March 1960

The Bill of Rights: A Limitation on the Several States or the Federal Government?

David Wittingham
THE BILL OF RIGHTS

A LIMITATION ON THE SEVERAL STATES OR THE FEDERAL GOVERNMENT?

The proposed objective of this paper is to explore William Crosskey's interpretation of the Constitution as given in his two-volume study, Politics and the Constitution in the History of the United States. Specifically, it will analyze what he called the Supreme Court's "destruction" of Constitutional limitation on state authority. Chapter XXX will be the basis of the study. The plan of the power includes an introductory chapter revealing basic background relevant to the study, the general area under discussion, and a basis upon which conclusions will be drawn. The second chapter is devoted to a review of several pertinent points in Crosskey's Chapter XXX. These are brought out to provide points of discussion for the following chapter. Chapter III is the core of the study. Herein lies the contention that Mr. Crosskey presented his readers, not a complete and unpredisposed text, but rather a one-sided brief. From its antecedents in the English system, succeeding sections of Chapter III are devoted to stages of development from the Federal Convention of 1787 until the Barron decision of 1833. In the course of the paper, deletions have been made only to shorten long quotations. Except where otherwise indicated, all underlining and parentheses are those of this author.

INTRODUCTION

In the interest of sound national government, William Crosskey presented his monumentous two-volume work to the public. It was, he claimed, a clear insight into the real meaning of the Constitution. He held that the words of the Constitution—the text, per se—have an intrinsic meaning apart from the intent of the framers or the understanding of the ratifying bodies or the general public. In the light of the facts presented, this interpretation seems clear and valid; his documentation and logic appear sound.
In supporting his contention, Crosskey referred to many sources, including newspaper accounts, court decisions, opinions of the day, and discussions held in the ratifying assemblies. How these can be divorced from the above mentioned sources of interpretation used by other analysts which Crosskey has discounted, is mysterious. How one can state what the text means, not what it was "intended" to mean or "understood" to mean, and at the same time use these very sources in support of such statements, is indeed a curious methodology. Nevertheless, by so doing, the door was opened to conflicting evidence of a similar nature. Thus without any longer pursuing the semantics of "intent", "meaning", "understanding", etc., there must follow an inquiry into the validity of Mr. Crosskey's supporting evidence.

*Politics and the Constitution* covers almost every point in the Constitution. In order to do justice to the research and scholarship of its author, it would be near impossible to review, point by point, every thing that he has covered. Therefore, the following is selected as a particular sample of Crosskey's work: Chapter XXX is entitled "The Supreme Court's Destruction of the Constitutional Limitation on State Authority, Contained in the Original Constitution and Initial Amendments." In this chapter Crosskey concludes that the Supreme Court erroneously relinquished its position as the leader of a national judiciary system that the framers "intended." He also concluded that this same Court "without any warrant at all", incorrectly held the first eight amendments, the "Bill of Rights", inapplicable to the several states.¹ The author will concentrate his discussion in this phase of his study (the applicability of the initial amendments). Mr. Crosskey has referred to the deliberations of the Federal Convention, several state conventions, court decisions, and the opinions of "good lawyers" and judges of the time.

It can be shown that Crosskey, in his case for general applicability of the Bill of Rights, has ignored its historical antecedents, has neglected to show both sides of the issue, has made liberal use of connotation, and has used the issue to support his general hypothesis.

¹ 2 Crosskey, *Politics and the Constitution* 1052.
What is the validity of Crosskey's book, *Politics and the Constitution* as a reliable text? It is conceded that Mr. Crosskey has prepared a convincing brief. However, the work is presented as an authoritative, accurately documented text. In this light, Mr. Crosskey has left many questions unanswered and others well hidden. It will merely be inferred that Mr. Crosskey's study is similar to almost any other research of its kind, that is, somewhat limited and bound by the philosophy and preconceptions of its author.

*Crosskey's Views of the Constitutional Limitations of State Authority*

Mr. Crosskey's general belief is, that the Constitution and the original amendments should be interpreted by reading the text together with an eighteenth century word-usage dictionary close at hand. He feels the Constitution leaves no leeway for broad interpretation of its powers. Mr. Crosskey also gives us what he calls "eighteenth century rules of construction." By this he refers to the style of draftsmanship used by the framers of all constitutions and amendments of the period. Crosskey claims this particularly prevalent style, if understood, should aid the analyst in finding the meaning of documents.

