Book Review of State and National Power over Commerce

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BOOK REVIEWS


This moderate sized volume, to quote the author, “attempts to trace the course of constitutional theory with reference to the division of power over commerce between the nation and the states.” Its “purpose is to view the division of power in the present in the light of this evolution through the past.” Thus, “it is hoped, some anomalies may be explained and aid may be given to a better understanding of the law of today.” That this purpose has been achieved with marked success becomes increasingly apparent as the reader makes progress through the pages.

Beginning with John Marshall and his great opinion in Gibbons v. Ogden (a natural and conventional starting point) Professor Ribble examines with careful analysis the exposition of the commerce clause from that day to the present. Influenced by eighteenth century legal philosophy, the great Chief Justice looked at “the nature of the power” granted to Congress by the Constitution. Thus in any case arising under the commerce clause the important fact was whether or not the power exercised was, by its nature, a part of that power granted to the federal government. For if it were, then Congress alone could exercise it; its power was exclusive over “commercial intercourse affecting more states than one.” Strong proponent of federal power as he was, Marshall recognized, however, that other parts of the Constitution left to the states powers, the exercise of which might look like a regulation of commerce and which might lead to something approximating the same result. Furthermore these reserved powers of the states permitted them to regulate matters within their borders in such a manner as to “impinge sharply on the conduct of interstate commerce.” But to Marshall it was obvious that the power of the states and the power of the federal government flowed from different sources.

Tracing the development of constitutional theory which went hand in hand with the tremendous expansion of commerce during the nineteenth century, the author points out how Marshall’s successor, Chief Justice Taney diverged widely from his predecessor. A Jacksonian Democrat and theoretically a Jeffersonian, Taney concurred in the fundamental theory of state’s rights embraced by his party. Primarily interested in the economic and social welfare of the people, he concerned himself with “practical” matters rather than with refinements of constitutional theory. As he surveyed the field of
commerce he found as a matter of fact that both the federal government and the states were legislating with respect to the same subject matter. Hence he enunciated the doctrine that the power to regulate commerce among the states was one possessed jointly by the state and nation. To this reviewer the author makes it clear that had Marshall’s concept of “the nature of the power” not suffered decline we should have been spared many inconsistencies and anomalies in the decisions of the Supreme Court, confusing and even bewildering to lawyer and layman alike. We would not have been told in one breath that the federal power was “exclusive” and almost in the next that it was “concurrent.” Nor would we have heard so much of “direct” and “indirect” burdens on commerce nor of laws “regulating” and “affecting” it. It is obvious that where one views commerce from the standpoint of the “subject of the power” rather than the “nature of the power” it must follow that any regulation dealing with the subject matter would be a regulation of commerce. Thus in the case of Cooley v. The Port Wardens, decided during Taney’s incumbency, in which state pilotage laws were upheld, the doctrine was enunciated that there resided in the states the power to regulate interstate and foreign commerce which could be exercised in the absence of a federal statute on the subject as to those matters which were local in character and regarding which no uniform rule was necessary. A corollary of this doctrine, however, recognized that if the regulation were not purely local in character but one requiring a uniform rule, silence by Congress was as effective in preventing state action as a positive congressional mandate.

Another important theory flowing from the concept of the “subject of the power,” as the author points out, was that dealing with the physical movement in interstate or foreign commerce. To Marshall, viewing the commerce power from the standpoint of the “nature of the power,” the question of physical motion was immaterial. But under the influence of the subsequent doctrine we find hair splitting legal technicalities employed in the solution of the question of whether or not a particular regulation was a regulation of interstate or foreign commerce. So long as manufacturing and commerce in the United States were relatively simple and an interval existed between the processing and marketing of goods, the “subject of the power” theory with its related concepts of movement and time worked reasonably well. But today manufacture and transportation frequently form a continuous process, and an attempt to apply the time and movement theory has resulted in startling niceties of distinction. The modern concept of “currents” of commerce tends to counteract the effects of the movement and time theory. Modern economic forces hardly can be expected to consider state boundaries other than artificial lines.

