THE CONSTITUTION—APROPOS OF CROSSKEY

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Judges assume that their predecessors were men
of sense and reason such as themselves.

—OLD SIMIAN PROVERB

I

IT IS UNFAIR to say that William Crosskey's volumes on the Constitution are timely—and not add more. They are timely, in view of the crisis of 1953, but they are also, so far as any political system can be enduring, timeless. The larger meaning which they carry is as pertinent today as to the crisis of 1937—when part of the instant book was presented as a paper on "The Language of the Fathers" read before the American Historical Association at its commemoration of the 150th year of operation of our government under the instrument of 1787. And the chapters here in review are as applicable in the constitutional crises which have been muddled through as they will be valuable in the constitutional crises which the passing decades will bring.

It is inevitable that judges should substitute doctrines of their own for those which the Fathers set down in the original document. And such a rewriting of the law—even of the enduring principles of the higher law—is as necessary as it is inevitable. For the values which fix the objectives of public policy must change as the aspirations of men are broadened "with the process of the suns"; and, even as ends endure, they must be newly instrumented amid the changing circumstances of a dynamic culture or they will be betrayed. With the fact that there is substitution we can have no legitimate quarrel. But we may object—vocally, indignantly, rightfully—at the specific substitute, at the uncritical way in which it is contrived, at the violence with which it is thrust into place, at the severity of its break with the past. Here lies the real contribution that Professor Crosskey's volumes will make. They do not, they cannot, arrest the development of the body of law; but, if they are read and heeded, they will serve to make constitutional change a more intelligent, critical, and rational process than ever it has been.

The doctrines originally written into the Constitution are set down by

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Crosskey in a fulness and with a clarity heretofore unknown. The jurist who remakes the constitutional clause which he applies, and professes to respect, can no longer be excused on the ground that he is quite unaware of what he is doing. Upstart doctrines which fall outside the code of the higher law as of 1787 or are utterly alien to it are revealed for what they are. In these pages there is sounded, not a call to constitutional statics, but a warning that those whose task it is to remake the Constitution must be aware of what they do.

It is the genius of the Constitution of the United States that it has never remained static long enough to receive definite statement. The Federalist Papers, which are a classical gloss rather than an authoritative guide upon the original text (or at least that part of it written at Philadelphia), attest differences in understanding among its three dominant authors—and perhaps a ghost writer or two—who were in position to speak with authority. I say the part written at Philadelphia, for the first ten amendments are amendments only in a technical sense. They are in reality an integral part of the original document; without their addition the Constitution would never have become the law of the land. It required no formal amendments to make the Constitution as expounded by John Marshall a body of doctrine on which John Jay and Oliver Ellsworth, who had preceded him in the office of Chief Justice, could never have passed an examination. In the late 1830's Joseph Story accused his newly appointed brethren of sacrilege to the memory of the sainted Marshall for the liberties in interpretation which they had taken. In point of fact, Story himself was not quite clear as to the line of division in the Constitution between the original and the pronouncements of the eminent Chief Justice. By the middle '50's, the Supreme Court was serving up raw material to the great "constitutional lawyers" who sat in the United States Senate; and Webster, Calhoun and his mouthpiece Hayne, and others had come to regard the Constitution itself as existing largely for didactical purposes. The infusion of country lawyers into the Supreme Court by Lincoln brought its own change in direction. By the turn into the twentieth century belief in laissez faire had become a cardinal article of constitutional faith; in the parchment which was a legacy from the late eighteenth century there was clearly to be read a prohibition against intrusion by the state into the province of the free and open market recognized as sovereign in all matters economic. By the middle 1930's, through a recently acquired capacity to read between the lines, the Supreme Court had been endowed by the Constitution with a veto power over the Congress in all matters involving public policy. But

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as the Court was reconstituted by F.D.R. much that had been clearly visible began to fade, even if not entirely to disappear, and canons of interpretation which some critics have mistaken for a cult of irresponsibility have come into the ascendancy. In the fact of change there is nothing startling or even unexpected. The document of 1787 could not have become and remained "the living constitution" unless it had the capacity to adapt itself, as one of our greatest jurists once put it, "to the infinite variety of the changed circumstances of life." Nor can I read the pages of these volumes without finding in the Constitution itself an invitation to adaptation and reinterpretation.

