

## The Meese Revolution

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**[00:00:00.0] Jeffrey Rosen:** In 1985, Edwin Meese was sworn into office as the 75th Attorney General of the United States. In their new book *The Meese Revolution: The Making of a Constitutional Moment*, Steven Calabresi and Gary Lawson argue that Meese became the most significant attorney general in American history by turning the Department of Justice into what they call an Academy in Exile, where originalism was developed, refined, theorized, and put into practice.

**[00:00:32.4] Jeffrey Rosen:** Hello, friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, Steven Calabresi discusses Attorney General Meese's role in the rise of originalism and in Ronald Reagan's transformative presidency. Steven Calabresi is the Clayton J. & Henry R. Barber Professor of Law at Northwestern Pritzker School of Law. Professor Calabresi worked in the West wing of President Ronald Reagan's White House, was a special assistant for Attorney General Edwin Meese III, and clerked for Justice Antonin Scalia on the Supreme Court and for judges Robert H Bork and Ralph K. Winter on the US Court of Appeals. Steve, it is wonderful to welcome you back to We the People.

**[00:01:24.1] Steven Calabresi:** Thank you so much, Jeff. It's a great honor to be on We the People, a great honor to talk to you. I'm a huge admirer of the National Constitution Center. You do fantastic work, and so I'm thrilled to be here.

**[00:01:36.6] Jeffrey Rosen:** Thank you for the very kind words. Congratulations on the new book. You argue that Edwin Meese was the most influential attorney general in history. Why?

**[00:01:50.9] Steven Calabresi:** Well, there's essentially two reasons, and I'll just mention them briefly and you may want to go into them in more detail. The first reason is that Ed Meese was Ronald Reagan's right-hand man in everything he did. And I think Reagan was a transformative

president in the way that Franklin Roosevelt was a transformative president. And Meese served on the National Security Council, for example, for almost all eight years of Reagan's presidency. When staffers observed him disagreeing with Secretary of State George Shultz, they reported that President Reagan always agreed with Meese and disagreed with Secretary of State Shultz. Meese was also the head of Reagan's Domestic Policy Council, and helped frame his initial tax cut bill in the transition that was sent to Congress. So the first way in which Meese is hugely influential is as Reagan's right-hand man. And perhaps the best comparison here is with Robert Kennedy and President John Kennedy.

**[00:03:00.6] Steven Calabresi:** The difference being that, tragically, President Kennedy's presidency ended after three years, whereas Reagan's went on for eight years and Meese played a central role all eight years, and therefore I think deserves some credit for Reagan helping to win the Cold War. As Attorney General however, Meese is unique in that early in his tenure as Attorney General. In fact, in July of 1985 is after the end of the Supreme Court term, he gave a very important speech to the American Bar Association, in which he set out the theory of originalism and argued that the Supreme Court should decide cases according to the original intentions of the framers, a vision that was later refined to the original public meaning of the texts. And Meese was really the first person of political prominence to articulate originalism and defend it.

**[00:04:13.2] Steven Calabresi:** And he announced that as Attorney General he was directing the Justice Department to file originalist briefs, directing the Office of Legal Counsel to issue originalist legal opinions, and that he would be appointing originalist justices and judges. And then he followed that up with the appointments of Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, and a slew of Court of Appeals judges of great distinction who were originalists. The only other Attorney General who has had a comparable impact in that sense is Homer Cummings, who was Franklin Roosevelt's first Attorney General. But Homer Cummings had no theory of judicial interpretation like originalism. He simply wanted to reverse the old Supreme Court's decisions, narrowing the Commerce Clause and applying substantive due process. And so Ed Meese really articulated a theory of judging in a way that Homer Cummings didn't. And so I think both by articulating a theory of judging, and by being Reagan's right-hand man, Ed Meese ended up being more influential than even Homer Cummings and Bobby Kennedy.

