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The Originalism Revolution Turns 30: Evaluating Its Impact and Future Influence on the Law

Edited by Elizabeth H. Slattery

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Abstract: *Thirty years ago, a majority of justices on the U.S. Supreme Court believed they should decide cases based on what the Constitution ought to say rather than what it requires, but others like Edwin Meese and Antonin Scalia believed that constitutional provisions could be discerned through dictionaries from the Founding Era, the common-law tradition, and foundational documents like Blackstone’s Commentaries on the Laws of England to understand what things meant at the time the Constitution was written. Seeking to discern the original public meaning of constitutional provisions minimizes the potential impact of a judge’s personal views or biases on the law. The Constitution is “the instrument by which the consent of the governed—the fundamental requirement of any legitimate government—is transformed into a government complete with the powers to act and a structure designed to make it act wisely or responsibly.” Thus, a judge preserves the freedom of all Americans when he interprets the Constitution as it was written. Otherwise, as President Ronald Reagan observed, “the words of the documents that we think govern us will be just masks for the personal and capricious rule of a small elite.”*

Introduction

October 2016 marked the 30th anniversary of then-Attorney General Edwin Meese III’s speech on “The Law of the Constitution,” which was part of a series advancing a jurisprudence of originalism. Champions of this theory, including Meese, Clarence Thomas, Robert Bork, and Antonin Scalia, believed that the Constitution and laws should be interpreted based on their actual text and original public meaning. Together, they brought about a revolution in constitutional interpretation.

Thirty years ago, a majority of justices on the Supreme Court of the United States believed they should decide cases based on what the Constitution ought to say rather than what it requires, but Meese, Scalia, and others were committed to the written Constitution. They believed that constitutional provisions could be discerned through dictionaries from the Founding Era, the common-law tradition, and foundational documents like Blackstone’s

Commentaries on the Laws of England to understand what things meant at the time the Constitution was written. In a speech before the Federalist Society’s D.C. Lawyers Chapter in 1985, Meese described this method of interpretation:

Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

Why does the original meaning of the Constitution matter? When a judge seeks to discern the original public meaning of constitutional provisions, he minimizes the potential impact of his personal

views or biases on the law. The Constitution, after all, implements a government based on the consent of the governed. As Meese said in a speech at Tulane University in 1986, “The Constitution is...the instrument by which the consent of the governed—the fundamental requirement of any legitimate government—is transformed into a government complete with the powers to act and a structure designed to make it act wisely or responsibly.” Thus, a judge preserves the freedom of all Americans when he interprets the Constitution as it was written.

Our Founding Fathers understood that judges must be bound by the text of the Constitution. In a 1985 speech before the American Bar Association, Meese explained, “To allow the courts to govern simply by what [they view] at the time as fair and decent, is a scheme of government no longer popular.... A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.” As President Ronald Reagan observed, we would “no longer have a government of laws, but of men and women who are judges. And if that happens, the words of the documents that we think govern us will be just masks for the personal and capricious rule of a small elite.”

Due to the efforts of Meese and other originalists, this theory of constitutional interpretation has permeated the judiciary and the academy over the past three decades. Today, we have a generation of law students, lawyers, and judges who interpret the Constitution as it was written and not as they *wish* it had been written. Thus, the originalism revolution continues with the next generation.

This *Special Report* includes remarks from an October 2016 public lecture by Judge William H. Pryor, Jr., of the U.S. Court of Appeals for the Eleventh Circuit commemorating the start of the originalism revolution 30 years ago as well as three speeches delivered by then-Attorney General Ed Meese in 1985 and 1986. Judge Pryor discussed how, as a student at Tulane University Law School in 1986, he advanced the cause of originalism by publishing Meese’s remarks on “The Law of the Constitution” along with commentaries by several leading constitutional scholars of the day. General Meese’s remarks from October 2016 explain the origin of his speeches advancing a jurisprudence of originalism and how it was that fidelity to the written Constitution became a cornerstone of the Reagan Administration.

Remembering Edwin Meese's Tulane Speech

October 5, 2016

The Honorable William H. Pryor, Jr.

I appreciate your invitation for me to return to one of my favorite places on Capitol Hill, The Heritage Foundation, to say a few words about one of my heroes, Edwin Meese III, and the debate that he launched 30 years ago about interpreting our Constitution. I had the good fortune of witnessing part of the beginning of that debate, and for reasons that I will explain in a moment, the events that we commemorate today have never left me.

On October 21, 1986, Attorney General Edwin Meese delivered an address at Tulane University as part of the Tulane Citizens' Forum on the Bicentennial of the Constitution.¹ His address, entitled "The Law of the Constitution,"² explained the "necessary distinction between the Constitution and constitutional law."³ General Meese described the fundamental principle that the Constitution itself is the supreme law of the land and that judicial interpretations of the Constitution, although important, are not the supreme law.⁴ He explained that the "Supreme Court would face quite a dilemma if its own constitutional decisions really were the supreme law of the land, binding on all persons and governmental entities, including the Court itself, for then the Court would not be able to change its mind. It could not overrule itself in a constitutional case. Yet we know that the Court has done so on numerous occasions."⁵

General Meese also addressed a related lesson:

Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.⁶

He elaborated: "Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative

no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect."⁷

General Meese's visit to Tulane, where I was a third-year law student, was a formative experience for me for two reasons. The first reason pertains to the public purpose of his address: that is, his intent to ignite a national conversation about first principles and the Constitution. The second reason pertains to a little-known but nevertheless important part of General Meese's visit: his attendance as the guest of honor at a reception hosted by a then-new student group at the law school. Both matters are testaments to the vision and legacy of Edwin Meese, for which our beloved country owes him a debt of gratitude.

To appreciate the importance of General Meese's public purpose, consider the surprising and heated reaction to his address in the reports of the national news media in the week that followed. In those reports:

- The president of the American Bar Association, Eugene Thomas, asserted that decisions of the Supreme Court are indeed the law of the land and that General Meese's argument would "shake the foundations of our system."⁸
- The executive director of the American Civil Liberties Union, Ira Glasser, described General Meese's speech as an "invitation to lawlessness."⁹
- Professor Laurence Tribe of Harvard Law School argued that General Meese's position "represents a grave threat to the rule of law because it proposes a regime in which every lawmaker and every government agency becomes a law unto itself, and the civilizing hand of a uniform interpretation of the Constitution crumbles."¹⁰

Before General Meese delivered his address, I had sought and secured his permission to publish his speech in a forthcoming issue of the *Tulane Law Review*, for which I served that year as editor in chief. After the histrionic reactions in the news media, I also invited, with General Meese's permission, several scholars to publish, in the same issue of the law

review, commentaries about his speech. In that context, General Meese's speech received the serious treatment and respect that it deserved.

When presented with the full text of General Meese's address instead of selected portions, scholars across the political spectrum admitted the correctness of General Meese's argument.

- Professor Mark Tushnet argued that "for virtually all of the subjects it addressed, the speech was obviously correct, and for the rest, it was probably right."¹¹
- Professor Sandy Levinson explained that it was "difficult to find a firm Archimedean point from which to lambaste Meese,"¹² who had invoked James Madison and Abraham Lincoln, "scarcely figures outside the American mainstream."¹³
- Professor Robert Nagel called the speech a "thoughtful and important contribution to public debate."¹⁴
- And former Solicitor General Rex Lee wrote that "it is the commentators and not the Attorney General who are deserving of criticism, because in their anxiety to criticize, they have assumed an extreme position that he did not in fact take."¹⁵

In the end, General Meese accomplished his purpose: He, in the words of Rex Lee, "turned our attention to some very important issues."¹⁶ And he taught me and other students at our law school enduring lessons.

The rest of the story about General Meese's visit to Tulane has been told publicly only once before. Several months before his visit, General Meese accepted the invitation of our new chapter of the Federalist Society to be our guest of honor at a reception immediately before his address. I was a charter member of that chapter, which I helped start in my first year of law school in 1984 during the founding period, if you will, of the Federalist Society, and I later served as president of the chapter. We were thrilled at the prospect of hosting the Attorney General, who had already hired as an assistant the founder of the first student chapter at Yale, Steve Calabresi, who accompanied General Meese in his visit to Tulane.

