The Constitution, Politics and Professor Crosskey

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1. INTRODUCTION—"Our Unknown Constitution"

No work on the Constitution since its ratification has resulted in more comment and controversy than Professor William Win-slow Crosskey's Politics and the Constitution. For some, our basic constitutive legal document has at last found its true prophet, while others have laughed Crosskey off as the "Don Quixote of Chicago . . . the Knight of Hyde Park." The great number of reviews, analyses and appraisals, the sharp criticism and bitter disagreement his work has evoked only underscore the importance of the contribution he has made to the study of American constitutional law. Indeed, the unrestrained acrimony of some attacks and the effervescent fervor of several eulogies amply fulfill the prophecy of Crosskey's colleague, Professor Max Rheinstein:

This book contains dynamite. It will be attacked, the truth of its historical conclusions will be doubted by many, one or other detail may perhaps be disproved, but neglected it cannot be.2

If one were to accept as valid Professor Crosskey's methodo-
logical approach, arguments and conclusions, Charles Evans Hughes' oft-quoted saying that "the Constitution is what the judges say it is"3 would need to be modified. True, constitutional law may be what the Nine Men have said it is, but the Constitution—the true, unknown Constitution—is anything but what they have said it is. Nor have the historians, the political scientists

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3 Quoted in 1 Pusey, Charles Evans Hughes 204 (1951).
and the academic branch of the legal profession done much better than the Supreme Court in their efforts to arrive at the intended meaning of our nation's governmental blueprint. It is for this reason that Professor Crosskey has devoted two volumes (and promises additional ones) to reporting the results of his research into the origins and character of the government of the United States and into the many political and philological vicissitudes which, according to him, have beclouded the historic and intended meaning of the provisions of our Constitution. He makes his report with courage and with what amounts to almost religious fervor.

The very first principle of orthodox constitutional law is rejected by Crosskey: The Founding Fathers did not intend to create a national government of limited, enumerated powers; on the contrary, their intent was to establish a government endowed with plenary power to attain all the objectives recited in the preamble. Congress was meant to have general legislative authority to pass all laws necessary and proper for the general welfare and the common defense. The President was to possess general executive power to insure domestic tranquillity. The Supreme Court was constituted the juridical head of a unified national system of administering justice—in all judicial matters it was to be supreme over state as well as federal courts. The states were to have a limited and subordinate governmental role, at least as far as the formal and effective power processes were concerned. One heretical proposition after another is propounded by Crosskey: Congress was to have authority to regulate intra-state commerce; most of the Bill of Rights was intended to apply to the states as well as the federal government; the Supreme Court was not granted a general power of judicial review to declare acts of Congress unconstitutional. And the accepted interpretations of other constitutional provisions are challenged and new explanations advanced.

It is the purpose of this article to consider critically the methodology employed by Professor Crosskey in his study and to present in survey fashion the Constitution, as he has rediscovered it. His supporters and critics—constructive and destructive—will be heard, and an appraisal of the significance of his work will be attempted.
II. THE MAN, HIS WORK AND HIS METHODOLOGY

There have really been very few scholarly works on constitutional law that could properly be termed "must reading" for the practitioner. But regardless of the ultimate judgment that only patient, calm, impartial historical scholarship can pass on Politics and the Constitution, it is a work that the practicing constitutional lawyer may not ignore, for it is a basic, fundamental study—it goes for the jugular on all controversial constitutional issues. One is not surprised, then, to learn that although William Crosskey has been a professor at the University of Chicago Law School for the past twenty years, as a young man he received over seven years of that rigorous training which only the stern school of New York corporate practice can provide.

Born in 1894, Crosskey did his undergraduate studies at Yale College and took his law degree at the Yale Law School. After a year's clerkship with Chief Justice Taft, he joined a Broad Street law firm. There, together with his colleagues, he was constantly puzzled over the then current constitutional exegesis espoused by the Nine Old Men. Nor for that matter was the New Deal Court's approach to satisfy him either. By this time he had become a law teacher, and he decided to make his own independent investigations. In 1937 he began his research in connection with a law review article on the commerce clause; the conclusions he reached were not in accord with conventional doctrine, but they were reasonable ones, supported by documentary evidence. To test his theories further, he undertook an intensive research project: he traveled throughout the country, visited libraries, great and small, investigated forgotten files, private papers and correspondences; he even went to cemeteries and read tombstones. As his research progressed, Crosskey became more and more convinced that the traditional interpretations of the Constitution were at least questionable. Politics and the Constitution represents the initial statement of his final conclusions which are presented by him as expressing the true meaning of our national constitutive governmental document.

Professor Crosskey seems to ground his entire methodological approach upon the well-known Holmesian canon of construction:

We ask, not what this man meant, but what these words
The interpretation of the Constitution, then, resolves itself into answering this question: what did the Constitution mean to an intelligent, well-informed person at the time it was drafted? As the foundation for his reply Crosskey has sought to recreate "the same apperceptive mass of factual knowledge possessed by an intelligent and well-informed mind of 1787" and to recreate also the legal and political ideas then prevalent. He attaches special importance to an understanding of eighteenth century modes of documentary interpretation and rules and practices of legal draftmanship. Equally important is his attempt to provide a specialized dictionary of eighteenth century word usages. After what seems to have been a thorough, if not exhaustive, philological survey of the era's newspapers, letters, pamphlets and public documents, Crosskey compiled his lexicon, and he assures us that in doing this he has relied upon "only materials that are beyond suspicion." His specialized lexicon of word-usages and juristic and political ideas thus furnishes an effective instrument with which to rediscover the circumstances in which the Constitution was written—the language, the law, the economics and politics of the time—all for the purpose of attaining a true understanding of the Constitution, and to that ultimate end, an understanding of the literature of 1787 and 1788 about it. Professor Crosskey's contentions are that his methodology is a valid one, that his research tools and procedures are reliable, and that his conclusions are established by them.

