

BOOK REVIEWS

POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES. By William W. Crosskey. Chicago: The University of Chicago Press, 1953. Pp. xi, viii, 1410. \$20.00.

This is a challenging work of constitutional heresy. Orthodox dogma has taught us that the Founding Fathers were devoted to their states; that in 1787 they struck a compromise between their preference for local government and a need for national union by creating a federal system with a central government of enumerated and limited powers. All this, Professor Crosskey¹ tells us, is snare and delusion. Instead of a federal system, the Fathers deliberately created a central government of virtually unlimited power. National power was designed for all local gainful activity without regard to any relationship to interstate commerce; Congress may not merely tax and spend but also may regulate for the "general welfare"; the United States Supreme Court may review local state courts in their application of the common law to purely local transactions.

This plan for a unitary national government was perverted, we are now told, when the Covenant fell in the hands of evil men—Madison and the other Jeffersonians—who, intent on preserving local control of slavery, led the Court and the country astray by sophisticated reasoning and falsification of the records of the Constitutional Convention. This exhaustive two-volume treatise embodies fifteen years of intensive research designed to right that wrong and restore to the national Government the power which the Fathers planned.

Although this work condemns much of the work of the Supreme Court, it presents a magnificent tribute to the foresight of the Founding Fathers. At virtually every point where their intent has been misunderstood, the original design is much more suited to the author's evaluation of the present needs of the country than the structure which rests on current readings of the document. There emerges a "simple and flexible" scheme of government which is "wholly free from all those useless complexities, and surprising deficiencies, that seem to characterize it under the Supreme Court's familiar theories; and beyond all doubt, the scheme of the Constitution is one far better fitted to meet the governmental needs of this country at the present day than the scheme the Supreme Court's theories describe" (p. vii).

Heresy, at least in constitutional law, is a precious thing which we shun to our loss. If Professor Crosskey's work is sound this is indeed the most important book on the Constitution which scholarship has yet pro-

1. Professor of Law, University of Chicago.

duced. This drives us to an examination of the underpinning on which this work rests.

One might suppose that such a revolution in constitutional interpretation could only be based on a discovery as dramatic and compelling as the unearthing of forgotten records of the Constitutional Convention. Professor Crosskey's case is not based on such secondary sources; it rests primarily on deductions from the very words of the Constitution. This solution to the mystery has been lying in plain view for over a century and a half, but its significance has not been perceived since the meanings of crucial words of the Constitution have been eroded with the passing of time. To meet this problem, Professor Crosskey has by prodigious effort created a "specialized dictionary" derived from eighteenth century usage of these terms. A second tool is a set of rules of statutory construction which are culled from contemporary legal sources. When these meanings are read into the Constitution and the proper rules of statutory construction are applied, there emerges a document of strange visage which Professor Crosskey aptly calls our "unknown constitution."

Vital to the author's reading of the Constitution as a charter for a unitary national government is his re-interpretation of the preposition "among" as it appears in the grant to Congress of power to "regulate Commerce . . . among the several States." The scope of national power over commerce has traditionally been based on the premise that the constitutional grant relates to transactions which concern two or more states; as it is customarily put, the commerce must be "interstate."² This view, says Professor Crosskey, erroneously reads "*among* the several states" to mean the same as "*between* the several states." However, in the author's specialized dictionary, "among" cannot mean "between" but bears the much broader meaning of "throughout." An example of the acceptable usage of this word is a news account in 1785 that there had been "a severe hurricane *among the Windward Islands*." It is "needless to point out that the hurricane blew 'within' the several islands of the Windward group quite as much as it blew 'between' them" (p. 53). There are many pages of similar examples which provide the support for the conclusion that the national commerce power need not be based upon any interstate relationship or effect, but applies to local commerce within any of the states.

Professor Crosskey also devotes a chapter (pp. 84-114) to examples of eighteenth-century usage of the word "commerce" as embracing all types of gainful activity. These researches lead the author to conclude that the commerce clause, by the inescapable meaning of its words, created at the outset a central government with power over all local businesses such as

2. Earlier writers on the Constitution have urged and the Court has adopted reading of the commerce clause sufficiently broad for Congressional control of an interconnected national economic life. *E.g.*, HAMILTON AND ADAIR, *THE POWER TO GOVERN* (1937); Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934). *Cf.*, Wickard v. Filburn, 317 U.S. 111 (1942) (national control over farmer's feeding of home-grown grain). None of these readings of the commerce clause approaches the sweep of Professor Crosskey's construction.

smithies or alehouses, without regard to any economic impact on national economic life.

