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Book Review: Politics and the Constitution in the History of the United States

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REVIEWS

POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES.

In the two volumes here under review we have a new and important contribution to the history of our Constitution. It is a work that cannot be disregarded, either by scholars and teachers of Constitutional law and governmental history or by the courts that must decide the cases that are continually arising in this field. Least of all can those afford to disregard it whose traditional opinions are flouted, whose political and judicial heroes are criticized, and whose local and sectional interests are deprived of their accustomed Constitutional support.

No important written document, statutory or constitutional, can remain unchanged in its interpretation and legal operation over a long period of time. However great a boon to mankind, language is in a high degree an uncertain and variable means of communication of ideas; and, along with all the other circumstances of life, it is in constant evolution. Ancient statutes can be wholly forgotten, or substantially emasculated by judicial and administrative action. The Statute of Frauds, enacted by Parliament in 1677 and re-enacted in substance by all of the United States, has been subjected to so many thousands of variable and inconsistent judicial interpretations and applications that a court now looks to the current of decisions rather than to the Statute. If these decisions have, as many competent critics believe, turned the Statute into an instrument for the encouragement of repudiation instead of the prevention of fraud and perjury, is it not time to look back to the words of the Statute itself rather than to the aberrant applications?

The Constitution of the United States, adopted nearly 166 years ago, has served us through the convulsions of foreign and civil wars, through periods of political overturn, and through social and industrial revolution. Half of its formal Amendments are almost as old. By judicial interpretation in numberless cases, by conscious and unconscious disregard of its express words, this great document has suffered the same fate as have all other similar writings. The distribution of governmental power has been frequently and materially changed; often, it seems quite clear, for the worse.

In the present work, Professor Crosskey takes us back to the time of the Constitutional Convention and to the beginnings of the national government. In immense detail, and with chapter and verse, he analyzes the language of that period, with its word usages and with the educational background of the men who chose the words of the Constitution and of its formal Amendments. He thus portrays, with convincing skill, what he believes to have been the understanding and the intended meanings of the draftsmen and of some, at least, of the adopting voters. He thus sets forth the intended distribution of
the powers of government and the reasons for that distribution. The men of
the Convention seized their great opportunity. The known evils of the time,
from which all suffered, made possible the creation of a new nation. Foreign
dangers, governmental impotence, obstructions of commerce, uncertainty of
law both common and statutory, ruinous inflation: these outweighed differ­
ences in sectional interest, differences in governmental theory, and the as yet
undeveloped conflicts of political ambition and economic greed. In no other
work are the individual provisions and phrases of the Constitution so thor­
oughly considered as in Professor Crosskey’s volumes, with the reasons for
their adoption and the reasons for the exact words in which they are ex­
pressed.

Having made this fresh start, the author brings us down through 166 years
of changing interpretation and application, with the causes, the nature, and
the results of those changes: how the general legislative power of Congress
became vastly limited, especially how its power to regulate all commerce was
reduced to power over commerce across state lines (until more recently ex­
panded by recessive interpretation); how the common law system inherited
from England became cut into 48 fragments of uncommon law; and how the
national judicial power of the Supreme Court has been in many of its aspects
frittered away. The reviewer cannot here attempt to follow the course of the
author’s argument. He will only say that the argument has a powerful appeal,
and that from beginning to end it will hold the attention of any reader who
knows something of the nature of law and its evolutionary growth and whose
desire for the truth promptly counteracts any feelings of resentment at the
author’s unexpected results.

Some of the principal theses of Professor Crosskey’s work, forcefully stated
and vigorously supported by historical and analytical research, are as follows:

The Constitution was drafted with the intention of creating a sovereign
nation, and not a limited federation of sovereign States.

The Congress was given general legislative power over all matters, with
only such exceptions and limitations as are found in express words of the
Constitution and its Amendments.

In particular, the expressly given power of Congress “to regulate commerce
among the several States” was intended to include “commerce” of every kind
carried on within the entire national territory, and not merely that which
crosses State boundary lines.

The judicial power conferred upon the Supreme Court of the United States
was such as to make that Court “the head of a unified system of administering
justice,” giving it general supervisory control over all State courts as well
as the inferior federal courts.

