

orously informs every stage of the argument, rather than being made in some way peripheral as is so often the case. Second, Ellul analyzes a wide range of cultural phenomena (politics, sexuality, economics, and arts, and so on) in detail and depth. He does not talk about culture in general. Third, the radical iconoclasm arising out of his strongly transcendental position enables him to be devastating in his criticisms of both the Right and the Left. In short, it is a distinctive approach to the theology of culture that, while it seeks to liberate us, is not "liberation theology" (with its inclination toward global action), and although it is informed by Marxism it is not akin to the theologies arising out of Christian-Marxist dialogue that have a penchant for utopias and the Left. Ellul wishes to announce the Good News that undercuts the pretensions of the Right and the Left, and he does so. We are in his debt.

Reviewed by W. TAYLOR STEVENSON

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### *Crosskey's Constitutional Blockbuster and the Limits of History*

**Politics and the Constitution in the History of the United States, Volume III: The Political Background of the Federal Convention**, by William Winslow Crosskey and William Jeffrey, Jr., *Chicago: University of Chicago Press, 1980. xii + 592 pp. \$27.00.*

STUDENTS OF American constitutionalism should be familiar with Professor William W. Crosskey's monumental *Politics and the Constitution* (1953), to which a third volume is now added, more than a decade after the author's death. The first two volumes set forth a controversial account of the intended meaning of the Constitution, particularly with respect to Congressional control over

the commerce of the country and with respect to the powers of the Supreme Court. Those volumes also offer an account of how that intended meaning has been distorted almost from the beginning, despite the valiant efforts of Chief Justice John Marshall and Justice Joseph Story.

The third volume of this study, which has been prepared for publication by Crosskey's faithful student, Professor William Jeffrey, Jr., of the University of Cincinnati, describes the events leading up to the Federal Convention which wrote the Constitution. The contents of this volume are indicated by the titles of its five parts: "The Articles of Confederation"; "The Movement for a National Commerce Power in the 1780's"; "Politics and Events Leading up to the Failure of the Annapolis Commercial Convention of 1786"; "Politics and Events Leading up to the Agreement of Congress and the States to the Meeting of the Federal Convention of 1787"; "The Public Mind on the Eve of the Federal Convention." Its first chapter, prepared by Jeffrey, provides a useful summary of the first two volumes of the set.

I have the impression that Crosskey is not regarded kindly by historians, even though some of the original reviews of his work were quite laudatory.<sup>1</sup> But others were unduly harsh—and it seems that they have determined the prevailing opinion.<sup>2</sup> His work has been described by one well-informed student of constitutional law as a "blockbuster"<sup>3</sup>—and, "naturally," people did not want to be in its vicinity when it shook up longstanding (even "sacred") scholarly opinions.

I have had occasion to testify to Crosskey's remarkable thoroughness as a researcher.<sup>4</sup> I can also testify that he can be very useful to anyone who wants to think about how the Constitution is put together. Certainly, one must have a sound "theory" of the Constitution—of what it says—if one is to be able to make sense of the often confusing materials one confronts, including those not infrequent judicial opinions which seem to ignore the language of the document.

The most helpful introduction to Crosskey's work, it seems to me, is that provided in 1973 by the late Professor Malcolm P. Sharp, a long-time associate of Crosskey at

the University of Chicago Law School. The judiciousness of Sharp's approach may be seen in his observation,<sup>5</sup> "I offer these suggestions . . . partly as an encouragement to those who are—to me, surprisingly—discouraged or confused by the bulk and style of [Crosskey's] argument and partly as my own view of its most important and convincing portions. On other matters he seems decisively convincing but not indisputably convincing; on others, barely convincing; and on a few, mistaken." Sharp's assessments are particularly valuable because of his considerable experience as a student of commercial law.

Professor Stanley N. Katz once reported, not altogether facetiously, that he had just learned from Crosskey through Sharp that "the greatest case in the history of the United States Supreme Court" is *Huidekoper's Lessee v. Douglass* (1805).<sup>6</sup> Something is to be said for this outlandish suggestion, in that it does recognize that interpretations by the Supreme Court of the United States (whether they be of State statutes [as in *Huidekoper's Lessee*], of the common law or of strictly federal matters) should be authoritative for all courts in the United States. Is not this implied by the rule of law under a constitution such as ours?