Professor Crosskey finds that other clauses of the Constitution, when properly read, support his view that the Constitution contemplated a unitary central government. An important example is the provision in Article 1, Section 8 that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and Provide for the common Defense and general Welfare of the United States . . ." It has been a mistake to conclude that this reference to "general Welfare" specifies one of the permissible objectives of the power of *taxation*; this is a grant of *regulatory* power over any subject which Congress deems will promote the "general welfare."

In Crosskey's view further light is shed on national power by a correct reading of the outlawry of state laws "impairing the obligation of contracts." The Supreme Court has been in error in concluding that this provision merely bars impairment of contracts executed prior to the legislation in question. Instead, the words of the Constitution plainly bar any state law which would restrict the enforceability of future contracts such as a statute of frauds, a statute of limitations, or regulation of usury (pp. 352-360). This reading, of course, cripples state legislative power; but this merely shows that Congress, and not the states, was designed to be the proper source of future legislation. Thus the author achieves a "perfect fit" between the various constitutional provisions (p. 1173).

These are not, by any means, all of the constitutional provisions which Professor Crosskey finds have been totally misunderstood: the book devotes large sections to unorthodox interpretations of the power of the Supreme Court, the scope of the Bill of Rights, and the true meaning of the Fourteenth Amendment.

In order to examine more closely Professor Crosskey's methods, an appropriate focal point is his reading of the commerce clause. The soundness of this conclusion affects the plausibility of much of the rest of the book, for limitations in the grant of power to regulate commerce would itself seriously jeopardize the author's assertions that unlimited regulatory power was contemplated by the "general welfare" clause and that the Supreme Court was authorized to override state courts in their application of the common law to local transactions.

This brings us back to Professor Crosskey's researches into the acceptable usage of the preposition "among" in the phrase "Commerce . . . among the several States." It must be conceded that Crosskey has proved that this phrase, standing alone, *could* have been employed in the all-inclusive sense which he urges. The evidence proves no more.

To get behind Professor Crosskey's assertion that his "very extensive study of eighteenth-century sources, British and American, has failed to bring to light" evidence that "among the states" in the commerce clause could be used in the interstate sense (p. 51), it is necessary to look into eighteenth-century writing. Fortunately, Professor Ernest Brown under-

took this chore.³ He reports that, without extensive research, examples of the use of the word "among" in the sense which Professor Crosskey denies to it appear repeatedly in such obvious sources as the *Federalist* and the writings of James Wilson. Perhaps the most striking of these examples occurs in the Articles of Confederation. Article IV guaranteed the privileges and immunities of the citizens of the several states and their right of free ingress and regress to and from any other state, with the stated objective the "better to secure and perpetuate mutual friendship and intercourse *among* the people of the different States in this Union . . ." Thus, the charter which preceded the present Constitution appears to have used the word "among" in the "inadmissible" interstate sense.⁴

When relatively brief examination uncovers such instances, ominous questions arise as to why Professor Crosskey's years of research apparently did not find them. It is also disturbing that Professor Crosskey did not take account of the obvious point that the word "among" in the commerce clause was rendered appropriate, if not dictated, by the multiplicity of the relationships of the thirteen states. "Between" comes from the same root as "twain" and literally speaks only of a relationship involving two objects; for a larger number of relationships the correct word is "among."⁵ To speak of correspondence "*between* the two of us and *among* us three" is hardly inadmissible use of language either now or in the eighteenth century.

If this discussion of word-usage seems unduly prolonged or trivial, it must be remembered that a very large part of the Crosskey case rests on his assertion that the *words* of the Constitution *cannot bear* the interpretation of relationship among the states which has been traditionally placed upon them. In Crosskey's words: ". . . the conclusive piece of evidence will be the Constitution itself, read as our specialized dictionary of words and ideas will require" (p. 12).

Even more distressing than this overstatement of his case for the true meaning of the words used in the Constitution is the author's failure to give a balanced account of the relationship between the Constitution and the needs and ideals from which it grew. In Crosskey's words, ". . . the

3. Brown, Book Review, 67 HARV. L. REV. 1439, 1449-51 (1954).

4. In glancing at the *Records of the Federal Convention* reporting the proceedings of the first day in which business was transacted, the following additional instance practically leaped from the page. Randolph, in opening the discussion, referred to various reasons why the Articles of Confederation had not been made stronger, including the fact that "no commercial discord had arisen *among* any states. . . ." (Italics added.) I FARRAND, RECORDS OF THE FEDERAL CONVENTION 18 (1911). Farrand notes that this summary was in Randolph's own hand. *Ibid.* n.7. In the context of the debates as a whole I find it impossible to read this statement other than as a reference to relationships among the states. Indeed, the debates on the commerce clause dealt primarily with the power which would thereby be conferred upon Congress to pass a navigation act. See II *id.* at 449-53, 631.