The Common Law was regarded, at the time of adoption of the Consti­
tution, as the system of law developed in the courts of England and by appli­
cable Acts of Parliament, a system national in scope and applicable every­
where, not a series of separate systems created within and controlled by the
several States independently.
The Supreme Court was given no power to review Congressional legislation or to declare it to be “unconstitutional,” except when such legislation might affect the jurisdiction of the Court itself.

The Judiciary Act of 1789, Section 34 (Rules of Decision) applied only in “trials at common law,” not including equity, admiralty, or international law and customs; and the “laws of the several States” made applicable in such “trials” were the laws that existed in 1789, without in any way limiting the subsequently exercised powers of Congress or the Supreme Court.

It is perfectly clear that the foregoing theses of the author are not those that now generally prevail or that are now supported by the Supreme Court. That they did generally prevail in 1789 and that they were then in accord with the express words of the great instrument, is supported with great force by the author. He has collected with great industry and accuracy the word usages of the contemporary period, as found in the newspapers, magazines, political pamphlets, and other publications. He has made a careful analysis of judicial opinions. In most surprising and convincing fashion, he has shown the influence of Blackstone’s Commentaries on the Laws of England on the thought and the expression of the makers of our Constitution. He has found in the constitutional ideas and practices of Great Britain most clarifying explanations for the insertion of many of the specific provisions in our written Constitution. We need not suppose that on these matters Professor Crosskey has said the last word; but he has fully demonstrated that the last word had not previously been said either.

What, then, has been the cause of these great changes in our constitutional thought and in the distribution of governmental powers among the departments—legislative, executive, and judicial? By what processes have these changes been brought about? The author leaves us in no doubt as to his answer to these questions. The answer is indicated in the title to his book: Politics and the Constitution in the History of the United States. It is no new discovery that the Supreme Court is aware of “election returns,” or that its decisions have reflected the opinions and the desires of the appointing power. But there are good “politics” as well as bad “politics.” New issues arise; and newly realized interests create new opinions and desires. No doubt, after 1800, the opinions and desires of Jefferson and Madison were different from what they had been in 1789; no doubt, also, they preferred to divert attention from that fact. In 1953, as well as in 1800 and 1860, “States’ rights” rise up in opposition to “National Interest” and affect both elections and judicial decisions. The author well portrays the work of Taney, C. J., and his Jacksonian Court. He appears to believe that the effects of “politics” have been generally bad, severely injurious to the general welfare; and he produces evidence, much of it clearly incontrovertible, in support of that opinion.

It is not “politics” alone, however, to which the author ascribes the great and detrimental changes in our governmental system under the Constitution. One of the special merits of his work is found in his exposition of word usages and his demonstration of the effect of the constant, unconscious changes
in those usages. Linguistic changes; changes in legal theory; changes in the views of scholars as to the nature of "law" and of the "common law;" changes in prevailing views as to the function of the judges in the growth of law: all these played a part in inducing Brandeis to lead the Court in overruling *Swift v. Tyson*,\(^1\) and to commit, in the case of *Erie Railroad Co. v. Tompkins*,\(^2\) what the author describes as "the most colossal error the Supreme Court has ever made." This was not caused by "politics" or the election returns.

The author is thoroughly convincing in his demonstration that the decision in *Swift v. Tyson* was in exact harmony with the meaning given in 1789 both to the Constitution and to Section 34 of the Judiciary Act, and that it was in exact agreement with the judicial decisions of the 40 years between that date and 1832, the date of the decision. By that decision the Court made no changes in the distribution of governmental powers, either because of "politics" or because of word usage. Story, who wrote the opinion, was the sole survivor of the Federalist regime; but he well knew the antecedent language and legal theories and judicial decisions, and the other eight Justices—all of them appointed since the Jeffersonian political revolution and the product thereof—all agreed with Story. Immediately after the decision in *Erie Railroad Co. v. Tompkins*, the present reviewer, although he had made no study of its constitutional background and did not repudiate the decision, at once foresaw the morass into which the reasoning of the Court was leading it.\(^3\) Professor Crosskey presents to us ten more years of this morass and at the same time destroys the supposed constitutional basis for the decision.

