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WILLIAM CROSSKEY AND THE COMMON LAW

by Larry Arnhart*

It is remarkable that William Crosskey’s massive work on the Constitution is today almost totally neglected. In 1953 his book was reviewed in most of the major law journals and in many newspapers and literary publications. Although many of the reviews were favorable, some were quite hostile. Apparently the adverse reviews—particularly those by Henry M. Hart, Ernest Brown, Julius Goebel, and Charles Fairman—were influential enough to create a pervasive impression among lawyers and legal historians that Crosskey’s arguments had been thoroughly discredited.

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1. W. Crosskey, Politics and the Constitution in the History of the United States (1953) [hereinafter cited as Crosskey].

2. The two volume work, simultaneously published, was reviewed in twenty-eight law journals and fifteen non-legal publications.


An illustration of the influence of the reviews attacking Crosskey is the following comment in a review of a book that relied greatly on Crosskey’s work: “All things considered, Crosskey must be taken with a great deal of caution. Reviews of his book indicate that original research is desirable. I do not know whether Bozell has read these
My intention is to cast doubt upon this unfavorable view of Crosskey and to argue that his work deserves more serious attention from students and scholars of the Constitution than it has received up to now. In particular, I shall examine Crosskey's thesis concerning the adoption of the common law in America in light of the criticisms made by Julius Goebel in his famous book review.\footnote{Ex Parte Clio, supra note 6.} If I succeed in showing that this small but important part of Crosskey's book can survive the unfriendly scrutiny of one of America's most prominent legal historians, then it could justifiably be concluded that his book is more formidable than has usually been thought.

Crosskey contends that by the time of the American Revolution, the English common law, except for those parts that were inapplicable to colonial conditions, was the general uniform law of the colonies as a whole. The constitutional or statutory "reception provisions" enacted by the states after 1776 recognized the continued existence of the common law as the general law of America although the imperfect union of the states under the Articles of Confederation prevented the effective application of this law. The Constitution, by establishing a vigorous national government, vivified this pre-existing common law as one of "the Laws of the United States," as stated in Article III, section 2.\footnote{The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ." U.S. Const. art. III, § 2.}
Crosskey uses this theory of the American adoption of the common law to buttress the general thesis of his entire work—that the Constitution grants Congress "a general national legislative authority,"11 which makes it supreme over both the state governments and the other branches of the national government. He infers that Congress possesses "a general judicial-rule-making power" in that it is empowered to make all laws "necessary and proper" for executing all the powers vested by the Constitution in the national government.12 This includes, of course, the judicial power of Article III.

Americans in the eighteenth century, Crosskey explains, thought that such legislative control of the courts was necessary so that judicial discretion could be restricted by statutory "rules of decision,"13 thereby preserving the Lockean principle of legislative supremacy, according to which the power of making laws is the supreme power in a state.14 Therefore, Crosskey concludes, the powers of the federal judiciary and Congress are intertwined: if the authority of the federal courts extends to matters of common law, then the authority of Congress, in the exercise of its judicial-rule-making power, must be co-extensive with the common law, which entails a general legislative power.15

But is it true that legislative supremacy is fully compatible with a national common law? Or, rather, is it not the case that they conflict with one another because they represent conflicting theories of law? Crosskey notes the problem without drawing attention to it, when he reports that the various forms of world-wide law that were presumed to be parts of the common law could be abrogated by the sovereign legislative power of any nation.16 According to the traditional conception of law, the common law is superior to statutory law because the common law is derived from natural law, whereas statutes are only acts

11. I Crosskey, supra note 1, at 363.
12. Id. at 504-05. U.S. Const., art. I, § 8, cl. 18 provides that Congress shall have power:
   To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
13. I Crosskey, supra note 1, at 522.
14. II id. at 1325 n.25.
16. I Crosskey, supra note 1, at 576-77.
of will. "Common law rules are discovered, statutes are made." But the Lockean theory of legislative supremacy depends upon the modern conception of law, according to which all laws are made by a sovereign will. It has been argued that although the modern view of law became the prevailing theory of American jurisprudence in the early part of the nineteenth century, near the end of the eighteenth century the modern and traditional theories existed simultaneously, creating some ambiguity in jurisprudential theory.

A similar ambiguity appears in Crosskey's theory of the American common law. Although Crosskey's work is dominated by legal positivism, which is consistent with his advocacy of national legislative sovereignty for Congress, he has great difficulty in trying to explain the American adoption of the English common law without relying on the traditional theory of the common law as the law that is not derived from the acts of a sovereign legislature.

In evaluating Crosskey's theory of the adoption of the common law, as well as Goebel's critique of the theory, it might be useful to consider first Crosskey's view in comparison with other leading theories of early American law. Therefore, the first part of this article shall survey and assess three of the most prominent theories, and then analyze Crosskey's position within the context of the continuing controversy as to the nature of the law in early America.

The second part of this paper will study Goebel's book review with attempts being made at every point to answer his criticisms in a manner consistent with Crosskey's text. Goebel's general argument will be seen to rest on the problem just mentioned, for he cites the manifest diversity


19. See notes 37-40, 97, 99, 131-32, 224-25 infra and accompanying text. Expositions of legal positivism may be found in J. AUSTIN, LECTURES ON JURISPRUDENCE (1885); KELSEN, note 17 supra; H. HART, THE CONCEPT OF LAW (1961). See also D'ENTREVES, note 17 supra at 174-78.
in the legal practice both of the colonies and of the states under the Articles of Confederation to refute Crosskey's view of the American common law as a uniform national law. How could the common law emerge out of the varied legal systems of early America to become a single law for the whole country? That is the question that Goebel poses to Crosskey. It should be emphasized that at times the cogency of Goebel's criticisms will be conceded since the purpose of this article is not to defend all of Crosskey's arguments as completely sound, but to show that they always merit our closest study, even when we find them dubious. Therefore, they cannot be as easily dismissed as Goebel seems to think.\textsuperscript{20}

I. THEORIES OF THE COMMON LAW IN EARLY AMERICA

Most students of American colonial legal history would probably accept the following sketch of the history of the English common law in the colonies.\textsuperscript{21} The original colonial charters generally contained one or both of two kinds of clauses pertaining to English law. One stated that the settlers possessed the rights of Englishmen, and the other required that the laws made by the chartered company or proprietors be consonant with English law insofar as it was applicable to colonial conditions. Yet despite these provisions in the charters, colonial laws diverged greatly from English law during the early history of the colonies. The leniency of the English authorities permitted it, and the peculiar circumstances of colonial life demanded it. Nevertheless, even during the early years the colonists applied some elements of the common law, usually without the procedural technicalities of English law. As English law-

\textsuperscript{20} Ex Parte Clio, supra note 6, at 451: "Let it be said at once that Mr. Crosskey's performance, measured by even the least exacting of scholarly standards, is in the reviewer's opinion without merit."

Goebel shows his disdain for Crosskey's work by not even mentioning Crosskey's book in J. Goebel, History of the Supreme Court of the United States (1971) [hereinafter cited as Goebel]. See Horwitz, Book Review, 85 Harv. L. Rev. 1076, 1081-82 (1972) [hereinafter cited as Horwitz].

\textsuperscript{21} See Goebel, supra note 20, at 1-8; R. Morris, Studies in the History of Early American Law 17-21 (1930) [hereinafter cited as Studies in Early American Law]; Chafee, Colonial Courts and the Common Law, 68 Mass. Hist. Soc'y Proceedings 132 (1952), reprinted in Essays in the History of Early American Law, supra note 9, at 53, 55-60 [hereinafter cited as Chafee]. Flaherty, supra note 9, at 3-4; Morris, Foreword to Law and Authority in Colonial America vii-xi (G. Billias ed. 1970) [Foreword will hereinafter be cited as Morris; the collection of essays will hereinafter be cited as LAW AND AUTHORITY IN COLONIAL AMERICA]. For a survey of the major works on colonial legal history see Johnson, American Colonial Legal History: A Historical and geographical Interpretation, in Perspectives on Early American History 250 (A. Vaughn & G. Billias eds. 1973) [hereinafter cited as Johnson].
yers arrived in the colonies during the eighteenth century, colonial law assimilated larger and more technical portions of the common law. By the time of the Revolution, the colonists had established as their fundamental law the common law, in combination with other types of law, and modified it to make it suitable to American conditions. Finally, after the Revolution, the states ratified this development by constitutional or statutory declarations of the continued authority of the common law as state law.  

But what types of law replaced the common law during the early periods of American settlement and to what extent did they exist even after later adoption of the common law? How did the colonists modify the common law? Did they receive the common law in a uniform manner, or was there diversity from one colony to another? Were there thirteen different legal systems in 1776, or was the common law a basis for legal uniformity? These are some of the questions that have created the divergent theories of colonial law among legal historians.

It will suffice for our purpose to follow Zechariah Chafee’s suggestion that there are three major theories of the American adoption of the common law—one proposed by Joseph Story, a second by Paul Reinsch, and a third by Julius Goebel.

A. Story’s Theory

According to Justice Story, the colonial settlers took the common law with them to America.

The universal principle (and practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law. Story challenges Blackstone’s view of the American colonies as con-

22. Morris, supra note 21, at vii-xi; Chafee, supra note 21, at 55-60.

For a study of Story’s views on the common law in America see J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 160-93 (1971) [hereinafter cited as McCLELLAN].
quered lands and hence not entitled to the laws of Englishmen. He appeals to the original colonial charters—to their declarations that the colonists were to be considered natural-born subjects and to their stipulations that colonial laws were to be consonant with those of England—as "an irrevocable annexation of the colonies to the mother country, as dependencies governed by the same laws, and entitled to the same rights." Furthermore, he contends, even if the colonies were regarded as lands taken from the Indians, the rule as to conquests would not apply to the English settlers themselves, who occupied the lands after the Indians vacated them.

The defect that legal historians commonly attribute to Story's theory is that it is too simplistic to explain the complex facts of colonial law. However, Story regards the common law not as a rigid body of laws but as a "system of principles, which expands with the exigencies of society." Story believes that the American common law is not a fixed substantive or positive law, rather it is a system of flexible principles of justice that require discretion in their application. It consists "of elementary principles and of juridical truths, which are continually expanding with the progress of society," and among these are "certain fundamental maxims . . . which are never departed from" and "others again, which though true in a general sense, are at the same time susceptible of modification and exceptions, to prevent them from doing manifest wrong and injury." These necessary modifications of the common law emerge best from "the gradual application of its principles in courts of justice to new cases, assisted from time to time, as the occasion may demand, by the enactments of the legislature."

A good example of Story's flexibility in judging the applicability of the common law to American circumstances is his opinion in *Van Ness v. Pacard.* Pacard had erected buildings on property rented to him by Van Ness. When Pacard removed the buildings from the property, Van Ness brought an action against him for waste committed by him while a tenant. Although the common law clearly favored the plaintiff, Story ruled that unless this part of the common law were adopted by a particular statute or judicial decision, it could be presumed to have been

25. 1 W. BLACKSTONE, COMMENTARIES *106-08 (1803) [hereinafter cited as BLACKSTONE].
27. Id. §§ 152, 156, 157.
28. MISCELLANEOUS WRITINGS, supra note 24, at 702-05. See also id. at 379.
29. Id. at 702.
30. Id. at 713.
31. 27 U.S. (2 Pet.) 137 (1829).
inapplicable to colonial conditions. It was inapplicable, he reasoned,
because it would have discouraged tenants from erecting buildings for
agricultural purposes, which would have contradicted the "universal
policy" to encourage the "cultivation and improvement" of the colonial
wilderness.\textsuperscript{2}

Story acknowledges that this principle of "applicability" created great
legal diversity among the colonies, for there was no central authority for
determining what portions of the common law were applicable to the
colonies. This was left to the various colonial courts to decide accord-
ing to "local usages and principles":

Of course, from a difference of interpretation, the common law, as ac-
tually administered, was not in any two of the colonies exactly the same.
The general foundation of the local jurisprudence was confessedly com-
posed of the same materials; but in the actual superstructure they were
variously combined and modified, so as to present neither a general sym-
metry of design nor a unity of execution.\textsuperscript{3}

The distinction between legal uniformity in the "general foundation"
and legal diversity in the "actual superstructure" is crucial for Story's
theory. Only insofar as the common law is in some manner uniform
across the nation can there be a national common law. But in what
form was the common law adopted at the national level?

In \textit{United States v. Coolidge},\textsuperscript{4} Story argued that even if the common
law is not a source of \textit{substantive powers} at the federal level, it is still
necessary for the \textit{interpretation} of federal powers. To fully exercise the
jurisdiction given them by the Constitution and by acts of Congress, the
courts of the United States must rely on the common law for legal
definitions, rules of procedure and decision, and punishments for offen-
ses, where the positive law has not provided for them.\textsuperscript{5}

\textsuperscript{2} See McCLELLAN, supra note 24, at 325, 333-41; MISCELLANEOUS WRITINGS, supra note 24, at 700-01; STORY, supra at 398-400, 404-06.

\textsuperscript{3} Id. at 144-45.