5. CENTURY DICTIONARY 180 (1914): "*Between* is nearly equivalent etymologically to *by twain*, so applying only to two; *among* refers to more than two; it is therefore improper to say either *among* them both, or *between* the three." Cf. JOHNSON'S ENGLISH DICTIONARY 135 (Chalmers' abridgment of Todd ed., 1839); BOSWORTH, DICTIONARY OF THE ANGLO-SAXON LANGUAGE 52, 404 (1838).

task of putting the Constitution, rightly understood, in context with the events and institutions which preceded it, has not yet been attempted and accordingly remains as one of the chief subjects to be dealt with in subsequent volumes of this book" (p. 1174).

In the face of this offering of two large and closely printed volumes it seems ungrateful indeed to suggest that we should have been given more. Nor can one quarrel with the presentation of research by installments. The problem arises only because Professor Crosskey claims that by these volumes he has demonstrated the true meaning of the Constitution to a point where "there cannot be a doubt" (p. 1161) and contrary views can be dismissed as "wholly imaginary" (p. 1173) or "little less than absurd" (p. 499), or as "almost childlike" (p. 391). Professor Crosskey thus invites the Court and Congress immediately to revise their views of the structure of the Constitution although vital evidence of the purport of the Constitution is not presented. This order of proof is the more difficult to understand since these two volumes are not confined to the meaning of the text of the original document, but run on to proclaim the "true" meaning of the Bill of Rights and the Fourteenth Amendment.

Unless the words of the Constitution are utterly compelling one cannot fairly reach final conclusions on its meaning without facing this question: On what evidence is it plausible to suggest that men who in drafting the Articles of Confederation were so averse to central government that they withheld legislative power even over taxation or foreign commerce should choose ten years later to create a government with complete regulatory power over all local business affairs?

Crosskey does not deny us a "foretaste" of the evidence which he promises for later volumes. The book refers to "commercial chaos" in the states prior to 1787 (p. 85), and apparently seeks to leave the impression that national regulation of local commerce was therefore demanded. Available evidence, however, seems to be primarily concerned with the repudiation of debts which accompanied the post-war deflation; this problem, of course, was met by the specific provision of Article 1, Section 9, prohibiting state laws which impaired the obligation of contracts.

Crosskey also builds an elaborate case for the receptiveness of the lawyers of the time for a single body of mercantile law, and points to the popularity of Mansfield's work in furthering the *lex mercatoria* (p. 33). This material would indeed be relevant to the intended scope of national legislative power if lawyers of the time generally contemplated that the "law of merchants" should be established by legislation. Such an implication, however, would be misleading. As Professor Crosskey himself seems to recognize at another point (pp. 556-59), the law of merchants was conceived as a body of customs followed by merchants which was implemented not by legislation but through recognition by the courts. Local state courts could ascertain and apply these general mercantile practices; an appreciable movement to codify commercial laws into statutes followed the drafting of the Constitution by a century. Much less is there evidence that the Con-

stitution of 1787 was designed as a tool for national legislation codifying business law.

Professor Crosskey points to the fact that at the time of the formation of the Constitution the country was in the midst of a post-war depression and draws the conclusion that this fact "naturally increased the demand that the nation take over the entire government of business" (p. 496). Although such a reaction seems "natural" today, one could hardly draw the same conclusion for 1787 without ample proof. But at this point Crosskey's discussion trails off, as it does so often at crucial points, into promises of more in a "later volume." In sum, Crosskey has not yet supplied evidence which makes even plausible his assertion that the framers planned to create a unitary national government with regulatory power over all local business.

The most disturbing aspect of the book is the handling, if one may use the word, of the "legislative history" of the Constitution. The difficulty for Professor Crosskey is that Madison's notes of the proceedings of the constitutional convention—by far the most complete record—conflict with his views. Therefore, since Crosskey can entertain no doubt of the correctness of his reading of the words of the Constitution, there can be only one explanation of this discrepancy: Madison's records are false. For this alleged falsification of the records, Crosskey readily supplies a motive: Madison's later political role in resisting Federalist versions of the national power. But the extent of this alleged falsification, and the method by which it was accomplished, are again left to "later volumes." For Professor Crosskey's sake alone, one may hope that his proof for these charges will be prompt and compelling.⁶

