The Nature of Judicial Power

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INTRODUCTION

I really appreciate the opportunity to have worked on this particular topic. It is interesting that when you teach in an area like I do in Constitutional Law and have never really come to focus upon a topic such as judicial power in the way that the title of what I'm going to share with you today required me to do, I am amazed how much I learned from just focusing upon an issue in a different way than I had before. So often what happens when you teach something like Constitutional Law is you come to address questions from the perspective of the Constitution, rather than from the perspective of the way that this series is structured, and that is from the perspective of the laws of nature and of nature's God.

One thing that we're learning here at [Regent] University is that you cannot ignore the charter of the nation, the Declaration of Independence. As a matter of fact, we were talking about this yesterday and at the end of the Constitution, the signers acknowledged that the Constitution was signed in the twelfth year of the establishment of the nation of the United States. They knew that the Constitution wasn't the establishing document. The establishing document was the Declaration of Independence because, indeed, they were in the twelfth year of the Declaration of Independence. So they themselves traced the establishment of the nation to the Declaration. And if that's true, then whatever is in the Constitution must be traced back to that establishing document and that, of course, goes back to the laws of nature and of nature's God.

I'm just going to give you some idea of where we're going to go and then I'm going to launch into it. I'll have a short introduction, but what I will be doing is talking to you in basically three parts. The first part will be the three kinds of government power. That is, we'll be talking about the law of nature of separated powers. Then the second part will be to focus specifically upon the judicial power, and that will be the law of the nature of judicial power. And then finally I will speak to you about the law of the constitutional limitations on judicial power. Now each of those three major parts will have three sub-parts, and I will try to indicate to you as I go what those sub-parts are so you'll be able to follow me, I hope, a little more carefully.

Roe v. Wade, the United States Supreme Court pro-abortion opinion, has many critics. One of its most persistent is United States Supreme Court Justice Byron White. A 1962 appointee of President John F. Kennedy and a democrat from Colorado, Justice White in his dissenting opinion to the majority in the *Roe* case said the following: "As an exercise of raw judicial power, the Court perhaps has authority to do what it has done today, but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court." Now many opponents of the *Roe v. Wade* decision have used this statement to support their criticism of the majority opinion. As one of those critics, I have quoted it myself. In doing so, those, including myself, who have used it have unwittingly affirmed several foundational assumptions of the majority opinion that we so desire to be overturned.

On another occasion I took the opportunity to correct another mistake that I, and I believe others, have made in the objections to *Roe v. Wade*. For several years I claimed that while *Roe v. Wade* had made the right to obtain an abortion the law of the land, it was bad law. It should be overruled. But upon more careful reflection, I realized that the Court's opinion is not bad law. It is not law at all. As Sir William Blackstone so ably put it over 200 years ago, if it be found that a decision of a court

is manifestly absurd or unjust, that is, contrary to reason, contrary to divine law, it is declared not that such a decision was bad law, but that it was not law.

Indeed, the framers of Article VI of the United States Constitution followed Blackstone when they wrote that the Constitution was intended to be the supreme law of the land. Today most of us read this commitment of our forefathers as if they were writing about gasoline in cars, a desire to run the government machine on high-grade premium, supreme. But a recognition that given our current circumstances, we will drive it on regular. No, that's not what they meant. Our forefathers believed that the Constitution that they had so labored over embodied the law of the land, all legislative enactments, executive actions, and court opinions to the contrary notwithstanding. Notwithstanding as law at all.

So *Roe v. Wade* is not law. It is contrary to divine law that protects innocent life, to reason and the Constitution. Now permit me to return to the statement of Justice White. First, he claimed that the Court in *Roe v. Wade* exercised raw judicial power. At the same time he conceded that perhaps it had the authority to do it. Second, he allowed that the Court's judgment was an exercise of power of judicial review extended by the Constitution to the Court, but that was improvident and extravagant.

I doubt if Justice White when he chose the word "raw" meant to convey to us that the majority had not fully cooked its opinion. Although someone like Art Buchwald could have fun with that word and suggest in one of his columns that Justice White thought his colleagues to be half-baked. I doubt also if Justice White used "raw" in the way that we often do when talking about a disagreeably damp or cold day or wind. Although, again, the day upon which the Court rendered *Roe v. Wade* is indeed a bleak day in the history of America, not only for the millions of unborn babies who have been killed in its name, but for a nation whose record theretofore had always been officially, at least, committed to the protection of innocent life. Could it be, however, that Justice White meant by "raw" that what the majority had done was to exercise judicial power in its natural state, but unbound, uncorrected by good editing, as if the opinion were the first draft of a Masters Thesis at [Regent] University?

Well, professional eyes that are more trained than I have exposed the opinion's lack of sound historical and legal underpinnings. But I want to concentrate on another possible meaning of the word "raw." The third meaning given in Webster's International Dictionary, "having the skin removed, so that the underlying tissues are exposed," like a "raw" wound. Not knowing his precise meaning, I've chosen this one because I believe that a close examination of the majority opinion in *Roe* as an exercise of judicial power reveals not an improvident or extravagant exercise of such power, not a bad use of such power, but no exercise of judicial power at all.

LAW OF NATURE OF SEPARATION OF POWERS

The Divine Pattern

Going into the first section, the law of separated powers. There are three kinds of government power and of course, as my brother Joe Kickasola so beautifully began our session, we have Isaiah 33:22 to give us testimony that indeed there are three kinds of power. "For the Lord is our judge," judicial power. "The Lord is our lawgiver," legislative power. "The Lord is our king," executive power.

Now what's interesting about Isaiah 33:22 is not only that it is a descriptive statement of the three kinds of power - judicial, legislative and executive - but it is also a normative statement of its execution. It also contains a statement of law. And indeed, it contains a promise that God as our judicial, legislative and executive authority will exercise it lawfully because it concludes, "He will save us."

