William Winslow Crosskey
William Winslow Crosskey and the Constitution

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The celebration of the Bicentennial of the Constitution has fueled the debate about how the nation's organic charter should be interpreted. Attorney General Edwin Meese III has urged that the Constitution should be construed in accord with the Framers' original intentions. Others have expressed sharp disagreement, arguing that although history is a guide, the Constitution is a living document that must be adapted to changing conditions. The debate is almost as old as the Constitution itself.

The foremost scholar in recent times of the original, historic understanding of the Constitution was a professor in the University of Chicago Law School from 1935 to 1963, the late William Winslow Crosskey. Paradoxically, Crosskey's views of the original intention would be largely unacceptable to those who now champion the "jurisprudence of original intention."

Crosskey was one of the most original and provocative legal scholars of the twentieth century. The publication in 1953 of his two-volume work, Politics and the Constitution in the History of the United States, generated a furious controversy. Crosskey undertook to demonstrate the historic, intended meaning of the Constitution. He challenged as incorrect many accepted views of the Framers' original intentions, including the division of power between the national government and the states; the scope of the authority granted to Congress; the intended role of the Supreme Court; and the breadth of the jurisdiction vested in the federal courts.

Crosskey's work inspired both extraordinary tributes and vehement criticism. Charles E. Clark, Dean of the Yale Law School in the 1930s and later Chief Judge of the United States Court of Appeals for the Second Circuit, acclaimed Crosskey's book "as a major scholastic effort of our times." The view of many of Crosskey's colleagues on the University of Chicago Law School faculty was reflected by Professor Malcolm Sharp who wrote that Crosskey had written "the greatest law book produced by any law teacher of our generation." A number of prominent scholars, however, vigorously disagreed with these views. Three noted professors, Henry M. Hart, Jr. and Ernest Brown, then members of the Harvard Law School faculty, and Julius Goebel of the Columbia Law School, wrote lengthy reviews in which they derided Crosskey's conclusions and assailed his scholarship. Few legal works have occasioned such rancorous controversy or have evoked such profoundly divergent assessments of their merits.

Crosskey was at work on a third volume entitled The Political Background of the Federal Convention when he died in 1968. The manuscript was edited by one of his former students, William Jeffrey, Jr., a professor at the University of Cincinnati College of Law. It was finally published by the University of Chicago Press in 1980 as Volume III of Politics and the Constitution. The third volume is a history of the major political events from the first continental Congress in 1774 leading up to the constitutional convention in 1787. One reviewer of this book, Professor John M. Murrin of Princeton, an authority on colonial and revolutionary history, observed of Crosskey that "[n]o one in this century has attempted a more sweeping reinterpretation of constitutional history." Another Princeton historian, and former professor at the University of Chicago Law School, Stanley N. Katz, described the posthumously published book as a "monument to
The publication of Volume III of “Politics and the Constitution” in 1980 completed the work. The first two volumes appeared in 1953.

Crosskey’s industry, obtuseness, originality, brilliance, and idiosyncrasy.

Crosskey today is a relatively unknown figure. His work is seldom mentioned, and he is often viewed as an eccentric and a curiosity. I count Crosskey as one of the most able and intellectually exciting legal scholars of recent times. His work justly belongs together with the great books of American legal history and constitutional law, and deserves to be better known.

II

Crosskey was a member of the University of Chicago Law School faculty for twenty-eight years—from 1935 to 1963—but he began his professional career as a Wall Street lawyer. He was born in Chicago in 1895 and entered Yale College in 1915. His college years were disrupted by leaves of absence to support his family, and he did not graduate until 1923. He then enrolled in the Yale Law School where he was a student of legendary brilliance. One of his classmates, Charles O. Gregory, a lifelong friend who became a leading authority on labor law and a colleague of Crosskey’s at the Law School, described his friend with a sense of awe as “a student who never appeared to work but who ended his first year number one in his class.” Another fellow student was Robert Maynard Hutchins who some years later, when President of the University of Chicago, persuaded Crosskey to abandon private practice and join the Chicago faculty.