**[00:05:40.3] Jeffrey Rosen:** Thank you so much for that. And you make a persuasive case that by articulating the theory of originalism, Edwin Meese was indeed the most influential attorney general because that theory announced in the 1985 speech that you mentioned, transformed the law, and it inspired a generation of lawyers at the Federalist Society, which you co-founded, to transform the law in a more originalist direction leading to the appointment of judges that, as you say in the book, by 2022, and you call it the Revolution of 2022, led to a originalist majority on

the Supreme Court. I really wanna dig into the political and intellectual history of originalism 'cause your book is so illuminating on that question. Tell us where Edwin Meese derived the theory of what he originally called original intention. You talk about how in 1985 there were a handful, maybe four conservative originalist law professors, then Judge Bork and Justice Scalia had articulated the theory, but few other judges. And then there was a group in the Justice Department that included you, Ken Cribb, Terry Eastland, and others, who contributed to General Meese's speech. So, where did the speech come from? And where did the theory of originalism come from?

**[00:07:01.6] Steven Calabresi:** So I think when one looks at references to originalism before 1985 on Westlaw or Nexus or HeinOnline, there are practically none. In William French Smith's autobiography of his tenure as Attorney General, the word originalism does not appear once. Smith was Meese's predecessor under Reagan. I think that the authors who mentioned originalism and who inspired Meese were, Robert Bork's, whose article on some neutral Principles and some First Amendment problems in 1971 was a source. And Bork contributed to the idea that judges should not make policy decisions. They had to find the legitimacy for their decisions someplace outside of their policy preferences. Raoul Berger wrote a book about the original intentions of the framers of the 14th Amendment, in which he reached all sorts of wild conclusions that modern-day originalists don't embrace. But he did talk about the original intentions of the framers and Meese's chief speech writer Gary McDowell, was familiar with Berger's work.

**[00:08:34.2] Steven Calabresi:** And then one other law Professor Bernard Siegan at the University of San Diego wrote about original intentions and the protection of economic liberty. I think that for Mr. Meese he was drawing on those sources. But one of the striking things about his first 1985 speech was that he came at the end of a Supreme Court term and he had the chutzpah, if you will, to grade the Supreme Court on how it had done during that term. And he considered three lines of cases, federalism cases, constitutional criminal procedure cases, and religious liberties cases. And he essentially gave the Supreme Court an F on federalism, a B minus on constitutional criminal procedure, and an F on religious liberty. And that's a fairly galling thing for an attorney general to do. The Supreme Court is not used to being graded on its opinions by the Attorney General in July at the end of a Supreme Court term.

**[00:09:50.2] Steven Calabresi:** And so Justice William J. Brennan in September responded to General Meese's speech arguing that originalism was impossible to do and that there was no way that one could figure out what the original intentions of the framers would've been as to modern-day problems. Justice John Paul Stevens, another liberal giant on the court, also gave a speech responding to General Meese and criticizing Originalism. And then Meese followed that up in November of 1985 with a speech to the Federalist Society, which was, I think, much more thoughtful and more laid out and more detailed, in which he essentially made a couple of key

points. And he said the framing era was alive with debate, with public pamphlets, op-ed pieces, the federalist papers, anti-federalists writings, state constitutions that the framers were drawing on, and that it was not some remote period of time that we couldn't access or have a window into.

**[00:11:09.9] Steven Calabresi:** And he also argued that originalism is the ordinary way in which people interpret legal texts. A lower court interpreting *Roe versus Wade* would look at the original meaning that *Roe versus Wade* had, when Justice Blackmun wrote it. A judge wouldn't look at how its meaning had changed over time. And so he set forth in his November speech a more detailed theory of originalism, eventually Judge Antonin Scalia then on the DC Circuit suggested that what Meese should really argue for is a jurisprudence of the original meaning of the text of the Constitution, and that it's the text that was adopted as law, not the intentions of the people who wrote it. And Ed Meese accepted that as a friendly amendment and afterwards advocated original public meaning textualism. So that's a lengthy version of the story by which he reached those conclusions.

