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The Language of Law and the Foundations of American Constitutionalism

Gary L. McDowell and Edwin Meese III

Abstract: *America's Founders believed that creation of the Constitution signaled acceptance of the belief that men could create their governments from what Alexander Hamilton called "reflection and choice" and not be doomed to whatever fate may bring as a result of "accident and force." At the heart of this idea is the further confidence that language, as John Locke said, "is the great instrument and common tye of society." The Founders held that their written and ratified Constitution of limited enumerated powers was understood to be the embodiment of what Hamilton called the 'intention of the people." The recovery of that original foundation of the Constitution begins with the premises of those who stood at the beginning of modernity, especially Locke and Thomas Hobbes, for it is in their political philosophies of natural rights that one sees most clearly the moral grounds of originalism as the standard of interpretation. Originalism is rooted in the belief that men are all created equal and may not be legitimately ruled arbitrarily by another and that, to avoid such tyranny, all legitimate government must rest upon the consent of the sovereign people from whom all power flows.*

EDWIN MEESE III: Today is a very important lecture in our Preserve the Constitution series, which is sponsored by our Center for Legal and Judicial Studies. Gary McDowell has an interesting, varied, and widespread career as an author, as an educational administrator, as a professor and teacher, and did an outstanding job in the Department of Justice as the Associate Director of Public Affairs; but most impor-

Talking Points

- The Founders' understanding of the relationship of higher law to their written and ratified Constitution is far removed from the idea of a morally evolutionary law that informs the Constitution.
- At the heart of the Founders' belief that the Constitution could be created from "reflection and choice" was confidence that language, as John Locke said, "is the great instrument and common tye of society."
- To Chief Justice John Marshall, "when judges depart from the exercise of simple judicial discretion and begin to embrace political discretion, they commit treason to the Constitution."
- Recovery of the Founders' Constitution of limited enumerated powers begins with the premises of those like Locke and Thomas Hobbes, in whose philosophies of natural rights one sees most clearly the moral grounds of originalism as the standard of interpretation.

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tant for me, he was the head of our speechwriting group, which was of tremendous help as we tried to explain to the country the importance of constitutional fidelity on the part of judges and the importance of restoring that sense of integrity to the judiciary throughout the country.

This was something Ronald Reagan was particularly interested in. He felt that too often judges had strayed from their roles as impartial arbiters and appliers of the law and were substituting their own judgment, their own policy preferences, their own political biases for what the Constitution and the laws enacted by Congress actually said.

Gary was instrumental in developing a strategy and then implementing that strategy for a series of articles and speeches that talked about judicial allegiance to the Constitution and fidelity to it. He has continued after he left the government: He was a scholar at various institutions, including Harvard Law School and the Center for Judicial Studies; he was the Director of the Institute of United States Studies at the University of London for several years, in which he brought to our friends in the U.K. an understanding of the law and constitutionalism in the U.S.; and he currently is a professor at the Jepson School of Leadership Studies at the University of Richmond.

A couple years ago, he and I had the pleasure of teaching together a seminar on Ronald Reagan and the rise of conservative leadership, and that was a great experience for me. We enjoyed having young people in the Jepson School as well as in the Law School participating in that seminar, and as a tribute to Professor McDowell, they actually showed up 100 percent attendance at a seminar that went from 1:00 to 3:00 on a Friday afternoon. That gives you some idea of his drawing power as a professor.

Despite the fact that he's already been either author or editor of some 10 books, I think that the current book, *The Language of Law and the Foundations of American Constitutionalism*, is probably his most important. He has been working on that for several years of research and writing, and it explains really the importance of constitutionalism in both an historical and a philosophical sense. To talk about that today, he will give us a lecture and discuss his book.

*—**Edwin Meese III** is Ronald Reagan Distinguished Fellow in Public Policy and Chairman of the Center for Legal and Judicial Studies at The Heritage Foundation.*

GARY L. MCDOWELL: It is a privilege to be with you today and to have the opportunity to make a few brief remarks about *The Language of Law and the Foundations of American Constitutionalism*. It is especially rewarding to be able to do so here at the "mother church" of American conservatism and in the company of my dear friend, Attorney General Meese.

One of the greatest honors of my life was to serve in the Meese Justice Department during the Administration of President Ronald Reagan. I have had occasion before to say that it was not like having a government job at all but was more like being a member of a family, and it still feels that way. I do not think that anyone who was there with us in those days does not feel that same attachment and the deep sense of having been a part of something far bigger than ourselves, and that was due solely to the extraordinary leadership of Attorney General Meese.

I went to the Tea Party convention in Richmond a couple weeks ago. I was saying to the Attorney General earlier, one of the greatest things about going to the Tea Party convention is you come out with a sense of the exhilaration of ordinary people who care about principles. I haven't had that feeling since Ronald Reagan became President.

