Crosskey, Anastaplo and Meiklejohn on the United States Constitution

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I

Alexander Meiklejohn, George Anastaplo and William W. Crosskey have made contributions to an understanding of the Constitution which are not adequately appreciated or understood. As our discussion proceeds, we shall find Hugo L. Black's ideas appearing and reappearing in such a way that he may be considered a fourth major figure in our reflections.¹

Mr. Meiklejohn made the systematic argument for an unqualified First Amendment which has strengthened and influenced the position of Mr. Justice Black, and—sporadically—the position of the Supreme Court of the United States.² Mr. Anastaplo has since strengthened that position further by establishing, among other perhaps more important things, that the unqualified application of the First Amendment is consistent with, if not required by, the meaning of its words at the time of their enactment.³ Mr. Crosskey has recreated a doctrine of general power, particularly in economic matters, on the part of the Congress and the Supreme Court, which was the doctrine of the draftsmen, though the vagaries of change and politics have obscured it.⁴

It may be useful now to state and consider these new doctrines in their simplest and broadest form. The doctrines are themselves simple, and what a high school student would expect on a careful reading of the Constitution. They have however been subject to so many glosses that the argument for the simple meaning has itself become complex and startling. It seems however to be worthwhile to make that argument as simple as possible.⁵

We shall start with Mr. Crosskey's Politics and the Constitution.⁶ His principal concern is with the economic matters subject, under the Constitution, to the control of the Congress and the Supreme Court. If a comparison is possible these matters seem to me less important than the human values associated with communication, and so with the freedom of speech protected by the First Amendment. Nevertheless, it seems useful to start with Mr. Crosskey, and so become acquainted with some neglected criteria of judicial decision.

II

1. The criteria may be derived from Mr. Justice Black's recent observations, particularly his objections in two dissenting opinions to making the Supreme Court a "constitutional convention."⁷ To these observations, a familiar rejoinder is the remark by Charles Evans Hughes, made before he was a judge, that "... the Constitution is what the judges say it is."⁸ Each position of course starts from its own assumptions. At the same time it is hard to doubt that Mr. Justice Black's view is closer than that of Chief Justice Hughes to the practical judgments expressed in the text of the Constitution.

We may test our views about the wisdom and utility of those judgments, and get some experience

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in their application, by following Mr. Crosskey’s treatment of the powers of Congress, particularly in economic matters, and the powers of the Supreme Court. His position is that the Commerce Clause, the grant of powers to the Supreme Court, and the implications of the references to “general Welfare” in the Preamble and among the grants of power to Congress, give general legislative power to Congress, subject only to exceptions provided for in the Constitution. We shall consider first, somewhat more narrowly, the effect of the Commerce Clause on the powers of Congress and the theory of the general prevalence of state law, particularly commercial private law, in the United States Courts.

The Constitution provides: “The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .” Mr. Crosskey has assembled a number of meanings, current in the society in which the Constitution was drafted and adopted, for “commerce.” A quite common meaning was “gainful activity,” and if a more limited meaning was to be understood, it is hard to understand why that limited meaning was not made explicit. “Among” meant, then as now, “in the midst of,” but it was used somewhat more generally than it is now. We would employ today one example used in conversation by Mr. Crosskey, “the ravages of the boll weevil among the southern states,” including but not limited to ravages “between” the states; but we would be unlikely to say, as one did in the Eighteenth Century, that someone died of poison “among some clam soup.” When we speak of a person going to work for the “state” we understand well enough that we are speaking of a particular group of people, whose activities and relationships may among other things extend far beyond a “state’s” boundaries.

“Among” was not authoritatively limited to “between” until 1873, in The Case of the State Freight Tax. As a result, “commerce” came to mean gainful exchange, and “state” came to be associated with the limited territorial aspects of state government. These steps made it possible to treat the affirmative words of the Commerce Clause, granting power to Congress but not saying “only” to Congress, as limits on the powers of states in the absence of Congressional action. It was impossible to think of the Clause by itself as prohibiting state action on commercial matters “among” the states generally. An effort to interpret the power of Congress over bankruptcy as itself limiting the powers of states over insolvency problems was defeated early in our history. There is no sufficient reason to think that the Commerce Clause itself was to be understood in its original context as automatically abolishing state power over commerce. It did give Congress power to deal with economic frictions between states in the exercise of its power generally to regulate “Commerce . . . among the several States.” The contemporary reader must be reminded repeatedly that “commerce” included all gainful activity, that “among” included but was not limited to “between,” and that “states” meant groups of people, with or without reference to hunks of land.

We observe that these Eighteenth Century meanings, except perhaps in the case of “commerce,” are, when we look at the words, our own as well. In the case of “commerce” the Supreme Court has now, in practical effect, worked out its own extended meaning so that the Commerce Clause now applies to virtually all gainful activity. In the substitution of “between” for “among,” on the other hand, the Supreme Court has created its own limited meaning and has thereby obscured what it has done with “commerce.” We all recognize that when we deal “with the state” in daily situations, it is not “with” territory but with a group or community. Instead of referring bluntly to domestic and foreign commerce, the Constitution uses the more vivid expressions: “. . . with foreign Nations . . .” and “. . . among the several States . . .”

The Commerce Clause became in 1873 a part of an evolving system of protections to business against both state and national governments. Its first uses were against states, and gradually fitted into the doctrines of economic substantive due process of law that, among other things, invalidated much labor legislation, in a line of decisions which began to be overruled and corrected in 1937.

The Clause was first treated as including a limit on federal power in a decision that sugar refining was manufacturing and not “commerce” or “among” the “states,” and so not subject to the Sherman Anti-Trust Act. Another famous case held child labor in factories to be manufacturing and not “commerce among the states” and so beyond regulation by Congress. The systematic overruling of these last two cases began in 1937, and has continued without any
explicit verbal correction of the general doctrine by which they were supposed to be justified. Even a small field of grain for home use may now be subject, as part of a total scheme of agricultural adjustment, to control by Act of Congress. Wages and hours of work may be subject to an Act of Congress, in manufacturing industry, and even in schools and hospitals which buy considerable amounts of supplies and equipment outside the boundaries of their "states." Desegregation at lunch counters may be required by Act of Congress where substantial amounts of a lunch counter's supplies come from outside the boundaries of its state. And now "loan sharks"—lenders depending if necessary on private force for collection—may be subjected to punishment by Act of Congress. The one dissenting Justice observed, it seems correctly, that the generalizations about the "interstate" effects of crime applied in this case apply also to a large number of other crimes, indeed to "crime in the streets" generally.

A considerable number of related problems are likely in the end to reach the Supreme Court. There is the application of the federal Truth in Lending Act to "local" matters, for example the renovation of private houses. There is the application of federal rent control to private houses, including the question whether a landlord's correspondence with a tenant in another "state" makes their relationship one in "interstate commerce" or "Commerce . . . among the States," and the further question whether if such correspondence is not only sufficient but necessary for such a result. As controversies approach such limits, it may prove helpful to consider carefully Mr. Crosskey's careful and extended argument that the limits of Congressional power are indeed less than we have come to think, and are better adapted to the needs of a society where geographical boundaries are less significant than they were in the days of the Founders.