When other organizations in Louisiana, including the State Bar and the New Orleans Bar, learned that General Meese had declined their invitations to attend a similar reception because of a prior commitment (that is p-r-i-o-r), their leaders howled in protest to the new dean of the law school, John Kramer, a brash and gregarious liberal who acted speedily to quell the controversy. Dean Kramer told the leaders of our chapter that he would host and finance a reception for the Attorney General and allow our officers to attend the event along with the leaders of other local organizations. Our student leaders responded tartly that our chapter would be pleased to have the dean pay for Cajun and Creole delicacies and an open bar and to allow his guests to attend our reception, but that all of our student members would attend the event. And our student leaders ended with this polite threat: If the dean did not like our terms, then we could ask General Meese to decide. The dean saw that his bluff had been called, and he folded like an accordion.

When the night arrived, General Meese and Steve Calabresi briefly mingled with the guests, and then the dean invited General Meese to offer a few remarks. General Meese then delivered words of warm praise about one thing only: the Federalist Society. He spoke of his hopes for our organization in restoring respect for the Constitution and its original understanding. General Meese said not one word about any other group, and he inspired all the students in attendance.

To give you an idea of how formative an experience this event was for me, I brought with me three items I have kept since then. The first is a poster from Tulane that advertised General Meese's address. The second is a photograph of General Meese and me enjoying cocktails at the reception that evening. The third is a reprint of the speech and commentaries published in the *Tulane Law Review* and signed with a note by General Meese.

My remembrance of the Tulane speech is a fond recollection of a prescient leader. General Meese added to his public contributions to the great debate on originalism, and he quietly supported and inspired the next generation of leaders in law. Many others can tell similar stories about General Meese. That night, I was fortunate to become his friend. In later years, he always remembered me and our brief partnership at Tulane and, in critical moments, assisted me in my career of public service.

Thank you, General Meese, for the help you provided me, but more importantly for your service to our country.

Remarks on the Originalism Revolution

October 5, 2016

The Honorable Edwin Meese III

Judge Pryor, thank you very much for your generous and kind words. It was a great time at Tulane. Little did we realize that 30 years later we would be thinking of that as the start of something that lasted, let alone something that has grown over the years. I certainly appreciate your kind words, but also how you yourself have helped to keep the spirit of constitutional fidelity going in your work both as a lawyer, as Attorney General of Alabama, and as a court of appeals judge. So thank you for your kind words and for your continued service to our country.

I thought it would be interesting to talk about the origin and the background of that Tulane speech. That was actually the third speech that I had given on the subject. The first was in 1985 at the American Bar Association's annual meeting. That was a particularly important annual meeting because it's only about every 13 or 14 years in which the ABA meets first in D.C. and then has a subsequent meeting a week later in London. I was privileged to go to both meetings and deliver this talk.

As I was preparing for a speech, my staff and I sat down and talked about what might be the topic of the speech. We all agreed that this wasn't the time to give an ordinary "welcome to Washington" speech, but rather to have some substance. That was where we came up with the idea of talking about the Constitution and interpretation of the Constitution. There was a reason for that, drawing on the efforts of three people: Ronald Reagan, Robert Bork, and Antonin Scalia.

Ronald Reagan, Robert Bork, and Antonin Scalia: The Originalists

During his time as governor of California, Ronald Reagan learned about what happens when judges don't follow the Constitution and make things up on their own. So he had a particular desire to do something as President that would restore fidelity to the Constitution and interpretation of the Constitution as it was intended by the Founders. He was a great student of our country's Founding period and really felt that this was something that he as President

could do to correct some of the things that had happened since the days of Madison, Hamilton, and the other Founders. It was his feeling that as President, he had a responsibility for the proper interpretation of the Constitution. He carried out this responsibility in three ways.

- First, by having as the policy of the Administration that we would promote a faithful interpretation of the Constitution.
- Second, by advancing this idea in his own speeches, in his own rhetoric. Particularly impressive in this regard was the speech that he gave on the investiture of William Rehnquist as Chief Justice of the United States and Antonin Scalia as an Associate Justice.¹ In that speech, Ronald Reagan talked about the Founders. He talked about the fact that Jefferson and Hamilton disagreed on most subjects, but the one thing that they did agree on was the role of the judge and that the judge should be restrained to interpreting the Constitution as it actually read. That was an important imprimatur on what we did in the Department of Justice.
- Third, by considering faithful interpretation of the Constitution as one of the hallmarks of the people he appointed to the federal courts. He recognized that most interpretation of the Constitution actually takes place at the district courts and the federal appellate courts because only a few cases get to the Supreme Court, so every judge that he appointed had to be committed to being faithful in their interpretation of the Constitution.

The second person was Judge Robert Bork. Bob Bork was really the first to write in modern times about the proper interpretation of the Constitution. In 1971, in the *Indiana Law Journal*, he wrote an article which was entitled "Neutral Principles and Some First Amendment Problems."² There he gave written accounts of how the courts frequently had gone wrong, particularly in the previous 30 or 40 years in terms of interpreting the Constitution, where justices instead of following what the Constitution actually said would substitute their own policy preferences, their own personal ideas, and particularly

their own political views. This article was kind of a cry for change, a cry for help, a cry for returning to what the Constitution actually said.

The third person who picked up on this idea was Antonin Scalia, who was probably the foremost law professor when he was at Harvard. He once said when he joined the faculty of Harvard that you could fire a cannon into the faculty lounge of most law schools and not hit an originalist anywhere. Later, then, as a judge he carried out the responsibility of proper interpretation of the Constitution.

That was the state of constitutional interpretation at the time I delivered the speeches before the ABA and Tulane.

And so, when preparing the speech I would deliver before the ABA, my staff and I sought to further the originalism movement advanced by Ronald Reagan, Robert Bork, and Antonin Scalia. This speech probably would have lain on the shelf someplace and never been heard from again, but something happened. Justice William Brennan happened to read the speech and was very offended because it sounded like I was talking about him. I really wasn't singling him out either by name or by other identification, but I guess he felt that he was guilty. In any event, he decided to give a rebuttal to the speech.³ Then Justice John Paul Stevens chimed in with another speech.⁴ Then I gave a speech back to that.⁵ And then came the Tulane speech.⁶

Bringing Originalism to Law Schools

And so we had a controversy. Fortunately, it got a good deal of attention. As a matter of fact, it got enough attention so that the controversy between those who were originalists and those who were "living Constitution" people—which really means that the Constitution is irrelevant and it's actually dead—resulted in a lively debate, not only among justices and experts on the Constitution, but one that permeated the law schools so that almost every law school now at least has to recognize originalism as a legitimate means of interpretation even though many of the professors think otherwise.

We still have very few originalists on law school faculties, but even fairly liberal law schools are now likely to claim that they have at least one. Odds of 99 to 1 or 75 to 1 are not too bad. The originalists seem to be doing pretty well holding their own in law schools throughout the country. So this is the background of the Tulane speech.

Another thing that brought attention to the doctrine of constitutional fidelity was the founding of the Federalist Society. That society adopted originalism as one of their principal points of discussion and one of the major topics that was part of their student conferences as well as their lawyer conferences every year, and it still continues in the various activities that they promote throughout the country. Just as the Federalist Society has now grown in importance and in scope to encompass virtually every law school in the United States, so the discussion of proper interpretation of the Constitution has continued.

Dividing Power: The Key to Preserving Freedom

In all of this, the most important thing was that we were returning to something that was crucial to the rule of law: the proper interpretation of the Constitution. Now, you might wonder why that is so important. It's really because the Constitution is the foremost document in the world that was designed for the protection of the freedom of the citizens of this United States.

The Founders were faced with a tremendous dilemma in 1787. They had just gone through a terrible war to win independence and to promote the freedom of every citizen in this country. And yet, how do you preserve that? How do you have a central government that had enough energy to do the things that had been lacking up until that time—things like protecting the national defense, engaging in diplomatic relations with other countries around the world, protecting our merchant ships on the high seas? Or how do you promote the idea of commerce among the states in an orderly fashion as opposed to the protectionism that had taken place up until that time?

How do you have, then, freedom on the one hand and energy in a central government on the other? Having studied every civilization, every kind of governmental organization, the Founders came up with the idea that the key to preserving freedom and yet having order and having a government capable of carrying out its responsibilities was dividing power.

