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Are Federal Courts Necessary?*

*Milton I. Shadur***

It is really an honor to have been invited to deliver the second Dooley Distinguished Lecture in Law. That honor is perhaps best exemplified by the privilege of being thus associated with not one but two illustrious Illinois Supreme Court Justices: not only Jim Dooley but also the choice for last year's speaker, Seymour Simon. My main hope is to get through the afternoon without someone (or everyone) wondering, either audibly or to himself or herself, whether Loyola should have reprinted the program to put the word "Distinguished" back where it belongs, modifying the name "Dooley" and not the word "Lecture."

Whenever I am invited to speak anywhere, I have two threshold problems. One is that the speaking date has to be far enough in advance so my mind will play the trick of persuading me the date will never come—that illusion makes it much easier to say "yes." And the second is closely linked to the first: Knowing that like all lawyers I will really do too much of the work near the deadline, I have to select a title that will at once be (1) sufficiently tantalizing not to drive away the prospective audience, (2) broad enough to cover anything I ultimately decide I want to talk about, and (3) nevertheless non-misleading (applying a kind of Securities Act Rule 10b-5 concept). That sometimes poses a problem one of my

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** The Honorable Milton I. Shadur was appointed to the United States District Court for the Northern District of Illinois on May 23, 1980. Judge Shadur received his legal education at the University of Chicago Law School where he ranked first in his class, served as Editor-in-Chief of the Law Review, and was elected a member of the Order of the Coif. While still at the University of Chicago, Judge Shadur had the unique honor of having two of his Law Review notes cited and quoted by the United States Supreme Court. Two years after being admitted to the bar he was made a partner in the firm founded by the Honorable Arthur Goldberg, which eventually became the firm of Shadur, Krupp and Miller. While in private practice, Judge Shadur's numerous professional activities included serving as Counsel to the Illinois Judicial Inquiry Board, Director of the Chicago Bar Foundation, and as Chairman of the Judiciary Committee of the Chicago Bar Association. He also has published and lectured extensively on a wide variety of legal matters. In addition to his various professional activities, Judge Shadur has served as Chairman of the Commission on Law and Social Action of the Chicago Chapter of the American Jewish Congress and as Trustee of the Village of Glencoe.

former law partners used to describe as trying to build an army larger than the Russians and smaller than the French.

In any case, that is how I came to label this afternoon's talk "Are Federal Courts Necessary?"¹ If you have troubled to read Article III of the United States Constitution lately—or maybe ever—and especially if you ever did that as a nonlawyer, you may well wonder how anything but a total spoof can be attached to that title. On the other hand, if your regular reading diet extends to the current Supreme Court opinions, you might agree at least some of the Justices are voting "no" to that question on a consistent basis. Either way I think I must begin by telling you a fairy tale. It seems to me much better than most fairy tales because it is really true. And of course I must start, as in all fairy tales, with "Once upon a time. . . ."

Once upon a time long, long ago there was an astonishing student at a great law school—and because this *is* a fairy tale, I've made up a fictitious name: Yale Law School. This student, having become financially responsible for the support of his whole family at an early age, had launched a career as an aluminum salesman, dropping out of college off and on to make the necessary money for himself and his family. It had therefore taken him eight years to get his A.B. degree at Yale, and his law school education was also punctuated by a full year away for the same purpose. That put him into his early 30s while still in law school, then an extraordinarily advanced age for a law student. In addition, he spent a lot of time while he was *in* law school engaged in the same activity of selling WearEver Aluminum, cutting back on his time available for study.

All this took place at the very same time when Robert Maynard Hutchins, despite time out for service in World War I, had just become Dean of the Yale Law School at the ripe age of 28. Many years later I heard Hutchins speak of this student with a mixture of awe and warmth, though on the same occasion the term Hutchins applied to the student from the teacher's point of view was that he was an "outrage." Our true fairy tale student consistently sat in the front row, scowling at everything that was said, his arms obdurately folded as he conspicuously declined ever to take a note. Of course, though he never seemed to work and he appeared to spend most of his time either working on the Law Journal or selling aluminum or going out for some beer or the movies on the eve of exams, he naturally ended up number one in his class.

From there the student—now a lawyer—went on to become law

clerk to Chief Justice Taft and then went into practice with Davis, Polk and Wardwell, where he engaged in a high-level Wall Street practice, closely associated with the preeminent lawyer of that era, John W. Davis. Mr. Davis is reputed to have said that this young man's mind was the best piece of legal equipment he had ever encountered.

