Supplementary Material

Chapter 10: The Reagan Era—Foundations/Principles

Edwin Meese, **"The Law of the Constitution"** (1987)[1]

Edwin Meese was one of Ronald Reagan's longest serving associates and advisors. Meese worked with Reagan during his days as governor of California, was Reagan's chief of staff during his campaign for president and served as his chief policy advisor during his first term of office. During Reagan's second term, Meese served as U.S. attorney general. His tenure as attorney general was notable in part for a series of speeches in which he sought to launch a public discussion of the administration's views on judicial review. His most controversial speech was a 1985 address to the American Bar Association advocating a "jurisprudence of original intention" and questioning the applicability of the Bill of Rights to the states. Two years later, Meese stirred further controversy with a speech delivered at Tulane Law School that called into question the Supreme Court's assertion in Cooper v. Aaron (1958) *that the Constitution and the constitutional law articulated by the judiciary were of equal authority. Most immediately, Meese's argument provided room for criticizing, and potentially reversing, judicial decisions with which the administration disagreed, most prominently* Roe v. Wade (1973). *Critics denounced the attorney general for inviting legal "chaos," but other legal scholars came to his defense.*[2] *What status should Court opinions interpreting the Constitution have? Does Meese's view invite chaos?*

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. . . 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. . . .

. . .

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.

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 "[h]owever 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

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[1] Excerpted from Edwin A. Meese III, "The Law of the Constitution," *Tulane Law Review* 61 (1987): 979. Reprinted by permission of the Tulane Law Review Association, which holds the copyright.

[2] For varying scholarly reactions, see "Perspectives on the Authoritativeness of Supreme Court Decision," *Tulane Law Review* 61 (1987): 977; "Symposium of Executive Branch Interpretation of the Law," *Cardozo Law Review* 15 (1993): 21; "Symposium on Constitutional Law," *California Law Review* 92 (2004): 959.

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. . . .

. . . 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 the 1858 Senate campaign in Illinois, Stephen Douglas went so far in his defense of *Dred Scott v. Sandford* (1856) as to equate the decision with the Constitution. In his third debate with his opponent, Abraham Lincoln, he said:

> It is the fundamental principle of the judiciary 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.
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> . . .

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.

. . . 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. . . . For as Felix Frankfurter once said, "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."

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* (1803), 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, in dictum, the Court characterized one of its constitutional decisions as nothing less than "the supreme law of the land." Obviously constitutional decisions are binding on the parties to a case; but the implication of the dictum that everyone should accept constitutional decisions uncritically, that they are judgments from which there is 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 the dictum in *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.

. . .

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* (1896). 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.