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## Book Review [The Undiminished Man: A political biography of Robert Walker Kenny]

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## BOOK REVIEWS

**THE UNDIMINISHED MAN: A POLITICAL BIOGRAPHY OF ROBERT WALKER KENNY.** By Janet Stevenson. Novato, CA: Chandler & Sharp Publishers, Inc. 1980. Pp. 200. Hardbound. \$10.95.

*Reviewed by Dorothy Gray\**

Most biographers choose for their subjects those figures who loom large in the public consciousness. In *The Undiminished Man: A political biography of Robert Walker Kenny*, Janet Stevenson has instead brought to our awareness a man who was once prominent on the public scene but who fell into obscurity in recent decades. Stevenson's story of Bob Kenny is competently written, informative, and entertaining. Its chief value is that it restores to us a man of the law who was courageous, witty, charming, and erudite. As manifested by his fifty year career on the California scene, Kenny symbolizes the finest in the legal profession and politics.

Stevenson's biography of Kenny as lawyer, judge, and state attorney general is also peculiarly timely. With public regard for the legal profession and politics at a particularly low ebb today, it is well to be reminded that law and politics have produced people of compassion and high principles. In simplest terms, a person like Bob Kenny should never be forgotten, and it is our loss that his story has been little known in recent years.

This biography of Kenny is timely for a second reason. Much of Kenny's career was given to fighting on behalf of those who were persecuted under the anti-communist hysteria which is generally called the McCarthy era. At a time when many attorneys turned their backs on those accused of com-

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munist leanings, Kenny courageously fought for the rights of the accused and in defense of first amendment guarantees. In reviewing the abuses of the McCarthy era, Kenny's story is a reasonable warning, for Congress is reportedly moving to revive the House Un-American Activities Committee (HUAC) and its Senate counterpart. Those who remember the climate of fear of the late 1940's and 1950's may have forgotten what a nightmare it truly was; for a younger generation the name "McCarthy" refers at most to "Clean Gene,"<sup>1</sup> and not to the grim-faced man who claimed he had a list of dangerous subversives.

Until Bob Kenny chose to oppose the outrages of the McCarthy era, it appeared as though he would achieve a high political office or gain appointment to the California Supreme Court. When, in the late 1940's, he chose to defend those accused of being pro-communist, he sacrificed all hope of high office and became a political untouchable. By the end of a decade of fighting McCarthyism, Kenny had the gratitude of the persecuted and the admiration of liberal intellectuals, but virtually nothing more than that except his own self-respect. He was nearly impoverished and without much hope of building a new career. Kenny might have finished his days penniless had not Governor Pat Brown, in the closing days of his administration, appointed his one-time mentor to the bench.

Given the high price Kenny paid for his principles, cynics might be tempted to say that good guys always finish last. Kenny himself would have rejected such a view. In 1975, not long before his death, Kenny reflected on the choices he had made: "I think of all the things I would have missed if I hadn't done what I've done."<sup>2</sup>

Kenny's activities during the McCarthy period alone would fill a book. He counseled and defended many of the people called before the various state, local and federal "loyalty" committees, and he labored in vain to save the Hollywood Ten. He was co-counsel in the unsuccessful lawsuits which sought to break Hollywood's blacklisting practices. In terms of development of the law, perhaps the most noteworthy case in which he participated was *Yates v. United*

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1. J. STEVENSON, *THE UNDIMINISHED MAN: A POLITICAL BIOGRAPHY OF ROBERT WALKER KENNY* at 153-54 (1980).

2. *Id.* at 142.

*States*,<sup>3</sup> which constitutional law textbooks currently include to teach the intricacies of first amendment rights and the Smith Act. *Yates* presented the winning argument that membership in the Communist Party was not independently sufficient to constitute illegal advocacy of violent overthrow of the government. Kenny's research on the fifth amendment and the right of silence was used in the dissenting opinion in *First Unitarian Church v. County of Los Angeles*<sup>4</sup> where the church attempted to preserve its tax exempt status after it refused to sign a loyalty oath. Stevenson includes Kenny's memo on the development of the right to remain silent, and Kenny's treatment of the historical development of the concept is highly interesting.