\textsuperscript{5} Id. at 619-20; STORY, supra note 24, § 158, at 107 n.2. For similar arguments see 1 J. KENT, COMMENTARIES ON AMERICAN LAW 318-19 (1826); J. SULLIVAN, THE HISTORY

St. George Tucker thought that the English common law could provide rules of
procedure for certain types of cases in federal courts without being a basis of jurisdic-
tion:

\[\text{[I]ts maxims and rules of proceeding are to be adhered to, whenever the written law is silent, in cases of similar or analogous nature, the cognizance whereof is by the constitution vested in the federal courts; it may govern and direct the course}\]
A full account of Story's theory of the common law and its place in American law would have to take into consideration the close relationship, in his view, of the common law to natural law. Indeed, it could be suggested that he conceived the reception of the common law in America as the general law of the country to rest not so much on its formal adoption and application by American legal bodies—since he conceded that "the common law, as actually administered, was not in any two of the colonies exactly the same"—but rather on its embodiment of traditional principles of justice in such a way that it would be generally accepted without question by men with an English heritage, and perhaps by all rational men.36

Story's conception of the common law as a system of rational principles that reflects natural law, has made him unpopular with legal positivists and with legal historians who are concerned with the law only as it exists in written records. Even Crosskey, whose theory of the adoption of the common law greatly resembles Story's, refuses to endorse his appeal to natural law. For instance, after denouncing conceptions of the common law based on "juristic metaphysics,"37 Crosskey quotes the passage in Swift v. Tyson38 where Story refers to Cicero's description of a law that is the same everywhere,39 but Crosskey denies
that Story's decision rests on anything beyond the positive law.\(^4\) Hence, while Story can explain the reception of the common law as the transmission to America of those general principles of natural justice that had been part of the English common law, Crosskey has to demonstrate that the English common law was formally adopted in America as *positive law*. Story can argue, therefore, that the diversity in the positive law of the country did not impede the adoption at the national level of the general legal principles of the common law, legal principles that lay behind the written law of the Constitution. Crosskey, however, cannot make such a move if he is to keep his view of the common law free of "juristic metaphysics."

Since legal historians regard Story's theory of the American common law as the "orthodox legal theory," they have felt obligated to take his position into account in their work on early American law. But the trend has been to criticize him for proposing an overly simple theory that clashes with the complex heterogeneity of colonial law as manifested in the legal records. He has been accused of disregarding the conditions of colonial life that precluded a uniform reception of the common law. One of the first to state these criticisms was Paul Reinsch, and although his theory of colonial law is now widely considered to be defective, his "revisionist" thesis initiated a controversy about the nature of early American law that continues even today.

### B. Reinsch's Theory

Reinsch\(^4\) disputed Story's claim that the colonists had brought the English common law with them to America.\(^4\) Applying Frederick Jackson Turner's "frontier thesis"\(^4\) to the history of early colonial law, he inferred that men as lacking in legal expertise as the first settlers and living in a wilderness far from England could not have lived under the common law. Thus the colonists had to establish their own indigenous legal systems, he maintained, based on Biblical law and popular customs

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40. CROSSKEY, supra note 1, at 857-58. See text accompanying notes 131-32 infra. Although he quotes Story's remark [in Swift v. Tyson] on natural law, Crosskey takes the position that Story decided the issue strictly on legal grounds, and not on "the nature of law." . . . What Crosskey apparently means by this is simply that Cicero's general principles were in fact part of the "laws of the United States."


41. English Common Law in the Early American Colonies, 2 BULLETIN OF THE UNIVERSITY OF WISCONSIN 397 (1899) [hereinafter cited as English Common Law].

42. Id. at 398-99.

43. On the "frontier thesis" see STUDIES IN EARLY AMERICAN LAW, supra note 21, at 12; Johnson, supra note 21, at 251-57.
refined by local magistrates and judges. Reinsch offered evidence drawn largely from the early history of New England, where he thought he had found a simple, untechnical "layman law" founded primarily on Mosaic law. He was less persuasive respecting the other colonies; he even conceded that some of the colonies instituted the common law at rather early dates.

It should be noted that Reinsch disagreed with Story only as to early colonial law; he confessed that at some time before the Revolution the common law was widely received by the colonies. In the eighteenth century, the increasing number of lawyers trained in England and the rising mercantile class created conditions favorable to the common law. Based on this Reinsch concluded: "We had a period of rude, untechnical popular law, followed, as lawyers became numerous and the study of law prominent, by the gradual reception of most of the rules of the English common law." Yet he insisted that even under the dominance of the common law, some elements of the old indigenous forms of law remained.

It is surprising to notice the extent to which Story's view accords with Reinsch's. Reinsch appeared to diverge from Story only because he falsely assumed that Story had not taken account of indigenous colonial law as a substitute for and an obstacle to the adoption of the common law. Reinsch and Story both agree that there was great legal diversity in the colonies resulting from the existence of various types of local law, especially during the early history, but despite this, the common law was in some way generally adopted into the colonies before the Revolution. Reinsch failed to recognize his essential agreement with Story because he assumed that Story had naively overlooked the complex variety of early colonial law, an assumption also held by some later legal historians who have continued to cite evidence of the variation in colonial law to refute Story's presumed theory that the common law was present in the colonies uniformly from the first settlements.

44. English Common Law, supra note 41, at 399.
45. Id. at 403-08, 417.
46. See id. at 420, 432-35, 441-42. An especially striking case of the early reception of the common law in New York. See id. at 422; Johnson, The Advent of Common Law in Colonial New York, in LAW AND AUTHORITY IN COLONIAL AMERICA, supra note 21, at 74-87.
47. English Common Law, supra note 41, at 400-01, 415.
48. Id. at 400.
49. Id. at 445-51.
50. See, e.g., G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 4-8 (1960) [hereinafter cited as EARLY MASSACHUSETTS]; Morris, supra note 21, at vii-ix.
We should not, however, obscure the central problem in Story's theory. For if he concedes that the common law was combined with various forms of indigenous law, thus creating substantial variation in the colonial legal systems, how can he still affirm the existence of a single national common law? The belief that there is a national common law presupposes that whatever variety there might have been at the colonial or state level, there was nevertheless some form of the English common law that had been adopted as the law of America as a whole. Crosskey confronts the same difficulty: he recognizes that it was impossible for the colonies to follow the common law fully and uniformly in their actual legal practice, and yet he insists that the common law was in some manner the general law of the entire country.

C. Goebel's Theory

Julius Goebel set forth a theory of colonial law similar in some ways to Reinsch's; he too dissented from Story's position by contending that the first settlers lacked the legal training necessary for establishing the common law. Yet Goebel thought that colonial law was too sophisticated to be characterized as crude indigenous law. The colonists did bring some English law with them, he concluded, but it was the law they would be expected to know best—local law: "the workings of the county, manorial, or borough tribunals were the length and breadth of their knowledge of the administration of justice, the local customs the sum of their law." Therefore, according to this theory, the deviations of colonial jurisprudence from the common law need not be explained as a response to frontier life, for even in England the settlers had been accustomed to local law administered by diverse local courts that followed only roughly the common law of the King's central courts.

But Goebel, like Reinsch, conceded that his thesis concerned only the early part of colonial history, which was the period "before the Leviathan common law had been set in motion." In his most recent work, Goebel has described the dominance of English local law as "the first phase of American legal development," and the "second phase," which

52. Id. at 87-88.
53. Id. at 88.
54. See Goebel, supra note 20, at 4-6.
occurred as English lawyers began arriving in the colonies, was the ascendency of the common law over the local law previously imported. It is clear, therefore, that Goebel's thesis as to the presence of English local law in the colonies is only a partial explanation of colonial legal history, even if he originally hoped that it would become a general theory. That is, it draws attention to one type of law that was important for some of the colonies at early periods of their history. But Story and Reinsch might also be said to have offered only incomplete accounts of colonial law. Indeed some legal historians have recently maintained that early American law was so various and mutable that any generalization is likely to be only partially correct. This has resulted in attempts to synthesize the major theories so as to attain a better grasp of the complex historical phenomena; a prime example is Zechariah Chafee's "synthetic rubber hypothesis."

D. Chafee's "synthetic rubber hypothesis"

Chafee finds the three different interpretations proposed by Story, Reinsch, and Goebel each to be true in some respect and yet deficient as comprehensive explanations of colonial legal development. He then suggests that a combination of the three into a "synthetic rubber hypothesis" might allow a grasp of colonial law in all its multifariousness.

Chafee disputes Story's theory to the extent that it implies that the first settlers transported to the colonies the common law as an accumulation of case law. The want of legal training and the need for simple modes of litigation made close adherence to English decisions impossible. But Chafee endorses Story's theory insofar as it considers the

56. See Goebel, supra note 20, at 5 n.9, 6. Goebel says that because colonial judicial systems were organized into inferior and superior courts without the property concepts of jurisdiction prevalent in England, "[t]he conditions for ultimate reception of common law from the ground up were thus highly favorable." Id. at 16-17. Also, Goebel believes "that the late eighteenth-century concept of the common law as a body of principles served to efface the blemish of alien origin and so encourage uninhibited use of English precedents by the legal profession in the federal courts." 1 J. GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON 33 (1964). Furthermore, in the early cases brought before the Supreme Court, "it was impossible to conduct any disputation on any proposition of law in a nation of lawyers trained in the common law, no matter how vagarious the version prevailing in any state, without recourse to sources in general use." Thus, "the members of the bar are revealed a jurisprudential not so much in the law of their several jurisdictions as in the law on which the law of the states was bottomed." Id. at 34. See also Horwitz, supra note 20, at 1080-82.

57. Chafee, supra note 21, at 71-72.

58. Id. at 80.
common law as a system of principles easily learned from reading works such as Coke's *Institutes* and Dalton's *Justice of the Peace*.69

As to Reinsch's thesis, Chafee thinks that so far as certain colonial court records evince important deviations from English law, the evidence favors Reinsch. However, insofar as these records manifest legal "formality and sophistication,"60 the evidence controverts Reinsch's position. Chafee suggests that colonial laymen were knowledgeable about English law and procedure despite their lack of formal legal training.61 He also presumes that over the long period of history before the Revolution, there must have been different degrees of proficiency in English law in the various colonies at different times.62 But his main argument against Reinsch is that he assumes a substitution of English law before the Revolution for the indigenous forms of law that had been established since the original settlements. Surely such a radical legal transformation would have been the subject of vigorous public discussion, but there is no evidence of this. Chafee observed that "it seems fair to ask supporters of the Reinsch theory to produce some contemporaneous evidence of an awareness on the part of colonists that they had shifted from a native American law to the recently imported common law."63

Chafee acknowledges that the colonists apparently gave more attention around the time of the Revolution to English court decisions than they had previously, but he views this as a reception of English case-law rather than a reception of the common law (understanding "the common law of England" to mean "the system of principles and rules of action which obtained in England").64 Chafee thinks the colonists adopted the *principles* of the common law before they began to appeal to English *cases*.65

Chafee objects to Goebel stating that it is not enough to show that the colonists handled small disputes in the same way that Englishmen handled small disputes. The real question is what was done in America about big litigations and serious crimes, which in England went to the King's courts and were governed by the common law.66

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69. Id. at 71-72.
60. Id. at 72.
61. Id. at 73-74.
62. See id. at 74-75.
63. Id. at 76.
64. Id. at 75.
65. Id. at 77-78.
66. Id. at 78.
Chafee also doubts that the colonists could have taken English local law to America without the superior law of the central courts, especially considering the influence in the colonies of English legal treatises that cited common law decisions. He also criticizes Goebel for sharing with Reinsch the questionable assumption that the early colonial legal system clashed radically with the common law system subsequently introduced.67

Finally, Chafee surmises that these three theories, although defective, could be improved by being combined. The original colonists might have brought the common law with them in the form of general principles but without the English case-law that would have required law libraries and skilled lawyers. The colonists may have supplemented these common law principles with their own indigenous customary law and with English local law. Then, in the eighteenth century, as colonial lawyers became better trained in English law and law libraries improved, English case-law could have gradually displaced the indigenous law and English local law. Hence Chafee concludes:

[T]here was no "reception" of the common law in the colonies. It was there from the start in some form, yet not the same form. I think of it as an outline map which was gradually filled in as the growth of law libraries and serious legal students brought more and more case-law and detailed doctrines from England.68

Chafee’s preference for a syncretism of theories is shared by some of the leading contemporary legal historians.69 Underlying this tendency is the conviction that simple generalizations cannot do justice to the complexity of colonial law. With respect to the adoption of the common law, as George Haskins has remarked, “statements which are true for one colony are very often untrue for another.”70 The variations in the position of the common law in colonial America arose from the combination of the common law with other types of law, including English local law and indigenous customs.71

67. Id.
68. Id. at 79. See Chafee, Book Review, supra note 23, at 413.
69. See notes 70-71 infra.
70. Haskins, Reception of the Common Law in Seventeenth Century Massachusetts: A Case Study, in LAW AND AUTHORITY IN COLONIAL AMERICA, supra note 21, at 17 [hereinafter cited as Haskins]. Long ago Richard Morris declared: “No general rule can be formulated... The extent to which the common law was adopted in the colonies must be actually determined in each specific situation.” STUDIES IN EARLY AMERICAN LAW, supra note 13, at 12. See also EARLY MASSACHUSETTS, supra note 50, at 6.
71. See EARLY MASSACHUSETTS, supra note 50, at xi, 6, 164-79; Haskins, supra note 70, at 18-19, 25-26; Katz, Looking Backward: The Early History of American Law, 33
Some legal historians have confirmed Chafee’s suspicion that the common law was present in the colonies at dates much earlier than was thought by either Reinsch or Goebel. Furthermore, it has been found that legal practice in early America was quite sophisticated and even comparable in some respects to English practice. These conclusions seem to support Justice Story’s thesis. But the leading legal historians still dispute Story’s case respecting the status of the common law as a law of the nation, a law uniformly applicable to the whole of America. The separate adoptions of the common law by the colonies, and subsequently by the states, did not, they maintain, establish a single uniform law: thirteen separate legal systems received the common law in different forms and in varying combinations with other types of law. Story did, however, as previously noted recognize the legal diversity in the colonies and in the states. But nevertheless he argued that the common law, as a fundamental rule of action, was assumed by the Constitution to be a national common law.

