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AN ATTEMPTED APPRAISAL OF “AN ATTEMPTED APPRAISAL OF THE WARREN COURT”*

W. CLARK HANNA**

Gilbert Nurick’s comparison of the efforts to impeach Earl Warren with the efforts to impeach John Marshall a century and a half before (Pa. Bar QUARTERLY, March 1968) is a discerning and interesting excursion into U.S. legal history. Mr. Nurick goes on to argue that because subsequent history vindicated Marshall’s highly unpopular opinions extending federal power at the expense of the states, it should follow that Warren’s posterity may be expected to do the same for him, and that the historians of the future will conclude that the Warren Court adhered to the basic philosophy of Marshall eloquently enunciated in *Cohens v. Virginia*:

A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it *** with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day.

AMENDMENT PROCEDURE

We submit that Mr. Nurick’s argument is incomplete and falls short of proving the desired conclusion. It is quite true that the Constitution is provided with the “means of self-preservation.” But this is not found in any judicial power, specified or implied, to “self-preserve” it by judicial interpretation, or reinterpretation, of issues already decided earlier. It lies, on the contrary, specifically in Article V of the Constitution itself. It consists of the four alternative methods of amendment by the people acting through their representatives. These are legal—if you like, democratic—methods that the Framers wisely provided for changing the Basic

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Law as new conditions and well considered public opinion might require.

To believe that history always repeats is to perpetuate as fact a proposition that history itself has proved over and over to be a fallacy. Americans of the early 19th century and the world they lived in were far, far different from those of the late 20th century. Mr. Nurick himself points this out. For that reason alone the vindication of John Marshall by no means points with any certainty whatever to the vindication of Earl Warren.

JUDICIAL POWER

But the issue really seems to hang on two broader and more basic issues:

(1) The power of the judiciary to invalidate legislative and administrative acts because in the judges' opinion such acts conflict with

- (a) the Basic Law or
- (b) the public interest as of the present time and locality;

(2) The power of the judiciary to modify or reverse in one case a rule already settled by decision in an earlier case in the same court on the same issue because in the judges' opinion

- (a) the law was erroneously applied in the earlier case, or
- (b) the rule laid down in the earlier case conflicts with the public interest as of the present time and locality.

(1) (a) A court's power to declare a statutory or administrative act unconstitutional when the question comes before it in an actual litigated case is peculiar to American law and has not been seriously challenged since Marshall's Court first enunciated it in *Marbury v. Madison*.

Sir Edward Coke stood on much the same principle when he asserted the supremacy of the Law even over the Crown. Obviously the interpretation and application of the law, constitutional, statutory and administrative, is precisely what the judiciary is in business for.

(2) (a) By the same token, from time beyond memory an American or English court has been accorded the power to decide a given issue in a case before it quite at variance with conclusions which it reached on the same issue in a previous case *on the ground that it now finds that it misapplied the law in the previous case*.

With these two propositions there is little room for dissent. (1) (b) and (2) (b) are a comparatively modern development.

JUDICIAL-LEGISLATIVE POWERS

Invalidating a statute or regulation or reversing a prior court opinion on grounds other than legal has been both attacked and defended by legions of competent authorities over the years, especially since the Supreme Court, speaking through Chief Justice Warren in *Brown v. Board of Education* in 1954, overturned the rule of *Plessy v. Ferguson*. The latter was based on an interpretation of the 14th Amendment by the same Court with a different bench over half a century before. We do not propose at this point to add another recruit to any of those legions, except to renew the question whether such invalidation or reversal is not interpreting the Law but changing it—a legislative function, not judicial.

It may be asked, if the Marshall Court could invalidate a federal statute in the *Marbury* case, why could not the Warren Court in the *Brown* case reverse an earlier holding of what was technically the same court, thus in effect voiding a state statute? It should be noted that the former was a matter not of changing the Law, but of interpreting and applying existing Law as a matter of first impression, to the case before it. The latter was a changing, on non-legal grounds, of Law that was in effect by virtue of its earlier *Plessy* decision. Moreover, it invalidated a state law which the highest court of that state had upheld on the authority of the *Plessy* case.

Theoretically (if not practicably) the Supreme Court can reverse any of its own decisions from *Marbury v. Madison* on down, provided, in some new case involving the same issue, it can devise plausible legal reasoning to the effect that it applied the law erroneously in the earlier case as the law was *at that time*.

According to the present trend of the Court's thinking, as exemplified in *Brown v. Board of Education* and numerous others, it can also reverse any of its earlier cases in deciding a new case if in the five-man wisdom of a bare majority it finds that the public interest of the *present day* requires it.

CENTRALIZED GOVERNMENT

As a practical matter the holdings of both the *Marbury* and *Brown* cases appear to be quite safe in the hands of the United States Supreme Court. Based though they are on completely different reasoning and completely different legal and political philosophies, both serve to strengthen centralized government at the expense of the states. For better or worse, that is the way the tree has been inclined ever since Marshall

bent the twig. There appears no present likelihood that the Court will undertake to bend the full grown trunk the other way.

STARE DECISIS

Lord Coke's dictum, "the knowne certaintie of the law is the safetie of all," states a basic necessity in the maintenance of a stable society. If no one can be certain of his legal rights and obligations because a court may decide to change them due to its own ideas of a changed public interest, no one can safely undertake new projects and new commitments. Hence the well-known (but apparently obsolescent) doctrine of *stare decisis*. We submit that once a court—any court—settles an issue in a case before it, that decision should be considered Law as far as that court—or any court of jurisdiction subordinate to it—is concerned, unless and until

- (1) the decision is reversed on grounds of legal reasoning upon direct appeal to a court of superior jurisdiction, or
- (2) the same issue comes before the same court in a subsequent case and it plausibly finds an error of law in its prior decision, or
- (3) the ruling is changed by appropriate legislative action, which means constitutional amendment if interpretation of a constitutional provision is the issue.

SUPREME LAW OF THE LAND

We pose one more question as bearing on posterity's verdict on the Warren Court. It was succinctly stated by Senator Sam Ervin (D., N. C.) as follows:

"There is not a word or syllable anywhere in the Constitution which sustains the position that a Supreme Court's interpretation of a constitutional provision constitutes the supreme law of the land. On the contrary, Article VI provides in unmistakable language that nothing constitutes the supreme law of the land except the Constitution, acts of Congress conforming to the Constitution and treaties made under the authority of the United States."*

To state it another way, does the responsibility of state judges under Article VI, Sections 2 and 3 run directly to the Constitution, acts of Congress and treaties *only*, or does it extend to the labyrinth of case law to be constructed subsequently by a Supreme Court that was a creature

* *Human Events*, Jan. 21, 1967, at p. 12 in review of *The Warren Revolution* by L. Brent Bozell (Arlington House, 1966).

of the Constitution and that did not come into existence until after the Constitution itself became Law? We do not find either in Article III defining the judicial power of the United States, or anywhere else in the Constitution specific authority for the Supreme Court to review a constitutional interpretation by the highest court of a state—or, for that matter, specific authority for the Supreme Court even to entertain appeals from the highest court of a state at all except in the classes of cases enumerated in Article III, Section 2. It would seem that this is another twig originally bent by the Supreme Court itself and nurtured into majestic treehood by long time universal acceptance.

Whether posterity vindicates Earl Warren as it did John Marshall will therefore depend on whether posterity returns to the Rule of Law (which includes changing the Law by the Law's own processes) as distinguished from rule by judicial interpretation and re-interpretation of decided cases according to the judges' personal analyses of contemporary conditions. If, and only if, the latter view continues to prevail, Warren will be permanently "in" as—for different reasons—Marshall is now.