As supporting evidence, Crosskey points to the inherent consistency and coherence of his entire unitary theory of constitutional interpretation. He also asks us to consider some of the evil consequences of the long-standing and current misconceptions of the scheme of power, legislative and judicial, which the Constitution established between the Nation and the states: (1) our failure to obtain uniform law throughout the country, in many fields, especially commercial; (2) the increasing complexity of our corporation laws; (3) the complicated chaos which prevails

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5 1 Crosskey, Politics and the Constitution 12 (1958) (hereinafter cited as Crosskey).
6 Id. at 5.
when our state laws come in contact; (4) the ever-growing maze of tax barriers to trade between the states, and (5) the needless differences resulting from the "common law" of our forty-eight states. According to Crosskey, the Constitution provided remedial action for all these very pressing and complicated problems, and still does, if only the distortions and misunderstandings that have accumulated over the years can be sloughed off and pristine constitutional purity restored. Hence, in addition to being able to put forward his theory of constitutional exegesis as a scientifically tested and proven one inasmuch as it renders the widest array of facts comprehensible as parts of a consistent whole, Crosskey can also make the telling point that, if adopted, his theory would ameliorate many of the evils and obviate many of the difficulties in our present system of law and government.

According to Crosskey, the men who have served as members of our highest court, with the possible exception of John Marshall Harlan, the elder—his one fall from grace was his ardent advocacy of substantive due process—have misunderstood the essential nature of our governmental structure. "[T]he Justices, over the years since 1789, have generally done things they ought not to have done, and, quite as generally, left undone things they ought to have done; and, further to pursue the language of the Book of Common Prayer, it does truly seem that, in their discharge of this important function [the guardianship of the Constitution], there has been no health in them." But if he be right, how account for the fact that not only the Supreme Court but also legal and historical scholars have misunderstood so many basic provisions of the Constitution?

Some of the present misconceptions are products of deliberate, wilful distortions to facilitate the accomplishment of desired political ends. There have been at times weak yieldings to pressure to adopt particular interpretations of the Constitution, whether warranted by its words or not. The "states' rights" politicians, especially those from the slave states, were major participants in effectuating the changed meanings—they wrung anti-national concessions from the Federalists. The Great Chief Justice was not a bold innovator. He and Story were, of course, nationalists, but it was not a case of their broadening originally narrow federal

7 2 Crosskey 1161.
powers; rather they fought rear-guard actions, salvaging what they could before the Jeffersonian onslaught. Then, too, Congress failed to exercise many of its rightful powers during the early years of our Nation’s history, and a paucity of precedents resulted from the geographic inaccessibility of the Supreme Court. But the most important, though least suspected, factors that have contributed to constitutional misunderstandings have been fortuitous elements of the highest potency—changes in basic legal, economic and political ideas and radical changes in the usage of key words. Further, traditional historians have mistakenly relied upon James Madison as the “Father of the Constitution,” and they have failed to grasp the true nature of the “Federalist Papers.” Crosskey considers Madison to be a highly unreliable witness; The Federalist was campaign propaganda designed to facilitate the adoption of the Constitution in an anti-federalist stronghold by allaying the fears of the doubting; and it contains sophistries, inconsistencies, distractions, tricks, and some things which come perilously close to falsehood.

Standing by themselves, these causal influences of erroneous constitutional interpretation may seem inadequate, but when buttressed by Crosskey’s detailed historic-philological documentation, his reasoning is at the very least not implausible. Once accomplished, heterodoxy became orthodoxy, and error was compounded upon error.

To sum up, here is the way Professor Crosskey describes the objective of his work and his methodology:

It will propound a unitary theory of the Constitution based, in part, upon the antecedent usage of the words in which the document is cast, and based, for the rest, upon certain legal and political ideas of the period in which the Constitution was written. It will then test this theory, and the dictionary of terms, and the legal and political ideas, upon which it is based, by the fit of all these with a long parade of events and ideas, some antecedent, some subsequent, to the Constitution as an historical event.8

But before Crosskey’s work can be evaluated with fairness, it is necessary to delineate in more detail his revolutionary unitary theory of constitutional exegesis. Of course, the most we can

8 1 Crosskey 13-14.
hope to do is to sketch some of the evidence he presents in support of his position, for his arguments are numerous, detailed and rather difficult to summarize.

III. The Constitutional World of Professor Crosskey

A. The National Power Over Commerce

Professor Crosskey began his initial research twenty years ago by examining the most important of Congress' non-military powers—its authority over commerce. This is the first subject to which he turns his attention in Politics and the Constitution.

When it seemed that the Nine Old Men intended to adhere resolutely to their restrictive interpretations of the commerce power, historical and legal scholars took up the challenge and endeavored to find new meanings for the commerce clause. Stern's suggestion was that "among" meant "concern more than one of" the states; hence Congress might regulate that intra-state commerce which "concerned" more states than one. Then in 1937 Hamilton and Adair reached the conclusion that "commerce" in 1787 was the "name for the economic order" and the "one word which could catch up into a single comprehensive term all activities directly affecting the wealth of the nation." Professor Crosskey follows this approach and contends that "commerce" in its eighteenth century constitutional context signified "all gainful activity," including agriculture, banking, manufacturing and insurance, as well as trade and transportation. To support this interpretation of "commerce" as co-extensive with business and economics, numerous examples of usages of the term with that precise connotation are cited: the writings of Adam Smith, Blackstone, Alexander Hamilton, and James Wilson (delegate to the Constitutional Convention and one of the original Supreme Court Justices).

But this is only the beginning. Not only did “commerce” mean “all gainful activity”; “state” was used to mean “the people collectively in a community,” not merely a “territory,” and “among” did not connote “movement between” states, but “within” the states themselves. Hence, the commerce clause, when and as it was written, was understood to be 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 with the people of the several states.” In short, Congress was intended to have the authority to regulate “intra-state,” as well as “inter-state” and foreign commerce.

In support of his position that “state” in 1787 was most commonly used in the sense of the “people of a state”—this is today still a legitimate, if not a common usage—Crosskey marshalls many examples of such usage from the newspapers, correspondence and treatises of that period. For example, plural verbs were used with the singular subject “state”: “the state of Virginia are involved to an amount almost incredible in debts to the British merchants, which were not cancelled according to their hopes by the treaty of peace.” Further, the word “States” in the commerce clause comes between the two nouns “Nations” and “Tribes,” both of which were often understood in 1787, and still are today, in a multitudinal sense. Besides, any interpretation but Crosskey’s would result in an unidiomatic meaning for “among,” which is usually employed to denote not movement from or to another of a group of places, but movement from one to another of a group of persons. Finally, the societal sense of the word “state” is underscored by eighteenth century political philosophy, according to which, men initially in a state of nature formed themselves into civil societies, into “states.”