He feels the Constitution provides the United States with a strong national government of few limitations, delegating to the several states the handling of local problems only. That it allows the American people, through the Congress, to handle any subject they so desire. On the subject of the Supreme Court, he feels its function is that of the nation's judicial head, but that the Court should not pass on acts of Congress. Crosskey is of the opinion that the Court has delved in "sophistries", given fragmentary and irrational judgments, and "surreptitiously ignored" the real meaning of the Constitution, which he sees so clearly.

In 1833, the Supreme Court, led by Chief Justice John Marshall, gave an important decision in *Barron v. Mayor and*

In this case Barron was appealing a lower court decision; he reasoned that, in his difficulties with the City of Baltimore, he was entitled to the protection of the Fifth Amendment of the Constitution of the United States. Marshall and the majority of the Court felt otherwise and so stated in their decision. It is this decision that Crosskey labels "unwarranted."

It is from this point, Crosskey enters his evidence which he feels disproves the position held by the Supreme Court. Crosskey states that the Court's position, as far as the First Amendment is concerned, is correct since Congress is specifically referred to. He also agrees that Barron v. Baltimore was correct with respect to the appeals clause of the Seventh Amendment. However, Crosskey claims that the specification of these two points only serves to make more clear the general applicability of the remainder of the Amendments. It is at this point that he turns to the substance of these amendments, and holds that they were "intended", at that time, to be general prohibitions on both national and state action. Each amendment he points out covers areas which seemingly could be usurped by either level of government. He continues his discussion by noting that since only about one-half of the states had bills of rights, the need for a general bill was widespread. At this point he states: "At least one of the state ratifying conventions had seemed to desire the enactment of just such a general bill of rights." This was the ratifying convention of Virginia. He points out that the proposed "bill of rights" from Virginia stands separate from the other amendments offered by Virginia (which specifically referred to Congress, judicial power of the United States, etc). Thus, Crosskey reasons, in Virginia at least, these people desired to strengthen their own constitution by placing an obligation on Virginia to bring her own bill of rights in line with that of the United States. At the same time, the prestige and pressure of the Federal Bill of Rights would cause it to be enforced more effectively.

---

4 7 Peters (10 U.S.) 243 (1833).
5 2 Crosskey, 1061.
Crosskey then considers the "eighteenth century constructionary rules" which he says must guide any interpretation of the amendments. After stating how general words may be made the subject of equities of restraint, he says, "The evidence of purpose giving rise to such equities of restraint—or for that matter, to equities of fulfillment—had to be strong and clear." In practice, this meant that any document of the sort under discussion had to have its purpose and applicability in the preamble or introduction, the remainder could be general; otherwise, specification, phrase by phrase, would be used.

As another pillar to support his case, Crosskey draws on the preamble to the Amendments, as they were presented to the states. This preamble, which never became a part of the Constitution, stated, "... a number of the states, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent misconstruction or abuse of its Powers, that further declaratory and restrictive clauses should be added." This is to emphasize that in this scheme of government, the Constitution embraced state as well as national powers. Continuing on, Crosskey points out that: "... any man of the times who read the current newspaper accounts of Congress' proceedings must, then certainly have concluded that the literal generality of these amendments were intended, ... they were ratifying limitations, not only on the nation, but on the state governments as well." In this section he notes that the Supreme Court Justices of New York in 1820 agreed to this philosophy. He also states that two "well-known law writers", Angell of Providence, and Rawle of Philadelphia, took a similar point of view in 1828 and 1829.

In the last six pages of Chapter XXX, Crosskey turns directly to the opinion and reasoning of Chief Justice Marshall in the Barron case. He notes that it contradicts views expressed by Marshall in earlier decisions. Also he discusses the probability that Marshall had come under the influence of

---

6 Id., 1064.  
7 Id., 1076.  
8 Ibid.
"State's Rights" elements, and had surrendered to them. To this he adds on many occasions Marshall gave court opinions even when they were repugnant to his own opinion and vote. At the same time, he says Justice Story had the admitted habit of silently submitting to the majority even when he differed with them. In conclusion he arrives at the opinion that the doctrine established in Barron v. Baltimore "appears to have been a sham." He states that not one of Chief Justice Marshall's reasons for the decision can be supported. In Crosskey's own words, "The decision of the Court, and the doctrine for which it stands, constitutes, in fact, one of the most extensive and indefensible of all the various failures of the Court to enforce the Constitution against the states as the document is written." 10

Without any basis for such action Crosskey feels Chief Justice Marshall succumbed to an "imaginary State's Rights Doctrine" of the time and thus started a trend which was not corrected until late in the nineteenth century.