In these situations Mr. Crosskey's views may help to clarify and define existing doctrine. In another group of situations, to which we now turn, his views are—certainly at first glance—remote from those of the Supreme Court and the Legal Profession.

In the 1790s a Pennsylvania land company operating in western Pennsylvania found its claim to purchased lands threatened by the fact that its possession had been impeded by the course of an Indian war before the state's statutory period necessary to give the company title had passed. In the confusion of events individual settlers had taken possession, who now challenged the company's contention that it could count the period of Indian occupation in computing its time of possession for purposes of the controlling state statute. An intermediate Pennsylvania state court of appeals had decided a first case in a way favorable to the settlers and unfavorable to the company. The relatively inactive state Supreme Court was eventually to acquiesce in the final determination of a second case by the United States Supreme Court. In that second case, the company relied on the parties' diversity of state citizenship to litigate the matter in the federal courts and finally in the United States Supreme Court.

In the extensive arguments characteristic of the time, counsel engaged in the Supreme Court apparently considered only problems of statutory interpretation, without any suggestion that the judgment of the state court must control the decision of this question of local land law governed by a constitutional state statute. On the question of statutory interpretation, the United States Supreme Court decided in 1805 in favor of the company and contrary to the decision of the state court. This decision prevailed in subsequent motions; and leaders of the Philadelphia Bar advised their clients, including the land company, that they might safely rely on it in dealing with the lands which were the subject of controversy.

Thirty-seven years later, in a diversity of citizenship case about a negotiable commercial instrument, the Supreme Court held that the federal courts had power to develop their own case law in commercial cases. But the Court perhaps implied that in most other cases state law must be followed in the United States Courts. This implication came to govern the United States Courts. As every lawyer knows, it has been extended in our time, so that state law usually applies in federal diversity cases. A slight correction has set in and won the approval of such respectable scholars as Professor Grant Gilmore and Judge Henry Friendly.

Mr. Crosskey would have us return to the original doctrine of the Pennsylvania land case. He argues at length and convincingly that the rule of that case,
as well as the usage of that day, requires us to recognize the common law as one of "the Laws of the United States," thereby permitting federal jurisdiction of common law disputes regardless of who the parties are. It is perhaps too much to expect a return to the earliest understanding of federal jurisdiction. Nevertheless Mr. Crosskey's arguments add support to his view of the extensive powers of Congress over economic matters. It is hard to suppose that Congress could be left without power to deal with a subject matter, land law or commercial law, on which a coordinate Court could rule. The utility if not necessity of legislative power to define, extend, limit, or change the law developed by a coordinate court is a persuasive reason for the familiar relationship in our system between legislatures and courts.

The original existence of extensive private law (and probably criminal law) powers in our United States Courts suggests, further, that it would not be revolutionary for us to embark much more extensively than we have done on a systematic program of federal codification, for example, of contract law, by Act of Congress. To help Congress keep up with the need for change in everyday law, Congress might use something like a federal Ministry of Justice. Reduction in the need for interstate private conflict of laws (apart from the inevitable jurisdictional questions) would alone be worth the energy and expense involved. The original Constitution has proved in this and other ways its possible usefulness in modern times.

3.

These observations are very much condensed summaries of Mr. Crosskey's two major contributions to an understanding of our constitutional law. Though we had long discussions of his work as it progressed, and though he expressed appreciation of my often contentious contributions, he also quite often expressed dissatisfaction with my versions of his doctrine.24 I offer these suggestions therefore partly as an encouragement to those who are—to me, surprisingly—discouraged or confused by the bulk and style of his 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.

Here we approach our second subject, Mr. Anastaplo and the First Amendment. A few selected transition topics seem in order.

To his argument about the Commerce Clause and his argument from the powers of the Court, Mr. Crosskey adds an argument from the Preamble and the General Welfare Clause, to derive a theory of general legislative power in Congress, limited of course by such explicit provisions as the guarantees of individual rights in the Constitution and its amendments.

The two familiar objections to such a theory should first be mentioned. These are the accepted theory of enumerated powers and the accepted theory of the Tenth Amendment.

Mr. Crosskey has an entirely adequate alternative explanation for the enumeration of powers of Congress in Article I. In each case there is a specific and limited reason for the enumeration, including the sections dealing with foreign affairs in which provision is made for giving Congress all or part of the powers at the time possessed by the English Crown.

The second objection, from the Tenth Amendment, seems adequately answered by the Amendment's function in protecting and "reserving" the power of states to deal with commerce, by regulation or taxation, in the absence of inconsistent legislation by Congress. The power was not "delegated" in the sense, familiar at least in the Eighteenth Century, of being completely given away to Congress, nor was it "delegated," in any sense, to the Court.

Answering objections does not of course establish a case. Mr. Crosskey's case depends on the implications of the two constitutional references to welfare. In the Preamble the reference to general welfare seems to apply appropriately to Congress, as the reference to domestic tranquility applies to the Executive, and the reference to justice, to the Court. Mr. Crosskey has a persuasive argument from the treatment of preambles in Eighteenth Century draftsmanship to support the inferences which might in any event be drawn from the Preamble. In Article I, the power to tax to promote the general welfare implies an agency, which can only be Congress, to use taxes, to finance regulation or subsidy, for this purpose.

The principal argument against the existence of the resulting general legislative power is the insistence, in ratification debates, by thoughtful contemporaries, including members of the Convention,
that there was no such general power; and that freedom of speech and press, for example, could not be limited by the exercise of any powers granted to Congress. Nevertheless, the decisions to propose and adopt the First Amendment lend support to the view that the existence of such a general power was perhaps not merely feared but reasonably anticipated by some discerning contemporaries.

Mr. Crosskey's position on this matter is somewhat more convincing than his position with respect to judicial review of congressional action. The power to review state action is clearly stated or plainly implied in the Constitution. The power to review congressional legislation is left to more doubtful inference, and contemporary state precedents did not go beyond judicial review of legislation affecting judicial procedure. Mr. Crosskey argues that review of congressional action was limited to procedural questions and to action which would usurp or restrict judicial power.

The apparently inevitable logic of Marbury v. Madison\(^\text{25}\) is of course not inevitable at all. But it seems to express an instinct about policy which has considerable force, and which fits the system of separation of powers and of checks and balances which was, and is, the great safeguard of freedom in the original Constitution. In view of the ambiguity of the Constitution on judicial review, considerations of policy may well play a part in its interpretation. Mr. Anastaplo, in the book to which we are coming, makes a persuasive argument against Mr. Crosskey on this matter.

The absence of judicial review of critical questions of war and peace is a reminder of the utility of judicial review in clarification of the Constitution and in preserving the checks and balances of our system. The strong reasons, in 1787 and now, for giving Congress exclusive power to declare or make war, except in a clear emergency, qualify what was said earlier in this essay about the absence of an "only" in the grants of power to Congress, including the power to regulate commerce.\(^\text{26}\) In matters of war and peace the context seems to require an "only," to limit executive power, in sharp contrast to the context of the Commerce Clause, which does not need an implication limiting the powers of states.\(^\text{27}\) It would perhaps be of some use for the Court at some time to deal explicitly with this question, for example in developing its Commerce Clause doctrines.

