Denver Law Review

Volume 13 | Issue 4 Article 2

July 2021

Faith in the Court

George R. Farnum

FAITH IN THE COURT*

By GEORGE R. FARNUM
Former Assistant Attorney General of the United States

> "No one can read the history of the Court's career without marveling at its potent effect upon the political development of the Nation, and without concluding that the Nation owes most of its strength to the determination of the Judges to maintain the national supremacy."
>
> *Warren:* The Supreme Court in United States History.

"THE Constitution," declared Justice Holmes in one of his most celebrated dissenting opinions, "is an experiment, as all life is an experiment." It has proved itself, however, to be a transcendent experiment. Upon its foundation our social, political and economic life were organized and have been developing toward certain ideals—albeit but dimly visualized—for approximately a century and a half. The guardian of its letter and spirit is the Supreme Court of the United States. Chief Justice Hughes, when Governor of New York, went so far as to declare: "We are under a constitution, but the constitution is what the judges say it is." Those of us who resist any effort to break down its essential integrity rest our faith in its preservation upon our confidence in the collective wisdom of the Court and the enlightened statesmanship of its individual members.

The acute exasperation in certain quarters with recent decisions, notably that nullifying the N. R. A., is no novelty in American history, though some people have for the moment seemingly forgotten it. In the early decades of its existence, while partisan feelings and political animosities ran feverishly high, the Court was subjected to such abusive attack that its usefulness, if not its very existence, was seriously endangered. At intervals since, certain decisions have provoked recurrent storms of protest.

The Dred Scott case, doubtless an extremely regrettable pronouncement, was the occasion for the bitterest denunciation. An editorial in the New York *Tribune* of the time was

*A recent address reproduced in the September 23, 1935, issue of *Vital Speeches of the Day*.

characteristic. "The long trumpeted decision * * * having been held over from last year in order not too flagrantly to alarm and exasperate the Free States on the eve of an important presidential election * * * is entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington barroom. It is a dictum prescribed by the stump to the bench." The New York *Evening Post,* implying that the Court had become the mouthpiece of a political party for the promulgation of falsehood, declared that "the moment its decisions cease to be binding, and impeachment, not obedience, belongs to it." "The decision," it added, "is a deliberate iniquity." Judged now, probably the worst charge that can fairly be made against the motives of the Court, as recently put by an eminent authority, is "the Court yielded by an unfortunate second thought to Justice Wayne's persuasion that it had in its grasp the opportunity to settle the constitutional issues arising out of the slavery question." In the days of Theodore Roosevelt, a project for the popular recall of judicial decisions was seriously mooted. As late as 1916 the recrudescence of hostility evoked from Holmes the following commentary upon its implications: "The attacks upon the Court are merely an expression of the unrest that seems to wonder vaguely whether law and order pay. When the ignorant are taught to doubt, they do not know what they safely may believe. And it seems to me that at this time we need education in the obvious more than investigation of the obscure."

When, however, the fierce political and sectional passions of the moment ran their course, and the work of the Court was seen in the sober retrospect, intelligent judgment has never failed to pronounce the confident verdict that the tribunal performed its duty with unquestionable disinterestedness and, all things considered, wisely and well. Such decisions as the Dred Scott case have been singularly rare and have been put down to those occasional mistakes from which no human institution is entirely free.

Through more than a century and a half of extraordinary transformations in our national life, the Court has succeeded in preserving the fundamental character of our constitutional institutions. Looking back dispassionately over the

difficult path of adjudication, the accomplishment seems little short of miraculous. It involved the task of applying a general text to conditions never dreamed of by its authors. It demanded a practical reconciliation, under continually changing social and political conditions, between the Hamiltonian conception of nationalism (expounded by Chief Justice Marshall) and the Jeffersonian doctrine of state rights (aptly referred to as the dual-federalism of Madison). It required the elaboration of a working compromise between traditional rights of property (or vested interests, as they are termed in constitutional law) and a recognition of the significance of human values. It exacted from the Court a reasonable harmonizing of the economic philosophy of *laissez faire*—attended by the phenomenal growth of capitalistic individualism—and the necessity of making a fair concession to our evolving ideas of a social democratic state. They were largely pioneer questions of great complexity. In dealing with these importunate antinomies the Court has seemingly accomplished for the practical ends involved, as Mr. Justice Cardozo would put it in his flair for posing paradoxes, "The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites."

That there should be some vacillation at times was natural; that views once expressed had in some instances to be reconsidered in the light of further reflection and the changing times was unavoidable. It is probably a fact that of no branch of our jurisprudence can it be more fitly said, than of constitutional law—in the words of Holmes—that "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it."

Furthermore, the character of the medium with which the Court was dealing must never be lost sight of. As Marshall long ago pointed out, it was a constitution that was being expounded, and Holmes subsequently added: "But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relations of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accidents

of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Dealing with such basic problems in political philosophy, social science and economic theory, it was inevitable that the individual members of the Court should not infrequently differ in their views. Indeed, this very difference was a healthy indication of vital and independent thinking and proof that the Court was not committed to any one-sided philosophy but was representative of various ideas that were fairly entitled to their day in court. In passing judgment, it is also well to bear in mind the national crises through which the Court has guided us—the precarious formative period when our American experiment might have collapsed; the critical period of the Civil War with its disturbing aftermath of reconstruction; the phenomenal growth of our industrial civilization with its proliferating problems, and the unprecedented disruption of the World War followed by bewildering economic breakdown.

In time, those who today hotly impugn the N. R. A. case—as those who denounced other decisions in the past—will arrive at a better understanding of its real significance. After all, it announced no new principle. It simply applied old fundamental ideas to a radical departure in legislation. It no more than reminded us again—albeit forcefully and dramatically—that ours is a constitutional democracy. Reading the two opinions which constituted the unanimous decision dispassionately, it is difficult to see how the draftsmen of the act could have believed that it could be squared with American political ideals and familiar legal theory. Possibly some feelings of grave misgivings explain at least in part the government's reluctance to invite a decisive test and its tardy acceptance of the gage of constitutional battle.

The moral of these few pages is that those of us who are fairly content with our traditional and established form of constitutional government—and, while discerning its defects, can see on the whole no acceptable substitute for it—should remain steadfast in our confidence in the great Court upon which in the last analysis its preservation depends. In our history we find ample support for our faith.