They divided it vertically between having certain powers reserved to the federal government and then the bulk of governmental power reserved to the states. Then they divided the federal government horizontally into three independent branches, one

of which was established for virtually the first time in history: an independent judiciary. The linchpin that held this all together was the Constitution.

Now, it is correct that the Declaration of Independence was one of the critical Founding documents, but one of the most important things in the Declaration of Independence is the concept that legitimate governments must depend upon the consent of the governed. That's how our freedom is protected, first by the Declaration of Independence as the philosophy of government which the Founders prescribed and then in the Constitution, which implemented that philosophy in a system of government. That's why having a Constitution that is faithfully interpreted by the courts of this nation is critical to preserving the freedom of all the people of this nation.

So that is the early history of how Ronald Reagan, Robert Bork, Antonin Scalia, the Federalist Society, and others worked to preserve the freedom of the people through proper interpretation of the Constitution. Today, 30 years later, it's important to remember that we all have a responsibility for the future and for those who come after us, to be sure that just as eternal vigilance is the price of liberty, the freedom of the people is only preserved so long as we continue our efforts to consistently and faithfully preserve and protect the Constitution of the United States.

Prime Minister William Gladstone of the United Kingdom once said that our Constitution was the most perfect document ever written by man. I think many of us would agree with that estimate of the Constitution, and that's why we're committed to its preservation for the future.

Speech Before the American Bar Association

July 9, 1985

The Honorable Edwin Meese III

Welcome to our Federal City. It is, of course, entirely fitting that we lawyers gather here in this home of our government. We Americans, after all, rightly pride ourselves on having produced the greatest political wonder of the world—a government of laws and not of men. Thomas Paine was right: “America has no monarch: Here the law is king.”

Perhaps nothing underscores Paine’s assessment quite as much as the eager anticipation with which Americans await the conclusion of the term of the Supreme Court. Lawyers and laymen alike regard the Court not so much with awe as with a healthy respect. The law matters here, and the business of our highest court—the subject of my remarks today—is crucially important to our political order.

At this time of year, I’m always reminded of how utterly unpredictable the Court can be in rendering its judgments. Several years ago, for example, there was quite a controversial case, *TVA v. Hill*. This dispute involved the EPA and the now-legendary snail darter, a creature of curious purpose and forgotten origins. In any event, when the case was handed down, one publication announced that there was some good news and some bad news. The bad news, in their view, was that the snail darter had won; the good news was that he didn’t use the Fourteenth Amendment.

Once again, the Court has finished a term characterized by a nearly crushing workload. There were 4,935 cases on the docket this year; 179 cases were granted review; 140 cases issued in signed opinions; 11 were per curiam rulings. Such a docket lends credence to Tocqueville’s assessment that in America, every political question seems sooner or later to become a legal question. (I won’t even mention the statistics of the lower federal courts; let’s just say I think we’ll all be in business for quite a while.)

In looking back over the work of the Court, I am again struck by how little the statistics tell us about the true role of the Court. In reviewing a term of the Court, it is important to take a moment and reflect upon the proper role of the Supreme Court in our constitutional system. The intended role of the judiciary generally and the Supreme Court in particular

was to serve as the “bulwarks of a limited constitution.” The judges, the Founders believed, would not fail to regard the Constitution as “fundamental law” and would “regulate their decisions” by it. As the “faithful guardians of the Constitution,” the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.

A “Citadel of Public Justice”

You will recall that Alexander Hamilton, defending the federal courts to be created by the new Constitution, remarked that the want of a judicial power under the Articles of Confederation had been the crowning defect of that first effort at a national constitution. Ever the consummate lawyer, Hamilton pointed out that “laws are a dead letter without courts to expound and define their true meaning.”

The Anti-Federalist Brutus took him to task in the New York press for what the critics of the Constitution considered his naiveté. That prompted Hamilton to write his classic defense of judicial power in *The Federalist* No. 78. An independent judiciary under the Constitution, he said, would prove to be the “citadel of public justice and the public security.” Courts were “peculiarly essential in a limited constitution.” Without them, there would be no security against “the encroachments and oppressions of the representative body,” no protection against “unjust and partial” laws.

Hamilton, like his colleague Madison, knew that all political power is “of an encroaching nature.” In order to keep the powers created by the Constitution within the boundaries marked out by the Constitution, an independent—but constitutionally bound—judiciary was essential. The purpose of the Constitution, after all, was the creation of limited but also energetic government, institutions with the power to govern but also with structures to keep the power in check. As Madison put it, the Constitution enabled the government to control the governed but also obliged it to control itself.

But even beyond the institutional role, the Court serves the American Republic in yet another, more subtle way. The problem of any popular government, of course, is seeing to it that the people obey the laws. There are but two ways: either by physical force or

by moral force. In many ways, the Court remains the primary moral force in American politics. Tocqueville put it best:

The great object of justice is to substitute the idea of right for that of violence, to put intermediaries between the government and the use of its physical force....

It is something astonishing what authority is accorded to the intervention of a court of justice by the general opinion of mankind....

The moral force in which tribunals are clothed makes the use of physical force infinitely rarer, for in most cases it takes its place; and when finally physical force is required, its power is doubled by his moral authority.

By fulfilling its proper function, the Supreme Court contributes both to institutional checks and balances and to the moral undergirding of the entire constitutional edifice. For the Supreme Court is the only national institution that daily grapples with the most fundamental political questions—and defends them with written expositions. Nothing less would serve to perpetuate the sanctity of the rule of law so effectively.

But that is not to suggest that the justices are a body of Platonic guardians. Far from it. The Court is what it was understood to be when the Constitution was framed—a political body. The judicial process is, at its most fundamental level, a political process. While not a partisan political process, it is political in the truest sense of that word. It is a process wherein public deliberations occur over what constitutes the common good under the terms of a written constitution.

As a result, as Benjamin Cardozo pointed out, “the greatest tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.” Granting that, Tocqueville knew what was required. As he wrote:

The federal judges therefore must not only be good citizens and men of education and integrity. [They] must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens

to carry them away, and with them the sovereignty of the union and obedience to its laws.

On that confident note, let’s consider the Court’s work this past year. As has been generally true in recent years, the 1984 term did not yield a coherent set of decisions. Rather, it seemed to produce what one commentator has called a “jurisprudence of idiosyncrasy.” Taken as a whole, the work of the term defies analysis by any strict standard. It is neither simply liberal nor simply conservative, neither simply activist nor simply restrained, neither simply principled nor simply partisan. The Court this term continued to roam at large in a veritable constitutional forest.

I believe, however, that there are at least three general areas that merit close scrutiny: federalism, criminal law, and freedom of religion.

Federalism

In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court displayed what was in the view of this Administration an inaccurate reading of the text of the Constitution and a disregard for the Framers’ intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan. Specifically, five justices denied that the Tenth Amendment protects states from federal laws regulating the wages and hours of state or local employees. Thus, the Court overruled—but barely—a contrary holding in *National League of Cities v. Usery*. We hope for a day when the Court returns to the basic principles of the Constitution as expressed in *Usery*; such instability in decisions concerning the fundamental principle of federalism does our Constitution no service.

Meanwhile, the constitutional status of the states further suffered as the Court curbed state power to regulate the economy, notably the professions.

- In *Metropolitan Life Insurance Co. v. Ward*, the Court used the Equal Protection Clause to spear an Alabama insurance tax on gross premiums preferring in-state companies over out-of-state rivals.
- In *Supreme Court of New Hampshire v. Piper*, the Court held that the Privileges and Immunities Clause of Article IV barred New Hampshire from completely excluding a nonresident from admission to its bar.

- With the apparent policy objective of creating unfettered national markets for occupations before its eyes, the Court unleashed Article IV against any state preference for residents involving the professions or service industries. *Hicklin v. Orbeck* and *Baldwin v. Montana Fish and Game Commission* are illustrative.

On the other hand, we gratefully acknowledge the respect shown by the Court for state and local sovereignty in a number of cases, including *Atascadero State Hospital v. Scanlon*.