**[00:12:26.7] Jeffrey Rosen:** It's a very helpful version of the story. And I wanna ask you about that friendly amendment that Justice Scalia gave. As you said, in June '86 months after Meese's speech to the Federalist Society, Justice Scalia said he'd received a vision from Mount Sinai that his mission was to criticize the doctrine of original intent as outlined by Attorney General Meese. And instead of trying to discover the original intent of the framers, as Meese had originally suggested, Scalia said that judges should instead be guided by the original meaning of the constitutional text, or the most probable meaning of the words. And Justice Scalia, in addition to rejecting the emphasis on original intent over original meaning also said the judges should not be strict constructionists. He rejected Thomas Jefferson's idea that judges should strictly construe the Constitution in a way that favored states' rights over national power. And instead, Scalia embraced the interpretive approach of Justice Story, "The words should be taken in their natural and obvious sense, not unreasonably restricted or enlarged." This seems like a really big shift for a friendly amendment from original intent to original meaning, and from strict construction to Hamiltonian liberalist construction. First of all, why was Meese so friendly about it? 'cause it's definitely a change in emphasis, and doesn't it suggest a rather different approach to originalism than General Meese had originally proposed?

**[00:13:54.2] Steven Calabresi:** I think that General Meese with his July, 1985 ABA speech wanted to start a national conversation and debate about constitutional interpretation. And I think he felt that the court was simply making policy, conservative or liberal, and not making any effort to interpret the law. And he started that debate with the ABA speech that Justices Brennan and Stevens then chimed in again, and then, as you said, Judge Scalia on the DC Circuit proposed the shift to original public meaning textualism from the original intentions of the framers. But what I would say is that the Meese Justice Department from 1985 until Judge Scalia gave that speech in 1986, was looking at original intentions, very much with reference to the text

of the Constitution. And there is reference to Textualism in Meese's second speech to the Federalist Society.

**[00:15:07.9] Steven Calabresi:** I think in November of 1985 units of the Justice Department that were applying originalism were doing it in a textualist way. One example is there was a proposal in Congress to create a national lottery to raise money. And General Meese asked the Office of legal Counsel whether that would be constitutional, and Chuck Cooper, who was the Assistant Attorney General in charge of the Office of Legal Counsel, produced an OLC memo that essentially went through the enumerated powers of Congress, noted that there was no enumerated power to establish a national lottery in a very textual analysis, and concluded that such a lottery would be unconstitutional. And at that point, President Reagan indicated he would veto a national lottery if one were created, if Congress were to pass such a bill, and the bill died in Congress. So, I think that while General Meese's ideas about originalism evolved over time, and while Justice Scalia contributed hugely to them, I think that General Meese was there on the first big point.

**[00:16:32.0] Steven Calabresi:** And Judge Scalia had not actually spoken about originalism at all prior to this June, 1986, speech to the Justice Department. He'd neither spoken about it, nor written about it. Even today, I would say that there are different flavors of originalism among the justices on the Supreme Court and among law professors. Some people attach more weight to original intentions, and sometimes in the form of early practice, for example, or the original expected applications of a text. Other people like Scalia and frankly myself, are more firmly textualist and attach less weight to original expected applications. So part of the reason why, even though there are six justices on the Supreme Court, who to some extent think originalism is relevant, they reach different conclusions. Some of it is that some of them are more textualist, some of them are more intentionalist and that's an enduring tension in originalism.

**[00:17:41.9] Steven Calabresi:** The final thing I would note is that, Judge Scalia didn't know when he was giving this speech that there was a vacancy on the Supreme Court, but two days later, he was asked to interview with President Reagan and Reagan offered him a seat on the Supreme Court. And I think that General Meese, having recommended Scalia already to President Reagan, was inclined to greatly respect his opinion that Textualism rather than Intentionalism was the way to go.

