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Essays on the Law and Practice of Governmental Administration: In Honor of Frank Johnson Goodnow (Book Review)

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BOOK REVIEWS

THE CONSTITUTION AND THE SUPREME COURT.

ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION. In Honor of Frank Johnson Goodnow. Edited by Charles G. Haines and Marshall E. Dimock. Baltimore: The Johns Hopkins Press, 1935, pp. xvii, 321.

A distinguished visitor to these shores, whose extra-literary pronouncements of late have been noted more for their pungency than for their profundity, gratuitously advised us to throw our Constitution into the sea. That advice was worth precisely what it cost.

"To be free," said Lord Mansfield, "is to live under a government by law." For us as a nation, that means a government under limitations and safeguards prescribed in the fundamental organic law, the Federal Constitution.

It is particularly fitting at this time of intense and widespread constitutional controversy, to pause to consider a volume of essays in honor of Frank J. Goodnow, on the law and practice of governmental administration, contributed by his former students in "grateful acknowledgment of his scholarly inspiration and counsel." Such a volume is a much more appropriate and significant way of doing honor to a great master than a dinner or a loving cup or a set of engrossed resolutions.

Frank J. Goodnow is a noted scholar, a brilliant teacher and a distinguished educator. It is a pity that his career as a teacher is not dwelt upon at greater length in the volume, for, as the editors say in their introduction, "everyone who came in contact with him could not help but be imbued with his enthusiasm for social studies and be inspired with his spirit of practical idealism."[1]

George Herbert Palmer, in his beautiful biography of his wife, wrote: "Some one person has vitalized knowledge for us—it matters little what branch—and almost magically our vague and variable desires for learning, power, public service, become crystallized and take a shape which defies the batterings of after years. Personal influence is a commanding factor everywhere; but nowhere has it so immediate or lasting an effect as in the schools."[2] From Professor Goodnow, his students did indeed carry off impressions and impulses of incalculable worth.

The orthodox procedure would be to comment briefly on the various articles in the volume. But the reviewing of books is not my *métier*. Suffice it to say, generally, that all of the essays bear evidence of painstaking, scholarly research that must have made the man who inspired them proud of his handiwork. Taken as a whole, the series is in itself an illustration of the growth of concepts concerning the law relating to governmental administration during the fifty years since the study of administrative law received its great impulse from Professor Goodnow.

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[1] P. xiv.

[2] GEORGE HERBERT PALMER, THE LIFE OF ALICE FREEMAN PALMER (1908) 36.

The articles on Public Administration and Administrative Law, on Executive Leadership and Administration, on Judicial Review of the Findings and Awards of Industrial Accident Commissions, on Various Phases of the Control of Administration, and on the Retirement or Refunding of Utility Bonds, show clearly the extent of the field so prophetically explored by the man in whose honor the volume is published.

The article by Professor Thomas Reed Powell on "The Scope of the Commerce Power," written before the decision in the *Schechter* case invalidating the N.I.R.A., is particularly opportune and appealing. It brings to mind what has been observed in another connection, that while it may be easy to say what the Supreme Court of the United States ought to do in given circumstances, and while it is even possible to forecast with reasonable certainty what the Supreme Court may do in those circumstances, nevertheless it remains beyond the range of human prescience (and for all his prescience, Professor Powell is still delightfully human) to prognosticate infallibly what the Supreme Court will do.

Professor Powell's article is singled out because it recalls vividly Frank J. Goodnow's outstanding contribution to the subject of constitutional interpretation, as embodied in his little book on "Social Reform and the Constitution." This book, published in 1911, has been neglected of late years, although its ripe wisdom holds many lessons of value in the trying times through which we are passing.

The book was a constant source of comfort and inspiration to me when, as a young man, I was appointed, in 1911, to serve as Assistant Counsel to the New York State Factory Investigating Commission, and participated in the drafting of remedial legislation for the protection of working men, women and children in industrial establishments.

