The Master

Malcolm P. Sharp

Bill, or as he was usually and affectionately called "Crosskey," was or is a great man—enthusiastic, warm, choleric, careful, daring, industrious, original. He is the author of the greatest law book produced by any law teacher of our generation.

It has annoyed Harvard and Columbia, whose scholars were so startled by the position that they could not understand it. It has delighted Crosskey's own law school, Yale, where he is understood. The school where he taught, Chicago, has been, at times at least, partly converted. Quite respectable scholars like Grant Gilmore and Judge Henry Friendly are cautiously making fatal concessions to his views about the powers of the United States Courts.

His wisdom is concealed from the wise but revealed to the simple. He has restored the Constitution to the simple structure which every sixth-grader or high school student thinks it has. The powers of Congress, Executive, and particularly Court are seen to be much more modern, much more suitable to the current age, than the patchwork which the Court has made of the Constitution since the Jeffersonians began to confuse our understanding.

It is to be hoped that someone young and critical will undertake a re-evaluation of Mr. Crosskey's doctrine and its critics. The two volumes which he left completed were perhaps one-third of the work planned and utilized perhaps one-third of the research completed, though much of it without any adequate record even in notes. In leaving work already great though only partly done, Mr. Crosskey is like such other historians as Acton, Namier, and Frederick Jackson Turner. His work, like theirs, will repay the careful study of other scholars. Here the most I can do is suggest for the general legal reader some interesting features of his doctrine.

He thought the first eight amendments (with a qualification in the Seventh) were made applicable to the states by the Privileges and Immunities Clause of Amendment Fourteen. Without discussion, the

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religious safeguards of the First Amendment have now been held to apply to the states by virtue of the Fourteenth Amendment.[1] The historical problem involved, as anyone with the most meager knowledge of our early history and the most elementary capacity to read our Constitution knows, is more serious than the supposed difficulty raised by the procedural provisions of the other amendments through Amendment Eight. To the extent that the law is partly logical, that is partly not insane, the school prayer case decision[2] governs the supposedly unsettled question about the application to the states of the guaranty of procedure by indictment, in Amendment Five. It will doubtless turn out that Mr. Crosskey's view of the relationship between the first eight amendments and the Fourteenth Amendment, particularly supported in the cases of amendments other than Amendment One by the early history of the Constitution, is established as the law of the land.

A related question is in more doubtful status. Mr. Crosskey has made a persuasive argument, though perhaps not as compelling as his other major arguments, for the view that the Supreme Court was given power to review acts of Congress only so far as they raise questions of procedural due process or interference with the constitutional powers of the Court in the ordinary conduct of judicial business. One result is to leave to Congress ultimate decisions on the constitutional status of a large number of questions that may properly be called "political." Mr. Crosskey emphasizes the clear provisions for judicial review of state action contained in the Constitution. If Mr. Crosskey and the Supreme Court are right about the incorporation of the First Amendment in the Fourteenth, a considerable number of what might well be treated as political decisions by the states will be subject to judicial review, as well as the questions of state procedure with which a court is particularly qualified to deal.

Besides the historical factors which work strongly in its favor, a view of the relationship between the First Amendment and the Fourteenth which emphasizes the differences between the First Amendment and the others of the first eight amendments has some considerable practical advantages. Mr. George Anastaplo, a brilliant student of the ideas of both Mr. Alexander Meiklejohn and Mr. Crosskey, has

1 *E.g.* Cantwell v. Connecticut, 310 U.S. 296 (1940). Freedom of belief, thought, and communication slipped into substantive due process at a time when commercial liberty was occupying the attention of the Court, and it did not later receive the critical examination given commercial liberty, beginning in the late thirties. *Compare* Meyer v. Nebraska, 262 U.S. 390 (1923) *with* Gitlow v. New York 268 U.S. 652 (1925); and compare the dissenting opinions of Mr. Justice Holmes in both cases.

2 Engel v. Vitale, 370 U.S. 421 (1962).

recently argued that the First Amendment, partly because of its history and partly for practical reasons, should be treated differently from the others of the first eight amendments.[3]

In addition to the reasons strongly relied on by Mr. Anastaplo I would suggest a further reason. The First Amendment by itself or by virtue of its present vague incorporation in Amendment Fourteen has never done any good when civil liberties were generally endangered. Jehovah's Witnesses produced some fine writing by the Court as the Second World War proceeded,[4] but all those who were so seriously threatened in the McCarthy period got no practical advantage from the writing and were if anything misled by it. What these safeguards have generally done is to give the Court an opportunity to make political arguments for the legislation which it was voting to sustain. As this legislation was often, as it seems to me, unconstitutional, we should have fared better if legislators and congressmen had been taught to debate the constitutional issues for themselves in deciding what have turned out to be, in practice, political questions.

Civil liberties, and civil rights for that matter, were not Mr. Crosskey's principal interests. He was, ostensibly at least, more interested in commercial liberty. His views of the Ex Post Facto Clauses,[5] the Contracts Clause,[6] the Imports and Exports Clause[7] and the negative implications of the Commerce Clause[8] cannot be said as yet to have become part of our law. What Mr. Crosskey has done is to show that the toleration of the often weirdly supported doctrines of the Court on these matters is now up to Congress. If there is a practical need for implementing his views on these questions, the way is open for Congress to do so.

