

style; and his quotations and citations of authorities fill an appendix of more than 200 pages.

It seems inevitable that this work will receive some uncomplimentary and even angry reviews. This is because the author's opinions are so often contrary to opinions that are currently held by respected scholars and judges and accepted as a matter of course by large numbers of people, and because they are expressed in such positive and uncompromising form. He often does much to dim, in varying degrees, the effulgent halos that we have rejoiced to create about the heads of our political and judicial heroes. Certainly he would have created less disapproval, and possibly he would have been more effective in attaining his ends, if he had been more considerate of human feelings and opinions and more moderate in his criticisms. In no case, however, was the present reviewer offended, even when his views were contradicted and his own heroes belittled. This is because he was convinced at every point that the author's only desire was to present the truth, that he had used the proper methods of research to determine the facts, and that the facts as he found them had induced the opinions that are expressed.

ARTHUR L. CORBIN†

FOR many years there have been rumors of revolutionary doings in constitutional history at the University of Chicago Law School. Professor Crosskey was reputed to be traveling around the country looking at old tombstones and unearthing ancient and forgotten manuscripts, all with an eye to establishing novel theories about the meaning of the Constitution. Those who heard these rumors and have since waited anxiously for the publication of the results of his research will not be disappointed. These two volumes constitute one of the most all-embracing broadsides ever made at orthodox history.

Mr. Crosskey's fundamental thesis is that the Convention of 1787 proposed, the states ratified, and the early Congresses operated under a Constitution that provided a unitary, centralized government. The election of Jefferson, according to Mr. Crosskey, marked the beginning of a "states' rights" trend that ran on for fifty years or so, by which time the true meaning of the Constitution had been completely obscured. The causes of this shift, apparently related to the slavery issue, are left for a later study.¹ For the present, Mr. Crosskey limits himself substantially to an analysis of the meaning of the original document.

He starts his analysis with the Commerce Clause. Under the commonly accepted theory that the United States is a government of delegated powers, limited principally to those contained in Article I, Section 8, of the Constitution, the central government has had to build its control over economic activity almost wholly by use of its power to regulate commerce. Consequently,

†William K. Townsend Professor of Law, Emeritus, Yale Law School.

1. See p. 1151 *infra*.

the United States Reports are filled with hundreds of decisions drawing lines between that commerce subject to regulation by the United States and that commerce reserved to the states for regulation. Most of these decisions came after the Civil War, by which time the states' rights theory of state sovereignty was well accepted, and the approach to be taken in analyzing the extent of federal power over commerce rested on the theory that the states had given up only a necessary minimum of their sovereignty. Out of this grew distinctions between interstate and intrastate commerce, between direct and indirect effects on interstate commerce, and similar legalistic hair-splitting, the absurdity of which Mr. Crosskey demonstrates by analyzing some selected early twentieth century Supreme Court cases. He is unwilling to find the able drafters of the Constitution guilty of creating such an unrealistic and unworkable relationship between the nation and the states as the Commerce Clause gloss by the Supreme Court appears to require. He tosses aside the gloss and turns instead to the actual language of the Constitution, which contains no such prefixes as "inter" and "intra." In a most painstaking way he dissects the clause in terms of the usages of the eighteenth century and makes out a persuasive case for the proposition that "commerce among the several states" meant "all gainful economic activity within the boundaries of the nation."

This established, he goes on to consider the interrelationship of the Imports and Exports, Ex Post Facto, and Contracts Clauses of Section 10 of Article I.² Again by reference to the language of the eighteenth century, he shows that "exports" and "imports" were terms used for goods shipped from and into states; they were not terms limited to foreign trade. This was in fact stated to be the case by Chief Justice Marshall as late as 1827,³ but in 1868 Justice Miller in *Woodruff v. Parham*⁴ destroyed any such interpretation and substituted instead the theory that the Commerce Clause had a negative implication in that it forbade discrimination against "interstate" commerce. Mr. Crosskey drily comments: "[H]ow the Commerce Clause—a mere grant of power to Congress—could do such a thing, the Justice did not explain; and the puzzle has never been elucidated from that day to this."⁵ From this

2. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

"No State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts. . . ."

3. *Brown v. Maryland*, 12 Wheat. 419 (U.S. 1827).

4. 8 Wall. 123 (U.S. 1868).

