Michigan Law Review

Volume 81 | Issue 4

1983

Empty History

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POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, VOLUME 3: THE POLITICAL BACKGROUND OF THE FEDERAL CONVENTION. By *William Winslow Crosskey* and *William Jeffrey, Jr.* Chicago: University of Chicago Press. 1980. $27.

In 1953, Professor William W. Crosskey published two volumes entitled *Politics and the Constitution in the History of the United States*.[1] These works attracted tremendous scholarly attention. Over fifty book reviews were written about them.[2] Two law reviews devoted substantial parts of issues to presenting various commentaries appraising Crosskey's efforts.[3] Some critics heralded the books as a "major scholastic effort of our times,"[4] while others termed them a "farrago of fancy rendered plausible only by a confident tone, nice printing, and an abundance of notes and appendices referring to obscure documents and esoteric word meanings."[5] Regardless of their viewpoint, all reviewers recognized that the controversy surrounding the volumes made their publication an important event in the scholarship of American legal history.

In his introduction, Crosskey made clear that these books were only the beginning, that at least two more volumes were planned.[6] Crosskey noted: "While considerably more than is now offered is already in draft, it seems a certainty in view of the long time that it has taken to get these initial volumes into publishable form, that a long time must elapse before the remainder of the book is ready."[7] In fact, it took twenty-seven years before volume three was published.[8] Following Professor Crosskey's death, Pro-

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1. 1, 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). The pages in the two volumes were numbered consecutively so that subsequent notes will not include references to the volume number.

2. A bibliography of the reviews is found in Jeffrey, *American Legal History, 1952-1954*, 1954 ANNUAL SURVEY OF AMERICAN LAW, 866, 881.

3. 54 COLUM. L. REV. 439-483 (1954); 21 U. CHI. L. REV. 1-92 (1953).

4. Clark, *Have We Misread the Constitution?*, 176 NATION 505 (June 13, 1953); *see also*, Corbin, Book Review, 62 YALE L.J. 1137 (1953).

5. Hart, Book Review, 67 HARV. L. REV. 1456, 1486 (1954); *see also*, Goebel, Book Review, 54 COLUM. L. REV. 450, 451 (1954) ("Mr. Crosskey's performance, measured by even the least exacting of scholarly standards, is . . . without merit."); Brant, Book Review, 54 COLUM. L. REV. 443 (1954) ("Professor Crosskey has built one of the strangest combinations of fact and fancy ever put before the public. The combination is tragic.").

6. W. CROSSKEY, *supra* note 1, at viii.

7. *Id.*

8. 3 W. CROSSKEY & W. JEFFREY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES: THE POLITICAL BACKGROUND OF THE FEDERAL CONVENTION (1980).

fessor William Jeffrey, a former student of Crosskey's, took Crosskey's manuscript and notes and published the current volume.[9]

Despite the authors' prediction that the third volume would stimulate a controversy like that accompanying the first two (p. 4),[10] almost no attention has been paid to the most recent work.[11] Why is it that volumes one and two were greeted with a "tumultuous reception" (pp. 3-4), while volume three has been largely ignored? In large part, the difference in reactions reflects the tremendous evolution of constitutional law and constitutional scholarship in the three decades since the first volumes appeared. Crosskey and Jeffrey dedicate their work to proving a point, that Congress can regulate intrastate commerce,[12] that is now completely accepted.[13] Furthermore, they attempt to establish their contention by using a method of proof, reliance on the intent of the Constitution's drafters, that is now almost totally discredited.[14] These factors, combined with the existence of numerous superior works describing the same period of American history,[15] ensure that volume three will remain largely ignored.

