Denver Law Review

Volume 14 | Issue 4 | Article 5

January 1937

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Recommended Citation
George R. Farnum, States' Rights, Nationalism, and the Supreme Court, 14 Dicta 98 (1937).

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STATES' RIGHTS, NATIONALISM, AND THE SUPREME COURT

By GEORGE R. FARNUM, *of the Boston Bar, Former Assistant Attorney General of the United States, Before the Twentieth Century Association, Boston, Mass., October 24, 1936*

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> The majesty of the national authority must be manifested through the medium of the courts of justice.
>
> —*Alexander Hamilton.*

* * *

> But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez-faire. It is made for people of fundamentally differing views, and the accident 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.
>
> —*Justice Holmes.*

IN 1835, with the passing of Marshall, the great formative era in the history of American constitutional law was brought to an end. The philosophy of the founding fathers, of whom Marshall was a contemporary and whose traditions he shared, had been vindicated, the solidarity of the Union firmly established, and the power and importance of the Supreme Court impressively demonstrated. Whether one can fully accept all the unstinted superlatives that his memory has evoked or whether one feels at times the moderating doubt once expressed by Holmes, "Whether, after Hamilton and the Constitution itself, Marshall's work proved more than a strong intellect, a good style, personal ascendency in his court, courage, justice, and the convictions of his party," no one can deny his further assertion that, "Time has been on Marshall's side, and the theory for which Hamilton argued, and he decided, and Webster spoke and Grant fought, and Lincoln died, is now our cornerstone."

The country viewed with mixed emotions the appointment by Jackson of his one-time attorney general and unconfirmed appointee to the treasury portfolio, Roger B. Taney as head of the court. Of curious pathos was the lament of Justice Story, who for more than two decades had been the *Fidus Achates* of his departed chief, "I am the last of the old race of

judges. I stand their solitary representative with a pained heart and subdued confidence." In this chastening role he was destined to be cast for another decade to come, representing the old order in the helpless position of dissent. Yet, when he died, of him Taney wrote, "What a loss the court has sustained in the death of Judge Story! It is irreparable, utterly irreparable in this generation; for there is nobody equal to him."

In the ever-recurring cycles that appear to govern human thought and control human destiny, it seems in retrospect that the hour had perhaps come for some political reorientation—for some shift in constitutional emphasis, at least for the time being. Taney found already on the court two Jackson appointees and with the next two years two more were added of Democratic persuasion. The change in judicial outlook, while not revolutionary, was nevertheless clearly discernible from the first term after Taney's accession in the dramatic battle of the bridges, the faith of the new dispensation was proclaimed, though in point of fact the issue turned on the narrow question as to whether in a legislative grant of the privilege of maintaining a toll bridge over the historic waters of the Charles river between Boston and Charlestown, the grant should be construed as exclusive by implication. In denying a monopolistic privilege in the absence of an express declaration, the chief justice, speaking for the court, declared that "A state ought never to be presumed to surrender this power [to promote the general welfare through improved channels of communication] because, like the taxing power, the whole community have an interest in preserving it undiminished," adding, in words of portentous implication, "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depend on their faithful preservation." Standing, as he asserted, "Upon the old law," and defending the spirit of adjudication of earlier times, Story vigorously dissented and asserted that, after the first argument six years before, Marshall had been minded to sustain the exclusiveness of the grant. Writing afterwards, he lugubriously asserted that "There will not, I fear, ever in our day, be any case in which a law of a state or of Congress will be declared unconstitutional, for the old constitu-

tional doctrines are fast fading away, and a change has come over the public mind from which I augur little good."

Taney died in 1864 and with him passed another accentuated epoch in constitutional history. "The central conception of the court affecting constitutional interpretation," during his leadership, as recently put by an acute student, Professor Corwin, "was that of the federal equilibrium; in other words, the idea that the then-existing distribution of powers between the states and the national government should be regarded as something essentially fixed and unchangeable." Unlike Marshall, who at least by implication denied its relevancy in deciding questions of federal power, for Taney the Tenth Amendment to the Constitution was a significant limitation upon it. In the end, the tendency to stunt the development of national jurisdiction to meet the exigencies of "an indefinite and expanding future," came into violent impact with the agitation over slavery—an institution that could only be adequately dealt with by national action—and the Civil War which exacted for the very preservation of the Union the exercise of the fullest measure of national power. A new cycle had set in, and unlike Marshall, his was the fate—escaped by Marshall—to live to see his influence wane and his control of the court largely disappear. Had the minority opinion of the court in the Prize cases, in which he concurred, prevailed, the government would have found itself in a most awkward situation in effectively maintaining the blockade and at the same time preventing foreign recognition of the Confederacy. Had the opportunity presented itself, on evidence of his own writings, he would have created a staggering handicap to the successful prosecution of the war by declaring the Conscription Act unconstitutional. What his views would have been on the legality of the Emancipation Proclamation had he been afforded a chance to express them judicially can only be surmised, but there was undoubted uneasiness on this score at the time. A certain fatality presided over the destinies of his reputation for many years—darkened to a large measure by the persisting odium of the Dred Scott decision and the recollection of his frequent collisions with military authorities during the rebellion. Charles Francis Adams, no stranger to the harassing problems of the war, greeted the news of his passing with the exclamation of relief, "So old

