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By David F. Forte

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Over the past two years, I have been on the trail of William Marbury, protagonist in Chief Justice John Marshall's most renowned case of *Marbury v. Madison*. My quest has taken me through collections of eighteenth century papers found in research libraries from Williamsburg to Boston. In Washington, I am often at the National Archives, or I travel the short distance to the Maryland Hall of Records in Annapolis. I am always surrounded by others, often older people, doing genealogical research. Every day I hear someone around me exclaim as they go through some old ledger or newspaper, "I got him!" or "Mildred, look! He was married twice!" as people are delighted and surprised by the discoveries of their pasts.

The Search for Roots. Why is there such a hunger for knowledge of our specific past, of our roots? Why, indeed, is genealogy such a passion for older people, knowing that their mortal time line is nearing its end? The quest, I believe, comes from the irrepressible human need to know our identity, to make real our being and individuality. We most frequently search for the answer in origins.

The hunger for the origins of things is unabated in man, witness each civilization's creation sagas. We seek it in the stories about our immigrant grandparents, or even about other immigrants, like the pilgrims, not related to us in blood or religion. We ask how the universe began, or whether we are the children of Abraham. We try to imagine the moment of the revolution on the Freedom Trail in Boston, or in the sufferings at Valley Forge. As tourists, we try to sense the presence of Jesus along the Sea of Galilee. And, despite all the scholarly doubts about our finding out, we need to know what the framers had in mind when they met in Philadelphia to write our Constitution.

Conservatives in particular find meaning in origins, whether the origin be historical, or religious, or posited, as in the state of nature theories that libertarians rely upon. A primary principle of conservatism is respect for the legacy of the past. A primary principle of judicial conservatism is respect for the source of one's judicial authority in the framers' Constitution.

Judicial conservatives in the Anglo-American tradition are most especially beholden to origins, for Anglo-American judges inherit their authority from the common law and the doctrine of precedent. Judges who forsake reference to first principles in favor of current political trends not only violate the principles of constitutionalism, they act as apostates to their own judicial tradition.

But in searching for origins, we come across a curious phenomenon. And that is this: we make sense of our origins after the fact. The meaning we find is not in the exact replication of what originally happened, but the meaning we find in it afterward. The Gospels are powerful, not because they are historic renditions of what Jesus did, but because the writers of the Gospels take events and report them in a context in which those events take on a deeper meaning, a more concrete reality.

Maybe you have noticed also that often we do not make sense of our sacrifice in wars by the reasons we put forward for going to war, but from the reasons we develop afterwards to justify the sacrifice. Holding the Union together was part of but not a sufficient reason for the sacrifice of so many thousands of men. Keeping the sea lanes open was not enough for our sacrifice in World War I.

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Even defeats can be made sense of. The South has come to terms with the Civil War as a noble effort in an ignoble cause. We have yet to make sense of the Vietnam defeat, nor even the Persian Gulf victory, and therein lies much of the current distress of the country.

The Principles of the Constitution. When we come to examine the Constitution and a judge's moral obligations to follow it, there is, over and above the specific text, a number of originating principles that give the text meaning.

Some of these principles can be discerned in the reason for the drafting of the Constitution: the need for a central government that could protect the liberties of Americans against foreign nations, and from the destructive competition among our own states; a government that would be capable of maintaining the physical and economic infrastructure of a large empire, possessed of powers over the post, commerce, army, navy, communications, currency, taxation, and the economy. Other originating principles can be found in the philosophic premises that the framers embraced, in the Anglo-American tradition of constitutionalism and the rule of law, in the specific events that led to the Revolution, and in the experience of the Revolution itself.

But the initial reasons for the Constitution do not give us a whole picture of the principles of our constitutional order.

In the months after the Constitution was signed, when it was in its struggle for ratification among the states, a series of essays appeared in defense of the document. Those essays, soon denominated as The *Federalist Papers,* made sense out of a collection of worked over and worked over again compromises at the Philadelphia convention. James Madison himself had been in deep distress at the end of the convention. He had pushed for a much stronger central government than he got, and he genuinely feared that the Constitution would go the way of the Articles of Confederation. Nevertheless, it was far better than the failure that was the Articles of Confederation, and being trained in the law, he, Jay, and Hamilton, worked up the best arguments they could for that document.