In recounting this era in Kenny's life, Stevenson's biography is at its best. Perhaps because Stevenson herself was called before the HUAC, she vividly depicts the fear, frustration, and dismay that many experienced during the red baiting period. Even those of us who remember the era may have forgotten the pervasiveness of guilt by association, the broad nets of the committees, and the ludicrous reaches of hysteria. It has been forgotten by many that those targeted included such well known artists as Berthold Brecht, Ring Lardner, Jr., and Dalton Trumbo. Even those who were far from prominent were not too obscure to escape the committees' probing. As Stevenson notes, those suspected by McCarthy and his committee included "lawyers who represented clients in committee hearings, doctors, dentists, clergymen, university professors and grade school teachers, dancers, housewives active in the P.T.A. and Girl Scouts, stage hands and literary agents, secretaries, accountants, electricians, plumbers, and research workers."<sup>5</sup>

Of McCarthyism, Kenny once recalled, "It hit every part of the country, every profession, every stratum of society. Lawyers found they had no more immunity than their clients. Why, at one time I found myself representing twenty-seven of my fellow barristers, along with twenty medical doctors, one optometrist, a dentist and four osteopaths!"<sup>6</sup>

When the federal government attempted to deport Harry

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3. 354 U.S. 298 (1957).

4. 48 Cal. 2d 419, 311 P.2d 508 (1957).

5. J. STEVENSON, *supra* note 1, at 102.

6. *Id.* at 98.

Bridges, leader of the west coast longshoremen, Kenny appeared as a character witness. Asked in the course of the proceedings whether he himself was a communist, Kenny replied with typical humor, "No, but some of my Democratic friends have accused me of being a Republican!"<sup>7</sup>

While Kenny more than held his own in the hearings and trials, his clients fared far worse. Before the committees, due process was virtually non-existent and witnesses were sometimes thrown bodily out of the hearing rooms for trying to make statements on their own terms as witnesses. As the Hollywood Ten tried in vain to make clear, if one denied communist affiliation one was seemingly recognizing the right of the committees to inquire into the political beliefs of everyone; if one admitted communist affiliation, even in the distant past, one risked self-incrimination and the pressure of the committee to disclose the names of others. As a matter of principle, many witnesses who had nothing to do with communism felt that they could not in conscience speak, and, thus, they risked being jailed for contempt. Even those who escaped contempt charges, often suffered economic loss and social ostracism. As Stevenson notes, careers were destroyed, marriages were broken, and there were premature deaths from stress, including several suicides. The story, in terms of the Hollywood community, has been shown in the Woody Allen movie "The Front," but the same scenario occurred in other parts of society.

Among the groups attacked as pro-communist were the American Civil Liberties Union (ACLU) and the National Lawyers Guild. Kenny was listed by a California state senate committee as having such "Communist front affiliations" as these two organizations.<sup>8</sup> The Guild was characterized by the same committee as being "the foremost legal bulwark of the Communist Party."<sup>9</sup> In a highly interesting chapter,<sup>10</sup> Stevenson tells of Kenny's role in the development of the Guild, of which he was president for seven years. Even though the Guild took anti-U.S.S.R. positions, it was characterized as pro-communist in part because it supported civil rights at a time when the American Bar Association (ABA) prohibited

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7. *Id.* at 144.

8. *Id.* at 122.

9. *Id.*

10. *Id.* at 122-41.

black members. Typically, Kenny stayed with the Guild when others fled in fear, and he refused to desert it when then congressman Richard Nixon urged that the Guild be officially listed by the Attorney General as a subversive organization.

What many in the McCarthy era refused to see was that Kenny's willingness to defend avowed communists and those accused of communism, was based on his ethical concern for the rights of the accused and his strong desire to protect basic constitutional rights. A defendant in one of the Smith Act cases well understood Kenny's orientation and his contribution: "What we gained by having Kenny was not only the services of one of the most distinguished public figures and the sharpest legal minds around—a real student of the Constitution!—but the reflected respectability of a man of his stature. It reflected on the issue, not on us."<sup>11</sup>

