Crosskey on "Politics and the Constitution"

For many years back, we of the Faculty have known we had inevitably to face the question, whenever meeting with alumni of recent years, "Has Professor Crosskey completed his book?" And we have grown to expect the smile of friendly doubt as to whether he would ever finish, which has always followed our enforced answer: "Not yet." Well, at last, this book, long eagerly awaited

"This remarkable work sweeps away acres of nonsense that have been written about the Constitution, and argues with an amplitude of evidence that the framers of the Constitution and the Bill of Rights believed they were setting up a thoroughly national government, with the states cast in a minor role. Professor Crosskey goes far toward proving that the Federal Convention intended to vest Congress with general (not enumerated) national legislative authority and to confer upon the federal courts a unified national administration of justice. He also shows how and why the original meaning has become obscured and distorted. His book should be in the hands of all students of the Constitution, whether jurists, lawyers, historians or political scientists. It is perhaps the most fertile commentary on that document since The Federalist papers of Madison, Hamilton and Jay."

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by Mr. Crosskey’s students, friends, and colleagues, is about to appear: it will be published by the University of Chicago Press on April 17.

As those of us who have read it know, this book is not just one more among the many poured out in a never ending flood by writers and publishers; it is, instead, one of those rare works whose publication is an intellectual event. Mr. Crosskey undertakes to prove that the Constitution of the United States and much, especially of the earlier part, of American constitutional history are misunderstood; that the "real" Constitution, as it was conceived by the Founding Fathers, has little similarity to that described by the theories of the Supreme Court, under which the country has long been operating.

According to Crosskey, it was the intention of the Fathers—subject to all the limitations upon particular matters that the Constitution contains—to set up a national government of general powers, legislative, executive, and judicial; in particular, it was their intention to make clear that this government would have power, not only to regulate the commerce moving between territory and territory of the several states, but to regulate all economic activity among the people of the states; and to establish a single supreme court for the country, with supremacy over all state courts in their administration of all kinds of law, whether written or unwritten, or state or national, in character. Only through a process of distortion, which set in at an early date, was the meaning of the Constitution perverted to what Americans have come to believe it means.

It all sounds incredible. Yet, when Professor Crosskey undertakes to prove that such were, indeed, the historical facts, he means proof in the sense of judicial proof, the kind of proof that will stand up in a court of law, that will be admitted to be presented to the jury, and that is apt to convince them beyond a reasonable doubt. To be sure, events which occurred a hundred-and-sixty-odd years ago cannot easily be proved today with absolute exactitude, in all cases; especially when they consist in the thought-processes of men. But the evidence that exists has been presented, and it is an impressive array, in points overwhelming, not only by its sheer mass, but by the sagacity with which it was discovered and the skill with which it is presented.

Professor Crosskey has gone to the sources, all the sources of which he could possibly think as likely to throw light upon the ideas of the men of 1787 and the product of their deliberations. Of course he has not found everything; but I venture to think it will be a hard task, indeed, to discover any letter, diary entry, newspaper article, pamphlet, or other relevant record of the time, which, if still available, Mr. Crosskey has not unearthed, analyzed, and evaluated, in its historical context, as it bears upon his subject. No wonder, then, that it has taken him so many years to complete these volumes.

Those of us who have known Bill Crosskey during the last fifteen years know what an amount of work and effort have gone into this work, how many wakeful nights have been involved, how many hours of poring
over the files of yellowed newspapers of bygone days, how many trips to the libraries of the East, how many revisions of text already drafted, and how many arguments with friends and colleagues. We also witnessed the periods of doubt and disgust, which, however, he always in the end overcame through scholarly persistence.

Now the volumes are before us, and we can follow in its completeness the argument and the evidence.

The fact which is presented as standing out as the principal cause of the transformation of the Constitution is the nonuser for decades by the federal government of those broad powers which were granted to it by the Constitution. The radical change of the country’s political climate that occurred almost immediately after the establishment of the new government placed the constitutional powers in the hands of men who not only did not wish to use them but were vitally interested in making their use impossible for the future. The driving force in transforming the Confederation of the thirteen states into a nation came, it will be remembered, from those who formed themselves into the Federalist party after the new government began to function. The principal strength of this group had lain from the beginning in the northern states, especially Massachusetts, where the powerful commercial groups were interested in establishing one national government that could do away with the barriers by which the several states had begun to impede internal trade and which could act for the nation as a whole in its commercial, financial, and political relationships with foreign countries. It was by a fortunate coincidence that, for a short, but decisive period, these northern interests happened to coincide with southern fears that the future development of the western lands of the South might be threatened by foreign powers, especially Spain, and that no effective military defense against such threats would be possible for the South alone. It was this temporary coincidence of interests that produced the Constitution. The ends of neither North nor South, as they were at that time, would have been served by a federal government so impotent as it was later made to appear by the proponents of the theory of states rights.

