

# Discussion at Dusk - Special Contribution

Melvin F. Wingersky

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## DISCUSSION AT DUSK

MELVIN F. WINGERSKY

NEAR evening and nearer this reviewer's deadline for a piece about *Politics and the Constitution in the History of the United States* by Professor Crosskey,<sup>1</sup> some conversation seemingly took place. So much recollected, and that much relevant here, is now reported. Shadows lengthened. Day's stay had been denied. Nighttime was about to overrule daylight. Neat sheets of blank white paper glared under the study desk lamp like a sullen, silent culprit's face waiting for an opening line.

At first, anonymous *they* held sway. Then, a mental sifting and testing process attributed lines to the following:

### THE CHARACTERS<sup>2</sup>

*(In the Order in Which They Spoke)*

MODERATOR, *not otherwise identified*

DIGLOT, *a forefather*

FUSTIAN, *a public official*

ELLIPSIS, *a poet*

AMPERSAND, *a reasonable man*

PASSIM, *a professor of law*

WORDY, J., *an ex-justice, U.S. Supreme Court*

ASTERISK, *a philosopher*

INFRA, J., *another ex-justice*

SUPRA, J., *yet another justice*

Barely discernible over assorted blurred voices a gavel sounded as the Moderator noisily sought silence. His raps finally molded attention of sorts, and he spoke:

<sup>1</sup> *Politics and the Constitution in the History of the United States* by William Winslow Crosskey, Professor of Law, University of Chicago Law School. University of Chicago Press (1953), 2 vols. pp. xii, viii, 1410; \$20.00. (Herein called "Crosskey." While the paging is in sequence commencing with Volume I, the appropriate volume is cited for readers' convenience.)

<sup>2</sup> Any resemblance to persons living or dead is purely coincidental, accidental, and even surprising.

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MR. WINGERSKY is Law Secretary to the HONORABLE PHILIP J. FINNEGAN, JUDGE, U.S. Court of Appeals, Seventh Circuit. He is also a member of the faculty of the De Paul University College of Law.

MODERATOR: Gentlemen, this time we are materialized to. . . .

DIGLOT: This day my concern for posterity took me far afield. My time was spent pondering Ellen Sewall's rejection of Thoreau's marriage offer. Subsequent events intrigue as do those past!

Indeed, as posterity tries on concepts as one would a jacket, I am in turn curious about the appearance made when that garment of ideas is donned by those to whom it was handed down.

FUSTIAN (*to DIGLOT*): One social item columnists have left unmentioned! Ellen must be of small importance, never having appeared on television—even in a commercial. Have I missed something?

ELLIPSIS: Better your inquiry, Fustian, be addressed to Emerson—though, whether he would be classified as a primary or secondary source is perhaps debatable.

As for you, my friend Diglot, there are instances, I think, when your jacket, spun on intellectual looms with resilient threads of ideas, is the liaison between posterity and forebears (that word—again I wander on Wardour Street).

AMPERSAND (*sliding into a modern form-fitting chair*): I am weary, fatigue nibbles my heels, ennui lays a heavy hand upon me. As a joiner, and reasonable man, my work is endless. New catch phrases, some old clause, a book title. . . .

PASSIM (*to AMPERSAND*): Another organization or society demanding affiliation, eh?

MODERATOR: Please, Professor Passim and gentlemen. . . .

WORDY, J.: Because colleague Ampersand spends his time working in conjunction with the ideas of others he perceives no alternative, Professor. Colloquially speaking, he is in the middle. When I first went on the bench "and/or"<sup>3</sup> was freely used, but Ampersand became confused.

MODERATOR: Despite your previous temporal status, gentlemen, I press for attention to the business at hand—critical evaluation of Professor Crosskey's two-volume work.

ASTERISK (*slipping in between the lines of seats*): Sorry to disturb this distinguished array of personnel, but I am unavoidably tardy, though some philosophers are ahead of their time. An ill-starred episode detained me. My apologies. I have been overburdened keying thoughts to some footnotes of life. It is appalling what some people

<sup>3</sup> Drummond v. City of Columbus, 136 Neb. 87, 285 N.W. 109 (1939) cites cases and articles inveighing against "and/or."

insist upon putting in text when relegation to the margin is clearly indicated. Lack of perspective, I say, mental immaturity—perhaps, yet that is why psychoanalysts' couches groan.