Three chapters are devoted to an analysis of the phrase “to regulate commerce.” To prove that it was understood in an inclusive sense during the pre-Federal Convention period Crosskey assembles and examines in detail three principal items of evidence: (1) the 1767 Letters from a Farmer in Pennsylvania, published by John Dickinson, a Revolutionary pamphleteer and

12 Crosskey 77.
13 Id. at 61. See also 1 Crosskey 60-65.
later a member of both the Continental Congress and the Federal
Convention;14 (2) the papers of James Duane, a New York dele-
gate to the First Continental Congress, which treat of the con-
gressional proceedings concerning the adoption of the 1774
Resolutions on the Rights and Grievances of the Colonies;16 and
(3) newspaper discussions of 1777-1780 concerning wage and
price control.10 Evidence advanced to establish that the phrase
was understood in the same sense at the time of the adoption of
the Constitution and during the formative period of our govern-
ment includes, in addition to a brief treatment of the ratification
campaign:17 (1) the discussions of 1791 concerning the bill to
establish the Bank of the United States;18 (2) the 1817 and 1823
debates on internal improvements;19 and (3) the famous con-
troversy over the New York steamboat monopoly.20

But what about Chief Justice Marshall’s Gibbons v. Ogden
opinion of 1824,21 which has been traditionally interpreted as re-
stricting Congressional power to the sphere of “inter-state com-
merce? Marshall himself, of course, did not use the word, and
Crosskey claims that if Gibbons v. Ogden is read carefully, it does
not support the conventional interpretation. He is also quick to
observe that the Great Chief Justice in his 1821 Cohens v. Virginia
opinion22 had declared:

That the United States form, for many, and for most im-
portant purposes, a single nation, has not yet been denied
. . . In all commercial regulations, we are one and the same
people. In many other respects, the American people are
one; and the government which is alone capable of con-
trolling and managing these interests, is the government
of the Union. It is their government, and in that character
they have no other. America has chosen to be in many
respects, and to many purposes, a nation; and for all these
purposes, our government is complete; to all these objects,

15 See Chapter VI, pp. 137-172.
18 See Chapter VIII, pp. 192-228.
19 See Chapter IX, pp. 229-292.
20 Ibid. See also Livingston v. Van Ingen, 9 Johns. 507 (N.Y. 1812); Gib-
bons v. Ogden, 9 Wheat. 1 (1824); and Steamboat Co. v. Livingston, 3 Cow. 713
(N.Y. 1825).
21 9 Wheat. 1 (1824).
22 6 Wheat. 264 (1821).
it is competent. The people have declared, that in the exercise of all powers given for these objects it is supreme.\textsuperscript{23}

Crosskey suggests that Marshall in retreating to some extent in the \textit{Gibbons} case from his earlier views was "merely making a compelled concession . . . to prevent dissents by certain of his 'States' Rights' brethren and keep the writing of the Court's opinion in his own hands, where, he doubtless considered, with very good reason, it was much more safe."\textsuperscript{24}

As a final piece of evidence, Professor Crosskey points out rather tellingly that less than a year after \textit{Gibbons v. Ogden} was decided Chief Justice Savage of New York in one of his opinions explained by way of dictum that in 1789:

It was not . . . thought, that state boundaries had any effect or influence upon this kind of navigation [the coasting trade—voyages between ports of the same state, as well as those between ports of different states]. It was not then thought that the coasting trade, or commerce among the states, must consist of voyages from state to state only: that was the discovery of later times. [But] it was then thought that commerce among the states meant among the people of the states.\textsuperscript{25}

\section*{B. The Interrelationships between the Commerce Clause and the Imports and Exports, Ex-Post-Facto, and Contracts Clauses of Article I, Section 10}

One of Crosskey's contentions is that the true meaning of the Commerce Clause has been in large part obscured by misinterpretations of three constitutional provisions which limit the power of the states: (1) the Imports and Exports Clause; (2) the Ex-post-facto Clause, and (3) the Impairment of Contracts Clause.

(1) Traditionally, the Imports and Exports Clause has been interpreted as forbidding the states to levy certain taxes upon goods imported from or exported to foreign countries. But by means of his historico-philological methodology Crosskey demonstrates that in the late eighteenth century the words "imports" and "exports" were used not only to designate goods brought

\begin{itemize}
\item \textsuperscript{23} Id. at 413-414.
\item \textsuperscript{24} 1 Crosskey 256.
\item \textsuperscript{25} North River Steamboat Co. v. Livingston, 1 Hopk. 149 (N.Y. Ch. 1824).
\end{itemize}

See 1 Crosskey 278 and in general 268-280.
from or destined for foreign countries, but also to refer to the movement of goods from one state to another state. Further, the clause prohibits the levying of "duties," which, according to Crosskey, meant all taxes, even retail excises, with the exception of only general property taxes. Therefore, he concludes that this clause was written to proscribe nearly all state taxation of interstate, as well as foreign, imports and exports.26

Should Crosskey's exegesis of the Imports and Exports Clause be accepted, the maze of confusion resulting from the Supreme Court's casuistic treatment of state taxation of interstate commerce could be cleared away. The taxable event, multiple burden and substantial effects tests and the various modifications thereof could be discarded, and the Court could strike down state attempts to tax interstate commerce on the authority of the Imports-Exports Clause:

(2) Ever since Calder v. Bull27 the Supreme Court has interpreted the Ex-post facto Clause as prohibiting only retroactive criminal legislation. Crosskey marshalls respectable evidence to prove that it was originally intended to forbid all retroactive laws, civil and criminal.28 Why the distortion? To pave the way for federal bankruptcy relief to those who were burdened with pre-existing debts. It is not insignificant that among those who needed this relief badly were Robert Morris, "the financier" of the Revolution, an important member of the Federal Convention and a former United States Senator, who was confined in a debtor's prison when Calder v. Bull was decided, and James Wilson, signer of the Declaration of Independence, member of the Federal Convention, chief preliminary draftsman of the Constitution, who was an associate justice of the Supreme Court when Calder v. Bull was decided, but who could not sit with his brothers on the case in Philadelphia because had he appeared there, he would have been imprisoned for his debts.