This theory and the concomitant notion that the federal government, as established by the Constitution, was one merely of a few enumerated powers was invented when a shift in the economic and political situation dampened the temporary southern fervor for a strong national government. The outbreak of revolution in France and the consequent successful slave rebellion in the island of Haiti filled southern slaveowners with alarming fears, not only for the economic bases of their existence, but for the very lives of themselves and their families. Simultaneously, the new prosperity which had begun to succeed the depression of the post-Revolution years, together with those rural resentments against urban financiers to which the Jeffersonians appealed successfully, had come to weaken the influence of the commercial groups of the North and the urgency of their demands. Twelve years after the establishment of the new government it was in the hands of those who were trying to reduce its powers to the minimum level by construction; and it was kept in the hands of such men, almost continuously, during the entire period up to the Civil War. During that long period, whatever governing there was, was done by the states; the powers of the nation under the Constitution were not used.

And after 1812 the same group dominated the Supreme Court. Marshall and Story were lone nationalists on a Court overwhelmingly opposed to their ideas. Marshall fought rear-guard actions, trying to preserve of the original design of the Constitution as much as could be saved for a possibly different future, for tactical reasons going along with his colleagues of the Court’s majority and even writing opinions in support of their views. In this view, he thus appears as anything but the bold innovator by whose inventive genius originally narrow federal powers were broadened at the expense of the states.

The total view of constitutional history, as it appears in Mr. Crosskey’s work, is even more startling. The picture that arises from the immense body of American historiography is that of a federal nation in which the powers of the central government have been kept from the outset within narrow limits, so narrow, indeed, that they had to be broadened by creative and not always ingenious interpretations, in the period of the Marshall Court, and much more so, in the period since the 1880’s, when the scope of governmental functions of the federal government was continuously increased to the dramatic climax of the New Deal and the Washington “centralizers” of the Fair Deal. Every step in this process was contested in the Supreme Court, which thus was thrust into the role of the final arbiter in problems not so much of law as of basic policy, and which sanctioned this steady expansion either by resorting to sophistry or in treating the Constitution as a “living document,” the choice of the term depending upon the observer’s own leanings. In the view of American history that Mr. Crosskey takes, this traditional view is wrong. Conceived at the outset as a grant of all powers necessary for the vigorous government of a unified nation, the Constitution was by sophistry narrowed down to a mere shadow of its original self; and so successful was this process that the knowledge of the Constitution’s original and true meaning was lost completely; and when the need for national governmental action became imperative after the Civil War, the bases for it could barely be found in the Constitution. It thus had to be squeezed and stretched in the most artificial ways to produce that ill-fitting patchwork of powers where intricacies have so often stood in the way of effective governmental action, which has resulted in so many baffling uncertainties, hardships, and injustices, and which would all be unnecessary if the Constitution were only understood in its original meaning. Most of our traditional constitutional law has accordingly been wrong,
and our traditional historiography mistaken, because both have unquestioningly accepted the falsification of the meaning of the Constitution which was brought about by the Jeffersonians for political ends and was gradually foisted onto the country as correct by them and their states-rights successors in the period before the Civil War.

These startling theses are sought to be proved by Professor Crosskey along two lines: a study of the Constitution as a meaningful document, and a study of the facts of American constitutional history. What, he asks, were the real issues, demands, and aspirations at the time of the Revolution? What were the problems developed during the period of Confederation? What did actually occur at the Federal Convention? What were the issues and the tactics of the struggle for ratification? What happened in the political sphere in the early years of government under the Constitution? How did the enemies of unified government produce their new theories about the meaning of the Constitution and by what means did they succeed in substituting them for the original meaning in the public mind so as finally to establish them as the unquestionably accepted meaning?