III

1.

"Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

Rivalling the Commerce Clause in importance, the principle expressed here is one of humanity as well as freedom, and an assertion of the important place occupied by the citizen in considering the decisions on public affairs which in our society are ultimately his. He is to have the benefit of all available views on public matters, expressed in speech or in the press.

Alexander Meiklejohn developed this position in his Political Freedom,\(^\text{28}\) stating the case for an interpretation of the First Amendment which understands "freedom of speech" to be unqualified. Such an interpretation has been applied at times by the Supreme Court, and supported particularly by Mr. Justice Black.

George Anastaplo has, it seems to me, made some useful developments of Mr. Meiklejohn's doctrines, and some persuasive modifications as well. His book, The Constitutionalist,\(^\text{29}\) with what might have been two separate volumes, one of Appendices and one of Notes, rivals Mr. Crosskey's as a contribution to American Constitutional Law.

Mr. Anastaplo develops Mr. Meiklejohn's doctrine by analyzing, particularly, the first five words, "Congress shall make no law . . ." The words could hardly be clearer. With some help from illustrations of parental commands and from familiar transactions in everyday life, Mr. Anastaplo shows how easy it would have been to introduce qualifications, such as some which appear in other parts of the Constitution and the Bill of Rights, if they were to be understood.

He observes that it is only "Congress" that is named. He resists the attractive tendency to apply the Amendment to the Executive and the Courts, leaving safeguards against them to other parts of the Constitution. A strict definition of the Executive Power combined with a proper regard for procedural due process would, for example, control any loyalty program which may seem to be needed in the future.

The meaning of "freedom of speech" is given by Mr. Anastaplo a more restricted scope than that given it by Mr. Meiklejohn. By what seems a sound intuitive insight, supported by observations on electoral and legislative, particularly parliamentary,
precedents, "freedom of speech" is limited to speech about political matters. These are such matters as are discussed in considering the election of officials or proposed amendments to the Constitution. Any economic proposals, however drastic, are open for discussion as political matters. On the other hand, Mr. Anastaplo seems to understand the interests of Eighteenth Century American statesmen, in that he excludes obscenity from the scope of the First Amendment, whatever protection it may be entitled to on other grounds, for example on grounds of administrative or procedural due process of law. And he leaves open the more troublesome questions raised by science, for example Darwin and Freud, and the old and new Tennessee evolution cases. 30

At the same time he supports an unqualified interpretation of the First Amendment against the most troublesome criticism it has received. This is Mr. Crosskey's criticism, which does not appear in his book—where the Amendment receives little attention—but has been made in conversations and in teaching. Mr. Crosskey emphasized the ordinary dictionary meaning of "abridge," which is not "limit" or "restrict" but "lessen." "Lessen" requires some reference to an earlier condition, and the reference which naturally suggests itself first is the contemporary law of England. That law prohibited only "previous restraints" on speech or publication, and it is that law which is said to be crystallized in the First Amendment.

Pursuing the kind of linguistic inquiry whose value Mr. Crosskey has shown, Mr. Anastaplo has found a significant number of Eighteenth Century texts of quality in which it is said that "natural rights" must not be, or ought not to be, "abridged" in the sense of "restricted." Contemporary usage thus appears to have warranted, though perhaps not required, the use of "abridge," in such a context, in the sense of "restrict." Our usage today seems, if anything, less precise. 31 The text is at least sufficiently flexible so that a relatively simple, as distinct from a relatively refined, meaning is legitimate. The refined meaning urged by Mr. Crosskey has been rejected by the Court, on the ground—among others—that previous restraints and subsequent punishments have much the same effects on the values associated with the words "freedom of speech" and "freedom of the press." Nevertheless, it is satisfactory to have Mr. Anastaplo's answer to Mr. Crosskey based on those scholarly methods which

Mr. Crosskey has used elsewhere with effects so devastating for accepted scholarly doctrines.

Mr. Anastaplo seems at times to rely on a view that Congress was given no general legislative powers. On this point Mr. Crosskey's different view has seemed more persuasive, though not indisputably so.

Rather unobtrusively, Mr. Anastaplo's interpretation of the First Amendment renders unnecessary extended consideration of the troublesome points raised by Mr. Meiklejohn and others under the head of "incitement." It is discussion that is protected. Mr. Anastaplo's treatment of Schenck v. United States 32 in his text and in an Appendix, indicates how discussion in politics normally merges into incitement, and how calmly the discovery of this phenomenon should be taken. 33 It should not be hard to distinguish discussion even with incitement from riots, revolutions and civil wars, planned, incipient or in operation.

By way of precaution, it should perhaps be said that Mr. Anastaplo, like others, recognizes that what may seem at first to be the implications of an "unqualified" freedom of speech require some critical common sense corrections. Rules of order, for meetings, limit freedom to interrupt and so destroy debate. The indispensable regulation of streets and public places is subject only to a requirement that regulation should not be used to the disadvantage of particular views. One may protest the uses made of one's tax money, but one can hardly expect to be immune to the processes of collection. Hijacking may be in some cases a revolutionary symbol, but it is not that alone, and can hardly be privileged. The Hatch Act disabilities of civil servants raise more troublesome questions. 34

The protection of discussion has no bearing on fraud—except perhaps religious or magical fraud—or on agreements on wages or prices or on private gossip, all of which are subject to other appropriate standards and safeguards.

Finally, it has been observed that Mr. Anastaplo excludes obscenity from First Amendment protection. He recognizes that the classics present problems of classification. But he insists with some force that the obscenity which flourishes on so many book stands is in principle at least distinguishable; and that in any event it is not political discussion, whatever safeguards found elsewhere in the Constitution it may be entitled to.
In limiting the First Amendment to apply to Congress, as it says, and not to the President or the Court, and to apply—further—to political speech only, Mr. Anastaplo observes that in making the Amendment less inclusive one makes it more manageable, and less likely to be subjected for example to what have proved the stultifying effects of the "balancing" metaphors. The limited meaning is simpler and easier to think of, and is itself persuasive.

2.

Mr. Anastaplo carries further his effort to isolate and strengthen the First Amendment by observing other legitimate limitations of its scope, this time in its application to the states.

Mr. Crosskey argues convincingly but not perhaps beyond dispute that, except for the First Amendment, the Bill of Rights guaranties (with one possible minor qualification about appellate practice) applied, in the context of their time, to the states as well as to the nation. At least as persuasively he argued that these guaranties were at any rate applied to the states by the Privileges and Immunities Clause of the Fourteenth Amendment. The Supreme Court has recognized a selective reenactment or enactment of these same safeguards by the Fourteenth Amendment. It may be observed that most of these safeguards could be derived from basic doctrines of procedural due process.

Both Mr. Crosskey and the Court have urged, further, that First Amendment guaranties, originally applicable only to Congress, were applied to the states by the Fourteenth Amendment. Mr. Crosskey derives what seems to be not quite convincing support from references to problems of freedom of speech in pre-Civil War discussions of slavery. He thinks First Amendment safeguards were included among the Privileges and Immunities of citizens of the United States in the Fourteenth Amendment.

