

## REVIEWS

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POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES.

By William W. Crosskey. Chicago: University of Chicago Press, 1953.  
2 vols., pp. xi, 1410. \$20.00.

IN the two volumes here under review we have a new and important contribution to the history of our Constitution. It is a work that cannot be disregarded, either by scholars and teachers of Constitutional law and governmental history or by the courts that must decide the cases that are continually arising in this field. Least of all can those afford to disregard it whose traditional opinions are flouted, whose political and judicial heroes are criticized, and whose local and sectional interests are deprived of their accustomed Constitutional support.

No important written document, statutory or constitutional, can remain unchanged in its interpretation and legal operation over a long period of time. However great a boon to mankind, language is in a high degree an uncertain and variable means of communication of ideas; and, along with all the other circumstances of life, it is in constant evolution. Ancient statutes can be wholly forgotten, or substantially emasculated by judicial and administrative action. The Statute of Frauds, enacted by Parliament in 1677 and re-enacted in substance by all of the United States, has been subjected to so many thousands of variable and inconsistent judicial interpretations and applications that a court now looks to the current of decisions rather than to the Statute. If these decisions have, as many competent critics believe, turned the Statute into an instrument for the encouragement of repudiation instead of the prevention of fraud and perjury, is it not time to look back to the words of the Statute itself rather than to the aberrant applications?

The Constitution of the United States, adopted nearly 166 years ago, has served us through the convulsions of foreign and civil wars, through periods of political overturn, and through social and industrial revolution. Half of its formal Amendments are almost as old. By judicial interpretation in numberless cases, by conscious and unconscious disregard of its express words, this great document has suffered the same fate as have all other similar writings. The distribution of governmental power has been frequently and materially changed; often, it seems quite clear, for the worse.

In the present work, Professor Crosskey takes us back to the time of the Constitutional Convention and to the beginnings of the national government. In immense detail, and with chapter and verse, he analyzes the language of that period, with its word usages and with the educational background of the men who chose the words of the Constitution and of its formal Amendments. He thus portrays, with convincing skill, what he believes to have been the understanding and the intended meanings of the draftsmen and of some, at least, of the adopting voters. He thus sets forth the intended distribution of

the powers of government and the reasons for that distribution. The men of the Convention seized their great opportunity. The known evils of the time, from which all suffered, made possible the creation of a new nation. Foreign dangers, governmental impotence, obstructions of commerce, uncertainty of law both common and statutory, ruinous inflation: these outweighed differences in sectional interest, differences in governmental theory, and the as yet undeveloped conflicts of political ambition and economic greed. In no other work are the individual provisions and phrases of the Constitution so thoroughly considered as in Professor Crosskey's volumes, with the reasons for their adoption and the reasons for the exact words in which they are expressed.

Having made this fresh start, the author brings us down through 166 years of changing interpretation and application, with the causes, the nature, and the results of those changes: how the general legislative power of Congress became vastly limited, especially how its power to regulate all commerce was reduced to power over commerce across state lines (until more recently expanded by recessive interpretation); how the common law system inherited from England became cut into 48 fragments of uncommon law; and how the national judicial power of the Supreme Court has been in many of its aspects frittered away. The reviewer cannot here attempt to follow the course of the author's argument. He will only say that the argument has a powerful appeal, and that from beginning to end it will hold the attention of any reader who knows something of the nature of law and its evolutionary growth and whose desire for the truth promptly counteracts any feelings of resentment at the author's unexpected results.

Some of the principal theses of Professor Crosskey's work, forcefully stated and vigorously supported by historical and analytical research, are as follows:

The Constitution was drafted with the intention of creating a sovereign nation, and not a limited federation of sovereign States.

The Congress was given general legislative power over all matters, with only such exceptions and limitations as are found in express words of the Constitution and its Amendments.

In particular, the expressly given power of Congress "to regulate commerce among the several States" was intended to include "commerce" of every kind carried on within the entire national territory, and not merely that which crosses State boundary lines.

The judicial power conferred upon the Supreme Court of the United States was such as to make that Court "the head of a unified system of administering justice," giving it general supervisory control over all State courts as well as the inferior federal courts.

The Common Law was regarded, at the time of adoption of the Constitution, as the system of law developed in the courts of England and by applicable Acts of Parliament, a system national in scope and applicable everywhere, not a series of separate systems created within and controlled by the several States independently.

The Supreme Court was given no power to review Congressional legislation or to declare it to be "unconstitutional," except when such legislation might affect the jurisdiction of the Court itself.

The Judiciary Act of 1789, Section 34 (Rules of Decision) applied only in "trials at common law," not including equity, admiralty, or international law and customs; and the "laws of the several States" made applicable in such "trials" were the laws that existed in 1789, without in any way limiting the subsequently exercised powers of Congress or the Supreme Court.

