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## Review of “The Constitutional History of the United States,” By Homer Hockett

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## BOOK REVIEWS

THE CONSTITUTIONAL HISTORY OF THE UNITED STATES. By Homer Carey Hockett. New York: Macmillan Co., 1939. Vol. I, 1776-1826; vol. II, 1826-1876. \$3.00 per volume.

If the reader of Professor Hockett's Constitutional History picks up the two volumes now published and gives them a glancing structural appraisal, he is likely to observe that each of them covers precisely fifty years and contains eighteen chapters, which leaves room for one more volume of the same size to cover the third half century of our national history. This is apt to convey the impression of an arbitrary time division, perhaps without unity in each volume.

In reality, each of the volumes so far published covers a definite period of constitutional growth, which merely happens to fit into a fifty-year time cycle. The first volume, bearing the dates 1776-1826, covers the period from the Declaration of Independence to the completion of Chief Justice Marshall's nationalistic exposition of the American Constitution, but opens with a preliminary survey starting with the gild system of medieval England. The second volume treats of the period before and after the Civil War when political democracy, slavery, and the beginnings of corporate finance dominated the malleable material which we call a fixed constitution. Had the author chosen to do so, he could have named his two volumes "Construction" and "Reconstruction."

To the lawyer or other layman (from the standpoint of professors of history, lawyers are laymen) constitutional history all too often begins with the first federal court decision after the passage of the Judiciary Act of 1789 and is limited to citable and uncitable opinions of justices of the Supreme Court—a sort of "on again, off again, gone again, Finnigan" journey down a double track judicial railway with an uncertain roadbed.

Two of the most notable merits of the Hockett history are, first, that it deals adequately, clearly, and accurately with the real beginnings of American constitutionalism, in the British constitution and the political and economic struggle which culminated in the War of the American Revolution; second, that it pursues the non-judicial lines of constitutional thought and action in the United States which have co-existed with the work of the Supreme Court and at times exerted a dominant pressure upon it.

The most notable defect in the work of Professor Hockett—indeed, the only defect that seems worthy of notice—is a too-confident reliance upon secondary authorities. This, in the opinion of this reviewer, has led to a serious misinterpretation of the attitude of American political leaders toward state and federal sovereignty during the revolutionary period from 1776 to 1783. If the interpretation thus accepted by Professor Hockett is incorrect, the effect is to distort the later periods, even though they are correctly presented. By blotting out of existence the nascent sense of nationality in the American people, it fortifies the later extreme doctrine of State Rights with a background which makes the nationalism of Marshall appear as a violent act of necessity.

It seems strange, in view of the high admiration expressed by Professor Hockett for Justice Story's work on the bench, that he did not give more weight to Story's view of constitutional principles under the Continental Congress. If, in this field, one looks to secondary authorities, the choice really lies between Justice Story and Professor Van Tyne. Story wrote an undocumented, carefully reasoned statement of first principles putting emphasis on federal origins of sovereignty. He was as near to the events of which he wrote as a man of thirty, today, is to the World War. Professor Van Tyne, a century later, wrote a heavily documented argument against the existence of an early sense of nationhood. Professor Hockett follows Van Tyne closely and gives credit to him for the fundamental position taken.

In this day of worship of footnotes, it is perhaps inevitable that teachers of constitutional history should place the documented argument of Van Tyne above the undocumented argument of Story, but it is not a safe thing to do because Van Tyne's documentation fails to sustain his argument. The result is that a great formative epoch in American history is presented in a way which colors—and this reviewer believes discolors—the succeeding epoch.

Van Tyne says, and Hockett quotes him, that the Continental Congress was "hardly more than a meeting of the agents appointed by the state governments to make the action of the thirteen states uniform," and whenever the people of any state found it necessary to choose between obedience to Congress and to the state government they obeyed the latter.

Suppose we examine the most important illustration cited by Van Tyne to support his theory—an assertion that the Maryland Convention of 1776 denied the existence of power in Congress. On this Van Tyne says:

As the Maryland convention expressed it, "the best and only proper exercise [of the powers of Congress] can be in adopting the wisest measures for equally securing the rights and liberties of each of the United States, which was the principle of their union."<sup>1</sup>

If Professor Hockett and other followers of Van Tyne had taken the trouble to look up the authority cited by Van Tyne for that quotation (*Scharf's History of Maryland*), they would have found the statement of the Maryland convention to be as follows:

This convention have a strong disinclination to go into any discussion of the powers with which the congress is invested, being fully sensible that the general interest will not be promoted by either the congress affirming, or this convention denying, the existence of A FULLNESS OF POWER in that honorable body; the best and only proper exercise of which can be \* \* \*.