Such an invitation—even if it is specifically withheld—is inherent in the very nature of a political instrument which is regarded as fundamental. The laws of the Medes and Persians are reputed to have been unchanging, but scholars report that even the scanty evidence on application which has come down to us refutes the conclusion. The Ten Commandments may have remained intact from the time of Moses down to the present day. But the honor which children were at the time of their origin expected to pay to parents would seem outrageous to us today. And the adultery there forbidden by divine command is subject to civil definition. Long after the Law-Giver had gone to rest on Nebo's lonely mountain the cohabitation of a man mighty in the land with many women did not fall within the prohibition; and today, as our multiplex of state codes go, a man who in one state is an adulterer in another may be a bigamist or even a celibate. The Twelve Tables, which were doubtless a codification of established usage, preserved their literal integrity from the Puritan days of early Rome well down into the times of urbane and worldly Caesars. Yet the gloss of judicial decision set down in the palmy days of the Empire has lost the severities which were its mark when the pater familias was lord and master. The Magna Carta was for long only one of a number of charters in which the rights of privilege were made secure against the royal prerogatives. So little did it signify to lawyers or to the people that it did not even occur to Shakespeare to mention it in his history of King John. But the coming of the Stuarts brought to the archaic lines of a forgotten document a meaning which had never been there. The words on parchment were the least among the elements which went into a political creation of the eighteenth century. So it has been with the Bill of Rights. It is quite certain that, even if he read it, George III did not understand the grand recitation of the unlawful acts of the English King which makes up the middle section of our Declaration of Independence. It is a historical

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fact that George III and Thomas Jefferson later did meet face to face. The details of the occasion are lost, but the only safe guess is that they found nothing to say to each other.

It is a little presumptuous for one generation, through a Constitution, to impose its will upon posterity. Posterity has its own problems; and to deal with them adequately it needs freedom of action, unhampered by the dead hand of the past. Restraints can be passed along the decades only by a generation persuaded that the wisdom it has acquired will somehow be denied to those who come after. But the dominion of the dead over the quick is too loosely held to invite lament. The Fathers may issue mandate after mandate to their successors; but they lack capacity to compel obedience unless they are understood and understanding is blocked by the stubborn fact that verbal currency passes uncertainly between the generations. For this uncertainty there are many causes. As instruments of communication, words are deceptive things. No rule of diction can assign to a word such as *power* or *process*, *contract* or *obligation*, a province of its own and fence it within boundaries which it is forbidden to transgress. As it is set down, in writing or in print, it takes its meaning from its context which endows it with color and with implications that, standing alone, it could never possess. As it goes ringing down the years on the tongues of a myriad of people it may take in new territory as little by little it surrenders a part of its ancient domain. The playwright of the Old Globe knew what he meant when he used the word "discovery" in connection with the raising of the curtain. Our grandfathers used the word "notorious" in the colorless sense of being well known; it is to us today a highly colored word, employed in forgetfulness of its etymology and suggestive of the scandal sheet. The word "humour" has lost far more than the "u" as it has come down from Ben Jonson to Maxwell Anderson.

