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RECENT BOOKS

CROSSKEY AND THE CONSTITUTION: A REPLY TO GOEBEL*

Sylvester Petro†

William Winslow Crosskey's *Politics and the Constitution*¹ has a number of features in common with Charles Darwin's *Origin of Species*. Like that work, Crosskey's is the product of extraordinary powers of analysis and synthesis applied to myriad, newly uncovered, brilliantly researched facts which seem at first to be separated by more dimensions than one; and in the result presents strikingly significant insights, previously unseen correlations, and a great fresh theory. Like Darwin's, Crosskey's book exposes vast flaws in the pre-existing general understanding, requires as a condition of its acceptance the abandonment of views institutionalized by a great deal of academic work, upsets patterns of thought and allegiances which have acquired deep emotional significance, and tenders perceptions so new and large as to be staggering. It is, in short, a radical, revolutionary work; and no one familiar with the early experience of Darwin's book should be surprised to find Crosskey's the subject of the same kind of outraged, bitter, skeptical condemnation. Every genuinely radical work *must*, in the absolute sense of that imperative, undergo such an ordeal. Its nature quite simply decrees its fate.

Here and there favorable and sympathetic reviews are to be found, written by persons of authority.² But in large part, the reviews have been unfavorable³—and that is putting it mildly. Besides being in a probable majority, the unfavorable reviews, or many of them, have been denunciatory in an extreme degree, so much so that their authors have very often not bothered to describe the thesis

* Goebel, "Ex Parte Clio," 54 COL. L. REV. 450 (1954), a review in the symposium on CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). Recognizing the importance and the controversial nature of Professor Crosskey's work, the *Michigan Law Review*, in the interest of a full reporting of that controversy, is departing from its usual policy in publishing in this section Professor Petro's argument in reply to the earlier review. The views expressed, naturally, are those of the author and do not necessarily represent the views of the *Michigan Law Review*.—Ed.

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¹ CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES. Vols. I-II (1953) [hereinafter referred to as CROSSKEY].

² For example, see Clark, "Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins," 21 UNIV. CHI. L. REV. 24 (1953); Krock, articles in N.Y. TIMES, Feb. 12, p. 24 and Feb. 18, p. 30 (1954); Yntema, 2 AM. J. COMP. L. 582 (1953).

³ For example, see Fairman, "The Supreme Court and the Constitutional Limitations on State Governmental Authority," 21 UNIV. CHI. L. REV. 40 (1954); Swisher, in 36 SAR. REV. 33 (April 4, 1953). For a list of comments, criticisms, etc., on the Crosskey book, see 3 UNIV. CHI. LAW SCHOOL RECORD 12 (1954). [See also Hart, 67 HARV. L. REV. 1456 at 1486, notes 86, 87 (1954). Professor Petro's article-review was written before the reviews by Professors Brown and Hart (67 HARV. L. REV. 1439, 1456) were available to him.—Ed.]

of the book accurately, to examine its methodology, or to address themselves to its fundamental premises. This is unfortunate; for, whatever the merits of the ultimate conclusions of the book under review, it is a performance so challenging, raises issues of such profound importance, that the most dispassionate and attentive consideration is required.

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,"⁴ written by Professor Goebel (hereinafter sometimes referred to as "the reviewer"). Demonstrating these things will involve repeated reference to the thesis and the methodology of the book, and comparison of the book with the contentions advanced by the reviewer. The reading will probably be as tedious as the writing has been, but that cannot be helped, for the longer aim of this paper cannot be achieved in any other manner. That aim is to help bring to a close the first phase of the reception of Crosskey's work, the phase which may be called that of "initial shock," and to encourage the commencement of the more constructive phase, that of cool-headed critical evaluation.

In order to make my own attitude toward the book perfectly clear, I wish to state the conviction that as people continue to learn that Crosskey's conclusions are not "preposterous" merely because they are not now generally shared; as it begins to be established that the book, despite its frank appraisal of such historical figures as Jefferson and Madison, is an extraordinarily prudent, balanced, and perceptive evaluation of evidence of a most widely varied and complicated kind, set forth in a manner so exhaustive and meticulous as to be unprecedented; and as the inevitable and desirable testing and re-testing establish that the theory of the Constitution which Crosskey sets forth is in the strictest sense scientifically sound, since it meets the requirements of scientific method—then statesmen, judges, lawyers, and perhaps even legal scholars will come to realize that to Crosskey is owed the profound appreciation which sensitive and intelligent persons always accord a supreme performance, eventually. I am not sure that our constitutional law and constitutional structure will ever become what Crosskey so convincingly shows us they were intended to be. But I think the book will live a long time as a reminder to everyone in and around the legal profession of the worth of their field of action, and as a model of the lawyer-historian's art and science.

1.

Methodology and Technique: Author and Reviewer

One of the characteristic features of Crosskey's work is extensive reliance on original source materials. The extraordinary labors inherent in this mode of procedure, one might have thought, should have evoked the universal praise

⁴ 54 COL. L. REV. 450 (1954) [hereinafter cited as Goebel].

and admiration of scholars. At least they should have led to some awareness of the nature of Crosskey's effort, for one does not beat new paths in following old ones, and the essential quality of creative work is still originality. Yet one of Professor Goebel's first criticisms of Crosskey is that the author did not cite and build upon the work of certain modern legal historians.⁵ Had Crosskey been satisfied with the work of these historians, his own would not have been forthcoming. Crosskey could, I suppose, have decided to turn out just another "scholarly synthesis." The trouble is, however, that things worked out differently for him, with the result that he was obliged to neglect the work of some modern scholars in exactly the same way and for precisely the same reasons that modern astronomy has as little as possible to do with the vast "learning" accumulated by Ptolemy and his his epigones. But it is not true, as the reviewer seems generally to suggest, that Crosskey has dispensed with secondary scholarship to any unusual extent, all things considered. The reviewer puts the matter well and comprehensively at one point, when he says that Crosskey's "citations of authority *in this area* indicate that he is either ignorant of the relevant scholarly work of the last three decades or does not hold it in sufficient esteem to accord it room even in footnotes."⁶ I feel sure that the second of these alternatives is the correct one, and it is not necessary to resort to anything outside Crosskey's book in order to establish the point reasonably well. Any examination of the book will turn up an abundance of citations to secondary authority the digging up of which must have involved considerable labor.

Anyone who has read only Goebel's review is likely to have a conception of Crosskey's book which roams far and wide of the mark. The reviewer remarks, for example, "It is perhaps just as well that Mr. Crosskey has not ventured too boldly into the thickets of historical data, for in the *one* instance where he has undertaken to break trail he has landed in the thorns."⁷ There is one thing upon which every person who has read the book from beginning to end must agree: right or wrong, sound or unsound, the book is, from beginning to end, a trail blazer; Crosskey has repeatedly swept into historical thickets with vigor and boldness.⁸

After declaring that the "writing of history requires maximum effort in the discovery of evidence and the utmost candor in presentation," the reviewer says that "Mr. Crosskey . . . coming to his task with a new axe to grind has seemingly forsworn all canons of objectivity to make himself a grindstone to suit his purposes." Goebel goes on immediately to say, as if it represents the only other possibility, "It is of course possible that what seem to be extraordinary perversions of fact in dealing with pre-Convention law are actually the result not of design but of mere blundering in precincts about which the author is ill-

⁵ Goebel 451.

⁶ *Ibid.* Emphasis added.

⁷ *Id.* at 478. Emphasis added.

⁸ The reader will want to examine all of part I of the book (pp. 17-292), especially cc. V-VII and IX, and cc. XXII-XXIV in parts III and IV for examples of some extraordinary trail-blazing.

informed."⁹ So far as the general tenor of the review is concerned, that's about it; the reader has two alternatives: he may infer that Crosskey is a knave, or he may infer that Crosskey is a fool. The rest of the review repeatedly offers these two alternatives, no others. Most pages are sprinkled with this kind of description of Crosskey and his analysis: "extraordinary perversion"; "ignorant"; "antic logic"; "as every schoolboy should know" (repeated frequently); "lack of candor"; "passage to the moon"; "moonstruck nonsense"; "reckless conclusions." The reader of the review is nowhere given a comprehensive description of the book; the reviewer does not outline either the main thesis or its major subdivisions; he does not describe either Crosskey's methods or the scope of his researches. The review—as such—is of little value, in the sense that no reader can possibly acquire from it a proper idea of the nature of the work under review. As we shall see, the reader is repeatedly told that Crosskey is a knave or a fool and that his ideas are preposterous, preposterous, preposterous. Thus the technique of adjectival characterization, rather than the more difficult but also more respectable method of orderly, dispassionate, proportioned analysis, argument, and demonstration, is a basic, organic feature of the review.

Proper perspective on several vital points requires that the main features of the conclusions and the methods of the book under review be set forth. The central thesis of the book is that the government of the United States was intended to be a *true* national government, that the Constitution was designed to vest in the government which it created all the general and complete powers of government. The checks on this government were to be, in order of importance: the ballot (republican government); the separation of governmental powers among three largely independent branches; and certain express limitations on the powers of those three branches. The states were intended to be preserved indefinitely as functioning elements of the Union, Mr. Crosskey concludes, but not in any sovereign sense; they were to stand to the national government in much the same relationship that prevails today between local municipal governments and the states: subordinate subdivisions of government, not separate coordinate sovereignties.

The most striking consequences of this general thesis are two, and they relate primarily to the powers and functions of the Congress and the Judiciary. The Congress has full power to govern, unimpeded and unfragmented by such things as the interstate concept, although subject to certain expressed limitations; the Supreme Court is the *supreme court* of the *nation*, a true court of last resort and ultimate appeal, having the power to establish a single rule of law among all the people of the United States, controlling upon state as well as federal courts, in matters involving the common law and state statutes as well as federal statutes and the Constitution.

So much of the general thesis is needed in order to provide at this point a basis for evaluation of the most offensive accusation made against Crosskey: the charge that he has "an axe to grind," that, presumably, he is the sycophant

⁹ Goebel 451.

of one or another of the political alignments now visible or, possibly, to become so in the future. This charge can be met by noting that, although the book in some ways supports the views of advocates of strong, centralized government, two of the most significant of its conclusions establish definitively the validity of contentions which political "*conservatives*" have been urging for years and continue to urge today in the United States.

The first of these relates to the principle of the separation and balancing of powers. Crosskey's book demonstrates the validity and importance of that principle under the Constitution in a manner so detailed and convincing as to remove any doubt from the issue. There is no alternative, after reading Crosskey, to the conclusion that every one of our present "quasi-judicial" administrative agencies is unconstitutional.¹⁰ Let those who think of the book as an advocate of the kinds of administration we have had in recent years ponder this proposition.

The second of these crucially important conclusions of a political kind has to do with the so-called states' rights issue. The great danger to the positive and profound values of the states' rights position lies *currently* in the thesis, virtually accepted by the Supreme Court today, that once the national government engages to any substantial extent in the regulation of a given "field," there is no longer room for state regulation of any kind, consistent or inconsistent, in that field.¹¹ The inevitable product of this approach is a constitutional premise upon the basis of which the states can continue to function in any material or creative way only by sufferance of the national government. This current theory would push the states into that ever-diminishing corner containing strictly intra-state matters, there to play with a perishable toy; for even now, under the present theory of the Supreme Court, we have come to learn that the power to regulate interstate commerce is subject to no *significant* territorial limitations—that the limitations which exist are only such as to vex and harass everyone concerned and to make the task of effective, sensible government impossible, not to give the states a respectable and permanent constitutional stature. This may be an ironic and queer result, but it traces directly to the old states' rights theory of two exclusive sovereignties, each supreme in its respective sphere. Enlarge the sphere of one, while maintaining the theory of exclusive sovereignties, and this result is inevitable.

Crosskey's theory of the Constitution gives an essentially different, vastly stronger, and constitutionally permanent role to the state governments. According to Crosskey, the state legislatures and courts are limited in only two ways: by the express and literal prohibitions (e.g., the contracts clause) and by the requirement of the supremacy clause that state courts conform their decisions to federal law. In all other cases, the states are entitled under the Constitution to operate, not only as regards strictly local matters, but in regard to *inter*-state commerce carried on within their political borders as well. Let the states

¹⁰ 1 CROSSKEY 615 et seq.