Professor Goodnow wrote that constitutional interpretation "should be made to harmonize with our actual economic and social situation"; that the Constitution should be treated "somewhat differently from an ordinary statute", and that in interpreting constitutional limitations the doctrine of *stare decisis* should be applied "less strictly than to other branches of the law."

The Factory Commission had the satisfaction of having a statute prohibiting night work of women in factories, which was enacted on its recommendation, unanimously upheld by the Court of Appeals,[3] although that same court eight years earlier, and without a dissenting voice, had held a similar law to be unconstitutional.[4] Legislation prohibiting certain types of manufacturing in tenement houses was held to be a valid exercise of the police power,[5] notwithstanding an earlier decision to the contrary in the *Jacobs* case.[6] The delegation of power to an Industrial Board to adopt rules and regulations for the protection of workers in industrial establishments, to supplement the general require-

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[3] People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915).

[4] People v. Williams, 189 N. Y. 131, 81 N. E. 778 (1907).

[5] People v. Balofsky, 167 App. Div. 913 (2d Dept. 1915), *appeal dismissed*, 216 N. Y. 666 (1915); People v. Raport, 193 App. Div. 135, 183 N. Y. Supp. 589 (1st Dept. 1925).

[6] *In re* Jacobs, 98 N. Y. 98 (1885).

ments of the labor law and to grant variations therefrom, was sustained over the objection that this constituted an unlawful delegation of legislative power.

Only one proposal recommended by the Commission was not enacted into law—the bill providing for a Minimum Wage Board to recommend a living wage for women and minors in industry. The Oregon Minimum Wage Law had already set up the machinery for determining the amount of the living wage to be paid to women and minors in industry; provision being made for punishing an employer who paid less than the prescribed amount. This law was upheld by the highest court of the State, and its decree was affirmed by the United States Supreme Court by a divided court of four to four, Mr. Justice Brandeis not voting because he had been of counsel in the state court.[7] This affirmance, however, could not be regarded as a binding adjudication.

In 1923, the question was again presented to the Supreme Court in a case involving the constitutionality of a Minimum Wage Law passed by Congress for the District of Columbia. The act, patterned on the lines of the Oregon statute, was held unconstitutional, at least in so far as it affected adult women, by a vote of five to three, Mr. Justice Brandeis again not voting.[8] Many then felt, and that conviction has become more widespread with the passing years, that the Supreme Court in that case substituted its judgment and its economic philosophy for those of the National Legislature. A mandatory Minimum Wage Law was recently enacted in this state and its constitutionality is now before the Court of Appeals. The decision will throw an interesting light on the working of the judicial process in this branch of the law.

Only those completely lacking in historical understanding will venture to charge the Supreme Court with usurpation of power when it passes on the constitutionality of a state or federal statute. In so doing the court is acting in accordance with recognized and long accepted authority. With respect to the necessity of the function it performs, Mr. Justice Holmes, in 1913, said in a speech: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end."[9] While it is true that the United States would not come to an end if the Supreme Court lost the power to declare an Act of Congress void, our dual system of government would be jeopardized and possibly totally destroyed if that power were taken from the Supreme Court. A supreme judicial tribunal is necessary to act as an arbiter of the respective rights, powers and obligations of the state and

[7] Stettler v. O'Hara, 69 Ore. 519, 139 Pac. 743 (1914), *aff'd*, 243 U. S. 629, 37 Sup. Ct. 475 (1917).

[8] Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923); see also Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation* (1924) 37 HARV. L. REV. 545, which gives a clear account of the history of the judicial decisions on the constitutionality of the legislation and an excellent analysis of the Adkins case.

[9] OLIVER WENDELL HOLMES, LAW AND THE COURT, COLLECTED LEGAL PAPERS (1921) 296.

federal governments; otherwise, the rule of force would have to be substituted for the rule of law.

It is sheer nonsense to object to fair criticism of the decisions of the Supreme Court, or to stamp those who venture to criticize them as guilty of blasphemy or even of bad manners. Freedom of discussion is of the very essence of a democracy, and this applies to every institution in a democracy. There is nothing sacrosanct about the Court or the opinions its members render. No true friend of the Court would assert otherwise. Just as there is a difference between ignorant abuse and intelligent, informed criticism, so there is a difference between critical respect and superstitious reverence.