These broad questions are not fully discussed in the two volumes now before us. The full discussion has been reserved for future parts of the work, of which no more than a tempting foretaste is given now. In these future parts Professor Crosskey will also show the decisive role played in the falsification of the historical picture by James Madison, whose notes on the Federal Convention have generally been accepted as an absolutely accurate report of the proceedings with which they deal. Published more than fifty years after the event and nearly as long after Madison’s transformation from an ardent Federalist into a leading states-rights protagonist, these notes should have been treated with suspicion, as, indeed, they were when they first appeared. Professor Crosskey hints at evidence unearthed by him that indicates that such suspicions were not unwarranted.

But, as indicated, all this is for the future. In the two volumes before us now, Mr. Crosskey pursues his other line of proof, which is basically that of the lawyer, rather than the historian, although the latter’s tools are consistently employed in the performance of the former’s tasks.

The Constitution is a legal document. So, let us read it as lawyers, but—and this is Mr. Crosskey’s new proposal—not with the mind of a lawyer of the twelfth century or the late nineteenth century, but with the mind of an American lawyer of the late eighteenth century when the document was drawn. That suggestion, it turns out, cannot be followed easily. The ways of legal thought of the contemporaries of Blackstone and Mansfield were not precisely those of today. Their methods of craftsmanship were different; the political and legal universe within which they lived, strove, worked, and wrote was theirs, not ours. They had problems to solve the very existence of which has been forgotten; they could take many things for granted which we cannot, and much appeared to them problematical which we take for settled. Besides, and this turns out to be of special significance, their use of language was different from ours. Of course, they thought, discussed, and wrote in English, but it was the English of the 1780’s rather than that of later times, and that English had its own usages, in structure as well as in vocabulary. Most of the words of their vocabulary still belong to ours, and mostly they have preserved the same connotations of meaning; but not entirely. There have been shifts, first in nuances, then in a more massive way, but occurring so slowly, so imperceptibly, that they have escaped complete discovery, even by lexicographers, who, with all their meticulous effort, have been unable to record and articulate all the shifts of all the meanings of all the words of the language. Furthermore, basic ideas have shifted in the legal realm; for example, as to the status, makeup, and concrete content of the Common Law; and since Mr. Crosskey shows that the framers regarded the Common Law as being the standing national law, these shifts in legal ideas have an important bearing on what the Constitution means.

The systematic investigation of the eighteenth-century legal world and of the vocabulary of the American Constitution makers of that time is an essential element in the present part of Mr. Crosskey’s work, and, when read against the background of the old forgotten legal ideas and with an eighteenth-century vocabulary, the Constitution emerges as a new document, simple, plain, and consistent in all its parts, the carefully considered and well-formulated work of men who cannot have meant anything other than to establish the government of a nation endowed with all the powers necessary for effective government; for, when the document is so read, it cannot be denied that the framers did succeed in expressing their scheme in clear language, plainly understandable to everyone who cares to read it in their way rather than in that of later times.

In his endeavor to read the Constitution in the light of eighteenth-century usage, Mr. Crosskey starts with the Commerce Clause; with the power of Congress to “regulate Commerce among the several States.” It is taken as axiomatic today that these words refer to what has come to be known, more generally, as “interstate commerce”; i.e., activities which involve the movement of goods, persons, or intelligence from a point in one state to a point in another. If the clause were literally applied with that meaning, much present-day legislation would be constitutional only within a most narrowly limited field, if at all. To maintain the constitutionality of the federal anti-trust laws, labor laws, social security legislation, agricultural marketing laws, etc., it has therefore been necessary to stretch the supposed constitutional grant of power so as to extend to activities apt to “affect interstate commerce,” and then to stretch this new concept to its utmost limits, although the text of the Constitution, when read in the
traditional way, contains nothing which would seem to allow of even the first step in this stretching. But, strangely, there is no evidence that this usual reading was that of the framers or the early expounders of the Constitution. That to them the phrase must have conveyed a different meaning becomes clear when the late-eighteenth-century usage of the three keywords, "Commerce," "regulate," and "States," is investigated. Mr. Crosskey finds that "Commerce" meant not only buying and selling goods and transportation but all gainful activity of every kind. The verb "regulate" was synonymous with "gov ern." So, "to regulate commerce" simply meant to take all possible governmental measures in the economic sphere. And, as for "among the States," the key to its meaning is that "State," to the eighteenth-century mind, was a "noun of multitude," meaning "the people" who made up the "state"; a noun, in other words, comparable to "tribes" and "nations." And a power "to regulate Commerce among the several States" of America is therefore like a power "to regulate marriage among the several tribes" of some Indian nation. Would anyone understand such a power as limited to the regulation of intertribal marriages? Hardly; the natural meaning would be power to regulate marriage as to all those persons who belong to the Indian tribes. In just the same sense "commerce among the several States" meant, to the man of the eighteenth century, commerce carried on among the people of our American states, all these people, wherever they might be with relation to state lines. "The power to regulate Commerce among the several States" is, then, the power to regulate the internal economic life of the nation, just as the power to regulate commerce with foreign nations is that of governing the nation in its economic relationships with the world outside, and both together, in conjunction with that referring to the commerce with the Indian tribes, constitute the fulness of governmental power to deal with the economic life of the nation, internally and externally. The need for a government having just such power is then shown, by Mr. Crosskey, to have been emphasized by the men who paved the way for the Federal Convention, who composed the document in it, and who hailed it after its adoption, just as it was the butt of those who, early thereafter, began to attack the Constitution as having gone too far for their tastes.