¹¹ *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161 (1953). Cf. the symposium in 5 N.Y. UNIV. CONFERENCE ON LABOR 1 (1952).

keep their laws conformable to national law, and let them refrain from legislation specifically forbidden by the Constitution, and their functioning within the Union is permanent and unassailable; they have concurrent powers.¹² When one considers what the real states' rights issue is today, he may be inclined to think of Crosskey as something of a states' rights man.

That being true, and it also being true that Crosskey's thesis lays the basis for a coherent system of national government, some may be inclined to conclude that, if he has bias, it must be something like the one that biological scientists demonstrate in their incessant warfare on germs. And the charge that Crosskey has an axe to grind may then be evaluated more fruitfully.

The careful, thoughtful reader of the book under review will find it a scientific work in every essential sense—in its method, its objective, and its political neutrality, with politics irrelevant except as a datum to be considered along with other relevant data. Crosskey's objective is to ascertain as precisely as possible the meaning of the Constitution of the United States. Legal science has evolved a series of principles and prescribes certain methods as controlling in the search for the meaning of any document. The intent of a document is to be gathered from the normal, natural meaning of its words at the time they were written. An interpretation which makes every part of a document meaningful, both in isolation and as a part of a coherent whole, is to be preferred to one which renders some parts meaningless or superfluous or which requires that the document as a whole be characterized as incoherent. In the process of establishing the precise meaning of a document, resort may be had to historical records indicating the evils which the document aimed to remedy, but always subject to the basic rules already stated.

Crosskey's work is built entirely on these principles; they, or clearly derivative principles, constitute the working method of the book; they account for practically every fact, every sentence, every line of analysis, to be found in both volumes. In these circumstances, the task of criticism is to demonstrate that the author has made mistakes in the application of these principles, or that somewhere in the structure of reasoning based on them he has erred. Failing this, the critic must prove the principles themselves unsound. The only alternative is to accept the thesis.

These considerations must be kept in mind as we proceed in the analysis of Goebel's review. We must remember that name-calling may divert, that caustic remarks about factitious errors may serve to let off steam, but that neither can supply for the serious person an alternative to those sketched in the preceding paragraph.

2.

On 18th Century Jurisprudence and the Influence of Mansfield

One of Crosskey's significant conclusions is that the Supreme Court was actually intended by the Constitution to be the nation's *supreme court*, its

¹² 1 CROSSKEY 493: ". . . Congress, and the state legislatures under it, have, in general, concurrent legislative powers within each of the respective states."

court of last resort, with appeals lying to it in cases involving all kinds of legal questions, including common-law questions, and with the state courts obliged in all but a few cases to follow its decisions.¹³ The author does *not* reach this conclusion exclusively, or even primarily, on the assumption that the term "laws of the United States," as used in the Judiciary Article of the Constitution, was meant to include the common law, although he does of course believe that such was the case. As is universal in the book, the principal basis of the conclusion is the natural, straightforward eighteenth-century meaning of all of the relevant provisions of the Constitution considered in its entirety.¹⁴ The central idea is that with the Supreme Court having jurisdiction—mandatorily—over cases involving *all known kinds of law*, including the common law, when the parties are citizens of different states, there can be no doubt that the framers expected that ultimately the Supreme Court would pass on *every* kind of legal problem that was likely to come before state courts, problems involving the common law and state statutes included. On the basis of the general structure of the Constitution, the unquestionably prevailing eighteenth century theory that a legislature had the power to make the laws which its courts applied, the fact that the Constitution set up its judiciary to "establish justice" for the whole people of the United States, and a number of other cogent factors, Crosskey concludes that the Congress and the Federal Judiciary had common-law authority which, under the supremacy clause and for other reasons, was binding on the states. The author's penetrating analysis of the First Judiciary Act¹⁵—never mentioned, so far as I know, by the reviewers who have accused him of so many things—demonstrates conclusively that the first Congress acted in accordance with these concepts, even though, on the whole, it was a Congress notable for the lack of any great will to exercise the powers which the Constitution gave it.

The reviewer nowhere deals with these aspects of the book (and it may be that he does not contest either Crosskey's textual analysis of the Constitution's judiciary features or the conclusions flowing therefrom). More than one-half of the review¹⁶ is devoted, instead, to an attack on the historical background material presented in chapters XVIII and XIX of the book; and the section of the review with which we now deal, section I,¹⁷ grapples with chapter XVIII, the title of which should be especially noted, since the reviewer makes quite a point of it: "Eighteenth-Century 'General Jurisprudence' and 'the Common Law.'"

This chapter scarcely mentions the Constitution, and is in no immediate sense designed as an interpretation of that document. The textual interpretation leading to Crosskey's conclusion comes later, and is substantially independent of the matters of history dealt with in chapter XVIII (and XIX). Crosskey wrote this chapter because he wished to demonstrate that his conclusions, while

¹³ 1 CROSSKEY, cc. XX-XXI.

¹⁴ *Ibid.*

¹⁵ 2 CROSSKEY 754 et seq., 1008 et seq.

¹⁶ Goebel 452-472.

¹⁷ *Id.* at 452-459.

perhaps strange to twentieth-century minds nurtured on *Erie v. Tompkins* and Justice Holmes' so-called legal realism, would seem anything but strange to those men of the eighteenth century who knew what was going on in that period of important world-wide legal development, when the distinction between "local" and "general" law was widely known and generally accepted as meaningful.¹⁸ Crosskey shows in this chapter that the conclusions flowing from his meticulous textual analysis of the Constitution fitted naturally into the progressive legal thought of the century in which it was written, the century in which men made such great progress toward an orderly basis of organizing at least some phases of the legal structure of the world.

The reviewer does not even charge, in so many words, that Crosskey's exposition of the jurisprudential thought of the eighteenth century is inaccurate. He could hardly do so; for, as usual, Crosskey's mode of presentation admits of no doubt of the accuracy of the things he says, since he selects unimpeachable, authoritative witnesses, and then lets them speak for themselves. The reviewer's attack is of another kind. Point by point it goes as follows:

1. "It is, of course," says the reviewer, "an anachronism [for Crosskey] to attribute the expression 'general jurisprudence' to thinking about law in eighteenth century England or America. This term becomes current in England only after the publication of Austin's lectures in 1832."¹⁹ The reviewer goes on to say that this observation is not the "arrant pedantry" it may seem to be, for, "in any problem involving the transit of ideas or of literature, chronology is a matter of no small consequence." The reviewer concludes, "This is . . . a consideration to which Mr. Crosskey is insensitive."²⁰ The reviewer nowhere *proves* that Crosskey is insensitive to this consideration; he merely *says* so, repeatedly. A more careful examination of the book might have revealed to the reviewer that his own chronology, his own information, and perhaps his own grasp of the drift of eighteenth century thought are wanting. For Crosskey quotes in the chapter under discussion the following matter from James Wilson's lectures of 1790-91: ". . . the commercial world is much indebted to a celebrated judge, long famed for his comprehensive talents and luminous learning in *general jurisprudence*."²¹ The most important point here is not really that Wilson used the term "general jurisprudence" so smoothly in 1790, thus making dubious the reviewer's insistence upon its belonging to much later time. It is, instead, that the reviewer has seized on a minuscule matter, representing a blunder on his own part, in order to level against Crosskey a serious charge.

2. In the same paragraph, the reviewer says that it was an equally anachronistic product of the author's alleged insensitivity to chronology which led him to present Montesquieu's concept of "orders of law" as a going concept of the *entire* eighteenth century, since the book containing the expression "orders

¹⁸ 1 CROSSKEY 577, 608-609.

¹⁹ Goebel 452-453.

²⁰ *Id.* at 453.

²¹ 1 CROSSKEY 571. Emphasis added.

of law" was first published in 1748.²² Now, we certainly agree with the reviewer that chronology should be respected, but this seems to be going a little too far. And if it were not for the fact that remarks relevant to this excursion by the reviewer will also be relevant to others which we shall encounter, we might all be better off in moving to the next point, without saying any more on this one. However, the problems still before us being what they are, it may be well to discuss this one a little further.

No importance attaches to the particular expression, "orders of law." It is the idea of different levels of problems, of varying strata of government, of the subjugation of mankind to different kinds of obligation, that counts. That Montesquieu may have first printed his own particular form of expressing the diversity and the subjugation, using the words "order of law," in 1748, is without significance. Indeed, the very fact that Montesquieu had the *phrase* printed in 1748 is the best evidence that the *idea* it expressed was alive long before. Man has probably known since the first day his mind worked as it now does that there are different orders of obligation in the universe, and the *structure* which Montesquieu described with his phrase may for all practical purposes be regarded as having always been in existence. That Montesquieu set forth the idea concretely in the middle of the eighteenth century is enough to prove, since he was one of the most widely read and respected thinkers of the century, that the thinking and reading men of the century numbered it among their working concepts. That is all Crosskey is concerned with in the chapter under discussion. Only a chronologically provincial mind can make anything of the date of publication.

3. The reviewer says that Crosskey is wrong in conveying the idea that the men of the eighteenth century were intensely preoccupied with settling the problem of the proper place of the common law in the law of the world. Finding no evidence of such preoccupation in what he calls the "practicke part of the law" of the relevant times—"brief, arguments, judicial opinions"—the reviewer assumes that he has made his point.²³

But there is no indication anywhere in the book that all the men of the eighteenth century were losing sleep over the matter; there is nothing in the book which even remotely hints that it was the kind of thing that would come up in the form of references to theoretical works in the run-of-the-mill cases. What Crosskey says is that for those people who thought about such matters, there was a pattern of thought emerging, and that ideas expressed by Mansfield had been influential in the emergent pattern.²⁴ No one can possibly disbelieve this after reading the evidence presented by Crosskey.²⁵

4. One of Crosskey's more important points in chapter XVIII is that during the eighteenth century, and of course beginning earlier, there came to be in-

²² Goebel 453.

²³ *Ibid.*

²⁴ 1 CROSSKEY 563 et seq.

²⁵ *Ibid.*, especially at 571-577.

corporated into the common law of England certain principles of the law of nations in general and the *lex mercatoria* in particular. There can be no real doubt of this.²⁶ There can be no real doubt, either, that Judge Mansfield played an important part in the process.²⁷ And there can be no doubt after reading Crosskey, finally, that influential figures in the pre-Convention American scene were aware of these facts and approved the development, and that state judges were then and later to use the principles of the *lex mercatoria* in cases brought before them.²⁸ To this reader, at least, it seems that Goebel challenges all these points.²⁹ Yet here and elsewhere, as we shall immediately see, he states as his own and supposedly in contrast to Crosskey, the very propositions which it is Crosskey's central purpose to establish, and which, when Crosskey states them, the reviewer calls "preposterous." For example, the reviewer says, while belaboring Crosskey, that English judges "calmly asserted" that the "law of nations" was "a part of the law of England."³⁰ Crosskey's response to this would be an "of course."

5. Most people will be convinced after reading Crosskey—as, indeed, they probably were before—that Mansfield was important and influential in the legal development of the eighteenth century in general, and particularly in America.³¹ The reviewer, however, doubts the latter and states his doubts in an offensive manner. As one small item in the mass of evidence tending to establish Mansfield's influence in the Federal Convention, Crosskey observes that "a number of the more important delegates had received their legal education in England, at the Inns of Court, during Mansfield's period in office."³² Goebel agrees that five members of the Convention had been legally trained in England during Mansfield's tenure as Chief Justice; and I suppose that, pushed to the wall, he would concede that five is a "number," although he seems to have some doubts about that.³³ But he nevertheless says that Crosskey has here delivered "a curious melange of insinuations." In support of this accusation, Goebel declares, "*first*," that "as every legal historian should know, the Inns of Court had ceased to be places of instruction [in the eighteenth century] and were merely a mechanism for admission to the bar."³⁴ I do not know whether that is so, and don't much care. The point to note is that the status of the Inns of Court has absolutely no relevance to the question whether Mansfield's work had been known to the five members of the Convention who had unquestionably studied law in England during his tenure as Chief Justice. Whether these five men had studied at the Inns of Court or elsewhere in England has very little bearing on anything.