As the Chief Justice of the United States said some years ago, when he was at the Bar, "the integrity of the Court is universally recognized and its ability gives it a rank second to none among the judicial tribunals of the world." This, he pointed out, is due "to the impartial manner in which the Court addresses itself to its never-ending task, to the unsullied honor, the freedom from political entanglements and the expertness of the judges who are bearing the heaviest burden of severe and continuous intellectual work that our country knows." [10]

With all that, however, it must be recognized that the Court is a human institution; that it has the fallibility of a human institution; that each of its members has his human limitations, his strength and his weaknesses; each has his own political, social and economic philosophies; each has his likes and dislikes, his sympathies and his prejudices, some of them avowed and which are sought to be controlled and others entirely subconscious but woven into the very texture of his being. "The great tides and currents which engulf the rest of men do not turn aside in their course and pass Judges by." [11]

It must further be recognized that the Court does not find the law as some objective entity on which it can place its finger, but that while we are under a Constitution, in the last analysis the Constitution is what the judges say it is. "We shall never be able to flatter ourselves," Mr. Justice Cardozo quotes with approval from Gény, "in any system of judicial interpretation that we have eliminated altogether the personal measure of the interpreter. In the moral sciences there is no method of procedure which entirely supplants subjective reason." [12] "My duty as a judge," Mr. Justice Cardozo himself adds, "may be to objectify in law not my own aspirations and convictions and philosophies but the aspirations and convictions and philosophies of the men and women of my time. Hardly shall I do this well if my own sympathies and beliefs and passionate devotions are with a time that is past." [13]

Especially is this true in connection with the process of judicial interpretation of constitutional limitations, concerning which there will always be such wide differences of opinion and as to which feeling invariably runs high. Professor Goodnow, a quarter of a century ago, said: "Our constitutional law is losing what legal character it may once have had and is becoming more or less a system of political science which at one time favors the demands of the

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[10] HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) 55.
[11] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 168.
[12] *Id.* at 173.
[13] *Id.* at 173.

advocates of the maintenance of the status quo in the domain of political relations and at another is influenced by conceptions of present economic and social needs." [14]

Twenty-five years ago, and even later, the United States Supreme Court was criticized for what was charged to be the refinements to which it resorted "in its endeavor by differentiating the field of work of the states on the one hand from that of the national government on the other, to find constitutional justification for the extension of federal power." Goodnow, who himself was a firm believer in a consistent theory of constitutional interpretation that would permit of the orderly development of the nation in accordance with its economic and social needs, stated that "the Supreme Court had probably done more than any other governmental authority in bringing about such degree of national unity as was then enjoyed." [15] Since 1911, the Supreme Court has gone further along those lines. Today the criticism of the Court is based upon its failure to find constitutional sanction for increased federal power and control as against the reserved rights of the states.

To those who assert that by criticism of the Supreme Court we are attacking the foundation of our political system, it may be pointed out that the strongest criticism has come from within the Court itself in the form of dissenting opinions and that criticism of the Supreme Court is no novel thing in our history. It may also be noted that the Supreme Court has on more than one occasion, either because of a change in its membership or because of a change in conditions, revised opinions which it had theretofore deliberately expressed. In referring to this subject in 1911, Goodnow said:

> "In these days of rapid economic and social change, when it is more necessary than ever before that our law should be flexible and adapt itself with reasonable celerity to the changing phenomena of life, it is on this criticism amply justified by our history that we must rely if we are to hope for that orderly and progressive development which we regard as characteristic of modern civilization." [16]