For all these propositions Professor Crosskey adduces ample and convincing evidence. But, still, there remains a source of doubt. If, by the commerce clause, the federal government was given the fulness of power in the economic field, why is it then followed by that catalogue of special economic powers which we find in Section 8 of the First Article of the Constitution: the powers to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures; or the power to establish post offices and post roads, etc? This seeming contradiction is explained when we consider two facts: first, that it was no unusual thing for an eighteenth-century draftsman, in a contract, will, statute, ordinance, or other legal document, first to lay down a broad, general rule, and then to state those of its specific applications for which there existed some particular reason that they be spelled out explicitly. Mr. Crosskey shows a single, common, particular reason did, in fact, exist for the enumeration in Article 1, Section 8, of more than half the specific commercial and other governmental powers there enumerated: they were enumerated to make sure that they belonged to Congress rather than the President. In eighteenth-century England the powers in question had either been recognized as belonging to the Executive, or had been the subject of controversy between king and Parliament. The history of these powers and controversies is traced by Mr. Crosskey with meticulous care, just as he points out the reasons why it was necessary for the Fathers of the Constitution of the United States to state expressly that they were to belong to Congress, if Congress was to have them rather than the President. As for the other specifically enumerated powers of Congress, Mr. Crosskey shows the miscellaneous motives that led to the specific mention of all of these, and that these motives had nothing to do with securing power against the states.

Nothing in the text of Section 8, Article I, indicates that it was ever intended to draw the line between the powers of the federal government and those of the states. The clause says that: "The Congress shall have certain powers, i.e., those which it specifically enumerates, and, then, in its final clause, also the power "to make all laws which shall be necessary and proper for carrying into execution all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." This is a plain reference to powers, be it noted, that are vested by the Constitution, not in some special department or officer of the United States, but in the government as such. Where in the Constitution are there any such powers? There are powers vested in the President, the Senate, the Congress, or the judiciary, but where are there any powers vested in the government as such? So what is the meaning of this reference to the "other Powers" of "the Government," in Section 8 of Article I?

Orthodox constitutional interpretation has no answer to this question. It has consistently ignored this reference to the "other" powers vested in the government of the United States. But, are we allowed to ignore words in an instrument which, as Mr. Crosskey proves, was drafted with great care by experienced draftsmen? Certainly not unless no reference for these words can be found anywhere in the instrument. But such reference can be found; to wit, in the Preamble, which to an eighteenth-century lawyer meant more than a mere statement of policies devoid of direct legal significance. In an eighteenth-century statute, treaty, or ordinance the preamble was an essential part, often the most essential, not in the sense of simply guiding the judge in his interpretation and, even less, in any—at that time—unknown scrutiny of constitutionality, but as the expression of those basic
general principles which, stated bindingly in the most conspicuous place, were to be spelled out as to detail, where necessary, in the following parts of the instrument. When scrutinized in this light, it appears that the Preamble to the Constitution is a most carefully phrased statement of the purposes of government, as they had been analyzed by the writers of the age and which, when brought together, as they were in the Preamble, would refer to the fulness of powers of sovereign government.