²⁶ Id. at 569.

²⁷ Id. at 568 et seq., and c. XIX.

²⁸ Id. at 571 et seq., especially at 572.

²⁹ Goebel at 458 makes a general reference to "all the moonstruck nonsense attributed to Judge Mansfield by Mr. Crosskey. . . ."

³⁰ Goebel 453.

³¹ I CROSSKEY 564 et seq.

³² Id. at 563.

³³ Goebel 454.

³⁴ Ibid.

Crosskey presents a good deal more evidence establishing that Americans were familiar with Mansfield's work. This evidence is made up for the most part of praise of Mansfield by such leading figures as James Wilson and Chief Justice McKean of Pennsylvania.³⁵ Yet, to Crosskey's conclusion that Mansfield was well known and his work held in high esteem before the Convention, the reviewer registers an "emphatic *dubitatur*."³⁶ For one thing, he says, all Crosskey's evidence dates from 1790, and therefore gives no indication of what people knew or thought of Mansfield's work in 1787.³⁷ In the second place, Mansfield could hardly have been admired or respected in the Colonies at the crucial time, the reviewer declares (while accusing Crosskey of having hidden this evidence), because he had not been in sympathy with their rebelliousness, or anything else.³⁸ There isn't much to be said about the first of these points. We have already made some observations about the continuous character of human history; it seems probable that the influence of Mansfield, who had served as Chief Justice of the King's Bench from 1756 to 1788, did not spring into being instantaneously in 1790; and we must remember how James Wilson, in the 1790 lecture already quoted here, referred to a "celebrated judge, *long famed* for his . . . talents . . . and learning." Some enterprising student might be interested in digging up the proof of what is certain: Mansfield's pre-1790 influence in America.

As to the second point, Crosskey is not concerned with establishing the existence of a personal affection for Mansfield in the colonies. He points out that "Mansfield was a notorious Tory on all the issues of the American Revolution,"³⁹ and he quotes the opinion of Chief Justice Chipman, of Vermont, to the effect that Mansfield had been "powerfully attached to the monarchical and aristocratical principles of the British government"⁴⁰—and these items should be sufficient to reveal the quality of the accusation that Crosskey, in showing Mansfield's influence, "does not mention" facts concerning Mansfield's Toryism.⁴¹ Crosskey says that Mansfield's *work* was known to and approved by the framers of the Constitution. There can be no doubt of this, and, when one examines carefully what the reviewer says, it will be seen that he himself cannot really doubt the point; for he frequently refers to Mansfield in terms which cannot but emphasize the historic importance of that great judge in the whole common-law world, including the American colonies.

6. The fact is that Crosskey's and Goebel's appraisals of Mansfield, if one only forgets the reviewer's unsupported assertions and namecalling, are virtually identical. Yet Goebel declares that Crosskey is guilty of "moon-struck nonsense"

³⁵ 1 CROSSKEY 564 et seq.

³⁶ Goebel 456.

³⁷ "The evidence Mr. Crosskey adduces is all post 1790, a date hardly probative of 'nurture' prior to 1787 and another unhappy example of the author's defective sense of chronology." Id. at 454.

³⁸ Id. at 455.

³⁹ 1 CROSSKEY 563.

⁴⁰ Id. at 564.

⁴¹ Goebel 455.

in describing Mansfield's work.⁴² According to the reviewer, the author attributed to Mansfield "grandiloquent"⁴³ generalizations concerning the natural law. This is nonsense, the reviewer avers, because Mansfield was a hard-headed practical reformer, primarily concerned in straightening out the kinks in the common law and England's system of justice.⁴⁴ The remarkable thing about this is not that Goebel should so characterize Mansfield's contributions, but that he should assume the existence of a difference of opinion with Crosskey on the matter. For even the most casual reader of chapters XVIII and XIX of the book must come to the conclusion that such, too, is Crosskey's opinion of Mansfield's work. After recounting in detail Mansfield's contributions to the law, Crosskey notes at one point that "it was a phase of Jeffersonism to oppose, in various artful ways, the recognition of this and all the other more modern and apposite developments in the Common Law that had taken place under Mansfield."⁴⁵ And Crosskey in numerous instances refers to Mansfield as "improving and modernizing the Common Law."⁴⁶

While of course one cannot be certain about this, one gets the impression, after trying to correlate all the things the reviewer has had to say, that he just didn't follow Crosskey very well. He seems to think that chapter XVIII was all Mansfield and all natural law; that, of all things! Crosskey is either enamored of the natural-law analysis himself or, at any rate, attributed great weight to it in general eighteenth-century thinking and Mansfield's work. But the intent in that chapter is unquestionably something else. Crosskey there recounts the general jurisprudential content within which the systematic legal thinking took its form; basically he seeks to emphasize the common eighteenth-century distinction between "general" and "local" law. The sources of his generalizations are primarily persons other than Mansfield: Blackstone, Woodeson, and Montesquieu in Europe; and James Wilson, McKean, and others in America. Mansfield is not the exclusively dominating creative figure in the chapter, although Crosskey does note that he had a large hand in shaping both the law and the systematic thinking of the times. Furthermore, Crosskey attributes no nonsense about the natural law, "moon-struck" or otherwise, to Mansfield. What Crosskey actually says is that it was conventional in the systematic jurisprudence of the eighteenth century to use the natural law as a *starting point*. With this proposition, no informed person could disagree. Crosskey, while not feeling it worthwhile to beat a dead horse, wanted nothing to do with the endless, fruitless speculations which have characterized some natural-law discussions for centuries. Note the manner in which he deals with the natural-law thinking of the eighteenth century:

"... juristic discussion characteristically started, in the eighteenth century, with the *assumption* of a primordial natural law, *supposed* to subsist between men in a state of nature. From this *assumed* starting point,

⁴² Id. at 458.

⁴³ Id. at 457.

⁴⁴ Ibid.

⁴⁵ 1 CROSSKEY 581.

⁴⁶ Id. at 582.

discussion then went on to consider the various modes in which this *assumed* primordial law could be displaced, or overlaid, with man-made regulations. According to some, there were limits beyond which such displacements could not go, even as between members of a single nation, or sovereign state; indeed, most of the eighteenth-century writers say that there are such limits, and then go on; and *because we shall have no concern with this idea in the chapters that follow, we, quite safely, may do the same.*"⁴⁷

Almost anyone should be able to see that Crosskey is here kidding—though gently, as is befitting—these old proponents of the natural law. For the reviewer to attribute a natural-law "passage to the moon" to a person as sophisticated as such writing shows Crosskey to be is ludicrous. Crosskey's subtleness and gentleness may have confused Goebel, but it is difficult to see how that possibility provides a basis for condemnation of either the book or its author.

3.

The Common Law in the Colonies

In section II of his review, Professor Goebel advances two principal contentions. The first is that, contrary to Crosskey's conclusion, the British common law could not have prevailed in the colonies because they were "conquered infidel lands" and were, therefore, under the rules stated in an old decision, subject exclusively to the royal prerogative. The second contention is that, although according to common opinion and rules of law stated continually from 1693 onward, all the laws of England, including the common law, were a birthright of Englishmen and followed them everywhere, including to the American colonies, Crosskey was guilty of a "preposterous conclusion" in declaring that the common law of England prevailed generally in the colonies. A closer examination of these two contentions will indicate that they are fully as remarkable as they at first seem to be. First, however, it is necessary to describe briefly the chapter in Crosskey's book to which section II of the review is directed.

In this chapter (XIX), Crosskey explicates two factors which are indispensable to fruitful understanding of the probable meaning of the Judiciary Article of the Constitution to the ordinary informed person of the eighteenth century in America. The first is that it was assumed by Americans and by Englishmen that as a general matter the common law of England should and did in fact prevail in the colonies. In accordance with his habitual procedure, Crosskey cites and quotes a great volume of evidence of the most convincing kind in point.⁴⁸ He also cites, and quotes, and demolishes, the arguments made by Jefferson and others, at a much later date, which challenge the applicability of the common law in the colonies.⁴⁹ To preclude any possibility of misunderstanding, however, the author spends much time and effort in demonstrating

⁴⁷ Id. at 565. Emphasis added.

⁴⁸ Id. at 578 et seq.

⁴⁹ Id. at 581 et seq.

that there was considerable divergence from the common law among the colonies, and that the divergences were of different kinds. Consider these statements: "it is not meant to imply that the law—and, particularly, the practical law—of the thirteen colonies, in the 1760's, was, or that it ever had been, completely conformable to English law, or wholly uniform as between the colonies themselves"; "complete conformity to English law was not a practical possibility"; "the Common Law, and the British statutes in amendment of it, were followed as law among the thirteen colonies, *only* to the extent that the rules, and amendments of rules, of English law were deemed to be 'applicable to colonial conditions.'" "In a sense, of course," Crosskey goes on to observe, "this was not a rejection of any part of the Common Law, so far, at least, as colonial conditions could truly be said to be novel; for it was not at that time a principle of the Common Law, any more than it is today, that, in situations really novel, inapplicable old rules should be followed."⁵⁰ It is necessary for the reader to keep in mind these observations if he is to evaluate properly the statements by the reviewer which we shall presently examine.

The second factor explicated in chapter XIX is a compound one, consisting in the various felt defects in the system of justice prevailing in the colonies: unresolved conflicts and deficiencies resulting from the common-law-equity dichotomy; uncertainty from one colony to another as to the degree to which the common law applied; the relatively primitive state of judicial administration (lack of technical facilities, absence of readily available reports of court decisions in the colonies, the problems of circuit-riding); and the deficiencies resulting from the lack of a unifying legal agency (*a* court of last resort).⁵¹ The last-mentioned factor deserves some attention here. While it militates to some degree *against* his point that the common law of England prevailed generally in the colonies, Crosskey observes that appeals to the Privy Council were not a very effective device for securing in the colonies a legal structure conformable to the laws of England.⁵² Properly evaluated, this assumption of the inadequacy of such appeals tends to indicate that Crosskey had no desire to exaggerate the extent to which uniformity prevailed in the colonies. However, the reviewer takes the position that those appeals were an efficacious device to keep the colonies in line! Perhaps the reviewer believes that by so arguing he refutes Crosskey's contention that one of the things desired by responsible Americans during the eighteenth century was a single supreme court of errors and appeals. Since Crosskey's contention is supported by direct evidence,⁵³ however, it would seem to make little difference whether the appeals to the privy council had been an effective unifying device. If they *had* been, as the *reviewer* asserts, that would be no sign that the colonists would not want such a unifying principle to continue when they were on their own. If they had *not* been, as the *author* contends, the desire for a unifying principle might be considered even

⁵⁰ *Id.* at 585-587.

⁵¹ *Id.* at 584 et seq.

⁵² *Id.* at 587.

⁵³ *Id.* at 592.

stronger. In either event, it is the direct evidence presented by Crosskey which counts; the direct evidence that there was a felt and expressed need for a court which would keep at least some phases of the common law uniform throughout the colonies.

