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Book Review

The Legacy of William Crosskey


Abe Krash†

William Winslow Crosskey was one of the most original and one of the most provocative American legal historians of recent times. He was also unquestionably the most controversial. The publication in 1953 of his two-volume work, Politics and the Constitution in the History of the United States, inspired both remarkable tributes and vehement criticism. Crosskey had presented a radically new historical interpretation of the Constitution. He had challenged the historic foundation of many basic ideas of constitutional law: conventional theories of federalism; prevailing views respecting the separation and balance of powers between Congress, the President, and the courts; and the intended role and jurisdiction of the Supreme Court and the lower federal courts. Moreover, Crosskey made a slashing attack on the credibility of James Madison and the reliability of The Federalist Papers as an authoritative source on the meaning of the Constitution. Charles E. Clark, Dean of the Yale Law School in the 1930’s and later Chief Judge of the Court of Appeals for the Second Circuit, acclaimed Crosskey’s work “as a major scholastic effort of our times.”¹ The view of many of Crosskey’s contemporaries on the Univer-

† Member, District of Columbia Bar. Visiting Lecturer, Yale Law School.
1. Clark, Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins, 21 U. CHI. L. REV. 24, 24 (1953). One of the nation’s most respected judges, Henry J. Friendly, did not evaluate the validity of Crosskey’s historical conclusions, but stated that Crosskey had written “an erudite and fascinating work,” and expressed admiration for Crosskey’s “immense labors, his remarkable skill in argument and polemics, and the illuminating insights he often affords . . . .” H. FRIENDLY, In Praise of Erie—And of the New Federal Common Law, in BENCHMARKS 155, 165, 166 n.52 (1967).
The University of Chicago Law School faculty was reflected by Professor Malcolm Sharp who wrote some years later that Crosskey had written "the greatest law book produced by any law teacher of our generation."²

A number of prominent scholars, however, took vigorous exception to these assessments of Crosskey's book. Three noted professors, Ernest J. Brown and Henry M. Hart, Jr., then members of the Harvard Law School faculty, and Julius Goebel of the Columbia Law School, derided Crosskey's conclusions and assailed his scholarship.³ It is difficult to recall any book on American legal history—indeed, I do not know of any book on a legal subject—published in the last fifty years which occasioned such rancorous controversy and which evoked such profoundly divergent views.

Crosskey published no further major work during the remaining fifteen years of his life.⁴ In the preface to the 1953 volume, Crosskey stated that substantial additional material on the background of the Constitutional Convention existed in draft form.⁵ More than a quarter of a century after publication of the first two volumes, and nearly fifteen years after Crosskey's death in 1968, some of these materials have at long last been published as volume III of Politics and the Constitution.

This volume, subtitled The Political Background of the Federal Convention, is based on a manuscript on which Crosskey was working at the end of his life; it was prepared for publication by William Jeffrey, Jr., a member of the University of Cincinnati law faculty and one of Crosskey's former students. Although this is not the book Crosskey would have published had he lived—he was a meticulous craftsman and parts of the book doubtless would have been substantially rewritten—the work does set out Crosskey's research and views on central issues in the period preceding the federal convention.

This book is a history of events and politics in colonial America during the thirteen turbulent years between the meetings of the First Continental Congress in the fall of 1774 and the convening of the Constitutional Convention in May 1787. Crosskey's book presents a view of the circum-

⁵ 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES vii-viii (1953). The pages in the first two volumes are numbered consecutively, but volume III is separately paginated.
stances and political forces which shaped the Constitution that differs in important respects from conventional histories on the subject. It reinforces the theories of the Constitution that Crosskey presented in the first two volumes and responds to some of the criticism levelled against his earlier work.

In volume III, Crosskey vividly describes the economic and political crisis following the Revolutionary War that precipitated the Constitutional Convention. He maintains that there was widespread support throughout the country in 1787, and for many years previously, for the idea of a generally empowered national government. He believed that the most significant issues were the intense postwar depression—which provoked demands by the New England states that Congress be granted comprehensive power to regulate commerce—and slavery and the fears resulting from it. According to Crosskey, the southern states, which were ambitious to expand territorially but were dependent on the military and naval strength of the northern states, acquiesced in northern demands that Congress be granted complete power to regulate trade and to establish an American “commercial system.” In exchange, the North made concessions respecting the basis of representation in Congress which would have eventually resulted in southern domination of the national government if the South had grown as Southerners anticipated.

This recent volume may revive interest in Crosskey’s work, which deserves to be better known. When published in 1953, Crosskey’s book encountered a wall of disbelief. Although Crosskey’s work is regarded with great respect by some writers on constitutional law and a few legal historians, he is currently a relatively unknown figure. His work is mentioned only occasionally; he is generally, though by no means universally, viewed as an eccentric and as a curiosity. Yet, I count Crosskey as one of the most able and intellectually exciting legal scholars of recent years. His work justly belongs on the list of great books of American legal history and constitutional law.

Apart from their intrinsic interest, Crosskey’s books merit reexamination for several reasons. First, his work is relevant to the recently revived debate concerning the respective roles of the state and national governments. Partisans on each side of great issues of government commonly invoke history as rhetorical ammunition; it is a justification or rationalization for a position arrived at independently of history. Crosskey’s work furnishes fresh and illuminating insights into federalism. He would have rejected the “new federalism”—defended by President Reagan as a “con-

stitutional balance envisioned by the Founding Fathers"—as a distortion of history and of the plan and intent of the federal convention. In addition, his work is germane to efforts to limit the jurisdiction of the Supreme Court and the lower federal courts. Crosskey maintained that the Supreme Court was intended to be the head of a unified national judicial system. His research and arguments support the unconstitutionality of divesting the Supreme Court and the lower federal courts of power to decide cases involving busing and school prayer.