This question, as to whether the reception of the common law in various forms by the colonies and the states could have been the basis for a national common law, is the fundamental issue not only between Story and his critics but also between Crosskey and Goebel. Yet insofar as Story thought that the American colonists initially established the common law as a system of general legal principles rather than as an accumulation of case-law, he had some grounds for explaining how the common law could have been a general national law in spite of the variety in the colonial legal systems. That is, he could have argued that although the common law embodied in the English court decisions had been applied very diversely and with great modifications, certain general principles of the common law had been received uniformly. But this differs from the argument employed by Crosskey.

E. Crosskey’s theory

Crosskey purports to show that “when the pre-Revolutionary controversy broke out, Americans generally regarded the Common Law,
including its British statutory amendments, as the general basic customary law of all the American colonies."  He also maintains that this conception of the common law in the colonies "passed, very easily and naturally, into a conception of it as a law of the United States as a whole, in the late 1770's and early 1780's." But Crosskey's primary concern is with the importance of this reception of the common law for the members of the Constitutional Convention:

To the Americans of that time, who met in the Convention, there was but one system, the system of the Common Law, with its British statutory amendments, which America had inherited from England. That system existed in America, subject to some local variants on particular matters, much as it existed in the mother country. But these local variants did not alter the general fact that there was, in a very real sense, a single system of law in America; a system badly organized, subject to much uncertainty, and in the hands of courts very variously appointed and empowered; but still, in spite of all this, a single system.

Thus, Crosskey maintains that the general acceptance of the common law as the uniform law of the country persisted despite the displacement of inapplicable portions of this English law by local laws and customs. Such displacement accorded with the nature of the common law, he explains, for even in England there were local customs that diverged from the customary law of the entire kingdom.

Thus, Crosskey makes an argument similar to Story's. He contends that during the few decades before the Constitutional Convention, the common law was somehow the general, customary law of all America. This is true, Crosskey contends, in spite of the admitted diversity in the application of that law first by the colonies and then by the states. Hence he must argue that

though the applicability of English law was, . . . somewhat variable among the thirteen American colonies, and local legislation and, to a certain extent, local customary rules displaced that law, among them, in a somewhat varying degree, the English law, insofar as it was deemed to be applicable, was everywhere thought of as law which was general, not local, in character.

Since Crosskey undertakes his historical study of the American adoption of the common law only for the sake of illuminating certain

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74. I Crosskey, supra note 1, at 622.
75. Id. at 623.
76. Id. at 663.
77. Id.
78. Id. at 623.
portions of the Constitution (particularly article III on the Judiciary) he is concerned solely with the views of "the Americans of 1787"; he dismisses as irrelevant Crosskey's opinions prevalent in earlier or later periods. Therefore, Crosskey investigates the ideas about the common law that were held by Americans in the 1760's and after the Declaration of Independence until the ratification of the Constitution. He considers his primary problem to be the determination of whether the Revolution affected attitudes towards the common law and, if so, how. By so restricting the purview of his inquiry, Crosskey leaves himself free to concede the arguments of Reinsch, Goebel and others as to the nature of colonial law in the early periods when there were many obstacles to the common law. Therefore, he seems to intend his thesis of the common law as the general customary law of America to apply only to the last years of colonial history, to what Goebel calls "the second phase" of colonial legal history.

Crosskey's first piece of evidence concerning the reception of the English common law in the 1760's is a remark by James Otis. Otis is said to have declared that the common law, its Parliamentary amendments, and the acts of Parliament that named the plantations were "received and practiced" in the colonies. A second piece of evidence sustaining the first is the acceptance by the Congress that passed the Stamp Act of the colonial jurisdiction of Parliament respecting "general Acts for the Amendment of the Common Law."

Crosskey concludes that Otis and the "Stamp Act Congress" viewed the common law "as the continuing uniform basic law of the entire

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79. Id. at 583-84.
80. Id. at 585-86, 622-23.
81. Id. at 584. Crosskey attributes incorrectly the cited passage to Otis. Actually it is from a resolution of the General Assembly of Massachusetts Bay that Otis appended to his essay. See J. OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 49, 108-09 (1764) [hereinafter cited as Otis].
82. I CROSSKEY, supra note 1, at 584. Crosskey quotes brief phrases from two passages in the resolution of the Stamp Act Congress addressed to the House of Commons. In the first passage, the Congress proclaims: It is also humbly submitted whether there be not a material distinction, in reason and sound policy, at least, between the necessary exercise of parliamentary jurisdiction in general acts, and the common law, and the regulation of trade and commerce through the whole empire, and the exercise of that jurisdiction by imposing taxes on the colonies. JOURNAL OF THE FIRST CONGRESS OF THE AMERICAN COLONIES 40 (1845). Subsequently, the Congress affirmed "that their [the colonists'] subordination to the parliament is universally acknowledged." PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS 68 (E. Morgan ed. 1959). In quoting from the second passage, Crosskey refers to "general subordination," but the word "general" is not included in any of the sources.
Empire." But he immediately adds a cautionary note, warning that this conclusion

is not meant to imply that the law—and, particularly, the practical law—of the thirteen colonies, in the 1760’s, was, or that it ever had been, completely conformable to English Law, or wholly uniform as between the colonies themselves.84

Although the colonial charters generally required a complete conformity of colonial law to English law, certain peculiar circumstances in the colonies—particularly, those connected with religion, slavery, and land-ownership—prevented English law from being entirely applicable. Hence “there never had been more than partial and approximate conformity to English law in practice.”85 Thus Crosskey admits that Otis’s “sweeping statement”86 must be qualified by recognition that the colonies accepted only those portions of English law “applicable” to their situation.87

Although adaptation to local circumstances was a principle of the common law itself, confusion resulted in the colonies. Crosskey observes that this confusion resulted because they lacked the efficient judicial administration necessary for a uniform determination of “applicability.” Consequently, the “practical law” of the colonies became diverse. If the colonial legal system had been more sophisticated, an American customary law could have been established to cover those areas where the English common law was inapplicable. However, “the . . . rules of local ‘common,’ or customary, law were the rules, at best, of inferior courts; besides, they resided only in oral tradition and in the undigested, incomplete, and highly inaccessible handwritten records” of the colonial courts.88 Evidence of the disordered legal diversity in the colonies, caused by confusion as to the application of English law, suggests that Otis and the “Stamp Act Congress” might have dissembled in the declarations quoted above in order to reassure the English authorities as to the legal subordination of the colonies. Crosskey thinks this seems unlikely, however, when one considers certain comments made by Thomas Pownall.89

83. I Crosskey, supra note 1, at 584.
84. Id. at 585.
85. Id.
86. Id. at 586.
87. Id. at 584-87.
88. Id. at 588.
89. Id. at 586-90.
Pownall, in *The Administration of the British Colonies*,\(^9\) confirms the other evidence of the uncertainties in colonial law in its relation to English law and the absence of a unified and properly constituted judicial system. But he also reports that many colonial leaders wished to overcome these defects in colonial jurisprudence and that a large number proposed the establishment of "a supreme court of appeal and equity" as the best reform.\(^9\) This proposal, Crosskey asserts, constitutes further evidence of the truth of the statements made by James Otis and the Stamp Act Congress, in 1764 and 1765, as to the then general American receptiveness to English law. For the fact that the proposal was made is in itself evidence that the uncertainties and diversities, in colonial law, which then existed, were not regarded by colonial lawyers, as being—at any rate, in their totality—local "common law" which it was desirable to conserve. Instead they must have been regarded, at least in very great degree, as evils.\(^9\)

Thus, Crosskey argues that no matter how unfavorable to the common law the legal practice of the colonies might have been, colonial leaders were "receptive" to its adoption.

Crosskey's thesis begins now to take on a new appearance, for he seems to explain the link of American jurisprudence to English law as more a matter of "receptiveness" than of "reception."\(^9\) This was implicit even in the general statements quoted previously. Crosskey stated that the common law was "generally regarded" as American law, that it was "thought of" as the general law of the colonies, and that this "conception" of the common law prevailed at the time of the Constitutional Convention. He suggests that the common law was considered in principle the general, customary law of the colonies, but that colonial courts failed in practice to accomplish a perfect adoption of this law by

\(^{90}\) See id. 590-93. \(^{91}\) T. POWNALL, *THE ADMINISTRATION OF THE COLONIES* (1764) [hereinafter cited as POWNALL].

\(^{92}\) POWNALL, *supra* note 90, at 129-36.

\(^{92}\) I CROSSKEY, *supra* note 1, at 593.

\(^93\) For examples of Crosskey's use of the word "receptiveness" see id. at 586, 592-93.

Claiming that the growing "receptiveness" to English law before the Revolution has been seen by "careful students of the period," Crosskey cites Paul Reinsch's monograph, *English Common Law*, *supra* note 27, and Charles Andrews' book. C. ANDREWS, *THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION* (1931) [hereinafter cited as ANDREWS]; see I CROSSKEY, *supra* note 1, at 586; II *id.* at 1341 n.21. Andrews states that the colonists "as a rule, were too much occupied in making a living... to doubt the legality of a system [i.e., the English legal supervision over the colonies] that offered so many opportunities for evasion." The obvious question is whether the colonists' "opportunities for evasion" of English law vitiated their affirmation of its "legality." *See* ANDREWS, *supra*, at 46, 49, 56-57, 59-60.
applying it uniformly to all of the colonies. This failure was caused by (1) the inapplicability of some parts of the English common law to colonial conditions; (2) the lack of clear rules for determining its applicability; (3) the absence of the general judicial organization necessary for insuring uniformity in the laws; and (4) the nonexistence of proper equity courts.

Occasionally, however, Crosskey speaks of an actual reception in practice of the common law as the general law of America. For instance, he contends that even after the displacements of the common law by "peculiar local customs in particular colonies,... there remained a vast body of customary law in use in the American states that was common to England and all America." He argues that the customary law of the American states in 1787 was the common law shared by all, rather than the local customary law peculiar to each, because the records of the English common law were easily available whereas there were almost no written records of state customary law.

The fact simply is that these English lawbooks were the only evidence of American customary law that Americans had; and if, in these circumstances, Americans were prone to regard their customary law as "a single, transcendent corpus," a body of law which the colonies, or states, all had in common, and which the nation as a whole had in common with England, it was, it would seem, only the perception of an obvious fact.

But still he concedes that without a national judicial system there was no way for the adoption of the common law by the colonies, and then by the states, to be carried out in a uniform manner. Hence, until the ratification of the Constitution, the status of the common law as the uniform general law of America had to rest more on the "receptiveness" of American leaders than on the actual practice of American law.

To sustain his view that the common law was accepted as the general customary law of America in 1787, Crosskey must thus show that American attitudes favoring the common law as a uniform law were strong enough to compensate for the diversities and uncertainties in its practical application. This point should be kept in mind, for Goebel bases much of his attack on evidence of the legal practice of the colonies or the states, evidence of which Crosskey was fully cognizant but which he did not regard as decisive for determining the place of the common law in the America of 1787.

94. I Crosskey, supra note 1, at 607 (emphasis added).
95. Id. at 608-09.
96. Id. at 607, 609.
By maintaining that Americans were “receptive” to the common law as the general law of the whole country, even when the legal practice of the times did not allow the fulfillment of this goal, Crosskey can argue that the national common law existed in potentiality until the Constitution provided the means for establishing the national judicial system necessary for actualizing this national common law. But is this not a type of “juristic metaphysics” since it assumes that law can have an existence beyond the written law and legal practice of a people? Perhaps for this reason, Crosskey would prefer to argue that the national common law was a part of the actual legal practice of America even before the ratification of the Constitution. The local variations from this national common law are then explained as comparable to the situation in England, where it is a principle of the common law that varying local circumstances require some local departures from the kingdom-wide common law of the King’s central courts.\footnote{See text accompanying notes 99, 131-32, 154-55, 174-77, 223-24 infra.}

\section*{F. Crosskey, Story, and the legal historians}

This short survey of the major theories of early American legal history shows a general agreement that there were two phases of this history. During the first period the original settlers established various types of law, including indigenous law (Reinsch) and English local law (Goebel). Although some research has shown the common law to be present even in the earliest periods, its full adoption did not come until the eighteenth century, which was the second phase of colonial legal development. Due to the arrival of English lawyers, the expansion of colonial law libraries, and the needs of the rising mercantile class, the common law was widely received into eighteenth-century America.

