A MORE PERFECT UNION: THE CONSTITUTIONAL WORLD OF WILLIAM WINSLOW CROSSKEY

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"History sets us free and enables us to make up our minds dispassionately. . . ."

—Oliver Wendell Holmes, Jr.

In the manner of a craftsman removing the gloss of later generations from an old masterpiece, William Winslow Crosskey has sought in Politics and the Constitution to recapture the "historic and intended" meaning of the nation's organic charter. This is an extraordinary book, boldly original and revolutionary in its implications. If Crosskey is right—and he adduces an enormous mass of supporting evidence—the historical meaning of the Constitution is generally unknown and much that passes as Constitutional Law is in fact unconstitutional. Politics and the Constitution is moreover not merely a treatise on law; it is an absorbing account in history and government by a perceptive student of human affairs.

The central thesis of this work is that the scheme of power intended to be established by the Constitution between the nation and the states has been largely misunderstood. The first principle of orthodox constitutional law is that the Constitutional Convention intended to create a national government of limited, enumerated powers. But Crosskey contends the Constitution was designed to establish a national government completely empowered to attain all of the objects recited in the preamble. Congress was intended to have general, not merely a limited, legislative authority to pass all laws necessary and proper in its judgment for the general wel-

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1 Crosskey, Politics and the Constitution in the History of the United States (1953) (hereafter cited only by chapter or page).
fare and the common defense. The Supreme Court was intended to become the juridical head of a unified national system of administering justice, supreme in all matters over both federal and state courts. The President was granted general executive power to insure domestic tranquility. The states were to have a subordinate and limited role. Crosskey challenges one accepted dogma after another. He concludes that Congress was intended to possess authority to regulate intrastate commerce; that the Supreme Court was never intended to have power generally to declare acts of Congress unconstitutional; that nearly all of the Bill of Rights were originally intended to apply both to the nation and the states. Clauses whose meaning has hitherto been obscure—the Full Faith and Credit Clause; the time, place and manner provision; the Imports and Exports Clause; the ex post facto prohibitions—emerge in a new light. Historical events and personalities appear in a fresh perspective.

The problem he sets out to answer is this: How was the Constitution understood by an intelligent, well informed person when the document was drafted in 1787? The first principle of his methodology is Holmes’ oft-quoted rule of documentary interpretation: “We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English using them in the circumstances in which they were used.” He has sought to “accumulate in the mind of the reader the same apperceptive mass of factual knowledge which would have been possessed by an intelligent and well informed mind of 1787.” In order to do so, he made an exhaustive survey of the eighteenth century American newspapers, pamphlets, public documents, correspondence and the like. He has succeeded in vividly recreating the “circumstances” in which the Constitution was written—the politics and economics, the law and language of the time. The Constitution is written in the idiom of the eighteenth century. “One is prone to assume that, when words abide, meanings remain; yet some 15 decades of cultural change—and their restless impact upon language—lie between us and the words of the Constitution.” With painstaking care, Crosskey has reconstructed the locution of 1787. Applying the word-meanings of that period, he shows that the Constitution was an internally consistent, carefully constructed document.

If he is right, how have the many misconceptions arisen? The causes, in his view, are multiplex. Failure by Congress to exercise many of its powers in the early years of the government and the geographic inaccessibility of

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2 P. ii. 3 P. 12. 4 Hamilton and Adair, The Power to Govern 42(1937).
the Supreme Court led to a paucity of precedents. Deliberate distortion to facilitate attainment of desired political ends was one factor. Thus, the slavery issue led to the mutilation of one clause after another because the South feared a generally empowered national government dominated by Northerners. But the principal sources of misunderstanding have been fortuitous changes in legal and political ideas and particularly in the usage of certain key words.

Crosskey believes that orthodox historians have been misled, in part by failure to grasp eighteenth century idiom, and in part by uncritical acceptance of certain source material. The principal authority to whom many historians have traditionally turned for evidence respecting the meaning of the Constitution is James Madison. Crosskey shows Madison to be a highly unreliable witness who was not above wilful distortion. He believes that still other traditional sources—particularly The Federalist—have been misunderstood. In the manner of Descartes, Crosskey begins by suspending judgment on all accepted historical views and he independently re-examines all of the evidence respecting the history and evolution of the Constitution.

This article is intended to summarize briefly Crosskey’s principal conclusions and to indicate his main points of departure from orthodox constitutional law. To compress a closely-reasoned 1410-page treatise within the compass of a law review article inevitably results in serious omission. Crosskey spreads before the reader all of the evidence upon which he relies. He explores exhaustively every alternative hypothesis. Abstracted from context, his conclusions will strike the initiated in this field as startling and difficult to credit. It seems useful, nevertheless, to present this capsulated statement of Crosskey’s views with the thought that it may encourage examination of the work itself and furnish a helpful background for the discussions of the book in this number of the Review.

I

Crosskey begins by examining the most important of the non-military powers of Congress—its authority over commerce. He believes that once the intended plenary scope of the Commerce Clause is understood, the thesis that Congress was designed to have general legislative power will become more intelligible and credible. The power is granted in these terms: “The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The Supreme Court interprets the word “states” in this clause to mean the “territorial divisions of the country.” “Commerce . . .
among the several States" is thus "commerce from the territory of one of our states to that of another," an idea subsumed in the phrase "interstate commerce." Since all activity involving no movement beyond the borders of a single state is excluded, congressional power over the nation's business is theoretically incomplete.

In practice, Congress has enacted, and the Supreme Court has sustained, many laws relating to "intrastate" commerce. Congress, it is said, may act upon intrastate activity which "substantially affects" interstate commerce. But the theoretical "interstate" limitation is by no means academic, as recent Supreme Court cases attest. Because the power of Congress is thought to be incomplete, case after case arises in which the issue is whether national or state law is applicable. Parties are forced to gamble in prognosticating the proper law. Effective governmental regulation is often stymied. Moreover, under the interstate theory Congress is thought to lack the constitutional competence to enact nationwide uniform commercial law, applicable to all gainful activity, interstate and intrastate.