Another great case, it is salutary these days to add, is *Youngstown Sheet & Tube Co. v. Sawyer* (1952), which recognizes that even the President of the United States is subject to the rule of law.<sup>7</sup>

Whatever one thinks of Crosskey's reading of the Commerce Clause—a reading which invests Congress with power to regulate all the gainful activity in the United States that it chooses to concern itself with—Congress and the Supreme Court have moved in practice since the 1930's to a recognition of virtually unlimited power in the national government with respect to most commercial matters. But since that recognition has not been straightforward, Congress is not yet confident enough of its power to provide the legislation that is said to be needed with respect to certain commercial matters (such as a national corporations law, the law of negotiable instruments, and, indeed, contract law generally). Consider,

however, what has been done by Congress in recent years through the Electronic Funds Transfer Act, the Fair Credit Reporting Act, and the Monetary Control Act. Perhaps even more significant may be the substantial efforts in Congress to regulate State usury laws.

As should be evident from the judicious observation I have quoted from Sharp, it must be a rare reader who does not have some reservations about Crosskey's work on the Constitution. Thus, I myself am not fully persuaded, although I remain intrigued, by what Crosskey has to say about the scope and effect of the Preamble, about the significance of the enumeration of powers in Article I, Section 8, about the intended meaning of the Contracts Clause, and about the *extent* of the Supreme Court role with respect to the entire common law of the country (however dubious *Erie Railroad Company v. Tompkins* [1938] may be). There does seem considerable merit to what is said by Crosskey about the commerce power (which argument, fundamental to his entire work, is reinforced by this third volume), about the care with which the entire Constitution was written and is to be read, and about the quite limited effect of the Tenth Amendment. There is merit as well in what he says about judicial review, but his argument here is far from conclusive. We differ about whether the doctrine of States' Rights has anything good to be said for it (he thinks not!). We differ as well about the First Amendment—but that is not a serious difference, since Crosskey never concerned himself much with that part of the Constitution.

The things Crosskey did concern himself with he handled with such imagination and perseverance that the serious student cannot help but find him instructive. True, he is hard on historians.<sup>8</sup> They are, in his opinion, simply wrong on one major issue after another, in part because of their uncritical reliance on James Madison, someone whom he considers an out-and-out opportunist as well as unduly timid.<sup>9</sup> He finds particularly galling the "Father of the Constitution" accolade bestowed by historians on Madison.

Fundamental to Crosskey's assessment of Madison is neither his ambition nor his

character, but rather the extent to which he, like most other Southern politicians, was moved by the slavery question. The discussion of the effects of that question both North and South (for the "democratic" North did not seem to be dominated by the Southern-planter "aristocracy," Crosskey explains) is probably the most valuable part of this third volume. The account of the chance consequences in the United States of the fierce Haitian slave rebellion of 1791 is sobering.<sup>10</sup>

Too much concern may be exhibited in all of Crosskey's publications with Madison's alleged chicanery. I, for one, am not much interested in whether Madison adjusted the record here and there, perhaps to fit in with what he came to "recall" "must have been" the original "understanding" among the delegates in the Federal Convention.<sup>11</sup> But Crosskey's third volume builds to a climax in its twenty-sixth chapter, "James Madison's Memorandum on the Proceedings in Congress on February 21, 1787; Herein of the First Clear Instance of Madisonian Falsification." Crosskey, despite his repeated carping at Madison throughout the three volumes, does seem in this chapter to present Madison in the best light he can generate for this purpose. This may be seen in a passage which touches as well on several other points I have mentioned:

