THE SUPREME COURT AND THE CONSTITUTION. AL LIMITATIONS ON STATE GOVERN- MENTAL AUTHORITY

CHARLES FAIRMAN†

MR. CROSSKEY ASKS: What kind of government did the constitutional Fathers intend for these United States?" This, the publisher announces, is "what the book is about":—it is an inquiry to find what the founders *intended*. The legend, however, inscribed upon each volume is this sentence from Justice Holmes' essay on "The Theory of Legal Interpretation":¹ "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." This is "a different thing," Holmes wrote, from an inquiry "to discover the particular intent of the individual. . . ." And Mr. Crosskey's parting shot is an affirmation that the ultimate question in constitutional interpretation is, not what the framers meant, not what the ratifying bodies understood, but what the text means.

What the authors "intended," and "what those words would mean," are not identical conceptions, even though they may, happily, lead to a single result. (Nor are they the only considerations that may enter into constitutional interpretation.) It is one thing for the state, through its judges, to say that an offeror will not be permitted to introduce parol evidence to show what he meant by the words of his offer. It is a very different thing for Mr. Crosskey, or any other among us, to insist that the rules he announces must govern the construction of the constitution by which the nation lives—no matter what the framers were seeking to accomplish or what the members of the ratifying bodies understood or what the people generally were saying and hearing and thinking about the matter. This would mean that some rule of constitutional construction—whose rule?—injected *ab extra*, was the supreme law of the land. The Constitution framed in 1787, and the amendments proposed from time to time, sprang from men's sense of need; they have been discussed at large, and popular reaction has had much to do with how members of the responsible

† Nagel Professor of Constitutional Law and Political Science, School of Law, Washington University.

¹ 12 Harv. L. Rev. 417 (1899).

bodies acted about them. Presently a provision of the fundamental law comes to be applied to new situations involving the happiness of generations who had no share in its adoption. Surely the process calls for a wisdom and philosophy too great to be compressed in one dogmatic formula, such as "what the text means" or "what the framers intended." We might, perhaps, find general agreement that in a given instance the judges reached a conclusion that gave lasting satisfaction, even though we might be unable to reach any general agreement on universal rules of decision.

It seems well, however, in this review of the concluding part of Mr. Crosskey's massive work, at this point merely to note a reservation on behalf of the public whose Constitution he reinterprets. Even if the historical facts were in truth exactly as he now finds them to have been, and supposing that no other relevant evidence appears that he overlooked or omitted to introduce—even so, there would be very serious questions about making his conclusions the present rule of action. Let us note and pass on. In the end, no doubt, the merit of Mr. Crosskey's work will be governed by the integrity of his historical investigation. If the views he expresses prove well founded—with the consequence that the Justices (excepting Justice Harlan) are found guilty of the laxness, ineptitude, and deliberate dereliction with which he charges them—then it will be time to consider what we now ought to do about it. The onus is, of course, upon the mover; Mr. Crosskey, most commendably, devoted "more than thirteen years of unremitting research" to making his case. As the publisher says, "The argument is stated boldly, eloquently, and with an abundance of new historical evidence." All that is true; the scope and penetration of the inquiry, and the tightness with which he has made his contentions fit together, reflects high professional ability. But the question is: does the proof stand up?

No reviewer, hastening to share in a symposium to greet the appearance of this work, can possibly examine all the evidence collected in so large an undertaking, or evaluate all the conclusions at which the author arrives. Superficial and noncommittal compliment would be an unworthy response to the author's endeavor. It would be imprudent to give an accommodation indorsement. It seemed most useful, in reviewing Part V, "The Supreme Court and the Constitutional Limitations on State Governmental Authority," to select some one important proposition and to poke about its underpinnings.

Part V makes two main contentions. (1) *Barron v. Baltimore*² was "in-

² 7 Pet. (U.S.) 243 (1833).

correctly decided";³ it was "without any warrant at all";⁴ Marshall's opinion "appears to have been a sham."⁵ Contrary to what was held in that case, the letter of the federal Bill of Rights, and the "inherent probability" as to what the men of the First Congress intended when they proposed it, require the conclusion that the first eight Amendments—except the First Amendment, which reads "Congress shall make no law . . .," and the latter part of the Seventh Amendment, the guaranty of the common law jury, where it speaks of "*any court of the United States*"—that aside from these exceptions the federal Bill of Rights is a limitation on state as well as on federal action. (2) The first section of the Fourteenth Amendment—privileges and immunities, due process, equal protection—is "clear in itself, or clear when read in the light of the prior law."⁶ In the privileges and immunities clause,

The whole iniquitous doctrine of *Barron v. Baltimore* was, then, apparently intended to be wiped out, both as to the First Amendment, in reference to which, we have seen, the doctrine was justified, and as to all the others of the first eight amendments, in reference to which, we have also seen, it was not. So, the whole "Bill of Rights"—as it is sometimes called—was made valid, and available, by this clause of the amendment, *in favor of all "citizens,"* as against the states.⁷

At Mr. Crosskey's hands, "the whole first section of the Fourteenth Amendment falls into good order as a careful, skilful, and consistent example of the drafting art."⁸ Even as to the due process clause, so troublesome to other minds, Mr. Crosskey arrives at conclusions "inferable with certainty."⁹ "So read, *and read as a whole*, the first section of the Fourteenth Amendment seems crystal clear; and since it has long been established that the framers of the amendment *intended* it to mean all these things which, we have seen, it plainly does, it is difficult to see how the Supreme Court can possibly have failed to understand. . . ."¹⁰ "So, there is, of the whole first section, only the clause forbidding state 'abridgments' of 'privileges or immunities of citizens of the United States' that could, by any stretch of the imagination, give any essential trouble; and with the assistance to be derived from the rest of the Constitution and its amendments, and from an ordinary English dictionary, its meaning, also, could very easily have been made sufficiently clear."¹¹ "So, what the Supreme

³ Crosskey, *Politics and the Constitution in the History of the United States* 1076 (1953) (hereafter cited only by page).

⁴ P. 1056.

⁸ P. 1102.

⁵ P. 1081.

⁹ P. 1108.

⁶ P. 1381.

¹⁰ Pp. 1116-17.

⁷ P. 1091.

¹¹ P. 1117.

Court has done, under this lucidly drawn provision of the document it is sworn to uphold, seems remarkable in the highest degree."¹² Of this we may be sure: either the Justices from 1873¹³ on down—the whole lot of them, except Harlan, J.—or else Mr. Crosskey, will be found to have fallen into error that is "remarkable in the highest degree."

It seemed wise to select the former of these two main contentions—the relatively small point as to whether the first eight Amendments (with the exceptions Mr. Crosskey noted) were originally designed as limitations on state as well as on federal action. And to avoid arguments about admissibility and relevance—in view of the problem noted above as to canons of constitutional construction—we will do well to conform to Mr. Crosskey's practice. He follows the legislative history of the proposed Amendments, so we may do the same. He notes what amending was desired in one of the state conventions called to act upon the original Constitution, so we too may refer to any state convention. In tracing "the long-neglected history of the framing of the initial amendments," the author has resort to what "was recorded contemporaneously in the country's newspaper press and other publications of the time."¹⁴ He arrives at an

obvious inference . . . that the First Congress *intended* all the prohibitions in the initial amendments, that are cast in literally general terms, to apply to the States as well as to the nation. . . . Any man of the time who read the current newspaper accounts of Congress' proceedings must, then, certainly have concluded that the literal generality of these amendments was intended; and since it is reasonable to suppose the leaders—and, particularly, the anti-nationalist leaders—in the several states, read the accounts of Congress' proceedings religiously, the further inference follows that the legislatures of the states, when they ratified the first eight amendments, must have been aware that, within the scope of all those amendments, or parts thereof, which were expressed unrestrainedly in the passive voice, or in some other literally general form, they were ratifying limitations, not only on the nation, but on the state governments as well.¹⁵

From this passage we learn much as to what is admissible and relevant according to the author's practice. Since we may seek to infer what members of the First Congress intended, we may show what any member understood to be the effect of their action. What was understood by the country may be considered. What the legislatures were aware of, when they voted on ratification, is evidently material.

"So, it is not in any way strange," continues Mr. Crosskey, "that good lawyers in the early days . . . were of the opinion, before the Supreme

¹² P. 1118.

¹³ The date of the Slaughter-House Cases, 16 Wall. (U.S.) 36 (Dec., 1872).

¹⁴ P. 1066.

¹⁵ Pp. 1075-76.

Court's decision of *Barron v. Baltimore* had been handed down, that all such parts of the first eight amendments did apply, *in accordance with their plain letter*, to all governmental action, whether by the nation or by the separate states."¹⁶ So it must be permissible to cite good lawyers, on *whichever* side their opinions may lie. And if it is pertinent to consider what some judges *may appear to have thought* prior to *Barron v. Baltimore*, then certainly what *other* judges *thought and decided* should be let in too. All this preliminary wariness about the rules of evidence is in order, because, remember, Mr. Crosskey, at the first and at the last, has warned us, what the authors (or the ratifiers) meant is not the question; it is what the text means that counts. What others have found obscure, Mr. Crosskey may suddenly pronounce crystal clear, so that all aids to interpretation are cut off. Or where, on the other hand, something has indeed seemed crystal clear, "the eighteenth century constructionary rules"¹⁷ may suddenly be invoked to impose a different meaning. He who would keep up with Mr. Crosskey's argument would better be sharp.

I

On June 8, 1789, James Madison brought up in the House of Representatives the alleged need for a Bill of Rights.¹⁸ He proposed various amendments, notably the following:¹⁹

Insert in Article I, section 9, certain clauses, on—

- religious liberty
- freedom of speech and press
- peaceable assembly and petition
- right to keep and bear arms
- no soldier to be quartered . . .
- no double jeopardy
- no compulsory self-incrimination
- due process of law
- no taking without just compensation
- no excessive bail or fines, nor cruel or unusual punishments
- no unreasonable search or seizure
- in criminal prosecutions, a speedy and public trial; the right to be informed of the nature of the accusation, to be confronted, to have compulsory process, and to have the assistance of counsel.

Insert in Article III, section 2.

trial by jury

"in all crimes punishable with loss of life or member," grand jury indictment.

Insert in Article I, section 10 [No State shall . . .]

violate the equal rights of conscience

¹⁶ P. 1076.

¹⁸ 1 Annals Cong. 424 (1834).

¹⁷ P. 1064.

¹⁹ Ibid., at 434-35.

or the freedom of the press
or the trial by jury in criminal cases.

The first and second of these enumerations would limit the United States. The third list was to limit state action.

Debating and voting, in the House and then in the Senate, produced changes—how fundamental they were is the question. It was decided to add the amendments at the end of the Constitution—not to insert them in the original text. Thus the labels, I 9, III 2, I 10, were lost. The Senate voted to strike out the amendment under I 10 above: the limitations on the states. But in the end the proposals emerged in the form “*Congress shall make no law respecting an establishment of religion . . .*” while the others became what Mr. Crosskey calls “unrestrained passive-voice prohibitions”—“the right to keep and bear arms shall not be infringed,” etc. So, he concludes, only the First Amendment is limited to Congress; the others operate generally upon state and national governments (except the latter portion of the Seventh Amendment, which speaks of “any Court of the United States”). Mr. Crosskey argues that, when one really understands the circumstances, “the inherent probabilities at the time”²⁰ point to the conclusion that the Congress desired to limit the states as well as the national government. It manifestly follows, “under the eighteenth-century constructionary rules,” that the words of the Amendments should be given “their full literal force”²¹ and be read against the states.