Crosskey’s work is also germane to the ongoing debate concerning the appropriate standard for interpreting the Constitution, a debate fueled recently by John Ely’s widely discussed book on judicial review and Raoul Berger’s two volumes on the historic meaning of the Eighth and Fourteenth Amendments. Crosskey believed one could demonstrate how reasonably well-informed citizens understood the Constitution in 1789. He was, in Ely’s phrase, the “quintessential interpretivist.” Crosskey maintained that the Constitution should be interpreted and enforced in accordance with the original understanding; amendments furnished a vehicle for change in light of experience. He wrote caustically of Supreme Court Justices who “rarely read, or study, or discuss the Constitution; they read, and study, and discuss, instead, their own pronouncements about it, and those of their predecessors on the Court.” Whether or not one agrees that the Constitution should be applied consistently with the original understanding, an appreciation of the intended historical meaning of the Constitution is a useful starting point for a dialogue about the proper standard of interpretation.

Crosskey’s posthumously published book can be read independently of the two volumes issued in 1953. However, one can appreciate its full implication only by taking into account the views that Crosskey presented in 1953 on the intended meaning of the Constitution. Accordingly, as a prelude to a discussion of this new work, I shall sketch the major points developed by Crosskey in the first two volumes. I shall then turn to the central themes in his new book and discuss some of the ways in which Crosskey has diverged from generally accepted historical views of the pre-Convention.

11. This was also essentially the view of Justice Hugo Black. See Duncan v. Louisiana, 391 U.S. 145, 162–71 (1968) (Black, J., concurring); Adamson v. California, 332 U.S. 46, 89–92 (1947) (Black, J., dissenting).
12. 1 W. CROSSKEY, supra note 5, at 514.
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tion period, and the relationship of the material presented in this new volume to Crosskey's earlier constitutional theories. Finally, I shall offer some thoughts on why Crosskey's work has not received greater attention and enjoyed more influence.

I.

Crosskey's objective in *Politics and the Constitution* was "to present the historic and intended meaning" of the Constitution. The problem he set out to answer was this: How was the Constitution understood by an intelligent, well-informed person when it was published in 1787? He insisted that the proper standard for construing the Constitution was Justice Holmes's oft-quoted general rule for interpreting documents: "[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . ." Crosskey maintained that the Constitution is a "sensible, straightforward document," and its meaning can be quite clearly demonstrated if one understands the politics and the economics, the law, and the language of the time.

Crosskey's conclusions regarding the "actual, historic meaning" of the Constitution were startling. According to Crosskey, contemporary men understood that the Constitution established a generally empowered national government, fully authorized to achieve all of the objects enumerated in the preamble to the Constitution. Congress was to have general, not merely limited, legislative authority to pass all laws necessary and proper for the general welfare and the common defense. The states did not have "sovereign" powers; they were assigned a subordinate role. Crosskey thus rejected as historically incorrect one of the central tenets of American constitutional law, that the national government was intended to have only limited, enumerated powers. His main points were:

13. *Id.* at vii.
14. O. Holmes, *The Theory of Legal Interpretation* in *Collected Legal Papers* 203, 204 (1921). The Holmes quotation is set out by Crosskey opposite the title pages of volumes I and II.
15. One of Crosskey's most important—and, I believe, least recognized—contributions to American legal historiography was his development of the idea that the usage of certain key words in the Constitution, essential to an understanding of its historic meaning, has changed over time. The Constitution was written in the idiom of the late eighteenth century. In order to understand the vocabulary of the time, Crosskey made an exhaustive study of the eighteenth-century American newspapers, correspondence, pamphlets, public documents, and other contemporaneous written materials. I W. Crosskey, *supra* note 5, at vii, 5-7. In the first two volumes, he presented a specialized dictionary of eighteenth-century usage of such key terms and phrases as "policy," "police," "state," "the regulation of commerce," "delegated," and "imports and exports." For a discussion of these terms, see *id.* at 50-186, 229-292, 675-708.

First, Congress was to have comprehensive power to regulate all of the nation's domestic commerce, both interstate and intrastate, and all of its foreign trade. The Constitution vests in Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." 17 Crosskey's conclusion, backed by immense documentation, was that the word "States" in the commerce clause was understood when the Constitution was written to refer to the "people of the states," and the term "Commerce" was understood to cover "all gainful activity." The commerce clause was thus a "simple and exhaustive catalogue of all the different kinds of commerce to which the people of the United States had access: commerce, that is, with the people of foreign nations; commerce with the people of the Indian tribes, and commerce among the people of the several states." 18

The Supreme Court, by contrast, has interpreted the word "States" in the commerce clause to mean the territorial divisions of the country: "Commerce . . . among the several States" is construed as "interstate commerce." In recent decades, the Supreme Court has upheld many federal statutes relating to "intrastate" commerce on the theory that Congress may regulate intrastate activity which "substantially affects" interstate commerce. The Court has arrived at approximately the same destination as Crosskey, but by an extremely circuitous and far more complicated route. Nonetheless, the "interstate" limitation is by no means academic even today. For example, Congress is still thought to lack constitutional authority to enact a nationwide code of uniform commercial law even though it has long been widely acknowledged that such uniformity would be highly desirable and could not be attained by independent state action. Similarly, Congress is still thought to lack authority to establish a national uniform corporation law, and thus state legislatures vie with one another in a contest to debase the rules controlling the country's large business organizations.