Two other matters must be dealt with before taking up the principal contentions advanced in section II of the review. The section opens with an observation the purport of which I am not sure I understand. The reviewer remarks that "as every critical and informed student of English Law knows, the . . . customary content of the [common] law . . . had shrunk to minute proportions by the mid-eighteenth century."⁵⁴ If this is intended to suggest that Crosskey is in error in concluding that the common law of England prevailed in a general way in the colonies, regardless of its content, I must confess that I do not see the point. If, as seems more likely, the reviewer's idea is that the colonies might have absorbed the "customary" part of the common law but not the amendatory and explanatory statutes, he is simply wrong. The quantity of absorption varied from colony to colony, but all absorbed such statutes to some degree, as Goebel himself indicates, and as Crosskey conclusively demonstrates.⁵⁵

I similarly do not quite grasp the reviewer's point in saying that Crosskey ought to have studied "law and judicial administration in the colonies and in the new states" in connection with his exposition of the prevailing character of the administration of justice in the colonies.⁵⁶ If there is anything exceptionally notable in chapter XIX, it is the careful review it contains of precisely those matters. The fact that Crosskey chose to describe the prevailing situation in the words of many competent contemporaneous observers of the administration of justice in those days seems to bother the reviewer, who suggests that Crosskey should have investigated "available judicial records."⁵⁷ But the best evidence of the matter with which Crosskey was concerned was not in "available judicial records." Crosskey was concerned with finding out whether or not there was, in the eighteenth century, a technical basis (readily available reports of decisions and like means) for a system of common law made up of the activities of colonial courts as contrasted to the central common-law making of England. The best evidence on that is to be found in the descriptions of the prevailing situation which Crosskey cites and quotes at length in chapter XIX. On the basis of numerous, factual, first-hand accounts of the status of law reporting, opinion-writing (as against decisions without opinion), and other similar things, Crosskey concludes that the precedents from the courts in Great Britain were probably more readily available in the eighteenth century, in America, than those of the colonial courts. The observers quoted by Crosskey repeatedly noted that such records of colonial judicial action as were available at all were usually

⁵⁴ Goebel 459.

⁵⁵ 1 CROSSKEY 594 et seq. See also Goebel 463, 465, 481, for the reviewer's own implicit acceptance of the fact that the states "received" far more than the allegedly minuscule customary content of the common law.

⁵⁶ Goebel 460.

⁵⁷ *Ibid.*

scattered over a whole state.⁵⁸ Now one who thinks vividly in terms of the technological status of the period under discussion, as historians must do, might well be disposed to concede that it is probably easier to know *today* what was going on all over the country in those days at any given time, than it was at the time. In those days there were no such things as centralized law libraries, readily available printed reports of American decisions, trains, telegraph, telephone, automobiles, or good roads.

The main assault on chapter XIX opens with an attack on Crosskey's conclusion that the common law of England made up an important part of the legal structure of all the colonies. This "reckless conclusion," the reviewer says, might have been abandoned had Crosskey "taken proper account of the constitutional principles upon which England's American empire was founded."⁵⁹ The reviewer then proceeds to expound these constitutional principles. He tells us, first, that, as conquered infidel lands, the American colonies were subject to the royal prerogative.⁶⁰ Presumably we are to infer from this that the royal prerogative controlled in the colonies, *to the exclusion* of the common law or the other laws of England. It is necessary to say "presumably" here, because while the reviewer does not state such a conclusion, there would be no occasion for challenging Crosskey on the matter in question on any other basis; for Crosskey nowhere suggests that the royal prerogative was without any significance in the colonies. However, it must be noted that the reviewer could not very well assert positively that the royal prerogative dominated in this exclusive way, because throughout the review he cites *facts* which tend to bear out Crosskey's point concerning the role of the common law of England in the colonies. These excerpts are from Goebel's review, not Crosskey's book: "The language of the first charters is of great and continuing significance because certain clauses, particularly those relating to the grant of legislative power and the requirement that it be exercised in agreement with the *laws* of England, found their way into the governors' commissions."⁶¹ The reviewer hastens to assert, however, that "neither by charter nor commission was the common law of England introduced into the King's dominions here."⁶² Then while the reader is still wondering whether or not the common law—as one of the "laws of England"—applied in the colonies, the reviewer says that "the charters and later commissions employ the expression 'laws of England' or 'laws and statutes of England,' a much broader reference to guide the planters along their legislative way than the narrower 'comon law'"⁶³ (and much wider, we may note, than the narrower "royal prerogative"—so much wider in fact that there seems to be no real possibility of contending that it did not include the common law). But further statements by the reviewer leave little doubt of the applicability of the common

⁵⁸ I CROSSKEY 599 et seq.

⁵⁹ Goebel 460.

⁶⁰ Id. at 460-461.

⁶¹ Id. at 461. Emphasis added.

⁶² Ibid.

⁶³ Ibid.

law in the colonies. Thus, "what was done in the colonies with respect to the law was necessarily conditioned by the basic pronouncements of the English courts and the policies pursued by the home authorities."⁶⁴ Then, still the reviewer writing, we learn of an English ruling of 1693 "to the effect that in a land newly found out by Englishmen the Laws of England were in force."⁶⁵ And, still *Goebel*, "This was later rephrased by the Privy Council (1722), which is said to have stated that since the law is the birthright of all subjects, wherever they go they carry their laws with them."⁶⁶

The reviewer also writes these two sentences: "Crown law officers expressed the belief that the common law obtained in the colonies, and colonial lawyers did likewise. There is no question but that in all the colonies from 1696 onward practice in the courts indicates a steady assimilation of common law procedures and substantive doctrine."⁶⁷ We shall have occasion in the next section of this paper to note more of this kind of admission by the reviewer of the central point advanced by Crosskey.

The unconsciousness of these remarkable admissions by the reviewer of the soundness of the conclusion which he called "reckless" a moment earlier does not reduce their importance as admissions. Consider this other example of the same kind of thing. After the statement last quoted, the reviewer says: "The picture painted by Mr. Crosskey of law in the colonies as a rude sort of memory jurisprudence with 'undigested, incomplete, and highly inaccessible handwritten "records"' is fabrication."⁶⁸ In support of this language, the reviewer declares that in a number of colonial courts "the sources of English law, from the Yearbooks down to the latest available statutes and reports, were used as a sort of *thesaurus juris*."⁶⁹ In the same piece of writing, a few pages earlier, the reviewer registered an "emphatic *dubitatur*" to the author's conclusion that Mansfield's opinions were known to and influential in the colonies; and he called it a "reckless conclusion" when Crosskey stated that the common law of England prevailed in the colonies. In describing as somewhat primitive the judicial records of the colonial courts, Crosskey obviously did not mean to say that the colonists had no means of telling what the common law of *England* was. On the contrary, it is precisely Crosskey's point that, not only in theory, but in practice as well, the common law of England applied in the colonies; that English authority was not only superior in the legal sense, but more readily available than American authority.

In spite of these virtual admissions, the reviewer insists that there is no justification "in assuming from this that there was any belief in the existence of a general and pervasive imperial law." "Neither," he continues, "is there any justification for asserting that such a body of law was being everywhere adminis-

⁶⁴ *Id.* at 463.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Id.* at 463-464.

tered with only small and insignificant local deviations."⁷⁰ These two denials must be considered separately.

The first—besides being a substitution of "imperial law" for "common law"—is a pure assertion which no person who has considered the directly quoted evidence presented in chapter XIX of Crosskey's book can possibly credit. There will be found in that chapter, very carefully and comprehensively quoted, a great deal of evidence indicating that among a large number of competent and reliable persons there prevailed the precise belief the existence of which the reviewer assertively denies.

The second denial misstates Crosskey. As already noted here, Crosskey took great pains in chapter XIX to present the facts concerning the degree to which the law in the various colonies diverged from the common law. And he also took pains to show that such divergence depended, not only on the differing conditions in the various colonies, but on the equally important lack of the technological aids without which uniformity could scarcely be expected.

Goebel's fundamental contention seems to be that the fact of local deviations makes untenable Crosskey's conclusion that the common law of England was basically and generally applicable in the American colonies. As a matter of logic, of course, that does not follow at all. On the contrary, "divagation" (the word Goebel prefers)⁷¹ presupposes something "divagated from." As usual, however, Crosskey does not rely upon verbal logic alone. The best evidence as to whether there was a belief in the applicability of the common law generally in the colonies is the preserved testimony of the competent and informed persons of the time who were interested in the matter. As already stated here, one need only read chapter XIX to find such evidence in abundance. None of the matters cited by Goebel in the last paragraph of section II of the review has the slightest tendency to rebut that evidence;⁷² and some of those matters, like other things in the review, bear out Crosskey's conclusions better than they do those of their own writer.⁷³

Examined in detail, section II of the review is unsatisfactory from every relevant point of view. It does not adequately or straightforwardly present the work under review; it attributes to that work qualities, statements, and positions not to be found in the work itself; as a challenge to Crosskey's conclusions—theoretical or factual—it is not even in the running; it very often does not even talk about the same things.

⁷⁰ *Id.* at 464.

⁷¹ *Ibid.*

⁷² *Id.* at 466.

⁷³ E.g., the statement (Goebel 466) that "If crown officials had to be convinced that there was no great divergence from the standards of the mother country, statements would be made accordingly," which indicates that, although the colonies might deviate from British law, as Crosskey shows that they did, the fact still remained that such law was considered to be a part of their binding legal structure. In order to insist on the contrary view, it would be necessary for the reviewer to take the position that law does not exist anywhere that there are law-breakers or law-evaders.

4.

On Goebel on Crosskey on Tucker—and Other Things

It will be remembered that in section II of the review, Goebel challenged in the most vigorous fashion Crosskey's conclusion to the effect that the common law of England was widely assumed to be generally applicable in the colonies. After partly proving himself wrong on this point in section II, the reviewer goes the whole way in section III. At various points in this section, he makes these observations: "The belief that the common law was the source of fundamental rights was of long standing";⁷⁴ "the colonists [declared in a Resolution of the Constitutional Congress that they] were 'entitled' to the common law";⁷⁵ "the plan agreed on by the Revisors [of the Virginia Laws] in 1777 stipulates that 'the common law is not to be meddled with, except where Alterations are necessary'";⁷⁶ "[St. George] Tucker states the familiar proposition that the colonists brought with them such parts of the common law and statutes of England as were applicable to their situation."⁷⁷ While the reviewer takes back part of this last admission a few sentences later,⁷⁸ the fact is that this admission and those preceding it constitute a thoroughgoing acceptance of the thesis which was condemned in the second section of the review.

There is a temptation to observe that the apparent function of section III of the review is to substantiate Crosskey's thesis in fact, while continuing to heap abuse upon it. This temptation must be resisted, though; for, while much of the section tends to bear out Crosskey, there are some parts which are manifestly designed to take issue with various features of his book. As matter of the former kind, we refer the reader to the first few pages of section III of the review, where the reviewer presents some evidence of what the colonies did in regard to formal "reception" of the common law by way of statutes or constitutions. Readers will perceive, even from the odd way that the reviewer puts the matter,⁷⁹ that the colonies all assumed that the common law of England was a part of their pre-existing legal structure which they intended to continue in their new status, after the Revolution. Those readers who wish to see the same matter put in a more detailed way will want to read Crosskey's chapter XIX.⁸⁰

The remainder of section III of the review is devoted to three things: (1) a version of what Crosskey has to say about the valiant old states' righter, St. George Tucker; (2) a dispute about whether Crosskey properly attributed to a certain case the establishment of a certain principle of law the existence of which

⁷⁴ Goebel 467.

⁷⁵ *Ibid.*

⁷⁶ *Id.* at 468.

⁷⁷ *Id.* at 469; also 1 CROSSKEY 597.

⁷⁸ Goebel 469.

⁷⁹ *Id.* at 467-469. For example, at 467: "The Massachusetts Constitution does not even mention the common law but merely affirms the continuance of all laws." Goebel seems to think that this proves no interest in the common law of England. For the real significance of this failure to mention the common law, see 1 CROSSKEY 593 et seq.

⁸⁰ 1 CROSSKEY 593 et seq.

is open to no doubt and is, indeed, not questioned by the reviewer; and (3) a brief discussion of the question whether the states or the union came first.