One of the odd coincidences of Kenny's story is that when he argued before the United States Supreme Court, the Chief Justice was his old friend Earl Warren. Kenny's political career and that of Warren's had been intertwined for nearly two decades in California. In 1942 when Warren ran for governor, Kenny agreed to support Warren and to stay out of the race himself. Kenny's support was significant because Warren was viewed with some disfavor by the liberals at that time. Kenny risked the anger of his liberal cohorts and the Democratic Party by supporting Warren and, in return, he demanded a written statement from Warren upholding civil rights so he would have something to show to justify his position. The letter is included in an appendix to this biography and makes an interesting addition to Warren scholarship as well.<sup>12</sup>

In the same election Kenny ran for Attorney General and was the sole Democrat to win in a Republican sweep. While Kenny was Attorney General his association with Warren continued, and some commentators attribute to Kenny's influence Warren's later strong civil rights orientation.

Stevenson's chronicle of Kenny's political career is fascinating, giving rise only to the complaint that her treatment is shallow. At most we get a tantalizing glimpse of the political history of the 1930's and 1940's. In fairness to Stevenson, she

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11. *Id.* at 120.

12. *Id.* at 166-67.

disclaims any pretensions to serious historical work, describing her book as a "political—not a scholarly—history."<sup>13</sup> Nonetheless, even as a political biography, her book would have benefited from greater detail and broader development of the political world in which Kenny moved. Her meager treatment of that political time is particularly disappointing in that she initially laments "the strange hiatus" in public consciousness concerning the era of Rooseveltian liberalism, but she does little to explain that trend.

In spite of the deficiencies in Stevenson's portrayal of the era, readers will undoubtedly enjoy the story of Kenny's rise to prominence. He was initially a news reporter, sporadically attending law school classes at night. In spite of his limited legal education, he passed the bar exam on his first try and a year later was made deputy counsel of Los Angeles County. In this position he spent considerable time in Sacramento lobbying on behalf of county interests. During this period as a lobbyist, Kenny developed his interest in politics.

Before long he was actively campaigning for various candidates and held the dubious distinction of being one of the instigators of the now ubiquitous bumper sticker. Of his antics at this time, Kenny once said, "In every campaign there are actually two separate efforts: one is to elect your candidate, and the other is to convince him that it was you who did it."<sup>14</sup>

Kenny's reward for his political work soon came in the form of appointment to the Los Angeles Municipal Court bench. "A judge," he quipped, "is just a fellow who knew a governor."<sup>15</sup> At the age of twenty-nine, Kenny was the youngest person ever appointed to the bench. His wit, kindness, and incredible capacity for work make his small claims court a model, even today, for courts of any level. He carried these abilities to his subsequent position on the superior court bench.

The political bug still had strong hold on Kenny and in 1938 he easily won a seat in the state senate. On his first day in office he introduced forty-six bills,<sup>16</sup> a record that probably still stands.

At the end of his four-year senate term, Kenny ran for

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13. *Id.* at xviii.

14. *Id.* at 10.

15. *Id.* at 9.

16. *Id.* at 30.

Attorney General and, as usual, received broad-based support. As Attorney General he fought restrictive covenants, opposed the internment of Japanese Americans during World War II, and instituted what would today be called sensitivity training for policemen working in minority areas. During these years Kenny was seen as a prime candidate for governor and possibly Roosevelt's next Vice-President.

Kenny's last serious political race was in 1946 when he ran against incumbent Governor Warren. He had been pressured into the race and the results at the polls were disastrous. In all likelihood he could have made a comeback, as did Richard Nixon after his trouncing by Pat Brown for the governorship in 1962. Kenny, however, chose to embark upon the decade of defending the underdogs of the McCarthy era and effectively bid farewell to any hope of a political future. Another one of the coincidences of Kenny's career is that he lost the governor's race the same year that Nixon ran for Congress and began his career as a red-baiter.