To appraise volume three, one must view it in the context of the entirety of Crosskey's work. Crosskey, a New Deal lawyer during the 1930s, was frustrated by the Supreme Court's invalidation of Roosevelt's legislative initiatives. As a result of these experiences, Crosskey set out to prove that the Supreme Court had misinterpreted the Constitution, that Congress possessed the authority to enact all legislation needed to regulate the economy (pp. 7-8). In 1937, Crosskey presented a paper to the American Historical Association that contained many of the themes his book would develop.[16] In fact, Crosskey's methodology and objectives never varied from those he set forth in his initial presentation almost a half century ago.[17]

The central thesis of Crosskey's work is that the Supreme Court has ignored the Constitution's design of the proper relationship between the federal and state governments. Contrary to the accepted dogma, Crosskey

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9. In the preface to volume three, Jeffrey states that he added chapters one and two to the typescript left by Professor Crosskey. Professor Jeffrey states that he revised the remainder of the manuscript "along the lines on which Professor Crosskey had been working." P. xi.

10. P. 4 ("The volume now in the reader's hands will in all likelihood stimulate a similar reaction.").

11. As of December 1982, two years after the publication of volume three, only two book reviews, both critical, have appeared in print: Finkelman, Book Review: *The First American Constitutions: State and Federal*, 59 TEXAS L. REV. 1141 (1981); Anawalt, Book Review, 21 SANTA CLARA L. REV. 1199 (1981).

12. P. 7 (Crosskey's views on the commerce clause "were the remote origin of the entire project of these volumes.").

13. *See* text accompanying notes 29-37, *infra*.

14. *See* text accompanying notes 43-49, *infra*. *But see,* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

15. Among the outstanding histories of the period between the signing of the Declaration of Independence and the Constitutional Convention are G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); F. BRODERICK, THE ORIGINS OF THE CONSTITUTION, 1776-1789 (1964).

16. Hamilton, *The Constitution — Apropos of Crosskey*, 21 U. CHI. L. REV. 79 (1953).

17. The paper presented by Crosskey was entitled, "The Language of the Fathers." *Id.* at 79. The focus on the language used by the framers is a major theme in all of Crosskey's work. Pp. 6-7.

argues that the Constitution intended to create a strong national government with little power reserved to the states. Crosskey contends that the federal government is empowered with all authority needed to fulfill the hopes of the preamble to the Constitution (pp. 15-23). In fact, each volume of Crosskey's work begins with a dedication "[t]o the Congress of the United States in the hope that it may be led to claim and exercise for the common good of the country the powers justly belonging to it under the Constitution."[18] Specifically, Crosskey sets out to demonstrate that Congress is vested with total authority to regulate all economic activities occurring in the United States, whether intrastate or interstate (pp. 7-15).

Crosskey attempts to prove this conclusion by referring to the intent of the framers of the Constitution. In volumes one and two of his work he focuses on the language used in the Constitution and bases his argument on an analysis of what the words meant at the time the document was written. Crosskey states that he is following Holmes' famous rule of documentary interpretation: "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English using them in the circumstances in which they were used" (p. 6).[19]

Following this principle, Crosskey offered a number of startling conclusions in his initial volumes. For example, he contended that the terms of the commerce clause[20] had been misinterpreted throughout American history. He argued that Congress' power to regulate commerce "among the several states," actually meant that Congress was given the authority to govern all commerce occurring in the midst of the people of the United States.[21] He maintained that the term "among" did not mean "between" as it had been interpreted, but rather meant "within."[22] Accordingly, Congress should not be limited to regulating interstate commerce; rather, it has authority to control all economic activity, including purely intrastate transactions. Similarly, Crosskey argued that the word "states" in the commerce clause was understood when the Constitution was written to refer to the "people of the states" and not to the political entities of the state governments.[23] In sum, Crosskey argued that a proper interpretation of the commerce clause necessitated the conclusion that Congress could regulate all commercial activity in the United States.

In volume three, Crosskey and Jeffrey attempt to prove the same conclusion, using the same methodology, but by relying on a different set of primary materials. Specifically, the authors examine the events occurring between the signing of the Declaration of Independence and the Constitutional Convention to support their contention that the federal government's powers, especially in the area of economic regulations, were intended to be

18. The frontispiece of each volume begins with this same exhortation.

19. The quotation is from Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

20. U.S. CONST. art. 1, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

21. W. CROSSKEY, *supra* note 1, at 84-115. The first eight chapters of Crosskey's initial volume are devoted to presenting his views on the commerce clause.

22. *See, e.g.*, *id.* at 51, 74-80.