1. It is bad enough to have to deal with what Goebel says that Crosskey says, but the situation for the commentator becomes virtually intolerable when he has to concern himself also with what Goebel says that Crosskey says that *Tucker* says. Conscious of the moral flaw which this method reveals, I am nevertheless simply going to set forth first what Crosskey says about Tucker, and then what *Goebel* says that Crosskey says. The reader will have to make his own comparison, and draw his own conclusions as to the justness of the reviewer's castigations:

Crosskey on Tucker. "Tucker, as we already know, denied emphatically that 'the Common Law' generally was 'the law of the United States'. . . ."⁸¹ "Tucker's theory was this: that, in a country living under a system of law, common in fact, and common, also, in his special, legalistic sense of being subject to alteration by a single central legislative power, a political revolution that sets up, instead, thirteen separate regional legislative powers, necessarily transforms the pre-existing single system of common law, into thirteen separate systems that are uncommon, in his legalistic sense of being thereafter separately and independently alterable, and only so alterable, in each of the thirteen separated regions, although, of course, the law of all these regions would remain common in fact, until such alterations should occur, and, even then, would continue common in fact, to the extent that any parts of the pre-existing law might be continued unaltered.* To this, it should be added that the pre-existing factually common customary law of the thirteen separating regions would likewise continue common, after the separation, in still another important sense; and that it would continue common, in this other sense, even after wholesale and divergent legislative displacements of it by one, or more, or even by all, of the regional legislatures. For, despite such displacements, it would everywhere still be the law that the courts would apply *if* the legislation displacing it should be repealed. This continuing *potential* existence of customary law, in spite of legislation displacing it, is a well-recognized characteristic of this type of law that cannot properly be overlooked. For it means that legislative displacements of customary law do not destroy it *as potential law*: it still remains, as Chief Justice Marshall put it, in 1807, 'the substratum of [the] laws [of the country].'"⁸²

Goebel on Crosskey on Tucker. "Mr. Crosskey has so interlaced his own beliefs with his representation of what Tucker is supposed to have stated that this reviewer has gained the impression that Mr. Crosskey is attempting to prove his point out of the mouth of a staunch States' Rights man. Tucker is

⁸¹ Id. at 575.

⁸² Id. at 635-636. The reader will note that this paragraph follows, and purports to restate, Tucker's theory, a theory which Crosskey had in the two preceding pages presented directly, in large measure in Tucker's own words. The form of the quoted paragraph is such as to make it tolerably clear that the statements following the asterisk represent Crosskey's own views of where Tucker's logic would consistently eventuate.

represented as believing that the country had lived under a system of law common in fact and common in its subjection to alteration by a single central legislative power; that the Revolution set up thirteen separate regional legislative powers and so transformed the pre-existing single system of common law into thirteen systems, uncommon in the sense that they were independently alterable; that the law in all these regions would remain common in fact until so altered; and that the pre-existing 'factually common customary law' would continue to be common even after separation because the repeal of displacing state legislation would result in the courts reverting to the common law. This he calls a 'continuing potential existence.' A reading of the whole of Tucker's text discloses that Mr. Crosskey's version is not a correct representation of Tucker's opinions. . . . Tucker's text does not support the imputation that he believed in a 'common customary law' of America, an impression which Mr. Crosskey's version conveys, although there is no question but that Mr. Crosskey believes that there was such a thing."⁸³

2. Crosskey says at one point that the old case of *Blankard v. Galdy*, "which merely followed previously recognized principles of the law of nations [citing Grotius], has always been understood to stand for the proposition that, when a political revolution occurs in a country, its pre-existing law continues unaltered, except to the extent that the revolution expressly alters it or alters it by necessary implication."⁸⁴ Goebel makes a great deal of one part of this sentence. Deleting the introductory dependent clause, with its citation of authority, Goebel quotes the independent clause, and then proceeds to say:

"The citation of *Blankard v. Galdy* for the proposition stated is a final breathtaking flourish to Mr. Crosskey's tortuous flight into unreality. . . . There is not one word said in any of the four reported versions of this case respecting change ensuing upon revolution.

"If Mr. Crosskey has in fact read *Blankard v. Galdy* he has misrepresented the proposition for which the case stands; there is no warrant in the books for treating 'conquest' and 'revolution' as synonymous. If Mr. Crosskey has not read the case he has no business talking about it. If he has evidence that the case 'has always been understood' to stand for his version he should have come forward with it."⁸⁵

The reader must bear in mind at this point (1) that the principle of law stated by Crosskey indisputably exists and was tightly relevant in his discussion; (2) that Goebel nowhere expresses any doubt of the existence or the validity of the principle itself; (3) that whether or not *the particular case of Blankard v. Galdy* actually stands, or has been understood to stand, for the proposition stated is of absolutely no importance; and (4) that the whole context of discussion in which the citation occurred, while of some importance and interest, constitutes a microscopically small element in a fantastically intricate and massively documented analysis.

⁸³ Goebel 468-469.

⁸⁴ 1 CROSSKEY 636.

⁸⁵ Goebel 472.

Bearing in mind these factors, there can be no doubt of the reaction which most must have to Goebel's asseverations. For the record I will say that if Crosskey observes that a case has always been understood to stand for a certain proposition, the probability is extremely high that such an understanding exists. And it is easy to see why, if that is true, the author neglected to document the observation: nothing of any substantial importance hinges on whether or not such an understanding exists. On the contrary assumption, namely that *Blankard v. Galdy* was mis-cited on the proposition, the reviewer earns no more credit; it then becomes just another instance like that one about the Inns of Court, or the first usage of the term "general jurisprudence," or the date of publication of Montesquieu's book.

In a book the dimensions of Crosskey's, small errors of this kind are bound to creep in. Properly analyzed, Goebel's remarks concerning *Blankard v. Galdy* go to the "editorial" features of the book under review—the makeup, the typesetting, the format, the mechanical accuracy of the citations. These too are validly the subject of a reviewer's attention, and it would have been desirable had Goebel spent more of his time on such matters. Had he done so, he would have found, as others have done, that even in terms of the minutiae the book is an extraordinary work. Crosskey and the University of Chicago Press have done a good editorial job. It is annoying to have the footnotes all gathered at the end of the second volume; but as a practical matter, in view of the extraordinarily extensive documentation, there was no real alternative. In other respects, there is very little to criticize: the book is beautifully printed and made up, and its index is truly remarkable.

3. The remainder of section III of the review is devoted to disputing Crosskey's suggestion to the effect that there was never a period during which the states were completely sovereign; that "the Union, in fact, was older than the States"; that "there never had been a time since its first formation, in 1774, when there had not been many matters of a Continental kind—matters arising, for example, under the resolutions and contracts of the Continental Congress—which, from their nature, could only have been decided by some law of the whole country."⁸⁶ The reviewer apparently assumes that he refutes Crosskey by showing that the "alliance" (as he calls it) was weak and loose and "amorphous indeed," and that it "was dependent upon the component members for the execution of its resolves."⁸⁷ But Crosskey never suggests that the Union under the Articles was a strong union, or a perfect union; he merely says that the Union was a union. He is aware that the Constitution which he knows so well was designed to form a *more perfect* union (not *a* union for the first time, be it noted). It is true that Crosskey does not spend a great deal of time on the matter. But it is not true, as Goebel says, that "Crosskey does not elaborate or document his theory that the 'union' continued from 1774 onward." The theory is elaborated—to the extent that elaboration was necessary to the point then

⁸⁶ 1 CROSSKEY 638.

⁸⁷ Goebel 470-471.

under discussion—in a substantial paragraph on page 638 of Crosskey's book, and anyone who consults note 43 cited on that page, will find extremely pointed documentation, in the form of a description by James Wilson of the application of the general common law of England by the Continental Court of Appeals.⁸⁸ Crosskey did not spend more time on the matter, probably, because the point in question was not vital either to those features of his general theory which were under discussion at the moment, or to the general theory as a whole. A reviewer has the right and the duty to question an author's judgment on distribution of emphasis; but he must always be accurate, and, in criticizing an author's judgment, he must make sure that he understands what the author is trying to do.

For my own part, I think it ridiculous that anyone with the slightest acquaintance of the relationships prevailing among the colonies during the long years prior to 1787 should think it proper to use the term "alliance" to define the bond between them from 1774 to 1787. "Alliance" is the word used to describe the kind of relationship which subsisted between the United States and Russia during the second world war. We prefer a different word, a word signifying more intimacy, to define even the relationship which exists between England and the United States today. To suggest that the bonds among the colonists *at any time* during the eighteenth century were less intimate than those between the United States and England today is to mislead and to distort.

We must conclude in regard to the third section of the review, as we have in regard to the preceding sections, that it is an unworthy performance as a review and, as a critique, it leaves Crosskey's book unscathed.

5.

Crosskey and the Enumeration of Congressional Powers

The remainder of the review concerns itself with Crosskey's theory of the reasons for the enumeration of congressional powers in article I, section 8. One of the basic conclusions of Crosskey's study, as already mentioned, is that the Congress was intended by the Constitution to be a generally empowered legislative body. This conclusion is reached on the basis of an independent line of documentary, linguistic, and historical analysis.⁸⁹ Only after the conclusion is thus reached does the author deal with the objection usually advanced to the proposition that Congress is a generally empowered legislative body—the objection based on the enumeration of congressional powers to be found in section 8 of article I of the Constitution. This enumeration would not have been necessary, the objectors state, had the Congress been meant to have general legislative powers; a simple declaration of general legislative power would have been sufficient. The true explanation of the enumeration, the objectors then declare, is that the Federal Convention was primarily concerned with distributing powers as between the national government, on the one hand, and the state

⁸⁸ 2 CROSSKEY 1346.

⁸⁹ 1 CROSSKEY 363-408.

governments, on the other; the enumeration was designed to establish which powers belong to the national Congress to the exclusion of the states. An unavoidable result of this explanation of the enumeration, according to common opinion, is that the national Congress is *not* generally empowered.

It will be observed that if Crosskey's independent analysis is sound in leading to the conclusion that the national Congress was intended to be generally empowered, the (misleadingly designated) "states' rights" interpretation of the enumeration does not necessarily refute him. The enumeration might have been designed to secure to Congress certain powers as against the states, or to the exclusion of the states, without implying that the national powers were *not* general. As Crosskey shows, a common practice in eighteenth century draftsmanship was to state a matter generally and then give a few—non-exhaustive—particulars thereafter. Enumeration did not necessarily mean exhaustion; it might and often did mean only illustration; or the enumeration might be called for by any one of a number of reasons, without necessarily meaning exhaustiveness.⁹⁰

This is the context for discussion of Crosskey's explanation of the enumeration. Crosskey offers an explanation which satisfactorily accounts for every single one of the powers listed,⁹¹ without throwing any doubt on the conclusion, previously reached on an independent basis, that the Constitution intended to vest in Congress general legislative powers. His explanation fits naturally into the general structure of the Constitution, and fits equally well the facts of history, legal and otherwise. In short, like his other theories, Crosskey's theory of the enumeration is scientifically sound. While it conflicts with many assertions and assumptions, it conflicts with no *known* facts and with no equally cogent explanation of the same facts; it explains and fits smoothly into its relevant fact pattern, and is the only known theory which does so.

It has been necessary to make the foregoing observations because without them a sensible judgment of the conflict between Goebel and Crosskey in regard to the enumeration is impossible. It often occurs, in the assessment of historical data, that alternative, conflicting hypotheses are possible; frequently, there is no immediate basis for resolving the conflict. In such cases, resort must be had to a larger frame of reference if a resolution is to be rationally reached.

Crosskey concludes that the motivation of the enumeration was complex, but that the intention of the framers of the Constitution to set up a tri-partite central government played a very large role.⁹² The existence of this intention—an intention which I suppose everyone agrees existed—made it impossible for the framers to adopt a simple, general form of attribution of powers to the respective branches. Able men that they were, the framers knew perfectly well that governmental powers do not resolve themselves automatically into the categories of "legislative," "executive," and "judicial" (contrary to the patron-

⁹⁰ The whole of chapter XIII of the book is concerned with explicating eighteenth century rules of interpretation and the general plan of the Constitution in the light of those rules.

⁹¹ *Id.* at 409-508.