But although recognizing this general reception of the common law, many historians of colonial law tend to emphasize the persistent diversity of the law that resulted from the combination of the English common law with different types of preexisting law. The common law dominated but could not abolish the earlier law. Furthermore, there was variation in the common law itself since its applicability to colonial circumstances was variously interpreted in the different legal systems. It was also argued, as previously noted, that this legal diversity continued even after the formal reception of the common law by the states after the Revolution; for the states continued to maintain thirteen different systems of the common law. Hence some legal historians are inclined to believe that American law was too pluralistic for there to have been an
adoption of the common law as a single national law. Therefore, they
dismiss Joseph Story's theory of the reception of the common law as too
simplistic.

It has also been noted that Story and Crosskey agree as to the thesis
that despite the great diversity in early American law, the common law
was received into America as the general, customary law of the whole
country. Just as Story admits that “the common law, as actually
administered, was not in any two of the colonies exactly the same,”98 so
Crosskey concedes that the common law was diversely applied in the
colonies and that “complete conformity to English law was not a practi-
cal possibility.” Yet they both maintain that the common law was
somehow the uniform law of all America. Hence, they share the prob-
lem of showing how the common law could have arisen out of such legal
variation to become a single system of national law. But whereas Story
explains that the common law was adopted at the national level not as
substantive law but as general principles of legal justice, Crosskey would
like to prove that the national common law was part of the substantive
written law of the nation. He must, however, at times admit that the
national status of this common law rested largely on the “receptiveness”
of American leaders rather than on an actual “reception” into American
law.99

II. GOEBEL'S CRITIQUE OF CROSSKEY

A. Lord Mansfield and “general jurisprudence”

Goebel, after some opening remarks in which he rebukes Crosskey
for disregarding some important secondary works,100 devotes the first

98. See text accompanying note 33 supra.
99. McClellan remarks that “contemporary critics Chafee, Reinsch, and Goebel fail to
counter in their unsympathetic treatment of the ‘orthodox’ theory . . . its underlying
philosophical assumption,” which is the connection of the common law to natural law.
“According to . . . Story,” McClellan says,
the problem of adoption could not be construed in strictly legal terms, and thus the
answer did not lie solely in colonial records. . . . Case law digested and com-
pounded into scientific commentaries, was after all, only a microcosm of the macro-
cosm, reflecting a general “omnipresence” of “natural” rights attained over cen-
turies.
McClellan, supra note 24, at 193.
100. Ex Parte Clio, supra note 6, at 451-52. Goebel criticizes Crosskey for not citing
Goebel's Law Enforcement in Colonial New York (J. GOEBEL, LAW ENFORCEMENT IN
Colonial New York (1944)) or Joseph Smith's Appeals to the Privy Council from the
American Plantations (J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN
PLANTATIONS (1950)) [hereinafter cited as APPEALS TO THE PRIVY COUNCIL]. Professor
Malcolm Sharp has replied to Goebel by asserting that Smith's book is “favorable to Mr.
Crosskey's position” and by observing: “Mr. Goebel's complaint that Mr. Crosskey did
part of his review to a refutation of Chapter 18 of the book ("Eighteenth-Century ‘General Jurisprudence’ and ‘the Common Law’"), which he regards as "the philosophical scaffold" of Crosskey's theory of the common law in America. In this chapter, Crosskey first summarizes certain eighteenth-century theories of English law in its relationship to other types of law. He then attempts to indicate how these theories were transmitted to American lawyers through the doctrines of "general jurisprudence" expounded by Lord Mansfield, who served as Chief Justice of the King's Bench in the second half of the eighteenth century.

According to Crosskey, the great achievement of Mansfield was the incorporation into the English common law of that part of "the law of nations" pertaining to commerce.101 "The general law of commerce" necessarily applied between citizens of different nations, but Mansfield also applied it between Englishmen where it was convenient. Therefore, in accordance with the ordering of national and international bodies of law known as "general jurisprudence," the common law was primarily "a body of kingdom-wide English judicial customs." However, "a considerable number of these kingdom-wide customs were customs that England was believed to share with the entire civilized world."102

Crosskey contends that Mansfield's view of the common law's incorporation of international commercial law was widely influential in America. He cites laudatory references to Mansfield made by James Wilson, Nathaniel Chipman, Zephaniah Swift, Thomas McKean, and John Marshall.103 He refers to two Pennsylvania cases that evince Mansfield's influence—Steinmetz v. Currie104 and Hunter v. Blodget.105

101. Id. at 314.

102. Crosskey, supra note 1, at 33.

103. Id. at 33-34, 36, 569-71, 576, 579.

104. 1 U.S. (1 Dall.) 270 (1788).

105. 2 Yeates 480 (Pa. 1799).
In the first case, Justice McKean stated that since the case concerned a bill of exchange between a citizen of Pennsylvania and a citizen of New York, it should be decided according to "the general mercantile law of nations." Furthermore, the court ruled that a decision made by Mansfield in 1786 concerning this commercial law was applicable in Pennsylvania. \footnote{106} Hunter \textit{v. Blodget} also involved a bill of exchange, and the court decided that an English decision of 1789 should be followed. \footnote{108}

Crosskey desires to prove that the prevailing view in America at the time of the Constitutional Convention, and for a few decades afterwards, was that commercial matters between citizens of different states and, to a large extent, between citizens of the same state should be regulated by "the general commercial law," which was one of the portions of the English common law applicable to America. Only later, he contends, did the Jeffersonians begin to substitute the conflict-of-laws technique for this national commercial law. \footnote{109}

Goebel offers a number of criticisms. He accuses Crosskey of using the term "general jurisprudence" anachronistically since it did not come into use before the nineteenth century. \footnote{110} He also states that Crosskey presents no evidence of Mansfield's influence in America before 1790 and thereby fails to show his influence over the the Constitutional Convention. \footnote{111} He also charges Crosskey with misinterpreting Mansfield's own views by attributing to him a strong interest in natural law.

\footnotesize
\begin{itemize}
\item \footnote{106} 1 U.S. (1 Dall.) at 270.
\item \footnote{107} Id. \textit{See I Crosskey, supra} note 1, at 572.
\item \footnote{108} 2 Yeates at 481. \textit{See I Crosskey, supra} note 1, at 572-73, 648.
\item \footnote{109} The early American conception of commercial law described by Crosskey was well stated by James Sullivan. Sullivan maintained that since commerce was properly governed by the law of nations rather than by strictly local law, and since the Constitution empowered the national government to enforce this international commercial law in America, the Congress should enact a uniform commercial law that would be upheld by the national judiciary against the states. He thought this necessary to prevent unnecessary diversity in commercial law resulting from a conflict-of-laws procedure. \textit{Sullivan, supra} note 35, at 337-38, 252-56. \textit{See} Vanuxem \textit{v. Hazlehurst}, 4 N.J. 223, 229-31 (1818); I Crosskey, \textit{supra} note 1, at 573-74; Z. Swift, \textit{A Digest of the Law of Evidence in Civil and Criminal Cases and a Treatise on Bills of Exchange and Promissory Notes} 210, 283-86 (1810). \textit{Cf.} note 36 \textit{supra} and note 174 \textit{infra}.
\item \footnote{110} \textit{Ex Parte Clio, supra} note 6, at 452-53. Goebel also challenges Crosskey's employment of Montesquieu's term "orders of law" by arguing that this phrase was not conceived before Montesquieu introduced it in the middle of the eighteenth century. But this objection seems rather trivial. Crosskey's citation of Montesquieu is intended as an example of the eighteenth century conception of a hierarchy of laws; and for this purpose, the peculiar terminology that Montesquieu uses to express this traditional idea is irrelevant. \textit{See} Petro, \textit{supra} note 9, at 319-20.
\item \footnote{111} \textit{Ex Parte Clio, supra} note 6, at 454-55.
\end{itemize}
Indeed he notes that the quotation from one of Mansfield’s cases that Crosskey employs to demonstrate Mansfield’s reliance on natural law is not taken from Mansfield’s remarks, as Crosskey indicates, but from the opinion of Wilmot, one of the puisne judges.  

Goebel fails to mention that two examples of the eighteenth-century use of “general jurisprudence” appear in Crosskey’s text—one from James Wilson and another from Richard Wooddeson.  

The passages from these two men are alike in their uses of other expressions as well; in fact, the likeness is so great that it is clear that Wilson must have copied Wooddeson’s passage with only a few changes but without acknowledging his debt to Wooddeson.  

The passages cited by Crosskey from the writings of Wilson are strong pieces of evidence for showing the influence in America of Mansfield’s conception of commercial law.  But Crosskey’s reliance on Wilson, whose quoted remarks were made after the signing of the Constitution, only emphasizes his failure to produce evidence involving

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112. Id. at 457.  
114. Since they are pertinent to some of Goebel’s other criticisms, Wilson’s remarks (from his LECTURES ON LAW, delivered in 1790-91) merit quotation at length:  
The law of nations, in its full extent, is a part of the law of Englandk. . . .  
One branch of that law [the law of merchants] . . . has been admitted to decide controversies concerning bills of exchange, policies of insurance, and other mercantile transactions, both where citizens of different states, and where citizens of the same state only, have been interested in the event.  
This system has, of late years, been greatly elucidated, and reduced to rational and solid principles, by a series of adjudications, for which the commercial world is much indebted to a celebrated judge, long famed for his comprehensive talents and luminous learning in general jurisprudence.  

Another branch of the law of nations, . . . is the law maritime. In a cause depending in the court of king’s bench in England, and tried at one of the assizes, my Lord Mansfield, the great judge to whom allusion has been just now made, was desirous to have a case made of it for solemn adjudication; not because he himself entertained great doubts concerning it; but in order to settle the point, on which it turned, more deliberately, solemnly, and notoriously; as it was of an extensive nature; and especially as the maritime law is not the law of a particular country, but the general law of nations: non eritis altera lex Romae, altera Athenis; altera nunc, altera postea; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.m  

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1 & 2 WILSON, supra note 35, at 278-79. See also id. at 281-82. In the quoted passage, footnote “k” contains only a citation—“3 Burr. 1481,” which refers to Mansfield’s decision in Triequet v. Bath (1764). Footnote “l” contains the following statement by Wilson: “In commercial cases, all nations ought to have their laws conformable to each other. Fides servanda est; simplicitas juris gentium praevalit. 3 Burr. 1672.” This is a quotation from Wilmot’s decision in Pillans v. Van Mierop (1765). In footnote “m,” he gives the source of his Latin quotation that originated with Cicero—“2 Burr. 887,” a reference to Mansfield’s decision in Luke v. Lyde (1759).
any of the other members of the Constitutional Convention. Furthermore, except for his reference to Steinmetz v. Currie, decided in 1788, the rest of his evidence seems entirely drawn from sources dated after 1795.

Hence, Crosskey's historical evidence for the reception of Mansfield's doctrines by the Framers of the Constitution is, as Goebel claims, insufficient. Nevertheless, Goebel seems to denigrate unfairly Crosskey's inference that Mansfield must have influenced the legal thinking of the American lawyers of his time simply by virtue of his judicial position. Goebel denies, for example, the assumption that Mansfield's decisions were widely studied since, as Crosskey says, "the most readily available of the English law reports were those most recent." Goebel maintains that Burrow's reports of Mansfield's cases, of which the first volume appeared in 1768 and the set of four volumes in 1772, were not easily accessible to Americans. He notes, for instance, that Burrow was cited in Maryland and Massachusetts in 1768 and in Pennsylvania in 1776. He thus gives the impression that Burrow's reports were only rarely cited; but if one peruses the three American law reports

115. However, Crosskey does contend that the various lawyer-members of the Federal Convention . . . had grown up professionally whilst Mansfield was holding the highest office known to the Common Law; and a number of the more important delegates had received their legal education in England, at the Inns of Court, during Mansfield's period in office. Goebel says that the Inns of Court in the eighteenth century were "merely a mechanism for admission to the bar." Ex Parte Clio, supra note 6, at 454. But this does not refute Crosskey's claim that those who went to England would have been exposed to Mansfield's views. See Petro, supra note 9, at 321. On the importance of the Inns of Court for training colonial lawyers see Early Massachusetts, supra note 50, at 6; Studies in Early American Law, supra note 21, at 65-66.

116. 1 U.S. (1 Dall.) 269 (1788).

117. Yet it is not true that Crosskey gives no evidence at all of Mansfield's pre-1790 influence in America. In a footnote to chapter 18, he refers to a note earlier in the book in which he draws attention to a remark by Mansfield—replying to a letter written by James Duane, then mayor of New York, who sought clarification of a legal point involving the law of nations—which was quoted in various colonial newspapers in 1785. I Crosskey, supra note 1, at 463, 565; II id. at 1339 n.8.

118. With respect to some of the points under discussion, Crosskey supplements the admittedly sparse historical evidence with evidence based on his textual analysis of certain provisions of the Constitution and of the Judiciary Act of 1789, which is largely neglected by Goebel, and which is beyond the scope of this paper. See note 18 supra.