The reviewer has not had sufficient time to study the legislative history as he would insist upon doing before he gave a firm opinion on this matter about which Mr. Crosskey is so very certain. But Chancellor Walworth, in the New York Court of Errors in 1831, made a careful study of the legislative history, and reached the opposite conclusion.²² Now Mr. Crosskey never tells his readers about Chancellor Walworth’s opinion, nor about any other judicial opinion that anticipated Marshall’s conclusion in *Barron v. Baltimore*²³—although he parades all the opinions he can find on the side of his own conclusion. So in the interest of a fair hearing, let us listen to the New York Chancellor. (Perhaps the reader will examine both interpretations and then study the Annals of Congress for himself.)

I have formerly had occasion to examine the question how far these amendments of the constitution of the United States were restrictive upon the power of the individual states; and the conclusion at which I arrived was, that all the amendments adopted by congress at its first session, and afterwards sanctioned by the requisite number of

²⁰ P. 1060; also 1059, 1061.

²¹ P. 1064.

²² *Livingston v. Mayor of New York*, 8 Wend. (N.Y.) 85, 100 (1831).

²³ 7 Pet. (U.S.) 243 (1833).

states, were intended to be restrictive upon the government of the United States and upon its officers exclusively (see *Jackson v. Wood*, 2 Cowen, 818, n. b.). The preamble which was prefixed to these amendments, as adopted by congress, is important to show in what light that body considered them. This preamble has not usually been published in connection with these amendments; it will be found in the journal of the federal convention, as published in conformity to a resolution of congress, and is as follows: "The conventions of a number of the states having at the time of their adopting the constitution expressed a desire, in order to prevent misconstruction and abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the grounds of public confidence in the government will best ensure the beneficent ends of its institution: resolved," &c., that the following articles be proposed, &c. When we take into consideration the fact that this preamble was added by the senate, after they had amended the resolution of the house by expunging therefrom the only article proposed as restrictive upon the powers of the states; and when it is known that these amendments were introduced into congress by Mr. Madison, in consequence of the objections which had been made in the state conventions to the unlimited powers given by the constitution to the general government, I think it is very evident that the amendments were intended to apply to the general government only, for the purpose of restricting and limiting its powers, but without any intention of limiting or controlling state legislation.

That was the New York Court of Errors, at December term, 1831.

At January term, 1832, *Barron v. Baltimore*²⁴ came before the Supreme Court of the United States. (The record had been received and filed on September 23, 1831.)²⁵ This arose on writ of error to the Maryland Court of Appeals; the only question was the applicability of the Fifth Amendment—private property shall not be taken for public use without just compensation. (Coming up from a state court, only the constitutional question was open.) The case was put over, and was not argued until February, 1833.

Concurrently there was before the Court, brought up from the federal Circuit Court for the Eastern District of Pennsylvania, the case of *Livingston v. Moore*,²⁶ involving, along with the question of local law, the applicability to the state of other provisions of the federal Bill of Rights.

Taney was engaged in each case, arguing that the Bill of Rights did not apply. He concluded his argument in the *Livingston* case on Friday, February 8, 1833. The *Barron* case was then called; counsel for plaintiff in error began on that day, and was heard again on Monday the 11th, "on the question of jurisdiction." The Report says that then Taney was "stopped"; the Minutes do not indicate that he was even called upon to

²⁴ Ibid.

²⁵ Dates and circumstances are derived from an examination of the Docket and Minutes of the Supreme Court.

²⁶ 7 Pet. (U.S.) 469 (1833).

start. The Justices evidently felt that nothing more need be said—the appeal to them had no merit. The Court sat as usual on Tuesday, Wednesday, Thursday and Friday, and on Saturday announced its decision in the *Barron* case: dismissed for want of jurisdiction. The *Livingston* case, involving substantial questions, was decided later, with opinion by Justice Johnson.

One would have said that Marshall's opinion was written with his usual cogency, that it was clearly right and stood above question. But Mr. Crosskey says it was "without any warrant at all";²⁷

the decision of the Court, and the doctrine for which it stands, constitute, in fact, one of the most extensive and indefensible of all the various failures of the Court to enforce the Constitution against the states as the document is written.²⁸

The decision, he says, went in the teeth of what "the First Congress intended" and stripped the people of rights to which they were clearly entitled.

Let us see, so far as we may, whether the members of the First Congress, and the people for whose benefit these rights are alleged to have been secured, did intend and understand what Mr. Crosskey says they intended and understood in the matter.

II

There assembled, at Concord, on September 7, 1791, a Convention to revise the Constitution of New Hampshire. Among the delegates were two men who had sat in the House of Representatives of the First Congress; they must have been thoroughly informed as to the "intent" of the members of the Congress that proposed the Bill of Rights. The elder of these was Samuel Livermore (1732–1803); he was chosen to preside over the Convention. Of his prior public services, the following are particularly in point. He sat in New Hampshire's convention of 1788 where he "did great service in bringing about ratification, thus securing the ninth state and ensuring the acceptance of the Constitution."²⁹ He was Chief Justice of the Superior Court from 1782 to 1790, in part concurrently with his service in the First Congress. Abiel Foster (1735–1806) was the other delegate who had served in the First Congress. Then he sat in the state Senate from 1791 to 1793. In a moment we shall notice that the Legislature in 1791 enacted that no person should be held for a *capital* offense (not "a capital, or otherwise infamous crime") unless on indictment of a grand jury.

Among other delegates in the Constitutional Convention of 1791–92,

²⁷ P. 1067.

²⁸ P. 1081.

²⁹ 11 Dict. of Am. Biog. 308 (1933).

the following experience was represented: member of the state convention that ratified the federal Constitution; member of the Legislature that ratified the federal Bill of Rights; member of the Second Congress [Jeremiah Smith (1759-1842), notable in the legal annals of the state]; judge of the Court of Common Pleas; Justice of the Superior Court; United States District Attorney, all at the moment when the federal Bill of Rights went into effect.³⁰ These certainly qualify as men of the time "who read the current newspaper accounts of Congress' proceedings" and who "must have been aware" of whatever it was that the original amendments were designed to accomplish.

Now the sequence of events becomes important. The federal Bill of Rights was submitted to the states on September 25, 1789; the New Hampshire Legislature ratified on January 25, 1790; ratification was completed on December 15, 1791.

The State Constitutional Convention³¹ assembled on September 7, 1791—after New Hampshire had given its assent, and at a moment when nine states had ratified; two more ratifications were needed. The Convention submitted its proposed amendments, and adjourned to await the referendum, on February 24, 1792—two months after the federal Amendments had become the law of the land. Very surely, current developments in the law of New Hampshire must have been understood to be in perfect consonance with the Constitution of the United States.

An examination of *The Laws of the State of New-Hampshire, the Constitution of the State of New-Hampshire, and the Constitution of the United States, with its Proposed Amendments, Printed by Order of the Honorable the General-Court*, in 1797, shows that the Legislature had made a great effort in the early '90's to tidy the statute book; a mass of basic legislation was enacted, and by the Act of June 20, 1792, over two hundred old statutes were repealed. Look to the Act for the punishment of certain crimes, passed February 8, 1791—a year after the Legislature had ratified the federal Bill of Rights:

And be it further enacted, That no person shall be tried for any offense, for which capital punishment may be inflicted, until a bill of indictment be found against him for such offence, by the grand jurors. . . .³²

Not "capital, or otherwise infamous crimes," but only in cases where "capital punishment may be inflicted." So stood the law when the Constitutional Convention of 1791-92 assembled.

³⁰ Biographical sketches in *Provincial and State Papers*, 10 Misc. Documents and Records Relating to New Hampshire 30-37 (1877).

³¹ The Journal is published in *Provincial and State Papers*, *ibid.*, at 38-196 (1877).

³² L. of State of N.H. 272 (1797).

Did President Samuel Livermore, fresh from the First Congress, cry out that the state law in this regard was out of accord with the federal Constitution? Or his colleague Abiel Foster? Or the members of the Legislature of 1790, who participated in ratifying the Amendments? Not at all. The Convention received and debated a report³³ on what changes should be proposed in the state bill of rights. Previously there had been no guaranty of grand jury; the Convention recommended none. It left the law as the Act of February 8, 1791, quoted above, had made it. It left untouched, too, this provision of the bill of rights of the old Constitution of 1788:

XVI. . . . Nor shall the legislature make any law that shall subject any person to a capital punishment (excepting for the government of the army and navy, and the militia in actual service) without trial by jury.

(The Sixth Amendment guarantees a jury trial "[i]n all criminal prosecutions. . . .") It is utterly inconsistent with all this history to suppose that Livermore, Foster, and the rest understood that the federal Amendments applied to New Hampshire.

A few more observations will be helpful. New Hampshire's punishment of crimes, as prescribed in the Act of 1791, was so severe that the capital offenses covered a considerable part of the field. For treason, murder, rape, sodomy, burglary, arson, robbery, forgery of public securities—for all these, death was the only punishment. But there were other major crimes which carried maximum punishments (omitting mention of fines, and such additional indignities as indelible marking on forehead and nose, whipping, standing in the gallows, and sitting in the pillory) as follows: maiming, seven years imprisonment; concealing the death of a bastard child, two years; manslaughter, twelve months; assault with intent to murder, two years. Thus we can understand what was *not* included in the statutory right to a grand jury and the constitutional right to a trial jury. It does not look much like the federal system.

It will be interesting now to glance back at the journal of the New Hampshire convention of 1788, called to act upon the proposed federal Constitution. In assenting to the Constitution, the convention declared: as it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this State, and more effectually guard against an undue administration of the federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution. . . .³⁴

³³ 10 Misc. Documents and Records Relating to New Hampshire 63 (1877); the report incorporated into the Constitution of 1788, *ibid.*, at 71; debate, *ibid.*, at 106.

³⁴ *Ibid.*, at 20.

Note, these are not going to be provisions New Hampshire wants to be imposed on New Hampshire and sister states; these are measures to quiet apprehensions about "an undue administration of the federal Government. . . ." Here are the proposals, so far as is pertinent:

Sixthly, That no person shall be tried for any crime by which he may incur an infamous punishment or loss of life, until he be first indicted by a grand jury—except in such cases as may arise in the government and regulation of the land and naval forces.

[Seventhly,] All common law cases between citizens of different States shall be commenced in the Common Law Courts of the respective States, and no appeal shall be allowed to the federal Courts in such cases, unless the sum or value of the thing in controversy amount to three *hundred?* dollars.

Eighthly, In civil actions between citizens of different States, every issue of fact arising in actions at common Law, shall be tried by a jury if the parties or either of them request it.

Ninthly, Congress shall at no time consent that any person holding an office of trust or profit under the United States, shall accept a title of nobility or any other title or office, from any king, prince or foreign State.