Of course, the testimony of Jesus Christ as the King of kings, the one with all three kinds of power, a testimony that indeed he will fulfill perfectly the law of the judicial, legislative and executive power, is found in Isaiah 51:4-8. Let me read it to you, "Pay attention to me, oh my people, and give ear to me, oh my nation. For a law will go forth from me and I will set my justice for a light of the peoples." The legislative power will be exercised lawfully, that justice will be embodied in the law. Then verse 5, "My righteousness is near, my salvation has gone forth, and my arms will judge the peoples, the coastland will wait for me, and for my arm they will wait expectantly." He will judge the peoples perfectly. He will apply that perfect law in a perfect way and make known the judgment of the Lord. And then in verses 6-8, He will execute that judgment perfectly.

> Lift up your eyes to the sky then look to the earth beneath. For the sky will vanish like smoke, and the earth will wear out like a garment, and its inhabitants will die in like manner. But my salvation shall be forever and my righteousness shall not wane. Listen to me, you who know righteousness, a people in whose heart is my law, do not fear the reproach of man, neither be dismayed at their revilings. For the moth will eat them like a garment and the grub will eat them like wool. But my righteousness shall be forever, and my salvation to all generations.

Now what's important here to see is that the Bible calls us as God's people to exercise legislative, executive and judicial power in accordance with law. Paul writes of that in Romans 13. Let me refer specifically to verse 1 and verse 4 in that particular Scripture, "Let every person be in subjection to the governing authorities, for there is no authority except from God, and those which exist are established by God." That is, God establishes legislative, executive and judicial authority in the civil order as he does in his own created world, including the civil order.

And then, of course, in a summary fashion in verse 4, "For the civil ruler is a minister of God to you for good, but if you do what is evil be afraid, for it does not bear the sword for nothing, for it is a minister of God, an avenger who brings wrath upon the one who practices evil." So whether you hold judicial, executive or legislative authority, you are but a minister of God and therefore bound as such a minister to the law of God.

The Example of Israel

Pre-Saul

The example that God gives us in the civil realm, in the nation realm, comes from his chosen nation, the nation of Israel. Let me summarize to you that in the nation's life, the exercise of judicial and legislative and executive power is found throughout the books of the Old Testament. But just simply as an example let me call your attention and refresh your recollection with the exercise of judicial power which is illustrated in Exodus 18:16, when Moses in response to Jethro, his father-in-law, indicated that he exercised judicial power. Verse 16, "When they have a dispute, it comes to me and

I judge between a man and his neighbor and make known the statutes of God and his laws." So Moses as the judge of Israel exercised judicial power.

But also as the judge of Israel, he exercised legislative power. That is, he was the lawbearer as well as the one who applied the law to specific disputes. We learn that from Exodus chapter 20 where Moses was given the Ten Commandments. And if you remember, Moses bore those Ten Commandments and gave them to the people. We find not only the law of the Ten Commandments, but the various specific conventional applications of that law typified by Exodus 22:1 with regard to the five ox for one ox and the four sheep for one sheep, in applying the law of the just sanction in that particular kind of situation.

Finally we find in Exodus, this time in chapter 17, that Moses as judge also exercised executive power. There if you recall, in the battle against the Amalekites, we see Moses as commander-in-chief of the army. He is the one who is standing apart from the battle, but the one who is seeking the victory that can come from the Lord. If you remember, he is the one whose arms are lifted up while the battle is being carried on. Of course, it was Moses as the judge who led the people into Israel as commander-in-chief in Exodus 17:8-13.

What is interesting here is that in the early history of the nation of Israel, the three kinds of government power were lodged in one office, the office of the judge. We find from Joshua to Samson that this exercise of power remained in the nation of Israel. But I want to contrast what happened to the exercise of those three kinds of power during that early history of the nation of Israel so that we can begin to see why it is that we have a law of separated powers, as contrasted to a law of separation of powers within one person.

In Joshua 1:8 we have this testimony of Joshua's exercise of judicial, executive and legislative power. "This book of the law shall not depart from your mouth, but you shall meditate on it day and night so that you may be careful to do according to all that is written in it, for then you will make your way prosperous, and then you will have success." We find in that particular testimony, in the testimony over into the second chapter of Judges, verse 7, "And the people served the Lord all the days of Joshua and all the days of the elders who survived Joshua, who had seen all the great work of the Lord which he had done for Israel," that Joshua was true, not only to the three kinds of powers, but he was true of the law that governed those three kinds of powers.

But contrast that to what happened to the office of judge by the time that Samson exercised that power. And I don't have time in this particular lecture to chronicle what happened to the law of separation of powers through the various judges as it deteriorated through the years. But listen to the testimony of Judges 16:28 and contrast it with Joshua 1:8: "Then Samson called to the Lord and said, 'Oh Lord God, please remember me and please strengthen me just this time, Oh God, that I may at once be avenged of the Philistines for my two eyes.'" What had happened, and Samson was given this power, is that it had become a power to be exercised for his own personal purposes, rather than for the purposes of the nation. So it is not surprising then that the conclusionary verse of Judges 21:25 is as follows: "In those days there was no king in Israel. Everyone did what was right in his own eyes."