Mr. Crosskey was not a central planner. I remember when he began work on his book in what was expected to be a relatively brief argument in support of the then questionable power of Congress to require disclosures in the corporate security business. I remember his remark that he came to teaching because he found, in the twenties and thirties, that

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3 *See* G. Anastaplo, Notes on the First Amendment to the Constitution of the United States, ch. 5, June, 1964 (mimeo). Anyone working in the law must of course operate with alternative, mutually inconsistent systems of thought. For what may be a timely example of good uses to which the Court's system may be put, see Sharp, *Science, Religion, and the Scopes Case*, 27 U. CHI. L. REV. 529 (1960).

4 *See, e.g.*, Board of Education v. Barnette, 319 U.S. 624 (1943).

5 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 324-51 (1953).

6 *Id.* at 352-60.

7 *Id.* at 295-323.

8 *Id.* at 315-323.

he was the only man in Wall Street with any regard for private property. What he was intent to establish was the power of Congress and the power of the Court to improve the business law of the country in the interest of making it more serviceable for a free economy.

This purpose he contributed to accomplishing. The ultimate absurdity of the territorial or geographical theory of the grant of power to Congress to regulate commerce among the several states was instructively exhibited in the Court's first decision that Congress might prohibit segregation at a restaurant. This was partly it seems on the ground urged by Mr. Justice Black, concurring, and not clearly disclaimed by the majority, that the proprietor's supplies had come in from other states.[9] In a case immediately following, the Court explicitly relied on the physical source of supplies in upholding the application of the statute in question.[10] It is hard to think of anything less relevant to the practical justification of the act of Congress, and Mr. Crosskey has furnished an adequate practical set of constitutional justifications for congressional action in such matters. There are particularly the real Commerce Clause, the General Welfare Clause (which means a little more nearly what it seems at first to say than what we have learned to think), and the power of the Court, which carries with it a corresponding power of legislation in Congress.

It is the power of the Court on which Professor Crosskey's views, until recently, have seemed most out of line with the probable course of judicial development. Now, however, that Judge Friendly has tried the impossible task of praising the *Erie* case and a federal "common law" of corporate matters alike,[11] we have a new indication of the way things seem to be developing in the field which was of the greatest interest to Mr. Crosskey. Somewhat similarly, in another developing field, Mr. Gilmore has indicated that possible abuses of Commercial Code provisions for inventory and accounts receivable financing may be avoided by the development of a federal "common law" of "fraudulent transfers."[12] Though I cannot remember that Mr. Crosskey aligned himself in the controversy between friends of the general creditor on the one hand and friends of the secured creditor on the other, I should like to

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9 *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 268 (1964). Reluctance to rely on this ground is suggested by comparing the opinions with one another and with the opinion in the following case, driven to rely entirely on this ground.

10 Katzenbach v. McClung, 379 U.S. 294 (1964).

11 *See* H. Friendly, IN PRAISE OF ERIE—AND OF THE NEW FEDERAL COMMON LAW (1964), reprinted in 39 N.Y.U.L. REV. 383 (1964) and in FRIENDLY, BENCHMARKS 155 (1967).

12 *See* 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 8.3; 2 *id.* § 45.2; Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 475-76 (1967).

think that this is a development which he would have welcomed for its commercial effect as well as for its recognition of the soundness of his views about the powers of the United States Supreme Court.

The most fascinating single discovery made by Mr. Crosskey is a case which I missed in my early study of Supreme Court overrulings and changes of position. *Huidekoper's Lessee v. Douglass*[13] is an extraordinary expression of an early doctrine about the relationships between the United States Supreme Court and the state courts, and between the states and the nation generally. This doctrine in Mr. Crosskey's view was destroyed by the influence of states' rights politics in the controversies which were to lead to the Civil War.

The view that the Constitution must be read in its historical context, so far as that can be discovered, or else in its simple meaning, is indispensable if there is to be any limit, except what it can do with words, on the Court's tendency to make itself, as Mr. Justice Black has put it, a "constitutional convention."[14] The details of Mr. Crosskey's historical account of the important meanings of the Constitution are so startling, at least at Harvard, that they apparently elude the unsophisticated reader. It is on the other hand hard to doubt the soundness of his controlling general doctrine about historical meaning. As one who participated in the controversies of the twenties and thirties, I remember well that our theory of a growing Constitution was a theory which demanded that the Constitution grow back to its original or simple meaning, free of the preposterous glosses which had been put upon it by the Supreme Court. While the present glosses made by the Supreme Court may be more congenial to us than were those we then opposed, my own view is that it is wise to remember what we said at that time about the limitations of courts as legislators.

Mr. Crosskey was or is an even greater man than his great book shows. His enthusiasm, single-mindedness, and personal warmth stimulated the love of a large number of students. While ostensibly concerned with history he was in fact much more concerned with making the document to which he gave his life effective for the purposes which the men he most admired expressed when they framed it.

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13 7 U.S. (3 Cranch) 1 (1805).

14 Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (dissenting opinion). And see Mr. Justice Black's dissenting opinion in Katz v. United States, 389 U.S. 347, 364-74, particularly 373-74 (1967).