The Court, without serious discussion, incorporated both the religious freedom and the freedom of speech provisions of the First Amendment into the substantive due process which was thought at that time to be generally provided for in the Fourteenth Amendment. The reconsideration and eventual disapproval of the bulk of substantive due process, which had been used to control labor and other economic legislation, did not bring any serious reconsideration of the religion and speech cases.

Mr. Anastaplo urges persuasively that so great a transformation of the scope of the First Amendment as that defended by Mr. Crosskey and the Court requires more support than that given by either Mr. Crosskey or the Court. Here Mr. Anastaplo is legitimately faithful to the historical tests insisted on by Mr. Crosskey. He emerges, it seems at first sight, as less of a "liberal" in this matter than Mr. Meiklejohn, Mr. Crosskey or the Court.

And yet he seems quite correct in his position. It seems to me, in any event, that much of the work now done on religious and political freedom in the states can be done quite as well by the expanding doctrines of equal protection and the well established doctrines of procedural due process as by the somewhat tortured doctrines of religious freedom and the relatively emasculated doctrines of freedom of speech and press at present applied to the states. These matters will be referred to later. Mr. Anastaplo's position is based on a liberal regard for the role of the states in maintaining order, subject to a power of correction by Congress to preserve, but not to "abridge," freedom of speech and of the press.

Though the differences between Mr. Crosskey and Mr. Anastaplo on this point have thus far been emphasized, Mr. Crosskey gives Mr. Anastaplo interesting support in one respect. Mr. Crosskey argues that if any powers are impliedly excluded from exercise by Congress under the Constitution, they are the "police powers" in the limited sense in which the phrase was used by Eighteenth Century French and English writers, in contrast to such larger powers as those to deal with welfare, commerce and defense. The police powers are the powers which we associate with the local police and fire departments or sometimes the state police. They are indispensable powers if the states are to govern at all.

Mr. Anastaplo reminds us of the guiding significance of the constitutional guaranty of a Republican Form of Government for the states. He explains the limitation of the original First Amendment to Congress partly by a regard for a principle related to the Republican Form of Government safeguard. Such disturbances as Shays' Rebellion were what was to be expected at that time. Like the Whiskey Rebellion they were expected to be within the physical capacity of states to control, just as quite serious riots today can be handled, in the first instance at least, by states.
The Republican Form of Government Section provides for federal intervention to deal with local insurrections at the request of the state governments, but not only at their request. One can put a case involving planning the Civil War, or taking the first steps, as by marching, toward firing on a federal fort, in which federal intervention would be justified even against the judgment of a hesitating state. This would be in the exercise of a power “necessary and proper” to preserve the federal government, as inevitable as a war power to deal with a planned or executed foreign war.

But otherwise the guaranty of a Republican Form of Government means that the states are to have at least the elementary functions of preserving order. For these purposes, such as the prevention of something like a Shays’ Rebellion, the states are to exercise their own judgments about controlling speech and the press, subject to their own constitutions, to the traditions of revolutionary freedom (however much disregarded in the treatment of Tories), and to the power of Congress to extend but not to “abridge” protections to freedom of speech even in the states, in case of serious excesses of state control.

In view of the accepted religious powers of the states, and the political considerations suggested here, it is possible to understand why the First Amendment applied only to Congress. And it is difficult to think that a policy, however changing, expressed so clearly in the original Amendment, could have been understood to be reversed by the general words of the Fourteenth Amendment, even in the context of their time.

To these historical considerations Mr. Anastaplo adds practical arguments drawn from the advantages of preserving the elementary functions of the states, and again from avoiding the strains incidental to expanding the scope of the First Amendment which threaten the purity of its application to its expressed object, the Congress.

3.

As I understand it, Mr. Anastaplo is content to leave his argument at about the point where I have attempted thus far to state it. To anyone alarmed by the resulting prospect of a possible loss of liberal safeguards against the states, it should be observed, as we have noticed, that the religion and speech safeguards now in force could well be supported by the Equal Protection Clause or, as in the case of obscenity (or as in Mr. Anastaplo’s own splendid case), by procedural due process.

A prayer originating in a Catholic or Protestant source may well, in context, be objectionable to one group of churches or the other, as well as to Jews and Humanists, who are entitled to equal treatment in tax supported institutions. Financial aid to private schools, as well as colleges and universities, from state or nation, requires controls in the interests of quality and racial justice, but not, it seems today, in the interests of religious neutrality; but this is a long story. An interest in Aristophanes, Rabelais or Freud is for all legitimate purposes like an interest in any other literary or scientific master, and the difficulty of defining “hard core” pornography, as well as the obstacles to unselective prosecution, may well give effective constitutional protection to printed matter generally.

Past (or even present) membership with knowledge and support of purposes, in far left or right wing revolutionary organizations seems an inadmissible basis for classifying bar admission applicants. This seems a legitimate objection to the New York bar admission procedure recently approved by the Supreme Court, over dissents which might well be supported on equal protection grounds.

It is to be noticed also that the implications of the Constitution may change with changing times. The Bill of Rights amendments concerned primarily with procedure may develop new meanings under the influence of equal protection standards and refinements by Justices who are particularly expert in matters of procedure, and with changing circumstances. Their words are in some cases, at least, evaluative as well as descriptive. “Due” is evaluative, “process” descriptive. As wardens know, if policemen do not, capital punishment is cruel. It would not have been unusual in the Seventeenth Century, when public drawing and quartering were familiar, but today it is unusual in expressing and stimulating extreme sadomasochistic impulses. It has become unusual in still another respect in recent years in being rarely carried out. It is most frequently ordered against the poor and members of minorities; though it is not altogether unique among punishments in this respect, its peculiar savagery makes it in this respect uniquely objectionable. Its abolition
should be added to all the improvements made by the Warren Court in criminal procedure, in which Mr. Justice Black generally concurred, though modification—as distinct from refinement—of Fourth Amendment meanings called for one of his warnings that the Court is not "a . . . constitutional convention." 39

These points seem to me important. They comfort us about the preservation of libertarian safeguards against the states. At the same time they remind us again of the significance of the Republican Form of Government guaranty. That is significant as a safeguard or a warning against the most extreme developments of federal judicial powers in constitutional matters, and against related developments of the powers of Congress to implement the Fourteenth Amendment. Such developments might accomplish a greater and more questionable change in the federal system than anything likely to occur soon under the influence of Mr. Crosskey's views of the economic powers of Congress and of the General Welfare Clauses of the Constitution.

Mr. Anastaplo's States' Rights instincts and Mr. Crosskey's Federalist instincts at this point reinforce one another. Taking a larger and more general view of constitutional history than he sometimes did, Mr. Crosskey in conversation and teaching used to warn us against letting the Equal Protection Clause develop the generality and undependability of the old substantive due process. He would have confined the Clause to racial matters and to the carpetbaggers' abuse of granting legislative monopolies to named persons, and he would have limited "protection" to common law types of criminal and civil responsibilities, including perhaps common law "public utility" responsibilities, but not public education.