(3) If the foregoing analysis of the Ex-post-facto Clause be correct, the Impairment of Contracts Clause, as traditionally interpreted, is rendered superfluous. Crosskey's thesis is that the latter provision was intended to forbid the impairment of the obliga-

26 See 1 Crosskey 295-323.
27 3 Dall. 386 (1798).
28 See 1 Crosskey 324-351.
tion of future contracts as well as those already executed; it was meant to proscribe all state laws which would lessen the number of enforceable contracts, whether the contracts were previously formed or not. For example, if before the ratification of the Constitution a state did not have a Statute of Frauds, the enactment of such a law would be unconstitutional, but if a Statute of Frauds was in force in a state when the Constitution was ratified, it could be repealed since such action would increase the totality of enforceable contracts.

Professor Crosskey claims that the interdependence in meaning of the Ex-post-facto and Contracts Clauses and their logical correlation with the Commerce Clause furnish oblique internal evidence of a most cogent kind that his view of a plenary national commerce power is correct.

C. A Unitary View of the National Governing Powers

The basic principle of Professor Crosskey's theory is that the Constitution of the Founding Fathers intended Congress to be endowed with general legislative power to enact all laws necessary and proper for the general welfare and the common defense, and that of the three branches of the federal government, Congress was meant to be supreme.

What are the sources of this general legislative authority? To begin with, Crosskey claims that regardless of the modern notion of a preamble as a "verbal flourish" or a "ritualistic rigmarole," in the eighteenth century it constituted a formal declaration of legislative intent to guide executive and juducial officers in their duties of administration. Indeed, the works of Viner, Rutherford and Blackstone show that the normal eighteenth century canons of statutory interpretation permitted a court to depart from the letter of a law, if its spirit, as expressed in its preamble, so required. Crosskey is of the view that our constitutional preamble vested Congress with general powers to obtain the general governmental objectives recited therein. Another source of Congressional general legislative power, according to Crosskey, is the first clause of Article 1, Section 8, which provides:

The Congress shall have Power to lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the general Welfare of the United States....

29 Id. at 352-360.
80 Id. at 363-384.
He interprets the "General Welfare" provision not as a limitation upon the taxing power, but as a grant of one of three separate substantive powers: (1) the power to tax, (2) the power to pay the debts, and (3) the power to provide for the common defense and general welfare of the Nation. A final source of general legislative power is found in the fact that an eighteenth century legislature was regarded as possessing power to enact "rules of decisions," that is, the power to require judges to decide all non-constitutional questions in a specific manner. Since, as we shall see, Crosskey contends that state courts were to be subordinate to the federal judiciary in all matters and that there was in 1789 no separate state "common laws," but only a general, nation-wide common law, the authority of Congress, he concludes, was meant to be commensurate with the fullness of the common law.

But how explain the presence of enumerated federal powers in the Constitution? As the basis for his answer, Crosskey relies upon an acute, penetrating analysis of Blackstone's chapters on the "Royal Prerogative." Nineteen of the twenty-nine enumerations are accounted for on the theory that prior to the American Constitution these powers were regarded as properly belonging to the executive branch of government; they were specifically enumerated as the functions of Congress because the Founding Fathers desired to transfer them to the legislative branch. Having formerly been the prerogative of the king, they would have naturally belonged to the President, had not the Constitution specifically spelled them out as being the powers of Congress. It is conceded that some clauses of Article I, Section 8 were enumerated to impose limitations on Congress; for example, the grant of power to establish "a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies" was meant to obviate even the possibility of non-uniform legislation in those fields. Other powers, Crosskey maintains, were enumerated for the sake of emphasis and clarification.

As for the Tenth Amendment, it, too, has been misinterpreted. The word "delegated" was used in the common eighteenth cen-

31 Id. at 393-401.
32 Id. at 557-562.
33 Id. at 409-467.
34 Id. at 468-493.
35 Id. at 468-486 and 493-508.
tury meaning of “absolutely parted with” or “vested exclusively in”; “reserved” was employed not in the sense of “retained,” but in the then common technical legal sense of the creation of a new interest which had never previously existed as such; and the phrase “or to the people” was used in apposition to the word “states” to signify the same persons, namely, the people of the United States. A modernized version of Crosskey’s Tenth Amendment would read:

The powers not vested exclusively in the United States by the Constitution nor prohibited by it to the state governments are reserved to the people of the states.

To support his philological interpretation, Crosskey adduces, in addition to the usages in Blackstone’s Commentaries and the Gazette of the United States, the views of the great commentator on American law, Chief Justice James Kent of New York, and the concurrent views of three United States Supreme Court Justices, Henry Brockholst Livingston, Smith Thompson and Joseph Story. Further, he points out that the insertion of the word “expressly”—its eighteenth century meaning was “unambiguously and in full detail”—was three times voted down in Congress.

Professor Crosskey also has a new interpretation for the Full Faith and Credit Clause: it was intended to make possible a national system of inter-state conflict of law rules. According to his specialized eighteenth century lexicon, “public acts” meant statutes of state legislatures, “judicial proceedings” meant judgments and decrees of courts, and “records” meant judicial precedents. Modernized, his version of the clause would read:

Such effect shall be given in each state to the legislation, judicial precedents and court judgments and decrees of every other state, as will answer, in every respect to what is required by the rules and principles of the conflict of laws.

And with respect to the “Time, Places and Manner of holding

38 Id. at 675-690 and 697-708. See supra, pp. 11-12.
38 See 1 Crosskey 690-697.
39 Id. at 680-684.
40 Id. at 541-557.
41 Krash, op. cit. Supra note 36, at 15.
Elections” Clause, Crosskey contends that “manner” was used in 1787 to refer to the qualifications or the identity of voters—the determination of the “manner” of voting was the decision as to “who should vote.” Hence, if it chose to do so, Congress could enact national uniform legislation concerning the qualifications for participation in Congressional elections.42

At this point it might be well to emphasize that in the Crosskey scheme for the distribution of governmental authority, state powers are not eliminated, but merely subordinated to those of the Nation, except for those cases of certain exclusive federal powers and certain specific prohibitions against the states.

D. The Supreme Court’s Intended Place in the Constitutional System.

Crosskey’s concept of the constitutional system for the administration of justice is anything but orthodox. His disagreement with accepted notions can be expressed in two theses:

1. The United States Supreme Court was intended to be the head of a unified national judicial system; and
2. The Court was not to be endowed with a general power of judicial review.