Taney is at last dead," and Charles Sumner declared that, "The name of Taney is to be hooted down the pages of history. Judgment is beginning now; and an emancipated country will fasten upon him the stigma which he deserves. . . . He administered justice at last wickedly and degraded the judiciary of the country and degraded the age."

Now that the passions of his day have spent their fury, and his work can be appraised and his motives judged in sober retrospect, the world concedes his memory a very fair measure of justice. In fact, with a large body of public opinion at the present time, his adherence to a static conception of the Constitution and his sponsorship of states' rights, have given his accomplishments a peculiar contemporary interest.

Charles Francis Adams, predicting that the choice of Taney's successor would fall to Salmon P. Chase, former secretary of the treasury in the Lincoln cabinet, opined that, if it did, "He will have a great future before him in the molding of our new constitutional law." Adams proved an accurate prophet, though Lincoln made the selection with some misgivings about Chase's well-known political restlessness. During the nine years allotted to the new chief justice, the court was largely occupied with war litigation and with the harassing troubles of reconstruction. The course of adjudication marked a strong running of the tide toward extreme nationalism, dictated by the necessity of giving the government a strong and free hand in liquidating post-war problems and made possible by the ascendency of the Lincoln appointees, of which Chase was the fifth. In the middle of the period, however, in the celebrated Milligan case, the court vindicated the great democratic principle that since "The Constitution of the United States is a law for rulers and people, equally in war and in peace, at all times, and under all circumstances," it follows that its prescriptions could not "be suspended during any of the great exigencies of government" and that "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." It should be furthermore noted in passing that the closing of the period marked a perceptible ebbing of the tide from the high water mark of nationalistic adjudication.

In 1874 President Grant selected Morrison R. Waite to fill the vacancy caused by the death of Chase—an appointment

which, according to Charles Warren, "was greeted with a sense of relief but with no enthusiasm." During the fourteen years of Waite's services, however, he conducted himself, in the words of some competent critic, "to the satisfaction of the bar and of the public." The constitutional history of these years, as well in fact of the entire period since the close of the reconstruction era, is largely what has been summarized as "the history of the adaptation of constitutional principles to rapidly changing economic and social conditions." The fourteen years of Waite's incumbency may be roughly divided into two periods, during the first of which, for the most part, the recessive tendency noted at the close of his predecessor's service continued, with the court showing a pronounced disposition to maintain state authority. During the latter part of his term, however, another change in tendency set in, with a swing back toward a more nationalistic outlook, one which was destined to increase for some time to come. Among the reasons that may have contributed to the change, two may be singled out for mention. New appointments to the court had affected the balance of opinion. Additionally, the transformation in American life due to the momentum of the Industrial Revolution and the impetus added to the exploitation of the seemingly limitless natural resources of the country consequent on the release of the national energies previously absorbed in war and the political problems of its immediate aftermath were making themselves felt. The growing sense of national unity demanded a greater concentration of power in the federal government, necessarily at the expense of state sovereignty.

In 1888 Waite died and was succeeded by Melville Weston Fuller, whose service extended to 1910. He was in turn replaced by Edward Douglass White, who presided until 1921. Contemporary fundamental conditions that reacted on the spirit and character of the work of the court can only be briefly summarized. Added to the phenomenal development of its continental affairs, the nation vastly extended its international interests, assuming in this connection the grave responsibilities of an imperialistic role. Together with the strenuous and sustained efforts to deal both nationally and locally with baffling economic and social problems, there was imposed upon the court a large and burdensome program for

constructive adjudication. Interstate commerce regulation, anti-trust legislation, and federal injunctions were to play an important part in the decisions. To such an extent was the growing power of the national government fostered that at the very end of the period the late James M. Beck noted that, "The insistence upon the reserved rights of the states has become little more than a political platitude," adding, "The American people think nationally and not locally, as they once thought locally and rarely nationally." Midway in the period, however, the court itself put the situation with greater restraint. "Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people; and the powers reserved in the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral." The court, responsive to the exigencies of change, had ushered in an era that would have assuaged the despair of Story, expressed a century before, though just before its close a divided court in the child labor case, served notice that constitutional barriers still stood against the growing pressure of nationalism.