Post-Saul

So when we come to that historical event that is chronicled in I Samuel 8 where the elders of Israel are complaining about the perversion of justice by Samuel's sons, it is not surprising to see after such a legacy of generations that this law of separation of powers that had been lodged in one office was not functioning in the way that God had intended it to function. But as is typical of man when he sees the lawless exercise of power, in I Samuel 8 we learn that the elders want to substitute another lawless way to redeem the lawlessness of its own judges. And of course, as you know, God in his mercy, because through Moses in Deuteronomy 17 he prophesied that while the people asked for a king like all the other nations, he would not give them such a king, but he would give them a king under the law. And therefore Samuel, in I Samuel 10:25, wrote up the manner of the kingdom in a book, and God gave them a king, not like all the other nations had, but a king who was to rule according to the covenant law as Deuteronomy 17 prophesied.

So what we see once Saul became king of Israel is we begin to see that these separated powers are indeed separated by office, as well as by kind. Saul, as you recall, was given executive power, but he did not receive judicial power..The testimony of I Samuel 7:15-16 says that Samuel judged Israel all the days of his life, which included the days of Saul, and therefore the judicial power remained in the office of judge. But the executive power which the judge had theretofore exercised in Israel was transferred to the king. So we find Saul, not Samuel, leading the army against the Philistines in I Samuel 13. We find Saul, not Samuel, leading the army in I Samuel 15.

What's important here is to see that the legislative power was not transferred to Saul. For I Samuel 15 indicated that Saul did not have authority to wage war any way he wanted to wage war. The war that God had ordained with regard to the Amalekites was a war of God's judgment upon that nation, and therefore was governed by the law of such wars. And we find Saul in exercising executive power disregarding that law, sparing the king of the Amalekites, sparing the best of the sheep. And Samuel, in his judicial capacity, coming in and ruling that Saul had so violated the law of God.

The legislative power remained independent of the executive and independent of the judiciary. How it was exercised, I am not too sure from the Biblical record. It certainly had to be in conformity with the law that had already been given to the nation of Israel. There is only a suggestion in Joshua 9:15 and 18 that perhaps the elders or the princes of the congregation were given legislative power so long as that power was consistent with the revealed law of God as found in the Ten Commandments and in the laws of Moses. That's the Biblical record of the law of separated powers, the law separating the three powers in three different offices.

The Common Law

From Bracton to Coke

Let me talk to you now about the common law heritage of the law of separated powers. I want to divide this into three parts, the first one is to chronicle the law of separated powers from Bracton to Coke. So I'm going to cover quite a bit of history in a very short period of time so I hope you bear with me. The thirteenth century, Bracton was the man who John C.H. Wu, a scholar of the common law, calls the father of the common law. And the words that Bracton penned that live on in this nation even today. He wrote them in Latin, they are today emblazoned on Langdell Hall at my alma

mater, the Harvard Law School. These are the words that appear: "The king himself ought not to be under man, but under God and under the law, because the law makes the king. Therefore let the king render back to the law what the law gives to him, namely dominion and power, for there is no king where will and not law wields dominion."

I can put it another way, "right makes might," not "might makes right." So he was following Judges 18:1, was he not, when the testimony says there is no king in Israel. There was no king, not because there wasn't someone exercising executive power; there was no king because the executive power that was being exercised was being exercised contrary to law. And as Bracton said, there is no king where will, and not law, wields dominion.

So what we have is this common law legacy from Bracton in the thirteenth century that what makes an executive power executive power is when it is exercised lawfully as contrasted to the lawless exercise of such power. Now as is always true when someone lays down a general rule, God in his providence will bring circumstances in such a way to test whether you really believe it. I'm sure some of you have experienced that in your own life when you have discovered a general rule in the Bible, be ready, you are going to be tested. And indeed the nation of England was tested whether or not it really believed that not under man, but under God and the law during the reign of James I in the first half of the 17th century.

So John C.H. Wu who called Bracton the father of the common law, called Sir Edward Coke, who then was a judge of the common law, the savior of the common law, because James I put to the test whether or not he, the king, was above the law or whether he was under the law. Now Sir Edward Coke had laid the groundwork himself for this particular test. Let me quote to you from John C.H. Wu's book, The Fountain of Justice, in which he deals with this particular period of history:

> At a time when political speculation was tending to exalt a sovereign person or body above the law, Coke had the insight and courage to resort to the law of God and the law of nature. In *Calvin's case* he declared that the law of nature is part of the law of England. The law of nature was before any judicial or municipal law. He said "the law of nature is that which God at the time of creation of the nature of man infused into his heart for his preservation and direction and this is *lex eterna*, the moral law, called also the law of nature. And by this law written with the finger of God in the heart of man were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world."

Now Sir Edward Coke had read Exodus chapter 18, because he knew that Moses as judge had made known the laws and statutes of God before God ever gave him the Ten Commandments in writing. He was applying the law of nature in the nation of Israel before the law of revelation had been given to him and put in writing.

Now again, and here is Coke in *Dr. Bonham's case*, he laid down the law that governed the judge. Not only did law govern the executive power, but law governed judicial and legislative power. "And it appears in our books that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void. For when an act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge such an act to be void." So what we see here is that Coke took from Bracton that the executive

power, the legislative power, and the judicial power had to be under the law and not under man. And that the law that he was talking about was the law of God.

Now King James had read the Bible, too. And he claimed that he had judicial power because he examined the Scriptures and found that Solomon had judged a case between two women and had determined to whom a baby belonged, one or the other. So he said, "Why shouldn't I as king exercise judicial power. Didn't Solomon exercise such power?" The difficulty was that King James did not recognize that the account of Solomon's judgment with regard to the child was not an exercise of judicial power. It was an exercise of executive power. For Solomon never intended that the order that he issued would be carried out, namely the cutting of the baby in half. We read in Deuteronomy 17 that if a judge issues an order, it must be obeyed or otherwise you act presumptuously. The example of Solomon was that you must exercise judgment when you are exercising executive power.

