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Mr. Crosskey, the American Constitution, and the Natures of Things*

George Anastaplo**

His greatness, clearly, was not that of triumphant victory. It was a greatness that consisted in devoting half a lifetime to a cause in which he profoundly believed; in faithful service to that cause in the face of overwhelming odds; in unflagging courage in the face of those odds and in the face of constantly recurring defeats.

—William W. Crosskey, Mr. Chief Justice Marshall

I.

The third, and apparently final, volume of William Winslow Crosskey’s Politics and the Constitution has at last been published. I venture, as someone who has been identified as one of “the most persistent exponents of [Professor] Crosskey’s views,” to discuss his three volumes. I hope, thereby, not only to help bring Mr. Crosskey’s remarkably instructive constitutional studies to the attention of a new generation of law students, but also to clarify opinions of my own which have been stimulated by his, however different they might now be here and there.

The remarkable harshness of some of the critics of Mr. Crosskey’s first two volumes was probably a response not only to his considerable deviation from the conventional constitutional interpretation of his day but also to the uncompromising, even belligerent, tone of his argument. That he did differ widely from the accepted opinion is obvious—even though he repeatedly insisted that he was merely resurrecting the originally intended meaning of the Constitution, a meaning which had been distorted by partisan political maneuverings and which had been obscured by the passage of time.

Critical to the early and deliberate distortion to which the

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*Useful suggestions about this article have been made by Professors Larry Arnhart, Northern Illinois University; Michael Conant, University of California at Berkeley; Paul Finkelman, University of Texas at Austin; and Stanley N. Katz, Princeton University.

The reader is urged, as with my other publications, to begin by reading the text without reference to the notes. The notes follow the text of this article.

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Constitution was subjected, Mr. Crosskey argued in all three volumes, was the concern of Southern politicians to keep to a minimum the Commerce Power of Congress and hence the ability of the national government to interfere with the slavery institutions that the South was burdened with and believed no one else but the South should be permitted to regulate in any way. This was a belief that, according to Mr. Crosskey, the South came most fervently to insist upon once it had been exposed to reports about the fierce slave uprising of 1791 in Haiti.

I shall return to these matters in the course of this article. It suffices at this point to suggest how critical the slavery issue was, how it was related to the Commerce Power, and hence what it was that fueled the subversive politics Mr. Crosskey makes so much of. The relation between slavery and the Commerce Power may be seen in an exchange Abraham Lincoln had with Stephen A. Douglas in the course of their 1858 contest for a Senate seat from Illinois. Lincoln was confronted by this Douglas interrogatory:

I desire him to answer whether he stands pledged to the prohibition of the slave trade between the different States. Lincoln answered:

... I must say here, that as to the question of the abolition of the Slave Trade between the different States, I can truly answer, as I have, that I am pledged to nothing about it. It is a subject to which I have not given that mature consideration that would make me feel authorized to state a position so as to hold myself entirely bound by it. In other words, that question has never been prominently enough before me to induce me to investigate whether we really have the Constitutional power to do it. I could investigate it if I had sufficient time, to bring myself to a conclusion upon that subject, but I have not done so, and I say so frankly to you here, and to Judge Douglas. I must say, however, that if I should be of opinion that Congress does possess the Constitutional power to abolish the slave trade among the different States, I should still not be in favor of the exercise of that power unless upon some conservative principle as I conceive it, akin to what I have said in relation to the abolition of slavery in the District of Columbia.

In the years following, Lincoln was to make this point on several occasions.
What is more significant perhaps than the answer Lincoln gave in 1858 was the fact that the question could even be put to him. Is not the possibility of a broad Commerce Power in Congress implied by the question? Lincoln's answer was carefully worded: he wanted to reassure Southerners and Southern sympathizers, as well as Northerners interested in domestic tranquility, without absolutely denying the power (including the Commerce Power) of the United States to deal with "interstate" traffic in slaves.

That the United States could regulate, and even forbid completely, American participation in the international slave trade, there was no doubt—and Congress had outlawed such trade as soon as it was permitted to do so by the Constitution. But did not the Commerce Power invoked in 1808 to prohibit the importation of slaves from Africa mean that Congress also had the power to regulate, and even to forbid completely, the trade in slaves among the States? Lincoln's reluctance to interfere with the "interstate slave trade" (as distinguished from the movement of slaves into the Territories, which movement he was pledged to oppose) was related to his policy of leaving slavery alone where it was but not allowing it to spread further. Not allowing it to spread, however, was regarded by him as tantamount to a gradual (and peaceful) suppression of slavery even in the States where it had always been. To insist, therefore, on recognizing the dormant Commerce Power of Congress to regulate the "interstate slave trade" must have seemed to him unduly provocative, unnecessary and hence hardly useful in his circumstances.

That the South should have to depend on the self-restraint of Northern politicians was, it must have seemed to apprehensive Southerners, a dangerous state of affairs—and they considered it their duty, from early in the life of the Republic under the Constitution, so to interpret that document as to keep the powers of Congress at a minimum, especially in domestic affairs. This was, according to Mr. Crosskey, at the heart of the politics which first led to massive distortions of the arrangements originally written into the Constitution.

II.

The third volume of Mr. Crosskey's work (which was prepared for publication, more than a decade after the author's death, by a former student of Mr. Crosskey's, who was [until his own recent death] at the University of Cincinnati) is in several critical
respects similar to the first two volumes. That is, the reviews published in response to the original volumes apply to this one as well—and it would be difficult, and perhaps pointless, to talk about the third volume (which is my point of departure for this article) without discussing the earlier volumes as well.

The response to Mr. Crosskey’s work has been such that it “is today almost totally neglected.” Even at the University of Chicago Law School, where he did almost all his work as a constitutional scholar, little use is made of him in constitutional law courses. Yet many reviews of the first two volumes were friendly. But, it has been suggested, “naturally, the favorable reviews were written in bland terms of general approval, the unfavorable reviews went in for detailed infighting.” Still, several of the favorable reviews were quite enthusiastic, even when some of Mr. Crosskey’s gratuitously-expressed sentiments were personally offensive to reviewers.

One of the more unfavorable reviews came from a historian Mr. Crosskey had singled out for special (negative) treatment in his very last note in the two volumes published in 1953. This reminds us that historians generally did not fare well at his hands. Thus, he could observe in the course of his explanation of “the probable general American understanding of ‘commercial regulation’ when the Commerce Clause was drawn”: “The historians’ discussions are not specific or rigorous upon this point, as, indeed, they are not specific or rigorous upon many points.” This sort of comment, which may be found throughout Mr. Crosskey’s most recently published volume as well, is hardly calculated to endear one to one’s colleagues.

How conventional historians of stature responded to Mr. Crosskey a generation ago is suggested by an observation in 1972 by a younger historian (then at the University of Chicago Law School) who added his own generous appraisal of the work of a man whom he had never known personally:

The book startled its scholarly audience and found several distinguished reviewers, men such as Judge Charles E. Clark, Walton Hamilton, and our own [Law School] colleague Malcolm Sharp, who praised it as the most important contribution ever made to constitutional history. A smaller number of equally eminent reviewers greeted the book with outrage and contempt. The heat of the controversy is difficult to imagine at twenty years distance, but it can perhaps be best suggested in the lan-
guage used by Henry Hart in his lengthy attack in Volume 67 of the *Harvard Law Review*. Hart referred to Crosskey as “the Don Quixote of Chicago,” “the Knight of La Mancha, the Knight of Hyde Park,” and spoke of Crosskey’s two volumes as “a farrago of fancy, rendered plausible only by a confident tongue, nice printing, and an abundance of notes and appendices referring to obscure documents and esoteric word meanings.”[25] I think it is fair to say that professional legal and constitutional historians have come down on the side of Hart’s intellectual position, if not his etiquette, and yet, speaking personally, I must say that I cannot think of any dozen books on the Constitution which have taught me half as much as I’ve learned from Crosskey’s remarkable pair.

Another generous appraisal has been recorded by a former student of Mr. Crosskey’s, who remembers him as “a courageous and scrupulously fair and honest man whose efforts were conducted for many years in crippling pain.”[26]

III.

The most important effect of Mr. Crosskey’s work comes not so much from the doctrines he argued for—the doctrines he found embodied in the Constitution—but rather from one proposition for which he stood, that the Constitution is something to be read, that it requires and rewards careful study. His students were induced to read the Constitution itself, really to read it, not merely what judges and scholars have happened to say about it.

It is a major scandal in American education that one can attend many a good college today without being required, during four years as an undergraduate, to read anything of Plato, Shakespeare or the Bible.[27] Similarly, one may study “constitutional law” in most law schools today without being required to study the Constitution itself. But then, why should students be required to do what all too many judges and commentators neglect to do? Mr. Crosskey referred to “that singular shyness toward the actual language of the Constitution, which, from their first appearance down to the present day, has been a marked characteristic of the friends of the interstate theory [of the Commerce Clause].”[28] Such “shyness” may be seen in what he says about a celebrated opinion by a celebrated Justice:[29]

So, had Justice Brandeis, in the *Erie case*,[30] only taken the trouble to read the Constitution, or even the opinion of
his great predecessor,[31] Martin v. Hunter,[32] he would undoubtedly have been saved from the grievous error he committed. But like Justice Holmes before him, he felt a high certitude about the Constitution and did not take this trouble; and the Supreme Court, in consequence, took the final step in its strange declension from its plainly granted position as the supreme and general juridical head of the country.

Earlier, Mr. Crosskey had spelled out what constitutional law is and is not:33

[T]he Justices, it ought not to be forgotten, rarely read, or study, or discuss the Constitution; they read, and study, and discuss, instead, their own pronouncements about it, and those of their predecessors on the Court. One Chief Justice, with somewhat surprising candor, once declared that "the Constitution is what the judges say it is";[34] and a famous Associate Justice, with the applause of the schools, announced his view that "the life of the law ha[d] not been logic: it ha[d] been experience," and that "the prophecies of what the courts w[ould] do in fact, and nothing more pretentious, [were] what [he] mean[t] by the law."[35] These ideas, glossed with the theory of a present member of the Court, that constitutional determinations "express the sensibilities of statesmen, not the formulations of technicians,"[36] have naturally tended, especially when constantly repeated with approval by the learned, to confirm the Justices in their long-standing neglect of the Constitution, and their constant myopic concern with their own decisions. As a consequence, the Court's product, incorrectly called constitutional law, has come to have almost no connection with the rather sensible, straightforward document on which it is supposed to be based. But although this is true, it would be a great mistake to suppose that the Justices, generally, are aware of this fact. They simply drift along with the current, without paying much attention to the ancient document they are sworn to uphold.[37] So, any suspicion that they are aware of the gross inconsistency in their various positions, or of the patent untenability of their theories as a whole, would probably be incorrect.

Mr. Crosskey speaks here of the Constitution as a "rather sensible, straightforward document." A former colleague of his,
following Mr. Crosskey’s lead, called it “simple and flexible, but disciplined.” And, one might add, only a constitution that does make sense can truly be thought about.

Critical to Mr. Crosskey’s influence, then, is that he does persuade us to take the Constitution itself seriously. Indeed, it may be possible to take it even more seriously than he does, in that he himself may be unnecessarily burdened with historical studies. In any event, it can be difficult to get law students to address the Constitution with sufficient seriousness, partly because its study is not generally regarded as “practical.” What does not seem to be generally appreciated, however, is that the study of so well-crafted a document as the Constitution can be invaluable for anyone who wants to learn how to read or write a carefully-wrought legal instrument, commercial or otherwise.

IV.

Of course, it would be impractical—no matter how sound one’s reading of the Constitution itself should be—to completely ignore “what the judges say it is.” After all, one must try to anticipate what “courts [are apt to] do in fact.”

But unless one has a view of the whole—of what is reasonable, of what is right—one cannot make much sense of what courts do and say from time to time. One needs to know what is if one is to be able to recognize errors and partial truths for what they are. This means, among other things, that one should be aware of what is by nature right, as well as of what republican government and the rule of law mean, if one is to approach political (including constitutional) things in the right spirit.

That is, when one studies what courts say about constitutional matters, one must rely upon some “theory” of the Constitution in order to be able to assess and “place” whatever is said. Otherwise, it is difficult to see how judicial pronouncements are to be distinguished from “policy” statements by other officers of the government. Some judges, we like to believe, do come closer than others to the Constitution in their expositions. For if some expositions are not superior, we are left with little more than mere rationalizations. This is reflected in the bad (even sophistic) habits students of constitutional law fall into trying to make sense on the basis of the Constitution itself, of the distinctions courts may chance to draw.

It is evident when one consults Mr. Crosskey’s work that it is indeed the Constitution he is trying to explicate. And so, as has
been noticed, his arguments "always merit our closest study, even when we find them dubious." There is about his work, however eccentric it may appear in some respects, the feel of solid integrity that one simply does not get from the work of most of his contemporaries. When he errs, it is on the side of assuming that there is an ascertainable meaning to be sought in and figured out for every provision in the Constitution. If this is an error on his part, it is a salutary one at a time when it is easy to assume that "anything goes."

It is no wonder, then, that a learned scholar could observe in 1972, "I cannot think of any dozen books on the Constitution which have taught me half as much as I've learned from Crosskey's remarkable pair."

V.

I turn now to Mr. Crosskey's work proper. The first two volumes of Politics and the Constitution were described in this somewhat Crosskeyan manner by the University of Chicago Press in 1953:

Mr. Crosskey asks: What kind of government did the constitutional Fathers intend for these United States?

His answer is arresting: George Washington and the other men who planned our government intended a government with plenary, nation-wide powers—legislative, executive, and judicial—a truly national government, uncomplicated and unimpeded by divisions of power over indivisible spheres of action between the nation and the states. And within this national government of plenary powers, the Fathers intended that the Congress of the United States should be supreme.

One important part of the evidence [for this remarkable thesis] consists in the difference in usage in the eighteenth century of certain key words contained in the Constitution. Mr. Crosskey has employed newspapers, books, letters, legal documents, and pamphlets from our nation's formative period to determine how the then-current meaning of certain crucial words differed from our own—words like "delegated," "the state," "commerce," "general," and "expressly." And, on the basis of this difference, he radically amends traditional views of what the Constitution means.
To take just one example, the domestic power of Congress over commerce, according to accepted views, relates only to that commerce which crosses state boundaries. Mr. Crosskey demonstrates that, to those who drew the Constitution, the words “commerce ... among the several States,” which describe this power, refer to the entire domestic commerce of the country.

Again, Mr. Crosskey shows that the Fathers believed there was an existing national customary law—the common law of England—applicable to the subjects with which they dealt and that only when the Constitution is read against that law can its true purposes be perceived. The Founders’ consuming concern, he shows, was the danger of monarchy and not the inviolable rights of the states.

In the course of his argument, at every point impressively buttressed with evidence from legal and political history, the author explains how the road to the current misconceptions was taken. And the Constitution, in the end, emerges in an entirely new light, tightly and logically drafted and unmarred, as currently accepted theories assume it to be, by empty rhetoric, ambiguous phrases, and meaningless variations in wording.

This description is about a text (in the first two volumes) which Mr. Crosskey had divided into five parts (after having opened the book with a chapter, “Our Unknown Constitution”). The titles of these five parts give a fair indication of the scope of his discussion:

I. The National Power Over Commerce;

II. The Interrelationships Between the Commerce Clause and the Imports-and-Exports, Ex-Post-Facto, and Contracts Clauses of Section 10 of Article I;

III. A Unitary View of the National Governing Powers;

IV. The Supreme Court’s Intended Place in the Constitutional System;

V. The Supreme Court and the Constitutional Limitations on State Governmental Authority.
I need add to the publisher's 1953 description of the contents of the first two volumes—which description is sufficient for our purposes for the time being—that Mr. Crosskey's suggestion about the Supreme Court's intended place in the constitutional system was twofold: the Court was not intended to exercise a general power of reviewing acts of Congress for their constitutionality; the Court was intended to exercise a general superintending power over the common law of the entire country. Or, to put his suggestion in terms of famous cases, both *Marbury v. Madison* and *Erie Railroad Co. v. Tompkins* were incorrectly decided.

The third volume of *Politics and the Constitution* (published in 1980) has been described in this manner by the University of Chicago Press:

When the first two volumes of William Crosskey's monumental study of the Constitution appeared in 1953, Arthur M. Schlesinger called it "perhaps the most fertile commentary on that document since *The Federalist* papers." . . . Crosskey's basic thesis was that the Founding Fathers truly intended a government with plenary, nationwide powers, and not, as in the received views, a limited federalism.

This third volume of *Politics and the Constitution*, which Crosskey began and William Jeffrey has finished, treats political activity in the period 1776-87, and is in many ways the heart of the work as Crosskey conceived it. In support of the lexicographic analysis of volumes 1 and 2, volume 3 shows that nationalist ideas and sentiments were a powerful force in American public opinion from the Revolution to the eve of the Constitutional Convention. The creation of a generally empowered national government in Philadelphia, it is argued, was the fruition of a long-active political movement, not the unintended or accidental result of a temporary conservative coalition.

This description is about a text that Mr. Crosskey had divided into five parts also. Here, too, the titles of these five parts give a fair indication of the scope of his discussion.

I. The Articles of Confederation;

II. The Movement for a National Commerce Power in the 1780s;
III. Politics and Events Leading up to the Failure of the Annapolis Commercial Convention of 1786;

IV. Politics and Events Leading up to the Agreement of Congress and the States to the Meeting of the Federal Convention of 1787;


It would be difficult to exaggerate the importance for Mr. Crosskey of the Commerce Power in our constitutional system—and it is to the detailed tracing of the development of the public demand with respect to this most important of the domestic powers of Congress that the third volume of his work is devoted. One sees here once again the thoroughness, as well as the belligerent tone, one became accustomed to expect from Mr. Crosskey's publications.

That Mr. Crosskey challenged many of the Supreme Court's (and the scholars') readings of the Constitution is well-known. But what is not generally known is that his students did get a reliable sense (albeit from an unusual perspective) of what the currently-accepted constitutional doctrines are. Indeed, if his opinions about the Constitution are sound, his students see the accepted doctrines of the day to a degree that others do not.

VI.

The first chapter of the third volume of Politics and the Constitution, "The Constitution of 1787," is written by Mr. Jeffrey. It provides a quite useful summary of the first and second volumes of Mr. Crosskey's work.

Mr. Jeffrey imbibed much of the spirit of Mr. Crosskey—and so one can hear his master again and again in these opening pages. In some respects Mr. Jeffrey even goes further than Mr. Crosskey: perhaps he almost goes too far, in that he is not quite able to carry things off with the aplomb of Mr. Crosskey—but then, who can?

Mr. Jeffrey (who was to be congratulated for his perseverance and his care in seeing this volume through the press) ended his introductory chapter with this recapitulation:

We conclude our description and analysis of the Constitu-
tion as it came to us from the hands of its Framers in 1787. What the Framers had done, in large outline, was to return to the familiar pre-Revolutionary British imperial system, substituting Congress for Parliament, the American presidency for the British monarchy, and, undoubtedly influenced by Montesquieu's theories, setting up a third, but far from coordinate and equal, branch of the government. This American, national, and republicanized substitute for the English, colonial, and monarchical system of the pre-Revolutionary days was not the repository of fragmentary, partial powers, as present-day "constitutional" dogma would have us believe, but instead was quite generally empowered to achieve the six great objects stated by the people in the Preamble to their Constitution, subject to the tiniest handful of particular and specific restraints on the powers of the new national legislature. The chapters and pages which follow recount the history of the events, institutions, and politics that together constitute the background of the Federal Convention of 1787, whose members drafted, and offered to their fellow citizens for their ratification, a Constitution with the character and contours which have been sketched for the reader in this chapter.

One can be reminded, by the tenor of the first chapter of volume III of *Politics and the Constitution*, of something that pervades Mr. Crosskey's work—something which Mr. Jeffrey is eager to adopt: it is obvious that there are heroes and villains in the tales to be told about American constitutional adventures. Thus, John Marshall can often be referred to by Mr. Crosskey as "the great Chief Justice." And another Chief Justice, Roger Brooke Taney, can be identified by him as "this great arch-sophist among Supreme Court Justices." That is, Mr. Crosskey has decided opinions, which are not uninformed, about quite an array of distinguished Americans who have been responsible for the shaping of our "constitutional law."

It should be noticed as well that Mr. Crosskey tends to be kind toward his heroes when they do things that might seem to us similar in critical respects to conduct he roundly attacks when indulged in by his villains. But one comes to expect this of Mr. Crosskey and to make allowances for his partisanship, a partisanship which (as we will see) may be essential to (or at least hard to avoid in) meaningful political discourse.
A somewhat more subdued partisanship may be seen in what may well be the best available introduction to the work of Mr. Crosskey, that provided in 1973 by his longtime colleague at the University of Chicago Law School, the late Malcolm P. Sharp.

The following extended passages from Mr. Sharp’s article suggest a balanced appraisal of Mr. Crosskey’s work by someone who followed, and encouraged, its development over a number of years:

[Mr. Crosskey’s] position is that the Commerce Clause, the grant of powers to the Supreme Court, and the implications of the references to “general Welfare” in the Preamble and among the grants of power to Congress, give general legislative power to Congress, subject only to exceptions provided for in the Constitution. We shall consider first, somewhat more narrowly, the effect of the Commerce Clause on the powers of Congress and the theory of the general prevalence of state law, particularly commercial private law, in the United States Courts.

The Constitution provides: “The Congress shall have Power... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes....” Mr. Crosskey has assembled a number of meanings, current in the society in which the Constitution was drafted and adopted, for “commerce.” A quite common meaning was “gainful activity,” and if a more limited meaning was to be understood, it is hard to understand why that limited meaning was not made explicit. “Among” meant, then as now, “in the midst of,” but it was used somewhat more generally than it is now. ... “Among” was not authoritatively limited to “between” until 1873, in The Case of the State Freight Tax. As a result, “commerce” came to mean gainful exchange, and “state” came to be associated with the limited territorial aspects of state government. These steps made it possible to treat the affirmative words of the Commerce Clause, granting power to Congress but not saying “only” to Congress, as limits on the powers of states in the absence of Congressional action. It was impossible to think of the [Commerce] Clause by itself as prohibiting state action on commercial matters “among” the states generally. An
effort to interpret the powers of Congress over bankruptcy as itself limiting the powers of states over insolvency problems was defeated early in our history. There is no sufficient reason to think that the Commerce Clause itself was to be understood in its original context as automatically abolishing state power over commerce. It did give Congress power to deal with economic frictions between states in the exercise of its power generally to regulate "Commerce...among the several States." The contemporary reader must be reminded repeatedly that "commerce" included all gainful activity, that "among" included but was not limited to "between," and that "states" meant groups of people, with or without reference to hunks of land.

We observe that these Eighteenth Century meanings, except perhaps in the case of "commerce," are, when we look at the words, our own as well. In the case of "commerce" the Supreme Court has now, in practical effect, worked out its own extended meaning so that the Commerce Clause now applies to virtually all gainful activity. In the substitution of "between" for "among,"[7] on the other hand, the Supreme Court has created its own limited meaning and has thereby obscured what it has done with "commerce."...

...[Mr. Crosskey argues that the Constitution] requires us to recognize the common law as one of "the Laws of the United States," thereby permitting federal jurisdiction of common law disputes regardless of who the parties are.[72] It is perhaps too much to expect a return to the earliest understanding of federal jurisdiction. Nevertheless Mr. Crosskey's arguments add support to his view of the extensive powers of Congress over economic matters. It is hard to suppose that Congress could be left without power to deal with a subject matter, land law or commercial law, on which a coordinate Court could rule. The utility if not necessity of legislative power to define, extend, limit, or change the law developed by a coordinate court is a persuasive reason for the familiar relationship in our system between legislatures and courts.[73]

...To his argument about the Commerce Clause and his
argument from the powers of the Court, Mr. Crosskey adds an argument from the Preamble and the General Welfare Clause, to derive a theory of general legislative power in Congress, limited of course by such explicit provisions as the guarantees of individual rights in the Constitution and its amendments.

The two familiar objections to such a theory should first be mentioned. These are the accepted theory of enumerated powers and the accepted theory of the Tenth Amendment.

Mr. Crosskey has an entirely adequate alternative explanation for the enumeration of powers of Congress in Article I. In each case there is a specific and limited reason for the enumeration, including the sections dealing with foreign affairs in which provision is made for giving Congress all or part of the powers at the time possessed by the English Crown.

The second objection, from the Tenth Amendment, seems adequately answered by the Amendment's function in protecting and "reserving" the power of states to deal with commerce, by regulation or taxation, in the absence of inconsistent legislation by Congress. The power was not "delegated" in the sense, familiar at least in the Eighteenth Century, of being completely given away to Congress, nor was it "delegated" in any sense, to the Court.

....

The principal argument against the existence of the resulting general legislative power [advocated by Mr. Crosskey] is the insistence, in ratification debates, by thoughtful contemporaries, including members of the [Constitutional] Convention, that there was no such general power; and that freedom of speech and press, for example, could not be limited by the exercise of any powers granted to Congress. Nevertheless, the decisions to propose and adopt the First Amendment lend support to the view that the existence of such a general power was perhaps not merely feared but reasonably anticipated by some discerning contemporaries.

Mr. Crosskey's position on this matter is somewhat more convincing than his position with respect to judicial review of congressional action. The power to review state
action is clearly stated or plainly implied in the Constitution. The power to review congressional legislation is left to more doubtful inference, and contemporary state precedents did not go beyond judicial review of legislation affecting judicial procedure. Mr. Crosskey argues that review of congressional action was limited to procedural questions and to action which would usurp or restrict judicial power.

The apparently inevitable logic of Marbury v. Madison\(^7\) is of course not inevitable at all. But it seems to express an instinct about policy which has considerable force, and which fits the system of separation of powers and of checks and balances which was, and is, the great safeguard of freedom in the original Constitution. In view of the ambiguity of the Constitution on judicial review, considerations of policy may well play a part in its interpretation.\(^7\)

I have found it useful thus to quote at length from Mr. Sharp. The judiciousness of his approach to the Crosskey thesis may be seen in his observation, "I offer these suggestions... partly as an encouragement to those who are—to me, surprisingly—discouraged or confused by the bulk and style of [Mr. Crosskey's] argument and partly as my own view of its most important and convincing portions. On other matters he seems decisively convincing but not indisputably convincing; on others, barely convincing; and on a few, mistaken."\(^7\)

VIII.

As should be evident from the extended passages I have quoted from Mr. Sharp, a gentle soul who was a well-informed and most sympathetic student of Mr. Crosskey's work on the Constitution, it must be a rare reader who does not have major reservations about that work, however instructive he finds it.