INFRA, J.: Asterisk, you are disconcerting, as always. Ah, my neck twitches, reminiscent of the days when I read briefs, and jumping from text to footnote was daily exercise. Yet, on mature reflection, I also recollect you have been charged with hampering the search for certainty. But be that as it may, we turn now to *Politics and the Constitution*.

Here is a title that sounds a bit like your handiwork, Ampersand, and one fraught with implications. I daresay it is as though we granted one broad sweeping certiorari in all prior cases involving constitutional questions. I voted for review, here, but it is to be remembered I also insisted we narrow and particularize the questions to be considered by us.

FUSTIAN: Sewall, Sewall, never heard of her. I wonder if she is a registered voter.

WORDY, J.: My brother Infra still speaks against a backdrop of red velvet drapery.

He has presented a truncated version of the title. Neither et seq. nor et al. will satisfy this caption because, in my opinion, "In the History of the United States" is an indispensable part.

Reaching now the point concerning narrowing the question to be considered by us, I recall that some reviewers<sup>4</sup> concentrated their efforts on one particular area, rather than cope with both volumes.

FUSTIAN: At the risk of underscoring the obvious, a line from a nominating speech I once made, it does appear we are pretty late in the day with this review. Were we waiting for Crosskey to produce his additional volumes which he has promised?

DIGLOT: After reading both volumes, I would insist upon withholding final judgment until Crosskey finished this project. When we voted to review, none of you mentioned that. This brings to my mind that our associates, the ex-judges, lost out when we cast ballots on the question of limiting the scope of this discussion, thereby setting judicial supremacy back a notch.

My first reaction to Crosskey was akin to that experienced on initial reading about Champollion's work on the Rosetta Stone. But,

<sup>4</sup> H. M. Hart, Jr., Professor Crosskey and Judicial Review, 67 Harv. L. Rev. 1456 (1954); N. Nathanson, 49 N.W.L. Rev. 118 (1954). Other views in the same issue appear on pp. 107, 114, 132.

then, reflection gives rise to speculations whether our Constitution embodies such hieroglyphics as must wait unlocking with some master-key. The words, there found, are not dead symbols; they are the articulations of a comparatively small group of men well known and described, for instance, by De Tocqueville.<sup>5</sup>

ELLIPSIS: While these two volumes were at hand, last summer, Stuart Chase's article<sup>6</sup> drew my attention. There is a semantic problem, here, that demands recognition. Indeed, if my memory serves me, Crosskey wrote an article<sup>7</sup> some time ago disagreeing with *Calder v. Bull*,<sup>8</sup> in which he contended that the phrase freely employed by judges, *ex post facto*, was applicable to civil and criminal law.

INFRA, J.: And from this record—er pardon, from Volume I—it appears Crosskey once again picks up cudgels to espouse his cause in chapter xi, entitled: "The True Meaning of the Prohibition of Ex-Post-Facto Clauses: A Chapter of Judicial Statesmanship from the Eighteenth Century." But we wander, gentlemen, far from an issue. Get to the point. My patience is short with nomadic arguments and meaningless debates. Has Crosskey defined the problem, answered it, and produced substantial evidence in support of his views?

PASSIM: It is as though we were eavesdropping on oral arguments or a conference of judges about to take an impression vote. You forget, my colleagues, the bench is no longer your citadel. In my opinion, Crosskey undertakes to explore what kind of government the sponsors of our constitution intended, and. . . .

MODERATOR: I interpose two items, here, for focusing your attention. First, Professor Crosskey's dedication, viz., "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." Secondly, to words of Mr. Justice Holmes, printed on the sheet facing the title-page: "We ask, not what this man meant, but what those words would mean in the

<sup>5</sup> Alex de Tocqueville, *I Democracy in America* 118 (Vintage Books, Inc., 1954).

<sup>6</sup> Chase, Korzybski and Semantics, *The Saturday Review*, p. 11 (June 19, 1954).. Alfred Korzybski's book, *Science and Sanity—An Introduction to Non-Aristotelian Systems and General Semantics* (3d ed.) was under scrutiny in that article. Stuart Chase wrote *The Tyranny of Words* (1938) and collaborated with Marion T. Chase in *Writing Power of Words* (1954).

<sup>7</sup> Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 *Univ. Chi. L. Rev.* 539 (1947).