Yet, it is as true today as it was in 1801 that "to have a contract of a particular form negotiable in one State while it is not so in another, is nonsense." The interstate theory has also contributed to the absence of a national uniform corporations act. Regulation of vast industrial empires has been left in many particulars to the states, and, as Crosskey observes, some businessmen have played off one state against another, debasing corporate law in the process.

Restrictive interpretations of the commerce power by the Supreme Court in the early years of the New Deal spurred efforts to discover a different meaning for the clause. It was suggested that "among" meant to "concern more than one of" the several states, so that Congress could regulate such intra-state commerce as "concerned" more states than one.

Whether or not a particular activity was interstate commerce was a central issue in Lorain Journal Co. v. United States, 342 U.S. 143 (1951), a Sherman Act proceeding, and Alstate Const. Co. v. Durkin, 345 U.S. 13 (1953), a Fair Labor Standards Act suit. Examination of the Federal Digest will show that the question recurs continually.

Though uniform commercial law is widely desired, it is now clear that it cannot be secured through independent state action. The Uniform Sales Act, one of the basic uniform laws, was first proposed in 1906 but has been adopted in only thirty-four states, and even as between these, it is non-uniform. Unless enacted by Congress and made applicable to all gainful activity, interstate and intrastate, there is small likelihood that the new Uniform Commercial Code, proposed by the American Law Institute, will produce uniformity, since the text, as adopted, will doubtless vary from state to state, and it will in time be interpreted differently by the various state supreme courts.

Sullivan, History of Land Titles in Massachusetts 353 (1801), quoted in Crosskey, p. 36.

Stern, That Commerce Which Concerns More States Than One, 47 Harv. L. Rev. 1335 (1934).
In 1937, Hamilton and Adair published a short study presenting evidence that “commerce” in 1787 was the “name for the economic order” and the “only word which could catch up into a single comprehensive term all activities directly affecting the wealth of the nation.” But even if commerce comprehended the wages of labor and the business of mining, as Hamilton and Adair urged, the assumed interstate limitation would have precluded effective national regulation.

Crosskey’s conclusion, backed by exhaustive documentation, is that the word “States” in the Commerce Clause was understood when the Constitution was written to refer to the “people of the states” and the term “Commerce” comprehended “all gainful activity.” The clause was understood as a “simple and exhaustive catalogue of all the different kinds of commerce to which the people of the United States had access: commerce, that is, with the people of foreign nations, commerce with the people of the Indian tribes, and commerce among the people of the several states.” Congress was given the power, he concludes, to “govern generally every species of gainful activity carried on by Americans” and was intended to have a “complete, not a fragmentary power.” Limitations of space permit only an outline of the argument.

1) The word “States” occurs in the Commerce Clause between two nouns, “Nations” and “Tribes,” understood in 1787, as they are today, in many contexts, in a multitudinal sense. The “French nation” commonly means the people of France. To interpret “States,” as the Supreme Court does, to mean the “territory of a state” results in an unidiomatic meaning for “among,” which is ordinarily used to denote movement from one to another of a group of persons and not movement from one to another of a group of places. The most common meaning of “State” in 1787, was in the sense of the “people of a state,” a still legitimate, but not


10 P. 77.

11 The Commerce Clause argument comprises the first eight chapters of the book after the introduction. Chapter II is a statement of the evil practical consequences of the interstate theory; Chapter III is intended to prove the correct meaning of the word “States” in the Commerce Clause; and Chapters IV–IX are designed to establish that the phrase “To regulate Commerce” was understood before and after the federal convention in a comprehensive sense.

12 Crosskey gives this example (p. 51): “[I]t is possible to speak either of ‘a constant correspondence among the members of a Congressional committee during an adjournment of Congress,’ or of ‘a constant correspondence between the members’... Yet, because of the difference in usage between ‘between’ and ‘among,’ it would not be said that the correspondence carried on by such a committee would give rise to ‘an increase in the postal traffic among the different places where the members were.’ It would be said, instead, that their correspondence would give rise to ‘an increase in the postal traffic between those places.”
common, usage today. Crosskey has assembled a great many examples of such usage from the newspapers, treatises, correspondence, and the like of that period. The most striking evidence of word habits was the use of plural verbs and pronouns with the word "state," as in the sentences, "the state of New-York are able to supply themselves with a sufficient quantity of that useful article nails" or "the state of Pennsylvania have justly considered themselves as holding the balance between the southern and northern interests." "State," in the foregoing examples, which were common locution, clearly means the "people" of New York and Pennsylvania. Similarly, Alexander Hamilton and others interpreted the Election-of-Electors Clause, which provides that "each State shall appoint ['Electors'] in such Manner as the Legislature thereof may direct," as vesting the right of selecting presidential electors in the people. Eighteenth-century theories of politics emphasized the societal sense of the word. The "state" was thought to have originated from a compact among men living in a state of nature who determined to form themselves into "civil societies." 

2) "Commerce" in the Eighteenth Century had a variety of meanings. At first blush, its many meanings would seem to preclude a precise sense for the term in the Commerce Clause. But variations in the meaning of the same word without attendant confusion are a commonplace. Meaning depends upon context. To invoke Crosskey's example, the word "animal" in "animal kingdom," "animal hospitals," and "the birds and animals at the zoo," has a different meaning in each phrase, but the meaning is plain when the phrases are considered as wholes. As proof that the phrase "To regulate Commerce" had a single and well understood meaning, Crosskey examines in detail three principal items of evidence from the pre-federal convention period: (a) the widely-circulated Letters from a Farmer in Pennsylvania, published in 1767 by John Dickinson, a leading Revolutionary pamphleteer and later a prominent member of