**[00:18:18.6] Jeffrey Rosen:** Absolutely. It shows great largeness of spirit by General Meese to continue with the nomination after he was criticized so memorably by Justice Scalia, but it embodies the vigorous debate that was taking place, and that General Meese had tried to inspire. Justice Scalia rejected the term "strict constructionist". He said in his speech that he was not a strict constructionist, but a reasonable constructionist. And in the process rejected a phrase that had been used by President Nixon when he campaigned for President in '68, promising to

appoint justices who would follow strict construction of the Constitution. And a phrase that had been embraced by other conservatives. By contrast, the next generation of originalists led by Justice Thomas, were more willing to embrace the phrase strict constructionism and to strictly construe the text rather than liberally construing its implied powers. What do you think about the suggestion that a real division arose among originalists between those like Justice Scalia who wanted to construe the text in the spirit of John Marshall and Joseph Story and Alexander Hamilton liberally, and the second generation like Justice Thomas, who wanted to construe the text strictly?

**[00:19:48.5] Steven Calabresi:** I think that Justices Scalia and Thomas had pretty similar approaches to originalism, with one major exception, and that was that Justice Scalia did believe that sometimes precedent was so well established and so deeply relied on that it was necessary for him to follow precedent rather than original public meaning. Justice Thomas, in contrast, has essentially said that precedent carries no weight with him and that he will only follow original public meaning or intentions. I think you're right that Justice Thomas is somewhat more of an intentionalist than Justice Scalia.

**[00:20:40.6] Steven Calabresi:** Justice Thomas probably gives more weight to the original expected applications that the framers of the Constitution had with respect to particular terms. In Justice Scalia's case, I think that he was more, as you said, like Justice Story, somebody who wanted to construe the text not strictly and not liberally but reasonably and give it the meaning that it should logically have. One thing I should say about General Meese during this period that's very important is that he thought that the Supreme Court was being non-originalist not only in creating the right to abortion in *Roe v. Wade*, which he didn't think could be found in the Constitution, but also that the court was not being originalist because it was failing to enforce the Free Exercise Clause of the First Amendment or the Takings Clause of the Fifth Amendment as vigorously as he thought they should be enforced.

**[00:21:51.8] Steven Calabresi:** And so General Meese was always of the view that the courts and interpreters of the Constitution should give it its reasonable meaning, and that's essentially the meaning that you're suggesting Justice Story said that it should have. And in that respect, I think General Meese has a somewhat broader understanding of originalism perhaps than some other people who've emphasized original intentions more or originally expected applications more.

**[00:22:38.6] Jeffrey Rosen:** The difference between Justice Scalia and Thomas was viewed most vividly over questions of federalism. And of course, in cases like *Gonzalez and Raich*, Justice Scalia adopting the Hamiltonian approach was willing to uphold regulation of medical marijuana, and Justice Thomas being willing to overturn it was also willing to overturn precedents from the New Deal era that might have called into question far more of the New Deal

administrative state. And then we see *Chevron*, where of course Justice Scalia supported it, and Justice Thomas voted to overturn it. Is that another place where the difference between strict and reasonable construction might present itself?

**[00:23:22.0] Steven Calabresi:** Both of those examples are very interesting. Justice Scalia and Gonzalez against Raich in upholding the Controlled Substances Act as it applied to medical use of marijuana was following a key New Deal precedent, *Wickard v. Filburn*. And I think that was an instance of Scalia following precedent rather than following original public meaning. But you should know that Justice Scalia subsequently told his law clerks, both before and after *NFIB* against *Sebelius*, the Obamacare health decision was rendered, that he thought in retrospect that he had made a mistake in *Gonzalez* against Raich, and that if he had it to do over again, he would have come out the other way.

**[00:24:25.0] Steven Calabresi:** So Scalia explicitly conceded error on that point. With respect to *Chevron*, and what I would say is General Meese would definitely have been with the dissenters in *Gonzalez v. Raich*, which the dissenters being Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas. Ed Meese cared passionately about federalism. It was one of his primary issues. And one of the reasons why he picked William Rehnquist to be Chief Justice instead of, for example, Robert Bork, was because he knew that Rehnquist really cared about federalism and agreed with him about it.