Those arguments made sense out of chaotic compromise, and provide the source of principles upon which so much of the Constitution makes sense. In modern parlance, they put a "spin" on those events, and the spin took. The *Federalist,* more than any document, defined the origins of our constitutional system, indeed, as much as the records of the convention itself. It is not a secondary source.

In answer to the Anti-Federalists who feared that the new document would reduce state sovereignty and thereby threaten the liberties of individuals, the *Federalist* authors developed a rationale for the structure of the new government system. Essentially, as Madison discussed in *Federalist* 10 and 51, the constitutional structure would be divided along federal lines first, and then within the central government, divided again into a complex separation of powers. The liberties of the people would therefore be protected, first by the residuum of sovereignty left to the states, and secondly, by tying different constituencies to separate parts of the federal government—House of Representatives, Senate, Executive, and Judiciary—and giving each branch some part of each other's powers in order to defend itself against any branch's aggrandizement of its own powers.

In 1791, the Bill of Rights were appended to the Constitution. As described by its mover in Congress, James Madison, those Amendments had two purposes: 1) to legitimize the Constitution and the new government in the eyes of a large segment of Americans, the Anti-Federalists, who were particularly concerned about the lack of a charter of rights, and 2) to provide, in modern parlance, a fail-safe mechanism against egregious conduct of Congress or the executive in case the structure of the Constitution proved inadequate in any particular instance.

The primary mechanism of our liberties was, therefore, a reliance on the structure, with the Bill of Rights providing a backstop. It follows that the maintenance of the integrity of the structure of the Constitution is the first duty of those who monitor the government, particularly the judiciary.

The Importance of John Marshall. Indeed, it was in the maintenance of the integrity of the structure of the constitutional order that Chief Justice John Marshall made his greatest contribution.

In 1800, the country and the government had become totally politicized. Both political parties had come to the honest belief that the other was animated by treasonous leanings: the Federalists thought that the Jeffersonians were selling out the country to maniacal French Jacobinism, and the Republicans thought that the Federalists had accepted the Tory ideology of England and were fast making the United States a colony of that kingdom once again. The judiciary was as political as any other branch. Things had become so politicized that Madison himself had given up on the separation of powers, and now wanted one faction, the Jeffersonian Republicans, to control the whole government.

Thus Marshall reinvigorated the separation of powers structure originally elucidated by Madison by giving it an ethical grounding. The branches of government now had a functional separation, a duty to be true to their function, and were not merely separated for purposes of power competition. The judiciary would ply its legal trade, but would leave the political issues to be resolved by the political branches and the states. Marshall gave the judiciary a new sense of role, and established an ethical grounding for how judges should act.

Therefore, in judging whether a court has been true to the constitutional heritage (which is, at bottom, what we ask of conservative judges), we look first to see whether it has reenforced the structural limitations among the branches in the federal government, on the one hand, and between the federal government and the states on the other; and second, we seek to determine whether the court has retained the ethical notion of self-limitation when pressed to resolve issues on political rather than legal grounds.

The problem judicial conservatives face is this: since 1938, the Supreme Court has given up enforcing both the structural and the ethical elements of our constitutional order. First, the Court has stopped protecting state jurisdiction against federal incursion, particularly in the areas of taxation and commerce. Second, the court has not enforced the limits on the delegated grants of power to Congress. The Taxing, Commerce, and Spending clauses have been given the widest possible scope, leading to the massive regulatory state we have today. Third, after some hesitation, the Court began using the Bill of Rights as the first line of defense against government, and, rejecting Chief Justice Marshall's counsel, began importing political programs into that clause. [1]

Now that the Supreme Court has been overwhelmingly staffed by appointees of Republican Presidents, we can ask: To what extent have they been faithful to the original vision of the Constitution as articulated during its early years? How have they revivified the structural protections? How have they communicated an ethical sense of their own role in the structure?

The answer, unfortunately, is that the record remains disappointing. I cannot here assay a complete survey, but let me give a few illustrations.

