

William Winslow Crosskey

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I still have a vivid memory, after more than twenty years, of the first time I saw William Crosskey. During the summer of 1947, he was teaching a course at Chicago in constitutional history in which I was enrolled as a student. On the opening day of the term, he arrived in the classroom a few minutes late, thumped the four volumes of Farland's *The Records of the Federal Convention* onto the desk in front of him with a loud bang, and began substantially as follows:

You have all heard, gentlemen, that James Madison is the father of the Constitution; that Oliver Wendell Holmes, 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 of the debates at 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*¹ demonstrates that he did not understand the true meaning of the judiciary provisions in Article III of the Constitution.

There was a stirring in the classroom at this assault on our youthful deities. Before he was finished that summer, Crosskey did indeed convince many of us that Madison's notes of the Philadelphia deliberations (published after the death of every member of the convention) were not a trustworthy source in many respects. Holmes remains for me a great human spirit (no one could read his speeches and his correspondence with Pollock and conclude otherwise), and I still think of Brandeis as the preeminent legal craftsman to sit on the Supreme Court in recent times. But Crosskey's teaching removed them from the pedestal and enabled us to see them in a realistic perspective. I

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¹ 304 U.S. 64 (1938).

believe that an important phase of our legal education began for many of us in the classroom that June morning two decades ago.

Crosskey was a most unusual man. He was an iconoclast, boldly original, and an exponent of ideas regarded as heresy by many orthodox constitutional historians; and yet he was an innately conservative man. In spirit, he was a New Englander and a Federalist. His cast of mind is illuminated by the dedication to his book: "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."

Crosskey had been an exceptional student in the mid-twenties at the Yale Law School. He was subsequently selected by Chief Justice Taft as his legal secretary, and from Washington he went to Wall Street where he became a personal assistant to John W. Davis. In the early 1930's, Crosskey was called upon as a young lawyer to advise clients concerning the newly enacted Securities and Exchange Act. He became intrigued by the arguments concerning the constitutionality of the statute, and when he received an invitation in 1937 from Robert Hutchins to join the law faculty at Chicago, he accepted, intending only to write an article on the subject. As matters developed, he devoted the next fifteen years to the research and writing of his remarkable book: *Politics and the Constitution*.

The central theme of Crosskey's book is that the founding fathers intended by the Constitution to establish a national government, fully empowered to accomplish all of the objectives recited in the Preamble; they did not intend, in his view, to create a government, as generally believed, of limited and enumerated powers. Congress was intended to have general legislative authority to pass all laws necessary and proper in its judgment for the general welfare and the common defense. The Supreme Court was designed to become the juridical head of a unified national system of administering justice, supreme on all points of law over both federal and state courts. The President was granted general executive authority to insure domestic tranquility. The states, on the other hand, were to have a very subordinate and limited role.

The central non-military power granted Congress in the Constitution is its authority "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." Crosskey believed that once the intended plenary scope of this power was understood, his thesis that Congress was to have general legislative power would be more credible, and the rest of his contentions would come into focus. The Supreme Court interprets the word "States" in this

clause to mean the "territorial divisions of the country"; commerce "among the several States" is thus "commerce from the territory of one of our states to that of another," an idea subsumed in the phrase "interstate commerce." Crosskey's thesis—supported by a vast mass of documentation—was that the word "States" in the Commerce Clause was understood when the Constitution was written to refer to "the people of the states" and the term "commerce" comprehended "all gainful activity." In his words, the Commerce Clause was understood in 1787 as a "simple and exhaustive catalogue of all the different kinds of commerce to which the people of the United States had access: commerce, that is, *with the people* of foreign nations, commerce *with the people* of the Indian tribes, and commerce *among the people* of the several states."²

Proceeding from the Commerce Clause, Crosskey undertook to account for the precise phrasing of each provision of the Constitution. Clauses whose meaning or background has hitherto been obscure—the Full Faith and Credit Clause, the Imports and Exports Clause, the prohibitions against enactment of ex-post-facto laws, the Piracy Clause—emerged in a totally new light.

