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Book Reviews

A DECLARATION OF LEGAL FAITH. By Wiley B. Rutledge. Lawrence: University of Kansas Press, 1947. Pp. 82.

It is with a good deal of genuine personal pleasure that this reviewer attempts to record his impressions of the first of the Judge Nelson Timothy Stephens lectures delivered at the University of Kansas by Mr. Justice Wiley Blount Rutledge who for many years was so well known to and closely associated with lawyers and law teachers of the middle west and who has contributed so effectively to the growth of our constitutional law during the brief period since he became a member of the United States Supreme Court.

It is always greatly worthwhile to the profession and to all students of legal and constitutional development to have made available the writings of any Supreme Court justice or any study of his work as a means of better understanding his philosophy and his outlook on social and economic problems that inevitably influence his approach to legal questions and in turn do much to dictate the development of our constitutional system at the hands of the high Court.

Under the intriguing title of "A Declaration of Legal Faith," Mr. Justice Rutledge has set forth in no uncertain terms his faith in law and legal principles as the foundation of justice for individuals and for nations on a flexible and ever-changing basis capable of being adjusted to the changing social and economic needs of each generation in its turn, and has shown how a single clause in our Constitution—"Congress shall have the power . . . to regulate commerce . . . among the several states . . ."—has been interpreted at the hands of our Supreme Court to meet the needs of a changing democracy in a federal system throughout the period of our national history, and according to the pattern of which he envisions the possible solution of the world's ills at this critical hour in the life of our modern civilization.

The major portion of this little book is devoted to a rather brief study of the commerce clause of the Constitution as it has been construed, applied and developed by the Supreme Court, and which is entitled "The Commerce Clause: A Chapter in Democratic Living." Preceding this is a short chapter in the nature of an introduction under the major title of "A Declaration of Legal Faith" which sets forth frankly the Justice's philosophy and his approach to moral, social and legal problems, which he characterizes as something at once deeper and more intuitive than reason, or science, or philosophy—his legal faith.

The terms of the donor in providing for this lectureship had asked "that 'discoveries in nature and gains in science' be viewed in their use and ability to strengthen men in 'reverence for the limitless and ordered energy of the Cosmos,' " and at the same time that "the essentials of free government" be treated. Partly due to this and partly due to his own definition of the paramount issue of our time, in the light of the problem of atomic power, being "whether science has become the

master of men or men can remain the masters of science," which alone they can do "through civil institutions founded in moral conceptions," he felt impelled to set forth his own declaration of faith.

Setting forth his belief in law and also in freedom, he emphasizes the "never-ending process of accomodating freedom to law and law to freedom," out of which has developed the "desire for and the struggle to achieve justice." It is out of conflicting conceptions of justice measured by differing emphases placed upon freedom on the one hand and law and stability on the other that he finds the major differences between the allied governments and the totalitarian powers in the recent war. From conceptions of "abstract justice, through concrete justice, to justice according to law," he finds the never-ending cycle of the fluidity of both justice and law. Thus with his acceptance of an ever-changing conception of justice as something alive, but imperfect and incomplete, to be made more nearly perfect as it develops, and with law, likewise far from static and operating merely as a means of achieving justice, we get a deep insight into the philosophy that is to guide him as a justice on our highest court. Law, freedom, and justice, always basic but never static, become the trinitarian objects of his faith on the basis of which he asserts an abiding hope that men may yet devise legal, political, and moral institutions adequate to control their physical powers and hold in restraint the terrible instruments of destruction that have recently been forged.

Finally, attention is called to the existence of many similarities between the present world crisis and that facing our fathers 160 years ago. It is here that he asserts his belief that the principle of a "federal union, with power adequate for the common need, but safeguarded in the interest of freedom by division between nation and state as well as among departments," which "gave the only feasible way for achieving the necessary accomodation of their time," may provide the guide to the solution of present world problems. It is upon this basis particularly that he finds appropriate the discussion of the constitutional development of the commerce power as "an illuminating chapter in federal democratic living."

This major title of the remaining portions of the lectures—"The Commerce Clause: A Chapter in Democratic Living"—is divided into two main divisions which the Justice entitles "The Pendulums of Power and the Arcs Traversed," and "The State Pendulum and the Implied Prohibition." A final brief third part is entitled "Observations for Federal Democratic Living."

The consideration which appeared to determine the clause of the Constitution to be chosen for this discussion appears to have been that the commerce clause, rather than the First Amendment safeguarding our great fundamental liberties of speech, press, religion and assembly, resulted from that need which more than any other prompted the calling of the Constitutional Convention—namely, "to secure freedom of trade," and "to break down the barriers to its free flow. . . . The generating source of the Constitution," as all students of the Constitution well know, "lay in the rising volume of restraints upon commerce which the Confederation could not check." By that provision in the Constitution, more than any other, foundation was laid for a unified nation rather than a mere confederation.

By the twelve simple words, "Congress shall have power . . . to regulate commerce . . . among the several states . . .," the new national government was given affirmative control, while by negative implication the states were stripped of their previous power "to lay tariffs or otherwise raise barriers against trade crossing state lines." The interpretation and application of this simple provision, involving as it has a determination of the meaning and content of the terms commerce and regulation, a distinction between what is interstate and what is intrastate, and a reasonable adjustment of state and national power with reference thereto, has been the source of unending complexity and confusion for the Supreme Court and all students of its endeavor. It is the experience arising out of the administration of the federal system, in the face of this complicated set of problems, to meet successfully the "greatest necessities of large masses of people inhabiting a vast area under varied conditions" that Mr. Justice Rutledge finds of "significance for the world need of today."

