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Book Reviews

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BOOK REVIEWS

STATE TAXATION OF INTERSTATE COMMERCE. By Paul J. Hartman. Buffalo: Dennis & Co., 1953. Pp. xi, 323. $7.50.

The multi-state business executive, the practicing lawyer, and the state tax administrator will all agree that the field of state taxation of interstate commerce presents a perplexing conglomerate of apparently inconsistent opinions and meaningless distinctions. Even the Supreme Court has admitted that "the history of the commerce clause has been one of very considerable judicial oscillation."[1] More than a century and a half of constitutional and judicial history still leave without clear delineation the borderline beyond which a state tax statute treads on ground forbidden by the commerce clause. Anything akin to a rule of property is virtually nonexistent in wrestling with the finer questions involved in the application of the commerce clause restriction to the complexities of modern business and its various facets which may be selected by the legislative draftsman for the incidence of the state tax.

Not that any other Court would have better solved the problem. As the author notes, "Each new means of interstate transportation and communication has engendered commerce clause controversy." (p.13). Inevitably the struggle will continue so long as the demands for the free flow of interstate commerce and for additional state revenues compete. No abatement of either can reasonably be expected in our time.

At the same time no other clause of the Constitution is as important as the commerce clause has been in the integration of the states into a national economic unit. The author has quoted Justice Stone in words worth repeating here:

> "Great as is the practical wisdom exhibited in all the provisions of the Constitution, and important as were the character and influence of those who secured its adoption, it will, I believe, be the judgment of history that the Commerce Clause and the wise interpretation of it, perhaps more than any other contributing element, have united to bind the several states into a nation."[2]

The author begins his study of the problem with an historical approach, going back to the original Marshall doctrine, that the commerce clause limitation leaves to Congress the exclusive power to regulate interstate commerce; under all circumstances regulation was

1. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 66 Sup. Ct. 1142, 90 L. Ed. 1342 (1946).
2. From an address by Justice Stone, *Fifty Years' Work of the United States Supreme Court*, 14 A.B.A.J. 428, 430 (1928).

forbidden ground to the states. As in other than developing fields of Constitutional Law, soon came a conflicting idea, the Taney doctrine, that the power of Congress was concurrent, and not exclusive. The states could act so long as they did not conflict with a Congressional enactment. These concepts were compromised in *Cooley v. Board of Wardens*.[3] The commerce clause prohibited only some, but not all regulation of interstate commerce by the states; local aspects of regulation, as to which national uniformity was not necessary, were permissible. The inquiry addressed itself to the particular object on which the power proposed to operate, rather than the source or nature of the power. The same theory was carried into tax cases.

Then came the proposition that the silence of Congress on any given subject left the states free to act; this seems to be part of the theme of the general tests applied today. But as Professor Hartman points out, it negates the theory that the states lack the power, for Congressional silence is immaterial if the states lack the power. The source of the impediment to state action, whether it lies in the commerce clause itself without action by Congress, is still an open question. For example, the question is raised, but unanswered, in the *Prudential Insurance* opinion.[4]

While the *Cooley* compromise doctrine has often been invoked in cases involving state regulation of interstate commerce, when the power to tax is involved the opinions seldom speak of "concurrent" powers; they generally declare that there is no local power to tax interstate commerce. In effect, the opinions rely on the commerce clause for a double standard of constitutionality. Professor Hartman appropriately asks:

> "What is there in the commerce clause that justifies the Court in concluding that the States have a concurrent power with Congress to regulate interstate commerce, but, at the same time, concluding that the commerce clause forbids State taxation of interstate commerce?" (p. 260).

Although the proponents of the "exclusive" power doctrine have over the years dominated the pronouncements of the Court, even they must have recognized the needs of the states for revenue and the basic equity in Justice Holmes' observation that interstate commerce "must pay its way." For they have approved taxes on any number of activities which are in economic reality a part of interstate commerce. This is true, for example, in many use, storage and consumption levies; yet these decisions insist that the states cannot tax the privilege of engaging in interstate commerce.

