

1937

Book Review of The Commerce Power versus States Rights: "Back to the Constitution"

Theodore S. Cox

William & Mary Law School

Repository Citation

Cox, Theodore S., "Book Review of The Commerce Power versus States Rights: "Back to the Constitution"" (1937). *Faculty Publications*. 1445.

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BOOK REVIEWS

THE COMMERCE POWER VERSUS STATES RIGHTS: *Back to the Constitution*. By Edward S. Corwin. Princeton: Princeton University Press. 1936. pp. xiv, 273. \$2.50.

While the slogan "Back to the Constitution" has been used from time to time by conservative advocates who desired a return to the ante-bellum principles of States Rights, it is interesting to find an author using it as the subtitle for a volume in which he rather convincingly delineates a modern liberal theory of constitutionalism calculated to solve some of the problems which have arisen in regard to the relation of federal and state power. In his preface the author, who is McCormick Professor of Jurisprudence at Princeton, says, "'Back to the Constitution' is the motto of this small volume, and by 'Constitution' is meant the Constitution of George Washington, Alexander Hamilton, James Madison (the Madison of 1787, not of 1798, nor of 1829), and of John Marshall; not the 'interested sophistications' of those later foster fathers of the Constitution, certain distinguished counsel who about 1890 began, with the too frequent aid of a sympathetic Court, to enmesh the powers of the National Government in 'a network of juridical niceties.'" It is the author's belief that while the national government today exercises a much wider area of jurisdiction, its depth, or as he states, "the discretion of Congress in its exercise," is much less than was the case during the first hundred years of our national existence.

Professor Corwin's general thesis is that while trade and industry today are essentially national, there has not been achieved that distribution of state and federal power which one might readily expect to have developed as a result of the reorganization of our national economic life. For this rather static condition he assigns as the answer the fairly recent tendency of the Supreme Court to restrict rather than enlarge federal authority over the interstate commercial life of the nation. It is obvious that from *Gibbons v. Ogden* to *Hammer v. Dagenhart*, there runs a strange judicial route. How the court arrived at the point which it has reached from the point at which it started forms the bulk of this interesting treatise. The author assigns as the principal doctrinal antecedents to the present somewhat paradoxical constitutional theory and practice, six propositions. From each proposition, Professor Corwin dissents and ably supports his position with strong reasoning.

The first proposition is: "That the framers of the Constitution conferred upon Congress the power to regulate commerce among the States with a different intent than the power to regulate foreign

commerce, with the result that the former power is of less scope than the latter power." So far as the actual wording is concerned, little fault can be found with the author's contention that the commerce clause endowed the national government with the same power to regulate interstate commerce as was given in regard to the two other kinds, but the reviewer remains unconvinced that other parts of the constitution, notably the due process clause and the tenth amendment, may not restrict the extent of this Federal interstate regulation.

The second proposition, "That the power to regulate commerce among the States does not include the power to prohibit it," of course may be maintained only by the most vehement partisans of strict construction. But with the author's position in denying proposition three, "That while Congress has power to restrain commerce among the States for the benefit of such commerce, this power is not available for the promotion of the general welfare in other respects," this reviewer is inclined to disagree. For, like propositions four and five, "That the reserved powers of the States constitute a limitation upon Congress's power to regulate commerce among the States and serve to withdraw certain matters from the jurisdiction of the latter power," and "That production is a subject which is segregated to the reserved powers of the States, and so lies outside the range of Congress's power to regulate commerce among the States," if these propositions be not retained to some degree then the federal government, under the commerce power, would be permitted practically to supersede the states in their control of many of their internal affairs. That large scale production and organization of industry in general on a national scale does form almost a continuous process when these goods are destined largely for interstate markets must be recognized today. But the manufacture of goods, *per se*, does not constitute interstate commerce. To that extent the decision in the Knight Case was legally sound. Where the court erred, in the reviewer's opinion, was in failing to recognize that a monopoly of production may operate as a bar to the unrestricted flow of goods in interstate commerce, as effectively as a border toll gate may do. It seems to adopt as a principle of constitutional theory, the author's view that the federal government should have power to regulate intrastate manufacture and production where, as is obvious, there is a direct and actual influence on interstate commerce and where production and marketing form a single continuous process.

With the author's denial of proposition six, "That Congress's purpose in enacting a measure is a judicially enforceable test of the validity of such measure if it invades the ordinary domain of the States," the reviewer is quite in accord. Where authority exists, the purpose or motive of congressional legislation is not justiciable, but where it does not, for example, in the Child Labor Tax Case and the A. A. A. Case (assuming that no federal authority existed to regulate production in each instance) it does not appear to the reviewer improper for the court to point out that such want of power cannot be remedied by attempting to use the taxing power for other than

purposes of revenue. With the holding in *Hammer v. Dagenhart* one may differ vigorously, but with the subsequent holding in the Child Labor Tax Case one must acknowledge the strength of the court's position.

The author has shown great care in studying his material and assembling it and has produced a strong and well documented work. Perhaps his thesis offers the best solution of the perplexing problem of federal and state relationship. The volume is marred somewhat by the frequency and length of quoted material. It might, perhaps, have been more desirable to paraphrase this material rather than quote directly. To refer to John Randolph Tucker's view of Federal authority over interstate commerce, as set forth in his work on the constitution, as "hocus-pocus" is extreme. And the author's emphasis on the fact that Mr. Chief Justice White had been a Confederate soldier is perhaps out of balance.

But to all persons, national and states rights advocates both, who are interested in American constitutional theory, this book is recommended. The author's view that the existing defects in our constitutional theory and practice, which have come about through our economic development may be cured in a constitutional manner by the Supreme Court itself, affords an encouraging picture.

THEODORE S. COX.

Williamsburg, Virginia.