119. I Crosskey, supra note 1, at 609; Ex parte Clio, supra note 6, at 454-55.

120. Holt's Lessee v. Smith, 1 Md. 275 (1768). Goebel incorrectly identifies the case as Mayson's Lessee v. Sexton, 1 Harr. & McH. 275 (Md. 1768), which is the immediately following case. Also, Goebel overlooks the earlier citation of Burrow's reports in Drane v. Hodges, 1 Harr. & McH. 262, 271 (Md. 1771).


to which he refers, one will find numerous references to the first three volumes of Burrows reports, and even the fourth volume is cited in Pennsylvania as early as 1784.\footnote{123}

The passage from Wilson's writing cited above is also pertinent to another point raised by Goebel. He accuses Crosskey of an excessive concern with abstract speculation about natural law and of incorrectly attributing this "moonstruck nonsense" to Mansfield and those he influenced. Goebel considers Mansfield "a reformer of the common law, imaginative, daring and hardheaded"; but he insists that, contrary to

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Crosskey, Mansfield handled his reforms as practical matters that did not require philosophizing about natural law. To illustrate Mansfield's view of the general commercial law as a part of the law of nations, Crosskey quotes the following from the case of *Pillans v. Van Mierop*, "in commercial cases, all nations ought to have their laws conformable to each other: fides servanda est, simplicitas juris gentium praevaleat." But Goebel points out that this remark was made by Wilmot rather than Mansfield and that Mansfield characteristically eschewed the "grandiloquence" of his colleague. An examination of the Wilson quotation not only explains Crosskey's incorrect citation, but also provides support for his interpretation of Mansfield's doctrines.

Wilson refers in his footnotes to three cases in which Mansfield participated without indicating whether he is referring to Mansfield's own words. The first citation is Mansfield's decision in *Triquet v. Batn*; the second the statement from Wilmot's opinion in *Pillans v. Van Mierop* that Crosskey mistakenly attributes to Mansfield; and the third, Mansfield's affirmation in *Luke v. Lyde*, of the commercial law as part of the law of nations, which Cicero described as existing "among all peoples and at all times" (apud omnes gentes et omni tempore). It is understandable that Crosskey mistakenly took the middle citation as a reference to Mansfield, especially since it came as a footnote to Wilson's explicit praise of Mansfield. But it is obvious that Yeinot's appeal to the law of nations as expressed in the Latin quotation concerning the "simplicitas juris gentium," is duplicated by Mansfield's appeal to this same law as described by Cicero. Reliance on natural law is evident in both.

Mansfield's invocation of the law of nations made an impression not only upon James Wilson, but also upon Joseph Story. In the important passage, noted earlier, from *Swift v. Tyson*, Story explains his own conception of general commercial law in its application to America by appealing to the same Ciceronian quotation used by Mansfield. Thus,

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124. 3 Burr. 1663 (K.B. 1765).
125. Ex Parte Clio, supra note 6, at 456-59. See I Crosskey, supra note 1, at 570.
126. 3 Burr. 1481 (K.B. 1764).
127. 3 Burr. 1672 (K.B. 1765).
128. 2 Burr. 887 (K.B. 1759).
129. 41 U.S. (16 Pet.) 1 (1842).
130. See note 36 supra. Story once urged a law student:

[Y]ou should ever remember that real, solid, permanent fame belongs to higher attainments, to the knowledge of principles, & to that noble jurisprudence, of which Lord Mansfield, quoting Cicero, said that nature was not one law at Rome & another at Athens.
we find a clear line of connection, from Mansfield to Wilson and then to Story is transmitted to America, in which Mansfield functions as a conduit through which the conception of the common law as encompassing the law of nations respecting commercial matters (and thus connected to natural law).

It is odd that Goebel should criticize Crosskey for falsely ascribing to Mansfield an interest in natural law. For indeed, quite to the contrary, Crosskey might be better accused of unjustly depreciating the importance of natural law for Mansfield and those under his influence. In his brief account of the theory of natural law, Crosskey is careful to use words such as "assumed," "supposed," and "hypothetical," which imply that he treats these ideas because they were prevalent in the eighteenth century, but that he himself doubts their validity. Also, we saw previously that even in citing the passage in the Tyson case in which Story invokes the Ciceronian conception of natural law, Crosskey tries to explain Story's position as based solely on positive law rather than "juristic metaphysics." 

B. The common law in colonial history

Goebel is satisfied that he has demolished the "philosophical scaffold" that Crosskey tries to erect in Chapter 18; so he dedicates the second part of his review to Chapter 19 ("The Common Law" and the Administration of Justice in Eighteenth-Century America). Crosskey uses this chapter to present most of his historical evidence pertaining to the status of the English common law in America before 1787.

Goebel thinks that to a large extent Crosskey's mistaken views about the reception of the common law into America result from his not properly understanding "the constitutional principles upon which England's American empire was founded and which with slight alteration obtained down to independence." According to Goebel, the American colonies were assumed to have been acquired by conquest under the legal fiction that the Indians were perpetual enemies since they were

Letter from Justice Story to A.D. Alois, February 15, 1832, on file in Story Papers, Yale University, quoted in McCLELLAN, supra note 24, at 182-83. See also Story, A Discourse on the Past History, Present State, and Future Prospects of the Law, in id. at 329-31.

In addition to the passage from Wilson's writing quoted in the text, see 2 WILSON, supra note 35, at 813.

131. I CROSSKEY, supra note 1, at 565-69. See Petro, supra note 9, at 323-24.

132. See text accompanying note 40 supra.

133. Ex Parte Clio, supra note 6, at 460.
infidels. Therefore, the colonies were the possessions of the King and were not entitled to the English common law.\textsuperscript{134} He thinks that these principles of the English empire were set forth in \textit{Calvin's Case}.\textsuperscript{135} There, English lands outside the Realm of England were presumed to be the property of the Crown by virtue of conquest. Hence, they were governed by the King's prerogative rather than by the laws of England, until such laws were formally introduced, at which time only Parliament could alter the laws.\textsuperscript{136} However, there was a distinction between conquered \textit{Christian} lands and conquered \textit{infidel} lands: in the latter, all native law was abolished, while in the former, existing law remained until changed by the King.

The officers of the Crown, Goebel explains, were careful to avoid introducing the common law into the colonies, which would have nullified royal prerogative and established Parliament as the ruling body over the colonies. Goebel argues that the provisions of the colonial charters requiring that the colonial legislative power be exercised in accordance with the laws of England did not institute the common law: "the law of England as such did not obtain in the plantations, but . . . it was a standard to which, all things being equal, their own law ought to comply."\textsuperscript{137}

Goebel is justified in criticizing Crosskey for ignoring the doctrine of \textit{Calvin's Case} in its application to the colonies. But it is questionable whether the mere existence of this doctrine refutes Crosskey's thesis as to the common law in America; Goebel himself admits that this doctrine provoked opposition both in England and America from those who believed that the colonies were entitled to English law. Chief Justice Holt, while applying the doctrine of \textit{Calvin's Case} in referring to Virginia as a conquered land, in \textit{Smith v. Brown},\textsuperscript{138} also distinguished between the case of an uninhabited country settled by Englishmen, in which all the laws of England would be in force, and that of a conquered country, in which English law would apply only when so decreed by the King. Goebel himself indicated that the theory stated by Holt in \textit{Blankard v. Galdy}, which was restated by

\begin{itemize}
\item 134. \textit{Id.} at 460-61. \textit{See} Goebel, \textit{The Matrix of Empire}, in \textit{Appeals to the Privy Council, supra} note 100, at xiii-vii, xxii-iv, xlvii-xi. \textit{See also} Goebel, \textit{supra} note 20, at 36.
\item 135. 77 Eng. Rep. 377 (K.B. 1608).
\item 136. The doctrine of royal dominion over conquered infidel lands was reaffirmed in \textit{East India Company v. Sandys}, 10 How. St. Tr. 371 (1811).
\item 137. \textit{Ex Parte Clio, supra} note 6, at 461-63. \textit{See} Goebel, \textit{supra} note 11, at 7, 11.
\item 138. 91 Eng. Rep. 566 (K.B. 1705).
\end{itemize}
the Privy Council in 1722,\footnote{24 Eng. Rep. 646 (P.C. 1722). See J. GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 300-01 (1931); APPEALS TO THE PRIVY COUNCIL supra note 100, at 482-83.} was a popular alternative to the conquest theory of Calvin's Case.\footnote{Holt's dictum . . . had considerable effect. . . . Crown law officers expressed the belief that the common law obtained in the colonies, and colonial lawyers did likewise. There is no question but that in all the colonies from 1696 onward practice in the courts indicated a steady assimilation of common law procedures and substantive doctrine. The picture painted by Mr. Crosskey of law in the colonies as a rude sort of memory jurisprudence with "undigested, incomplete, and highly inaccessible handwritten 'records'" is fabrication . . . . [I]n provinces such as New York, Virginia and South Carolina, the superior courts on the common law side achieved a more than passable facsimile of the practice in the English Central Courts. Here and elsewhere the sources of English law, from the Yearbooks down to the latest available statutes and reports, were used as a sort of \textit{thesaurus juris}.} In the process of making what he apparently thinks is a criticism of Crosskey, Goebel declares that the legal practice of the colonies after 1696 evinces "a steady assimilation of common law procedures and substantive doctrine," and thus he affirms Crosskey's main contention! In fact, he pushes the point farther than does Crosskey himself, because, as we have seen, Crosskey concedes that the legal practice of the colonies, especially during the early years, was in many ways unfavorable to an effective reception of the common law.

Goebel apparently thinks that by arguing that the colonial courts adopted the common law, he is refuting Crosskey's view of colonial law as "a rude sort of memory jurisprudence." Crosskey does speak of "undigested, incomplete, and highly inaccessible handwritten 'records',"\footnote{Consider Washburn, \textit{Law and Authority in Colonial Virginia}, in \textit{LAW AND AUTHORITY IN COLONIAL AMERICA}, supra note 21. \textit{Essential to the thinking of the mother country from the first project to establish settlements in the New World down to the final break with the colonies was the assumption that they could be incorporated "within the Realm" in terms of individual rights if not in terms of imperial policy. \textit{Id.} at 119-20. \textit{St. George Tucker, disputing Blackstone's application of the conquest theory to the American colonies, reasoned that since in most cases the Indians withdrew as the English settlers arrived, the settlers brought their law with them as though they were entering uninhabited lands; and he observed that even if the colonies were conquered lands, the English immigrants, being of the conquerors rather than the conquered, could not be justly deprived of their English law by the King. Tucker, supra note 35, at 381-86. \textit{See also Otis, supra note 81, at 35-38, 48-52, 56-58, 65-70, 77-78, 81, 92-93, 98-99, 106-08, 112.}} but, as noted earlier,\footnote{I CROSSKEY, supra note 1, at 588. \textit{See text accompanying notes 92-93 supra.}} this is in reference to the attempts by colonial
courts to establish local colonial customary law as a substitute for English common law. Due to this absence of published reports of colonial cases, the colonial courts had to rely on the common law that they found in English law books. It is hard to see how Goebel can dispute this since he also emphasizes the reliance of colonial jurists on English law reports and describes the “native jurisprudence” of the colonies as a “memory jurisprudence” resting on “oral tradition.”

Goebel must sense that the “steady assimilation” of the common law and the colonial use of English law books as a “thesaurus juris” tended to buttress Crosskey’s case, for he immediately adds the following qualifications:

There is no justification, however, in assuming from this that there was any belief in the existence of a general and pervasive imperial law. Neither is there any justification for asserting that such a body of law was being everywhere administered with only small and insignificant local deviations.

He gives three reasons for denying these two assumptions. First, because of the absence of certain administrative controls over the courts during the early years, “there was perpetuated much non-Central Court English law dating from the time of first settlement and derived from the imitation of English local law.” Second, some colonies allowed “drastic divagations from the common law practice.” Finally, there was confusion as to the applicability of some English statutes connected to the common law. Goebel goes on to argue that the variations in colonial law prevented the establishment of “a general law common to all the colonies” because there was no central supervisory agency over the courts. Even the Privy Council failed to provide sufficient supervision of colonial law. In addition, the law in each colony was regarded by the colonists themselves as autonomous.