It is an astonishing performance, to use the mildest language possible, to proclaim the "true meaning" of the Constitution while disposing of such compelling evidence by unproven charges of forgery. Skepticism based upon the old-fashioned notion that proof should precede verdict is enhanced by numerous instances of Professor Crosskey's agility in leaping to a conclusion. Thus, at one point he is met by the fact that a statement by Madison damaging to Crosskey's views was made in the Virginia ratifying convention and reported by Eliot, whose honor Crosskey has not yet impugned. Crosskey, however, seizes on the fact that Madison spoke in such a weak voice that his remark had to be repeated. Crosskey concludes that "the weakness of his delivery in all probability resulted" from his awareness that his statement was false, "and from his consciousness of the in-

6. Such proof would have to overturn the detailed researches of Max Farrand which preceded the publication of his *Records of the Federal Convention* (1911). Farrand isolated the corrections which Madison made in his notes prior to publication, and noted that most of these "stand out from the page almost as clearly as if they had been written in red ink." I FARRAND, *RECORDS OF THE FEDERAL CONVENTION* xviii (1911). Irving Brant reports that in view of the way Madison's original notes were folded and bound, substantiation of Crosskey's charges would qualify Madison as "one of the most accomplished forgers in the world's history," and, *inter alia*, would involve duplicating in 1819 the paper and handwriting of thirty-two years earlier. Book Review, 54 COL. L. REV. 443, 447 (1954).

herent improbability, to the minds of his hearers, of the supposed fact which he affirmed" (p. 334). This is, on its face, a breathtaking inference, even apart from the fact that contemporary records show that Madison at this time was recovering from an acute illness.⁷

The treatise closes with these words of promise concerning the forthcoming volumes: ". . . when, on the basis of the actual evidence, a true view of all these matters has been built up, it will be found that weight, not doubt, has been added to the conclusions, as to the true view of the Constitution itself, which has been presented in the foregoing pages" (p. 1175). One can indeed share the author's confidence concerning the content of his conclusions while reserving judgment as to their weight.

One cannot deal tenderly with this performance without compromising principles which are basic to our profession. Incomplete and garbled reporting of data and the substitution of assertion for proof surely cannot escape the condemnation which such work would unhesitatingly receive if it were to appear in other fields of scientific investigation.⁸ The nature of the judgment can not be modified even though it must be assumed that these qualities are not deliberate, but result from an alchemist's zeal to transmute into gold the supposedly base metal of limited national power.

John Honnold †

AN ESTATE PLANNER'S HANDBOOK. By Mayo Adams Shattuck and James F. Farr. Second Edition. Boston: Little, Brown and Company, 1953. Pp. xxv, 610. \$10.75.

What, precisely, is Estate Planning? Obviously Mr. Mayo Shattuck is—or, regrettably one must say, *was*¹—its prime prophet. But just what is it?

One might say, glibly and cynically, that it is the latest fad in legal education. There would be much beside cynicism in such a statement.

7. *Id.* 449-50.

8. These qualities have been found in appalling proportions wherever reviewers have troubled to dig below the surface of the text. *E.g.*, Brant, 54 COL. L. REV. 443 (1954); Brown, 67 HARV. L. REV. 1439 (1954); Fairman, 21 U. OF CHI. L. REV. 40 (1953); Goebel, 54 COL. L. REV. 450 (1954); Hart, 67 HARV. L. REV. 1456 (1954); Nathanson, 49 N.W.L. REV. 118 (1954). Some reviews have praised the book. *E.g.*, Clark, 21 U. OF CHI. L. REV. 24 (1953); Corbin, 62 YALE L.J. 1137 (1953); Dean, 40 A.B.A.J. 314 (1954); Durham, 41 CALIF. L. REV. 209 (1953); Heiman and Kelso, 39 IOWA L. REV. 138 (1953); Sharp, 20 U. OF CHI. L. REV. 529 (1953); Sharp, 54 COL. L. REV. 439 (1954); Sholley, 28 WASH. L. REV. 249 (1953).

† Professor of Law, University of Pennsylvania.

1. It appears from the preface that Mr. Shattuck's work on the book was terminated by his regretted and premature death; the work was completed by his longtime friend and colleague, Mr. Farr.

Every law school has in its curriculum a number of courses which (if they are properly given) could very well be called courses in Estate Planning. The instructor in Taxation, in Trusts, in Future Interests, in Wills, may or may not conspicuously and explicitly stress drafting and planning, but it is to be supposed that what the intelligent student learns in these courses about the operation of wills and trusts, and about the impact of estate taxation, will be his prime store of ammunition when first he comes to have clients with wills to be drawn. It could not implausibly be argued that nothing more in the way of Estate Planning is needed. (Does the instructor in Taxation think we should have a course in Tax Evasion?)