In very large degree, Madison's undoubted motive in all these alterations was an easily understandable desire for self-justification: a desire to appear in the pages of history as a more consistent and clearheaded man, a man less timid and less subservient to the dominant pro-slavery opinion of Virginia and the Southern states than in actual fact he was. In certain cases there is also a seeming desire to aggrandize his part in the proceedings of the Federal Convention, or at any rate to asperse or derogate from the part taken therein by others. These motives undoubtedly go far to account for most of the things that are found, or not found, in Madison's notes on the convention; but to account for all the alterations they apparently contain, something more is necessary. If this be true, another motive, strong enough to

justify to most men the kind of thing he did, undoubtedly existed for Madison when he made the changes in his notes. This was the conviction apparently felt by Madison in his latter days that the theories of the Constitution which public opinion in Virginia and the South had compelled him to adopt for political reasons in his earlier years, were in fact absolutely essential to fend off the ruin of that part of the nation whose welfare he had most at heart. The reader will therefore find it easy to understand that with respect to the documents he left for posthumous publication Madison may have been led into acts which, without this powerful motive, he might otherwise not have engaged in.

There remain serious questions that Crosskey does not address and that affect how his own work is to be regarded. What is law? That is, what should the status of law, including constitutional law, be when either justice or self-preservation seems to be threatened by law-abidingness (by respect for the original intention of a constitution)? Indeed, one might even venture to ask, is history possible as a science, especially since chance can be decisive in shaping events? That is, can things determined in large part by chance (including the volatile public opinion Crosskey sets out to chart) truly be understood? (The meaning here of nature and of cause may be crucial.) Crosskey would have been inclined to shrug off such questions as "metaphysical." Still, one must wonder whether history should be regarded, at its best, as little more than a handmaiden either to moral instruction or to political philosophy, if not as a kind of political rhetoric.

Such questions aside (which questions apply to constitutional history generally), it should be recognized that Crosskey could not have done what he did do if he had not been remarkably single-minded and self-confident. And what he does in this third volume, in addition to examining Madison's career, is to trace out (in a masterful fashion) the opinions and interests (throughout the thirteen States) which happened to lead to a constitutional convention very much inter-

ested in a broad commercial power for the legislature of "a more perfect Union." The jockeying among the regions of the country is described in persuasive detail. The significance of the proposed Spanish Treaty is explored; the effects of the economic depression of the time, and of resulting disturbances such as Shay's Rebellion, are weighed; and, of course, the influence of opinions about slavery, North and South, is explained. Although Crosskey's primary concern is with the decade leading up to the Federal Convention, he does touch as well upon the first decades under the Constitution. In all that he does, he is dramatic, while at the same time evincing (a favorite word of his) a constant awareness of the available evidence.<sup>12</sup>

Crosskey is persuasive, in the sense that candid readers are moved to concede that he has, with the art of a great lawyer, made a plausible case for much of what he says. His passionate thoroughness inevitably impresses and instructs, so much so that the other books on this subject in our time seem far less solid by comparison. He knows well the people he deals with. He does not try to conceal the fact that he has heroes and villains. His deepest sympathies are with the more conservative New Englanders; but George Washington, too, is a special hero for him. He also has great admiration for the work in the Constitutional Convention of James Wilson and Gouverneur Morris. That Crosskey is a partisan is not necessarily a defect: one cannot write sensibly about political things without an informed awareness of the good and the bad, the just and the unjust. It probably would have been better for him "professionally" if he could have been more tactful with colleagues and could have moderated some of his criticisms—if he had, for example, tempered his condemnation of Madison until he could present in print his full case against him. But Crosskey's honesty was such that he was uncompromising (and hence perhaps unrealistic) in his response to all-too-human failings in the rest of us. It is not likely that those who knew and respected him would have wanted him any other way: without the limitations he did exhibit, including a charming bullheaded-

ness that bordered on naiveté, a man of his magisterial legal intellect, disciplined energy, and apparent insensitivity to criticism might have seemed monstrous.

One leaves this third volume with a major regret: there evidently is not available from the same pen a fourth volume on the Federal Convention and the Ratification Campaign—and it is on these subjects that Crosskey would have been perhaps most instructive. True, there are passages here and there in all three volumes which describe Convention developments. But the comprehensive "inside" account that he, and perhaps he alone among his contemporaries, was capable of is quite another thing: no student of Crosskey can fail to remember how familiarly he could speak at length of each day's Convention proceedings in Philadelphia "during the hot summer of 1787."