Now the fairy tale becomes somewhat shrouded in the mists, for I have heard differing accounts of one of its key elements. But whether as an outgrowth of a brief on the constitutionality of the Securities Act of 1933, work that reportedly caused this young man to begin a deep inquiry into the real meaning of the Commerce Clause (that's one version of the story), or in some other way, William Winslow Crosskey—for that's the paragon whom I've been describing—launched into what became a lifetime of research and ultimately of writing on the real origins and intended meaning of the Constitution.² Crosskey read, it is fair to say, virtually every still-extant publication of any kind produced on this side of the Atlantic Ocean during the last half of the 18th century—so much so that he actually *wrote* like the 18th century man of letters: style, punctuation, capitalization, though fortunately not spelling. And his voracious reading extended into the 19th century as well, searching for clues as to the intended meaning of the Constitution.

To Crosskey the Constitution was a document to be construed like other documents: It was a contract, but one of the ultimate nature—the social contract, written in an era in which Rousseau's notion of the social contract was an important philosophical and therefore governmental truth. And as a contract, it was to be read in the conventional way. Its language was to be read in its contemporary meaning—not the *reader's* contemporary meaning but the *writers'*. That concept is the same one put simply by Justice Oliver Wendell Holmes and quoted in the frontispiece of Crosskey's book:

[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. . . .³

Holmes expressed that notion more elegantly in the famous aphorism from *Towne v. Eisner*:⁴

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Parenthetically, there has been an odd tendency for people to recall and to use only part of that aphorism—the phrase “skin of a living thought”—in support of exactly the opposite principle of construc-

tion: one that gives *changed* meaning to the same words because of changed external conditions over time.

Indeed, Holmes himself was far from one of Crosskey's favorites. Much worse, the two short quotations I have just read to you represent the height of irony, for Holmes was guilty of the same sin he preached against. Despite his impeccable contract-interpretation principles as expressed in those quotations, Holmes' approach to the Constitution was the wholly different concept of changing the meanings of words, of adapting the document to changing needs by altering the sense of the words themselves—an approach that Crosskey saw as building on shifting sands. Let me read to you my own modest claim to fame as one who, after having first been schooled in conventional constitutional law with its pantheon of heroes such as Holmes, came later in my law school career to Crosskey's course, expecting to scoff and remaining to be converted. In 1968, the University of Chicago Law Review devoted an issue in principal part to *in memoriam* tributes to Crosskey and to a posthumously published article by him. In that issue, Abe Krash, now the senior litigating partner at Arnold & Porter but also a reluctant convert to the Crosskey canon while Abe was a law school classmate of mine, recalled this episode:

Crosskey will be remembered by his students as a great teacher. He could hold a class spellbound. . . . Crosskey 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. 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?"⁵

But let me return to the main theme of this introductory section. As you may have gathered, Crosskey was a predecessor of today's strict constructionists, those who claim to believe the Constitution should be read in accordance with the original intention of the Framers. There are, however, major and critical differences between the Crosskey view and that of such shallow proponents as our present Attorney General. Perhaps the most significant of

those differences for purposes of this afternoon's topic is Crosskey's intellectual honesty. Unlike the present advocates of the original-intent view, who are really anti-federal government and who use their purported purist position as a means of espousing preconceived notions of a weak central government, Crosskey worked to find what the document really meant. His thesis was that the Constitutional Convention comprised a great assemblage of lawyers, scholars and draftsmen—perhaps the greatest in history—and that the rational presumption was that they had produced an integrated and internally consistent document.

What Crosskey sought to do by steeping himself in the writing of the 18th century was to peel back the layers of misunderstanding that are often generated by shifts in language meaning. None of us today would dream of reading Shakespeare by using the current meanings of words that have changed shape over time. That is because we know, of course, that such changes have taken place. If we did *not* know—if we mistakenly assumed that all words retained the identical content despite the passage of time—we would inadvertently introduce serious distortions in meaning. And Crosskey illustrated dramatically that the same kinds of traps lurk in applying today's vocabulary to the words in a great contract written in the late 1700s.