Not only did Van Tyne garble the words of the Maryland convention to prove his point, but he squarely reversed the implications of the resolution, for Maryland was seeking to have Congress assert and exercise authority over the British crown lands claimed by the "back land" states. "Equally securing the rights and liberties" of each of the states meant that Congress should take land away from Virginia for the benefit of Maryland.

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1. C. H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study* (1907) 12 *The American Historical Review* 529, 535.

Had Professor Hockett not been misled by the current worship of Van Tyne among historians who have accepted his documentation without looking up his documents, this part of his work would no doubt be as valid as the rest of it, which has an admirable balance and perspective, testifying to the fairmindedness of its author.

Acceptance of the theory that there was no federal sovereignty in the Continental Congress prior to adoption of the Articles of Confederation in 1781 produces queer results when applied to treaties of alliance and exchange of ambassadors, and also requires forced interpretations of domestic acts of legislation. Thus, Professor Hockett describes the early resolution of Congress prescribing rules for disposition of maritime prizes, and providing for appeals to Congress from state admiralty courts, as something originating in state sovereignty: "the authority of Congress to hear appeals was found in the response of the states to the recommendation of that body that they establish their own admiralty courts."

It is astonishing that such a statement should be made when it is contrary to the implications of all the cases in which disputes occurred bearing on it. When the federal Commissioners of Appeal contravened Pennsylvania law in hearing an appeal in the famous *Olmstead* capture of 1778, when the Continental Congress upheld the powers of the commissioners against the protest of Pennsylvania, and when the United States Supreme Court in 1809 enforced the original *Olmstead*<sup>2</sup> decision, these bodies did not find that the authority of the Continental Congress grew out of the action of the states in setting up admiralty courts. On the contrary, they affirmed the supremacy of the acts of the Continental Congress over the conflicting admiralty law of the State of Pennsylvania, and in the *Penhallow*<sup>3</sup> case the Supreme Court did the same thing in regard to the State of New Hampshire. In both instances, appeals were taken, heard, decided, upheld, and finally enforced, contrary to the state law involved. Professor Hockett describes these cases fully, but fails to realize that they destroy the theory accepted from Van Tyne about the absence of federal sovereignty before the Articles of Confederation came into effect. That theory is still less supportable when applied to the treaties negotiated, alliances formed, and ministers exchanged between the United States and foreign countries from the very beginning of an independent existence. The judicial record thus supports Story's view that national sovereignty was in Congress from the moment of independence, but that power to uphold it did not come until 1789.

Professor Hockett's description of the work of the Federal Convention of 1787 contains a clear statement of the relationship of the changes in form of government to the political, economic, and social views of the period, and makes a fair apportionment of credit for the new constitution. He aids in the belated recognition of James Wilson of Pennsylvania as one of the "great democrats of the formative period of the Republic"—ranking him with James Otis, Thomas Jefferson, George Mason, and James Madison, which probably overrates Otis as a democrat, though not as a formative

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2. *United States v. Judge Peters* (U. S. 1809) 5 Cranch 115.

3. *Penhallow v. Doane's Adm'rs* (U. S. 1795) 3 Dall. 54.

force. Though Wilson's views were not fully embodied in the Constitution, his utterances deserve the credit given them as "prophetic of the time to come when new western states would democratize the nation." The grouping of these five men as great democrats emphasizes the truth of Hockett's statement that "the delegates did not intend to establish a democratic government." Two of the five, Otis and Jefferson, were not framers of the Constitution, Mason refused to sign it because it lacked a Bill of Rights, Madison did not pursue the democratic line until after the Constitution was ratified, and Wilson, as stated, was a prophet of democracy rather than an achiever of it in 1787.