It seems to me that the results of equal protection decisions, including the desegregation and voting decisions, have thus far been constructive and linguistically defensible. The Connecticut birth control decision may best be explained by the inequalities of selective enforcement inherent in the punishment of birth control itself and in the bizarre types of investigation, hardly consistent with procedural due process, which would be necessary for general enforcement. 40 The discovery of a constitutional protection for union members' and union lawyers' consultations about members' problems may arguably be justified on grounds of an extended equal protection, or on grounds of the important procedural features of legal advice on civil and criminal matters alike. 41 It is perhaps barely arguable that equal protection is a part of substantive or procedural due process which is applicable to Congress, and a ground, though unmentioned by the Court, for the District of Columbia school desegregation case. Or perhaps the District of Columbia is a "state" or to be dealt with by analogy to states.

We should remember here that the Equal Protection Clause, thus treated, has critical philosophical implications. The Golden Rule, the Categorical Imperative, and Utilitarian doctrine exhibit the necessity of using the idea of equality in practical matters, including lawmaking, however difficult its application may be. The idea is not inconsistent, as Aristotle and Thomas Jefferson will remind us, with an internally consistent scheme of differential economic returns. But experience with the old substantive due process, developed generally from even more speculative ideas of liberty and property, reminds us also that law is not identical with equity.

The illustrations which follow of both the uses and the dangers of equal protection in economic matters will serve as a final warning that Mr. Crosskey's disposition to confine the principle strictly to racial matters and grants of private monopoly has a thoughtful philosophical basis, too.

The Equal Protection Clause has useful and perhaps growing applications to taxation. 42 If "subsidy" can be adequately defined, or only its cruder forms considered, equal protection might prove not only a safeguard against "discrimination" immediately unfavorable to nonresidents. It might prove also a limit on discrimination immediately favorable to nonresidents, but ultimately unfavorable to residents and nonresidents alike. 43 An example is the great range of tax benefits, from differential assessments to "industrial revenue bond" exemptions, used to attract and please corporations in selecting sites for manufacturing and perhaps for other activities.

Economic policy has perhaps in any event been found, as a result of our experience with substantive due process, a subject more fit for legislative treatment, state or national or both, than for judicial treatment. An ironical example may be suggested. An effective minimum wage, like an effective union scale, tends to be immediately advantageous to the relatively employable and immediately disadvan-
tageous to the relatively unemployable, and hence the relatively poor. The case for collectively set wage scales depends on long-run problematical social considerations. It is doubtful whether a decision is to be expected returning constitutional doctrine to the 1920s and invalidating state minimum wage laws, this time on equal protection grounds. The equalization of women’s opportunity for overtime work and wages and the removal of unions’ remaining exemptions from antitrust laws may be in the spirit of the coming times, even if they are not required by the Equal Protection Clause.

A fascinating problem of straightforward and serious inequality combined with troublesome problems of taxation is presented by the public school equal expenditure cases. Here the Supreme Court has been faced with the application of counsels of justice on the one side and of judicial caution and the appropriate sphere of state policy on the other. My unrealized expectation was a decision extending the scope of equal protection and limiting, however cautiously, the scope of state determinations. There is a curious contrast between the two cases decided since this paper was prepared, in the recognition of a right of privacy in the abortion case, and the inability to recognize a right to equal expenditures on public education in this more recent case. On the other hand in the latter case, there is a rational reluctance to interfere with state policy determinations, particularly in a somewhat intricate matter of taxation.44

The development of equal protection as a safeguard for religious and civil liberties generally, and for civil rights, will doubtless be limited by a caution derived from considering the consequences of applying formulations in such cases to the somewhat different controversies and complexities of economics. Mr. Anastaplo and Mr. Crosskey combine to emphasize the importance of such caution on general principles. Considerations of States’ Rights and of the appropriate scope of Legislative and Congressional powers alike will indicate the continuing need for a degree of judicial self-restraint. Mr. Justice Black’s two warnings that the Supreme Court is not a constitutional convention will reinforce our sense of the limitations of judicial proceedings as means of deciding great social, economic, and political issues, and of the limitations of even the greatest Justices as well.

IV

1.

Mr. Meiklejohn served as President of Amherst from 1913 until he was removed by the Trustees in 1923. The removal was itself a drama in free speech, with the opposition to Mr. Meiklejohn led by such middle income reactionary Amherst graduates as Calvin Coolidge, and with Mr. Meiklejohn supported until the end by at least one high income conservative Trustee, Dwight Morrow, a Morgan partner. I studied under Mr. Meiklejohn at Amherst and later taught in his Experimental College at Wisconsin, where we had the first—and best—college house plan in this country. Mr. Meiklejohn moved later to Berkeley where he became more and more active in advising young lawyers and their clients about the free speech issues which had been, throughout his teaching, major subjects of his interest. He was relied on—it seems fair to say—more than anyone else, by Mr. Justice Black in his development and expression of a theory of an unqualified First Amendment. When the New York Times libel case was decided in 1964, not long before Mr. Meiklejohn’s death, he said to a friend that it was “an occasion for dancing in the streets.”

Mr. Meiklejohn was rightly happy about what was partly his own victory. His influence on Mr. Justice Black, and on the Court, was symbolized at the Washington memorial service, attended by Mr. Anastaplo, for Mr. Meiklejohn. Mr. Justice Black left a conference of the Court, for the first time in his career—as he told the assembly—to speak at the service. In a related sequence, the daughter and son of Mr. Anastaplo, who is in many ways a reincarnation of Mr. Meiklejohn, were stirred at the Washington funeral service for Mr. Justice Black, by hearing the conclusion of his dissent in their father’s case read first in a series of excerpts from Mr. Justice Black’s opinions.45

The relationship between the University of Chicago and the development of a sensible constitutional theory since the Second World War is indicated by what may be more than a coincidence. Mr. Meiklejohn gave at the University his celebrated lectures on freedom of speech, to an audience which included Mr. Anastaplo, just before Mr. Anastaplo himself became a student of Mr. Crosskey. The cause of freedom was being advanced in other ways as well by the University economists.
2.

Mr. Meiklejohn once said, rather proudly it seemed to me, that no student of his had ever agreed with him. It is at any rate not surprising that his thought seems both to have started much of the development described here and to oppose some of it. His criticism of the First Amendment "present danger" qualification, going back to the 1920s and 1930s, was an important feature of a period rich with critical attacks on accepted constitutional doctrine. His criticism did not affect the law until the late 1950s. But it has always been a stimulus to rethinking the Constitution.

He deplored my own disposition, expressed in this essay, to give great significance to historical meanings of constitutional texts and, where such meanings cannot be discovered, to simple layman's meanings. I justified my position then, as I would today, on the ground that it is the best approach to keeping judges under some control, to prevent what might politely be called their rhetorical skill from turning a court into a "constitutional convention." But Mr. Meiklejohn had more confidence than I in lawyers and their reasoning. He was ready to trust himself and them to remake the Constitution, or at least its broadly generalized portions, to suit the times.

