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CROSSKEY'S CONSTITUTION: AN ARCHEOLOGICAL BLUEPRINT†

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Could it be fortunate that so much of history is a closed, or at least a forbidden, book? Otherwise might we not squander our resources reliving and refighting the past? The present soon would be unendurable, the future an endless re-marshalling yard for causes stretching back to antiquity.

If the first volumes of Professor Crosskey's study invite this somber opening reflection, it is not that his achievement is unimpressive. Here, undeniably, is a work in the great tradition of controversial writing. Few lawyers — and certainly fewer historians — ever willingly have assumed greater burdens of proof. Yet fewer still have contrived a more ingenious *tour de force,* or written with greater verve and clarity. *Politics and the Constitution* may be a mistaken, and many will say, a misdirected book; yet it unquestionably also is a challenging one — an intellectual achievement destined to leave a mark on scholarship for years to come.

I

Professor Crosskey's thesis and plan are outlined in an introductory chapter, Our Unknown Constitution. This, by itself, perhaps is as breathtaking a piece of academic iconoclasm as has appeared since Spengler. The Fathers, it is first hinted, then in the 600,000-word body elaborately argued, did not establish the sort of balanced federal system that three leading members of the Convention — Hamilton, Madison, and Jay — assured the country they had established when the document was up for ratification. They created instead almost the exact opposite — a unitary, centralized government in which Congress was to be supreme and the states — potentially at least — might be gradually reduced to little more than French *départements* or English counties. Far from being merely the coordinate branch of a national government endowed with special and enumerated powers, Congress received in addition wide "plenary" and "general" legislative powers. Delegation, in short, was both specific and general, precise and elastic. Above all, it was intended that Congress be the supreme department, and the government as a whole, a unitary, centralized system. Hence, neither the tripartite separation nor the federal-state

†Being a review of POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES. By William Winslow Crosskey. Chicago: University of Chicago Press, 1953, 2 vols. Pp. xi, 1410. $20.00.

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division was conceived to have anything like the significance each eventually assumed.

Throughout his study Professor Crosskey stresses the merits and simplicity of a government of this type. "So, if the Constitution were allowed to operate as the instrument was drawn," he argues in his concluding chapter, "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." (p.1172). Earlier, he has assured us that "By 'a general national legislative authority' is not meant a power to supplant the legislature of any particular state. The state legislatures were, in general, continued for local state legislation. The general power apparently intended to be given to Congress was a general power of nation-wide legislation; a power to deal with matters, less than nation-wide, that transcended the competence of a single state; and a power to deal even with matters confined to a single state when of concern to any other state, or states, or to the nation." (p.363n.)[1] Congress, in short, would somehow simply peel off its powers as needed, and there would be little if any nonsense about either adequacy or form.

Disregarding what certainly are some very loose ends in the outlined mechanics of federalism,[2] a most interesting doctrinal parallelism exists here — one that Crosskey himself has not yet stressed. In 1785, James Wilson, two years later one of the principal members of the Federal Convention and eventually one of the original Justices of the Supreme Court, spoke of the powers of the old Congress under the then-existing Articles of Confederation, in the following language:

> "Though the United States in congress assembled derive *from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular states.
>
> The United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole: . . .
>
> To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such. . . .
>
> Whenever an object occurs, to the direction of which no particular state

1. *Cf.* pp.358-60. See also p387 (Marshall's "indefensible dictum" regarding enumerated powers in *Gibbons v. Ogden*).

2. The implication — and indeed the inarticulate, tactical premise — often is that, given the Crosskeyan reinterpretations, the Supreme Court would be spared troublesome problems of linedrawing and umpiring the federal system. See the various caustic remarks on judicial "inclusion and exclusion" (c.2 and p.317); and the running attack on Justice Frankfurter, *passim*.

> is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature."[3]

It is quite evident that Professor Crosskey's thesis has features in common with this so-called "Wilson Doctrine" of inherent, general and unenumerated Congressional powers. Yet there are also pointed differences. Wilson, of course, was speaking of congressional powers under the drastically narrow Articles of Confederation; Crosskey, of powers under the Constitution. Moreover, Wilson, a Scottish-trained jurist of the Age of Enlightenment, saw nothing anomalous in a concept of inherent powers: arrangements of that order existed simply as part of, or in the nature of things. Our generation of course cannot endure such nudity of mind. Crosskey's proposition therefore is not offered or argued as an abstract principle of jurisprudence or of natural law, but rather as a matter of historic fact and framer-intent. The burdens that James Wilson was willing and able to leave to God, Professor Crosskey today must shoulder himself. He does so to the extent of shifting them to the broad back of the eighteenth century and of members of the Constitutional Convention. In short, the argument of *Politics and the Constitution* reduces tacitly to this: the leadership and majority of the Convention of 1787 held substantially Wilsonian views of the nature of Congressional powers and delegation. Our constitutional document therefore, whether regarded today as embracing inherent powers or not, at least bestows on Congress large general and unenumerated powers in addition to those specifically enumerated. It does this, because that was the Framers' collective intention. To be sure, no Framers themselves ever quite put it that way, and some of them, notably Madison, later and repeatedly said precisely the opposite. Even James Wilson, during his nine years as a member of the Supreme Court, never repeated his Wilson Doctrine.[4] And of

3. *Considerations on the Power to Incorporate the Bank of North America*, in 1 THE WORKS OF JAMES WILSON 549, 557-58 (Andrews ed. 1896). The "Wilson Doctrine" is historically important in that it provided the jurisprudential base for Theodore Roosevelt's "New Nationalism"; as such it was expressly offered to and rejected by the Court in Kansas v. Colorado, 206 U.S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956 (1907). For contemporaneous discussion, see Alexander, *James Wilson, Patriot, and the Wilson Doctrine*, 183 NORTH AM. REV. 971 (1906); the Wilson Memorial addresses in 55 AM. LAW REG. 13 (1907); Lindsey, *Wilson versus the "Wilson Doctrine,"* 44 AM. LAW REV. 641 (1910). For fuller bibliography, see Konkle, *James Wilson*, in 15 ENCYC. SOC. SCI. 425 (1935).

4. See Lindsey, *supra* note 3; and Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 381, 452 (1919), reprinted in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 36, 40 (1938). In his Lectures on Law, delivered in 1792, Wilson pointed up this "striking difference between the constitution of the United States and that of Pennsylvania. . . . The latter institutes a legislature with general, the former, with enumerated, powers." 2 WORKS OF JAMES WILSON 56 (Andrews ed. 1896). But he added, "The powers of congress are, indeed, enumerated; but it was intended that those powers, thus enumerated, should be effectual, and not nugatory. In conformity to this consistent mode of thinking and acting, congress

course John Marshall, the last and greatest of the Federalists, in what generally is regarded as his master opinion — *McCulloch v. Maryland*,[5] the very cornerstone of American constitutionalism — himself officially expounded the doctrine that the Federal Government is one of enumerated powers. Yet all such evidence to the contrary notwithstanding — and Crosskey recognizes there is a great deal of it, though he avoids showing us how much — our Constitution really created a federal government of "plenary" and "general" as well as enumerated powers.

The mood and thought of our introductory paragraph, therefore, emphatically are not Crosskey's. His hostages are irrevocably pledged to history even though the 18th Century obviously is to be a pretty tough bargainer. What was thought and done, not just what was said, must be determined, and this book is avowedly an attempt at a full and unanachronistic re-construction. (p.7).

In Crosskey's view, the Commerce Clause was to have been the keystone of the new edifice. Destruction of that clause, and the courts' related refusal to construe the Common Defense and General Welfare Clauses[6] as a direct substantive grant of power to Congress — both promoted and abetted by the Jeffersonian party — soon left our Constitution a shambles, hardly a caricature of what the Convention intended. Simultaneously, gradual shifts in word meanings overlaid and disguised these developments.