- In *Atascadero*, a case involving violations of Section 504 of the Rehabilitation Act of 1973, the Court honored the Eleventh Amendment in limiting private damage suits against states. Congress, it said, must express its intent to expose states to liability affirmatively and clearly.
- In *Haille v. Eau Claire*, the Court found that active state supervision of municipal activity was not required to cloak municipalities with immunity under the Sherman Act.
- States were judged able to confer Sherman Act immunity upon private parties in *Southern Motor Carrier Rate Conference, Inc. v. United States*. They must, said the Court, clearly articulate and affirmatively express a policy to displace competition with compelling anticompetitive action so long as the private action is actively supervised by the state.
- And in *Oklahoma City v. Tuttle*, the Court held that a single incident of unconstitutional and egregious police misconduct is insufficient to support a Section 1983 action against municipalities for allegedly inadequate police training or supervision.

Our view is that federalism is one of the most basic principles of our Constitution. By allowing the states sovereignty sufficient to govern, we better secure our ultimate goal of political liberty through decentralized government.

We do not advocate states' rights; we advocate states' responsibilities. We need to remember that state and local governments are not inevitably abusive of rights. It was, after all, at the turn of the

century the states that were the laboratories of social and economic progress—and the federal courts that blocked their way. We believe that there is a proper constitutional sphere for state governance under our scheme of limited, popular government.

Criminal Law

Recognizing, perhaps, that the nation is in the throes of a drug epidemic which has severely increased the burden borne by law enforcement officers, the Court took a more progressive stance on the Fourth Amendment, undoing some of the damage previously done by its piecemeal incorporation through the Fourteenth Amendment. Advancing from its landmark *Leon* decision in 1984, which created a good-faith exception to the Exclusionary Rule when a flawed warrant is obtained by police, the Court permitted warrantless searches under certain limited circumstances.

The most prominent among these Fourth Amendment cases were:

- *New Jersey v. T.L.O.*, which upheld warrantless searches of public school students based on reasonable suspicion that a law or school rule has been violated; this also restored a clear local authority over another problem in our society, school discipline.
- *California v. Carney*, which upheld the warrantless search of a mobile home.
- *U.S. v. Sharpe*, which approved on-the-spot detention of a suspect for preliminary questioning and investigation.
- *U.S. v. Johns*, upholding the warrantless search of sealed packages in a car several days after their removal by police who possessed probable cause to believe the vehicle contained contraband.
- *U.S. v. Hensley*, which permitted a warrantless investigatory stop based on an unsworn flyer from a neighboring police department which possessed reasonable suspicion that the detainee was a felon.
- *Hayes v. Florida*, which tacitly endorsed warrantless seizures in the field for the purpose of fingerprinting based on reasonable suspicion of criminal activity.

- *U.S. v. Hernandez*, which upheld border detentions and warrantless searches by customs officials based on reasonable suspicion of criminal activity.

Similarly, the Court took steps this term to place the *Miranda* ruling in proper perspective, stressing its origin in the Court rather than in the Constitution. In *Oregon v. Elstad*, the Court held that failure to administer *Miranda* warnings and the consequent receipt of a confession ordinarily will not taint a second confession after *Miranda* warnings are received.

The enforcement of criminal law remains one of our most important efforts. It is crucial that the state and local authorities—from the police to the prosecutors—be able to combat the growing tide of crime effectively. Toward that end, we advocate a due regard for the rights of the accused—but also a due regard for the keeping of the public peace and the safety and happiness of the people. We will continue to press for a proper scope for the rules of exclusion, lest truth in the fact-finding process be allowed to suffer.

I have mentioned the areas of federalism and criminal law. Now I will turn to the religion cases.

Religion

Most probably, this term will be best remembered for the decisions concerning the Establishment Clause of the First Amendment. The Court continued to apply its standard three-pronged test. Four cases merit mention.

- In the first, *City of Grand Rapids v. Ball*, the Court nullified shared time and community education programs offered within parochial schools. Although the programs provided instruction in nonsectarian subjects and were taught by full-time or part-time public school teachers, the Court nonetheless found that they promoted religion in three ways: The state-paid instructors might wittingly or unwittingly indoctrinate students; the symbolic union of church and state interest in state-provided instruction signaled support for religion; and the programs in effect subsidized the religious functions of parochial schools by relieving them of responsibility for teaching some secular subjects. The symbolism test proposed in *Ball* precludes virtually any state assistance offered to parochial schools.
- In *Aguilar v. Felton*, the Court invalidated a program of secular instruction for low-income students in sectarian schools provided by public school teachers who were supervised to safeguard students against efforts of indoctrination. With a bewildering Catch-22 logic, the Court declared that the supervisory safeguards at issue in the statute constituted unconstitutional government entanglement: “The religious school, which has as a primary purpose the advancement and preservation of a particular religion, must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.”
- In *Wallace v. Jaffree*, the Court said in essence that states may set aside time in public schools for meditation or reflection so long as the legislation does not stipulate that it be used for voluntary prayer. Of course, what the Court gave with one hand, it took back with the other: The Alabama moment of silence statute failed to pass muster.
- In *Thornton v. Caldor*, a 7-2 majority overturned a state law prohibiting private employers from discharging an employee for refusing to work on his Sabbath. We hope that this does not mean that the Court is abandoning last term’s first but tentative steps toward state accommodation of religion in the creche case.

In trying to make sense of the religion cases—from whichever side—it is important to remember how this body of tangled case law came about. Most Americans forget that it was not until 1925, in *Gitlow v. New York*, that any provision of the Bill of Rights was applied to the states. Nor was it until 1947 that the Establishment Clause was made applicable to the states through the Fourteenth Amendment. This is striking because the Bill of Rights, as debated, created, and ratified, was designed to apply only to the national government.

The Bill of Rights came about largely as the result of the demands of the critics of the new Constitution, the unfortunately misnamed Anti-Federalists. They feared, as George Mason of Virginia put it, that in time the national authority would “devour” the states. Since each state had a bill of rights, it was

only appropriate that so powerful a national government as that created by the Constitution have one as well. Though Hamilton insisted a Bill of Rights was not necessary and even destructive, and Madison (at least at first) thought a Bill of Rights to be but a “parchment barrier” to political power, the Federalists agreed to add a Bill of Rights.

Though the first 10 amendments that were ultimately ratified fell far short of what the Anti-Federalists desired, both Federalists and Anti-Federalists agreed that the amendments were a curb on national power. When this view was questioned before the Supreme Court in *Barron v. Baltimore* (1833), Chief Justice Marshall wholeheartedly agreed. The Constitution said what it meant and meant what it said. Neither political expediency nor judicial desire was sufficient to change the clear import of the language of the Constitution. The Bill of Rights did not apply to the states—and, he said, that was that.

Until 1925, that is.

Since then, a good portion of constitutional adjudication has been aimed at extending the scope of the doctrine of incorporation. But the most that can be done is to expand the scope; nothing can be done to shore up the intellectually shaky foundation upon which the doctrine rests. And nowhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation.

In thinking particularly of the use to which the First Amendment has been put in the area of religion, one finds much merit in Justice Rehnquist’s recent dissent in *Jaffree*. “It is impossible,” Justice Rehnquist argued, “to build sound constitutional doctrine upon a mistaken understanding of constitutional history.” His conclusion was bluntly to the point: “If a constitutional theory has no basis in the history of the amendment it seeks to interpret, it is difficult to apply and yields unprincipled results.”

The point, of course, is that the Establishment Clause of the First Amendment was designed to prohibit Congress from establishing a national church. The belief was that the Constitution should not allow Congress to designate a particular faith or sect as politically above the rest. But to have argued, as is popular today, that the Amendment demands a strict neutrality between religion and irreligion would have struck the Founding generation as bizarre. The purpose was to prohibit religious tyranny, not to undermine religion generally.

In considering these areas of adjudication—federalism, criminal law, and religion—it seems fair to conclude that far too many of the Court’s opinions were, on the whole, more policy choices than articulations of constitutional principle. The voting blocs, the arguments, all reveal a greater allegiance to what the Court thinks constitutes sound public policy than a deference to what the Constitution—its text and intention—may demand. It is also safe to say that until there emerges a coherent jurisprudential stance, the work of the Court will continue in this ad hoc fashion.

But that is not to argue for *any* jurisprudence. In my opinion, a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government.

Judging Policies in Light of Principles: A Jurisprudence of Original Intention

What, then, should a constitutional jurisprudence actually be? It should be a jurisprudence of original intention. By seeking to judge policies in light of principles rather than to remold principles in light of policies, the Court could avoid both the charge of incoherence *and* the charge of being either too conservative or too liberal. A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.

