

Krock on Crosskey

In February, Mr. Arthur Krock, of the New York Times, devoted two lengthy columns to comment on Politics and the Constitution in the History of the United States, the recently published work of Professor William W. Crosskey of the Law School Faculty. By permission of the Times, Mr. Krock's comments are reprinted below.

WASHINGTON, Feb. 15—Signs are appearing that, after the current movement to amend the Constitution has been disposed of, lawyers, judges, historians and professors of English will become even more fundamentally involved over a new interpretation of the National Charter than Senators and lawyers are now over an old one. This revolutionary opinion of what the Founding Fathers really intended the Constitution to mean was expressed in a recent book by Prof. William Winslow Crosskey of the Law School of the University of Chicago.

If the thesis of this book were before Congress instead of the Bricker amendment and its flock of substitutes, the current Senate debate would be riotous instead of merely confusing. That is why one critic has already described the book as "dynamite," and why the law reviews are devoting great space to it. Imagination falters before the thought of what this book, if adopted as political doctrine by either major party, would do to the blood pressures of Republicans and Democrats who already find loopholes in the Constitution through which abuses of what they consider strictly reserved Congressional and state powers may enter our governing system.

Nevertheless, Crosskey's conclusions from the amazing research he did are finding influential support. And there is evidence that among his earnest students are members of the Supreme Court. Yet at some point one of his conclusions rejects some firm belief held by experts who will go along with others.

The New Deal lawyers who argued that the Constitution's clause giving Congress authority over "commerce" should be interpreted with new breadth, and the judges who sustained them, will be pleased with the result of his research on that subject. But they will not be pleased with his conclusion that the Supreme Court has been violating the Constitution in declaring that Acts of Congress, except those in a limited group, are inconsonant with the National Charter. And so on.

WHAT WORDS MEANT IN 1789

The book began in 1937 with work on a proposed law review article on the commerce clause. But this led to a search of fifteen years through archives mostly undisturbed theretofore—forgotten files in large and small libraries, private papers, the whole context of the writing of the Constitution. Crosskey put special labor on the vocabulary of the eighteenth century, in which it was

composed. And he decided, according to the editors of the University of Chicago Law Review, that:

The Constitution, far from being the glorious but vague, and general statement of the purposes, powers, and, above all, the limitations of our Federal Government, was in reality a tight, meticulously drafted, wonderfully consistent document. . . . As originally understood [in the eighteenth century vocabulary] it provided a charter for a government admirably suited to modern conditions.

Among his conclusions were:

¶"Commerce," as employed, meant "all gainful activity" by the people; hence the long-made distinction between "interstate" and "intrastate" commerce is without constitutional sanction.

¶To interpret "states," as the Supreme Court does, to mean "the territory" encompassed by each of them is contrary to the eighteenth century meaning, which was "the people" within those borders. Thus in those days they wrote "The State of New York are able to supply themselves," etc. This locution proves that the Founding Fathers intended Congress to have the power to regulate all gainful activity of the people everywhere.

PREAMBLE THE MASTER KEY

¶Their intent also, when they gave Congress authority to pass all laws necessary and proper for general welfare and the common defense, was for Congress to be supreme among the different branches of the Government. Legislative supremacy was the concept of the eighteenth century. The language of the Preamble, which was carefully constructed in the locution of the time, proves this by its statement of the Government's obligations, the attainment of all of which was assigned to Congress.

¶The English common law as applied to American conditions, and Parliament's unreviewable power to make statutes, formed the concept of the American colonies in 1787-89. The Supreme Court was never intended to possess a general power to review Acts of Congress but only to protect its own enumerated powers as expressed in eighteenth-century language.

¶Conversely, the Supreme Court is not, as it has long held, bound by the Constitution to follow the interpretations by state courts of state law and common law: in accepting that limitation it has "abdicated" its granted authority as the supreme tribunal.

¶Except for the First Amendment, and the appeals clause of the Seventh Amendment, the Bill of Rights was designed to apply to the states as well as to the nation, and the steady stream of laws and decisions to the contrary is made up of violations.

Historical research before has had its effects on the Supreme Court, for instance Charles Warren's "New Light on the Judiciary Act." The Crosskey book may provide another example, but only after a forensic battle of atomic intensity.

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Krock on Crosskey (Continued from page 8)

WASHINGTON, Feb. 18—In this space last Tuesday an account, necessarily inadequate, was given of a revolutionary concept of the meaning of the language of the Constitution that was evolved by Prof. William Winslow Crosskey, after fifteen years of intense research into writings contemporaneous with its drafting. It was reported that, on the evidence he offered of what words meant in the eighteenth century, these were among his startling conclusions:

¶“Commerce” meant all gainful activity by the people; hence the long-made judicial distinction between “interstate” and “intrastate” commerce has no warrant in the Constitution.

¶By “States” its drafters meant the people within specified territories, and not these territories or their internal

regulations. Hence it was intended that the power given Congress to "regulate (govern) commerce" covered all gainful activity within state borders.

¶Congress was designed to be supreme among the branches of the Federal Government; the Supreme Court was never intended to possess a general power to review the Acts of Congress, only those dealing with its specific province; and the Supreme Court was not bound to follow state courts' interpretation of state law and local common law. In the first instance it has violated the Constitution; in the second it has "abdicated" its appointed role.

Though Professor Crosskey's work is a miracle of scholarly research, and is being read with serious attention by, among others, members of the Supreme Court, its thesis is so controversial that one lawyer wrote to this department: "Now I join the book burners!" Did not, he demanded, Chief Justice John Marshall know the semantics of the eighteenth century, in which he was born and in which he helped to draft the Constitution? And, if a "state" did not mean a specific territory and local government, why did the Founding Fathers empower Congress to regulate commerce "among" the several states?

OTHER CONCLUSIONS

The author, who was law secretary to Chief Justice Taft, has answers for these and other dissents, as follows:

¶Eighteenth century documents show no evidence that "among" was used in the sense of "between." An example is a press report that "a severe hurricane blew among the Windward Islands," and "it is needless to point out that the hurricane blew 'within' as well as 'between' them."

¶Marshall's career "was a long and stubborn rear-guard action in defense of the Constitution" as it was meant to be read. "Nevertheless, he was continually forced . . . into compromise and defeat, the cumulative effect of which amounted to a transformation of the Constitution."