Second, Crosskey maintained that the federal convention assigned general legislative power to Congress in three different ways: by the preamble—conventionally thought to be merely a verbal flourish, but in Crosskey's view, drafted with the utmost care 19—read together with the "necessary and proper" clause; by Article I, section 8, which provides that Congress shall have the power to lay and collect taxes and "to pay the debts and provide for the common Defence and general Welfare of the United States," a clause customarily interpreted as if it states that: "Con-

18. 1 W. CROSSKEY, supra note 5, at 77.
19. Id. at 374–79.
gress shall have power to lay and collect taxes [in order] to pay the debts and provide for the common Defence and general Welfare"); and finally, by the relationship of Congress to the judiciary, and specifically Congress’ powers, recognized in the eighteenth century, to enact rules of decision for the courts in all cases over which the courts have jurisdiction.

One question immediately arises: If the Constitution grants Congress general legislative power, why then were various congressional powers enumerated in section 8 of Article I? Moreover, how can the Tenth Amendment be reconciled with a view of plenary congressional authority?

The accepted theory, of course, is that the powers of Congress were enumerated in the Constitution to make clear which powers Congress would possess as against the states and, by negative implication, which powers Congress would not possess. Crosskey advanced an altogether different explanation for the enumeration. A grant of power to Congress to “provide for the common Defence and general Welfare” would not have sufficed to vest in Congress power of the type intended because the federal convention also wished to transfer to Congress many powers which were executive in character under the prevailing English common law. Many of the powers enumerated in section 8 of Article I as powers of Congress parallel those described by Blackstone in his discussion of the “Royal Prerogative” vested by the common law in the King of England. Nearly all of the military powers allocated to Congress in the Constitution are of this character. If such powers had not been specified in the Constitution as among the powers of Congress, they would have been considered executive powers belonging to the President pursuant to Article II’s grant of executive authority.

Crosskey explained that other powers of Congress were spelled out in section 8 to limit congressional authority, for purposes of emphasis or clarity, and to reaffirm that the powers which belonged to the Continental Congress under the Articles of Confederation would also be vested in

20. Id. at 393-401.
21. Crosskey maintains, contrary to long-accepted views, that the English common law as applicable to American conditions was one of the “Laws of the United States” within the meaning of the judiciary article. Id. at 584-609. The jurisdiction of the federal courts thus would have extended to all cases arising under the common law. Id. at 610-25. Congressional power would have been commensurate with the plenitude of the common law, i.e., it would have been comprehensive.
22. 1 W. BLACKSTONE, COMMENTARIES *237-80.
23. For example, the grant of power to establish “an uniform Rule of Naturalization, and Uniform Laws on the subject of Bankruptcies” in Article I, section 8 of the Constitution was designed to foreclose private or non-uniform acts of naturalization and bankruptcy. 1 W. CROSSKEY, supra note 5, at 486-93.
24. For example, enumeration of the power to tax would have been necessary notwithstanding a general grant of legislative authority because in the dispute with England which led to the Revolutionary War, a general power by Parliament to legislate for the colonies had been conceded in America, but this concession did not extend to Parliament’s power to tax. Id. at 494.
the new Congress. Failure to enumerate them in the Constitution would have invited the argument that Congress was not to possess those powers under the new Constitution. Crosskey thus accounted for the enumeration and the phrasing of every one of the powers that the Constitution vests in Congress. 25

The current interpretation of the Tenth Amendment 26 is, of course, inconsistent with Crosskey's theory. The Amendment is thought to mean that the states retained all of the sovereign powers they enjoyed under the Articles of Confederation that are not expressly vested by the Constitution in the national government or prohibited to the states. If Crosskey is right—if the powers vested in the national government were general and complete—the current interpretation of the Tenth Amendment is surely wrong since nothing would remain to be retained by the states. Crosskey argued that the Tenth Amendment is not correctly understood at present because modern scholars and courts have interpreted the terms "delegated" and "reserved" in light of twentieth, instead of eighteenth, century word meanings. The Framers did not use the word "delegated" in the modern sense of "explicitly vested in" but rather in the sense of "absolutely parted with" or "vested exclusively in," a usage common in 1787 but obsolete today. 27 Modernized, the Tenth Amendment would read: "The powers not vested exclusively in the United States by the Constitution nor prohibited by it to the state governments are reserved to the people of the states." Crosskey concluded: "[I]f the Constitution were allowed to operate as the instrument was drawn, the American people could, through Congress, deal with any subject they wished, on a simple, straightforward, nation-wide basis; and all other subjects, they could, in general, leave to the states to handle as the states might desire." 28

Third, in Crosskey's view, the roles of the Supreme Court and the judicial structure established by the federal convention differ in basic respects from currently accepted theories and practice. Since the 1938 opinion in Erie Railroad Co. v. Tompkins, 29 a decision which Crosskey severely criticized, it has been accepted that the Supreme Court has final authority over all courts, federal and state, with respect to questions under the federal Constitution, federal statutes, and treaties, but that the federal courts, including the Supreme Court, must follow the decisions of the state courts on points of state law. Crosskey, by contrast, maintained that the Supreme

25. See id. at 409-562.
26. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
27. 1 W. CROSSKEY, supra note 5, at 697-701, 707-08.
29. 304 U.S. 64 (1938).
Court was to become the head of a unified national judicial system, with supremacy over both federal and state courts on all points of law. He argued that the Constitution granted the Supreme Court appellate jurisdiction in certain enumerated cases, that both federal and state questions of law would foreseeably arise in such cases, and that the Supreme Court was to be the ultimate authority in deciding all those questions. Thus, if a diversity case in a federal district court presented questions regarding the interpretation of a state statute or the nature of a state's common law, the Supreme Court could decide the point authoritatively and independently of the state's courts. If, in a subsequent case, a state court were to disregard the Supreme Court's decision on a point of state law, the state court's action would be subject to reversal by the Supreme Court under its authority, conferred by Article III, to review cases "arising under the Constitution." Were Crosskey's views of Article III to be accepted, a great deal of the pervasive and expensive complexity so characteristic of our legal system would be significantly reduced.