12 P. 61; see pp. 60-65.
14 Pp. 67-68.
15 Crosskey concludes that no competent lawyer in 1787 would have read "Commerce among the several States" as "commerce between citizens of different states, only" (p. 80). He contrasts the language of the judiciary article which extends the judicial power "to Controversies . . . between Citizens of different States." Just as a power to regulate homicide among the Indian tribes would be understood to extend to inter-tribal and intra-tribal murders, so would a power to regulate commerce among the several states have been understood to apply to commerce between the citizens of each state considered singly as well as between citizens of different states. See also pp. 80-82, 214-15,
the Continental Congress and the Federal Convention;17 (b) certain extant papers of James Duane, delegate to the First Continental Congress from the Colony of New York, which relate to the proceedings in Congress leading to the adoption on October 14, 1774, of the Resolutions on the Rights and Grievances of the Colonies;18 (c) discussions in the newspapers of the country in 1777–1780 evoked by attempts to fix wages and prices, inflated by the Revolution, through uniform state action.19

As evidence that the commerce clause was understood in an inclusive sense at the time of adoption and in the early years of the government, Crosskey considers briefly the ratification campaign,20 and he examines in detail the 1791 discussion respecting the bill to establish the Bank of the United States,21 the internal improvement debates of 1817 and 1823,22 and the New York steamboat monopoly controversy.23

The bank bill excited extensive discussion of the Commerce Clause. Crosskey contrasts Madison's contention that the bill to incorporate the bank had nothing to do with trade with his assertion only a year earlier that Congress possessed the power "generally, to regulate the mode in which every species of business should be transacted."24 The bank bill was attacked on many grounds, but neither in the Congressional debates nor in the pamphlet and newspaper discussions of the time was there any suggestion that the bill was void as a commercial regulation because it pertained not only to foreign and interstate trade but to the state's internal or intrastate commerce as well.

It was not until 1824 that the first Commerce Clause case, Gibbons v.

17 C. V. Dickinson's usage in the "Letters" indicates clearly that he understood the phrase "to regulate trade" to comprehend all of the colonies' gainful activities. "Trade" and "commerce" were then interchangeable terms.

18 C. VI. Crosskey's analysis of the Duane papers is designed to demonstrate the incorrectness of the assumption held by a number of historians (see p. 1298 n. 1) that a power of "regulating trade" or "commerce" was understood in the Eighteenth Century to refer to "external commerce only." Crosskey explains that, though the phrase "to regulate commerce" covered all of the colonies' gainful activities, the politics of the Revolution which led the colonists to concede to Parliament only a power over external or foreign trade, required that all aspects of the commerce power be particularized in the Constitution.

19 C. VII. The newspaper discussions indicate that only a short time before the commerce clause was drawn there was a common understanding that a power to regulate commerce comprehended every branch of the internal business of the country. By way of example, a Massachusetts act which undertook to fix "the price of farming labour," "the price of the labour of mechanics and tradesmen," and "other labour"; prices of farm products, local manufactures and other activities was characterized in a Boston newspaper as a "legislative regulation of commerce." Opponents of wage and price legislation spoke of "the vain project of supporting the credit of fictitious wealth, by a general regulation of commerce."

20 Pp. 187–92. Detailed discussion of the ratification has been deferred to a future volume.

21 Pp. 192–228.

22 C. IX.

23 Ibid.

24 Pp. 193, 203.
Ogden,\textsuperscript{25} reached the Supreme Court. The conventional view is that Chief Justice Marshall there interpreted "commerce among the several states" to mean "inter-state commerce," a phrase Marshall did not employ. Three years earlier, in Cohens v. Virginia,\textsuperscript{26} Marshall had declared in sweeping terms that "[i]n all commercial regulations we are one and the same people," and that as to "all commercial regulations," the power of the national government "is complete."\textsuperscript{27} Crosskey suggests that Marshall was compelled by his states-rights colleagues on the Court to retreat in some measure from these views but that, read carefully, Gibbons v. Ogden does not support the interstate theory. His masterful analysis of that opinion should be read entire. Shortly after Gibbons v. Ogden, the highest court in New York of the time said that it was not thought in 1789 that "the coasting trade or commerce among the several states must consist of voyages from state to state only. That was the discovery of later times. [But] it was then thought that commerce among the states meant among the people of the states."\textsuperscript{28}

II

Distortions in the intended meaning of three provisions which limit state power—the Imports and Exports Clause,\textsuperscript{29} the prohibition of ex post facto laws,\textsuperscript{30} and the Contracts Clause—have, in Crosskey's view, obscured the true meaning of the Commerce Clause.

1) The accepted view is that the Imports and Exports Clause forbids the states from levying certain taxes upon goods brought from or destined to foreign countries.\textsuperscript{32} Crosskey shows that when the clause was drawn, "imports" and "exports" were understood to refer to the movement of goods from state to state as well as to the designation of things brought in

\textsuperscript{25} 9 Wheat. (U.S.) 208 (1824).

\textsuperscript{26} 6 Wheat. (U.S.) 264 (1821).

\textsuperscript{27} Pp. 413–414 (emphasis supplied).

\textsuperscript{28} North River Steamboat Co. v. Livingston, 1 Hopk. (N.Y. Ch.) 149 (1824). For Crosskey's discussion of the case, see pp. 268–80.

\textsuperscript{29} "No State shall, without the Consent of the Congress, lay, any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports and Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and the Control of the Congress." U.S. Const. Art. 1, § 10, ¶ 1.

\textsuperscript{30} U.S. Const., Art. 1, § 10, provides that "No State shall... pass any... ex post facto Law, ..." § 9 contains a similarly worded prohibition applicable to Congress.

\textsuperscript{31} U.S. Const., Art. 1, § 10: "No State shall... pass any... Law impairing the Obligation of Contracts, ..."

\textsuperscript{32} Woodruff v. Parham, 8 Wall. (U.S.) 123 (1868); Sonneborn Bros. v. Cureton, 262 U.S. 506, 510–11 (1923).
from abroad or sent to foreign nations. So, for example, a Rhode Island newspaper referred to flour "[J]ust [i]mported . . . from Philadelphia" and a Connecticut writer urged the manufacture of stockings in that state "for exportation to other States." Moreover, the "duties" which the clause prohibits comprehend all taxes, including retail excises and excepting only general property taxes. It follows that the clause was designed to forbid virtually all state exactions upon interstate and foreign imports and exports. The clause was so understood and applied by the Supreme Court until the Civil War.