Attention is called to the interesting fact that the mere promulgation of the commerce clause without the active participation of Congress in the exercise of its legislative authority was adequate to meet the primary purposes upon which the clause was based throughout the first century of our constitutional history. It was not until the Interstate Commerce Act of 1887 and the Sherman Act of 1890 that Congress entered the field in an extensive way. Long before that, however, the Court was confronted with many difficulties presented by state legislation regulating business activity of an interstate nature. It was, then, the negative implications of the commerce clause that first served to give it shape and meaning.

With the more recent entry of Congress upon the business of large scale regulation the use of the commerce clause as a federal instrument has become important, and the Court has found itself called upon to deal with "clashes of federal and state power," and to mark out the "lines of their division and their reconciliation in the federal plan." The power of neither nation nor states, it is noted, is without limits, and "each is to some extent a restriction on the other." The problem of their proper accommodation has long been a chief concern of the Court.

Justice Rutledge quite properly emphasizes the opinion of Mr. Chief Justice Marshall in *Gibbons v. Ogden* (9 Wheat. 1), forming as it does such a major portion of the foundation for the great field of commerce clause law to follow, as fitting into and buttressing his "main tenet of federal supremacy." As a matter of fact, Marshall found easy room for the enunciation or application of this underlying philosophy in a surprising number of his opinions, and, in doing so, greatly influenced and directed the new government in the way he thought it should develop.

By asserting that in Marshall's view the commerce power of Congress "was 'exclusive,' not tolerant of intrusion by state authority although Congress had taken no affirmative action," it was probably not intended to convey the impression that Marshall ever so ruled expressly, for certainly he did not. He "flirted" with the doctrine repeatedly and continuously and appeared fully to embrace it, which certainly fitted in with his philosophy of government, yet in each case his specific holding was

that Congress had acted and that state acts in question before the Court were in conflict therewith and for that reason must give way.

Mr. Justice Rutledge took his listeners swiftly and deftly through the various assertions of the exclusive doctrine seemingly embraced by Marshall in *Gibbons v. Ogden*, through its modification in *Cooley v. Board of Wardens* (12 How. 299) by which exclusive federal power was recognized in areas requiring national uniformity, but denied with respect to matters primarily of local concern where uniformity of regulation was regarded as not essential, or perhaps appropriate.

The broad outlines of the development of the commerce power and the accommodations at the hands of the Supreme Court of state and federal claims are lightly drawn, down to the first great reversal of federal power in the *E. C. Knight Co.* decision (156 U.S. 1) in 1895 when the Court denied application of the Sherman Act to the sugar trust, as dealing with production and not with commerce. In even broader outline and less detail is indicated the wide swing of judicial decision, which is likened to a great pendulum swinging from the states' rights or state power end of an arc as represented by the *Knight* case to the federal end of the arc as represented by the *Jones & Laughlin* case (301 U.S. 1) and cases that have followed. In spite of such backward swings or "jerks" as *Hammer v. Dagenhart* (247 U.S. 251), *Adair v. United States* (208 U.S. 161), and the *Schechter Poultry Corporation* case (295 U.S. 495), the center gravity, so to speak, is shown to have shifted measurably in recent years, as we all know, toward the federal end of the arc, which is to mark a return in large measure to the broad concepts of the Marshall doctrine. By this process of accommodation to the growing needs of national power, it is suggested, strength to meet the crises of the two great world wars in which this country recently has engaged was largely developed.

In his second lecture under the title of "The State Pendulum and the Implied Prohibition" is emphasized the fact that while Marshall's doctrine of "exclusiveness" had a "profound effect in fixing the law of the prohibition," it has been so modified as to leave room for "the states to protect vital interests of the people and of the commerce itself." Thus the three major tenets of Marshall's original philosophy—a broad conception of commerce, "an equally broad idea of 'regulation,' and a sweeping notion of 'exclusiveness'"—were destined to be modified only as to the third. How this has been accomplished is briefly and somewhat lightly traced. Largely it has been brought about by the doctrine of the *Cooley* case limiting Marshall's theory of the "exclusiveness" of Congress' power to those matters concerning which a uniform plan of regulation for the nation as a whole is required. Of considerable importance also has been the influence of the "great enigma" of the doctrine of the "silence of Congress" as modified in recent cases to recognize that the scope of this doctrine is not that of complete exclusiveness and that such implied prohibition upon the states is not as broad as the affirmative constitutional grant to Congress and may be removed by the specific authorizing action of Congress breaking its silence and thus eliminating the implied prohibition. Finally, a growing limitation upon the original force of the idea that Congress by any legislation may have "occupied the

field" to the complete exclusion of the states, and a corresponding recognition of a field for cooperative state and federal action, have contributed to the formulation of present conceptions. The effect upon the scope of Congress' power has been largely to return to the broad conceptions of Marshall, while at the same time the prohibitive effect upon state action "has been progressively narrowed." It is in the "continuing adjustment and readjustment of federal-state relationship, without which no federal scheme could long survive" that Mr. Justice Rutledge finds his greatest hope for the future of our federal system. It is in this democratic adjustment under the commerce clause, through the participation of Congress, the states, and the courts, thus avoiding too great a concentration of power in any single authority, that he finds a possible pattern for the working out of a world system destined to have some prospect of successfully dealing with the chaos in which the nations of the world now find themselves. As "the federal principle, applied to create liberty under law, is the basic tool by which our people have attained" a measure of their goal of democracy and liberty, so may the same principle find broader application in the future.

The lectures embodied in this little book apparently were formulated for something of a popular audience and contain a most important message for all. For the lawyer and the student of government they contain much to repay very careful study, both by way of insight into the practical workings of our constitutional system and its possible influence upon the solution of world problems, and by way of a better understanding of the philosophy and "legal faith" of one whose judicial position destines him, along with the rest of the Court, to play an important part in the future workings of that constitutional system.

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