Thus, I myself am not fully persuaded, although I remain intrigued, by what Mr. Crosskey has to say about the scope and effect of the Preamble, about the significance of the enumeration of powers in Article I, Section 8, about the intended meaning of the Contracts Clause,\(^7\) and about the extent of the Supreme Court role with respect to the entire common law of the country (however dubious Erie Railroad Co. v. Tompkins\(^7\) may be). There does seem considerable merit to what is said by Mr. Crosskey about the Commerce Power (which argument, funda-
mental to his entire work, is reinforced by the third volume of
*Politics and the Constitution*, about the care with which all of
the Constitution was written and is to be read, and about the
quite limited effect of the Tenth Amendment. There is merit as
well in what he says about judicial review, but his argument
here is (as Mr. Sharp observed) far from conclusive. Mr. Cross-
key and I differ about whether the doctrine of States' Rights has
anything good to be said for it (Mr. Crosskey thinks not!). We
also differ about the First Amendment—but that is not a serious
difference, since he never concerned himself much with that part
of the Constitution.

It would be convenient for me to say something more here
about a few of the reservations I have just touched upon before I
turn to more extensive comments on the points that would be
most useful to develop on this occasion.

I have never understood why there was no clear indication in
the early decades under the Constitution, or in any records of the
Convention or of the Ratification Campaign, of the purposes of
the enumeration of powers in Article I, Section 8, if those pur-
poses should be somewhat along the lines indicated by Mr.
Crosskey. Mr. Crosskey himself, without recognizing it, indi-
cates a number of occasions when such an obvious explanation
would have been in order.

It is indeed a curious state of affairs (as one of his students has
observed) if Mr. Crosskey should happen to be correct about the
purposes of the enumeration of powers.

If Crosskey is right about the legislative authority, we are
left with an irony: the powers which might have been
doubtful legislative powers and which were therefore
enumerated to remove all doubts have come to be the only
powers in Congress, under the orthodox theory; on the
other hand, powers assumed to be Congress' under its
general authority and which were therefore not enumer-
ated, are the very powers which have been lost to it under
the orthodox theory.

This "irony" might even be considered a cosmic joke on all of us
who take constitutional government seriously.

Mr. Crosskey, I have indicated, sees no merit in the States'
Rights position: he tends to speak from a Northern anti-slavery
perspective in dismissing as a chronic Southern sophistry the
suggestion that States' Rights were linked to the cause of lib-
erty. He also tends to suppose that a virtual consolidation of the
States was widely desired in 1787. Mr. Crosskey does not see any merit in anti-consolidation sentiment—and so he may not be equipped to give it its due weight.

Furthermore, one simply does not get the impression, from the various records we do have of discussions during the Constitutional Period, that a virtual consolidation of the States was intended. If anything, it was assumed that consolidation was not contemplated, however minor the role of the States was eventually to be in the workings of the government under the Constitution. That is to say, Mr. Crosskey’s thoroughness as a researcher does not preclude a systematic misreading by him of the intentions of the country at large on this critical issue, an issue discussed quite freely in the early decades of the Republic.

IX.

My own study of the First Amendment takes account of, even as it departs from, Mr. Crosskey’s opinions on the subject. He is particularly helpful for anyone thinking about the Religion Clauses of the First Amendment. But he would not have said about the Speech and Press Clause what Mr. Sharp has said:

Rivalling the Commerce Clause in importance, the principle expressed [in the Speech and Press Clause] is one of humanity as well as freedom, and an assertion of the important place occupied by the citizen in considering the decisions on public affairs which in our society are ultimately his. He is to have the benefit of all available views on public matters, expressed in speech or in the press.

Mr. Crosskey does consider the omission of a bill of rights “as a great tactical error upon the [Constitutional] Convention’s part.” That is, this omission gave the Anti-Federalists the only popular weapon they had available to use against the Constitution during the Ratification Campaign. In defense of the omission it was said by advocates of the Constitution during the Campaign that Congress did not have, for example, any power to abridge freedom of speech or of the press. But caution prevailed—and the guarantee which became part of the First Amendment was proposed to the States by the First Congress.

Still, an observation in the Crosskeyan mode is that made by Fisher Ames, that “our disturbances [had] arisen more from the want of power than the abuse of it.” And it is on the considerable power given to Congress, not on the restraints placed by the Constitution upon Congress (as distinguished from the Presi-
dent), that Mr. Crosskey places the emphasis in everything he has done.

X.

The various reservations I have indicated in Section VIII of this article, as well as the status I have just suggested for the First Amendment, need not matter much for the most significant points Mr. Crosskey makes. These points are with respect to the Commerce Power under the Constitution, with respect to the supremacy of the Congress (in the exercise of the powers of the General Government) as against the States and as against the President and the Judiciary, and with respect to the proper place of the Judiciary (and especially the Supreme Court of the United States) under the Constitution.

I will consider each of these now, beginning with the Commerce Power, which does figure largely in the constitutional system described by Mr. Crosskey. The Commerce Power is, especially when reinforced by the Tax Power, the principal domestic power of Congress—and its extent very much determines, in practice, the extent of the powers of the Government of the United States. This is not unrelated to the plausible proposition that the business of America is business.100

XI.

Mr. Crosskey argues for a sensible interpretation of the Commerce Clause, not one that is as fragmented, as uncertain and as apparently arbitrary as the Supreme Court’s interpretations have been since early in the Nineteenth Century. Thus he reported that he had “heard workingmen laugh aloud” at decisions by the United States Supreme Court “striking down state laws against picketing, for the reason, forsooth, that such laws infringe freedom of speech and the press.”101 A proper reading of the Commerce Clause, he argues, would have prevented such absurdities.

But, more important, the Commerce Clause should permit Congress, when it wants to do so, to deal directly with the commercial affairs of the country in a systematic and comprehensive fashion.102 Thus, Mr. Sharp suggests that “it would not be revolutionary,” under Mr. Crosskey’s view of things, “for us to embark much more extensively than we have done on a systematic program of federal codification, for example, of contract law, by Act of Congress.”103 The alternative is to permit, even
require, inefficiencies and to provoke, in some circumstances, serious disturbances.\textsuperscript{104}

Critical to all this is a determination of just how broad "commerce" is. Is it to be distinguished, for example, from "agriculture" or from "manufactures"?\textsuperscript{105} We have seen that Mr. Crosskey suggests that "commerce" refers to "all kinds of business," to "the gainful activity of a nation, as a whole."\textsuperscript{106} And, as we have also seen, the third volume of Politics and the Constitution makes much of "the movement for a national commerce power" as an influence, especially in the North, toward the calling of the Constitutional Convention in 1787.\textsuperscript{107}

### XII.

In practice, of course, the recognized commercial power of Congress has been steadily broadening during the past half-century.\textsuperscript{108} But, it is said, problems remain: proper legislative treatment of commercial matters, on a national basis, is still hampered by the "theory" under which Congressional power has been extended.\textsuperscript{109}

A good deal is to be said for the Crosskey thesis, in that it liberates both Congress and the Supreme Court to deal directly with matters that are still regarded as within the State domain—matters which are, however, nationwide in their ramifications.\textsuperscript{110} And so it was predicted in 1953:\textsuperscript{111}

It will be interesting to watch the process by which the Crosskey thesis becomes accepted, as much of it is certain to be. The express recognition of a comprehensive commerce power in Congress will in all probability come first, as only the bones of the "interstate" theory remain. There are indications that this has been happening, one recent example being the substantial effort in Congress to enact legislation regulating state usury laws.\textsuperscript{112} This fits in nicely with another element in the 1953 prediction I have just drawn upon:\textsuperscript{113} By and large the legal community will find comfort or distaste in Crosskey depending upon their own biases about the issue of Big Government. The one exception to this will be the financial community and its representatives, who will probably be willing to swallow their fear of Big Government in exchange for Federal commercial laws.

Commercial rules do vary from State to State—and that can be wasteful if not even unjust at times.\textsuperscript{114} Of course, there can be differences between federal circuits interpreting acts of Congress,
just as there are differences between States—but the possibility of systematic correction by the United States Supreme Court remains.

Still, it can be said that Congress has invoked and exercised much of the virtually plenary power over commerce that Mr. Crosskey argues was sensibly intended by the Framers to be available to Congress when it should want to exercise it as circumstances changed. This "natural" development, compelled (or at least encouraged) by our circumstances, confirms that the Constitution, as originally devised, is well-fitted for our use today.\(^1\)

XIII.

How efficient do we want business to be? Do we want it to be any more efficient and effective, and hence more likely to be influential, than it has long been? Are things more interesting and perhaps politically safer, with the diversity we have among the States (whatever its inefficiency)? In short, what kind of regime do we want anyway?

To ask this kind of question is to oblige ourselves to consider the relation between free enterprise and modernity (or progress),\(^6\) to consider the advantages and disadvantages of avarice and of luxury (that is, the problem of virtue),\(^17\) and to consider whether commerce tends toward excessive mobility, the subversion of a healthy variety in traditions, and a stifling homogeneity.\(^18\) Those who see certain private vices as often productive of public good insist that law should not be permitted to stand in the way of—it should even be employed to serve?—our desire for gain.\(^19\)

However these questions should be answered, the commercial development of the country may well have been furthered by the lack of effective commercial power in Congress in the early decades of the Republic. That is, is it not likely that the exercise then of a broad national power over commerce would have been rather restrictive of the free market, with considerable recourse to price and wage controls and that sort of thing?\(^20\) The insistence on State power in these matters meant, in effect, no effective national control—and thus made a free market more likely: what the States did try to do then, in the way of interfering with commercial activity, must have tended (so long as restricted to particular States) to have little effect nationally (or, consequently, even in those States).
Perhaps Congress today is more inclined toward a free market than it would have been in the late Eighteenth and early Nineteenth Centuries. Still, is it better that no government in the United States have effective power to regulate all commerce, especially if commercial power tends to spill over into control of other matters as well?\footnote{121}

It should be noticed also that if commerce is critical in the United States, the status of local governments might be further subverted if they should have (in the event, admittedly unlikely, of complete Congressional occupation of the field) no power at all to regulate any commerce.\footnote{122}

XIV.

If anyone in the Government of the United States has policy-making power over commerce, it should be Congress, not the President. We return with this constitutional truism to the problem of legislative supremacy.\footnote{123}

Mr. Crosskey argues, of course, for the substantial subordination of the President to Congress and “the Laws” generally.\footnote{124} We have, since the Second World War, faced an alternative to this in the form of “the Imperial Presidency.”\footnote{125}

This brings us to the great case of Youngstown Sheet & Tube Co. v. Sawyer.\footnote{126} The country confronted there, as later in the Pentagon Papers cases,\footnote{127} the reluctance of the President not only to recognize himself as subordinate to Congress but also to trust Congress to do its duty. Legislative supremacy means, among other things, that there may be circumstances in which Congress simply refuses to do what the President very much wants to see done “to save the country.”\footnote{128} That is, it is assumed throughout the Constitution that legislative judgment should generally prevail over presidential judgment, with the short-term risks (but also with anticipated enduring benefits) of this arrangement for the country.\footnote{129}

To say all this is to insist upon the rule of law. And, it should be added, it is ultimately to the rule of law that we look for many of the assurances sought through bills of rights.\footnote{130}

XV.

We look to the courts for expositions of the law. But they too are subordinate to their coordinate legislature.\footnote{131}

What should be thought, then, of the much-vexed question of
judicial review of acts of Congress for their constitutionality?132 How judicial review should be dealt with, especially after a long-time nominal reliance upon it, may not be as clear as Mr. Crosskey seems to indicate.133 Besides, if Congress is willing to accept judicial review—if not even to rely upon it—does not that suggest that it may thereby have been legitimated so as to serve a useful purpose?134

Perhaps a much more significant question is with respect to the duty and powers of the Supreme Court as a common law court, as well as the supreme expositor of all laws, whether State or Federal. Thus, there is a striking contrast between Huidekoper's Lessee v. Douglass135 and Erie Railroad Co. v. Tompkins.136 In Huidekoper, the Supreme Court's interpretation of a Pennsylvania land statute was considered authoritative for Pennsylvania State courts.137 In Erie, the Court declared itself bound to follow, in diversity of citizenship cases, the interpretations of the relevant common law laid down by the courts of the State jurisdiction deemed applicable.138

At the root of this problem is the question not only of the nature of the common law but also of the nature of law itself.139 That is, a certain "legal realism" may be evident in Erie.140 Compare the confident assumption in Swift v. Tyson141 that there are universal standards of justice ascertainable by judges.

In any event, it is difficult for me to understand why interpretations by the Supreme Court of the United States should not be authoritative, whether they be of Federal statutes, of State statutes and constitutions, or of the common law.142 For many people, one appealing feature of the prospect of judicial review is that it dramatizes the Supreme Court as a critical source of a superintending reason, and hence of moderation, in our public life. But would the Court not be even more such an influence if it should be depended upon for the best word, among all courts in this country, as to what the common law is, that law which touches every day the lives of all of us in countless ways?

XVI.

There is, about the way Mr. Crosskey proceeds in all three of his volumes, something of the assurance of "the master."143 It sometimes even seems that courts have been devising outlandish opinions primarily for Mr. Crosskey's pleasure in demolishing them.144
One does come to know the people he describes and to have a sense of what moved them: both their ideas and their interests come alive. Of course, all this is done by someone with “an axe to grind”—that is, with principles and standards and a confident sense of what is good and bad. He is a scholar who is very much a patriot. Thus, Mr. Crosskey can speak of the “evil consequences” of the Supreme Court’s theory about the Commerce Power.

How this kind of robust scholarship can look to conventional scholars may be seen in the following assessment made of Mr. Crosskey by one critic:

The readiness...to impute lack of scruple to others, wholesale, is worthy of note. But what is of main interest is the ineffability of the assumption that in the interpretation of a document embodying a grant of fundamental powers from the people to their government the representations made to the people to obtain the grant are irrelevant, and what alone counts are the secret thoughts of the men who drew the document the people approved.

The reference to “the ineffability of the assumption” does remind one of how a master can appear to the rest of us. More serious, however, is what is said here about the supposed irrelevance for Mr. Crosskey of “the representations made to the people” to obtain their ratification of the Constitution. One of the primary purposes of the third volume of Politics and the Constitution is (as I have indicated) to support a proposition relied upon again and again in the first two volumes, that the people of the United States wanted from the Constitution what they in fact got, a government of quite broad powers, especially with respect to commerce.

Mr. Crosskey, as we have seen, does have his heroes and villains. And he is very much a partisan. But one must be a partisan—a partisan of virtue and the common good—if one is to be able to competently describe political (including constitutional) issues and decisions. One is not being objective if one cannot, or will not, distinguish between good and bad.

In this respect, at least, Mr. Crosskey writes an old fashioned history, drawing more on the art of the novelist than on the data and “objectivity” of the economist or of the sociologist.

XVII.

To be sure, Mr. Crosskey’s art differs significantly from that of
the novelist in at least one critical respect, and that is in the considerable influence of chance upon the events he describes.152

Chance developments which very much influenced the emergence of the Constitutional Convention and the matters in which it would be interested include the proposed Spanish Treaty of 1786, the Business Depression of the 1780's, and Shays's Rebellion (which was directly related to that depression).

The Depression and Shays's Rebellion are said to have pointed up the need for a national commercial policy, as well as for an amelioration of the effects of corruption and inefficiency in the State governments.153 These are said to have been primarily Northern concerns, as was (of course) the concern about being subjected to Southern domination. The South, on the other hand, is said to have been very much influenced by its sense of vulnerability, militarily, and this became evident in the controversy over the proposed Spanish Treaty.154

But fundamental to all this—and to the very fact of a deep cleavage between North and South—was the slavery issue already referred to.155 I know of no student today of American constitutional origins who makes as much of slavery as does Mr. Crosskey.156 Thus, he can speak (as we have seen) of “the Southern sophistical views of the Constitution”—views very much shaped by slavery and the vulnerability and interests it promoted in the South. Mr. Crosskey is in his stance, even though not in the tenor of his language, very much in the tradition of which Abraham Lincoln was the peak.158 Consider how one reviewer could describe Mr. Crosskey's work in 1953:159

[H]e has a passionate hatred of slavery that permeates the entire work. Crosskey's evidence rather effectively demonstrates that it was slavery almost alone which brought about the misconceptions he attacks. For without slavery to defend, most of the incentive to shift the meaning to be given to the Constitution would have been missing.

Decisive to the Southern incentive to distort, Mr. Crosskey argues, was (I have indicated) the “successful” Haitian slave rebellion of 1791, which radically affected Southern opinion about slavery for more than half a century.160 It was this, perhaps more than any other single event, which made it seem necessary to Southern whites that only they should be entrusted with control of their slavery institutions—and any pretensions to national domestic power (commercial or other) which diluted
State sovereignty had to be vigilantly resisted.\textsuperscript{161} Indeed, this development was much more important, in Mr. Crosskey's opinion, than the cotton gin development which we so often hear of as responsible for the hardening of attitudes in the South about slavery. In these matters the opinions of a people (including the fears it has) may simply be more important than its prospects of material gain or loss.\textsuperscript{162}

\textbf{XVIII.}

The slavery issue is, for Mr. Crosskey, intimately related to the career of James Madison, to whom more space is devoted in the three volumes of \textit{Politics and the Constitution} than to any other of the Framers.\textsuperscript{163} It is to the slavery issue that an ambitious Madison is said by Mr. Crosskey to have responded in an opportunistic fashion: from 1791 on, it was deemed essential in Virginia to establish that the Government of the United States had quite limited powers—and hence that it did not threaten Southern control of slavery.

Mr. Crosskey finds particularly galling the “Father of the Constitution” accolade that historians have bestowed on Madison.\textsuperscript{164} Much in the third volume is devoted to showing that Madison was hardly one of the principal movers for, or at, the Constitutional Convention of 1787. And, of course, there are (as in the earlier two volumes) various allusions to Mr. Crosskey's firm conviction that Madison's Convention Notes and files of correspondence are simply unreliable.\textsuperscript{165} Conclusive proof to establish these charges is, again and again, reserved for a fourth volume which, it now seems, we are not to have.\textsuperscript{166}

Mr. Crosskey did offer considerable evidence to support his charge that Madison was guilty of “great apostasy” in his constitutional opinions.\textsuperscript{167} But Mr. Crosskey did not seem to appreciate fully that he did come to understand (and thus to begin to forgive) Madison for what he did in response to the demands of Southern politics and to the evidently desperate needs of Virginia.\textsuperscript{168}

\textbf{XIX.}

Some of Mr. Crosskey’s criticisms of various judges and politicians (including, of course, Madison) depend on presuppositions and opinions he held which may be somewhat dubious. A consideration of these, if only briefly, can serve to rehabilitate, if
only partially, several of the people he (in his perhaps congenitally uncompromising way) felt obliged to condemn. 169

Mr. Crosskey portrays New Englanders as democratic and commercial. 170 Southerners, on the other hand, are portrayed as oligarchs who called themselves democrats, even as they condemned New Englanders as aristocrats. 171 Madison himself is said to have exhibited his anti-democratic opinions in various ways, such as in the mode of ratification he sought for the Constitution. 172

Although Mr. Crosskey seems to be at times uncertain how to regard democratic principles, 173 he generally uses “undemocratic” as a term of opprobrium. One cannot help but wonder whether some of his strictures are guided by a view of self-government which is somewhat more doctrinaire than that generally found among leading republicans of the Constitutional Period. 174 One does get the impression, upon reading discussions from the period, that public-spirited men were then far more skeptical about “democratic” opinions and practices than Mr. Crosskey sometimes seems to consider it proper to be. 175

In short, some of Mr. Crosskey’s criticisms may rest on an insufficient awareness on his part both of the place of prudence in political life and of the form that prudence may take wherever egalitarian sentiments are in the ascendancy. 176

XX.

Prudence may permit and sometimes even require wariness, if not even craftiness, in one’s public statements as a political man (and not the least in democratic circumstances). Mr. Crosskey, in his criticisms of various political men (especially those whom he considers to have been on the wrong side), does not seem to recognize this. His disapproval of deception reaches its peak, of course, in the case against Madison, especially with respect to the papers Madison left behind. 177

At times, however, Mr. Crosskey does seem to acknowledge the need of political men to be discreet. 178 Certainly, he can make allowances (as we have noticed) for those public statements by various of his heroes which exhibit less than that full frankness toward which he himself was naturally inclined. 179

Mr. Crosskey could, as a scholar, indulge himself in that luxury of complete candor which political men would be irresponsible, or at least ineffective, in trying to enjoy. Even so, his frankness (or honesty in expression) could be troublesome, if not even
But he seems not to have been able to help himself in this respect, partly because he did take himself quite seriously. This may even be seen in how he repeats qualifications each time he draws on any common usage he considers questionable. But this does mean that one can generally rely on whatever he reports, despite the reservations one may have about his interpretation.

I can do no more than suggest on this occasion the kind of analysis of Mr. Crosskey himself that he brings to Justices who, sensing that there is something wrong in what they say, permit “the decisions they make” to be “unconsciously” affected because of a “bad conscience”: that is, they involuntarily expose in “tell-tale talk,” Mr. Crosskey suggested, the need “to salve the wounds that a logical mind naturally feels.”

It provides a transition to my next section to notice that I know of no writer on law and politics today who uses as frequently as Mr. Crosskey does various forms of the word “nature.” Is not this, in effect, his most revealing “tell-tale talk”?

XXI.

Mr. Crosskey’s frequent, almost obsessive, invocations of the natural must be “unconscious,” or at least uninformed and far from thoughtful. For he is highly suspicious of natural right and natural law. It is the Constitution he insists upon as authoritative, not those personal opinions of judges which he fears would hold sway under the guise of natural law. Thus, Mr. Crosskey can warn, “the world is still full of people, seemingly otherwise intelligent, who believe their own judgments of what is for ‘the common good’ to be objective determinations of fact.”

We can see implied here a question, about the character and source of the standards by which we should live, which may be fundamental to any serious assessment of Mr. Crosskey’s work. In the final analysis, he may be revealed as someone who does not truly understand what he is doing, because he has been misled by certain modern opinions, if not prejudices, about the unreliability (if not complete irrelevance) of nature as a guide.

That nature can be a problem should be evident to anyone who is aware that nature is somehow responsible for the very desires in us which nature often counsels us not to satisfy. But however equivocal the nature of nature may sometimes seem to be, one must wonder how an alert rationalist could, without recourse to nature, make sense either of the common good and
the justice that politicians and judges cannot help but draw upon,\textsuperscript{189} or of great political issues such as the case against slavery (no matter what constitutional compromises had had to be made about it),\textsuperscript{190} or of what law itself (including a constitution) is and what is good about law-abidingness.\textsuperscript{191}

Are not natural right principles repeatedly drawn upon by Mr. Crosskey himself as he assesses the consequences of almost two centuries of Supreme Court opinions? Certainly, he brings to bear upon these issues standards of reasonableness, of justice and of efficiency that seem to me very much part of the natural right tradition.\textsuperscript{192} Furthermore, natural right considerations are drawn upon repeatedly by Mr. Crosskey’s favorite judges, as may be seen in the opinions of Chief Justice Marshall\textsuperscript{193} and of Justice Story.\textsuperscript{194}

Does not Mr. Crosskey invest constitutional language and constitutional interpretations with the authority that natural right alone can have? Even the “sophistry” against which he repeatedly inveighs cannot be properly condemned without some awareness of that form of discourse which respects the truth and hence nature.\textsuperscript{195}

In addition, Mr. Crosskey’s suspicion of natural right and natural law keeps him from making the full argument to be made for a national common law, especially with respect to commercial matters—since the common law may usefully be seen as that set of determinations which reason, rooted in nature, discovers and refines in varying circumstances.\textsuperscript{196} Thus, the common law points to, or assumes, something which can properly be general for the country at large. If it does not—if it is rooted in positive law alone and not at all in natural right—, then it need not be considered something everyone in like circumstances should acknowledge.\textsuperscript{197}

That is to say, the common law, in the hands of the best judges, need not be considered primarily accidental in the particular forms it takes or in the direction it moves: its commonness—that which entitles it to general respect, irrespective of somewhat arbitrary State lines—is derivable from its plausible grounding in nature.

XXII.

Mr. Crosskey’s principled disregard of that nature which he must implicitly draw upon permits his repeated disparagement of “politics,” something which is implied even in the title of his
masterpiece.\textsuperscript{198} And his explicit attitude toward politics conforms to how he feels about the “undemocratic” and the deceptive. And yet, a sensible politics—with its willingness on appropriate occasions to prudently restrain both truth-telling and self-government—takes its bearings from nature, however concealed nature may be behind the facade of public policy and positive law (including constitutions).

Some respect for politics might seem to follow from Mr. Crosskey’s disparagement of economic determinism.\textsuperscript{199} Perhaps he goes too far, however, in his salutary disavowal of such determinism: for there are material interests which affect the opinions and actions of communities—this Mr. Crosskey does recognize—and of which the prudent politician must take account in considering what to say or not to say—this Mr. Crosskey all too often fails to recognize. Compromises have to be struck, as was true, for example, of the Southerners he repeatedly criticizes: they wanted dominion but had to settle for security.\textsuperscript{200} Considering how things turned out for the South, then, it can be said that what seemed to Northerners a lusting after dominion on the part of Southerners was little more than enormously costly and yet eventually futile (if not even self-destructive) efforts in the service of the preservation of their way of life.

Mr. Crosskey takes for granted, and deplores, the biases of political men.\textsuperscript{201} But is not he, too, somewhat a political man when he passes judgment as he does? His politics, however, may be presented as based ultimately on mere legality—on the Constitution which happened to be agreed upon in 1787. Much is made by him of the rules of the game. But does he not undermine his position by failing to recognize explicitly any serious basis for justifying the “game” itself, that for the sake of which rules are devised and respected? Implicitly, of course, he does rely on various natural right notions—but is not that true of anyone who is serious about political (including constitutional) things?

XXIII.

There may be, then, in Mr. Crosskey’s political stance and constitutional approach something unduly rigid—something which keeps him from seeing and presenting his position in its full strength. Is not that one consequence of legal positivism? Since the law is all there is believed to be available to guide communities—with nothing transcending law, either at its foundations or in its aspirations, to provide a sense of purpose—,
legal positivist is moved toward one of two extremes, that of an
unnatural permissiveness or that of an insistent (also unnatural)
inflexibility.

Mr. Crosskey's instincts favor the latter extreme. One conse-
quence is that he bristles at any suggestion that the Constitu-
tional Convention of 1787 was in any significant way "revolu-
tionary" or "a coup d'état." He recognizes, of course, that there
were certain apparent irregularities in the manner that the Con-
stitution was prepared and ratified:

Some extralegal steps gradually came to seem neces-
sary, and out of this necessity came proposals from var-
ious quarters for a national constitutional convention and, in the end, the scheme of the framers of the Consti-
tution, and of certain other men, both in and out of Con-
gress, for submitting that document for approval by con-
ventions specially elected by the people of the states. In
view of the extralegal character of these expedients as
well as the provision in the Constitution that the govern-
ment thereby provided should be set up if the Constitution
were ratified by nine of the thirteen states then existing,
that document may have been, in a certain, very limited
technical sense, revolutionary in character.