And it was an example of righteous exercise of judgment, not the usurpation by the executive of judicial power. And Coke claimed that very proposition when he challenged King James and said that the king had no judicial power. This is what King James replied. He said that if that's so, then it's treason to affirm. Coke's reply: "I said that Bracton saith that the king must not be under any man but under God and the law." Now what's interesting about that is to see the power of judgment, that because Coke was right, he survived. Because he was right, God honored Coke's willingness to stand. And we see the legacy of Coke in Sir William Blackstone, who was able to write in his Commentaries that judges are depositaries of the laws, living oracles, bound by oath to decide according to the law of the land.

The Colonial and State Experience

Now that was the legacy that our forefathers brought to this nation and the charters of the several colonies affirmed that they had the rights and liberties as Englishmen. And therefore they brought with them this law of separated powers, this law of executive, judicial, and legislative power to America. And yet they faced the same challenge that Sir Edward Coke had faced, not with King James I, but with King George III. So what we find is that in the early administration of the colonial charters that once again an executive threat to the independence of the judiciary under the King's power was made through the colonial charters.

So it is not surprising that when you read the Declaration of Independence in which our forefathers claimed that King George III and the Parliament had violated the laws of nature and of nature's God, that part of the Bill of particulars of that violation was as follows: "He has obstructed the administration of justice by refusing to assent to laws for establishing judicial powers. He has made judges depending on his will alone for the tenure of their offices and the amount and payment of their salaries."

What happened when our forefathers found themselves building a new nation? Were they going to build constitutional safeguards that would protect the new nation from further usurpations by executive power over judicial power. You find evidence even before the Declaration of Independence to that effect. One month before the Declaration was signed the Commonwealth of Virginia (then the Colony of Virginia which declared itself to be an independent state) established in its Constitution the following: "That the legislative and executive powers should be separate and

distinct from the judiciary, and only the members of the first two be subject to election of the people." That particular legacy was one four years later that we find in the Constitution of Massachusetts and perhaps best articulated in that particular Constitution in the early state documents.

A recognition not only that there were in fact three kinds of power, but that the exercise of those three kinds of power was governed by law, and that part of the law of the exercise of that power was the guarantee of an independent judiciary. A judiciary not responsive to the people in the same way as the executive and the legislative branches were, but responsive only to the law of God. Listen to the thirtieth article of the Constitution of Massachusetts:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial power or either of them. The executive shall never exercise the legislative and judicial powers or either of them. The judicial shall never exercise the legislative and executive power or either of them. To the end that it may be a government of law and not of men.

The man most responsible for that provision of the Massachusetts Constitution was John Adams, who claimed that the law of separation of powers was not just a matter of political expediency, not just a matter of checks and balances because of the sin of mankind, but was a matter of virtue, namely part of God's law order for civil nations in order to assure the government of law and not of men. Now let me read to you the twenty-ninth article of the Massachusetts Constitution with regard to the importance of the independence of the judiciary in the law of separation of power:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the law and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people and of every citizen that the judges of the supreme judicial court should hold their offices as long as they behave themselves well, and that they should have honorable salaries ascertained and established by standing law.

The U.S. Constitution

It is not surprising with this state constitutional legacy that the United States Constitution follows those state constitutions, both in terms of describing the three kinds of power, and also providing for a law distinguishing between the three kinds of power. All you have to do is look at the first sentence of each of the first three articles and you will find that Article I deals with legislative power and vests it in Congress. Article II deals with executive power and vests it in the President. And Article III deals with judicial power and vests it in the Supreme Court. Then if you look at Article I and Article II you will find that the legislative body, both the House and the Senate, were to be subject to election by the people. The House, direct election every two years from the people. The Senate, every six years indirectly through the state legislative bodies. And of course, the President every four years and once again, indirectly, through the electoral college. But nonetheless, both executive and legislative power would be done in response to the people, but not judicial power.

Let me read to you from Article III, Section 1 so that we have the language before us. We find that judges, unlike legislators and executive power office holders, held their office during good behavior, and not on a periodic time scale of election. "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Of course, as we know, in Article II, Section 2 that judges to the federal courts are appointed by the executive power and not elected by the people.

In California, there three Supreme Court judges were voted out of office by the people. Of course, many people rejoiced because they knew who was getting voted out of office. There were probably some who didn't rejoice. Why is it that we don't see today this distinction that was so clearly adhered to in the early state and United States constitutional heritage, that executive and legislative officers were subject to the election of the people, but judicial officers were not. I suggest to you the reason is not only because we no longer believe that there is a law that governs separation of powers. We think it is only a matter of political checks and balances. But we don't believe in the law of the nature of judicial power, and therefore we are stuck with judges who the people finally have to vote out of office because our legislators and our executives are not appointing people who respect the law of judicial power to the courts today.

LAW OF NATURE OF JUDICIAL POWER

Now I want to turn to the second topic, and that is, what power. What is the law of the nature of judicial power? Now as I believe most of the matters that face us, the law is really a simple matter, we just simply need to believe it, instead of trying to figure it out for ourselves.

Responsive, Not Initiative, Power

Let me take you once again back to Exodus 18:16. I believe in this simple verse that we see the three-fold aspect of the law of judicial power. "When they have a dispute, it comes to me." Notice, he doesn't go to the dispute, the dispute comes to him. So the first law of the nature of judicial power is that it is a law of responsive power, not of initiative power. A law of responsive power, not of initiative power. Now notice, contrast the way Moses exercised judicial power, waiting for the people to bring the dispute to him, to when he exercised legislative power. In Exodus 34:29-35 we have the account of after Moses had broken the Ten Commandments when he saw the people prostituting themselves before the golden calf. He came back with a new set of ten commandments.