⁹² *Id.* at 409 et seq.

izing attitude of such critics as Kelsen, who seems to think that he is the first discoverer of this fact); and thus, Crosskey points out, if they wanted to give to Congress—the supreme legislature—certain powers which for one reason or another might be considered either executive or judicial in character, they would have to give those powers expressly and directly—they could not rely on a general grant of “legislative” powers.⁹³

Now it will be seen that this brilliant hypothesis—for at this stage it is still only a hypothesis—gains greatly in strength if one learns that there were reasons to believe, in the eighteenth century, that powers of the kind enumerated in section 8 could be considered “executive” in nature, and might therefore be claimed by the executive established by the Constitution, if they were not expressly given to the legislature. And the hypothesis becomes a theory when all other known, relevant facts tend similarly to bear it out.

Crosskey does not entirely reject the states’ rights—or, better, state-exclusion—explanation of the enumeration. His conclusion is that excluding the states played some part, but only a small part, and a part different in character from the one usually thought—and at that only in connection with relatively few of the enumerated powers.⁹⁴ Crosskey explains the rational and factual bases for this conclusion at considerable length and with a good deal of care. And it is therefore surprising to find him accused by the reviewer even here of having tried to hide the fact that the states had, in the 1780’s, exercised and laid claim to powers of the kind enumerated. Crosskey tells us of the notion, “which had grown from the American Revolution and the Articles of Confederation, that law administration and the preservation of ‘internal peace’ were peculiarly the functions of the states.” He continues in this vein, saying, “The states . . . had claimed the right to ‘regulate’ their own ‘internal polity,’ or ‘police,’ against Congress; and ‘polity’ and ‘police,’ we know, were meant to include, in these claims, the whole subject of law enforcement, or ‘civil Administration.’ This was the situation all through the period under the Articles of Confederation; for, throughout that period, the function of law enforcement had been discharged—to the extent, and in the manner, that it *was* discharged in the case of resolutions of Congress—by the thirteen separate states.”⁹⁵

While these statements make the reviewer’s accusation of want of candor surprising, other aspects of Crosskey’s work make the reviewer’s charges seem astonishing. For Crosskey sets forth certain reasons for doubting the state-exclusion theory of the enumeration which the reviewer does not even mention, although their importance to the basic task of evaluating the competing explanations can scarcely be exaggerated.

First. Crosskey suggests that the state-exclusion theory neglects the fact that the framers of the Constitution used straightforward unequivocal methods of excluding the states from areas of control. They directly denied powers to the states or they expressly made congressional powers exclusive when they did

⁹³ *Id.* at 411 et seq.

⁹⁴ *Id.*, cc. XV-XVI, *passim*.

⁹⁵ *Id.* at 433.

not want the states to participate in government. From this practice Crosskey infers, contrary to the Supreme Court's vague current theory of federal preemption, that, except where excluded by express provision or necessary implication, the states have powers concurrent with those of the national government. How any other conclusion is possible to any one who has given any thought to the supremacy clause is not apparent. The requirement of that clause, that the states must conform themselves to federal law, makes no sense on any basis other than that the states were assumed to have powers concurrent with those of the central government.⁹⁶ It is thus tolerably clear that the state-exclusion theory of the enumeration does not fit very well into the pattern of the document.

Second. Crosskey observes that in respect of certain enumerated powers, unmentioned by Goebel, the idea of excluding the states simply could not have played any part at all. This is true, for example, of the power to legislate uniformly on bankruptcy and naturalization "throughout the United States" and of the power "to constitute tribunals inferior to the supreme court." Certainly no one can reasonably think that any state could make bankruptcy or naturalization rules applicable uniformly throughout the country. This grant of power *must have been* designed as a limitation on congressional power, not as a device for excluding the states. Likewise, it seems scarcely possible that, in the absence of the enumeration, the states would have considered themselves empowered to "constitute" federal courts. This power, too, *must have been* expressly stated for some other reason.⁹⁷

Third. A substantial number of the enumerated powers represent a mere transfer to the new Congress of powers previously possessed by the old Congress under the Articles. It is difficult to see how this kind of a transfer could be "primarily" concerned with a division of power between the nation and the states, Goebel to the contrary notwithstanding.⁹⁸

Fourth. In regard to certain powers, Crosskey shows that the particular form in which they were drafted makes sense only on the basis, further suggested by an exhaustive analysis of existing law, that the framers of the Constitution were intent upon encouraging legal reforms. Crosskey does not insist that the framers were totally unconcerned with the states in regard to these matters. His point is that the powers are awkwardly and ineptly phrased if such was the primary purpose, while they are well and competently phrased if directed to encouraging legal reform.⁹⁹

Fifth. By a process so analytical and painstaking that it can not even be sketched here (although we shall deal with one instance at some length in the next section of this paper), Crosskey demonstrates from the particular nature and details of certain provisions that the framers were probably preoccupied,

⁹⁶ *Id.*, cc. XV-XVI, *passim*.

⁹⁷ On judicial appointments, see *id.* at 429 et seq.; on the bankruptcy power, *id.* at 487 et seq.

⁹⁸ *Id.* at 411 et seq.

⁹⁹ E.g., the copyright power, *id.* at 477 et seq.; and the treason power, *id.* at 468 et seq.

not with the states, but with the president when they enumerated most of the powers to be found in section 8 of article I.¹⁰⁰

The nature of the problem posed by the enumeration is such as to preclude any absolute "ocular" proof of the motivation or intent of the framers. Neither Crosskey nor Goebel can *absolutely* prove his point. But here as elsewhere in the law, the standard is not absolute proof; it is preponderant probability, the weight of the evidence, the cogency of the logic. Goebel does not prove Crosskey wrong by saying that the colonists had previously repudiated the royal prerogative; for Crosskey's point is that distrust of *executive power in any form* is made manifest by the supreme position of Congress in the constitutional structure, and that it was this distrust which accounted so largely for the enumeration. The colonists may have repudiated the royal prerogative earlier, but, as Crosskey demonstrates, until the enumeration was composed there remained the danger that the analogue of the English king, the American President, might gain by implication from his possession of the whole "executive power" of the nation, powers which the framers wished Congress to have.¹⁰¹ Nor can Goebel convince by the pure assertion that "the confinement of the national executive could enter into the matter only as a second and subsidiary motive."¹⁰² If Goebel wishes to swing the balance of probability into his favor, he must do more than merely assert. His having failed to meet clearly and to dispose of the reasons advanced by Crosskey for rejecting the state-exclusion interpretation of the enumeration leaves his assertion without traction. Against Crosskey's coherent *theory* of the enumeration, a mere *assertion*, contrary to established facts and probabilities, is powerless.

Sarcasm is no substitute for responsive and relevant analysis, either. And sometimes sarcasm is worse than nothing at all, as in the instance where Goebel ridicules Crosskey for suggesting that Blackstone's *Commentaries* "were open when these provisions [of the enumeration] were written."¹⁰³ Crosskey thinks that the coincidence of concepts and actual wording between Blackstone's book and the terminology of the Constitution are evidence that the book influenced the wording of the document, especially in the light of the fact, conclusively established, that Blackstone was one of the most widely read of all legal authors in the colonies. This is what Goebel has to say:

"Bewitched by the pages of Blackstone he spins out his theories, with here and there a passing reference to English law, leaving this reader, at least, with the impression that the delegates were like a conventicle of eighteenth century dons enjoying a disputation over some abstruse academic problem. And who could avoid such an impression when in the midst of Mr. Crosskey's discussion of the powers of Congress over army, navy and militia one encounters a passage such as this: 'The almost slavish following, throughout all these provisions of Blackstone's words—"command," "regulate," "govern"—can hardly leave a doubt as to what the Convention was doing; and although the language used, came, in some

¹⁰⁰ *Id.*, c. XV.

¹⁰¹ *Ibid.*

¹⁰² Goebel 476.

¹⁰³ CROSSKEY 425.

instances, immediately from the Articles, the fact that it came originally from Blackstone, and that the *Commentaries* were open when these provisions were written, hardly can admit of doubt.'¹⁰⁴

The most important burden of this incident is its tendency to reveal the lack of that indispensable analytical tool which the great economist Von Mises has called "historical understanding."¹⁰⁵ Anyone who has done any legal drafting will fully appreciate the insight which Crosskey shows in thus depicting the draftsmen of the Constitution as referring to books like Blackstone's and documents like the Articles of Confederation, as they wrote. It is Crosskey who puts the drafting of the Constitution into a realistic context, by this depiction of what was going on; it is Goebel who fails to grasp the realities of the situation. Of course the draftsmen of the Constitution had first to know their general aim, and of course that general aim was hammered out in the proceedings of the Convention. But the careful, competent draftsman of anything from a will to a complex piece of legislation operates in more or less the same way. In drafting the former, he first thrashes out with his client the matter of what dispositions are to be made. Then he gets out the form-book, the cases, or other legal materials in order to establish for himself what form of expression will best make the will "stick." The legislative draftsman operates in the same way, first getting his orders from the legislative committee, or other political source, then littering as large a table as possible with as many models as he thinks he needs, in order to do the job. These models, if they are good, give him the manner of expression which is best designed to serve his purposes; they show him what the problems are and help to take him past the hazards which beset all legal draftsmen. Anyone in possession of the indispensable quality of *understanding* which Crosskey's work everywhere demonstrates to such an extraordinary degree would not have been so patronizing in this instance. For sarcasm here suggests either that the critic does not understand how legal draftsmen operate or that he thinks the draftsmen of the Constitution were different from the draftsmen of all other legal documents and all other ages. The defect in either case is clear.

6.

On Historical Thickets and Thorns

In the last section of the review (section VI), the reviewer contends that Crosskey does not properly account for the enumeration of the piracy power. The reviewer prefaces this section of the review with the language which we have already had occasion to note: "It is perhaps just as well that Mr. Crosskey has not adventured too boldly into the thickets of historical data, for in the one [sic] instance where he has undertaken to break trail he has landed in the thorns. This is his explanation of the constitutional grant to Congress of power to define and punish piracies and felonies on the high seas."¹⁰⁶

¹⁰⁴ Goebel 476.

¹⁰⁵ VON MISES, *HUMAN ACTION* 51 (1949).

¹⁰⁶ Goebel 478.

In his book, Crosskey concluded that the power to "define and punish" piracies and marine felonies was specifically enumerated, because, the background of British law being what it was, the contention might conceivably have been made, in the absence of specific attribution of these powers to Congress, that they, or some part of them, belonged to the executive.¹⁰⁷ The reviewer takes the position that Crosskey has misrepresented the situation prevailing under the relevant British statutes. Presumably, the reviewer feels that the fear of an executive claim could not have motivated in any way the enumeration of the power in question for, in his opinion, this power too was enumerated solely in order to secure it to Congress as against the states.¹⁰⁸

The reviewer does not, in the course of his challenge of Crosskey's explanation of this power, mention the basis on which Crosskey concludes that pre-occupation with the states was not involved. The basis of this conclusion lies in the textual changes which the power underwent in the Convention. The provision came from the Convention's Committee of Detail as one giving Congress the power "to declare the law and punishment" of piracies and felonies; then it became a power "to punish" such offenses, and finally a power "to define and punish." After noting that these were important changes of substance, not trivial linguistic temperings, Crosskey concludes that *as against the states*, the change from a power 'to declare the law and punishment . . .' to a power 'to define and punish' . . . seems incontestably to have been completely meaningless.¹⁰⁹

Crosskey explains further:

"For any act of Congress under a power of the kind the Committee reported would surely have been as binding *upon the states*, in every respect, as would such an act under the power the Convention substituted; in either case, in view of the terms of the Judiciary Article, the crimes would have been *completely* under national control. So, it appears a certainty, merely on the basis of the facts thus far recited, that the Federal Convention was not concerned, when it made these changes, with the securing of power to Congress *as against the states*. And since the primary concern of the changes it made was very evidently to secure to Congress *the right 'to punish* piracies and [marine] felonies,' the inference appears warranted by the words the Convention used—*words that clearly import what would ordinarily be an 'executive' act*—that the right it was seeking to secure to Congress was one which, it was feared, would otherwise belong, in some peculiar way, to the President. That this was the true situation is confirmed by certain features of the prior law of 'piracies and [marine] felonies.'"¹¹⁰

The fact that the reviewer fails to deal with the foregoing objection to the state-exclusion theory of the enumeration of the piracy power does not conclusively disprove that theory. The omission does become significant, however, if the reviewer also fails to establish that Crosskey was wrong in concluding that

¹⁰⁷ 1 CROSSKEY 443 et seq.