This reviewer has no doubt of the correctness of the author's view that the "common law" in 1789, in 1832, and for long years thereafter, was understood as a single system inherited by all the colonies and the United States; and that the words "trials at common law" as used in the Judiciary Act of 1789, did not include either equity or admiralty or much (if any) of the "law merchant" (in spite of Lord Mansfield's recent efforts). This does not mean that our ancestors regarded the "common law" as a "brooding omnipresence in the sky." Undoubtedly, they had more notions of the existence of "natural law" than most of us now have; and they may have been unaware of the fact that the boundary lines between "law" and "equity" and "law merchant" (and even "admiralty" and "ecclesiastical law" and other local and less well-known systems of law and practice) had never been clean and well-marked, and that these boundaries were becoming and would continue to become wide zones of overlapping uncertainty. Without doubt, they had not clarified in their minds the part played by the judges in the evolution and proliferation of our legal system. How many minds are clear on that subject now? Their minds were at least as clear as have been those of a Court that

1. 16 Pet. 1 (U.S. 1842).
2. 304 U.S. 64 (1938).
has told all federal judges (as well as its own Justices) that they must accept
as applicable law in diversity cases, the words of a Vice-Chancellor or of a
trial judge in a county court, even though no other court in the United States
is bound to do so.

The views of Thomas Jefferson as to the "common law" may have been
more hazy than those of the lawyers of his time. He was not much of a
supporter of any "Brooding Omnipresence." He hated John Marshall, at least
after his own political victory; and he feared the obstruction that any truly
"common" law, administered by a powerful central Court, would provide to
his own political system. In 1829, there was published in Virginia a thin
volume entitled Jefferson's Reports. There had been in the possession of
Attorney General Randolph three volumes of manuscript reports of cases in
the General Court of Virginia, some of them as late as 1772. Of these manu­
script reports, a small number were selected by Thomas Jefferson, of interest
to us because he wrote both a Preface and an Appendix. With respect to the
Appendix, he thus wrote in his Preface: "I have added, also, a Disquisition
of my own on the most remarkable instance of Judicial legislation, that has
ever occurred in English jurisprudence, or of another nation, and its incor­
poration into the legitimate system, by usurpation of the Judges alone, with­
out a particle of legislative will having ever been called on, or exercised
towards its introduction or confirmation." In his "Disquisition" it appears
that this "most remarkable instance" of "usurpation" by the Judges was the
assertion that Christianity was a part of the English common law. The first
such assertion, later repeated at various times by other Judges, was by Sir
Matthew Hale in The King v. Taylor, where Hale said: "Christianity is parcel
of the laws of England."4 Jefferson tells us that this originated from a mis­
translation of the words "ancien scripture" in a case in the Year Books. He
then adds, as to Hale's statement: "But he quotes no authority. It was from
this part of the supposed common law, that he derived his authority for burn­
ing witches." In this "Disquisition," Jefferson defines the "common law" as
follows: "For we know that the common law is that system of law which
was introduced by the Saxons, on their settlement in England, and altered,
from time to time, by proper legislative authority, from that, to the date of
the Magna Charta, which terminates the period of the common law, or lex
non scripta, and commences that of the statute law, or lex scripta."

It does not appear when Jefferson wrote his Preface and this remarkable
"Disquisition." His Reports were published in 1829 by "The Legatee of Mr.
Jefferson's manuscript papers."

Professor Crosskey gives very convincing support for his theory that the
Constitution granted general legislative power to Congress, and that its powers
were not limited to those that are more specifically mentioned. He shows the
particular reasons why the draftsmen thought it was necessary to put these
specific provisions in express words. As much can be said also for his theory

that the "power to regulate commerce among the several States" included the regulation of all gainful employment within the entire country, and not merely transactions across State boundary lines. What a vast amount of wasteful "jurisdictional" litigation would have been avoided had "politics" not limited the meaning of the express words of the Constitution! Both the first Roosevelt and the second one made strenuous efforts to recover some of the lost legislative power, largely in order to expand executive power also; and the recent Supreme Court has done much to expand the content of "interstate commerce" and to extend Congressional power over a large portion of purely intrastate commerce. This is illustrated strikingly with respect to labor legislation. Anything that materially affects "interstate commerce" is now within the national legislative power, thus further complicating the field of "jurisdictional" litigation. Now Congress may regulate the wages and hours of men who work in repairing a railway culvert in Pennsylvania, and also the wages and hours of men who (also in Pennsylvania) manufacture the concrete mixture for use by the men repairing the culvert. This causes Mr. Justice Douglas (dissenting) to say: "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' Yet if that is true, how about the men who produce the tools for those who carry the cement and gravel or those who furnish the materials to make the tools used in producing the cement and gravel?"5 Is the Court now repairing past errors, and doing it by the pin point pricking method in a thousand cases (while "politics" permits)?