1. One of Crosskey’s key theses is that at the time of the ratification of the Constitution there was a national common law.43 The whole theory of each state having its own common law was nothing more than a tenet of “the party line” of Jeffersonism around 1800, but the Supreme Court unfortunately accepted this false premise and thus not only, as we have seen, foreclosed completely any true understanding of the enumeration of Congressional powers and obscured the scope of Congress’ judicial-rule-making power, but also helped to destroy its own general judicial supremacy. As might be expected, our author has little sympathy with the Erie-Tompkins doctrine, which limits the Supreme Court’s supremacy to federal questions and requires it to follow the state courts with respect to state statutory and

42 See 1 Crosskey 522-530. Crosskey also contends that the Constitution grants to Congress the “ultimate power over voters’ qualifications in state elections of the more popular branches of the several state legislatures” (id. at 533) and the power “to see that the right of the people to appoint Presidential electors is everywhere preserved inviolate and really effective” (id. at 539). See 1 Crosskey 531-541.
43 Id. at 578-609.
Crosskey attacks this position on pragmatic and historical grounds; he impliedly claims that the Court in overruling *Swift v. Tyson* was misled by the well-known historical study of Charles Warren; and he expressly states that “it would seem unquestionable that acceptance of ... [the *Erie*] dogma has, by all odds, been the most fundamental and far-reaching error the Supreme Court has ever made.” Justice Story made no rash advance in the *Swift* case; instead his opinion was a cautious effort to save what he could of the plenary jurisdiction of the federal judiciary.

Originally, there was no intention to have two independent judicial structures—federal and state—without a common head, much less to have the national court system subordinated to the state judiciaries with respect to all questions of law. Suppose, for example, that a case arose in a federal court based upon diversity of citizenship and that the questions at issue involved the interpretation of the Constitution, a treaty, a federal statute, a state statute and the common law. If the case eventually came before the Supreme Court, it would be the final arbiter of all the legal issues raised, and thereafter all state courts would be obliged to follow the Supreme Court's resolution of not only the federal, but also the state questions of law. In short, if Crosskey's views should ever be accepted by the Supreme Court, there would be a national uniform common law, state laws would be construed identically in all courts, and the Supreme Court would have the final say on all questions of law.

The evidence advanced in support of this position includes the following:

(a) In the 1805 diversity case of *Huidekoper's Lessee v. Douglass* the Supreme Court rejected the construction of a state statute concerning title to realty previously adopted by the highest court of the state and

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46 2 Crosskey 1169.

47 3 Cranch 1 (1805). See 2 Crosskey 719-753.
substituted its own; subsequently the Supreme Court's interpretation was followed.

(b) Anti-federalist contrivances of the Jeffersonians led to the 1812 Supreme Court holding in *United States v. Hudson* and *Goodwin* that there is no federal common law of crimes.

(c) In the early years of our Nation's history the federal courts did not follow state law in equity cases: they enforced certain substantive equitable rights that were not recognized by state tribunals and denied enforcement of others that were established by state law.

2. But if Crosskey would expand the jurisdiction of the Supreme Court in one direction, he would limit it in another. While stressing that the Court was intended to have the power to declare null and void all state statutes which conflict with the Constitution, he contends that the Constitution does not confer upon it similar authority with respect to federal legislation, except that which might infringe upon the judiciary's constitutional bailiwick—the administration of justice in accordance with Article III and pertinent sections of the Bill of Rights.

For example, if Congress should pass a law that abridges the right of the people peaceably to assemble the Court could not declare it unconstitutional, but Congressional enactment abolishing trial by jury could and should be struck down. Each branch of the federal government was to decide the limits of its own sphere of constitutional authority, and the people, not the courts, were to be the ultimate judges at the polls.

After carefully examining and analyzing all alleged cases of pre-constitutional judicial review, Crosskey concludes that there was not one instance of an open or effective reversal of a legislative act by a court other than where the act involved the authority of the court. Further, he considers, but rejects the arguments based upon constitutional provisions which have been traditionally relied upon as logically sufficient to justify the power of the Supreme Court to invalidate acts of Congress. There is nothing in the Constitution itself to support the theory of general judicial

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48 7 Cranch 32 (1812). See 2 Crosskey 766-784.
49 See 2 Crosskey 865-902.
50 Id. at 1002-1007.
51 Id. at 938-975.
52 Id. at 982-1002.
review. On the contrary, negative arguments grounded upon the
Constitution can be adduced against it. Crosskey, for example,
finds it strange that the very governmental agencies to be super-
vised—the executive branch and Congress—are presented with
the means of circumventing judicial review in the form of their
court "packing" powers. Then, too, if judicial review be con-
sidered as an instrumentality intended for the protection of states' rights against the federal government, why was provision not
made for advisory opinions, for the states and Congress to be
parties in cases where a federal statute is challenged as uncon-
stitutional, and for the expeditious handling of such litigation?
All of this, of course, neatly dovetails with Crosskey's unitary
view of the national governing powers, for if Congress was in-
tended to possess not limited, but general legislative authority,
there would not be too many states' rights to be protected.

E. The Supreme Court and the Constitutional Limitations on
State Governmental Authority.

Professor Crosskey contends that the Bill of Rights, with the
exception of the First Amendment, in which Congress is specific-
ally named, and the appeals clause of the Seventh Amendment,
restricted by its terms to the federal courts, was intended to im-
pose limitations upon the states as well as the national govern-
ment.

To begin with, the amendments under consideration are writ-
ten literally in general terms—nothing in their language exempts
the states from the governmental disabilities created—and this
stands out in contrast with the two instances of guarantees drawn
to apply to the federal government only. Eighteenth century
rules of draftsmanship would have required explicit limitation to
minimize the full scope imported by the general words used.
Then, too, the governmental action proscribed by the Bill of
Rights is "inherently evil"; therefore it is "utterly impossible" to
suppose that the First Congress intended the states to have the
power to do the things forbidden. This general interpretation
is also in keeping with the high purposes of the Preamble. More-

53 Id. at 981-982.
54 Id. at 976-981.
55 Id. at 1059-1060, 1064.
56 Id. at 1059.
over, after analyzing the complex Senate proceedings relative to the amendments, Crosskey concludes that they were intended to be general and to apply to the states, although he does concede that, as originally proposed by Madison, the Bill of Rights was meant to constitute restrictions upon only the national government. Finally, he maintains that Supreme Court Associate Justice William Johnson in 1819 and in 1820, the Supreme Court of New York in 1820, and then the well-known law writers, William Rawle and Joseph Angell, in 1828 and 1829, "were of the opinion, before the Supreme Court's decision of Barron v. Baltimore had been handed down [in 1833] that all such parts of the first eight amendments did apply, in accordance with their plain letter, to all governmental action, whether by the nation or by the separate states."