¹⁰⁸ Goebel 482.

¹⁰⁹ 1 CROSSKEY 445.

¹¹⁰ Ibid.

the "standing British law" might reasonably be thought to give to the power in question an "executive" cast. It becomes necessary, accordingly, to describe both Crosskey's and Goebel's analysis of the "standing law."

Following the analytical procedure which prevails throughout the book, Crosskey sets forth in exact text the statutory provisions in issue. With the words of the statutes laid out before the reader, the author proceeds to a painstaking step-by-step dissection, exploring all the variant interpretative possibilities, and citing extra-statutory authority and filling in relevant historical detail at appropriate points. No phase of the process between source-material and author's conclusion is hidden from the reader. Proceeding in this manner, Crosskey demonstrates that the final relevant British statutory pattern was such that persons familiar with these statutes would probably assume that the executive power played a considerable role in the definition and punishment of piracies. Crosskey points out that before the enactment of the ultimately relevant British statute, the trial of piracies was committed by statute exclusively to civil commissioners who were to be appointed by the king and who were to apply the ordinary law of the land in the cases which they heard. This statute was supplanted in 1700, by one which provided, among other things, that trial might be "in any place at sea, or upon the land, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, to be appointed for that purpose by the King's commission or commissions under the great seal of England, or the seal of the admiralty of England." Crosskey interprets the resulting situation as one in which (1) trials might be *either* at sea *or* at one of the land-locations listed and (2) that since the statute provided for naming navy men as "judges," and since there was the possibility of trials at sea, it appeared that the navy might be in full charge, from beginning to end, of certain piracy trials. As he points out subsequently, the only alternative construction, confining trials to land locations, would require the statute to be read as providing for a trial "in [a] place at sea . . . in [an] island, plantation, colony, [or] dominion"—or, even more curiously, in a "place at sea . . . in [a] fort."¹¹¹ The reader who takes the trouble to examine the whole of Crosskey's discussion of the matter will find a good deal of other evidence that Americans in the eighteenth century might well have concluded that the executive power was deeply involved in the definition and punishment of piracies and marine felonies.¹¹²

In challenging Crosskey's statutory interpretation, the reviewer does not engage in the same analytical procedure that the author followed. First, he declares "preposterous" the author's description of the Admiralty as the "Navy's Court." According to the reviewer, "It is only necessary to examine the pleas before the court and to reflect a little on the fact that in the 16th century the judges were doctors of civil law to recoil from the implications of Mr. Crosskey's assertion."¹¹³ The present writer is not competent to judge the point conclusively. But it must be noted that Crosskey has presented considerable evidence

¹¹¹ Id. at 450-451, 452-453.

¹¹² See especially the interesting footnote, id. at 449.

¹¹³ Goebel 479.

concerning the degree to which the officers of the King's Navy itself were influential in the proceedings in Admiralty.¹¹⁴ Moreover, contrary to the reviewer's innuendo, it is not true that Crosskey made some kind of underhanded identification of the Admiralty as the "Navy's Court." As readers of the book will note, Crosskey declares positively that "'the court of the Admiral,' it must be remembered, was the Navy's Court"¹¹⁵—an undeniable and incontestable fact. And in a footnote to this positive statement, Crosskey cites his authority [*Benedict, The American Admiralty* pp. 2-3 (1850)], and he explains further in that footnote, saying, "The complete independence of American admiralty courts under the Constitution tends, of course, to obscure for Americans the very different character of 'the courts of the Admiral,' in England, in the earlier days."¹¹⁶ Furthermore, the author points out that, under the terms of the act of 1700 there could be no doubt that commissions might "again issue out of 'the Admiralty'; that is, in the language of America at the present day, out of 'the British navy department.'"¹¹⁷ Certainly the plain statutory permission of the issuance of commissions in this manner signifies action controlled by an executive agency, even if Goebel is correct in saying that "judges" of the Admiralty Court were doctors of civil law. Finally, whether or not these judges were doctors of civil law is not very significant if it is true, as it undoubtedly was, and as Crosskey states, that "the usual judicial element in the colonies was smothered by a host of 'executive' officers, among whom the largest element were of the Royal Navy."¹¹⁸

The reviewer then accuses the author of having "failed to mention" that the Lords Committee of the Privy Council had, during the reign of Charles II, refused to countenance trials of pirates by "virtue of vice-admiralty commission."¹¹⁹ This accusation, like others we have encountered, happens to be unfounded, as the reader may check for himself by reading Crosskey's carefully documented statement: "The law officers of the Crown, in 1684, had at first agreed with the view stated in the text hereof and then, later, had held that, though the act of 28 Hen. VIII did not extend to the colonies, so as to authorize commissions under it for trial of pirates *there*, the colonial vice-admirals' authorities did not extend to the trial of piracies and other capital crimes. See Crump, *Colonial Admiralty Jurisdiction in the Seventeenth Century* (London, 1931), 112-13."¹²⁰ The reader will note that Crosskey here has not only mentioned the fact which the reviewer says he failed to mention, but that, as is customary, he has put the matter more completely and comprehensively than the reviewer himself did. The same is probably true of other things which, according to the reviewer, "Crosskey does not mention," although I cannot be sure of this in all cases and do not deem it of sufficient importance to check the manifestly trivial

¹¹⁴ 1 CROSSKEY 445 et seq., especially footnotes at 446, 449.

¹¹⁵ Id. at 448.

¹¹⁶ 2 CROSSKEY 1329, n. 75.

¹¹⁷ 1 CROSSKEY 450-451.

¹¹⁸ Id. at 453.

¹¹⁹ Goebel 479.

¹²⁰ 2 CROSSKEY 1329, n. 78.

instances in which the reviewer makes the charge. Suffice it to say on this point that any reader will probably conclude, after having read Crosskey's book, that it does quite a job of presenting, at first hand and extremely clearly, the details, arguments, facts, and probabilities which militate against his conclusions, as well as those in support thereof.

As we have seen, Crosskey concluded after a careful analysis, that the act of 1700 clearly permitted the confinement of commissions to officers of the Royal Navy in piracy trials "in any place at sea." While pointing out that the Admiralty entertained this view, the author also points out that it was rejected by the law officers of the Crown. The latter interpretation, the author demonstrates, was, however, plainly inconsistent with the terms of the statute.¹²¹ And since this queer interpretation, which would have trials take place "at sea in factories and forts," had been kept secret for more than a century, it could not have been generally known to the colonists.¹²² Accordingly, Crosskey concludes, the colonists could only assume, on the basis of the statutory text, that the Royal Navy could be exclusively empowered in some cases to control piracy trials.

The reviewer makes no attempt "on the merits" to prove Crosskey's (and the Admiralty's) interpretation of the statute "wrong." He is content to cite the contrary opinion of the law officers, to emphasize their "learning and ability," and to set forth other reasons of a like kind against Crosskey's interpretation.¹²³ On this basis, of course, the reviewer could condemn most critical legal scholarship, since most such scholarship takes the position that this or that "learned and able" judge has erred in an interpretation or application of law. Critical legal scholars will not accept this method of challenging the validity and utility of their work. If the reviewer expects to convince anyone of the error of Crosskey's interpretation, he is going to have to get down to work on the statute itself, and show more convincingly than Crosskey has shown the contrary, that the normal, intelligent, instructed reader of the statute, without the aid of the law officers' interpretation, would have concluded as those law officers did.

It must be remembered that Crosskey's interpretation of the act of 1700 does not suggest that commissions in piracy cases could or should issue *only* from the Admiralty; under his interpretation commissions might issue under the ordinary process, involving the great seal of England, or the Admiralty seal. Keeping this in mind, one will see that the reviewer does not affect Crosskey's conclusion by declaring that "in any event there was no reason to attribute 'executive character' to the alternative civil trials."¹²⁴ The fact is that Crosskey does not attribute "executive character" to those trials. He purports to show only that the framers of the Constitution had some ground to fear that *somehow* the executive might make a claim in connection with the piracy power unless it was given exclusively to Congress. That he has made his case is beyond any real doubt.

¹²¹ 1 CROSSKEY 452-453.

¹²² *Id.* at 453.

¹²³ Goebel 481.

¹²⁴ *Id.* at 482.

It is no more relevant for the reviewer to note, in language suggesting again that Crosskey has hidden "historical facts," that "since the sweeping Reception Act of 1712," South Carolina had "received" the older British statute providing for trial according to the common law.¹²⁵ The real significance of such reception statutes relates to the point contested so hotly by the reviewer previously, concerning the applicability of the common law as a general matter in the colonies. Reference to Crosskey's book will demonstrate his acquaintance with the colonial situation in regard to piracy trials. Though he treats the matter briefly, it is clear that Crosskey has conned and explained it at least as comprehensively as Goebel has.¹²⁶

The reviewer's final point concerns the situation prevailing under the Articles of Confederation. He notes, as Crosskey did before him, that the old Congress, under the Articles, had the power "to appoint tribunals for the trial of piracies and felonies committed on the high seas."¹²⁷ The trouble with the author here, according to the reviewer, is that he doesn't say enough about this matter. What the author should have added, the reviewer asserts, is that in 1781 the old Congress "agreed" to an ordinance pursuant to which piracies and marine felonies were to be tried in the courts of the respective colonies under the law which each colony was accustomed to apply to robbers, murderers and felons on land. The reviewer describes the situation thus obtaining in these words: "Thus in 1787 as a matter of law the trial of piracies had been for some years settled by congressional ordinance in the states. Thirteen different procedures and punishments had been sanctioned. It seems to us an *inescapable conclusion*," the reviewer then states, "that, only six years having elapsed, the provision in the Constitution was drawn with reference to the status quo, viz. as a delegation of power as against the states and not as a protection against executive power." Finally, Professor Goebel says: "Mr. Crosskey does not refer to this Ordinance. If he did not know of it, he has not properly studied his lessons, for it has been in print since 1912. If he knew of it and did not mention it, he has not been honest with his readers."¹²⁸

With all due respect for the reviewer's demonstrated powers of logical analysis, we feel constrained to point out that there are other possibilities which he has neglected to advance. There is the possibility that Crosskey knew about the ordinance, but simply forgot about it or somehow overlooked it, as would be understandable since he deals with so many varied items in the book. Then, too, there is the further possibility that Crosskey knew about the ordinance and deliberately omitted any mention of it because, as is perfectly clear, no analysis of complex, multitudinous phenomena can possibly mention *everything*. If this last possibility should be the proper one, however, we agree that it represents a shortcoming—*unless it can be shown that the existence of the ordinance is of no importance*.

¹²⁵ Id. at 481.

¹²⁶ 1 CROSSKEY 449-450, especially 2 CROSSKEY 1329, n. 77 and works cited therein.

¹²⁷ Goebel 482.

¹²⁸ Id. at 482-483. Emphasis added.

If the latter can be shown, most people familiar with Crosskey's vast documentation and scrupulous presentation of evidence will probably agree that the failure to mention the ordinance does not constitute a shortcoming, since every author must be allowed a certain amount of leeway in admitting or rejecting uncritical evidential details.

It can be shown that the ordinance is of no critical importance. In the first place, it has no bearing whatsoever on the project of demonstrating that the power to define and punish piracies and marine felonies might somehow have been regarded as "executive" in nature had it not been specifically enumerated among the powers of Congress. Moreover, as the reviewer knows, the ordinance, while directing the courts of the various states to apply their own laws in piracy trials, was *an act of the Continental Congress*. There is no question of that. Nor is there any question of its being an act within the constitutional authority of the Congress. The power to define and punish piracies and marine felonies was therefore—ultimately—a power belonging to the Congress, and the power of the states in the premises was only derivative and conditional—conditional on the continuance of the delegation from the Congress. There was, accordingly, nothing in the form of a basic power for the Constitution to take away from the states. The reviewer's "inescapable" conclusion to the effect that the piracy power was designed "as a delegation of power as against the states" must be considered, therefore, as plainly "escapable," and his argument must, in consequence, be dismissed as without merit.