In the wake of the stormy years of McCarthyism, Kenny closed out his life by returning to the bench as the appointee of his one-time protege Pat Brown. As a superior court judge, he undoubtedly derived satisfaction in ruling that a loyalty oath for county employees was unconstitutional, an opinion upheld by the California Supreme Court. Though virtually unknown to the general public, Kenny's contributions to society did not pass unmarked by his peers: in 1975 the Los Angeles County Bar Association voted him the Shattuck-Price Award "for outstanding dedication to the improvement of the legal profession and the administration of justice."<sup>17</sup>

Kenny died in 1976 but his spirit will never die within the legal profession. As was said of another courageous lawyer, Sir Thomas More, he was a man for all seasons. While Stevenson may be somewhat biased in her portrayal of Kenny, this reviewer's associates who knew Kenny are in accord that he was an admirable and lovable man. To read this book is to share for a brief time the pleasure of his company.

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17. *Id.* at 140.



POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES VOLUME III. By William Winslow Crosskey and William Jeffrey, Jr. Chicago, Ill. and London, England: The University of Chicago Press. 1980. Pp. vii + 592. Hardbound.

*Reviewed by Howard C. Anawalt\**

This book will appeal to the patient reader, the history buff and the occasional legal scholar in need of analysis of critical stages of constitutional history. Whether its influence will be felt beyond such a select readership depends upon the book's general thesis and the character of a growing popular interest in adjusting constitutional balances in the United States today.

The book is the third volume of a history project commenced by the late William Winslow Crosskey. The two earlier volumes appeared nearly thirty years ago. Crosskey seems to have become a constitutional historian somewhat by accident. He was practicing law in a Wall Street law firm when the early "New Deal" legislation of Franklin Delano Roosevelt's administration was enacted and he became the office expert on the application of these laws.<sup>1</sup> In the course of developing his expertise, he studied the entire report of *Gibbons v. Ogden*<sup>2</sup> and other historical materials. "One thing led to another, his researches broadened, and the results were presented for interested readers in the first part of Volume I of *Politics and the Constitution*."<sup>3</sup> Crosskey's death in 1968 prevented him from personally finishing the entire project.

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1. W. CROSSKEY AND W. JEFFREY, JR., III POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 8 (1980) (hereinafter cited as *Politics and the Constitution III*).

2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The case sustained the claim of a federally licensed steamboat operator, Gibbons, that he could not be prevented from engaging in an interstate passenger carrying operation because of legislation of the state of New York which created a steamboat monopoly in favor of a competitor. The case is usually cited as the foundation for a broad interpretation of the commerce clause (U.S. Const. art. I, §8, cl. 3). The opinions in the case are 240 pages long.

3. *Politics and the Constitution III*, *supra* note 1, at 8.

Fortunately, he had a younger colleague and active collaborator, William Jeffrey, Jr., who finished the work with apparent devotion and personal interest.<sup>4</sup>

The introduction to the present volume summarizes the main thesis of Crosskey's earlier work. Crosskey's argument, greatly simplified, is that the original plan of the Constitution was to establish a national or central government, as opposed to a federal one, as is often taught in basic courses on the Constitution. The national legislative power was intended to be complete, including a capacity to regulate for the general welfare.<sup>5</sup> Further evidence of a plan for a national government is drawn from the commerce clause, which was intended to provide for a general national scheme of commercial regulation without regard to interstate flow of goods.<sup>6</sup>

The contract clause (U.S. Const. art. I, §10) also fits into the nationalist scheme in an interesting fashion. Obligation of contract, the authors argue, refers to all aspects of contract law, including formation.

In other words, the 'obligation of Contracts' within any particular legal system at any particular time is the resultant of all the then existing laws relating to the subject of contracts. Any law which, by making it more difficult to become 'bound' by a contract, has the effect of diminishing the obligation of contracts in its totality 'impairs the Obligation of Contracts' as of the time in question.<sup>7</sup>

Unlike the Supreme Court at the turn of the century, the authors do not conclude from this analysis that there is a "right to contract" which is protected from legislative interference.<sup>8</sup> Instead, the authors state:

A further significant feature of the Contracts Clause, however, is that a parallel prohibition against the impair-

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4. William Jeffrey is presently a Professor of Law at the University of Cincinnati. He became acquainted with Professor Crosskey when he was a student in 1942. He collaborated with Crosskey on the final volume when the latter was still alive. Concerning Crosskey, Jeffery states, "To have been his student, his friend, and his collaborator was the greatest of fortunes and the highest of honors." *Id.* at xii.

5. *Id.* at 18-20. See also U.S. CONST. art. 1, §8, cl. 1.

