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AN APPEAL TO SAVE OUR WRITTEN CONSTITUTIONAL FORM OF GOVERNMENT

H. E. NICHOLS

TOO OFTEN a crisis is required to alarm us sufficiently to bring us to our senses. The Supreme Court's decision in the case of *Brown v. Board of Education*¹ produced such a crisis, for no other decision of this nation's highest tribunal has so forcibly and glaringly focused attention upon the fact that since 1937 the Supreme Court has time and again, without authority, sought to amend the United States Constitution. Prior to 1937 the people of the United States had been pretty well able to depend upon the judgments of the Court because its decisions were generally rendered on long established constructions of the Constitution and legal precedent. Subsequent to 1937, but prior to the integration decision of May, 1954, *supra*, the complacent attitude of the populace throughout the entire country had been that the ends justified the means, the most dangerous attitude of which one can possibly conceive. Since no one objected to the ends sought to be accomplished there were no effective objections directed at the unconstitutional manner in which the desirable ends were being reached. The objections that were voiced were not strong enough to stop the iniquitous practice. But in 1954, when the Supreme Court deliberately ignored and ruled contrary to a decision rendered in 1927,² in which it had held that separate but equal school facilities met constitutional requirements under the 14th Amendment, the powder was indeed thrown into the fire. As was stated by E. Morton Coulter, Professor Emeritus, University of Georgia: "It is a fact which anyone may decide for himself that the 1954 decision of the Supreme Court called for a greater fundamental social change and an upset way of life not only as old as the republic but antedating the republic back to the beginning of the colonization of America. It called for a more fundamental change than was worked by any of the last seven amendments to the United States Constitution . . . And yet

¹ 347 U.S. 483 (1954).

² *Gong Lum v. Rice*, 275 U.S. 78 (1927).

the Supreme Court took it upon itself to so amend the Constitution.”³

The truly big question brought on by the integration decision, however, is not the mixing or the association of the races, in schools or otherwise—the big question is whether the states have the right, under the protection of the Constitution, to govern their own affairs. This makes the question then just as important to the states of New England and the Pacific Coast as it does to the states of the South. All states want to decide for themselves how to conduct their own affairs. The underlying question, therefore, is What is the Constitution? Is it whatever the justices of the Supreme Court from time to time say it is? Or is the Supreme Court without authority to reverse an initial decision ascertaining intent and extracting a constitutional principle and thereby in effect to amend the Constitution? It took the 1954 integration decision to awaken America and shock her into a consciousness of what had begun to happen in 1937 and what we have to do to save our Written Constitution. I very much doubt that the Court will ever again make such a mistake but it is a matter of plain and simple justice that the South should not have to raise the issue, prove the point, save the Constitution and yet have to pay the assessment of having to abide by the unconstitutional decision because of the failure of the Court to correct its mistake or the failure of Congress to provide for its correction.

The Supreme Court has no right to reverse an initial decision ascertaining intent and extracting a constitutional principle and thereby in effect to amend the Constitution. This view is shared by Americans all over the nation—north, south, east and west—who are not influenced by hatred, intolerance or politics, but influenced solely by law, logic and a correct interpretation of constitutional principles and of history.

WHAT IS “THE LAW OF THE LAND”?

There has, in my opinion, been a great deal of misunderstanding and confusion about what is meant by the expression, “the law of the land.” Most of our people are conscientious and patriotic and have a fervent desire to obey, so far as safe and practicable, what they conceive to be “the law of the land.”

The Constitution provides that the Supreme Law of the Land is the Constitution, statutes passed under the provisions of the Constitution,

³ Address by E. Morton Coulter, Professor Emeritus, University of Georgia.

and treaties entered into under the authority of the United States. Whatever may be true about other decisions by the Supreme Court there are two types of decisions which in inexorable effect become the law of the land. These are: (1) decisions which for the first time ascertain and define the intent of the framers and adopters of the Constitution or its amendments, and (2) decisions which for the first time ascertain and define the intent of Congress in passing an Act. In each case, the Court thus defines the meaning of certain words of the Constitution or Act, and the definition becomes in effect a part of the words defined.

In the first class of cases the initial ascertainment and definition of the intent of the framers and adopters of the Constitution or amendments become an integral part of the Constitution itself and can be altered or modified only by an amendment to the Constitution by the method provided therein. This is true whether the decision ascertaining the intent is right or wrong because to allow a majority of the Supreme Court to change its mind at will as to the definition of the original intent would destroy the basis and philosophy of our government, which is limited (and written) constitutional government.