**[00:25:09.7] Steven Calabresi:** And Judge Bork did care about federalism, but Judge Bork was of the view that the New Deal decisions were a settled matter and couldn't be reconsidered. And General Meese did not believe that. He wanted to see some New Deal decisions reconsidered and reanalyzed. And that's part of what made him such a revolutionary force as an Attorney General. And so he would have been with the dissenters in *Gonzalez v. Raich*. He also would have been with Justice Thomas with respect to *Chevron*, because he was very critical of the administrative agencies set up during the New Deal era. He argued that independent agencies were unconstitutional and that the President had unlimited removal power. He criticized broad delegations of power by Congress to agencies. And on both of those fronts, his views were very much in line with Justice Thomas's views rather than Justice Scalia's.

**[00:26:16.1] Jeffrey Rosen:** Very interesting indeed. The question of the constitutionality of the New Deal administrative state has become central to the Supreme Court today. And we are seeing members of the originalist majority, including Justices Gorsuch, Thomas, and Alito, are willing to question New Deal precedents that had seemed settled since the 1930s. The initial justification for originalism in the hands of judges like Judge Bork, as you said, and Raoul Berger, evoked language of judicial deference and restraint and was sympathetic to the view, as you note in the book, of Professor Thayer at Harvard Law School at the turn of the last century, that courts should broadly defer to federal laws and should rarely second-guess them except

when the arguments for doing so were accepted by all sides. By contrast, the younger generation of originalists, led by Justice Thomas, talked of judicial engagement and were far more willing to question precedents and laws that had seemed settled since the New Deal. Was this indeed a shift of emphasis? And is it right to say that although some of the first generation of originalists had focused on judicial deference, the second generation came to embrace judicial engagement?

**[00:27:32.0] Steven Calabresi:** I think that is a fair criticism. That is a fair point to make. I think that for Judge Bork and Justice Scalia, they began thinking about constitutional issues in the 1970s in the wake of the Warren Court. And the Warren Court was, of course, very active on a number of fronts, including in some ways that I, as an originalist, heartily endorse, such as with respect to *Brown v. Board of Education* in loving against Virginia, in banning all forms of race discrimination, and also with respect to the Warren Court's one person, one vote decisions, which were a great triumph. And then also with respect to the Warren Court's freedom of speech and of the press decisions, which were a great triumph.

**[00:28:25.4] Steven Calabresi:** But some of the complaints that arose among conservatives about the Warren Court were over its criminal procedure opinions, and then over developing the right to privacy, and then expanding the Burger Court, then applying that to abortion. And so I think it was natural for Bork and Scalia, with that experience in mind, to emphasize the importance of judicial restraint. Meese agreed about judicial restraint with respect to *Griswold* and *Roe v. Wade* and abortion. But for him, the real issue was that he wanted judges to follow the law. He thought that if the law commands something, being restrained and applying it is incorrect.

**[00:29:27.9] Steven Calabresi:** If the law commands something, one follows the law, you don't go further than the law and you don't go less far than the law. And so he was as concerned about erasing things that were in the Constitution as he was about creating new things that were not in the Constitution. I don't think that General Meese or, certainly not myself or most other originalists, think that the entire New Deal was unconstitutional. I don't think that at all. But there were aspects of the New Deal revolution that raised constitutional issues. And so I agree with General Meese that *Wickard v. Filburn*, which is a case that said that a farmer growing wheat on his farm for his own consumption was engaging in interstate commerce. I agree with General Meese and really with the dissenters in *Gonzales v. Raich* that that was an overreach.

**[00:30:33.4] Steven Calabresi:** I think deferring to agencies on the construction of the law is an abdication of judicial duty because it's emphatically the province and duty of the judiciary to say what the law is, as Chief Justice Marshall said in *Marbury v. Madison*. And so judges ought to say what the law is as to agencies. Agencies shouldn't be foxes in charge of a chicken house, basically enforcing the limits on their own power. Another way in which the Supreme Court has recently pushed back a bit against some New Deal decisions is with respect to administrative law



judges and the Securities and Exchange Commission. The New Deal agencies routinely made law through rulemaking, enforced it through bringing enforcement proceedings, and then had the laws adjudicated by administrative law judges within their own agency. And to me, and I think this is also true for General Meese, that raises serious separation of powers problems. And so I think that Meese was concerned about that, and I think that's what the current court is concerned about with respect to some of the New Deal precedents.