The Federal Government today thus finds itself needlessly hamstrung — powerless to deal effectively with problems like employers' liability, fair labor standards or anti-trust legislation. Worse still, the nation is denied the obvious benefits of a uniform federal commercial code and corporation law. "States Rights" doctrine thus consistently lost every battle but the last one and is today almost as deeply and offensively entrenched as ever. Actually Congress has — as it always has had, and was intended to have — full power to regulate even *intra*-state and local trade. (c.2).

By Crosskey's "unitary view of the national governing power," the whole Constitution is of a piece with this theory. Following the brilliant salvaging operation performed on the Commerce power, (cc.2-9) he goes on to find "oblique internal evidence" in the other clauses to substantiate his thesis that Congress possesses power to regulate all the "gainful activities the American people carry on." (p.521). Conventional views to the contrary are attacked at great length, and a

has power to make all laws, which shall be necessary and proper for carrying into execution every power vested by the constitution in the government of the United States, or in any of its officers or departments." *Id.* at 59.

5. 4 Wheat. 316, 4 L. Ed. 579 (1819).

6. For Crosskey's "substantive" rehabilitation of this clause, and for his criticism of both the Hamiltonian and Madisonian restrictive or "purposive interpretations, see c.14, The Constitutional Context as It Relates to the General Legislative Power of Congress. This transitional chapter is an excellent epitome of the thesis and methods.

breath-taking reconstruction of the Tenth Amendment[7] blasts that obstacle aside.

Volume 2 is essentially an alibi explaining why these interpretations never have been realized and a sustained quadruple attack on the Supreme Court for sins both of omission and commission. The Court, says Crosskey, at a very early date surrendered both its supremacy and its independence with reference to state and common law. It thus in effect abdicated its responsibilities as the supreme juridical head of the country in matters pertaining to commercial law, conflicts. etc. (cc.23-26). In recent years this process has gone to unbelievable and disastrous lengths in such cases as *Erie Railroad v. Tompkins*.[8] Simultaneously with these early developments, the Court established itself as "the special and peculiar guardian" (p.1161) of the Constitution and of private rights against the other two departments, expanding judicial review far beyond anything conceived by the Fathers or required by the nature of the government; and this too has worked badly. (cc.27-29). Thirdly, the Court destroyed the originally-intended restraints on state power, especially by refusal to interpret the first eight Amendments as binding on the states as well as on the Federal Government.[9] Finally, capping the record, the Supreme Court made exactly the reverse error after the Fourteenth Amendment had made the Bill of Rights binding on the states for a second time. That is, by its wholly unwarranted development and interpretation of substantive due process and equal protection, the Court now *over*-restrained the states and set itself up as a censor in the field of social and economic legislation, instead of employing the Amendment to protect Negro rights and civil liberties generally. (cc. 31-32).

As Crosskey himself puts it in his concluding chapter:

> "Viewing that record as a whole, it is apparent the Justices, over the years since 1789, have very generally done things they ought not to have done, and, quite as generally, left undone the things they ought to have done; and, further to pursue the language of the Book of Common Prayer, it does truly seem that, in their discharge of this important function, there has been no health in them." (p. 1161).

Ironically, there is nothing messianic about Professor Crosskey or his theory, even though under the circumstances, one would almost expect that there might be. For the upshot of what he is telling us is

7. C.22, The Tenth Amendment and the National Powers. Words frequently mean just what Professor Crosskey wants them to mean. There nevertheless were some Anti-Federalists — and even Federalists — who in *1788-89* stubbornly or callously refused to accept his "technical" meaning of the word "reserved" as defined in the cited *1820* ed. of Sheppard's *Touchstone* (p.77, 80). *Cf.* CROSSKEY 701, 1352 nn.63-64, and examples cited *infra* note 30.

8. 304 U.S. 64, 58 Sup. Ct. 827, 82 L. Ed. 1188 (1938). For Crosskey's critique, see pp.912-37.

9. C.30. *Cf.* Professor Fairman's documented article-review of this chapter in 21 U. OF CHI. L. REV. 40 (1953).

that it has taken a century and two-thirds, plus two decades of research, to get the Constitution back on the tracks, headed the way the Framers intended. It amounts to a sanguine act of faith, therefore, to disregard such obstacles and continue to base theories of constitutional government on the intrinsic meaning and intent of the document as historically discoverable. Time and distance can not be operating in our favor, but error has been shown for what it is, and "*True*" intent and "*True meanings*" are at last known. Truth and intent therefore ought to serve us henceforth. Professor Crosskey's faith is staunch and personal. Indeed, some readers will wonder at his rejection of a "Higher Law." Yet the positivism is everywhere as strong and explicit as is criticism of the Supreme Court. Curiously, severest censure is reserved for the Court's decision in *Erie Railroad v. Tompkins,* here condemned as "one of the most grossly unconstitutional governmental acts in the nation's entire history." (p. 916). Yet it was in that case that Justice Brandeis, for the majority, moved to correct what appeared to be, on the basis of Mr. Charles Warren's studies[10] of manuscript drafts of the Judiciary Act of 1789, a century-old misreading of the first Congress' true intent!

Paradoxes of this sort help make *Politics and the Constitution* the fascinating, provocative work it is. There is nothing timid nor equivocal in these pages. Understatement is an all but unexampled virtue. Categoricals like "unquestionably," "absolutely certain," "there can be no possible doubt"; helpers like "the absolute constructional necessities of the situation"—one which on its face proved something less than "absolute"; compulsives like "must have known" and "must have understood" — are scattered six and twelve to a paragraph, sometimes in sequences that cancel out bewilderingly. There also are Professor Crosskey's strong partisan preferences.[11] It might be unfair to call them more than that, but if it ever should develop that his ancestors were Federalists, this book will be a telling new argument for inheritance of acquired characters.

What we are given, in cantos scattered through the entire work, is another version of the Creation and Fall of Constitutional and Judicial Man. Alexander Hamilton, Gouverneur Morris and James Wilson alternate as Seraphim; Thomas Jefferson doubles as Lucifer and Satan; James Madison — "The Apostate" who faithlessly promoted an Era of Good Feeling rather than stand true and lonely with the Essex

10. Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923); *id.* at 49-52, 81-88, reprinted in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1246 (1938). Nowhere does Professor Crosskey discuss or analyze the important textual changes in the drafts of Section 34 of the Judiciary Act, which Mr. Warren discovered and presented; see instead pp.627 and 902.

11. Treatment of the Jeffersonians is a page out of the period itself. See entries in index and especially p.779. Even the defects in the "mischievous" and "vicious" [Federalist] Judiciary Act of 1789 are attributed to Anti-Federalist maneuvering. (pp.610 ff. and 756).

Junto — is Jefferson's sinister accomplice. Paradise [was] Lost in 1800. It has not been regained by our latter day penitence and tinkering. (p.1170). It will only be regained when the resurrected Federalist Host returns to rout the forces of Darkness and Evil. Professor Crosskey's Puritanism is as pure and poetic as Milton's. He scarcely pretends to be writing history; he revels in "delving" (p.13, *cf.* p.6) into it and using it. The argument throughout is that of a lawyer's brief. Even the organization is selective, forensic, dictated wholly by personal interest, never by chronology, never by the immense body of evidence some readers would like to see systematically and publicly assayed.[12]

The work thus leaves one fascinated and perplexed. None will deny the Gothic splendor of argument, the wide ranging research and intellectual passion, nor the sweep and symmetry of the parts — at least in the first volume. As a work of rhetoric, *Politics and the Constitution* compares with Spengler's *Decline of the West,* and has the same air of truculent dogmatism and infallibility.[13] Purely as an intellectual creation, it is more impressive still. One is reminded of the controversial works of the Reformation. And here of course is the rub: Forensic genius, and intellect alone are not enough, for if they were, Thomas More's *Dialogue of Heresies*[14] would be one of the world's classics. Any *tour de force* is a fixed, hazardous enterprise, vulnerable generally beyond its maker's insight.

