

## *Krock on Crosskey: II*

*The extensive discussion of basic constitutional doctrine stemming from the publication of Professor William Winslow Crosskey's widely debated book, Politics and the Constitution in the History of the United States, continues unabated. By permission of the New York Times we reprint below a recent column concerning the Crosskey work by Arthur Krock, head of the Times' Washington Bureau.*

Until a President committed to "progressive moderation" as a political philosophy is replaced by another disciple of the New-Fair Deal no Supreme Court majority seems likely to adopt the basic view of the minority in the case known as *Adamson v. California*. This view was that the "privileges and immunities" clause of the Fourteenth Amendment made all the first eight amendments in the Bill of Rights enforceable in the states.

Justice Black spoke for himself and for Justices Douglas, Murphy and Rutledge in this constitutional construction—the largest minority possible on the court. So it was conceivable, since these four most regularly reflected the new Federalism of the Roosevelt-Truman Democrats, that this concept would become that of a majority if President Truman were succeeded by another adherent to New-Fair Deal thinking, with the power of filling vacancies in the court. The 1952 elections ended that prospect for the time being. But the concept is among several advanced by Prof. William Winslow Crosskey of the law faculty of the University of Chicago that are widely shared in the dominant wing of the Democratic party. And in witness of the fact that the minority opinion in *Adamson v. California* remains in the field of active controversy Crosskey and Prof. Charles Fairman, formerly of the Stanford University law faculty, contributed another chapter to the latest number of the *University of Chicago Law Review*.

Fundamentally at issue are the provisions in the Bill of Rights which have been held not to extend to all state cases the privilege of right to counsel and the immunity from unreasonable search and seizure which they confer. Of the 156 pages devoted to the subject Crosskey covered 143, which makes even the most contracted summary an impossibility in this space. But a citation of a few of his points can be attempted.

### THE "PURPOSE" OF CONGRESS

¶One of the doctrines in the *Dred Scott* decision, which decreed that no person of African descent could be a United States citizen, whether or not he was a citizen of a state, was that the privileges and immunities of the Constitution were conferred on citizens of the United States only. When Congress, with *Dred Scott* still in force, passed the Fourteenth Amendment its clear purpose in repeating the "privileges and immunities" lan-

guage of the decision was to overrule it and make good against the states, in favor of all citizens (including those of African descent), these particular guarantees.

¶The Fourteenth Amendment was also intended to wipe out the precisely contrary doctrine of *Barron v. Baltimore* (1833) with these words: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States," etc.

¶The evidence shows that Senator Howard of Michigan and Representative Bingham of Ohio, who drafted this language, not only designed it to overrule these Supreme Court doctrines. They also were reflecting ideas common to the Republican party of their day of what the Constitution, and specifically the Bill of Rights, really intended.

¶The fact that subsequently Congress and the state and federal courts reverted to the judicial interpretations which Congress, at the instance of Howard and Bingham, intended to overrule by constitutional amendment does not change that original purpose, expressed in unmistakable language to achieve it.

### WHAT "NEVER WAS"

In his brief rejoinder Fairman, who previously has challenged Crosskey at great length, described the latter's argument ironically as follows:

In the later years the old, original, peculiar ideas that gave [Crosskey's and Black's] meaning to the Fourteenth Amendment were forgotten. In the years of its youth the amendment's true meaning was ignored; people, even justices, were unaware of its "true tenor." There, I believe, we have the gist of the thing: Mr. Crosskey's Fourteenth Amendment is an amendment that never was.

The book by Crosskey that started the argument among lawyers and English professors of which the current dispute is only a part dealt extensively with research into what language meant in the eighteenth century when the Constitution was drafted, and how, in the author's opinion, Congress and the courts have mistaken its meaning. "Commerce," he wrote, meant to the drafters "all gainful employment by the people"; hence the later distinction between intrastate and interstate commerce is unconstitutional. "States" meant "the people within those borders" and not, as the Supreme Court has construed it, "the territory encompassed by each of them." Therefore, it was intended that Congress should have the power to regulate all gainful employment by people everywhere in the land. And "among," in "among the several states," did not mean "between" in 1789.

Crosskey's general conclusion was that Congress was designed to be paramount among the federal branches, and the Supreme Court was never intended to have a general power to review its Acts, only those dealing with the province specifically assigned to the court.

The forensic fire he lit has been growing in scope and heat ever since.