It is perfectly clear that the foregoing theses of the author are not those that now generally prevail or that are now supported by the Supreme Court. That they did generally prevail in 1789 and that they were then in accord with the express words of the great instrument, is supported with great force by the author. He has collected with great industry and accuracy the word usages of the contemporary period, as found in the newspapers, magazines, political pamphlets, and other publications. He has made a careful analysis of judicial opinions. In most surprising and convincing fashion, he has shown the influence of Blackstone's *Commentaries on the Laws of England* on the thought and the expression of the makers of our Constitution. He has found in the constitutional ideas and practices of Great Britain most clarifying explanations for the insertion of many of the specific provisions in our written Constitution. We need not suppose that on these matters Professor Crosskey has said the last word; but he has fully demonstrated that the last word had not previously been said either.

What, then, has been the cause of these great changes in our constitutional thought and in the distribution of governmental powers among the departments—legislative, executive, and judicial? By what processes have these changes been brought about? The author leaves us in no doubt as to his answer to these questions. The answer is indicated in the title to his book: *Politics and the Constitution in the History of the United States*. It is no new discovery that the Supreme Court is aware of "election returns," or that its decisions have reflected the opinions and the desires of the appointing power. But there are good "politics" as well as bad "politics." New issues arise; and newly realized interests create new opinions and desires. No doubt, after 1800, the opinions and desires of Jefferson and Madison were different from what they had been in 1789; no doubt, also, they preferred to divert attention from that fact. In 1953, as well as in 1800 and 1860, "States' rights" rise up in opposition to "National Interest" and affect both elections and judicial decisions. The author well portrays the work of Taney, C. J., and his Jacksonian Court. He appears to believe that the effects of "politics" have been generally bad, severely injurious to the general welfare; and he produces evidence, much of it clearly incontrovertible, in support of that opinion.

It is not "politics" alone, however, to which the author ascribes the great and detrimental changes in our governmental system under the Constitution. One of the special merits of his work is found in his exposition of word usages and his demonstration of the effect of the constant, unconscious changes

in those usages. Linguistic changes; changes in legal theory; changes in the views of scholars as to the nature of "law" and of the "common law;" changes in prevailing views as to the function of the judges in the growth of law: all these played a part in inducing Brandeis to lead the Court in overruling *Swift v. Tyson*,<sup>1</sup> and to commit, in the case of *Erie Railroad Co. v. Tompkins*,<sup>2</sup> what the author describes as "the most colossal error the Supreme Court has ever made." This was not caused by "politics" or the election returns.

The author is thoroughly convincing in his demonstration that the decision in *Swift v. Tyson* was in exact harmony with the meaning given in 1789 both to the Constitution and to Section 34 of the Judiciary Act, and that it was in exact agreement with the judicial decisions of the 40 years between that date and 1832, the date of the decision. By that decision the Court made no changes in the distribution of governmental powers, either because of "politics" or because of word usage. Story, who wrote the opinion, was the sole survivor of the Federalist regime; but he well knew the antecedent language and legal theories and judicial decisions, and the other eight Justices—all of them appointed since the Jeffersonian political revolution and the product thereof—all agreed with Story. Immediately after the decision in *Erie Railroad Co. v. Tompkins*, the present reviewer, although he had made no study of its constitutional background and did not repudiate the decision, at once foresaw the morass into which the reasoning of the Court was leading it.<sup>3</sup> Professor Crosskey presents to us ten more years of this morass and at the same time destroys the supposed constitutional basis for the decision.

This reviewer has no doubt of the correctness of the author's view that the "common law" in 1789, in 1832, and for long years thereafter, was understood as a single system inherited by all the colonies and the United States; and that the words "trials at common law" as used in the Judiciary Act of 1789, did not include either equity or admiralty or much (if any) of the "law merchant" (in spite of Lord Mansfield's recent efforts). This does not mean that our ancestors regarded the "common law" as a "brooding omnipresence in the sky." Undoubtedly, they had more notions of the existence of "natural law" than most of us now have; and they may have been unaware of the fact that the boundary lines between "law" and "equity" and "law merchant" (and even "admiralty" and "ecclesiastical law" and other local and less well-known systems of law and practice) had never been clean and well-marked, and that these boundaries were becoming and would continue to become wide zones of overlapping uncertainty. Without doubt, they had not clarified in their minds the part played by the judges in the evolution and proliferation of our legal system. How many minds are clear on that subject now? Their minds were at least as clear as have been those of a Court that

1. 16 Pet. 1 (U.S. 1842).

2. 304 U.S. 64 (1938).

3. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941); Comment, 47 YALE L.J. 1351 (1938).

has told all federal judges (as well as its own Justices) that they must accept as applicable law in diversity cases, the words of a Vice-Chancellor or of a trial judge in a county court, even though no other court in the United States is bound to do so.

The views of Thomas Jefferson as to the "common law" may have been more hazy than those of the lawyers of his time. He was not much of a supporter of any "Brooding Omnipresence." He hated John Marshall, at least after his own political victory; and he feared the obstruction that any truly "common" law, administered by a powerful central Court, would provide to his own political system. In 1829, there was published in Virginia a thin volume entitled *Jefferson's Reports*. There had been in the possession of Attorney General Randolph three volumes of manuscript reports of cases in the General Court of Virginia, some of them as late as 1772. Of these manuscript reports, a small number were selected by Thomas Jefferson, of interest to us because he wrote both a Preface and an Appendix. With respect to the Appendix, he thus wrote in his Preface: "I have added, also, a Disquisition of my own on the most remarkable instance of Judicial legislation, that has ever occurred in English jurisprudence, or of another nation, and its incorporation into the legitimate system, by usurpation of the Judges alone, without a particle of legislative will having ever been called on, or exercised towards its introduction or confirmation." In his "Disquisition" it appears that this "most remarkable instance" of "usurpation" by the Judges was the assertion that Christianity was a part of the English common law. The first such assertion, later repeated at various times by other Judges, was by Sir Matthew Hale in *The King v. Taylor*, where Hale said: "Christianity is parcel of the laws of England."<sup>4</sup> Jefferson tells us that this originated from a mistranslation of the words "ancien scripture" in a case in the Year Books. He then adds, as to Hale's statement: "But he quotes no authority. It was from this part of the supposed common law, that he derived his authority for burning witches." In this "Disquisition," Jefferson defines the "common law" as follows: "For we know that the common law is that system of law which was introduced by the Saxons, on their settlement in England, and altered, from time to time, by proper legislative authority, from that, to the date of the Magna Charta, which terminates the period of the common law, or *lex non scripta*, and commences that of the statute law, or *lex scripta*."

It does not appear when Jefferson wrote his Preface and this remarkable "Disquisition." His Reports were published in 1829 by "The Legatee of Mr. Jefferson's manuscript papers."

Professor Crosskey gives very convincing support for his theory that the Constitution granted general legislative power to Congress, and that its powers were not limited to those that are more specifically mentioned. He shows the particular reasons why the draftsmen thought it was necessary to put these specific provisions in express words. As much can be said also for his theory

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4. 1 Vent. 293, 86 Eng. Rep. 189 (1676).

that the "power to regulate commerce among the several States" included the regulation of all gainful employment within the entire country, and not merely transactions across State boundary lines. What a vast amount of wasteful "jurisdictional" litigation would have been avoided had "politics" not limited the meaning of the express words of the Constitution! Both the first Roosevelt and the second one made strenuous efforts to recover some of the lost legislative power, largely in order to expand executive power also; and the recent Supreme Court has done much to expand the content of "interstate commerce" and to extend Congressional power over a large portion of purely intrastate commerce. This is illustrated strikingly with respect to labor legislation. Anything that materially affects "interstate commerce" is now within the national legislative power, thus further complicating the field of "jurisdictional" litigation. Now Congress may regulate the wages and hours of men who work in repairing a railway culvert in Pennsylvania, and also the wages and hours of men who (also in Pennsylvania) manufacture the concrete mixture for use by the men repairing the culvert. This causes Mr. Justice Douglas (dissenting) to say: "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' Yet if that is true, how about the men who produce the tools for those who carry the cement and gravel or those who furnish the materials to make the tools used in producing the cement and gravel?"<sup>5</sup> Is the Court now repairing past errors, and doing it by the pin point pricking method in a thousand cases (while "politics" permits)?

What a difference the recognition of general legislative power in Congress would have made in the matter of Uniformity of Commercial Law! And how large a reduction of litigation in the field of Conflict of Laws! The new Uniform Commercial Code would need but one legislative enactment, instead of forty-nine separate ones. The author dedicates his 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." But if the loss of power was due to "politics," it is only by more and better "politics" that it can be restored.

A national "Uniform Commercial Code" would be given its final interpretation by the one Supreme Court of the United States, binding upon all the State courts alike. Forty-nine "Uniform Commercial Codes" will be subject to final and varying interpretations by forty-nine Supreme Courts; and in diversity cases, at least, the federal judges (including the Justices of the Supreme Court) will have to determine which State Code to apply and will be required to follow the interpretations of the vice chancellors and trial judges of that State.

The author is far from alone in his contention that the Constitution makers conferred no power on the Supreme Court to pass upon the validity of Acts

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5. *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 17 (1953) (dissenting opinion).

of Congress; but his ability in the analysis of relevant cases adds new support to the contention.