It seems amazing today that Marshall’s clear and logical exposition of the Constitution should have been ignored by subsequent jurists. To him it was perfectly apparent that state regulation, although affecting the same subject matter, did not flow from the same source. But even the exercise of the reserved power of the
states, while affecting the same subject matter, and often approxi-
mating the same end, could not be so employed as to regulate that
which was vested solely in Congress, even though Congress had is-
 sued no mandate.

Another factor vitally touching federal and state power over com-
merce, discussed by the author, is the due process clause of the fifth
amendment. Intended as a limitation on congressional power, it was
understood at first to apply to procedure only. But with time it has
developed to include substantive rights as well. Where an attempted
regulation of interstate commerce is deemed highly unreasonable by
the court, due process of law is said to have been denied. But, as
the author says, “the more unreasonable the statute, the more diffi-
cult is it to show that the statute is a regulation of interstate com-
merce, particularly where reliance is placed upon economic or prac-
tical relationships.” On this theory were the Adair case and the
Railroad Pension case decided.

With a long line of decisions which recognized the power of Con-
gress to prohibit the transportation in interstate commerce of ar-
ticles deemed injurious, the court in the Child Labor case felt bound
to call a halt. While the author doubts perhaps, that the Court se-
lected the best opportunity for drawing such a line, he “does not
question the political wisdom of, or the constitutional sanction for,
drawing a line such as will leave, as of right, some substantial au-
tonomy to the states.” It would be an unwarranted construction
which would permit the federal government directly or indirectly to
absorb all the powers of the states, since everything to some degree
is connected with interstate commerce. Under such a construction
the federal government could legislate as if there were included in
the Constitution a clause reading “Congress shall have power to
provide for the general welfare.” As the author aptly states, “If,
in effect, all powers were delegated, the Tenth Amendment is a
gross delusion.” The belief on the part of the Court in varying de-
grees of concurrence that the power to regulate interstate and for-
egn commerce is limited by other parts of the Constitution, is ap-
parent in recent important decisions, notably in the Schechter case
and the AAA case.

Although, as the author says, “Unfortunate terminology breeds
many paradoxes,” the Supreme Court has sought “consistency with
the policy apparent in federal legislation, so far as the Court can
ascertain that policy.” But in attempting to discover this “will of
Congress,” as he states further, “The Court has to guess and in
guessing it is likely to concede that its wisdom coincides with the
wisdom of Congress.” Despite apparent paradoxical conclusions
which have been reached because of uncritical definitions and use of
terms, and conflicting constitutional theories, the author finds a rea-
sonably consistent policy on the part of the Court. The principal
foundation on which American constitutional law has been built is
the adjustment between federal and state power. As the author de-
cares, “It would be a shocking thing, if state and federal govern-
ments acting together were prevented from achieving the end de-
sired by both, simply because of the division of power between
them." But this adjustment between state and nation naturally in-
cludes, in addition to the result desired, a selection of the appro-
riate medium, national or state. The Court has sought to leave to the
states those powers which "can be most advantageously exercised
by the states themselves," while permitting the federal government
to control "those things which can be best handled" by it, and those
"which require unified control," except "where the Court has felt
that the cost to state autonomy is too great."

Mr. Ribble, who has held the chair of Constitutional Law at the
University of Virginia for some years, and who recently has been
made acting Dean of the Law School, has presented an able, dis-
passionate, and illuminating study of the commerce power. Be-
cause of the relative brevity of his book, at times, perhaps he has
condensed his material too greatly. This is no serious defect since
his readers for the most part will be persons fairly conversant with
the field. At most it may result only in one's having to re-read cer-
tain passages to gain their full import. The Table of Cases would
be more valuable were the citations given also, while in the Table of
Leading Articles Cited the inclusion of the surname only of the au-
thors tends toward difficulty in identification. This reviewer re-
commends this work to all students of the Constitution and congrat-
ulates its author.

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