144. Goebel, supra note 20, at 6, 112, 503.
145. Ex Parte Clio, supra note 6, at 464.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id. at 464-66. Goebel’s comments here about the Privy Council contradict his criticism a few pages earlier of Crosskey’s conclusion that the appeals to the Privy Council failed to enforce legal uniformity in colonial law. Id. at 462. See Crosskey, supra note 1, at 587. Compare Goebel, supra note 20, at 41. Petro remarks: “It would seem to make little difference whether the appeals to the privy council had been an effective unifying device. If they had been, as the reviewer asserts, that would be no sign that the colonists would not want such a unifying principle.
The second assumption denied by Goebel, that a general body of colonial law was applied everywhere "with only small and insignificant local deviations," also is denied by Crosskey, contrary to Goebel's implication. Goebel and Crosskey agree that colonial legal practice departed in diverse ways from the standards of the English common law, but they disagree as to the significance of this fact. Goebel takes it as proof that the common law was not the general law of the colonies; Crosskey takes it as showing the difficulty of actualizing in practice the legal supremacy that the colonists accorded the common law in principle.\textsuperscript{151}

Therefore, the question involves not the second assumption mentioned by Goebel, but the first—"that there was any belief in the existence of a general and pervasive imperial law." Does not Goebel give an advantage to his opponent by speaking of a belief in the existence of such a law rather than simply its existence? Crosskey is forced to show that in their beliefs or attitudes, colonial leaders were "receptive" to the common law even when the actual "reception" of it was a practical impossibility. This difficulty in practical application was particularly shown during the early period of colonial history, and although conditions in the 1760's and afterwards favored adoption of the common law into American legal practice, variations in the legal systems of the colonies and the states continued to prevent uniformity in the law. Therefore, up to 1787, the common law as the general uniform law of America must be explained by Crosskey as "existing" largely in the aspirations of colonial leaders until the Constitution allowed its existence in actuality. Hence, Goebel's evidence of variation in the application of the common law does not refute Crosskey's thesis that, despite such diversity, this law was regarded as the general customary law of all America, especially in the light of Goebel's own admission as to the inclination towards "a steady assimilation of common law procedures and substantive doctrine."\textsuperscript{152}

\textsuperscript{151} Petro, supra note 9, at 325-26.

\textsuperscript{152} See note 56 supra. Horwitz, supra note 20, at 1081, observes that Goebel "does not consider that despite an actual diversity of common law practice there may have been a strong ideological assumption of common law uniformity."
C. The common law and the American Revolution

Goebel’s disagreement with Crosskey on the significance of legal diversity in America, reappears in the third part of his review, which concerns Crosskey’s view of the effects of the American Revolution on the common law. Crosskey must argue that the Revolution did not diminish the importance of the common law, but rather that the states, through the pertinent statutory and constitutional provisions, ratified and reaffirmed its existence as fundamental law. But Goebel reasons that because the states declared merely the continuance of their existing legal systems, with all of their diversity and departures from English law, this proves there was no single, uniform common law in America. Crosskey, although acknowledging that the states sanctioned the common law only as it had been made applicable to their local conditions, accentuates the lack of any references to local systems of law. Although the states applied the English common law differently, it was still the same legal source for all. Their legal peculiarities had not become so fixed as to constitute autonomous, local forms of common law—they still used English law reports as the basis of their customary law. Crosskey, at one point in his book, presents his interpretation of the Revolution’s effect on the common law in America with reference to the views of St. George Tucker (as stated in his essay on the adoption of the common law that he appended to his edition of Blackstone’s Commentaries in 1803), which Goebel accuses Crosskey of distorting, in order “to prove his point out of the mouth of a staunch States’ Rights man.”

Tucker inferred from the variations in the application of the common law among the colonies that there was no uniform customary law during any period from the dates of the first settlements to the time of the Revolution. He then contended that after the Revolution all aspects of the English common law that had not been brought into “use and practice” in the colonies, were “obsolete” and “incapable of revival, except by constitutional, or legislative authority.” This was true be-

153. Ex Parte Clio, supra note 6, at 467.
154. I Crosskey, supra note 1, at 595-99; Ex Parte Clio, supra note 6, at 467-68. For a detailed survey of the use of English court decisions by the state courts in accordance with the reception provisions of their respective states see Goebel, supra note 20, at 109-18.
155. I Crosskey, supra note 1, at 634-38.
156. Tucker, supra note 35, at 378.
157. Ex parte Clio, supra note 6, at 469.
cause “they no longer possessed even a potential existence, (as being the laws of the British nation, and as such, extending, in theoretical strictness, to the remotest part of the empire) because the connexion, upon which this theoretical conclusion might have been founded, was entirely at an end.”

Since each state became sovereign and independent,

there was no common law amongst them but the general law of nations, to which all civilized nations conform . . . . And how much soever their municipal institutions might agree, one with another, yet as it was in the power of their legislatures, respectively, to alter the whole, or any part of them, whenever they should think proper, therefore, such coincidence by no means established a common rule amongst them . . .

Even if all the states adopted the common law, thereby producing “a general conformity in their municipal codes,” the adoption would be “the separate act of each state” and, therefore, would not create a national law superior to the laws of each state.

Crosskey observes that the “coincidence” of the “municipal institutions” of the states would establish a “common rule” in fact, but that Tucker apparently wished to distinguish this factual legal commonality from a commonality enforced by a central legislative power superior to the state legislatures. Thus, Crosskey summarizes Tucker’s theory as follows:

[I]n a country living under a system of law, common in fact, and common, also, in his special, legalistic sense of being subject to alteration by a single central legislative power, a political revolution that sets up, instead, thirteen separate regional legislative powers, necessarily transforms the pre-existing single system of common law, into thirteen separate systems that are uncommon, in his legalistic sense of being thereafter separately and independently alterable, and only so alterable, in each of the thirteen separated regions, although, of course, the law of all these regions would remain common in fact, until such alterations should occur, and, even then, would continue common in fact, to the extent that any parts of the pre-existing law might be continued unaltered.

Crosskey makes the further point, which he seems to regard as a necessary implication of Tucker’s comments, that even the parts of the “pre-existing factually common customary law” that were displaced by the sovereign state legislatures would continue to exist in potentiality:

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159. Id. at 406.
160. Id. at 407.
161. Id.
162. I CROSSKEY, supra note 1, at 635.
163. Id.
For, despite such displacements, it would everywhere still be the law that the courts would apply if the legislation displacing it should be repealed. This continuing potential existence of customary law, in spite of legislation displacing it, is a well-recognized characteristic of this type of law that cannot properly be overlooked. For it means that legislative displacements of customary law do not destroy it as potential law: it still remains, as Chief Justice Marshall put it, in 1807, “the substratum of [the] laws [of the country].”

That Crosskey has distorted Tucker’s opinions, as Goebel claims, is quite clear. Tucker denies emphatically that there was in America before the Revolution a “factually common customary law;” although he concedes that before the Revolution the whole of the English common law might have had a “potential existence” in the colonies, he emphasizes the legal diversity that prevented the actual existence of such a uniform general law. Also, Tucker does not affirm the existence “in fact” of a national common law after the Revolution. Rather he speaks of the existence of such a coincidentally common law as purely hypothetical (i.e., if two or more of the states had adopted the common law in the same form, then the established law would have been common in fact for the states involved).

Crosskey insists that Tucker’s conception of the legal consequences of the American Revolution is “a correct application of the ancient principle of Blankard v. Galdy.” According to Crosskey, this case established that “when a political revolution occurs in a country, its pre-

164. Id. at 634-35. Crosskey restates this conception of “potential existence” in criticizing Tucker’s assumption that the states were prior to the Union:

[The Union, in fact, was older than the states; and there never had been a time since its first formation, in 1774, when there had not been many matters of a Continental kind—matters arising, for example, under the resolutions and contracts of the Continental Congress—which, from their nature, could only have been decided by some law of the whole country. And the only law the whole country had, was the law it had inherited from England. So, in spite of the scarcity of surviving evidence, there hardly can be a doubt that there must always have been an actually functioning national Common Law as to a great many matters; and as the national matters increased in variety (as of course they did in 1789), that law, always existent in potentiality, must have expanded in its actually functioning scope.

Id. at 638 (emphasis added). The scarcity of the “surviving evidence” of the “actually functioning national Common Law” under the Articles of Confederation is evidenced by Crosskey’s citation of only one piece of evidence: he refers to James Wilson’s opinion, recorded in Madison’s records of the Constitutional Convention, that the Continental Court of Appeals in Cases of Captures decided “facts as well as law & Common as well as Civil law.” II id. at 1346 n.43. See 2 Records of the Federal Convention 431 (M. Farrand ed. 1937) [hereinafter cited as Records]. Petro is surely wrong in regarding this as sufficient substantiation for Crosskey’s theory of the Union. Petro, supra note 9, at 333-34. See also Ex Parte Clio, supra note 6, at 470-71.

165. CROSSKEY, supra note 1, at 636.

166. Id.
existing law continues unaltered, except to the extent that the revolution expressly alters it or alters it by necessary implication.” 167 But the subject matter of this case seems so unrelated to revolutions that Goebel concludes that Crosskey has never read the case! 168 The issue was whether Jamaica was governed by English law or by its own law. Chief Justice Holt ruled that although Englishmen settling in a previously uninhabited land carry their law with them, Jamaica was a conquered land, and hence “the laws of England did not take place there, until declared so by the conqueror or his successors.” 169

Crosskey does not explain clearly how Blankard v. Galdy supports the principle he attributes to it. Yet he does cite, in connection with this case, the Massachusetts case of Commonwealth v. Chapman 170 and a passage in Grotius’ De Jure Belli et Pacis. 171 Perhaps a study of these three texts in juxtaposition, to see what they have in common, will clarify Crosskey’s meaning.

In Commonwealth v. Chapman, a case concerning the common law of libel, the Supreme Court of Massachusetts ruled that the provision of the state constitution declaring the continuance after the American Revolution of the existing laws, presumably including the common law insofar as it was applicable, “was rather of an existing rule, than the enactment of a new one.” 172

We take it to be a well settled principle, acknowledged by all civilized states governed by law that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. 173

Crosskey cites Book 2, Chapter 9, sections 8 and 9, of Grotius’ book. The title of the Chapter is “When Empires [imperia] or Dominions [domina] Cease.” Grotius explains that “the law (or rights) of a

167. Id.
168. I Crosskey, supra note 1, at 636; Ex Parte Clio, supra note 6, at 471-72. Although believing Crosskey’s citation of this case to be mistaken, Petro dismisses it as a trivial oversight. But Crosskey’s appeals to “the Common Law rule of Blankard v. Galdy” are too numerous and too important to be so easily glossed over. Petro, supra note 9, at 332-33. See I Crosskey, supra note 1, at 594, 636-38, 650, 657, 818, 825, 869, 871, 876, 898.
170. 54 Mass. (13 Metc.) 68 (1847).
171. I Crosskey, supra note 1, at 636; II id. at 1346 nn.40-41.
172. I id. at 72.
173. 54 Mass. (13 Metc.) 68, 71, 72 (1847).
people” (ius populi) cease only when the people itself ceases. A people “is of the genus of bodies that consists of distinct parts that is subject to one name”; it is “an artificial body” (section 3). Hence, a people ceases with the extinction of “the essential parts” of its body (section 4); of its “body as a whole” (section 5); or of its essential spirit or “form” (forma) (section 6). He then states that a people is not extinguished by migration (section 7) or by a change of “regime” (regiminis) (section 8) and that a union of peoples does not destroy but rather combines the “rights” (iura) of each (section 9).

These remarks by Grotius indicate the commonality between Blankard v. Galdy and Commonwealth v. Chapman seen by Crosskey: both cases rely implicitly on the principle that a “people” keeps its laws so long as its identity as a “people” is unchanged. The English colonists did not lose their English law by migration to America (Blankard v. Galdy) or even by revolution against the English monarchy (Commonwealth v. Chapman) because in both cases they remained the same “people.” Underlying the principle here employed is the distinction between civil society and political organization: a populus, as a social entity, can persist despite changes from one political regime to another.

It is significant, therefore, that Crosskey is careful to refer to the American Revolution as a “political revolution,” which implicitly distinguishes it from a “social revolution.” The Revolution dissolved America’s political relations with England without dissolving the social relations among the American people and the English law that regulated those relations.174

174. Goebel explains the continued acceptance of English law in America after the Revolution by referring to “the prevailing consensus that in time of revolution it was desirable to maintain the private law in a state of stability.” 1 GOEBEL, supra note 20, at 120.

The principle under discussion was stated by John Marshall: When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connection with the parent state, we did not break off our connection with each other. It remained subject to the ancient rules, until those rules should be changed by the competent authority.


James Sullivan, denying that the common law should be considered a law imposed on America by a foreign nation, argues “that the general principles of right and wrong, between individuals in civil society, are nearly the same in all countries, however they may differ as to the rights between the supreme power and the people.” SULLIVAN, supra note 35, at 14. See note 109 supra.

Finally, is it not clearly stated in the Declaration of Independence that a “people” can discard a form of government while retaining their identity as a “people”?
Before the Revolution there was in America, Crosskey seems to believe, a “single system of common law” that was “common in fact.” The political revolution of 1776, by transforming the colonies into independently sovereign states, deprived America of the legal supervision of a supreme central body (a place previously filled by Parliament), which was necessary for insuring uniformity in the common law. But even while the state legislatures were free to displace portions of the previously uniform common law, there was still “an actually functioning national Common Law” with respect to “many matters of a Continental kind”; and even the displaced portions of the pre-existing common law continued to exist “in potentiality” until the ratification of the Constitution allowed this law to resume its prior existence in actuality.\footnote{175. I Crosskey, supra note 1, at 635-36.\footnote{176. Id. at 636.}}

Hence, the adoption of the Constitution, Crosskey infers, was America’s second political revolution, which restored the common law to the national uniformity that had been jeopardized by the first revolution.