Tenthly, That no standing army shall be kept up in time of peace, unless with the consent of three fourths of the members of each branch of Congress; nor shall soldiers in a time of peace, be quartered upon private houses without the consent of the owners.

Eleventhly, Congress shall make no Laws touching religion or to infringe the rights of conscience.

Twelfthly, Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.

And the Convention do, in the name and in behalf of the people of this State enjoin it upon their Representatives in Congress, at all times, until the alterations and provisions aforesaid have been considered, agreeably to the fifth article of the said Constitution, to exert all their Influence and use all reasonable and legal methods to obtain a Ratification of the said alterations and provisions in such manner as is provided in the said article.

These desired limitations are to be only on Congress. Observe, sometimes the drafting is "Congress shall [not]"; in Sixthly and Eighthly the prohibition is framed in general terms and Congress is not mentioned; and yet the entire purpose is to "guard against an undue administration of the federal Government." These New Hampshire statesmen—Chief Justice Livermore and his colleagues in the ratifying convention of 1788—evidently didn't know Mr. Crosskey's "eighteenth century constructionary rules."

Why did not Mr. Crosskey make a frank disclosure of this instance, so damaging to his contention about contemporary modes of drafting and interpretation? Here is an excerpt from his argument:

Now, apart, once more, from the remote possibility of sheer negligence or want of skill, in the First Congress . . . the only reasonable explanation for the variance in

form thus existing between the First Amendment and all the others of the first eight is that the others were *intentionally* drawn in general terms. . . . And if these were not the intentions of the First Congress, its draftsmanship of these amendments was bungling, in an extreme degree.³⁵

We cannot suppose he had not read the proceedings of New Hampshire's Convention. A moment later³⁶ he is quoting for his own purposes the corresponding recommendations in Virginia's Convention.

Here is what Mr. Crosskey should have disclosed to his readers: The New Hampshire Convention wanted to ratify the Constitution, but to attach to their ratification certain recommendations as to amendments limiting the power only of the national government. A committee was appointed to report such amendments. One member was John Langdon (1741-1819); he was one of the Founding Fathers, and shortly after he sat as a Senator in the First Congress, where the Bill of Rights was proposed. Another member was Chief Justice Samuel Livermore (1732-1803); he sat as a Representative in the First Congress. (Mr. Crosskey quotes Livermore in the House debates, on one matter that seems to help his argument.)³⁷ That committee's report recommended amendments, many on points later covered by the Bill of Rights. Sometimes the drafting was that *Congress* should not; sometimes the drafting was in "unrestrained passive-voice prohibitions": and yet Langdon, Livermore, and the rest clearly had in view limitations only on the United States. We can see clearly "what those words would mean" to those able and responsible statesmen.

(Presently it will be pointed out that in considerable part these proposals were derived from similar recommendations for amendment as adopted by the ratifying convention in Massachusetts.)

It is not too much to say that Mr. Crosskey *suppressed* this important evidence—for surely he must have read the Proceedings. In offering the public what purports to be a systematic and objective study—not a brief—he was under a duty to disclose *all* that was material, in whatever way it bore. The author would have us believe that through the decades the Justices have knowingly been derelict in their construction of the Constitution; he calls upon us to turn against their judgments and follow him. Certainly one who assumed such a responsibility was under a duty to tell the whole truth, so far as in him lay.

III

On September 25, 1789, the federal Bill of Rights was proposed by the First Congress.

³⁵ P. 1058.

³⁶ P. 1061.

³⁷ P. 1068.

On November 24, 1789, there met in Philadelphia a Constitutional Convention proposed by the General Assembly of Pennsylvania to consider needed amendments to the state constitution of 1776. (One reason was that the existing form of government was in "various instances . . . contradictory to the constitution of the United States.")³⁸ First on the list of delegates was James Wilson (1742-1798)—signer of the Declaration, outstanding among the Founding Fathers and in Pennsylvania's ratifying convention, and, since September 26, a Justice of the Supreme Court. Another delegate was Thomas McKean, also a signer, member of the ratifying convention, and, since 1777, Chief Justice of Pennsylvania. The Constitutional Convention chose a committee of nine to prepare a draft revision; Wilson was one of those chosen.³⁹ The draft, in its Declaration of Rights, contained these provisions:

IX. That in all criminal prosecutions the accused hath a right to be heard by himself and his counsel; to demand the cause and nature of the accusation; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor, and a speedy public trial by an impartial jury of the vicinage; nor can he be compelled to give evidence against himself; nor can any man be deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

X. That no person shall be proceeded against by information for any indictable offense, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. . . .⁴⁰

In committee of the whole, Chief Justice McKean succeeded in having Section IX amended to begin "that in all prosecutions by indictment."⁴¹ Later the convention voted to restore the original wording, and further to make the section read, "in all prosecutions by indictment" to have a speedy public trial, etc.⁴²

While the Convention was at all times disposed to have a provision requiring that prosecution be by indictment, some difference of opinion arose as to the excepted situations wherein no action by a grand jury need be had. One proposed amendment was, "except for specific penalties or forfeitures, or in matters merely civil." As to this, Chief Justice McKean obtained a postponement.⁴³ Later the Convention adopted the form

That no person shall, for any indictable offense, be proceeded against criminally by information . . .

except in cases in the land and naval forces, etc.⁴⁴ Still later it made a limitation

³⁸ The Proceedings Relative to Calling the Conventions of 1776 and 1790 (The Minutes of the Convention) 129 (1825).

³⁹ *Ibid.*, at 154.

⁴¹ *Ibid.*, at 378.

⁴³ *Ibid.*, at 223.

⁴⁰ *Ibid.*, at 162.

⁴² *Ibid.*, at 222.

⁴⁴ *Ibid.*, at 226.

except for oppression or misdemeanor in office. . . .⁴⁵

Presently Mr. Wilson obtained a reconsideration,⁴⁶ and it was moved to make the exception read, "except in cases arising in the land and naval forces" etc.—

or, by leave of the court, for oppression or misdemeanor in office. . . .

This, of course, was inconsistent with the grand jury provision in the federal Bill of Rights, then before the states for adoption. Then Mr. Wilson moved to strike out the words "for oppression or misdemeanor in office." Note carefully: Justice Wilson thus favored a version reading that "*no person shall, for any indictable offense, be proceeded against, criminally, by information, except . . . by leave of the court*"—which would greatly have increased the variance from the federal version. Wilson's amendment was defeated, the vote being 21 to 36. The original motion was then carried.⁴⁷

Since prosecution on information was now permitted in some instances, Section IX was amended to guarantee a speedy trial, etc., "in prosecutions by indictment or information."⁴⁸

So the Convention tinkered freely with matters which, in the federal Bill of Rights, were already settled, and ended with a provision in disagreement with the federal provision. So far as the Minutes of the Convention indicate, the proposed Amendments were entirely ignored.

That trial by jury shall be as heretofore, and the right thereof remain inviolate.

So ran Section 6 of the Declaration of Rights of the Constitution of 1790. The language is disarming; it discloses nothing different from the Seventh Amendment, which guarantees trial by jury "[i]n suits at common law, where the value in controversy shall exceed twenty dollars." But what had been the scope of the right "heretofore" in Pennsylvania? It was narrower than the federal provision.⁴⁹ By Act of April 5, 1785,⁵⁰ the summary jurisdiction of justices of the peace—who, of course, sat without jury—was extended to £10. This jurisdictional amount was more than twice as high as the federal sum of 20 dollars.⁵¹ The Act of April 19, 1794,⁵² raised the amount to £20, but, subject to giving special bail, permitted removal to the Court of Common Pleas if the amount exceeded £5. (Five pounds was still in excess of the federal figure of \$20.) In 1803 the validity of this

⁴⁵ Ibid., at 261.

⁴⁷ Ibid.

⁴⁶ Ibid., at 280.

⁴⁸ Ibid., at 283.

⁴⁹ See decisions of the Pa. Supreme Court: *Geyger v. Stoy*, 1 Dall. (Pa.) 135 (1785); *Cooper v. Coats*, 1 Dall. (Pa.) 308 (1788).

⁵⁰ 2 L. of Pa. (Dallas) 304 (1793).

⁵¹ 1 Stat. 145, 167 (1790).

⁵² 3 L. of Pa. 736 (1810).

latter statute was vigorously challenged, as denying the right as "heretofore" enjoyed. The state Supreme Court sustained it as not inconsistent with the state constitution—one judge dissenting.⁵³ The judges said not a word about the Seventh Amendment, and so far as appears from the report, neither did the able counsel who argued the case.

IV

Zephaniah Swift (1759–1823) was a member of the lower house of the Connecticut Legislature from 1787–1793, during which time the first Amendments were submitted and adopted. Thereafter he was a Representative in Congress (1793–1797), became a judge of the state Supreme Court in 1801 and served as Chief Justice 1806–1819. In 1795–96 he published *A System of the Laws of the State of Connecticut*, and in Chapter 19 we read "Of the Several Modes of Prosecution," wherein we may learn whether the Fifth Amendment was understood to govern.

There are four modes of prosecuting crimes. By complaint or presentment of a grandjuror: by information exhibited by an attorney for the state: by information exhibited by the party injured, or some common informer in his own name or in the name of the state: and by indictment.

I. Complaint or presentment by a grandjuror is a mode of prosecution instituted and authorized by statute law, and is unknown to the common law. Grandjurors are officers annually appointed by each town, and are public informing officers. . . .

By force of this statute,⁵⁴ every grandjuror has the power of making complaint or presentment, of every crime that can be prosecuted by the state . . . and upon such presentment, the offender except in capital cases, may be holden for trial. . . .

This practice of holding an offender to trial on complaint of a single grandjuror, is unknown to the English law. . . .

II. Informations may be exhibited by the attorneys for the state . . . in all matters proper for and in behalf of the state. There is no express statute authorising this officer to make information for crimes: but this is fully implied in the description of their duty. . . . And such has been the practical construction of the law, and it is now universally considered as a part of the office of attorneys for the state . . . to make information of all crimes . . . excepting in capital cases. . . .

III. Informations qui tam. . . .

IV. An indictment is a written accusation, of one or more persons, of a crime preferred to, and presented on oath, by a grandjury. This mode of prosecution, might be practiced for every species of crimes, if the courts thought proper. . . . The operation of this statute⁵⁵ is to make indictments by a grandjury necessary only in capital cases,

⁵³ *Emerick v. Harris*, 1 Binn. (Pa.) 416, 423 (1808). The case was argued at Sept. and Dec. Terms, 1803; the opinion must have been written shortly thereafter: "The opinion of the supreme court of the United States between *Marbury v. Madison* . . . has been published in 1 Cran. 137 [1803] since I drew up this opinion."

⁵⁴ The revised provisions on Grand Jurors are in 1 Pub. Stat. L. of Conn. (1808), tit. 83, at 371.