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1 I do not wish to minimize the effect that the Fourteenth Amendment had in providing addition judicial protections for the citizens of the several states. Nonetheless, the Fourteenth Amendment remains a modification of the original constitutional structure, not its undoing.

1) Federalism. Subsequent to 1938, any real judicial concern for maintaining the federal system quickly evaporated. Through a virtually unlimited definition of the Commerce Power,[2] and especially through an unrestrained use of the Spending Power,[3] Congress was able to supplant the states as the primary policy making force in the country.

The Rehnquist Court has been able to do nothing to protect the states from the inducements of federal spending.[4] For a while, then-Justice Rehnquist was able to forge a bare majority to safeguard a very narrow enclave of state independence under the Tenth Amendment from direct congressional regulation.

Under *National League of Cities v. Usery*[5] and succeeding cases, the Court declared that Congress could not regulate the states as states in an area of historically exclusive jurisdiction of the states. Thus, congressional regulation of the wages of state police and fire personnel was prohibited by the Tenth Amendment. The attempt to leave the states free of congressional control was short lived, however, and a change in vote by Justice Blackmun in the case of *Garcia v. San Antonio.*[6] overruled Usery and declared that the states' only constitutional protection lay in the political process, a process we all know has provided precious little range of independence from federal control. At that time, Justice O'Connor, in dissent, declared that she hoped that *Garcia* itself would one day be overruled and the Tenth Amendment revivified.

In this last term of the Supreme Court, Justice O'Connor had such an opportunity. By the vote of 6-3, the conservative majority resurfaced to protect New York State from being conscripted into passing regulations on radioactive waste.[7] Yet, Justice O'Connor failed to overrule *Garcia* and thus the future of state independence under the Tenth Amendment is as ambiguous as ever.

2) Separation of Powers. In a similar vein, the conservative Court early on began to enforce the distinctions between the three branches of government only seemingly to abandon the project in its most recent decisions. For a while, a conservative coalition voided Congress's attempt to regulate the executive branch's internal workings by the device of the congressional veto.[8]

It prevented the Comptroller General, part of the legislative branch, from performing the functions of the Executive,[9] and it protected the President's right of appointment to the Federal Election Commission.[10]

Again, however, the trend has been reversed. Strangely, the Court has been particularly insensitive to congressional incursions into the judicial process. The Court upheld the independent counsel statute, allowing the equivalent of an unresponsible Star Chamber to operate in the American Government.[11] The Court also permitted Congress to establish an independent agency within the judiciary to set sentencing guidelines.[12] Finally, in this last term, the Court undercut one of the

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2 See, e.g. *Wickard v. Filburn*, 317 U.S. 111 (1942).
3 See, e.g. *Oklahoma Civil Service Commission*, 330 U.S. 127 (1947).
4 See his opinion in *South Dakota v. Dole*, 483 U.S. 203 (1987) upholding the withdrawal of highway trust funds from states that do not enact a 21-year-old minimum drinking age, despite the provisions of the Twenty-First Amendment.
5 426 U.S. 833 (1976).
6 469 U.S. 528 (1985).
7 *New York v. United States*, 60 USLW 4603 (1992).
8 *INS v. Chadha*, 462 U.S. 919 (1983).
9 *Bowsher v. Synar*, 478 U.S. 714 (1986).
10 *Buckley v. Valeo*, 424 U.S. 1 (1976).
11 *Morrison v. Olson*, 487 U.S. 654 (1988).
12 *Mistretta v. United States*, 488 U.S. 361 (1989).

greatest precedents in its history[13] and agreed that Congress could direct an outcome of a case pending before a court by changing the underlying law at the same time.[14]

3) Rights. In recent years the Court has expanded the rights of property owners against direct government takings, requiring compensation for partial takings,[15] temporary takings,[16] and takings of intangible property.[17] The Court has, on the other hand, allowed the government to take property for any reason whatsoever, so long as compensation is paid for it.[18]

A greater problem for property owners is not direct government taking, but government regulations that deny so much of one's ordinary uses of one's property. This last term, in the much anticipated case of *Lucas v. South Carolina Coastal Council*,[19] the Court did little to protect property owners from intrusive state regulation.