5. P. 315. Mr. Crosskey is not one to hide his feelings. On the same page he describes Justice Miller thus: "One of the great destructive geniuses of the Court, Miller had a principal part, not only in this outstanding piece of 'judicial statesmanship,' but in all those other queer decisions, just after the Civil War, by which, for a variety of different reasons no doubt, the Southern sophistical views of the Constitution were, in so many instances, fastened upon a victorious country."

case to date, Mr. Crosskey demonstrates, the Court has been floundering about, trying to strike down interstate trade barriers by use of a theory spun out of no constitutional language whatsoever.

The law merchant is part of the broad definition of "commerce" that Mr. Crosskey presents, and he believes that the Contracts Clause was meant to be a prohibition against state control over private commercial relations. To establish this, he must first eliminate the commonly accepted theory that the clause was the general protection against unfair retrospective legislation. This he does by arguing that the Ex Post Facto Clause was incorrectly construed in *Calder v. Bull*,⁶ where it was asserted that that clause was limited to criminal matters. If he is right in this—and his demonstration is highly persuasive—then the Contracts Clause is unnecessary if limited to retrospective matters. He argues, therefore, that the true purpose of the Contracts Clause was to preclude the states from legislating in the field of the law merchant. The Imports and Exports and Contracts Clauses taken together, then, would come close to making the federal power over commerce exclusive.

Mr. Crosskey's views on commerce are consistent with a theory that the United States is a government of limited delegated powers. He is not content to rest there, however, and devotes a major portion of his study to a demonstration that the Convention of 1787 in fact created a unitary government possessing substantially all powers of government. In support of this he relies on two major rules of interpretation prevalent in the eighteenth century. One is that the spirit and intent of a document are more important than the literal words, a rule of special importance where there is an appropriate preamble to the document. The other is a rule that a general statement followed by particulars is not normally to be taken to mean that the enumerated particulars define the limits of coverage because to limit the general statement to the subsequent particulars usually makes the general statement ineffective. For example, a statute might give a dog warden authority to destroy vicious or dangerous dogs, and in subordinate provisions might state that a dog with rabies should be killed upon a veterinarian's certificate that the dog had rabies, that a dog which attacked sheep should be killed upon the affidavit of a sheep owner, and that a dog which attacked people should be killed upon the request of the police. Under eighteenth century rules as explained by Mr. Crosskey, these specifications would never be construed to limit "vicious or dangerous" so that the warden had no power with respect to a dog that viciously attacked other dogs.

By use of these two rules, Mr. Crosskey argues that the Constitution granted to Congress all legislative power possessed by the United States and that that legislative power embraced all that is necessary to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty." To establish this proposition he must cope with the enumeration of various specific powers in Section 8 of Article I. He notes, of course, that the last clause of

6. 3 Dall. 385 (U.S. 1798).

Section 8, the so-called "sweeping clause," indicates that Congress has powers over and above the enumerations preceding that clause, for it authorizes necessary and proper laws for executing "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." And this, he argues, is an important provision when related to the sweep of the Preamble. He then takes up the many enumerated powers and offers explanations for their inclusion notwithstanding the sufficiency, under his argument, of a simple grant of legislative power to Congress. The majority of the enumerated powers, he maintains, were put in to make it certain that they would not be considered prerogatives of the executive in much the same way many things were matters of the royal prerogative in England.⁷ The remainder of the enumerated powers are explained on various other grounds. In some cases, he asserts, the inclusion was primarily to express a limitation on the power, as for example, the power to enact *uniform* naturalization laws. In others, he maintains, it was advisable to set forth expressly powers that had been in the Articles of Confederation for fear that omission might raise the question whether it was intended that they be carried over. Two are included, he believes, as much for public relations purposes as any other: the power to tax and the power to regulate commerce. The absence of these being the primary causes of dissatisfaction with the Articles of Confederation, he argues, the Convention spelled them out to make it crystal clear that the great faults had been eliminated.

There is one anomalous power that has a special explanation, the detailing of which will perhaps give some of the flavor of Mr. Crosskey's method in erecting his argument that the several powers were enumerated for special reasons. In Section 8 it is provided that Congress shall have power "to provide for the Punishment of counterfeiting the Securities and current Coin of the United States." Even under a theory of delegated powers, one is hard put to explain the inclusion of this power, for it is obviously "necessary and proper" in executing the power to coin money. But counterfeiting was one of the forms of treason under the English law as it existed in the colonies, and the Constitution in Article III so defines treason as to exclude counterfeiting. Therefore, the argument goes, in an abundance of caution the Convention included the power to provide punishment for counterfeiting to demonstrate that counterfeiting was unlawful even though it was no longer treason. The foregoing as developed by Mr. Crosskey is a matter of logic; there is nothing set forth to show that anyone ever *said* or *wrote* that this was the reason for the inclusion of the power. It is simply a case of deducing a logical reason consistent with Mr. Crosskey's primary thesis that Congress was sup-