As you well know, it was 25 years ago this past summer when the Attorney General embarked on a program of remedial legal education for the nation. Before the American Bar Association's annual meeting here in Washington, he urged the nation and her courts to abandon judicial activism and return to what he called a "jurisprudence of original intention," a traditional means of interpretation stretching back hundreds of years that would allow the country to recover the Founders' Constitution from beneath the rubble of legal and scholarly moralizing. That speech, and the others he would deliver over the next several years that

would build upon it, caused a sensation. It is perhaps worth revisiting why that was so by recalling just how set in their ways were the judicial activists of the day.

The summer of 1985, President Reagan was just at the beginning of his second term. In his first four years, there had only been one occasion for him to appoint a justice to the Supreme Court of the United States, and that had been Sandra Day O'Connor in 1981. The O'Connor appointment proved more that the President was willing to honor his campaign promises—he had pledged to appoint the first woman to the Court—than that he was committed to changing the direction of the judiciary at that particular moment.

Unlike originalism, the living Constitution theory embraces the view that judges should redefine the meaning of the Constitution over time according to "their own fresh moral insight."

There were, of course, important originalists like Antonin Scalia and Robert H. Bork, who had been appointed by President Reagan to the United States Circuit Court of Appeals for the District of Columbia Circuit in 1982, but there was no guarantee at the beginning of that summer that there would be any additional openings on the Supreme Court any time soon. Indeed, another year would elapse before the President would have the opportunity to elevate then-Associate Justice William H. Rehnquist to the chief justiceship and in turn award his place as an associate justice to Judge Scalia.

During that summer the Federalist Society—an organization I consider to be a revolutionary development in legal education in this country—was in its infancy. It had been founded only in 1982, and all of its founders worked for Attorney General Meese in the Justice Department. It was nothing like the powerful force for good it has become.

In 1985, the Supreme Court itself was dominated by the great liberal lion, Justice William J. Brennan, who prowled those marble corridors looking around every corner for justice to be done and insisting that the Court could only interpret the Constitution as a living, evolving, modern document. It was his view that in nearly every case, contemporary needs must trump the original meaning of the fundamental law. His job, as he saw it, was not to keep the times in tune with the Constitution, but rather to keep the Constitution in tune with the times. Brennan was not alone.

The Court at that time had certain well-defined premises on which it routinely rested its decisions, premises many in the legal community either shared or for the most part left unquestioned. Judge J. Skelly Wright some years earlier had written an article in the *Harvard Law Review* in which he attacked Alexander M. Bickel and Philip B. Kurland as what he called "self-appointed scholastic mandarins" who had dared to resist the spread of judicial policymaking and thus government by judiciary. In that article, Judge Wright exposed the three basic premises of modern judicial activism that the Reagan Administration had to confront.

The first premise, Judge Wright argued, was that when it came to judging there need be "no theoretical gulf between law and morality." The second premise was that the Supreme Court of the United States, of all the institutions of government, was best equipped to speak what he called "the language of idealism" for the nation. Finally, the result of those beliefs had been nothing less than the creation of a "revolutionary" jurisprudence in which the historic written Constitution was to be supplanted by judicial recourse to an allegedly "living" Constitution of a morally evolutionary sort.

These were not premises without purposes; there were objectives to all of this, and the objectives themselves were quite clear. The first objective was to create and persuade the nation to embrace the notion that the Constitution is a living law with a morally evolutionary content, that there is no settled original understanding whereby the politics of the nation could be ordered and guided. The second objective was to convince the nation that under this ideology of a living Constitution, it is the judges over time who should redefine the meaning of the Constitution according to what Ronald Dworkin—the patron saint of activists everywhere—called their own "fresh moral insight."

The final objective of this new judicial power was not at all modest. It is not concerned merely with the securing of legal and constitutional rights, not even those that had been created by the Supreme Court, such as the right to privacy in *Griswold v. Connecticut*. No, these new moralists were far bolder than that. The object of judicial power they sought to promote was nothing less than what Michael Perry had called "the moral evolution of the nation," a moral evolution that was to be defined, guided, and developed by ordinary judges sitting in ordinary courts.

It was into this complacent judicial world of smug self-satisfaction that Attorney General Meese raised the most radical of ideas that one could imagine: The Constitution still matters and still has the status of binding law. That was the sum total of the radicalism, but you knew it was radical not only because of the finger-pointing and the disapproving clucking of *The Washington Post* and *The New York Times* (in the so-called news pages as well as on the editorial pages), but because the Attorney General achieved what was then the gold standard of liberal condescension and ideological derision; We earned not one but two cartoons by *The Washington Post*'s celebrated editorial cartoonist, Herblock. We all knew the Attorney General was on to something.