Crosskey also disagreed with generally accepted theories of judicial review. He maintained that the Supreme Court was vested with authority to set aside any state law inconsistent with the Constitution, but that the Court could declare unconstitutional only those acts of Congress that infringed upon prerogatives conferred to the judiciary by the Constitution, such as the jury trial provision in Article III. Crosskey maintained that the federal convention did not intend for the Court to have a general power of judicial review of acts of Congress. He demonstrated that the handful of supposedly relevant cases decided during the Revolutionary period do not support the argument that the general grant of judicial power to the Supreme Court in Article III encompassed judicial authority to declare congressional acts unconstitutional. Further, he convincingly showed that the conventional arguments for judicial review based on various provisions of the Constitution beg the question whether such authority was conferred. Although I find Crosskey's treatment of judicial review less persuasive than other parts of his work, his critics did not adequately address the searching questions he raised.

Crosskey would have rejected as unconstitutional recent legislative proposals to divest the Supreme Court and the lower federal courts of jurisdiction over cases regarding school prayer and busing and to reserve such authority to the state courts. In his view, Congress could constitutionally

30. 1 W. CROSSKEY, supra note 5, at 610-74.
31. Id. at 655-69.
32. 2 W. CROSSKEY, supra note 28, at 1172.
33. Id. at 938-75.
34. Id. at 982-1002.
divest the Supreme Court of its appellate jurisdiction in specified cases, but only if Congress assigned appellate authority in such cases to another federal court, for example, a Circuit Court of Appeals.\textsuperscript{5} Congress could not constitutionally confine final jurisdiction to a state court because Article III mandates that “the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” It seems to me difficult to evade the logical power of this argument.

II.

Crosskey stated that historical accidents account for many of the prevailing misconceptions of the scheme of government which, in his view, was established by the federal convention. Until the end of the Napoleonic wars, America was absorbed by foreign affairs, and domestic matters tended to be secondary. As a result, Congress did not exercise many of its powers. This circumstance, taken together with the geographic inaccessibility of the Supreme Court, resulted in a scarcity of early precedents by those men who presumably would have been most familiar with the original understanding of the new government’s authority. Crosskey also maintained that misunderstandings arose because many historians have failed to understand eighteenth century idiom and the changes which have occurred over time in the usage of certain words that constitute the key to the meaning of significant provisions of the Constitution.\textsuperscript{8} He further attributed misconceptions to uncritical acceptance of certain source materials, especially \textit{The Federalist} and Madison’s papers and famous notes of the proceedings of the federal convention.\textsuperscript{37}

Crosskey insisted, however, that the most important source of the distortion of the Constitution was slavery. It was the driving force behind the states’ rights theories of the Constitution that developed in the years after the federal convention. The South feared an uprising by the slaves from the time of the great slave rebellion in the French colony of Haiti in 1791.\textsuperscript{38} Many Southerners were convinced that the South’s safety and power lay in an absolute maintenance of the status quo with respect to slavery. This, in turn, required the formulation of some theory of the Constitution that would preclude any action by the federal government against slavery. According to Crosskey, the southern pre-Civil War theories of the Constitution “required that all national power over matters of

\begin{itemize}
\item[35.] 1 W. Crosskey, supra note 5, at 615-18.
\item[36.] Id. at 4-6.
\item[37.] Id. at 7-13.
\item[38.] 3 W. Crosskey, Politics and the Constitution in the History of the United States 405-07 (1980).
\end{itemize}

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an internal nature (interstate or intrastate) be absolutely denied or frittered down to uselessness. These states’ rights theories have continued to resonate in American constitutional law into the 1980’s.

III.

Volume III of Politics and the Constitution is designed to demonstrate that the Constitution, as Crosskey interpreted it in the earlier two volumes, was the logical outgrowth of the political struggles which culminated in the federal convention. A constitution providing for a generally empowered national government with complete authority to regulate all of the country’s commerce was not, as he puts it, “a sudden, unforeshadowed, and inexplicable occurrence. In short, it was not a bolt from the blue. It was, instead, the fulfillment of a long-felt need and widely-expressed desire . . . .” The book is thus responsive to a significant criticism of his work expressed in 1954. Critics of his first two volumes argued that Crosskey’s views of the Constitution required the dubious assumption that the federal convention made a sharp break with the country’s recent past, and that his theories were thus inconsistent with the normal evolution of political institutions. If, however, Crosskey is right about the political background of the federal convention, then his interpretation of the Constitution was precisely responsive to the political and economic concerns of the country in 1787.