7. It is important to note that Mr. Crosskey relies heavily on Blackstone's elucidation of many royal executive powers which, if Blackstone were to be followed, would perhaps be taken over by the President because he succeeded to the executive authority of the king. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-322 (1936), where Justice Sutherland states that the power to enter into negotiations with foreign nations was transferred directly from the King of England to the colonies as a "union" and then to the President.

posed to have general legislative power over all matters of general concern. This reason for the counterfeiting provision is not necessarily the only one. It may be that Delegate X had a peculiar worry about counterfeiting and insisted on its inclusion and the other delegates, seeing that it did no harm, may have placated the insistent delegate. The most that can be said for Mr. Crosskey's theory is that it is logical and makes more sense than the sort of thing that must be dreamed up otherwise to explain the specific inclusion of the power to punish counterfeiting.

An integral part of Mr. Crosskey's thesis is the proposition that the common law *was* a brooding omnipresence in the sky and that it settled in the national government under the Constitution. If he is right about this, it becomes more understandable why the commerce power was believed to be so all-embracing and why Congress was considered to have general legislative power; for if the common law in the United States was to be a national common law as in England and if the individual states were involved only in the manner that local customs in England affected English law, then only the national legislature could effect necessary changes in the common law. There is no need here to discuss generally this part of Mr. Crosskey's work,⁸ but it is appropriate to point out a relationship between the previously mentioned counterfeiting provision and the theory of a national common law. Mr. Crosskey argues that the limitations on the definition and punishment of treason in Article III must have been considered by the drafters to be limitations only on the judiciary because they obviously do not prevent Congress from making certain acts crimes and punishing them just so long as they are not called treason. But if this is true, he goes on, then the Convention must have believed that the English common law of crimes would be operative in the absence of any Congressional legislation on the subject and that the breadth of the English law of treason and the inhuman punishment therefor, if it was to be forbidden forthwith, had to be done by limiting the judiciary's power under the common law. He likewise notes that the counterfeiting provision does not provide that Congress shall have power to define and punish—as is the case with the piracies provision—but only to punish, which again would appear to evidence a belief that counterfeiting would be a common law misdemeanor prior to any determination by Congress of appropriate punishment.

Part of Mr. Crosskey's theory about the nature of "law" at the time of the writing of the Constitution is the proposition that the United States Supreme Court was expected to be the head of the entire judicial system of the country. It was expected, he argues, to supervise both state and federal litigation in order to preserve the consistency of the common law throughout the country. By virtue of the Supremacy Clause the Court was also given control over local legislation that might contravene the Constitution, but, he believes, the Court was not expected to have any power over the constitutionality of Acts of Congress, except any Acts that encroached on judicial prerogatives. Granted

8. See Professor Corbin's Review, p. 1137 *supra*.

that Congress was to have plenary power to legislate for the general welfare and to regulate all economic activity including the power to alter the common law, it is not hard to believe that the drafters would not include a power of review over Congress, if only because there would be so few limitations to be enforced. Mr. Crosskey is not content, however, with this logical argument; he also maintains that there was no substantial history of state judicial review prior to the Convention and that the proceedings of the Convention itself do not support judicial review. He doubts that anything so novel would be left to implication.

Mr. Crosskey also takes on the Bill of Rights and, just to round out the picture, the Fourteenth Amendment. The Bill of Rights, or at least Amendments II through VIII, he argues, were intended to apply to the states as well as to the United States. They do not, he points out, appear as does the First Amendment to be limited to the United States, for their language is general whereas in the First Amendment only Congress is forbidden to act.⁹ He also argues that in some of the ratifying conventions the need for a Bill of Rights was presented in a context that indicated a desire for protection by means of the Supremacy Clause against abuses in the states.¹⁰ Finally, he places great stock in the vicissitudes of the draft of the First Amendment through Congress. At one time the language proposed was general, and it was at the insistence of New Englanders whose states still had an established church that the draft was made operative only against the Congress, a circumstance that leads Mr. Crosskey to conclude that Congress viewed general language as applicable to states and that the switch in form in the First Amendment was to preserve the validity of established churches.¹¹ This theory forces him to observe that Marshall and Story were falsely interpreting the Constitution when in *Barron v. Baltimore*.¹² Marshall held the Bill of Rights inapplicable to the states. These strong nationalist judges are forgiven, however, for Mr. Crosskey is sure that they were simply bowing to the states' rights sentiment of the times.