The issue, therefore, is not whether Professor Crosskey has produced a work of art. Unquestionably he has. It is not whether he has provided a brilliant resynthesis and rationalization of our constitutional law. Again, obviously he has. His "unitary view of the Constitution" is neat, and to many, considering the problems and alternatives we face today, will appear attractive indeed, *limited to the ends Professor Crosskey foresees.* As a re-thinking of alternatives, and as a re-channeling of precedents, this book would be a superb job.[15] Were

12. To call POLITICS AND THE CONSTITUTION a "commentary" on the document, as some have done, is misleading. Rarely does Professor Crosskey attempt systematic elucidation, or summarize existing knowledge, or assemble and weigh evidence pro and con. To get any systematic idea of the historical evidence and judicial opinion, one must keep at hand THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Corwin ed., 1953) (SEN. DOC. No. 170, 82d Cong., 2d Sess.) and standard monographs. The adversary character of legal proceedings ordinarily serves as a corrective for law office history. As an historian, Professor Crosskey temporarily is trading on a broad *ex parte* margin.

13. Note, for example, the treatment of Justice Miller, pp.315, 1127; and Justice Frankfurter, *passim.*

14. Reprinted in MORE, ENGLISH WORKS (Campbell and Reed ed. 1931).

15. For appreciative reviews, see Durham, *Crosskey on the Constitution: An Essay-Review* 41 CALIF. L. REV. 209 (1953); and those of Krash, Clark and Hamilton in 21 U. OF CHI. L. REV. 1, 24, 79 (1953) (*Politics and the Constitution — A Symposium*). It is interesting to note that most favorable reviewers devote more space to Crosskey's *doctrinal objectives,* which they approve, than to his supporting arguments and methods. Many readers might thus be willing to "concur in the result"; but if that is to be the choice, why not leave out

the United States starting from scratch, had Professor Crosskey been appointed the Supreme Court's special master to overhaul the works and develop a new plan of simplified constitutional practice in accord with modern needs, certainly we all should have to honor both his hardihood and his achievement.

This, however, is not the measure of Professor Crosskey's purpose. As already noted, his argument is not based on mere expediency, nor on persuasively-argued social and constitutional advantages. It is grounded on history; and parts of it are offered as history. (p.6). We are not told merely that this might have been, or ought to have been. We are told that it was intended to be. Skeptics will wonder that any thesis-rider's own preferences could have been so perfectly divined by the Fathers; and cynics will go even further. Given our tendency to read history backward, to find what we look for, and to overlook what we please, several questions arise. What are the basic premises of *Politics and the Constitution*? What of that apparent antithesis in the title? In short, is this another *Dialogue of Heresies*, or is it potentially one of the wonders of all time: an *archeological* blueprint for Twentieth Century America?

II

First, some credits, debits, and historiographical notes.

Part III, the heart of the book, is a ten-chapter exposition of Crosskey's "Unitary View of the National Governing Powers." The "Scheme of Draftsmanship" (c.13) of the Constitution as a whole is considered in the light of accepted eighteenth century rules of documentary interpretation. (pp.369-84). This of course is largely an ultra-sophisticated modern version of the Abolitionists' premise that the Preamble, properly construed, is a part of the Constitution[16] — the part which defines the objectives and which must therefore help determine the scope. Accordingly, all powers granted the Federal Government and all limitations placed on the states, have to be construed to "form a more perfect Union, establish Justice . . . and secure the Blessings of Liberty to ourselves and our Posterity." One need not be so acute a lawyer as Professor Crosskey to see that this phrasing, at least in combination with the Necessary and Proper and Supremacy Clauses, is all anyone needs to fashion a commodious national power. Doubtless many citizens, distressed at the mounting complexity of our constitutional doctrine, and accepting, if not yet reconciled to its apparently inevitable freedom of decision and "subjectivization," will see gains, or even wisdom, in this turn to simpler, more flexible forms.

labored framer-intent and squarely face the issue as one of constitutional power and expediency?

16. See, *e.g.*, GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW 40-43 (1844); GOODELL, OUR NATIONAL CHARTERS 5, 13 (1860).

It will be noted also, that the prescribed tonic is one that can be marketed and taken in much less than these bottle-sized doses.

Most ingenious of all perhaps is Crosskey's 100-page analysis of the Fathers' reasons for enumerating Congressional powers. (pp.409-508). Some powers, he shows, had to be enumerated because in dividing up the undifferentiated legislative-executive-judicial powers belonging to the old Congress under the Articles of Confederation, it was essential to indicate those to be regarded as legislative. (c.14). Others had to be enumerated because under standing English law and amendatory acts of Parliament, they customarily were regarded as executive powers derived from the royal prerogative. (c.15). A third miscellaneous group had to be enumerated for reasons inherent in particular circumstances. (c.16). It is apparent, therefore, that in general the purpose of enumeration was to make clear what powers Congress was to *have,* not what powers it was *not* to have as against the states. Crosskey lays great stress on this point, which of course is the very heart of his thesis: Enumerated congressional power does not at all preclude general congressional power. In fact, it is a condition of it. The judicial rule to the contrary is simply another instance of the tales and "sophistries" propagated by James Madison until at length they have become accepted articles of constitutional faith. (p.12). By this neat and arresting section, the groundwork of Crosskey's thesis is laid, and laid moreover on much the same lines as the Wilson Doctrine.

Here again, it is not necessary to accept the full interpretations to pay tribute to virtuosity. Despite question begging (pp.406-07, 674), pyramided inference (p.680) and the apparent assumption that anything in Blackstone must have been known and recalled at appropriate times by members of the Convention,[17] even a skeptical reader soon is prepared to concede that drafting the Constitution, given these eighteenth-century political and legal backgrounds, was a more subtle, complex undertaking, particularly for skilled lawyers, than generally has been presumed. Just how many members of the Convention were as sophisticated as Crosskey believes is the real question, for here again we are given neither direct proof nor testimony. Perhaps from the nature of the case none is possible. But even without it, these chapters stand as brilliant analysis and historical reconstruction, and will be read and debated for years by students of both historiography and law.

Probably the most remarkable chapter in *Politics and the Constitution* is that on the Contracts Clause. (c.12). An extreme example of Crosskey's positions and methods, it is the concluding part of a section designed to buttress his thesis that the Commerce Clause actually was intended by the Convention to give Congress power even over intra-

17. Much of Chapters 15-16 rests on this premise; see pp.411, 546.

state and local trade — "over the entire complex of gainful activities which the American people carry on." The basic proposition is that the "True Meanings" of the Imports and Exports, the Ex Post Facto, and the Contracts Clauses never were perceived by the Supreme Court, even though several early Justices were former members of the Convention. In fact, all three clauses soon were judicially emasculated, and this in turn has tended to obscure both the nature and extent of the Commerce power. By no means all this section is heterodox, though in Crosskey's view, interstate trade barriers were the real target of the Imports and Exports Clause. (c.10). Newspaper usage is cited to show that in their true eighteenth-century meanings both "imports" and "exports" embraced products from other states as well as from abroad. Consequently, a restraint on the states' power to "lay any Impost or Duties" on imports or exports without the consent of Congress except as needed for inspection laws, must properly be viewed as an intended buttressing of the national Commerce power. Likewise, the two Ex Post Facto Clauses were intended by their drafters to prohibit all retrospective legislation, both state and national, civil and criminal. But here again the Court presently overruled the Convention, holding these clauses to prohibit only retrospective criminal laws, thus defeating the framers' obvious purposes to outlaw paper tender and debtors' stay legislation. (c.11).