<sup>8</sup> 3 *Dall.* 386 (U.S., 1798).

mouth of a normal speaker of English, using them in the circumstances in which they were used.”

PASSIM: That is a quotation, I believe, from an article authored by Holmes, not from one of his opinions. Crosskey supplies no reference. Holmes was disagreeing with Hawkins at the time. It appears in an early law-review article.

AMPERSAND: Well, I derived some pleasure out of it, Professor, because he was struggling to free words from fixed meanings, indelibly stamped upon them by law, rather than what I, a reasonable man, would ascribe to them.

WORDY, J.: You are right, Professor Passim; I just read the footnote<sup>9</sup> to this discussion.

Parenthetically, let me say, that I have read so many interpretations of my own opinions, and what men think they have discovered in them, that it has become increasingly difficult for me to strip off the accumulated overlay of ideas to find mine. Perhaps, alas, my opinions were prolix, though a joy to the report printers. Confronted as we are with 1,400 pages of material, I would vote to restrict ourselves to an aspect which I describe as the intention of the Constitution planners. That is a good springboard for discussion. Professor, how does Crosskey ascertain their intention, a troublesome word!

PASSIM: Certain major contours of his central theme emerge in this passage, found in his Introduction:

. . . in the case of the Constitution, many of the word-meanings requisite to its true comprehension are imperfectly recorded, when they are recorded at all, in the best of our English dictionaries.

One main purpose of this book is to supply these lacks: to provide the reader, . . . with a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas, which are needed for a true understanding of the Constitution; and to that ultimate end, for an understanding of the literature of 1787 and 1788 about it.<sup>10</sup>

ASTERISK: For Lafcadio Hearn<sup>11</sup> words had character, color, and form. In their pioneer work Ogden and Richards<sup>12</sup> noted this about

<sup>9</sup> Holmes, *Theory of Legal Interpretation*, *Collected Legal Papers*, 204. See also: 12 *Harv. L. Rev.* 417 (1899). Professor Fairman stresses this aspect in his first article concerning Crosskey's books, i.e., Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 *Univ. Chi. L. Rev.* 40 (1953). See also, Fairman, *A Reply to Professor Crosskey*, 22 *Univ. Chi. L. Rev.* 144 (1954).

<sup>10</sup> I Crosskey 5.

<sup>11</sup> *The Selected Writings of Lafcadio Hearn* (Goodman, edit. 1949) 12. Of course Hearn was a nineteenth-century author, but that does not undercut Asterisk's statement.

<sup>12</sup> Ogden and Richards, *The Meaning of Meaning* (2d ed., 1927), pp. 235 ff. These authors quote Hearn more accurately than does Asterisk. Their quote matches the one

Hearn. I merely inject it, now, because of my awareness of the tremendous task Crosskey has undertaken. Indeed, some thirteen years lay behind the books we are now considering. When a man spends that much time and effort researching, it seems unfair to strike his work down with several short paragraphs.

DIGLOT: I would start by insulating our project against personal predilections and prejudices! There is more to the passage Passim just read:

In building this dictionary, our rule [DIGLOT: That's Crosskey speaking] will be to employ in it only materials that are beyond suspicion. The samples of word-usage and juristic and political discussion, of which it shall be built, will therefore, all be drawn, in the first instance, from sources not connected with the Constitution.<sup>13</sup>

SUPRA, J.: Humpf! Puts me in mind of the dictionary hunt traced in the appendix to *Burstyn v. Wilson*,<sup>14</sup> where Mr. Justice Frankfurter was examining the word "sacrilegious."

ELLIPSIS: For my part, interpretation of instruments or documents may be likened unto paying a fair lady court—it all depends upon the environment and extent of mutual understanding—much is silently communicated, third persons can only divine, the immediate participants know.

SUPRA, J.: Bosh, Ellipsis, a typical poet's viewpoint, besides you cut me off. We judges have an array of principles from which can be drawn some handy intellectual weapon when interpreting documents. We track down the parties' intent. But you infect the stream of our discussion with flights of fantasy. Get the facts, my boy, define the problem, place an incisive finger on the point, and you are ready to resolve the question before us.