A CONTRADICTORY POINT OF VIEW

The preceding brought out the main points of William Crosskey's attack on the Supreme Court's decision in the case of Barron v. Mayor and City of Baltimore. These views were supported by introducing references to the First Congress, the intent of the framers of original amendments, contemporary opinions and newspaper articles, as well as court decisions prior to the Barron case. It is my contention that Mr. Crosskey rather than compiling an accurate history or account of the subject, prepared a brief that fitted his overall thesis.

Upon viewing the situation of the colonists prior to the Revolution, it cannot be denied that they were, politically and socially, still Englishmen. The environment of the New World did have its effects; yet, their heritage and traditions were common. When the locus of power was transferred by way of revolution, from London to America, the colonists did

9 Id., 1080.
10 Id., 1081.
not forget their earlier political philosophy. The Declaration of Independence was a compilation of grievances against the Crown; it stated that in light of their rights as Englishmen, which had been denied them, revolution was the only recourse.

True English freemen were entitled to the protection of the English “bill of rights” secured during the revolution of 1688. This act, passed by the Parliament, spelled out the conditions upon which the Prince of Orange and his wife, Mary, would be invited to take the throne vacated by James II. The first part of the document enumerates twelve ways in which James II abridged their liberties and rights. Naturally, in a desire to avoid any such recurrence, the Convention Parliament wanted to establish certain undeniable rights which succeeding Parliaments and sovereigns would recognize as inviolate.  

This limitation upon a grant of power was obviously paralleled in America. The several states, upon creating a central government, felt the need to limit its scope and protect themselves from its possible encroachment. The following documents in their chronological order provide a continuous thread of beliefs establishing this parallel even more clearly: the English Bill of Rights of 1688; the Virginia Bill of Rights of June 12, 1776 (drawn by George Mason); the Declaration of Independence of 1776; and, the Bill of Rights of 1789-91. The continuity as well as the terms and phrasing are clear. There can be no doubt that the intentions of both bills are analogous.  

From a contemporary of Marshall and Story there is a similar statement of the recognized identity between the English model and our Bill of Rights. Justice Henry Baldwin of the Supreme Court states:

... I find a weight of political authority, which my mind cannot resist and so feel bound to trace the great work of the fathers of the revolution and the country, back to its source in the common law, the magna charta,

---


12 See, Dumballs, THE BILL OF RIGHTS, viii and 139.
and the constitution of England; the basis and pattern of our own ... Taking it as already apparent, that in 1774 and 1776, our constitution was the English constitution, and the free system of English law was the common law then; and that system to yet be the law of the land, by the authority of the states, the constitution, the acts of Congress and the adjudications of this court. It is in this law that we find the rules of interpretation.

Justice Story in his *Exposition of the Constitution of the United States* (dedicated to students), held an identical point of view, stated as follows:

In the next place, a Bill of Rights is important and may often be indispensable, whenever it operates as a qualification upon powers actually granted by the people to the government. This is the real ground of all the Bills of Rights in the parent country, in the Colonial constitution and laws, and in the State constitutions. In England, the Bills of Rights were not demanded merely of the Crown as withdrawing a power from the Royal prerogative; they were equally important, as withdrawing power from Parliament. A large proportion of the most valuable of the provisions in the Magna Charta, and the Bill of Rights of 1688, consists of a solemn recognition of the limitations upon the powers of Parliament; that is, a declaration that Parliament ought not to abolish, or restrict those rights. Such are the rights of trial by jury, etc. ...

Thus in spite of the prevalence at the time of broad theories of democratic government inspired by Locke and Montesquieu, the American Bill of Rights stands as a pragmatic limitation on a grant of power. The only model available for such an approach—the English Bill of Rights of 1688—in similar fashion limited William and Mary and succeeding monarchs and Parliaments in their exercise of power.