But he at once notes:

This aspect of the Constitution has been greatly exagger-
ated by many writers.... The most revolutionary aspect of
the Constitution was the provision for its going into effect
upon the ratification of nine states but even this aspect of
the Constitution was consented to by Congress, in submit-
ting it to the state legislatures for submission to the
people, and by the legislatures, in acting upon the sugges-
tion for such submission. All the state legislatures had
acted upon the suggestion, in one way or another, before
nine states had ratified.... The kind and mode of change
which the Federal Convention proposed were thus im-
pliedly consented to by all the bodies responsible for the
Articles [of Confederation], before the Constitution took
effect. To speak of the work of the Federal Convention as
amounting to a coup d'état as [some] have done, is com-
pletely unwarranted.

And so Mr. Crosskey can conclude this discussion:

[The Constitution] was not, as has sometimes been said,
counterrevolutionary. The system of government [under
the Articles of Confederation] which the Constitution displaced "had not had the sanction of general choice," so it was not in accord with the Revolution's principles. In rather striking contrast, the system which the Constitution established with "the sanction of general choice" was, in all its essential respects, under a true construction, precisely such a system of American continental government as the country had been led to expect eleven years previously, when the Revolution had occurred.

Mr. Crosskey invokes here "the Revolution's principles." But I sometimes have the impression that he was too conservative, or oldfashioned, in temperament to endorse even the Revolution wholeheartedly. Thus, he could speak of the famous Boston Tea Party (of December 17, 1773) as involving an "entirely lawless destruction of some hundreds of chests of the East India Company's tea." I am reminded, by the tenor of his remarks throughout the three volumes of his work, of talented and generally respected Americans such as Tench Coxe and William Samuel Johnson, who were temperamentally incapable of joining the rebellion against the British King but who became, after the Revolution, ardent nationalists. Certainly, Mr. Crosskey's temperament does not remind one of the revolutionaries described by Benjamin Rush as "that band of patriots who, with halters round their necks [had] signed the Declaration of Independence."

It is instructive, by way of comparison with Mr. Crosskey, to notice how James Wilson met at Philadelphia on August 30, 1787 the criticism that the Federal Convention was proposing something "revolutionary": "As the Constitution stands, the States only which ratify can be bound. We must...in this case go to the original powers of Society. The House on fire must be extinguished, without a scrupulous regard to ordinary rights." Wilson can speak confidently of "the original powers of Society." Mr. Crosskey, it seems, would prefer not to—for to speak thus is, in effect, to invoke some form of natural right—and this, we have seen, he shies away from. This is, it has been noticed, the dilemma of all conservatives, that they are unable to face up to the radical character of the beginnings of that which they so zealously seek to preserve. This bears, of course, on whether conservatives can understand that for which they do stand.

Or, to put this another way, I suggest that it is the Declaration of Independence which provides the true foundation of the Amer-
ican regime, insofar as our regime is distinctive, not that Constitution which Mr. Crosskey seems to regard as fundamental. And it is in the Declaration of Independence, more than in the Constitution, that nature and natural right appear as the ultimate authority for the making and unmaking of laws, governments and even constitutions.  

XXIV.

It is salutary to be reminded, in these times, of the sovereign authority of nature and hence of reason in the affairs of men. After all, we were told from on high a generation ago:

Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. . . .

To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.

The “principle that there are no absolutes” is not one, however, to which citizens can deliberately sacrifice themselves in forming or re-forming a free and sensible community. It is as a reminder of absolutes, and indeed of the nature of man, that the Declaration of Independence provides our enduring foundations. Still, it is characteristic of the great natural right teachers, recognizing as they do the limits of public opinion, that they respect tradition. Even revolution is justified by them as a return to the best or, at least, to the traditional (which, somehow or other, tends to draw on the naturally best).

Any responsible invocation of the right of revolution, whether peaceful or by force, depends on a reliable perception of standards, or guidance, provided by nature. Nature endorses, as well, the deference we exhibit (in ordinary times) to the rule of law—to that legality which usually does serve a people’s dedication to justice and the common good. We have noticed that an awareness of justice and the common good is, despite what Mr. Crosskey may at times say, implied in many of the arguments he himself makes. Without such an awareness of reliable standards, there is no point arguing for or against any particular interpretation of the Constitution, except perhaps as a pedantic exercise.

The Constitution we are fortunate enough to have inherited does not eliminate foolishness from our political life. Rather, it
tends to channel whatever foolishness we are likely to release among us, thereby making it less harmful in its consequences than it might otherwise be. That is, we can more easily predict where our foolishness is apt to flow—and perhaps reduce, if not altogether avoid, its devastation.

Thus, something in addition to the Constitution is needed to permit us to use well the government and processes provided for in the Constitution. The guidance available from nature must be relied upon to help us amend the Constitution, as need arises, as well as to use sensibly the powers already provided for in the Constitution. Neither mere legality (that is, no change?) nor change for its own sake holds much attraction for a free people who know what they are doing. 

XXV.

The third volume of Politics and the Constitution is largely concerned (as we have seen) with describing the development of the public opinion that led to the Constitutional Convention and thereafter to the Constitution—a public opinion which, Mr. Crosskey argues, was prepared, even eager, to establish a national government with broad powers, especially with respect to commerce and taxation.

But scholarly opinion today about what public opinion was then may be ultimately irrelevant, except as an aid to those who can establish on other grounds what the Constitution does mean. That is, it is what the Constitution itself does say that matters—and whether what it provides for is good. Is it not prudent for us to proceed with the conviction, for which there is considerable support and in which there is considerable utility, that the drafters of the Constitution were both skillful and highminded? Mr. Crosskey may have been most helpful by reminding us (especially in his first two volumes) of the rules of interpretation by which the Constitution should be read, by reviving the original meanings of long-obscured Constitutional language, and by assuring us that the Constitution can properly be taken seriously as a “rather sensible, straightforward document.” Perhaps the principal contribution that the third volume of Politics and the Constitution can make to us, as students of the law, is to provide further assurance that the Constitution (and especially its vital Commerce Clause) could well have been written as Mr. Crosskey suggests (in his first two volumes) it should be read.

I do not believe Mr. Crosskey appreciates, however, the signifi-
cance of what he quotes Gouverneur Morris as having said about any reliance by the Convention upon public opinion: "'The sentiments of the people...are unknown. They cannot be known. All that we can infer is that if the plan we recommend be reasonable and right, all who have reasonable minds and sound intentions will embrace it.'"^{218} It is well for historians, political scientists and legal scholars to keep in mind Morris's observation—an observation ultimately dependent upon natural right principles—and to be more concerned with what is good (and hence is knowable?) than with what may happen from time to time (and hence may be knowable only in a most tentative way?). The role of chance in such developments is not likely to be overestimated by either the prudent politician or the thoughtful student.^{219} This again points up the sturdy guidance—that guard against both legalistic mediocrity and unsettling chaos—provided by nature.

XXVI.

We recognize in still another way the workings of nature among us—by acknowledging such workings as they are manifested in the talents of this gifted man who devoted himself wholeheartedly to the Constitution. All three volumes of Mr. Crosskey's masterpiece are further testimony to his thoroughness, to his integrity, and to his magisterial ordering of his subject. These volumes testify as well both to his somewhat accidental and yet consuming interests and to his limitations.

It is natural for us to respect the magnitude of Mr. Crosskey's undertaking—and to regret that we will evidently never be privileged to have his additional volume, many times promised us, on the Constitutional Convention and the Ratification Campaign, a volume which would have been even more instructive than the volume recently added to his published work.^{220}

But it is also natural for us to be grateful for what we do have of genuine worth from Mr. Crosskey, however many reservations we may have about his work as we reflect upon it. No doubt, reservations about our reservations will also naturally occur to us from time to time, especially since what has been said here in this reconsideration of Mr. Crosskey's work is not presented with either the massive learning or the exquisite care that he brought to everything he did.

It would be unnatural not to honor a scholar, especially if he should happen to have been one's teacher, who undertook what
Mr. Crosskey did in devoting half a lifetime to a cause in which he profoundly believed. His was a remarkable undertaking, one that should inspire every properly-instructed student of the law to take our well-crafted Constitution much more seriously than it had been regarded before Mr. Crosskey detonated in 1953 his well-placed revolutionary “blockbuster.”

NOTES


   Mr. Crosskey, who was born on June 14, 1894, died on January 6, 1968. He served on the faculty of the University of Chicago Law School from 1935 to 1962.

   Mr. Jeffrey, who was born in 1921, died on July 25, 1983. During his 27 years on the faculty of the University of Cincinnati College of Law, where he was the law librarian, he taught courses in Soviet Legal Institutions, Comparative Law, Sociology of Law, the Framing of the Constitution, American Legal History, and Property.

2. “Although they have sometimes disagreed with him, Malcolm Sharp and George Anastaplo have been perhaps the most persistent exponents of Crosskey’s views.” Arnhart, William Crosskey and the Common Law, 9 Loy. L.A.L. REV. 544 (1976). I was a student in Mr. Crosskey’s courses at the University of Chicago Law School in 1948-1950. On Mr. Sharp and his work, see infra text accompanying note 69; infra notes 24, 38, 68-70, 95, 107 & 125. For examples of my use of Mr. Crosskey’s work, see G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 467, 468, 483, 567-68 (1971) [hereinafter cited as The Constitutionalist]. See also id. at 812. For corrections of The Constitutionalist, see G. ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE 369 n.13 (1983) [hereinafter cited as ARTIST AS THINKER].

3. For reviews of Mr. Crosskey’s work, see infra note 17. One of Mr. Crosskey’s harshest critics was Julius Goebel. See Goebel, Book Review, 54 COLUM. L. REV. 450 (1954). Mr. Crosskey had occasion to refer to Mr. Goebel as the “angriest of [his] accusers.” Crosskey,
Mr. Chief Justice Marshall, in MR. JUSTICE 28 n.12 (A. Dunham & P. Kurland eds. 1964). Critical to what Mr. Crosskey said about the common law and the Supreme Court, and to what Mr. Goebel said about Mr. Crosskey in this respect, are the matters discussed in Sections XV and XXI of this article. See also infra note 107. See as well infra note 220. Among the responses to Mr. Goebel's criticism was the following: "The immediate purpose of this paper is to demonstrate the inadequacies of the most embittered of the reviews of Crosskey's book which I have read, 'Ex Parte Clio', written by Professor Goebel..." Petro, Crosskey and the Constitution: A Reply to Goebel, 53 MICH. L. REV. 312, 313 (1954) (footnote omitted). Mr. Arnhart, too, addressed himself to Mr. Goebel's review:

In particular, I shall examine Crosskey's thesis concerning the adoption of the common law in America in light of the criticisms made by Julius Goebel in his famous book review. If I succeed in showing that this small but important part of Crosskey's book can survive the unfriendly scrutiny of one of America's most prominent legal historians, then it could justifiably be concluded that his book is more formidable than has usually been thought.

Arnhart, supra note 2, at 545 (footnote omitted).

4. See, e.g., Section XVII of this article. See also infra note 159. The principle that the South was relying upon is one that Mr. Crosskey has recognized in another context: "It was as true in the eighteenth century as it is today, that no nation dependent upon other nations for the sinews of war is safe." 3 W. CROSSKEY, supra note 1, at 405-06, 575. Another useful account of the Haitian slave uprising may be found in an editorial note in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN (R. Basler ed. 1953) [hereinafter cited as LINCOLN]:

In March, 1790, the General Assembly of France, on the petition of the free people of color in St. Domingo, many of whom were intelligent and wealthy, passed a decree intended to be in their favor, but so ambiguous as to be construed in favor of both the whites and the blacks. The differences growing out of the decree created two parties—the whites and the people of color; and some blood was shed. In 1791, the blacks again petitioned, and a decree was passed declaring the colored people citizens, who were born of free parents on both sides. This produced great excitement among the whites, and the two parties armed against each other, and horrible massacres and conflagrations followed. Then the Assembly rescinded this last decree, and like results followed, the blacks being the exasperated parties and the aggressors. Then the decree giving citizenship to the blacks was restored, and commissioners were sent to keep the peace. The commissioners, unable to sustain themselves, between the parties, with the troops they had, issued a proclamation that all blacks who were willing to range themselves under the banner of the Republic should be free. As a result a very large proportion of the blacks became in fact free. In 1794, the Conventional Assembly abolished slavery throughout the French Colonies. Some years afterward the French Government sought with an army of 60,000 men to reinstate slavery, but were unsuccessful, and then the white planters were driven from the Island.

Id. at 540 n.29 (emphases in original). See also infra text accompanying notes 160-62; infra note 160.

6. See Sections XII-XVIII of this article. See also infra note 190.

7. See, e.g., 2 W. CROSSKEY, supra note 1, at 762, 810. See also infra note 93. For Mr. Crosskey's opinions about politics, see Sections XII-XXIII of this article.

8. 3 LINCOLN, supra note 5, at 40.

9. Id. at 42 (emphasis in original). Lincoln had also been asked by Douglas on this occasion whether he stood "pledged to the abolition of slavery in the District of Columbia." Id. at 40. He had answered:

The fourth [interrogatory] is in regard to the abolition of slavery in the District of Columbia. In relation to that, I have my mind very distinctly made up. I should be exceedingly glad to see slavery abolished in the District of Columbia.
(Cries of "good, good.") I believe that Congress possesses the constitutional power to abolish it. Yet as a member of Congress, I should not with my present views, be in favor of endeavoring to abolish slavery in the District of Columbia, unless it would be upon these conditions. First, that the abolition should be gradual. Second, that it should be on a vote of the majority of qualified voters in the District, and third, that compensation should be made to unwilling owners. With these three conditions, I confess I would be exceedingly glad to see Congress abolish slavery in the District of Columbia, and, in the language of Henry Clay, "sweep from our Capital that foul blot upon our nation." (Loud applause.)

Id. at 41-42 (emphases and crowd's interjections in the original). Douglas was later to insist that Lincoln had "a fertile genius in devising language to conceal his thoughts." Id. at 261. See Section XX of this article. See also infra notes 70 & 111.

10. See, e.g., 4 LINCOLN, supra note 5, at 162, 183. See also infra note 37; 1 W. CROSSKEY, supra note 1, at 313f.


Many members of the Constitutional Convention wanted to permit Congress to immediately have the power to forbid any American participation in the international slave trade. See infra note 190. See also infra notes 158 & 162.

12. See 1 W. CROSSKEY, supra note 1, at 313-14. See also id. at 192-93, 218f, 249-50. Or did the 1808 provision in U.S. CONST. art. I, § 9 give to Congress a power to prohibit the importation of slaves that Congress would not have had under the Commerce Clause or otherwise? How far the Commerce Clause did extend was, at least, open to question—and anything open to question in these matters was, to an apprehensive South, a grave threat, especially when it became obvious, early in the nineteenth century, that the political and economic power of the North was steadily growing in relation to the South, which greater Northern growth had not been expected. See 1 W. CROSSKEY, supra note 1, at 409; 3 W. CROSSKEY, supra note 1, at 261-67, 408, 551 n.21, 555 n.38. See also 1 W. CROSSKEY, supra note 1, at 284-85, 313-14.


14. But the South needed a broad war power vested in Congress for defensive purposes. 3 W. CROSSKEY, supra note 1, at 231-36, 311-13, 353. It is somehow fitting, therefore, that it was by means of that very war power, which had been so critical to the Southern desire for a stronger government under the Constitution, that the fatal blow against slavery was struck in 1862-1863. See supra note 13.

15. Arnhart, supra note 2, at 544.

16. At the University of Chicago Law School there is an annual William Winslow Crosskey Lecture in Legal History which was inaugurated on May 4, 1972. U. CHI. L. SCH. REC. 10 (Summer 1972). For the title of the inaugural lecture in this series, see infra note 18. See also infra note 220.


19. Thus, one favorable reviewer of *Politics and the Constitution in the History of the United States* could lament:

This reviewer wishes that Professor Crosskey had used a more accurate expression on pages 145 and 478 [of volume 1 of *Politics and the Constitution*] than “Romish” clergy or church. On the latter page he seems to betray an unfortunate anti-Catholic bias, particularly where he states: “when, fortunately for England, Mary died, in 1558, it therefore became possible for her successor, Elizabeth, to confirm the incorporation of the Stationers’ Co. and yet turn it to the support of the English, rather than the Romish, church.” No Catholic can read such lines without a feeling of sadness.

Peters, *Our Ancient and Sensible Constitution—Professor Crosskey’s View*, 28 NOTRE DAME L. 307, 329 n.75 (1953). See *infra* note 180. Nevertheless, Professor Peters could present perhaps the most engaging account in print of the full scope of Mr. Crosskey’s “project”:

No attempt has been made to conceal the present reviewer’s enthusiasm for Professor Crosskey’s work. On the basis of what has already been published it seems that Professor Crosskey’s view of the Constitution is the correct one, but it should be remembered that the first two volumes are a mere fraction of the projected work, and it seems safe to assume that the succeeding volumes will confirm what has already been said. The author does not state how many more volumes will be necessary to set forth what he has to say about politics and the Constitution in the history of the United States, but he surely contemplates producing more than two or three additional volumes if he continues to canvass the materials in the thorough fashion of the first two volumes. While there are numerous excursions and digressions in the present set that take the reader up to the present-day events, on the whole, these first two volumes present primarily those materials that show what the Constitution by its very language said and was intended to say to the people of the United States when it was first brought forward for their consideration and adoption. Again and again the author indicates that his discussion of what was said and done in the Federal Convention and what happened in the ratification campaign will appear in subsequent volumes. Many volumes, it would seem, will be required for consideration of the fateful politics of the pre-Civil War years, Lincoln’s administration and the reconstruction era. Then, many more will be required to bring the story down to date. It is a stupendous task, which it is hoped the author will be spared to complete. Whether or not the work is ever completed, however—indeed, in a sense it never can be—the work as it stands today is the prime work on the Constitution, superseding all others. . . . No course in constitutional law in the future will be sound without abundant references to Professor Crosskey.

Peters, *supra*, at 327-28 (emphasis added). See *infra* text accompanying note 220.

I, too, am confident that Mr. Crosskey’s subsequent volumes would have confirmed much of what he said and anticipated in his first two volumes. See *infra* note 166. The materials drawn upon and alluded to in the opening volumes indicate that Mr. Crosskey had more than enough evidence to support, *according to his lights*, all his claims. (Mr. Sharp also seems to have thought so, encouraging Mr. Crosskey to be less of a perfectionist than he was and to publish what he did have.) Indeed, the “excursions and digressions” in the first two volumes may have been enough to make subsequent volumes unnecessary, so far as the imaginative reader was concerned. (Certainly, the evidence Mr. Crosskey relied upon remains available to be collected by other determined scholars.) Thus, much more critical than any further evidence from Mr. Crosskey is an assessment of his presuppositions, purposes, and mode of interpretation—an assessment which I attempt to make, in however limited a manner, in this article. Most of the reservations I
indicate about Mr. Crosskey's work, especially in the latter half of this article, apply to many of his critics as well. Indeed, one can adapt to Mr. Crosskey what was said by Edward Gibbon of Belisarius—that his virtues were his own, his imperfections largely those of his times. See THE CONSTITUTIONALIST, supra note 2, at 261. See also infra text accompanying note 69; infra note 220. See as well infra note 184.

20. See 2 W. CROSSKEY, supra note 1, at 1381 n.11; Fairman, The Supreme Court and the Constitutional Limitations on State Governmental Authority, 22 U. CHI. L. REV. 40 (1953).

21. 1 W. CROSSKEY, supra note 1, at 137; 2 W. CROSSKEY, supra note 1, at 1298. Compare 1 W. CROSSKEY, supra note 1, at 446 n.*. See infra note 111.

22. See, e.g., 3 W. CROSSKEY, supra note 1, at 188, 236, 290, 324, 333, 354-55, 376, 382, 388f, 409, 418, 431, 542 n.3, 545 n.22, 556 n.47. See also infra text accompanying note 147. See as well infra note 215.


Another colleague of Mr. Crosskey's (and still another teacher of mine) at the University of Chicago Law School called POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES "surely the single most dedicated, courageous, persistent feat of scholarship in our time." Kalven, Our Man from Wall Street, 35 U. CHI. L. REV. 229, 231 (1968). Professor Kalven also observed about Mr. Crosskey: "As I reflect on him, he seems to me to have been one of law's angry men.... He demanded of law more rationality than [others did] and he was to spend his career finding it in the Constitution." Id. at 230. See infra text accompanying notes 35 & 195; infra note 60. See also infra notes 37 & 221.

25. See Hart, supra note 17, at 1456, 1457, 1486. See also infra text accompanying note 147; infra note 36.

The disturbingly harsh character of the Hart critique is not limited to those times. And it would be a mistake to believe that only "mavericks" such as Mr. Crosskey are picked upon. Consider some of the closing remarks of a recent book review which extends its unbecoming criticisms to constitutional law scholars generally:

Tribe-trashing is something of a thing to do these days, and I therefore want to emphasize that my final comments are directed at the present state of constitutional scholarship, of which Professor Tribe's treatise is, for these purposes, only an example. I hope that what has gone before raises a serious puzzle: how could so morally obtuse a work be taken so seriously?... I take some pleasure, not however unmixed with regret, in noting that the Framers would have understood the phenomenon that Professor Tribe's work represents: they called it corruption.

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J., Apr. 26, 1984, at 1, col. 6 (esp. at 20, col. 1-2); Wall, Anastaplo: Greed Top Threat to Law Profession, Southern Illinoisan (Carbondale, Ill.), Mar. 7, 1984, at 3, col. 1; Stewart, Extracurricular Work by Law Professors is Source of Controversy, Wall St., Mar. 1, 1984, at 1, col. 1; Time, Jan. 23, 1984, at 34; Gerth, Texas Oilman Sues the No. 2 State Department Aide Over Arbitrations Case, N.Y. Times, Aug. 18, 1983. See also infra note 220.


27. St. John's College, of Annapolis, Maryland and of Santa Fe, New Mexico, remains a salutary exception to the rule. See, e.g., The CONSTITUTIONALIST, supra note 2, at 731; ARTIST AS THINKER, supra note 2, at 258-59, 284.

28. 1 W. CROSSKEY, supra note 1, at 184. See supra text accompanying note 25, which is further evidence that it can be a small world, indeed. See infra notes 142 & 220.


31. Mr. Crosskey was referring to Joseph Story. See 2 W. CROSSKEY, supra note 1, at 766. See also infra note 168.


33. 1 W. CROSSKEY, supra note 1, at 514 (footnotes omitted).

34. This remark was made by Charles Evans Hughes—but before he himself became a judge, I believe. See 2 W. CROSSKEY, supra note 1, at 1334 n.5; infra notes 39 & 143.

35. These remarks were made by Oliver Wendell Holmes, Jr. The texts drawn upon here are: O.W. HOLMES, COLLECTED LEGAL PAPERS (1921); O.W. HOLMES, THE COMMON LAW (1881). See 2 W. CROSSKEY, supra note 1, at 1334 n.6; infra notes 138, 195 & 221.

36. Mr. Crosskey's note at this point reads, "Felix Frankfurter and Henry M. Hart, Jr., The Business of the Supreme Court at October Term, 1934, 49 HLR, 68, 91-94 (1935); cited with apparent approval by the senior author in Flournoy v. Wiener, 321 U.S. 253, 264 (1944)." 2 W. CROSSKEY, supra note 1, at 1334 n.7. Consider, also, the first two and the last entries for Felix Frankfurter in Mr. Crosskey's 1953 index: "on Constitution as ultimate touchstone, 318, 906; on Constitution as not ultimate touchstone, 318; . . . on unimportance of Supreme Court as a court of justice, 938." 2 W. CROSSKEY, supra note 1, at 1393. Consider, as well, supra text accompanying note 25, which is further evidence that it can be a small world, indeed. See infra notes 142 & 220.

Implicit in much of Mr. Crosskey's work may be a brilliant insight—which he seems not to have been conscious of—and that is that James Madison and Felix Frankfurter were very much alike, physically, morally and intellectually. (Both were sometimes considered "apostates" by their colleagues. See infra text accompanying note 167.) I suspect, on the basis of what I have heard of the man and of what I saw of the way he conducted himself during Oral Argument in December 1960, that the no doubt instructive notes and reminiscences left behind by Justice Frankfurter will be found to be as unreliable here and there as Mr. Crosskey believed James Madison's to be. See supra text accompanying note 25.

The Madison-Frankfurter comparison can be taken one step further: a critical influence upon the career of James Madison, according to Mr. Crosskey, was the slavery question; a critical influence upon the judicial career of Felix Frankfurter was the "flag salute" question. See, e.g., West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Were not both men compromised by their rigid responses to these challenges? See H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 147f, 171f, 177 (1981). See also id. at 127f, 138f. But should it not be added that Justice Frankfurter somewhat redeemed himself by his response in

37. Later Mr. Crosskey refers to "the Justices' long-standing practice of never studying the document they are sworn to uphold." 2 W. CROSSKEY, supra note 1, at 902. Mr. Crosskey repeatedly refers in his work to the oath taken by public officials, and especially judges, to uphold the Constitution. See, e.g., 1 W. CROSSKEY, supra note 1, at 292; 2 W. CROSSKEY, supra note 1, at 831, 902, 916, 934, 1005, 1118, 1134, 1145; 3 W. CROSSKEY, supra note 1, at 33; infra note 61. This emphasis upon oaths may be related to that insistent honesty of his which made him both so troublesome and so reliable. See, e.g., supra note 19; supra text accompanying note 26. See also Section XX of this article. See as well infra notes 177-83 and accompanying text; infra note 166. This emphasis may be related also to his seeming faith in the efficacy of words; and so he can make as much as he does of the original intentions incorporated in the language of the Constitution. See supra note 24; infra notes 38 & 221. Compare his tendency to disparage the efficacy of bills of rights.

1 W. CROSSKEY, supra note 1, at 675f. See infra notes 93 & 182; infra text accompanying notes 96 & 130.

Consider the following passage from Lincoln's first inaugural address:

In your hands, my dissatisfied fellow countrymen, and not in mine, is the momentous issue of civil war. The government will not assail you. You can have no conflict, without being yourselves the aggressors. You have no oath registered in Heaven to destroy the government, while I shall have the most solemn one to "preserve, protect and defend" it.

4 LINCOLN, supra note 5, at 271 (emphases in the original). Earlier in this address Lincoln had said, "I take the official oath to-day, with no mental reservations, and with no purpose to construe the Constitution or laws, by any hypercritical rules." Id. at 264. See infra text accompanying note 158. See also supra note 9.


Mr. Sharp, who also was one of my teachers at the University of Chicago, spoke in this manner of Alexander Meiklejohn, one of his teachers at Amherst College:

One theme on which Mr. Crosskey, Mr. Anastaplo and I are in agreement is the treatment of the Constitution. Mr. Crosskey, the most uncompromising of us all, is opposed to the rhetorical manipulation of the Constitution which has appeared throughout its history. Mr. Meiklejohn does not agree with us. He would be more disposed than we to have judicial policy prevail in conflicts with text.

