

Sooner or later these facts and the conclusions they lead to will be common knowledge. Armed with this knowledge people will demand and get the constructive action which special interests and their propaganda now prevent. *Breaking the Building Blockade* is a real contribution to that essential understanding.

RICHARD F. WATT\*

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Chief Justice Stone and the Supreme Court. By Samuel J. Konefsky. New York: The Macmillan Company, 1946. Pp. xxvi, 290. \$3.00.

Mr. Konefsky states that the main purpose of his book is to present "Mr. Stone's conception of the Supreme Court's special function in interpreting the Constitution."<sup>1</sup> Its subsidiary purpose is to present the "larger trends of constitutional development as well as the conditions which gave rise to the controversies."<sup>2</sup> The book, save for the interpolation of one or two later opinions, covers the period down to June, 1943. It necessarily omits much material of value in the late Chief Justice's opinions during his last three terms of Court. This is, of course, a hazard involved in writing a book upon the views of a judge in active service.

The author has chosen for study six topics of constitutional law: intergovernmental tax immunity, state power as affected by the commerce clause, federal power to spend and to regulate industry, the administrative process, state power to regulate industry as limited by the Fourteenth Amendment, and civil liberties. The background of each topic is given, followed by a case by case discussion of the opinions of Justice Stone as to both their substance and their bearing on the author's main theme. The book closes with a chapter summarizing Justice Stone's "Enlightened View of the Judicial Function."<sup>3</sup>

Mr. Konefsky's principal conclusions as to the judicial methods of Justice Stone are these: He displayed an unwillingness to permit decision to turn on "the use of legalistic formulas and labels."<sup>4</sup> Cases should be decided "not on the basis of legal logic but on actual experience."<sup>5</sup> In economic matters, the courts should not "sit in judgment on the wisdom of legislative action,"<sup>6</sup> and should allow "wide latitude . . . for the legislative appraisal of conditions and for the legislative choice of methods."<sup>7</sup> But in matters involving civil liberties or the protection of the political processes of government, "he is 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."<sup>8</sup>

These conclusions seem essentially correct. Justice Stone rejected the meaningless labels which often confused constitutional rules, e.g., permitting constitutionality of a state statute to turn upon whether it imposed a "direct" or an "indirect" burden on interstate commerce. He insisted rather that the decision in each case should be guided by the practical necessities which called the constitutional principle into play, and that in each case the factual setting of the concrete case should be carefully explored.

\* Assistant Professor of Law, University of Chicago.

<sup>1</sup> P. vii.

<sup>3</sup> P. 255.

<sup>2</sup> Ibid.

<sup>4</sup> P. 260.

<sup>5</sup> P. 261.

<sup>6</sup> P. 264, quoting from *United States v. Butler*, 297 U.S. 1, 78, 87 (1936).

<sup>7</sup> P. 263.

<sup>8</sup> P. 270.

Thus, Justice Stone conceived of the commerce clause as a "nationally unifying force."<sup>9</sup> It did not prohibit state regulation or taxation in accordance with local needs, merely because interstate commerce was involved. It had that effect only if some discernible *national* policy was infringed as where there was discrimination against the interstate commerce, or it was placed at a disadvantage with respect to the local trade, or where the state statute conflicted with a federal statute, or where the free flow of interstate commerce was substantially impeded, or where a uniform national rule was required. In this area, the Supreme Court had the duty to enforce the national policy, even in the absence of specific Congressional legislation in the field. If, upon a weighing of the national and local interests, the state statute conflicted with the national policy, it must fall.<sup>10</sup>

It would have been useful for Mr. Konefsky to have contrasted more specifically Justice Stone's approach in reviewing state economic legislation under the commerce clause with his methods under the Fourteenth Amendment. As the author points out, Justice Stone was reluctant to curb state power in the latter type of case. There, competing local interests were weighed, e.g., the freedom of contract of employers against the evil of underpaid workers in the minimum wage cases,<sup>11</sup> and Justice Stone was generally unwilling to say that there was no reasonable basis for the legislative judgment. But in commerce clause cases there was a national interest to be vindicated as to which a state legislature did not necessarily exercise an informed or impartial judgment. The Supreme Court was required to make its own independent appraisal of the interests involved and was the final arbiter in the field, subject, of course, to the exercise of Congress' power to regulate interstate commerce.<sup>12</sup>

Justice Stone's famous admonition to the majority in the *AAA* case<sup>13</sup> was not an idle gesture on his part, but his fundamental precept in reviewing the constitutional validity, under the Fifth and Fourteenth Amendments, of regulation by the federal or state legislature. Although he might have his own ideas as to the wisdom of the legislation before the Court, he was not influenced by these views in his resolution of the issues

<sup>9</sup> *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943), a full faith and credit case, in which Chief Justice Stone compared the full faith and credit clause to the commerce clause.

<sup>10</sup> See, for instance, the late Chief Justice's opinion in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), and the many cases there cited. Mr. Konefsky, who did not have the benefit of the *Southern Pacific* case, seems to have under-emphasized the weight to be given to the national interest in the resolution of questions in this field. See pp. 92-93, for example.