But what did he do? He took it to the people. As the legislator, he took the initiative to tell the people the law that governed their lives. The nature of a legislative power is to take the initiative, to bring the law to bear to the people within the legislative authority. Contrast that also to the exercise of executive power and look at the testimony in Joshua 1:10-11. Who took the initiative to muster the army to go across the river Jordan into the promised land? Joshua, as commander in chief. He didn't wait for the people to say, "Well, are we ready to go? Is it time for us now to go?" No, Joshua said, "In three days we've got to go across the Jordan. Get your gear together, get your backpacks on, get your arms, so that we might go into the land."

And we even see this today, in a current controversy over the Iranian policy. Notice it was the President who took the initiative, or those working under him who took the initiative, in that matter.

The President didn't wait around for someone else to take the initiative. And Congress doesn't wait for someone to come to it to complain. As a matter of fact, we see the legislators quick to take initiative to determine whether or not the President with regard to the Iranian policy violated the law. We would not expect, hopefully even in this day, that Justice William Brennan would call the Supreme Court to determine whether or not the President had violated the law. No, as is meet for one who exercises judicial power, we hear nothing from the Supreme Court, because they had no power to initiate a review of whether the Iranian policy is contrary to law or not. They must wait for the matter to come to it, if it ever does come to it.

But contrast the way the Court is conducting itself with regard to the Iranian affair and what the Court said in *Roe v. Wade*. Listen to this passage from the *Roe v. Wade* case. "Measured against these standards," that is, the standards they set up under the Due Process Clause, "Article 1196 of the Texas Penal Code restricting abortions to those 'procured or attempted by the medical advice for the purpose of saving the life of the mother,' cannot survive constitutional attack made upon it here." Then after they held the Texas statute to be contrary to the Constitution, they immediately launched into the next section and said this: "To summarize and to repeat," (listen carefully to the language) "a state criminal abortion statute of the current Texas type..."

Notice it doesn't say "the criminal statute of Texas." It says a "state criminal abortion statute of the current Texas type." They're not going to wait for someone to litigate whether the Oregon statute is unconstitutional. They're not going to wait to determine whether or not the North Dakota statute is unconstitutional. They're not going to wait for someone to bring another case under a different abortion statute. They're going to resolve it now, once and for all. "A state criminal abortion statute of the current Texas type that excepts from criminality only a lifesaving procedure on behalf of the mother without regard to pregnancy stage and without recognition of other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." A clear example of simply not exercising judicial power at all, because it doesn't have one essential feature of judicial power, and that is to wait until someone brings the claim to them under the other statutes that were not being litigated in that particular case.

Resolves Individual Disputes

Now the second essential feature of judicial power is once again found in Exodus 18:16. Not only was the judge to wait for a matter to be brought to him before he could take action. Notice it says, "I judge between a man and his neighbor." The second essential feature of the exercise of judicial power is that it resolves a dispute to parties of a case, not a dispute for the whole nation. It was only to resolve a dispute between a man and his neighbor, not between a man and the whole nation. Or between one department of the nation and another department of the nation. Now this particular exercise of judicial power is reflected in the difference between what is called a "rule" and what is called an "order."

A court cannot under the law of the nature of judicial power issue a rule, because the very nature of a rule is that it is an action of general application. It applies not just to the parties of the case, it applies to everyone. Let me illustrate the difference between a rule and an order by contrasting Exodus 20:13 which says "thou shalt not kill," a rule, with Numbers 35:24 in which the congregation was to determine between the slayer and the avenger of blood as to whether or not a particular

person had committed an offense against "thou shalt not kill." The second was only an order which bound the parties to the case. The first is a rule that governs everyone in the nation of Israel.

Now the importance of this distinction between rule and order is reflected in a passage of scripture in Deuteronomy 17 that deserves very careful consideration. And that is that when a judge gave an order, if you were a party to the case, you were bound to obey it. No questions asked. There was no comparable rule that a person was bound by whatever a person in the name of legislative power might say. As a matter of fact, the testimony of scripture is that if someone writes a rule that is contrary to the law of God, then you are duty bound to disobey it as is attested in Acts 5:29. The difference between a rule and an order here is extremely important. As a matter of fact, it is the foundation of what we know as the contempt power of the court.

It is based upon the principle that you can't be a judge of your own case. Two parties can't bring a dispute before a judge and the losing party, after the judge resolves it against him, say "well, I don't like that judgment. I'm going to judge my case myself." The contempt power is power that says you can't act presumptuously when a court orders you to do a certain thing. It is based upon the assumption that the judicial power is lodged in the court, not in the individual person before the court. But in order for that contempt power to be exercised lawfully, it has to be confined to an order in a specific case to parties to the case. Otherwise, the court could hold us all in contempt if we happened to disagree with one of their opinions.

Let's go back and look at *Roe v. Wade*. Was it an order or was it a rule? What's so remarkable about the *Roe v. Wade* case is that at the conclusion of the case, it doesn't say, "State of Texas, the statute is unconstitutional, you can't enforce it." Listen to the language you find in the trimester formula of the court. "First trimester. For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." Now listen to the statement as to the guidance with regard to attending physician. "The state may define the term 'physician' as it has been employed in the preceding numbered paragraphs of this opinion to mean only a physician currently licensed by the state, and may proscribe any abortion by a person who is not a physician as so defined."

That language includes every state in the union, and yet only the state of Texas was a party to the case. They are the only ones who brought the dispute, or were involved in a dispute brought by someone else. And yet this rule, this three-part rule, was designed to bind every state, not just the state that was a party to the case. And deny to the state of Oregon, to the state of North Dakota, to the state of North Carolina, the opportunity to be heard. The very nature of this three-part formula, this trimester rule, was to govern every state in the union, and therefore was not an exercise of judicial power.