**[00:32:05.8] Jeffrey Rosen:** You described how important the individuals surrounding General Meese were. You played a crucial role. You mentioned Kenneth Cribb and you say that there were debates about some of your colleagues. There's an amazing moment in the book where you described going down on your hands and knees to implore that General Meese not hire Charles Freed as Solicitor General 'cause you thought he was not conservative enough on federalism questions in particular. But when he was appointed, you say that he did a fine job. Tell us about debates like that and about the other crucial figures in the Meese Revolution that made it possible.

**[00:32:47.4] Steven Calabresi:** Well, first of all, the most important person in the Meese Revolution, in my opinion, was Meese's counselor and Chief of Staff, Ken Cribb. And Ken went on to become president of the Intercollegiate Studies Institute after the Reagan years. Ken was a 37-year-old, very intellectual conservative when he was Meese's counselor and chief of staff. And he very much wanted to bring academics into the Justice Department and to create an intellectual atmosphere. And because he was Meese's right-hand man in the way that Meese was Reagan's right-hand man, Ken had the ability to turn the Justice Department into something really more like a law school than like a law firm.

**[00:33:43.4] Steven Calabresi:** And Ken wanted to hire intellectuals and law professors and supported the appointment of an extraordinary number of law professors to be judges. One of the reasons why Ken Cribb wanted to hire Charles Freed to be Solicitor General was because Charles was a Harvard Law professor and a superb intellectual. And even though he was much more of a follower of Justice John Marshall Harlan the younger, who he clerked for, than an originalist, Ken thought the debates between a Harlan advocate of judicial restraint and originalists were valuable debates to have. And we had many of those debates in the Justice Department.

**[00:34:33.3] Steven Calabresi:** And Charles Freed won a number of the debates internally in that sometimes people would appeal things in Charles Freed's briefs to General Meese and General Meese would express his opinion, but he never overturned Charles on anything or told him what briefs to file. However, Charles Freed was not included in the Supreme Court selection committee, which was set up, which came up with a list of names of people to suggest to

President Reagan for appointment to the Supreme Court. Other intellectuals were included in that list.

**[00:35:17.1] Steven Calabresi:** Among the other intellectuals that were important in the Justice Department, I would mention John Harrison, who is now the James Madison Professor of Law at the University of Virginia. John Manning, who worked in the Office of Legal Counsel, who's Dean of the Harvard Law School and currently acting as Interim Provost of Harvard University. Douglas Ginsburg, who was the head of the Antitrust Division and was appointed by Meese and Reagan to be on the DC Circuit. Stephen Markman, who went on to become Chief Justice of the Michigan Supreme Court, where he revolutionized Michigan constitutional law.

**[00:36:00.9] Steven Calabresi:** And then people who went into practice but were very intellectual, like Chuck Cooper, for example, who is a leading Supreme Court litigator today. And one can also see the value Meese and Reagan placed on intellectuals and on ideas in the judges they appointed. And if you compare this to the appointments of recent presidents, there's a startling difference. Among the law professor judges Reagan and Meese appointed were Robert Bork, Antonin Scalia, Stephen Williams, Douglas Ginsburg, Frank Easterbrook, Richard Posner, John Noonan, Pasco Bowman, J. Harvey Wilkinson, Ralph Winter, and the list goes on.

**[00:36:54.1] Steven Calabresi:** And that's an extraordinary number of law professors. I can only think of one law professor who President Trump appointed and I can't off the top of my head think of any law professors who President Biden has yet appointed, although perhaps I've missed somebody. But Meese essentially was very interested in ideas. He was a real intellectual and he wanted to win the war of ideas. And I think that he gave the speeches he gave hoping to change public opinion and hoping to influence future administrations and change legal discourse. But he hired a more cautious Solicitor General like Charles Freed because the Supreme Court was not at all originalist when Meese was Attorney General and he needed to win cases there. And so he needed someone who could make other different arguments. But Charles Freed of course was also a law professor. So, you know, I think there was a tremendous commitment to bringing in intellectual debate and dialogue.