In describing constitutional development after the new government came into being, Professor Hockett shows discernment and discrimination in treating the struggle between Jefferson and Hamilton, the shift of Madison to Jefferson's support, and the political struggle over Internal Improvements, as factors in constitutional development to be studied along with the federalist trend of the Supreme Court under Marshall and his predecessors. This makes it easier to understand how, despite Marshall's overwhelming victory in constitutional interpretation, the Jeffersonian doctrine of state sovereignty came back in later years as an influence driving the South toward secession. When the protection of slavery was seen to hinge on constitutional interpretation, the slave holders seized on the Virginia and Kentucky resolutions against the Sedition Act of 1798 as justification for nullification and secession, and all the protests of Madison could not obscure the fact that he and Jefferson had furnished good ammunition for them to use, even if they had not furnished it intentionally.

Professor Hockett rallies to Madison's support, rather more strongly than the record warrants, in defending him from the charge, based on Genet's garbling of Yates's notes of June 6, 1787 on the Federal Convention, that Madison in helping to frame the Constitution had advocated doing away with state governments. Madison's own notes (published after his death) show that he said on June 28, 1787:

In a word; the two extremes before us are a perfect separation and a perfect incorporation, of the 13 states. In the first case they would be independent nations subject to no law, but the law of nations. In the last, they would be mere counties of one entire republic, subject to one common law. In the first case the smaller states would have every thing to fear from the larger. In the last they would have nothing to fear. The true policy of the small states therefore lies in promoting those principles and that form of government which will most approximate the states to the condition of counties.

If Madison's opponents in the 1808 presidential election had possessed this quotation, they could have used it more effectively than they did the less accurate and more sweeping one from Yates, because the words were put down by Madison himself. This suggests that Madison's aversion to constitutional interpretations based on recollections of what took place during the framing of the Constitution was not due so much to the faulty memory of others, as Hockett surmises, as to his own clear memory of his earlier hostility to states' rights.

History, however, was being made at that time by current stresses, not

by recollections. The step taken by Andrew Jackson in dealing with South Carolina's attempt at nullification is characterized by Professor Hockett with a terse exactness which makes it an offset to the whole course of state and slave ascendancy in the Supreme Court of Chief Justice Taney:

If Jackson had supinely acquiesced in nullification, a chain of events would have followed which might have made the preservation of the Union impossible in 1861. Jackson, indeed, may be said to have made Lincoln's role possible.

The chapters dealing with constitutional history after the Civil War have an especial value today because they treat extensively of the relationship between civil liberties and war-engendered passions. Chief Justice Taney is given credit for a sincere defense of the rights of citizens during the War, when he was being overridden as a judicial ally of the seceded states; and the later return of the court to support of civil rights, in *Ex parte Milligan* especially, is characterized as a posthumous justification of Taney. At the same time, quotations from the press of the day, and from congressional leaders, suggest the frailty of the judicial arm as a protection in wartime of rights that theoretically belong to Americans in both peace and war.

The vast field of constitutional history covered by the industrial and corporate development after 1876 is left to the third volume, not yet published. It is foreshadowed, of course, in the discussion of the transition from the Marshall to the Taney court—from the *Dartmouth College* case to the *Charles River Bridge* case. In dealing with the economic aspects of the American Revolution, Professor Hockett points out that parliamentary supremacy, against which the colonies revolted, was really supremacy by the same English mercantile class which in 1688, in conjunction with the landed interest, had used parliament as a weapon against the king. Dealing with the next great crisis, Hockett gives weight to the impact of slavery upon American constitutional development. The ultimate value of his constitutional history will depend upon his treatment, in the volume yet to be published, of the economic forces which have dominated the constitutional struggle of the last three-quarters of a century. If he can deal as realistically, at close range, with the forces which have enjoyed judicial supremacy since 1876, as he has dealt with those which attempted to force parliamentary supremacy before 1776, the work will take high rank as a study of the forces governing our constitutional development, as well as an accurate outline of institutional growth under the document whose not-so-fixed terms became effective in 1789.

IRVING BRANT.†

THE LAW OF BANKRUPTCY REORGANIZATION. By Thomas K. Finletter. Charlottesville: The Michie Company, 1939. Pp. x, 994. \$10.00.

One of the most interesting developments in the legal literature of the last decade has been the great increase in the number of worthwhile books in the field of insolvent estates. Of these, a full share have been devoted to corporate reorganization, the general subject covered in the volume under review.

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