---


At the Federal Convention of 1787, a “bill of rights” did not enter the discussion of the assembly until a few days from its conclusion. When it did, the proposal was not felt to be necessary, on the ground that any set of enumerated rights would infer no restraint on any which would possibly have been omitted. It was felt that the general provisions of the Constitution itself would prove bulwark enough to safeguard liberty. The main consideration of the convention was to present a constitution to the states which would be received favorably and not arouse any great dissent over relinquishing sovereignty. The following statement by John Lansing, a delegate from New York, is along this line of reasoning:

If we form a government, let us do it on principles of which are likely to meet the approbation of the states. Great changes can only be gradually introduced. The states will never sacrifice their essential rights to a national government. New plans annihilating the rights of states (unless upon evident necessity), can never be approved.\(^\text{15}\)

He was a supporter of the Constitution but came from New York, a state in which the Constitution was later bitterly opposed for the reasons Lansing above states.

When the Constitution was presented to the states, much discussion arose in almost every ratifying convention over forfeiting control and power to the general government. With the exception of Mr. Crosskey’s reference to the Virginia Convention, little or none of this material is brought out in his Chapter XXX. Since he did refer to the Virginia Convention, it seems only fair that a close look be taken at what the other conventions had to say.

In Pennsylvania the desire to look into the possibility of amendments was drafted; “It ha(d) been thought expedient that delegates . . . should meet together for the purpose of deliberating on the subject . . .”\(^\text{16}\) These conferees assembled and the following excerpt from their petition for amendments and corrections reads:

---

\(^\text{15}\) 1 Elliott, DEBATES 412.
\(^\text{16}\) 2 Elliott, DEBATES 543.
That your petitioners possess sentiments completely federal, being convinced that a confederation of republican states and no other can secure political liberty, happiness . . . They are well apprized of the necessity of developing extensive powers to congress, and of vesting the supreme legislature with every power and resource of a general nature, and consequently they acquiesce in the general system of government framed by the late Federal Convention,—in full confidence, however, that the same will be reviewed without delay; for, however worthy . . . this system may be, your petitioners conceive that amendments on some parts of the plan are essential not only to the preservation of such rights and privileges as ought to be reserved in the respective states, and in the citizens thereof, but to the fair and unembarrassed operation of the government in its various departments.¹⁷

From the above discussion, it is indeed difficult to come to the same conclusion as Mr. Crosskey—that the states were attempting to apply these proposed amendments to themselves as well as the government of the United States.

In Massachusetts we find a similar feeling of jealousy towards the potential power of the general government. The following is the preface to the proposed amendments accompanying the state's ratification of the Constitution of the United States:

And as it is the opinions of this convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of the Commonwealth, and more effectively guard against undue administration of the federal government, the convention do therefore recommend that the following alterations and provisions be introduced into the said constitution.¹⁸

¹⁷ Id., 544.
¹⁸ Id., 117.
Following this preface, which clearly states the applicability and intention of the authors, are a list of amendments. Some were specific, others more general in character. New Hampshire in similar manner, with exact same wording of the preface, presented a document. Why Mr. Crosskey failed to present these facts to his readers is baffling.

Mr. Crosskey in supporting his contention drew on the Virginia convention. He states this as proof that at least one state desired a general bill of rights, applicable to all levels of government. Herein lies just such a point as was mentioned in the preceding paragraph. Crosskey quoted and discussed the Virginia prefaces to the amendments, allowing the reader to conclude that such was their desire (a general bill of rights). Yet a closer perusal of activities recorded in Elliott brought to light certain statements which indicate otherwise. Virginia, when she finally ratified the Constitution, sent the engrossed ratification to Congress a few days prior to the formulations of their “general” bill of rights. Enclosed in this ratification was the following:

We, the delegates of the people of Virginia, duly elected . . . , do in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution . . . [cannot] be cancelled, abridged, restrained or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified by any authority of the United States.

With these impressions, . . . and under the conviction that whatsoever imperfections may exist in the Constitution ought rather to be examined in the mode prescribed therein, than to bring the union into danger by delay, with a hope of obtaining amendments previous to the ratification.

---

19 21 U. Chi. L.Rev. 49.
We, the said delegates, in the name and behalf of the people of Virginia, do, by these presents, assent to and ratify the Constitution . . . for the government of the United States.20

In light of this statement of ratification, Crosskey's "one state" desirous of a "general" bill of rights, does not appear so all conclusive as he would have his readers believe.