Political theory and economic fact are wont to be discrepant. How to reconcile the two so as to enable the nation successfully to meet conditions arising out of our modern industrial system is the great task of statesmanship, judicial as well as political. Mr. Justice Roberts, speaking for the majority in the *Hoosac Mills* case,[17] invalidating the Agricultural Adjustment Act, placed the emphasis on the powers reserved to the states. Mr. Justice Stone, for the minority, put the emphasis on the "general welfare" of the country. The difference of opinion within the Court has its counterpart in the difference of opinion throughout the nation. To many the dissent of Mr. Justice Stone is as significant of the future trend as was the dissent of Mr. Justice Holmes in the *Lochner* case.[18] Others find in the utterances of Mr. Justice Roberts the

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[14] SOCIAL REFORM AND THE CONSTITUTION (1911) 15.
[15] *Id.* at 357.
[16] *Id.* at 359.
[17] United States v. Butler, 56 Sup. Ct. 312 (1936).
[18] Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539 (1905).

bulwark of American political institutions. However that may be, it must be recognized that in order to preserve the right of the individual to life, liberty and the pursuit of happiness, governmental supervision, regulation and control are, under our complex civilization, advisable and often essential; otherwise these fundamental individual rights would exist only on paper. Few will now challenge the advisability, yes, the necessity, of governmental regulation in connection with labor and social welfare.

Today, as Lord Macmillan has aptly observed, "the kind of injustice which most exercises the world is economic injustice." [19] Experiment, of necessity, there must be. Of course, it is possible to go to extremes. Particularly in the realm of constitutional law a difference in degree may often constitute a difference in kind. There will always be conflicting interests to be considered, the general welfare of the nation and the reserved rights of the states. The great difficulty is how to reconcile them and bring them into harmony. The best method, it has been urged, is that of the gradual approach, wisely and prudently planned, with clearly defined objectives, with measures and administration carefully devised, with a view to minimizing new evils which are bound to arise in connection with any social or economic readjustment.

Whatever may be our political philosophy, we cannot close our eyes to the fact that economic problems are more and more tending to become national in scope. Particularly is this true when an emergency arises which requires prompt action. The national power, of necessity, must be expanded to deal with these problems. The question is whether this shall come through gradual, progressive change in judicial interpretation of the existing organic law, which shall emphasize the social and economic needs of the nation, or whether it shall come by constitutional amendment. The likelihood of the adoption of any such amendment altering the respective powers of the state and federal governments will depend largely upon its scope. If the people have clear and settled convictions with respect to any change in the organic structure of the government, experience has shown that such convictions can make themselves felt. There is a good deal in what Mr. Walter Lippman said recently: "The truly national view is neither the Jeffersonian nor the Hamiltonian by itself, but that of Washington, who united them in a workable combination; and to unite them now, as it was then, is the fundamental task of the American statesman."

As is usual whenever a sharp controversy arises concerning decisions of the Supreme Court on measures of widespread national importance, many remedies are offered. Most of those now suggested are by no means novel. The serious limitation of the appellate jurisdiction of the Supreme Court, as Professor Goodnow himself observed, "would be our undoing as a nation." [20] The power of the legislative branch of the government to over-ride an unfavorable decision of the Court would tend to have the same effect. To provide for advisory opinions by the Supreme Court in advance of legislation would result in greater evil than good. To increase the membership of the Court would hardly seem advisable, particularly at a time when its decisions are the subject of such bitter controversy. Whether or not provision should be made that no state or

[19] LAW AND POLITICS (1935) 24.
[20] SOCIAL REFORM AND THE CONSTITUTION (1911) 357.

federal statute should be held unconstitutional save by a vote of two-thirds of the membership of the Court, is worthy of careful consideration. So it would seem to be wise to limit the power of the lower federal courts to declare a statute unconstitutional, and to make provision for prompt submission of such questions to the Supreme Court itself.

But I fear I have lost sight of the book I set out to review. That is too bad, for it is decidedly worth reading. Lord Hewart's characterization of the growth and influence of administrative agencies as "The New Despotism" has been largely discredited in England. Nevertheless, many difficult problems concerning organization, powers and methods of review of administrative bodies, are constantly pressing for solution. The articles dealing with some of these problems contain many helpful suggestions and recommendations. The learned contributors to the volume will not find fault with me, I am sure, if I also suggest that a reading of Goodnow's earlier book on "Social Reform and the Constitution" will serve as a guide and an inspiration to those who turn to it today.