The historical approach to the Constitution in which I claim to share applies to the whole instrument. It seems to me indispensable to describe that approach at the beginning [of this article] and then move to the topics which are perhaps now more controversial. . . . Among other things, this beginning will supply materials for those, perhaps including Mr. Anastaplo, who will wish to complain that my own treatment of Constitutional freedoms and equalities is inconsistent with the historical criteria with which I begin.


39. See PLATO, TIMAEUS 48D-E, 53D, 59C-D, 61D; PLATO, PHILEBUS 59; PLATO, SOPHIST 246A sq., 265C-E; ARISTOTLE, NICOMACHEAN ETHICS 1139b20sq.; THE CONSTITUTIONALIST, supra note 2, at 582-84; ARTIST AS THINKER, supra note 2, at 280-81; Wollan, supra note 17, at 134-36. See also infra notes 49, 111, 219 & 221.

Compare such sophisticated (or at least fashionable) observations as the following (in a review of POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES) about
how seriously the craftsmanship of the Constitution is to be taken:
So with reason it may be urged that the twentieth century burrowings into
scattered and little known eighteenth-century documents and the invocation of
contemporary popular usages cannot yield legally or constitutionally binding
authority on the interpretation of the scheme of government which ultimately
emerged. We can accept the view that this scheme is to a large extent a judicial
creation—and indeed from time to time an undulating one—without agreeing
that there is a Mt. Sinai verbal compulsion to confine legitimacy to a very dif-
ferent structure and organism.

Powell, Book Review, 288 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 159-60 (1953). It is
difficult to see, however, that such an approach as Professor Powell's can properly be
characterized as being “with reason”: by what, in his view, should the deliberations of
courts, legislatures, or citizens be guided in interpreting and applying the Constitution if
no authority is provided by what he characterized as “a Mt. Sinai verbal compulsion”? See infra notes 46, 58, 111, 143, 215 & 220. See also supra text accompanying note 28. Consider as well L. FULLER, THE PRINCIPLES OF SOCIAL ORDER 294f (1981).

40. See supra text accompanying note 35; Section XXV of this article. See also infra notes 143, 180 & 186.

41. On how carefully one can write and read, see L. STRAUSS, ON TYRANNY (1963) (a
study of Xenophon, HIERO). On how carefully Lincoln's Emancipation Proclamation was
written, see Emancipation Proclamation, supra note 13. See also infra notes 116 & 143.
Consider as well the following: “The Constitution of the United States is, in other words, not
an internally inconsistent document; it is internally consistent in a remarkable
degree; an extraordinarily fine example of eighteenth-century legal craftsmanship, and a
great credit to Gouverneur Morris and James Wilson, whose work it chiefly is.” 1 W. CROSSKEY, supra note 1, at 674. See infra notes 65, 158, 162 & 188.

For Mr. Crosskey's summaries of various aspects of the constitutional arrangement,
see 1 W. CROSSKEY, supra note 1, at 363n, 381, 384, 674; 2 W. CROSSKEY, supra note 1, at
1172. See also infra note 155.

42. See supra text accompanying note 34.
43. See supra text accompanying note 35.
44. See Sections XIX-XXII of this article. See also infra note 58.
45. It is often tempting (considering the undisciplined state of constitutional interpre-
tation these days) to substitute one's “policy” preferences for a rigorous reading of the
Constitution. I had occasion in 1979, before the Chicago Council of Lawyers (a liberal bar
association), to indicate reservations about three sets of opinions, based on and reinforc-
ing misreadings of the Constitution “that the 'better' lawyers and judges among us hold
these days”:

My first dissenting opinion is that we now face here in Chicago, in the pros-
pact of mandatory busing of public school children, a tiresome ritual which
promises to do little in this city for education and the invariable neighborhood
school, for racial justice, or for ordinary people's faith in the Constitution,
bureaucrats and federal judges. It would make far more sense, and hence be a
far better use of the passions and resources which forced busing will waste, to
do something (if only in the form of an urban equivalent of the Civilian Con-
servation Corps) about the scandalous unemployment rate, especially among
the young, in the remarkably patient Negro community.

My second dissenting opinion is that the virtually unlimited access to abortion
now available in this country is an unconscionable state of affairs. The Roman Catholics among us are substantially correct in their deep opposition to
what we now have, even though they (because of a misunderstanding of the
dictates of natural law) have long been misled by their leaders with respect to
birth control. Particularly serious here is the unwarranted reading of the Con-
stitution by the United States Supreme Court, which has left local governments
paralyzed in any attempt to deal compassionately but firmly with our dreadful
abortion epidemic (which represents, among other things, a callous exploitation of women and an endorsement of mindless gratification).

My third dissenting opinion is rooted in the argument, which I have made again and again in my publications, that the primary purpose of the First Amendment is to protect our right and duty to discuss fully, as a sovereign people, the political questions that come before us from time to time. (The "clear and present danger" test is, in these matters, simply without support in the Constitution.) Among the questions always open for discussion is that of what the community should do to train itself and its citizens for self-government and for a decent life together. Certainly, no community is obliged, in the name of liberty and self-expression, to allow itself to be corrupted by the demented, the vulgar, the selfish, the thoughtless or the doctrinaire.

125 CONG REc. 36,365-66 (daily ed. Dec. 15, 1979). Among the doctrines to be vigorously challenged are those which undermine the self-confidence of the community in promoting the good and discouraging the bad. See ARTIST AS THINKER, supra note 2, at 275 ("A Primer on the Good, the True, and the Beautiful"). See also Anastaplo, Aristotle on Law and Morality, reprinted in 3 WINDSOR Y.B. OF ACCESS TO JUST. (1983); infra note 189. See as well Anastaplo, Censorship, in ENCYCLOPEDIA BRITANNICA (15th ed. 1985).

The wholesale substitution of "policy" preferences for a rigorous reading of the Constitution may be seen as well in what the courts have done with religion and the First Amendment. See Anastaplo, The Religion Clauses of the First Amendment, 11 MEM. ST. U.L. REV. 151 (1981) (In note 154, p. 256, of that article, "a sin of community" should read, "a sense of community." On "telltale talk," see infra text accompanying note 183.) See infra notes 72 & 142.


Mr. Crosskey's approach recognizes that the power to regulate these matters systematically belongs to Congress rather than to the courts. Thus, he can refer to "Madison's preposterous 'negative' theory of the national internal commercial power." 1 W. CROSSKEY, supra note 1, at 315. See id. at 43, 252-53, 265, 284-85, 313-14, 316, 318f, 678. See also Krash, A More Perfect Union: The Constitutional World of William Winslow Crosskey, 21 U. CHI. L. REV. 1, 9 (1953); infra notes 69 & 92; infra text accompanying notes 70-71 & 122.

47. Arnhart, supra note 2, at 548. See infra notes 180 & 186.

48. Compare Keith Ian Polakoff's review of the third volume of POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES which includes this observation:

Jeffrey would have performed a greater service to his mentor and his readers alike had he tried to reconcile Crosskey's opinions with more recent historical accounts. There is no indication, for example, that he has even read Gordon Wood's indispensable Creation of the American Republic (1969). Similarly, given a quick perusal of Jackson Turner Main's Political Parties Before the Constitution (1973), one wonders whether he would have ventured the judgment that the newspapers of the larger towns are a reliable indicator of the full range of public opinion. Nevertheless, historians of the constitutional period will ignore at their peril the interpretations and huge mass of supporting primary evidence presented here.


Compare also 1 H. STORING, THE COMPLETE ANTI-FEDERALIST: WHAT THE ANTI-FEDERALISTS WERE FOR (1981). "Gordon Wood added greatly to our understanding of the Anti-Federalists in his rich and encyclopedic account of the American founding and the
way the Americans gradually blundered into a new political theory.” *Id.* at 4. Of course, the Americans who believed themselves to have developed the implications of “self-evident” (and hence timeless) truths (as in the Declaration of Independence) would hardly have considered themselves to have “blundered” into anything essential, however much their political maturation depended on circumstances. See infra notes 48 & 221. See also infra notes 141, 186, 188 & 215. *Compare Augustine, The City of God*, XXII, 22 (end).

If anything goes, then chance upon chance governs? Is this especially so in a democratic regime? See *Plato, Crito* 44D; *Human Being and Citizen*, supra note 24, at 203f. See also infra notes 111, 143, 188 & 221; Section XIX of this article. But see infra text accompanying note 95. “The result [of present day notions on the subject of commercial law] is to introduce into the legal process... a considerable element of chance and to make the giving of legal advice... correspondingly difficult.” *1 W. Crosskey, supra* note 1, at 35.

Even so, are there not indications in Mr. Crosskey’s work, whether or not he is aware of them, that no fixed construction of the Constitution was anticipated with respect to some of its passages? See, e.g., *1 W. Crosskey, supra* note 1, at 245, 304, 402-03. See also Section XX of this article. See as well infra note 134 (on the removal power debate).


50. See *supra* text accompanying note 23. Mr. Crosskey’s influence on his students is suggested by the following report I made to Malcolm P. Sharp:

I ran into Mr. Crosskey on campus [at the University of Chicago] the other day and exchanged with him observations on our respective research activities. I repeated for him what I once said to you, that looking at the First Amendment was like looking through a kaleidoscope—the pattern changed every time and certainty was hard to come by.

“Mr. Anastaplo,” he said, “I guess I am more bull-headed than you are. I decided what was right and then went to work on it.” (I took it that he decided what was right after having looked over and thought about the evidence with some care.) We parted after I had asked and he had agreed that I should visit him sometime with some of my ideas about the First Amendment.

Well, I told myself, the summer is drawing to an end. Classes will be starting soon and I am going to have a lot to do during the coming year. Perhaps I should try to collect some of my ideas on the First Amendment. So, last Friday evening I sat down and, working without notes, began to piece together my thinking on the subject, starting with the question, “What can be known and what is worth knowing about the First Amendment to the Constitution of the United States?”

By Sunday evening I had typed the equivalent of about 90 pages of a dissertation. A good deal is just sketched in; and, of course, there are no footnotes, appendices, etc. I was surprised to find when I finished that I had a very rough first draft of my dissertation. Now I can begin to rearrange, fill in, expand and even polish. I was further surprised to learn several things about the First Amendment as I began to piece together what I had already worked out.

I believe I can now present a coherent picture, one that makes sense and is justifiable before both lawyers and political philosophers. Mr. Crosskey would be horrified, however, to see what his advice had led to: the picture I present is at once more and less libertarian than Mr. Meiklejohn’s. As it looks now, the
Congressional power is very limited (so far as legislation is concerned), the state power is quite extensive (with the effect of the Fourteenth Amendment yet to be worked through).

I have begun to look through some of the accepted authorities on the First Amendment. Needless to add, I must conclude that usually they are wrong or they are right for the wrong reasons. I am looking forward to a long conversation upon your return, during which I can spell out a complete view of the matter.


I should add that I thereafter left my dissertation alone for several years while I taught and litigated. See supra note 24. My next considerable burst of energy expended on the dissertation proper (as distinguished from the seventeen lectures I had given in the meantime, which I eventually appended to it) came after the dissertation had been accepted by my doctoral committee. (It was most sensibly suggested to the committee by David Grene, also of the University of Chicago, that if they accepted it on the basis of what they had “heard” about it, then I would promptly finish it and submit it—which is what happened. I have, in short, been most fortunate in the teachers I have had.) See infra notes 76, 93, 95 & 220; infra text accompanying note 82.

51. 1 W. Crosskey, supra note 1, at dust jacket. See also Krash, supra note 46, at 1f; Wollan, supra note 17, at 130-32. Mr. Jeffrey commends Mr. Krash’s article as an excellent summary of the first two volumes of Politics and the Constitution in the History of the United States. Jeffrey, supra note 17, at 866 n.1. (Mr. Krash, who is a prominent Washington lawyer in the Arnold & Porter firm, was also a student of Mr. Crosskey’s. He has written a quite instructive review of the third volume of Politics and the Constitution in the History of the United States. Krash, The Legacy of William Crosskey (Book Review), 93 Yale L.J. 959 (1984). See also infra note 220.)

52. 1 W. Crosskey, supra note 1, at ix-xi.

53. 5 U.S. (1 Cranch) 137 (1803). See also infra text accompanying note 75.

54. 304 U.S. 64 (1938). See supra text accompanying note 29.

55. 3 W. Crosskey, supra note 1, at dust jacket. See also Lee, Book Review, 41 Best Sellers, July 1981, which includes these observations upon Mr. Crosskey’s third volume:

It is a review of the political events that occurred between the signing of the Declaration of Independence and the arrival of the state delegates to the Philadelphia Convention that would frame the present Constitution. . . .

The materials presented are employed to make two main points. First, they portray a public sentiment that, beginning in the north but gradually working its way south, accepted the idea of a national government with total powers over commerce. Second, they present us with a portrait of a James Madison who far from being the “Father of the Constitution” was, except for the last year or so of the period studied, an opponent of a strong national government. Accordingly, Crosskey and Jeffrey argue that his interpretations of the meaning of the Constitution are highly suspect.

The third volume is as meticulously researched as its predecessors. . . . In light of subsequent research which calls into question other generally accepted ideas about the “intent of the framers,” for example Leonard Levy’s books on the First and Fifth Amendments and the total breakdown of the distinction between inter- and intra-state commerce, Katzenbach v. McClung (1964), Crosskey’s ideas seem less radical today than in the fifties.

Id.

On Professor Levy’s work, see Human Being and Citizen, supra note 24, at 33. (The publisher, in 1953, spoke of “Mr. Crosskey”; by 1980, “Crosskey” sufficed. Does not this reflect the kind of decline in civility dramatized by the majority opinion in Cohen v. California, 403 U.S. 15 (1971)? By 1971, I myself was not permitted by the quite competent publisher of The Constitutionalist to use “Mr.” or to capitalize “State.” I have been permitted, in subsequent books, to be more oldfashioned.)

56. 3 W. Crosskey, supra note 1, at vii-ix.
57. See, e.g., 2 W. CROSSKEY, supra note 1, at 1247-51, 1297 n.50; 3 W. CROSSKEY, supra note 1, at 174, 505-07, 579 n.10. “Whenever I have tracked down an obscure publication on constitutional law or history in the University of Chicago Library, the most recent and often the only name on the card (many years before) has usually been Mr. Crosskey’s.” THE CONSTITUTIONALIST, supra note 2, at 568 n.7.

One also comes to expect from Mr. Crosskey a distinctive vocabulary. Thus, he made much of “evince” (see, e.g., 1 W. CROSSKEY, supra note 1, at 243, 246, 624, 662; 2 W. CROSSKEY, supra note 1, at 983, 1002, 1350; 3 W. CROSSKEY, supra note 1, at 94, 119, 245, 246, 261, 390, 396), of “manifest” (see, e.g., 1 W. CROSSKEY, supra note 1, at 4, 52, 63, 88, 92, 93, 203, 236, 255, 278, 280, 287, 641, 697; 2 W. CROSSKEY, supra note 1, at 731, 749, 755, 760, 918, 921, 995, 1017, 1042, 1104, 1105, 1144, 1147, 1157; 3 W. CROSSKEY, supra note 1, at 92, 137, 218, 248), and of “true (or actual) facts” (see, e.g., 1 W. CROSSKEY, supra note 1, at 281; 3 W. CROSSKEY, supra note 1, at 280, 281, 283, 367). Consider also, his uses of “nature” and of “orthodox” (and “pseudo-orthodox”). See also Section XXI; infra note 181.

58. See supra text accompanying note 46; infra text accompanying note 150. See also infra note 67. Compare infra notes 180, 186 & 187; infra text accompanying note 90.

Consider, as well, this advice: “It is safer to try to understand the low in the light of the high than the high in the light of the low. In doing the latter one necessarily distorts the high, whereas in doing the former one does not deprive the low of the freedom to reveal itself fully as what it is.” L. STRAUSS, LIBERALISM ANCIENT AND MODERN 225 (1968). See supra note 39; infra notes 143 & 187.

59. See 3 W. CROSSKEY, supra note 1, at xi-xii.

60. For example:

The palpable want of fit between the Constitution's system of government and the doctrine, practice, or institution of judicial review of acts of Congress, as this exotic and carcinogenic plant has blossomed in these latter days, has had the effect of stimulating some students to discover or, rather, to confect either a defense of, or a rationale for, that institution.

3 W. CROSSKEY, supra note 1, at 34-35. Compare infra note 134.

It was observed of POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, in 1953: “The chapters are written with a goodly amount of verve, spice, and sarcasm. . . However, the sarcasm serves a very real function here; it cuts so savagely in many places that many will be hurt, but none can forget.” Durham, CROSSKEY ON THE CONSTITUTION, 41 CALIF. L. REV. 209, 225 (1953). See also Wollan, supra note 17, at 33-34. See as well SHAKESPEARE, JULIUS CAESAR, I, ii, 292-299 (on the bluntness of Casca); Clark, supra note 24, at 28; TACITUS, THE LIFE OF JULIUS AGRICOLA 22(4).

61. See, e.g., the uses of “ridiculous.” 3 W. CROSSKEY, supra note 1, at 24, 385. The epigraph for Mr. Crosskey's volume III is from Patrick Henry: "I smell a Rat." See 1 W. CROSSKEY, supra note 1, at 332 (where Henry is referred to as "masterful"); 3 W. CROSSKEY, supra note 1, at 342, 350n. I much prefer the epigraph for volumes I and II from Oliver Wendell Holmes, Jr.: "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." See 2 W. CROSSKEY, supra note 1, at 910, 1028; 3 W. CROSSKEY, supra note 1, at 6. See also supra text accompanying note 35; infra notes 138, 167 & 215.

I like to believe that Mr. Crosskey would have been more rigorous than Mr. Jeffrey is in certain respects. See, for example, what is said by the latter about the impeachment provision in the Constitution. 3 W. CROSSKEY, supra note 1, at 31, 512. Compare 3 W. CROSSKEY, supra note 1, at 1043-44 ("their Constitutional oath of office meant nothing to the Jeffersonians"). Certainly, an impeachment proceeding with respect to the President should not be understood as little more than a vote of confidence in his administration. Consider the care taken in the Constitution about electors for President and Vice-President: Senators and Representatives, who would select those officers in case the electors do not, cannot themselves be electors. U.S. CONST. art. II, § 1. On responses to abuses of presidential power, see Anastaplo, Book Review, Chi. Sun-Times, Apr. 30, 1978, Show/-
Mr. Jeffrey confirmed (in correspondence) my observation that “Northerners” should be “Southerners” in 3 W. CROSSKEY, supra note 1, at 366, line 10. (It should be noticed that a common complaint among reviewers of this volume is that Mr. Jeffrey apparently read nothing written by any historian since 1953. See supra note 48. Compare Loftgren, Book Review, Pol. Sci. Q. 505, 507 (1981).)

62. 3 W. CROSSKEY, supra note 1, at 37-38. See infra text accompanying note 77.

63. See, e.g., 1 W. CROSSKEY, supra note 1, at 259, 288; 2 W. CROSSKEY, supra note 1, at 1076 (ironic?). See also Crosskey, supra note 3, at 3, 26. Compare infra note 85. See as well infra text accompanying note 145.

64. 1 W. CROSSKEY, supra note 1, at 288. Mr. Crosskey called Justice Samuel Freeman Miller one of “the great destructive geniuses of the Court.” Id. at 315.

65. Mr. Crosskey’s deepest sympathies are with the more conservative New Englanders; but George Washington is a special hero for him, as is Alexander Hamilton whom he describes as “a man of courage and high intelligence.” 3 W. CROSSKEY, supra note 1, at 321. See infra notes 171 & 179. He also has great admiration for the work in the constitutional convention of Gouverneur Morris and James Wilson. See, e.g., 1 W. CROSSKEY, supra note 1, at 153, 195, 571, 673, 674; 2 W. CROSSKEY, supra note 1, at 841; 3 W. CROSSKEY, supra note 1, at 85. See also supra note 41; infra notes 158, 162 & 182. For a discussion of Gouverneur Morris, see Anastaplo, supra note 38, at 94f.

Of course Washington did act “unwisely” at times and Hamilton not always in a “completely creditable manner.” 1 W. CROSSKEY, supra note 1, at 402-03, 673; 3 W. CROSSKEY, supra note 1, at 581 n.46. Mr. Crosskey considers Connecticut “the most mature of the states politically.” 1 W. CROSSKEY, supra note 1, at 600. See also 1 W. CROSSKEY, supra note 1, at 310, 491. Presumably, this judgment had nothing to do with the fact that he was trained at the Yale Law School. He was living in New Haven when he died.

See infra note 220; infra text accompanying note 206.

66. See, e.g., 1 W. CROSSKEY, supra note 1, at 208, 219-20, 402-03; 3 W. CROSSKEY, supra note 1, at 256, 267, 312. See also infra note 179. Some of his heroes were even obliged on occasion, it would seem, to engage in deliberate misinterpretations of texts. See, e.g., infra note 179.

67. See infra text accompanying notes 146 & 150. See also L. STRAUSS, NATURAL RIGHT AND HISTORY 49-50 (1953); ARTIST AS THINKER, supra note 2, at 476f; A Conversation with Harry V. Jaffa at Rosary College, Claremont Rev. Of Books, Dec., 1981, at 5f, reprinted in H.V. JAFFA, AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING 48f. Mr. Crosskey describes John Adams as someone “who, when not engaged in controversy, seems to have been a thoroughly honest man.” 2 W. CROSSKEY, supra note 1, at 1308 n.75.


It has been recalled “how magnificent Malcolm Sharp was in reading, criticizing and discussing the validity of Crosskey’s basic ideas.” Gregory, William Winslow Crosskey—As I Remember Him, 34 U. Chi. L. Rev. 243, 245 (1968). See infra note 107.

69. Sharp, supra note 38, at 4, 6-7 (footnotes omitted). Previous discussions by Mr. Sharp of Mr. Crosskey’s work may be found cited in footnote 1 of his article. Id. See also supra note 24; infra note 107.

70. 82 U.S. (15 Wall.) 232 (1873). Mr. Sharp adds at this point:

Mr. Crosskey, and others, attribute the 1873 development to such cases as Gibbons v. Ogden (9 Wheat. 1) [22 U.S. 1 (1824)] and to the anti-federalist influence of pre-civil war days. My own view is that the judicial statements to this effect before the Civil War are few in number, dicta in the simplest sense of the word, and cautious. They are inconsistent with what happened to the bankruptcy power in litigation which had considerable political interest. The relation between substantive due process and the negative implications of the Com-
merce Clause is illustrated by the protections developed for insurance, which was not even "commerce," beginning with Allgeyer v. Louisiana, 165 U.S. 578 (1897), and proceeding to a scheme with remarkable resemblance to that developed for occupations which were "commerce" and "interstate." The whole scheme of protections was an appropriate mark of that era, foreseen by Tocqueville, when the freedom of the great and powerful, if not the aristocrats, was to have its last day, before it lost its vitality and was succeeded by equality and perhaps authority. See my "movement in Supreme Court Adjudication," [46 Harv. L. Rev. 361, 593, 795 (1933)], with conclusions on this matter which I have seen no reason to change since 1933.

Sharp, supra note 38, at n.10. This last sentence (reflecting, as it does, an influential intellectual career of almost half a century) must be one of the most remarkable in recent legal literature. See supra note 38; infra note 120.

It should be noticed that Lincoln, in 1858, could use "between" and "among" interchangeably. See supra text accompanying note 9; infra note 107. Mr. Crosskey found, and Mr. Sharp rather liked, a challenging usage of "among" in a 1786 report of a woman who had killed her husband by giving him rat poison "among some clam soup." See 2 W. CROSSKEY, supra note 1, at 1278 n.106. Should the 1873 and subsequent developments, referred to by Mr. Sharp, be considered a delayed Civil War victory for the pro-slavery element? That is, did not entrepreneurs take the place of slaveholders in wanting to be free of regulation, but by both State and Federal legislatures? See 1 W. CROSSKEY, supra note 1, at 315.


72. This would not only require the repudiation of Erie R.R. v. Tompkins, 304 U.S. 64 (1938) and the revival of a properly understood Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), but it would also mean that the United States Supreme Court should be, indirectly if not directly, the ultimate authority in common law adjudications in all courts of the United States, State as well as Federal. It has been observed:

A Supreme Court that loses its grip on the idea of the judicial office or can no longer visualize itself as a court or can no longer distinguish between politics and law or does not care about that distinction and begins to accept itself as a power organ will encounter difficulty in summoning up a sense of judicial authoritativeness on those occasions when the Constitution and country need an authoritative Supreme Court.

Schrock & Welsh, supra note 46, at 1157-58. See Strong, Levellers in Judicial Robes, 60 Neb. L. Rev. 680 (1981); Thurow, Book Review, 34 Rev. of Metaphysics 374 (1980). See also Section XV of this article.

73. See infra text accompanying notes 88-92.

74. See The Constitutionalist, supra note 2, at chs. 5-6; Federalist, No. 84. See also infra note 98. See as well infra text accompanying notes 97 & 130; infra note 215. Compare 1 W. CROSSKEY, supra note 1, at 512; 2 W. CROSSKEY, supra note 1, at 767f.

75. 5 U.S. (1 Cranch) 137 (1803). See supra note 72; Section XV of this article.

76. It should be evident from Mr. Sharp's introduction to Mr. Crosskey's work why it should have been called a "blockbuster." See Pritchett, Book Review, 60 Calif. L. Rev. 1476 (1972). See also infra text accompanying note 221.

A passage from a long (undated) letter from Malcolm Sharp to Alexander Meiklejohn, written not long after Barenblatt v. United States, 60 U.S. 109 (1959), suggests how a Crosskeyean analysis, especially with respect to judicial review, might be applied to the abuses of Congressional investigations:

It is arguable, somewhat as Professor Crosskey seems to suggest, that Congressional action, however unconstitutional, is not subject to judicial review unless
it violates the principle of the separation of powers in a somewhat more obvious way than any we have described. Unless a committee uses simply the device of submitting witnesses to fines, imprisonment or execution for the views they express or which are attributed to them, it is perhaps not an exercise of the judicial function. The Committee may be acting in an unconstitutional manner and in particular its procedure may be scandalous, but this is for Congress and not the Court to judge. Though there is in my opinion little justification for this position in traditional and conventional constitutional law, there is something to be said for this arguable result of Mr. Crosskey’s brilliant and persuasive reconsideration of judicial review.

If this is the ground on which the Court in effect declines to interfere with Congressional committees, it is a matter of some importance for the Court to say so. It is one thing for the Court to advise a committee acting in some of the ways referred to in this discussion that its conduct is constitutional. It is quite another thing for it to say that it is not the Court’s function to judge whether the conduct is or is not unconstitutional. That leaves the question of constitutional separation of powers and due process of law to be debated by the responsible lawyers and other students of the Constitution who are members of the House of Representatives and the Senate. If it is their decision, the arguments suggested in this letter should be addressed to them and to their constituents, who have the final voice on ultimate problems of policy and constitutional law alike.