The Constitution was bitterly opposed by many New Yorkers, who were fervently against giving up any sovereignty. Yet, through the propaganda efforts of Hamilton, Jay, and Madison, as well as the prestige lent to the Constitution by the chairmanship of General Washington, it was finally ratified, conditionally.

On Saturday, July 19, 1788, Mr. Lansing moved to "postpone the several propositions before the house in order to take into consideration a draft of a conditional ratification with a bill of rights prefixed and amendments subjoined."21 Thus New York wanted a bill of rights to be "prefixed" to a constitution for the United States. After conditional ratification, a circular letter was sent to the governors of the several states rallying support for amendments to the Constitution. The following is an excerpt from their plea:

We, the members of the Convention of this state, have deliberately and maturely considered the constitution proposed for the United States.* Several articles in it appear objectionable to us . . . we observe that amendments have been proposed, and are anxiously desired by several of the states, as well as by this, and we think it of great importance that effectual measures be immediately taken . . .22

Again, the state, in fear (or jealousy) of federal power, wanted to limit the extent to which the general government could operate.

20 3 Elliott, DEBATES 656.
21 2 Elliott, DEBATES 411.
22 Id., 414.
In Maryland the committee on amendments put forth the suggestion that “all warrants without oath . . . to search suspected places or seize any person on his property are grievous and oppressive, and all general warrants to search suspected places or to apprehend any person suspected . . . are dangerous and ought not to be given.” According to Crosskey’s eighteenth century constructionary rules, this general statement would appear all inclusive in intent and application. Yet a majority of the committee felt that such an amendment was indispensable for the following reason:

Congress, having the power of laying excise, by which our dwelling houses . . . will be laid open to the insolence and oppressions of office, there could be no constitutional check provided that would prove so effectual a safeguard to those magistrates who are to administer the general government.

Again it seems to this author that the basic intention of these men was to protect the citizens of their own respective state from undue exercise of power by the general government. It also seems likely that all these preceding remarks made in ratifying conventions were well known to Crosskey. While spending thirteen years in preparing his work, it seems unlikely that he would pass over all of Jonathan Elliot’s Debates, except the section on Virginia.

During the ratification period, Mr. Iredell, a North Carolina member of the Federal Convention, was addressing his North Carolinian brethren in an attempt to gain passage of the document. His words express the feeling which, this author feels, Mr. Crosskey either avoided, or did not wish to convey. “The general ground of objections seems to be that the power proposed to the general government may be abused . . . on these principles I am of the opinion that some amendments should be proposed.”

---

23 Elliott, DEBATES 551-552.
24 Id., 551.
25 4 Elliott, DEBATES 219.
John Marshall, in his *Life of George Washington*, devoted several paragraphs to Thomas Jefferson's feelings on the proposed constitution. At the time, Jefferson was in Paris:

Mr. Jefferson therefore, seems to have entertained no jealousy of the state sovereignties; and no suspicion of their encroachments. His fears took a different direction, and all his precautions were used to check and limit the exercise of the powers vested in the government of the United States. Neither could he perceive danger to liberty except from that government, and especially from the executive department.

He . . . had, at one time, avowed a wish that it might be rejected by such a number of states as would secure certain alterations which he thought essential. His principal objections seem to have been, the want of a bill of rights, and the re-eligibility of the President.  

That this expression of Jefferson's feelings is accurate may be further evidenced by excerpts from his letters. The following were written from Paris prior to any Congressional action on a bill of rights. The first is to James Madison, encouraging him to press for such a bill in the first session of Congress. After pointing to the positive values Jefferson concludes:

I hope, therefore, a bill of rights will be formed to guard the people against the federal government, as they are already guarded against their State governments in most instances.

A second letter, the following year, to Francis Hopkinson, in which Jefferson was defending his position:

What I disapproved from the first moment also was the omission of a bill of rights, to guard liberty against the legislative as well as the executive branches of the

---


27 Dumbald, *POLITICAL WRITINGS OF THOMAS JEFFERSON* 142.
government; that is to say, to secure freedom in religion
freedom of the press . . . 28

It was Jefferson who acted as one of the primary links
between the American Bill of Rights and its English counter-
part. The Declaration of Independence was a statement on the
loss of the rights stated in the Bill of Rights of 1688. Couched
in terms similar to the 1688 bill, the Declaration came from
Jefferson’s pen. Later, the Constitution was without such a bill
until Madison and others, convinced and urged by Jefferson,
succeeded in 1789.