The Constitution emerged from an economic and political crisis that followed the Revolutionary War. The inadequacies of the Articles of Confederation were widely recognized. The severe post-war depression, felt most intensely in New England, provoked demands by the northern states that the Articles be revised to vest the Continental Congress with full power over all of the country’s commerce. The Northerners wanted a diversified national economy and a Congress fully empowered to establish an American commercial system. The southern states, by contrast, were committed to an agricultural economy based upon slavery, and were opposed or indifferent to the northern petitions. Many Southerners believed that the territory south of the Ohio River would soon become a heavily populated and developed area in which slavery would flourish, while the Northwest Territory was worthless land which would attract few settlers. As a result, the South would become the most populous region and the dominant force in a new national government. The Southerners accordingly insisted upon a change in the system of representation in Congress.

39. Id. at 409.
40. Id. at 126.
41. See Brown, supra note 3, at 1441.
provided by the Articles, under which each state, regardless of population, had one vote.

Spain's presence in Florida and Louisiana threatened the southern ambitions. The South was dependent on the military and naval resources of the northern states. Disunion and the formation of a separate government consisting of only the northern states would have been a crippling blow to these aspirations. It was essential for the southern states to reach an accommodation with the North.

In Crosskey's view, "the slavery issue . . . was all-important for the North as well as the South."42 Influential Northerners feared future domination of the national government by the handful of slave-holding planters who controlled the southern states. In these circumstances, "[t]he essential problem, then, was how the national government which all thoughtful men desired, could be set up safely; how it could be set up so as to make it strong and vigorous, and yet, at the same time, assure that men in all parts of the nation would feel that their interests were secure."43

IV.

Volume III is divided into five parts. Crosskey first describes the various stages in the writing of the Articles of Confederation. His thesis is that the form of government finally set up by the Articles, with its emphasis on states' rights, did not reflect the desires of a majority of the American people at the time. He then turns to his central theme: the movement to vest the Continental Congress with complete power to regulate commerce. In the third section, he examines the bitter quarrel in Congress in the summer of 1786 between northern and southern delegates concerning the commercial treaty with Spain proposed by John Jay, and the Annapolis commercial convention in September 1786. In the fourth part, Crosskey discusses the impact in various regions of Shays' Rebellion and other disturbances in the New England rural areas in 1786. He rejects the usual view that Shays' Rebellion aroused support for a national government in the New England states, and contends that, on the contrary, the uprising frightened laggard Southerners into supporting a federal convention. He also describes the movement for a "plenipotentiary convention," that is, a convention at which delegates would have written a constitution which would have become effective without confirmation by the Continental Congress or approval by the state legislatures or state ratifying conventions. Finally, Crosskey reviews surviving correspondence and newspapers

42. 3 W. CROSSKEY, supra note 38, at 431.
43. Id.
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published in the winter and spring of 1787 which, he argues, show widespread public sentiment on the eve of the convention in favor of a generally empowered, strong national government.

It is impossible here to describe in detail the evidence and arguments he presents on all of the foregoing matters. I shall accordingly concentrate on several major points of difference between Crosskey and other historians which bear on his theory that the federal convention intended to establish a generally empowered national government with a complete commerce power.

A. The Articles of Confederation

A number of historians maintain that the Articles—finally approved by the Continental Congress in November 1777—describe the kind of government desired by a majority of the American people at the time.44 The Articles are cited as proof of a widespread aversion to a generally empowered national government. Crosskey disagrees. There is, of course, no question respecting the states’ rights character of the Articles.45 If, in fact, the Articles mirrored the view of a majority of all Americans during the Revolutionary period that a national legislature should not be vested with extensive or important powers, then a Constitution establishing a fully empowered national government would, indeed, have represented a radical break with the past. Crosskey acknowledges that “it may possibly be true that the form of government set up by the Articles was the form of government which a majority of the revolutionary party wanted,” but he contends that there is “no reason whatever for believing that the government set up by the Articles was the kind of government which a majority of the whole American people of the time desired.”46

Crosskey carefully traces the evolution of the Articles. He discusses in detail the plan of confederation presented by Joseph Galloway to the First Continental Congress in September 1774,47 the proposals of Benjamin Franklin to the Second Continental Congress in the summer of 1775,48 the plan of confederation drawn up by John Dickinson in the summer of 1776,49 and the draft of the Articles reported to Congress in August 1776

44. See, e.g., M. JENSEN, THE ARTICLES OF CONFEDERATION 15 (1970 ed.) (“[T]he Revolution was essentially . . . a democratic movement . . . [which] elevate[d] the political and economic status of the majority of the people. The Articles of Confederation were the constitutional expression of this movement . . . .”).
45. See, e.g., G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 357 (1969) (“The Confederation was intended to be, and remained, a Confederation of sovereign states.”).
46. 3 W. CROSSKEY, supra note 38, at 123–24.
47. Id. at 46–49.
48. Id. at 53–59.
49. Id. at 98–104.
by the committee of the whole.\textsuperscript{50} All of these plans envisioned a strong central government. Crosskey believes that these proposals, and surviving contemporaneous correspondence concerning them, demonstrate that from 1775 through 1776 "some kind of generally empowered national legislature was widely regarded among men of all shades of opinion regarding independence as being an essential feature of any acceptable scheme of government."\textsuperscript{51}

The Articles as ultimately approved differed fundamentally from these earlier plans. Crosskey maintains that Congress drastically revised these drafts after independence was declared, and that the Congress which finally approved the Articles in the autumn of 1777 was far from representative.\textsuperscript{52} Outright loyalists, near-loyalists, and men who were undecided about independence from England represented approximately two-thirds of the total population of the country; these men were excluded from Congress after 1776. Such men were conservative on the question of independence, but as supporters of the British imperial system, they tended to favor a strong central government. After the Revolutionary War, many of the neutrals and near-loyalists were prominently involved in the adoption of the Constitution.\textsuperscript{53} The revolutionary party, which controlled Congress when the Articles were finally approved in late 1777, was divided between delegates who favored a strong central government and an opposing faction consisting of state politicians with a vested interest in localized government, men from the back country, and Southerners with vast land claims. The supporters of a strong national government finally acquiesced in a watered-down version of the originally contemplated Articles because of pressing wartime financial needs. Crosskey's thesis is that, given the circumstances surrounding the adoption of the Articles and the unrepresentative character of the Congress which approved them, the Articles do not convincingly show that the country at large was opposed to a strong central government.\textsuperscript{54}