The Contracts Clause, in Crosskey's view, was the perfect capstone for this interlocking four-clause system as originally conceived. Above all, it was the means by which the national Commerce power was made "sole and exclusive." Far from prohibiting merely state impairment of contracts previously formed — as judicially construed — the Contracts Clause really was intended by its framers to apply to all contracts. Moreover, its "literal effect" (p.355) was to crystallize, as of 1787, "all pre-existing state laws on the subject of contracts," stopping the clock as of that date, and leaving the states free to diminish, but never to increase, their regulations in this field. No direct evidence whatever is adduced in support of what Crosskey, in one of his rare understatements, acknowledges as "This somewhat arresting meaning of the Contracts Clause." Its meaning, he declares, is "obvious." Moreover,

> "its obviousness* is very greatly increased when the eighteenth-century meaning of the Ex-post-facto Clauses is known. That meaning of the Ex-post-facto Clauses was, on the basis of the evidence presented in the preceding chapter, undoubtedly known* to the men of the Federal Convention; and since those men, and those of them, particularly, who originated the Contracts Clause, in the Committee of Style, were, in the main, highly skilled and careful lawyers, it seems preposterous to suppose* that this obvious* and undeniable* meaning of the Contracts Clause was not known to, and intended by them. And if they did know and intend* that meaning of the Contracts Clause, it is certain* they must have in-

> tended* to end state power, for all practical intents and purposes,* over the whole subject of the law of contracts. Of this, no reasonable doubt* seems possible,* and since a governmental system, with no part or branch having any effective power over the subject of contracts, would, very certainly, have been a great anomaly, the only reasonable conclusion* is that the skilled lawyers of that final committee must have supposed* there was a full and adequate power over contracts conferred by the Constitution on Congress." (p.355) (asterisks added).

After the reader has recovered his footing and counted those little asterisks, he begins to wonder: Does not this situation and argument presume, logically and historically, that almost the first, and certainly an indispensable, act of the new government of 1789, have been one "for the national regulation of contracts"? At any rate, some sort of stand-by or holding regulation?

If Professor Crosskey has discovered as much, or has even found serious proposals for such, he certainly owes readers the information immediately. James Madison, we know from frequent reminders, was given at this date to "bluffing" (pp.406-07) and to carelessness, but it strains credulity to think that even he, or, if he, that other members of the Committee on Style and Detail, several of whom also served in the first Congresses,[18] ever would have jeopardized the economic and commercial life of the new Republic, or the powers of the new national government in this vital field. Or, if they did, that some anxious insider or troubled litigant would not soon have reminded them — or at least have capitalized on their oversight. Remember, these men were "highly skilled and careful lawyers." And as Crosskey elsewhere reminds us, they were capable of expressing themselves and their every idea perfectly. Yet here we have them indulging in this strange four-clause circumlocution, when what they really meant to say was: "The Commerce power shall be sole and exclusive." Fortunately everything worked out all right, because not a soul in the land ever noticed the error — not even a Philadelphia Tory lawyer.

It must be acknowledged in this regard of course, that Professor Crosskey has not yet clearly defined his positions with reference to the nature of "sole and exclusive" versus concurrent power of Congress in this field.[19] As noted earlier in the quoted paragraph stressing the flexibility of his theory, he seems to presume that virtually all delegated Congressional power was regarded by the Fathers as concurrent, and thus to be shared with and by the states until Congress

18. One-half the Senate, and eight members of the House in the first Congress had been members of the Convention — *i.e.*, 20 of the 55 Framers served in the first Congress. See HART, THE AMERICAN PRESIDENCY IN ACTION: 1789 70 n.91 (1948) and authorities there cited. In addition, Jay, Rutledge, Wilson, Paterson and Ellsworth served on the Supreme Court, Paterson until 1806. Ellsworth was the leading draftsman of the Judiciary Act of 1789.

19. *Cf.* the discussion in the following passages: 1172, 363, 318-20, and 358-60.

acted; yet Congress was not to supplant the state legislatures, "which were, in general, continued for local state legislation." It must be remembered, however, that the members of the Convention in 1787 could not foresee later judicial rules regarding the "Silence of Congress," and that many such rules Crosskey himself at various times attacks as the root of error and evil. Here again therefore, it is virtually impossible *for us today, in wrestling with these problems, not* to reason anachronistically. Yet does not this doctrinaire "intent school"[20] of constitutional construction require exactly that? — unless the intent rule itself is to be an *avowed* anachronism? At bottom, it is this conflict and anomaly that makes *any* "Back to 1787," "Back to the true and original intent" campaign such as Professor Crosskey is here re-organizing appear such an utterly hopeless, dubious enterprise. Surely our burdens today are heavy enough without adding to them this sort of extravagant exercise in historical mirror-writing and mirror-reading. Professor Crosskey attacks Justices Holmes and Brandeis and their followers for "reasoning anachronistically about the Common Law," and so getting us bogged in the morasses of *Erie v. Tompkins.* (p.910). Yet his own book is shot through with just such anachronisms[21] — as any such book must be. We all need to ponder Kierkegaard's maxim: "Life [and Law and History] can only be understood backwards. But [they] have to be *lived* forwards."

The extremely circumstantial and conjectural character of much of Professor Crosskey's argument[22] leads one to wonder how far he is willing to see such methods employed. It would be very simple, indeed, using these techniques, to "prove" that framers of the Fourteenth Amendment contemplated and understood the word "person" in the Due Process and Equal Protection Clauses to include both corporations and natural persons.[23] It would be no trouble at all to build up a *nineteenth*-century glossary showing that corporations, since Coke's time, had been regarded as artificial "persons"; were spoken of

20. For an excellent critique, see tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction,* 26 CALIF. L. REV. 287, 437, 664 (1938); 27 CALIF. L. REV. 157, 399 (1939).

21. Like all practical men, the Framers thought concretely, and largely in relation to the problems of their own day. To seek solutions for many of our problems in the solution the Framers found for theirs is like looking to Goodyear (the vulcanizer of rubber) and Duryea (inventor of the horseless carriage) for the solutions to modern traffic problems. The Framers created a going concern — and presumed that posterity's common sense would equal theirs.

22. The Contracts Clause "must have known" argument, discussed *infra,* is extreme, but by no means unique; see *e.g.,* pp. 563-64, 679-80, 772. And after chapter on chapter of the "glossary" argument, roaming over two continents and through two centuries, what is one to make of the following *caveat* (made with reference to the Corwin-Haines treatment of the colonial precedents for judicial review): "It should be remembered that evidence remote in time, or place, from the Federal Convention is of little relevancy." (p.1368).

23. In fact, this was exactly what Roscoe Conkling attempted. See Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,* 47 YALE L.J. 371, 48 YALE L.J. 171 (1938).

continually as such by lawyers, judges, and even laymen; that members of the Joint Committee so spoke of them; that incidents occurring while Section One was in draft raised the problem of constitutional status. Nor would the objection that all this is irrelevant because corporations cannot be "born or naturalized," and hence a double-standard of interpretation is required for the two main uses of "persons" in Section One, be hard to counter: Over the years distinguished courts and lawyers had disregarded far narrower, more precise constitutional texts in order to extend to corporations and shareholders benefit of state due process. One such case was *Brown v. Hummel*.[24] Its progeny were used in 1865 by Reverdy Johnson (who a year later was one of the drafters of Section One) — used, moreover, in a successful defense in the federal courts of the rights of one of the very corporations (later in 1866) found petitioning Congress for relief. The framers were men of large views, well aware of the meaning of words; they are known from their votes to have sympathized with these petitioning corporations. *If all this is true,* they *must have known* and *must have intended* to do precisely what Roscoe Conkling in his celebrated argument in the *San Mateo*[25] case intimated they did.

One gathers from his general positions on corporate personality (p.43) and from his attitude toward judicial construction of the Fourteenth Amendment (cc.31-32) that Professor Crosskey would be little impressed by this argument. His disapproval and skepticism would be wholly warranted. All we have done — all he has done in analogous cases — is to weave a web of conjecture and inference. Men and ideas are placed on the same street corner, so to speak, or in the same city, during the same year — or even during the same century — and the inference is then drawn that they inevitably were linked, or were mutually recognized or recognizable. But contiguity and simultaneity of this order are not highly persuasive. At best they are not proof, but merely the first conditions of proof. Roscoe Conkling simply made artful use of the synapse-jumping, conclusion-hopping abilities of the human mind. And it is hard to see how such use can be more validly applied to 1787 than to 1866.