Lest you think that revolutionary changes in the meaning of language can occur only over several centuries, such as between Shakespeare's time and our own, let me remind you of an obvious 180 degree turnabout in the same time-span of which I now speak. Contrast the term "Our Federalism," used with capital letters these days by a number of our Supreme Court Justices, with the sense of the same term at the time of the Constitution. Today that term is a catch-phrase for sustaining states' rights in preference to those of the United States—a concept that was the hallmark of the *anti*-Federalists in the years immediately preceding and following 1787. Through some legerdemain, the principles labeled by their advocates as "Federalist" today are the very ones fought against by the true Federalists in those days.

But that illustration, poignant though it is, does not advance us in constitutional analysis. Toward the latter end we may more profitably look to a cogent example of Crosskey's work, but I think a conceptually breathtaking one. Crosskey's omnivorous reading disclosed that both before and at the time of adoption of the Constitution, the word "State" was *not* limited to its present denotation of a geographic entity. Instead, "State" was, at that time, just as

commonly used as a collective noun to mean the *people* within that governmental unit, in precisely the same way that the words “Indian Tribes” then meant (as they still do) the *people* of those tribes. Indeed the conventional usage in those days was to employ a plural verb with the noun “State” used in that way—such as saying “the State are”—a locution that obviously made no sense if today’s most common usage as a geographic unit was the only correct one, but that was precisely right if Crosskey’s reading (buttressed as it was by virtually all of the contemporary literature) was accurate.

All of you may have guessed by now the implications of that discovery, for Article I, Section 8, Clause 3 of the Constitution—the famous Commerce Clause—reads:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Note the use in that Clause not only of the word “States” but, more importantly, of the word “among” (and not the word “between”). It was surely bizarre for the Framers to speak of commerce “among” the several States (using “States” in the geographical sense) if they meant only transactions that cross state lines. Crosskey’s book treated at length the universal then-current meaning and usage of the word “among,” as well as the differing meanings of the word “States,” and concluded that the only natural sense of the constitutional language meant that Congress had been granted broad power over commerce among all members of the American people (that is, all the people of “the several States”), not just over commerce between state and state in the geographical sense. In precisely the same way that congressional power to regulate commerce “with foreign Nations” meant regulation of trade with the *people* of those nations and not simply with the governmental entities themselves, and in precisely the same way that congressional power to regulate commerce “with the Indian Tribes” embraced trade within tribes as well as between tribe and tribe, so too did congressional power to regulate commerce “among the several States” embrace all gainful activity among all the people of the states. And that included trade among people within the geographical lines that now represent our only concept of the word “State,” as well as trade across those lines. None of the nonsense that we have now come to call “interstate commerce”—requiring that the transaction have some linkage with the crossing of a geographic boundary—made any sense in terms of the intent of the draftsmen.

Indeed Crosskey buttressed that analysis not only by the simple

parsing of words but by reference to all of the contemporaneous literature—both from the Constitution’s supporters, who intended to cure the ills suffered in that respect under the Continental Congress, and from the Constitution’s anti-Federalist opponents, who fought against its adoption because they sought to promote state sovereignty in opposition to a centralized government. Though I certainly do not expect to convert you with such a brief and superficial exposition, in the absence of (or at least pending) your actual reading of Crosskey’s work let me ask that you take my word for two things. First, in terms of the way that lawyers draft and analyze language as well as the overwhelming usage of the Constitution’s draftsmen, Crosskey’s position is far more compelling than the artificial reading that has come down to us—a reading that has forced the bizarre and unnatural distortions of the notion of “commerce” that the Supreme Court had to adopt beginning with the New Deal days to deal with the real world. Second, Crosskey’s application of the same principles of research and construction throughout the Constitution led him to a coherent, integrated document of the kind that should have been expected from bright and skilled draftsmen, not the hodgepodge of inconsistent and patchwork meanings we have become accustomed to.

In sum, what Crosskey found was that the Constitution’s framers had intended to create a strong rather than a weak central government, with broad powers to deal with all the concerns a national government could expect to encounter. That purpose had simply been frustrated when the political shift from the Federalists to the Jeffersonians in the first years of the 19th century resulted in a distortion of those goals. At that later time, even such a Federalist and strong Justice as John Marshall had to fight a rearguard Stalingrad type of defense to save some of the originally-intended principles while surrendering others. Little wonder that Crosskey entitled his great three-volume work “Politics and the Constitution in the History of the United States,” inserting this as his dedication:

To the Congress of the United States in the hope that it may be led to claim and exercise for the common good of the country the powers justly belonging to it under the Constitution.