Exercise of Judgment, Not Will

We should not be too surprised. For the United States Supreme Court took its own rhetoric too seriously from the 1958 case of *Cooper v. Aaron*, where Chief Justice Warren, frustrated by the reluctance and resistance in the South to the court order in *Brown v. Board of Education* to desegregate the schools, made this most startling statement, and it was for a unanimous court. They 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 Article VI of the Constitution makes it of binding effect on the states, anything in the Constitution or laws of any state to the contrary notwithstanding.

Now if you take that language seriously, that means that when the Georgia sodomy statute was litigated recently in the United States Supreme Court, and if it would have come out the other way, every sodomy statute in every state would have been unconstitutional, even though only the state of Georgia was a party to the case, contrary to the exercise of the nature of judicial power. Not only is the nature of judicial power responsive, not initiative, limited in its scope to the parties of the case, not to people who are not parties, the law of the nature of judicial power is it is judgment, not will.

Listen to the language once again of Exodus 18:16: "when they have a dispute it comes to me and I judge between a man and his neighbor, and make known the statutes of god and law." Make known the statutes of God and his law. It doesn't say "hit you over the head with a baseball bat." It doesn't say, put you in jail if you don t do what we say. No, all the judge has is judgment, to make known the statutes of God and his law.

Notice, this is what distinguishes judicial power primarily from executive power. In the previous section, limiting the order to the parties of the case is what primarily distinguishes judicial power from legislative power. Only legislators can enact rules that affect people generally. Courts can apply rules to the parties of the case. Now what we see here is that no court has the power to execute the law. Only the executive has power to execute the law. United States Marshalls, county sheriffs, or members of the executive branch - not the judicial branch. It is county sheriffs who go out and levy on property of a defendant who refuses to pay a judgment in response to a court order. The court can't send the sheriff out, because that's not the court's business to send the sheriff out. The sheriffs don't belong to the court's office. The judge might be able to order his bailiff to do something, but he can't order the sheriff to do it. It is within the executive power to execute the judgment of the court.

If you recently were watching television, at least in this area, on Channel 27 they had an interesting documentary film on the Little Rock Central High case of 1958, where governor Orville Fauvis called out the state militia to stop the court order of integration in Little Rock Central High. Well, who called out the state militia to stop the execution of a court judgment? The one who held executive power in the state of Arkansas. And while a federal court issued a judgment that that was contrary to the order of the court, and Fauvis withdrew the state militia, who was left to protect and to execute that judgment, but the city police. And of course they found themselves in an impossible situation. And if it hadn't been that President Eisenhower called out the army, that judgment of the court would not have been executed in that particular case. But it shows, does it not, that it is the president, not the court, that sees whether the laws be faithfully executed. That's Article II, Section 3.

Hear me carefully. If a court opinion is contrary to law, should an executive official execute it?

Would it be faithfully executing the law to put into effect a lawless court judgment? Does not, not only an executive authority have discretion under the constitution, not to execute a judgment that is not a judgment at all but contrary to law, he has a duty under the Constitution to faithfully execute the law, not a court opinion. And therefore it is not surprising to remind ourselves that Alexander Hamilton in Federalist No. 78 said that the judicial branch is the least dangerous branch because it has neither force nor will, only judgment. That means, therefore, that just because a court renders an opinion, the sheriff or the United States Marshall, or any other executive officer, shouldn't just automatically go out and execute it. Because they have an oath to faithfully execute the law, not a court's opinion.

Only if the court's opinion is true judgment, that is, only if the court's opinion is right should it be executed. And that is an independent decision to be made according to the constitutional law of executive power, not one that should just simply automatically follow from the rendering of a court opinion. Even Chief Justice Marshall, who is oftentimes considered to be the architect of judicial review, and therefore is oftentimes cited in opinions such as *Cooper v. Aaron*, said the same thing of the limitation on judicial power. In *Osborn v. The Bank*, this is what he said: "judicial power as contradistinguished from the power of the laws has no existence. Courts are mere instruments of the law and can will nothing. Judicial power is never exercised for the purpose of giving effect to the will of a judge; always for the purpose of giving effect to the will of the law."

Let me give you a simple example which illustrates this notion that judicial power, if rightfully exercised, is only judgment and doesn't call for an automatic execution of that judgment. In 1923 in *Adkins v. Children's Hospital* the United States Supreme Court struck down a District of Columbia minimum wage law as unconstitutional. Congress did nothing in response to that opinion, left the law on the books. In 1937, 14 years later in *West Coast Hotel v. Parrish*, the United States Supreme Court concluded that its *Adkins* decision was erroneous and overruled it.

The Attorney General of the United States was asked to give an opinion. Is the District of Columbia minimum wage law still law, or must Congress go back and pass a new one? That is, could the President faithfully execute that law in the District of Columbia now? Here was the Attorney General's reply: "The courts have no power to repeal or abolish a statute, and notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books. The statute is valid from the date it was first effective." You see, the Attorney General, even in 1937, believed the same thing that Blackstone said. If an opinion is contrary to law, it is not law at all. So Congress did not have to go back and reenact a statute that had always been law. They just hadn't bothered to execute it.

There is another aspect to this notion that all the court has under judicial power is judgment, and not will. That is, they have no discretion as to the rule of law. They have only discretion with regard to its application to the facts. For example, a legislature can take the rule of law that you are supposed to exercise reasonable care towards your fellow man, and pass a rule that says you've got to drive 55 miles an hour on the freeway. Or 53, or 57, or 70. Because they have the authority to exercise their discretion as to how that rule of reasonable care might be articulated for the nation's highways. But can a court? I would suggest to you that if a court set down such a rule, it would go beyond its authority to exercise judicial power, because it would no longer be exercising discretion as to the facts, but would be exercising discretion as to the conventional statement of an underlying principle

of law which only the legislature has authority to do.

