Of course, the constitutional debates of the Jeffersonian era did not begin with the impeachment of Judge Pickering in 1803. They began even before Jefferson actually became President. We may think we have just been through the most hotly-contested election in our nation’s history after witnessing the dimpled-chad controversy last year, but Thomas Jefferson would beg to differ, and Florida was not even a state when he ran for President! Although Jefferson outpaced his Federalist opponent, sitting President John Adams, in the 1800 election, he received the same number of electoral votes as Aaron Burr, his own Vice-Presidential running mate. Under the original electoral college provisions of the Constitution, however, that was not a victory for the slate, but a tie that sent the election to the House of Representatives, where an ambitious Burr, buoyed by Federalist hatred of Jefferson, was able to force thirty-six ballots before Jefferson finally prevailed. (p. 39).

The debate over an amendment to fix the obvious problem threatened to unravel the delicate compromise between large and small states that had been such an essential element in the adoption of the Constitution in 1787, and Currie thoroughly explores all the intricate arguments made on both sides of the debate. The most interesting argument was made by Massachusetts Representative Samuel Thatcher: The proposed amendment was not even permissible, he claimed, because it altered one of the fundamental principles of the Constitution, the great compromise itself. For such an amendment, the mechanism set out in Article V was insufficient; nothing less than the consent of all the States would suffice to ratify an amendment that would destroy the rights of individual States. As Senator Plumer elaborated, “The forms & modes of proceeding established by the Constitution may be amended, but its principles cannot.” Just as the Article V amendment mechanism could not be used to establish a monarchy in Virginia or divide Massachusetts and New Hampshire into ten independent states, a departure from the Constitution’s basic principles would release dissenting states from their obligations. (pp. 54-55 and n.127).

Although Plumer’s position was based on the old Articles of Confederation “compact” theory that had been rejected by the Constitutional Convention in 1787, there was more to his claim than just a defense of a theory of state sovereignty that would later gain so much favor in the South during the nullification crisis and the Civil War itself. Even Thomas Cooley, no disciple of the South’s philosophical godfather John C. Calhoun, accepted the proposition that “an amendment, … in the very nature of the case, must be in harmony with the thing amended, so far at least as concerns its general spirit and purpose.”

Professor Currie finds the argument nonsensical, and his contention does have a great deal of surface appeal: “It makes no sense to argue,” he claims, “that a measure is inconsistent with the substantive constitutional principles when the question is whether to change the Constitution itself; constitutional amendments by definition are departures from the present Constitution.” (p. 56). But below the surface of the Thatcher-Plumer-Cooley position is a profound claim about the nature of government,

12 See Art. 11, § 1, cl. 3.
one grounded in the principles of the Declaration of Independence itself. There, Jefferson recognized that the people have a “right” to alter or abolish their government whenever it becomes destructive of the ends for which it was justly established, namely, the securing of the unalienable rights with which all human beings are endowed by their Creator. The corollary of that contention, though, is that there is no such “right” to alter government in a way that makes it more destructive of the ends for which it is justly established.

A claim like Thatcher’s necessarily recognizes that the Constitution of the United States is not a document of mere positive law, but a document that in some sense (albeit with unfortunate compromises) reflects the same higher-law principles espoused in the Declaration. It would be the same claim that Lincoln would later use to deny the “right” of the Southern States to secede from the Union, for without the appeal to the justness of the cause, there could be no claim to a “right” to overthrow the existing just government. The proper response to Thatcher’s contention, therefore, is not that it was nonsensical, but that the proposed amendment did not undermine any principle of justice, even if it did at the margin reduce the relative weight afforded to the small states in the selection of a President.

Even though, in my view, Currie too quickly dismisses the argument, his extensively-annotated discussion nevertheless provides a very useful roadmap that will enable any originalist scholar and – dare I hope – jurist to navigate back to the original understanding of our Constitution’s principles.

Those principles also played a significant role in the debate over Congress’s power to exercise exclusive legislation in the District of Columbia,14 a debate that continues to this day. Massachusetts Representative John Bacon contended, according to Currie, that the “very concept of an enclave subject to the ‘exclusive legislation’ of Congress” was “an infringement of the principle of self-government on which the country had been founded.” (pp. 66-67). Although Currie finds “grave constitutional difficulties in arguing that what the Constitution itself authorizes is unconstitutional,” (p. 67 n.7), it is an argument grounded in the recognition that there is a difference between the principles of the Constitution and the compromises with principle that of necessity appear in the document. The former should be defended wherever possible, while the latter should be narrowly construed to keep the tension with principle to a minimum. Those same arguments appear repeatedly in our history – in the debate over Missouri’s admission to the Union, for example, or President Lincoln’s suspension of the writ of habeas corpus, or even today in the debate over whether the death penalty is unconstitutional under the Eighth Amendment’s prohibition against infliction of cruel and unusual punishments despite the fact that “capital” crimes, upon conviction for which one might be “deprived of life,” are specifically recognized by the Fifth Amendment.