My reasons for first exposing to you the historical distortion of the constitutionally-intended congressional power rather than of the federal judicial power are twofold. In candor, my principal consideration was that the example I chose and have just expressed in capsule form is easier to explain: It depends on looking at a

single clause of the Constitution and at the shift that has taken place over time from the original meaning of the words in that clause. My second reason is that congressional power and federal judicial power are, of course, related. All of us know of the general doctrine—prevalent when the Constitution was adopted and, though maybe to a lesser extent, even today—that the scope of federal government is coextensive in all its branches: legislative, executive, and judicial. Thus a broader notion of federalism, in its original sense, also tends to support a far broader concept of the role of the federal judiciary than the one to which we have descended. It is that latter topic—the proper place of the United States Supreme Court and the lower federal courts in this country’s jurisprudence—on which I want to focus in my remaining time today.

On that issue of federal judicial power, though, the search for original meaning is much more complex than the simpler Commerce Clause analysis I have outlined for you. It involves, for example, the interaction of the Full Faith and Credit Clause, the “necessary and proper” clause in Article I (what has sometimes been termed the “sweeping” clause vesting expansive congressional power), and the Supremacy Clause, as well, of course, as implicating Article III’s definition of the range of federal jurisdiction—the “cases” and “controversies” provision. And the study is made even more difficult by the need for the reader or listener to shed all the preconceived notions that have been ingrained by conventional teaching based on modern usages—usages so different from those of the Framers that *should* be controlling. Because this is just an afternoon’s and not a semester’s course, I will essay to pique your interest (I hope) with just two highly significant facts.

First, Article III, Section 2 extends the judicial power among other things “to all Cases, in Law and Equity, arising under . . . the Laws of the United States. . . .” At that time “Laws”—the plural as well as the singular form of the noun—was commonly employed as a generic term to include not only statutory enactments but the *Common Law*. Indeed I would remind you, for example, that Blackstone’s famous work (famous in the colonies when no other lawbooks were available, either in the form of texts or as reported decisions) was *Commentaries on the Laws of England*.⁶ And, of course, Blackstone’s *Commentaries* dealt extensively, really principally, with the English common law. Crosskey adduces extensive similar contemporaneous usage in the United States.

But there is more direct evidence as to the very clause in ques-

tion. When the Committee of Detail of the Constitutional Convention produced its original draft, that draft read that federal jurisdiction extended to “all cases under laws *passed by the Legislature* of the United States.”⁷ That phrase “passed by the Legislature,” which would clearly have limited “Laws” to the statutory source of law, was stricken from the Constitution on the motion of the same Federalist delegate who contemporaneously explained to the Convention the need for the establishment of national courts over state courts to secure uniformity of judgments. Here too I have oversimplified the evidence, but at the very least there is a substantial basis for believing that the Framers’ intent was that what has come to be called the “federal question” class of jurisdiction, embraced all cases under the Common Law, not just those under federal statutory law.

Second and relatedly, in then-contemporary usage the “Common Law” meant the Common Law of *England* (in the sense of both law and equity), a common law that by the law of nations was carried over to this side of the Atlantic except as modified by statutory enactments. At that time there *was* no separate “common law” of the states. And that was true not only conceptually but also because there were no systems for the reporting of decisions, so there was no way for lawyers or even judges to know what that common law—if it existed—would be.

Suffice it to say that those and the other things Crosskey examined in original-intent terms provide a convincing demonstration that the United States Supreme Court, and the inferior federal courts when Congress created them, were intended to provide the unifying juridical force in this country—to define the common law, as well as the meaning of the Constitution and federal statutes, in a way that would bind the state courts. Contrast the situation today, when the intended position of the Supreme Court as that of a juridical head over *all* courts has long since vanished, when even the system that prevailed for so long of two independent coordinate systems without a common head has been replaced by the foolishness of *Erie v. Tompkins*,⁸ under which federal judges must follow state-court decisions in diversity cases slavishly, without even the freedom our state-court counterparts may enjoy to reshape those decisions.

Though I cannot take you on the necessary excursion (or perhaps *Odyssey* is a more accurate label) to analyze the intended purpose of Article III, I assure you the trip is a fascinating one. Crosskey’s entire approach yields a product that is a much better

drafted, a much more cohesive version of the Constitution than the one we have learned in law school and that we struggle with in today's idea of federal jurisprudence. It makes more sense of a great many things that must strike everyone as odd on a first reading of the Constitution as a document, let alone as an instrument of government. And it would certainly change the tune of a great many persons—Attorney General Meese is a prime, though not the only, example—who are really urging the skewed concept they call “original intent” because they think it will quell what they view as activist federal judges.