All of this is far too obvious to become a guiding principle of constitutional law. The easy way is for the advocate, the essayist, and even the judge, to say, "When the Fathers wrote the Constitution they meant by any word just what I mean by it, or what I want it to mean." A great contribution of Crosskey's volumes is a return to simplicity; a recognition that the Fathers were not "men of sense and reason such as ourselves"; that they were differently circumstanced, were confronted by other and distinct problems, and breathed another and a different intellectual atmosphere. Their language is the more deceptive because of its superficial resemblance to our own. But even in little matters of speech distinctions in usage betoken differences in thought. Crosskey, for example, makes

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much of the use of plural verbs with what appear to us to be single subjects, e.g., "Virginia feel" or "Pennsylvania think." The nouns, of course, are collective in character. The groups are considered as still too diffuse to be dealt with as clearcut entities. As a result, each of the several states is primarily thought of rather as an aggregate of people—with all the diversity which such an aggregate must possess—than as an organized and homogenous political community. It appears, too, that "the people," to whom were left the rights not specifically prohibited to the state governments nor vested exclusively in the federal government, was not to the Fathers a homogenous "body politic" but rather an aggregate of all sorts and conditions of mankind. Verb and noun in their disparity attest the lack of an overruling notion of uniformity in the words of the Fathers.

In like manner, Crosskey sets out to draw back through all the mutations which a century and two-thirds have brought to discover exactly what the Fathers meant when they used the word "commerce." It is not a word indigenous to economic or business speech. It came into the language as a verbal symbol for contact, intercourse, communication, the co-mingling together in organized society. Its contours extended far beyond the market place and it transcended activities which had to do with the buying and selling of commodities or even their production for exchange. In a pecuniary sense, the commerce of a number of the several states constituted the thinnest sort of a stream. The Fathers would never have thought of the scanty stream of vendibles headed for market as the commerce of their several states. The power "to regulate commerce," Crosskey shows, was a power to govern "all gainful activity" among the people of the states. The interpretation in these volumes is in strict accord with the original Randolph resolution which came into its definitive statement in the "commerce clause" of Section 8 of Article I. The resolution proposed to endow the Congress with power to act in all matters which lie beyond "the competence of the several states." As such, it is as clearcut as it is comprehensive in its mandate; and it is unfortunate that a functional definition of legislative power was superseded by a definition set down as an area of regulation. It is more unfortunate that, as the word "commerce" lost a large part of the human activities for which it once stood the legislative power delegated by "the people" came to be restricted. It is peculiar that the drift of a word from its ancient meaning should have narrowed the legitimate province of federal regulation. The careful marking of the ancient desmaine is typical of the work in restoration in constitutional law which Crosskey has so imaginatively and painstakingly accomplished.

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II

If a decade ago I had been asked whether the United States has a written or an unwritten Constitution I would have replied, "I do not know." If the same query were put to me today the reply would be, "There is no such question." For, after delving into the two Crosskey volumes, as many questions dance on the point of a pen as ever angels staged a ballet on the point of a needle.

A search for its authors will attest the nature of the Constitution. The hunt begins, of course, at Philadelphia in 1787 where the Founding Fathers "in Convention assembled." In one way or another all who were present had a share in paternity. There was, first of all, James Madison, who by wide reading and alert study had for some time tried to anticipate and contrive answers to the problems which such a convention would pose. He was in particular concerned to subdue the violence of the struggle between the interests which make up the commonwealth into questions which could be stated and resolved within the decorum of orderly parliamentary procedure. He was also bothered by the historical fact that almost without exception the successful republics of the past had been city states and he was intent upon creating a system where that principle could be applied on a continental scale. There was Gouverneur Morris, the Philadelphia lawyer, who emerges in Crosskey's work as one of the chief architects of the document. There was Edmund Randolph, head of the Virginia delegation, who was resolved that matters which lay beyond the competence of the several states, such as the rising commerce of the new republic, should be saved from the current anarchy. There was George Mason who, among as able a group of country squires as was ever assembled, somehow knowingly or unknowingly brought a touch of democratic thought into the deliberations. There was James Wilson, who during the Revolution had from experience fortified his scepticism of the mercantile system—an article of faith or of disbelief which he had first learned as a student from Professor Adam Smith himself. There was Alexander Hamilton, closest of all to the presiding officer, George Washington, who held in high esteem a government by the noblest, the richest, and the best and who was sure that he could adapt its principles to the new great commonwealth which—if only his fellow delegates would be wise—he saw ahead. There was the loquacious Charles Pinckney who on occasion came across with an idea, indigenous or borrowed. There were the score or more of delegates who, so far as the records attest, made only the constructive contribution of silence to the proceedings and the affixing of their names