When the First Session of Congress convened, James Mad-
ison introduced to the House of Representatives a number of
amendments to propose to the states. It was his belief that these
amendments, interpreted by the judiciary, would prove a
bulwark against possible legislative or executive encroachment
of rights. He also felt that a “bill of rights” would gain
popular support for the Constitution:

But I will candidly acknowledge that . . . the
Constitution may be amended. That is to say of
all power to abuse, then it is possible the abuse of the
powers of the General Government may be guarded
against in a more secure manner than is now done while
no one advantage is arising from the exercise of that
power shall be damaged or endangered by it. 29

Thus it was his intention to present a bill “to guard against any
possible abuses by the General Government . . . and along
with these prohibitions against the states.” It is significant
that of all the amendments presented by Madison, the one
which specifically restricted state power were not passed on to
the states for action. 30 To implement these amendments,
Madison desired to insert them within the body of the ratified
Constitution. However, Roger Sherman of Connecticut

28 Prescott, HAMILTON AND JEFFERSON TO FRANCIS HOPKINSON,
PARIS 13 March 1789, 293.

29 ANNUALS OF CONGRESS 432-39.

30 “No State shall violate the equal rights of conscience, or the freedom of the
press, or the trial by jury in criminal cases.”
pointed out that this would require a re-interpretation of the document and also create confusion. Thus they were placed at the end. Crosskey holds that if Madison's method had been used then the *Barron v. Baltimore* decision would have been correct. Since they were subjoined however, he feels that Marshall's decision was erroneous. It seems strange that he ignores the obvious reason for sub-joining the amendments (clarity and accuracy).

Reverting back to the point when the Constitution's fate was in the hands of the state conventions, there are a number of contemporary newspaper articles which show how the document was then understood. The first is a letter written under the pen name of "The Landholder." He concluded as follows: "To have inserted in this constitution, a bill of rights for the states, would suppose them to derive and hold their rights from the Federal governments when the reverse is true." From this letter one may infer that a bill of rights was understood to be for the benefit and protection of the states. It was written from the view that such bill was not really necessary in the Constitution. Later "The Landholder" had charged Luther Martin [Martin was a member of the late Federal Convention] with allowing the Constitution too much federal power. In reply to this charge Martin said:

The more the system advanced, the more I was impressed with the necessity of . . . forming a complete bill of rights . . . to serve as a barrier between the general government and the respective states and their citizens.

The rejection of the clauses attempted in favour of particular rights, and to check and restrain the dangerous and exorbitant powers of the general government from being abused, had sufficiently taught me what to expect.

Martin, the next week wrote another letter, addressed to "The Citizens of Maryland." His point is even clearer in the following two paragraphs:

---

31 *CONNECTICUT COURANT*, 10 Dec. 1787; See also, Ford, ESSAYS ON THE CONSTITUTION 163.

32 *Maryland Journal*, 21 March 1788; See also, Frarand, RECORDS OF THE FEDERAL CONVENTION 290.
There is my fellow citizens, scarcely an individual of common understanding, I believe, in this state, who is in any way acquainted with the proposed constitution, who doth not allow it to be, in many instances, extremely censurable, and that a variety of alterations and amendments are essentially requisite, to render it consistent with a reasonable security for the liberty of the respective states and their citizens.

Reflect also, I entreat you, my fellow citizens, that the alterations and amendments which are wanted in the present system are of such a nature as to diminish and lessen, to check and restrain, the powers of the general government ...\textsuperscript{33}

One must conclude the opposite point of view than that which Crosskey presents.

Before moving to the Barron case itself, it is interesting to note the feelings of two men on the scene prior to the decision of Barron v. Baltimore. First was Chancellor Kent, chief of the New York Court of Errors. In 1827, prior to his retirement, he wrote a broad commentary on the American judicial system and its practices. One of his lectures entitled “Of Constitutional Restrictions on the Powers of the Several States,” of which not one sentence makes any reference to the applicability of the bill of rights upon the states. Surely, if this was a subject of doubt during his time on the bench, Kent would not have neglected to mention it.\textsuperscript{34}

In another work, Commentaries on the Constitution of the United States, by Joseph Story, is found additional evidence of this view. Story’s Commentaries were written about a year prior to Barron v. Baltimore; and, while the book contains no pointed remarks on the applicability of the amendments, there are useful references. First is a general statement by Story on the reason for such amendments:

\textsuperscript{33} Maryland Journal 28 March 1788; See also, Ford, ESSAYS ON THE CONSTITUTION 376.