In the second class of cases the initial ascertainment of the intent of Congress in passing an Act—the initial definition of its words—becomes a part of the Act itself and this initial ascertainment of intent is not subject to alteration or modification by the Supreme Court because the Supreme Court has no authority to legislate. To permit the Supreme Court to continually change its mind about what Congress intended would be in effect to permit it to legislate, contrary to the provisions of the Constitution.

It thus becomes clear that when the two classes of initial decisions are rendered they become a part of the law of the land and remain so until the intention so ascertained and defined by the Court is changed by amendment of the Constitution or, in the case of an Act of Congress, by congressional revision of its Act.

When the Supreme Court itself undertakes to reverse or modify its initial decision ascertaining and defining intent in either class of cases, it is exceeding its power under our constitutional system. The decisions of the Court acting beyond the scope of its power are, as the Supreme Court itself has many times held, wholly and completely void. The fact that the Court may have been endeavoring to attain idealistic and, to its way of thinking, desirable goals cuts no figure,

because the end does not justify unconstitutional means. If these are desired under our form of government they must be obtained by legal means.

It is what may in the future be done under a principle or practice that determines the soundness—the legality and validity—of the principle or practice, and not merely what is actually done at present. The logical consequences must be taken into consideration. To see just what could happen under the practice of the Supreme Court of reversing its initial decisions in which the intention of the framers and adopters was ascertained, let us consider the matter of a Federal Income Tax. Suppose that, instead of adopting the proposed amendment to the Constitution authorizing a Federal Income Tax, the States had defeated the amendment. The very next year Congress could have passed a statute similar to the one held to be unconstitutional, prior to the proposed constitutional amendment, and the Supreme Court could have ruled the last statute constitutional. Does it not make cold chills run up and down your spine to think that five men can defy the will and hope of a whole nation? Well, that is the kind of thing we are witnessing, whether by the Supreme Court or other branches of government or all combined.

The law of the land as to provisions of the Constitution, the meaning of which is uncertain, is in effect the initial decision of the Supreme Court ascertaining and defining the original intent of the framers and adopters because it becomes in each instance in effect a part of the defined words of the Constitution. Any other or subsequent decision changing or reversing the definition of that intent amounts, in reality, to a constitutional amendment by the Supreme Court.

It occurs to me that irrefutable proof that such an initial decision becomes in effect a part and parcel of the Constitution is the fact that in three instances the Constitution has been amended to put into the Constitution provisions which the Court had held were not already in it. In *Chisholm v. Georgia*,⁴ the Supreme Court decided that a state could be sued in assumpsit by a citizen of another state. That meant that the Supreme Court construed the Constitution to intend that such an action would lie. The Constitution was immediately amended (11th Amendment) to provide that such an action could not be instituted. The decision of the Supreme Court was not amended. There is

⁴ 2 U.S. (2 Dall.) 419 (1793).

no such remedy provided in the Constitution. The Constitution was construed by the Court and thereafter it meant what the Supreme Court said it meant. Whether the Supreme Court decided the case right is immaterial. Its decision was merged and melded into the Constitution and in such event the only remedy is amendment as provided in the Constitution and not by a reversal of decision by the Supreme Court. If the people of America had been satisfied that the decision was right, or were satisfied with it even if it was wrong, the only right of amendment was with the people and not with the Court. The next instance is the *Dred Scott* case.⁵ Whether right or wrong, the decision was wiped out by Amendments 13, 14, and 15. The decision was a part of the Constitution or an amendment could not have changed it. The third instance, already alluded to, is the amendment authorizing the income tax. The conclusion is inescapable and unanswerable that if a Supreme Court ruling can be corrected by a constitutional amendment it cannot be corrected by the Supreme Court by a reversal of its decision for the reason that the Constitution does not provide for a circuitous or substitute method of amendment in such cases. *If we submit to such a practice we surrender our written constitutional form of government.* Whatever may have been the status before 1954 the issue is now drawn and you cannot dodge an honest issue. The rule laid down in *Gong Lum v. Rice*⁶—separate and equal facilities—is *the law of the land* and those opposing the 1954⁷ and similar subsequent decisions are not misguided, ignorant, intolerant radicals after all.

LAW OF CASES

Those who contend that no court decision can be more than the law of the case, binding only the parties to the case, overlook the distinction between common law decisions, which appellate courts are not bound to follow, and statutory-construction decisions and Constitution-construction decisions, which appellate courts are bound to follow under the provisions of the Constitution. This difference will be discussed later.

REVERSE-INTERPRETATION PRACTICE BEGAN IN 1937

For nearly 150 years prior to 1937 the Supreme Court never asserted directly the power of that Court to overrule prior decisions

⁵ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

⁶ 275 U.S. 78 (1927).

⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954).

of the Court construing provisions of the Constitution. The decisions in the *Genesee*⁸ case and in the *Legal Tender*⁹ cases do not support a contrary assertion. The question of the power of the Court to overrule prior decisions was first brought out into the open by the dissenting opinions in *Morehead v. New York, ex rel. Tipaldo*.¹⁰ In that case the Court, five to four, approved an earlier decision. The same question arose in 1937 in *West Coast Hotel Co. v. Parrish*,¹¹ and the Court by a five to four vote overruled the decision approved in the *Morehead*¹² case. Mr. Justice Roberts switched his vote in the later case and seemingly later regretted it. (See his dissenting opinions in *Mah-nich v. Southern Steamship Co.*,¹³ and in *Smith v. Allwright*.¹⁴) Since 1937 the Court has many times overruled prior decisions of that Court in similar cases.¹⁵

The Constituion is a contract between the several sovereign States and the Federal Government. That contract provides that the States surrender certain attributes of sovereignty to the Federal Government. *The rest are reserved to the States.* One provision of the contract is that the contract cannot be amended except as provided in the (contract) Constitution. The Federal Government has been violating the contract since 1937. Up to 1954 we acquiesced in the unconstitutional actions. We do not acquiesce in the 1954 decision or in any subsequent ones. By our acquiescence in the decisions prior to 1954 we are not estopped to call a halt now and that is just what we do. *We want the contract complied with.*

14TH AMENDMENT MEANS WHAT IT MEANT IN 1868 WHEN ADOPTED

It is axiomatic that a Constitution or an amendment thereto means what it meant at the time of adoption. That is a truth of universal acceptance and application except on occasion by the United States

⁸ *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

⁹ *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871).

¹⁰ 298 U.S. 587 (1936).

¹¹ 300 U.S. 379 (1937).

¹² 298 U.S. 587 (1936).

¹³ 321 U.S. 96, 105 (1944) (dissenting opinion).

¹⁴ 321 U.S. 649, 666 (1944) (dissenting opinion).

¹⁵ This paragraph is a paraphrase of a portion of a speech made by the Hon. Dozier A. DeVane, U.S. District Judge, retired, Northern District of Florida, before the Jacksonville Bar Association on Feb. 5, 1959.

Supreme Court. Incredible as it seems, this is what the Supreme Court said in the *Brown* case: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."¹⁶ What can this mean if it does not mean that the Court was construing the 14th Amendment *as if it had been adopted in 1954 rather than construing* it as it should have been construed, to-wit, as of 1868, in accordance with the ascertainment already made by the Court in 1896 and 1927?

In *Smith v. Allwright*,¹⁷ the Supreme Court stated:

In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its powers to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.¹⁸

In this statement the Court said that it did not attempt to correct a mistake it made in interpreting an Act of Congress. That statement shows a correct decision but the chances are that it was made because Congress could act quickly in correcting the Court's mistake and not because the Court recognized the prohibition against the Court's power to legislate. The statement that the Court throughout its history freely exercised its power to re-examine the basis of its constitutional decisions shows that the Court had not done its homework in noting that the Court had not in the preceding 150 years intentionally reversed an initial Constitution-interpretation decision. And, if the truth were known, I dare say that the Court's reversal of initial decisions is based on the slowness of the process of constitutional amendment. The above statement states two practices of the Court, one of them right for the wrong reason and the other wrong for every conceivable reason.

THE 1954 DECISION WAS NOT ONLY UNCONSTITUTIONAL,
IT WAS WRONG OTHERWISE

I do not think that anyone ever seriously contended that the 14th Amendment gave women the right to vote. It includes language

¹⁶ 347 U.S. 483, 492 (1954).

¹⁷ 321 U.S. 649 (1944).

¹⁸ *Id.* at 665 (1944).

broad enough to do so but the language did not mean in 1868 that they should vote. So the women did not have the right and we amended the Constitution and gave it to them. The present Court no doubt would give it to them if it had the chance, by saying that the 14th Amendment does not mean what it meant in 1868 but rather it means what the Court says it means now. It is inconceivable how, from all the facts of life and history, the Court held that the 14th Amendment was inconclusive as to different races attending the same school. The state court decisions cited in *Gong Lum v. Rice*¹⁹ and *Plessy v. Ferguson*²⁰ and numerous other well-known facts show that it was much clearer that the 14th Amendment did not intend that races could go to the same schools than that women could not vote. Moreover, the very same Congress which submitted the 14th Amendment enacted legislation providing for a more equal distribution of funds for *separate schools* in Washington and Georgetown and granting certain losses in Washington for separate schools for Negroes. These statutes were amended a number of times subsequently, and all the provisions relating to separate schools were carried over in a codification of the District laws. And, up to the time of the Segregation Cases,²¹ the District schools were still segregated, and in the interim, Congress had frequently passed legislation recognizing the segregated pattern of the District School System. *If the decisions since 1937 mean that the further we get from the adoption of the Constitution and Amendments the further we get from the principles of constitutional government taught us by our forefathers, it is indeed much later and further than we think.* It about means the end of written constitutional government as we have always known it. And I might suggest that if the members of our Supreme Court still think we operate under a written constitution it may be well for them to authoritatively inform the law schools of the country of the fact so that the schools may desist from their current instruction and opinion that written constitutional government in America is a thing of the past.