The accepted theory for dealing with interstate tax barriers is among the most casuistic in all constitutional law. It is said that the Commerce Clause "by its own force created an area of trade free from interference by the States." The Court, in other words, relies upon the Commerce Clause to invalidate state taxes which interfere with the free flow of interstate trade. The structure of the Constitution, however, precludes the assumption that a grant of power to Congress by itself limits state power. Why, for example, when Congress was given power to coin money, was it deemed necessary expressly to prohibit the states from coining money? Moreover, if an implied state disability to tax interstate commerce flows from an assumed grant to Congress of an interstate commerce power, why, Crosskey asks, would not a comparable disability to tax foreign commerce spring from the grant to Congress of a power over "commerce with foreign nations," thereby rendering the Imports and Exports Clause, as presently interpreted, totally unnecessary? The Supreme Court's theory of an implied state disability to tax interstate commerce logically requires a corresponding interstate commerce power, thereby reinforcing misunderstanding concerning the Commerce Clause. Were Crosskey's views accepted, the Supreme Court would have a respectable intellectual footing from which to strike down state attempts, which have steadily increased in number, to erect tax systems obstructing the free flow of goods.

2) The Supreme Court interprets the Ex post facto Clauses as pro-

23 C.X.
24 P. 298.
25 See p. 314.
27 Justice Frankfurter, who is now one of the leading exponents of the negative implication doctrine, recognized before coming to the Court that "The conception that the mere grant of commerce power to Congress dislodged state power finds no expression" in "the Philadelphia Convention nor the discussions preceding ratification of its labors. . . ." Frankfurter, The Commerce Clause 12–13 (1937).
hibiting retroactive criminal statutes only. Crosskey demonstrates that when the Constitution was drawn the clauses were understood to forbid all retroactive laws, civil as well as criminal. The phrase occurred repeatedly in reference to the notorious state debtor-relief acts of the pre-convention period. The orthodox view is that various state laws retroactively altering the obligations of debtors were intended to be forbidden by the Contracts Clause. That clause is thus read to forbid state laws which "impair the obligation of contracts" previously formed. But if Crosskey's analysis of the Ex post facto Clause is correct, the Contracts Clause, as usually interpreted, would be superfluous; the subjects which the Contracts Clause is thought to cover would be within the prohibition of ex post facto civil laws, of which laws impairing the obligation of contracts previously formed would be an example. In Crosskey's view, the Contracts Clause means what it literally says: it prohibits the impairment of the obligation of contracts, whether the contracts were previously formed or not. By "obligation of contracts" was meant all of a state's laws relating to contracts, and any state law which subsequent to the date of the Constitution diminished the totality of enforceable obligations would violate the clause. By way of example, if before the Constitution a state did not have a statute of frauds rendering unenforceable oral agreements above a specified amount, the state could not subsequent to the Constitution pass such a law. On the other hand, a state law abolishing the requirements for consideration would not impair obligation of contracts; it would increase the quantum of enforceable obligations.

As customarily understood, the Contracts Clause, in Crosskey's phrase, is "undeniably a queer provision." The usual view is that the clause was inserted to forbid state acts deemed unfair. But if retrospective impairments were forbidden as unfair, why was the equally unfair retrospective creation of contracts not precluded? There is no provision corresponding to the Contracts Clause applicable to Congress. But if the impairment of

39 The decision of the Supreme Court in Calder v. Bull, 3 Dall. (U.S.) 386 (1798), restricting the clause to criminal matters was motivated, Crosskey suggests, by the desire to free Congress to enact a bankruptcy law that would afford relief to preexisting debtors, among whom were Robert Morris, "the financier" of the Revolution, who was then in debtor's prison, and James Wilson, an Associate Justice, who had been sent out on circuit to avoid imprisonment for debt. Opponents of the retroactive bankruptcy law argued that Congress was forbidden to pass such an act because of the Ex post facto Clause applicable to Congress. By narrowing the clause as applied to the states, the Court paved the way for federal bankruptcy relief to preexisting debtors. The decision was questioned for many years. Pp. 349–51.
41 C. XII.
contracts by the states is deemed unfair, why were not equally unfair impairments by Congress in interstate and foreign commerce forbidden? Crosskey's answer is that the Contracts Clause was inserted to make exclusive Congressional power over contracts and not to forbid the doing of unfair acts.

Crosskey's interpretation of the Contracts and Ex post facto Clauses furnishes evidence from the Constitution itself that the Commerce Clause was intended to be plenary. If, as he concludes, the states were forbidden by the Contracts Clause to restrict future intrastate contractual obligations, and if Congress possessed only interstate commerce power, as the Supreme Court holds, there would be no governmental agency, federal or state, with power over intrastate contracts. Such a gap in a scheme of governmental regulation is anomalous. It is conceivable that there was a blunder in draftsmanship. But Crosskey's documentation and the logical interrelationship of the provisions as he reads them is powerful proof that such was not the case. If the Commerce Clause is understood in a comprehensive sense, the problem vanishes.

III

Crosskey maintains, contrary to orthodox views, that Congress was intended to be vested with general legislative authority to pass all laws necessary and proper for the general welfare and the common defense. Moreover, as among the different branches of the government, Congress was intended to be supreme. The Eighteenth Century believed in legislative supremacy. As James Otis put it in 1764: "[T]here can be but one supreme power which is the legislative, to which all the rest are and must be subordinate."42

General legislative power resulted in the first instance from the preamble which is conventionally thought to be nothing but a "verbal flourish." He shows that the preamble was in fact carefully constructed, and that under eighteenth century rules of documentary interpretation there resulted from the preambular statement of the government's ob-

4 Otis, The Rights of the British Colonies Asserted and Proved 33 (1764). Compare 1 Bl. Comm. 49 (Cooley's 3d rev. ed., 1884): "... all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end."