What was at stake—what *is* at stake—in this war for the Constitution is the original view of the Constitution, an understanding that takes seriously the importance of it being a written document, the terms of which are to be deemed permanent until and unless changed by what Alexander Hamilton called "the solemn and authoritative act" of formal amendment. This is the understanding that lies at the core of what might properly be called the Founders' Constitution. And it is this idea of a Constitution at once fundamental and permanent that is still most in danger of being eroded by the idea of moral judging under an evolving Constitution that continues to dominate so much of contemporary constitutional law and theory.

These two views of the Constitution—the Founders' Constitution versus the living Constitution—would come into their most direct and explosive conflict with the battle over President Reagan's nomination of Judge Robert H. Bork to replace retiring Justice Lewis Powell on the Supreme Court.

The Founders' Constitution is a written document, the terms of which are to be deemed permanent until and unless changed by what Alexander Hamilton called "the solemn and authoritative act of formal amendment."

On the afternoon of October 23, 1987, the U.S. Senate committed a grave constitutional and political sin: At that hour and in that place, they voted Judge Bork down by the largest margin in American history. I mention this because I firmly believe this is one of those events we must never forget, must never forgive. To forget and to forgive would be to lose sight of what the institutions of our government are capable of doing to good and decent and capable men who would be jurists.

In the end, Bork was rejected for his modesty, for his beliefs about the limited nature and circumscribed extent of the judicial power he would wield as a justice. In other words, he was rejected for his refusal to promise that he would violate his oath of office.

The issue that united the judge's critics and their scorched-earth opposition to his nomination was the fact that in his sober constitutional jurisprudence, there was no room for any airy talk about a general right to privacy, allegedly unwritten constitutions, vague notions of unenumerated rights, or what the progressive Justice Hugo Black once derided as "any mysterious and uncertain natural law concept." In particular, Bork was denied a seat on the highest court because of his unfaltering belief in what Chief Justice John Marshall once called "the most sacred rule of interpretation," the idea that it is "the great duty of a judge who construes an instrument…to find the intention of its makers."

How did this all come to pass? Where did the idea of a "living" Constitution come from? How did it gain such currency and legal traction, and how did it come to dominate American political thinking? I want to suggest to you three culprits who I think were essential to this transformation and bear the responsibility for it.

Between 1870 and 1925, the foundations of modern constitutional law and theory were laid largely by three scholars, one in law and two in political science. Christopher Columbus Langdell, the first dean of Harvard Law School, and Woodrow Wilson and Edward S. Corwin, in succession each the McCormick Professor of Jurisprudence in the Politics Department at Princeton, successfully undermined the grounds of the Founders' Constitution and prepared the way for the ideology of

For Chief Justice John Marshall, "the most sacred rule of interpretation" was "the great duty of a judge who construes an instrument…to find the intention of its makers."

the "living" Constitution. While during the same period there were many other scholars influencing the academic study and doctrinal development of the law—not least Roscoe Pound, Oliver Wendell Holmes, Thomas Cooley, and Christopher Tiedeman—the views of Langdell, Wilson, and Corwin are fundamental to understanding precisely how and when the Founders' Constitution gave way to this new ideology.

Let me speak of them briefly in turn. Christopher Columbus Langdell, who, at the time of his appointment as dean, had been described by one critic as having been a "second-rate New York lawyer," transformed the law through three innovations at Harvard Law School.

The first and arguably most important was his introduction of the case method of instruction in 1870, replacing the legal treatise as the focus of legal education with the decided cases of the courts. This was an effort to make the study of law scientific and thus worthy of inclusion in a university curriculum. Ultimately, the case method would produce "a far-reaching change in the general conception of the nature and purpose of legal education." The treatises, after all, were almost all originalist documents. They all spoke of original intention. They all spoke of a judge's obligation, in Marshall's terms, to get at a sense of that intention when construing the document. With the case law and the judicial method that it carries with it, you make the judge front-and-center rather than the law itself, and that was one of the most pernicious things to come out of Langdell's reforms.

Langdell's second innovation came in 1873 when he startled the legal profession and irritated some in the university community by hiring the first purely theoretical law professor, James Barr Ames, himself a graduate of Harvard Law School. Since law was a science, it followed that it required "philosophical" professors, not mere practitioners, to teach it.

The third development during Langdell's tenure was the creation of the *Harvard Law Review* in 1887. Such student-edited law reviews would soon proliferate, becoming the "literary meeting place and powerful organ" of the newly intellectualized professoriate. In a short time, they would become the avenue by which the latest theorizing in the law schools would routinely make its way into the judges' chambers. As Thomas Hobbes, once said of universities generally, so might one say of law reviews: they "have been to this nation as the wooden horse was to the Trojans."

Together, these three innovations of Langdell's—the case method, philosophical professors, and a place to publish those philosophical professors—would come to have great importance in the development of the law generally and the fate of originalism in particular.