**[00:38:06.4] Jeffrey Rosen:** I'm so glad you shared that list of extraordinary law professors who President Reagan appointed. It's absolutely striking in their scope and distinction. And it seems like a big takeaway from your book is the transformative power of ideas. You describe how Meese helped President Reagan to transform the federal judiciary by appointing brilliant originalist lawyers, jurists, and legal academic to fill half the federal judgeships, that he gave more than 30 speeches about constitutional interpretation because he was a real intellectual, that he created an incubator for originalist ideas by holding major academic conferences at the Justice Department with legal academics, creating an academy in exile.

**[00:38:49.0] Jeffrey Rosen:** And that his staffers, including Charles Cooper and others, were legal intellectuals as well. I really want our We The People listeners to understand the significance of the conservative legal movement that General Meese inaugurated, which you contributed to in your founding of the Federalist Society, and which has culminated in the creation of an originalist majority on the Supreme Court. It does seem to have been focused on a recognition of the power of ideas and the appointment of legal intellectuals. Did you imagine that it would succeed to this degree when you were serving in the Justice Department with General Meese? And to what degree did everything that followed, including the creation of the Federalist Society, the transformation of legal culture, the appointment of conservative law clerks and justices, to what degree did you foresee all that when you started?

**[00:39:43.9] Steven Calabresi:** I think it fulfilled our wildest expectations. I don't think we foresaw everything at all, the extent to which we would succeed. We thought there was a very serious danger that Scalia would be the lone originalist on the Supreme Court and that he would be a voice in the wilderness for 30 years. And of course, he was a voice in the wilderness for a while, but he began getting more and more allies over time. Part of that is because Ed Meese kept working for originalism after his tenure as Attorney General ended. He was a good friend of George H. W. Bush, President Reagan's vice president. He urged President Reagan to pick Bush as his running mate.

**[00:40:32.3] Steven Calabresi:** And when Meese resigned in August of 1988, he encouraged President Reagan to appoint Dick Thornburg as Attorney General because he knew Thornburg was a good friend of George H. W. Bush, and he thought Bush would keep him on. And in fact, Thornburg was one of the very, very few Reagan cabinet secretaries who was George H. W. Bush did keep on. Bush also funded staffers for Vice President Bush's counsel, C. Boyden Gray. And C. Boyden Gray eventually hired a Meese, the Justice Department alumna, Lee Liberman Otis, to do judicial selection for the first Bush administration.

**[00:41:21.0] Steven Calabresi:** And President George H. W. Bush's instructions to Boyden Gray when he took office were, "Keep everything at the Justice Department the same. Keep judicial selection the same, but stop giving all those controversial speeches." And that reveals both the strengths and the weaknesses of the first President Bush. He knew good policy, but he didn't know how to win the war of ideas. But one has to credit Lee Liberman Otis for the appointment of Justice Clarence Thomas, which I think she was principally responsible for, and for the appointment of former Penn Law professor Morris Arnold to the Eighth Circuit, and the appointment of some very distinguished judges like Dennis Jacobs to the Second Circuit, and Ray Randolph to the DC Circuit, as well as others.

**[00:42:18.6] Steven Calabresi:** But Meese kept at it even after that. During George W. Bush's presidency, George W. Bush campaigned saying he wanted to appoint Supreme Court justices

like Antonin Scalia, and that was what conservatives had been led to expect. But it turned out when the vacancies appeared in 2005, that the people George W. Bush thought were like Justice Scalia were his White House counsel, Alberto Gonzalez, and then his second White House counsel, Harriet Myers. Neither of them were originalists in any serious sense of the word, and they also didn't exhibit the kind of excellence that Meese and Reagan had expected of judges.

