Tulane University
"The Law of the Constitution"
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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, less than a month ago, 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," he said,

> 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, of 'the sense in which the Constitution was accepted and ratified by the nation is not the guide to 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."

During its nearly two hundred 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 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."

But 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 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.

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. That 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 26th 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 it 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 which 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.

And in its limited role of offering judgment, the Court has had a great deal to say. In almost two hundred 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 whence it is derived.

And 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. But 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, not the decisions 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.

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 down through 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. And in his response to Douglas we can see the nuances and subleties, 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 the 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 decision. 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 we disagree with. 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. 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: that constitutional interpretation is not the business of the Court only, but also, and 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 Justice Felix Frankfurter once said, "The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."

Judicial review of Congressional and executive actions for their constitutionality have played a major role throughout our political history. The exercise of this power produces constitutional law. And 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 thirty 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 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 *Cooper* v. *Aaron* today. For example, a U.S. 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 co-sponsored 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 one of the greatest improvements 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."

But 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 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.

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.

But 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's 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 question of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.

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."

Thank you.