The second figure responsible for the rise of the "living" Constitution is Woodrow Wilson, a lawyer by training and a political scientist by profession (until the pull of real politics proved irresistible). Wilson undertook to displace the theoretical underpinnings of the Founders' Constitution with an entirely new science of politics. Like Langdell, Wilson embraced the scientific enthusiasms of the day and sought to replace what he derided as the Founders' Newtonian conception of constitutional law and politics—all those checks and balances and countervailing weights—with a Darwinian notion. The result would be an argument on behalf of a Constitution of growing meaning, a fundamental law that would be evolutionary, not static.In such works as *Congressional Government* in 1885 and *Constitutional Government in the United States* in 1908, Wilson the professor undertook to effect nothing less than a re-

founding of the constitutional order. Later, as President of the United States, he would practice what he had preached by appointing to the Supreme Court Louis Brandeis, a student of the Harvard Law School, a long-time supporter of the law reviews, and an open advocate of judges and justice undertaking to create what he called a "truly living law."

But perhaps no damaging thing Wilson ever did to the Constitution was more severe than the appointment of Edward S. Corwin to the McCormick chair at Princeton. Over the better part of a half-century, Edward Corwin would build upon Langdell's methodological focus on judge-made law and Wilson's idea of Darwinian constitutional development, enveloping both of these within his own new notion of natural law. By 1925, he had developed his theory that the higher law background, as he put it, of the constitutional order was to be found not in the Constitution but in constitutional law.

In such works as* Congressional Government *and* Constitutional Government in the United States, *Woodrow Wilson undertook to effect nothing less than a re-founding of the constitutional order.

Corwin was blunt: "As a document, the Constitution came from the framers, but as law…the Constitution comes from and derives all its force from the people of the United States of this day and hour." The document, he said, is to be regarded as "a living statute, palpitating with the purpose of the hour, reenacted with every waking breath of the American people."

Put a bit differently, for Corwin, the Constitution "must mean different things at different times if it is to mean what is sensible, applicable, peaceable." Summing up his view, he put it this way: "the judicial version of the Constitution *is* the Constitution." This idea would, for some, be seen as properly providing "the enduring canon of scholarship" for the remainder of the 20th century.

In terms of legal theory, Corwin is the father of the age in which we still live. "All who work in the field of constitutional history today," one scholar has insisted, "tread in the tracks Corwin blazed." Ultimately, the difference between Corwin's constitutional jurisprudence and that of today's constitutional moralists is one of degree, not of kind. While Corwin might object to the extremes to which modern theorists are willing to go in infusing the Constitution with contemporary moral theories, they are, in truth, only following the path he helped clear between law and politics.

To an extraordinary degree, Corwin's work from the early decades of the 20th century continues to inform and shape much of contemporary constitutional scholarship. The basic premises of the contemporary scholars who embrace so-called noninterpretivist judicial review, or who suggest that there is historical justification for judges to appeal to an unwritten Constitution, or who argue that to ignore the original intention is to abide by the original intention are all the same as Corwin's premises. They are united in the belief, as Stanford Law School's Thomas Grey once put it, that the Constitution leaves in the hands of the judges "the considerable power to define and enforce fundamental rights without substantial guidance from the Constitution and history."

The main argument of *The Language of Law and the Foundations of American Constitutionalism* comes down to this: The need remains to make central to American politics not only the recovery of the Founders' Constitution, but also the recovery of their appreciation for what might be called the moral foundations of originalism—that is to say, the philosophic base on which their Constitution was originally understood to rest. By such a recovery, we can once again appreciate the difference between the Founders' view of the higher law as they saw it and the higher law as it has come to dominate the contemporary scholarly tradition.

To the Founders, the creation of the Constitution signaled the acceptance of the belief that it was possible for men to create their governments from what Alexander Hamilton, in the first essay of *The Federalist*, called "reflection and choice" and not be doomed to depend on whatever fate may bring as a result of mere "accident and force." At the heart of the idea that constitutions can be created from "reflection and choice" lies the confidence that lan-

guage, as John Locke said, "is the great instrument and common tye of society."

The American Founders held that their written and ratified Constitution of limited enumerated powers was understood to be the "fundamental law," the embodiment of what Hamilton labeled the "intention of the people." The recovery of that original foundation of the Founders' Constitution begins with the premises not of the medieval natural law theorists or common law judges to whom Corwin and his intellectual descendants look, but with the premises of those who stood at the beginning of modernity, especially Locke and Thomas Hobbes. It is in their political philosophies of natural rights that one sees most clearly the moral grounds of originalism as the standard of interpretation; it is rooted in the belief that men are all created equal and may not be legitimately ruled arbitrarily by another—and that to avoid such tyranny, all legitimate government must rest upon the consent of the sovereign people from whom all power flows.