23. *See, e.g.*, *id.* at 55-69.

virtually unlimited. Crosskey and Jeffrey present a detailed examination of the pamphlets, documents, newspapers, and correspondence of this time period in an effort to prove that their view is the correct interpretation of the Constitution. Unfortunately, the authors' efforts are directed to proving a point that is already universally accepted, by a method of proof that is almost totally discredited; moreover, even on their own terms, Crosskey and Jeffrey never prove what they set out to establish.

I. THE SCOPE OF THE COMMERCE CLAUSE

Crosskey and Jeffrey do not aim merely to provide a history of the time period being examined. Rather, their entire effort is an attempt to prove that the commerce clause was intended to vest Congress with authority to regulate all economic activities in the United States. As such, the reader must ask whether there is any point to proving this contention. To the extent that they seek to document a point that requires no additional proof, there is little value to their effort.

There is no doubt that when Crosskey began his work during the 1930's there was a need to establish that Congress possessed plenary authority to regulate under the commerce clause. From the late nineteenth century to 1937, the Supreme Court narrowly interpreted the commerce clause to invalidate numerous attempts by Congress to enact national economic regulations. The Court held that the term "commerce" only referred to the final stage of business and, hence, Congress could not use its commerce powers to regulate other aspects of business such as mining, manufacturing, or production.[24] For example, a federal law imposing a requirement for minimum wages and maximum hours for coal miners was declared unconstitutional as a congressional regulation of production, not commerce.[25] The reach of the commerce clause was narrowed further by the Court's repeated holding that Congress could regulate only those aspects of business that had a "direct" effect on interstate commerce.[26] Moreover, the Court held that Congress could not use its power to prohibit commerce between the states as a method for controlling intrastate production.[27]

The effect of these restrictive doctrines was to limit the regulatory powers of the federal government during the Depression, when strong national policies were urgently needed. The invalidation of many key New Deal actions led to President Roosevelt's famous Court packing plan.[28] In light of this history, it is hardly surprising that a government attorney such as

24. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. E.C. Knight Co., 156 U.S. 1 (1895).

25. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

26. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Board v. Alton R.R., 295 U.S. 330 (1935).

27. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (declaring unconstitutional a congressional law excluding from interstate commerce the products of child labor).

28. For a discussion of the events surrounding the Court packing plan, *see*, L. BAKER, BACK TO BACK — THE DUEL BETWEEN FDR AND THE SUPREME COURT (1967); R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); Leuchtenburg, *The Origins of Franklin D. Roosevelt's Court-Packing Plan,* 1966 SUP. CT. REV. 347.

Crosskey would set out to prove that the Court was misinterpreting the Constitution.

However, by the time Crosskey's initial volumes appeared, it already was apparent that the Court's shift in personnel and ideology meant that Congress would be accorded broad authority under the commerce clause. In a series of decisions in the late 1930's and the early 1940's, the Court explicitly overruled the restrictive interpretations of the earlier era.[29] The Court held that Congress could regulate any activity that had a substantial effect on interstate commerce.[30] In fact, even purely intrastate matters that in themselves have a trivial effect on interstate commerce can be regulated if the cumulative effect of many such activities is significant. Thus, for example, in *Wickard v. Filburn*,[31] the Supreme Court held that Congress could regulate the amount of wheat that a farmer could grow for personal consumption because the cumulative effect of all of the wheat grown by all of the farmers for their own use had a substantial effect on the interstate wheat market. In short, the Court made clear that it no longer believed that the existence of the states limited Congress' commerce powers.[32]

Despite these expansive rulings, there still was doubt in the early 1950's, when Crosskey's first volumes were published, as to how far congressional powers extended. The controversy surrounding the appearance of the initial volumes and the numerous articles in law reviews dealing with the commerce clause during this time,[33] evidenced the uncertainty concerning the scope of Congress' authority. By the 1980's, however, there was no uncertainty as to Congress' ability to regulate all commerce, intrastate and interstate alike. The decisions of the past two decades make absolutely clear that Congress can regulate purely intrastate activities. For example, in sustaining the constitutionality of the Civil Rights Act of 1964, the Court upheld a ban on discrimination by a small local restaurant, Ollie's Bar-B-Q, because the combined effects of discrimination by many similar restaurants rationally could be perceived as having a substantial impact on interstate commerce.[34] Even a snack bar in a local country club has been held to be part of interstate commerce.[35] In fact, the commerce power has been extended to permit Congress to enact criminal laws that ban intrastate

29. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

30. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 36-37; United States v. Darby, 312 U.S. at 119.