Mr. Crosskey concludes his analysis by a consideration of the Fourteenth Amendment. Here he joins those who maintain that the Amendment overruled *Barron v. Baltimore*. This analysis is almost wholly logical and omits any consideration of the progress of the Amendment through Congress and the ratifying legislatures. This omission is perhaps the one sour note in an otherwise convincing exposition of the Constitution; in all other instances

9. The last part of the Seventh Amendment is also applicable by its terms only to the United States.

10. One wonders, however, why a fear in the states that their own judiciary could not protect them would not also give rise to a fear which would express itself in a demand for judicial review of Acts of Congress. Distrust of state legislatures would seem likely to give rise to distrust of all legislatures.

11. Mr. Crosskey points out that the prohibition against Congress' establishing a religion would seem to involve a belief that Congress had a broad enough power to include such legislation.

12. 7 Pet. 243 (U.S. 1833).

he relies on—or gives the impression of so doing—contemporary evidence of the meaning of constitutional provisions. With reference to the Fourteenth Amendment he not only ignores the history of the Amendment, he even attacks those who do rely on that history when he claims that one such writer “apparently forgets that the ultimate question is not what the legislatures meant, any more than it is what Congress or the more immediate framers of the amendment meant: it is what the amendment means[!]”¹³

In approaching the problem of evaluating Mr. Crosskey's work it is important to note that he has, in effect, requested a delay in judgment. He has not produced in these two volumes the total findings of his research. In general, he has withheld an analysis of the Convention proceedings, the ratification campaign, and the story, as he views it, of the fairly rapid shift of large groups in the country from support of a strong government to advocacy of states' rights. All of this is to be considered in further volumes. This promise of more to come blunts one's critical comment, for many of the questions that come to mind are certain to be covered in these additional volumes. For example, the great shift in constitutional interpretation was brought about by the Jeffersonians. If Mr. Crosskey is correct in his major thesis, the delegates to the Convention were in the main nationalists. Some time between 1787 and 1801 many of these must have changed their minds. Unless he can present a convincing explanation of this change, his major thesis becomes suspect.

Notwithstanding this difficulty of judging a work that is incomplete, it is possible to comment on the methodology of the published part. In many ways the work is highly persuasive. His painstaking research into the language of the times and the rules of interpretation of legal documents then in vogue appears to be accurate and the conclusions he draws seem reasonable. He especially makes out a good case for placing a great deal of reliance on Blackstone's *Commentaries* as a source for understanding the Constitution, for apparently the *Commentaries* were at that time the one law book universally read both by lawyers and educated laymen. He also makes out a good case for viewing with suspicion much that appears in *The Federalist* because, as he argues, the essays therein were written for publication in an anti-Federalist stronghold and were probably tailored to allay the fears of the doubting. He is further to be congratulated for making a valiant effort to read the Constitution with a completely open mind. After very little study of the gloss on the Constitution, to say nothing of reading words in their contemporary sense, it becomes difficult to read its words without automatically including meanings added through the years. Finally, there is no gainsaying the fact that Mr. Crosskey has used only original sources and that he has uncovered what appears to be material not before considered by students of the subject.

But his arguments are not based on historical material alone. In much of his analysis he relies on logic, and this frequently cuts both ways. For example,