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to the emergent document. And there were, finally, the handful of human beings, such as Gates and Lansing, who, finding the whole affair distasteful, left the hall in disgust or refused to sign the parchment and thus sought to insure to themselves immunity from immortality.

But even so short a recitation carries the search for authorship afield. The importance of the event at Philadelphia does not obscure the continuity of constitutional history. This creation—this superb political creation—was contrived from the best of the stuff at hand. Madison was no researcher, who garnered what to him seemed valuable and piled up facts, like bricks, into an imposing edifice. Instead, he began with insistent questions, foraged far and wide for exactly what he required, and beat his raw materials into an organic whole. In the shaping of the Constitution of 1787, ideas, usages, diction from many sources lose their marks of individual identity, yet survive in the fabric which is woven. Take away the past—and the Fathers would have lacked the materials with which they built. Take away the Fathers—and the material would have gone into another sort of edifice or would have remained inert. Who, then, can say that men of old, whose words helped to shape the kind of government which befits free men, were not as truly as Franklin, Madison, and Wilson to be numbered among the Fathers of the Constitution? An intellectual venture which is as alluring as it is unconceivable is to draw up a list of the men whose influence has been sufficient, directly or indirectly, to entitle them to be numbered among the Fathers of the Constitution.

Through a single event in time the whole course of history may flow. In Article II the office of the Chief Executive is set down in almost obvious words. Yet back of the simple statement lie some centuries of history with living events shaped by a host of unlike actors. For the Presidency is the Monarch of old, whose absolute prerogative has been subdued by law and whose divine right has been turned into a series of specific and limited powers. The words and deeds by which the appointed of the Lord became the servant of the electorate occurred for the most part long before the hot summer of 1787 set in and in places far removed from the City of Brotherly Love. A circumlocutious method of selection—which within two decades had to be made over—was the only real innovation. The legislative branch likewise bears the marks of time and of a changing culture. The idea of a bicameral system was too firmly implanted by tradition and uncritical acceptance to be given up, even if only historical accident had brought it into being and whatever rationale it had once possessed was alien to its American use. There had come to be, without anyone intend-

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ing it, two houses because very early the Lords Spiritual and the Lords Temporal had recognized their common interests in an Act of Union and the Commons, representing interests which were in conflict, were not content to remain mere bystanders in the political order. In America it was easy enough to commute the House of Commons into a House of Representatives. But a House of Lords, with all the pomp and circumstance it entailed, was quite out of place in a republic; the aristocratic had to give way to a more republican appearance. It had come about—a creative touch badly needed in late eighteenth century America—that the city state of old, particularly Athens and Rome, had been endowed with a prestige which they never as living republics deserved. Note, for example, the host of Greek and Roman place names which fill the map. Rome was a Republic—at least the Rome the Fathers venerated. Rome had a Senate, a body made up of the good and wise and not, to the Fathers at least, a body of peers. So a Senate, composed of representatives from the states which had but recently acquired more or less of sovereignty and elected for the limited period of six years by the legislatures thereof, transformed the ancient hereditary and ecclesiastical estates into an American Upper House. Here, too, the creative work was not gigantic; the pioneering had already been largely done by the colonial assemblies recently become state legislatures. Here too the materials for the work were at hand but the choices which had to be made were not inevitable and, above all, it was fortunate that men were at hand blessed with the gift of creative authorship.