B. The Movement for a National Power To Regulate Commerce

A large part of volume III relates to the unsuccessful efforts in the 1780's to vest the Continental Congress with a comprehensive commerce power. Crosskey rejects as "quite incredible the common story that the demand in the 1780's for a national commerce power had its origin in the postwar troubles in trade with the British, and in the barriers to com-

\textsuperscript{50} Id. at 104–05.
\textsuperscript{51} Id. at 59.
\textsuperscript{52} Id. at 108.
\textsuperscript{53} Id. at 127, 33 n.12.
\textsuperscript{54} Id. at 123–27.
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merce "‘between state and state.’"55 This "common story" is the historical foundation of the interstate theory of the commerce power.

Crosskey maintains that the movement for a national commerce power had three phases. The first effort occurred from 1779 to 1781, during the Revolutionary War, and involved attempts to vest Congress with general authority to regulate wages and prices—to grant power over activity that would now be characterized as "intrastate commerce."56 Despite substantial support in Congress, these efforts were unsuccessful because of opposition by merchants profiting from war-inflated prices. The second phase may be dated from September 1783, when news reached America from England of royal proclamations for regulating trade between the two countries. In response, the Continental Congress recommended to the states that Congress be granted a limited power over foreign imports and exports.57 The third phase, and by far the most significant in Crosskey's view, began in New England in the spring of 1785. The end of the Revolutionary War released a pent-up demand for foreign goods. The volume of imports greatly exceeded that of exports; money had to be sent abroad in payment for imported goods. This monetary drain decreased purchasing power for goods on the shelves of merchants, and a depression ensued. In Crosskey's words:

Mercantile failures then began; the building boom, which for a little while had eased the situation for many members of the artisan group, rapidly faded away; unemployment increased; and as the country was steadily drained of more and more specie to pay the merchants' foreign debts, agricultural prices fell; the troubles of the merchant in meeting his bills were then soon paralleled in the experience of many backcountry farmers; a demand for fiat money and moratory laws arose; violence and insurrection broke out; disunion reared its head; and, greatly helped along at this final state by certain paramount military and political considerations in the Southern states, the Constitution at last came to birth out of all this trouble.58

The depression inspired demands that Congress be granted full power to regulate trade. The most important proceedings occurred in Boston, the city hardest hit by the depression. In April 1785, the Boston merchants sent a petition to Congress and a circular letter to merchants in other states asserting that "nothing short of vesting Congress with full powers to regulate the internal as well as the external commerce of all the States"

55. Id. at 149.
56. Id. at 132-48.
57. Id. at 151-57.
58. Id. at 165.
would suffice. Crosskey demonstrates that these letters were extensively reported in newspapers throughout the country. He examines in detail the reaction to the petition in each of the states. All the northern states strongly supported a complete commerce power for Congress. However, "in all the Southern states, the majority opinion in 1785 was certainly opposed, or at least indifferent, to the proposals advanced by the Northern states." In Crosskey's view, the only explanation for this striking difference in attitude "is that the South as a whole, in contradistinction from the North, was tied to, and desired to be tied . . . to the slavery system.

Crosskey stresses that, in addition to the economic implications of this difference, "a slave economy was universally recognized in the eighteenth century to be militarily weak. The slaves were looked upon as a potential 'fifth column' . . . ." Crosskey maintains that the federal convention came about in part because influential southerners perceived this weakness. They were willing to accede to northern demands that Congress be granted comprehensive power over commerce because they recognized that the South could not expand if there were disunion and the South lacked northern naval and military support. In exchange, they wanted concessions from the North on the basis for representation in Congress which, if the South developed as they anticipated, would soon have resulted in a southern majority in Congress.

Crosskey's thesis is that the commerce clause emerged from a number of different events and not merely from complaints about interstate trade barriers and post-Revolutionary War commercial difficulties with England. The demand for a full commerce power provoked by the depression was, in his view, the most significant event. The commerce clause was an answer to this demand. Those critics who in 1954 questioned Crosskey's conclusion that the federal convention vested Congress with a plenary commerce power—and persons who rely upon such criticism—are now obliged to take account of the evidence concerning the background events presented in volume III.

59. Id. at 172.
60. Id. at 173–75.
61. See id. at 176–236.
62. Id. at 198–99.
63. Id. at 233.
64. Id.
65. Id.
66. See id. at 149–50, 167–68.
One of the most absorbing parts of volume III is Crosskey’s discussion of the efforts to hold a “plenipotentiary convention.” I commend the two chapters devoted to this subject as exemplars of Crosskey’s methodology: piecing together a logical and convincing explanation of complex events on the basis of rigorous textual analysis of key documents and painstaking attention to detail.