\textsuperscript{34} KENT, COMM. 105.
Whenever, then, a general power exists, or is granted to a government, which may in its actual exercise or abuse be dangerous to the people, there seems a peculiar property in restricting its operations, and in excepting from it some of the mischievous forms, in which it may be likely to be abused. 3.5

This general statement seems more specific when applied to the following statements by Justice Story in his explanations of the separate amendments. Story refers to the Second Amendment as, "This clause in our National bill of rights." Later in reference to the Eighth Amendment he remarks as follows:

It was however, adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts. 3.6

The preceding statements refer to two of the amendments that Crosskey claims clearly were intended to apply to both levels of government. On the basis of Judge Story’s remarks this one must again conclude otherwise.

Until this point we have been devoted to an analysis of the Bill of Rights itself. Mr. Crosskey allowed himself the same privilege after making the charge that the decision of the Supreme Court in Barron v. Baltimore was a "sham", "unwarranted", and "without any basis at all." His conclusion, after covering this same ground is that the bill of rights, as the framers meant it, was to apply to both the United States government and the governments of the several states. When the Barron case came before Marshall’s court in 1833, the only point of appeal was the applicability of the Fifth Amendment. Barron felt that his loss of property, without compensation entitled him to protection under the federal Bill of Rights. Chief Justice Marshall gave the opinion for the Court:

The Constitution was ordained and established by the people of the United States for themselves, for their

---

3.5 Story, COMM. (1833 ed.) 696.
3.6 Id., 710.
own government, and not for the government of the individual states. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, necessarily, applicable to the government created by the instrument.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states . . .

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands . . . serious fears were extensively entertained that those powers, which the patriot statesmen . . . deemed essential to union . . . might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

We are therefore of the opinion that there is no repugnancy between the several acts of the general assembly of Maryland . . . and the constitution of the United States. 37

It is hard to view this decision as running contrary to the intent of the framers, the meaning of the words, or even the understanding of "men of the day". Yet Crosskey makes such a claim, stating that the decision was without basis.

In 1824 a Judge Walworth presided over the Courtland Circuit in New York. The question of the applicability of these amendments came before him; he allowed himself a broad opinion on this point. 38 This opinion which is partially

37 7 Peters (10 U. S.) 243 (1833).
38 Jackson v. Wood, 2 Cowan (N. Y.) 819 (1824).
quoted below, was also used in the same year by Chief Justice Savage of the New York Supreme Court, cited in *Murphy v. The People.*

The terms of these amendments are broad enough to embrace original proceedings in all courts. There is nothing in the fifth or sixth amendments, taken by themselves, to show whether they were intended to be thus extensive . . . It therefore becomes necessary, in order to ascertain the true construction, to refer to the causes which produced the amendments, to the time and manner of their adoption, and other attendant circumstances.

It is a well known fact, that, a very considerable portion of the people . . . were disturbed on the grounds that the powers of the general governments were not sufficiently limited. They insisted that the authority of the State governments was too much weakened . . . Several states . . . for a long time refused to accept the constitution . . . and when the state conventions finally ratified it, they recommended amendments and modifications mostly restricting the power of the United States.

Judge Walworth continued to note other points: First, is that the first session of the Congress, from which the proposed amendments originated, "expunged . . . the only one (amendment), restricting the powers of the states . . ." They also amended the preamble by reciting, as the reason (for the amendment): " . . . that the conventions of a number of states, had at the time of their adopting the constitution, 'expressed a desire in order to prevent misconstruction or abuse of its powers' . . ." Judge Walworth concluded:

. . . and in most of the other state constitutions, which have been formed or altered since that period (ratification) there will be found exceptions to the right of trial by jury, and other provisions, which are wholly inconsistent with the idea that these amend-

---

39 2 Cowan (N. Y.) 815 (1824).
ments to the constitution of the United States restrict the powers of the state governments.