There is one key line in a slim book,<sup>15</sup> its title eludes me, written by Charles A. Beard in 1926, which resembles Crosskey's chapter xxiii—"Judicial Review in the Constitution." Now then, "Did the framers of the federal constitution," wrote Beard, "intend that the Supreme Court should pass upon the constitutionality of acts of Congress?"

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from The Selected Writings cited *supra*, and they employ it to illustrate their chapter concerning "Symbol Situations."

<sup>13</sup> I Crosskey 5.

<sup>14</sup> 343 U.S. 495 (1952).

<sup>15</sup> The Supreme Court and the Constitution 1 (1926) where Professor Beard discusses judicial control of legislation.

INFRA, J.: Resorting to history of the times when interpreting an ambiguous constitutional provision was suggested by Willoughby.<sup>16</sup>

WORDY, J.: Speaking of Willoughby, he thought that whether there was any arrogation of powers, by the Supreme Court in *Marbury v. Madison*,<sup>17</sup> was a matter best fitted for determination by historians.<sup>18</sup> His conclusion concerning "judicial veto" collides with this view sponsored by Crosskey:<sup>19</sup>

. . . judicial review was not meant to be provided generally in the Constitution, as to acts of Congress, though it was meant to be provided generally as to the acts of the states, and a limited right likewise was intended to be given to the Court, even as against Congress, to preserve its own judiciary prerogatives intact.

FUSTIAN: This business of meanings even found its way on to the floor of Congress recently, when Senator Watkins said: "That is a difference of semantics. Some persons believe that 'condemn' is a stronger word than 'ce(n)sure'; and some persons believe that 'censure' is a stronger word than 'condemn.' I do not know which is which."<sup>20</sup>

SUPRA, J.: Interesting, but irrelevant, friend Fustian. Mr. Justice Miller, speaking for the majority in *Ex parte Bain*,<sup>21</sup> said, among other things, and I am now reading from that opinion:

It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.

<sup>16</sup> I Willoughby, *The Constitutional Law of the United States*, 60 (2d ed., 1929). *Prigg v. Penn.*, 41 U.S. 536 (1842) and *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892) are cited as illustrations.

<sup>17</sup> 1 Cranch 137 (U.S., 1803). This case is dissected by Professor Crosskey in Volume II, pp. 1035 ff.

<sup>18</sup> I Willoughby, *The Constitutional Law of the United States*, 7 (2d ed., 1929), viz.: "The author of this treatise feels justified, however, in saying that, in his opinion, the records of the Convention which framed the Constitution clearly show that it was expected that the courts would exercise a 'judicial veto' . . ."

<sup>19</sup> II Crosskey 1007.

<sup>20</sup> 100 Cong. Rec. 15251 (Dec. 2, 1954.)

<sup>21</sup> 121 U.S. 1, 12 (1887). Of interest here is Charles Fairman's book, *Mr. Justice Miller and the Supreme Court*, reviewed by the Honorable C. E. Wyzanski, Jr., 53 *Harv. L. Rev.* 696 (1940). See also: Charles Fairman, "Legislative History," and the Constitutional Limitations in State Authority, written by Prof. Crosskey, 22 *Univ. Chi. L. Rev.* 1, 2, 119 (1954) and Charles Fairman, *A Reply to Professor Crosskey*, 22 *Univ. Chi. L. Rev.* 144 (1954).

It should also be noted that there is another tie to Justice Miller, relevant here, in the article by Thomas R. Powell, *Some Aspects of American Constitutional Law*, 53 *Harv. L. Rev.* 529 (1940).



Now, I submit, isn't that Crosskey's approach and methodology?

AMPERSAND: All this discussion dominated by Judges *Infra*, *Supra*, and *Wordy* provokes me, for I struggle between government and judicial supremacy here, and cannot put in one word. Our people have been represented in Congress almost exclusively by lawyers, and certainly the judiciary has long since been pre-empted by the legal profession. Lawyers, by golly, speak for all the people, and yet I wonder if they know the views of the general public. When Crosskey examines the National Power over Commerce, he explored sources other than legal materials; I like that, it seems reasonable.

May I add another thought: what of the people's will when legislation is struck down in the courts as unconstitutional?

FUSTIAN: Tsk, tsk, Ampersand, you have been peeking into Justice Jackson's book<sup>22</sup> written about the time when F.D.R. was trying to revitalize the Supreme Court.