The need remains to make central to American politics the recovery of the Founders' Constitution and the recovery of their appreciation for the moral foundations of originalism.

John Marshall died on July 6, 1835. At the moment of his death, his colleague of 25 years, Justice Joseph Story, was in, as he put it, "wretched spirits." Story wrote to Harriet Martineau and said, "you know, I've begun to think of myself as the last of the old race of judges." I think what Story meant by that was very simple: He was a constitutionalist, as Marshall had been a constitutionalist. They were not judicial activists in any sense, and Story was truly the last of the old race of judges. He summed up his view of the Constitution in his justly celebrated *Commentaries on the Constitution* this way:

> Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, bounded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and they cannot be presumed to admit in them any recondite meaning or any extraordinary loss.

But in a very important sense, Justice Story was not really the last of the old race of judges. There is another claim that could be made to that distinction, and that claim is Benjamin Robbins Curtis.

When Justice Curtis was appointed to the Supreme Court of the United States, he had a distinction of being the first nominee who would be familiar to us as what nominees look like now. He was the first justice to ascend to the highest bench with a university law degree. He was not someone who had just read the law and worked his way up; he had actually gone to school and had taken classes on the Constitution. And it was not just any legal education he had undertaken. He had been taught at the knee of the Dane Professor of Law at Harvard University, one Joseph Story. You can hear clearly in Curtis the echo of Story's constitutional jurisprudence.

The American Founders held that their written and ratified Constitution of limited enumerated powers was understood to be the "fundamental law," the embodiment of what Hamilton labeled the "intention of the people."

Justice Curtis was on the Supreme Court when the infamous case of *Dred Scott* was handed down. There was a circulation of opinions before the case was announced. Chief Justice Roger Taney had seen Curtis's objections to his opinion, took back his opinion, and rewrote it—adding more than a few pages to it, according to Don Fehrenbacher, the leading historian of the case. Thus did Taney endeavor to show he had anticipated Curtis's objections and rebutted his criticism in advance. Curtis eventually resigned his seat on the Court over that, thinking Taney's behavior unseemly, unprofessional, and unacceptable.

But in his dissent in *Dred Scott*, he captured what was, for his teacher Story, the essence of that old race of judges. Curtis put it this way:

> When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under a government of individual men who for the time being have power to declare what the Constitution is according to their own views of what it ought to mean.

If I had to choose a single hope in writing *The Language of law and the Foundations of American Constitutionalism*, it would be this: May we soon find ourselves blessed with the return of that old race of judges.

Questions & Answers

ROBERT ALT: I was wondering if you could talk a little bit about new trends in originalism, particularly some of the leading liberal academics like Jack Balkin who have attempted to offer new thoughts on originalist jurisprudence, which sort of brings an evolving sense to originalism.

GARY L. MCDOWELL: One of the things I made a vow to do when I got out of teaching constitutional law was to stop reading constitutional law, so I haven't kept up with it as I should. But I do know that there is a trend among liberal academics to assert themselves to be somewhat originalist or on the trail of originalism. In response to one years ago, I would say about him, as I would say about others, that hearing them speak of themselves as being originalists is a little bit like hearing East Tennessee mountaineers who handle snakes talking about their Christianity. I don't want to question their faith, but I think the practice is dangerous.

I would say the same thing about liberals who pose as originalists. Cass Sunstein is one of the major people who tried to get on this showboat of constitutional minimalism. Up until Chief Justice Rehnquist became Chief, it was a really neat thing to overrule precedent, but all of a sudden it became a very un-neat thing to overrule precedent once the Court was in certain hands.

I haven't read Balkin, so I can't respond to that in particular, but I think it always behooves us to take those kinds of assertions with some misgivings and some skepticism.

BYRON THOMS: It seems that the evolutionary or living interpretation of the Constitution is based on two things: one, the inability to know what the Founders meant in its entirety and, two, the belief that their beliefs or principles in the Constitution have no epistemic superiority to any other. How would you respond to that? It seems as though the progressives aren't arguing that theirs is necessarily better, but that we don't really have a position at all that is tenable.

GARY L. MCDOWELL: Well, the idea that you can't know with exact certainty what the Founders intended about everything in American politics doesn't mean that the alternative is to let the judges do whatever they please. There's still an obligation to try and come close.

One of the great influences on Joseph Story and one of the great influences on Enlightenment constitutionalism was Thomas Rutherforth and his *Institutes of Natural Law*. He talked about the mechanism—and this is why Story liked him—of how you go about interpreting a written document. You begin with a literal interpretation. If you can tell what the words mean, that's what they mean, and that's that: The President has to be a certain age and that kind of thing.