<sup>11</sup> *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 636 (1936), overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>12</sup> This function is comparable to the duty of the Supreme Court, in the national interest, in the full faith and credit cases, to make its own independent investigation of questions of law of the state in which a judgment had been obtained. *Barber v. Barber*, 323 U.S. 77, 81 (1944); and see note 9 *supra*.

<sup>13</sup> *United States v. Butler*, 297 U.S. 1, 78-79 (1936):

"The power of courts 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."

presented. But this was significant of a larger judicial attitude of Justice Stone, which Mr. Konefsky might well have explored: his policy of never interfering with what he considered the rightful functions of the legislature, and, indeed, his ability to decide cases apart from any extraneous personal views or bias.

Thus, in the years prior to the change in 1937 in the current of constitutional decision, Justice Stone expressed the feeling that the Court was infringing upon the legislative sphere by actually passing judgment on the wisdom of the legislation before it. In later years, after the reconstitution of the Court, this same thought was expressed, but on questions of statutory interpretation. Justice Stone, again dissenting, often indicated his belief that the majority of the Court had distorted or rewritten a statute contrary to Congressional intent.<sup>14</sup>

Mr. Konefsky, on the whole, does a commendable job in the fulfillment of his secondary purpose—to trace the lines of decision in those portions of the constitutional field which he has selected. However, there are some inaccuracies in this portion of his work. Some of his conclusions, for instance, appear faulty in the hindsight of Chief Justice Stone's opinions during his last three years of service.

In his chapter on intergovernmental tax immunities, the author seems to find a shift of Justice Stone's approach from *Metcalf & Eddy v. Mitchell*,<sup>15</sup> to *Graves v. New York ex rel. C'Keefe*,<sup>16</sup> leading perhaps to a theory that all immunity depends on the intent of Congress to tax the states or to permit taxation by the states, or at least to a weighing of the actual burden of the tax in each case.<sup>17</sup> In *New York v. United States*,<sup>18</sup> decided after the publication of this book, Chief Justice Stone reiterated his views of the *Metcalf* case, that there is an undefined area in which the Constitution protects one government from *any* taxation by the other, when the taxation would infringe the former's sovereignty.<sup>19</sup>

In his chapter on the commerce clause and state power Mr. Konefsky erroneously concludes that a "majority of the Court seems to have been won over to Mr. Justice Black's view that Congress, and not the courts, is best able to deal with state actions interfering with interstate commerce."<sup>20</sup> This is not supported by the case cited.<sup>21</sup> The contrary is demonstrated, at least as of this writing, by several cases at the last three terms holding state statutes unconstitutional even in the absence of Congress-

<sup>14</sup> See, for example, *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 434, 441 (1945): "It is not our function to prescribe wage standards or policies which Congress has not adopted." See also *Girouard v. United States*, 66 S. Ct. 826, 830 (1946), generally, as to the respective functions of Congress and the Court, and in particular at 834, "It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power."

<sup>15</sup> 269 U.S. 514 (1926).

<sup>16</sup> 306 U.S. 466 (1939).

<sup>17</sup> Pp. 25-27, 44-47, for example.

<sup>18</sup> 326 U.S. 572, 586 (1946).

<sup>19</sup> In this chapter, too, the author, at p. 41, n. 64, misstates the holding of *State Tax Commission v. Van Cott*, 306 U.S. 511 (1939). This case did not hold valid a Utah tax, as stated by the author, but merely vacated on procedural grounds the contrary decision of the state court. See 39 Col. L. Rev. 1043 (1939).

<sup>20</sup> Pp. 96-97.

<sup>21</sup> *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944).

sional action under the commerce clause.<sup>22</sup> Justice Black admitted that his view had not been accepted in his concurring opinion in *Morgan v. Virginia*,<sup>23</sup> in which he acquiesced on that ground in holding a state statute invalid.

A number of more general criticisms suggest themselves. The author presents few original ideas and unfortunately his study often lacks clarity and brevity. Mr. Konefsky's choice of materials also lacks the breadth of view warranted by his subject.<sup>24</sup> Nevertheless, this is an interesting study of the work of one of our greatest jurists.

EDWARD L. FRIEDMAN, JR. \*

<sup>22</sup> See, for example, Chief Justice Stone's opinion in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), holding the Arizona Train Limit Law invalid. See also *McLeod v. Dilworth*, 322 U.S. 327 (1944); *Nippert v. City of Richmond*, 327 U.S. 416 (1946); *Freeman N. Hewit*, 67 S. Ct. 274 (1946).

<sup>23</sup> 66 S. Ct. 1050, 1058 (1946), holding invalid a Virginia statute requiring segregation of races in interstate buses.

<sup>24</sup> For example, Justice Stone's important opinions in the following fields are not investigated: full faith and credit, the double taxation of intangibles, due process requirements of notice and hearing, the discretionary jurisdiction of federal courts of equity, the requirement of a proper case for constitutional decision.

\* Member of the New York Bar; formerly Law Clerk to Chief Justice Stone.