ASTERISK: "Revitalize," a euphemism well worthy of your technique, Fustian. Would you say that Professor Crosskey suggests turning back the clock and have readers observing the daily lives and times of those instrumental in developing and drafting our Constitution? Would he have us become hostages of the past?

ELLIPSIS: Am I to understand that our author envisages the Constitution as a frieze over which a blind man need only trace, with sensitive fingers, its contours and so ascertain its outline?

DIGLOT: Bah! The lot of you pose questions and answer nothing. While I am only authorized to express my personal viewpoint, I say (as I think Crosskey does, in part) we tried to capture a theory of government, not imprison posterity with words on paper.

WORDY, J.: Such *élan* is commendable, but I thrive on facts controllable by general principles.

Professor Crosskey challenges *The Federalist*, saying, *inter alia*: "The great vogue of *The Federalist* which has been responsible for its very place in American history was a vogue of a later time. . . ."<sup>23</sup>

At an earlier point in his first volume<sup>24</sup> he states: "In addition, it is virtually certain that much of *The Federalist* was written only to fill up space in the New York 'federal' newspapers and thereby to make

<sup>22</sup> R. E. Jackson, *The Struggle for Judicial Supremacy* (1941). Ampersand might well have read an article by Barnett, Jr., *The Political Philosophy of the New Supreme Court*, 7 J. Social Philosophy and Jurisprudence, 101 (1942) for a collection of views.

<sup>23</sup> I Crosskey 10.

<sup>24</sup> I Crosskey 9.

less obvious the exclusion therefrom of opposing views." These are but a few lines from context and must be, of course, read in their setting, yet I have trouble in reconciling Professor Crosskey's argument with this statement in *Cohens v. Virginia*,<sup>25</sup> written by Marshall:

The opinion of the Federalist has always being [*sic*] considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having being [*sic*] published, while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extant of its powers, and on its diminution of state sovereignty, are entitled to the more consideration, where they frankly avow that the power objected to is given, and defend it.

Crosskey discusses *Cohens v. Virginia*, but the passage just quoted was unmentioned.

FUSTIAN (*muttering to himself*): Maybe I missed Miss Sewall on some radio program because of my constant traveling.<sup>26</sup>

PASSIM: Your singleness of purpose, friend Fustian, might be admirable under other circumstances; here it is conspicuous as a minor, if not irrelevant, theme. It is becoming tiresome. You can forego her one vote.

Gentlemen, let me read one major finding announced by Professor Crosskey.

. . . the Constitution, a carefully drawn legal document of the late eighteenth century, has been interpreted in accord with word-meanings, and legal and political ideas, current, not when the instrument was drawn, but nearly a full century later. . . . For, after all, word-meanings, over a century's time, cannot possibly be supposed to have changed in consonance with the needs of government. To read the Constitution in accord with modern word-meanings, where word-meanings have altered, is then, certain to give arbitrary results.<sup>27</sup>

AMPERSAND: Jeffersonian sophistries, according to Crosskey, guide the interpreter's mind and hand. Even as a layman I find it hard to conceive of a constitution which would spell out in detail every phase

<sup>25</sup> 6 Wheat. 264 (U.S., 1921). Perhaps Wordy's law secretary overlooked Piersin, *The Federalist in the Supreme Court*, 33 *Yale L. J.* 728 (1924) or Padover, *The Complete Jefferson*, 1112 (1943) containing lines of Jefferson, written, March 4, 1825 stamping *The Federalist* as authoritative.

<sup>26</sup> "This Court expresses no opinion as to the desirability of radio programs in public vehicles." *Public Utilities Commission v. Pollak*, 343 U.S. 451, 465 (1952).

<sup>27</sup> II Crosskey 1169.

of government, rights, and power. Recently rereading Bryce's<sup>28</sup> ideas (we nonlawyers read such books, you know) on flexible and rigid constitutions, I saw some resemblance, not too much though, of certain observations made by Crosskey.

ELLIPSIS: You remind me of Bryce's comments about the interplay and impact of centripetal and centrifugal forces on political constitutions<sup>29</sup> and the corresponding usage of those two identical terms as descriptive of the same forces discussed by Emerson in his essay on *Politics*.<sup>30</sup>

WORDY, J. (*to* ELLIPSIS): Neither trover nor replevin would lie for mere ideas alone. It may well have been coincidence that each accorded recognition to those two factors. The same theme is implicit in Crosskey's work.