If not, you go a little bit further out with concentric circles into kind of a mixed interpretation, and that mixed interpretation would draw from the literal as well as draw from speculation as to what that phrase must mean. If you look at somebody like John Marshall who goes through the Constitution with exegetical care to try to get at the notion of what this word means or what this phrase means, that's what originalism demands, and you do it by looking at the words directly in front of you, but also how they use the same words in other situations.

It all raises what Thomas Sowell used to call the "precisional fallacy"; that is to say, if you have

two mountains, the tops of which are obscured by cloud cover, you can't tell which is the higher, but you can still know that a mountain is higher than a molehill. In a sense, that's the sort of obligation you have. Can you be absolutely certain at every turn that you know exactly what the Founders meant? No, but you do the best you can by construction as opposed to interpretation. We might agree with a case or we might not, but the point is that it is still rooted in and guided by the obligation to get at what the Founders did intend.

The second basis for the evolutionary or living Constitution argument is that the Founders can't possibly speak to our age; we're very different. This is Breyer's whole book. Somehow, you can't understand the power to regulate commerce among the several states because we have computers.

That's obviously not true in the sense that the Founders understood that commerce would change in its manifestations, that it would change over time. They knew commerce had changed in their time, in their recent history. They had no doubt that when they said, "Regulate commerce among the several states," they were not talking about horses and buggies, but whatever commerce would eventually become. It's that obligation that judges have to allow Congress to exercise its political judgment as to what is necessary and proper for giving the Constitution full effect when it comes to regulating commerce.

So the idea that they can't speak to us because our times are so different I think is just manifestly untrue, and it was manifestly untrue in their original position. The idea that their original intention was to have their original intention ignored just begs credibility.

BARRETT YOUNG: Barrett Young, Federalist Society. Which strain of contemporary originalism do you suppose is closest to how that old race of judges approached constitutional interpretation?

GARY L. MCDOWELL: Clarence Thomas. Clarence Thomas takes language seriously; he takes meaning seriously. I think Thomas is the real thing.

I once took my class to the Court, and Scalia arranged for us to come, and he came and gave a talk afterward. My students were asking questions like, "Do oral arguments really work?"—all these usual kinds of questions—and Scalia stopped them and said, "That's not what you really want to know. You want to know who believes in the Constitution? What does the Constitution matter? There are two of us here who believe in it."

I was shocked because Rehnquist was still on the Court in those days. But I think Clarence Thomas is one of the great achievements of this country, institutionally and intellectually.

CALEB SMITH: Just as we look at the Founders when we're interpreting the Constitution itself, if we're looking at later amendments such as the Fourteenth Amendment, do you go back to the Founders or do you go to the people who amended it? Then you start looking at the intent of the Congress and the states who put in that particular amendment.

GARY L. MCDOWELL: Let me come back to that. I meant to say something in answer to a previous question about the process of amendment: that if we think the Constitution doesn't fit the times in which we live, we have that extraordinary sovereign power to change it and to do whatever we want to it to make it conform.

In the Fourteenth Amendment, you would look to the ratifiers, it seems to me, to understand what that amendment meant, because that amendment changed things fundamentally. You can't go back to say what would James Wilson or James Madison have thought about the Fourteenth Amendment? You can speculate, and it's a lot of fun to do that, but I think you have to go to those who framed and ratified to understand what they meant by the framing and the ratification.

BRIAN WALSH: Could you elaborate more about Woodrow Wilson's influence, both direct and indirect, on legal education and on the Court?

GARY L. MCDOWELL: Yes. Are you all annoyed by the fact that liberals have appropriated the name "progressive"? I still want to call them liberals, because "liberal" carries with it a stigma. There's something supposedly enlightened and forward-looking about "progressive" that I just don't buy.

Woodrow Wilson is always my favorite argument as to why you should never vote for a political scientist for anything. Look where he got us. He truly believed that the Constitution was an inconvenience, that it was a hurdle to modern evolutionary politics. To his credit, he was facing a generation that had thwarted efforts legislatively to do things on economic betterment and all of that under the guise of liberty of contract; he was ticked off.

But his whole argument is to supplant a kind of original Lockean understanding of the founding of limited law—Locke's famous dictum that what made civil society preferable to the state of nature was a known and settled law with the judges that could enforce it. That seems to me what you lose with Wilson. He's quite willing to sacrifice the entire tradition in order to get the political mechanisms he wants in place to achieve the policy ends he most desires. The problem is, he became President.

Think about Louis Brandeis, what he represents. He was a Christopher Columbus Langdell student, he was a strong supporter of the *Harvard Law Review*, and think about the right to privacy. Where we get the moral legitimacy for the right to privacy was an 1890 article by Samuel Warren and Louis Brandeis on the right to privacy in the *Harvard Law Review*. He understood how you do that, and Wilson was all for that.