Let me not be misunderstood as espousing any notion that a particular problem must have been within the specific contemplation of the Constitutional Convention for it to be covered by the Constitution. That kind of warping comes with the serious misunderstanding of the fact that the Constitution is the principal product of our second American Revolution: the bloodless revolution represented by replacement of the Articles of Confederation with the Constitution. Quite to the contrary of the position taken by the present vocalizers of the original-intent doctrine, the real Constitution—understood as its Framers originally intended—is an activist charter of government that does not *need* expansion by so-called activist judges.

Perforce I must leave the full development of the analysis, with all its interplay, to those willing to approach the questions with an open mind—what the philosopher referred to as “suspension of judgment.” All I urge in that regard is that preconceived conclusions not be permitted to get into the way of scholarship, a process that has infected so much of the writing in this field (not the least of which is much of the professorial reaction to Crosskey's work). What I will do instead is to sketch briefly a few of the powerful implications of the idea of a general supreme juridical head in the form of the United States Supreme Court, supported by the lower federal courts.

Among the purely incidental benefits, obvious at the outset, is the destruction of three cottage industries I can think of, in each instance freeing up the participants for more constructive work. Let me touch on them briefly.

First, law professors and speakers like me could put their creative talents to better use. During the few months since I agreed to talk on this subject, for example, I have seen and read—even without any pretense at intensive searching—Judge Irving Kaufman's *New York Times* piece headed “What Did the Founding Fathers

Intend?";⁹ Professor Bob Bennett's speech before the Chicago Council of Lawyers' annual meeting captioned "Judges and Original Intent: Attacks on Judicial Activism";¹⁰ Professor Bob Clinton's 125-page article in the University of Pennsylvania Law Review titled "A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III";¹¹ an article in the Boston University Law Review by Yale Assistant Professor Designate Akhil Amar, entitled "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction";¹² and an entire 350-page issue of the Georgia Law Review containing no fewer than nine articles collected under the rubric "Federalism: Allocating Responsibility Between the Federal and State Courts."¹³ Just think how much better (or maybe worse) off we would all be if all that mental horsepower were diverted into different channels, producing electricity of an entirely different type.

Second, there would be no further need for the Commissioners on Uniform Laws as such, because that role in the justice system would be performed automatically by a unitary system of justice with the United States Supreme Court as its head. Just as Lord Mansfield led the unifying force of the law merchant in Great Britain, so we would no longer have to deal with the arcane mysteries of choice of law concepts during the period that one state but not others opted for adoption of, or variances from, (for example) the Commercial Code or some other codified body of law. When I speak of the Supreme Court itself as the head of the system, of course, that is figurative rather than literal. Its docket problems, though not nearly as serious as some of the Justices would have it, would preclude such large-scale personal intervention by the Court.

But it would comport entirely with Article III, and with its original intent, for the *entire* federal judicial system to play that role of the national juridical head. Lest you think I am being revolutionary, Hamilton's Federalist Paper No. 82 contemplates exactly such a structuring, under which lower federal courts as well as the Supreme Court would appropriately have an essentially (or even actually) appellate function in dealing with state courts' treatment of federal causes. This subject is treated at some length in both the Clinton and the Amar articles. Indeed the entire subject demonstrates graphically just how far afield some current Supreme Court Justices' concepts of the "principles of federalism" are (see, for example, Justice Powell's opinions in such cases as *Stone v. Powell*,¹⁴ *Rose v. Mitchell*¹⁵ and elsewhere).

