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Book Reviews

POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, by William W. Crosskey. University of Chicago Press, Chicago, 1953. 2 vols. \$20.00.

Some 166 years ago, as everyone knows, a group of men foregathered in Convention at Philadelphia, and framed the Constitution of the United States. In this revered, but antiquated, document, replete with examples of confused and imperfect draftsmanship, they set up a federal government of three separate, co-ordinate and co-equal departments, carefully confining, within limits of varying scope, the enumerated powers of the legislative branch, thereby saving to the respective sovereign states all other powers of government. The framers set up a Supreme Court, whose great tasks, requiring intuitions of statesmanship of the highest order, were to be: (1) the maintenance of this carefully devised system of "federalism," and (2) the guardianship of the document, by a general review of legislative acts, both national and state, for conformity to its mandates. We know, further, that, to remove any doubts about the whole matter, a series of amendments was very shortly thereafter adopted, which further restrained the Congress, and concluded with a general reaffirmation of state sovereignty in those areas not given over to the national government.

That all this "just ain't so"—that is, that the framers did *not* do a very great many of the things they are orthodoxly supposed to have done—has now been demonstrated conclusively by the writer of the volumes under review. In this lucidly-written, richly-documented study, Mr. Crosskey, a professor of law in the University of Chicago, has published the initial two volumes of a work which will be a bombshell to traditional historians, an important new source for lawyers, judges, and political scientists, and a revelation to thoughtful citizens everywhere.

What method has the author employed in fashioning this two-volume bombshell? The answer is simple: A major portion of the volumes is devoted to applying to our fundamental constitutive document, the orthodox rule of interpretation, that "We ask, not what this man meant, but what those words would mean

in the mouth of a normal speaker of English, using them in the circumstances in which they were used."¹

His analysis begins with the Commerce Clause. On the basis of a prodigious research into eighteenth-century word usages, the author shows, among other things, that "Commerce" refers to the *entire* complex of gainful economic activities carried on in this country, and that "States," as used in the Commerce Clause, refers to "the people" of the States.² The fact that that Congressional power over commerce is free of any "interstate" limitation obviously throws a very great many of the remaining elements of the Constitution into a new light.

The "newness" of this light will be apparent from the following exceedingly brief sketch of the major conclusions which emerge from Mr. Crosskey's researches. The Congress was intended to enjoy a *general national legislative authority*,³ with quite extensive powers over the forms of the state governments,⁴ and with supremacy over the other two departments of the national government. All of the powers of Congress enumerated in the Constitution were enumerated for reasons which have nothing whatever to do with "States Rights."⁵ Indeed, very far from having such "State Rights," the states were meant to play a distinctly *subordinate* role in governing the country, and the Tenth Amendment, far from changing this situation, was intended as, and, when understood, is a clear re-affirmation of the arrangements devised at Philadelphia in 1787.⁶

Nor is this all. Incredible as this may seem, the Supreme Court was intended to function as the supreme juridical head of the country, paramount to all other courts in the country, exer-

1. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 (1899).

2. Pp. 50-186.

3. It may be important to be clear on this potentially controversial point. By "a general national legislative authority" Mr. Crosskey does *not* mean "a power to supplant the legislature of any particular state." The state legislatures were, in general, continued for local state legislation. The general power apparently intended to be given to Congress was a general power of nation-wide legislation; a power to deal with matters, less than nation-wide, that transcended the competence of a single state; and a power to deal even with matters confined to a single state when of concern to any other state, or states, or to the nation (p. 363).

4. The scope of Congressional authority over voting in the states, under the "Time, Place, and Manner" provisions of Art. I, and the national guaranty of a "Republican Form of Government" to "every State" in Art. IV, is vastly greater than it is currently thought to be. Cf. pp. 522-541.