This belief in a jurisprudence of original intention also reflects a deeply rooted commitment to the idea of democracy. The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is why it is the fundamental law. To allow the Court to govern simply by what it views at the time as fair and decent is a scheme of government no longer popular. The idea of democracy has suffered. The permanence of the Constitution has been weakened. A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.

Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shocking new theory; nor is it arcane or archaic.

Joseph Story, who was in a way a lawyer's Everyman—lawyer, justice, and teacher of law—had a theory of judging that merits reconsideration. Though speaking specifically of the Constitution, his logic reaches to statutory construction as well.

In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear and determinate, they require no interpretation.... Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.

A jurisprudence of original intention would take seriously the admonition of Justice Story's friend and colleague, John Marshall, in *Marbury v. Madison* that the Constitution is a limitation on judicial power as well as executive and legislative. That is what Chief Justice Marshall meant in *McCulloch v. Maryland* when he cautioned judges never to forget it is a constitution they are expounding.

It has been and will continue to be the policy of this Administration to press for a jurisprudence of original intention. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.

Within this context, let me reaffirm our commitment to pursuing the policies most necessary to public justice. We will continue our vigorous enforcement of civil rights laws; we will not rest till unlawful discrimination ceases. We will continue our all-out war on drugs—both supply and demand, both national and international in scope. We intend to bolster public safety by a persistent war on crime. We will endeavor to stem the growing tide of pornography and its attendant costs, sexual and child abuse. We will be battling the heretofore largely ignored legal cancer of white-collar crime and its cousin, defense procurement fraud.

And finally, as we still reel as a people, I pledge to you our commitment to fight terrorism here and abroad. For as long as the innocent are fair prey for the barbarians of this world, civilization is not safe.

We will pursue our agenda within the context of our written Constitution of limited yet energetic powers. Our guide in every case will be the sanctity of the rule of law and the proper limits of governmental power.

It is our belief that only “the sense in which the Constitution was accepted and ratified by the nation” and only the sense in which laws were drafted and passed provide a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law.

Speech Before the D.C. Chapter of the Federalist Society Lawyers Division

November 15, 1985

The Honorable Edwin Meese III

A large part of American history has been the history of constitutional debate. From the Federalists and the Anti-Federalists, to Webster and Calhoun, to Lincoln and Douglas, we find many examples. Now, as we approach the bicentennial of the framing of the Constitution, we are witnessing another debate concerning our fundamental law. It is not simply a ceremonial debate, but one that promises to have a profound impact on the future of our Republic.

The current debate is sign of a healthy nation. Unlike people of many other countries, we are free both to discover the defects of our laws and our government through open discussion and to correct them through our political system.

This debate on the Constitution involves great and fundamental issues. It invites the participation of the best minds the bar, the academy, and the bench have to offer. In recent weeks, there have been important new contributions to this debate from some of the most distinguished scholars and jurists in the land. Representatives of the three branches of the federal government have entered the debate, as have journalistic commentators.

A great deal has already been said, much of it of merit and on point, but occasionally there has been confusion. There has been some misunderstanding, some perhaps on purpose. Caricatures and straw men, as one customarily finds even in the greatest debates, have made appearances. Still, whatever the differences, most participants are agreed about the same high objective: fidelity to our fundamental law.

The Meaning of Constitutional Fidelity

Today, I would like to discuss further the meaning of constitutional fidelity. In particular, I would like to describe in more detail this Administration's approach.

Before doing so, I would like to make a few commonplace observations about the original document itself. It is easy to forget what a young country America really is. The bicentennial of our independence was just a few years ago, that of the Constitution still two years off. The period surrounding the creation of the

Constitution is not a dark and mythical realm. The young America of the 1780s and '90s was a vibrant place, alive with pamphlets, newspapers, and books chronicling and commenting upon the great issues of the day.

We know how the Founding Fathers lived and much of what they read, thought, and believed. The disputes and compromises of the Constitutional Convention were carefully recorded. The minutes of the convention are a matter of public record. Several of the most important participants—including James Madison, the “father” of the Constitution—wrote comprehensive accounts of the convention. Others, Federalists and Anti-Federalists alike, committed their arguments for and against ratification, as well as their understandings of the Constitution, to paper so that their ideas and conclusions could be widely circulated, read, and understood.

In short, the Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis. The bicentennial is encouraging even more scholarship about its origins. We know who did what, when, and many times why. One can talk intelligently about a “founding generation.”

With these thoughts in mind, I would like to discuss the Administration's approach to constitutional interpretation. But to begin, it may be useful to say what it is *not*.

Our approach does not view the Constitution as some kind of super-municipal code, designed to address merely the problems of a particular era—whether those of 1787, 1789, or 1868. There is no question that the Constitutional Convention grew out of widespread dissatisfaction with the Articles of Confederation, but the delegates at Philadelphia moved beyond the job of patching that document to write a *Constitution*. Their intention was to write a document not just for their names, but for posterity.

The language they employed clearly reflects this. For example,

- They addressed commerce, not simply shipping or barter.
- Later, the Bill of Rights spoke through the Fourth Amendment to “unreasonable searches and seizures,” not merely the regulation of specific law enforcement practices of 1789.

- Still later, the Framers of the Fourteenth Amendment were concerned not simply about the rights of black citizens to personal security, but also about the equal protection of the law for all persons within the states.

The Constitution is not a legislative code bound to the time in which it was written. Neither, however, is it a mirror that simply reflects the thoughts and ideas of those who stand before it.

Our approach to constitutional interpretation begins with the document itself. The plain fact is, it exists. It is something that has been written down. Walter Berns of the American Enterprise Institute has noted that the central object of American constitutionalism was “the effort” of the Founders “to express fundamental governmental arrangements in a legal document—to ‘get it in writing.’” Indeed, judicial review has been grounded in the fact that the Constitution is a written, as opposed to an unwritten, document. In *Marbury v. Madison*, John Marshall rested his rationale for judicial review on the fact that we have a written constitution with meaning that is binding upon judges. “[I]t is apparent,” he wrote, “that the framers of the Constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it?”

The presumption of a written document is that it conveys meaning. As Thomas Grew of the Stanford Law School has said, it makes “relatively definite and explicit what otherwise would be relatively indefinite and tacit.”

We know that those who framed the Constitution chose their words carefully. They debated at great length the most minute points. The language they chose meant something. They proposed, they substituted, they edited, and they carefully revised. Their words were studied with equal care by state ratifying conventions.

This is not to suggest that there was unanimity among the Framers and ratifiers on all points. The Constitution and the Bill of Rights, and some of the subsequent amendments, emerged after protracted debate. Nobody got everything they wanted. What’s more, the Framers were not clairvoyants: They could not foresee every issue that would be submitted for judicial review. Nor could they predict how all foreseeable disputes would be resolved under the

Constitution. But the point is, the meaning of the Constitution can be known.

What does this written Constitution mean? In places, it is exactingly specific. Where it says the Presidents of the United States must be at least 35 years of age, it means exactly that. (I have not heard of any claim that 35 means 30 or 25 or 20.) Where it specifies how the House and Senate are to be organized, it means what it says.

The Constitution also expresses particular principles. One is the right to be free of an unreasonable search or seizure. Another concerns religious liberty. Another is the right to equal protection of the laws. Those who framed these principles meant something by them, and the meanings can be found. The Constitution itself is also an expression of certain general principles. These principles reflect the deepest purpose of the Constitution: that of establishing a political system through which Americans can best govern themselves consistent with the goal of securing liberty.

The text and structure of the Constitution is instructive. It contains very little in the way of specific political solutions. It speaks volumes on how problems should be approached and by *whom*. For example, the first three articles set out clearly the scope and limits of three distinct branches of national government, the powers of each being carefully and specifically enumerated. In this scheme, it is no accident to find the legislative branch described first, as the Framers had fought and sacrificed to secure the right of democratic self-governance. Naturally, this faith in republicanism was not unbounded, as the next two articles make clear.

A Document of Powers and Principles

Yet the Constitution remains a document of powers and principles, and its undergirding premise remains that democratic self-government is subject only to the limits of certain constitutional principles. This respect of the political process was made explicit early on.