The point is merely that some of Professor Crosskey's records are playable on either side. Moreover, there is enough question-begging (pp.679-80) and *non-sequitur*[26] in his own positions to make one patient and sympathetic with the Supreme Court. Three hundred and fifty volumes written over a century and a half by nearly a hun-

24. 6 Barr 86 (Pa. 1847).
25. San Mateo County v. Southern Pacific R.R., 116 U.S. 138, 6 Sup. Ct. 317, 29 L. Ed. 589 (1885).
26. P.406: Madison's membership on the Committee that drafted the Preamble and the Common Defense and General Welfare Clause makes it "utterly impossible" to believe that the views he expressed in *Federalist, No. 41,* were "candid."

dred different justices, largely from the materials presented in the briefs and arguments, pretty obviously are a rich mine of "sophistry" and anachronism as well as of authority. Yet pretty plainly too these are occupational hazards. The difficulties are inherent in the enterprise, and they are doubly inherent in that of Crosskey. It is as easy to prove too much as too little.[27] It is easy to believe at first that what seems most vital to us today in Blackstone or Mansfield was known and recalled at the appropriate moment in the Convention; that those petitions referred to by Conkling bulked large in the framers' minds; that the word "reserved" in the Tenth Amendment was "a technical legal word . . . use[d] to indicate the creation of a *new* interest, *never previously existing as such,* in respect of *a thing conveyed,*"[28] and *not* as a synonym for "retained." It is easy, that is, until we get into the jungle of these mens' minds and times — until we discover that they were not always as preoccupied with these matters,[29] nor as consistent, as we assumed; that "reserved" for example, also is found used in many contexts as a synonym for "retained" in the discussions of the *proposed* Bill of Rights![30]

One reluctantly concludes therefore that Professor Crosskey's positions simply are too over-extended for his methods. As a lawyer he prefers to argue within the four corners of the document and its clauses. (p.1173). As an historian, willy-nilly, and one assaulting long-accepted positions, he has burdens of proof that cannot be met by inference or four-corners reasoning. Many of his arguments have been

27. After a highly circumstantial section (cc.18-19) intended to show that the Framers shared views of the common law and general jurisprudence predisposing them toward keeping a very tight rein on the state courts, we learn (p.610) that "some of these powers never have been enjoyed, in practice, by our national courts"; moreover, that the [Federalist] Judiciary Act of 1789 was "diabolically contrived" to limit the national jurisdiction and render the federal courts unpopular, and that "it is hard to doubt that these unwise features . . . were a result of maneuvers by the Anti-Federalist minority in Congress." (p.756). See also pp.554-55 *re* Full Faith and Credit Clause.

28. P.701; see *supra* note 7, *infra* note 30.

29. The disinterest that business lawyers and leadership seem to have taken in the draftsmanship of Section One of the Fourteenth Amendment, even while simultaneously appealing to Congress for relief and for expansion of the national jurisdiction, suggests that not everything clear to hindsight is equally clear to foresight. And the reason is clear enough when one gets into these men's correspondence and problems. Insurance leaders, for example, were so preoccupied with agency agreements, policy suits, incendiarism, etc., that most of them gave little or no thought to the opportunities that presently became so obvious and important. This apparent human blindness is one of the most heartening facts in life. Problems generally are simpler and nearer of solution than they appear — unless we begin refighting our whole constitutional history!

30. See, for example, THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 538, 549, 551 (Scott ed. 1894) (James Winthrop, *Agrippa Papers*); *id.* at 774 (James Wilson); *id.* at 870 (R. H. Lee). The same papers are printed in PAMPHLETS ON THE CONSTITUTION (Ford ed. 1888) and ESSAYS ON THE CONSTITUTION (Ford ed. 1892). (These usages of "reserved" were discovered incidentally, and no attempt has been made to verify or disprove Crosskey on such points).

advanced and rejected by the courts over the years.[31] They never were presented as a "unitary view," nor as a coherent system because the judicial process is not adapted to that method, nor need we especially regret the fact. Historiographically, therefore, Professor Crosskey's own book seems a powerful answer to his thesis.

III

The major jurisprudential premises of *Politics and the Constitution* are the same nice dichotomy that has served so many masters of forensics:

1. First and last, our Constitution is a legal document. It was drafted by superb lawyer-statesmen — men supreme in their mastery of law and expression. Their text is crystal clear, needs only to be taken literally and as a whole to make perfect sense. Constitutional meaning really is intrinsic. (p.390). Even the first section of the Fourteenth Amendment, which quite needlessly has befuddled the courts and which some students[32] lately have attempted to clarify by reference to its antislavery origins and backgrounds and to the prevalent natural rights usages and concepts, is "clear in itself, or clear when read in the light of the prior law." (p.1381). "[T]he 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." (*Ibid.*). Scholars and judges who ignore this cardinal fact do so at their peril. (*Ibid.*).

2. Words and texts of course do sometimes have to be construed. Here again the problem is one of arriving at the "true meaning" of texts and language, or the "true intent" of the framers. To do this we simply "delve into" American history and build up our "specialized dictionary of . . . eighteenth-century word-usages, and political and legal ideas . . . needed for a true understanding of the Constitution." (p.5). . . . Scholars and judges who ignore this cardinal fact also do so at their peril.[33]

These two complementary halves are joined neatly together in one sentence in Crosskey's introduction: throughout the long inquiry ahead, he assures, "the conclusive piece of evidence will be the Constitution itself, read as our specialized dictionary of words and ideas will require."[34] (p.12).

31. The Wilson Doctrine, for example; see *supra* note 4.

32. See TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610.

33. See *passim. Enumeratio unius est exclusio alterius.*

34. One is reminded of the late Professor Becker's words, An "argument subtle but clear, deriving the nature of an act from the intention of its makers, and the intention of its makers from the nature of the act. . . ." BECKER, THE EVE OF THE REVOLUTION 133 (1918).

The declared approach to fundamental law and its history thus is frankly, even sternly, ambivalent. Equally vital in their bearing and importance are several of Professor Crosskey's more detailed premises about the character and direction of early American government. Indeed, five of these more or less tacit assumptions deserve to be briefly noted:

1. The Constitutional Convention at Philadelphia was a fairly homogeneous group, and had behind it a reasonably united country. No immediate need exists, therefore, for analysis of the history and politics of that time. Economic and sectional differences of course did exist, but they assumed little real importance until later. Hence, they are secondary to the main business, which is to determine what the constitutional text itself means. After that has been done, these auxiliary matters can be considered.[35]

2. The "true meaning" of the Constitution is the meaning it had — avowed or not — to those strongly nationalist leaders, who as members of the Committees on Detail and Style, hammered out the final legal phraseology. These men — Rutledge, Wilson, Ellsworth, Randolph and Gorham of the Committee on Detail, and Johnson, Hamilton, Gouverneur Morris, Madison, and King, of the Committee on Style, together with James Wilson, (pp.673, 1335-36) consummate draftsmen and statesmen all — were more or less free agents, able to exercise their best judgment without detailed accounting to the people; and that is precisely what they did. Our problem today is to discover what their intended meanings were, even where not explicit, and that of course is the purpose of the eighteenth-century glossary and rules of construction.

3. Though the views of the remaining members of the Convention,[36] and of the people and ratifiers as such, are of little practical consequence today (p. 1381), the historic and legal meaning of the Constitution nevertheless was fixed, virtually for all time, save for processes of amendment and *correct* judicial construction, by the formal acts of approval and ratification.[37] Professor Crosskey thus takes both a pietistic and a somewhat cynical view of the constitutional contract. In fact, his scorn for the Jeffersonians obviously derives in part from their outrageous success. They soon came to regret some of their bargains, denied and haggled over others, yet still found overwhelming popular, congressional, and even judicial support!

4. The United States in 1787 were a nation well-suited to strong, highly centralized government. This premise, to be sure, is almost

35. See p.1174; also c.1.
36. Crosskey promises a full reexamination of the Convention debates and proceedings in future volumes.
37. *Cf. passim,* the criticism of judicial emasculation and "sophistry."

wholly implicit. It would seem to follow, however, from the reverence shown throughout for the extreme nationalist wing of the Convention.[38] These men were the true statesmen and knew exactly what was good for the country. The fact that they gave it this highly centralized government must mean that in their judgment and Professor Crosskey's, that government was well-suited to the needs and desires of the time.