31. 317 U.S. 111 (1942); *see also* United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (upholding federal control over minimum prices of milk produced and sold intrastate in order to make effective federal control over minimum prices of milk distributed through interstate commerce).

32. United States v. Darby, 312 U.S. at 124 ("The [tenth] amendment states but a truism that all is retained which has not been surrendered.").

33. *See, e.g.*, Myers, *Interstate Commerce — The Constitutional Interpretation of a Nonconstitutional Term*, 17 U. PITT. L. REV. 329 (1956); Stern, *The Scope of the Phrase Interstate Commerce*, 41 A.B.A. J. 823 (1955); Stern, *The Problems of Yesteryear — Commerce and Due Process*, 4 VAND. L. REV. 446 (1951).

34. Katzenbach v. McClung, 379 U.S. 294 (1964); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

35. Daniel v. Paul, 395 U.S. 298 (1969).

activities.[36]

In its most recent formulation of the appropriate standard for review of statutes enacted under the commerce clause, the Court held that it "must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."[37] It is virtually impossible to imagine any activity that cannot be regulated under this expansive test.[38] In fact, almost a half century has elapsed since the Supreme Court last held that a congressional statute was invalid because it regulated activities that did not fit within the commerce power. Although the Court has stated that the tenth amendment creates some limits on the ability of Congress to use its commerce powers to regulate state governments, the Court never has indicated any intent to reinvoke a distinction between intrastate and interstate commerce.[39]

Simply stated, Crosskey and Jeffrey dedicate themselves to a task that already has been accomplished since Congress is accorded all of the regulatory authority that the authors argue for. Additional works about the expansive scope of the commerce power serve little purpose.

II. THE AUTHORS' METHOD OF CONSTITUTIONAL INTERPRETATION

Assuming that the authors make a point worthy of additional proof, it is necessary to ask whether their method is capable of proving the point. The current volume seeks to demonstrate the proper interpretation of the Constitution by referring to the debates and events that occurred after the signing of the Declaration of Independence and prior to the Constitutional Convention (pp. 38, 462).[40] The authors assume that the views expressed

36. *See, e.g.,* United States v. Culbert, 435 U.S. 371 (1977); Perez v. United States, 402 U.S. 146 (1971); *see also* Stern, *The Commerce Clause Revisited: The Federalization of Interstate Crime*, 15 ARIZ. L. REV. 271 (1973).

37. Hodel v. Virginia Surface Min. & Rec. Assn., 452 U.S. 264, 276 (1981).

38. Commentators have recognized for over a quarter of a century that the interrelationships inherent in the modern economy make any distinction between interstate and intrastate commerce impossible. *See*, Stern *supra* note 33, at 449.

39. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court declared unconstitutional a federal law extending the minimum wage to state employees. The Court, however, did not deny that such employees were part of interstate commerce. Rather, the Court held that the tenth amendment limits the ability of Congress to use its commerce powers to regulate the states as states. Subsequent cases have made clear that *Usery* is a limited holding applying only to congressional regulations of states in areas of "traditional" or "integral" government activities. *See, e.g.*, Federal Energy Regulatory Commn. v. Mississippi, 102 S.Ct. 2126 (1982); United Transp. Union v. Long Island R.R., 102 S.Ct. 1349 (1982); Hodel v. Virginia Surface Min. & Rec. Assn., 452 U.S. 264 (1981).

