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Constitutional Education

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It is always a distinct pleasure to be with so congenial a group of patriots. But this evening, it is even more so, because the occasion that brings so many friends—so many enlightened friends—together is a symposium in the finest tradition of the Federalist Society that is focused on some of the most important issues of our day. There are any number of reasons why it is especially fitting for this conference to be addressing the issues that are on the program. For me, there are two reasons that stand out.

First, it is no secret that we are on the eve of the bicentennial of the United States Constitution. I can think of no more auspicious time for all Americans—those learned in the law as well as those who are not—to focus their attention on the occasion of our national birth, to consider (whether it be anew or again) the actions and thoughts of that remarkable generation of celebrated patriots of an earlier era, who produced the first Nation in the history of the world from "reflection and choice," as Alexander Hamilton put in *The Federalist*.[1] Our founding was the first time men sought rationally to devise a government of men in balance with a government of laws. It marked a dramatic departure for mankind from its uninterrupted experience with governments born only by accident or force. Thus, when we commemorate the bicentennial of the Constitution we are really celebrating more than America; we are in a very real sense celebrating the true beginning of modern political life. Our Constitution signaled, as de Tocqueville noted, a world "quite new."[2]

The second important reason this symposium has special

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1. THE FEDERALIST No. 1, at 3 (A. Hamilton) (J. Cooke ed. 1961).

2. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 5 (J. Meyer ed., G. Lawrence trans. 1835).

significance is that we are today, thankfully, in a period of considerable intellectual fomentation concerning the "first principles" undergirding our legal and constitutional system of justice. The Attorney General energized much of the scholarly debate a little over a year ago with his forceful call for a return to a jurisprudence of original intention—*i.e.*, a way of constitutional thinking and litigating that begins with the text of the Constitution and is informed by the intentions of those who wrote, proposed and ratified that text (including, of course, the subsequent twenty-six amendments to the Constitution of 1787). The debate, once ignited, has predictably spread, with the Attorney General continuing to contribute and others of prominence and recognized scholarship joining the discussion. Two sitting Supreme Court Justices have added their views in ways uniquely candid. Even the editorial pages of newspapers and newsmagazines across the land have devoted much space and commentary to the topic. This event provides yet another respected forum, and I can assure you, there is much more to come.

As one who has thought and read much about these issues, the feature of these debates that I have found most striking thus far is the limited understanding—indeed the lack of any real appreciation—of the Constitution or its history on the part of so many of the most prominent news analysts and commentators. There are, of course, notable exceptions, but their ranks are regrettably thin and their voices are often all but drowned out by those who are both less informed and less careful.

This has been demonstrated most vividly in the past few weeks with the petulant outcry from the liberal left in response to the Attorney General's speech at Tulane University.[3] Most of you know by now that the Attorney General made the seemingly unassailable point that it is the Constitution which in reality is the supreme law of the land, not the differing interpretations of that document that are embodied in the decisional law of the Supreme Court. In this regard, the Attorney General pointed out, quite accurately, that dicta in the Supreme Court's decision in *Cooper v. Aaron*,[4] expansively declaring Court opinions to

3. E. Meese III, Address at the Tulane University Citizens' Forum on the Bicentennial of the Constitution (Oct. 21, 1986) (essentially reprinted in Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987)).

4. 358 U.S. 1 (1958).

have the same status as the Constitution itself, significantly overstated the matter.[5]

This observation seemed to unsettle many who earn their pay by criticizing first and taking time to read the text much later, if at all. When initial media attacks on the theme of the speech were met with scholarly support from some unexpected quarters, the criticism took a curious—albeit not altogether novel—turn. The Attorney General was suddenly faulted for what he *did not say*, rather than for what the Tulane speech carefully stated.

Thus, we read that the Attorney General's disagreement with certain dicta in *Cooper v. Aaron* was in reality a veiled dispute with the Court's decision in that case. Nothing could be farther from truth. Never has the Attorney General contested the Court's authority—indeed its institutional obligation—to demand that Governor Orval Faubus comply with the judgment of the Court in *Brown v. Board of Education.*[6] Embracing fully *Cooper v. Aaron* in that respect, however, does not require full allegiance to the gratuitous observation that constitutional decisional law, like the Constitution itself, reigns supreme.

As the Attorney General accurately stated in his Tulane speech, and has since amplified, Supreme Court decisions are concededly legally binding on the parties before the High Court, the executive branch for whatever enforcement is necessary and, of course, other federal and state courts. By making this obviously correct point, however, the Attorney General did not suggest—as commentators have erroneously indicated—that the Supreme Court, or its decisions, are otherwise to be wholly ignored and openly disregarded. Rather, his respect for the insti-

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5. Chief Justice Earl Warren, writing for the Court, stated:

> In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Law of any State to the Contrary notwithstanding."