Amendments to the Articles of Confederation required both the agreement of the Continental Congress, in which each state had one vote, and confirmation by the legislatures of all the states. The proposal from the Annapolis commercial convention in September 1786 for a federal convention to revise the national government was in strict accord with the Articles: No change proposed by such a convention should be effective until “agreed to by [Congress] and afterwards confirmed by the legislatures of every state.” It was unrealistic to expect that fundamental reforms could be accomplished by this procedure. This was one of the major reasons for the disappointed reaction to the Annapolis proceedings by those men seeking to restructure the government. The importance of this point was recognized in the subsequent resolution by the Virginia legislature, drafted by Madison, which approved the proposal for a convention. The resolution provided that changes proposed by a convention would be effective when approved by the Continental Congress and “by the several states.”

This small but important revision in the Annapolis plan laid the basis for bypassing the state legislatures.

A more fundamental effort to facilitate a restructuring of the government came on February 20, 1787, from the New York legislature, which approved a resolution calling for a plenipotentiary convention. The New York resolution was presented to the Continental Congress and narrowly voted down the next day. Congress then adopted a resolution calling on the states to appoint delegates to a convention to revise the Articles. The revisions were to become effective “when agreed to in Congress and confirmed by the states.” Ultimately, of course, the federal convention proposed that the Constitution be submitted for ratification to conventions of delegates chosen by the people in each of the thirteen states. Although a plenipotentiary convention was ultimately rejected, the substantial backing for this idea reinforces Crosskey’s argument that there was powerful sup-

67. Arts. of Confederation of 1781, arts. V & XIII.
68. 3 W. Crosskey, supra note 38, at 323.
69. Id. at 350.
70. Id. at 377–81.
71. Id. at 381–83.
72. Id. at 382.
port in the winter of 1787 for a generally empowered national government.

In Crosskey's view, the leaders in the movement for a federal convention were a "handful of men" in the northern states: Rufus King and Nathan Dane, delegates to the Continental Congress from Massachusetts; Henry Knox, the Secretary of War; and John Jay and Alexander Hamilton of New York. They favored a plenipotentiary convention. Crosskey does not conceal his respect for the ability and astuteness of these men, nor his distaste for southern slaveholders and local politicians.

Crosskey believes that historians have been misled into minimizing or ignoring the movement for a plenipotentiary convention because of their reliance on a memorandum of the proceedings in Congress on February 21, 1787, written by James Madison. Crosskey maintains that Madison later rewrote the memorandum to obscure the importance of the New York resolution calling for a plenipotentiary convention. In substance, Crosskey's thesis is that Madison voted for the New York resolution and a plenipotentiary convention but that he subsequently wished to explain away his vote because it was strongly adverse to states' rights. The revelation of this truth would have been politically damaging to Madison.

In the first two volumes, Crosskey stated, in conclusory terms, his view that Madison deliberately altered his famous notes of the federal convention debates. In the present book, Crosskey describes Madison's memorandum of the proceedings in Congress on February 21, 1787, as the "first clear instance of Madisonian falsification" among the papers Madison left after his death. Crosskey offers the following explanation of these alleged actions by Madison:

Madison's undoubted motive in all these alterations was an easily understandable desire for self-justification: a desire to appear in the pages of history as a more consistent and clearheaded man, a man less timid and less subservient to the dominant pro-slavery opinion of Virginia and the Southern states than in actual fact he was. In certain cases there is also a seeming desire to aggrandize his part in the

73. Id. at 362, 380.
74. Id. at 388-409.
75. Crosskey wrote of Madison's memorandum of the proceedings in Congress of February 21, 1787:

The memorandum in question is one among a large number of papers that Madison very deliberately prepared and left for publication after his death, which occurred in 1836, some forty-nine years after the occurrences to which these papers of his related. Before 1836, it is relevant to observe, all the men who had participated with Madison in the proceedings in Congress had died; and this was true, also, of all the men who had participated with him in the work of the Federal Convention—the other subject to which Madison's carefully prepared documents related.

Id. at 388.
proceedings of the Federal Convention, or at any rate to asperse or
derogate from the part taken therein by others. These motives un-
doubtedly go far to account for most of the things that are found, or
not found, in Madison’s notes on the convention; but to account for
all the alterations they apparently contain, something more is neces-
sary. If this be true, another motive, strong enough to justify to most
men the kind of thing he did, undoubtedly existed for Madison when
he made the changes in his notes. This was the conviction apparently
felt by Madison in his latter days that the theories of the Constitu-
tion which public opinion in Virginia and the South had compelled
him to adopt for political reasons in his earlier years, were in fact
absolutely essential to fend off the ruin of that part of the nation
[i.e., the South] whose welfare he had most at heart.76

I do not think that Crosskey proved, either in the present book or in the
1953 volumes, that Madison willfully falsified various papers. If Crosskey
is right in stating that the debate in the Continental Congress on Febru-
ary 21, 1787, focused on the proposal for a plenipotentiary conven-
tion—and he makes an extremely cogent case in support of that conclu-
sion—then Madison’s memorandum describing these events is, to say the
least, puzzling and curiously uninformative. That, however, is not the
equivalent of proving falsification. Crosskey raises disturbing questions
about Madison’s reliability and accuracy as a reporter, and his work
should inhibit uncritical reliance on Madison’s writings.

V.

It seems to me worthwhile to consider why Crosskey’s writings have
not received greater attention. When Crosskey began his research in the
mid-1930’s, the central constitutional questions involved congressional
power to regulate commerce and the authority of the national government
to deal effectively with the Depression. By the time his work was pub-
lished in 1953, however, those issues had been resolved, and the signifi-
cant constitutional problems were racial discrimination, the administration
of criminal justice, reapportionment and voting rights, and the scope of the
First Amendment. Crosskey dealt with these issues, but they were not
central to his work. He was concerned with the great structural issues of
American government: the relationship of the national government to the
states, and the distribution of powers among Congress, the President, and
the Judiciary. His work did not lend itself to popularization, and it did
not seem to be of immediate practical importance in resolving the issues
then at the forefront. The intellectual and political climate of the 1950’s

76. Id. at 404.
may have affected the reception accorded Crosskey's work at that time, but it certainly does not diminish its enduring importance.