Thus, if there is any issue involving the commerce clause, it is whether the tenth amendment limits Congress' commerce powers. Crosskey and Jeffrey barely address this, pp. 36-38, and their history of the pre-Constitutional Convention events contains no insights on this issue. In recent years there have been a number of excellent scholarly works arguing that issues relating to state sovereignty should be left to the political process and not dealt with by the courts. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-258 (1980); H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49-82 (1961); Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

40. This approach has been characteristic of all of Professor Crosskey's work. As Harold Lasswell noted in reviewing the first two volumes: "Crosskey believes that the historic inten-

during this time period should guide the Court in its modern interpretations of the Constitution. This approach to judicial review, often termed interpretivism,[41] has been thoroughly discredited in the decades since Crosskey's initial volumes appeared.[42]

The authors premise their work on the assumption that constitutional interpretation should be based on an inquiry as to what the framers intended the words of the Constitution to mean (pp. 1-7). This limits the scope of the Constitution to what its drafters wanted to accomplish. Such an approach, however, undermines the very idea of a Constitution. A Constitution is not a static document to be interpreted like a statute, but rather is meant to derive its meaning from the experiences of each new generation. As the Supreme Court stated almost fifty years ago:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — "We must never forget that it is a Constitution we are expounding."[43]

The Court should not be bound to what the framers intended their words to mean. Contrary to Crosskey's and Jeffrey's assumption, the "Court is not dealing with the men who made the Constitution, but what they made."[44] In fact, there are strong indications that the framers drafted the Constitution intending for its meaning to be defined by the experiences of each succeeding generation.[45] Accordingly, those, such as Crosskey and Jeffrey, who believe that the framers intent should be followed, are obliged by that very intent to abandon such an inquiry.

The framers clearly recognized that they could not possibly write a doc-

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tion of the founding fathers ought to govern the interpretation given to the language of the Constitution by modern decision-makers." Lasswell, Book Review, 22 GEO. WASH. L. REV. 383 (1954).

41. Interpretivism is the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980).

42. For excellent, detailed critiques of interpretivism, see *id.* at 11-41; Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONSTITUTIONAL L.Q. 257 (1982); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). *But see*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Although there are still a few scholars who attempt to defend interpretivism, the clear weight of scholarly opinion, to say nothing of the consistent view of the Court, is that the Court is in no way obliged to follow the intent of the framers. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting); United States v. Classic, 313 U.S. 299, 315, 316 (1941); Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 442-443 (1934).

43. Home Bldg. and Loan Assn. v. Blaisdell, 290 US. at 442-443 (citation omitted).

44. C. CURTIS, LIONS UNDER THE THRONE 7 (1947).

45. *See* Miller, *An Inquiry Into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 584 (1973). J. ELY, *supra* note 41, at 11-41.

ument capable of governing future generations facing problems they could never begin to imagine. They knew that a "nation wholly different from that existing in 1787, facing problems obviously not within the contemplation of the Founding Fathers, can scarcely be governed — except in the broadest generality — by the concepts and solutions of yesteryear."[46] An inquiry into the events between the Declaration of Independence and the Constitutional Convention, therefore, has no relevance to modern interpretations of the commerce clause.[47] As Professors McDougal and Lans noted more than twenty-five years ago:

> [I]t is utterly fantastic to suppose that a document framed 150 years ago "to start a governmental experiment for an agricultural, sectional seaboard folk of some three millions" could be interpreted today . . . in terms of the "true meaning" of its original framers for the purpose of controlling the "government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent."[48]

In sum, "there is no acceptable theory demonstrating why and how historical materials are relevant to the present resolution of present constitutional problems."[49] Even if there is a need to prove that the commerce clause should be given a broader scope, Crosskey and Jeffrey cannot succeed in this aim by appealling to quotations that are now more than two centuries old.

III. The Inadequacy of the Authors' Evidence

Assuming that there is a need to prove that the commerce clause should be given an expansive interpretation, and assuming that the framers' intent is relevant in establishing this point, it is necessary to consider whether the evidence marshalled by the authors establishes what they set out to document. That is, does the work, taken on its own terms, effectively prove the authors' point?

The authors exhaustively survey pamphlets, newspapers, speeches, and correspondence from the period between the signing of the Declaration of Independence and the Constitutional Convention. They produce page after page of quotations which, they assert, support their central arguments. Even if the quotations say exactly what the authors claim they do, at most the authors have demonstrated that some people during this time period favored a strong national government with expansive powers to regulate interstate commerce.[50] The authors, however, never demonstrate that a

46. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 683 (1960).