The terms of the court presided over by William Howard Taft—who was appointed in 1921—marked no pronounced change in fundamental attitude. At its beginning the second child labor law, again by a divided court, was consigned to the same fate as its predecessor. The judges were called upon to deal with perplexing questions growing out of the prohibition amendment and the Volstead Act. These decisions were marked by two strong tendencies, first to uphold the arm of the government in the widest fashion in what was to prove a futile and sorry effort to deal with the liquor question by national authority, and secondly to protect the constitutional guarantees of individual rights and immunities from the action of enforcement personnel. Throughout the period and into that of the present chief justice, Charles Evans Hughes, who succeeded Taft in 1930, the court continued on the whole to adapt its views to the advancing spirit of nationalism and the receding prestige of state authority.

With the advent of the New Deal and the efforts to deal with the economic breakdown and its tragic consequences to the welfare and morale of the country, through congressional

legislation, these old issues of states' rights and national power have again become major political issues, complicated by alignment of curious interest from an historical point of view. During the brief years since Roosevelt took office, the court has been repeatedly called upon to pass on questions of the greatest complexity and to adapt the Constitution to emergency conditions without impairing its essential integrity. Never before—in so short a period—have so many laws passed by Congress fallen before judicial scrutiny. For the most part the court has been sharply divided, and rarely have dissenting views been more vigorously expressed. The repercussion on a public—unusually susceptible by reason of unprecedented conditions and agitated by bitter partisan feelings and debate —has been great. The result has been to push the court into the center of the spotlight and to subject its work to the widest public discussions, and the political campaign has in no wise mitigated this situation.

No such compressed treatment of the history of the court and the vicissitudes of constitutional adjudication as is here ventured can present more than a very rough and sketchy approximation to high lights and major trends. Minor divagation must be completely ignored. It will be seen, however, that the work of interpreting constitutional prescriptions, adapting them to the rapid changes in the fundamentals of American life, and adjusting the ever-competing claims of state authority and national power, has been constantly and profoundly influenced by the dominant conceptions of economic policy, political philosophy, and social outlook of the times and of the individuals composing a continuously changing judicial personnel. Years ago, Lord Justice Mellish hazarded the opinion that "the whole of the Rules of Equity and nine-tenths of the Rules of the Common Law have in fact been made by judges," though the scope of such legislation has been largely disguised by the slowness of the process of judicial accretion through trial and error—the laborious process "in pricking out a line in successive cases" as Chief Justice Taft once called it—and by resort to the convention that the judges only expound and apply the law as they actually find it. No court, in no field, however, has played a more decisive legislative role than that of the United States Supreme Court in constitutional decision. From this dilemma there is no pos-

sible escape under the American system, and in the course of the years the decisions of the court have necessarily reflected the influence of those vast changes that years have wrought in the character of American civilization. It has also reflected the influence of the impact of society with alternating war and peace, with the recurrent cycles of prosperity and depression and with the vagaries of public opinion. On the whole, it can be asserted that, viewed over the years, the movement of adjudication in the court has been one of cautious and at times painful advance—checked intermittently by recoil and recession—but on the whole a normal reaction of an institution recruited from members of a profession which, as De Tocqueville long ago observed, "are conservative as a class" and designed to function in harmony with the spirit of what has been styled "the strange conservatism of a progressive people."

Not infrequently the court has been sharply divided as divergent political, economic, and social views battled for mastery, and there have seldom been long periods in which some pronouncement of the court has not called forth choruses of sharp public dissent and hostile criticism. Thus it must ever be. Society is not static and the judicial process involved in constitutional construction is implicated in its most creative and dynamic role. In its fundamental aspects such criticism is not to be entirely deprecated. There is no surer sign of the fatal decay of thought that Emerson diagnosed than apathy on the part of the people to the functioning of their major political institutions. In fact, not infrequently dissenting members of the court itself have expressed serious misgivings as to the character and effect of particular decisions—such as were voiced so long ago by Story. Time, however, has largely deflated these misgivings as it has always tempered public opinion. In the end, sensible students of American government have been persuaded that, on the whole, the court has amply fulfilled the hope of those who established it as a basic factor in American democracy, and has earned the respect and confidence of those who continue to look to it to perform the difficult task of preserving, on the one hand, the essential elements of the Constitution while avoiding, on the other, any undue frustration of the orderly evolution of human affairs toward a better and happier social goal with the passing years and growing public enlightenment.