For anticipations of Mr. Crosskey’s work, see W. HAMILTON & D. ADAIR, THE POWER TO GOVERN (1937); Stern, Book Review, 45 N.W. U.L. Rev. 107, 108 n.2 (1954). See also 2 W. CROSSKEY, supra note 1, at 1381 n.10. See as well infra notes 93, 95 & 220.

77. Sharp, supra note 38, at 6.

78. On the Contracts Clause, see 1 W. CROSSKEY, supra note 1, at 352f; 3 W. CROSSKEY, supra note 1, at 15; Krash, supra note 17, at 10-11; Wollan, supra note 17, at 147-48. What Mr. Crosskey sees in the Contracts Clause is not altogether unlike “the liberty of contract” concern of the Court in Lochner v. New York, 198 U.S. 45 (1905), but applicable only against State governments (and certainly not by way of any due process clause). But see Anawalt, Book Review, 21 SANTA CLARA L. Rev. 1199, 1200-01 (1981). See also infra notes 120-21 & 185.

Consider the implications of the common mistake of referring to the Contracts Clause as the “Contract Clause.” See, e.g., G. GUNThER, supra note 46, at 554f. Does not this mistake tend to emphasize interferences with specific contracts (and hence retroactivity) rather than the interferences with contract law generally by a State, which Mr. Crosskey looks to? Similarly, Mr. Gunther’s use of “freedom of expression” in connection with the First Amendment puts the emphasis in the wrong place. Id. at 1105f. See also W. LOCKHART, Y. KAMISAR & J. CHOPER, supra note 24, at 649f. Compare Anastaplo, Passion, Magnanimity, and the Rule of Law, 50 S. Cal. Rev. 351, 370 (1977); Anastaplo, Book Review, supra note 45.

On the Preamble, see Crosskey, supra note 3, at 29-30 n.25; Sholley, Book Review, 49 N.W. U.L. Rev. 114 (1954); infra note 81. See also supra text accompanying note 62.

79. 304 U.S. 64 (1938). See Section XV of this article.

80. See M. CONANT, THE CONSTITUTION AND CAPITALISM 82f (1974); Sharp, supra note 38, at 4-6; Wollan, supra note 17, at 138-40. See also Sections XI-XIII of this article.

81. On the Tenth Amendment, see 1 W. CROSSKEY, supra note 1, at 675f; Wollan, supra note 17, at 146-47. See also supra text accompanying notes 73-74. On the Preamble, see 1 W. CROSSKEY, supra note 1, at 153, 196f, 241f, 277, 364, 370f, 374-79, 391f; 2 W. CROSSKEY, supra note 1, at 1164; 3 W. CROSSKEY, supra note 1, at 349, 355. See also Currie, The Constitution in the Supreme Court: 1789-1801, 48 U. Chi. L. Rev. 819, 834 (1981); Wollan, supra note 17, at 136-38. See as well supra text accompanying note 62.

I do not see that similar preambular provisions (announcing “great objects”) prior to
the Constitution gave any legislature the broad powers argued for by Mr. Crosskey. See, e.g., 3 W. CROSSKEY, supra note 1, at 349. On the other hand, the Preamble we now have was written and adopted quite late in the Convention proceedings—and it seems to me unlikely that it would have, at that stage, affected whatever arrangements with respect to the distribution and amounts of power had been theretofore agreed upon in the Convention. It can be understood, however, to confirm the liberal grants of power theretofore and otherwise provided for in the Constitution—and this may be substantially what Mr. Crosskey meant.


83. On the Supreme Court, judicial review and the common law, see Section XV of this article.

84. See 1 W. CROSSKEY, supra note 1, at 19f, 372, 396, 410f; 2 W. CROSSKEY, supra note 1, at 1381. Compare 1 W. CROSSKEY, supra note 1, at 415; THE FEDERALIST NO. 69. But see 1 W. CROSSKEY, supra note 1, at 387n*. See also infra notes 97, 178 & 179.

A useful account of Mr. Crosskey's enumeration argument is provided in these terms by a member of the Connecticut bar:

The majority of the enumerated powers, [Mr. Crosskey] maintains, were put in to make certain that they would not be considered prerogatives of the executive in much the same way things were matters of the royal prerogative in England. The remainder of the enumerated powers are explained on various other grounds. In some cases, he asserts, the inclusion was primarily to express a limitation on the power, as for example, the power to enact uniform naturalization laws. In others, it was advisable to set forth expressly powers that had been in the Articles of Confederation for fear that omission might raise the question whether it was intended that they be carried over. Two are included, he believes, as much for public relations purposes as any other: the power to tax and the power to regulate commerce. The absence of these being the primary cause of dissatisfaction with the Articles of Confederation, he argues, the Convention spelled them out to make it crystal clear that the great faults had been eliminated.


85. For example, does not Madison say "outlandish" things in the First Congress which could have been easily refuted if Mr. Crosskey is correct about the purposes of the enumeration? See 1 W. CROSSKEY, supra note 1, at 196f, 203, 207f, 211, 230, 257, 410. See also id. at 372, 381, 387n*, 396, 402, 415; 2 W. CROSSKEY, supra note 1, at 815-16, 844-45. See as well infra text accompanying note 78; infra notes 97, 178 & 215. (One caution is in order here, however: the early records we have, including accounts of Congressional debates, are often fragmentary.)

On the perils of "partial enumeration," see 2 FEDERAL CONVENTION, supra note 11, at 125. See also 1 FEDERAL CONVENTION, supra note 11, at 53, 65-66.

On Mr. Crosskey's enumeration argument, see Crosskey, supra note 3, at 13-14; Krash, supra note 46; Petro, supra note 3, at 334f; Brown, Book Review, 67 HARV. L. REV. 1439, 1455-56 (1954); McCloskey, Book Review, 47 AM. POL. SCI. REV. 1152, 1155 (1953); Shelley, supra note 78, at 115f; Sutherland, Book Review, 39 CORNELL L. Q. 160, 165-66 (1953). See also 1 W. CROSSKEY, supra note 1, at 387 n*, where Mr. Crosskey is obliged to refer to "John Marshall's famous, but indefensible dictum, in Gibbons v. Ogden, that 'an enumeration presupposes something not enumerated.'" There is no talk here, in any event, of "the great Chief Justice." Compare supra note 63. See supra text accompanying note 63; infra text accompanying note 183. See also 1 W. CROSSKEY, supra note 1, at
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257-58, 695; 2 W. Crosskey, supra note 1, at 815-16, 844-45. See as well supra note 70; infra note 105.

86. Wollan, supra note 17, at 142.

87. "The joke of '87," one might say. Is there here a cosmic playfulness at work? See The Constitutionalist, supra note 2, at 464 n.15, 806-08; infra note 111. It may be, however, that the bits and pieces of the powers which were enumerated for special reasons have been enough, through the use of the Necessary and Proper Clause and of the Supremacy Clause, to have permitted Congress to claim what are in effect most of its general powers. That is, has not the spirit of the Constitution and of the regime, as well as various persistent necessities, led after all to a recognition of the general powers, especially with respect to commerce? See infra text accompanying note 115. Even so, such a piecemeal approach may have had various questionable by-products: the generality of the common law, if not the very nature of law, has been lost sight of, see Section XV; a national commercial law remains to be properly developed, see Section XII; and anomalies such as the "burden on interstate commerce" difficulties continue to plague us. See supra note 46. Even more critical, constitutional law has all too often come to be thought of as sophistry in the service of mere power politics. See supra notes 39 & 41; infra note 196.

On the enumeration of powers, see supra text accompanying notes 73-74; infra text accompanying note 97; infra notes 98 & 115.

88. See 1 W. Crosskey, supra note 1, at 31, 47, 284, 315, 561; 3 W. Crosskey, supra note 1, at 96, 99, 125, 158, 184-85, 205, 417, 431, 433, 448, 523, 534. Compare The Constitutionalist, supra note 2, at ch. 7.

Whether or not the States had ever been independent of each other is a related question. See 1 W. Crosskey, supra note 1, at 615, 635, 638; 3 W. Crosskey, supra note 1, at 98, 530. See also 1 H. Storing, supra note 48, at 13. See as well 1 Federal Convention, supra note 11, at 331-32, 340-41, 468. Compare United States v. Guest, 383 U.S. 745, 771 (1966): "The Constitutional Convention was called to establish a nation, not to reform the common law." (Harlan, J., concurring in part, dissenting in part). Justice Harlan's grandfather on the Court would have insisted that the nation was permanently established in 1776. As for reform of the common law, see, e.g., supra note 72; infra notes 92, 114, 138, 143 & 178; supra text accompanying notes 29 & 72; infra text accompanying note 141.

89. See 1 W. Crosskey, supra note 1, at 304, 363, 541, 561, 609; 2 W. Crosskey, supra note 1, at 994. See also 2 W. Crosskey, supra note 1, at 1306; infra note 155.

90. See 1 W. Crosskey, supra note 1, at 244, 284, 669; 2 W. Crosskey, supra note 1, at 763, 815-16, 1350 n.29. See also 1 H. Storing, supra note 48, at 10-11, 12, 15f, 28. See as well supra text accompanying note 58.

91. Nor have there been serious attempts made since the early days of the Republic to amend the Constitution (as interpreted by the Supreme Court) so as to provide for the clearly plenary powers (for example, over commerce) that Mr. Crosskey says were originally intended and desired. Whatever "need" was perceived, it was not strong enough to overcome the considerable (and salutary) reluctance, once the Bill of Rights was adopted, to change the language of the Constitution? Compare 1 W. Crosskey, supra note 1, at 49, 83. See Section XI of this article. See also infra notes 115 & 122; infra text accompanying note 215.


92. Does a national common law imply consolidation? That is, must not some legislature be able to modify judicial rulings with respect to the common law? And what legislature is that likely to be but Congress once the federal courts pass on common law questions? See 1 W. Crosskey, supra note 1, at 606, 634, 669, 673; 2 W. Crosskey, supra note 1, at 763, 768, 936-37; 3 W. Crosskey, supra note 1, at 27-28. See also supra text accompany-
Compare Erie R.R. v. Tompkins, 304 U.S. 64, 72, 78 (1938). Or should State legislation still govern in these matters, subject to Congressional preemption? Such preemption is certainly possible in the fields (such as the commerce of the country) that Congress can otherwise control? Thus, it can be argued, each State legislature retains considerable power, subject to Congressional supervision, to supersede common law rulings by both Federal and State courts. See supra note 72; infra note 114; infra text accompanying note 142. See also supra note 46; infra notes 155 & 178.

On the status of the common law in the United States, see 1 W. CROSSKEY, supra note 1, at 32f; 2 W. CROSSKEY, supra note 1, at 818f, 865f, 1356-57. See also supra note 3; Section XV of this article; infra text accompanying note 197.

93. See the “Crosskey” entry, THE CONSTITUTIONALIST, supra note 2, at 812. My reservations, with respect to Mr. Crosskey’s reading of the First Amendment and with respect to the related question of what the Fourteenth Amendment does in making the First Amendment applicable to the States, are endorsed by Mr. Sharp. See Sharp, supra note 38, at 9-10. See also supra note 50. (Certainly, Mr. Crosskey thought better of the Alien and Sedition Acts of 1798 than did either Mr. Sharp or I.) See, e.g., 2 W. CROSSKEY, supra note 1, at 767.

In any event, it is difficult for me to see how the Fourteenth Amendment “incorporation” of the Bill of Rights takes place, whether the Due Process Clause or the Privileges and Immunities Clause is used. Why should the Due Process Clause in the Fourteenth Amendment be taken to mean substantially more than it means in the Fifth Amendment? And if the Privileges and Immunities Clause was intended to incorporate the Bill of Rights, why was a Due Process Clause added to the Fourteenth Amendment, thereby “duplicating” what the Fifth Amendment is now taken to provide against the States? But see Conant, Book Review, 34 VAND. L. REV. 233, 239-40 (1981). Consider, however, the implications of the recognition by Professor Conant of “a partial redundancy” in the Constitutional language. Id. See also 2 W. CROSSKEY, supra note 1, at 1090-91, 1093-94, 1103, 1111, 1116, 1118, 1121.

Be all this as it may, it was Mr. Crosskey’s opinion: “The right of free election was the true protection of all civil rights.” 2 W. CROSSKEY, supra note 1, at 1348 n.3. See also 1 W. CROSSKEY, supra note 1, at 677. Compare THE CONSTITUTIONALIST, supra note 2, at 219-24. See supra text accompanying note 76; infra text accompanying note 130. See as well supra notes 76 & 78; infra note 130.


95. Sharp, supra note 38, at 7. See the final paragraph in the long quotation supra note 45. Consider, also, Mr. Sharp’s observation:

The relationship between the University of Chicago and the development of a sensible constitutional theory since the Second World War is indicated by what may be more than coincidence. Mr. Meiklejohn gave at the University his celebrated lectures on freedom of speech, to an audience which included Mr. Anastaplo, just before Mr. Anastaplo himself became a student of Mr. Crosskey. The cause of freedom was being advanced in other ways as well by the University economists.

Sharp, supra note 38, at 12. See supra notes 38 & 50; infra notes 111, 120 & 220.

96. 1 W. CROSSKEY, supra note 1, at 677. See 1 H. STORING, supra note 48, at 64f.

97. See THE CONSTITUTIONALIST, supra note 2, at 131. See also supra text accompanying note 74. Do we see here another indication that the enumerated powers were generally regarded in the Constitutional Period as the powers of Congress? See supra text accompanying notes 84-85. See also supra note 85; infra note 178. Certainly, one can read the debates in the States during the Ratification Campaign and get this impression, subject to the reservation (or fear) that the Necessary and Proper Clause could expand considerably the scope of the enumerated powers. See supra text accompanying notes 89-92. See also supra note 87; infra note 114.
98. See supra text accompanying note 74. For citations to my discusisons of the Speech and Press Clause of the First Amendment, see Anastaplo, Human Nature and the First Amendment, 40 U. PITT. L. REV. 661, 664 n.2 (1979). See also supra notes 45 & 78; infra notes 127, 138 & 214.

Broad powers to deal with the general welfare and the common defense can be thought of as posing no threat to freedom of speech and of the press when those powers (say, with respect to commerce) are exercised by a Congress faithful to the purposes for which those powers have been granted. But the First Amendment can be considered an encouragement to Congress to remain thus faithful. See supra note 76; infra note 121. See also supra text accompanying note 74.


100. See Anastaplo, supra note 38, at 77, 83, 133 n.6. See also 3 W. Crosskey, supra note 1, at 78, 15. See as well HUMAN BEING AND CITIZEN, supra note 65, at 33-34; infra text accompanying note 162.

But homogeneity, partly because of the prosperity and the mobility we take for granted, is consistent among us with considerable individuality (that is, with being left alone to pursue one's own private affairs). See A. Tocqueville, Democracy in America 374 (G. Lawrence trans. 2d ed. 1969).

101. 2 W. Crosskey, supra note 1, at 1258 n.36; 1 W. Crosskey, supra note 1, at 31. The decisions referred to here by Mr. Crosskey are Bakery & Pastry Drivers & Helpers Local v. Wohl, 315 U.S. 769 (1942); Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).

102. See supra text accompanying note 69. See also supra note 80.

103. Sharp, supra note 38, at 6. See also id. at 17 n.43. See as well supra note 46; infra note 112.

104. The classic case is Shays's Rebellion. See supra text accompanying note 99. Little is made by Mr. Wood of Shays's Rebellion. Mr. Crosskey makes more of it, but suggests that its influence was quite different from what it is usually said by historians to have been. See, e.g., G. Wood, supra note 48, at 412, 465; 3 W. Crosskey, supra note 1, at 327f. See also infra text accompanying note 153.

105. See 1 Federal Convention, supra note 11, at 167, 401f, 422, 512-13. See also G. Gunther, supra note 46, at 256-59.

Does Mr. Crosskey take issue on this point with Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)? See G. Gunther, supra note 46, at 260. See also supra note 85.

106. See 1 W. Crosskey, supra note 1, at 89, 205, 206, 253-54; 3 W. Crosskey, supra note 1, at 202f, 213, 386-87, 455-57, 459. See also supra text accompanying note 71.

107. See, e.g., supra text accompanying note 55. Compare supra note 91. For a detailed critique of Mr. Crosskey's Commerce Clause interpretation, see Brown, supra note 85, at 1446-55. Mr. Sharp, in an unpublished letter said about the Brown review:

Mr. Brown discusses some of the circumstantial evidence used by Mr. Crosskey in investigating the historical context in which the words of the Constitution may be read. In particular, Mr. Brown discusses some of the lexicographical evidence. A significant example is his discussion of the word "among" in the Commerce Clause. "Among" he says is the important word." He has, however, apparently not followed Mr. Crosskey's citation of the Oxford Dictionary, or he would have had a firmer grasp of the point Mr. Crosskey is making. As it stands, his examples of the meaning of the word are all, it seems to me, quite consistent with Mr. Crosskey's thesis. None of Mr. Brown's examples meets either Mr. Crosskey's or the Oxford Dictionary's view of the meaning of "among."

Letter from Malcolm Sharp to Journal of Legal Education (Oct. 18, 1963). See supra text accompanying note 69. See also supra note 70. See as well 1 W. Crosskey, supra note 1, at 252 n*.

It is convenient to add here another passage from Mr. Sharp's letter (which includes a
series of useful comments on various critics of Mr. Crosskey's work, comments which
implicitly suggest that a good deal of passion distorted what has been said against, and
perhaps for, that work):

Mr. Goebel's review [see supra note 3], with whose authorship I have been cre-
dited in a [volume of selections on the legal profession published by the Associ-
ation of American Law Schools], has always seemed to me the strangest of the lot. . . . Mr. Goebel's review consists of delightful and crotchety observations
about the history of law suggested by Mr. Crosskey's argument. We are told
that it is directed at Mr. Crosskey's view that the common law was part of "the
Laws of the United States" within the meaning of Article III of the Constitu-
tion and at some other specified points of Mr. Crosskey's doctrine. Beyond this,
I have found it in some cases impossible and in other cases difficult to discover
just what doctrine Mr. Goebel thinks he is attacking, still more to determine
whether it is Mr. Crosskey's doctrine.

was quite amused to learn that the editors of this "legal profession" volume, who had
presumed to use one of the most conscientious and instructive legal scholars of this cen-
tury as an illustration of unreliable (if not even unethical) scholarship, should have had
their *hubris* (or was it *chutzpah*?) rewarded by issuing materials in which a scathing
attack by Mr. Goebel on Mr. Crosskey should have been carelessly attributed by them to
Mr. Sharp. See supra note 19 & 24; infra notes 111 & 220.

Compare the first and second printings, both evidently in the same year, of ASSOCIA-
TION OF AMERICAN LAW SCHOOLS COMMITTEE, SELECTED READINGS ON THE LEGAL PROFES-
SION 383 (1962). The second printing shows signs of a hurried patch-up job: thus, the
Table of Contents, the Biographical Materials, and the Alphabetical List of Authors all
omit Malcolm Sharp's name, although the second printing squeezed in a passage from
Mr. Sharp's Crosskey review to "compensate" Mr. Sharp after Mr. Goebel's condemna-
tion of Mr. Crosskey was given its correct identification.

108. See, e.g., 1 W. CROSSKEY, supra note 1, at 18f. See also supra note 55.
109. See, e.g., 1 W. CROSSKEY, supra note 1, at viii ("unnecessary complications"), 39f;
3 W. CROSSKEY, supra note 1, at 145, 228.
110. See, e.g., 1 W. CROSSKEY, supra note 1, at 42-44; 3 W. CROSSKEY, supra note 1, at
43n.
111. Durham, supra note 60, at 226. This prediction relates to what was central to Mr.
Crosskey's career as a constitutional scholar, the scope of the Commerce Power of Con-
gress and the implications of that scope for the Constitution as a whole. It is curious that
so vital a concern should have been accidentally "chosen":

Here again the legend can only slightly exaggerate the fact. The story runs like
this. After he had been on the [University of Chicago Law School] faculty for a
year or so, it was gently suggested to him that he ought to do a law review
article or two. As his last task in Wall Street practice, he had done an extensive
memorandum on the jurisdictional reach of the Securities Act. His mission then
was to assist clients in how to stay beyond its reach. He remembered that he
had run into some interesting puzzles about the boundaries of national power
under the Commerce Clause which he thought he might go back to and maybe
extract a twenty-five page article. He kept at these puzzles of the Commerce
Clause but he never did get the article worked out. But two decades later he
reported back with the two volumes of Politics and the Constitution. And with a
thesis about plenary federal power that would have made it difficult indeed for
any Wall Street clients to escape the reach of federal regulation.

Kalven, supra note 24, at 230. See also Gregory, supra note 68, at 245; supra notes 87 &
95; infra notes 188, 219 & 220.

It is curious that two younger (and quite critical) reviewers of the third volume of
Politics and the Constitution in the History of the United States should turn Mr.
Crosskey into a thwarted New Deal lawyer in order to explain his work. Thus we are
“informed”:

Crosskey’s historical studies were not begun simply to find out what really happened in the Federal Convention of 1787 or what was really meant by the Constitution. Crosskey had been a New Deal lawyer in the 1930s and had seen important parts of Roosevelt’s recovery program voided by the Supreme Court. He wrote this book to convince Congress, the President, and the Court that the Constitution gave Congress plenary power to regulate economic activity.

Finkelman, The First American Constitutions: State and Federal, 59 Tex. L. Rev. 1114, 1157 (1981) (this review does have a number of useful observations about the period discussed). To the same effect, see Chemerinsky, Empty History, 81 Mich. L. Rev. 828 (1983):

To appraise volume three, one must view it in the context of the entirety of Crosskey’s work. Crosskey, a New Deal lawyer during the 1930’s, was frustrated by the Supreme Court’s invalidation of Roosevelt’s legislative initiatives. As a result of these experiences, Crosskey set out to prove that the Supreme Court had misinterpreted the Constitution, that Congress possessed the authority to enact all legislation needed to regulate the economy (pp. 7-8).

Id. at 829. Of course, one finds at the pages cited here by Mr. Chemerinsky a quite different story told by Mr. Jeffrey about Mr. Crosskey:

Another reason for thus beginning [with the broad topic of the national power over commerce] lies in the senior author’s reaction to the then (and still) prevalent “interstate” theory of the Commerce Clause, when he first heard it expounded in his student days at law school. In a basic sense, this reaction was the remote origin of the entire project of these volumes. He [Mr. Crosskey] thought it unreasonable to split up governmental power over the nation’s economic order in such a fashion, nor did the phrase “Commerce among the several States” seem apt language for the expression of what modern lawyers mean by “interstate commerce.” Some few years later, upon the enactment of the securities and exchange legislation of President Franklin Delano Roosevelt’s “New Deal,” the senior author [Mr. Crosskey] became the “office expert” on these laws in the Wall Street firm where he was then practicing law. Their complicated scheme of incidence having re-aroused his former skepticism about the “interstate” theory of the Commerce Clause, he thereupon read, for the first time, the entire report of Gibbons v. Ogden [of some 240 pages].... One thing led to another, his researches broadened, and the results were presented for interested readers in the first part of Volume I of Politics and the Constitution.

3 W. Crosskey, supra note 1, at 7-8. Mr. Crosskey, upon seeing his biography distorted by his critics in the course of their accounting for his motives and hence his work, would have chortled good-naturedly, especially since he would have believed his reservations about historians again vindicated thereby. See supra text accompanying note 21; supra note 107.

Mr. Crosskey would, I believe, have been also amused by the following use of his text by a reviewer of the third volume of Politics and the Constitution in the History of the United States:

But Crosskey is his own worst enemy. He seems driven to extend his arguments well beyond his evidence. One example will have to suffice. From the totally plausible premise that support for a stronger national government was increasing during the mid-1780’s, Crosskey arrives at the incredible conclusion that “there was no real opposition to a generally empowered national government when the Constitution was drawn” (p. 431). As is so often the case with this book, the original point is acceptable, even persuasive, but its extension is so clearly inappropriate that the reader’s vehement rejection of it constantly threatens to encompass both.

Jillson, Book Review, ETHICS (Jan. 1983). But is not Mr. Crosskey’s argument here more plausible and less incredible if one considers the qualifications to be found in the beginning and at the end of the sentence which is quoted from? That sentence, in its entire
and in its context, may be found in infra note 155. See also 1 W. CROSSKEY, supra note 1, at 677-78.

On the possible influence of chance and ignorance in the drafting of the Constitution, see THE CONSTITUTIONALIST, supra note 2, at 29. Or should the Constitution be considered to have been inspired, like a great work of art, with its artists saying more than they were aware of? See PLATO, APOLOGY 18D, 19C. See also HUMAN BEING AND CITIZEN, supra note 24, at 186; Alvis, Moral Criticism, CLAREMONT REV. OF BOOKS 1 (Oct. 1983); supra note 39. This could mean that the Constitution has been designed, as a consistent whole, to be suitable for use as needed in changing circumstances by thoughtful men who appreciated how well it is crafted. Thus, power would be seen to be available, to serve the great ends of government; purposeless limitations on government would be suspected as misreadings. Besides, what is it salutary for the community to believe the status of Divine Providence to have been in our constitutional development? The awesome majesty of the Lincoln Memorial in Washington suggests one way of beginning to answer this question. I do not suggest that this is the approach to these matters recommended by Mr. Crosskey, whatever the implications may be of his celebration of the Constitution as “eminently sensible.” See, e.g., supra note 19. On the relation of the divine to the natural (and hence to prudential government), see PLATO, REPUBLIC, 414C sq., 427B sq. See Anastaplo, The Declaration of Independence, 9 ST. LOUIS U.L.J. 390, 404-06 (1965); supra note 9. Consider also, Jefferson’s characterization of the Framers in the Constitutional Convention as “demigods.” 3 W. CROSSKEY, supra note 1, at 7. Does not Mr. Crosskey himself believe that political biases were effectively risen above at least once in American history? See, e.g., 1 W. CROSSKEY, supra note 1, at 363. Does not our great, and useful, respect for the Constitution assume this to have been a rare incarnation of reason in our political deliberations? See also 2 W. CROSSKEY, supra note 1, at 1108 (“a case that seems to have been completely free of distorting political pressures”). Compare infra text accompanying note 201. See supra notes 48 & 49; infra notes 215 & 221.


113. Durham, supra note 60, at 227.

114. The Court in Swift v. Tyson invoked universal principles of justice in standing by certain rules, nationwide, for negotiable instruments. 41 U.S. (16 Pet.) 1, 15, 19, 20 (“It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper. . .In England the same doctrine has been uniformly acted upon.”). See infra notes 142, 193 & 194.

A uniform common law among the States with respect to business transactions would tend to be in aid of any Congressional effort to facilitate trade. See supra notes 87 & 92.