The debate that produced the Missouri Compromise in 1820 is one of the most significant debates in our nation’s history; it is, certainly, the one that produced the gravest consequences. The lead-up to it was long in coming, for the central legal issue of the debate – the extent to which Congress could impose conditions on the admission of new states to the Union – had been addressed in the Northwest Ordinance, adopted in 1787 at the very time the new Constitution was being drafted, and re-adopted as one of the first acts of the new Congress in 1789. The Northwest Ordinance,

14 U.S. Const. Art. 1, § 8, cl. 17.
one of the four organic laws of the United States (together with the Declaration of Independence, the Articles of Confederation, and the Constitution), set the terms by which Congress would govern the territories of the United States and prepared the way for their ultimate admission into the Union as States.

The Ordinance banned slavery in the territories northwest of the Ohio River (the present states of Ohio, Indiana, Illinois, Michigan, and Wisconsin), though the parallel ordinances subsequently enacted to govern the Southwest and Mississippi Territories excluded the prohibition on slavery. (p. 111 n.178). The Ohio Enabling Act, which paved the way for Ohio to become the first State formed out of the Northwest Territory, required the new State to adopt a constitution that was “republican” in form and consistent with both the Ordinance and the Constitution. (p. 90). After some dispute about whether Congress could compel Ohio to adopt a written constitution, Ohio was admitted on terms consistent with the Ordinance’s conditions. (p. 94 n.59). Illinois faced a more serious challenge when it sought admission fifteen years later. New York Representative James Tallmadge contended that Illinois was not entitled to admission because its constitution permitted slavery then in existence (although it prohibited the future introduction of slaves). (p. 231). That contention, and the rebuttal challenge to the very validity of the Ordinance’s anti-slavery provision itself, was a harbinger of the Missouri debate soon to come. During that debate, Congress explored the full depth of the equal footing doctrine, the doctrine of unconstitutional conditions, and the monumental compromise between the equality principle of the Declaration of Independence and the republican guarantee clause of the Constitution, on the one hand, and the slavery clauses of the Constitution, on the other. Again, Professor Currie performs yeoman work making the intricacies of those debates accessible to contemporary scholars and jurists, but in my view he gives too little credence to the most significant of the arguments. Massachusetts Representative Timothy Fuller contended that it was permissible to ban slavery as a condition of Missouri’s admission to statehood because slavery was itself incompatible with the republican guarantee clause. Currie dispenses with this argument with a terse sentence: “Plausible enough to a visitor from Mars, this was an impossible argument, for as howls of protest made clear it would make unconstitutional the institutions of half the existing states.” (p. 237). Fuller’s argument may have been politically impossible, but it was theoretically correct, and much more profound than Currie credits. Fuller, in an argument very similar to one Abraham Lincoln would later adopt, did not contend that the republican guarantee clause could be used to invalidate slavery in the existing states, which was explicitly protected by other provisions of the Constitution. He did contend, however, that slavery was incompatible with the republican guarantee clause, and he looked to the Declaration of Independence to ascertain which of the incompatible provisions was the principle to be applied in admitting new states and which merely a necessary compromise that should be confined to its express terms and to the original states.15 The distinction between existing states, where the slave clauses were in full force, and new states, many of which had been admitted pursuant to the Northwest Ordinance’s ban on slavery, is supported by another provision of the Constitution (although Fuller does not appear to have relied on it): The Article 1, Section 9 limitation on Congress’s power to prohibit the importation of slaves before 1808 expressly applies only to

15 33 Annals of Cong. 1180-81 (1819).
Finally, one of the most protracted debates of the period involved the running battle between Jefferson and Madison, on the one hand, and Hamilton and his political heirs, on the other, about the scope of Congress's spending power. In his famous 1791 Report on Manufacturers, Hamilton had proposed federal subsidies to encourage manufacturing. He also subsequently made clear that he thought Congress was authorized to subsidize internal improvements such as roads, bridges, canals and aqueducts. (p. 116 n.216). Jefferson and Madison agreed that internal improvements made for good policy, but they did not believe that the Constitution authorized Congress to make such expenditures. In his Sixth Annual Message to Congress, Jefferson recommended that a federal surplus be applied "to the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the enumeration of Federal powers," but he thought "an amendment to the Constitution ... necessary, because the objects now recommended are not among those enumerated in the Constitution." (p. 116).