Legislative supremacy was conferred in the Constitution, according to Crosskey, by the grant to Congress of "all" legislative power, U.S. Const., Art. 1, § 1; from the grant to Congress of a power to enact all laws necessary and proper for carrying into execution its own powers and all other powers vested in the government or any department thereof, ibid., § 8; and from the supremacy clause, ibid., Art. 6, § 2, which makes the laws, which only Congress can enact, a part of "the supreme Law of the Land," a status significantly not accorded acts of the President or decisions of the courts.
jects, powers fully adequate to attain all of those objects. All of the legislative aspects of such powers were vested in Congress.

A general, substantive power was granted in his view by the introductory clause to Section 8 of Article 1, which provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; ..." He interprets this clause as conferring a power to tax, a power to pay the debts, and a separate, substantive power to provide for the common defense and the general welfare. The Supreme Court construes this clause as if it read: "Congress shall have power to lay and collect taxes [in order] to pay the debts and provide for the common defense and general welfare."

General legislative power had still a third source, namely the relationship between Congress and the judiciary. In the 18th Century, a legislature was deemed to have the power to enact "rules of decision" for the courts in all cases. Crosskey concludes that contrary to long accepted views, the English common law as applicable to American conditions and the acts of Parliament in amendment thereof was the general, basic customary law of the American colonies in 1787. There was no separate, developed body of state common law; indeed there were no state law reports before 1789. Since this nationwide common law was one of the "Laws of the United States" within the meaning of Section 2 of the judiciary article, the jurisdiction of the federal courts would have extended to all cases arising under the general common law. The questions to which the common law relates are of course comprehensive in scope. And because the state courts were in Crosskey's view intended to be completely subordinate to the federal judiciary, as to which Congress had power to make "rules of decision," Congressional authority would have been commensurate with the plenitude of the common law. The premise that the common law was one of the laws of the United States is one of his central operative hypotheses; but he shows that the judicial rule-mak-

43 Pp. 374–79.  
44 Corwin, op. cit. supra note 40, at 28–29.  
44 Pp. 393–401.  
46 C. XIX.  
48 "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority. ..." U.S. Const. Art. 3, § 2. Though one of the "laws of the United States" within the meaning of the judiciary article, the common law, Crosskey concludes, was not part of the supreme law under the supremacy clause, i.e., the common law was not a law "which shall be made" by Congress. See note 71 infra. If the common law had been accorded a constitutional supremacy status, it would have been inalterable by state legislation.
ing power of Congress would exist in the same scope, whether this view were taken or not.

The oft-voiced objection to the thesis that Congress was granted a separate, substantive power to provide for the common defense and the general welfare is that the enumeration of powers in Section 8 of Article 1 would then be purposeless. The Tenth Amendment is advanced as decisive proof that Congress was not granted such authority. It thus becomes incumbent to establish that, even if Congress were given general legislative authority, the enumeration was nonetheless required, and the Tenth Amendment did not undo the Philadelphia Convention's labors. Crosskey traces the pre-convention history of each provision enumerated; he accounts even for the precise phrasing of many clauses; he pinpoints the unsatisfactory character of present-day explanations; and he demonstrates why it was necessary to enumerate each clause notwithstanding a general grant of legislative power.\(^4\)

The accepted theory is that the powers of Congress were enumerated in order to make plain which powers Congress should possess as against the states and, by negative implication, those powers it should not possess. In Crosskey's view, this factor was operative only in a few cases. The reasons for the enumeration were varied, but would have been intelligible to anyone in 1787 conversant with the politics and a "best seller" of that day, Blackstone's *Commentaries on the Laws of England.*

A general grant of executive, judicial, and legislative power to the president, the judiciary, and Congress, would not have sufficed, since the convention wished to transfer to Congress many powers which were of an executive character under the standing law—namely, the English common law, which was the law of the colonies. Most of the powers of Congress enumerated in Section 8 of Article 1 were powers which, under the common law, belonged to the King of England in his executive capacity, and if such powers had not been enumerated as powers of Congress, they would have been understood to belong under the Constitution to the chief executive. A comparison of Blackstone's chapter on the "Royal Prerogative" branch of the common law with the enumeration of powers in Section 8 is highly revealing: power after power transferred to Congress is described by Blackstone, almost in the exact terms employed in the Constitution, as a power of the king. Nearly all the military powers of Congress were of this order. The penetrating insight that the powers of Congress in Section 8 were primarily enumerated to allocate powers to

\(^{4}\) For Crosskey's explanation of the enumeration, see cc. XV-XVII.
Congress that would otherwise have belonged to the President enables Crosskey to account for nineteen of the twenty-nine powers therein enumerated.

Still other clauses in Section 8 were enumerated to express limitations upon Congress. By way of illustration, the grant of power to establish “a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies” was designed to blot out private or non-uniform acts of naturalization and bankruptcy. Other powers were enumerated for political reasons or for purpose of emphasis and clarification. Thus, enumeration of a power to tax would have been necessary notwithstanding a general grant of legislative authority because in the dispute with England a general regulatory power had always been distinguished from a power to tax, and for the further reason that absence of a taxing power was one of the chief defects of the Articles of Confederation. Still other powers were enumerated because they had belonged to the Continental Congress and nonenumeration in the Constitution would have permitted the argument that Congress was not to possess those powers.50

His analyses of two clauses—the Time, Place, and Manner Clause and the Full Faith and Credit proviso—are of unusual interest, both because of light shed on provisions whose meaning has hitherto been unknown and because of the intrinsic importance of the subjects. It is customarily thought that, subject to the Fifteenth and Nineteenth Amendments, the Constitution confides in the states the power to determine who shall vote for Senators and Representatives to Congress. But Congress is given power by Section 4 of Article 1 to prescribe the “Manner of holding Elections for Senators and Representatives.” Crosskey demonstrates that the word “Manner” employed in connection with elections was commonly understood in 1787 to refer to the identity or qualifications of voters.51 To determine the “Manner” of voting was to decide “who” would vote. The supporting evidence is extensive. Pursuant to this power, Congress could abolish state poll taxes or enact uniform nationwide legislation fixing age and other qualifications for participation in various state and federal elections.52

50 Crosskey’s explanation of the enumeration is not an arid legal analysis. His treatment of the Piracy Clause includes a short but absorbing survey of the punishment of sea bandits in England and the colonies from 1400 until 1787. Pp. 443–52. In explaining the reason for the enumeration of the Copyright Clause—to limit the power of Congress to grant perpetual copyrights—he discusses the history of the printing monopoly from its inception in Tudor England, and he traces the long struggle by authors to protect their intellectual product against exploitation. Pp. 477–86.