In *Lucas*, a man was prohibited from building on a lot on one of South Carolina's barrier islands despite the fact that houses were already built on the adjoining lots. The most that Justice Scalia could do was to remand the case and indicate that in certain very narrow circumstances, a regulation could constitute a taking.[20]

In other rights areas, the Rehnquist Court has developed modifications of the law on which conservative opinion is divided. The Court has expanded the substantive protections of political speech, even including expressive flag burning,[21] but has restricted the areas in which unrestrained speech can be expounded.[22] The government may, for example, determine that certain kinds of speech are impermissible in schools and airports.[23]

The Court has maintained the distinction between obscene and non-obscene expression,[24] but has cut back on the protections afforded to commercial speech.[25]

Generally speaking, the Rehnquist Court has retained most of the protections afforded persons accused of crimes,[26] but has vigorously pruned the procedural techniques that have led to virtually unlimited delays and rehearings of legitimate convictions.[27]

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13 *United States v. Klein*, 80 U.S. 128 (1872), prohibiting Congress from prescribing results of a case before a court.
14 *Robertson v. Seattle Audubon Society*, 60 USLW 4273 (1992).
15 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
16 *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).
17 *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986 (1984).
18 In doing so, the Court has made the "public use" requirement of the Fifth Amendment a nullity. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).
19 60 USLW 4842 (1992).
20 The best I can discern from a most complex opinion is this: If a regulation operates to deprive an owner of real property (not chattel or intangible property) of its total value (not just part of the value) based on owner's investment-backed expectation (leaving out owners of land who obtained it by gift or inheritance) in a state where such regulation could not be presumed to part of the normal scheme of state-imposed property encumbrances (such as zoning, environmental and other regulations), then there is a taking and compensation must be paid. Obviously, not many property owners are protected under this ruling.
21 *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).
22 *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985).
23 *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); *International Society for Krishna Consciousness, Inc., v. Lee*, 60 USLW 4749 (1992).
24 *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).
25 *Board of Trustees of SUNY v. Fox*, 492 U.S. 469 (1989).
26 *Foucha v. Louisiana*, 60 ULSW 4359 (1992); *Hudson v. McMillan*, 60 USLW 4151 (1992).
27 *Keeney v. Tamayo-Reyes*, 60 USLW 4339 (1992); *Sawyer v. Whitley*, 60 USLW 4655 (1992).

The greatest disappointments for conservatives, however, lay in the areas of school prayer and abortion. This last term, five person majorities, led by Justices Kennedy, O'Connor, and Souter, halted a trend towards greater tolerance for religious expression in school settings. By striking down a non-denominational prayer at a voluntary school graduation, the Court rejected two centuries of unbroken tradition of ceremonial acknowledgement of Providential guidance by all levels of government.[28]

At the same time, that trio of Justices upheld a judicial usurpation of but two decades' longevity.[29] The reaffirmation of *Roe v. Wade*[30] in the name of *stare decisis* and with the pretentious claim of saving the reputation of the Court is a burlesque of conservative principles.

The principle of *stare decisis* is designed to maintain worthy precedents. But *Roe v. Wade* is without any constitutional worth. That decision was a political ruling ungrounded in the Constitution's text or the history of our country. It destroyed legislation and precedents that stretched back over a hundred years. Its very maintenance brings the Court continued disrepute, distorts the nomination process, and makes the Supreme Court the very political body John Marshall had sought to limit in *Marbury v. Madison.*

Chief Justice Rehnquist has, on the whole, led a brave and good natured battle to return the Supreme Court to its ethical grounding. He has been deserted in that quest by Justices who had once claimed to have been his allies. Constancy is another conservative virtue neglected by many members of this Court.

This year especially, conservatives have been surprised to realize how untutored so-called conservative judges are in the first principles of the Constitution and of their judicial craft. It is a lack that conservative educational and policy institutions should now address.

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28 *Lee v. Weisman*, 60 USLW 4723 (1992).
29 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 USLW 4795 (1992).
30 410 U.S. 113 (1973).