After graduation from Yale, Crosskey was a Supreme Court law clerk to Chief Justice Taft. He then went to New York to practice law. For about five years, Crosskey was a personal assistant to John W. Davis, the Democratic party candidate for President in 1924 and the senior partner of a prominent Manhattan law firm. After six or seven years, Crosskey became restless in private practice, and in 1935 he accepted Hutchins’s invitation to join the University of Chicago faculty. He spent the rest of his life as a teacher and scholar.

Crosskey was puzzled by the argument that the government lacked constitutional power to deal effectively with the Depression. He decided to write an article on the Congressional power to regulate commerce. He soon widened his research to other provisions of the Constitution and ultimately devoted fourteen years to the research and writing of Politics and the Constitution.

At the time Crosskey began his research in the mid-1930s, the Supreme Court was at the center of a political firestorm. The Court had scuttled a number of New Deal measures. An embittered President Roosevelt had proposed reform of the Court. Chief Justice Hughes had remarked that the Constitution is what the judges say it is, and there were many who felt that the majority of the Court, who professed to be guided by the language of the Constitution, were in fact guided by their own conservative political and economic preferences.
Crosskey undertook to ascertain the historic and intended meaning of the Constitution. He had no preconceived view or thesis. The problem he set out to answer was, how was the Constitution understood by an intelligent, well-informed person when it was published in 1787? Crosskey insisted that the Constitution should be interpreted and enforced in accordance with the same rules and principles that govern the interpretation of any legal document. He stated that the proper standard for construing the Constitution was Justice Holmes’s oft-quoted rule for interpreting documents: “[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used....” He maintained that the Constitution is a “sensible, straightforward document”; that it was written with meticulous care by able lawyers; and that its meaning could be properly understood if one were knowledgeable about the contemporaneous legal, political, and economic ideas, and especially the language of the time.

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The Constitution is written in the idiom of the late eighteenth century. In the intervening two centuries, the meanings of certain key words in the Constitution have changed. In order to understand the terminology of the time, Crosskey made an exhaustive study of eighteenth-century newspapers, correspondence, pamphlets, and other materials. In the first two volumes of Politics and the Constitution he presented massive evidence of eighteenth-century usage and understanding of such key terms and phrases as “police power,” “the regulation of commerce,” “delegated,” and “imports and exports.”

Crosskey’s principal conclusions and his central points of difference from prevailing theories of history and constitutional law were as follows.

1. Crosskey rejected as historically incorrect one of the central tenets of constitutional law, that the national government was intended to have only limited, enumerated powers. He maintained that the constitutional convention intended to establish a national government fully empowered to govern the country. Congress was to have general, not merely limited, legislative authority to pass all laws necessary for the general welfare and the common defense. The states were assigned a subordinate role. Crosskey’s volumes bear this unusual dedication: “To the Congress of the United States: In The Hope That It May Be Led to Claim and Exercise for the Common Good of the Country the Powers Justly Belonging To It Under the Constitution.”

2. The Constitution empowers Congress “to regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes.” The Supreme Court interprets the word “States” in this clause to mean the geographical divisions of the country; Congress is deemed authorized to regulate interstate but not intrastate commerce. Crosskey’s conclusion, backed by immense documentation, was that the word “States” in the Commerce Clause was understood to refer to “the people of the states,” in the same way that “Indian Tribes” referred to the people of the tribes. Crosskey assembled a vast number of examples from contemporaneous newspapers and correspondence showing the common usage of plural verbs with the word “state,” as in the statement that “the state of New York are able to supply themselves with a sufficient quantity of that useful article nails.” In such statements, “state” manifestly refers to the people of New York and not to New York as a geographical entity. Crosskey’s conclusion was that Congress was vested with plenary power over all of the nation’s gainful activity. The Supreme Court currently recognizes broad Congressional power to regulate the country’s economy, but gaps persist even to this day. For example, Congress is thought to lack authority to establish a national uniform corporation law, and thus state legislatures vie with one another to debase the rules controlling the country’s large business organizations.

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3. In Crosskey’s view, the role of the Supreme Court and the judicial structure established by the federal convention differed in basic respects from currently accepted theories and practice. Crosskey maintained that the Supreme Court was to become the head of a unified national judicial system with supremacy over both federal and state courts on all points of law. Under existing practice, the federal courts, including the Supreme Court, must follow the decisions of the state courts on points of state law. Crosskey also maintained that while the Supreme Court was intended to have power to set aside any state law inconsistent with the Constitution, the Court could declare unconstitutional only those acts of Congress that infringed on the prerogatives conferred by the Constitution to the judiciary, such as the right to jury trial.