Wilson was all for this new law, living law, changing it, getting it out of the way, letting the people have their will, and it was exactly the opposite of the Founders' concern: What happens if that will is bad? What happens if that will is tyrannical? You need these structures and these institutions to, as Madison said, "refine and enlarge the opinions, passions, and interests of the people." Wilson didn't want any refining and enlarging done.

And then there's Corwin.

TODD GAZIANO: Corwin and Wilson either had a movement behind them or helped lead a larger movement. It took them decades, really, to completely dominate the legal academy and the courts. Now we're celebrating 25 years of a revival of the right type of thinking, but maybe it will take a similarly broad-based movement, even maybe a political movement, behind reverence for the original Constitution. Do you see any reason to think that Tea Party energy or the Tea Party patriots' interest in the Constitution could be harnessed to provide some of that motive of power?

GARY L. MCDOWELL: Oh, I think so. I sat there in Richmond, where your colleague Matt Spalding, by the way, gave one of the most magnificent presentations I've ever heard. You sit there with a banner that says "The Constitution still matters," and you're going, "Wow, these are my people." Yeah, I think it does take time. Corwin lived into the late 20th century, into the era of *Griswold v. Connecticut*, and it does take time.

The problem is they have control of the universities and we don't. You have a few outliers like me who get a job at a university, but the vast majority of us don't go into the university anymore. We certainly don't dominate the university anymore. I remember when George W. Bush was running for reelection, I said to somebody I was impressed by the University of Richmond parking lot filled with "W" stickers, and they said, "Don't get too excited; that's the staff, not the faculty."

Are we on track? We are, and we are on the right track, because the great thing about conservatism and the great thing about the constitutionalism that derives from conservatism is that constitutionalism has the virtue of common sense. You take your average American and say, "Let me put it to you this way: There's a written Constitution. The legislature makes laws, and judges are intended to interpret what those laws mean and to see whether they square with the Constitution. You all right with that? Let's take a third-rate lawyer who knew a President who got a job on the Supreme Court; would you like for him to make all the moral decisions that matter in your life?" Common sense and the American people say, "Of course not."

That's why I think we're on the right track and why I think we'll eventually prevail.

We were pushed into obscurity over a period of years by people like Wilson, by people like Corwin, and it's not just what Corwin wrote, but it's the huge number of people he produced who infiltrated the academy. Leading scholars in constitutional law for

generations were Corwinians. I remember when I started out in graduate school and I read Corwin. I believed Corwin. I thought it was the greatest stuff I'd ever come across. And then all of a sudden one day you're reading it, and you go, wait a minute; that doesn't make sense.

It's a matter of showing people how it doesn't make sense. You do things like the big originalism book that Steven Calabresi did, the *Guide to the Constitution* that Heritage did; you chip away. It's like saving souls: You do it one at a time. Revivals are great, but at the end of the day it's that individual inclination that matters most.

RODGER HUNTER-HALL: I'm a professor at the Notre Dame Graduate School. My question is on things that we're seeing currently, looking toward the future in trends with the Court that I personally find disturbing: the call, for instance, to televise oral arguments when oral arguments form such a little part of the decision that's made; the desire to politicize what happened when the President was chastising the Court during his State of the Union speech. I was wondering if you would speak for a moment to those manifestations, those trends, and what your thoughts are.

GARY L. MCDOWELL: Well, there's always been that tendency in American politics to not understand the robed culture, to think that there's something standoffish about these fellows. I thought one of the greatest moments in my life in American politics was that moment at the State of the Union address when Sam Alito goes, "That's not right," or "That's a lie," or whatever it was he said. I thought, "Finally, fight back, guys!"

The whole notion of democratizing the Court, I think, is probably a bad idea, and it's a bad idea precisely because there are more bad laws proposed and made than good laws that are proposed and made, and you want to maintain the structural integrity of judicial review, which I think was implicit in the Founding, so that you have an institution that can say no when the people through their legislatures go too far. And if you bring in television cameras, you're going to politicize it in a way. Goodness knows they're all getting increasingly PR-conscious as it is.

I don't know if you remember an article in the *California Lawyer* some years ago where Anthony Kennedy invited the reporter to follow him around. It's just hilarious to read. You'd think he was up for a central casting role as a judge or something. And Breyer is on every television channel. So I don't think democratization of a Court and an institution that was explicitly intended to be anti-democratic in a way—or democratic in an elevated way is how I would put it—I would hate to see that lost in the rush for democratization.

EDWIN MEESE III: One of the great dilemmas that people like Clarence Thomas and others have is what happens when you have precedent where certain doctrines have been upheld by the Court wrongly over the years and conflict with the Constitution? How do you handle that?

GARY L. MCDOWELL: I have one view of precedent, and that's my hero Thomas Hobbes. He said in response to Sir Edward Coke, "Precedent only shows what was done, not that it was done well," and I think there's no truer statement in law than that.