358 U.S. at 18.

6. 347 U.S. 483 (1954).

tution and regard for precedent were underscored explicitly in the speech. His remarks were not an attack on the Court. They were, instead, a useful and much-needed explanation of the judicial process.

Supreme Court decisions are, by their very nature, under constant review—by the courts, by legislative bodies and by the legal profession. Indeed, precisely because most of the Court's opinions reflect the diverse, and often contradictory, views of nine justices, who manage at times (but not always) to forge a narrowly-drawn consensus (notwithstanding open disagreement) among five or more of them on at least one of the issues presented, it is seldom the case that there is a common understanding of the majority's position in a given case. To suggest in these circumstances that constitutional decisional law stands on par with the Constitution itself as the supreme law of the land is to blink at reality. It ignores the obvious vulnerability of Court decisions to constant second-guessing, revision, reinterpretation and outright reversal—whether done with the precision of a surgeon's scalpel by the Court itself or more crudely, and often more clumsily, with a legislative meat ax. The point is, as the Attorney General's Tulane speech made clear, that constitutional decisional law has a transient quality about it that entitles it to respect—and yes, even some degree of deference under the honored doctrine of *stare decisis*—but not the same degree of faithful allegiance that is owed to the Constitution itself. Thus it is, as the Attorney General noted explicitly, that the pernicious "separate-but-equal" doctrine, born of an eight to one decision in *Plessy v. Ferguson*[7] in 1896, and firmly embedded for over fifty years as a part of constitutional decisional law, could be overturned unanimously by the Court in 1954 in *Brown v. Board of Education*[8] after a thirty-year campaign by the NAACP and others who refused to regard *Plessy* as binding precedent on little Linda Brown and the Topeka Kansas school district. It is thankfully unnecessary to belabor the point with this group. The central message in the now famous Tulane speech is that the Constitution is not simply what judges may say it is in their opinions. The Constitution has a life of its own, and its support system comes from the text that the Framers agreed upon and the historical context in which those agreements were fashioned.

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7. 163 U.S. 537 (1896).
8. 347 U.S. at 483.

It is that framework on which our system of government is built and which serves as the central guide for not only the Executive and Legislative Branches but also for the Judicial Branch.

In this respect, the Constitution transcends those pronouncements heard from federal judges who have undertaken to reshape American society to their moral liking. It supersedes the opinions of jurists who in pursuit of an ideological agenda for social reform have created new rights where none existed in the Constitution. Furthermore, it makes a mockery of the currently fashionable philosophy of radical egalitarianism of which I spoke not long ago at the University of Missouri Law School[9]—a philosophy that is fundamentally at odds with the basic constitutional commitment to individual freedom and equal opportunity for all. That philosophy, as Walter Berns has so well stated, that "treats the Constitution frivolously."[10]

That is why the Attorney General spoke out so forcefully at Tulane—to underscore the supremacy of the Constitution. There are those who said he did no more than "state the obvious"—which was, I suspect, the reaction of most of you in this room. What is so disquieting is that it was a view shared by so few. Perhaps in this, there is a clue as to why he gave the speech. Many thought the Attorney General must have some "hidden agenda." But he has no "hidden agenda." The Tulane speech, like so many of the Attorney General's other thoughtful speeches, is a piece of an overarching effort to help educate the public about our constitutional heritage during the bicentennial celebration.

There are few better suited to embark on such an ambitious educational program than the chief legal officer of the United States. He rightly commands both the respect and attention of a public that has grown tired of the verbal elites who advocate and celebrate judicial supremacy. Here I am referring to those in powerful reporting and commentary positions in the fourth estate, in the most esteemed law schools, and in academia generally.

For many of these elites in journalism, law schools, and academia, no death penalty may intrude their world, even

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9. W.B. Reynolds, The Earl F. Nelson Memorial Lecture, delivered to the University of Missouri School of Law (Sept. 12, 1986) (copy on file at Brigham Young University Law Review Office).

10. Berns, *The Constitution as a Bill of Rights* in HOW DOES THE CONSTITUTION SECURE RIGHTS? 67 (R.A. Goldwyn & W.A. Shambra eds. 1985).

though the Framers of the Constitution found such punishment to be neither cruel nor unusual. Yet, they would freely permit a death sentence to be pronounced by way of abortion on the most innocent and fragile among us. Their attention is riveted on rights of the accused to a degree that is a logical absurdity, so that truth in the criminal justice system is no more than lip service, and the victims of crime are largely left to fend for themselves. They regard civil rights not as a set of protections available in equal measure to all Americans, but rather as the personal preserve of only a select few, whose lot in life is no longer to strive for equality but instead to be content with proportionality. The Constitution has no intrinsic worth to the journalists and commentators of this school. To them, it means only what can be found in the most recent collection of Supreme Court opinions that further their liberal agenda. Moreover, it matters little to them whether they draw upon statements by the majority or by the dissenters to advance their ideological cause.