⁵⁵ Presumably referring to a revision of 1784, 1 Pub. Stat. L. of Conn. (1808) tit. 83, § 11, at 373.

and tho it has given the courts power to summon grandjuries in all cases, not capital; yet as another mode by single grandjurors, has also been authorized, courts, to save the expense and trouble of grandjuries, have permitted all offences not capital, to be prosecuted by the presentment of single grandjurors, and the information of the attornies for the state, and call in grandjuries only in capital cases.⁵⁶

There, set out in great fullness is the law and the practice of Connecticut, in 1796—quite different from what the Fifth Amendment required—and the author of the treatise, then a Federalist Representative in Congress, a member of the Legislature when the Amendment was ratified, sees nothing whatsoever amiss.

In September term, 1816 [1817?], the Superior Court of Hartford County held that the Amendments to the federal Constitution did not control the proceedings of State courts. This was in the unreported case of *State v. Phelps*, of which we learn in an opinion⁵⁷ of the state Supreme Court in 1837, where the point is said to have “been well settled”—citing the local decision of 1816 [1817?], New York cases of 1824⁵⁸ and 1831,⁵⁹ and finally, in 1833, *Barron v. Baltimore*⁶⁰ and *Livingston v. Moore*⁶¹ in the Supreme Court.

In 1818, Connecticut framed and adopted its first written constitution. Of the state's delegation to the First Congress, only two survived and neither was a member. But there were seven members who had served in the state convention that ratified the United States Constitution in 1788, including Pierpont Edwards, the federal District Judge, who was chosen to preside over the 1818 convention.⁶² Three of the members had already been Representatives in Congress, three had been United States Senators. If the First Congress intended, when it proposed the Amendments in 1789, to make them apply to the states, presumably someone in the Convention of 1818 would have heard and remembered.

⁵⁶ 2 Swift, *A System of the Laws of the State of Connecticut* 374-79 (1796).

⁵⁷ *Colt v. Eves*, 12 Conn. 243, 253 (1837). The court Records Department of the Connecticut State Library advises that it cannot now find the record of such a case in 1816, but refers to *State v. Noah A. Phelps, Jr.*, in the Superior Court of Hartford County at September term, 1817. I have examined a photostatic copy of the record. On a motion in arrest of judgment the composition of the trial jury was challenged, and perhaps the pertinence of the federal Bill of Rights was drawn in issue on the argument—but this is not spelled out in the papers in the file. In any event, surely the court in 1837 knew what it was talking about.

⁵⁸ *Murphy v. People*, 2 Cow. (N.Y.) 815 (1824); *Jackson v. Wood*, 2 Cow. (N.Y.) 819 (1824).

⁵⁹ *Livingston v. Mayor of New York*, 8 Wend. (N.Y.) 85, 100 (1831).

⁶⁰ 7 Pet. (U.S.) 243 (1833).

⁶¹ 7 Pet. (U.S.) 469 (1833).

⁶² Trumbull, *Historical Notes on the Constitutions of Connecticut and on the Constitutional Convention of 1818*, pp. 52-53 (1901), found in *Constitutions of Conn.* (1901).

The committee report⁶³ on a bill of rights contained no provision on the grand jury. The Convention inserted the guarantee,

And no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or indictment of a grand jury . . .

except in the militia, etc.⁶⁴

So we see, the Convention put its mind on the grand jury, and chose a provision that fell far short of what the comparable federal guarantee requires.

In *State v. Danforth*,⁶⁵ in 1819, the defendant had been prosecuted, on information, for the common law crime of assault with intent to maim and kill. After conviction, in arrest of judgment he contended that the prosecution without grand jury indictment had violated the *state* constitution. The court held that the maximum punishment for an offense at common law must be less than imprisonment for life and hence that the intervention of a grand jury was not requisite. Not a word was said, by counsel or the judges, so far as the report shows, of the Fifth Amendment. The opinion of Chief Justice Hosmer was carefully prepared. One of the five justices dissented, vehemently and with much show of learning, on other points—but he was in agreement that the grand jury was guaranteed only where death or imprisonment for life was involved, as provided in the state constitution.

Why, if among the lawyers of Connecticut there was any idea that it was arguable that the federal Bill of Rights applied to state procedure, why was that contention not being pressed on behalf of men who were being convicted of serious crimes without any indictment by a grand jury?⁶⁶ *Why?*

Of Connecticut's five Representatives in the First Congress—where the Bill of Rights was framed—two subsequently sat on the bench of the Superior Court. Benjamin Huntington (1736–1800) sat from 1793 to 1798; Jonathan Sturges (1740–1809) sat from 1793 to 1805. Supposing Mr. Crosskey to be right, and considering what was the law and the practice in Connecticut, as described by Swift in 1795–96—how must those judges have felt when they saw men being convicted of serious crimes without benefit of a grand jury?

⁶³ Journal of the Proceedings of the Convention of Delegates Convened at Hartford, August 26, 1818, For the Purpose of Forming a Constitution of Civil Government for the People of the State of Connecticut 73 et seq. (1901).

⁶⁴ *Ibid.*, at 19; Conn. Const. Art. I § 9 (1818).

⁶⁵ 3 Conn. 112 (1819).

⁶⁶ As reflected, e.g., in *Southworth v. State*, 5 Conn. 325 (1824), a prosecution on information for assault and battery with intent to kill.

V

With Massachusetts, as with New Hampshire, it is instructive to look to the Journal of the Convention of Delegates that ratified the United States Constitution. Opponents of the new instrument were many: in the end, ratification was by a vote of 187 to 168.⁶⁷ On January 31, 1788—the Convention having debated since the 9th—John Hancock, the President, made a proposal, “in order to remove the doubts, and quiet the apprehensions of gentlemen.”⁶⁸ The proposition was that the Constitution be ratified, with a recommendation of certain amendments that would “more effectually guard against an undue administration of the federal government.” (The drafting in the New Hampshire convention, already noticed, was inspired by that in Massachusetts.) The amendments proposed included various points, such as grand jury and trial by jury in civil cases, that finally appeared in the Bill of Rights. In Hancock’s proposition the limitations were all upon the federal government alone.

The proposal was submitted to a committee.⁶⁹ On it sat Caleb Strong (1745–1819), who presently became a Senator in the First Congress, and Theodore Sedgwick (1746–1813)—later a Representative in the First Congress and Justice of the Supreme Judicial Court. Here are some of the Hancock proposals, as reported by this committee:⁷⁰

Sixthly. That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

Seventhly. The supreme judicial federal court shall have no jurisdiction of causes between citizens of different States, unless the matter in dispute . . . be of the value of three thousand dollars at the least. . . .

Eighthly. In civil actions between citizens of different States, every issue of fact arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.

Sometimes *Congress* was specifically named (it was so in *Thirdly*, *Fourthly*, and *Fifthly*), and once the “supreme judicial federal court”; *Sixthly* and *Eighthly* are “unrestrained passive-voice prohibitions”: and yet, throughout, plainly the *national* government alone was in view. Members of the Convention, supporting ratification with the urgent recommendation that these amendments be made, were, in addition to Strong and Sedgwick, the following men who subsequently sat in the First Congress: Tristram

⁶⁷ Debates and Proceedings In the Convention of the Commonwealth of Massachusetts, Held in the Year 1788, and Which Finally Ratified the Constitution of the United States 87 et seq. (Boston, 1856).

⁶⁸ *Ibid.*, at 79 (journal) and 225 (debates).

⁶⁹ *Ibid.*, at 82 and 243–44.

⁷⁰ *Ibid.*, at 83, 84.

Dalton (1738–1817), Senator; George Partridge (1740–1828) and Fisher Ames (1758–1808), Representatives; and Rufus King (1755–1827), one of the Founders, who was sent to the First Congress as a Senator from New York—six men who later shared in framing the Bill of Rights, who in 1788 were using “unrestrained passive-voice prohibitions,” along with clauses referring to “Congress,” as equally limitations on only the United States. Nathaniel Gorham (1738–1796), a Founder; William Cushing (1732–1810), the future Justice of the Supreme Court; Francis Dana (1743–1811), then a Justice, later Chief Justice, of the Supreme Judicial Court; Theophilus Parsons (1750–1813), Dana’s successor as Chief Justice, were others in this notable assembly. Parsons had taken an outstanding part in the drafting of the Massachusetts Constitution of 1780—one of the most influential of American charters of government. Parsons wrote Hancock’s conciliatory proposal for ratification with a recommendation of amendments.⁷¹ So we may take it that very certainly the Massachusetts recommendations were the work of a competent hand.

Why did not Mr. Crosskey, with his many pages on drafting and the occult business of the “eighteenth century constructionary rules,” ever get around to telling about this Massachusetts background of the first Amendments?

The Massachusetts Constitution of 1780 contained no guarantee, in its Declaration of Rights, of the grand jury—a matter to which we now turn.

At the Constitutional Convention of 1820, there were among the members ex-President John Adams (1755–1826), who had been presiding officer of the United States Senate when the federal Bill of Rights was submitted to the states; Justice Story (1779–1845) of the Supreme Court of the United States; Isaac Parker (1768–1830), Chief Justice of the Supreme Judicial Court and Professor in Harvard Law School; his brethren Justices Charles Jackson (1775–1855) and Samuel S. Wilde (1771–1855); Lemuel Shaw (1781–1861), who ten years later became Chief Justice; Daniel Webster (1782–1852), with the *Dartmouth College* case⁷² and *McCulloch v. Maryland*⁷³ just behind him; and Levi Lincoln (1749–1820), Attorney General under Jefferson, who had declined an appointment to the Supreme Court in 1811.

Two of the Representatives from Massachusetts in the First Congress, where the Bill of Rights was framed, thereafter sat on the Supreme Judicial Court. Theodore Sedgwick (1746–1813) was a Justice from 1802 to

⁷¹ Professor Zechariah Chafee’s biography of Theophilus Parsons in 14 Dict. of Am. Biog. 271 (1934) gives the facts and sources.

⁷² *Dartmouth College v. Woodward*, 4 Wheat. (U.S.) 518 (1819).

⁷³ 4 Wheat. (U.S.) 316 (1819).

1813; George Thacher (1754–1824) sat from 1800 to 1824. Note that of the three Justices who were delegates to the Constitutional Convention of 1820, Chief Justice Parker sat concurrently with Sedgwick from 1806 to 1813, and with Thacher from 1800 up to the Convention and beyond. Justice Jackson had sat with Thacher since 1813; Justice Wilde had sat with him since 1815. Now—assuming that the members of the First Congress designed the Bill of Rights to operate on state as well as nation—can it be supposed that Sedgwick and Thacher would over the years have failed to impart their understanding to their associates in the course of administering justice? Surely then—still assuming, as above—we should count Parker, Jackson, and Wilde, along with old John Adams, as delegates to the Convention who really knew of the design of the First Congress.