Here he was in opposition to Mr. Crosskey's methods. On the other hand, he was—I think—in basic agreement with Mr. Crosskey's view of federal power. Walton Hamilton taught at Amherst in my day. Later, in a book warmly expressing his debt to Mr. Meiklejohn, he anticipated a part of Mr. Crosskey's discussion of the Eighteenth Century meaning of "commerce," and came to conclusions anticipating Mr. Crosskey's conclusions about the scope of congressional power to regulate "Commerce . . . among the several States." This was part of a constitutional reform movement that did succeed to some extent, beginning in 1937, with the discrediting of the old sugar refining and child labor cases, and a related Due Process and Commerce Clause case limiting the power of Congress to protect labor organizations, even on the railroads.

And yet—returning to unions—Mr. Meiklejohn was not doctrinaire. I once urged him to incorporate in his Free Speech a distinction which I think it fair to say he was at least ready to consider approving in conversation. He defended the first picketing decisions of the 1930s, on the ground that in one case picketing was the only means of bringing the workers' grievances to the attention of a local community, and that in the other case the picketing was on a construction job for a government. In both cases there was in his view "public speech," which was entitled to First Amendment protection, even against the states. He was ready to consider the possibility, at any rate, that ordinary picketing in a private wage dispute otherwise known to the public was entitled only to the protection given price agreements generally. This would include that "due process" protection to which all human activity is entitled.

It will be seen that Mr. Meiklejohn's approach has influenced Mr. Anastaplo's thinking, but not controlled it. Mr. Meiklejohn's "public speech" has a larger scope than Mr. Anastaplo's "political speech." I think Mr. Meiklejohn would have had no difficulty about Darwin and Freud, and in his later years he was, as I understand him, disposed to extend First Amendment protection at least to allegedly pornographic classics. Nor did he have any difficulty about applying First Amendment limitations to the states.

Mr. Meiklejohn was ready to use "incitement" as a test of the outer limits of free speech, a matter about which we used to engage in some of those happy arguments that were characteristic of our relationship. I used to insist that "incitement" would in a time of stress revive the "present danger" qualification. On the other hand language "planning," or "commanding" violence may raise elementary problems about the order which any state must by its nature maintain. (But an idle dream is not a "conspiracy," whether to corner a market or to overthrow the government.) On this point, as I have indicated, I am happy to find that Mr. Anastaplo has found a legitimate way of avoiding what in this case seems an unproductive linguistic discussion.

Philosophically, Mr. Meiklejohn was convinced that freedom of communication may be preserved in communities where, in the interests of public welfare, economic liberties are considerably restricted. This position disposed him to accept in general the conclusions of both Mr. Anastaplo and Mr. Crosskey, if not their way of reasoning, about the Constitution. Mr. Anastaplo is somewhat appre-
hensive about any concentration of economic as well as political power. Mr. Crosskey was, despite his opinions on federal power, definitely opposed to syndicalist or "central" planning, as well as to socialism. He started his book as support for a hoped for improvement in capital markets by the Securities and Exchange legislation of the 1930s, and its optimistically awaited implementation. He said that he left Wall Street (where he was much admired) in the 1930s because he was "the only man there with any respect for private property." He was, like me, neither a Pelagian nor a Jansenist; but, like me, he had a healthy Eighteenth Century regard for the limitations of the human being, including the human being in power. While history as usual is ambiguous, economic liberty seems to me, in experience and in principle, a necessary and probably in the long run a sufficient condition of freedom in communication.

In this view there is great merit in the simple and flexible, but disciplined, Constitution for which Mr. Crosskey, Mr. Anastaplo, and Mr. Meiklejohn have worked. Whatever our economic policies, liberal or collectivist, they will increasingly require self-consistent national implementation; and they will increasingly require the fullest possible discussion of even the most drastic and unlikely appearing suggestions.

An example is the "negative income tax," which I have heard discussed, off and on, since 1926. It will be noticed that any family income plan based on allowances given by the United States depends on the spending powers of Congress. In view of the traditional concern over the regulatory powers of Congress, it is ironical that its spending powers have seldom been questioned. Even state spending has received little if any effective check. It is only in the case of the first Agricultural Adjustment Act that federal spending has been impeded by the Supreme Court. State and federal welfare spending will be increasingly in need of coordination. Comprehensive schemes of regulation, for example wage and hour regulation, may need to be coordinated with welfare programs. Do wage and price controls lessen or increase poverty? If they do neither, are they useful for other purposes? Poverty and unemployment seem, on questionable grounds, to affect decisions on military spending and hence on strategic policy.

The problems of poverty and of war and peace require national solutions reached with the most complete freedom of discussion that can be obtained.

V

Mr. Meiklejohn's, Mr. Anastaplo's and Mr. Crosskey's constitutional opinions not only stand the tests of practical utility. When slight adjustments are made among them, their Constitution has the immediate intuitive appeal characteristic of music or poetry.

In the Notes which are in effect the third volume in Mr. Anastaplo's Constitutionalist, the author engages in brilliant and delightful comments and explorations, which can be read with the main text or with the aid of the Index, but which are best read at leisure on their own account. Here, for example, fairly early in the Notes, the Constitution is compared with the famous cup of tea which brought to life in Proust's mind the beloved and beautiful Combray with its people, its fields and its buildings. And at the very end of the Notes, Mr. Anastaplo reverts to his early love for and skill in mathematics, with a passage which—as I understand it—has received (for its mathematics) confirmation by qualified specialists. It is in part beyond the comprehension of a layman. But it is also in part intelligible to any student of philosophy who is aware of the part played by Pythagorean thinking in the history of both Greek and modern philosophy. Here the extraordinary mathematical relations among the elements are taken as signs of a deep if inscrutable reason in the nature of things, including the nature of law.

1 This essay includes observations which have been stimulated, or originally made, by a great number of unnamed students, teachers and colleagues. The person who should be selected for special mention here is Harry Kalven, whose influence is most readily identifiable among all those going back to the earliest days of someone born in Madison and largely reared in academic communities. Mr. Kalven's conversation and writing have been exceptionally useful with respect to the subjects discussed in this essay. My own view is that his general ideas can be expressed in the language used here, and that his principles will often if not generally lead to results like those reached by means of the principles stated here. The statements of the three principal authors considered in this essay have some advantages in persuasiveness, accuracy and clarification, along with some disadvantages, no doubt, in unfamiliarity of approach. Mr. Kalven will perhaps not object if I express a hope that his new book will be published before too long. I am sure it will join the recent classics here under discussion.
Another colleague, Philip B. Kurland, has written a survey, perhaps somewhat comparable to the present essay, expressing views different from those developed here, particularly his views about equality and the Warren Court. See Kurland, Politics, the Constitution and the Warren Court (Chicago: University of Chicago Press, 1976). But see note 35, infra.


Previous discussion by me of Mr. Crosskey’s views, in various aspects, appeared in “The Old Constitution,” 20 U. Chi. L. Rev. 529 (1953); Book Review, 54 Colum. L. Rev. 469 (1954); “The Master,” 55 U. Chi. L. Rev. 238 (1968). Unpublished correspondence with the Journal of Legal Education dealing with details of the major criticisms of Mr. Crosskey’s book is available from me for anyone interested. The correspondence was incidental to a badly mistaken reference to my Columbia Law Review contribution in the first edition of the American Law School Association’s readings on professional responsibility.