The events in England and America from the early seventeenth to the late eighteenth century had made the government the instrument of the state. The days of the Stuarts were still fresh in the minds of the Fathers. In the Declaration of Independence the bill of particulars which makes up the eloquent middle section is cast in the form of the unlawful acts of His Majesty George III. For that reason, so far as there could be any supremacy in the system of checks and balances set up it lay in the legislature. It has been remarked that the power conferred by the People of the United States upon the Congress is so concise that it could be written upon a postcard. In the light of his general thesis that a national government was being set up, fitted out with all the necessary powers to govern, Crosskey is bothered as to why it was deemed necessary to enumerate these powers. In respect to different powers Crosskey gives different, and usually persuasive, reasons. As regards the majority of the powers, his argument is that the Congress is being endowed with powers which under the British Constitution belonged to the Crown. In fact, there had, especially in the

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period of 1688 to 1787, been a shift—always startling, often notorious—from the Crown to the King's Council to the Parliament, so in terms of downright fact it is the British Constitution which is being copied. In form, however, the power to legislate remained still with the Crown and measures of Parliament were still cast as recommendations awaiting the pleasure of His Majesty. Even if, in fact, the King had no alternative but to sign, the fiction of the royal freedom of choice was still preserved. Although he is not in accord with orthodox scholarship, Crosskey seems to me quite right in his insistence that the powers conferred upon the Congress are plenary, not partial or limited or contingent. The case for each is strengthened by the list as a whole. Section 8 of Article I is a catalogue of the powers which were deemed essential to the practice of political economy—that is, to the making and execution of public policy—by men of the late eighteenth century. Without such an arsenal the new state which was taking its position among the nations of the earth could not operate. These were the powers which the operation of a mercantile economy demanded; and the Fathers of the Constitution, true to the thought of their own times, were mercantilists.

It seems unnecessary to go on. Line after line, clause after clause, has its origin in some memorable event and proclaims continuity with the past. If the occasion is new, if much expediency is called for, if there has to be compromise between the interests which make up the commonwealth, nevertheless the material which had to be adapted, shaped to new ends, fitted to an inchoate yet continental republic was at hand. The really creative work of the Convention has been recited and appraised time and again. It has, however, not been fully appreciated that the Constitution of the United States had been in the making long before the gentlemen of substance and standing—called the Fathers in spite of their average age of forty-three—met at Philadelphia. What they tried to do was to catch up the usages which experience had approved, add to them essential political inventions of their own, impart a flexibility to elements from many sources, and contrive an instrument which would serve as a general guide to the new republic for the venture ahead.

III

It is a challenging adventure—that of committing a Constitution to parchment—but from it there was for the Fathers no escape. So long as kings ruled by divine right there had been no need to put the conditions of their tenure in writing, for the right was as absolute as the divinity from which it sprang and to give it definition or to appoint its limits was to deny

its existence. But as the king's pleasure came to be confined to an appointed orbit and as its exercise was channeled into approved ways, it had to be supplied with a new source. There was hesitation, stumbling, tentative statement; and at length came the felicitous concept of "the consent of the governed." With the rise of the doctrine of "the social contract," the dominant analogue of political power ceased to be real property and became contract. The people contracted between themselves as an organized community and themselves as an aggregation of individuals to accept "law and order" and to establish a government shaped to their own requirements.

A power which is absolute needs no certificate of authority. A government which is not despotic is constantly called upon to justify its exercise of power. A social compact may in time become manifest in a system of usages which, even if not immune to time, can maintain a high degree of stability. But the necessity for the American Revolution had demonstrated how easily misunderstandings might arise between the government and the governed and showed the wisdom of putting it down in writing. In England at the time the use of written documents, at least as evidence, was in vogue. In the New World came the bold idea of engraving the whole social compact on parchment, and as colony after colony put on the trappings of statehood it took a fling at turning a royal charter or some like instrument into a constitution. The age of contract demanded that the arrangements which constitute a government which is to be an instrument of public policy be put in writing.