A delegate, Mr. Hinckley offered a resolution to add an article in the Declaration of Rights,

that no person shall be subjected to trial for any offense which would subject him to ignominious punishment, except on presentment of a grand jury of the county in which the case is tried, except in cases to which the law martial may be properly applicable.⁷⁴

In committee of the whole, Mr. Hinckley said “[h]e had known an instance, many years ago, in which the attorney-general having failed to obtain an indictment by a grand jury against an individual, had threatened to proceed by information. He thought that every individual ought to have the security of not being brought to trial without first being charged by the grand inquest of the county. . . .”⁷⁵

Chief Justice Parker then spoke—and it is evident that in his view the law on indictments in Massachusetts could be stated without any reference to the federal Bill of Rights:

[I]t was remarkable that when the constitution was drawn up by persons so careful of the rights of the citizen, no provision was made to guard them in this particular. It would seem from the nature of the government to be proper that no person should be put upon his trial but by an inquest of a jury of his county. In Great Britain the power to proceed by information is a great instrument in the hands of the government. The common law is in force here, and by it the attorney and solicitor general have authority to file informations in cases under felony. Perhaps the court would determine that the law not having been practised was obsolete. But in revising the constitution it might be proper to provide for the case. The citizen would be safe enough under such officers as we now have, but at another time the case may be different. A person vexatiously

⁷⁴ Journal of Debates and Proceedings In the Convention of Delegates Chosen to Revise the Constitution of Massachusetts, 1820–21, p. 188 (Boston, 1821), p. 416 (Boston, 1853) (the editions hereafter cited in that order).

⁷⁵ *Ibid.*, at 211 and 467.

proceeded against, though acquitted, might be greatly injured by being brought to trial when the interference of the grand jury would have prevented his being publicly accused. He proceeded to state the probable reasons founded on some provincial laws to which he referred, why the provision was not made in the constitution, and to state more at large the reasons why it should be made now. He hoped the resolution would pass but as he thought a further exception ought to be made, he moved to amend the resolution by adding the following, viz.:

and the cases of convicts in the State prison, against whom informations by law may be filed, for additional confinement to hard labor.⁷⁶

Mr. Fay thought there might be other cases where the grand jury should not be secured; there would be no danger in giving the Legislature discretion to provide for prosecution on information in particular cases. He wished the resolution might be further modified.⁷⁷

Chief Justice Parker's amendment, as to cases of convicts, was agreed to. Mr. Fay urged further study, and the matter went over.⁷⁸ Mr. Hinckley, the proponent, obtained reference to a select committee of three.⁷⁹

The report of the select committee was consistent with Chief Justice Parker's statement of the existing situation: the Attorney or Solicitor General had authority to proceed by information in capital and other cases; this power was dangerous, although no abuses were found; the committee considered that the grand jury should be guaranteed, subject to authority in the Legislature to provide for proceeding by information in specified cases.⁸⁰

Mr. Webster obtained a slight modification to make the proposal more accurate, and the Convention then adopted this resolution:

That it is expedient to amend the constitution in the declaration of rights so as to provide that no person shall be subjected to trial for any crime or offence, which, on conviction, may expose him or her to imprisonment, or ignominious punishment—but by presentment or indictment of a grand jury—except in cases which are or may be otherwise provided for by the statute of this Commonwealth.⁸¹

The foregoing was incorporated in Article the First of the Convention's proposed amendments, along with a highly controversial statement that the duty of the Legislature to require provision to be made for public worship would not be confined to *Protestant* teachers.⁸² It was not adopted at the polls.

In these debates, so far as the record discloses, no mention was made of the Fifth Amendment to the United States Constitution; Chief Justice

⁷⁶ *Ibid.*, at 211 and 467–68.

⁷⁷ *Ibid.*, at 211 and 468.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, at 212 and 471.

⁸⁰ *Ibid.*, at 258 and 571–72.

⁸¹ *Ibid.*

⁸² *Ibid.*, at 275 and 613–14.

Parker, Justice Story, Daniel Webster, and the rest evidently supposed it was entirely a matter of state law.

Chief Justice Parker's amendment, mentioned above, was inspired, no doubt, by a then recent statute, Chapter 176, of February 23, 1818, an Act making further provision for the punishment of convicts sentenced to hard labor. Section 5 enacted that one convicted of a second offense punishable by confinement at hard labor should be sentenced to solitary confinement not exceeding thirty days, and confinement at hard labor, not exceeding seven years, in addition to the punishment by law prescribed for the second offense. Moreover, inasmuch as the conviction for a previous offense might be unknown to the grand jury that indicted, it was enacted (Sec. 6) that when such previous conviction was discovered, the Attorney or Solicitor General might proceed *by information*, for the imposition of the residue of the punishment prescribed.

At October term, 1818, the Supreme Judicial Court, acting upon an information, imposed such an additional punishment upon one Ross. In 1824, on habeas corpus, Ross challenged the validity of this further sentence.⁸³ His contentions were two: that the statute was *ex post facto*—[his first, but not his second offense had been committed prior to the Act of the 1818]—and further,

2. The statute is unconstitutional also, in providing that the trial and sentence arising out of former convictions may be founded on *information*, instead of presentment or indictment. The courses of proceeding by information has never been used among us, except to try some misdemeanors which do not make the offender infamous. Declaration of Rights, art. 12, 13, 29; Amendment to Const. U.S. art. 5; 1 Chit. on Cr. Law, 844.

The court, per Parker, C.J., found no difficulty in denying both contentions. On the second point, no mention was made of the Fifth Amendment. "There was no need of a presentment by a grand jury, for no offense was to be inquired into. That had been already done." But note, Parker had considered that this statutory proceeding would need to be specially recognized when, in the Constitutional Convention of 1820, it was proposed to give a constitutional guarantee of the grand jury.

One of Chief Justice Parker's associates on the bench when the *Ross Case* was decided in 1824 was Justice George Thacher (1754–1824), who had been a Representative in the First Congress, and thus must have had first-hand knowledge of the understanding with which the federal Bill of Rights was proposed.

Article 15 of the Declaration of Rights (1780) provides that

⁸³ Case of William Ross, 2 Pick. (Mass.) 165, 167–68 (1824).

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury. . . .

*Mountfort v. Hall*⁸⁴ is an early case on the guarantee. There was a statutory proceeding whereby, when a militiaman failed to appear at muster, the company clerk sued for a penalty; the proceeding was before a justice of the peace, without jury; appeal to the Court of Common Pleas (to which normally one could go, with right of trial by jury) was not allowed. Nonetheless the Court of Common Pleas had taken the case on appeal. The Justices of the Supreme Judicial Court were unanimous in holding that that was an error, even supposing the militiaman was entitled to demand a jury: his remedy would have lain elsewhere. Two of the Justices—George Thacher and Theodore Sedgwick (1746–1813) had been Representatives in the First Congress, where the federal Bill of Rights originated. The former found it unnecessary to discuss the right to trial by jury. Justice Sedgwick said that “the public interests are much involved” and that accordingly he was going “to take a more extensive view of the subject. . . .” As to the right to a jury:

Now, it does not appear—no law is shown for that purpose—that before the forming of the constitution, a man charged with a mere neglect of militia-duty, which is precisely this case, was entitled to a trial by jury; but the fact is confidently believed to be directly contrary. . . . The defendant was not deprived of a trial by jury in a case where, before the constitution, it had been “otherwise used and practised. . . .”

Nothing was said of any possible relevance of the Seventh Amendment. To be sure, in the instant case, the amount involved did not “exceed twenty dollars.” But the case had been “argued at large,” and Justice Sedgwick thought it proper “to consider generally the proceedings before the justice [of the peace]” and to express opinions that “in some respects” might be considered “extra-judicial.”

While not much can be made of this episode, as to the matter that now concerns us, nevertheless it is of some slight significance that Justice Sedgwick, in extending his observations, treated the right to trial by jury as entirely a matter of Massachusetts law.

The Massachusetts Constitution contained no provision against double jeopardy. In the event a jury was discharged from giving a verdict—say because a juror was stricken with critical illness, or because the jurors were in hopeless disagreement—the accused not having consented to the discharge, could the case be prosecuted before another jury? Such a situation would give occasion to refer to the Fifth Amendment and for the state court to consider its relevance. *Commonwealth v. Merrill*⁸⁵ in the

⁸⁴ 1 Mass. 442 (1805).

⁸⁵ Thacher's Criminal Cases 1 (1823).

Municipal Court of Boston, in 1823, was such a case, the first jury having been discharged when a juror was taken by a hemorrhage. On a motion in arrest of judgment after the second jury had convicted, counsel submitted the question without argument, and the municipal judge examined the point "with as much attention, as the shortness of the time and my leisure since the trial would permit."

The judge said:

I most fully respect the principle, contained in the fifth article of the amendments to the constitution of the United States, which declares . . . [quoting]. I consider this provision to be binding on this court, in the administration of justice, and that by the latter clause is meant, "that no man shall be twice tried for the same offence." But it is a principle of law, well established, that on every indictment against a citizen, whether for felony or misdemeanor, there shall be one legal trial, on which a final judgment may be rendered of acquittal or conviction. . . .

It would be a reflection on the administration of justice, if a person charged with a crime, should be permitted to avail himself of the occurrence of a physical accident like the present, to escape from the retribution of justice. But I apprehend our law is not liable to such imputation.

The municipal judge discussed New York cases, English cases, what Justice Story had held in a prosecution in the circuit court,⁸⁶ and what the Supreme Judicial Court of Massachusetts had held. He concluded:

Upon a full examination of the cases, I am satisfied, that the course which I pursued in this trial was according to the acknowledged principles of law, as practised upon by the supreme judicial tribunals in this commonwealth, and that it conforms to the practice in similar cases in New York and Great Britain. I feel myself bound by these authorities—*Eadem lex Romae, eadem Capuae*.

The Massachusetts practice, thus referred to, rested upon *Commonwealth v. Bowden*,⁸⁷ in 1813, where the first jury had been discharged, without the assent of the accused, after hopeless disagreement. The Supreme Judicial Court (which then included Justice Thacher, a Representative in the First Congress) had sustained the trial before a second jury, without any reference to the federal Constitution, in two sentences:

The ancient strictness of the law⁸⁸ upon this subject has very much abated in the *English* courts; nor would it be consistent with the genius of our government or laws to use compulsory means to effect an agreement among jurors. The practice of withdrawing a juror, where there existed no prospect of a verdict, has frequently been adopted at criminal trials in this Court, and the exception taken in this case cannot prevail.

⁸⁶ *United States v. Coolidge*, 2 Gal. 364 (C.C. 1st, 1815).

⁸⁷ 9 Mass. 493, 494 (1813).

⁸⁸ Co. Litt. 227b (Hargrave and Butler ed., 1832): "A jury sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict."

In *Commonwealth v. Purchase*,⁸⁹ in 1824, the Supreme Judicial Court gave a fresh and thorough examination to the question, in a capital case. Counsel for the accused urged various objections, and in the argument "[h]e cited the 5th art. of Amendments to the Const. U.S." Chief Justice Parker said:

The question to be discussed therefore is, whether by the common law, or by virtue of the constitution of the United States, a second trial for the same felony is prohibited, when the first shall have failed on account of the disagreement of the jury. . . .

The court considered the statement by Sir Edward Coke and contrary views of Sir Michael Foster and Sir Matthew Hale, discussed the reason of the thing, and sustained the Massachusetts practice without any further mention of the Fifth Amendment.⁹⁰

The import of these cases on a second jury appears to be this: it was essentially a question of the reason and sense of the common law; the Fifth Amendment's provision against double jeopardy was a significant expression of what already was established; it was for the Massachusetts judges, informed by such authoritative materials as seemed persuasive, themselves to lay down the rule for Massachusetts.