Still another line of analysis leads ineluctably to the same conclusion. The case for considering the enumeration of the piracy power as being designed primarily to give the new Congress a power exercised formerly by the states might better have been made on the basis of the fact that some of the colonies had laws of their own relating to piracies and marine felonies, laws completely their own or in the form of "received" British law. As already pointed out here, Crosskey mentions those laws. He gives the reader a more precise account of their content than Goebel does; and, apparently not satisfied with doing only that, he cites several books which the reader may consult in order to inform himself further.¹²⁹ This is scarcely the kind of thing to be expected of either an inadequately informed scholar or a suppressor of evidence. And when one realizes, after having read Crosskey's book in its entirety, that not a small part of its general methodological superiority lies in the comprehensive care with which he has presented arguments contrary to his own—often, very often, indeed, more cogently than the proponents of those arguments themselves do—one must conclude that there is something vicious in a review which would characterize such a man as a knave or a fool.

Conclusion

There may be some who think that, in dealing with Jefferson, Madison, and some members of the Supreme Court as he did, Crosskey invited such handling

¹²⁹ References in note 126 *supra*.

as he got from Professor Goebel, from Brant,¹³⁰ and from others.¹³¹ Now it is true that Crosskey has not been exactly gentle with Jefferson, Madison, and some Supreme Court justices; and I suppose that he might have been equally effective had he not been quite so rough on them.¹³² There are many sides to the matter, however.

The thing that counts most in evaluating this aspect of the book is whether or not Crosskey has been accurate about those men. As to that, it would seem that anyone who is really able to set aside or rid himself of the predilections with which a lot of bad, allegedly historical writing has loaded so many of us cannot help admitting that Crosskey *has shown* Jefferson and Madison acting the role of cheap politicians, trimmers, demagogues, and hypocrites,¹³³ and certain members of the Supreme Court acting pompously, obtusely, and in at least a certain sense unfaithfully to their oath of office.¹³⁴ The adjectives, let it be noted clearly, have been supplied here, for the obvious reason that this is not the place to recount everything that Crosskey has done. Crosskey in no instance uses the technique of adjectival characterization. He demonstrates.

Nothing, therefore, could be so wide of the mark as Brant's accusation that Crosskey's method "fits snugly into the political mores and morals of present-day America"¹³⁵—if by that Brant means "McCarthyism"—and if we can be at all sure that we know what that unfortunate term means. If it means name-calling and unsupported accusation, it can have nothing to do with Crosskey. He does not call names—a fact which tends to be overlooked because his demonstrations are so mordant, so deadly, so conclusive, that people fail to notice the absence or the subordination of the adjective.

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. It will not do to insist that Crosskey should not have raised the question of falsification until he was ready to demonstrate. Madison's notes, as they stand now, conflict with and therefore throw doubt on Crosskey's theory of the intended meaning of the Constitution. A competent, straightforward scholar could not for a moment think of evading or hiding that fact, even though the structure of his work might be such as to preclude his dealing with it at the time. The proceedings of the Federal Convention are so important and require such extensive treatment that Crosskey is devoting a

¹³⁰ Brant, "Mr. Crosskey and Mr. Madison," 54 COL. L. REV. 443 (1954).

¹³¹ Fairman, "The Supreme Court and the Constitutional Limitations on State Government Authority," 21 UNIV. CHI. L. REV. 40 (1953).

¹³² Clark, "Have We Misread the Constitution?" 176 THE NATION 505 (June 13, 1953).

¹³³ See the entries "Madison" and "Jefferson" in the index at the end of Vol. II of Crosskey's book for the appropriate references. For those readers who have not already discovered it, that index may be recommended as a fascinating work in itself.

¹³⁴ Ibid., entries for "Supreme Court of the United States," "Taney, Roger Brooke," "Holmes, Oliver Wendell, Jr.," "Frankfurter, Felix," "Brandeis, Louis Dembitz."

¹³⁵ Brant, "Mr. Crosskey and Mr. Madison," 54 COL. L. REV. 443 at 446 (1954).

separate volume to them;¹⁸⁶ but that fact neither absolved him from the necessity of noting the conflict with Madison's notes at the present times 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, unless they want to risk giving away the fact that the people who throw around the term "McCarthyism" most freely today are the ones who have historically used the techniques of the demagogue most liberally. For it must never be forgotten that the so-called liberals have waged against American capitalism and business a continuous campaign, for more than fifty years, of the most scurrilous and shallow and unsupported name-calling in our history, in spite of the fact that a decent acquaintance with history and the world today will convince rational men that our economic system, our production, our business methods, our consumer-services constitute one of the two outstanding contributions of America to world civilization, and are the envy of all other peoples and nations, try as they may to hide or disguise their sentiments.

The foregoing paragraph is only in small part a digression. The Constitution of the United States—as written, and as explicated by Crosskey—represents the other great contribution of the United States to world civilization. That Constitution, not the baffling structure of government which we piece together from the decisions of the Supreme Court, is what has shown the world how men may have effective government without tyranny. Crosskey's Constitution—not the Supreme Court's—gives us legislative supremacy, or the supremacy of law, as against the supremacy of the executive, which is a supremacy of fiat; and as against the supremacy of the judiciary, which, in this country, has been a capricious unrepugnant supremacy of men appointed for life, usually lagging behind the times, sometimes adjusting the Constitution to suit their own desires, and sometimes, as recently with labor unions, amending the Constitution to establish special privileges for politically potent interests. It is also Crosskey's Constitution which contains the real structural safeguards against legislative tyranny and legislative folly. The legislature is the supreme branch of government, under the Constitution as written; but, as Crosskey so clearly shows, it is a supreme *legislative* body; it can act supremely only by means of law; and its law-making is signally limited by the principle of the separation and balancing of powers.

But all this, to repeat, is the Constitution as interpreted by Crosskey—a sagacious structure of government, designed by men who knew that ineffective government is bad government but that absolutely empowered government is even worse. The Supreme Court's structure differs radically and basically. In place of the Constitution's prudent order and balance it has substituted confusion, and within that confusion impregnable strongholds of absolute power. For itself it has taken the authority of a super-legislature, with power unchecked by anything more substantial than its own "instincts of statesmanship," a

¹⁸⁶ I CROSSKEY vii-viii, 12. The reader is urged to note carefully the circumspect manner in which Crosskey approaches the task of characterizing Madison's notes as fraudulent, in the absence of direct proof. *Id.* at 7-13.

phrase and a concept which would have made the keen and knowledgeable Gouverneur Morris go back to Paris in disgust, thinking the French Revolution a relatively progressive move. At the same time, the Court has permitted the Congress and the Executive, by means of the so-called quasi-judicial administrative tribunals, to run rampant among the judicial powers, despite the deliberation and care with which the framers stipulated that the judicial powers of the United States may be vested only in federal judges who have life tenure in office and irreducible salaries. The Supreme Court has long been preoccupied, as Crosskey definitively shows, with everything but the special job which the framers had in mind in giving it a position relatively immune to the whims of the electorate and the vagaries of politics—the job of being the nation's supreme court, with the duty of seeing to it that all the other courts of the nation interpret and apply the laws uniformly and well, job enough for any nine men. This is a job which the Supreme Court has done very badly, not because it is improperly constituted to do the job well, but because it has revised the Constitution in order to take over another job, one for the performance of which it is as poorly equipped as can be imagined.¹⁸⁷

¹⁸⁷ There is not much sense in the idea of general judicial review of the substantive content of legislation on any basis; there is none at all in the context of our Constitution and the makeup of our Supreme Court. Crosskey explains this at length, and his ideas may be summarized as follows: (1) The Constitution nowhere provides for general judicial review, although there were well-known proposals, inside and out of the Convention, for such an institution. (2) The conception of a generally reviewing super-legislature, occupied by men appointed for life, is thoroughly at odds with the Constitution's reliance on the ballot as the primary control on the activity of the government. (3) The form of judicial review which the Supreme Court has developed usually involves a long wait between congressional legislation and the Supreme Court's approval, a seriously embarrassing factor which should be accepted only on the basis of the most convincing evidence that it was intended by the framers; but all the best evidence is to the contrary, and this includes the rejection by the Convention of a proposal for a body which would pass immediately on the validity of legislation.

The same factors which militate against the conception of the Supreme Court as a super-legislature turn into virtues when the Supreme Court is considered as a true court of last resort for the whole nation, duty-bound to see that the laws of the nation are well and truly interpreted and applied, and that the facts are well and truly found. Possessed of life tenure and standing at the apex of the judicial structure, the Supreme Court is as well equipped to do these things as any body could conceivably be. The Supreme Court has not always been objective and disinterested; it has not always been able. But if life tenure in office will not encourage men to be disinterested, nothing else subject to constitutional control will. And if the position of court of last resort does not provide the environment for clarification and isolation of issues, and dispassionate consideration of fact and law, no constitutional architecture better adapted to those ends has ever been forthcoming.

We are all told ad nauseam from childhood what a grand document the Constitution is. The able person familiar with the Supreme Court's version is likely to consider this nurture well-meaning, but certainly inconsistent with the irrational, clumsy, hopelessly confused constitutional structure which we know today, and certainly inconsistent with the commonly accepted version of the virtues of the eighteenth century—clarity, order, good sense, and a magnificent grasp of politics and the art of government. Crosskey's theory of the Constitution, besides being a literally exact interpretation of the document, fits these conceptions of the eighteenth century; it informs the document with the clarity and good sense which both the rules of documentary interpretation and our nurture lead us to expect of it.

Those who think Crosskey too hard on certain people must be sure that they themselves have given due consideration to these serious matters. It is important to note, in this connection, that he is harsh only with those who have played fast and loose with the Constitution. When convinced that a man has made only good-faith errors in interpreting or applying the document, Crosskey has been as kind and human in dealing with that man as anyone could be. His forthright but gently critical analysis of the qualities and capacities of Justice Harlan gives us all a model of the way to deal with a good and honest judge who, we think, errs.¹³⁸ And the exquisite savagery of his characterization of those justices who take the view that the Constitution is only what they say it is, is a masterpiece of another kind.¹³⁹

Crosskey consistently understates his own attitude toward the Constitution, restricts himself to calling it a "rather sensible document" or "a fine example of eighteenth-century draftsmanship." But perceptive readers will properly evaluate all the relevant considerations, appreciate the reticence as a becoming refusal to introduce personal values into an analytical, scientific work,¹⁴⁰ and yet understand the profound feeling which accounts for the author's treatment of those who would pervert one of the greatest products of American life.¹⁴¹

Deep things are involved. Perhaps others might have been more tolerant of Jefferson, Madison, et al. Perhaps biological scientists might be more tolerant of germs during an epidemic. But when they are not, I for one do not blame them. There is a time for being gentle, and a time, too, for wrath.

¹³⁸ 2 CROSSKEY 1147.

¹³⁹ 1 CROSSKEY 514.

¹⁴⁰ "For it will not be forgotten it is the Constitution, and not the Supreme Court's accumulated errors about it, which Congress and the Justices take oath 'to support,' and the President swears he will 'preserve, protect, and defend.'" 1 CROSSKEY vii.

¹⁴¹ It seems worth noting here that not too long ago we were favored with a giant work in explication, and defense, of the other great American institution, the developed market economy. See VON MISES, *HUMAN ACTION* (1949). Von Mises there deals with economic fallacies as Crosskey does with constitutional fallacies. These authors have much else in common, notably, distaste for pussy-footing, fidelity to purpose and to subject-matter above all, respect for the rules of consistency and straightforward reasoning, and the supreme capacity to dispose effectively of the hypocrisy which has permeated our public affairs and public law for these many years. There is enough in these two books, when they are considered together, as they should be, to re-direct public policy for years to come. Those who choose to follow the path cleared by Von Mises and Crosskey are not likely to get any political plums, or headline-filling jobs, but in compensation they may come to learn that the job of the scholar has its significance, too.