That event re-created for the thirteen American states a single central legislative power, even though it left the separate legislative powers of the several states largely intact in a subordinate way, as they had been when the states were colonies under the British Empire. There was, in other words, a substantial return to the situation that had existed before the American Revolution occurred; but with the new American Congress substituted for the British Parliament.\footnote{176. Id. at 636.}

So the legal identity of Americans, their constitution as a populus, arose first, Crosskey thinks, in the submission of the colonists to the English common law as authoritatively interpreted by Parliament. After the revolutionary break from England, this previously uniform national law existed as “potential law” (with large portions continuing to exist even in actual practice) until, by the adoption of the Constitution, which established political arrangements analogous to those before 1776 (with the United States Congress in the place of Parliament), Americans reaffirmed their actual legal submission to the English common law as their uniform national law insofar as it was applicable to their situation.

It was previously noted that Crosskey conceded that the circumstances in the colonies hindered the full reception of the common law in the actual practice of colonial law. The adoption of the common law into the colonies seemed to be more a matter of “receptiveness” to English law than actual reception in practice. Presumably the common law was the uniform general law of the country only “in potentiality.”
Yet, it now seems that Crosskey believes the English common law (as interpreted by Parliament) to have been the actually functioning general law of the colonies. The existence of this law “in potentiality” was necessary only between 1776 and 1789, i.e., during the period when the common law was not supported in its uniform application by a single supreme legislative body.

But how then does Crosskey account for the diversity in the adoption of the common law by the colonies? Apparently he conceives this variation as similar to the local law in England, which departed from the common law as administered for the entire kingdom by the King’s central courts. The necessity for legal variation as required by diversity in local circumstances was a fundamental principle of the English common law; hence, the existence in the American colonies of local variations in the application of this law would not have vitiat ed its uniformity in national matters, for, as Crosskey says, “the Common Law, with its British statutory improvements... was plainly thought of as the general law of all America: the departures from it only were looked upon as local.”

D. Royal prerogative and the enumerated powers of Congress

Crosskey’s historical survey of the common law’s development in America before the ratification of the Constitution provides only historical background for his explication of certain parts of the Constitution that imply, according to his interpretation, the existence of a national common law. Goebel generally ignores Crosskey’s exegesis of the Constitution in evaluating Crosskey’s thesis concerning the adoption of the common law, and instead he concentrates his attention on the historical survey. Yet he does devote the last three sections of his review to criticizing Crosskey’s contention that the inclusion of certain powers among the enumerated powers of Congress implies the existence of those portions of the common law pertaining to royal prerogative. Even on this point, however, he chooses to dispute a few of Crosskey’s historical arguments rather than the arguments based on the actual wording of the Constitution.

Crosskey claims that although the enumerated powers of Congress appear at first glance to be an odd list with much repetition, their
articulation with one another and with the rest of the Constitution becomes clear when the reasons for listing them are properly understood. Of the twenty-nine powers contained in article I, he identifies thirteen as belonging to the "executive" as described by Blackstone in his treatment of royal prerogative. These thirteen had to be enumerated, he argues, because they would otherwise have been regarded as "executive" powers under the pertinent "standing law," i.e., the parts of the English common law dealing with royal prerogative applicable to America.

But Goebel denies, in the fourth section of his review, that royal prerogative was part of America's "standing law." He notes that much of the conflict with England concerned colonial resistance to the King's prerogative powers and therefore the states were careful to abrogate the prerogative powers by appropriating them to themselves. Goebel contends, since the states in 1787 were exercising these powers formerly belonging to the King, "any enumeration of quondam royal prerogative was an enumeration as against the states."

One could reply to Goebel by observing that despite the tradition of American resistance to royal prerogative, the Framers might still have felt a need to enumerate certain "executive" powers as belonging to the Congress for fear that they might otherwise belong to the President. Since the Constitution grants to the President "the executive Power," it would have seemed natural to interpret this power by comparison with the executive prerogative of the King of England. This is confirmed by St. George Tucker, who observed that although the American Revolution abolished the "lex prerogativa," some of the enumerated powers of Congress were drawn from royal prerogative. Similarly, Alexander Hamilton, in denying that the Constitution gave the President powers comparable to those of the English King, points out that many of the powers of the King were expressly delegated to the Congress. One is entitled to conclude, therefore, that it is quite likely that certain powers

179. I Crosskey, supra note 1, at 381-83.
180. Although Crosskey assumes Blackstone to have been the chief authority on royal prerogative for the Framers, he thinks they also had other sources of information since Blackstone sometimes mixed legal "fictions" and "historical sketches" into his descriptions of existing law. Id. at 415-16.
181. Ex Parte Clio, supra note 6, at 474-76.
182. Id. at 476.
183. U.S. CONST. art. II.
184. Tucker, supra note 35, at 405-06, 413-16.
were included among the enumerated powers of Congress as a precaution against their being considered inherently "executive" powers.

Goebel, in the fifth section of his essay, subjects to particular criticism Crosskey's explanation of the military powers of Congress as powers that would have belonged to "the executive Power" if they had not been enumerated. He rebukes Crosskey for using the section of Blackstone's Commentaries on royal prerogatives without citing the subsequent passages on the withdrawal of some of the military prerogatives from the King by Parliament. In addition, he accuses Crosskey of neglecting the pertinent facts of American history, such as the colonial trespasses on the royal military prerogative and the exercise of military powers by the states under the Articles of Confederation. Since the executive prerogative in military matters was abolished in America, Goebel reasons, Crosskey's theory of the enumeration of the military powers of Congress as a limitation on "the executive Power" is without foundation.

First—as to Crosskey's alleged misuse of Blackstone—it should be noted that Blackstone, in the passage cited by Goebel, describes the military powers of Parliament without indicating that the military prerogatives of the King had been drastically reduced. Second, as with his previous argument, one might answer Goebel by insisting that the opposition first of the colonies and then the states to executive control of military matters would not have necessarily eliminated the need for the Framers of the Constitution to enumerate these powers in Article I so as to insure that they would not be considered part of "the executive Power." Indeed, American resistance to executive military prerogative made it even more probable that the men at the Convention would have used enumeration of the congressional powers to prevent any misinterpretation of "the executive Power."

But Goebel's most elaborate critique, in the sixth and final section of his review, is reserved for Crosskey's theory that the power over

186. U.S. Const. art. I.
187. Ex Parte Clio, supra note 6, at 477. See 1 Blackstone, supra note 25, at 414.
188. Ex Parte Clio, supra note 6, at 477.
189. Id. at 477-78.
190. 1 Blackstone, supra note 25, at 414.
191. Deserving of notice is a footnote by Goebel in which he seems to dispute a small point in Crosskey's study of prerogative:

It is difficult indeed to resist dispatching an arrow at the suggestion . . . that comprehended in the power to constitute courts was the royal prerogative to appoint fairs and markets because the fair privilege anciently included the right to a court piepower—an institution long as dead as mutton.

Ex Parte Clio, supra note 6, at 467 n.12. This insinuation that Crosskey was ignorant of the fact that courts of piepower had ceased to exist, is clearly unjustified. For Crosskey
piracies and marine felonies would also have been an “executive” power if it had not been listed as a power of Congress. Crosskey’s central contention, which Goebel denies, is that American lawyers in 1787 would have considered piracy trials as being subject, at least potentially, to “executive” control since it had been technically possible in the American colonies for such trials to be conducted in Admiralty Courts controlled by the Crown rather than in common law courts. Crosskey supports this theory with a review of certain events in English legal history that may be summarized as follows.

In 1361 Edward III revoked a commission for trying a case of piracy according to the common law and declared:

> It appears that, according to the law and custom of our realm, felonies, trespases, or injuries done upon the sea ought not to be dealt with or determined before our Justices at the common law, but before our Admirals according to the maritime law.

Crosskey suspects that the Kings of England wished to use the Admiralty Courts to provide lenient treatment for the “Rovers of the Sea.” He quotes R. G. Marsden’s observation that

a sovereign who was largely dependent upon them [the ‘rovers’] for a navy and transports was not unwilling to wink at or encourage, even in times of nominal peace, private enterprise at sea which might give him an advantage over a neighbor with whom he might shortly be at war.

But the ineffectiveness of the Admiralty Courts in punishing piracy provoked recommendations for returning piracy cases to the common law courts. Finally, two acts were passed in 1535 and 1536 emphasizing this fact and cites the same account by Holdsworth to which Goebel refers. Crosskey denies Blackstone’s statement that the royal power of “establishing markets and fairs” was part of the King’s power over commerce; Crosskey infers that since the right to hold a market or fair involved establishment of a court of piepower, the King’s power over markets and fairs was a part, not of his commercial power, but of his “right of erecting courts of judicature.” Crosskey thinks, however, that the framers of the Constitution did not have to be concerned about what to do with this particular “executive” power since the King no longer exercised it because courts of piepower had disappeared. So he is in full agreement on this point with Goebel. I CROSSKEY, supra note 1, at 441-42; II id. at 1328 n.58. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 540 (4th ed. 1938).

192. I CROSSKEY, supra note 1, at 446-47.
193. Id. at 446.
194. Id., quoting 1 R. MARSDEN, LAW AND CUSTOM OF THE SEA viii (1915) [hereinafter cited as MARSDEN].
195. 27 Hen. VII, c. 4.
196. 28 Hen. VIII, c. 15.
removing marine offenses from the jurisdiction of the Admiralty. Trials were to be conducted in England under the ordinary laws of the land before juries and with judges holding special commissions.\textsuperscript{107}

The requirement that piracies and marine felonies be tried in England however was very inconvenient for the American colonies.\textsuperscript{108} To solve this problem, a new statute was passed in 1700\textsuperscript{109} which was expressly applied to the colonies, and which permitted piracies and marine felonies to be tried

in any place at sea, or upon the land, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, to be appointed for that purpose by the King's commission or commissions under the great seal of England, or the seal of the admiralty of England.\textsuperscript{200}

Crosskey interprets this to mean that since such trials could be conducted \textit{either} at sea \textit{or} on the land, and under \textit{either} the Great Seal \textit{or} the Admiralty Seal, it would have been \textit{possible} for trials to be totally under the control of the Admiralty and, since the Admiralty Court was the court of the Royal Navy, thus subject to the "executive" power.\textsuperscript{201} He concedes, however, that the uniform practice under the act of 1700 was to conduct trials through the civil powers rather than the Admiralty. Yet he insists that any colonist who had read the act would have concluded that trials under the Admiralty jurisdiction were legally possible, but that the Crown had passed over this alternative for reasons of policy.\textsuperscript{202}

Even if Crosskey were correct in maintaining that piracy trials in the colonies were potentially subject to the "executive" power as represented

\begin{enumerate}
\item[197.] I Crosskey, supra note 1, at 446-48. See Marsden, supra note 194, at vii-viii, x-xii, xxii, 84-88.
\item[198.] Some colonists regarded the acts of 1535 and 1536 as inapplicable to their circumstances, and thus they returned to the older English law providing for trials in Admiralty Courts, except where colonial legislation established alternative procedures. I Crosskey, supra note 1, 449-50. Goebel states that plantation vice-admiralty courts undertook to try pirates by virtue of vice-admiralty commission without reference to the 1536 statute. But the Lords Committee of the Privy Council refused to countenance such trials by local vice-admiralty courts and sent over commissions pursuant to the Act. Mr. Crosskey does not mention this. Ex Parte Clio, supra note 6, at 479 (footnotes omitted). But Goebel's statement that Crosskey overlooks this Privy Council decision is incorrect. See II Crosskey, supra note 1, at 1329 n.78; Petro, supra note 9, at 342. Furthermore, he does not contest Crosskey’s main point here, which is that some of the colonies, despite the opposition of the English authorities, tried piracies and marine felonies in Admiralty Courts.
\item[199.] 11 & 12 Will. III, c. 7.
\item[200.] Id. § 14.
\item[201.] I Crosskey, supra note 1, at 45.
\item[202.] Id. at 450-53.
\end{enumerate}
in the Admiralty Courts, it would seem that the American Revolution abolished this use of the "executive" power since article IX of the Articles of Confederation gave the power of "appointing courts for the trial of piracies and felonies on the high seas" to the Continental Congress. Crosskey argues, however, that the powers of the Continental Congress were "of a highly mixed character," and included some that were ordinarily considered to be "executive" powers. He then contends that the Constitution's nullification of the Articles of Confederation restored the relevant English statutes concerning the trial of piracies as the "standing law."203

As to what the members of the Constitutional Convention thought about the power over piracy trials, Crosskey makes two somewhat plausible arguments, neither of which is mentioned by Goebel. First, one reason for believing that the Framers feared that the power over crimes committed at sea could be construed as an "executive" power, is that there had been a close connection in the minds of the colonists between piracy and privateering. This made it likely that piracy had been considered as much a subject for "executive" power as privateering had been.204 Second, Crosskey finds significance in the changes made in the piracy and marine felonies clause during the drafting of the Constitution. It began as the power "to declare the law and punishment of piracies and felonies committed on the high seas"; it was changed to a power "to punish" such offenses; finally it was changed again to the power "to define and punish" these crimes. These alterations would have been unnecessary, Crosskey infers, if the intention had been to secure this power for Congress as against the states because the original form of the clause would have sufficiently accomplished this purpose. Thus, there must have been some other reason for enumerating this power in precisely the words finally chosen. He suggests that "to declare the law and punishment" sounded too much like a "legislative" power for some of the Framers, whereas "to define and punish" conveyed the desired implication of an "executive" power.205

203. Id. at 454.
204. Id. at 454-55.

[While as is the legal distinction between the authorized warfare of the privateer and the unauthorized violence of the pirate, in practice it was very difficult to keep the privateer and his crew, far from the eye of authority, within the bounds of legal conduct, or to prevent him from broadening out his operations into piracy, especially if a merely privateering cruise was proving unprofitable.

