particularly in topical areas such as speech, privacy, religion, and equality. Courts should seek not to monopolize but to serve as collaborators with legislatures and executive authorities in defining identity. Finally, in defining rights and standards under one's own constitution, courts need to pay attention to what other constitutional courts around the world are saying. Much is to be learned from the experiences of other constitutional democracies. But as Jacobsohn notes throughout *Identity*, it is also important in an age of transnational constitutionalism for national courts of judicial review to pay attention to the identity-affirming decisions of other such tribunals around the world while insulating them against any mindless adaptation to foreign constitutional decision-making.

–Donald P. Kommers

## FROM NATURE TO LAW

Gary L. McDowell: *The Language of Law and the Foundations of American Constitutionalism*. (Cambridge: Cambridge University Press, 2010. Pp. xvi, 409. $99.00. $32.99, paper.)

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In this long-planned book, Gary McDowell presents a defense of original intent, legal positivism, and judicial restraint rooted in the thought of Thomas Hobbes, "the father of what would become liberal, modern constitutionalism" (57). McDowell portrays the American Constitution as constructing a government based on written law with a clear meaning that is, in the words of Joseph Story, "the same yesterday, today and forever."

McDowell's intent is clear. His cover features a portrait of the 1787 constitutional convention in Philadelphia, and his opening epigraph quotes Justice Benjamin Curtis's dissent in *Dred Scott*. McDowell dedicates the book to—among others—Walter Berns, Raoul Berger, Edwin Meese III, and Robert H. Bork. The Senate's rejection of Bork's nomination to the US Supreme Court in 1987 is to McDowell "an unforgivable political and constitutional sin" (1). His concluding chapter disparages the opinions in *Planned Parenthood v. Casey* and *Lawrence v. Texas* authored by Justice Anthony M. Kennedy, who possesses the seat denied to Bork.

McDowell traces contemporary departures from originalism to twentieth-century progressive academics such as Harvard's Christopher Langdell and Princeton's Woodrow Wilson and Edward Corwin. But the problem of law and language, McDowell argues, runs through premodern thought: medieval

Aristotelians and English common lawyers like Coke all engaged in "perversions of language," as "their descriptions took precedence over what had originally been the object to be described" (61).

McDowell seeks to recover constitutional law by turning—surprisingly—to Thomas Hobbes. To McDowell, "Hobbes's sovereign, his 'mortal god,' has more in common with a constitution based on popular sovereignty than with any notion of institutional absolutism" (57). From Hobbes, McDowell derives "nothing less than the legal positivism that is the essence of modern constitutionalism" (81).

Hobbes's linguistic intentionalism, to McDowell, provides a critical protection against arbitrary rule. "By keeping the language of the law precise and well defined," McDowell says in the guise of Hobbes, "such problems are avoided" (79). The only way to prevent arbitrariness is to use constitutional language with a plain meaning. "It is in the definition and clarity of the language that the power of law is to be found," McDowell writes. "This truth lies at the heart of the idea of constitutionalism generally; it is the essence of modern faith in written constitutions in particular" (80).

In later chapters, McDowell situates competing constitutional thinkers within Hobbes's argument for plain meaning and absolute clarity and thus for judicial restraint. "The great and unifying principle that links those whose works have contributed to the moral foundation of originalism in constitutional interpretation—a line that stretches from Hobbes to Locke to Blackstone to Jefferson, Hamilton, Marshall, Story and Curtis," McDowell writes, "is the idea that arbitrariness in the administration of power is the greatest threat to liberty and most likely foundation for tyranny" (395). McDowell rejects arguments that constitutional interpretation should consider natural, unenumerated individual rights. "Appeal by a judge to custom or to the allegedly unwritten laws of nature, absent the mark of a sovereign making them binding," he writes, "is an appeal neither to custom nor to higher law but only to the judge's personal opinion" (76). To McDowell, "the objective of a law-governed society is the security of individual freedom, rather than an approximation of some transcendent ideal of justice" (399).

Though McDowell criticizes a "new ideological theory of moralistic judging" (4), he concedes the essentially moral foundations of originalism itself. It is "rooted in the belief that men are all created equal and may not be 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 sovereign power flows" (54). The argument for constrained courts, McDowell writes, vindicates "the most important right of individuals, the right to be self-governing" (395).