The theory is much the same as that applied by the Court in cases

3. 12 How. 299, 13 L. Ed. 996 (U.S. 1851).
4. Note 1 *supra*.

involving federal immunity from state taxation; a tax cannot be levied on the activities or property of the Federal Government, but a tax levied on a cost-plus contractor with the Government,[5] or measured by units of property owned by the Government,[6] is permissible. This is true even though in each instance the economic burden of the tax is passed on to the Government. The important point is that the asserted doctrine of prohibitions in economic reality must be severely qualified. Interstate commerce, like the Government itself, may be economically, if not legally taxed, provided the draftsman is careful in his selection of words, and the particular activity on which the tax is imposed. Professor Hartman succiently summarizes that "The Court was more concerned with captions than with consequences." (p. 32).

Whatever the concern of the Court, little guidance was given to either the tax administrator or tax attorney.

A commendable trend away from this worship of captions was exemplified in Justice Stone's opinion in *Western Livestock v. Bureau of Revenue*,[7] where he spelled out a new and practical approach. The important question became not a matter of nomenclature, but, "whether the tax as a practical matter was being used to place interstate commerce at a competitive disadvantage." This wholesome idea, taking into consideration the economic facts of life, has faded in such recent cases as *Freeman v. Hewitt*,[8] and *Spector Motor Service Inc. v. O'Connor*[9] and in Justice Frankfurter's classification of the cumulative burdens concept as a "fashion in judicial writing."[10] Neither counsel nor the state administrator can act with any more certainty than he could thirty years ago. Each imposition is a separate question; it matters not that the same tax cannot be duplicated in other states to create a cumulative burden, and that no economic discrimination results against interstate commerce. The question is, Does the Court conclude it is or is not a tax directly on interstate commerce? Which label does the Court, on a given day, prefer to apply to a given factual situation?

The author illustrates the point by comparing *Fisher's Blend Station v. State Tax Commission*[11] and *Utah Power & Light Company v. Pfost*.[12] In *Fisher's Blend* the Court held that a state occupation tax on radio broadcasting, measured by gross receipts, was a direct

5. Alabama v. King and Boozer, 314 U.S. 1, 62 Sup. Ct. 43, 86 L. Ed. 3 (1941).
6. Esso Standard Oil Co. v. Evans, 345 U.S. 495, 73 Sup. Ct. 800, 97 L. Ed. 1174 (1953).
7. 303 U.S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823 (1938).
8. 329 U.S. 249, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946).
9. 340 U.S. 602, 71 Sup. Ct. 508, 95 L. Ed. 573 (1951).
10. 329 U.S. 249, 254, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946).
11. 297 U.S. 650, 56 Sup. Ct. 608, 80 L. Ed. 956 (1936).
12. 286 U.S. 165, 52 Sup. Ct. 548, 76 L. Ed. 1038 (1932).

burden on interstate commerce. The activity of producing the program and starting it on its way through the ether could not be, or at least it had not been, separated from the interstate movement of the radio waves. But only four years earlier in the *Utah Light* case the generation of electricity had been a local activity subject to tax, even though the electricity as generated was immediately transmitted to out-of-state consumers. Whether there is any real difference here can be endlessly debated between the lawyer and the physicist, who probably would not appreciate the legal distinction.

At this point the practicing attorney or tax administrator may be ready to conclude that this book is not for him, but is only for the academic scholar. To the contrary, it will prove most helpful to the lawyer advising the client who crosses state lines, and to the tax administrator seeking a guide as to how far he can go in insisting on liability, and yet in his own mind honestly staying within the limits laid down by the Court. The book will not provide them with many definite answers, for there are few in such unsettled areas as gross receipts, and sales and use taxation. But it will provide them with clear analyses of the leading lines of cases, discussed in separate chapters devoted to local activity privilege, public facility (highways), use and sales, gross receipts, and capital stock franchise taxes. It will save many hours which would otherwise be spent in trying to reconcile the irreconcilable.