51 The subject of voting in the Constitution is discussed by Crosskey, pp. 522–41.

52 Congress was also given substantial power over state governments, according to Crosskey, by Article 4 which provides that the “United States shall guarantee to every state . . . a
Crosskey’s examination of the Full Faith and Credit Clause discloses eighteenth century notions of jurisprudence in advance of current thought. Section 1 of Article 4 provides that “Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.” This clause was intended, according to Crosskey, to enable establishment of a nationally uniform system of interstate conflict of law rules. By “public Acts” were meant the acts of the state legislature as distinguished from acts of the Courts and the executive, and, moreover, only “public” as contrasted with “private” legislative acts. “Judicial proceedings” referred to the judgments and decrees of state courts. “Records,” he shows, was the eighteenth century term for judicial precedents. Modernized, the clause would read: “Such effect shall be given in each state to the legislation, judicial precedents, and court judgments and decrees of every other state, as will answer, in every respect, to what is required by the rules and principles of the conflict of laws.” Contrary to Crosskey’s view, the Supreme Court holds that the “full faith and credit clause is not an inexorable or unqualified command.”

As a result, judgments do not of necessity have the same status in other states as in the state where rendered; there is apparently no requirement that a state give effect in an applicable case to the precedents of another state, since the Court does not appear to recognize the true meaning of “records”; and the statutes of another state are frequently displaced by the forum’s own law. Moreover, instead of nationwide uniformity, conflict rules are deemed to be part of the “local” law of each state.

What of the Tenth Amendment? It provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” “Delegated” is assumed to have been used in the sense of “vested” and “reserved” in the sense of “retained.” The amendment is thus thought to

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Republican form of Government, . . .” Republican government is representative government and the representative character of government depends upon a wide distribution of suffrage. Pp. 522–24. Pursuant to this clause, Congress would pass laws wiping out the “rotten boroughs” that exist in some states.


54 Pink v. A.A.A. Highway Express, 314 U.S. 201, 210 (1941).


56 Contrast, however, the analogous provision in Article II of the Articles of Confederation: “Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled.” (emphasis supplied) Crosskey shows that “reserved” was deliberately chosen for the Tenth Amendment in place of “retains” and that insertion in the Amend-
mean that the states retained all sovereign powers enjoyed by them under the Articles of Confederation, not vested in the national government, and not prohibited to them by the Constitution. But if Crosskey's analysis of the Constitution before the amendments is correct, this could not possibly be the correct interpretation of the Tenth Amendment, because the powers vested in the United States were general and compete, so that nothing would be left to be retained by the states. Further, there is the well known fact that no change in the original document was understood to be made by the amendment, which was intended to be only declaratory.

Here again error is said to have arisen because the clause is interpreted in light of twentieth instead of eighteenth century word meanings. The word "delegated," Crosskey states, was used in the sense of "absolutely parted with" or "vested exclusively in," a usage then common though obsolete today. "Reserved" was employed in the technical legal sense of the creation of a new interest never previously existing as such, as the reservation of a right of way in connection with the transfer of a fee simple estate. In other words, all the powers of government were transferred to the national government; from this grant certain powers were created de novo in the "states." The phrase "or to the people" is used in apposition to "states." Modernized, the clause would read: "The powers not vested exclusively in the United States by the Constitution nor prohibited by it to the state governments are reserved to the people of the states." Crosskey's views accord with those of James Kent, one of the leading early American law commentators, and Joseph Story. Except to the extent that the national powers were made exclusive and except for various express prohibitions, the state powers were not blotted out. The states were subordinated to the national government but a large area of concurrent power was preserved, subject always, however, to the supremacy of the national government. "So, if the Constitution were allowed to operate as the instrument was drawn, the American people could, through Congress, deal with any subject they wished, on a simple, straightforward, nationwide basis; and all other subjects, they could, in general, leave to the states to handle as the states might desire."

__57__ Pp. 690-97.

__58__ P. 1172.
Crosskey's conception of the intended scheme for administering justice and the Supreme Court's place in that system differs radically from accepted views. He concludes that the Supreme Court was designed to become the head of a unified national judicial system and that the Court was never intended to possess a general power to review acts of Congress.

The "new orthodoxy" is that the Supreme Court is supreme over all courts, federal and state, respecting questions arising under the federal Constitution, federal statutes, and treaties, but that in the interpretation of state statutes and the common law, the state courts are supreme. The Supreme Court has gone so far as to hold that it is constitutionally bound to follow the precedents on points of state law and common law by state intermediate appellate courts, and even by state trial courts. In subordinating itself to state courts, Crosskey believes that the Supreme Court has abdicated its position as a supreme tribunal. He shows:

1) That in 1805, the Supreme Court, in a diversity case, substituted its own interpretation of a state statute respecting title to real property for that of a state's highest court, and the Supreme Court's construction was thereafter followed.

2) The Supreme Court's opinion in 1812 that there is no federal common law of crimes was the end result of a cleverly contrived series of maneuvers by the anti-federalists related to the anti-sedition laws.

3) That there was a separate system of substantive equity administered by the federal courts in the early years of the government in which the federal courts denied substantive rights accorded by the states or granted substantive rights denied by state law, showing thereby that the federal courts did not follow state law.