How does Crosskey account for the erroneous opinion of Chief Justice Marshall in Barron v. Baltimore to the effect that the first eight amendments do not apply to the states? Surely Marshall and concurring Justice Story knew better. In fact, "bearing in mind the ability of the two men concerned, the only tenable conclusion is that Marshall and Story knew full well that the Court's decision in Barron v. Baltimore was quite unjustified; that it was, in fact, just one more of the Court's many regrettable surrenders to the steady onslaughts of 'States Rights.'"

Professor Crosskey seems to consider the "true meaning" of the Fourteenth Amendment to be "very simple and very obvious." The Privileges and Immunities Clause was to overrule not only the Dred Scott decision, but also Barron v. Baltimore and make the Bill of Rights a restriction upon the states, as originally intended. The Due Process Clause was intended to protect only procedural, not substantive rights. The Equal Protection Clause was meant to proscribe state legal inequalities or discriminations, but only those between some "person" and other

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57 Id. at 1066-1076.
58 Id. at 1076.
59 7 Pet. 234 (1833).
60 2 Crosskey 1080.
61 Id. at 1083.
62 Id. at 1083-1095. It is noteworthy that four Justices of the Supreme Court—Black, Douglas, Murphy and Rutledge—in their dissenting opinions in Adamson v. California, 332 U.S. 46, 66-125 (1947), subscribed to the view that the first eight amendments were incorporated into the Fourteenth.
63 See 2 Crosskey 1102-1116.
persons," for example, between a colored person and non-colored persons; it was not intended to prohibit even the most arbitrary discriminations between one class and other classes, for example, between farmers and non-farmers. Crosskey, therefore, has no patience with the Supreme Court's opinions which have reduced the Privileges and Immunities Clause to a nullity, have sired the illegitimate substantive due process concept and have relied upon the Equal Protection Clause as a general roving commission to review the reasonableness of every type of state law.

By way of concluding our survey of Professor Crosskey's unitary theory of the national government powers, let him speak for himself:

The scheme of the Constitution is simple and flexible: general national power, subject only to a few simple limitations, with state powers, in the main, continuing for any desired local legislation. So if the Constitution were allowed to operate as the instrument was drawn, the American people could, through Congress, deal with any subject they wished, on a simple, straightforward, nationwide basis; and all other subjects, they could, in general, leave to the states to handle as the states might desire.

[U]nder the scheme of the Constitution, the laws of Congress need not, any longer, be complicated and fragmentary in their incidence; the incessant jurisdictional litigation that now goes on, over the powers of the nation and the powers of the states would be a thing of the past; and, in general, all those expensive and paralyzing complexities in our government . . . resulting from the Supreme Court's theories, would be forever and completely at an end. And with these things accomplished, the Court itself, as in the early days, could, with great benefit to the American people, devote itself undistractedly to its own truly intended function as the nation's juridical head.

IV. THE CRITICS AND CROSSKEY—AN APPRAISAL

The scholars and practitioners who have reviewed Professor Crosskey's two volumes have heeded the biblical admonition about not being lukewarm—with very few exceptions they have been very, very hot or very, very cold.

64 Id. at 1096-1102.
65 Id. at 1172-1173.
Here are several samples of adverse criticism:

... [F]rankness requires admission of the impression that such great labor has served for the most part only to bring forth the proverbial mouse... On the whole... the volumes are distinctly disappointing. R. K. Gooch, 40 A.B.A.J. 313, 314 (1954).

The work is what one might expect from a social scientist who wants absolute government which could facilitate a social revolution, but it is not what one would expect to be the product of a scholarly legal mind. C. Perry Patterson, 32 Tex. L. Rev. 251, 255 (1953).

... Professor Crosskey has built on the strangest combination of fact and fancy ever put before the public... an interpretation of the Constitution for which there is no factual basis whatever. Worse than that, when facts get in the way of fancy, Mr. Crosskey disposes of them either by deft restatement, making them what they are not, or by unwarranted accusations or insinuations, sometimes amounting to character assassination... One would have to write a fair-sized book to refute in detail all the distortions of recorded fact and dispel the more numerous insinuations relative to Madison alone. Irving Braut, 54 Col. L. Rev. 443, 445 (1954).

It is unfortunate that Mr. Crosskey's years of research should have produced a book so incomplete in the evidence it presents, so curious in its reasoning processes, so bitter in its address to unwelcome ideas... E. J. Brown, 67 Harv. L. Rev. 1439, 1456 (1954). 66

But Walton Hamilton has a rather unflattering answer for Crosskey's critics:

The monograph boys and the pedants who conceive of scholarship as an excursion in myopia will loudly voice disapproval. Then there are those who have, by the heroic use of the pen, created for themselves vested interests in established articles of constitutional faith. To them acceptance of the Crosskey thesis will be anathema. In particular, all those who expect dividends of prestige from

established scholarship will entrench themselves behind their publications and defend their frontiers to the last footnote. 21 U. of Chi. L. Rev. 79, 91 (1958).

As far as Hamilton is concerned:

Never has so adequate a gloss—fashioned from materials from a hundred sources—been written to an authoritative text. It is for this reason that Crosskey's volumes are timely, that is, they are for all time. Id. at 92.

Other examples of favorable comment are:

Mr. Crosskey's evidence for his interpretation of the Constitution is detailed, elaborate, internally consistent and inconsistent with any other meaning . . . Though Crosskey's position may have become unfamiliar, it seems to the reviewer impregnable. Malcolm Sharp, 54 Col. L. Rev. 489, 441, 443 (1954).