I think you will all agree that his approach to the problem of interpreting the Constitution is seemingly unorthodox. I qualify, here, because one could say, if persuaded by Crosskey's materials, that he represented an orthodox view, and others an opposite. For it appears to me he has attempted to portray an intimate story of the subsequent shift from our original Constitutional provisions—the words reduced to paper, and changed in application to subsequent affairs. Has he then produced substantial evidence or even a preponderance of evidence to buttress his contentions? In short, has he sustained the burden of proof?

INFRA, J.: Cautiously, I point out that at this juncture Professor Crosskey has not yet supplied all his quantitative evidence demonstrating the causes producing the effects (or shifts as my brother Wordy calls them) upon constitutional interpretation. Indeed, his final caveat<sup>31</sup> would, alone, stay my hand, at this moment.

. . . and it is the expectation of the author to offer, at some future time, a consideration of these remaining problems in full detail. The effort then will be to put the Constitution, as here presented, into context with the actual events, institutions, and politics, which preceded it; and into context, also with the events and politics, and the many politically motivated misconstructions,

<sup>28</sup> James Bryce, *Constitutions* (1905). It can be safely assumed that Essay I, Flexible and Rigid Constitutions, XIV Democracies and Rigid Constitutions, pp. 77 ff., is the area referred to by Ampersand.

<sup>29</sup> Bryce, *Constitutions* 95 (1905). Ellipsis quoted the title of Essay II, written by Bryce in 1885.

<sup>30</sup> The Complete Essays and Other Writings of Ralph Waldo Emerson, 422 at 429 (Modern Library, 1950). Later, Ellipsis checked VI Dict. Amer. Biog. 132 and learned that Emerson died about three years before Bryce wrote the essay referred to in note 29, above.

<sup>31</sup> II Crosskey 1175.

which followed in the years after the Constitution was adopted. And when, on the basis of the actual evidence, a true view of all these matters has been built up, it will be found that weight, not doubt, has been added to the conclusions, as to the true view of the Constitution itself, which have been presented in the foregoing pages.

SUPRA, J.: You would, then, I take it, refuse even an interlocutory order, Infra? Perhaps I should say an interim opinion.

INFRA, J.: As a side judge, and next to the junior, I will cast my vote when the time comes.

AMPERSAND: As I fully expected, the judiciary falls back hedged about by technicalities.

PASSIM: My reaction is that Crosskey engages in a quest for the historical Constitution, believing that, upon finding it, our government either will or should be brought into conformity or realigned consonant with that document. But my reactions and views tend to coincide with those expressed in an article by Professor Hamilton.<sup>32</sup>

FUSTIAN: One thing I can say without fear of contradiction is that Professor Crosskey has provoked and stimulated considerable controversy and thinking about our basic document. So many things have been written about his books it reminds me of the flow of articles, commentary, criticism, and books that followed in the wake of Joyce's *Ulysses*.

DIGLOT: Friend Fustian, we can always count on you to inject some novel aspect into our discussions.

MODERATOR: Gentlemen, I would like to refresh your recollection on, or direct your attention if you are not already acquainted with, certain materials either pertaining directly to Professor Crosskey's work or warranting consideration along with it:

E. Cahn has edited a slim volume<sup>33</sup> called the *Supreme Court and Supreme Law* which is a collection of various meetings held at the New York University School of Law in observance of the one hundred and fiftieth anniversary of *Marbury v. Madison*.

Selections from the Columbia Bicentennial Conference concerning American Federalism: The General Perspective, are reprinted in the April, 1954, *Columbia Law Review*.<sup>34</sup>

<sup>32</sup> W. Hamilton, Southmayd Professor Emeritus of Law, Yale Law School, *The Constitution—Apropos of Crosskey*, 21 *Univ. Chi. L. Rev.* 79 (1953). This article is one of the series in that issue devoted exclusively to a symposium on Professor Crosskey's two volumes.

<sup>33</sup> Cahn, *Supreme Court and Supreme Law* (1954).