Still, the doubter may ask, what about the Tenth Amendment? If the Constitution itself has failed with sufficient clarity to state that the federal government was to be one of enumerated powers, has that thought not found expression in the Amendment? Again we are admonished by Mr. Crosskey to read it, not with the mind of a citizen of the twentieth century, but with the mind of a contemporary of the men of 1789, and again it appears that the text does, not only not militate against, but strongly supports, Mr. Crosskey’s reading of the Constitution.

And so, taking up one part of the instrument after the other, the author demonstrates, with infinite care, pains, and patience, that they all make sense and fit together to make up a plain, simple, and efficient governmental scheme, in which the states were not to be obliterated but were to continue to function and to occupy an important role in the governmental structure of the country, but a scheme, nevertheless, under which this country was to be a nation, one and indivisible, and in which the national government was to be able to act in reference to all matters for which uniform regulation and uniform action should at any time be deemed advisable or necessary.

That so shortly after the adoption of the Constitution a political constellation was to arise which would render the exercise of these powers impossible could not be foreseen by its makers. Still less could they foresee that the meaning of their work was to be intentionally distorted by some of those who were in their very midst, and least of all could they foresee that the latter’s efforts would be successfully carried on for a period long enough to allow the original meaning of the Constitution to be forgotten and to disappear behind the imperceptibly changed façade of new word meanings and new basic conceptions about the common law. For those doubters who find it hard to believe in the fact of actual, intentional distortion of the Constitution, Mr. Crosskey produces irrefutable evidence; for example, with respect to the two ex-post-facto clauses of the Constitution.

For some of his background material we have to wait for the future parts of Mr. Crosskey’s work. But what he has presented in the two volumes of Politics and the Constitution in the History of the United States is impressive enough.

That the book will be attacked is certain. Its theses are too startling not to provoke resistance on the part of historians as well as on that of the practitioners of constitutional law. For the historians it will not be easy to refute Mr. Crosskey’s charge of uncritical and thus unscholarly acceptance, as historical truth, of a partisan view skilfully propagated under circumstances favorable to its adoption almost beyond belief.

For the constitutional life of the nation, the adoption of Professor Crosskey’s reading of the basic text would mean that we shake off as unnecessary ballast those tortured theories which constitutional lawyers found themselves compelled to invent if government was to fulfill elementary twentieth-century needs. There would also disappear those doctrines which have so often and so effectively been used by sectional groups to maintain the sacrosanctity of their tenets and interests. Certainly those interests which are still felt with vigor would find the means for effective defense under any constitutional scheme. Yet, stiff resistance must be expected against the acceptance of Mr. Crosskey’s thesis even as historically true. Assuming they were to be accepted as such, it might still be a long way toward their full actualization in constitutional life. A century and a half of error produce the normative effect of the factual. Yet, the meaning which the Founding Fathers meant to express in their work cannot be brushed aside entirely. It will serve as a powerful weapon in political argument, it will be resorted to in dissenting opinions of the Supreme Court, and it is bound to find, though probably, at first, only in scattered instances, expression in decisions of the Court. The readiness of the Court to resort to historical research in its interpretation of the Constitution and early federal legislation has been demonstrated by the use the Court made of Charles Warren’s investigation into the meaning of the thirty-fourth section of the first Judiciary Act. Perhaps it might be induced to revise that decision under the impact of Professor Crosskey’s convincing demonstration of the incompleteness and, consequently, the misleading nature of Warren’s argument. Perhaps, the Court will be induced to revise, or discard, that concept of interstate commerce which, since it became stereotyped and accepted, has resulted in so many unnecessary difficulties, as our author shows. Perhaps, the Court will revise its strange definition of the scope of maritime law which has resulted in so much hardship to injured workers and to employers. Perhaps, the impact of that rediscovered original meaning of the Constitution will bring about changes which cannot yet be foreseen. The book contains dynamite. It will be attacked, the truth of its historical conclusions will be doubted by many, one or the other detail may perhaps be disproved, but neglected it cannot be. Lawyers will use it in argument, judges will have to discuss it, historians will have to test it, politicians will draw upon it or inveigh against it, and many will read it for the sheer joy of reliving that decisive period of history which has been so colorfully, readably, and thrillingly re-created in this book.

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