It was, of course, an impossible task. The technique of the scribe had to be invoked for a task which lay beyond its utmost competence. The expediencies which are rooted in experience are living things, tangled into the whole texture of a culture; yet, when captured and imprisoned in a document, they had to be represented by words, phrases, and clauses. Experience moves on one plane and literary expression on another. And, although the one is substance and the other vehicle, an accommodation between them which is as practical as it is exact has never been contrived. In fact, it is among the most parlous of all adventures to entrust a series of living mandates to an inert document. The commands, undertakings, arrangements—the social contract if you will—must of necessity take the form of brief statement. The words in which they are cast are general and even abstract. The reasons which brought the series of mandates into being—reasons in which inhere their power to compel—are stripped away in the writing. These reasons are often inseparable from long chains of events—struggles or crusades which have occupied decades or even cen-

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turies and which have been dramatized in concrete happenings that have left an impress upon men's souls. What is vivid and real and obvious to the Fathers—because they have personally shared in all which lies back of a phrase or a clause—reaches posterity only in the form of words. And even if the past is not neglected the hearsay of history is no substitute for a personal role in stirring events.

As the Fathers were men of their own age, whose spirits responded to and whose minds could not transcend the culture within which their lives were cast, so were the Sons, the experienced interpreters. It was not the writing and all which lay back of it, but rather what was read in it by more or less alien eyes, which came to signify. As the Fathers made words mean what they wanted them to mean, so the Sons read them, in the same spirit and to a different effect. The struggle in England to abate the royal prerogatives, with which the minds of the Revolutionary Fathers were filled, receded. Even the Revolution itself lost its position as a contemporary event and nationalism and unity, which had been so important, lessened—even if they did not lose—their persuasive power. Just as Otis and Hancock and Samuel Adams could not quite become Pym and Milton and Hampden, however ardently they cast themselves in those roles, so Marshall and his brethren, close as they were to the events at Philadelphia, could not quite become Constitutional Fathers. Crosskey is, I think, a little severe on James Madison because his views changed with the changing political scene. It seems inappropriate to regard him as a graphic illustration of what the mind of man will inevitably do with words engraved on parchment. If Madison, who had not only been there but was present among the actors, could fall into—or even joyously embrace—error, what of the jurists, great and little, of posterity, who were shaped by different environments, matured their views on alien experiences, and assumed—because any other course would be laborious, painful, and almost impossible—that the authors of the Constitution were men of sense and reason such as themselves?

Such a temptation to departure from pristine meaning is present in even the most static society. In a society such as ours, where the dynamic impulse has always been dominant, change constantly calls for adaptation —if only to preserve the old values. Situation after situation is presented to the courts which the Fathers never confronted and hence could not have anticipated. It is sheer speculation to state what they would have done—and what the Constitution commands—under such alien circumstances. The Constitution is treated as a sanction and causes of law are to be resolved in its name. Where there is no explicit language to guide, meanings

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which are relevant must be found in the most responsive lines. Here the intent of those who drew the instrument must do duty as best it can for words which are not there. And where the instant case—as, for example, in radio broadcasting, oil depletion, or air carriage—presents problems which people of the late eighteenth century never contemplated, there is still at hand a frame of constitutional reference. For the word "manifest" can be placed before the word "intent"; and the judiciary may talk learnedly about "manifest intent," that is, what the Fathers would have intended had they been confronted with the circumstances of the instant case. And no one can prove that in such speculation the courts are beyond any peradventure wrong. No document can preserve its original integrity when beat upon by such hammers as the march of time has at its command. Usage, the creation of a changing culture, has a way of impressing itself upon the lines of any document which serves to carry down the generations a legacy of command. The quarrel which Crosskey has with the interpreters is not, I suspect, because of departures from what was really written in the original text. It rests, rather, I take it, upon two grounds—that the departures have been made in an unintelligent way and that they have moved in the wrong direction. It is an axiom of judicial interpretation that one who departs from the accepted text should understand what he is forsaking and that he should have good and sufficient reasons for the new script. In general, this has not been true of the exposition of constitutional doctrine. Too often strange tenets, the handiwork of advocates for special interests, have won the adherence of the Supreme Court. For illustration, one has only to note the multifarious ways—running from states rights through interstate commerce to the delegation of power—in which the courts have read a theory of laissez faire utterly unknown to the Fathers into dominant clauses of the Constitution. The expounders did not know—in cases, they did not care to know—what the Founders of the Republic had in mind. So far as ignorance goes, it can no longer be an excuse; for Crosskey has established the great majority of his theses beyond peradventure and has created an all but impossible task for all who will challenge them.