The legislative draftsman, too, should welcome this work. It will help to guide him in selecting the appropriate words in which to phrase his tax statute, so that he will stay away from taxing interstate commerce itself, but will make it bear its fair share of the tax burden.

Many practical questions occur to the lawyer and tax administrator as he digests this work. To mention only one, the author points out how, in *General Trading Company v. State Tax Commission*,[13] the Court held that coerced collection of a use tax by an out-of-state seller was permissible, even though the seller had no place of business in the taxing state, took orders through travelling salesmen, and parted with title in his own state. An almost shocking result, the general practitioner would say. In advising his similarly situated selling client to refuse to collect the use tax for the buyer's state he would point out that the seller in *General Trading* had voluntarily submitted to jurisdiction. His client would not make that mistake. But what of the effect of the reciprocal statutes which permit each of the reciprocating states to bring tax suits in the courts of the other? Such statutes have been adopted by many states in the past six

13. 322 U.S. 335, 64 Sup. Ct. 1028, 88 L. Ed. 1309 (1944).

years. Confronted with *General Trading* and a reciprocal tax suit statute in each of the two states involved, it would seem that the interstate seller no longer has any escape from being a use tax collector.

The author concludes with a challenging suggestion. He proposes that Congress step into this "judicial oscillation" and exercise affirmative control of state taxing activities. Congress would define the permissive and forbidden areas and types of taxes affecting interstate commerce. But the author does not put into words a statute which he would sponsor. That bit of draftsmanship is a project calling for tough thinking, and one to which it is hoped the author will apply his knowledge of the field.

A few of the many questions to be considered in finally evaluating such a statute include:

1. Can any such statute have significance if the Court reasons as it has on occasion, and as Justice Frankfurter observed for the majority in *Freeman,* that the tax is invalid if it is "directly on" interstate commerce or levied "on the very process" of interstate commerce? Under such a view, is any expression from Congress relevant? Is it not a Constitutional amendment which is needed, authorizing Congress to delegate to the states some of the power which is now exclusively its own?

2. Assuming Congress can invalidate state statutes which are valid under current decisions, how far can and should Congress go in applying its statutory axe to fell the timbers which have in some instances for years been key pieces in the revenue structure of various states? Do the advantages to be derived by any proposed statute justify the very serious disruption of state finances? Or should Congress content itself merely with restricting the future exercise of the ingenuity of the state statutory draftsman?

3. Recalling the problem of labels, so well appreciated by Professor Hartman, what words will put the pragmatic and economic approach into a statute which will curtail litigation and lend more certainty? One wonders if Congress over a period of years can do any better than has the Court.

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CHURCH, STATE AND FREEDOM. By Leo Pfeffer. Boston: The Beacon Press, 1953. Pp. xvi, 605. $10.00.

The delicate issue of Church-State relations has brought a huge harvest of cases before the American Courts in recent years. At the heart of this issue is a basic ambiguity concerning the meaning of the Constitutional provision which holds that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." And as the title of this book clearly implies, the relation of Church and State bears directly on the broader question of Freedom. Indeed, the inclusion of this passage in the Constitution reflects the intent of the framers to insure in every way the conditions of a free society. The conviction that there is a correlation between a free Church and a free society had become clear a century before our Constitution was framed. Lord Acton has written that "The idea that religious liberty is the generating principle of civil, and that civil liberty is the necessary condition of the religious, was a discovery reserved for the seventeenth century." It is this concern about freedom, then, that makes the Church-State issue a serious one. The spectacle of vulgar intrusions by certain European governments into the life and affairs of organized religious bodies is one of the fearful characteristics of nondemocratic procedure. Yet even within the democracies, in particular in America, the pressure of events and the conflict in ideas about the nature of religion, and the role of its institutions, have complicated the peaceful coexistence of Church and State. And the resulting conflicts and their attempted solutions are the chief concerns of this book.