Professor Crosskey's new book on the Constitution is an exciting work. It is exciting for a reason as unique as it is admirable, the intellectual punch it delivers. . . . I cannot believe but that devoted attempts such as this to ascertain what was originally purposed and how results fell short of objectives will play a large part in shaping our heavenly city of the future. Charles E. Clark, 21 U. of Chi. L. Rev. 24, 39 (1958).

Professor Crosskey's study is a major work in the field of American constitutional law and constitutional history, judged by any standard . . . a piece of scholarship. Oliver P. Field, 28 N.Y.U. L. Rev. 1197 (1953). 67

It would seem to be unfortunate that for the most part scholars in reviewing Professor Crosskey's work have adopted an either-you're-for-him-or-you're-against-him approach and accordingly have "chosen up sides." If there are any all-right-or-all-wrong questions in the fields of law and history, the validity and significance of Crosskey's theories and theses is clearly not one of

67 The following reviews have also praised Crosskey's work in whole or in large part: Dean, 40 A.B.A.J. 314 (1954); Durham, 41 Calif. L. Rev. 209 (1953); Forkosch, 20 Brooklyn L. Rev. 124 (1953); Heiman, 39 Iowa L. Rev. 138 (1953); Jeffrey, 13 La. L. Rev. 638 (1953); Kelso, 39 Iowa L. Rev. 149 (1953); and Peters, 28 Notre Dame Law. 308 (1953). A rather unique position concerning Crosskey's work is taken by Howard Jay Graham. He writes: "Is Politics and the Constitution really a parable—a masterpiece of constitutional impressionism—a mirror and a sermon in the form of a brief . . . Like the Sphinx and Congress, Professor Crosskey speaks in riddles and shouts in silences." 7 Vand. L. Rev. 365 (1954).
them. Of course, the odds against Crosskey’s being 100% correct are tremendous—it is just incredible that our nation has been victimized by a plot to subvert the labors of the Founding Fathers and that the Supreme Court and constitutional scholars have misunderstood the real meaning of our basic legal document, at least to the extent claimed by him. On the other hand, he is definitely not a charlatan—his work is too thoroughly documented to permit such a conclusion, and there is no evidence that he is not a man of good will.

One of the most refreshing things about Crosskey’s study is his refusal to accept authority and mere repetition as the ultimate criteria of historical truth. We are his debtors if for no other reason than that he has dramatized the necessity of searching patiently all relevant original documents and background historical materials, not merely those that have been traditionally relied upon. He has shown himself eminently prudent in returning to the primary source material of American constitutional law.

True, Professor Crosskey’s conclusions, standing by themselves, sound incredible and they are startling, if not shocking. Yet the evidence he advances to support them is impressive, not only because of its sheer mass—because it is elaborate and detailed—but also because of the resourcefulness with which it has been discovered and the skill with which it has been marshalled. An original thinker and master logician, he lucidly presents his new and fascinating theories with verve and biting sarcasm. What has resulted is a plausible, powerful opening statement of his position, and at the very least he should not be non-suited.

It is rather unfortunate, though, that in proposing his views Crosskey has become so emotionally involved and personally committed. He does not always give the impression of a detached scholar at work, for he finds it difficult to advance his arguments dispassionately, and his writing often takes on the style of a lawyer’s brief. His condemnations of legal and historical scholarship are needlessly tactless, and it is not impossible to understand how his attitude could be interpreted as a belligerent, chip-on-the-shoulder one. He appears to enjoy his “debunking” just a little too much. Then, too, Crosskey employs a “no-possible-doubt” phraseology that can become irksome. Finally, it is questionable whether his disparaging characterizations of Jefferson,
Madison, Mason and Taney are in good taste. However, all this has its good side. You always know where Crosskey stands; there are no unexpressed premises, no straddling of issues, no double talk. He seems to say exactly what he means, and there is every reason to think that he means and firmly believes exactly what he says.

Crosskey and his followers emphasize the consistency of his unitary theory of the national governing powers. But a reader cannot help but get the feeling that the meaning of Crosskey’s Constitution is too crystal-clear, that his constitutional universe is too perfect. Nor can one help but be a little suspicious that perhaps Crosskey has omitted unpleasant facts that could not be reconciled with his theses. Professor Charles Fairman, “a legal historian of notable fairness,” claims that Crosskey in his treatment of *Barron v. Baltimore* selected material favorable to his position, but neglected abundant evidence to the contrary. Professor Julius Goebel, speaking on behalf of Clio, contends that Crosskey has not mastered the details of legal development in the colonies and the states; he challenges on historical grounds Crosskey’s view that the colonies had a common customary law and that the Founding Fathers intended to convert this common customary law into a general common law for the United States. And in passing, it may be observed that Crosskey’s treatment of the “Third American Constitution” is in general less exhaustive, searching and brilliant than his study of the original Constitution and the Bill of Rights.

Crosskey and his followers stress that the Constitution, as he has rediscovered it, is eminently suited to meet the needs of our Nation today. But what about the United States of 1787? When one remembers that about ninety per cent of the population was agricultural, that roads were bad, that certain sections were in large part isolated from the rest of the country, it would seem clear that at the time the Constitution was drafted the United

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68 Sutherland, 39 Cornell L. Rev. 160, 169 (1953).
States was not well-suited for a unitary governmental structure and system. Crosskey may be technically correct concerning his philological arguments, but certainly some of those who spoke eighteenth century English would have been surprised to learn that the Constitution vested general powers in a highly central-ized national government.

The most unfortunate thing about Crosskey’s study, however, is that it is incomplete. He has yet to present in any great detail his analyses of what happened at the Constitutional Convention, what was said and done during the Ratification Campaign, and why the intended scheme of government was never put into operation. This he plans to do in forthcoming volumes. It can be hoped that he will also attempt to explain more explicitly the relatively rapid shift from the Constitutional advocacy of a strong central government in 1787 to the Jeffersonian championing of states’ rights by 1801. In this connection, Crosskey’s colleague, Professor Max Rheinstein says that the promised volumes will show the decisive role played in the falsification of the historical picture by James Madison.72

Obviously, it would be premature to come to a final conclusion at this time on the question whether the words of the Constitution meant in 1787 what Professor Crosskey says they did. But this is so not just because his study is incomplete. Before a fair and impartial judgment can be rendered with respect to even the two volumes which have appeared, it will be necessary for scholars to go over Crosskey’s source materials with a fine-tooth comb. Only after his steps have been carefully retraced, can his arguments be critically evaluated and his constitutional interpretations be seen in their proper perspective. This will take many years and dozens of doctoral theses. One thing, however, seems certain: Crosskey’s study is a stimulating, provocative, challenging intellectual achievement which has already made its impact felt in educational circles and one which will leave its marks on scholarly endeavors for years to come.