I do find it surprising, as well as disappointing, that there is not anything substantial left by Crosskey on this subject—but I have been informed both by his publisher and by his conscientious collaborator that this is so. What makes this particularly curious is that Crosskey does say, in the preface to his first two massive volumes, that "considerably more than is now offered is already in draft"—which *could* mean, of course, considerably more than we find in Volume III.<sup>13</sup> Also confusing are the conflicting indications given in the third volume as to whether a fourth volume should be expected. Still, the third volume is itself probably essential for any serious student of the Constitutional Period, especially for anyone interested in how the States happened to agree (when the time was just right) on the remarkable convention in Philadelphia. But it is probably even more useful as a reminder of the challenges posed by Crosskey, in his first two volumes, to all students of American constitutional law. Although it is a reminder as well of what we might have enjoyed in a fourth volume, consolation may be found in Crosskey's productive ratification here of a principle implicit in all of his work, that what should guide us both as citizens and as legal scholars is the Constitution itself, a well-crafted document (somehow above history) that is entitled to respect as "the

supreme Law of the Land"—and all this despite the diverse partisan distortions it is bound to be subjected to by generation after generation of political men trying to do their best for themselves and their country.

Reviewed by GEORGE ANASTAPLO

<sup>1</sup>Listings of the reviews of Crosskey's work may be found in William Jeffrey, Jr., "American Legal History, 1952-1954," 1954 *Annual Survey of American Law* 866, and in Laurin A. Wollan, Jr., "Crosskey's Once and Future Constitution," 5 *Political Science Reviewer* 129 (1975). See, also, "In Memoriam: William Winslow Crosskey," 35 *University of Chicago Law Review* 229-247 (1968). <sup>2</sup>The worst of the lot was probably the review by Julius Goebel, Jr., "Ex Parte Clio," 54 *Columbia Law Review* 450 (1954). Compare Sylvestro Petro, "Crosskey and the Constitution: A Reply to Goebel," 53 *Michigan Law Review* 312 (1954); Larry Arnhart, "William Crosskey and the Common Law," 9 *Loyola of Los Angeles Law Review* 544 (1976). See, also, Grant Gilmore, "The Age of Antiquarius: On Legal History in a Time of Troubles," *University of Chicago Law School Record*, Summer 1972, pp. 10, 19, n. 21. <sup>3</sup>C. Herman Pritchett, Book Review, 60 *California Law Review* 1476 (1972). <sup>4</sup>"Whenever I have tracked down an obscure publication on constitutional law or history in the University of Chicago Library, the most recent and often the only name on the card (many years before) has usually been Mr. Crosskey's." Anastaplo, *The Constitutionalist: Notes on the First Amendment* (Dallas: Southern Methodist University Press, 1971), p. 568. My study of the First Amendment, which takes account of but departs from Crosskey's opinions on the subject, has recently been supplemented by my article, "The Religion Clauses of the First Amendment," 11 *Memphis State University Law Review* 151 (1981). <sup>5</sup>"Crosskey, Anastaplo and Meiklejohn on the United States Constitution," *University of Chicago Law School Record*, Spring 1973, pp. 4, 6. Other discussions by Sharp of Crosskey's work are cited in note 1 of his article. <sup>6</sup>"William W. Crosskey," *University of Chicago Law School Record*, Spring 1972, pp. 20, 21. See Pressman v. State Tax Commission, 102 A.2d 821, 827 (1954). *Huidekoper's Lessee v. Douglass*, 3 Cranch 1 (1805) is easily consistent with the great cases of *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816) and *McCulloch v. Maryland*, 4 Wheat. 316 (1819), which can hardly be said of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). See note 12, *infra*. <sup>7</sup>Crosskey anticipated the holding in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952), in his contribution to "The Constitutionality of the President's Seizure of the Steel Industry," *University of Chicago Round Table*, May 18, 1952, pp. 1-2, 4-5, 6-10. See, also, Crosskey, *Politics and the Constitution*, I, 390, 433-443. <sup>8</sup>See, e.g., *ibid.*, II, 1298, n. 1. But compare the respect shown for Lawrence Henry Gipson, *The British Empire Before*