Crosskey believed the Constitution could properly be understood only in the context of the actual events which preceded it and in light of the politics and economics, the law and the language of the age when it was written. He maintained that the Constitution should be interpreted as it was understood by an intelligent, well informed person in 1787. His guiding principle was Holmes' rule of documentary interpretation: "We 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." Crosskey viewed with scorn the notion that the Constitution is a "living document" to be brought into harmony with the times by the Supreme Court. "Did you ever see a living document?" he would growl. If the Constitution was in some way inadequate to the needs of the time, there was a procedure established for its amendment.³

The Constitution is written in the idiom of the 18th century, and Crosskey felt that some of the misunderstandings of the document were connected with failure to understand this idiom and to perceive

² W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 77 (1953). The discussion of the commerce clause occupies the first eight chapters of the book following the introduction.

³ Lest Crosskey be thought outlandish, it should be noted that at least one present member of the Supreme Court, Justice Hugo Black, subscribes in essence to this principle of constitutional interpretation. *See, e.g., Katz v. United States*, 389 U.S. 347, 364, 373-74 (1967) (Black, J., dissenting).

changes in the usage of certain key words which occurred with the passage of time. As he put it: "One is prone to assume that when words abide, meanings remain; yet some 15 decades of cultural change—and their restless impact upon language—lie between us and the words of the Constitution."⁴ Crosskey sought to create a specialized dictionary of 18th century word usages—which he felt was essential to a correct understanding of the Constitution—on the basis of examples drawn from contemporaneous newspapers, pamphlets, letters, public documents, and the like. His methodology, whether or not one agrees with his conclusions, surely stands as a contribution to American legal history of the very first magnitude.

Strange as it may seem to those unfamiliar with his work, the structure of government which emerged from Crosskey's reading of the Constitution in conformity with 18th century canons of documentary interpretation is in nearly every respect suitable for the atomic age.

Crosskey was gifted with great analytical power; there are few men who could equal his ability in amassing, assimilating, and organizing vast masses of material. It would be difficult to exaggerate the dedication, the immense industry, the range and sweep of the research, and the painstaking attention to detail which went into his book.

A number of discerning critics—Judge Charles E. Clark, at one time Dean of the Yale Law School and later Chief Judge of the Court of Appeals for the Second Circuit; Walton Hamilton; and Malcolm Sharp, to name only three—believed that Crosskey had written a great book, deserving of the widest attention.⁵ But they were in a minority, and his book was attacked, sometimes ferociously, by various commentators.⁶ Some went so far as to impugn his intellectual integrity—a charge which was preposterous to those privileged to know him. The fact remains, however, that his book has not had widespread influence.

There are a number of factors which may account for the failure of Crosskey's work to receive its just recognition. In the first place, when Crosskey began to write his book in the middle 1930's during the depths of the depression, the problems with which he dealt were burning public issues. The Supreme Court had struck down a number of New Deal statutes, and Roosevelt's court-packing plan had excited

⁴ W. HAMILTON & D. ADAIR, *THE POWER TO GOVERN* 42 (1937).

⁵ Judge Clark hailed the book "as a major scholastic effort of our times." Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24 (1953); Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79 (1953); Sharp, *Book Review*, 54 COLUM. L. REV. 439 (1954).

⁶ See, e.g., Goebel, *Ex Parte Clio*, 54 COLUM. L. REV. 450 (1954); Brown, *Book Review*, 67 HARV. L. REV. 1439 (1954); Hart, *Book Review*, 67 HARV. L. REV. 1456 (1954).

intense controversy. But by the beginning of World War II, and certainly by 1953 when Crosskey's book was published, the power of the federal government to deal effectively with the nation's problems had been largely settled. For example, congressional power over commerce is now recognized to be almost complete. It is true that gaps remain—there is still substantial question, for example, whether the Congress could enact a Uniform Commercial Code which would be applicable to all commerce throughout the country, intrastate as well as interstate, or whether Congress could pass a Uniform National Corporations Act, so that the country would at long last enjoy the obvious advantages of uniform commercial law. But these issues are scarcely a source of great public controversy.