VI

During October 1819 there sat at Portland a Convention that drafted the Constitution of Maine. Justice George Thacher (1754-1824) of the Supreme Judicial Court of Massachusetts was the only delegate who could speak with the authority of a participant in the First Congress. He took a very active part—perhaps the most active—in the deliberations of the Convention. His son and namesake, who had studied law with the Judge, was also a delegate. Two delegates had sat in the Massachusetts legislature while the first Amendments were awaiting ratification.⁹¹

The Constitution as adopted contained (Sec. 7 of the Declaration of Rights) the following provision as to the grand jury:

No person shall be held to answer for a capital or infamous crime, except on presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offences, as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia. . . .

⁸⁹ 2 Pick. (Mass.) 520, 522 (1824).

⁹⁰ The Supreme Court of the United States was at the same moment taking a like view. In *United States v. Perez*, 9 Wheat. (U.S.) 579 (1826), it held, per Story, J., that the discharge of a jury, without the consent of the prisoner, because the jury was unable to agree, was no bar to a subsequent trial. This conclusion was reached on the basis of general reasoning, without mention of the Fifth Amendment.

⁹¹ Biographical sketches appended to the *Debates and Journal of the Constitutional Convention of the State of Maine 1819-20* (reprint, 1894).

Turning to Perley's *Debates*,⁹² one finds the following brief discussion on the reported draft. (The text of the report is not set out, but it did not contain the above exception "or in such cases of offences, as are usually cognizable by a justice of the peace.")

On section 7th being read, Judge Thacher enquired why other crimes besides capital and infamous ones should not be presented, etc.

Mr. Holmes [John Holmes (1773-1843), then a Representative in Congress] replied: That by the Constitution of Massachusetts there is no provision for the presentment of any crime by a grand jury. But it seemed highly necessary, that capital and infamous offences should be investigated by a grand jury. There are other minor crimes which it is not so important should undergo this investigation.

Mr. Wallingford [George W. Wallingford (1778-1824), then a Representative in the General Court] observed, that magistrates, by the law as it now stands, have the power to punish petty larceny and other offences which are infamous. This section will take that power from them which it may be desirable for them to exercise.

Mr. Holmes proposed to insert the words "or in such cases of offences, as are usually cognizable by a Justice of the Peace" (which were not in the report). This would meet the wishes of the gentleman last up, and answer the purpose proposed. This amendment was accepted.

Evidently, the grand jury was not something already guaranteed; there was no mention of the Fifth Amendment. If it was to be secured, a provision to that effect must be written into Maine's Constitution. And it was thought desirable to except "petty larceny and other offences which are infamous" from the guarantee. Justice Thacher, who (if one may so construe his inquiry) believed the institution to be valuable, participated in this discussion and saw no reason to tell his colleagues about his recollection of the First Congress back in 1789. (We need not inquire whether, if the Fifth Amendment *had* applied, Maine's practice would have met its requirements: even on such a view, the members of the Convention would have given the matter their attention. But they utterly ignored the law of the Fifth Amendment.)

In 1820 Justice Thacher moved from Biddeford to Newburyport; he remained a citizen of Massachusetts, and continued to sit on its supreme bench—along with Justices Parker, Jackson, and Wilde, who, as we have already seen, served in the Massachusetts Convention of 1820.

VII

On August 28, 1821, there assembled at Albany, New York, a Constitutional Convention, chosen to revise the Constitution of 1777. First to be

⁹² *Ibid.*, at 118; Perley's *Debates, Resolutions, and Other Proceedings, of the Convention of Delegates Assembled at Portland on the 11th, and Continued until the 29th Day of October, 1819, For the Purpose of Forming a Constitution for the State of Maine* 89 et seq. (1820).

noted among the delegates is Rufus King (1755-1825), United States Senator from New York, 1789 to 1796, 1813 to 1825—hence one who had been a member of the Congress when the federal Bill of Rights was framed. King was a Federalist—in 1816 he was that party's last candidate for the Presidency. Among the other delegates were Chancellor Kent⁹³ (1763-1847); Chief Justice Ambrose Spencer (1765-1848); Samuel Nelson (1792-1873), soon to enter upon his forty-nine year judicial career; Henry Wheaton (1785-1848), reporter of the Supreme Court; and Martin Van Buren (1782-1862), the future President, who from 1815 to 1819 had served as Attorney General of New York.

King took a very active part in the debates; we may assume that, if the Convention had started to do anything which, to his understanding, the federal Bill of Rights forbade, he would have risen and offered a correction.

The matter of a bill of rights was referred to a committee composed of Chief Justice Spencer, five farmers, and one mechanic.⁹⁴

The chairman, Peter Sharpe (Speaker of the Assembly), in reporting, "stated, that the committee had taken up the bills of rights of other states, of the United States, and of our own state, and compressed the whole into the nine articles read."⁹⁵ So the federal provisions were fully considered. Chief Justice Spencer

thought much of the bill of rights redundant—perhaps, indeed, where rights are so well understood as in this country, it is useless to have any bill setting them forth—yet upon the whole it was deemed proper to keep before the eyes of the legislature a brief and paramount declaration of rights beyond which they cannot go. There was one part of this bill of rights which he thought, however, quite useless, that restraining from cruel and unnecessary punishments—now no punishment can be inflicted but by law—and if the legislature pass laws inflicting punishment, the punishment whatever it be, will not be considered by them as cruel. . . .⁹⁶

Evidently, in the view of the Chief Justice, the Eighth Amendment did not speak to the state legislature.

Then the second clause was read:

No person shall be held to answer for a capital, or otherwise infamous crime, except in cases of impeachment, and in cases of the militia when in actual service, and in cases of petit larceny, assault and battery, and breaches of the peace, under the regula-

⁹³ Kent read law under Attorney General Egbert Benson, who later served in the First Congress.

⁹⁴ Carter and Stone, Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York 38 (1821) (hereafter cited as C & S); the proceedings were also reported by Clarke, 10 (1821) (hereafter cited as C). Occupations of delegates, and other data, C & S at 687 et seq. Report on Bill of Rights, C & S at 102, C at 50.

⁹⁵ C & S at 163, C at 87.

⁹⁶ Ibid.

tion of the legislature, unless on presentment or indictment of a grand jury; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

The Chief Justice "explained the motives which had induced the committee to except . . . certain cases, and principally that of petit larceny, which requires speedy punishment, and which would be too vexatious, and productive of too much delay, to subject to the form of indictments by a grand jury."

Petit larceny, which the statute defined as the stealing of personal property of the value of \$25 or under, was punishable "by imprisonment in a county jail not exceeding six months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment."⁹⁷ We need not pause to inquire whether, if Congress had at that time attached that penalty to that offense, the crime would have been regarded as "infamous" within the meaning of the Fifth Amendment.⁹⁸ Chief Justice Spencer said he thought it needful that the exceptions be express, for the purpose at least of removing doubts.⁹⁹ (In 1885, when Justice Horace Gray in the Supreme Court had to construe the comparable words of the Fifth Amendment, he developed much interesting historical material but reached no precise definition.)¹⁰⁰

A motion was made to strike out the exception as to petit larceny, etc., seemingly under the impression that it was a matter of the trial jury that was involved.¹⁰¹ Chancellor Kent saw the confusion—the guarantee of trial by jury had not yet been reached. He supported the Chief Justice's exceptions: "There is not a state in the Union which requires the presentment of a grand jury for petit larceny."¹⁰² William I. Dodge, a young lawyer, wished "to call the attention of the committee to that part of the constitution of the United States which requires, that no person shall be convicted of any infamous crime, except on the presentment of a grand jury." Colonel Samuel Young, an older lawyer, replied that he

⁹⁷ Laws of 1817, p. 315, § 11, 2 N.Y. Rev. Stat. 690 (1829).

⁹⁸ Justice Redfield of the Supreme Court of Vermont had this to say in 1836: "Petty larceny, which is now very generally admitted to be an infamous offence, is in all our cities tried before the police courts, where it is well known no grand jury attend. The same is true of trials for petty larceny in this state and many other states, before single magistrates. And it has never been doubted that these convictions, upon information, were regular and valid." He said that "contemporaneous construction and subsequent practice" rejected the idea that the federal Bill of Rights applied to state proceedings. *State v. Keyes*, 8 Vt. 57, 64 (1836).

⁹⁹ C & S at 164, C at 68.

¹⁰⁰ *Ex parte Wilson*, 114 U.S. 417 (1885). He discussed the problem further in *Mackin v. United States*, 117 U.S. 348 (1886).

¹⁰¹ C & S at 163, C at 87.

¹⁰² C & S at 165, C at 89.

thought the provision of the constitution of the United States, requiring the interposition of a grand jury, would apply only to offences against the United States; and that it should not be construed to interfere with the details of the state government.

Apparently the members—Senator Rufus King (survivor of the First Congress), Chancellor Kent, Chief Justice Spencer, and the rest, thought that that explanation was quite satisfactory, for the Convention went right ahead discussing the question how far New York should guarantee procedure by grand jury. Presently Mr. Van Buren joined in supporting the Chief Justice's exceptions, and made it clear that in his view it was quite "unfounded" to suppose that the federal Constitution spoke to the matter of state criminal procedure.¹⁰³ The proposed amendment to strike out the exceptions was lost.

There followed further efforts to amend—to strike out "or limb" from the expression "life or limb," and otherwise to alter the proposed double-jeopardy clause—all going to show that the Convention regarded itself as in no wise controlled by the federal Bill of Rights. Then Mr. Birdseye, a lawyer, went back to the exceptions in the grand-jury clause: he would strike out "of petit larceny . . ." and substitute "under the grade of grand larceny." [Grand larceny carried a penalty of imprisonment for a term not exceeding five years.]¹⁰⁴ This shows that the Fifth Amendment was considered to be entirely irrelevant as a limit on state procedure. The Chief Justice said he "thought the amendment would leave too large a scope to the legislature," and it was defeated.¹⁰⁵

The clause relating to the trial jury in criminal cases was taken up:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county. . . .

Chief Justice Spencer repeated an explanation he had previously made: that in cases excepted from the grand jury guarantee, trial by petit jury would not be guaranteed. Accordingly the clause was made to read

In all criminal prosecutions on indictment or presentment of a grand jury, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county. . . .¹⁰⁶

The Convention took up another clause:

The trial by jury, as heretofore enjoyed, shall remain inviolate.

After some discussion of *heretofore* as the measure of the right, this provision was adopted.¹⁰⁷

The immediate upshot of all this arguing was that the committee of the

¹⁰³ Ibid.

¹⁰⁴ 2 N.Y. Rev. Stat. *679 (1829).

¹⁰⁶ C & S at 167, C at 90.

¹⁰⁵ Ibid.

¹⁰⁷ C & S at 169, C at 92.

whole was discharged from further consideration of the bill of rights, and the matter was put over until a later time.¹⁰⁸ The reporter's summary of further action on the bill of rights becomes rather laconic. In the end, when the various guarantees were incorporated into the text of the revised constitution, the specific reference to trial by an impartial jury in criminal cases disappeared. Trial by jury was guaranteed in these words:

The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever.¹⁰⁹

The provision on the grand jury became

No person shall be held to answer for a capital or otherwise infamous crime, (except in cases of impeachment; . . . [in the militia] . . . and in cases of petit larceny, under the regulation of the legislature;) unless on presentment, or indictment of a grand jury. . . .¹¹⁰

In all this protracted consideration, seemingly nothing that was done or forborne was attributable to anything in the federal Bill of Rights.