Third, my federal court colleagues and I could be spared the need to spend time on such debates as what is the proper rule to follow where different Illinois appellate court districts have ruled differently on a legal question on which the Illinois Supreme Court has not spoken. Although I have been one of the principal offenders in this area by my efforts to contribute to the corpus juris, I must confess there are more worthwhile and important topics to occupy us than the question whether *Erie* and its progeny call for us to try to predict what the Illinois Supreme Court might do if it did take the problem on or whether we should instead (as Illinois trial courts must) follow the rule in the appellate district that would have the case had it been filed in the state rather than the federal court.¹⁶

Enough for my semi-jocular comments on the incidental benefits of a Crosskeyan approach to the subject of federal judicial power. More seriously, the Crosskey contribution to constitutional jurisprudence, with its insistence on a return to the Framers' intention armed with a real understanding of what the words meant to the Framers themselves, makes a proper affirmative answer to "Are Federal Courts Necessary?" far easier. It is easy to tick off several proofs of that proposition:

1. Those who would propose to give Congress an unfettered right to gut federal jurisdiction can be forced to grapple with the evidence that such a right is not justified by Article III in light of its language as explicated by contemporary meanings and the drafting history of the provision. Though neither Professor Clinton nor Professor-designate Amar agrees with the Crosskey analysis chapter and verse, they agree on the end result, and their approaches to adducing the compelling evidence owe much to the insights he pioneered. And as a result, each of them really devastates the opposition among the academic community.

2. Any arguments that emanate from now former Chief Justice Burger and others for elimination of diversity jurisdiction are weakened immeasurably by an understanding—stimulated by Crosskey-style analysis—of the real purposes of the Constitution's grant of judicial power and of the intended role of the federal judiciary in this country's jurisprudence.

3. All the distressing states rights efforts of those who, like now Chief Justice Rehnquist, would further subordinate the federal judiciary are exposed by the Crosskey approach as being in direct contradiction to the Supremacy Clause.

4. Finally in this brief bill of particulars, the bizarre effects of *Erie v. Tompkins*¹⁷ and its progeny can and should be undone by a return to first principles. *Erie* rejected *Swift v. Tyson*¹⁸ on false

premises after nearly a century, and *Erie's* own half-century life is not too much to repudiate.

Examples could be multiplied further, but I fear they would try your patience as well as my own.

One last word of confession: When I began this afternoon, I spoke of this talk as a true fairy tale. That characterization should be understood as having been chosen advisedly. Of course I recognize there are flaws in the Crosskey fabric, and to that limited extent I have indulged in some oversimplification for rhetorical purposes. Learning in this area, like that in the sciences, comes in large part from new scholars who stand on the shoulders of their predecessors. Crosskey was human, not infallible. But the essence of the Crosskey canon, that of an intended strength and not an intended weakness in the federal government, generally and most particularly in the federal judiciary, is sound. It, and not the false prophets of what is misleadingly called "New Federalism," should be heeded.

NOTES

1. For a discussion of the judiciary, see Anastaplo, *The United States Constitution of 1787: A Commentary*, 18 LOY. U. CHI. L.J. 15 (1986) (Lectures 10 and 11).
2. William Winslow Crosskey authored the first two volumes of *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953). The third volume was co-authored by W. CROSSKEY and W. JEFFREY, JR., *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1980).
3. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).
4. 245 U.S. 418, 425 (1918).
5. Krash, *William Winslow Crosskey*, 35 U. CHI. L. REV. 232 (1968) (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)).
6. W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1899).
7. 3 DEPARTMENT OF STATE, *DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1787-1870*, at 454 (1900).
8. 304 U.S. 64 (1938).
9. Kaufman, *What Did the Founding Fathers Intend?*, N.Y. Times, Feb. 3, 1986, § 6, at 42, col. 1.
10. Bennett, *Judges and Original Intent, Attacks on Judicial Activism*, 22 TRIAL 60 (1986).
11. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984).
12. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985).
13. *Federalism: Allocating Responsibility Between the Federal and State Courts*, 19 GA. L. REV. 789 (1985).
14. 428 U.S. 465 (1976).
15. 443 U.S. 545 (1979).
16. See my opinion in *Rizzo v. Means Services*, 632 F. Supp. 1115, 1131-33 (N.D. Ill. 1986), the most recent exposition of my viewpoint as expressed during a multi-case ex-

change of views with my colleague Judge Prentice Marshall (*see* *Abbott Laboratories v. Granite State Ins. Co.*, 573 F. Supp. 193, 196-200 (N.D. Ill. 1983) and cases cited). Meanwhile, the Seventh Circuit Court of Appeals continues to repeat the Supreme Court-predictive approach, either unaware of or unconcerned about the special factors discussed in *Rizzo* that make Illinois different in *Erie* terms. *See, e.g.*, *Green v. J.C. Penney Auto Ins. Co.*, 806 F.2d 759, 761 (7th Cir. 1986).

17. 304 U.S. 64 (1938).

18. 41 U.S. 1 (1842).