5. The American Congress, which includes most of the ablest politicians in the land, has somehow been the unfortunate victim of a century and two-thirds of "politics" and of "sophistical" interpretations of its powers — many of them made or concurred in by its own members. Congress never has found its true place, nor risen to its full stature in our constitutional scheme, largely because of various "warping influences" — specifically judicial emasculation and misconstruction of congressional powers, combined with outrageous judicial favoritism for the states and an unwarranted assumption that the judiciary alone is the guarantor and guardian of popular rights.[39]

It is fairly evident there is enough historical criticism and political theory submerged in these premises to occupy doctoral candidates for years.[40] Premises 1-3 can be left for specialists in jurisprudence or to historians of the Revolutionary-Federalist periods.[41] Numbers 4 and 5, however, are of a different order. Premise 4, in particular, assumes positions quite at odds not only with sound administrative principles and practice, but with the common understanding of our early history and society.[42] Professor Crosskey evidently is convinced that his

38. Note, too, the premises in the sections on the Judiciary Acts of 1789 and 1801 (*e.g.*, pp.610-18, 754). *Cf.* WHITE, THE FEDERALISTS c.38 (1948), (especially p.483). See *infra* notes 44:45.

39. See Crosskey's dedication (p.v), and pp.4, 12-13 and c.2.

40. Since Professor Crosskey must steel himself to this prospect in any event — which is by no means unwelcome now that nearly every Justice's constitutional opinions are scissor-syllabied a dozen times or more by candidates on as many campuses even before the Justice has left the Bench — we suggest: "Crosskey on Constitutional Power" — *i.e.*, is power an entity, concrete, everlasting, self-renewing, or does it have to be articulated with "Politics" to give us constitutional government? Does the Republican form of Government Clause still mean what it meant in 1787? (pp.522-41). If so, then: "Crosskey on Political Questions," "Crosskey on Non-Enforceable Constitutional Provisions" (*i.e.*, just which Electoral College is our not-too-Alma-Mater today — that of 1787, or 1952?). Above all, "Crosskey on Undisclosed, Denied (p.712) and Unperceived Framer-Intent" — in short, "Crosskey's 'Conspiracy Theory'" and "Crosskey's Psycho-Analytical Interpretations. . . ." The possibilities are exciting and endless.

41. Meanwhile, see tenBroek on framer-intent and extrinsic aids, *supra* note 20. See also the following standard historical works: HART, THE AMERICAN PRESIDENCY IN ACTION: 1789 (1949); JENSEN, THE ARTICLES OF CONFEDERATION (1940); JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION (1950); NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION (1924); WHITE, THE FEDERALISTS (1948); WHITE, THE JEFFERSONIANS (1951); and the histories of Henry Adams, McMaster and Channing.

42. See especially WHITE, THE FEDERALISTS cc.1,15-16 (Post Office), cc.30-32 (frontier government and law enforcement), c.38 (communications) (1948) and similar chapters in WHITE, THE JEFFERSONIANS (1951).

eighteenth-century blueprint not only is adequate for our own day, but was as well (or even better) suited to the Fathers'. This means, of course, suited to the needs and interests of four million artisans, farmers and merchants, thinly scattered along a coastal fringe a thousand miles in length, frontiersmen moving constantly westward, hacking their way through hostile Indian territory, for the most part still without decent roads and bridges, restless, land-hungry men, fiercely individualist in thought, starting their federal administrative system virtually from scratch, as yet without adequate post or coinage, dependent on uncertain sea and river communications, men jealous of authority, rent by sectional conflicts and by state prejudices and rivalries over trade, war debts and western lands.[43]

It means, in concrete terms, that in 1787, when there was not even a turnpike between Philadelphia and Baltimore, or New York and Boston, and either journey still took from five to seven days, men nevertheless were thinking about running the country from Philadelphia. It means that while President Washington was fretting over official dispatches that had taken nearly sixty days to reach Governor Randolph in Richmond,[44] or General St. Clair on the Ohio,[45] and after Hamilton's whiskey excise had boomeranged and 15,000 reluctant militiamen had had to be dispatched on a two-months' march from Philadelphia to Pittsburgh to secure the national authority,[46] statesmen had courted more of this sort of thing.

Does Professor Crosskey really mean it? Does he really think a national contracts law was conceived — or conceivable — for such a society? Or perhaps merely for ours?

And does he believe that the Jeffersonian wave of 1800 was an unmitigated disaster for the American people? That it threw the nation off course, hampered conquest of the continent and creation of stable, enduring government?

Historical speculation is idle stuff. But national achievements are not. What happened following overturn of Hamilton's System? What accompanied the nefarious repeal of that statesmanlike Federalist Judiciary Act of 1801? (pp. 758-63).

It is a strange story of national misfortune: 1803. The Louisiana

43. See works cited *supra* note 41.

44. "On October 3, 1789, he [Washington] sent dispatches from New York to Governor Randolph of Virginia which failed to arrive until November 30." WHITE, THE FEDERALISTS 191 (1948), citing 30 WASHINGTON, WRITINGS 477-78.

45. St. Clair doubled as Indian Superintendent and as Governor of the whole Northwest Territory. In 1790 he had not a single clerk, managed Indian affairs without an office and with the help of two deputies and two interpreters. Marriage-, ferry-, tavern-, and Indian trader-licenses were a burden in themselves, and, together with land and tribal affairs, apparently account for the disinterest in a federal contracts law on the Ohio. See WHITE, THE FEDERALISTS cc. 30, 38 (1948).

46. See BALDWIN, WHISKEY REBELS (1939); 2 MCMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES 41, 190-203 (1928).

Purchase and the continent rounded out. 1805-07. Continued strong, though scarcely consistent Jeffersonian opposition to a federal program of roads and canals.[47] The Cumberland or National Road reluctantly commenced. Construction simple enough, but routing and location a nightmare of state-community rivalry, dictation and "logrolling": Maryland v. Pennsylvania; Uniontown v. Washington, Pennsylvania; Washington v. Wheeling; Wheeling v. Steubenville and so on across Ohio and Indiana to Vandalia, finally reached, 1838.[48] *Meanwhile,* 4000 miles of turnpikes completed in New York alone by 1821; 1800 more in Pennsylvania; and other states in proportion; by 1830 practically all main arteries turnpiked, wholly by state and private enterprise.[49]

1808. Secretary of the Treasury Gallatin's Report on Internal Improvements,[50] a farsighted plan for a $20,000,000 national system of canals and postroads to be built over a decade — destined only to gather dust in congressional committees. *Nevertheless,* 3326 miles of canals constructed by 1840, at a total cost of $125,000,000, all built by state and private capital.[51]

1817. Madison's puzzling flip-flop on federally-sponsored internal improvements: "With a degree of inconsistency extreme even for him," as Professor Crosskey puts it (p.234), the President vetoed the program he had initiated — the so-called "Bonus Bill," sponsored by, of all people, Calhoun, and one which was to have been financed from the $1,500,000 bonus received from the Bank of the United States for its charter. *Nevertheless,* the 364-mile, seven million dollar Erie Canal, built by New York State *alone* during the next eight years: and another 2000 miles constructed in the country during the Thirties, inspired by the New Yorkers' example.[52]

1822. President Monroe's veto of the Cumberland Road repairs bill.[53] 1830. President Jackson's veto of the Maysville Road appropriation, on grounds of inexpediency rather than defect of power (Jackson was impressed by bills for $106 millions for local improvements pending in Congress, with petitions and memorials received for another hun-

47. For the doctrinal and legislative history of the Internal Improvements controversy, see Corwin, *The Spending Power of Congress,* 36 HARV. L. REV. 548 (1923), reprinted in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 565 (1938).

48. YOUNG, POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD (1902), especially pp. 20-55.

49. See TAYLOR, THE TRANSPORTATION REVOLUTION, 1815-60 (1952) (an excellent, fully documented work); and DURRENBERGER, TURNPIKES (1931); LUXON, NILES' WEEKLY REGISTER (1947) (indexes and summarizes material in that magazine).

50. AMERICAN STATE PAPERS: MISCELLANEOUS I, 724 (1834); 3 McMASTERS, *op. cit. supra* note 46, at 473-75; WHITE, THE JEFFERSONIANS c.31 (1951).