*the American Revolution*. Crosskey and Jeffrey, *Politics and the Constitution*, III, 41. <sup>9</sup>Compare how Professor Gordon S. Wood speaks of Madison in *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), e.g., pp. 410, 413, 471-473. Crosskey's third volume includes, in effect, a considerable political biography of Madison. Thus, the longest entry by far in its index is James Madison's. His is also the longest entry in the index to volumes I and II. <sup>10</sup>See Anastaplo, *The Constitutionalist*, pp. 239-253; "Abraham Lincoln's Emancipation Proclamation," in Ronald K. L. Collins, ed., *Constitutional Government in America* (Durham: Carolina Academic Press, 1980); Book Review, *Modern Age*, Winter 1981, p. 106. I say "chance consequences" because the effects on American constitutional developments of the Haitian uprising might have been markedly different if it had been a generation earlier or a generation later or if this uniquely "successful" slave rebellion had not been in a place so close to the United States. In addition, chance developments in France influenced both the uprising in Haiti and the effects of that uprising in this country. <sup>11</sup>Similarly, I could never get excited about whether President Nixon had tried to cover up the third-rate burglary that his more incompetent underlings had bungled at the Watergate. See Anastaplo, *Human Being and Citizen: Essays on Virtue, Freedom and the Common Good* (Chicago: Swallow Press, 1975), p. 160; Book Review, *Show/Book Week, Chicago Sun-Times*, April 30, 1978, p. 10; *Claremont Review of Books*, December 1981, p. 5. Compare the text at note 7, *supra*. <sup>12</sup>This means, among other things, that his accounts can be hilarious, even when dedicated to the most prosaic subjects. Consider, for example, Crosskey, *Politics and the Constitution*, II, 924-925. See note 6, *supra*. <sup>13</sup>Jeffrey, in his preface to the third volume of *Politics and the Constitution*, says, "In his preface to the two volumes of this study published in 1953, Professor Crosskey gave notice that 'considerably more [text] than is now offered' was already in draft. He also ventured the prediction that a 'long time [would] elapse before the remainder of the book [would be] ready.' The materials announced in those prefatory remarks as being then in draft are at long last in the reader's hands" (p. xi). Does not Jeffrey read Crosskey's 1953 notice as implicitly distinguishing between what was then in volumes I and II and what was yet to come (that is, "in draft")? But what is now volume III (that is, what was then only "in draft") is surely *not* "considerably more" than was offered in volumes I and II. Sharp, in an early review of Crosskey's first two volumes, referred to later volumes as "now largely prepared." Book Review, 54 *Columbia Law Review* 439, 441 (1954). May there be temporarily misplaced somewhere substantial additional materials prepared by Crosskey on the Federal Convention and the Ratification Campaign? One can hope so. In any event, one is reminded by these observations of the question of the dependence of history on chance. See, on history as a science, Anastaplo, *The Constitutionalist*, pp. 500, 817; *Human Being and Citizen*, p. 326. Vital here is that natural right tradition which Crosskey so casually depreciates throughout his work (without recognizing its importance for that common law he

makes so much of for the Supreme Court). See *ibid.*, pp. 46f, 74f, 175f. Compare the opening page of Oliver Wendell Holmes, Jr.'s *The Common Law* (where "history" [chance?] is preferred to "logic" [reason?]). But see Crosskey, *Politics and the Constitution*, I, 514. Consider, also, *Brown v. Board of Education*, 347 U.S. 483 (1954), where principles take precedence over history (which should be recognized to be [by nature?] inconclusive whenever serious issues must be settled by a community). Consider, further, on the relation of chance, principles and history, Anastaplo, "Notes toward an 'Apologia pro vita sua,'" 10 *Interpretation* 310 (1983).

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