47. P. Brest, Processes of Constitutional Decision-Making: Cases and Materials 158 (1975).

48. McDougal & Lans, *Treaties and Congressional, Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I,* 54 Yale L.J. 181, 214-15 (1945) (footnote omitted).

49. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. Chi. L. Rev. 502, 502 (1964).

50. There are numerous places in the book where the authors offer a few quotes and then generalize, concluding that the quotations were representative of widespread public sentiment, but offer no support for their generalization. *See, e.g.,* pp. 75-76, 126-27.

majority of Americans favored this view. In fact, most of the authors' evidence in favor of broad national economic powers is in the form of statements by political leaders from active commercial states such as Massachusetts, New York, and Rhode Island (*e.g.,* pp. 161, 168-69, 176-77). There is no doubt that merchants in these states favored a strong national government. However, merchants were a relatively small segment of the American population during the period that Crosskey and Jeffrey survey. Most people in America during this time were farmers, and Crosskey and Jeffrey offer no evidence that this group favored a powerful national government with expansive powers to regulate commerce.[51]

Moreover, a close examination of the evidence presented by Crosskey and Jeffrey reveals that it does not support their claim that there was strong sentiment in favor of federal authority to regulate all commercial activities in the United States. The authors present literally dozens of quotations which, they contend, reflect support for congressional authority to regulate both intrastate and interstate commerce. Yet, almost all of these quotations speak of a need for federal regulation of "internal" and "external" commerce (*e.g.,* pp. 100, 140, 173, 188, 191 and 318). The authors assume that references to "internal" and "external" commerce indicate a desire to bestow upon Congress the power to regulate all commerce in the country. However, an equally plausible interpretation of this language is that it refers to a desire to establish congressional authority to regulate interstate and foreign commerce. The authors never defend why they assume "internal" commerce should be interpreted to include intrastate activities.[52]

In fact, the events of the time period surveyed by the authors indicate that the speakers quoted were probably advocating federal authority over interstate and foreign commerce. Before the Declaration of Independence was signed, the British Board of Trade controlled commercial transactions within and between the colonies.[53] After the colonies broke away from Great Britain, there was no national commercial power. The states, fearful that they would be controlled by a central government,[54] refused to permit Congress under the Articles of Confederation to regulate commerce. Economic chaos resulted as individual states set up trade barriers and economic sanctions with respect to goods from other states and goods passing through the state.[55] One commentator wrote:

> The states passed tariff laws against one another as well as against foreign nations; and indeed as far as commerce was concerned, each state treated the others as foreign nations. There were retaliations, discriminations, and every manner of trade restrictions and impediments which local ingenuity

51. The authors present many examples of opposition to a strong national government, especially by the Southern states. *See, e.g.,* pp. 197, 215, 217, 232-33, 283.

52. Similarly, the authors present many quotations advocating vesting the federal government with "full power" to regulate commerce and assume that this phrase refers to authority to regulate both intrastate and interstate commerce. *See, e.g.,* pp. 211, 318, 321, 362, 441.

53. J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 132 (1978).

54. *Id.* at 132.

55. *See, e.g.,* C. HEATHCOCK, THE UNITED STATES CONSTITUTION IN PERSPECTIVE 20 (1972); F. BRODERICK, THE ORIGINS OF THE CONSTITUTION, 1776-1789 18 (1964); C. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 25-27 (2d ed. 1954).

and selfishness could devise.[56]

Surprisingly, Crosskey and Jeffrey devote little attention to detailing the barriers to interstate trade existing during this period. These obstructions are critical because the economic problems that resulted were the single largest impetus for the Constitutional Convention. Since the primary concern was with *interstate* barriers to trade, it is quite likely that those who spoke of the need for congressional regulation of "internal" and "external" commerce were referring to interstate and foreign activities. As one historian has noted: "When they considered the need for regulating 'commerce with foreign nations and among the several state's, they were thinking only in terms of the national control of trade with the European countries and the removal of barriers obstructing the physical movements of goods across state lines."[57]