Crosskey explains that the Supreme Court was given supreme appellate jurisdiction over "all" of the law in certain enumerated categories of cases; that all kinds of questions of law would in the normal course of events arise in such cases; and that the Court, in the exercise of its appellate jurisdiction, was to determine supremely and independently all of the

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69 Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
71 Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).
72 Huidesker's Lessee v. Douglass, 3 Cranch (U.S.) 1 (1805). For Crosskey's discussion of the case see C. XXIII.
73 United States v. Hudson and Goodwin, 7 Cranch (U.S.) 32 (1812).
74 Pp. 766-84.
75 Pp. 865-902.
questions in such cases, for if some questions of law in the enumerated cases could not be determined, the Court could not really decide the cases. Its rulings were to be binding upon all courts, federal and state. To illustrate, in a diversity case in a federal district court, there may be a question respecting the meaning of the Constitution, federal statutes, treaties, state constitution, state statutes, and state common law. The Supreme Court was intended to determine as it deemed appropriate the meaning of a state statute or the state common law rule if the Court chose to exercise its appellate jurisdiction in a case involving only these or other questions. If in a subsequent case, a state court in a dispute between two citizens of the state were to disregard the interpretation of a state statute by the Supreme Court, the state court’s action would present a case “arising under the Constitution,” one of the enumerated categories of federal jurisdiction. Refusal of the state court to follow the Supreme Court’s precedent, in other words, would raise a question as to what was meant by giving the Supreme Court its “supreme” “judicial” status and its “appellate jurisdiction” over certain categories of cases.

Crosskey’s attack on *Erie v. Tompkins* on both historical and pragmatic grounds is devastating. Were his views accepted there would be nationwide uniform common law; state statutes would be construed the same in all courts; and the Supreme Court would have the last word on all questions of law.

While the Court has failed to exercise the powers it was intended to enjoy, in asserting a general power to declare acts of Congress unconstitutional, it has exercised authority it was never intended to possess. The Court, he concludes, was intended to have authority to set aside all state statutes conflicting with the Constitution, but only such acts of Congress as invaded the duties confided to the judicial department by the Constitution. Thus, the Court could declare unconstitutional an act of Congress abolishing trial by jury in criminal cases but not a congressional ex post facto statute. The judiciary article and those sections of the Bill of Rights which relate primarily to activities of courts were the only provisions as to which the Court was to be free to disregard acts of Congress. In all other cases, the Court was to enforce the statute, even though the Court itself might deem the act forbidden by the Constitution. Crosskey shows that when the federal convention met there was not a single instance in which

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66 Crosskey adumbrates the manner in which the Supreme Court would enforce its precedents against state courts in c. XXI.

67 304 U.S. 64 (1938).

68 Pp. 916-34.

any American court had openly or successfully reversed a legislature's determination as to the nature of its powers, where the Court's own powers were not in issue. He has examined in detail every instance of alleged pre-convention judicial review. The draftsmanship of the Constitution does not support the conclusion that the Court was intended to be vested with a general power of judicial review. Indeed, as Crosskey points out, the structure of the Court militates against the conclusion that it was to protect the states against the national government. Thus, the number of Justices is not fixed by the Constitution so that the President and the Senate, the very agencies to be supervised, can obtain desired decisions by "packing" the Court. The Constitution does not provide that the Congress or the states shall be parties to a case in which a statute is challenged as invading state prerogatives and no time is fixed for promptly deciding such disputes—curious lacunae if protection of state rights was intended. Finally, the chief purpose for judicial review disappears if the powers of the national government are general and not limited.

Crosskey undermines completely the belief that general judicial review was a widely accepted or intended institution when the Constitution was adopted. Each branch of the government, he states, was intended to be

70 C. XXVIII.
71 Four clauses are traditionally relied upon to support the power of the Supreme Court to invalidate acts of Congress: (a) The grant of judicial power in Article 3. But this assumes that judicial power was generally understood in 1787 to include judicial review, a thesis Crosskey disproves, c. XXVII. (b) The provision in Article 3, § 2, that judicial power shall extend to "all Cases, in Law and Equity, arising under this Constitution..." But this begs the question; the court could decide questions arising "under [the] Constitution" without declaring acts of Congress unconstitutional. (c) The oath to support the Constitution taken by the justices. This also begs the question, since all executive and legislative officials take the oath, yet judicial review is not an incident of their offices. The oath to support the Constitution does not include a duty of judicial review unless that duty is part of the Constitution. (d) The Supremacy Clause, Article 6, which provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof shall be the supreme Law of the Land." "In pursuance of" in this clause is usually thought to mean "consistently with" so that statutes inconsistent with the document are deemed unconstitutional. Crosskey shows that "in pursuance of" was used in the sense of "in consequence of" or "in prosecution of." The Supremacy Clause, in other words, was designed to make a temporal distinction between "this Constitution" and the Articles of Confederation, and between "Laws which shall be made" and Laws already passed by the Continental Congress and the Common Law. Only "this Constitution" and future-made laws were given a supremacy status. That review of state legislation but not of Acts of Congress was intended is confirmed by the provision in the Supremacy Clause that "the Judges in every State shall be bound" by the Constitution, notwithstanding "any Thing... to the Contrary" in a state constitution or a state statute, while the Supreme Court and other federal courts were not declared similarly bound by the Constitution "anything in the Acts of Congress to the contrary notwithstanding." C. XXVIII.

72 For his discussion of Marbury v. Madison, 1 Cranch (U.S. )137 (1803), the first case to declare an act of Congress unconstitutional, see pp. 1035–46.
the judge of its own powers. If Congress transgressed one of its limitations, the people, not the courts, were to provide the check.