Let's go back and look at that *Roe v. Wade* opinion and look at the formula that the court came up with regard to abortion. Notice that the court didn't say that the Texas statute is unconstitutional, and leave it to the Texas legislature to go back to the drawing board and determine what kind of statute would be right in light of this court opinion. No, the court went ahead and wrote the formula. It wrote a 55 mile an hour formula for the state of Texas and for all states. As a matter of fact, it wrote clearly a 55 mile an hour formula when you think about the key to their formula is the viability of the fetus. Because if the fetus becomes viable, that is, capable of life outside of its mother's womb, that is when the state has authority to take into account the potential life of the fetus in assessing what the rule of law ought to be with regard to abortion.

Immediately after *Roe v. Wade*, there was a dispute as to what that point of viability is. Is it the fifth month? Is it the fourth month? Indeed, some were claiming it is even the first month. So what had the Court done but drafted a 55 mile an hour speed limit rule, or one like that, to govern all abortion laws everywhere forever. Clearly not an exercise of judicial power, but a usurpation by the Court of legislative power.

Now what's incredible about the *Roe v. Wade* case was that the state legislatures across the land responded as if the Court had executive power, and made no effort whatsoever to make an independent judgment as to whether it was right, or whether they had another option. Contrast that with the state legislative response to the United States Supreme Court cases that held old capital punishment statutes unconstitutional. States across the land didn't believe that they were bound by that opinion because they knew that they could go back and redraft their capital punishment statutes, and take into account other factors and perhaps the second time around, get a favorable opinion from the Court.

You can examine *Roe v. Wade* and find that the Court confined its concern about the medical interests that were involved to only those medical risks of a woman who does have an abortion. They said that those medical risks are not very serious. But they never assessed what were the medical risks for a woman who had had an abortion. That factor was never taken into account. And the reason why it's never been taken into account is because state legislatures have failed to recognize that the exercise of judicial power is only judgment, and not discretion as the. Court exercised in that particular situation in crafting its trimester rule.

CONSTITUTIONAL LIMITATIONS ON JUDICIAL POWER

Finally, what is the law of the constitutional limitation upon judicial power? What do we do with a court that habitually does not exercise judicial power, but indeed, usurps other power? Once again, let me suggest to you that there is guidance, not only in the Constitution, but guidance in the Scripture.

Judicial Selection

First of all, going back once again to Exodus 18, we find that there was a selection process with regard to the judges in Israel. Look at verse 21: "Furthermore, you shall select out of all the people able men who fear God, men of truth." We find that Article II, Section 2, Clause 2 gives to the

President the power to nominate judges to the Supreme Court and other judges. We find likewise in Hamilton's Federalist No. 76 that the President is the one who has the authority to nominate judges because "he can investigate with care the qualities requisite to the position to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." In other words, the President in the nomination process should be looking for able men, who fear God, men of truth.

What's happened to us today is that if a President articulated that as his standard, he would be accused of violating separation of church and state, when as a matter of fact, that's the very quality that you must find if someone who is put in a position of lifetime tenure for good behavior is one who has those kinds of attributes. Because otherwise, you're putting incredible power into the hands of a man who doesn't fear God, but only fears himself. Someone who is not a man of truth, but would do whatever is expedient. No surprise, then, that the appointment power is tempered in the Constitution by the advice and consent of the Senate.

And yet, what do we see today in the judiciary committee of the United States Senate? Do they examine to see whether or not Justice Rehnquist was a man who was able, who feared God, and was a man of truth? Or did we not see a judiciary committee composed of many Senators who wanted to determine whether they believed what he stood for or whether they disagreed with what he stood for.

Listen to what Hamilton again says in Federalist No. 76:

> To what purpose then require the cooperation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity. And in addition to this, it would be an efficacious source of stability in the administration.

Because neither the President nor the Senate are looking for those who are ones who would respect the power of the judicial office, it is no wonder that the issue has become; "Do we agree with them or do we not agree with them." And yet in the selection process, that was not considered to be the relevant consideration to determine who ought to sit as a Judge on the Supreme Court or any other federal court.

Judicial Tenure

What is the other criteria? It is criteria that relates to judicial fidelity to the oath of office. Listen to what it says in Exodus 18:21 - not only men of truth but "those who hate dishonest gain." Those whose character record would indicate that if you put them on the bench, you wouldn't have to worry about whether they would conduct themselves in accordance with the standard of good behavior. But if they did go astray, the standard of good behavior is really in contrast to what we oftentime think of as a lifetime appointment. Judges on the United States Supreme Court and on the Courts of Appeal and District Courts are not there for life. They are there for a time of good behavior. And we've got to stop talking about lifetime tenure for judges. That's not what the Constitution calls for - it calls for tenure during good behavior.

Now what is this standard of law with regard to good behavior? Listen once again to Federalist No. 78:

> The standard of good behavior for the continuance in office of the judicial magistry is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

Notice that good behavior was designed for the purpose of protecting the independence of the judges from legislative and executive removal. At the same time, it was designed to limit judges to their term of office so long as they conducted themselves well. Who was to enforce this standard of good behavior? Well let me suggest to you that it was given to the judiciary to discipline their own ranks. And a judiciary that abandons that responsibility is a judiciary that assumes that it has lifetime tenure instead of tenure during good behavior.

Now I believe that in the history of America there have been discipline matters taken against judges. But normally they are done in a very informal way. I know, for example, a District Judge in the state of Oregon who for many years had an office and a secretary and sat as Senior Judge, but never heard a case. But he was paid by the taxpayers during that entire time. You see, he was an habitual drunkard. And his colleagues eased him out of office, that is, eased him out of hearing any cases of any significance, but left him on the payroll. Because they were unwilling to take the action they were constitutionally required to take, and that was to oust him from office because he was persistent in failing to conduct himself in such a way that he could be a fair and impartial administrator of justice.