51. TAYLOR, *op. cit. supra* note 49, at c.3.

52. *Ibid.*

53. 2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 142 (1904).

dred millions.).[54] In short, the Improvements half of Clay's "American System" challenged and aborted in his own state. *Yet,* a decade later, in 1840 — barely fifteen years after construction of the first railroad in England — 3300 miles of completed track in the United States, against 1800 for all Europe. The Philadelphia-Baltimore-New York trade rivalry — quickened of course by the Erie Canal — stoked state competition and established the national pattern: by 1838, $43 millions of state debts attributable to railroad subsidies, with county and municipal aid perhaps greater, and half the early railroads' original construction capital estimated to have come from public sources.[55]

The heart of it is simply that even Federalist Congresses didn't do the things Professor Crosskey's historical theory demands; because they couldn't do them.[56] Jeffersonian and Jacksonian Congresses didn't do them, and weren't permitted to do them, because leaders sensed it fortunately was unnecessary to do them.

Historical causation is quite as complex as speculation is futile. It can be very plausibly argued however, that Americans got these things so soon, and in such generous measure, *because* the thousands of state and local rivalries and drives were capitalized and given outlet directly, not dammed up or dragged before Congress to fester and exacerbate sectional and local feelings as had the Cumberland Road. It can be argued very logically that our whole "Transportation Revolution" of the pre-Civil War period would have been utterly stymied had it been left dependent on affirmative action by Congress. It can be argued that the Union stood in the end because economics knit and held the sections together, even as politics was throwing them apart.

The plain fact is that "States Rights" during the period 1790-1830 was not the sterile, negative, futilitarian dodge it so often is today, or so often later became where slavery and race problems were involved. This is dramatically shown in Professor Hartz' study of the internal improvements situation in Pennsylvania.[57] The popular notion that this period was one of *laissez-faire* and non-interference is here demolished as pure myth. State and local government activated

54. 2 *id.* at 482 (veto message of May 27, 1830); 2 *id.* at 97, 120 (annual message of Dec. 1, 1834).

55. TAYLOR, *op. cit. supra* note 49, at c.5, especially pp.92-96, and authorities there cited.

56. "The improvement of roads and bridges was within the grasp of the technical knowledge of the period. Time and money and resolution were required, and all were available. But the Federalist years ran their course with no action on a matter that some saw already to be a national problem." WHITE, THE FEDERALISTS 487 (1948). For the history of one of the main early and largely unsuccessful attempts at Federalist promotion (development of the Potomac), see SUNDERLIN, THE GREAT NATIONAL PROJECT: A HISTORY OF THE CHESAPEAKE AND OHIO CANAL (1946). This project dated from 1785, and George Washington was one of the original backers, yet *state* charters, *state* permission and *state* legislation were sought.

57. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT, PENNSYLVANIA, 1776-1860. (1948) (one of the most illuminating syntheses yet made of American constitutional and economic history).

the whole improvements program; constitutional theory and economic practice were rich, varied, and closely interwoven. It is gross falsification to presume that States Rightism *then* meant inaction and evasion. Federalism worked precisely because state policy was vigorous and affirmative. The states were willing and able to do the jobs, and did them, spectacularly.

Congress, on the other hand, was not able to do them, could not get down to them, did not know how to deal with them, had neither reason nor means to tackle them. Furthermore, Congress' deficiencies in these respects sprang less from constitutional scruples or uncertainty, than from sheer economic and political geography or arithmetic. There is no occasion whatever to make Jefferson, Madison and Jackson, or the Taney and Chase Courts, villains, or the American people their dupes or accomplices — least of all Congress the innocent victim — in order to explain this situation. Several examples will reveal why.

River steamboating gave Americans their first real taste of "Commerce among the States."[58] By 1820 seventy vessels were operating in the West alone; during the Thirties and Forties the steamboat dominated internal transport. Frightful boiler explosions occurred with monotonous regularity. *Gibbons v. Ogden*[59] of course had given Congress its cue in 1824. Clamor for congressional action began in that year. Bills were introduced and considered in every Congress. State and municipal regulation was a farce — unconstitutional by any test. Yet not until 1838 did Congress manage to pass even a token act, and that one of the strangest specimens ever: Some well-meaning provisions for lifeboats and unspecified navigation lights; for periodic inspections of boilers, hulls and machinery; yet with no requirement for hydrologic tests; with the choice of inspectors entrusted to the federal district judge, and with each inspector operating solely on his own, and dependent on fees for income.[60] Not until another fourteen years, and more than a hundred fatal explosions later, did Congress finally pass the Act of 1852 licensing engineers and pilots, and creating a coordinated, supervised inspection service.[61]

On its face, this evidence alone pretty strongly intimates that the historic flabbiness of the Commerce power, and indeed the want of attractive symmetry in the whole Congressional torso, is traceable to something besides the limitations and distortions of the Supreme Court's modern "interstate theory" of Commerce. Something more

58. See HUNTER, STEAMBOATS ON THE WESTERN RIVERS (1949), especially c.13, The Movement for Steamboat Regulation, an elaborately documented account that would enliven many class discussions of federal regulation and government and business.
59. 9 Wheat. 1, 6 L.Ed. 23 (U.S. 1824).
60. 5 STAT. 304-06 (1838).
61. 10 STAT. 61-75 (1852).

than Madisonian and judicial "sophistry," and changes in word meanings, is indicated here.

Samuel F. B. Morse, inventor of the telegraph, tried for years to interest Congress in his invention. A $30,000 appropriation for an experimental line from Washington to Baltimore demonstrated the feasibility and pointed up the relation to the postal system. Editors and statesmen urged federal action. Morse repeatedly offered his patents for about $100,000. Yet the crucial Baltimore-New York extension bill failed to pass the House in 1844. The Mexican War intervened. Private capital took over, lines crossed and crisscrossed the country, 1846-50, and spanned it, 1863. This was all done in a "wonderful era of methodless enthusiasm"[62] — and utter Congressional absentmindedness. Postmasters General continued unsuccessfully to urge Congressional purchase and development for a while in the Forties to protect the Government's original stake. Then as the local lines merged and systems consolidated, the public and editors began calling for effective regulation. "Postal power," "Commerce," "Commerce among the States," "Commerce between the States," "interstate Commerce" — all were adequate and all apparently were urged. Yet not until 1862 did Congress finally move; then simply to pass the Pacific Telegraph Act,[63] subsidizing the transcontinental line. By 1866, Western Union having emerged as the "nation's first great industrial monopoly and its largest corporation,"[64] Congress clarified rights across the public domain and secured the Government's right to purchase lines at appraised value. But not until many years and many hearings later was there any real national regulation.

Pretty evidently here too, something more than "warping influences" (pp. 12, 1174) and shifts in the meaning and judicial interpretations of "regulate," "Commerce," "among," "the States" is involved. No one will deny that the legislative and constitutional status of corporations is crucial today; and certainly the telegraph companies were among the earliest buttonholers and nosethumbers in Washington. But why pick on the Supreme Court, and its *Pensacola* doctrine (pp.41-45) — Professor Crosskey's only reference to the telegraph business! — as a cause and example of letting corporate business run riot? Why give the idea that the Federal Convention intended to regulate intrastate commerce *in 1787* when Congress could not, would not, and did not regulate even *inter*state commerce until *after 1860*?[65] Why present

62. See THOMPSON, WIRING A CONTINENT (1947) (another fine study deserving a place on administrative and constitutional law reading lists).
63. 12 STAT. 489-98 (1862).
64. THOMPSON, *op. cit. supra* note 62, at 442.
65. A useful aid in studying the later silences and inaction of Congress under the Commerce power over railroads is REGULATION OF INTERSTATE COMMERCE HISTORY OF BILLS AND RESOLUTIONS INTRODUCED IN CONGRESS . . . 1862-1911 (Briggs Comp. 1912); see also, HANEY, A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES (1908-1910).

these as matters of naked constitutional power, and hence of "judicial sophistry," when they obviously and mainly were matters of political expediency, sectional and corporate interest, rivalry and politics? Why divorce constitutional law from the history and circumstances that explain it? Why complain that Congress has been shortchanged judicially when so much of the trouble was and is that Congress is a representative body and there were and are a terribly lot of competing interests and viewpoints to represent? Why ignore, for example, that for years Congress was unable even to set a uniform gauge for railroads because each competing road naturally wanted its own — and this fight was no place for a congressman! That the same was true of failure to legislate on bridges across the Ohio at Wheeling[66] in the Fifties, and again across the Mississippi in the Sixties.[67] Congress gallantly bowed out of these fights, then eventually crowned the winners. It simply was the Cumberland Road situation over again, with the stakes higher and weapons sharper.