There is something else that can be said, however. A character in Dickens, whose name now escapes me, proposed to write a paper on Chinese Metaphysics by looking up in the encyclopedia first China and then Metaphysics, and then proceeding to combine what he had learned. In that case, as best I remember, the prospects of success appeared dim. Estate Planning, as now so extensively advertised and promoted, involves much the same procedure, to be carried on, we hope, under rather more competent auspices. It is, precisely, the combining.

I should suppose that a fair statement of what Estate Planning is involves two steps. First, it presupposes a student with a substantial training in the subjects of Wills, Future Interests, Trusts, and Estate Taxation. Then, *and only then*, it supposes the application of the learning so acquired to the consideration of what kinds of dispositions of property are, in a given case (or perhaps in typical cases), best adapted to secure the optimum disposition of an individual's post-mortem affairs. "Optimum disposition" here, I suppose, means the one that best carries out the individual's desires, best protects his family in the various contingencies, foreseen and unforeseen, that are bound to occur, and at the same time avoids tax expense as far as that is possible consistently with the major objectives just stated.

The "*and only then*" is of major importance. It conditions rigidly what can be done in a course on Estate Planning. (And, as will be suggested in a moment, what should go into a treatise on the subject.) Most importantly, it makes it clear that a course in Estate Planning must be an *addition* to the curriculum, and cannot be a substitute for something already there. This is likely to be overlooked (or evaded) on two levels. The first is the very stupid level of thinking that you can *start* with Estate Planning, and so eliminate those tedious, old-fashioned, and quite un-policyladen subjects of Wills, Trusts, and so on. (Here one thinks of the college that had a course in Elementary Greek and one in Advanced Greek. This seemed to the Authorities too much Greek, so the course in Elementary Greek was abolished.)

On the second, and more sophisticated level, you encounter the realization that the basic information has to be imparted somewhere, but also the realization that curriculum committees are not likely to be enthusiastic about allotting more time to the Property Department. Hence the attempt

to stuff Wills, Trusts and the other basic disciplines all into one course. All this—and Planning too! A noble experiment, but one that may overlook the fact that courses, like other human devices, are apt to blow up when the internal pressure gets too great.² (With all the admiration I have for Mr. Casner's casebook on Estate Planning, I cannot help thinking that it is plagued somewhat by this difficulty. Despite the myriad varieties of learning with which it is packed, he may still not have been able to put *everything* into it, since I am told that he finds it necessary to bootleg into his course a little foreign material on Future Interests and the like.)

These observations, some may think, do not bear on the Shattuck and Farr book. But I believe they do. This is from every standpoint of performance a first rate book. I have read it with constant interest and profit, and with a constant awareness of the high level of its writing and thinking. It is in a sense too good a book to review; perhaps that is why I am tempted not to dwell on its merits but rather to indulge in the collateral reflections it induces. Yet, after all, I think the book has ultimately failed to solve the basic Estate Planning dilemma: just what is it we are trying to do?

We first encounter a vigorous and appealing description of the role of estate planners. Almost inspirational, one is tempted to say, so highly do the authors rate this among the useful arts. The career of a promising young man is traced with loving care from the early days when all he can afford is insurance³ to take care of the contingency of his premature death, up to the happy days when he is rich and can afford a board of high-powered advisers (including, one is happy to say, a lawyer) to plan his estate. Save for what I confess seems to me some exaggeration of the importance and difficulty of the process, all this is admirable. (Perhaps, though, I should be more likely to think it useful to my son than to my lawyer.)

Presently, however, the emphasis shifts to the various branches of substantive law, a knowledge of which is essential to the framing of the estate plan. There is a study of the law of Trusts, Wills, Future Interests, and, of course, Taxation. Incidentally, it may be suggested as one of the little ironies of this book that almost its major theme is that the estate plan should not be unduly warped by the zeal to save a few pennies in taxes—a very sound notion—and yet the authors proceed to devote more pages to taxation than to anything else. An excellent summary of tax law, if one

2. See Dean Ritchie's very sensible remarks on the subject in 7 J. LEGAL EDUC. 89 (1954).

3. Our authors set an extraordinarily high value on the understanding of insurance and assume that the staff of estate planners will include an insurance expert. They are palpably enthusiasts and I wonder if they may not have, as enthusiasts will, a little overestimated the value of some things with which they deal. I should assume that a competent lawyer, setting up in the estate planning business, could readily master the relevant information about insurance policies. The picture the authors present of a group of three or four—maybe an attorney, an accountant, a business adviser, and an insurance broker—gathered together in solemn conclave to plan Mr. Smith's will, to me at times nearly verges on the preposterous. What kind of broth will result?

somewhat doomed by the fact that tax law changes faster than books can be run through the press.