If the judiciary is not going to discipline itself, then we should not be surprised to see such actions as those recently in California. And we shouldn't be surprised that a matter that perhaps is not really very significant becomes a matter of impeachment, with regard to the recent Judge out in Nevada that takes up all the time in the House and the Senate. Why? Because the judiciary won't discipline its own ranks for failure to meet the standard of good behavior.

Now finally, we see the Biblical example of a failure to administer discipline when Samuel failed to discipline his own sons who were chasing after lucre and perverting judgment. No wonder the elders of Israel came to a point of frustration and said they wanted a king like all the other nations had. It is a testimony that if a judiciary does not discipline itself, then its going to find itself in great difficulty to exercise judicial power, especially in those states where the people can vote them out of office.

Judicial Impeachment

Let me talk to you a little bit about judicial impeachment. There is a law that governs impeachment. And I believe it's a law that is ignored, particularly in the area of the misuse of the exercise of judicial power. Listen to Federalist No. 81, which I think is extremely helpful to understand. If a judiciary does not discipline itself, does not exercise judicial power, does not keep itself within the bounds of the law of nature and of nature's God, here's what Federalist No. 81 says:

> This may inferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone is a complete security.

Now what they were talking about here was that if you had a judiciary that began to exercise legislative power, and usurping the function of Congress, or usurping the function of the state legislature, then that would be a high crime and misdemeanor and subject to impeachment. The assumption of the writers of the Federalist Papers was that the legislature would be a lawful legislature, one that would recognize the lawless exercise of judicial power, and if it saw it systematically and consistently being exercised, that they would not stand for it and impeachment would be the threat, and if necessary, would be instituted in the appropriate case.

But what do we see? We see a House and a Senate divided over the issue of abortion. They've never addressed the question of whether or not the Court in that particular opinion exercised judicial power or didn't exercise judicial power. The reason for that is because they themselves no longer follow a rule of law in exercising legislative power, so we shouldn't be surprised that they haven't even considered the possibility of impeaching the several justices on the United States Supreme Court, for not only the decision in *Roe v. Wade*, but for a long line of cases in which the Court has exercised legislative power rather than judicial power.

CONCLUSION

In conclusion, I want to rephrase Justice White's dissent a little bit. Here's what I believe would have been the right thing to have said: "The Court has no authority to do what it has done today. The Constitution vests only judicial power in this Court. Today the Court has exercised legislative, not judicial power. This is only one instance in a long line of cases of usurpation of power and according to Federalist No. 81, is grounds for impeachment." Thank you.

(Question about President's possible course of action in response to *Roe v. Wade*.)

I believe the first step he could take is not to follow his predecessors. I think what we have seen in the last two or three decades are presidents who are result-specific in assessing the qualities of a particular person for holding the judicial office. For example, the majority of *Roe v. Wade* was made up primarily of Nixon appointees. It was a Republican court that constituted the judges that really rendered the majority decision. Now, why is that so when we had a man who said "I believe in strict constructionism," that is, I believe that the judges are bound by the text and intent of the writers of the Constitution.

Well, the reason for that was that he only looked to see whether or not they had certain results in certain kinds of cases. If they had followed the Constitution in the area of criminal procedure, then that satisfied the President and those who reviewed those with regard to the appointment process. They didn't ask any questions about any other area of the law. If they would have, they would probably have found, both with Blackmun as well as Chief Justice Burger, that those men were just

as much willing to rewrite the Constitution as had their liberal counterparts been willing to do so. And indeed we have evidence of that.

So what I would suggest the first thing is to broaden the scope of the inquiry to find out just precisely what is the understanding of the office of judge, not how would you rule a particular case. Because what they may find is someone who rules favorably in one area, but because they do not have a constitutional legal understanding of judicial power, they will rule wrong in another area.

Now the second question, of course, is where can you find such men? And here I would suggest that they are looking in the wrong places. They are looking in prestigious law firms. They are looking at people who are active politically. A President, especially a President who has the kind of authority that President Reagan has had, is that he ought to exercise more independence of judgment in the office of President. We need to restore the appointment power to the President. Today, other than the United States Supreme Court, the appointment power effectively is exercised at the Circuit Court level and at the District Court level by Senators. They are the ones who decide who is going to be appointed. They are no longer being limited to responding to the President's exercise of power.

Now we've seen the President, and I applaud him, in some instances taking the initiative. I think Dan Manion is a beautiful example of where the President said, "I'm going to appoint Dan Manion, I don't care what Sen. Lugar might really think." Sen. Lugar didn't oppose him, but on the other hand it wasn't Sen. Lugar's choice. So what we need to do, I think, is to restore that constitutional balance.

I believe that in the question of faithfully executing the law, the President is not bound by a congressional enactment any more than he would be bound by a Court opinion. That if he believes that it is unconstitutional, then under his power to execute or not execute the law, he should obey the Constitution. Now there may be instances involving the abortion question where he has that authority. In the basic instrument of enforcing the criminal law, he doesn't have that authority and therefore the question of executive power is really not in him, the question there really rests with the states. That goes for the legislative and at the executive level.

It's amazing, isn't it, today that if you go back and look at the early history of Supreme Court opinions that states didn't automatically follow court opinions rendered by the United States Supreme Court Justices. As a matter of fact, there were some rather healthy and sometimes dramatic confrontations in the early history of our country. But today it's like the state officials just roll over. The Supreme Court pronounces, we roll over. So I think the major responsibility in the abortion area lay with the state legislative and executive officials.

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