When John Marshall upheld the Act of Congress chartering a national bank in *McCulloch v. Maryland*, he wrote: “The Constitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.” But to use *McCulloch*, as some have tried, as support for the idea that the Constitution is a protean, changeable thing is to stand history on its head. Marshall

was keeping faith with the original intention that Congress be free to elaborate and apply constitutional powers and principles. He was not saying that the Court must invent some new constitutional value in order to keep pace with the times. In Walter Berns's words, "Marshall's meaning is not that the Constitution may be adapted to the 'various crises of human affairs,' but that the legislative powers granted by the Constitution are adaptable to meet these crises."

The approach this Administration advocates is rooted in the text of the Constitution as illuminated by those who drafted, proposed, and ratified it. In his famous *Commentaries on the Constitution of the United States*, Justice Joseph Story explained that "[t]he first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."

Our approach understands the significance of a written document and seeks to discern the particular and general principles it expresses. It recognizes that there may be debate at times over the application of these principles, but it does not mean these principles cannot be identified.

Constitutional adjudication is obviously not a mechanical process. It requires an appeal to reason and discretion. The text and intention of the Constitution must be understood to constitute the banks within which constitutional interpretation must flow. As James Madison said, if "the sense in which the Constitution was accepted and ratified by the nation...be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."

Thomas Jefferson, so often cited incorrectly as a Framers of the Constitution, in fact shared Madison's view: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Jefferson was even more explicit in his personal correspondence:

On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find], what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it passed.

In the main, jurisprudence that seeks to be faithful to our Constitution—a jurisprudence of original intention, as I have called it—is not difficult to describe. Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

Sadly, while almost everyone participating in the current constitutional debate would give assent to these propositions, the techniques and conclusions of some of the debaters do violence to them. What is the source of this violence? In large part, I believe that it is the misuse of history stemming from the neglect of the idea of a written constitution.

There is a frank proclamation by some judges and commentators that what matters most about the Constitution is not its words but its so-called spirit. These individuals focus less on the language of specific provisions than on what they describe as the "vision" or "concepts of human dignity" they find embodied in the Constitution. This approach to jurisprudence has led to some remarkable and tragic conclusions.

In the 1850s, the Supreme Court under Chief Justice Roger B. Taney read blacks out of the Constitution in order to invalidate Congress's attempt to limit the spread of slavery. The *Dred Scott* decision, famously described as a judicial "self-inflicted wound," helped bring on the Civil War. There is a lesson in this history: There is danger in seeing the Constitution as an empty vessel into which each generation may pour its passion and prejudice.

Our own time has its own fashions and passions. In recent decades, many have come to view the Constitution—more accurately, part of the Constitution, provisions of the Bill of Rights and the Fourteenth Amendment—as a charter for judicial activism on behalf of various constituencies. Those who hold this view often have lacked demonstrable textual or historical support for their conclusions. Instead, they have "grounded" their rulings in appeals to social theories, to moral philosophies or personal notions of human dignity, or to "penumbras," somehow emanating ghostlike from various provisions—identified and not identified—in the Bill of Rights. The problem

with this approach is that, as John Hart Ely, dean of the Stanford Law School, has observed with respect to one such decision, it is not that it is bad constitutional law, but that it is not constitutional law in any meaningful sense at all.

Despite this fact, the perceived popularity of some results in particular cases has encouraged some observers to believe that any critique of the methodology of those decisions is an attack on the results. This perception is sufficiently widespread that it deserves an answer. My answer is to look at history.

The Lessons of History

When the Supreme Court, in *Brown v. Board of Education*, sounded the death knell for official segregation in the country, it earned all the plaudits it received, but the Supreme Court in that case was not giving new life to old words or adapting a “living,” “flexible” Constitution to new reality. It was restoring the original principle of the Constitution to constitutional law. The *Brown* Court was correcting the damage done 50 years earlier, when in *Plessy v. Ferguson* an earlier Supreme Court had disregarded the clear intent of the framers of the Civil War amendments to eliminate the legal degradation of blacks, and had contrived a theory of the Constitution to support the charade of “separate but equal” discrimination.

Similarly, the decisions of the New Deal and beyond that freed Congress to regulate commerce and enact a plethora of social legislation were not judicial adaptations of the Constitution to new realities. They were in fact removals of encrustations of earlier courts that had strayed from the original intent of the Framers regarding the power of the legislature to make policy.

It is amazing how so much of what passes for social and political progress is really the undoing of old judicial mistakes. Mistakes occur when the principles of specific constitutional provisions—such as those contained in the Bill of Rights—are taken by some as invitations to read into the Constitution values that contradict the clear language of other provisions.

Acceptances to this illusory invitation have proliferated in recent decades. One Supreme Court justice identified the proper judicial standard as asking “what’s best for this country.” Another said it is important to “keep the Court out in front” of the general

society. Various academic commentators have poured rhetorical grease on this judicial fire, suggesting that constitutional interpretation appropriately be guided by such standards as whether a public policy “personifies justice” or “comports with the notion of moral evolution” or confers “an identity” upon our society or was consistent with “natural ethical law” or was consistent with some “right of equal citizenship.”

Unfortunately, as I’ve noted, navigation by such lodestars has in the past given us questionable economics, governmental disorder, and racism—all in the guise of constitutional law. Recently, one of the distinguished judges of one of our federal appeals courts got it about right when he wrote: “The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else.” Or, as we recently put it before the Supreme Court in an important brief, “The further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning.”

In the *Osborne v. Bank of the United States* decision 21 years after *Marbury*, Chief Justice Marshall further elaborated his view of the relationship between the judge and the law, be it statutory or constitutional:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it.

Any true approach to constitutional interpretation must respect the document in all its parts and be faithful to the Constitution in its entirety. What must be remembered in the current debate is that interpretation does not imply results. The Framers were not trying to anticipate every answer. They were trying to create a tripartite national government, within a federal system, that would have the flexibility to adapt to face new exigencies—as it did, for example, in chartering a national bank. Their great interest was in the distribution of power and responsibility in order to secure the great goal of liberty for all.

The Genius of Our Constitutional Blueprint

A jurisprudence that seeks fidelity to the Constitution—a jurisprudence of original intention—is not a jurisprudence of political results. It is very much concerned with process, and it is a jurisprudence that in our day seeks to depoliticize the law. The great genius of the constitutional blueprint is found in its creation and respect for spheres of authority and the limits it places on governmental power. In this scheme, the Framers did not see the courts as the exclusive custodians of the Constitution. Indeed, because the document posits so few conclusions, it leaves to the more political branches the matter of adapting and vivifying its principles in each generation. It also leaves to the people of the states, in the Tenth amendment, those responsibilities and rights not committed to federal care.

The power to declare acts of Congress and laws of the states null and void is truly awesome. This power must be used when the Constitution clearly speaks. It should not be used when the Constitution does not.

In *Marbury v. Madison*, at the same time he vindicated the concept of judicial review, Marshall wrote that the “principles” of the Constitution “are deemed fundamental and permanent” and, except for formal amendment, “unchangeable.” If we want a change in our Constitution or in our laws, we must seek it through the formal mechanisms presented in that organizing document of our government.

In summary, I would emphasize that what is at issue here is not an agenda of issues or a menu of results. At issue is a way of government. A jurisprudence based on first principles is neither conservative nor liberal, neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of government the proper ambit of its responsibilities. It is a jurisprudence faithful to our Constitution.

By the same token, an activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence, changing color and form in each era. The same activism hailed today may threaten the capacity for decision through democratic consensus tomorrow, as it has in many yesterdays. Ultimately, as the early democrats wrote into the Massachusetts state constitution, the best defense of our liberties is a government of laws and not men.

On this point, it is helpful to recall the words of the late Justice Frankfurter. As he wrote:

[T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate.

I am afraid that I have gone on somewhat too long. I realize that these occasions of your society are usually reserved for brief remarks. But if I have imposed upon your patience, I hope it has been for a good end. Given the timeliness of this issue and the interest of this distinguished organization, it has seemed an appropriate forum to share these thoughts.

I close, unsurprisingly, by returning a last time to the period of the Constitution’s birth. As students of the Constitution are aware, the struggle for ratification was protracted and bitter. Essential to the success of the campaign was the outcome of the debate in the two most significant states: Virginia and New York.

