University of Miami Law Review

Volume 2 | Number 3 Article 11

3-1-1948

CHIEF JUSTICE STONE AND THE SUPREME COURT, by Samuel J. Konefsky. New York: The MacMillan Co., 1945.

Arthur Kent

REVIEWS

CHIEF JUSTICE STONE AND THE SUPREME COURT, by Samuel J. Konefsky. New York: The MacMillan Co., 1945. pp. xxvi, 290. $3.00.

This small (290 pp.) book is well named. It is neither the biography of an individual nor a history of the Supreme Court. Rather, its purpose is to present, "by means of the analysis of the great public issues that have come to the court for decision, Mr. Stone's conception of the Supreme Court's special function in interpreting the Constitution." The author relies almost exclusively on Stone's own words as expressed in his judicial opinions. The period covered is March 1925 to June 1943 inclusive. Therefore it is in part a history of dissenting viewpoints capturing a court majority.

Enough material is drawn from Stone's dissents and the opinions which he wrote to reduce the danger that what purports to be the views of an individual may be those of the court collectively. It is clear that the author regards Stone as a leader in a liberal reorientation undergone by the Supreme Court during the years covered by this work. It is difficult but important to define the word liberal as it is used today. Perhaps it is not too great a generalization to say that as Konefsky uses the word it signifies an awareness of the fact that property rights indeed are human rights but that there is a hierarchy of human rights and that some of these are more important than even the right to own private property—at least once the individual's bread and butter needs are served through exercising his property rights. This idea should not be too revolutionary to those who are accustomed to hearing from the pulpit that man does not live by bread alone.

And the reasonable objection that the overwhelming majority of cases that come before the Supreme Court do so in order that conflicting property interests may be adjudicated, perhaps is answered by reference to the Flag Salute cases. In these, that rather obstreperous and unprepossessing minority known as Jehovah's Witnesses sought and finally obtained from the Court a vindication of their very human right to be not coerced by state law into making a salute which to them would have been at worst a sin and at best a mockery.

In organization, the book is devoted in its first part to an examination of Stone's views with respect to the principles and methods by which the Court may best harmonize our dual system of government. These chapters deal with the taxing power in inter-governmental relations, the commerce clause and state power, and the scope of federal power. Chapters 4, 5 and 6 deal with the Court's role in enforcing constitutional limits in behalf of private rights. These treat of restraints upon the adminitsrative process, the "censoring" of state regulation of economic activities and the safeguarding of civil liberties.

Konefsky regards Stone as a jurist of stature comparable with that of the great Marshall himself. He makes many comparisons between the

two, as in his handling of the "Immunity Doctrine". A somewhat extended discussion of this small but compact and richly documented section of the book may serve to illustrate the method employed by the author throughout the entire work. As a constitutional doctrine, the author sketches the development of the immunity of governmental instrumentalities from taxation, which began with the decision in McCulloch v. Maryland. The case was an aftermath of the financial upheaval following the War of 1812 and was the occasion, as Konefsky states, "for Marshall's ablest exposition of the nature of our Union." In invalidating the Maryland tax upon the national bank Marshall rested his decision upon the broad doctrine of the total want of power in the states to tax the operations of "an instrumentality employed by the government of the Union to carry its powers into execution." He held that the judiciary was not equipped for the consideration of "questions of political economy." Thereby, says Konefsky, "he rejected the use of the fact inquiry in the determination of constitutional issues." On the other hand, adjudication in the light of actual conditions "is what distinguishes the methods of (Stone). It is this approach which has characterized the dominant part he has played in the reconsideration and modification of the immunity doctrine recently undertaken by the Supreme Court. His opinions reveal a fundamental divergence from Marshall's method in McCulloch v. Maryland."

But in one important respect, Stone's influence was all on the side of a return to Marshall in this field. In Graves v. New York ex rel O'Keefe, 305 U.S. 466, 1939, the Supreme Court upheld the New York Tax Commission in its tax upon the salary of O'Keefe, an examining attorney for the Home Owners Loan Corporation and a resident of the state. It is true that this was a complete reversal of the approach in McCulloch v. Maryland. In the Graves case the Court in effect adopted Holmes' earlier view that the power to tax is not the power to destroy so long as the Supreme Court sits. And, said Mr. Justice Stone: "The theory . . . that a tax on income is legally or economically a tax on its source is no longer tenable." But Stone also emphasized that although the reciprocal tax immunities were intended to obviate interference by one government with the exercise of its powers by the other, the two classes of immunities do not have equal force, the federal government's immunity being greater than that of the states. This revitalizes a distinction made by Marshall which had been disregarded in the decision in Collector v. Day, 11 Wall. 113, 1870, when the Court applied the doctrine of immunity to the states, making them equally exempt from federal taxation of their intsrumentalities.

But in Helvering v. Gerhardt, 304 U.S. 405, 1938, Stone advanced a view in opposition to Marshall's century-old one that the immunity of federal instrumentalities' taxation by the states was based upon the Constitution itself. In Stone's view it is based upon the supremacy of Congress acting under the Constitution. Whether or not immunity is to be extended to a federal agency thus, in this view, would be a question of Congressional intent. The Supreme Court applied this principle in a case subsequent to the O'Keefe case: Pittman v. Home

Owners Loan Corporation, 308 U.S. 21, 1939. Here it was held that Home Owners Loan Corporation mortgages could be recorded without the purchase of Maryland recording tax stamps because the Federal act had said that no state tax should be imposed.