The author, Leo Pfeffer, is a lawyer who has actively participated in many of the cases in which the Church-State issue was at stake, appearing before lower courts as well as the United States Supreme Court. That the author is a lawyer does not mean that this book is necessarily a lengthy brief in which he lays out his arguments to sustain his own point of view. It appears, rather, to be the scholarly fruit of a conscientious lawyer who has felt the need to rediscover the meaning of the First Amendment restrictions against the "establishment of religion" and against laws "prohibiting the free exercise thereof."

The book is divided into three parts. The first deals with a historical sketch in which the roots of the Church-State conflict are traced. Here the author gives an admirable summary of the relation of organized religion and government from ancient, mediaeval and colonial times to the present. Moreover, he considers how other countries in our own day are dealing with this problem, referring particularly to Spain, Portugal, Italy, Latin America, Great Britain, the Scandinavian coun-

tries, Israel and Japan. But the most important section of Part One is the account of the development and passage of the First Amendment of the Constitution which contains the central principle of "separation of Church and State." Although the Constitution does not use the word "separation," the author adopts it as suitable for expressing the intent of the fathers of the Constitution.

Part Two is the longest (334 pages) of the three and the most substantial. It contains a carefully documented treatment of the ways in which the Constitutional provision that there shall be "no law respecting an establishment of religion" has become the center of fierce controversy. The issue here is two-fold, for it is possible for the State and the Church to engage in activities in relation to each other in such a way that some would feel that the principle of separation has been compromised. Controversy has resulted most quickly when the state would grant aid to religious bodies. The author carefully distinguishes the different ways in which the state can grant such aid. Actual financial grants to denominational welfare organizations, permission for the church to use state property, and the practice of providing to church-school pupils transportation at public expense are the most familiar activities of the state which have caused serious controversy. The most delicate issue recently has been the problem of religious education in the public schools and the general question of federal aid to education. On this issue there is almost a bewildering conflict of views. Understandably, there are those who view this issue from the standpoint of their own religious affiliation. But it would be somewhat misleading to think that this is a quarrel between Protestants, Catholics and Jews. Within each of these groups there is also difference of opinion making any sharp alignments inaccurate. Moreover, there are those who take sides in this controversy not from a religious point of view but from the conviction that the democratic philosophy requires separation of church and state.

Part Three deals chiefly with the problem of religious freedom. The question here is how far the state can tolerate religious belief and practices when these would bear significantly upon the other members of the community. Here the concerns of national security, public morals, and public health are pitted against the freedom of a person to believe and act as he will. These questions are raised especially in connection with the activities of the small sects. Grave questions inevitably arise when people expose themselves to personal collective dangers: Does a person have the right to harm himself and others, as in the snake-handling sects? Does a parent have a right on religious grounds to prevent a child from being vaccinated or inoculated against disease? Can a parent refuse to allow a blood transfusion to be given to a child? In general, who is to decide between the general welfare

of the state, the legitimate bounds of religious conviction and practice, and the realm of fanaticism? Such questions, although frequently raised by cases of almost extreme eccentricity, involve the fundamental question of the entire book which I take to be this: How are the respective claims of *religion* and *citizenship* to be reconciled? The vast array of the material of this book would answer that the principle of separation of Church and State is the formula. But the continued and mounting controversy would indicate that this principle does not yet mean the same thing to everyone.

The chief value of this book is its rich citations from cases (the author cites 271 relevant cases), briefs, historical documents and other pertinent materials. While much of the material is familiar and can be found in other books, they are put together here in briefer form. Moreover, even though the book would make excellent reading for a general audience, it has a special merit for the lawyer's library. Being written by a lawyer, the book inevitably points up clearly the legal issue in most of the controversies. At the same time, the book is written with unusual clarity and facility. Though this is a full-length treatment of this vast problem, it is not too long to be forbidding nor too short to be inadequate. It is a very competent, thoroughly reliable and unusually non-partisan treatment of a difficult subject.

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