All this in 310 pages. It is too much. Such an attempt is bound to lay itself open to the criticism that in attempting the impossible one is likely to fall short of the possible. Here the disciplines attempted to be subsumed, no matter how expertly, defy the process by their very bulk. The resulting picture is definitely fragmentary. And in the process—perhaps because of its difficulty—the authors often betray (though I regret to use such a nasty word) a marked provincialism.

Two instances will suffice. For one, the law of Trusts seems to begin and end with Mr. Austin Scott. I have taught over and over from various editions of his casebook and thumbed his treatise from end to end and back again, so that no one is more aware of his wisdom and his scholarship—and yet there are other writers on Trusts. For example, I query the wisdom of recommending so broadly to readers everywhere reliance on the doctrine of “independent significance.” (A doctrine, incidentally, apparently first stated by a New York court,⁴ and first given wide currency by an article by the late Dean Evans.⁵) In my own teaching I have grave difficulty in explaining just what is an act of independent significance. And it seems to me somewhat hard to think that when a testator modifies his trust, knowing full well that it will radically modify the disposition of the residue of his will, he is doing an act of non-testamentary significance. The draftsman in California, New Mexico or Illinois will do well to consult his local precedents.

Again, in the pages dealing with the recondite subject of Future Interests and, in particular, with that immemorial bugbear, which I should think of supreme importance to estate planners, known as the Rule against Perpetuities, we find the authors committed exclusively to the gospel according to Leach.⁶ This is not very surprising; no one else has had, first, the nerve, and, second, the skill, to attempt putting perpetuities into a nutshell. Still, others have touched on the subject. Perhaps what really disappoints me is that, rather oddly—unless it is a matter of chronology—there seems to be no mention of the heresy which of late years Leach has been busily promoting, whereby the validity of remainders is to be determined by whether they in fact vest within a life in being and 21 years, rather than whether they must, as of the time of their creation, necessarily vest within that period. In consequence, the Rule is changed from a rather difficult but still comprehensible canon of policy, under which all gifts are given equal treatment and can be held valid or not as of the date when the instrument takes effect, into a gamble in which the validity of a remainder

4. *Langdon v. Astor's Executors*, 16 N.Y. 9 (1857).

5. Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, 25 COL. L. REV. 879 (1925).

6. See Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952).

may be determined by how long Aunt Sally lives. For example, if on the same day two wills take effect, one leaving Blackacre to Aunt Sally for life and then to the children of Brother Bill who reach 25, the other leaving Greenacre to Aunt Susie and then to the children of Brother Ben on the same terms, it is clear that (brothers Bill and Ben being alive) both remainders are bad at common law. Under the New Look, however, the gift to Bill's children may be bad, though they all qualify in 22 years, while the gift to Ben's may be good though they don't reach 25 for another 75 years.

I understand that Mr. Leach's idea⁷ has been adopted by the Massachusetts legislature; all Pennsylvania lawyers know that a similar idea was incorporated (most unfortunately, I am bound to think) in our Estates Act of 1947.⁸ Many of them are wondering, no doubt, just what the statute means and how it should affect their draftsmanship. (Very little, perhaps, since obviously all limitations good at common law must be good under the statute, and there are, it would seem, relatively few situations in which a good lawyer will wish to let his client take a gamble.) Perhaps they wonder, as certainly I do, what will happen if the remainderman produces in court a hardy centenarian with a long white beard, proves his age, and, though he is a complete stranger to the parties in interest, offers him in evidence as the life in being. (Plaintiff's Exhibit A.) There is nothing in the statute to forbid.

These are minor comments⁹ on the authors' attempt to teach rudiments by the way. They are not important save as they raise a problem very pertinent to the many proposed courses in Estate Planning: if you don't try to teach the rudiments (and I am sure you can't) just what do you do? In the case of a book, I suspect you do what the authors have done so well, yet to my mind without complete success. Frankly, if I were faced with a difficult problem in this area, I doubt if it is Shattuck and Farr I should consult. I should go to *Scott on Trusts* or *Simes on Future Interests* for the relevant law; from there on I should rely on my own judgment.

In the case of a course, I should think the most that could be done would be to give a seminar open only to those who have done well in Future Interests, Taxation, Trusts and Wills. The seminar would be based on the analysis of individual problems. How such a course could be given to a large group in the ordinary way, is hard to see.