6. *Politics and the Constitution* III, *supra* note 1, at 10.

7. *Id.* at 14.

8. *Lochner v. New York*, 198 U.S. 45 (1905) and *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). The doctrine of such a nearly inviolable right to contract has since been disavowed by the Supreme Court. See *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937) and *Nebbia v. New York*, 291 U.S. 502 (1934).

ment of contractual obligation by the *national* legislature is *not* contained in the Constitution. In other words, if the states were prohibited from *all retroactive* legislation by the Ex-post-facto Clause, and the states are additionally prohibited from *all prospective* impairments of the obligation of contracts, the conclusion directly follows that Congress has an *exclusive power* over contracts legislation, subject to the unprohibited sector of state legislation just referred to in the preceding paragraph. When the reader recalls the extensive scope of contract legislation, and its fundamental connection with the whole field of the regulation of 'Commerce among the several States,' the natural conclusions are that the power of Congress 'to regulate Commerce, with foreign Nations, and among the several States and with the Indian Tribes' is *exclusive* of state legislation, and, further, that the Constitution itself provides oblique internal evidence of the intended complete coverage of the nation's gainful economic activities.<sup>9</sup>

The Crosskey/Jeffrey reading of the national plan includes a strong departure from the accepted view of the role of the federal judiciary as well. "Not only have the Justices 'done those things which [they] ought not to have done,' but they have also 'left undone those things which [they] ought to have done.'"<sup>10</sup> Specifically, the authors conclude that the federal judiciary has constitutional authority to establish a federal common law which would eventually displace the variations of state common law. Such a role would "round out" the national system and enable the Supreme Court "to maintain a uniformity in American case-law on a nation wide basis, thereby very greatly contributing to the achievement of the preambular object of 'establish[ing] Justice.'"<sup>11</sup> However, with respect to judicial review the role of the court is much more constrained than the history of Supreme Court interpretations has revealed. The preeminent federal power resides in the Congress,<sup>12</sup> and the role of the court is to determine the constitutionality of only that legislation which might offend one of the few specific limitations on the power of Congress.<sup>13</sup>

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9. *Politics and the Constitution* III, *supra* note 1, at 14-15.

10. *Id.* at 25, citing from the General Confession in the Book of Common Prayer.

11. *Politics and the Constitution* III, *supra* note 1, at 29.

12. *Id.* at 24.

13. The supremacy clause (U.S. Const. art. VI, cl. 2) is the critical provision:

More conventional interpretations of the text and history of the constitution assert that it was intended to establish a federal government of limited power, preserving the states as constitutional entities with general governmental power. Historical events together with judicial interpretation of the commerce clause and the fourteenth amendment have overtaken the original design. Today our federal government essentially functions as a law maker which touches virtually every important aspect of national and local life.<sup>14</sup> The Crosskey/Jeffrey view is that congressional supremacy was intended, but that judicial control of federal legislation was not. One might expect the authors to offer a means of returning to what they believe is the original design, but they do not. Instead they state:

If the reader begins to sense the possible emergence of the conclusion that, over the years of our national history, the Supreme Court's performance has been what can only be characterized as a lengthy career in the distortion, misconception, and misconstruction of the Constitution of the United States, that conclusion must simply be faced, without anger, tears, or lamentations.<sup>15</sup>

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Under it all state legislation is subject to judicial review. Acts of Congress, however, are "supreme." Traditionally, the problem of judicial review has arisen in cases of conflict between the supremacy of the Constitution and the supremacy of acts of Congress. The resolution advocated by the authors is to define "conflict" narrowly. For them no judicially recognizable conflict exists unless the Constitution contains a provision which specifically curtails congressional power, for example, the first amendment. Most of the Bill of Rights, the authors note, deals with restrictions on the exercise of federal judicial, not legislative, power. In relation to this argument, the reader might consider Justice Holmes' remark, "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." O.W. HOLMES, *Law of the Court Collected Legal Papers*, 295-96 (1920).

