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Book Review. A Declaration of Legal Faith by Wiley Rutledge

Fowler V. Harper

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In this small but inspiring book, an Associate Justice of the United States Supreme Court sandwiches a semi-technical discussion of the Commerce Clause between two layers of political philosophy. Indeed, what is essentially political philosophy is as ill-concealed in that part of the volume dealing with interstate commerce as it is in the author's judicial opinions. The middle of the book is pretty good; the first and last parts eloquent. The reader can hardly escape the emotional sincerity and intellectual integrity which characterizes every page and line.

The Commerce Clause, the author believes, is the central core of our national unity. The fathers wrought even better than they knew. "By a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions." 1 From it has evolved a mighty continent of free trade, mighty because trade was free; a continent and a democracy able to triumph over depression and war and, for good or ill, to assume leadership in a shattered world.

The Commerce Clause is a uniquely federal instrument. In all the brilliant bickering and strategic statesmanship of the making of the Constitution, perhaps the greatest stroke of genius was that which incorporated the twelve magic words: "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ." The Clause was to become the greatest monument to the vision of those who realistically appraised the toughest problem at hand and ahead. "More than any other provision, it has had to do with clashes of federal and state power, the lines of their division and their reconciliation in the federal plan." 2

In language sufficiently technical to be accurate and popular enough to be intelligible to laymen, the Justice writes briefly on the major problems under the Commerce Clause. He develops the views of Marshall and Taney, and the conflicting interpretations which have evolved therefrom, with appropriate credit to both jurists for their contributions to the continuous solution required in a dynamic nation. To Marshall must be attributed the establishment of the judicial role in the accommodation of the powers over commerce to the federal system. "Gibbons v. Ogden will stand for the life of the federal system as a landmark in Commerce Clause law, as it will also in the law of federal supremacy and of the place of judicial power in the scheme." 3 Cooley v. Board of Wardens detracts but little from the luster of Marshall's achievement. Taney, differing from Marshall as to the exclusiveness of federal power, is entitled to major credit for the realistic manipulation of the Clause to permit desirable if not necessary State action. "For him, it may be surprising to those who know him only as the author of an

2. P. 33.
3. P. 36.
opinion in the *Dred Scott* case, the nation and the States were not essential antagonists, each seeking to exclude the other from power. He was rather a statesman of great common sense, except in the single instance, devoted to making workable accommodation between the two great powers in the federal scheme and giving appropriate play for each to act." 4

The author not only traces the swing of the pendulum of federal power across its narrowing and lengthening arc, but develops the conflicting interpretations of the implied prohibition upon State power. One, rooted in Marshall’s conviction of exclusive Congressional power, which declares the prohibition self operating in the Clause itself; the other, evolved from Taney's views, that the intention of Congressional silence is the touchstone by which to determine the limits of State action. 5 Although recognizing that the silence of Congress may on occasion mean merely that it has no attitude at all and disavowing the major premise of the self-executing character of the Commerce Clause, the Justice appears to find value in both views as affording the Court necessary latitude for handling Commerce Clause problems.

The author is at his best in his declaration of faith in federal democracy. He believes in law. He also believes in freedom. And he knows that each of these things may destroy the other. But he also knows “that without both, neither can long endure.” Man, he believes, instinctively denies the validity of anarchism as he intuitively shrinks from despotism. He therefore seeks to reconcile the opposing extremes, and in doing so, is motivated by the desire for justice. Justice in the abstract, for the author, is but the source from which concrete justice springs. In its finite form, justice is neither complete nor perfect. It is, on the other hand, incomplete, imperfect and everchanging. The federal system, the author believes, is the only political framework within which man’s conflicting objectives can successfully be reconciled. His exaggerated evaluation of the Commerce Clause is based on this conviction.

Like all idealists, Justice Rutledge reaches for something which probably isn’t there. He would apply the federal plan to the entire world. He thus marks himself as an incurable internationalist. If there are any copies of this little book left after World War III and if there is anybody left alive who can read, he will reflect sadly upon the tragedy of a civilization which could not bring itself to follow the path which Justice Rutledge, along with all too few others, pointed.

**Fowler v. Harper†**

4. P. 52.
5. See P. 55.
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