What a difference the recognition of general legislative power in Congress would have made in the matter of Uniformity of Commercial Law! And how large a reduction of litigation in the field of Conflict of Laws! The new Uniform Commercial Code would need but one legislative enactment, instead of forty-nine separate ones. The author dedicates his volumes "To the Congress of the United States in the Hope that It May be Led to Claim and Exercise for the Common Good of the Country the Powers Justly Belonging to It under the Constitution." But if the loss of power was due to "politics," it is only by more and better "politics" that it can be restored.

A national "Uniform Commercial Code" would be given its final interpretation by the one Supreme Court of the United States, binding upon all the State courts alike. Forty-nine "Uniform Commercial Codes" will be subject to final and varying interpretations by forty-nine Supreme Courts; and in diversity cases, at least, the federal judges (including the Justices of the Supreme Court) will have to determine which State Code to apply and will be required to follow the interpretations of the vice chancellors and trial judges of that State.

The author is far from alone in his contention that the Constitution makers conferred no power on the Supreme Court to pass upon the validity of Acts

of Congress; but his ability in the analysis of relevant cases adds new support to the contention.

What, then, is the Constitution of the United States today, the Constitution that all the judges and other officials, both state and federal, have taken oath to support? Is it the very same Constitution that was signed and submitted to the people of the United States in 1787, by George Washington and some 38 other notables (with such variations and additions as appear in 22 Amendments)? The printed words, filling only 8 pages in the volume under review, and divided into 8 Articles, are certainly the same words as those that George Washington signed. But words are merely symbols by which men attempt to convey their thoughts to others; and the degree of success attained in this process is extremely variable. The ideas that the words of the Constitution expressed in 1789 to the signers thereof, and to the limited number of people who then voted for it, could not have been identical, although we may believe that there was a high degree of uniformity. Since that day, for more than 160 years, those very words have been the supreme written law for some hundreds of millions of men, many of whom could not read English; and they have been interpreted and applied by thousands of officers and judges. In 160 years, word usages have greatly changed, along with other habits and customs of men, the social and economic conditions, all the circumstances of life. No one has been more successful than the author of the work under review in showing that the words of the Constitution do not express the same ideas to the people of today that they expressed to George Washington and his associates, or that the applications made of it by our judges and administrators in governing the affairs of our lives are greatly different from those of 1789, or 1832, or 1860, or even 1900.

Whose meaning then, and whose interpretation, do our judges and legislators and executives take an oath to support? Is it the meaning and the interpretation of the 39 signers in 1787? Their hands wrote, in the language of that day, the thoughts of their active and intelligent minds. Shall we still be governed by the dead hand?

Professor Crosskey differs plentifully with Justice Holmes; but in one matter he accepts his theory. Opposite the title page he thus quotes Holmes: "We ask, not what this man meant, but what these words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." The present reviewer does not accept this dictum as a just rule for the interpretation of a contract; it may work better when applied to a Constitution or to a statute. Who is a "normal speaker of English"; and who is a "normal" man? The reviewer agrees unreservedly, however, with the author of the present work, in his condemnation of cocksure judgments in ignorance of our constitutional history and of the usages and conditions and education of the men of 1789, and of judgments rendered without a re-reading of the express words in the light of that history and those

6. 3 CORBIN, CONTRACTS §§ 532 et seq. (1951).
usages and conditions. Interpretation and application of the words of the old document to the circumstances of later times is the continuous function of men living in those later times, particularly the judges.

While it is the function of the courts to act as the selective and creative agents of society in the evolution of any legal system, it cannot be regarded as their function to make new interpretations and applications of a Constitution that materially vary the granted powers of any branch of the government, either (1) with full consciousness of the variation and with intent to improve the constitutional distribution (supported, it may be, by a political party then in the ascendant), or (2) in sublime ignorance that any variation is being affected.