14. The sweep of congressional power under the Commerce Clause is familiar. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) and the Oleo Margarine Act of 1950, 21 U.S.C. § 347 which regulates the identification of oleo margarine served in restaurants. The fourteenth amendment as a source of national power is equally familiar. American historian Carl N. Degler has commented,

The use by the courts of the celebrated due-process clause of the amendment has been so protean and ingenious as almost to defy summary. This handful of words has been the basis for voiding dozens of state efforts at social reform as well as for justifying federal interference in the administration of justice within the states.

C.N. Degler, *Out of Our Past*, 206 (1959).

15. *Supra* note 1, at 32.

In any event, the conclusion is sobering. The discovery that we may have operated on erroneous constitutional understandings may influence present day politics. This potential exists because the problems of the near future are linked to demands for a reallocation of power within our constitutional system. Now is, thus, a fertile time for the discovery of a revisionary history of our system. Nevertheless, this book is unlikely to influence the direction of American political development, primarily because the context of American constitutional demands has changed radically since the eighteenth century.

Volume III confines itself to events which occurred prior to the Federal Constitutional Convention. Part I outlines the elements of British control of American continental affairs in the late eighteenth century. Americans in this period were not only revolting against British control, but were expressing a desire to realize the potential of their growing commercial power. A substantial number of citizens favored a comprehensive continental power over commerce as a means to this end. Jeffrey demonstrates that the First Continental Congress of 1774 created an effective association to "undertake a comprehensive regulation of the country's *entire commerce*, foreign and domestic."<sup>16</sup> The movement was reinforced by Benjamin Franklin and Thomas Paine in 1775, after the "shot heard 'round the world.'" Franklin called upon the Second Congress to create a government able to "make such general ordinances as [thought] necessary to the General Welfare,"<sup>17</sup> and Paine urged the same theme in his pamphlet, *Common Sense*.<sup>18</sup> Jeffrey's review of the periods from 1774 to 1787 led him to conclude that there is "nothing to show that the form of government set up by the Articles of Confederation was the kind of government desired by a majority of the American people at that time."<sup>19</sup>

There is general agreement by scholars that the inability to regulate commerce under the Articles of Confederation was a major reason for the constitutional movement. The issue taken up in the remainder of the book appears somewhat nar-

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16. *Id.* at 51.

17. *Id.* at 53, citing 1 W. Crosskey, *Politics and the Constitution in the History of the United States*, 578-609 (1953).

18. *Politics and the Constitution* III, *supra* note 1, at 72.

19. *Id.* at 123.

row from our twentieth century vantage: Did the majority of proponents of a constitution want the continental government to have a power which included strictly local or intrastate objects of regulation, such as price regulation? Jeffrey concludes that they did.

Dissatisfaction with the Articles of Confederation was not immediately manifest. After the ending of hostilities with Britain, American business prospered and a huge influx of foreign goods stimulated and satisfied consumption. "The resulting mercantile profits, or apparent profits, were in turn freely spent; a building boom resulted and many of the other usual marks of inflation were evident."<sup>20</sup> The commercial boom was followed by a depression or "commercial languor" which brought about a "major phase of the pre-constitutional movement for a national commerce power."<sup>21</sup> This phase was characterized by merchant agitation, which began in Boston and Philadelphia in the spring of 1785 and spread by way of newspaper commentary throughout the other states. Jeffrey carefully recounts the progress of the movement and finds that it succeeded in generating support in New England and the middle states, but failed in the south.

The failure of this movement prompted the Congress (of the confederation) to propose a meeting to consider the establishment of a uniform system of commercial regulation.<sup>22</sup> The meeting, known as the Annapolis Convention, failed to produce a plan of action under the confederation and resulted in a call for a constitutional convention, the ultimate objective of which would be the formation of a new government.<sup>23</sup>

The latter portions of the book trace the political moves and sparring that led to the Constitutional Convention in 1787. Jeffrey's interpretation of the data for this period is consistent with his major thesis—the predominant forces in the immediate preconvention maneuvers favored a nationalist scheme. At the Convention divergencies between the north and south were reduced and a consensus was reached.

It would seem to follow, then, that unless the Federal Convention in the course of its proceedings did something

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20. *Id.* at 164.

21. *Id.* at 165.

22. *Id.* at 229.