I Crosskey, supra note 1, at 444-45; 2 Records, supra note 164, at 182, 312, 320.]
Goebel begins his criticisms by challenging Crosskey's view of the Admiralty Court as "the Navy's court." He cites "the great variety of matter (including commercial transactions) over which the Admiralty Court had jurisdiction" and "the fact that in the 16th century the judges were doctors of civil law." But it is hard to see how these facts refute Crosskey's essential argument that the Admiralty Court was more closely allied to the "executive" power of the King than were the common law courts. Crosskey might be wrong in regarding the Admiralty Court as simply a branch of the Royal Navy, but even here Goebel does not discredit the following remark by Benedict, on which Crosskey relies:

In the earlier history of nations, when absolute rule and strong executive powers have exercised most of the functions of government, the affairs of the sea and of navigable waters of the nation, have been usually administered by a naval officer of the highest dignity and station, holding his authority directly from the sovereign power, subordinate to the monarch alone, and clothed with many of the prerogatives of royalty.

Goebel also criticizes Crosskey's interpretation of the act of 1700 by referring to an opinion rendered to the King in 1720 by his law officers: they concluded that the act did not allow piracy trials under the Admiralty jurisdiction. But he does not deal with Crosskey's contention that these men ignored the literal meaning of the text. As they stated:

[W]e conceive that, though the Act uses the words 'any place at sea or upon the land in any of his Majesty's islands, plantations etc,' the intent was only to give a liberty for trying pirates on shipboard, on the coast of a plantation or colony, without laying a necessity upon the commanders of ships to being them on shoar.

The language of the key provision of this act, which we quoted above, clearly indicates that trials can be held either "in any place at sea or

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206. Ex Parte Clio, supra note 6, at 479. See 1 SELECT PLEAS IN THE COURT OF ADMIRALTY lixii (E. Marsden ed. 1894).
208. Id. at 2. See I CROSSKEY, supra note 1, at 448; II id. at 1329 n.75. Marsden speaks of "the dependence of the Admiralty Court upon the crown, the Lord Admiral, the council, and the executive generally." Id. at 254. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 9 (1957), wherein the authors observe that the Admiralty Court, in its early history, aroused "the dislike of those who feared it as a prerogative court."
209. Ex Parte Clio, supra note 6, at 480-81.
210. 2 MARS DEN, supra note 194, at 254.
211. See text accompanying notes 198-202 supra.
upon the land in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories.” In order to interpret the act as only allowing trials “in any place at sea” on the coast of territory possessed by the King, the King’s advisers had to read the statute as if the phrase “any place at sea” were qualified by the subsequent prepositional phrase, i.e., as if the act permitted trials “in any place at sea . . . in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories.” But how could a trial be conducted at sea in a fort?212

In the final pages of his review, Goebel mentions some important pieces of evidence as to colonial piracy trials that are neglected by Crosskey. First, the Privy Council decided in 1700 that commissions for trying pirates in America should issue under the Great Seal rather than the seal of the Admiralty.213 But Crosskey might have questioned whether this decision was well known among colonial lawyers; and he might also have argued that if it was known, any colonist who had read the act of 1700 would have interpreted this Privy Council declaration as a decision of policy rather than a legal imperative.

Second, Goebel cites a statute passed in 1717214 amending the act of 1700.215 Since this act is expressly extended to America,216 it surely would have gained the attention of the colonists. One of the provisions of this law states that offenses under the law of 1700 “may be tried and judged” in the “manner and form” prescribed by the law of 1536;217 thus it sanctioned piracy trials under the common law rather than under the Admiralty jurisdiction. But even here Crosskey might have reasoned that the “may be” still leaves open the possibility of trials in the Admiralty Courts.

Thirdly, Goebel upbraids Crosskey for overlooking an ordinance passed by the Continental Congress in 1781 concerning218 “the trial of piracies and felonies committed on the high seas.” This provided for trials “according to the course of the common law, in like manner as if

212. I CROSSKEY, supra note 1, at 452-53; 2 MARSDEN, supra note 194, at 252-55. See Petro, supra note 9, at 341-43. It should also be noted that although the opinion of the crown law officers was rendered in 1720, it would not have been easily known to the colonists since it was not published until the publication of the volumes edited by Marsden in 1915. I CROSSKEY, supra note 1, at 453.
213. Ex Parte Clio, supra note 6, at 480. See 2 Acts of the Privy Council 342 (W. Grant & I. Munro eds. 1910) (Goebel's reference to page 352 is incorrect).
214. 4 Geo. I, c. 11, § 7 (1717).
215. 11 & 12 Will. III, c. 7.
216. 4 Geo. I, c. 11, § 9 (1717).
217. Id. § 7.
218. ART. OF CONFEDERATION art. IX.
the piracy or felony were committed upon the land, and within some county, district or precinct in one of these United States."\textsuperscript{219}

Thus in 1787 as a matter of law the trial of piracies had been for some years settled by congressional ordinance in the states . . . [Thus] the provision in the Constitution was drawn . . . as a delegation of power as against the states and not as a protection against executive power.\textsuperscript{220}

It has been argued that this evidence does not weaken Crosskey's thesis since the ordinance was only a statutory grant to the states of a power that belonged to the Continental Congress under the Articles of Confederation and thus is not a power essentially belonging to the states.\textsuperscript{221}

What should be our evaluation of Crosskey's interpretation of the piracies and marine felonies provision of the Constitution? As with many of his other arguments, Crosskey's position here is neither as indefensible as Goebel claims nor as secure as Crosskey himself seems to think. His interpretation of the act of 1700 as condoning the trial of pirates in the colonies by the Admiralty Courts as a possible legal alternative to trials according to the common law, appears altogether persuasive. But since the universal practice in the colonies—as sanctioned by the King's law officers, the Privy Council and Parliament itself—was to try pirates only in common law courts, it seems unlikely that the members of the Constitutional Convention would have worried that the trying of pirates in Admiralty Courts was still part of the "standing law."

Perhaps Crosskey should have seen more significance in the similarity of the provision in the Articles of Confederation concerning piracy trials and the corresponding provision in the Constitution.\textsuperscript{222} For does it not seem probable that the Framers enumerated this power in Article I, section 8, not for fear that it would otherwise be considered an "executive" power, but simply as a precaution against the view that any enumerated power of the Continental Congress not mentioned in the Constitution was to be denied the new Congress? Indeed Crosskey believes that such a precaution by the Framers does explain the inclusion of some of the enumerated powers of Congress that had been

\textsuperscript{219} 19 JOURNALS OF THE CONTINENTAL CONGRESS 354 (G. Hunt ed. 1912).

\textsuperscript{220} Ex Parte Clio, supra note 6, at 482-83. See 19 JOURNALS OF THE CONTINENTAL CONGRESS 354-56 (G. Hunt ed. 1912).

\textsuperscript{221} Petro, supra note 9, at 345.

\textsuperscript{222} See text accompanying notes 205-06 supra.
previously enumerated in the Articles of Confederation among the
powers of the Continental Congress.\footnote{223. I CROSSKEY, supra note 1, at 411-13.}

III. THE COMMON LAW IN AMERICA: SOME CONCLUDING REMARKS

A proper evaluation of William Crosskey’s theory of the American
reception of the English common law would demand a much more
elaborate investigation than has been done here. But at least a prelimi-
nary survey has been made of the issues that would have to be handled
in such an investigation. One issue in particular has arisen as the
central question: Can Crosskey adequately explain the emergence of
a uniform national common law out of the varied forms in which the
English common law was adopted by the colonies and the states?

Story maintained that the common law of the colonies was uniform
with respect to the “general foundation” of colonial jurisprudence but
diverse with respect to the “actual superstructure.” This was consonant
with his view of the common law as having some parts that were
fundamental and unchangeable and other parts that were changeable in
response to the varying circumstances of society. Thus, despite the
legal variation among the colonies and the states, the fundamental
principles—those grounded in nature—could remain the same for all.
Even while the absence of a unified judicial system prevented their
uniform application in practice, these general legal principles existed in
potentiality; they were there to be discovered once the Constitution
established a national judicial system.

Because of Crosskey’s careful avoidance of “juristic metaphysics,” he
cannot accept Story’s line of argument. Crosskey must ground the
common law entirely in the legal practice of America without reference
to general principles underlying this legal practice. This puts him in a
difficult situation since he admits that in the colonies there was only
“partial and approximate conformity in practice.”

Crosskey is ultimately compelled to violate the principles of legal
positivism in order to explain the uniformity of the American common
law before 1787. He argues, for instance, that although the colonists
could not receive the English common law into their legal practice in a
uniform manner, they were still receptive to it; that is, they regarded
it as being in principle the general customary law of all the colonies even
when this was impossible in practice. Furthermore, the revolutionary
break from England in 1776, which permitted the thirteen states to form
their own legal systems, did not, Crosskey maintains, abolish the com-
mon law as the fundamental national law: after this first political
revolution, the common law remained in existence, at least in potentiali-
ty, until the second political revolution in 1789 allowed it to be actual-
ized in practice. The national common law did not disappear between
1776 and 1789 because it belonged to the legal history shared by all
Americans insofar as they constituted a single “people” with a common
legal heritage. So it seems, according to this theory, that the American
people in 1789 did not make a national common law for themselves,
rather they discovered a pre-existing one. Thus, Crosskey relies on one
of the primary assumptions of the traditional theory of the common
law—namely, that the legitimacy of the common law, unlike statutory
law, arises from custom rather than sovereignty.\(^{224}\)

It would appear, therefore, that although Goebel is wrong in accusing
Crosskey of being captivated by the “moonstruck nonsense” of natural-
law speculation, it may be true that any theory of the uniform adoption
of the common law before 1787 requires some appeal to the traditional
understanding of the common law as derived from natural law.\(^ {225}\)

\(^{224}\) See Horwitz, supra note 11, at 259-98; notes 9-18 supra and accompanying text.

\(^{225}\) It should be remembered that Crosskey lays out his theory of the reception of the
common law solely to buttress his interpretation of the Constitution as granting to
Congress a general national legislative power. Therefore, it would seem important to
find out where the Framers of the Constitution stood on this issue concerning the nature
of the common law. That is, did they think the common law obligated men because it
was grounded in nature or because (and only insofar as) it was the creation of a supreme
legislative power? If they thought the common law existed independently of the
legislative power, and if they thought America had a national common law in 1787, then
they might well have considered this law as a source of substantive powers for the
national government. But if they thought the common law had to be created by the
legislature, then they would surely have considered any federal common law to be only
incidental to the legislative powers of Congress and therefore not a legitimate source of
substantive powers. See note 40 supra and accompanying text.

We could begin our study of the Framers’ views on this point by examining James
Wilson’s Lectures on Law, which are especially pertinent to the question before us since
Crosskey relies greatly on these lectures to support his theory of the national common
law.

First, Wilson accepts the traditional theory of law as based in nature. He begins his
lectures by observing: “Order, proportion, and fitness pervade the universe. Around us,
we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or
should not, or will not be made.” 1 Wilson, supra note 35, at 97. Also, he describes
the common law as that which “contains the common dictates of nature, refined by
wisdom and experience, as occasions offer, and cases arise.” Id. at 356.

However, on the other hand, Wilson’s insistence that legal obligation depends on
human consent shows an inclination towards the modern theory of law as based on
human will. He even goes so far as to say that the law of nature does not bind a man
unless he consents to it, that is, unless it is sanctioned by human authority. He also
In this paper an attempt was made to demonstrate that, contrary to the opinions fostered by some of the reviewers of the book, Crosskey's *Politics and the Constitution* is worthy of serious study. His treatment of the American adoption of the common law was used as an example of the kind of argumentation found in his book. In carrying out this project, attention was devoted primarily to answering the criticisms made by Julius Goebel with regard to Crosskey's theory of adoption. The fact that Crosskey's *Politics and the Constitution* presents a viable theory of the adoption of the common law in the colonies is but a single indication of the continuing validity and usefulness of the work.

gives an account of the common law that makes it consistent with the primacy of consent. Although the common law was traditionally understood to obtain its legitimacy by being sanctioned by custom because custom reflected the dictates of nature, Wilson explains the customary character of the common law as the sign that men have consented to this law; this seems very close to the view that the common law is derived from a sovereign will rather than nature. *Id.* at 187, 121-22.

Hence at first glance Wilson's treatment of the common law appears to contain elements of both the traditional and the modern theories of law. Perhaps the views of the other members of the Constitutional Convention possess this same ambiguity, which could be explained as the result of their attempted fusion of classical theories of law and politics with those of modernity. But, all of this goes far beyond the limits of this article. For a study of Wilson's theory of law see Horwitz, *supra* note 20, at 311-12.