Considering these and other factors together, the author points out that the function of the Supreme Court under the immunity doctrine has been greatly curtailed: "The theory of Congressional consent and the distinction between the immunity of Federal and state instrumentalities may hold important consequences for the judicial supervision of Federal-state relations in the United States. Their ultimate impact on judicial review itself is but one of the important questions posed by the recent line of decisions."

" . . . the commerce clause and a wise interpretation of it, perhaps more than any other contributing element, have united to bind the several states into a nation." Thus the author quotes Stone upon that clause of the Constitution which has been the main source of the court's pronouncements concerning federalism. We have come a long way since in Brown v. Maryland, 12 Wheat. 419, 1827, the question was asked: What is interstate commerce? Today the application of the commerce clause seems to depend in a specific case upon the answer to the question: What affects interstate commerce? And in Wickard v. Filburn, 317 U.S. 111, 1942, we have seen that home-grown wheat intended for home consumption can be "interstate commerce". Again in this field Stone strove successfully to show that expanding Federal control should not bar the states from legitimate exercise of their regulatory and taxing powers. Again here his approach was practical—factual. Before he was willing to restrain the state, he must be satisfied "that the challenged state action actually discriminates against or impedes in other ways the mobility of . . . commerce". In South Carolina State Highway Department v. Barnwell Bros., Inc., 303 U.S. 177, 1938, he wrote the majority opinion sustaining South Carolina's prohibitions upon excessive width and weight of interstate trucks. His opinion dealt notably with the role of the judiciary in reviewing challenged legislation. He objected to the use by the Court of its authority to make of itself an arbiter of public policy. He pointed out that in order to protect the national interest in commerce Congress could by appropriate legislation forestall or remove state restrictions upon interstate commerce. The determination of how the national interest in commerce is best to be preserved is a "legislative, not a judicial function to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which in that field, state power and local interests should be required to yield to the national authority and interest." If the Court must act where Congress has not, Stone's theory was that the "judicial function under the Commerce Clause as well as the 14th Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." If Congress had not chosen to regulate a specific question relating to interstate

commerce, then, he held, the question arose of whether the state's action was permissible and its means to the end desirable. He placed the burden of proving unreasonableness upon those who objected to the state's action.

It was in disagreement over the scope of federal power that Stone's most forthright outcry was heard against judicial censorship of public policy. This occurred in U.S. v. Butler, 297 U.S. 1, 1936. This was the case that overthrew the Agricultural Adjustment Act of 1933. Mr. Justice Roberts wrote the opinion. Stone dissented. "Their opinions," says the author, "reveal a fundamental conflict with respect to the court's role under our constitutional system . . . it can be surmised that the minority's charge of abuse of power against the majority rankled . . ." The charge did not go unanswered and the response which is elicited from Mr. Justice Roberts is in the best tradition of the Marshallian apologia for the exercise of judicial power.

". . . Then follows a description of the Court's function under the Constitution which is by far the best statement of what Professor Corwin has called 'the theory of the automatism of the Court's role in relation to the Constitution'." Mr. Justice Roberts wrote:

"When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, provisions of the Constitution; and having done that, its duty end".

In his dissenting opinion, Stone unequivocally repudiated the notion that judicial decisions are completely devoid of subjective factors.

"The power of the courts," he said, "to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." Yet Stone was not entirely consistent here. Determined as he was to limit the court's role in reviewing legislation affecting business activity, he did not hesitate to restrain the legislature when convinced that it was unwisely attacking liberty of the mind.

"To Chief Justice Stone", writes Konefsky, "must be given the credit for raising that distinction to the level of explicit constitutional doctrine. A judicial function in passing judgment on the validity of legis-

lation embodying economic policy stops with the determination that the legislature had a 'rational basis' for adopting the challenged regulation.

"Chief Justice Stone . . . succeeded in committing the court to the proposition that its veto power is greater in respect to litigation growing out of attempts to curtail fundmental civil rights, particularly the four freedoms of the First Amendment." In safeguarding civil liberty, the author writes, Stone was prepared to weigh the legislative restriction in the light of possible alternatives, and to substitute the court's view of what is necessary or appropriate in the given circumstances for that of the legislature. It was here that Stone clashed with Frankfurter. The latter objected to Stone's double standard of legislative morals on this point and held that in constitutional cases the single issue before the court should be "Whether legislators could in reason have enacted such a law." Thus in Minersville School District v. Gobitis, 310 U.S. 586, 1940, Mr. Justice Frankfurter wrote the majority opinion sustaining the constitutionality of a school board regulation requiring pupils and teachers to participate in a daily flag salute ceremony. The Gobitis children were members of a sect known as Jehovah's Witnesses and were expelled from the school when they refused to salute the American flag. Stone was the sole dissenter. But he lived to see the Gobitis case overruled in West Virginia Board of Education v. Barnette, 319 U.S. 624, 1943.

There, wrote Konefsky, "the majority was stating categorically that the criterion of constitutionality is much more definite when the legislation conflicts with the 14th Amendment because it also conflicts with the freedoms of the 1st Amendment than when only the 14th Amendment is the relevant constitutional limitation. Wrote Mr. Justice Jackson:

"Much of the vagueness of the due process clause disappears when the specific prohibitions of the 1st (Amendment) becomes its standard. The right of a state to regulate, for example, a public utility may well incude, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender ground. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect".—Arthur Kent.*

*Senior student at the University of Miami School of Law.