23. *Id.* at 323.

entirely different from what the country generally expected at the time when the convention met, they must have provided in the Constitution for a generally empowered government, whose legislature possessed, along with its many other powers, a complete power over the whole commerce of these United States.<sup>24</sup>

Two figures draw special attention from Jeffrey. Alexander Hamilton is described as a leader of foresight who consistently pressed for national power from the earliest opportunity. He was "a man of courage and high intelligence,"<sup>25</sup> who helped to bring about the Federal Convention, though circumstances prevented him from being particularly instrumental in the Convention itself.

Madison, on the other hand, is accused of vacillation in his views and of being too much guided by his own political ambition and the particular commercial interests of Virginia. Jeffrey says that Madison's life divides into three well-defined periods. Prior to 1786 he was a "moderate and cautious nationalist."<sup>26</sup> He sided with national power only to the extent that it would help liberate Virginia's commerce from dependency on the great ports of Baltimore and Philadelphia.

According to Jeffrey, Madison changed his views in 1786 and became "an *extreme* and *ardent* nationalist—a nationalist, moreover, who was distinctly antidemocratic in his views."<sup>27</sup> This period ended in 1791, with the vote on the National Bank. Jeffrey believes that this change of views was due to Madison's desire to accommodate the southern political ideas. Jeffrey finds that Madison's earlier political opinions were such an embarrassment that he turned to revisions or falsifications of the record of certain important events.<sup>28</sup>

"The first clear instance of Madisonian falsification" is the subject of an entire chapter.<sup>29</sup> It concerns the question of what happened on February 21st, 1787, several months before the Constitutional Convention met in Philadelphia. On that day the Congressional delegates from New York moved for congressional approval of a call for a convention. Madison,

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24. *Id.* at 462.

25. *Id.* at 321.

26. *Id.* at 401.

27. *Id.* at 402.

28. *Id.* at 403-04.

29. *Id.* at 388 (ch. XXVI).

who was a participant, prepared a memorandum which he left for publication after his death, forty-nine years later. The memorandum indicates that the motives of the New Yorkers were to frustrate progress toward a federal union.<sup>30</sup> In reviewing the evidence concerning the New York proponents, the instructions from the New York legislature, and the votes of the New York congressional delegates, Jeffrey determines that Madison must have known that the motives of the New York proponents were not anti-national. According to Jeffrey, Madison wrote his memorandum in order to reconcile his own vote with his subsequently acquired states' rights views.

Some readers will find that Jeffrey's attacks on Madison are overblown and too partisan. Jeffrey does sketch Madison as an opportunistic man, and in so doing he ventures into the realm of speculation. Yet the principal charge is that Madison changed his mind, and Jeffrey assembles evidence which indicates that perhaps he did. In so doing Jeffrey fosters an interesting and healthy curiosity about people, like Madison, who played dominant roles in framing our Constitution. No doubt they were complex men. It would be no great damage to his work as principal author of the Constitution if Madison were as changeable or uncertain as Jeffrey suggests.

The book is flawed by a lack of a clear story line. Jeffrey's extensive attention to detail requires some overall outline to orient the events discussed. The author too often assumes that the reader will know the general events of the pre-constitutional period and will recall previous material in the book. A stronger story line would bring the questions raised into sharper focus. In the same vein, the book would also benefit from a chapter which states a conclusion. Instead, the conclusions are stated in an offhand way in the final paragraph of the book.<sup>31</sup> Further, I believe that the end of the book should introduce the reader to the actual work of the convention. This would enable the reader to make a firm connection between the authors' thesis of pronationalism and the work of the drafters of the Constitution.

The book will satisfy many knowledgeable history buffs, and as a history book it is a valuable contribution. However, it will be of slight importance to the work of a lawyer. It con-

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30. *Id.* at 388-89.

31. *Id.* at 462.

tains some important insights about constitutional politics which might be applicable in modern political dialogues. Economic interests influence politicians, who shape the constitutional norms. However, the specific message of the book is that a potent national government was intended in 1786. This idea seems only to affirm the notion that the scope of federal governmental power which now exists was in fact intended to be created two hundred years ago. The pertinent questions today appear to be whether and to what degree the people of the United States want the federal government to exercise or refrain from exercising its admitted range of power.