115. See 1 W. CROSSKEY, supra note 1, at ii. Henry Clay, of Kentucky, could be drawn on by Mr. Crosskey in this fashion:

Adhering to the view that he had expressed in 1818, that the power of Congress under the Commerce Clause was one "for the regulation of commerce, internal and external," [Clay] explained the lack of early legislative precedents of an internal kind, on the ground that, in the early years, the internal commerce of the country had not been important. "The whole interior has grown up," he said, "since the Constitution was adopted; and though this gives no new power,
yet it may and ought to call forth every dormant power conveyed by that instrument, the exertion of which may tend to the public prosperity. It presents a new case—new relations—new interests; and certainly it is the duty of Congress to look to the whole—to remember we have an internal as well as an external commerce.”

1 W. CROSSKEY, supra note 1, at 246 (quoting 41 ANNALS OF CONGRESS 1315 (1824)) (emphases in original) (footnotes omitted).

Mr. Crosskey said many times that the failure of Congress, in its early decades under the Constitution, to use much of its Commerce Power contributed to the development of the mistaken opinion that its jurisdiction extended only to the trading of goods moving between States. See, e.g., 1 W. CROSSKEY, supra note 1, at 440, 531, 600, 611, 619-20, 645, 684f, 695, 697; 2 W. CROSSKEY, supra note 1, at 756, 1162-63. See supra text accompanying notes 86-87. See also supra notes 87 & 91; infra notes 120, 178 & 196.

However, even under the Supreme Court’s “interstate commerce” doctrine, it is plausible to argue that Congress can pass uniform acts regulating all of the commercial life of the country. That is, in order to make these acts effective for “interstate” transactions, they should govern “intrastate” transactions as well, if only to make enforcement easier and more efficient. See, e.g., supra text accompanying note 71 and the cases cited therein.

It is also plausible to argue that a national corporations act is necessary for the effective regulation of the “interstate commerce” of the country. See 1 W. CROSSKEY, supra note 1, at 292. See also Krash, supra note 46, at 4, 22. Compare Sutherland, Book Review, 39 CORNELL L. Q. 160, 165 (1953).

Cases such as Katzenbach v. McClung, 397 U.S. 294 (1964), and Heart of Atlanta v. United States, 379 U.S. 241 (1964), may have been better grounded, however, in the Thirteenth and Fourteenth Amendments (and their ban on the incidents of slavery and on racial discrimination) than in the Commerce Power. See, e.g., G. GUNTHER, supra note 46, at 203, 972f. See also THE CONSTITUTIONALIST, supra note 2, at 710-13 n.83. See as well supra note 98; infra note 121.

116. “Bills of exchange were unknown to the ancients, and have been introduced in modern times for the purpose of facilitating and extending commerce by the means of credit.” 2 W. CROSSKEY, supra note 1, at 1263 n.45. Technically speaking, “efficiency” means the minimizing of long-run average costs. If one is not efficient, one wastes resources in meeting one’s given production target. Consider infra text accompanying note 192. See infra note 120.

Professor Leo Strauss has enumerated what he considers “the most striking elements of modernity”:

The first characteristic feature of modern thought as modern thought, one can say, is its anthropocentric character. Although apparently contradicted by the fact that modern science with its Copernicanism is much more radically anti-anthropocentric than earlier thought, a closer study shows that this is not true. When I speak of the anthropocentric character of modern thought, I contrast it with the theocentric character of biblical and medieval thought and the cosmocentric character of classical thought. The underlying idea [in modern philosophic disciplines], which shows itself not in all places clearly but in some places very clearly, is that all truths or all meaning, all order, all beauty, originate in the thinking subject, in human thought, in man. . . . To give you a very simple popular example, certain human pursuits which were formerly called imitative arts are now called creative arts. One must not forget that even the atheistic, materialistic thinkers of classical antiquity took it for granted that man is subject to something higher than himself, e.g., the whole cosmic order, and that man is not the origin of all meaning.

Connected with this anthropocentric character is a radical change of moral orientation, which we see with particular clarity in the fact of the emergence of the concept of rights in the precise form in which it was developed in modern social thought. Generally speaking, pre-modern thought put the emphasis on
duty; and rights, as far as they were mentioned at all, were understood only as derivative from duties and subservient to the fulfillment of duties. In modern times, we find the tendency, again not always expressed with the greatest clarity but definitely traceable, to assign the primary place to rights and to regard the duties as secondary if, of course, very important. This is connected with another fact that in the crucial period of the seventeenth century, where the change becomes most visible, it is understood that the basic right coincides with a passion. The passions are in a way emancipated, because in the traditional notion, the passion is subordinate to the action, and the action means virtue. The change which we can observe throughout the seventeenth century in all the most famous revolutionary thinkers is that virtue itself is now understood as a passion. . . . This leads to another change which becomes manifest only at a somewhat later age, namely, that freedom gradually takes the place of virtue; so, that in much present-day thought you find that—of course, freedom is not the same as license, that goes without saying—but that the distinction between freedom and license takes on a different meaning, a radically different meaning. The good life does not consist, as it did according to the earlier notion, in compliance with a pattern antedating the human will, but consists primarily in originating the pattern itself. . . . To state it somewhat differently, . . . man has no nature to speak of. He makes himself what he is; man's very humanity is acquired. . . .

And this leads me to the third point, which became fully clear only in the nineteenth century, and which is already a kind of corrective of this radical emancipation of man from the superhuman. It became ever more clear that man's freedom is inseparable from a radical dependence. Yet this dependence was understood as itself a product of human freedom, and the name for that is history. The so-called discovery of history consists in the realization, or in the alleged realization, that man's freedom is radically limited by his earlier use of his freedom, and not by his nature or by the whole order of nature or creation. This element is, I think increasing in importance. So much so that today one tends to say that the specific character of modern thought is "history," a notion which is in this form, of course, wholly alien to classical thought or to any pre-modern or biblical thought as well, naturally.

Strauss, Progress or Return? The Contemporary Crisis in Western Civilization, 1 MOD. JUDASIM 17, 31-33 (1981). For suggestions about the nature of nature and about the relation of nature to "history," see ARTIST AS THINKER, supra note 2, at 284f. ("What is a Classic?"); Anastaplo, One Introduction to Confucian Thought, in GREAT IDEAS TODAY (1984). See also supra notes 39, 41; infra notes 143, 186, 196 & 219.

117. See 3 W. CROSSKEY, supra note 1, at 164, 542; 1 H. STORING, supra note 48, at 21, 23, 73, 75-76; G. WOOD, supra note 48, at 417f. See also ARTIST AS THINKER, supra note 2, at 123f (the chapter on Charles Dicken's Christmas Carol).

118. See 3 W. CROSSKEY, supra note 1, at 281-82.

119. See 1 W. CROSSKEY, supra note 1, at 46; THE CONSTITUTIONALIST, supra note 2, at 213-17; Anastaplo, supra note 38, at 133 n.6. On the life of gain as the third best kind of life, see PLATO, REPUBLIC 583E, 586B, 590B; PLATO, LAWS 705A. See also A. TOCQUEVILLE, supra note 100, at 347, 403 (on the "heroism" manifested in the American "greed for gain" and in the American "way of trading"). Consider also Grant Wood's painting, Cedar Rapids, or Adoration of the Home (owned by the Museum of Art, Cedar Rapids, Iowa).

On sumptuary laws, see 2 FEDERAL CONVENTION, supra note 11, at 344, 606-07, 607*.

120. See, e.g., 1 W. CROSSKEY, supra note 1, at 179-85; 3 W. CROSSKEY, supra note 1, at 134, 138, 143, 145, 536 n.31. This suggests that if in the early nineteenth century, the South had wanted to slow down that commercial development of the United States which threatened the Southern way of life, should it not have both acknowledged a plenary power in Congress to regulate all commerce and encouraged Congressional exercise of
such power to the fullest, thereby retarding the emergence of what otherwise became an unregulated (and hence more efficient) free market throughout the United States? Does not this suggestion further indicate the dependence of "history" upon chance? See supra note 115; infra text accompanying note 219.

But did the Contracts Clause imply "liberty of contract" and hence no state interference with the free market? See supra note 78. If so, would there have been a presumption against the use by Congress of the power it did have to interfere with the free market? See supra notes 70 & 95. See also supra note 116. Mr. Crosskey reports that some of the Framers wanted a broad commercial power in Congress to permit it "to prevent those 'partial,' or state, regulations of wages and prices that had theretofore been in force." 3 W. CROSSKEY, supra note 1, at 139. See also 1 W. CROSSKEY, supra note 1, at 46f, 181; 3 W. CROSSKEY, supra note 1, at 142, 145, 536 n.31. See as well infra note 185. Consider Cochrane, Did the Civil War Retard Industrialization? 58 MISS. VALLEY HIST. REV. 193 (1961).

121. For the suggestion made in 1785 that the "powers [of Congress] ought to go as far as the general interest extends, whether it be to trade, to religion, or to any other circumstance." See 3 W. CROSSKEY, supra note 1, at 216 (quoting Savannah Gazette) (emphases added by Mr. Crosskey).

As indicative of how innocent grants of powers to Congress can be extended to dubious uses in the forms of mail fraud and conspiracy charges, consider Anastaplo, supra note 98, at 688f. See supra note 98.

122. See supra text accompanying notes 88-92. Does the grant to Congress of power to regulate all commerce, when it should choose to do so, indicate that an eventual consolidation was indeed intended by the Framers of the Constitution? But see infra text accompanying note 147. See also supra note 46; infra note 155.

123. See Wollan, supra note 17, at 177 n.76. All three volumes of POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES bear this dedication:

TO THE
CONGRESS OF THE UNITED STATES
IN THE HOPE THAT IT MAY BE LED TO CLAIM
AND EXERCISE FOR THE COMMON GOOD OF THE COUNTRY
THE POWERS JUSTLY BELONGING TO IT
UNDER THE CONSTITUTION

Compare infra text accompanying note 186.

124. See, e.g., 1 W. CROSSKEY, supra note 1, at 390, 433-43. See also 1 W. CROSSKEY, supra note 1, at 425, 427, 429, 455; 3 W. CROSSKEY, supra note 1, at 23-24, 42, 180, 183, 187. Compare 2 W. CROSSKEY, supra note 1, at 1006 ("the three co-equal departments of the Government").


126. 343 U.S. 579 (1952). Scholars tend to make much of the opinion by Justice Jackson on that occasion. Thus, one scholar has said:

The executive power to make "law" has evoked frequent and intense battles, most commonly over abstractions, with Presidents as well as commentators on opposing sides. But the operative and most helpful answers may lie less in embrace of absolutes than in discriminating distinctions and practical adjustments: compare, for example, the broad assertions of Justice Black with the more detailed analysis of Justice Jackson in the Steel Seizure Case . . .

G. GUNTHER, supra note 46, at 385. But it is the opinion written by Justice Black for the Court in that case which, it seems to me, goes down to bedrock—that is, goes down to those constitutional foundations which must be, or at least must seem to us to be, absolutist in character. See supra note 46; infra text accompanying note 211. See also infra notes 128 & 220.

In any event, it should be noticed how broad the Commerce Power available to Congress is assumed to be in Justice Black's opinion in Youngstown, 343 U.S. at 588.

128. One can distinguish in principle, however difficult it may be to do so in each instance, those relatively few situations in which the President may be obliged and entitled to preserve the status quo until Congress has had an opportunity to consider circumstances which seem to have changed in significant respects since the last time Congress had an opportunity to act on the matter in question. Common sense is called for in these situations. Thus, for example, work should not go forward on the dam which an earthquake has made unnecessary since Congress recessed. But if Congress, upon its return, refuses to change its mandate that a dam be built at that place (even though the river no longer runs in that channel), it is not the President’s prerogative, but rather the people’s, to correct Congressional folly. Is not this one consequence of what we mean by the rule of law? Chief Justice Vinson, if he took seriously what he said in his dissent in the Youngstown case, never understood this. 343 U.S. at 708-09. But, then, does not a reliable common sense depend upon a respect for “ absolutes”? See infra text accompanying note 211.

See also Anastaplo & Sharp, supra note 125.

This is not to suggest that the President should never be inflexible with respect to certain things “required” of him. Consider these remarks by President Lincoln in his annual message to Congress in December 1864:

“I repeat the declaration made a year ago, that “while I remain in my present position I shall not attempt to retract or modify the emancipation proclamation, nor shall I return to slavery any person who is free by the terms of that proclamation, or by any of the Acts of Congress.” If the people should, by whatever mode or means, make it an Executive duty to re-enslave such persons, another, and not I, must be their instrument to perform it.

8 LINCOLN, supra note 5, at 152. See Emancipation Proclamation, supra note 13, at 423.


129. Short-cuts, which circumvent constitutional safeguards and procedural guarantees, should be suspect. See, e.g., the questionable tactics of the New York bar in Cohen v. Hurley, 366 U.S. 117 (1961). See THE CONSTITUTIONALIST, supra note 2, at 340-41, 682 n.19. (Our 1983 Grenada invasion is a recent instance of an evident circumvention of constitutional safeguards. Among those whose rights may not have been properly dealt with are the young Americans who were killed there. The dispatch of Marines to Lebanon during the same period, with perhaps tacit Congressional approval, is a more complicated issue.)

Mr. Crosskey anticipated the ruling in Youngstown, and especially Justice Black’s opinion, in his remarks on a University of Chicago Round Table broadcast. See remarks by William Crosskey, The Constitutionality of the President’s Seizure of the Steel Industry, Transcript of University of Chicago Round Table Broadcast 1-2, 45, 6-8 (May 18, 1952). See also infra note 134.

130. See supra text accompanying note 74. See also Section IX of this article. Consider, as bearing on the rule of law, the insistence in the Constitutional Convention that ex post facto laws were “void of themselves.” 2 FEDERAL CONVENTION, supra note 11, at 376. Does a genuine rule of law make both a due process guarantee and an equal protection guarantee superfluous? See supra note 93.

131. Thus, Blackstone observed:

...I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power...that...[can] control it: and
the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

1 W. BLACKSTONE, COMMENTARIES *91. See also id. at 62. See as well Stone, We Inherit an Old Gothic Castle, 8 HASTINGS CONST. L. Q. 923, 930 (1981). Compare infra note 193.

132. See 2 W. CROSSKEY, supra note 1, at 938-1046; 3 W. CROSSKEY, supra note 1, at 27-28. See also Wollan, supra note 17, at 142-46.

For possible anticipations of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), see Currie, supra note 81, at 822-23, 827, 828, 839, 842, 848, 850, 851, 852, 855, 861 n.274, 863-64, 868 n.299, 866, 878, 880-81, 882. See also Krash, supra note 17, at 18f. Compare Hart, supra note 25.

133. See supra text accompanying notes 74-75. See also THE CONSTITUTIONALIST, supra note 2, at 229f, 816. See as well 1 FEDERAL CONVENTION, supra note 11, at 97-98; 2 FEDERAL CONVENTION, supra note 11, at 73f, 298f, 375-76, 440.

134. Consider Mr. Crosskey's comment on judicial review by consent and the then pending case of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See Section XIV of this article. He was asked during a radio discussion, "But how about [Nathaniel] Nathanson's other point, which is that even if the President had acted unconstitutionally, nonetheless the Supreme Court was not designed to have the final say over the constitutionality of the President's actions?" His response is instructive with respect to various facets of his constitutional doctrines which I have touched upon in this article:

I agree with this, of course. I agree that the framers of the Constitution probably never intended the Supreme Court to mark out the limits of the presidential power. But then I think too that they never expected the Court to have the power to mark out the limits of the powers of Congress. The original notions of the framers of the Constitution came out in the Removal Power Debate in 1789, which took place within a few months after the organization of the government. They were stated in that debate by James Madison. He spoke for the majority in Congress, and the action afterwards taken by the majority is comprehensible only in the light of the theories of constitutional construction which Madison announced. Madison's position was, first, that the Supreme Court of the United States had no more power in marking out the powers of the various departments of the government than did the President, the House, and the Senate. He maintained, second, that the involvement of a department's own powers in any particular question at issue was essential and sufficient to give it the right to interpret the Constitution in that connection. Madison maintained, further, that, when the interested departments agreed on any particular point, that settled the question as against any noninterested department of the government. And he said that, where the interested departments could not agree with respect to any particular matter, that matter was to be settled by adjustments between them.

With respect to the particular matter of the President's removal power, Madison maintained that if the House and Senate and the President agreed with respect to that particular subject, it would decide all similar cases in the future. In other words, it would be binding on the one uninterested department of the government, the Supreme Court of the United States. He maintained that the right of the House to participate in deciding the question resulted from the fact that its power to establish offices, which it shared with the Senate, was at issue in the case.

If these original ideas of the Federalist party, which was the party of the framers of the Constitution, were to be applied in this steel-seizure case, I would agree, of course, that the Court would be precluded from decision; but the case at issue involved the relations of the President and Congress. The Court's prerogatives and duties under the Constitution are in no way involved; and if the
original ideas were followed, I agree that the Court would be without power to
decide. The situation would be one for the House and Senate to handle under
their powers of impeachment.

But we all know that those powers do not work to check a President when his
own party is in power in Congress, and especially in an election year. And, of
course, Presidents take these matters into account when they act.

The custom of allowing the Court to decide questions of constitutional inter-
pretation has arisen in spite of the original intention of the framers, and the
present incumbent of the presidential office has expressed himself as willing to
abide by the decision of the Court. In these circumstances I confess that it
seems to me desirable that the Court should decide this question. I agree that
judicial review may not be the best imaginable preservative of the features of
the Constitution which are endangered by the steel-seizure case, but at least
they are better than none at all.

Remarks by William W. Crosskey, The Constitutionality of the President’s Seizure of the
Steel Industry, Transcript of University of Chicago Round Table Broadcast 8-10 (May 18,
1962) (emphases added). On the removal power debate, see 1 W. CROSSKEY, supra note 1,
at 385f; 2 W. CROSSKEY, supra note 1, at 1033-35; THE CONSTITUTIONALIST, supra note 2, at

However all this may be, the Supreme Court’s limitations in many so-called “constitu-
tional law” cases should be apparent. See, e.g., supra note 46. See also Schrock & Welsh,
supra note 46, at 1175-76. See as well supra note 60.

135. 7 U.S. (3 Cranch) 1 (1805). See 2 W. CROSSKEY, supra note 1, at 719f; Katz, supra
note 23, at 21. See also Pressman v. State Tax Commission, 204 Md. 78, 88-89, 102 A.2d
821, 827 (1954).

136. 304 U.S. 64 (1938). See Krash, supra note 46, at 17f.

137. See Sharp, supra note 38, at 5-6. See also Clark, supra note 24, at 30f; Sharp,

138. The Erie decision was regarded by Mr. Crosskey as “the most colossal error the
Supreme Court has ever made.” 2 W. CROSSKEY, supra note 1, at 907. See id. at 916: “one
of the most grossly unconstitutional governmental acts in the nation’s entire history.” It
seems to me that Justice Holmes, with his careless talk about what the common law was
and was not, very much contributed to this development. See id. at 907f. (Justice Holmes
is drawn upon by Justice Brandeis in Erie). I am reminded of the consequences of Justice
Holmes’s careless talk in Schenck v. United States, 249 U.S. 47 (1919). See THE CONSTITU-
tIONALIST, supra note 2, at 294f, 826. Indeed, the remarkably facile Justice Holmes has
been a loose cannon on the deck of the good ship “American Constitutional Law” for
some time now. See R. FAULKNER, supra note 137, at 227f. Compare supra note 61. See
infra note 221. But there is the following redeeming comment by Justice Holmes: “[I]t will
need more than the 19th Amendment to convince me that there are no differences
between men and women, or that legislation cannot take those differences into account.”
the following characterization of Justice Holmes: “The real Holmes was savage, harsh
and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but
a continuing struggle in which the rich and powerful impose their will on the poor and
weak.” G. GILMORE, THE AGES OF AMERICAN LAW 48-49 (1977). (The male-female dif-
fferences—and the moral, political and constitutional significance of such differences—
very much bear today upon our understanding of and respect for nature. See, e.g., TACI-
tUS, THE LIFE OF JULIUS AGRICOLA 6 (1), 29 (1)).

See Durham, supra note 60, at 226. See also Krash, supra note 17, at 232, 236 n.7. See as
well, Corbin, Book Review, 62 YALE L. J. 1137, 1140f (1953). Compare Corbin, Book
Review, 62 YALE L.J. 1137, 1140f (1953); Nathanson, supra note 137, at 118f; Sutherland,
supra note 115, at 167-68. Compare also Friendly, In Praise of Erie—and of the New
See 2 W. Crosskey, supra note 1, at 1167-68, 1346 n.39, 1356 n.45. See also supra note 114. See as well infra note 186. 304 U.S. at 79. Justice Holmes has been the most prestigious advocate of "legal realism" in this country. See supra text accompanying note 35. See also 2 W. Crosskey, supra note 1, at 907; Human Being and Citizen, supra note 24, at 46f, 74f. On why the Erie "correction" came to be necessary, see 2 W. Crosskey, supra note 1, at 864f, 903f, 912f, 916f.

How "universal" the standards of justice may be is suggested by the following passage from Thomas Aquinas:

Since justice is a certain "correctness," as Anselm says, or "equation," as Aristotle teaches, the essential character of justice must depend first of all upon that in which there is first found the character of a rule according to which the equality and correctness of justice is established in things. Now the will does not have the character of the first rule; it is rather a rule which has a rule, for it is directed by reason and the intellect. This is true not only in us but also in God, although in us the will is really distinct from the intellect. For this reason the will and its correctness are not the same thing. In God, however, the will is really identical with the intellect, and for this reason the correctness of His will is really the same as His will itself. Consequently the first thing upon which the essential character of all justice depends is the wisdom of the divine intellect, which constitutes things in their due proportion both to one another and to their cause. In this proportion the essential character of created justice consists. But to say that justice depends simply upon the will is to say that the divine will does not proceed according to the order of wisdom, and that is blasphemous. T. Aquinas, Truth, Q. 23, A. VI, Reply. See Augustine, The City of God, XII, 16, XXI, 7-8, XXII, 2, 7.

Erie R. R. v. Tompkins, 304 U.S. 64 (1938), is not only a repudiation of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), but it also calls into question the holdings in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). See supra text accompanying note 29. See also supra notes 72 & 92. See as well the remarkable (indeed unnatural) exercise in Bishop v. Wood, 426 U.S. 341 (1976)

Is it not respectful of the principles of the common law for American courts to regard sound rulings by English courts as instructive if not even as "authoritative"? See supra note 114.

The quite influential reapportionment case of Baker v. Carr, 369 U.S. 186 (1962), would have been easier to decide if the United States Supreme Court had been recognized to be at least as capable as the Tennessee Supreme Court of interpreting and applying the Tennessee Constitution in order to correct a system of State legislative apportionment which had become grossly inconsistent with the State charter.

The Court in Baker v. Carr did rely, of course, on the Equal Protection Clause. But would not recourse to the Republican Form of Government Guarantee have been sounder? It is somehow appropriate (and, characteristically, self-defeating) that Justice Frankfurter, in a dissenting opinion which insisted that the judiciary cannot take cognizance (even implicitly) of the Guarantee Clause, should have invoked Justice Holmes's unfortunate "brooding omnipresence in the sky" language directed against the old-fashioned understanding of the common law. 369 U.S. at 268. The treatment by the Holmes "legal realism" school both of the common law and of the Republican Form of Government Guarantee makes far too much of "externals" and technicalities and not enough of the principles at the heart of the common law and of republican government. Compare supra text accompanying note 36. See infra text accompanying notes 195-97.

One consequence of the Court's refusal to consider seriously, in Baker v. Carr the rather flexible Republican Form of Government Guarantee was to make even more likely the subsequent development in reapportionment cases of that mechanical emphasis on
rigid mathematical parity which reliance on the Equal Protection Clause seems to make more likely.

On the Republican Form of Government Guarantee, see 1 W. CROSSKEY, supra note 1, at 505, 522-41; 3 W. CROSSKEY, supra note 1, at 22, 526; The Constitutionalist, supra note 2, at 648, 820; Anastaplo, supra note 38, at 136 n.13; infra note 174. As to when the judiciary may usefully be relied upon, see supra note 134.

143. See Sharp, The Master, 35 U. Chi. L. Rev. 238 (1968). The Master accolade applies to still another teacher I have been fortunate to have had, Leo Strauss of the University of Chicago Political Science Department. See supra notes 38, 39, 41 & 116. See also Anastaplo, On Leo Strauss: A Yahrzeit Remembrance, 67 U. Chi. Mag. 31 (Winter 1974), reprinted in Artist As Thinker, supra note 2, at 250f. Mr. Strauss once told me that he had heard that Mr. Crosskey read the Constitution as carefully as Mr. Strauss read the things he studied. See supra text accompanying note 49. Both Mr. Strauss and Mr. Crosskey may have been more persuasive in speech than in print. See infra note 180.

A review of the third volume of Politics and the Constitution in the History of the United States includes these observations:

The current volume seeks to demonstrate the proper interpretation of the Constitution by referring to the debates and events that occurred after the signing of the Declaration of Independence and prior to the Constitutional Convention [citing 3 W. CROSSKEY, supra note 1, at 38, 462]. The authors [Mr. Crosskey and Mr. Jeffrey] assume that the views expressed during this time period should guide the Court in its modern interpretations of the Constitution. This approach to judicial review, often termed interpretivism, has been thoroughly discredited in the decades since Crosskey's initial volumes appeared.

Chemerinsky, Empty History, 81 Mich. L. Rev. 828, 833-34 (1983) (footnotes omitted). We are told in note 41 of Professor Chemerinsky's review that "interpretivism" is the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." And we are informed, in note 42 of this review: "Although there are still a few scholars who attempt to defend interpretivism, the clear weight of scholarly opinion, to say nothing of the consistent view of the Court, is that the Court is in no way obliged to follow the intent of the framers." Mr. Crosskey, Mr. Strauss, and Justice Black would have found such remarks puzzling, if not even shocking. Does not "the clear weight of scholarly opinion" consider the Court to be obliged to take the Constitution seriously? See infra notes 176 & 210. See also supra text accompanying notes 28 & 34. See generally S.A. Barber, On the Constitution Means 13f (1984); Conant, supra note 93; Linde, E Pluribus—Constitutional Theory and State Courts, 18 Ga. L. Rev. (1984); Section XXV of this article. Compare H. Ely, Democracy and Distrust ch. 1 (1980).

It is sometimes assumed that the "interpretivism" approach rules out a natural-right approach. See, e.g., G. Gunther, supra note 46, at 605-06. But do not the traditional natural right teachings illuminate and help one interpret various constitutional provisions? Do not those provisions presuppose a grounding in natural right (partly in the form of the common law)? Consider Tocqueville's observation: "The Anglo-Americans regard universal reason as the source of moral authority, just as the universality of the citizens is the source of political power, and they consider that one must refer to the understanding of everybody in order to discover what is permitted or forbidden, true or false." A. Tocqueville, supra note 100, at 374. Consider also 1 W. CROSSKEY, supra note 1, at 565f; 2 W. CROSSKEY, supra note 1, at 1107-08, 1110, 1113-14, 1147, 1151-52. Consider as well infra text accompanying note 185.