That, by and large, has been until now the sorry state of the public's education about the Constitution. Many of the nation's top editorial writers and news analysts, neither very learned in the law nor at all intimidated by that shortcoming, have misused their media access to foster public misconceptions about our Constitution and the proper role of the courts under it; small wonder that these same writers lashed out at the Tulane speech. For, as obviously correct as the Attorney General's message was to most of us, seen from a liberal media perspective it puts the lie to that overblown myth that our courts are constitutionally free to embark on their own independent and unchecked ideological journey of liberal social reform.

The Attorney General dared to join the issue, to bring to the debate a sorely needed historical perspective that could breathe new life into that unique and treasured cornerstone of the Republic—the Constitution—and demonstrate, contrary to the naysayers' message, that it is not, never has been, and never will be a "dead letter." The educational process will not be easy; critically important endeavors rarely are. But a start, a significant start, has been made, and at least there is now a voice of reason in the debate that has taken up the cause of the Constitution.

That is the good news. The bad news is that, present company excepted, the Attorney General has pitifully few allies prepared to join in this educational effort. The fact is that for far

too long most law schools in this country have largely abdicated their responsibility to educate the future members of our profession on the Constitution. Far too few students of the law are exposed in law school to *The Federalist Papers*,[11] Farrand's *Records*[12] and Elliot's *Debates*.[13] Even fewer have so much as a passing familiarity with the stands taken by the Anti-Federalists who, by the force of their arguments, helped produce a Constitution that would indeed endure for all ages to come. Nor are there very many, I suspect, who, if pressed, could even name article III, section 2 as that part of the Constitution which declares that "[T]he [S]upreme Court Shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[14] And I shudder to think how few of them would feel comfortable defending the inclusion of this clause as a necessary feature of limited government.

Explanations abound for this noticeable failure of our legal education system. In no small measure it derives from the undesirable phenomenon that the overwhelming majority of tenured professors in our law schools today are aligned philosophically with the liberal left, and that they view their mission much less in terms of teaching "first principles" than in terms of cultivating new recruits to advance their social reform agenda.

These are the law students of the 1960s and early 1970s, who learned their constitutional law in much the same manner as they now teach it: through the case-method form of instruction. Harvard Law School's current catalogue offers a typical description of the introductory course: "A study of basic principles of constitutional law as created, confused, compromised and changed by the Supreme Court."[15]

I am not here to take on the inveterate case-method form of instruction in all its particulars. As you undoubtedly know, it has been around since the last quarter of the 19th century, when it was first introduced at Harvard Law School under the guiding hand of Dean Christopher Columbus Langdell. Designed princi-

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11. THE FEDERALIST (J. Cooke ed. 1961).

12. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand rev. ed. 1966).

13. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION: AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (J. Elliot 2d ed. 1876).

14. U.S. CONST. art. III, § 2, cl. 2.

15. HARVARD LAW SCHOOL CATALOG, 1986-87, at 64 [hereinafter CATALOG].

pally to "teach students to think like lawyers," the Langdell method has proven to be an effective academic tool for educating students on the proper techniques of case analysis.

However, this approach has inherent limitations. For its frame of reference focuses almost exclusively on specific rulings of the Supreme Court, seeking to construct some coherent body of evolving jurisprudence by juxtaposing one precedent against another. The strength of this method, when first introduced by Dean Langdell, and for the early decades of its use, resided primarily in the fact that the Court decisions were examined against the historical backdrop of the Constitution itself. There remained in the curriculum an emphasis on the interpretivist role of the judiciary, whose pronouncements could not be lightly cut loose from their constitutional moorings.

That feature of a law school education gradually began to fade, however, in the first part of this century. Students of the law were exposed less and less to the enduring principles on which our rich legal tradition was founded, and by the 1920s this part of the curriculum was vanishing. Eventually, the history of the Constitution, the intent of the Framers, the first principles underlying the Constitution—and indeed the Constitution's text itself—became matters of passing interest to only a handful of law professors. Most were content to leave the subject to the political scientists.

What has emerged is a heavy overdose of "case law jurisprudence." Rather than teaching constitutional law as the embodiment of enduring principles, law schools almost uniformly approach the subject in haphazard fashion, leaving it to each professor to shape the curriculum according to his or her favorite, or least favorite, collection of cases. Regrettably, it has become the accepted understanding of generations of law students that the "Constitution is what the judges say it is," thereby fostering the misconception that was addressed so well by the Attorney General in his Tulane speech—the misconception of the supremacy of decisional law.