Philip Mechem †

7. Leach, *Perpetuities Reform by Legislation*, 70 L.Q. REV. 478 (1954).

8. PA. STAT. ANN. tit. 20, § 301.4 *et seq.* (1950).

9. For a lucid and sensible discussion of the matter, see Simes, *Is the Rule Against Perpetuities Doomed?*, 52 MICH. L. REV. 179 (1953).

† Professor of Law, University of Pennsylvania Law School.

LEGISLATIVE DRAFTING. By Reed Dickerson. Little, Brown and Company. Boston, 1954. Pp. 149. \$4.95.

It is time, long past time, that we face facts concerning legislative drafting. An infinitesimally small percentage of the bar can draft a statute satisfactorily.¹ Whatever its analytical skills may be, the profession fails ignominiously in expressing new standards of conduct in statutory form. It would be pleasant to assign this failure to the habit patterns of the profession: a carry-over from complaint writing where redundant terminology hides a cause of action in abstruse, archaic, and incomprehensible verbiage.² Or it might be blamed on "form book practice"—in legislation, the copying of statutes from other states without regard for their merit. Or the fault might be placed on the practitioner's contempt for the legislative process. But these are too easy answers.

The responsibility must come back to the teaching profession. We, in large measure, determine the approach, the cast of mind, the method, and the skills of the bar. True, the current bar is not our product but that of our predecessors. True also, our predecessors were more contemptuous of the legislative process and all "practical matters" than are we. But it remains a fact that too large a percentage of the teaching profession is still contemptuous of all forms of legal drafting because (1) it is beneath our dignity, (2) it does not develop analytical skills, (3) it is so simple that it can be learned better in practice, (4) it is not one of our skills, or (5) it is too much like teaching Freshman Composition if we have to correct the student's drafts.³ Whatever the reason, the result is that few law graduates in modern times have been prepared to draft legislation or any other legal document.

Against this background Reed Dickerson has had the temerity to publish a small volume devoted exclusively to the problem of *Legislative Drafting*. If words speak as loud as actions it will receive rough treatment at the hands of the sophisticates. For myself, I find it a welcome addition

1. Represented principally by groups specializing in the statutory field, *i.e.*, The National Conference of Commissioners on Uniform State Laws, the Legislative Reference Services of the two Houses of Congress and the Library of Congress, the New York Law Revision Commission, and staffs of some of the state Legislative Councils and Legislative Reference Bureaus.

2. This of course is unnecessary in the first place. See, PANTZER AND O'NEAL, *THE DRAFTING OF CORPORATE CHARTERS AND BY-LAWS* (1951).

3. But a few have been willing to accept the burdens: Since the 1937 Indiana University Law School has required first year students to draft a bill and a committee report as a part of the course in legislation, or in the course in first year research. At Ohio State, "In the third year, the methods of instruction are those of problem solving . . . and legal drafting . . . and planning." 52 OHIO ST. UNIV. BULL. 9 (No. 6, Jan. 15, 1953); at Nebraska "The course [Legislative Laboratory] includes the preparation and analysis of social science data upon which the need for legislation is bottomed . . . the drafting of legislation to achieve the objectives; the preparation of legal memoranda in support of the validity of proposed legislation, and of reports for submission to legislative bodies." 58 UNIV. OF NEB. BULL. 19 (No. 5, Feb. 21, 1953). The Law School of the University of Pennsylvania offers a course in legislation dealing in "legislative method, organization and procedure; policy formulation; form and style of statutes; drafting; sanctions." 54 U. OF PA. BULL. 37 (No. 14, Jan. 29, 1954).

to the literature. It is not startlingly new; it is not revolutionary; it is perhaps no better than Coode,⁴ Ilbert,⁵ or Jones,⁶ but it is both "up-to-date" and "in print" which the others are not. I venture to say that its severest critics can learn much from it and none could do a better job of drafting than has its author.⁷

The book is divided into three parts: "What Legislative Drafting is About," "How to Draft," and "What to Say." The content of these three parts is heavily influenced by Mr. Dickerson's experience as Assistant Legislative Counsel of the House of Representatives and as Chief of the Codification Section, Office of General Counsel, Department of Defense. In other words, some of his suggestions are practical only when they concern departmental legislation proposed and sponsored in the Congress of the United States.

The first part, "What Legislative Drafting is About," attempts in five and a quarter pages to orient the lawyer as to his place in the drafting process. It emphasizes, as all writers have, that the draftsman should not determine policy. In terms of basic objectives this is true; but the point should also be emphasized that at the level of secondary policy the draftsman should inject his professional skill. The objective of the bill can often be furthered and its chance of enactment improved by the type of legal controls selected, by the form of its standards, and by the kind of sanctions selected.⁸ The final choice should be the client's, but the draftsman's knowledge and experience should make the clients' decision an informed one.