144. See, e.g., 2 W. CROSSKEY, supra note 1, at 922f where Mr. Crosskey discusses Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).

145. See, e.g., 3 W. CROSSKEY, supra note 1, at 260. See also supra text accompanying note 63.

146. 1 W. CROSSKEY, supra note 1, at 17. See also supra text accompanying note 67.

147. Hart, supra note 17, at 1456, 1481. See supra text accompanying note 25. Mr.
Hart's assessment is quoted with approval in Fairman, A Reply to Professor Crosskey, 22 U. CHI. L. REV. 144, 154 (1954). See also supra text accompanying note 85; supra note 60; infra notes 167 & 215.

148. See supra note 55 and accompanying text; supra text accompanying note 107; infra note 215. Compare supra note 91.

Mr. Crosskey does say that there were many unreliable representations about the Constitution made during the Ratification Campaign (including in The Federalist) and in the First Congress—and so one needs to go back to the document itself if one is to be able to understand it. See, e.g., supra text accompanying notes 74 & 97; supra note 66; infra note 215.

149. See Section VI of this article.

150. See supra text accompanying notes 58 & 67. See also supra note 67.

151. See infra text accompanying note 199. See also infra note 187. Compare infra text accompanying note 186. Mr. Crosskey is said to have “pursued his prolix and leisurely course in a manner reminiscent of the novels of Anthony Trollope.” McCloskey, supra note 85, at 1154. Professor Sutherland gave this advice about Politics and the Constitution in the History of the United States:

By and by, when the reader realizes that this is a different sort of book, not a calm study but the product of an enthusiasm, he can relax and enjoy it. There is an exhilaration in swashing denunciations. A certain mealy-mouthed quality has crept into our history writing; Mr. Crosskey offers a corrective.

Sutherland, supra note 85, at 169.

152. On history and chance, see Section XXV of this article. See also supra note 111.

153. See 3 W. CROSSKEY, supra note 1, at 164f, 324f. See also supra note 104; infra note 173.

154. By the terms of Jay's scheme, the United States was to agree “to forebear to use the Navigation of the Mississippi River below their territories to the Ocean for twenty-five or thirty years”; in return, Spain was to agree for a similar period to open the ports of her empire to American fish and flour and other products which Americans badly needed to sell, and in particular to purchase ship masts from America with specie.

3 W. CROSSKEY, supra note 1, at 289 (footnote omitted). Southerners tended to regard the first part of this proposed treaty as neglectful of their interests, while they saw the second part as advantageous to New Englanders alone. See infra note 180.

155. See, e.g., 1 FEDERAL CONVENTION, supra note 11, at 486-87, 566, 580-81; 2 FEDERAL CONVENTION, supra note 11, at 9-10; 3 LINCOLN, supra note 5, at 454f. Consider also the following particularly challenging recapitulation by Mr. Crosskey of the key issues before and in the Constitutional Convention and during the Ratification Campaign:

Apart from a small, but eventually vociferous, group of petty-minded local politicians, who were impressed only by the fact that they stood to lose in a personal way by the adoption of a national system, there was no real opposition to a generally empowered national government when the Constitution was drawn, provided only that such a government could be so constituted as to permit both the Northern and Southern regions of the country to feel safe. There were also, on the part of the smaller states, certain fears of a national government dominated by the larger states. In conventional histories, a great deal is made of the small states' fears; some of the fears of the South are, also, generally mentioned; but the fears of the Northern states, both large and small, are ordinarily omitted, and statements can even be found that the slavery issue, which gave rise to the Northern fears, was not of much importance in the Federal Convention. The truth is that the slavery issue, with the fears growing out of it, was all-important for the North as well as the South. Without it, and without the consequent fears of the large Northern states, the demands of the minor states would undoubtedly have been brushed aside, if, indeed, in the absence of the slavery issue, they would not have been anticipated, and ren-
dered unnecessary, by a complete consolidation.

3 W. CROSSKEY, supra note 1, at 431 (footnote omitted) (emphasis added in the three concluding lines). See also infra note 190; supra notes 41, 91, 92 & 122; infra note 190; supra text accompanying notes 89-92.

156. On the influence of the slavery issue, see 1 W. CROSSKEY, supra note 1, at 36, 281, 284, 314; 3 W. CROSSKEY, supra note 1, at 181 n.197, 206, 211, 218, 233, 234-35, 236, 260, 261, 264, 266, 267, 311-12, 360, 363, 365, 366-67, 383, 388f, 392, 395, 422. See also infra note 190. Scholars who do make much of the slavery issue include Harry V. Jaffa, Paul Finkelman and Staughton Lynd.

157. 1 W. CROSSKEY, supra note 1, at 315.

158. See also Gouverneur Morris's remarkable speech against slavery in the Constitutional Convention on August 8, 1787. 2 FEDERAL CONVENTION, supra note 11, at 221-23. See also infra note 162. The Virginian George Mason said: "Every master of slaves is born a petty tyrant." 2 FEDERAL CONVENTION, supra note 11, at 370.

159. Durham, supra note 60, at 211. Lincoln usually had more sympathy than Mr. Crosskey displayed for the plight of those saddled (as masters) with the institution of slavery. See, e.g., 3 W. CROSSKEY, supra note 1, at 406-07. See also supra notes 9 & 37. Compare 3 W. CROSSKEY, supra note 1, at 233: "[T]he South as a whole, in contradistinction from the North, was tied to, and desired to be tied—or, at any rate, conceived itself to be tied up beyond all remedy—to the slavery system." See supra text accompanying note 4.

For my discussion of the slavery-question issue, see THE CONSTITUTIONALIST, supra note 2, at 239f; Anastaplo, supra note 13; Emancipation Proclamation, supra note 13. See also supra notes 13 & 100; infra note 190.

160. See also 3 W. CROSSKEY, supra note 1, at 405f, 575-76. See also 3 LINCOLN, supra note 5, at 540; supra note 5.

Chief Justice Taney, in a letter of October 19, 1860 to his son-in-law, was moved by the prospects of a Lincoln administration to say:

My thoughts have been constantly turned to the fearful state of things in which we have been living for months past. I am old enough to remember the horrors of St. Domingo, and a few days will determine whether anything like it is to be vested upon any portion of our Southern countrymen. I can only pray that it may be averted and that my fears may prove to be nothing more than the timidity of an old man.


161. See Section I of this article. See also 1 W. CROSSKEY, supra note 1, at 284-85, 313-14.

162. I do not recall that Mr. Crosskey ever discussed the influence of the development of the cotton gin. See 3 LINCOLN, supra note 5, at 133, 276, 278, 320. "The plainest print cannot be read through a gold eagle; and it will be ever hard to find many men who will send a slave to Liberia, and pay his passage while they can send him to a new country, Kansas for instance, and sell him for fifteen hundred dollars, and the rise." 2 LINCOLN, supra note 5, at 409-10. Some historians have argued that slavery was solidly entrenched in the South before 1790, well before Haiti and the cotton gin. See, e.g., R. McCOLLEY, SLAVERY IN JEFFERESONIAN VIRGINIA (2d ed. 1973); P. FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY (1981).

On the relation between one's desire and one's principles, see Anastaplo, Book Review, Chi. Sun-Times, Aug. 14, 1979, Show/Book Week, at 8 (on South Africa today). See also Section XIII of this article; infra text accompanying notes 199-200. See as well the closing sentence of Gouverneur Morris's anti-slavery speech at the Constitutional Convention on Aug 8, 1777, which reads: "[I] would sooner submit [myself] to a tax for paying for all the Negroes in the United States than saddle posterity with such a Constitution." 2 FEDERAL CONVENTION, supra note 11, at 223. See supra note 158.

163. The Madison index entries are the longest for all three volumes of POLITICS AND
THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES. See also supra note 55.


165. See, e.g., 1 W. CROSSKEY, supra note 1, at 7f, 11, 12, 13, 313, 314, 621-22; 2 W. CROSSKEY, supra note 1, at 1008f, 1012, 1255; 3 W. CROSSKEY, supra note 1, at 28, 268, 276, 388-90, 398, 404-05. See also supra note 36. Tench Coxe's work is preferred by Mr. Crosskey to THE FEDERALIST. 3 W. CROSSKEY, supra note 1, at 533 n.12. Compare 1 H. STORING, supra note 48, at 6; G. WOOD, supra note 48, at 410, 413, 471. See infra note 178.

166. See infra note 220. Consider, however, the following passage in Professor Petro's 1954 defense of Mr. Crosskey:

There is only one instance of an unproved accusation in the book—the charge that Madison falsified his notes on the Federal Convention—and as to that accusation, it is as yet too early to judge, since the demonstration is promised in a future volume. . . . The proceedings of the Federal Convention are so important and require such extensive treatment that Crosskey is devoting a separate volume to them; but that fact neither absolved him from the necessity of noting the conflict with Madison's notes at the present time nor in any way precluded him from indicating how he intended to deal with them.

Until Crosskey fails to deliver as promised, his accusers must be quiet . . . Petro, supra note 3, at 346-47 (footnote omitted). See supra note 19. See also Brant, Mr. Crosskey and Mr. Madison, 54 COLUM. L. REV. 433 (1954); Sharp, supra note 24, at 441.

Historians who have studied the relevant materials have told me that it is highly unlikely that Mr. Crosskey would ever have come up with "conclusive proof" that Madison made significant changes in his notes. Compare W. Crosskey, The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison, 35 U. CHI. L. REV. 248 (1968).

In any event, I, for one am not much interested in whether Madison adjusted the record here and there, perhaps to fit in with what he came to "recall" "must have been" the original "understanding" among the delegates in the Constitutional Convention. (Mr. Sharp once characterized the report of such an attempt on Madison's part as "touching if true.").) Similarly, I could never get excited about whether President Nixon had tried to cover up the third-rate burglary that his more incompetent underlings had bungled at the Watergate. See HUMAN BEING AND CITIZEN, supra note 24, at 160. Or, as Gouverneur Morris said in the Constitutional Convention: "It was a precept of great antiquity as well as of high authority that we should not be righteous overmuch." 2 FEDERAL CONVENTION, supra note 11, at 122. See infra note 217.

167. 1 W. CROSSKEY, supra note 1, at 404. James Madison, in explaining the rift between Alexander Hamilton and himself, is reported to have said:

I deserted Colonel Hamilton, or rather Colonel Hamilton deserted me; in a word, the divergence between us took place from his wishing . . . to administer the Government . . . into what he thought it ought to be; while, on my part, I endeavored to make it conform to the Constitution as understood by the Convention that produced and recommended it, and particularly by the State conventions that adopted it.

Schrock & Welsh, supra note 46, at 1130 n.72 (emphasis in original). See supra text accompanying note 147; infra text accompanying note 186. See also supra note 61; infra notes 178-79 & 215.

168. See, e.g., 3 W. CROSSKEY, supra note 1, at 404-05. It should be noted that President Madison did appoint Joseph Story to the Supreme Court, despite Jefferson's opposition. Crosskey, supra note 3, at 38 n.11. See supra text accompanying note 31. On Justice Story, see 2 W. CROSSKEY, supra note 1, at 872, 1115.

169. See, e.g., supra text accompanying note 26. See supra notes 37 & 166.

170. See, e.g., 3 W. CROSSKEY, supra note 1, at 259-60, 267. See also supra note 70.

171. See e.g., 3 W. CROSSKEY, supra note 1, at 260, 266-67, 279f, 417. Of course, George
Washington and John Marshall are routinely excepted by Mr. Crosskey from the criticisms he generally makes of Southerners. See 1 W. CROSSKEY, supra note 1, at 195; 3 W. CROSSKEY, supra note 1, at 297-98, 351. See also 2 FEDERAL CONVENTION, supra note 11, at 202-03, 278-79, 284-85, 545; supra note 85; infra note 79.

172. See, e.g., 3 W. CROSSKEY, supra note 1, at 397. See also 2 W. CROSSKEY, supra note 1, at 762, 810. On the relation between democracy and chance, see supra note 49. See also 1 FEDERAL CONVENTION, supra note 11, at 49-50, 122-23. See PLATO, REPUBLIC 557A. (In the Athenian democracy, the ruling offices were allocated, for the most part, by lot. Compare id. at 546B-547A. See also THE CONSTITUTIONALIST, supra note 2, at 765 n.199.) See as well supra text accompanying note 94.

173. See 3 W. CROSSKEY, supra note 1, at 453-54. See also 2 W. CROSSKEY, supra note 1, at 1037. Mr. Crosskey says:

These phenomena [during the time of Shays’s Rebellion] gradually embittered the groups in Massachusetts that suffered from them most: and since those groups included a large part of the more ignorant and less intelligent members of the state, it was only natural—and, indeed, quite in accord with common experience—that their resentment became directed against those in their immediate neighborhood who did not seem to be suffering so severely as they.

3 W. CROSSKEY, supra note 1, at 336.

174. On the Republican Form of Government Guarantee, which does not concern itself with “democracy” simply, see supra note 142. On democracy and its limitations, see 3 W. CROSSKEY, supra note 1, at 453-54; 1 FEDERAL CONVENTION, supra note 11, at 10, 48f, 68, 80f, 122f, 218, 287f, 359, 424-25, 545; 2 FEDERAL CONVENTION, supra note 11, at 29f, 73f, 114, 249, 276, 476-77. On the merits of the British system, see 1 FEDERAL CONVENTION, supra note 11, at 136, 153, 288, 398-99.

175. Compare 1 H. STORING, supra note 48, at 48f; G. WOOD, supra note 48, at 396f. See THE CONSTITUTIONALIST, supra note 2, at 237f, 276f, 615 n.35. Consider the exchange between Harry V. Jaffa and Walter Berns, NATL REV., Jan. 22, 1982, at 36, 44. Consider also Anastaplo, supra note 13, at 314; ARTIST AS THINKER, supra note 2, at 476 n.285; Anastaplo, supra note 38, at 94f.

Mr. Crosskey does not seem to appreciate the fact that the “democratic self-government” he generally extols could lead to considerable reliance upon local government and States’ Rights. See, e.g., A. TOCQUEVILLE, supra note 100, at 246 n.1. See also infra note 206. Compare A. TOCQUEVILLE, supra note 100, at 331, 335, 337 (on the limits of local government, as seen in the treatment of the Indians). For a useful examination of the proper relations between Federal and State governments, see the opinion of Justice Black in Oregon v. Mitchell, 400 U.S. 112 (1970). Consider also the challenging dissenting opinion of Justice Rehnquist in Rome v. United States, 446 U.S. 156, 206 (1980).

176. For Mr. Crosskey, prudence can be both good and bad. See, e.g., 1 W. CROSSKEY, supra note 1, at 412, 497; 2 W. CROSSKEY, supra note 1, at 744, 916, 921; “And since, in the circumstances that had come to exist, issuance of the writ [sought in Marbury v. Madison] could not possibly do the applicants any good, common prudence required that the Court find some way to justify a refusal of the writ as prayed.” Id. at 1044; 3 W. CROSSKEY, supra note 1, at 153, 238, 229; “As we have previously suggested, Madison’s original apostasy was almost certainly the result of selfish, prudential motives.” Id. at 405. On prudence, see the discussion of the similarities between Daniel Webster and Abraham Lincoln in Anastaplo, supra note 38. See infra note 191. See also ARTIST AS THINKER, supra note 2, at 279f; Notes Toward An “Apologia pro vit.f sua”, INTERPRETATION, May-Sext. 1982, at 328.

Consider, as well, the use of prudence, as perhaps distinguished from exigency, in the following Hamiltonian passage from FEDERALIST No. 33:

If the federal government should overpass the just bounds of its authority, and make a tyrannical use of its power, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution as the exigency may suggest and prudence justify.
Prudence is, I believe, usually if not always spoken well of in the Constitutional Convention. See, e.g., 1 FEDERAL CONVENTION, supra note 11, at 401, 566; 2 FEDERAL CONVENTION, supra note 11, at 89, 203, 237-38, 328, 372. See also Section XXI of this article. See as well THE CONSTITUTIONALIST, supra note 2, at 781-82 n.8 (comments on parresia).

177. See supra notes 165-66. Compare Mr. Crosskey's somewhat greater tolerance when someone of whom he approves (preferably a Northern nationalist) resorts to questionable arguments: "The statements from the pamphlet of 1774 [by John Dickinson, of Pennsylvania] undoubtedly exemplify the tricks and sophistries to which the 'logic' of the events of the time could force even a high-minded and ordinarily honest man to resort." 1 W. CROSSKEY, supra note 1, at 136. See also id. at 178. Compare supra text accompanying note 65. See infra note 221.

178. See, e.g.: "Furthermore, King's fear of the 'landed Aristocracy' of the Southern states was not a matter explicitly communicated in the Massachusetts delegates' joint letter; and there can be little doubt it was a matter that Rufus King would have considered 'improper to have communicated' in it." 3 W. CROSSKEY, supra note 1, at 260. Consider also, how the Constitutional Convention delegates signed the Constitution itself. See, e.g., Anastaplo, supra note 38, at 112-13. See also supra notes 9 & 66.

But Mr. Crosskey indicates that it can be a risky approach to rely too much on discretion. Consider:

For the present, it is sufficient to note that the Judiciary Act was one element in the "lulling policy" (as their opponents called it) which was unwisely pursued by the Federalists, in the First Congress. As such, the act was regarded by many Federalists as an extraordinarily clever beginning of all the various judicial reforms that the Constitution had been intended to usher in.

1 W. CROSSKEY, supra note 1, at 610. Such a "lulling policy," with respect to the extent of the Commerce Power as well, may have contributed to the establishment of a general opinion that the powers of the government of the United States under the Constitution were fairly limited. See supra notes 92 & 115. See also supra notes 85 & 97.

Consider also, how the successful effort to get the Constitution ratified in New York contributed to subverting its intended scope:

The attempt to confuse "objects" and "powers," begun by Madison and Hamilton in THE FEDERALIST, as a means of helping the Constitution over the hump in New York (see, for example, No. XXIII, by Hamilton, and No. XL1, by Madison) later became a stock trick of those seeking to cry down the national powers.

1 W. CROSSKEY, supra note 1, at 509n. There is the question, of course, of how clear the Constitution was taken to be about matters that could have been played with as Mr. Crosskey considers them to have been. See supra text accompanying notes 84-85. See also infra note 167; infra note 215.

179. Consider, for example, how Hamilton equivocated in order to further nationalist purposes. 1 W. CROSSKEY, supra note 1, at 402f, 418n, 619-20; 2 W. CROSSKEY, supra note 1, at 1027. See supra text accompanying note 66. See also supra note 178.

I do not believe that Mr. Crosskey appreciated the extent to which the subtlety of some of his heroes could take them. (This may be related to his general depreciation of "politics." See Section XXII of this article.) Thus, Hamilton in a letter of June 7, 1782 argued against a proposal that a captured British officer be executed (by way of retaliation) for the murder, under British auspices, of an American officer. He included in his letter the following suggestion:

If it is seriously believed that in this advanced stage of affairs retaliation is necessary, let another mode be chosen. Let other actors be employed, and let the authority by which it is done be wrapt in obscurity and doubt. Let us endeavor to make it fall upon those who have had a direct or indirect share in the guilt. Let not the Commander-in-Chief—considered as the first and most respectable
character among us—come forward in person and be the avowed author of an act at which every humane feeling revolts. Let us at least have as much address as the enemy; and, if we must have victims, appoint some obscure agents to perform the ceremony and bear the odium which must always attend even justice itself when directed by extreme severity.

9 The Works of Alexander Hamilton 257 (H.C. Lodge ed. 1904). There is something Shakespearean about this advice. Both the Duke's Angelo (in Measure For Measure), and the murderers of Banquo (in Macbeth) come to mind. See also Artist as Thinker, supra note 2, at 15f. See as well supra note 9; infra note 180. (We are told that "Washington could not bring himself to this act of retaliation, even as a last extremity." 9 The Works of Alexander Hamilton, supra, at 258 n.1.) Had Hamilton's suggestion in his June 7th letter been intended, in part, to move Washington? For an instructive comment by Hamilton on the character of Washington, see id. at 232-37. Compare 3 W. Crosskey, supra note 1, at 581 n.46. See supra note 65. On Hamilton, see The Constitutionalist, supra note 2, at 651 n.91.

180. See, e.g., supra note 19. Perhaps it would be charitable to consider Mr. Crosskey's "Romish" comments in Volume I tacitly expiated by his good-natured comment: A commercial treaty with Spain, it is perhaps needless to say, was at the time an object of great general desire in Congress, and especially was this true among the New England men, who, because of the Roman Catholic allegiance of the Spanish Empire, regarded that empire as a most excellent market for New England fish.

3 W. Crosskey, supra note 1, at 286. See id. at 299. See also supra note 154.

However this may be, it is difficult to think of Mr. Crosskey as truly thoughtful, however accomplished he was in the art of a highly skilled lawyer turned historian. See supra text accompanying note 40. See also, supra note 143. See as well supra notes 176 & 179; infra notes 186 & 188. Of course, he would have been inclined to suspect "thoughtful" (as used here by me) as merely a synonym for "metaphysical." See infra note 187.

181. See, e.g., 3 W. Crosskey supra note 1, at 336, lines 1 & 31. His repeated use of "pseudo-orthodox" in all three volumes is symptomatic: he generally refuses to call "orthodox" the accepted opinion (even if it should be an opinion that has been widely accepted for more than a century) if that opinion should be simply wrong. It seems to me unlikely that the generally known decision by the First Congress to change the location in the Constitution of the proposed amendments meant to most people then that the amendments would thereafter apply to the States as well as to the United States. See The Constitutionalist, supra note 2, at 55-56, 80-81, 171f, 289-93, 461-62. See also Fairman, supra note 147; Fairman, supra note 20; Frank, Book Review, 49 Nw. U.L. Rev. 132 (1954). Compare The Constitutionalist, supra note 2, at 487 n.86; Crosskey, Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority, 21 U. Chi. L. Rev. 1, 119f (1954). See also supra note 37.

183. 1 W. Crosskey, supra note 1, at 318 (emphasis added). See supra note 85.

184. Thus, Mr. Crosskey can speak of a "natural, customary field of legislation," or of a "natural and usual field of legislation." 1 W. Crosskey, supra note 1, at 21, 49. That is, he does not seem to distinguish the natural from the usual or the customary. See Human Being and Citizen, supra note 24, at 47; Artist as Thinker, supra note 2, at 411 n.145;
I have noticed more than 200 uses of "nature," "natural" and "naturally" in the almost 2,000 pages of Mr. Crosskey's three volumes. Perhaps more can be said on another occasion about his usage. Still, Mr. Crosskey's understanding of "nature" probably is not distinctive to him, but is rather that of the typical intellectual of his time. See supra note 116; infra note 188. See also supra note 19.

185. I suggest that this suspicion may, in part, be shaped by his opinion about "Romanish" influences. See supra note 19. Certainly, that has been an important consideration for many twentieth century intellectuals. See Human Being and Citizen, supra note 24, at 46; Anastaplo, supra note 45, at 226-27 n.164; Anastaplo, On Speaking to and for Mankind: The Laborem Exercens Encyclical of Pope John Paul II, Catholicism in Crisis, Sept. 1983, at 6. See as well Arnhart, supra note 2, at 593-95. Also important for intellectuals are the troublesome judicial determinations (sometimes in the name of "natural law") represented by Lochner v. New York, 198 U.S. 45 (1905), and by the early New Deal cases. See supra notes 78 & 120; infra note 186. See also supra notes 111 & 142-43. Consider 2 W. Crosskey, supra note 1, at 1149.

186. 2 W. Crosskey, supra note 1, at 1152. Mr. Crosskey adds here, "The Justices responsible for 'substantive due process' appear to have been, in the main, men of this persuasion." Id. But what of the men who framed the Constitution? Did they not act on "their own judgments of what is the 'common good'?" And did not they, by and large, consider those judgments to be "objective determinations of fact"? Certainly, again and again, in the Constitutional Convention, the drafters spoke of justice and the right as if they were "objective determinations of fact." See, e.g., 1 Federal Convention, supra note 11, at 215 (Madison); id. at 286-87 (Hamilton); id. at 533-34, 551-52 (Gouverneur Morris); id. at 581 (Mason); id. at 595-96 (King); 2 Federal Convention, supra note 11, at 4 (Wilson). Obviously, they did not speak on those occasions for "public consumption." Many other similar instances can be collected from the Constitutional Convention, from State Ratifying Conventions, and from writings of the time (including, or course, the Declaration of Independence). (Whatever the problem with the reliability of Madison's Notes, it is hardly likely to affect most work usages that he records.) "Objective determinations of fact," in such matters, depend on the kind of "mature consideration" deferred to by Lincoln in the passage quoted, supra text accompanying note 9. See also the second paragraph in the long quotation, supra note 45; supra text accompanying notes 123 & 139.

If the men who framed the Constitution did act on the basis of "their own judgments of what is for 'the common good'"—judgments which they believed to be more or less "objective determinations of fact"—why cannot others who follow them act in the same manner? If they did not and could not so act, then why should we respect and conform to what they have done? Only because it is desirable to have some standard, some constitution, to live by, however it is arrived at? But does not this conclusion—that it is desirable to have an accepted standard by which to live—rest on a sensible judgment about the common good, objectively determined? See infra note 196. See also infra note 221; supra note 123 (where Mr. Crosskey himself can be seen to have deliberately invoked justice and the common good on more than one occasion). Thus, Mr. Crosskey (who could be more sensible in "practice" than in "theory") can speak of "shocking injustice," 2 W. Crosskey, supra note 1, at 939, of "evil," 1 W. Crosskey, supra note 1, at 17, 25, 31, and, of course, of "the common good," 2 W. Crosskey, supra note 1, at 935 ("And that it would be for the common good to introduce order and uniformity into the country's law, there can be no question.").

I do not believe that Mr. Crosskey confronted questions such as these (nor, for that matter, do most of his critics). His failure to do so does place limits upon his work, which is nevertheless often brilliant and almost always useful. See supra text accompanying notes 40 & 50. See also supra note 180; infra note 187. In any event, he seems to agree with the principle invoked by Madison in the passage quoted supra note 167.

187. The best account of this modern development may be found in L. Strauss, supra...
The fashionable modern development, with respect to these matters, is reflected nicely in the following comment I have received on Section XXI of this article from a highly regarded social scientist:

Your views on nature are highly debatable. Statements about the common good, made without statistical sampling of opinion on the common good, are mere personal value judgments. Your view of useful analyses of reason as "rooted in nature" is highly debatable. Any social scientist would tell you that law is not discovered; it is made by legislatures and judges. Their function is normative, expressing their values or views on public welfare.

See supra text accompanying note 151. See also supra note 58.

