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Final Contribution of John B. Sholley

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The touch of a vanished hand and
the sound of a voice that is still.

TENNYSON

The following is an unfinished review by Professor Sholley of POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES by William Winslow Crosskey, University of Chicago Press, 1953, two volumes, pp. 1410, $20.00.

Professor Crosskey opens his argument with a discussion of statutory draftsmanship as practised in the eighteenth century. The legislature usually contented itself with a relatively brief enactment in general terms, leaving questions of detail to be answered by the courts in the course of litigation. Under such an approach, of course, the courts were bound to "fill up the details" in a manner consistent with the intent of the legislature, as gathered from the statute as a whole and the known or presumed causes which moved the legislature to act. Very frequently, the legislature made a formal declaration of its intent in the form of a preamble for the very purpose of guiding executive and judicial officers in their duties of administering the statute. Today a preamble is usually[1] treated as a ritualistic rigamarole of little significance as compared to the "purview" or active parts of the statute, but in the eighteenth century it was quite otherwise. Indeed, a court, if convinced that the intent or "spirit" of the statute so required, felt free to depart from the "letter" and this departure could be either an expansion or a contraction of the "letter" by invoking what was then called the "equity" of the statute.[2]

[1] This attitude is justifiable with respect to most modern statutes because, as Crosskey points out, the current legislation fashion is that of spelling things out in great detail. It should be noted, however, that where the power of filling details is delegated to an "administrative" agency, the preamble may still well be of vital importance. See, e.g., Schechter v. United States, 295 U. S. 495 (1935).

[2] "These cases out of the letter, are often said to be within the equity, of an act of parliament; and so, cases within the letter are frequently out of the equity." Blackstone, I, 59-62, quoted by Crosskey at 367. Classic instances of the application of this approach to the Constitution itself are found in Marshall's opinions. In Fletcher v. Peck he held that an executed grant of land was protected by the contract clause, saying, "It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected." 6 Cr. 87 at 137 (1810). In the Dartmouth College Case, "contracts" of employment of public officers were said to be without the scope of the conract clause because the "framers" could not have intended "so mischievous" a limitation on state power. 4 Wheat. 518, , but charters of private eleemosynary corporations were held protected, Marshall saying: "The case being within the words of the rule, must be within its operation likewise, unless

Such were the normal eighteenth-century rules of statutory interpretation, Crosskey asserts, relying largely upon Rutherford and Blackstone, whose Commentaries had been very widely read in America prior to 1787, and such were the rules by which the Founding Fathers were guided in drafting the Constitution. If so, and the supposition is highly probable, the primary rule to be followed in interpreting the Constitution is to effectuate the "intent" of the "People of the United States," who are the "legislature" for this purpose. The draftsmen saw fit to express this intent in the form of a Preamble which was phrased in the broadest of terms, being a list of the "objects" of the new government which was practically all-inclusive. To achieve these objections, the government would need all governmental "powers." Hence, had the Constitution in its active parts, or "purview," consisted only of the creation, or "constitution," of the forms, agencies and departments of government, the government so created would have been vested with *general* powers for anything less would have defeated the expressed intent of the People. Nor would this conclusion be cast in doubt by the inclusion in the Constitution of the specific limitations upon the various agencies of government as found in Article I, section 9 and the first nine Amendments.

What has formed the textual basis for the accepted, or "federal," interpretation of the Constitution, is the presence therein of numerous specific grants of power, particularly to Congress, grants which, so the now orthodox view insists, are unnecessary and meaningless if general powers are conferred by operation of the Preamble. Hence, we have been taught to believe, the Framers could not have intended to vest general powers in the proposed government, and the People, acting through their delegates in ratifying conventions, could not have so understood the proposal and must have regarded the Preamble as a rhetorical flourish rather than an operative standard of interpretation. This conclusion is not necessarily inconsistent with the rules of statutory interpretation then current, for the purview of a statute, it was recognized, might clearly demonstrate that the legislature could not have meant what it said in the Preamble. Thus if a general purpose were stated, followed by the enactment of a series of particulars, the operation of the statute could properly be limited to the specified particulars, *if,* but only if, the enumeration would be meaningless if

there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception." Id. at

the general purpose were made operative. Hence, if the enumeration of specific powers in the Constitution would have served useful purposes in the face of express grants of general power to the three departments of government, we at least are not driven to reach the conclusion which underlies the current orthodoxy.