The severely critical reviews by Professors Hart and Brown profoundly influenced the general reaction to Crosskey's work. Both men were prominent and justly respected authorities. In retrospect, Crosskey made a mistake in not responding to various critics. But Crosskey's work cannot be dismissed on the basis of these old reviews. Over the years, an appreciable number of eminent authorities have expressed great regard for his work. Moreover, these old critiques, especially that by Professor Brown on Crosskey's theory of the commerce clause, must now be reassessed in light of Crosskey's posthumously published book.

The most significant factors which have affected the reception of Crosskey's extraordinary three volumes are the character of legal education—particularly the approach to the study and teaching of constitutional law in law schools and the tenuous links between law schools and professional historians—and the nature of historical scholarship on the revolutionary period.

Crosskey threw down the gauntlet to legal scholars on a number of grounds. He dismissed the concept of an amorphous, "living" Constitution as a legal absurdity. He maintained that the historical, intended meaning of the Constitution could be demonstrated with a high degree of certainty, a point of view at odds with prevailing theories of documentary interpretation which stress ambiguity. Moreover, Crosskey's views on the intended relationship between the national government and the states ran counter to long-held theories. Finally, his view of the intended function of the Supreme Court and the federal judiciary differed fundamentally from accepted ideas. Crosskey's work has thus invited resistance from many different quarters.

He eludes classification as either a "liberal" or a "conservative." Liberals would probably applaud his view that the Constitution provides for an effective, generally empowered national government; his theory of the comprehensive scope of the commerce clause; his denunciation of the southern slaveholders and their states' rights theories of the Constitution; and his argument that the Bill of Rights was made applicable in its entirety to the states by the Fourteenth Amendment. Neither liberals nor conservatives, however, would readily agree with Crosskey's views about judicial review, or his thesis that Congress was to occupy a position of supremacy over the executive and judicial departments. Few commenta-

tors today would endorse his theory that the Constitution should be interpreted and applied in accordance with its historical meaning.\textsuperscript{78}

The structure of legal education also has had an important bearing on the reception accorded Crosskey's work. For many years, the teaching of constitutional law has consisted principally of the reading and classroom discussion of relatively recent Supreme Court opinions. The focus is on current problems; the historical background has tended to be of secondary interest. Most professors of constitutional law have not been educated as historians. They are not, as a rule, deeply versed in the politics of the Revolutionary War period, the background of the federal convention, the debates in Philadelphia during the summer of 1787, or the history of the early years of the new government. In short, there were, and there are, only a small number of law school professors who have the background to make an informed evaluation of Crosskey's work.

Many professional historians, by contrast, do not have a background in or intimate knowledge of law and the legal literature which forms so large a part of Crosskey's work. Historians have largely ignored Crosskey's books since they are not in the mainstream of American colonial history. In 1953, historians tended to sympathize with the views of anti-federalists. These scholars viewed the federalists as anti-democratic and elitist. Crosskey was a vigorous defender of the federalists who, he insisted, were in fundamental ways more democratic than the Jeffersonians. In recent years, historians more sympathetic with the old federalist point of view have come into prominence. Paradoxically, they have also generally ignored his work.\textsuperscript{79} Crosskey's style and rhetoric would strike many historians as legalistic and too narrowly focused.

For his part, Crosskey felt that many historians were superficial, that they did not rigorously analyze the texts of key documents, and that they were too willing to rely on secondary sources and accepted theories of events in lieu of uncovering and re-examining original sources. As Crosskey put it in one connection: "The historians' discussions are not specific or rigorous upon this point, as, indeed, they are not specific or rigorous upon many points."\textsuperscript{80} There is merit on each side: Crosskey analyzed a selected number of documents more carefully than most professional historians, but the historians take into account a wider range of phenomena.

I first heard Crosskey present his theories when I was a law student at Chicago in the 1940's, and I have had occasion many times over the years

\textsuperscript{78} Few legal scholars these days believe that constitutional law need have any actual connection with the Constitution." Rabkin, Book Review, 73 The Public Interest, Fall 1980, at 142.

\textsuperscript{79} Crosskey's book is not even cited in one of the major works on revolutionary period history published in recent years, G. Wood, supra note 45.

\textsuperscript{80} 2 W. Crosskey, supra note 28, at 1298 n.1.
to reflect on his work. Isaiah Berlin's remarks concerning J.L. Austin, the Oxford philosopher, seem to me apposite to Crosskey:

His favourite examples of intellectual virtue in later years were Darwin and Freud, not because he particularly admired their views, but because he believed that once a man had assured himself that his hypothesis was worth pursuing at all, he should pursue it to its logical end, whatever the consequences, and not be deterred by fear of seeming eccentric or fanatical . . . . He said that a fearless thinker, pursuing a chosen path unswervingly against mutterings and warnings and criticisms, was the proper object of admiration and emulation . . . .

This month marks the thirtieth anniversary of Brown v. Board of Education. Certainly, no modern case has had a greater impact either on our day-to-day lives or on the structure of our government. To mark this occasion, the Yale Law Journal invited four Assistant Attorneys General for Civil Rights, past and present, to comment on Brown and the role of the Civil Rights Division.

—The Editors