188. Consider, for example, Mr. Crosskey's "it is only natural" in the passage quoted supra note 173. Consider, as well, other uses of "nature," supra text accompanying notes 18 & 36. The problem of nature may also be seen in any serious consideration of the status of prudence. See supra note 176. See also supra notes 180 & 184.

The complexity of nature is suggested by Gouverneur Morris's observation in the Constitutional Convention: "Such is the nature of man, formed by his benevolent author no doubt for wise ends, that altho' he knows his existence to be limited to a span, he takes his measures as if he were to live forever." 2 FEDERAL CONVENTION, supra note 11, at 113. See supra note 41. See also Anastaplo, Psychiatry and the Law in By Reason of Insanity: Essays on Psychiatry and the Law 171f (L.Z. Freedman ed. 1983).

What is the status of nature if the universe and man in it exist in their present form by chance? That is, is nature itself then due merely to chance, or are certain things good in themselves, including the universe and its ordering, because they conform to certain principles, however much chance may determine when, where, and the form in which they appear? On the goodness of existence itself, see T. AQUINAS, SUMMA THEOLOGIAE, 1A, 5, 3. See also, The CONSTITUTIONALIST, supra note 2, at 803-05 n.38. Consider, as well, the Hegel quotation, infra note 221. See supra note 49.

There is an instructive discussion of the question of nature in Klein, The Nature of Nature, 3 INDEPENDENT J. PHIL. 101 (1979). See also J. CROPSEY, POLITICAL PHILOSOPHY AND ISSUES OF POLITICS 221 (1971); Anastaplo, supra note 38, at 140-42 n.20; ARTIST AS THINKER, supra note 2, at 414-17; TACITUS, THE LIFE OF JULIUS AGRICOLA 33 (2, 6). The "What is God?" inquiry may be fundamental to these questions. See supra note 111.

189. See, e.g., supra note 186. Whether there is an "objectively determinable" common good affects one's answer to the question whether the common law is made or discovered by the judges. See, e.g., 2 W. CROSSKEY, supra note 1, at 904, 906-07, 909-10. See also infra notes 196 & 197.

190. For example, consider how slavery was discussed in the Constitutional Convention. 1 FEDERAL CONVENTION, supra note 11, at 486-87, 561-62, 566, 580-81, 593-95; 2 FEDERAL CONVENTION, supra note 11, at 9-10, 220f, 364-65, 369f, 414f, 559, 629. See THE CONSTITUTIONALIST, supra note 2, at 149-50, 154-55, 239-54, 431, 473-74, 489, 511-12, 563, 579-80, 584-85, 600-03, 623, 645, 651-54, 657, 670-71, 674-75, 710-13, 726-32, 736, 740, 779-80; Anastaplo, supra note 38. See also supra notes 11, 156, 158-160 & 162.

191. It is encouraging to notice that the truly great constitutional authorities in this
country (such as Webster and Lincoln) can be said to have been in fundamental agreement on the major issues, making allowances for varying circumstances. See supra note 176.

192. See, e.g., 1 W. Crosskey, supra note 1, at 25f; 2 W. Crosskey, supra note 1, at 514-15, 517f, 603, 916, 939. See also infra text accompanying note 213. See as well supra note 24; supra text accompanying note 146. On "efficiency," see supra note 116.

It should be noticed, however, that some of the evils Mr. Crosskey speaks of may have to be thought of differently in the light of the reservations indicated in Section XIII of this article about the consequences of commerce.

193. See, e.g., Huidekoper's Lessee v. Douglass, 7 U.S. (3 Cranch) 1 (1805):

This is a contract; and although a state is a party, it ought to be construed according to those well-established principles which regulate contracts generally.

The state is in the situation of a person who holds forth to the world the conditions on which he is willing to sell his property.

If he should couch his propositions in such ambiguous terms that they might be understood differently, in consequence of which sales were to be made, and the purchase-money paid, he would come with an ill grace into court, to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase-money. All those principles of equity, and of fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction.


How courts "lean" can be crucial, even without judicial review (that is, the power to declare Congressional legislation unconstitutional). Thus, courts can interpret acts of Congress in accordance with the Constitution, proceeding on the reasonable assumption (until Congress clearly indicates otherwise) that nothing unconstitutional or unjust is intended. That is, a court should be able to press legislators to acknowledge, if they dare, their determination to act unjustly or unconstitutionally. See supra note 131. See also supra note 114.

194. See, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), where Justice Story considers "what is the just rule furnished by the principles of commercial law to govern the case." Id. at 19. See also supra note 114. On "the law merchant" (or "commercial law") as incorporated into the common law, see 1 W. Crosskey, supra note 1, at 78-79, 82, 576.

This approach seems to be challenged by Erie R.R. v. Tompkins, 304 U.S. 64, 83-84 (1938). See also 2 W. Crosskey, supra note 1, at 857-58; Arnhart, supra note 1, at 552-53, 573. See as well supra note 142.

195. See, e.g., supra text accompanying notes 64 & 157; supra notes 87 & 177. See also 1 W. Crosskey, supra note 1, at 8, 10, 13 (four times!), 136, 153, 159, 179, 186, 229, 257, 266, 287-88, 290, 315, 388, 440; 2 W. Crosskey, supra note 1, at 1169, 1172, 1322; 3 W. Crosskey, supra note 1, at 38, 95. See as well supra note 187. Consider PLATO, STATESMAN 303C. Consider, also, the implications of the recognition of anyone as "great" and of an insistence upon rationality. See, e.g., supra note 24; supra text accompanying note 63 (Compare the different use of "great" in supra note 64 and accompanying text.). Was Mr. Crosskey ever aware of the natural-rights implications of his criticisms of Justice Holmes? See infra text accompanying notes 35 & 189. See also supra text accompanying note 183; infra text accompanying note 221.

On the lengths to which the natural can nominally be carried, see PLATO, CRATYLUS 429B-E, 433C-D.

196. See supra note 189; infra note 197. Circumstances and hence justified expectations do vary and should be accounted for. Thus, Mr. Crosskey can refer to "the history of the unexpected happenings and new political trends that crowded in, in the early years, and defeated the intentions and purposes with which our government was founded." 2 W. Crosskey, supra note 1, at 363. See, e.g., MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Consider the following comment on MacPherson:
This development concerns the recognition of a duty of care on the part of providers, manufacturers, and repairers of products of various kinds toward others than those in privity of contract with such providers, etc., who will foreseeably use or be exposed to the use of such products and will probably be hurt by them if they are negligently constructed, handled, or repaired. And this does not mean that the identity of such persons must be foreseen, since the beneficiaries of this duty of care are normally people like ultimate consumers—an indeterminate class who, in the nature of things, will eventually use or consume the product in question.

Perhaps confining the duty of care to parties in direct contractual privity was all right when people used to purchase commodities directly from those who made them; but the trend toward mass production, with intervening contracting parties like wholesalers and retailers administering distribution, considerably altered this picture.

C. Gregory & H. Kalven, Jr., Cases and Materials on Torts 290-91 (1959). It is impossible to read much in the literature (and especially the great cases) of the common law, which common law does seem to be taken for granted by the Constitution, without noticing the influence upon the judges of natural right—that is, the influence upon them of considerations of what is by nature, or reasonably, just.

Of course, modern intellectuals try to explain away what they cannot help but notice here. Thus, it will be said, it is no sense of justice that is being drawn upon but merely a desire for uniformity for the sake of efficiency, with the uniform standard from place to place being determined by chance, etc. What is good, however, about efficiency or about predictability if there really is no standard of justice to which nature inclines us? If one presses this line of inquiry, one is eventually told that self-preservation is fundamental and so the presuppositions of modernity come into view. See Berns, Thomas Hobbes, in History of Political Philosophy 370 (L. Strauss & J. Cropsey eds. 2d ed. 1972). See also Human Being and Citizen, supra note 24, at 282-83 n.7. Anastaplo, Legal Realism, the New Journalism, and The Brethren, 5 Duke L. J. 1045 (1983). See as well supra notes 116 & 186; infra note 198.

On the link between the common law and what is by nature right, see Aristotle, Rhetoric, bk. I, ch. 13. For an explication of the Rhetoric, see L. Arnhart, Aristotle on Political Reasoning (1981).

197. See Arnhart, supra note 2, at 546-47 (and the cross-references in his note 19). "[T]he most noteworthy aspect of the . . . opinion [in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)] was the controversy between Chase and Iredell over the place of natural law in constitutional litigation." Currie, supra note 81, at 871.

Consider, as well:

The common law as we believe it to be generally understood involves considerably more than judicial legislation. This "more" is a discipline by which the power to implement policy is confined through presumptive adherence to precedent and commitment to a course of principled development. Indeed, perhaps only the discipline of precedent and principle justifies allowing the judiciary to second-guess the choices made by popular majorities.

Schrock & Welsh, supra note 46, at 1132. See supra note 142.

198. See, e.g., 1 W. Crosskey, supra note 1, at 391, 394, 531; 3 W. Crosskey, supra note 1, at 9, 159, 180. Compare the tenor of James Wilson's observation in the Constitutional Convention: "Again he could not agree that property was the sole or the primary object of Governt. & Society. The cultivation & improvement of the human mind was the most noble object." 1 Federal Convention, supra note 11, at 605. Consider, also, Gouverneur Morris's observation at the Constitutional Convention:

As to those philosophical gentlemen, those Citizens of the World, as they call themselves, He owned he did not wish to see any of them in our public Councils. He would not trust them. The men who can shake off their attachments to their own Country can never love any other. These attachments are the wholesome
judges which uphold all Governments.

2 Federal Convention, supra note 11, at 238.

199. See 3 W. Crosskey, supra note 1, at 298-99. See also supra note 162.

200. See 3 W. Crosskey, supra note 1, at 253f, 298, 300, 351f, 354, 360, 363, 462.

201. See, e.g., 1 W. Crosskey, supra note 1, at 290. See also supra notes 111, 178 & 180.

202. 3 W. Crosskey, supra note 1, at 163 (footnote omitted). (Does Mr. Crosskey's "necessary" here draw on nature?) See also supra note 162.

203. 3 W. Crosskey, supra note 1, at 541 n.68 (emphasis in original).

204. 3 W. Crosskey, supra note 1, at 163 (footnote omitted) (emphasis in original). See also id. at 359, 448.

205. 3 W. Crosskey, supra note 1, at 43. See also 1 W. Crosskey, supra note 1, at 140. Compare M.L. King, Jr., Why We Can't Wait 87 (1964).

206. 3 W. Crosskey, supra note 1, at 391, 533 n.12. Did the more ardent (or younger) revolutionaries tend to become States' Rightists? See The Constitutionalist, supra note 2, at 721-22 n.98. See also supra note 175.

207. 3 W. Crosskey, supra note 1, at 438.

208. 2 Federal Convention, supra note 11, at 469. See also 1 Federal Convention, supra note 11, at 249, 283, 338; 2 Federal Convention, supra note 11, at 468-69, 476-77. See as well 3 W. Crosskey, supra note 1, at 385; supra note 178.

209. "Mr. Strauss, I should add, was not really as conservative as most of his devoted students, not only because he did not care as much as (or in the way) they did about practical matters but also because he knew better than they that the institutions which conservatives so passionately protect often have questionable radical origins." Anastaplo, supra note 143, at 32 n.1. See also Artist as Thinker, supra note 2, at 474-75 n.282. See as well supra notes 116 & 176.

210. On the Declaration of Independence as fundamental, see H. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates (2d ed. 1982); Anastaplo, supra note 111. Does Mr. Crosskey tacitly recognize the supremacy of the Declaration of Independence when he makes as much as he does of the people's ratification of the Constitution and its superiority to the Articles of Confederation in this respect? Compare supra note 143.


211. Dennis v. United States, 341 U.S. 494, 508 (1951) (Chief Justice Vinson). See supra notes 126 & 128; infra note 220. See also S. Barber, supra note 143, at 49, 226 n.23.

212. See Human Being and Citizen, supra note 24, at 52. See also Anastaplo, supra note 111, at 398.

213. See, e.g., the end of Section XXII and the beginning of Section XXIII. See also supra notes 180 & 192. See as well supra text accompanying note 186.

214. Consider Rufus King's July 11, 1787 report to Henry Knox, from the Constitutional Convention: "I wish it was in my power to inform you that we had progressed a single step since you left us—I say progressed; this expression must be defined by my own political creed, which you are very well acquainted with." 3 W. Crosskey, supra note 1, at 572 n.65. See also Human Being and Citizen, supra note 24, at 117. See as well supra note 116.

215. See, e.g., 1 W. Crosskey, supra note 1, at 192, 266; 3 W. Crosskey, supra note 1, at 462f. But consider this observation on Mr. Crosskey's work in Swisher, Book Review, Sat. Rev., Apr. 4, 1953:

If a few people in the Constitutional Convention planned the centralization of power the author envisages, the American people quickly demonstrated they
Mr. Crosskey wanted something very different.

No amount of rewriting of history can change this fact. If the Framers really attempted to palm off on the people something that might easily become a highly centralized tyranny—and this the reviewer profoundly disbelieves—more than a century and a half of American history demonstrates that the people will have none of it.

Id. at 3. See also supra text accompanying notes 147 & 148; supra notes 91 & 167. See as well Powell, supra note 39, at 159. Of course, it is (as we have seen) one of the principal purposes of the third volume of Politics and the Constitution in the History of the United States to demonstrate that the American people, by and large, had indeed come to want a rewriting of their constitution which would permit a “centralization of power,” at least with respect to commerce. See 1 W. Crosskey, supra note 1, at 3, 17, 20, 32f, 36-39, 44-45, 515. For an anticipation of Volume III, see 1 W. Crosskey, supra note 1, at 187-88. See also 3 W. Crosskey, supra note 1, at 462. (Certainly, “tyranny” was never part of the Framers’ intention, nor does Mr. Crosskey ever suggest it was. See A. Tocqueville, supra note 100, at 668, 687-88, 695-96.)

When there is a well-crafted constitution, there are bound to be a few who understand it better than the many do. What, then, constitutes “consent of the governed?” See Anastaplo, supra note 111; Rousseau, Social Contract Bk I, ch. 7. See also supra notes 48, 49, 111, 148, 167 & 176; infra notes 220 & 221. Consider, as well, the following observations, prompted by the accounts of Joseph’s dream interpretation in chapters 40 and 41 of the Book of Genesis:

To see the whole force of Joseph’s [dream] interpretation and its relation to the dream as it was understood by the dreamer we must reflect on our own activity as interpreters of the Book of Genesis and its relation to that large mass of people—great and small—for whom the book was written. Was it thought by the author [of Genesis] that all the men, women, and children whose lives were to be guided by this book would follow the intricacies of dates and the history of each city [examined in this commentary]? Probably not. How then are we to understand the relation of [the author’s] deepest thoughts to that mass of people for whom he is writing? While not every one of the Children of Israel need be aware of the deepest understanding of tradition they . . . must have a vague reflection of that awareness, deep in their hearts. If the New Way [provided for in Genesis] is to succeed, that alone will save their lives.

Sacks, The Lion and the Ass: A Commentary on the Book of Genesis, in 12 Interpretation.

But it can be difficult even for Mr. Crosskey to say what “must have been clear to every reasonably intelligent, well-read American of the eighteenth century” about the Constitution. 1 W. Crosskey, supra note 1, at 508. See also supra note 61. Consider, for example, the troublesome implications of this passage about the disabilities of the non-lawyer (and hence of most citizens?) in reading the Constitution even in 1791:

[The advice [Attorney General Edmund Randolph] gave to [President] Washington, that the Bank Act was unconstitutional, was in every way in character. Yet the fact remains the opinions he sent to the President were very remarkable documents for one ex-member of the Federal Convention to hand to another. For, in the course of his main opinion and the side-memorandum that accompanied it, Randolph not only denied that the national commerce power had the comprehensive scope which he and Washington must both have known it was meant to have; he, in addition, denied, more generally, that the Constitution set up the fully empowered government which . . . both he and Washington must also have known, had been intended to be supplied by it. In these circumstances, the question naturally arises, how Randolph dared to render such opinions to Washington.

The answer probably is, in part, that Washington, not being a lawyer, had taken, and of course was known by Randolph to have taken, no actual part in
the technical drafting of the Constitution. Beside this, Washington, as a lay-
man, would have to depend, in this whole matter of constitutional interpreta-
tion, very much upon what lawyers told him the Constitution meant. And Ran-
dolph, counting upon these facts, apparently decided to take the bull by the
horns and declare that the amendment to the Constitution which is now the
Tenth had changed the Constitution from what the Federal Convention had
originally drawn it to be. The Tenth Amendment had not, then, it is true, been
fully ratified; but nine states had approved it, and there was little doubt it
would soon be part of the Constitution.

1 W. CROSSKEY, supra note 1, at 206 (footnote omitted). See supra text accompanying note
85; supra notes 39 & 178.

On the principal objects of the national legislature developed in the Constitutional
Convention, see 2 FEDERAL CONVENTION, supra note 11, at 198 (King: “The most numerous
objects of legislation belong to the States. Those of the Na[t]ional Legislature were but
few. The chief of them were commerce and revenue.”); id. at 220 (King: “What are the
internal sedition.”); id. at 233 (Wilson: “All the principal power of the Na[t]ional Legis-
lature had some relation to money.”); id. at 275 (Wilson: “War, Commerce, and revenue
were the great objects of the Gen[eral] Government. All of them are connected with
money.”); id. at 666 (letter of September 17, 1787 from the Convention to Congress: “The
friends of our country have long seen and desired, that the power of making war, peace
and treaties, that of levying money and regulating commerce, and the correspondent
executive and judicial authorities should be fully and effectually vested in the general
government of the Union . . . .”) (emphasis added). See supra note 91.

216. 1 W. CROSSKEY, supra note 1, at 514. See supra text accompanying notes 37 & 40.

217. The most important further contributions of this third volume are its sugges-
tions: (1) about the influence of the slavery issue in the late eighteenth and early nine-
teenth centuries; (2) about the career of James Madison (whose intelligence, competence
and sensitivity can be seen to manifest themselves repeatedly, despite Mr. Crosskey's not
altogether implausible reservations, in the quite instructive notes he has left us of the
Constitutional Convention); (3) about the development of considerable public support,
before 1787, for a broad commercial power in the national legislature; and (4) about the
precise political developments and legal measures that led to the Constitutional Conven-
tion. See supra text accompanying notes 202-04.

218. 3 W. CROSSKEY, supra note 1, at 532-33 n.8 (quoting 1 FEDERAL CONVENTION,
 supra note 11, at 529). Wilson had said in the Constitutional Convention, “with regard to
the sentiments of the people, he conceived it difficult to know precisely what they are.
Those of the particular circle in which one moved, were commonly mistaken for the gen-
eral voice.” 1 FEDERAL CONVENTION, supra note 11, at 253 (emphasis in original). Com-
pare id. at 250. Mr. Crosskey himself has suggested that “the public prints . . . are the
best evidence of the general understanding.” 1 W. CROSSKEY, supra note 1, at 61. Thus,
“the best evidence” of “the sentiments of the people” was available to Morris, who never-
theless insisted that those sentiments “cannot be known.” How, then, should a scholar,
two centuries later, be able to determine eighteenth century opinion in a reasonably reli-
able manner? See supra note 48; infra note 219. See also infra note 220.

219. See supra notes 39, 120, 111, 116, 176 & 180. On history, see THE CONSTITUTIONAL
IST, supra note 2, at 815; HUMAN BEING AND CITIZEN, supra note 24, at 326; Anastaplo,
supra note 193. On chance, see HUMAN BEING AND CITIZEN, supra note 24, at 324; supra
note 49. See also an instructive review of POLITICS AND THE CONSTITUTION IN THE HISTORY
OF THE UNITED STATES: Miller, 75 AM. POL. SCI. REV. 1036 (1981). (Chance may be seen
even in whether a critical volume of one's work ever appears. See infra note 220. For
what can be said for, and through, history, see Stone, Terrible Times, New Rep. May 5,
1982, at 24.)

For a reminder of how difficult it is to judge, in quite changed circumstances, what was
said and done (or what was not said and done) in another era, see Bethge, Dietrich Bon-
See 1 W. CROSSKEY, supra note 1, at vii-viii, 12, 187, 358, 384, 407, 535, 537-38; 2 W. CROSSKEY, supra note 1, at 1009, 1012, 1303, 1319 n.36, 1326, 1333; 3 W. CROSSKEY, supra note 1, at xi, xii, 7, 400-01, 409, 462. See also supra note 16. See as well supra note 19. (The Constitutional Convention volume, the existence of which seems to be presupposed in some of Mr. Sharp's correspondence, is anticipated in all three published volumes. Mr. Crosskey's readers can get a sample of how interesting and useful his account of the Convention would have been by considering what he did with the drafting of the Articles of Confederation. 3 W. CROSSKEY, supra note 1, at 98f. Mr. Crosskey's students will recall that he seemed to work from a text in dealing with the Convention in class, just as he did with other matters which have since been published. In short, I believe that there may well exist somewhere a draft of his Constitutional Convention volume.)

It is natural, as well, to make much of one's own, and this can very much affect both historians and the materials they must reply upon. See, e.g., PLATO, REPUBLIC 581C sq. Consider, for example, the banner headline of the Chicago Tribune: The Coldest Day in History, Chi. Tribune, Jan. 11, 1982, at 1. The severely limited scope of this spectacular headline is indicated in the first paragraph of the story that follows: "Bitter Arctic winds drove temperatures to 26 below zero and a wind-chill factor of 81 below in Chicago, Sunday [January 10, 1982], shattering a century-old record..." Id. That is, it was a century ago that temperature records began to be kept in Chicago. Are, then, the very existence and workings of history, not merely its writing, dependent on the records that happen to have been made and preserved? See supra note 219.

How scholars can respond to their own may be seen upon considering the remarkable division among the critics of Mr. Crosskey in the 1950's. The principal friendly comments came from Yale University (his alma mater) and the University of Chicago (where he taught); the decidedly unfriendly comments came from Harvard University (with Professor Goebel of Columbia University thrown in for good measure and heartily endorsed by the Harvard people). (Professor Fairman, who was at Washington University when he first wrote against Mr. Crosskey, ended up at Harvard. Professor Petro, of New York University, graduated from the University of Chicago Law School. See supra note 3.)

Do we not have here an intellectual counterpart to the Harvard-Yale Game? Thus, this contest may reflect deep-rooted sectional differences—differences keyed not to geographical but to intellectual sections in American academic life. This may even seem to support Mr. Crosskey's opinion that somewhat accidental sectional and hence "party" allegiances have very much shaped constitutional arguments. See supra notes 17, 38, 51, 65, 95 & 107. See also supra note 39.

Perhaps the most remarkable thing about all this is how ungenerous the Harvard Law School faculty (with the exception of Professor Sutherland) were in their responses to Mr. Crosskey's monumental effort. See supra note 151. Walton H. Hamilton (of the Yale Law School, of course) challenged them when he wrote a generation ago:

The monograph boys and the pedants who conceive of scholarship as an excursion in myopia will loudly voice disapproval. Then there are those who have, by the heroic use of the pen, created for themselves vested interest in established articles of constitutional faith. To them acceptance of the Crosskey thesis will be anathema. In particular, all those who expect dividends of prestige from established scholarship will entrench themselves behind their publications and defend their frontiers to the last footnote.


It is my sad duty again to notice, however, that the University of Chicago has also been callously ungenerous at times. See, e.g., Anastaplo, supra note 36, at 1019-20 n.62; ARTIST AS THINKER, supra note 2, at 476; Letter to the Editor, NATL L.J., Sept. 12, 1983, at 12; supra note 24. Compare supra notes 16, 50 & 95. Thus, Ramsey Clark, a University of
Chicago Law School classmate of mine, could also divide our gifted teachers into two principal categories: “I saw [Harry Kalven] from several perspectives, and he was always the same. And that’s the essential truth of the man. He knew himself, and he was himself. Others that I knew as a student, who taught me, seemed overbearing then and later condescending.” Harry Kalven Memorial Service, Rockefeller Chapel, The University of Chicago, Dec. 6, 1974. There began in 1950 a struggle for the soul of the Law School—and with the departures of William W. Crosskey, Harry Kalven, Malcolm P. Sharp and Roscoe T. Steffen, the long-dominant “realists” were finally in virtually complete control. But hollow men can have no more than hollow victories. See supra notes 25, 126 & 128; supra text accompanying note 211. See also TACITUS, THE LIFE OF JULIUS AGRICOLA 1, 6 (3), 40 (3-4), 42 (3), 46; ARISTOTLE, NICOMACHEAN ETHICS IV, 3 (1123a 32 sq.)).

221.   See supra note 76. See also supra text accompanying notes 205 & 210. See as well ARTIST AS THINKER, supra note 2, at 250-53, 265-66, 475 n.285.

Consider, in closing, Dickinson’s observation in the Constitutional Convention:

Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular and admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has given a sanction to them. This is then our guide.

2 FEDERAL CONVENTION, supra note 11, at 278. But is not reason needed if one is to assess properly and to use prudently whatever experience (or accident) may happen to provide us? Thus, King insisted: “We ought to be governed by reason, not by chance.” Id. at 106. See THE CONSTITUTIONALIST, supra note 2, at 581-84 n.50. See also supra notes 48, 49, 111, 141, 143, 186 & 196.

Among the things that experience has happened to provide us is the institution (or, at least, the relaxed expectation) of a considerable “separation of powers.” This can seem “absurd” to outsiders. See, e.g., Bennett, Life in the U.S. is Grim, China Papers Say; But Chinese Wonder, Wall St. J., Apr. 16, 1984, at 12, col. 3: “An American diplomat recalls Deng Xiaoping throwing up his hands at an explanation of how the U.S. executive, legislative and judicial branches all influence legislation affecting China. ‘I can deal only with one government at a time, not three,’ the Chinese leader reportedly complained.” What would this Chinese “leader” have said upon being informed of our fifty state tripartite jurisdictions as well—which oblige China to take not three but rather one hundred and fifty-three “governments” into account upon dealing with “the United States”? Does not reason confirm the usefulness, at least for us, of this complicated arrangement? See supra text accompanying note 82.

See supra text accompanying note 35, where “logic” is distinguished from “experience.” (This seems to be related to Justice Holmes’s distinction between “principle” and “tradition” in Pennsylvania Coal Co. v. Mahon, 260 U.S. 394 (1922).) See supra note 138. Consider the halfhearted attempt to combine “logic” and “experience” in the ‘logic of the events of the time,’ which may be a poor substitute for oldfashioned prudence. See supra note 177. May not this be seen as well, on a higher level, in Hegel’s questionable extension of logos, “the primal Greek thought,” to “the world of history, in order to complete and perfect it”? See Gadamer, Heidegger and the History of Philosophy, 64 THE MONIST 434, 442 (1981). See also supra notes 24 & 37. See as well supra note 142.

Consider supra notes 116, 176, 188 & 196. Consider also supra note 19. Consider as well supra note 111.