Our conclusion is simply that Professor Crosskey's brand of "Politics" is not the staple American article. Too exclusive a diet of case law and the *Annals,* and too little attention to news columns, has given him a jaundiced view of history, and a strange one indeed of Congress. Congress, in reality has been an indispensable national undertaker, but a very chary, reluctant *entrepreneur.* It seldom has needed to go looking for corpses or trouble. If Crosskey is not the first to tempt it, he at least is the first to make temptation retroactive. Whether that is an anachronism, and if so, whether it is ours or his, of course depends partly on whether one postulates a Living Constitutional Document or a dead one. Again and again, Crosskey pillories the "Living Document" school (pp.1171-72); but many, if obliged to refight these battles, will at least be obliged for that choice of weapons. Time has become a confused and confusing subject in this generation, since it now really is Space-Time. But for all that this still is a workaday world. To many, John Marshall's "We must never forget it is a *constitution* . . . we are expounding"[68] — "a Constitution meant to endure for ages to come" — seems a simpler, sounder, more heartening premise and approach than any appeal for constitutional mortmain, whether judicially or academically derived or enforced. "The earth belongs to the living," and so does the American Constitution.

Pretty clearly the ultimate, decisive limitation on national legislative power always has been geographic-political, not constitutional. It is inherent in the size of our country, in the economic and sectional

66. See Pennsylvania v. Wheeling and Belmont Bridge Co. 13 How. 518, 14 L. Ed. 249 (U.S. 1852), 18 How. 421, 15 L. Ed. 435 (U.S. 1856).

67. See 2 HANEY, *op. cit. supra* note 65, at c. 18. Correspondence of members of the 39th Congress contains many interesting letters from outraged constituents in the states bordering the Mississippi on the tardiness of national action.

68. McCulloch v. Maryland, 4 Wheat. 316, 406, 4 L. Ed. 579 (U.S. 1819).

diversity, in the competing interests and varying degrees of social and economic development. These are what really have given content to "Commerce" — and more often withheld it. What we need most is not another reraking of the case law and its "sophistries," but a real synthesis of the case law and the Congressional Silences. Professor Crosskey has been psychoanalysing the Fathers when he ought to have been showing us what really defeated Clay's American System and what made Webster's and Lincoln's tasks so difficult.

Such a synthesis would have provided a better footing, and a much more convincing reconstitution of the national authority than does so much of the *ex parte* brief we are here offered. For it *is* true beyond question that many factors did conspire during the early periods to limit and obscure national legislative powers — at times to the point of waste and atrophy. The prolonged stalemate over slavery, so often here stressed, was but one of them. Constitutional positions by themselves, however, seldom were consistently taken or maintained — nor can they be in any intricate or protracted social or constitutional controversy. Abolitionist theory was nationalist in its protection of civil rights; "states rights" on northern personal liberties laws, mixed on the problems inherent in fugitive slave rendition. And pro-slave theory was quite as tangled and inconsistent. Railroad lawyers took nationalist positions on federal aid for their own road; states rights on aid for their rivals! Professor Crosskey not only ignores these situations, but is ready to use virtually any legal argument, regardless of its origins, if the *doctrine itself* suits his immediate purpose. Indeed, the tactic of "using the devil as a character witness" probably never has been pushed farther than in these pages.[69]

Beard's "Economic Interpretations" of a generation ago[70] were welcome reactions from just this sort of sterile hyper-legalism and partisanship in constitutional history and interpretation. If Professor Crosskey now insists on another vacuum repack of our early case law and congressional argument we undoubtedly are in for another round of the corrective. Heaven help us: we barely have ceased re-fighting

69. See pp189, 223 [use of Winthrop's Anti-Federalist Agrippa papers on the scope of the Commerce power; and many similar uses in cc. 8, 9, 23 (pp. 683-85)]. One sometimes wonders what Professor Crosskey would think of an avowedly historical argument that made use of the American Liberty League lawyers' logic, citations and "scare talk," at times to beat down the more moderate constitutional positions taken by the Solicitor General, and always with the object of establishing a *super-New Deal* construction of national power. Yet essentially this is what we often have here. Is it history, or a parlor game?

70. BEARD, ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY (1915), THE RISE OF AMERICAN CIVILIZATION (1927) (Mary R. Beard, co-author).

Crosskey has a field day exposing Madison's apostasy and sponsorship of the Virginia and Kentucky Resolutions of 1798. No reference is found to the States' Rights resolutions of the Federalists in the Hartford Convention, 1815. "Bluffers"?

the Civil War, and now we are to go back to 1787! Boiler explosions meanwhile have been superseded by others. Minds like Professor Crosskey's simply are too few to waste on this business. What we need and want now is his version of *Paradise Regained.*

What, indeed, *is* a Constitution?[71] That is the basic question this book raises. Was and is the document a writ of mandate from the Committees on Detail and Style? Or was it — is it — something of an act of faith and trust and accommodation on the part of many groups and viewpoints through our whole history? Was it not a series of compromises *in pursuit* of union, an agreement at times intentionally vague and openended, a rough floor plan, not a perfected set of drawings — much less of architectural specifications — a process, in short, not simply a lawyers' document.

What it seems to me Professor Crosskey really is telling us is that constitutional government must always be effective government, and that our government today is not as effective as it once was, as it needs to be, as it can be. The world has changed; local action and local responsibility are not the sovereign rules they once were; too often they merely are excuses for inaction and evasion. More and more of our problems are national, but too many of our solutions are not. Where there are obvious advantages in uniformity and consistency, and where speed of travel and communication have destroyed the historic and geographic case for localism *per se,* and tend to leave it a mere fetish, we need to re-examine our premises and conclusions,[72] bring our theory up to date — just as the Fathers themselves did between 1776 and 1787.[73] As citizens we must face the fact that the Transportation and Communication Revolutions have erased state lines for many purposes. Willy-nilly, Congress is now the forum; it must act as responsibly and efficiently as state and local government once did. Given our traditions, and given the size and diversity of the United States, this creates tremendous challenges and obligations. Geography or not, we must think and act in national terms, exploiting more effectively the new means of communication, education and enlightenment. So basically, our crisis is not a crisis of constitutional power so much as it is one of public imagination, insight and action. Our problems have been pooled increasingly for two generations, but our solutions have not been, nor are they now.

Much of this is simply implicit in Professor Crosskey's argument. Could that be why it is so persuasive? The thought thus comes like a

71. *Cf.* Hamilton, *The Constitution—Apropos of Crosskey,* 21 U. OF CHI. L. REV. 79, 91-92 (1953).

72. For example, Agrippa's premise, 1788: "All human capacities are limited to a narrow space." THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 554 (Scott ed. 1894).

73. Corwin, *Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention,* 30 AM. HIST. REV. 511 (1925).

flash: And is *that* the explanation? Is *Politics and the Constitution* really a parable — a masterpiece of constitutional impressionism — a mirror and a sermon in the form of a brief? Stranger things have happened in the world of books and faith: Veblen, we know, delighted in professional *scherzos.* Tolstoi wrote *War and Peace* ostensibly to prove the *illusoriness* of free will. Job thought his afflictions unbearable and peculiarly his own. And Saint Thomas More wrote another book besides the *Dialogue of Heresies — Utopia.*

Like the Sphinx and Congress, Professor Crosskey speaks in riddles and shouts in silences.