5. Pp. 409-508.

6. Pp. 675-708.

cising a general superintendence over them in all branches of law, and settling and declaring in the last resort a uniform rule of civil justice.⁷ Nor did the framers intend that the Supreme Court, in discharging this important function, should review the acts of Congress for constitutionality; it was intended, however, that the Court should ignore Congressional acts, where this might be necessary to preserve its judiciary prerogatives intact.⁸

Finally, the whole Bill of Rights was meant to be valid against state governmental action,⁹ a view re-emphasized in the Fourteenth Amendment. The latter was not, however, designed to confer on the Supreme Court a general roving commission which has given us the very queer thing known as "substantive due process."¹⁰

This "unitary" view of the historically intended character and structure of our national government will, perhaps, come to some readers with all the hideous novelty of an attack of plague. For those readers who may believe the whole view is incredible, Mr. Crosskey includes, in the course of his discussion, extended analyses of the political and, particularly, the legal, history of the early years of the government. For example, the history of the Commerce Clause is carried forward to *Gibbons v. Ogden*, and the case is shown to possess a character quite different from that usually imputed to it.¹¹ Again, by extended research in the early cases, Mr. Crosskey demonstrates that the intended character of the Supreme Court as the supreme juridical head of the country was understood, and acted upon, by courts and lawyers of the period.¹²

To say that these volumes are "a great contribution" is to indulge in pale understatement. The many persons who are interested in comprehensive reform of our chaotic commercial law will find much useful material here, as will those interested in FEPC, or corporation law reform, or the rationalizing of the "conflict of laws." Citizens who are concerned over state violations of the Bill of Rights are given invaluable ammunition, and those concerned with the state of political enfranchisement throughout the nation will necessarily recur frequently to these volumes. And citizens who have long thought something should

7. Pp. 563-674.

8. The discussion of judicial review is found at pp. 938-1046.

9. Pp. 1056-1082.

10. Pp. 1083-1158.

11. Pp. 187-291.

12. Pp. 711-753.

be done to put an end to the many indefensible "interstate trade barriers" will find a persuasive brief ready at hand.¹³

For at least nine men in Washington the book is required reading. The absolute unconstitutionality of the 1938 *volte-face* in *Erie v. Tompkins* is now demonstrated beyond question. If the Supreme Court were then willing to rely on a piece of misleading research published in the *Harvard Law Review*,¹⁴ by so much more they ought now to rely on Mr. Crosskey's really thorough analysis, overrule *Erie*, and get to their intended work as the supreme head of a general and nation-wide system for establishing Justice, as is provided by the document they have all solemnly sworn to uphold.

Scholars in many fields will be interested in these and subsequent volumes.¹⁵ The "dictionary of terms" which the author has constructed will be of the first importance to the philologists. American historians will now be obliged to re-examine (and, perhaps, revise) a great many of their notions, as will the political scientists. The idolators of the late Thomas Jefferson and the late James Madison will, in these volumes, find good reasons to pause in their devotions.¹⁶ I even venture to think that some law professors will be led to look at their familiar cases with new vision.

While this general reassessment of ideas proceeds apace, this reviewer would join in the sentiment manifested in the dedication of these volumes: "To the Congress of the United States, in the hope that it may be led to claim and exercise for the common good of the country, the powers justly belonging to it under the Constitution."

William B. Jeffrey, Jr.*

EQUALITY BY STATUTE, by Monroe Berger. Columbia University Press, New York City, New York, 1952. Pp. ix, 238. \$3.25.

This is a book that should be read by every person who possesses views on the subject of legislation in the field of race

13. Pp. 295-323.

14. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49 (1923).

15. From the many hints scattered through these initial volumes, it would seem that at least two more volumes will be necessary to the completion of the work. Cf. especially pp. 6, 12, 82, 187, 510, 535.

16. For example, consider the perfectly fantastic frenzied maneuvers in the subversive campaign issuing in *U.S. v. Hudson & Goodwin* and *U.S. v. Coolidge*, recounted at pp. 754-784.

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