Whether Professor Crosskey’s theories will have an effect upon our legal system and our governmental structure, whether that effect, if any, will be profound and lasting, only time can tell.

Surely some of the Supreme Court Justices will read Crosskey, and perhaps the law clerks of the others will do so, too. At least some of his arguments will eventually be presented to the Court and passed upon. His influence is also likely to be felt in Congress; indeed it is to that body that he has dedicated his entire work "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." But it is submitted that in the last analysis the extent of Crosskey's influence will be determined principally by the extent to which his underlying philosophy of constitutional law is accepted and acted upon by our formal authoritative decision-makers.

V. CONCLUSION—A NEW SCHOOL OF CONSTITUTIONAL LAW

There are several basic questions that are implicitly raised by Professor Crosskey's methodological approach: What essentially and realistically is a constitution? Whence the binding force of our nation's constitutive legal document? Is there a fundamental difference between the American written Constitution and the English unwritten one? Does the United States actually have a written Constitution? What precisely are or should be the reasons for constitutional development and change? Is it really important to discover the "true" 1787 meaning of the Constitution?

It would seem that the most significant aspect of Professor Crosskey's study is that he has in effect established a new school of constitutional law. His entire work is a forthright rejection of the constitutional doctrines of the conservative historical school, and he has no patience with, or respect for, what he describes as "the 'liberalizing' sophistries of the 'living document' school." One way of classifying the new Crosskey school, however, would be as a hybrid of the conservative historical school and the living document school. From the viewpoint of methodology and form, the Crosskey school resembles the former; from the viewpoint of content and doctrine, it approximates the latter. Similarly to the conservative historical school, Professor Crosskey is an ardent advocate of a written constitution with precise, definite meanings, and he insists on the importance of discovering the meaning of

\[73\] 2 Crosskey 1172.
the Constitution as it was originally written. But Crosskey reaches many of the actual and potential conclusions of the living document school. Of course, Crosskey's followers would be quick to point out that unlike that of the conservative historical school, his methodological approach is a scientific one which enables him to arrive at the "true" meaning of the original Constitution; and that unlike the living document school, he need not resort to the embarrassing intellectual task of squeezing, stretching and distorting the Constitution, nor is his end product an artificial patchwork of doctrinal interpretations. In short, it appears to be the contention of the Crosskey school that the Constitution means today what it did in the summer of 1787 when "Go. Washington—President and deputy from Virginia" became its first signer, and that it meant then what Crosskey's historico-philological lexicon says it did.

Crosskey's opponents have a perfect opening at this point. They can remark sarcastically that the Nation is being asked to accept the proposition that the Constitution is not what the Supreme Court says it is, but rather what Crosskey says it is and that the credo of the Crosskeyites is that there is no law but the Constitution and Crosskey is its prophet.

As has been mentioned in another context, the Crosskey Constitution is compatible with the present political economy of the United States and is ideally suited to meet what many would consider to be the needs of our times. Admitting this to be the case, we have already asked from an historical viewpoint: what about the United States of 1787? Another relevant question is: what about 1987? In proposing his kind of written constitution rather than a living one, is Crosskey not underestimating the advantages of subtle changes that can emerge only through statesman-like judicial interpretation, based upon political custom and tradition?74 Does he not fail to realize that the Constitution has served our Nation as well as it has in large part because of the ambiguity and indefiniteness of many of its provisions; that with changing economic, social and political conditions, constitutional provisions will be and should be given new and expanded or contracted meanings; that "We, the People" were not merely the citizens of the eighteenth century, but are also the citizens

of each succeeding generation? These are questions of the greatest importance, for, as Mr. Justice Douglas has so well expressed it: "The Constitution was written for all times and all ages. It would lose its great character and become feeble if it were allowed to become encrusted with narrow legalistic notions that dominated the thinking of one generation."75 In fairness to Professor Crosskey, however, it should be remembered that under his Constitution, Congress would possess general legislative authority, and the Supreme Court would not be endowed with the power of general judicial review. Thus new social and economic problems and political challenges could be met by the legislative enactments of Congress, a governmental branch that is directly responsible to the people at the polls and accordingly more responsive to the will of the majority.

A final consideration: assume arguendo that Crosskey is 100% correct concerning his philological and historical conclusions; what then? Should we return to pristine constitutional purity by revamping our governmental structure according to the 1787 meaning of the Constitution? Should historic facts about the perspectives of the Founding Fathers be binding upon the authoritative decision-makers of today to the extent that our present constitutional form of government should be drastically modified just because historic and philological mistakes were made in the past? Even if Crosskey should be correct in his thesis that the Supreme Court was not intended to possess the power of general judicial review, there are many who would be unalterably opposed to doing anything about it. Under Crosskey's Constitution, Congress could abridge the freedoms of religion, speech, press and assembly, in fact, any of the constitutional safeguards other than those pertaining to the administration of justice; the only recourse available to the citizenry would be the ballot box. There would be no adequate means for the protection of the rights of minorities, and this would constitute a major setback to the progressive development of democracy under the aegis of the rule of law. Pristine constitutional orthodoxy cannot be worth that much!

However, should Crosskey be philologically and historically

correct to any great extent, it is imperative that we critically re-evaluate the essential nature of the constitutional decision-making process of the Supreme Court. If we are to be intellectually honest with ourselves and to maintain the integrity of our legal system, it will be necessary at the very least to replace the traditional mythical rationalizations for many of our constitutional doctrines with realistic, rational justifications. Further, should Crosskey be philologically and historically correct to any great extent, we as a Nation shall be faced with momentous and far-reaching decisions concerning alternative governmental policies and practices which possess what we have traditionally regarded as the hallmark of constitutional orthodoxy—the approbation of the Founding Fathers as expressed in our basic legal document. Whether or not we shall consider it wise or expedient to return at this late date in whole or in part to eighteenth century constitutional orthodoxy, who would deny that William Winslow Crosskey deserves well of his fellow citizens for having attempted to give us this choice?