In what cases had trial by jury "been heretofore used"? We need not pursue that matter:¹¹¹ in 1824 the Supreme Court of New York declared as New York's theory of the power of its legislature that statutes authorizing trial without jury were not subject to a federal constitutional test. This was the leading case of *Murphy v. The People*.¹¹² Said Chief Justice Savage (who in 1823 had succeeded Chief Justice Spencer):

The constitution of the United States, was intended to regulate the general political interests of the nation, and the modes of proceeding of its own officers; but never to regulate the internal policy of the individual states.

The other Justices [Jacob Sutherland, who had participated in the Constitutional Convention's consideration of the bill of rights, and John Woodworth] did not discuss this question; but they agreed clearly with the Chief Justice.

The reporter added this note:

This question has, I am informed, repeatedly arisen at Nisi Prius, at which the decisions have not been uniform. Having been several times raised before the Judge of the Fourth Circuit, he was led to an examination of the subject; and at the last Cortland Circuit, the question being again made was answered by the opinion which follows. . . .

The opinion that follows is *Jackson v. Wood*,¹¹³ decided in June 1824 by Judge Walworth. (This is Reuben H. Walworth [1788-1867], who became

¹⁰⁸ C & S at 173, C at 94.

¹⁰⁹ N.Y. Const. Art. VII, § 2 (1821).

¹¹⁰ *Ibid.*, at § 7.

¹¹¹ Cases on the point are summarized in Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 947 (1926).

¹¹² 2 Cow. (N.Y.) 815, 818 (1824).

¹¹³ 2 Cow. (N.Y.) 819 (1824).

Chancellor in 1828 and served until 1848. In 1844 he was nominated to be a Justice of the Supreme Court of the United States.) An accused had been convicted of petit larceny without indictment and without trial by jury. The Fifth and Sixth Amendments were invoked. Judge Walworth held "that none of these amendments are applicable to the individual states," and set out at length the results of the investigation on which this conclusion was based.¹¹⁴

A note to the report says, "Vid. *The People v. Goodwin* . . .¹¹⁵ where the question was discussed . . . whether the provision in the 5th amendment of the United States constitution . . . [no double jeopardy] is applicable to the state Courts. Spencer, Ch. J. intimated that it is, though the question was not finally determined." The situation was that in a felony trial the jury had been discharged after a hopeless disagreement; the accused was then brought before a new jury. The Constitution of 1777, which then prevailed, had no provision against double jeopardy; counsel for the accused could invoke only the common law and the Constitution of the United States. He tried both. Chief Justice Spencer, in sustaining the trial before the new jury said:

I do not consider it material whether this provision [the double jeopardy clause of the Fifth Amendment] be considered as extending to the state tribunals or not; the principle is a sound and fundamental one of the common law. . . . I am, however, inclined to the opinion, that the article in question does extend to all judicial tribunals in the United States, whether constituted by the Congress of the United States, or the states individually. The provision is general in its nature, and unrestricted in its terms. . . . [Citing the "supreme law of the land" clause of Art. 6, cl. 2.] . . . These general and comprehensive expressions extend the provisions of the constitution of the United States to every article which is not confined, by the subject matter, to the national government, and is equally applicable to the states. Be this as it may, the principle is undeniable, that no person can be twice put in jeopardy of life or limb, for the same offense.¹¹⁶

The Supreme Court of the United States, four years later in the *Perez* case,¹¹⁷ held that the discharge of a hung jury did not bar a further trial—and in doing so did not so much as refer to the Fifth Amendment.

Chief Justice Spencer's statement of the inclination of his mind is, of course, worthy of particular note. But on reflection he must have reached a contrary conclusion, as the record of his part in the Constitutional Convention makes evident.

Chancellor Kent wrote his *Commentaries on American Law* between 1823 and 1826—not long after his participation in the New York Consti-

¹¹⁴ *Ibid.*, at 820-21. The opinion should be read by anyone who would form an accurate judgment of Mr. Crosskey's account.

¹¹⁵ 18 Johns. (N.Y.) 187 (1820).

¹¹⁶ *Ibid.*, at 200.

¹¹⁷ *United States v. Perez*, 9 Wheat. (U.S.) 579 (1826).

tutional Convention. In Lecture XIX he discussed "Constitutional Restrictions on the Powers of the Several States"—quite fully. There is no reference to the federal Bill of Rights. In Lecture XXIV, "Of the Absolute Rights of Persons," he came to bills of rights, which he treated briefly.

In the revision of the constitution of New-York, in 1821, the declaration of rights was considerably enlarged, and yet the most comprehensive, and the most valuable and effectual of its provisions, were to be found in the original constitution of 1777. . . . [He mentions the more important.] . . . Several of the early state constitutions had no formal bill of rights inserted in them; and experience teaches us, that the most solid basis of public safety, and the most certain assurance of the uninterrupted enjoyment of our personal rights and liberties, consists, not so much in bills of rights, as in the skilful organization of the government, and its aptitude, by means of its structure and genius, and the spirit of the people which pervades it, to produce wise laws, and a just, firm, and intelligent administration of justice.¹¹⁸

As we have seen, the contention that the federal Bill of Rights governed state procedure had clearly been raised, and had been rejected, in 1821, in a debate wherein Kent was taking an active part. Had he regarded the point as meriting serious consideration, surely that matter would have been reflected in his *Commentaries*.

In 1831, the Court of Errors was called upon to rule upon the problem on which the state Supreme Court had ruled in 1824. This was *Livingston v. Mayor of New York*,¹¹⁹ wherein Chancellor Walworth rendered the opinion quoted early in this review;¹²⁰ he reached the same conclusion that Marshall's Court was to reach shortly thereafter.

We have now followed a fair number of participants in the First Congress—as many as there was time to pursue in preparing this review. We have observed them in situations where it would have been their duty to speak out, if they understood that the Bill of Rights was binding upon the states. Their conduct implied the contrary. Mr. Crosskey has not produced a single member of that Congress who said the Bill of Rights was designed to limit the states. Certainly he would have been most happy to have discovered even one. Can it be supposed that the Men of 1789 remained through the decades a great silent company, serving in legislatures and constitutional conventions, executing the laws and administering justice in the courts, observing and even participating in action that completely disregarded some of the procedures of the Bill of Rights—yet permitted the one great secret to remain lodged in them useless?

Mr. Crosskey might resort to saying, as he has said in another connec-

¹¹⁸ 2 Kent, Comm. on Am. Law 7-8 (1st ed., 1827).

¹¹⁹ 8 Wend. (N.Y.) 85 (1831).

¹²⁰ P. 45 supra.

tion,¹²¹ it is not what the members of Congress meant, nor what the members of the ratifying legislatures meant, it is what the Amendments mean; we ask, "not what this man meant, but what those words would mean. . . ." Of course we have in the United States a body whose official business it is to say what the words mean—the Supreme Court. But Mr. Crosskey says, their decision was clearly wrong: they should have given effect to what (he says) "the First Congress *intended*." This goes in a circle. One might escape by saying, as an act of faith, that Mr. Crosskey and such as may agree with him are the only ones who know what the Bill of Rights really means!

VIII

At this point the reviewer was approaching the assigned limits in time and space. It is unknown what a close study of men and events in other states would reveal, save for the following brief notes on Vermont and Louisiana.

Vermont entered the Union on March 4, 1791. The first ten Amendments became a part of the Constitution on December 15, 1791. On July 3, 1793, a state Constitutional Convention met, which framed and adopted a new constitution. There was no guarantee as to indictment by a grand jury, either in the Constitution of 1793 or in its predecessor, that of 1786. The statute of February 27, 1787,¹²² provided as follows:

And no person shall be held to trial or put to plead for any complaint, indictment or accusation, for capital offense, punishable with death, unless a bill of indictment be found . . . by a grand jury. . . .

In 1797 the Legislature enacted a revision of the Laws of the State of Vermont. Chapter IX was an Act for the punishment of certain capital and other high crimes and misdemeanors. By Section 36 it was provided

That no person shall be tried for any offense against this act, until a bill of indictment be found against him. . . .

No such requirement applied to Chapter X, an Act for the punishment of certain inferior crimes and misdemeanors. The first of these "inferior crimes" was theft of goods and chattels, to be punished by a fine not exceeding \$300 or by not more than 39 stripes of the whip, and, in addition, treble damages; if the offender could not make such satisfaction, the person wronged was authorized to dispose of the convict's services for such time as ordered by the court or justice. Subsequently it was provided that

¹²¹ P. 1381. The concluding note in Mr. Crosskey's book, in commenting upon my article, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stan. L. Rev. 5 (1949). When I accepted the Editors' invitation to review Mr. Crosskey's book, and until I had received and examined it, I was not aware of this comment. It has seemed proper not to use the occasion of this article to pursue that matter.

¹²² Stat. of State of Vt. 81 (1787).

The state's attorney may prosecute, by information, all crimes not capital and where the punishment is by imprisonment in the state prison, for a term not exceeding seven years.¹²³

Very evidently, in Vermont, whose admission to the Union was contemporary with the adoption of the federal Bill of Rights, the course of legislation repelled any notion that the federal provisions applied to the state.

Even before the decision of *Barron v. Baltimore*, the Supreme Court of Vermont reached that conclusion. In 1832, in *Huntington v. Bishop*,¹²⁴ a litigant claimed the benefit of the Seventh Amendment—the common law jury where the value in controversy exceeds twenty dollars. The court said:

It is very doubtful whether this article has any reference to the proceedings of the State Courts. These articles of amendment, were proposed by Congress, after the Constitution was adopted. The resolution of that body, proposing the amendments, assigns a reason for the proposal, "the desire" of the conventions of several of the States, at the time of adoption of the Constitution, "in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." It is apparent that the object of this article was, to prevent "misconstruction or abuse" of the powers conferred by the Constitution, and for that purpose this "restrictive clause" was added. It was designed as a check upon the General Government. It does not, in its terms, apply to the State Governments, and was introduced, as appears by the preamble just quoted, with reference solely to the Courts of the United States. The article itself affords evidence of the same truth. The restriction upon the re-examination of any fact tried by jury is limited, in terms, to the Courts of the United States. This restriction was most obviously necessary to render the article perfect, and fully to secure the right in question; and if the former clause was intended to have any bearing upon the jurisprudence of the States, no possible reason can be assigned why the latter clause was not thus limited. It may be added, that no control is given to the general government, by the constitution, over the jurisprudence of the States; and such a restriction, as a measure of precaution against the "abuse of its powers," was wholly unnecessary. Moreover, had it been intended as restrictive of the States, it would neither have been introduced with such a preface, nor concluded in the same language. The provisions of the instrument, intended to be restrictive upon the States, are so in terms.