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NOTE.—Since this review was submitted for publication, the New York Court of Appeals has passed upon the constitutionality of the Minimum Wage Law (*People* ex rel. *Tipaldo v. Morehead,* March 3, 1936). The statute, in so far as it affects adult women, was held invalid by a vote of four to three, entirely in reliance on the decision of the Supreme Court in the *Adkins* case. The remittitur, I am informed, places the decision on the sole ground of a violation of the provisions of the Federal Constitution. It therefore appears likely that the case will go to the United States Supreme Court. The Court of Appeals, reversing the holding below, found no material difference between the two statutes and deemed itself foreclosed from a consideration of the change in economic conditions since the *Adkins* decision twelve years ago. The prevailing opinion indicates that because the Supreme Court had already determined the closely controverted constitutional issue, it was up to that Court to change its ruling, if it saw fit to do so. The doctrine of *stare decisis* was applied without regard to the present-day factual and economic backgrounds upon which this act of social legislation is predicated.

The statute involved is entirely local in character, in no way encroaches upon the powers of the Federal Government, and does not discriminate against citizens of other states or against citizens of the enacting state on the basis of race, color or creed. The test of the validity of such a statute, in the last analysis, is its reasonableness. The question now presented is whether a decision of the United States Supreme Court shall be considered as giving a fixed content to the idea of reasonableness, which shall be unaffected by increased factual knowledge or changed conceptions of the social and economic forces involved. It would hardly seem in keeping with even the most conservative traditions, that in the present state of our industrial civilization, an amendment to the Federal Constitution should be necessary to permit a state to enact the very moderate

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* Justice of the Supreme Court of the State of New York.

measure of social and economic reform contemplated by the statute under consideration. I am still one of those optimists who believes that the judicial process, even under our existing fundamental law, can effectively deal with the problem presented. I still believe that our courts will not stand in the way of the inexorable march of progress and say that because of interference with an illusory "freedom of contract", and an equally fictitious power of bargaining, a state may not prohibit, as inimical to the public welfare, the employment of women in industry at starvation wages inconsistent with their reasonable worth.

B. L. S.

RESTATEMENT OF THE LAW OF TRUSTS. Two Volumes. St. Paul: American Law Institute Publishers, 1935, pp. xxxii, 1–807; pp. xxiv, 809–1496.

I

The apparently incongruous qualities of certainty and elasticity in the common law have long been the boast and frequently the bane of English and American jurists. From the governed comes the plea, and a just one it is, that the law be certain. From the jurist comes the answer that were the law to be certain in that it is unalterable, it might in the end disrupt the society it is ordained to protect.[1]

In the reconciliation of the claims of the judge and the judged, it seems inevitable that just causes be wrecked occasionally on the treacherous shoals of *stare decisis*. Courts, however, dare not be too elastic, lest they be accused of betraying their trust to administer law as it is.

When a court does become so bold as to venture on the discovery of a new certainty as distinguished from stretching the old certainty to the breaking point, awe overcomes the judicial world. But gradually, this discovery, if it be a true one, is conceded by other jurisdictions, until, finally, that which was originally an unauthorized departure soon becomes what is affectionately referred to as the weight of authority.

Although the weight of authority is not necessarily truth in its most abstract connotation, it does furnish a rule of thumb by which society may conduct itself. It is to the restatement of legal certainties that the American Law Institute has dedicated itself, not merely for the purpose of establishing certainty in the sense above mentioned, but also to avoid "the adoption in its (common law) place of rigid legislative codes."[2] This worthy object is ample justification of the Restatement. Indeed, no lengthy discussion should be required to prove how inadequate a fixed legal code would be to further the aspirations and the ideals of the people of our country.

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[1] "One of the reasons why our law needs to be restated is that judges strive at times after the certainty that is sham instead of the certainty that is genuine." CARDOZO, THE GROWTH OF THE LAW (1924) 17.

[2] Introduction, p. ix.