I think it is fair to assign a major part of the responsibility for contemporary judicial activism to the pedagogical failure of the law schools to teach constitutional fundamentals. Young law students, lacking a grounding in the history and text of the Constitution, enter the legal profession from an academic environment that, until recently, has all but presumed it is the responsibility of judges to adapt the Constitution to "modern

conditions." Many, predictably, have counted themselves among the core group of legal activists. A number of them, reinforced by a liberal media—while meeting little resistance from colleagues in practice who are largely indifferent to such cosmic issues that have no relevance to their more mundane (but more lucrative) client issues—have, on elevation to the Bench by prior administrations, gone on to work their special brand of judicial activism.

Not surprisingly, judges schooled in this manner owe no allegiance to the intent of the Framers nor to the letter of the Constitution. Possessed of a thinly disguised intellectual arrogance that not infrequently takes cover behind the "spirit" of the Constitution as found in its so-called penumbra, they roam widely across the legal landscape, content not only to proscribe public policy, but intent on prescribing it as well. They dismiss as archaic the words of Madison, where he argued that "the legitimate meaning of the Instrument [of government] must be derived from the text [of the Constitution] itself."[16] They ignore the clear import of the words of Chief Justice John Marshall in *Marbury v. Madison*,[17] when he stated that the Constitution was intended to serve "as a rule for the government of *courts*, as well as of the legislature."[18] There is an overwhelming need in this setting for someone to step forth and "state the obvious." The fact is that for too long in this country we have silently suffered too many judicial "emperors" with no constitutional clothes. These appointees erroneously regard their pronouncements from the Bench as the supreme law of the land. Law professors by and large—with a few notable exceptions—"teach" their students that this decisional law is supreme. Certainly a misguided, and largely untutored, cabal of liberal journalists and commentators share and assiduously promote this view.

Is it any wonder, then, that an unsuspecting public approached this bicentennial year without any real knowledge about our Constitution or any real appreciation of its paramount importance in our legal system? This Administration, and this Attorney General, desire to fill this educational chasm, to add much needed insight into our history, to urge that our jurisprudence tie itself once again to those enduring principles that are

16. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821) *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 447 (M. Farrand ed. 1938).

17. 5 U.S. (1 Cranch) 137 (1803).

18. *Id.* at 180.

the fabric of our Constitution. Nothing in that message suggests disrespect for the Court or disregard for its decisions. To the contrary, our judicial system gains in stature, enhances its credibility and improves the integrity of its process to the extent that it shows a faithfulness to the Constitution and puts aside the wayward ways of legerdemain and social engineering. Thus, we have seen some of the lost confidence in our judiciary restored over the past six years with the President's appointments of men and women to the Federal Bench whose jurisprudential philosophy is truly constitutional—not aconstitutional or anticonstitutional.

That, too, is part of this educational process, and there are encouraging developments elsewhere. For example, Walter Dellinger at Duke has joined forces with historian William Leuchtenburg to teach the records of the Federal Convention. Dickinson Law School in Carlisle, Pennsylvania, has hired a nonlawyer as an adjunct professor to teach a course on the Constitution—rather than on constitutional law. And even Harvard, while regrettably surrendering the educational high ground to a band of renegade professors whose socialist reform movement masquerades under the fetching title, Critical Legal Studies, has just recently added a course to its Law School catalog on the "Constitution of the United States: Origins, Formation, Intention and Character" to be taught by one of America's leading historians, Bernard Bailyn.[19]

On yet another front, the National Endowment for the Humanities (NEH) has started a program of Bicentennial Seminars for law professors, a program that will see its second year this coming summer. The University of Chicago Press is preparing to release a massive multivolume set edited by Phil Kurland and Ralph Lerner entitled *The Founders' Constitution*,[20] a set that will seriously undermine the claim that one cannot discern the intentions of the Founders. Finally, Jim McClellan at the Center for Judicial Studies is beginning a series of Judicial Seminars that will be open to sitting judges and will be patterned after the NEH Law Professors' Bicentennial Seminars.

All told, the educational initiative that lies ahead looms large, but there is movement in the right direction. In the end,

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19. CATALOG, *supra* note 13, at 92.

20. See the five-volume set, THE FOUNDERS' CONSTITUTION (P. Kurland & R. Lerner eds. 1987).

the future of the Constitution—indeed of constitutionalism—will depend upon the commitment of all of you to join in these efforts aimed at recapturing a serious regard for our most cherished principles. Ed Meese has shown the way with his Tulane speech, but his joining in the debate has shown that, for many people, the "obvious" is not nearly so obvious.

There is an opportunity during the approaching bicentennial year to correct the existing misperceptions about our founding and its lasting significance. We have a Constitution that is worthy of celebration. Regrettably it has been knocked rudely from its pedestal in decades past, but there is a resilience and a strength about it that has left it only bruised, not broken. Our task is to return it to its rightful place of prominence. As the Attorney General stated earlier this week, "our interest—our agenda—is the integrity of the Constitution and its preservation as the supreme law of the land." I hope and trust that this will be your interest and your agenda as well.

Thank you.