What, then, is the Constitution of the United States today, the Constitution that all the judges and other officials, both state and federal, have taken oath to support? Is it the very same Constitution that was signed and submitted to the people of the United States in 1787, by George Washington and some 38 other notables (with such variations and additions as appear in 22 Amendments)? The printed words, filling only 8 pages in the volume under review, and divided into 8 Articles, are certainly the same words as those that George Washington signed. But words are merely symbols by which men attempt to convey their thoughts to others; and the degree of success attained in this process is extremely variable. The ideas that the words of the Constitution expressed in 1789 to the signers thereof, and to the limited number of people who then voted for it, could not have been identical, although we may believe that there was a high degree of uniformity. Since that day, for more than 160 years, those very words have been the supreme written law for some hundreds of millions of men, many of whom could not read English; and they have been interpreted and applied by thousands of officers and judges. In 160 years, word usages have greatly changed, along with other habits and customs of men, the social and economic conditions, all the circumstances of life. No one has been more successful than the author of the work under review in showing that the words of the Constitution do not express the same ideas to the people of today that they expressed to George Washington and his associates, or that the applications made of it by our judges and administrators in governing the affairs of our lives are greatly different from those of 1789, or 1832, or 1860, or even 1900.

Whose meaning then, and whose interpretation, do our judges and legislators and executives take an oath to support? Is it the meaning and the interpretation of the 39 signers in 1787? Their hands wrote, in the language of that day, the thoughts of their active and intelligent minds. Shall we still be governed by the dead hand?

Professor Crosskey differs plentifully with Justice Holmes; but in one matter he accepts his theory. Opposite the title page he thus quotes Holmes: "We ask, not what this man meant, but what these words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." The present reviewer does not accept this dictum as a just rule for the interpretation of a contract;<sup>6</sup> it may work better when applied to a Constitution or to a statute. Who is a "normal speaker of English"; and who is a "normal" man? The reviewer agrees unreservedly, however, with the author of the present work, in his condemnation of cocksure judgments in ignorance of our constitutional history and of the usages and conditions and education of the men of 1789, and of judgments rendered without a re-reading of the express words in the light of that history and those

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6. 3 CORBIN, CONTRACTS §§ 532 *et seq.* (1951).

usages and conditions. Interpretation and application of the words of the old document to the circumstances of later times is the continuous function of men living in those later times, particularly the judges.

While it is the function of the courts to act as the selective and creative agents of society in the evolution of any legal system, it cannot be regarded as their function to make new interpretations and applications of a Constitution that materially vary the granted powers of any branch of the government, either (1) with full consciousness of the variation and with intent to improve the constitutional distribution (supported, it may be, by a political party then in the ascendant), or (2) in sublime ignorance that any variation is being affected.

It is a different question whether the Supreme Court should overrule previous decisions that have been acquiesced in for 100 years, on the ground that when first rendered they were not in accord with the Constitution as then understood (or as now understood—for example, *Swift v. Tyson*). The reviewer will not here assent to the statement by Holmes (in the *Black and White Taxicab* case) that when some “fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States” it is one “which no lapse of time or respectable array of opinion should make [the Supreme Court] hesitate to correct.”<sup>7</sup> But the reviewer will definitely support Professor Crosskey in advocacy of the prompt overruling of *Eric Railroad Co. v. Tompkins* and its numerous and insufferable progeny of 15 years.

No other writer has presented so devastating and so convincing a criticism of *Erie Railroad Co. v. Tompkins*, “the most colossal error the Supreme Court has ever made” and “one of the most grossly unconstitutional governmental acts in the nation’s entire history.” Without doubt, this will receive violent counter-criticism; but no such counter-criticism is likely to be based upon as industrious a research into our constitutional and linguistic history, accompanied by as keen an analysis of judicial decisions, as that of the author of this work. This reviewer believes that it will be impossible to show any material error in the author’s demonstration of the harmful results of the *Erie* decision as evidenced by the morass of subsequent decisions.

This is a controversial work, but a work that has long since been overdue. It is a work of originality and a work of courage. It is a work that evidences immense industry and keen analytical power. Its author is a man with much important experience as an active practicing lawyer and as a law school professor and research scholar. His work shows no temporary political motivation, the kind that destroys objectivity and invalidates judgment. His opinions, strikingly and sometimes shockingly unusual as they are, are his own honest opinions based upon careful and extensive research. His thinking is “wishful thinking”; but only in the sense that he wishes our country had been run by greater men, men with clearer minds, men less motivated by temporary and merely local interests. Throughout, his work is written in a clear and attractive

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7. *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (dissenting opinion).