I was thinking of the *McDonald* case and the gun control case, and all my conservative friends who apparently hoist rifles and go hunting and protect themselves on a daily basis. I thought Justice Alito went too far. I thought he went too far because I don't think—and this is why I say "Thank God for tenure"—the Bill of Rights applies to the states. I don't think it's ever been made to apply to the states. I think it's only by a stretch of the Fourteenth Amendment that it can be made to apply to the states. It's been done not on a consistent basis, but on an *ad hoc*, whoever's-got-the-votes basis, and when it comes to applying the Second Amendment to the District of Columbia, I think there's a lot of credibility that has to be given to Scalia for his exegetical effort to come to grips with what it means to have freedom of firearms.

But that's a different story than the states. I think the willingness to basically reduce your argument to "everything else has been incorporated, and I like this one, so why not?" is wrong. All my conservative friends hated me for that, and all of them threatened me with their firearms.

MALE VOICE: You say that the Bill of Rights doesn't apply to the states? But we all live in states, so it wouldn't apply to anybody.

GARY L. MCDOWELL: It would apply to the national government. The whole point of the Bill of Rights was at the behest of the anti-Federalists, who were concerned about what the new national government was going to do to the states. So the Bill of Rights was fashioned in order to secure the states' legitimacy to do what they saw fit without intrusions by the national government.

The best single thing ever written on the incorporation doctrine was by Charles Warren in the *Harvard Law Review* in 1925 following *Gitlow v. New York*, which was the first time the First Amendment was incorporated. It's a compelling argument, which he entitles simply "The New Liberty Under the Fourteenth Amendment." The idea was that if you allow the incorporation of the Bill of Rights to take place—and in the *Gitlow* case, the Court said simply we can and do assume it applies; they gave no argument, they gave no evidence, they gave no historical justification for it—that this would be a massive engine for judicial arbitrarianists. That's what it's proved to be.

The entire Bill of Rights doesn't apply to the states.

MALE VOICE: So, then, a state can restrict the right to bear arms, can restrict freedom of the press?

GARY L. MCDOWELL: They can have a state religion, in my view.

EDWIN MEESE III: But isn't it correct that the Founders also thought that a freedom movement in the states, which existed at the time, was very important and that the states were equal to the federal government in terms of protecting the liberty of the people?

GARY L. MCDOWELL: Well, the states would be the first place your liberties would be protected. You couldn't really trust the federal government to do it. Boy, have things changed!

MALE VOICE: In the book, do you get into what I view as the fundamental concept of judicial review and whether the Constitution actually authorizes judicial review? As eminent a person as Bork, in one of the annual Federalist Society speeches, shocked the audience to some extent as he came out adamantly opposed to the concept of judicial review.

GARY L. MCDOWELL: First of all, judicial review is a phrase of the 20th century; the Founders didn't speak of judicial review. I think it was Corwin's, actually, formulation in a law review article. So what they would have talked about was whether or not the courts had a right to invalidate legislation that they felt was at odds with the Constitution—the same thing we call judicial review, but they didn't speak that way.

I was on the Bork side for a long time, but if you go through the records of the Federal Convention, you'll see repeatedly key Founders arguing, and also on the First Congress, that you don't need a council of revision, for example; you don't need an extra-constitutional notion of somebody sitting in judgment of the rightness or wrongness of proposed legislation. Why? Because the courts, in the ordinary exercise of their judicial powers, will take care of that.

Over time I've come to find that convincing, and I believe it was implied by the very idea of a written Constitution. That's Marshall's view, in a sense, in *Marbury*, that a written Constitution is the greatest improvement on political institutions, and as he said in the Virginia Ratifying Convention, "If the courts are not going to invalidate the laws, who is?" We've got to have that safety check. What if the legislature, which we know is likely to go too far, goes too far? Who's going to stop it? Who's going to draw the line?

There is a big difference between saying that judicial review of a limited sort was anticipated, expected, and wouldn't have shocked any of the Founders and saying that you can have *Casey v. Southeastern*, the Leonard Cohen phrase about it's the job of the Court to determine existence and being and all that. It's a far cry from that excessive kind of judicial activism, and it seems to me judicial review is different from judicial activism.

Marshall had a great line in *Cohens v. Virginia* where he said that "when judges depart from the exercise of simple judicial discretion and begin to

embrace political discretion, they commit treason to the Constitution." That seems to me to be absolutely right.

What I got out of this book is that Marshall is the great hero of American constitutionalism. He got something fundamentally right. I've always wondered, has Scalia read Marshall in great detail? Because they look a lot alike when you get down to their constitutional arguments. But Marshall is the key to all this, and that's what I come down on. He's the real hero.

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