4. Crosskey illuminated various relatively obscure provisions of the Constitution. For example, he explained that the provision prohibiting the
states from levying duties "on Imports or Exports" was intended to cover the movement of goods from state to state as well as things brought in from abroad or sent to foreign nations. He also showed that the clause prohibiting enactment of ex-post-facto laws was understood in 1787 to forbid all retroactive law, civil as well as criminal, and not, as is presently thought, just retroactive criminal legislation.

5. In 1833, the Supreme Court ruled in *Barron v. Baltimore* that the Bill of Rights applied only to the national government and not to the states. Over the years, the Supreme Court has held that some, but not all, of the guarantees of the Bill of Rights were made applicable to the states by the Fourteenth Amendment adopted after the Civil War. Crosskey insisted that most of the Bill of Rights was originally intended to be enforced against the states, that *Barron* was incorrectly decided, and that, in any event, the Fourteenth Amendment was designed to overrule *Barron* and to make the Bill of Rights in its entirety enforceable against the states.

6. The orthodox view is that the Constitution resulted from a compromise between the large states and the small states. Crosskey maintained that the Constitution emerged from a political compromise between the Northern states, led by Massachusetts, and the Southern states, headed by Virginia. He believed the most significant issues were slavery and the intense post-Revolutionary War depression that provoked demands by the New England states that Congress be granted comprehensive authority to regulate trade, a power the Continental Congress lacked under the Articles of Confederation. According to Crosskey, the Southern states expected that, in time, the South would become the most heavily populated region in the country, but meanwhile the Southerners were dependent on the military and naval strength of the Northern states. The South acquiesced to demands of the Northern states that Congress be granted comprehensive power to regulate trade and to establish an American commercial system.

In exchange, the North made concessions to the South concerning the basis of representation in Congress that would have resulted in Southern domination of the national government if the South had grown as many Southerners anticipated.

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7. James Madison is regarded by many historians as "the father of the Constitution." Scholars have relied heavily on his notes of the proceedings of the federal convention, first published posthumously in 1840, as a guide in interpreting the Constitution. Crosskey regarded Madison as untrustworthy. He maintained that Madison altered parts of his famous notes of the proceedings in the federal convention and some of his other papers for personal and political reasons. Madison's contemporaries accused him of gross inconsistency with respect to almost every important public issue of his time. Crosskey believed that Madison, sensitive to these charges, falsified various records to appear more consistent and less subservient to the pro-slavery opinion of the Southern states than he actually was, and perhaps most important, in order to lend historical credibility to Southern states' rights theories of the Constitution. Crosskey also insisted that excessive reliance has been placed on *The Federalist Papers* in interpreting the Constitution. He pointed out that *The Federalist* was written to help promote adoption of the Constitution in the state of New York, where there was extremely strong opposition, and the nationalist character of the Constitution was minimized and blurred in *The Federalist* to further that political objective.

Crosskey stated that historical accidents account for many of the prevailing misconceptions of the scheme of government that, in his view, was established by the federal convention. Until the end of the Napoleonic Wars, America was absorbed with foreign affairs, and domestic matters tended to be secondary. As a result, Congress did not exercise many of its powers. This circumstance, taken together with the geographical inaccessibility of the Supreme Court, resulted in a scarcity of early precedents by those men who presumably would have been most familiar with the original understanding of the new government's authority. Crosskey maintained that misunderstandings have also arisen because judges and historians of more recent times have not understood eighteenth century idiom and the usage of certain words that constitute the key to the meaning of significant provisions of the Constitution.