The events at the Constitutional Convention further support the view that the commerce clause was meant to empower Congress only with authority over interstate activity. The key proposal at the Convention providing for the powers of the national government came from Virginia Governor John Randolph. His resolution, presented early in the Convention's proceedings, read in part:

> [T]hat the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.[58]

All of the subsequent events at the Convention support the view that Congress was to have authority in areas where the states were individually incompetent to act.[59] The states obviously were fully able to regulate purely intrastate economic activity; it was the interstate transactions that could not be handled by the states and, therefore, necessitated federal government action.

At the very least, the authors' use of quotations that speak of a need for federal power to regulate "internal" and "external" commerce does not prove that there was support for congressional authority to control intrastate economic activity. It is ironic that a book premised on the importance of correctly interpreting the meaning of words would so carelessly use these quotations to support its point.

Similarly, the book uses quotations advocating the creation of a stronger national government as proof for the authors' view that the framers intended to create an all powerful central government (pp. 137-43). While

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56. 1 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 310-11 (1916) (footnote omitted); C. SWISHER, *supra* note 55, at 25-27 ("New Jersey was embittered by the fact that both New York and Pennsylvania collected import duties on goods intended for sale in New Jersey . . . . North Carolina suffered similarly from action taken by Virginia and South Carolina. The states collected duties, not merely on goods from abroad, but on those brought in from other states as well.").

57. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1344 (1934) (footnote omitted).

58. *See*, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, 69TH CONG., 1ST SESS. 117 (1927).

59. *See, e.g., id.* at 389, 466.

some of the speakers quoted might have shared the authors' view of the role of the federal government, it is quite likely that many of those quoted had a far different plan in mind. The authors simply assume that advocacy of a strong federal government meant that the speakers favored a government with the power to regulate all economic activity occurring within the country.

Finally, even if one were to assume that there were strong sentiments supporting the authors' view of the proper design for government, this does not mean that the Constitution adopted such a perspective. The authors minimize the strong opposition to the creation of a powerful national government (*e.g.*, pp. 121, 197, 215, 217 and 232-33). There had been repeated unsuccessful efforts to give Congress powers to regulate commerce under the Articles of Confederation.[60] The opposition is crucial because it makes it highly likely that the Constitution was a compromise, reflecting numerous concessions made by all of the states. As a document reflecting many compromises, the Constitution cannot be analyzed or understood simply by referring to quotations from those favoring its creation during the period prior to its drafting.[61] Accordingly, the methodology of Crosskey and Jeffrey cannot possibly prove the proper meaning of the Constitution.

CONCLUSION

None of the above is meant to imply that a history of the events between the signing of the Declaration of Independence and the Constitutional Convention serves no purpose. To the contrary, a reexamination of that period can provide important insights into a critical stage of American constitutional development. Crosskey and Jeffrey do not, however, set out simply to provide a history of a fascinating decade. Their entire effort is directed at proving a point and, as such, must be appraised on those terms.

Certainly, there are places in the book where the authors discuss important events that are often overlooked, or insufficiently dealt with, in other examinations of the period. For example, the discussion of the relationship of Shay's rebellion to the development of the Constitution (pp. 332-40), and the description of the events surrounding a proposed treaty with Spain in 1786 (pp. 285-314), are interesting and important. Unfortunately, the few useful insights are buried in a book so poorly written as to be almost unreadable. Often there are pages that contain little more than strings of quotations tied together by sentence fragments (*e.g.*, pp. 74-75, 147, 224, 288, 317, 371 and 435). The prose is dense and difficult to follow. Unlike the initial volumes of Crosskey's work, the current volume offers little to recommend it.

60. C. WARREN, THE MAKING OF THE CONSTITUTION 85 (1928); 1 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES 250-52 (1882); Pp. 132-33.

61. In fact, it is precisely for this reason, that so many people were involved in the drafting and ratification of the Constitution, that it is impossible to ever know the framers' intent. J. ELY, *supra* note 41, at 17; Shaman, *supra* note 2, at 267-68.