I am therefore clearly of the opinion that these amendments were never intended to limit the powers of the state, or to control the proceedings of state courts...\(^\text{40}\)

Judge Walworth at this time found such inconsistencies in the constitutions of Alabama, Mississippi, Maine, and New Hampshire.

Seven years later Walworth became Chancellor of the New York Court of Errors. In *Livingston v. Mayor of New York*, two years before the *Barron* case, Walworth restated his former opinion thusly: "All the amendments adopted by the Congress at its first session, and afterwards sanctioned by the requisite number of states were intended to be restrictive upon its officers exclusively."\(^\text{41}\)

Obviously the aforementioned cases contradict Crosskey. In *Livingston's Lessee v. Moore*, reaching Marshall's court in the same year, Judge Hopkins of the Circuit Court of Pennsylvania had held that inconsistencies in the Pennsylvania constitution were not "repugnant with the constitution and amendments of the United States." This was affirmed by Marshall's court.\(^\text{42}\) In Louisiana in 1816, the case of *Rentrop v. Bourg* found the amendments applicable to the federal government only.\(^\text{43}\) In this case, reference was made to *Territory v. Hattick*, where again a similar opinion was rendered. There the Attorney General ruled that "the parts of the Constitution of the United States and its Amendments involved (6th) relate only to the trials of crime against the United States."\(^\text{44}\)

\(^{40}\) *Id.*, 821.

\(^{41}\) *Livingston v. Mayor of New York*, 8 Wendell (N. Y.) 85 (1831).

\(^{42}\) *Livingston's Lessee v. Moore*, 7 Peters (10 U. S.) 551 (1833).

\(^{43}\) *Rentrop v. Bourg*, 4 Mart. (La.) 97 (1816).

\(^{44}\) *Terr. v. Hattick*, 2 Mart. (La.) 87 (1811).
SUMMARY

At the outset, this paper was intended as a probe into the reliability and accuracy of William Crosskey's *Politics and the Constitution*. Mr. Crosskey presented the work as a complete and open study; and, since the work admittedly developed an unorthodox and controversial thesis, one could not avoid the significance of it.

Thus, the author has not attempted to refute Mr. Crosskey completely. (He has, in deference to Mr. Crosskey's thirteen years of study and research, taken a small point—the applicability of the first eight amendments—which occupies only one chapter). Crosskey's eighteenth century constructionary system and his own sources of evidence have been the ground rules. Throughout the paper his philosophy has not been challenged. Yet, by his method, certain contradictory facts have been brought to light.

It is my feeling that Crosskey approached the original amendments with a pre-developed philosophy of nationalism. The amendments seemingly were not as easy as other points to draw into this theory; thus he was forced to make some very unstable deductions. The various discussions in the state ratifying conventions give a distinct feeling that the delegates were predominantly fearful of federal power and encroachment. At the same time, they were also reluctant to give more state sovereignty than was necessary. Their words and the meanings of those words are clear. The very same feelings were prevalent in the public minds at the time. The framers, far-sighted as they are renowned to have been, were attempting to create a workable instrument, foremost for their countrymen, then their descendants. The compact was necessarily framed within the environment and philosophy of the era. Yet Crosskey seems to have given these men an inconceivable degree of foresight in his attempt to take up the 1787-91 instrument from its original position in the development of the United States, and place it down in a twentieth century setting.

The most striking note which Crosskey makes is the charge that the *Barron* decision is utterly "without basis", "un-
warranted'', etc. This position is untenable as Crosskey would have his readers believe the Barron case itself was.

Mr. Crosskey's work, as a brief, would be adequate and convincing, but to foster it upon his readers as a "scientifically tested and proven theory of constitutional history" is either a misconception of the scientific method or an inaccurate appraisal of his own objectivity.

It is my conclusion that the Constitution was a document which although durable and broadly phrased must be understood as a product of eighteenth century minds. Because veneration and sanctity surrounds it, America sometimes loses sight of the possibility of adapting it to change through its prescribed manner—amendment. The result is that the Supreme Court adjusts it to changing times and new situations through varied and strange practices. Yet it seems that this is the only way it still survives as the law of the land.

If they wish it to be immortal the true friends of the Constitution should be attentive, by amendments, to make it keep pace with the advance of the ages in science and experience.\footnote{Dumbauld, \textit{POLITICAL WRITINGS OF THOMAS JEFFERSON} 125.}

\textbf{David Whittingham}