This paper began as a deliberately noteless and correspondingly readable essay. In the course of discussing specific obscurities and objections, notes have been regrettably added. It must be obvious that they are selective. They do not pretend to deal with all obscurities or objections. Citations are limited to easy aids and to cases of special interest. Lower court and state court citations particularly make no pretense of completeness, and much the same thing is true of United States Supreme Court decisions.


His Apology article was commented on by Willmoore Kendall, the conservative political scientist, in his review of Ancients and Moderns, where he speaks of “the touching essay on Plato’s Apology by George Anastaplo (himself the author of perhaps the only ‘apology’ of our time that demands a place in any anthology of American oratory); it is hardly too much to say that Anastaplo gives us a wholly new Apology...” 61 American Political Science Rev. 783 (1967).

In his Appendices, in effect the second of three volumes in The Constitutionalist, Mr. Anastaplo includes, with other interesting materials, selected materials on his bar admission case. In re George Anastaplo, 396 U.S. 82 (1961). That case still seems to me an outstanding contribution to legal education. The briefs in that case prepared by him as counsel pro se, merit particular attention as do the dissenting opinions of Mr. Justice Bristow in the Supreme Court of Illinois and of Mr. Justice Black in the Supreme Court of the United States.

Professor C. Herman Pritchett, in a recent review (60 Calif. L. Rev. 1476 [1972]), expresses his admiration for The Constitutionalist, and recognizes its relationship to the studies of Mr. Crosskey.

This huge book is primarily a treatise on the first amendment, with notes. As such it is probably the most original, extended, learned, dogmatic, tightly-structured, eloquent, unorthodox, and altogether heroic essay in constitutional explanation, interpretation, and plain and fancy assertion since the two volume blockbuster of William W. Crosskey, who incidentally was one of Anastaplo’s professors at the University of Chicago Law School.


See, on Mr. Crosskey, the Memorial Issue, 35 U. Chi. L. Rev. 229 (1968). See also note 1, supra.

Mr. Meiklejohn’s book can be used without an index. Mr. Crosskey’s and Mr. Anastaplo’s books are well indexed.

5 For some purposes it would be desirable to start with Mr. Anastaplo and Mr. Meiklejohn. Mr. Anastaplo’s book, dealing with material with which both he and Mr. Meiklejohn are concerned, is new. Its discussion will lead to my expression of some views about equality. In the end, equality and freedom are perhaps more important, more general, topics than power to regulate commerce.

One theme on which Mr. Crosskey, Mr. Anastaplo and I are in agreement is the treatment of the Constitution. Mr.
Croskey, the most uncompromising of us all, is opposed to the rhetorical manipulation of the Constitution which has appeared throughout its history. Mr. Meiklejohn does not agree with us. He would be more disposed than we to have judicial policy prevail in conflicts with text.

The historical approach to the Constitution in which I claim to share applies to the whole instrument. It seems to me indispensable to describe that approach at the beginning and then move to the topics which are perhaps now more controversial, and which are illuminated by Mr. Anastaplo's brilliant book. Among other things, this beginning will supply materials for those, perhaps including Mr. Anastaplo, who will wish to complain that my own treatment of Constitutional freedoms and equalities is inconsistent with the historical criteria with which I begin.

6 Note 4, supra.

7 Griswold v. Connecticut, 381 U.S. 479, 520 (1965); Katz v. United States, 389 U.S. 347, 364-74, particularly 375-74 (1967). The context in both cases was, to Mr. Justice Black's view, the creation of a constitutional right of privacy. Compare the discussion in the text at notes 39-41, infra.


Compare: "What's the Constitution between friends?" Attributed to "Timothy J. Campbell, about 1885, to President Cleveland who refused to sign a bill on the grounds it was unconstitutional. Campbell was a Tammany member of the House of Representatives and the attribution to him is on the authority of William Tyler Page." Burton Stevenson, The Home Book of Quotations, 307 (New York: Dodd, Mead & Co., 1964).

9 Politics and the Constitution, 1278. Mr. Croskey did not use the boil weevil illustration in his book. It might have appeared among the illustrations on pages 53-54, except for the view that states' territories are no more "discrete" than "vacant lots"; or on page 76. Mr. Croskey was intent on relating "among" to "states" as collective units. He was more skeptical about his view of the meaning of "states" than he needed to be. Anyone whose views are affected by life "in" an incompletely urbanized "state," like New Mexico, will realize to what an extent one uses the word "state" to refer to the community and not to the territory.

One may recognize that it would be "hilarious" today to speak of activity "among" a level plain; but it does not seem to me inappropriate to speak of boys playing baseball among "vacant" or "back" lots; and state boundaries create in our minds, it seems to me, a sense of discreteness like that "among" islands or mountains. When one adds the common use of "states" as communities Mr. Croskey's argument, based on an overwhelming number of instances of "among" with groups of people, seems unanswerable. His fastidious dependence on these latter instances seems to me, as I go back to them, to have limited the force of his argument for the contemporary reader. "Among" includes but is not limited to "between" even in its application to more than two territorial units, including the territories of states; and even more clearly, perhaps, in its application—of which Mr. Croskey has such a wealth of examples—to more than two communities.

This note is meant particularly for readers, of whom I hope there will be a number, who will be encouraged to go back to the book itself and compare it with my treatment of its meaning and implications.

10 15 Wall. 232 (U.S., 1873). See note 43, infra. Mr. Croskey, and others, attribute the 1873 development to such cases as Gibbons v. Ogden (9 Wheat. 1 (U.S., 1824)) and to the anti-federalist influence of pre-civil war days. My own view is that the judicial statements to this effect before the Civil War are few in number, dicta in the simplest sense of the word, and cautious. They are inconsistent with what happened to the bankruptcy power in litigation which had considerable political interest. The relation between substantive due process and the negative implications of the Commerce Clause is illustrated by the protections developed for insurance, which was not even "commerce," beginning with All­gayer v. Louisiana 165 U.S. 578 (1897), and proceeding to a scheme with remarkable resemblance to that developed for occupations which were "commerce" and "interstate." The whole scheme of protections was an appropriate mark of that era, foreseen by Toqueville, when the freedom of the great and powerful, if not the aristocrats, was to have its last day, before it lost its vitality and was succeeded by equality and perhaps authority. See my "Movement in Supreme Court Adjudication," op. cit. supra, note 1, with conclusions on this matter which I have seen no reason to change since 1933.

11 See notes 14-18, infra.


15 United States v. Darby, 312 U.S. 100 (1941).


19 Lest it be supposed that all such questions are "settled," one should recall the questions raised by the application of statutes with "among" tests but limited by interpretation to "interstate" commerce, such as the Labor Standards Act and the Sherman Act, when labor conditions or monopolies in the construction industry are under consideration. The Labor Standards Act leaves things somewhat unpredictable. See 48 Am. Jr. 2d. "Labor," § 1503. Unions seem to be more vulnerable, so far as the "commerce" criterion is in question, than do employing contractors under the Sherman Act. Compare Industrial Ass'n of San Francisco v. U. S., 286 U.S. 84 (1925) with Allen Bradley Co. v. Union, 325 U.S. 797 (1945).