More important is the fact that many of the departures have been in the wrong direction. They represent an attempt, from which the courts have not been completely immune, to turn back the clock. As decade has followed decade, an aggregation of petty agrarian economies with a fringe of industry has been converted into a unified and highly diversified economic entity continental in reach. With this march, one would expect the power of the Congress over commerce among the several states to be little

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by little enlarged until, with the move into the twentieth century, it became plenary, as a truly national economy demands. Instead, the concept of the Fathers better fits the circumstances of today than does that of the jurists who have covered up the original text of "commerce among the several states" with the corroding gloss of "interstate commerce." So corrupting has been the exegesis that even today courts dare to undo the harm only in a piecemeal fashion. Had the Fathers been permitted to have their way, we would long ago have had a truly national code of commercial law and there would be none of the confusion which a multitude of sovereignties with power to command has brought into our economic life. And had the mandates of the Judiciary Article and the Full Faith and Credit Clause been preserved, they would have gone far to fit out the nation with a simple, uniform, and definitive code of law. Above all, Crosskey has fought valiantly in his crusade against the trend—not yet entirely out of fashion—of looking upon and interpreting the Constitution as an aggregation of fragments. It is a unified document and each clause must be read in its context. It is high time for the Preamble to be restored to its place as an integral part of the document; it states the objectives of national government and the political structure which is dedicated thereto, and the powers with which its several branches are endowed have significance only in terms of the ends of public policy they are intended to serve.

These two volumes will draw forth sharp criticism and bitter disagreement. The work would have far less significance if it did not do so. Critics are as other men; and, even as and like other embroiderers on ancient texts, are not fully aware of the ultimate sources of their judgments. Something other than Crosskey's paragraphs will get into the thing which is appraised. Certainly his boldness, justified as it is by the documents, will not appeal to timid souls who are shocked by all novelty. The monograph boys and the pedants who conceive of scholarship as an excursion in myopia will loudly voice disapproval. Then there are those who have, by the heroic use of the pen, created for themselves vested interest in established articles of constitutional faith. To them acceptance of the Crosskey thesis will be anathema. In particular, all those who expect dividends of prestige from established scholarship will entrench themselves behind their publications and defend their frontiers to the last footnote.

It is, I think, my differences with Crosskey which make me so conscious of how superb his contribution is. He makes the Constitution more of an entity than I can, less of a document through which the whole stream of history flows. To Crosskey its mandate is more self-contained, more com-

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pelling, more enduring than to me. We agree, I think, in admitting the flexibility of at least many of its provisions. We differ in that the correcting—or, if you will, the corroding—impact of time seems to me far more inevitable than to him. And, above all, I am far more prone than he to merge the parchment of 1787 into a stream of usage in which its identity is hard to discover, if not entirely lost. In a word, he puts more faith in the capacity of the writing in itself to maintain law and order than I can command. And I return from his pages with my skepticism renewed that there is no such question as to whether we possess a written or an unwritten constitution.

Never has so adequate a gloss—fashioned from materials from a hundred sources—been written to an authoritative text. It is for this reason that Crosskey's volumes are timely—that is, they are for all time.

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