Even as he concedes moral bases for positivism and judicial restraint, McDowell's argument ultimately disappoints. Like many originalists, McDowell focuses on "the Founders' Constitution" and says little about the intent of constitutional changes after the Civil War. Some, such as dissenting

Justice Noah Swayne in the *Slaughter House Cases* (1873), argue the Reconstruction Amendments "may be said to rise to the dignity of a new Magna Charta" and are "necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy." Originalists could respond that Section 5 of the Fourteenth Amendment envisions the primary federal protector of individual rights to be Congress and not the courts. That argument, however, requires a shift in historical focus from the Founding Era to the 1860s.

McDowell's originalism also fails to engage the *Federalist*'s most searching reflection on the difficulty of finding intent in the language of law. "Properly interpreted," McDowell writes, "language will spawn in the mind of the reader the same idea that had been in the mind of the writer. This is no less true for the language of the law than for any other written expression" (400). In contrast, in *Federalist*, No. 37, Madison finds legal interpretation to be marked inevitably by "obscurity." All laws, "though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."

The innovation of a written constitution, Madison writes, "adds a fresh embarrassment." Madison agrees that "the use of words is to express ideas. But no language is so copious as to supply words and phrases for every complex idea or so correct as not to include many equivocally denoting different ideas." Using existing language to describe new political institutions—as the US Constitution does, to create a system of divided sovereignty—brings not clarity but confusion to legal interpretation. "And this unavoidable inaccuracy," Madison writes, "must be greater or less, according to the complexity and novelty of the objects defined." Madison describes human language as essentially a "cloudy medium" owing to "indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas."

When interpreting written law, the Hobbesian clarity of intent sought by McDowell is impossible. Rather, Madison teaches, practical considerations "must produce a certain degree of obscurity." This legal obscurity forces us to "moderate still further our expectations from the efforts of human sagacity." The clarity McDowell takes from Hobbes seems to exist less in the precise language of law and more in political certainty about who has authority to act as its ultimate interpreter.

More practically, originalists like McDowell must confront not just how but why American politics has departed from its foundations. The expansion of judicial power throughout American history was not dreamt up by professors of law and then imposed by judges on an unwilling political system and unwitting nation. It resulted from actions acquiesced to and even encouraged by presidents, Congresses, and the public. From this perspective, as Keith Whittington persuasively demonstrates, "the political dynamics that give

rise to judicial supremacy may be more troubling from a democratic perspective than judicial supremacy per se" (*Political Foundations of Judicial Supremacy* [Princeton University Press, 2007], 295).

Nevertheless, the language of the US Constitution does provide clear and effective means to enforce the limited judicial role advocated by McDowell. In *Federalist*, No. 78, Hamilton notes the "natural feebleness" of the Court and its ultimate dependence on the other branches. Congress and the president possess the political legitimacy and the constitutional powers to control the courts, yet choose not to exercise them. McDowell admits "changing the public mind is never easy" (8). If recent expansion of judicial power constitutes a sin, opponents need to do more than scapegoat medieval Aristotelians, English common lawyers, progressive professors, and willful justices. Any successful argument for judicial restraint must first account for the institutional and political reasons why—even today—elected officials and the American people they represent allow the US Supreme Court to grow ever more powerful.

–Frank J. Colucci

## CHECKMATE MOVES

Martin J. Sweet: *Merely Judgment: Ignoring, Evading, and Trumping the Supreme Court*. (Charlottesville: University of Virginia Press, 2010. Pp. xi, 220. $35.00.)

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*Merely Judgment* is a study of how elected officials in three cities reacted to a decision of the US Supreme Court, and what that reaction tells us about the power of the Court and the protection of constitutional rights. First and foremost, it is a detailed empirical study of the reaction of Philadelphia, Portland, Oregon, and Miami to the US Supreme Court's 1989 decision *City of Richmond v. J. A. Croson Co.*, requiring that governmental affirmative action programs in contracting at the state and local level be held to the strict scrutiny standard of the Fourteenth Amendment. Second, Sweet "explores the question of what happens *after* the Supreme Court decides a case" (2). To his dismay, he finds that elected officials have an array of tools to ignore, evade, and trump constitutional requirements, which he labels "'checkmate' moves" (4). Thus, third, Sweet aims to "make the case that we ought to prioritize judicial determinations about the nature of constitutional rights above those of the elected branches of government" (5).

The book is divided into an introduction, five chapters, and a conclusion. The first chapter presents a detailed examination of *Croson*, placing it in the context of ongoing debates and Court decisions about affirmative action. Chapters 2, 3,