13. P. 1381, n.11.

he argues that in *Marbury v. Madison*,¹⁴ Marshall asserted the power of the Court to pass on the constitutionality of an Act of Congress only because he had to have a way out of the political dilemma which Jefferson had forced on the Court. Marshall could not issue the writ of mandamus, for he knew it would be ignored; neither could he safely say that Marbury was not entitled to his commission, for this would be politically disastrous to the Federalists, to say nothing of subversive of orderly government. Therefore, Mr. Crosskey concludes, Marshall, who must have known that the Constitution did not include the power of judicial review over Acts of Congress, used this very argument as the way out. All of this is a matter of deduction, for nowhere does Marshall give any hint that such was his strategy. But the difficulty with this logic is that Marshall could have achieved the same result by limiting the power of judicial review to the protection of the prerogatives of the judiciary against encroachment, a limited power of review which Mr. Crosskey concedes the Constitution can be read to provide for. As between two theories of judicial review, one "right" and one "wrong," one would assume that Marshall would rely on the "right" one, the limited power of the Court to interpret its own Article III. That Marshall did not do this seems logically to lead to the conclusion that he, who must have known the right answer, set forth exactly what the Constitutional Convention really meant to provide for. To this there is a counter argument. Marshall, it could be said, provided for broader review because he wanted to undercut the Kentucky and Virginia Resolutions which purported to give the states power to override Acts of Congress. But to this one can reply (1) that an assertion of supervisory power over Congress is an admission that the national powers are limited, and that is inconsistent with Marshall's nationalist sentiments; and (2) that the power once created might be misused if and when the Jeffersonians captured the Court and the Federalists regained control of Congress and the Presidency. The long and short of the matter is that to the extent that Mr. Crosskey relies on logic alone he can never satisfactorily prove his point. The most he can do is show that the traditional meaning is not necessarily valid.

Somewhat akin to his reliance on logic is what seems to be his fundamental premise that the Constitution was in all respects consistently and tightly drafted. He assumes an almost perfect document, and when he gets through with his analysis the parts fit together ever so neatly. But it seems likely that there were minor compromises of terminology, to say nothing of substantive provisions. We know, of course, of the great compromise between the large and small states. It seems equally probable that various delegates had their pet wants and peeves and that little changes were made here and there to placate various delegates or states. If so, Mr. Crosskey proves too much by producing perfection. The very fact that he is able to do this makes one doubtful that everything he concludes can possibly be right. There ought to be, it seems, a little more fallibility on the part of the Founding Fathers.

14. 1 Cranch 137 (U.S. 1803).

Perhaps the most unfortunate aspect of this study is a minor fault that many will probably consider major. The entire work is written with a chip on the shoulder. There is a belligerency about it that is traditional in a lawyer's brief, but not in a scholarly historical treatise. This belligerency has the effect of putting the reader—especially the orthodox historian—on his guard. Even if one approaches it with an open mind and an amused tolerance of some of the nastier digs at various Presidents, Justices, historians, and law teachers, there is still something suspicious about the use of the brief-writing technique. For example, Mr. Crosskey discusses at length the case of *Daly's Lessee v. James*.¹⁵ He makes much of the fact that two "leading lawyers—in the Supreme Court, at least—,"¹⁶ Henry Wheaton and David B. Ogden, argued for the plaintiff in a manner that fits Crosskey's thesis. Reference is also made by him to "[c]ounsel for the defendant," not otherwise identified, who argued for a position contrary to that taken by Mr. Crosskey. Leaving aside the question whether the attorneys for the plaintiff believed wholeheartedly in their position—a question raised by Mr. Crosskey himself from time to time, especially with regard to *The Federalist*—one becomes interested in knowing who was the unidentified counsel for the defendant. It turns out to be Sergeant, either John, "an acknowledged leader of a famous bar,"¹⁷ or Thomas, who was not so famous as his brother but was a competent lawyer and a legal scholar and writer of some note.¹⁸ All of which proves nothing, of course, but certainly makes one wonder about the fairness of the presentation. In many ways Mr. Crosskey reveals the scholar's true search for the truth, and he frequently notes carefully that he has given the reader all the information he could find on a point. He would be even more persuasive had he completely suppressed the advocate's argumentative tricks.¹⁹

The practicing lawyer and the man in the street may very well dismiss this study and the one to follow as of no importance today. We all know that the Constitution is what the judges say it is, and if Mr. Crosskey is right the judges have given us a lot of bum steers. But that still leaves the Constitution right where it was; it is what the judges, right or wrong, say it is. And if the Constitution is to be changed here and now it will be for present day reasons, not for reasons existing in 1787 and now revealed for the first time. The most that a new light on the Constitution will do is provide an argument in support of a position chosen for other reasons. Furthermore, a large number of people have lived happily under this erroneous frame of government, and nothing that Mr. Crosskey proves can eliminate this past and present

15. 8 Wheat. 495 (U.S. 1823).

16. P. 835.

17. 16 DICTIONARY OF AMERICAN BIOGRAPHY 588 (1935).

18. *Id.* at 590.

19. There is a story of a great legal scholar who labored for years to reconcile all the cases in his field but in the end was unable to cope with four of them. In disgust he threw the volumes containing those four out the window and published his work without mentioning them. I sometimes had the feeling that perhaps Mr. Crosskey occasionally forgot unpleasant facts.