Crosskey believed, however, that slavery was the most important factor that produced a deviation from the original understanding. Slavery was the driving force behind the states' rights theories of the Constitution that developed in the years after the government was formed. The South feared an uprising by the slaves from the time of the great slave rebellion in the French colony of Haiti in 1791. The Southerners were convinced that the South's safety and power lay in maintaining the status quo with respect to slavery. This, in turn, required the formulation of theories of the Constitution that would preclude any action by the federal government against slavery. According to Crosskey, the Southern pre-Civil War theories of the Constitution "required that all national power over matters of an internal nature (interstate or intra-state) be absolutely denied or frittered down to uselessness." These states' rights theories have continued to resonate in American constitutional law into the 1980s.
III

William Crosskey’s classes were one of the great intellectual experiences at the University of Chicago Law School during the 1940s and 1950s. He was a spellbinding teacher. Forty years have passed since my first encounter with Crosskey, but I still have a vivid memory of that occasion. During the summer of 1947, he taught a course on constitutional history. On the opening day of the term, a sultry June morning, Crosskey arrived at the classroom a few minutes late. We saw a stocky man of average height wearing a rumpled seersucker suit and carrying an armload of books. He dropped the books on to a desk in front of him with a loud thump—we learned later they were the four volumes of Farrand’s *The Records of the Federal Convention*—and he began substantially in these words:

“You have all heard, gentlemen, that James Madison is the father of the Constitution; that Oliver Wendell Homes, Jr., of Massachusetts was our greatest Supreme Court justice; and that Louis Dembitz Brandeis was the leading authority on the jurisdiction of the federal courts. Before I finish this summer, I propose to demonstrate to you that Madison was a forger—he tampered with the notes he kept at the debates of the federal constitutional convention in order to suit his own political advantage and that of his party. Holmes undoubtedly knew a great deal about old English law, but he was not the most eminent authority on American constitutional history. As for Brandeis, his opinion in *Erie v. Tompkins* demonstrates that he did not understand the true meaning of the judiciary provisions in Article III of the Constitution.”

The class was stunned by this unexpected assault on our youthful demi-gods. Before he finished that summer, Crosskey did indeed convince many of us that Madison was a suspect source, and he demonstrated that the constitutional convention that met in Philadelphia in 1787 intended to vest greater powers in the federal judiciary than Justice Brandeis acknowledged. Holmes remains for me a great human spirit, and experience has only deepened my admiration for the intellectual power and the moral force of Brandeis’s opinions. But Crosskey’s lectures removed Madison, Holmes, and Brandeis from a pedestal, and he enabled us to see them more realistically. We came to understand that not even the most eminent authorities are immune from critical scrutiny. I believe that an important phase of my education began that summer four decades ago.

The America of the late eighteenth century came to life in Crosskey’s classroom. His knowledge of that age was encyclopedic and he spoke with eloquence and passion about the men and the issues of the revolutionary period. There was no pretense of Olympian detachment. Crosskey did not conceal his regard for the ability and astuteness of the handful of New England men who, in his view, were the leaders of the movement for a constitutional convention. He admired the contribution to the writing of the Constitution made by Gouverneur Morris and James Wilson, delegates to the constitutional convention from Pennsylvania. He respected Alexander Hamilton as a “man of courage and high intelligence.” He thought Chief Justice Marshall the most able of all the judges who have sat on the Supreme Court. Crosskey did not disguise his distaste for the Southern plantation slaveholders whom he deemed profoundly anti-democratic, and he spoke scornfully of the petty and provincial local politicians who resisted an adequately empowered national government. Students arrived at his courses aware of his reputation as a nonconformist and iconoclast. Many had studied constitutional law and history in college and at the outset they were highly skeptical. By the end of the term, the great majority had come to admire and respect him.

Crosskey was severely critical of most historians. He thought highly of an English historian, Lawrence Henry Gipson, who wrote a thirteen-volume history of *The British Empire before the American Revolution*, but he felt that many historians rely too heavily on secondary sources and do not seek out and examine original source materials with an open mind and a disregard of preconceptions. He also believed that many historians do not rigorously analyze the texts of key documents. As he remarked in his book, “The historians’ discussions are not specific or rigorous upon this point, as indeed, they are not specific or rigorous upon many points.”

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Crosskey worked almost entirely alone. During vacation periods, he traveled to libraries throughout the country where colonial and revolutionary period documents are gathered and preserved. Many of the materials he sought were not readily accessible. There were relatively few scholars at Chicago, or elsewhere, who shared his outlook and with whom he could exchange ideas. His was a lonely intellectual odyssey. One
of his colleagues on the faculty, Harry Kalven, was moved to write in a memorial tribute that Crosskey’s “two-volume study is surely the single most dedicated, courageous, persistent feat of scholarship in law of our time.”