It is a different question whether the Supreme Court should overrule previous decisions that have been acquiesced in for 100 years, on the ground that when first rendered they were not in accord with the Constitution as then understood (or as now understood—for example, *Swift v. Tyson*). The reviewer will not here assent to the statement by Holmes (in the *Black and White Taxicab* case) that when some “fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States” it is one “which no lapse of time or respectable array of opinion should make [the Supreme Court] hesitate to correct.” But the reviewer will definitely support Professor Crosskey in advocacy of the prompt overruling of *Erie Railroad Co. v. Tompkins* and its numerous and insufferable progeny of 15 years.

No other writer has presented so devastating and so convincing a criticism of *Erie Railroad Co. v. Tompkins*, “the most colossal error the Supreme Court has ever made” and “one of the most grossly unconstitutional governmental acts in the nation’s entire history.” Without doubt, this will receive violent counter-criticism; but no such counter-criticism is likely to be based upon as industrious a research into our constitutional and linguistic history, accompanied by as keen an analysis of judicial decisions, as that of the author of this work. This reviewer believes that it will be impossible to show any material error in the author’s demonstration of the harmful results of the *Erie* decision as evidenced by the morass of subsequent decisions.

This is a controversial work, but a work that has long since been overdue. It is a work of originality and a work of courage. It is a work that evidences immense industry and keen analytical power. Its author is a man with much important experience as an active practicing lawyer and as a law school professor and research scholar. His work shows no temporary political motivation, the kind that destroys objectivity and invalidates judgment. His opinions, strikingly and sometimes shockingly unusual as they are, are his own honest opinions based upon careful and extensive research. His thinking is “wishful thinking”; but only in the sense that he wishes our country had been run by greater men, men with clearer minds, men less motivated by temporary and merely local interests. Throughout, his work is written in a clear and attractive

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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,

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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 Control of the Congress."

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


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*, 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-

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\(^7\) 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, 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. 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. 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. This theory forces him to observe that Marshall and Story were falsely interpreting the Constitution when in *Barron v. Baltimore* 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

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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.

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[1]"\textsuperscript{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,

\textsuperscript{13} P. 1381, n.11.
he argues that in *Marbury v. Madison*, 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. He makes much of the fact that two "leading lawyers—in the Supreme Court, at least—" 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," or Thomas, who was not so famous as his brother but was a competent lawyer and a legal scholar and writer of some note. 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.

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).
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.
acceptance of the way things are. Nor can he conclusively show that all would have been better had the Jeffersonians not "subverted" the Constitution.

All of this is irrelevant to the worth of his study. History ought to be as accurate as we can make it. If he is half right in his assertions, he has done a great service, for whether we speak good or ill of the dead, we ought to speak the truth about their deeds. And in an ironic way there is a special present value in the shape of things past. Just as the Court may use new light on an old event as an argument for a position to be taken for other reasons, so the events of the past are used as covering arguments for political positions of the present. If Mr. Crosskey is eventually proven right in his assertion that the Jeffersonians distorted the Constitution in the name of states' rights, then those who today argue for states' rights will no longer be able to rely on the Founding Fathers as their allies. (Conversely, those who demand a strong central government will be able for the first time to call upon the Founding Fathers for vindication.) However history is rewritten, some one will still have a partisan use for it. The irony of the Crosskey thesis is that the history used today is used by the very side that created the false history. If we are to bandy about the events of the past, let us at least do it straight and not by a bootstrap doctrine.

Whether Mr. Crosskey is right, in whole or in part, will certainly have to wait on a great deal of research by others. Orthodox historians who have trodden this path once are not likely to be enthusiastic about treading it again even were they to admit that they may have missed something along the way. This means that the new crop of historians, the graduate students now searching for topics for doctoral theses, must be relied upon to do the checking. In all likelihood it will be another decade before we have very much in the way of verification or disproof of these heretical ideas. In the meantime, Mr. Crosskey can rest his case; no judge would dare nonsuit him.

GEORGE D. BRADEN†


PROFESSOR Nevins describes this work as "the greatest of American diaries and one of the world's great diaries." It is.

The Man:

George Templeton Strong was a New York lawyer, second generation of the firm which today is Cadwalader, Wickersham, and Taft. But his legal career held only a small part of his interest and very little of his heart. A ranking of his enthusiasms, after his family and his social class with which he felt an intense identification, begins with music. Next in line are literature or perhaps Columbia University, or Trinity Church or innumerable charities.

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