<sup>34</sup> This consists of three articles: H. M. Hart, Jr., *The Relations Between State and Federal Law*; H. Wechsler, *The Political Safeguards of Federalism*; *The Role of the*

For an interesting sidelight, and by-play with some substance, you should examine Professor Petro's article, "Crosskey and the Constitution: A Reply to Goebel."<sup>35</sup> You will recall that Professor Goebel was one of the trio reviewing Professor Crosskey's books in the *Columbia Law Review*.<sup>36</sup>

I assume you know that the University of Chicago published a listing of various reviews and symposia.<sup>37</sup>

Gentlemen, we will now proceed to your voting.

DIGLOT: Whatever question or criticism you pose, to be voted on, I will abstain for the reasons I have already stated. But I would leave one thought with you. Over the years I have noticed that some people tend to envisage "government" or "the government" as a shadowy personality brooding over and lurking behind daily affairs of the citizenry—say tax returns, as an illustration. There is, I think, a marked tendency toward treating government as something separate from the individual citizens. Not only is this unsound but downright unhealthy. Intellectual neglect can eventually impair the vitality of even the most robust constitution.

MODERATOR: If you will permit me to frame a specific question. . . .

FUSTIAN: At the outset one of you drew an analogy, using a jacket. While my contribution, here, has been a bit frivolous I have been listening—and I read both volumes.

Now, I wonder if that jacket were let out a bit, here and there, patched and mended over the years, would any of you say it was not the same jacket—or if I stripped off the patches, removed the mending and darning thread, took it in to the size it was before I gained weight, would it be the *same* jacket or one made over to be like the original?

AMPERSAND: I for one, not a lawyer but a reasonable man, would commend Professor Crosskey for his contribution. He has made me think about some matters long enshrouded by cases and lawyers' jargon. It is, in my opinion, healthy to ventilate problems such as he

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States in the Composition and Selection of the National Government; P. A. Freund, *Umpiring the Federal System*, 54 Col. L. Rev. 489, 543, 561 (1954).

Professor Hart's article should be read in conjunction with his earlier review of Professor Crosskey's book. See n. 4 above.

<sup>35</sup> 53 Mich. L. Rev. 312 (1954). The Moderator omitted mention of the bibliography footnoted in this article, which provides a good point of beginning for those readers searching materials on Crosskey's books.

<sup>36</sup> J. Goebel, Jr., *Ex Parte Clio*, 54 Col. L. Rev. 450 (1954).

<sup>37</sup> 3 Univ. Chi. Law Sch. Rec. 12 (1954). Comments on Crosskey are there arranged by articles, symposia, reviews from legal and non-legal periodicals.

has posed. I want to see the next volumes, then perhaps I can speak decisively.

PASSIM: Some of you might read an article titled "Law and Opinion in the Business Community"<sup>38</sup> for an interesting approach to business reaction in the area of certain types of legislation. My feelings, expressed a moment ago, pretty well cover my opinion.

WORDY, J.: Mr. Moderator, if any opinion is now rendered, please record me as Dubitante.

INFRA, J.: May I join you, Wordy?

WORDY, J.: Is it possible to have a doubting position concurred in by the minority? I never had this problem as C. J.

SUPRA, J.: Suppose I want to dissent from Dubitante?

MODERATOR: Oh, gentlemen, this is uncalled for at this stage.

ASTERISK: The hour is late. Before we fade away, we have yet to hear from Ellipsis.

ELLIPSIS: As always, thank you, Asterisk. My few lines which follow express my viewpoint . . .

Blue mists drift at heights where I stand alone—  
 With birds that hover—like words recalled now  
 From what was written or said. Can I endow  
 Words with life after author's thoughts have flown?  
 A feather is some clue to birds well known!  
 But how can I weigh and test all you avow?  
 By symbols in the ambit letters allow?  
 At this hour, time's haze blurs the Rosetta Stone.  
 For myths and legends must be winnowed out!  
 Your meanings and my meanings vary much with  
 Time and the ebb and the flow of life's rhythm.  
 Poor emotions, false notions all spawn doubt.  
 Does context or intention plumb the pith  
 Of ideas underlying words that garb them?<sup>39</sup>

\* \* \*

Morning sounds and daylight prompted turning out of the study desk lamp.

<sup>38</sup> Professor R. E. Lane, *Law and Opinion in the Business Community*, 17 *Public Opinion Quarterly* 239 (1953).

<sup>39</sup> Copyright 1955, by Melvin F. Wingersky, under the title *Sonnet of Words*, and reprinted here with his permission as its author.

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