In the courts of Louisiana, it was *jurisprudence constante* that the federal Bill of Rights did not govern state procedure: *Territory v. Hattick*¹²⁵ in 1811; *Renthorp v. Bourg*¹²⁶ in 1816; and *Maurin v. Martinez*¹²⁷ in 1818.

¹²³ Vt. Rev. Stats. (1839) C. 102, § 1.

¹²⁴ 5 Vt. 186 (1832). In 1836 the court—per Redfield, J., who had then just entered upon his distinguished judicial career—applied the same reasoning to reach a like conclusion as to the Seventh Amendment. *State v. Keys*, 8 Vt. 57 (1836).

¹²⁵ 2 Mart. (O.S.) (La.) 87 (1811).

¹²⁶ 4 Mart. (O.S.) (La.) 97 (1816).

¹²⁷ 5 Mart. (O.S.) (La.) 432 (1818).

"Congress appear" to have recognized that the Sixth Amendment would not apply, said Martin, J., in the second of these opinions, "when they required that there should be, in the constitution of this state, a clause securing to the citizens the trial by jury in all criminal cases; for, if the corresponding clause in the constitution of the United States extended to cases under state government, the precaution would have been useless."¹²⁸

Mr. Crosskey did not mention those three Louisiana decisions made prior to *Barron v. Baltimore*—nor did he mention that in Vermont in 1832, nor that in the Superior Court of Connecticut in 1816 [1817?], nor the decisions of the New York's Supreme Court in 1824 and of the Court of Errors in 1831—all holding one or more of the federal Amendments to be inapplicable to a state. One does not need thirteen years of research, one needs only the United States Code Annotated and thirty minutes in a law library, to uncover a number of decisions, prior to *Barron v. Baltimore*, uniformly holding the law to be as the Supreme Court held in the *Barron* case. Now consider this passage from the work under review:

So, it is not in any way strange that good lawyers in the early days—Justice William Johnson, speaking for the Supreme Court itself, in 1819, and for himself alone, in 1820; *the justices of the Supreme Court of New York, in that same year* [reviewer's italics]; and the well-known law writers, William Rawle, of Philadelphia, and Joseph K. Angell, of Providence, in 1828 and 1829—were of the opinion, before the Supreme Court's decision of *Barron v. Baltimore* had been handed down, that all such parts of the first eight amendments did apply, *in accordance with their plain letter* [author's italics], to all governmental action, whether by the nation or by the separate states.¹²⁹

Fastening on Mr. Crosskey's citation to the justices of the Supreme Court of New York, in 1820, will the reader refresh his recollection as to what had been said and decided in the New York courts.¹³⁰ Chief Justice Spencer, in *The People v. Goodwin*,¹³¹ had said that while he did not consider it material whether the double-jeopardy prohibition of the Fifth Amendment be considered as extending to state tribunals or not—since the principle was sound and fundamental in the common law—he was *inclined to the opinion* that the Amendment did apply to all tribunals in the United States. The Chief Justice said "I," so we are not warranted in saying that his brethren inclined to the same view—the point was not essential. Then recall that Spencer took a most active part in framing the bill of rights in the Constitutional Convention of 1821, and that we have seen that what was said and done in that connection indicates that his mind must have reversed itself from the "inclination" of 1820. Then recall

¹²⁸ Ibid., at 132. The requirement was in the Enabling Act of Feb. 20, 1811. 2 Stat. 641-42.

¹²⁹ P. 1076.

¹³⁰ Pp. 69-70, *supra*.

¹³¹ 18 Johns. (N.Y.) 187 (1820).

that in 1824 the Supreme Court of New York, when there was need actually to rule on the question, held, per Savage, C.J., that the federal Bill of Rights did *not* control state action. Then recall that at December term, 1831, in *Livingston v. Mayor*,¹³² the Court of Errors, per Chancellor Walworth, had reached the same decision. Very surely it is inexcusable to claim the benefit of the *inclination* of Chief Justice Spencer's mind while making no disclosure of two later *decisions* to the contrary effect. What would be said of counsel who relied upon a tentative first impression while omitting to tell the court that there were two subsequent holdings *contra*? And surely a professor, offering a book as a reliable work of scholarship, is under a duty to act with an objectivity not required in adversary proceedings.

This lack of candor is the more disturbing when one considers that Chancellor Walworth, retracing the ground covered by his opinion as Circuit Judge in 1824, had examined (what Professor Crosskey calls) "the long-neglected history of the framing of the initial amendments, in the First Congress"—it wasn't neglected by Chancellor Walworth—and had arrived at the conclusion: "I think it very evident that the amendments were intended to apply to the general government only." Professor Crosskey, citing the "opinion" of "the justices of the Supreme Court of New York"—(Chief Justice Spencer's "I am inclined"), and omitting any reference to Chancellor Walworth's opinion, assures us that "these old records put all doubt at rest. . . ." Why did he not, in frankness, say, "*But see* the opinion of Chancellor Walworth, *contra*, in the New York Court of Errors"? It is always difficult for a reader to follow a close discussion of legislative history; short of going to the documents and making an independent examination, he accepts, almost inevitably, the conclusions his guide points out. What the guide has done in the present case is lacking in fundamental fairness.

Let us examine another of the author's representations: that "Justice William Johnson, speaking for the Supreme Court itself, in 1819" was of opinion that the Bill of Rights applied to the States. The citation is to *Bank of Columbia v. Okely*.¹³³ Here is the case, in a nutshell. A Maryland statute of 1793 gave the bank a summary process against debtors who had expressly in writing made instruments drawn by them negotiable at the bank. Congress, by a statute of 1801, made "the laws of the state of Maryland, as they now exist," applicable to the District of Columbia. The validity of the Maryland statute of 1793 was challenged as denying the civil jury trial. One side argued, the Act of Congress of 1801 was a re-

¹³² 8 Wend. (N.Y.) 85 (1831).

¹³³ 4 Wheat. (U.S.) 235, 242, 244 (1819).

enactment of the laws of Maryland; "consequently the question of the repugnancy to the local constitution of Maryland could not properly arise." The other side insisted, the Act of 1801 "did not extend to such acts as are repugnant to the state and national constitutions." Of course the federal Bill of Rights prevailed; the question was, was the Maryland Constitution also applicable? Johnson, J., for a unanimous Court, wrote:

These words [of the Act of 1801] could only give to those laws that force which they previously had in this tract of territory under the laws of Maryland; and if this law was unconstitutional in that State, it was void there, and must be so here. . . .

Was this act void, as a law of Maryland? If it was, it must have become so, under the restrictions of the constitution of the State, or of the United States. . . .

The Court found it easy to conclude that the Constitution of Maryland was satisfied, and that "full effect" was given to the Seventh Amendment. Of course the test of the Seventh Amendment must be met; the question was as to the applicability of the Maryland Constitution to a statute to be enforced in the District of Columbia—not as to the applicability of the Seventh Amendment to Maryland legislation in Maryland.

Now consider Mr. Crosskey's other citation to the Supreme Court, *Houston v. Moore*,¹³⁴ the case in 1820 where Justice Johnson is alleged to have recorded his personal opinion that the Bill of Rights applied to the states. The Act of Congress of 1795,¹³⁵ to provide for calling forth the militia, imposed on one who failed to obey the President's call certain penalties to be "adjudged by a court martial." Pennsylvania, by its Militia Act of 1814,¹³⁶ imposed the identical penalties for the same failure, to be adjudged by a court-martial of the state. A militiaman, convicted under the state law, claimed that the statute was invalid as an encroachment upon the authority of the United States. The Supreme Court (two Justices dissenting), said no. Justice Johnson, concurring in this holding, said he could not see why the same offense might not be denounced by both Pennsylvania and the United States.

. . . It is obvious, that in those cases in which the United States may exercise the right of exclusive legislation, it will rest with congress to determine whether the general government shall exercise the right of punishing exclusively, or leave the states at liberty to exercise their own discretion. But where the United States cannot assume, or where they have not assumed, this exclusive exercise of power, I cannot imagine a reason why the states may not also, if they feel themselves injured by the same offense, assert their right of inflicting punishment also. *In cases affecting life or member, there is an express restraint upon the exercise of the punishing power. But it is a restriction which operates equally upon both governments; and according to a very familiar principle of con-*

¹³⁴ 5 Wheat. (U.S.) 1, 32, 34 (1820).

¹³⁵ 1 Stat. 424 (1795).

¹³⁶ Acts of Pa. 319 (1814).

struction, this exception would seem to establish the existence of the general right. [Reviewer's italics.]

Presumably it is these last two sentences that Mr. Crosskey would read as holding that the federal Bill of Rights—here the provision against double jeopardy—applies to the states. To the reviewer, Justice Johnson did not make his meaning clear. It may easily have seemed to make sense to say that in a matter where Congress might exclusively occupy the field, yet has permitted the States to punish the very offense that Congress has denounced—since Congress may not expressly make the offense twice punishable—the Court will not permit congressional tolerance of State cooperation to result in the double punishment which Congress alone could not impose. Maybe one can squeeze a bit more out of those two sentences. They were used in respect of a very special situation.

In any event, in *Livingston v. Moore* which followed closely after *Barron v. Baltimore* and involved a question of the applicability to a state of guarantees of the federal Bill of Rights, Justice Johnson, for the Court, said "it is now settled, that those amendments do not extend to the states."¹³⁷ There is nothing to suggest that he wrote this reluctantly. Johnson was never a man to submerge his own views; in that very opinion, a few pages earlier, he had spoken out "[f]or myself, individually. . . ."

In spite of Mr. Crosskey's efforts, it seems quite unjustified to count Justice Johnson as one who really thought the Bill of Rights to be a limit on state action.

Mr. Crosskey has found two writers who can be quoted for his view. Over against this, think of the institutional writers—Kent at their head—who had nothing to say on the subject. This is as one would expect—a writer does not comment on a point of which he never heard, or which he regards as too unsubstantial to need refutation.

On the basis of this censurable performance—invoking a first impression, *obiter*, without explaining that it did *not* represent the considered opinion of "the justices of the Supreme Court of New York"; failing to make frank disclosure of cases that went against his view; citing a decision for a proposition it does not support—Mr. Crosskey undertakes to censure the Court:

Yet the Supreme Court, speaking through Chief Justice Marshall, announced its incorrect decision [in *Barron v. Baltimore*] as if the correctness thereof were clear and certain, beyond the possibility of any doubt.¹³⁸

That, with slight adaptation of words, is exactly what the author himself has done!

¹³⁷ 7 Pet. (U.S.) 469, 551 (1833).

¹³⁸ P. 1076.

The reviewer read into this book with the constant thought, one should never let pride of opinion close one's eyes to new scholarship. The author's industry and evident ability bespoke an attentive and respectful hearing. His strictures on the long line of Justices—many of them men who, one thought, had been proved profoundly wise—seemed to ring sincere, however unwelcome and incredible their sound. The vehemence of the denunciation appeared to spring from a feeling of righteous indignation. A mature scholar, surely, would realize the responsibility he assumed in urging the country to rely upon his findings. But then, when one concentrated on the methods employed—as illustrated in the long sentence whose statements and omissions have just been dwelt upon—the conclusion came, this is not candid and objective; on the contrary, results thus arrived at should be viewed with the greatest skepticism and reserve.