In the second place, Crosskey's ideas require a major readjustment in thinking for those interested in constitutional law. The highly charged reaction of some critics to Crosskey's book reflects the deep emotional commitment which many men have to the views Crosskey so vigorously attacked. Moreover, the force of Crosskey's rhetoric was not calculated to disarm his critics.

Finally, it must be acknowledged that Crosskey was not a skillful popularizer of his ideas. He had little patience with or interest in the politics of academia, which may be essential to gaining extensive attention for one's views. Crosskey was innocent of the art of extricating money from foundations so that he could surround himself with graduate fellows and research assistants who would then go forth to carry his views to the world. He did not write articles for law reviews or spend his time in making speeches. He was a scholar, and he had little interest in popularization.

Crosskey will be remembered by his students as a great teacher. He could hold a class spellbound. Who among those who studied with him will ever forget *Gouverneur Morris*, or the case of *Huidekoper's Lessee v. Douglass*,⁷ or the phrase "tub for the whale" (the derisive characterization of the tenth amendment by Federalists)?⁸ Crosskey

⁷ 7 U.S. (3 Cranch) 1 (1805). For his discussion of the case, see CROSSKEY, *supra* note 2, Ch. 23. Crosskey demonstrated that in *Huidekoper*, the Supreme Court, in a diversity case, substituted its own interpretation of a state statute respecting title to real property for that of the state's highest court, and the Supreme Court's construction was thereafter followed. Contrast this with the present view of the Supreme Court that it is constitutionally required to follow the precedents on points of state law and common law by the state courts, including even intermediate state appellate courts and state trial courts. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *West v. American T. & T. Co.*, 311 U.S. 223 (1940); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940).

⁸ See CROSSKEY, *supra* note 2, at 688. The phrase was derived from Jonathan Swift's *The Tale of A Tub*: "Seamen have a custom when they meet a whale, to fling him out an empty tub by way of amusement to divert him from laying violent hands upon the

was greatly admired by his students, but some felt that he was a forbidding figure. I found, on personal acquaintance, that like so many men of gruff demeanor, he was in fact a sensitive and kindly man. He was also a man of wit. I recall on one occasion he had been discussing the intricacies of the federal common law and Holmes' opinion in the *Black & White Taxicab* case.⁹ Crosskey had attempted, in a variety of ways, to make a point critical of Holmes' position. One member of the class, Milton Shadur, then Editor-in-Chief of this Law Review and now a distinguished member of the Chicago bar, had persisted in arguing against Crosskey's point. Finally, with a snort of exasperation, Crosskey turned to him and said, "Shadur, you don't want to be like Oliver Wendell Holmes, do you?"

He was a gallant man. During the closing years of his life, he suffered from an arthritic condition and nearly every movement was painful for him. He nonetheless continued to teach and to travel to various libraries and other document repositories. It is tragic that Crosskey did not live to finish the volumes of his work dealing with the events preceding the constitutional convention, the convention debates, and the ratification campaign.

It was Holmes who once remarked that the study of history is valuable because it "sets us free and enables us to make up our minds dispassionately" about various problems. Perhaps that was Crosskey's greatest contribution to his students: he helped liberate them from the feeling that history and authority dictate only one solution and opened their minds to other alternatives. It was an invaluable lesson.

ship." In contemporaneous discussions of the tenth amendment, the phrase conveyed the thought that the amendment would divert the attention of statesrighters who wished to alter the scheme of power between the states and the nation established by the original constitution.

⁹ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532 (1928).