IV

Why is it that a work so highly praised by various discerning critics and a scholar so greatly admired by a number of his contemporaries is now so obscure? There are probably a number of reasons why Crosskey is not better known and which account for the negligible influence of his writings.

There is no doubt that the severely critical reviews by the Harvard faculty members adversely affected the reputation of Crosskey’s work. Some persons thought he had been discredited. For the most part, Crosskey chose not to respond to his critics, and in retrospect that was probably a mistake.

Crosskey’s work encountered a wall of disbelief and met resistance from many different quarters. None of the various factions who currently debate the manner in which the Constitution should be interpreted would invoke Crosskey, certainly not in his entirety. Crosskey rejected the notion of a “living” Constitution as a legal absurdity and thereby alienated many liberals. He maintained that the historic, intended meaning of the Constitution could be demonstrated with a high degree of certainty, a point of view at odds with prevailing theories of documentary interpretation that stress the ambiguity of language. Crosskey’s theory of the broad scope of power conferred on the national government and the limited role intended for the states runs counter to the views held by champions of states’ rights. His theories concerning the intended function of the Supreme Court and the federal judiciary also conflict with deeply held opinions.

Crosskey eludes classification as either a liberal or a conservative. Liberals would probably applaud his view that the Constitution provides for an effective, fully empowered national government; his theory of the comprehensive scope of the commerce power vested in Congress; his denunciation of the Southern slaveholders and their states’ rights theories of the Constitution; and his argument that the Bill of Rights was made applicable in its entirety to the states by the Fourteenth Amendment. But most liberals would reject his contention that the Constitution should be interpreted in accordance with its original understanding. Some conservative thinkers and judges would endorse this position, but they would find politically unacceptable many of the conclusions that Crosskey reached concerning the original understanding.

Crosskey’s work fell into a no-man’s land between teachers of constitutional law in the law schools and historians. The teaching of constitutional law consists, for the most part, in the reading and discussion of relatively recent Supreme Court opinions. The historical antecedents tend to be of secondary interest. Most professors of constitutional law in the law schools are not trained as historians. Accordingly, they have not quite known what to make of Crosskey. On the other hand, most professional historians do not have an intimate knowledge of the legal literature that forms so large a part of Crosskey’s work. Crosskey’s style and rhetoric have impressed many historians as legalistic and too narrowly focused. His work is often viewed by historians as a lawyer’s brief and not as a dispassionate presentation. Crosskey intensively studied the work of other historians but he did not discuss them by name in his books, and the erroneous belief arose that he was not aware of other scholarship in the field. Historians who have written in the past thirty years have largely ignored his books.

I believe that Crosskey was right in his basic thesis that the federal convention intended to establish a fully empowered national government. His cornerstone argument concerning the intended comprehensive scope of Congressional power to regulate commerce is enormously persuasive. That is a conclusion with profound implications. The view that Congress has general legislative authority follows logically from a plenary power to regulate trade; conversely, the orthodox theory that Congress has only fragmented, limited powers is difficult to reconcile with a comprehensive commerce power. It does not, of course, follow, if one thinks Crosskey correct, that it would be possible or prudent to reverse the clock of history, and now to construe the Constitution as originally understood. Crosskey’s work, like the works of other great historians, has a liberating power. For example, one who is convinced by the argument that the Constitution should be construed in accord with the Framers’ intent is not bound by the political views and the historical assumptions of the current advocates of the “jurisprudence of original intention.”

Crosskey had tremendous moral and intellectual courage. He did not flinch from challenging the most entrenched dogmas, and he shrugged off the harshest criticism. Darwin and Freud were singled out as exemplars of intellectual courage by J. L. Austin, the Oxford philosopher. As Isaiah Berlin wrote, Austin admired them because he believed that “once a man had assured himself that his hypothesis was worth pursuing at all, he should pursue it to its logical end, whatever the consequences, and not be deterred by fear of seeming eccentric or fanatical.” It was Austin’s view—which I share—that “a fearless thinker, pursuing a chosen path unswervingly against mutterings and warnings and criticisms, was the proper object of admiration and emulation.” Those words are a just and fitting epitaph for William Crosskey.

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