CONTRACT CONSTRUED BY COURT

The Constitution says nothing about the authority of the Supreme Court to construe the Constitution. The case of *Marbury v. Madison*²²

¹⁹ 275 U.S. 78 (1927).

²⁰ 163 U.S. 537 (1896).

²¹ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

²² 5 U.S. (1 Cranch) 137 (1803).

held that it had such authority. Whether right or wrong, the people have not amended the Constitution to change the ruling. They evidently agree that it is a good ruling. *Can you conceive of what answer the proponents of the 1954 decision would give to the contention that the Supreme Court has authority after all these years to reverse Marbury v. Madison?* You talk about human explosions! You would have a rash of them from coast to coast. Well, if the Court cannot reverse *Marbury v. Madison*²³ it cannot reverse *Gong Lum v. Rice*.²⁴ Of course the answer will come that the Court would never reverse *Marbury v. Madison*,²⁵ but that dodges the issue as those who support the 1954 decision for political or reasons of spite dodge the real, substantial, fundamental, logical issue we in the South have tried to present.

PEOPLE HAVE ONLY ONE CHANCE TO GET A CONSTITUTION OR AN
AMENDMENT RIGHT WITHOUT AN AMENDMENT, AND
THAT IS WHEN IT IS ADOPTED

If the people fail to include in a constitution or an amendment a matter they intend to include, their only recourse is amendment. If an expression used is ambiguous they have but two remedies: (1) they can amend the Constitution or (2) ask the Supreme Court for an interpretation. If the Supreme Court gives a satisfactory interpretation the people are satisfied; if not, amendment is the only answer. The idea that the Supreme Court is privileged to have two tries, or more than two, at correctly ascertaining the intent of the farmers and adopters is inconsistent with and repugnant to the principles of written constitutional government for the reason that the provision in the Constitution for amendment can be sidetracked by court action and the peoples' right to amendment nullified. An *initial decision* by the Court to clear up an ambiguity or ascertain doubtful intention is not an amendment—it is an *interpretation, which the Court has jurisdiction to make, under the authority of Marbury v. Madison*.²⁶ If the Court in 1927 in *Gong Lum v. Rice*²⁷ had decided in favor of the integration of the schools such a decision might have been wrong but it would have been within the power of the Court and the decision could not be attacked as a usurpation of power. *It would have been*

²³ *Ibid.*

²⁴ 275 U.S. 78 (1927).

²⁵ 5 U.S. (1 Cranch) 137 (1803).

²⁶ *Ibid.*

²⁷ 275 U.S. 78 (1927).

binding on us all until amended as provided in the Constitution. But a second and reverse interpretation is equivalent to amendment which the Court does not have jurisdiction to make. This is the answer to the question so often asked by careless-thinking people: "If the Court can make one interpretation why can it not make the second?" To honest men and women of intelligence and integrity the answer is more than sufficient. *The people made the mode of amendment cumbersome to protect the Constitution and themselves from hasty and hysterical amendments by the states and surely they never intended to subject the Constitution to hasty or hysterical amendment by the Court under pressure of "souped-up" or irresponsible transient public opinion.*

STARE DECISIS AS TO COMMON LAW DECISIONS HAS EXCEPTIONS;
THERE ARE NO EXCEPTIONS TO THE DOCTRINE OF STARE DECISIS IN
STATUTORY OR CONSTITUTIONAL-CONSTRUCTION DECISIONS