In New York, the battle between Federalist and Anti-Federalist forces was particularly hard. Both sides eagerly awaited the outcome in Virginia, which was sure to have a profound effect on the struggle in the Empire State. When news that Virginia had voted to ratify came, it was a particularly bitter blow to the Anti-Federalist side. Yet on the evening the message reached New York, an event took place that speaks volumes about the character of early America. The losing side, instead of grousing, feted the Federalist leaders in the taverns and inns of the city. There followed a night of drinking, good fellowship, and mutual toasting. When the effects of the good cheer wore off, the two sides returned to their inkwells and presses, and the debate resumed.

There is a great temptation among those who view this debate from the outside to see in it a clash of personalities, a bitter exchange. But you and I and the other participants in this dialogue know better. We and our distinguished opponents carry on the old tradition of free, uninhibited, and vigorous debate. Out of such arguments come no losers, only truth. It’s the American way, and the Founders wouldn’t want it any other way.

The Law of the Constitution

October 21, 1986

The Honorable Edwin Meese III

I'm very pleased to be here with you tonight at Tulane to take part in this Citizens Forum and to pay our respects to that great document which has been so essential to our happiness and freedom: the Constitution. Bob Strong, in particular, is to be commended for putting together this important seminar. For the opportunity for citizens to gather and discuss important public issues is the greatest strength of our democracy, and to pause and reflect on our great charter on this eve of our bicentennial is especially important.

Perhaps no country in history has been blessed with liberty and prosperity more than our own. And while our Founding Fathers were careful to give thanks to divine Providence, they also knew much effort and sacrifice would be due from them if their good fortune was to continue.

As you know, recently, in the East Room of the White House, a new Chief Justice and a new Justice of the Supreme Court were sworn in: William Rehnquist and Antonin Scalia, respectively. After both men had taken their oaths to support the Constitution, President Reagan reflected on what he called the "inspired wisdom" of our Constitution:

Hamilton, Jefferson and all the Founding Fathers recognized that the Constitution is the supreme and ultimate expression of the will of the American people. They saw that no one in office could remain above it, if freedom were to survive through the ages. They understood that, in the words of James Madison, if "the sense in which the Constitution was accepted and ratified by the nation is not the guide in expounding it, there can be no security for a faithful exercise of its powers."

In concluding, the President repeated a warning given by Daniel Webster more than a century ago. It is a thought especially worth remembering as we approach the bicentennial anniversary of our Constitution. "Miracles do not cluster," Webster said. "Hold on to the Constitution of the United States of America and to the Republic for which it

stands—what has happened once in 6,000 years may never happen again. Hold on to your Constitution, for if the American Constitution shall fall there will be anarchy throughout the world."

America's "Novel Experiment"

During its nearly 200 years, the Constitution, which Gladstone pronounced "the most wonderful work ever struck off at a given time by the brain and purpose of man," has been reflected upon and argued about from many perspectives by great men and lesser ones. The scrutiny has not always been friendly. The debates over ratification, for example, were often rancorous, and scorn was poured on many of the constitutional provisions devised by the Federal Convention in 1787.

The Federalists and the Anti-Federalists were, to say the very least, in notable disagreement. Richard Henry Lee of Virginia, a leading Anti-Federalist, was convinced, for example, that the new Constitution was "in its first principles, [most] highly and dangerously oligarchic." He feared, as did a good many others, for the fate of democratic government under so powerful an instrument. Still others thought it unlikely that so large a nation could survive without explicit provision for cultivating civic virtue among the citizens. The critics of the proposed Constitution had serious reservations about this new enterprise in popular government, an effort even the friends of the Constitution conceded was a "novel experiment."

No sooner was the Constitution adopted than it became an object of astonishing reverence. The losers in the great ratification debates pitched in to make the new government work. Indeed, so vast was the public enthusiasm that one Senator complained that, in praising the new government, "declamatory gentlemen" were painting "the state of the country under the old Congress"—that is, under the Articles of Confederation—"as if neither wood grew nor water ran in America before the happy adoption of the new Constitution."

It has not all been easy going, of course. There has been some pretty rough sailing during the nearly 200 years under the Constitution. In fact, the greatest political tragedy in American history was played out in terms of the principles of the Constitution. You see, the debate over nationalism versus confederalism that had first so divided the Federal

Convention and later had inflamed the animosities of Federalists and Anti-Federalists lingered on. Its final resolution was a terrible and bloody one: the War Between the States. And in the war's wake, the once giddy, almost unqualified adoration of the Constitution subsided into realism.

Today, our great charter is once again under close scrutiny. Once again, it is grist for the editorial mills of our nation's newspapers and news magazines. And while the attention is generally respectful, it is, to be sure, not uncritical. This attitude, I think, befits both the subject and our times. It shows better than anything else the continuing health of our Republic and the vigor of our politics.

Distinguishing Between the Constitution and Constitutional Law

Since becoming Attorney General, I have had the pleasure to speak about the Constitution on several occasions. I have tried to examine it from many angles. I have discussed its moral foundations. I have also addressed on separate occasions its great structural principles: federalism and separation of powers. Tonight I would like to look at it from yet another perspective and try to develop further some of the views that I have already expressed. Specifically, I would like to consider a distinction that is essential to maintaining our limited form of government. This is the necessary distinction between the Constitution and constitutional law. The two are not synonymous. What, then, is this distinction?

The Constitution is—to put it simply but one hopes not simplistically—the Constitution. It is a document of our most fundamental law. It begins “We the People of the United States, in Order to form a more perfect Union” and ends up, some 6,000 words later, with the Twenty-Sixth Amendment. It creates the institutions of our government, it enumerates the powers those institutions may wield, and it cordons off certain areas into which government may not enter. It prohibits the national authority, for example, from passing *ex post facto* laws while it prohibits the states from violating the obligations of contracts.

The Constitution is, in brief, the instrument by which the consent of the governed—the fundamental requirement of any legitimate government—is transformed into a government complete with the powers to act and a structure designed to make it act wisely or responsibly. Among its various internal

contrivances (as James Madison called them) we find federalism, separation of powers, bicameralism, representation, an extended commercial republic, an energetic executive, and an independent judiciary. Together, these devices form the machinery of our popular form of government and secure the rights of the people.

The Constitution, then, is the Constitution, and as such it is, in its own words, “the supreme Law of the Land.”

Constitutional law, on the other hand, is that body of law that has resulted from the Supreme Court's adjudications involving disputes over constitutional provisions or doctrines. To put it a bit more simply, constitutional law is what the Supreme Court says about the Constitution in its decisions resolving the cases and controversies that come before it.

In its limited role of offering judgment, the Court has had a great deal to say. In almost 200 years, it has produced nearly 500 volumes of reports of cases. While not all these opinions deal with constitutional questions, of course, a good many do. This stands in marked contrast to the few, slim paragraphs that have been added to the original Constitution as amendments. So, in terms of sheer bulk, constitutional law greatly overwhelms the Constitution, but in substance, it is meant to support and not overwhelm the Constitution from which it is derived.

This body of law, this judicial handiwork, is in a fundamental way unique in our scheme, for the Court is the only branch of our government that routinely, day in and day out, is charged with the awesome task of addressing the most basic, the most enduring, political questions: What is due process of law? How does the idea of separation of powers affect the Congress in certain circumstances? And so forth. The answers the Court gives are very important to the stability of the law so necessary for good government. Yet as constitutional historian Charles Warren once noted, what's most important to remember is that “however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court.”

By this, of course, Charles Warren did not mean that a constitutional decision by the Supreme Court lacks the character of law. Obviously, it does have binding quality: It binds the parties in a case and also the executive branch for whatever enforcement is necessary. But such a decision does not establish

a “supreme Law of the Land” that is binding on all persons and parts of government henceforth and forevermore.

This point should seem so obvious as not to need elaboration. Consider its necessity in particular reference to the Court’s own work. The Supreme Court would face quite a dilemma if its own constitutional decisions really were the “supreme Law of the Land” binding on all persons and governmental entities, including the Court itself, for then the Court would not be able to change its mind. It could not overrule itself in a constitutional case. Yet we know that the Court has done so on numerous occasions. I do not have to remind a New Orleans audience of the fate of *Plessy v. Ferguson*, the infamous case involving a Louisiana railcar law, which in 1896 established the legal doctrine of “separate but equal.” It finally and fortunately was struck down in 1954, in *Brown v. Board of Education*. Just this past term, the Court overruled itself in *Batson v. Kentucky* by reversing a 1965 decision that had made preemptory challenges to persons on the basis of race virtually unreviewable under the Constitution.