The second part, "How to Draft," deals with the importance of research and conference in the drafting process. The author's reproduction of Professor Jones' case study on time allocation for research, conference, and drafting should convince the most skeptical.⁹ It is true as Dickerson says that clients often expect "a draft by Thursday noon"; but what is more discouraging is that most draftsmen think that they can finish it Wednesday evening.

Too frequently the draftsman's concept of research is to look for a "case in point" which, when applied to bill drafting, means copying a statute from another jurisdiction. This most certainly is not research. It is nothing more than copying atrocities of form and language in the vain belief that

4. LEGISLATIVE EXPRESSION (1848).

5. LEGISLATIVE METHODS AND FORMS (1901).

6. STATUTE LAW MAKING IN THE UNITED STATES (1912).

7. For example see the work of the author and his associates, PROPOSED CODIFICATION OF THE LAWS RELATING TO THE ARMED FORCES vols. I—V (H.R. Comm. on Judiciary, Comm. Print, 1954).

8. Unfortunately these problems are but briefly mentioned; obviously, Dickerson could not discuss all of the facets of drafting in so compact a book, but it is in this area that draftsmen are most deficient. Landis, *The Study of Legislation in Law Schools*, 39 HARV. GRAD. MAG. 433 (1931); Horack, *Can American State Legislatures Keep Pace?*, 26 ROCKY MT. L. REV. 468 (1954).

9. Jones, *Some Reflections on a Draftsman's Time Sheet*, 35 A.B.A.J. 941 (1949).

if the statute has been judicially interpreted, that security is preferable to mediocrity.

Dickerson emphasizes the desirability of drafting as a team operation. This view is certainly acceptable, but it is not easy of achievement when drafting for non-governmental groups at the state level. Under these circumstances, the preparation of a bill is usually a one man task. But this should put a greater responsibility on the draftsman to try his draft out in conference and to include persons with as many different points of view in the conference as possible. Furthermore, when the final draft is complete the draftsman should insist that his client submit the draft to the opposition. Too frequently, both draftsman and client treat the bill as highly confidential and try to conceal its existence from known opposing groups. This is folly of the worst order. It merely gives to the opposition an irrelevant argument—that the bill must be bad because its introduction is secretive.¹⁰ It also injures the bill's chance of enactment, for not infrequently many minor objections can be eliminated prior to introduction, thereby reducing argument and uncontrolled amendment from the floor. The coordination of conflicting governmental interests is regularized in the federal system by clearance through the Legislative Reference Division of the Bureau of the Budget; for private legislation either at the federal level or in the states it is the responsibility of the draftsman to "educate" his client to the advantages of the "pre-trial conference" in the legislative area.

The first two parts of Dickerson's book, together with its excellent introduction, contain the experience of an expert; the experienced draftsman will recognize it as sound advice to the neophyte. Perhaps I share with Beaman the doubt that the inexperienced will profit from anything but experience. This is the discouraging part of the whole process, for there are so few competent draftsmen that the apprenticeship system is more likely to produce incompetent draftsmen than it is to improve the bill drafting process.

The third part, "What to Say," will no doubt be looked upon as the "meat" of the book. In one sense this is true, for no matter how careful the research, no matter how illuminating the conferences, if the ultimate decisions are not transposed into a draft consistent and accurate in form, the result is still a failure. If anyone should be so bold as to assert that the suggestions on arrangement, brevity, style and grammar, specific word form, and general writing problems are too elementary, let him read the session laws of any state for any year. Dickerson's material on specific word form is particularly good and, although he presents it as suggestive only, it should be accepted as mandatory by all but the veteran draftsman.

10. The Indiana practice is to introduce all bills, regardless of length, on a four page folio. I have known "draftsmen" to deliberately write enough to fill the first three pages in an endeavor to discourage the reading of the fourth page; invariably the "legislative news bulletins" published by the lobbying organizations carry careful analyses of the content of the fourth page. But the draftsmen never seem to learn.

One final word. Dickerson suggests a "basic library" for the draftsman.¹¹ His selection is excellent, but it is beyond the means of all but the large law office and the governmental department. For the average practitioner three books, well read and understood, will go far toward improving his competence. They are: Hurst, *The Growth of American Law: The Law Makers* (1950); Gross, *The Legislative Struggle* (1953); and Dickerson, *Legislative Drafting*.

Frank E. Horack Jr. †

11. Page 19. In addition three appendices, pp. 115-29, include a description of federal statute law, a table of state constitutional provisions, and a selected bibliography of books, articles, and drafting manuals.

† Professor of Law, Indiana University School of Law, Bloomington.