The question is often asked: "The courts can change or reverse common law decisions; why can they not reverse *any* decision?" The answer is simple and lies in the Constitution. The rule of stare decisis means "let the decision stand" for the sake of certainty and uniformity. But judges make common law decisions. They are not based on statutes or constitutions. They are based on the customs of peoples crystallized by judicial decisions. If conditions change and no great harm will result, judges often change common law decisions to fit new circumstances and conditions—but when it comes to changing *statutory-interpretation* decisions or *constitution-interpretation* decisions the courts are limited in their power to change the initial decision. The reason they cannot change the initial decision is that in statutory decisions the legislative branch is clothed with the power of amendment and change, after the initial interpretation, and not the court. After the initial interpretation decision on a constitutional question the right lies with the people to amend or not. One simple illustration will cinch the argument. Suppose the Supreme Court initially interprets an ambiguous Congressional Act. Congress reads the decision and determines that the Court has correctly interpreted its enactment and it decides to let the Act stand as interpreted. If the Court later changes and reverses itself it has gone into the field of legislation by enacting a law when the branch of government charged with the duty of legislating has refused to do so. The same principle applies to the constitution-construction situation except that in reversing this type

of initial decision the Court makes a greater error because it is less evil for the Court to assume a legislative function than it is to assume the power to amend the Constitution. This is the most grievous error the Court is capable of committing.

It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk v. United States*, 290 U.S. [371 (1933)]. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124.²⁸

EACH STATE HAS THE RIGHT TO CONTROL ITS SCHOOLS

On the question of the rights of the states to control their schools it is interesting to note that in the acts admitting about ten of the thirteen or fourteen states since the 14th Amendment there has been a specific provision that these states could control their schools. It is submitted that the reason for this provision (and it should have been in all of the admitting acts) is that Congress knew that the states admitted before the 14th Amendment already had complete control of their schools under the 9th and 10th Amendments and knew that all states had to be admitted on exactly the same basis. But even if this is not true—and it is certainly not conceded not to be true—all states must be admitted on the same basis and, since there is no way to remove the rights of these ten states over their schools without their consent, all of the other states automatically have the same rights.

The Supreme Court has presented a predicament. In honor, character and integrity it ought to reverse the 1954 and similar integration decisions. If it does not, Congress should act and relieve the situation. *We have a solemn contract and the government has repudiated it.* We, as sovereign states, ought to be given better treatment than a Communist dictator. Integrity and good faith begin at home. We joined the Union in good faith and our sacred contract should be observed until it is changed according to agreement. Military tactics through the use of troops should not be resorted to in order to enforce

²⁸ *Dimick v. Scheidt*, 293 U.S. 474, 487 (1935).

submission to a lawless decree against a sovereign state, helpless to defend itself against the power of the Nation whose duty it is to protect it. There is no hope for any sovereign state except the conscience of America. If that conscience could be shown the naked truth, with all political and emotional considerations removed, a way could be found to peacefully and in good will solve the racial problems confronting us. If America could only understand the law and the facts the answer in this case would be clear. *Force is not the answer.*

The only check on the Supreme Court's usurpation of power is the force of public opinion. *The integrity, character and conscience of the American people are on trial.* Before God, what is your answer?

In Washington's *Farewell Address* he admonished all Americans as follows:

If in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an Amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use itself can at any time yield. . . .

The most discouraging fact connected with the present controversy is that outstanding citizens are sometimes deluded by the specious argument that to criticize a court for exercising authority which it does not possess has the effect of undermining law and order.

Nothing could be further from the truth. Few of those who really understand what I'm talking about would have the audacity to say that the people of a nation must stand dumb in the face of usurpation of power by their highest court. It will be a tragedy if the people of the United States fail for any reason to distinguish between the judgments of courts rendered within their constitutional jurisdiction and those which are rendered *beyond* their constitutional jurisdiction and contrary to the authority which gave them life.

No decision of the Supreme Court of the United States is entitled any greater moral weight than its context merits. If a decision of the Supreme Court is correct and in accord with the fundamental law of the Constitution, it carries great moral force and should be respected and followed. If, on the other hand, it undertakes to announce a rule contrary to our Federal Constitution, contrary to the dual system which is the very foundation of our national government, and clearly

indicates that the law and the facts have been ignored, such decision violates the law itself and is entitled to no respect and should be sternly disapproved and condemned by both officials and the general public. Such a decision is not “the law,” but is simply an enforceable pronouncement of the Court.

The late Mr. Justice Cardozo, one of the greatest legal luminaries ever to grace the Supreme Court bench, in his book, *The Nature of the Judicial Process*, wrote:

Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law.²⁹

The Supreme Court violated the law of legal precedent by ignoring and refusing to follow its own prior decisions which hold that separate but equal school facilities met Constitutional requirements under the 14th Amendment; it violated the law by its usurpation and exercise of power and authority that was never intended that it should have or exercise by the framers and adopters of the Constitution of the United States.

A usurper is a tyrant, in whatever garb he is clothed. If we cannot lift our voices against them we have surrendered our freedom. God help us not to make that mistake.

²⁹ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 129 (1921).