



1-1-1981

# Politics and the Constitution in the History of the United States, Volume III

Howard C. Anawalt

*Santa Clara University School of Law*

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>

## Recommended Citation

Howard C. Anawalt, Book Review, *Politics and the Constitution in the History of the United States, Volume III*, 21 SANTA CLARA L. REV. 1199 (1981).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol21/iss4/11>

This Book Review is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

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.

---

© 1981 by Howard C. Anawalt

\* Professor of Law, University of Santa Clara School of Law. A.B., Stanford University, 1960; J.D., Boalt Hall, University of California, 1964.

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-

---

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, Jeffrey 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>

---

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>

---

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-

---

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

---

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,

---

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-

---

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.