It is here that Crosskey makes what is probably his greatest contribution to our understanding of the intended meaning of the Constitution, for he provides an explanation of the presence therein of each enumerated power consistent with the assumed presence of general grants of power. To the extent that these explanations are convincing —I, for one, find them so—they undermine the textual basis of the orthodox interpretation and make it, at best, of possible, rather than probable, historical soundness. The accepted view, that the Framers intended that Congress have only the powers specified in Article I, section 8, and ôther places in the Constitution because all other legislative powers should be retained exclusively by the state legislatures, fails to explain many features of the Constitution. Why, for instance, was Congress specifically empowered to punish counterfeiting and not robbery of the mails, or of the mint, for that matter? And, why, if Congress was to be rather strictly limited, did the draftsmen insert the "general Welfare" and "necessary and proper clauses? Crosskey's explanations are built upon the assumptions, only partially supported in the present volumes and to be more fully supported in forthcoming portions of his monumental work, that the Framers intended to found a government adequately empowered to achieve the objectives recited in the Preamble, and that the draftsmen of the Constitution were highly competent and skilled lawyers, which latter assumption is hardly compatible with the now orthodox view

A third assumption, one which is almost a certainty, is that most, if not all, of the Founding Fathers were careful students of Blackstone, that most influential of all law teachers and most popular of all legal authors. Indeed, our author surmises that the Commentaries were open at the elbows of the draftsmen in Philadelphia. The Constitution would be largely meaningless unless read against a background of "standing law" to provide definitions of its terms, and the "standing law" of the United States in 1787 was very largely the law of England. That is, those portions thereof deemed suitable to conditions in this country. Blackstone was everywhere available in this country, and that meant that the Constitution would be interpreted in light thereof,

regardless of the occasional inaccuracies of the Commentaries.

Space precludes more than a cursory survey of Crosskey's explanations of the presence of enumerated powers. A large number of the specified powers of Congress were set forth to insure against an assertion of such powers by the President, for according to Blackstone, these powers were within the royal prerogative and hence might be construed to fall within the scope of the "executive Power" vested generally in the President by the opening clause of Article II. In this category fall, among others, the patent, constitution of inferior courts, and offenses against the law of nations clauses, and most of the "military" clauses. Moreover, since some of the powers which were enumerated to preclude their characterization as "executive" had been vested in the old Congress under the Articles of Confederation, it was deemed desirable to enumerate all of the other powers of the old Congress to avoid the possibility of a negative influence. This category includes the borrowing, coinage, post office, piracy and certain of the military clauses.

A third category includes those instances in which an apparently affirmative grant of power in qualified terms was in reality a device to limit a power which would otherwise have been unlimited. The draftsmen of the Constitution seem to have preferred this somewhat oblique approach, to the considerable confusion of succeeding generations. Thus the President was specifically empowered to enter treaties and appoint the principal officers, but only with the approval of the Senate, whereas his power to remove officers was not set forth and hence should be deemed unqualified. The naturalization and bankruptcy clauses were reinserted to prohibit Congress from passing special, i.e., non-uniform, laws in favor of named persons, as was the practice in several of the states during the 1780's. The copyright and patent clause precludes Congress from granting perpetual monopolies to authors and inventors, and negatives, by inference, the existence of perpetual rights at common law, for which there was then some authority

The taxing and commerce clauses were included in the enumeration of congressional powers, Crosskey contends, for "political" reasons, that is, to make perfectly clear to *all* readers, in 1787-8, of the Constitution that the proposed government would have those powers whose absence caused the greatest dissatisfaction with the then Articles of Confederation.