Denying the Distinction: *Dred Scott*

These and other examples teach effectively the point that constitutional law and the Constitution are not the same. Even so, although the point may seem obvious, there have been those throughout our history—and especially, it seems, in our own time—who have denied the distinction between the Constitution and constitutional law. Such denial usually has gone hand in hand with an affirmation that constitutional decisions are on a par with the Constitution in the sense that they too are the “supreme Law of the Land,” from which there is no appeal.

Perhaps the most well-known instance of this denial occurred during the most important crisis in our political history. In 1857, in the *Dred Scott* case, the Supreme Court struck down the Missouri Compromise by declaring that Congress could not prevent the extension of slavery into the territories and that blacks could not be citizens and thus eligible to enjoy the constitutional privileges of citizenship. This was a constitutional decision, for the Court said that the right of whites to possess slaves was a property right affirmed in the Constitution.

This decision sparked the greatest political debate in our history. In the 1858 Senate campaign in Illinois, Stephen Douglas went so far in his defense of *Dred*

Scott as to equate the decision with the Constitution. “It is the fundamental principle of the judiciary,” he said in his third debate with his opponent, Abraham Lincoln, “that its decisions are final. It is created for that purpose so that when you cannot agree among yourselves on a disputed point you appeal to the judicial tribunal which steps in and decides for you, and that decision is binding on every good citizen.” Furthermore, he said, “The Constitution has created that Court to decide all Constitutional questions in the last resort, and when such decisions have been made, they become the law of the land.” It plainly was Douglas’s view that constitutional decisions by the Court were authoritative, controlling, and final, binding on all persons and parts of government the instant they are made—from then on.

Lincoln, of course, disagreed. In his response to Douglas, we can see the nuances and subtleties and the correctness of the position that makes most sense in a constitutional democracy like ours—a position that seeks to maintain the important function of judicial review while at the same time upholding the right of the people to govern themselves through the democratic branches of government.

Lincoln said that insofar as the Court “decided in favor of Dred Scott’s master and against Dred Scott and his family”—the actual parties in the case—he did not propose to resist the decision. But Lincoln went on to say:

We nevertheless do oppose [*Dred Scott*]...as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.

I have provided this example not only because it comes from a well-known episode in our history, but also because it helps us understand the implications of this important distinction. If a constitutional decision is not the same as the Constitution itself, if it is not binding in the same way that the Constitution is, we as citizens may respond to a decision with which we disagree. As Lincoln in effect pointed out, we can make our responses through the Presidents, the Senators, and the Representatives we elect at the national level. We can also make them through those we elect at the state and local levels. Thus, not only

can the Supreme Court respond to its previous constitutional decisions and change them, as it did in *Brown* and has done on many other occasions, but so can the other branches of government and, through them, the American people. As we know, Lincoln himself worked to overturn *Dred Scott* through the executive branch. The Congress joined him in this effort. Fortunately, *Dred Scott*—the case—lived a very short life.

Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: Constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.

The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect.

For the same reason that the Constitution cannot be reduced to constitutional law, the Constitution cannot simply be reduced to what Congress or the President say it is either. Quite the contrary: The Constitution, the original document of 1787 plus its amendments, is and must be understood to be the standard against which all laws, policies, and interpretations must be measured. It is the consent of the governed with which the actions of the governors must be squared.

And this also applies to the power of judicial review. For as Felix Frankfurter once said, “The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”

Judicial Review and *Cooper v. Aaron*

Judicial review of congressional and executive actions for their constitutionality has played a major role throughout our political history. The exercise of this power produces constitutional law. In this task, even the courts themselves have on occasion been tempted to think that the law of their decisions is on a par with the Constitution.

Some 30 years ago, in the midst of great racial turmoil, our highest Court seemed to succumb to this very temptation. By a flawed reading of our Constitution and *Marbury v. Madison*, and an even more faulty syllogism of legal reasoning, the Court in a 1958 case called *Cooper v. Aaron* appeared to arrive at conclusions about its own power that would have shocked men like John Marshall and Joseph Story.

In this case, the Court proclaimed that the constitutional decision it had reached that day was nothing less than “the supreme law of the land.” Obviously, the decision was binding on the parties in the case; but the implication of the dictum that everyone would have to accept its judgments uncritically, that it was a decision from which there could be no appeal, was astonishing; the language recalled what Stephen Douglas said about *Dred Scott*. In one fell swoop, the Court seemed to reduce the Constitution to the status of ordinary constitutional law and to equate the judge with the lawgiver. Such logic assumes, as Charles Evans Hughes once quipped, that the Constitution is “what the judges say it is.” The logic of *Cooper v. Aaron* was, and is, at war with the Constitution, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law.

Just as *Dred Scott* had its partisans a century ago, so does the dictum of *Cooper v. Aaron* today. For example, a United States Senator criticized a recent nominee of the President’s to the bench for his sponsorship while a state legislator of a bill that responded to a Supreme Court decision with which he disagreed. The decision was *Stone v. Graham*, a 1980 case in which the Court held unconstitutional a Kentucky statute that required the posting of the Ten Commandments in the schools of that state.

The bill cosponsored by the judicial nominee—which, by the way, passed his state’s Senate by a vote of 39 to 9—would have permitted the posting of the Ten Commandments in the schools of his state. In this, the nominee was acting on the principle Lincoln well understood: that legislators have an independent duty to consider the constitutionality of proposed legislation. Nonetheless, the nominee was faulted for not appreciating that under *Cooper v. Aaron*, Supreme Court decisions are the law of the land—just like the Constitution. He was faulted, in other words, for failing to agree with an idea that would put the Court’s constitutional interpretations in the unique position of meaning the same as the Constitution itself.

My message today is that such interpretations are not and must not be placed in such a position. To understand the distinction between the Constitution and constitutional law is to grasp, as John Marshall observed in *Marbury*, “that the framers of the Constitution contemplated that instrument as a *rule for the government of courts, as well as of the legislature*.” This was the reason, in Marshall’s view, that a written Constitution is “the greatest improvement on political institutions.”

Likewise, James Madison, expressing his mature view of the subject, wrote that as the three branches of government are coordinate and equally bound to support the Constitution, “each must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it.” And as his lifelong friend and collaborator, Jefferson, once said, the written Constitution is “our peculiar security.”

Perhaps no one has ever put it better than did Abraham Lincoln, seeking to keep the lamp of freedom burning bright in the dark moral shadows cast by the Court in the *Dred Scott* case. Recognizing that Chief Justice Taney, in his opinion in that case, had done great violence not only to the text of the Constitution but to the intentions of those who had written, proposed, and ratified it, Lincoln argued that if the policy of government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

“Hold on to Your Constitution”

Once again, we must understand that the Constitution is, and must be understood to be, superior to ordinary constitutional law. This distinction must

be respected. To confuse the Constitution with judicial pronouncements allows no standard by which to criticize and to seek the overruling of what University of Chicago Law Professor Philip Kurland once called the “derelicts of constitutional law”—cases such as *Dred Scott* and *Plessy v. Ferguson*. To do otherwise, as Lincoln said, is to submit to government by judiciary, but such a state could never be consistent with the principles of our Constitution. Indeed, it would be utterly inconsistent with the very idea of the rule of law to which we, as a people, have always subscribed.

We are the heirs to a long Western tradition of the rule of law. Some 2,000 years ago, for example, the great statesman of the ancient Roman Republic, Cicero, observed, “We are in bondage to the law in order that we may be free.” Today, the rule of law is still the very fundament of our civilization, and the American Constitution remains its crowning glory.

Yet if law, as Thomas Paine once said, is to remain “King” in America, we must insist that every department of our government, every official, and every citizen be bound by the Constitution. That is what it means to be “a nation of laws, not of men.” As Jefferson once said:

It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power.... In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

Again, thank all of you for the honor of addressing you this evening. In closing, let me urge you again to consider Daniel Webster’s words: “Hold on to the Constitution...and the Republic for which it stands—what has happened once in 6,000 years may never happen again. Hold on to your Constitution.”

Endnotes

Remembering Edwin Meese's Tulane Speech

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Remarks on the Originalism Revolution

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6. Edwin Meese III, Speech at Tulane University in ORIGINALISM at 99.



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