V

Crosskey throws new light on the intended relationship of government to civil rights. He has reconstructed the various stages in the draftsmanship of the Bill of Rights, and he concludes that except for the First Amendment, which is addressed in terms to Congress, and the appeals clause of the Seventh Amendment, limited in terms to Courts of the United States, the first eight amendments were originally intended to apply both to the states and the nation. Because of state-supported religious establishments in New England and the still-fresh memories of Shays' Rebellion and other disturbances, the First Amendment was made applicable to Congress only. But Congress was not prohibited from forbidding infringement by the states of the free exercise of religion or free speech.

In 1833 the Supreme Court held in Barron v. Baltimore, incorrectly in Crosskey's view, that the first eight amendments did not apply to the states. The purport of the Dred Scott decision in 1857, which held that Negroes could not be citizens of the United States, was that Negroes could enjoy no "privileges or immunities" whatever under the Constitution. These two cases were the relevant standing law when the Fourteenth Amendment was adopted. In providing that "All persons born or naturalized in the United States . . . are citizens of the United States," the amendment overruled Dred Scott. But under Barron v. Baltimore, the states remained free to infringe all of the rights of the newly-liberated Negroes covered by the first eight amendments. The provision in the Fourteenth amendment that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" was intended, in Crosskey's view, to make good as against the states the Bill of Rights in favor of all citizens, Negro and white. In short the Privileges and Immunities Clause overruled Barron v. Baltimore and Dred Scott.

The Equal Protection Clause of the Fourteenth Amendment was intended in his view to correct a deficiency in the so-called interstate Privileges and Immunities Clause in Article 4 of the Constitution. Each

73 Pp. 1056-82.
74 7 Pet. (U.S.) 243 (1833).
75 Dred Scott v. Sanford, 19 How. (U.S.) 393 (1857).
76 Art. 4, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."
state was required pursuant to that clause to accord citizens of another state the same general privileges accorded its own citizens as a group, but a state was free to create inequities among its own citizens. The new Negro citizens would have been unprotected against various discriminatory state laws. The Equal Protection Clause was intended to supplement the interstate Privileges and Immunities Clause by destroying this power. The clause is primarily designed to insure to each individual the right to have each state's law enforcement machinery as available in defense of his interests as in behalf of any other individual.

The Fifth Amendment provides that no person may be deprived of life, liberty, or property without due process of law. The Privileges and Immunities Clause of the Fourteenth Amendment made this prohibition good as against the states in favor of citizens. The Due Process Clause in the Fourteenth Amendment was intended to make good in favor of "any person," citizen or alien, the process guaranties of the Bill of Rights. The tests of "dueness," i.e., propriety of procedure, under the two Due Process Clauses, according to Crosskey, are threefold: (1) Is the procedure unforbidden by the Constitution? (2) If unforbidden, is it supported by applicable, i.e., 1787, common law precedents? (3) If not forbidden by the Constitution and not supported by common law precedent, is the procedure fair and reasonable?

Crosskey's views differ substantially from the doctrines now held by the Supreme Court. The Court gives virtually no force to the Privileges and Immunities Clause of the amendment; in effect, that clause is a dead letter. Some but not all the provisions of the Bill of Rights have been incorporated into the Due Process Clause and thereby made good as against the states. Procedural and substantive rights have been subsumed indiscriminately. The Equal Protection Clause is deemed to be a license to review the reasonableness of state legislative classifications of all kinds.

Crosskey is the first writer to piece together the much-mooted Four-

80 Ibid.
82 See Palko v. Connecticut, 302 U.S. 319, 323 (1937); Adamson v. California, 332 U.S. 46 (1947). The most important right not "incorporated" is the Sixth Amendment's guarantee of the assistance of counsel in state criminal, non-capital cases.
teenth Amendment as a symmetrical, logical whole and to account for the relationship of all its various provisions to the antecedent law.

VI

Apart from its intrinsic importance as a contribution to American history, what difference does Crosskey’s work make? Doctrinally Crosskey and the Supreme Court are far apart; but the end results are in many cases the same. Acceptance of Crosskey’s views would, however, obliterate a great many useless technicalities; it would vastly simplify our law and government. The Commerce Clause, for example, has been interpreted by the Supreme Court to cover nearly all of the nation’s business. Straightforward recognition that the clause comprehended all gainful activity among the people of the states would not, therefore, be a radical innovation, and yet it would close a troublesome gap which produces endless jurisdictional strife and which prevents badly needed unification of the nation’s commercial law. Similarly, Crosskey’s interpretation of the Full Faith and Credit Clause would not touch off violent controversy if accepted; to the contrary, uniform conflict of laws rules would be welcomed in most quarters as a means of eliminating needless legal complexity. Other views advanced by Crosskey—his theory of judicial review and his interpretation of the Imports and Exports and the Contracts Clauses, for example—would not find ready acceptance.

In one sense, it is true, as Hughes observed, that “the Constitution is what the judges say it is.” But historical research has not been without effect upon the Supreme Court. Charles Warren’s investigation into the historical meaning of the judiciary article influenced the decision in *Erie v. Tompkins* when the Supreme Court confessed that it had been acting unconstitutionally for ninety-six years. Only recently, the Court deferred decision in the school segregation cases pending research into the historical meaning of the Fourteenth Amendment. If he has done nothing else, Crosskey has demonstrated that many of the anachronistic doctrines of the Supreme Court are not legally and logically compelled by the words of the Constitution itself. It is a striking paradox that the historical meaning should be shown to permit a more flexible, simpler

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83 Justice Frankfurter has reminded us, however, that the constitutional document, and not the decisions of the Court, is the “ultimate touchstone of constitutionality.” *Graves v. O’Keefe*, 306 U.S. 466, 491–92 (1939).


85 304 U.S. 64, 72–73 (1938).

scheme of government than that which has resulted from viewing the Constitution as a "living document."

Because he so searchingly questions so many deeply felt beliefs, accepted institutions, and historical heroes, Crosskey's views are certain to encounter great resistance. His refusal to accept authority and repetition as the test of the truth and his insistence upon reexamining accepted premises are in the best tradition of scientific inquiry. *Politics and the Constitution* warrants wide and thoughtful attention. It may have a profound and lasting impact on American law.