The "common Defence and general Welfare" clause gives Crosskey trouble, as it has all other analysts of the Constitution. Had it been accorded a paragraph of its own in Article I, section 8, Crosskey's book would almost certainly never have been written, for there would have been no need. Yet, as he points out, the clause makes little sense as a limitation on the taxing power, for the borrowing and spending clauses have no expressed limitations and an empty treasury must be filled even if its contents have been faithlessly squandered. Moreover, there *are* limitations upon all of the fiscal—and all of the other—powers of Congress. That body is bound to exert all of its powers *only* for the purpose of achieving one or more of the "objects" recited in the Preamble, and it would have made no difference if each enumerated power had been expressly so limited. Hence the "accepted" reading has no effect unless it is to restrict the purpose for which taxes may be levied to *less* than all of the preambular "objects," that is, for example, to forbid Congress to tax for the purpose of "establishing Justice" by paying judicial salaries. So it would seem that the "common Defence and general Welfare" clause either has no meaning or, as Crosskey asserts, it was intended as a grant of general legislative power which was set forth for "political" reasons.

But, if so, why not specify the other "objects" in the Preamble in the catalogue of congressional powers? Crosskey suggests that the Framers believed that "establishing Justice" was primarily the function of the Judicial Department, and "insuring domestic Tranquility," that of the Executive, while "securing the Blessings of Liberty" might well result from the political checks and balances of the form of government as a whole. Yet question remains, why did the Framers append the clause to the grant of the taxing power, rather than set it out independently? Crosskey can only say that even Homer nodded.

Which brings us finally to the "necessary and proper" clause, merely surplusage, it might be urged, if Congress has general legislative powers as broad as the Preamble. Not so, says Crosskey, for this is an indirect way of forbidding the other departments of government from legislating, as well as an express affirmation of the power of Congress to effectuate all of the powers of the "Government," including the otherwise only partially expressed powers—i.e., by the "general Welfare" clause—of achieving the objectives of the Preamble. As Crosskey notes, his reading of the clause in question is supported by the fact that during the ratification period and ensuing years it was frequently

described as the "sweeping clause."

Crosskey finds yet another source of general legislative power in the provisions of Article III. The jurisdiction of the federal courts, although not completely general, is obviously of sufficient health to bring all varieties of legal questions before the federal courts in the course of time. Hence, Congress was intended to have the power to prescribe the "rules of decision" for all such questions, that is, the power to require the federal judges to decide all non-constitutional questions presented to them in defined ways. This power, says Crosskey, was in 1787 regarded by all jurists as inherent in the relationship between the legislature of a government and the courts thereof.

The final chapter of Part III is devoted to the impact of the Tenth Amendment upon the powers conferred upon the national government by the original Constitution. Modernly this Amendment is usually regarded as an explicit declaration that Congress enjoys only such powers as are expressly delegated and a negation of the existence of a "general" power of legislation, and, furthermore, as a mandate to the Supreme Court to hold Congress within such bounds. It is unquestioned that, during the ratification campaign, one of the strongest objections to the proposed Constitution was the absence of any specific reservation of state "sovereignty" against the threat of national "consolidation"—which itself tends to support Crosskey's major thesis. The Federalist leaders probably made "campaign promises" to weaken the force of these objections. In any event, the Tenth Amendment was proposed by the First Congress, but in a form quite unsatisfactory to the States Rights members, who unsuccessfully attempted to insert "expressly" before the phrase "delegated to the United States" and thereby preclude the assertion of "implied" or "general" powers.

Crosskey presents convincing evidence that the actual words used were then understood, almost if not quite universally, as a restatement of the intended meaning of the original Constitution, as being in no way restrictive of the national government, and as a harmless reassurance of those who-mistakenly-feared that the express delegation of certain powers to the national government operated to impliedly prohibit the states from exercising those powers. Read in this light, the Tenth Amendment not only provides no textual basis for the view that was orthodox as late as 1936, but, on the other hand, is rather cogent evidence to the contrary