Unpredictable questions about the Truth in Lending Act, which has no "interstate" language, and which seems to depend on monetary powers, and about rent controls, which has no "interstate" language either, have arisen, recently in Albuquerque (along with a federal gun control case under a statute properly given an "interstate" interpretation by the Supreme Court [United States v. Bass, 404 U.S. 336 (1971)]. The truth in lending case was settled favorably to the client, but probably less favorably than it would have been but for the probable necessity for and the chances on taking it to the Supreme Court. When last I knew the rent control case was still in litigation.

The recent federal act applicable to bombings creates here the traditional "interstate" classifications which may seem to the detached lay observer somewhat bizarre.

20 Huidekoper's Lessee v. Douglass, 3 Cr. 1 (U.S., 1805).
22 Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938).
24 See note 9, supra.
25 1 Cr. 137 (U.S., 1803).
26 The absence of "only" is a strong reason for not inferring it, like the reasons for not usually making interchangeable, in the ordinary interpretation of writings, words as different as "or" and "and." But the context of a writing may require an "only," or it may change an "and" to "or" or an "or" to "and."
28 Note 2, supra.
29 Note 3, supra.
31 See the discussion in the text at notes 9 and 11, supra.
33 There is a reproduction in the Appendix of the pamphlet which led to the conviction of the defendants in the Schenck case and to the affirmative of the judgment of conviction by Mr. Justice Holmes on behalf of his associates.
36 In view of a persuasive but at present ineffectual case for the position that equal protection requires contributions to parochial schools, it is possible to think that cases limiting such contributions will be reconsidered. Brusca v. State of Missouri ex rel State Board of Education, 335 F. Supp. 275 (three-judge court, E.D. Mo., 1971), aff'd 405 U.S. 1050 (1972). But see Lemon v. Kurtzman, 403 U.S. 602 (1971) (inclusion of salary payments; state legislation) Compare Tilton v. Richardson, 403 U.S. 672 (1971) (buildings; federal legislation). See also note 44, infra.
40 Griswold v. Connecticut, supra, note 7 (Mr. Justice Black dissenting).
41 Compare, however, Roe v. Wade, 41 L. W. 4213 (Jan. 29, 1973). A recognized factor in the situation is the difficulty of the relatively poor and the facility of the relatively prosperous in getting abortions, particularly safe abortions, in a number of jurisdictions, at least. Illinois is one such jurisdiction, and Texas seems to have been another. This factor would have justified a decision based on the principle expressed in the Equal Protection Clause.
42 Privacy may be included in the Ninth Amendment, but a more likely explanation of that Amendment is that it was and is to be understood as applying to philosophical "rights." The simplest example is the "right" of revolution, clearly not enforceable in any court. It is hard to suppose that the Amendment was to be understood as meant to expand the power of the Supreme Court to create substantive constitutional law governing either the states or Congress, free from anything but debatable philosophical guidance. What proved a limitation on the application of the Bill of Rights to the states, and the questionable historical basis for the Supreme Court's power to disregard acts of Congress except for its own protection or on procedural grounds, are special warnings against expanding the Ninth Amendment. See Anastaplo, The Constitutionalist, supra note 3, pp. 25, 432-433. The Ninth Amendment seems, however, a more straightforward basis for the result in Roe v. Wade (the case from Texas) than is "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" which Mr. Justice Blackmun, speaking for the majority, says "we feel" to be the source of "the right of privacy." He includes the Ninth Amendment as an alternative source.
43 Compare, again, Allied Stores of Ohio v. Bowers, supra, note 42. An extended dictum is carefully limited in its application. Compare also Weaver v. Palmer Brothers, 270 U.S. 402 (1926) and especially Liggett Co. v. Baldrige, 278 U.S. 105 (1928) (Equal Protection and Substantive Due Process).
44 The useful purposes of the negative implications of the Commerce Clause could be served by a carefully drafted Act of Congress or by the application to new problems of Equal Protection doctrine. Existing applications of the "burden" test could be left, during a period of evolution, as a diminishing monument to stare decisis.
45 See, also, the "Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black," April 18, 1972, reported in 405 U.S. v.--vii (1972). The tribute read by the Solicitor General includes a long quotation from Mr. Justice Black's dissenting opinion in Mr. Anastaplo's case. The authors of this tribute add after the quotation an interesting comment which may, one hopes, represent an opinion about future bar admission problems: "[Mr. Justice Black's] stirring dissent in Anastaplo, quoted above, led to a long exchange of letters with the unsuccessful petitioner and, more importantly, to an ultimate change of the Court's position. Baird v. State Bar of Arizona, 401 U.S. 1 (1971); In re Stolar, 401 U.S. 23 (1971)."


51 A review by Laurence Berns of The Constitutionalist (Dallas Morning News, Nov. 28, 1971, p. 6H) includes the following observations on Mr. Anastaplo's Notes: "As the author explores in his Notes the question of what kind of character in the people free institutions and self-government presuppose, the reader is led into depth after depth—that is, the reader who is able to accept the author's invitation to explore. The range of topics dealt with penetratingly and carefully in these notes must be seen to be believed: this part of the book is like a little university, a second University of Chicago (the author's alma mater)."

"Scarcely any important political event of the last forty years, it seems, has been neglected in Anastaplo's Notes; but far more important is the wealth of discriminating references, comment, and often detailed analysis of the anthropological, sociological, psychological, and above all poetic and philosophical writing that the author has found useful for his explorations into the nature of American institutions, into the meaning of the American way of life, the nature of man, the nature of nature. Serious students of American institutions, of political life, and of what transcends and is the ground of political life have here a guide to where to go as they face the dilemmas posed by the realization that the good citizen and the good man are not simply identical. Students of the law will be pleasantly surprised to learn how fascinating their field of study can be. "The author seems, judging roughly from the frequency of references, to have learned most from Shakespeare, from his fellow Illinoisan Abraham Lincoln, and from Plato. This book is a major attempt to discover and articulate the harmony, or at least the compatibility, that exists between the principles of the American polity and the principles of classical ('Greek') philosophy."

See, among other reviews of The Constitutionalist, the following: C. Herman Pritchett, 80 Calif. L. Rev. 1476 (1972); L. A. Powe, Jr., 8 Crim. L. Bull. 850 (1972); A. J. Thomas, Southwest Review, Winter 1972, p. vi; Gary L. Starkman, Chicago Sun-Times, June 18, 1972, sec: 5, p. 18; Ehner Gertz, Panorama—Chicago Daily News, Jan. 22-23, 1972, p. 7; William Gangi, Nation, Sept. 18, 1972, p. 218; Fred J. Naffziger, St. Louis Post-Dispatch, Oct. 3, 1972, p. 3B. See, also, New York Times Book Review, June 18, 1972, p. 33 (where The Constitutionalist was advertised by some of Mr. Anastaplo's University of Chicago students as "the thinking woman's treasure trove").


Mr. Anastaplo reports that he was encouraged in his speculations about symmetry and the nature of things upon hearing Werner Heisenberg's lecture of April 30, 1973 at the University of Chicago. Dr. Heisenberg concluded his lecture by observing that physicists should now replace the concept of "fundamental particles" by the concept of "fundamental symmetries."