Drawing on examples of federal grants of school lands to states formed in the Northwest Territory and the construction of the Cumberland Gap road, Professor Currie contends that the constitutional dispute amounted to no more than a "petty quibble over the source of funds." (p. 117). Jefferson, in Currie's view, apparently thought grants of land for unenumerated purposes were permissible, but direct financial support was impermissible. Currie rightly calls this a "troubling distinction," but the distinction is his, not Jefferson's. President James Buchanan, drawing on the positions articulated by Jefferson and Madison, would later explicitly reject the distinction, viewing both direct financial aid and a grant of lands as outside the scope of Congress's authority. "The natural intendment" of those who drafted and ratified the Constitution, he wrote in his message to Congress vetoing an agricultural college land grant bill,

would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation with respect to the public lands.16

The "troubling distinction" Professor Currie attributes to Jefferson dissolves once the true nature of the land grants is considered. As I have previously argued at great length elsewhere,17 the school land grants were negotiated conditions of sale to the Ohio Company and other purchasers of land in the Northwest Territory. They were not outright gifts that would have violated Jefferson's understanding of the Constitution's spending limits. Significantly, requests by existing states for similar land grants were rebuffed as unconstitutional.18

The same is true for the Cumberland Road precedent, which Professor Currie also addresses. (p. 114). Various appropriations to fund a road across the Cumberland Gap were

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approved early in Jefferson's administration. The larger appropriation for internal improvements of which the Cumberland Gap road project was a part was rejected on constitutional grounds, however; the Cumberland Road project is therefore a special case, and the authority for it parallels the authority to provide the Section 16 school lands discussed above. The Admission Act for the State of Ohio specifically required the federal government to devote 1/20 of the proceeds arising from the sale of lands in Ohio to the construction of a road "leading from the navigable waters emptying into the Atlantic, to the Ohio [River]." In exchange, the new State of Ohio agreed not to tax any land sold by the federal government for five years.\footnote{2 Stat. 173, 175 (April 30, 1802).} The contractual trade-off thus protected the "general" welfare obligation of Article I, § 8, since the higher price that could be obtained for tax-exempt lands was designed to offset the cost of the road construction. Indeed, Congress accepted the view that it had no power under the Constitution to open roads and canals in any State; its power to fund the Cumberland Road was the result only of the compact with Ohio "for which the nation received[d] an equivalent."\footnote{36 Annals of Cong. 1252 (1816).}

This point is extremely significant, as the disagreement about the scope of the spending clause was part of the contested ground over which the election of 1800 was fought. Jefferson wrote in the Kentucky Resolutions of 1798 that that the words of the general welfare clause "ought not to be construed as themselves to give unlimited powers, so as to destroy the whole residue of [the Constitution]."\footnote{Draft of the Kentucky Resolutions, Oct. 1798, reprinted in Thomas Jefferson, Writings 449, 452 (Merrill D. Peterson, ed.) (Library of America, 1984).} The principles outlined in the Kentucky Resolutions (and the parallel Virginia Resolutions authored by James Madison) became the platform for Jefferson's emerging political party and the primary grounds on which Jefferson challenged the incumbent President John Adams in the election of 1800. Indeed, Thomas Jefferson was later to write that the different interpretations of the general welfare clause were "almost the only landmark which now divides the federalists from the republicans."\footnote{Thomas Jefferson to Albert Gallatin, June 16, 1817, reprinted in 2 The Founders' Constitution 452 (Philip B. Kurland & Ralph Lerner, eds.) (Univ. of Chicago Press, 1987).}

Thus, although Hamilton's reading carried the day for a while in the executive branch during the 1790s, the issue remained hotly disputed and Hamilton's view was essentially repudiated by the election of 1800.

Professor Currie rightly points out that, toward the end of his Administration, President James Monroe essentially "gave away the store" on the Jefferson-Madison position, and that once "the lid was off the pot," the "sweet smell of pork filled the air" for the remainder of his administration and throughout the administration of John Quincy Adams. (pp. 281-82). By the close of the Jeffersonian era, therefore, it seems that the 1800 election's repudiation of the expansive Hamiltonian position had itself been repudiated. President Andrew Jackson would soon put the Hamiltonian genie back in the bottle one more time, but that story will have to wait until the next volume in David Currie's scholarly odyssey to rediscover the true meaning of our Constitution. Justice Scalia may anxiously be awaiting the next installment. I know I am.

As for you readers who read this review hoping to see the "answer" to the perennial dispute between Congress's power to declare war and the President's power as Commander in Chief, which I tantalizingly announced at the outset of this article, it is discussed in the central chapters of Professor Currie's book,
and includes the immortal scholarly line, “Take that, Lyndon Johnson!” (p. 124) – but, alas, I am out of time and space. You will have to help reward David Currie’s heroic efforts by going out and buying a copy of the book yourselves. It will be well worth the investment.