**[00:43:21.7] Steven Calabresi:** So Ed Meese gave Andy Card, Bush's White House Chief of Staff, a list of four names of possible Supreme Court appointees. John Roberts, Sam Alito, Michael McConnell, and Michael Luttig, who was then on the Fourth Circuit. And they were all then sitting Circuit Court of Appeals judges. Well, George W. Bush, when Sandra Day O'Connor appointed, nominated John Roberts to that seat, and there was such unanimous applause that when Chief Justice Rehnquist died a few months later, he elevated Roberts to be the Chief Justice nominee, and he tried to nominate Harriet Myers to be an Associate Justice. And Judge Robert Bork and conservatives throughout the Federalist Society all rebelled in outrage, and President Bush had to withdraw the Myers nomination, and at Meese's suggestion, he nominated Sam Alito instead. And Alito, of course, was an alumnus of the Meese Justice Department.

**[00:44:34.7] Steven Calabresi:** So Meese was directly involved in the appointments of Roberts and Alito. With respect to President Trump, the most important thing that General Meese did was in the mid-1980s, a guy named Don McGahn, who was a law student, came to a National Lawyers Convention and ended up having lunch with Ed Meese and Ken Cribb and having a two-and-a-half-hour conversation with them. And he was so amazed that a former Attorney General and his Chief of Staff would devote so much time to talking to him as a law student that he became a steadfast member of the Federalist Society. And then Don McGahn turned out to be Donald Trump's campaign counsel in 2016 and was his first White House counsel in 2017 and 2018.

**[00:45:32.7] Steven Calabresi:** And he said in a speech that he was accused of outsourcing judicial selection to the Federalist Society, but that in fact, instead, he had hired Federalist Society members to work in the White House Counsel's Office, and he thought that was insourcing judicial selection, not outsourcing it. So I'd say that Don McGahn, in picking Justices Gorsuch and Kavanaugh and putting Justice Barrett on the list of names to be seriously considered for the Supreme Court, was consciously trying to complete the revolution that Ed Meese began. And I think he succeeded. And that's why I think that the 2022 and 2023 Supreme Court terms were so momentous. I think that Don McGahn and President Trump completed the constitutional revolution that Meese began, but Meese theorized the revolution. He got it started. He nurtured it with the appointments of Alito and Roberts, and he inspired McGahn to then complete it. And that's why I think he deserves credit for essentially a constitutional moment.

**[00:46:51.1] Jeffrey Rosen:** Don McGahn and President Trump completed the revolution that Meese began, you just said, and Meese theorized the revolution. Well said, indeed. As you note, in the last chapter, there is a vigorous debate among originalists on the Supreme Court about how to balance text, history, and tradition. We've talked about the way that originalism changed its emphasis from reasonable construction to strict construction, and from judicial deference to judicial engagement. Given these dramatic shifts, critics today say that it fails to constrain judges and essentially leaves them free to choose among different emphases of text, original public meaning, or tradition in ways that tend to favor conservative results. Was that central promise of originalism, that it would promote neutrality and prevent judges from imposing their policy preferences, achieved or not?

**[00:47:55.3] Steven Calabresi:** I think that what the proposal of originalism has done has allowed everyone to basically speak the same language to one another and to argue about cases using the same guideposts. And so, I guess one thing I would say is that there is enormously more reliance on history in Supreme Court opinions today than there was in 1985 when General Meese gave his first speech. And it's true that the six Republican appointed Supreme Court justices disagree from time to time, and three of them are often classified as being more conservative, Gorsuch, Thomas, and Alito, and three of them are classified as being more moderate, Barrett, Kavanaugh, and Roberts.

**[00:48:52.6] Steven Calabresi:** But I would submit to you that there is less disagreement among those six than there was among the New Deal Supreme Court justices. Franklin Roosevelt and Homer Cummings appointed activists like William O. Douglas and Hugo Black, but they also appointed ardent defenders of judicial restraint like Felix Frankfurter and Stanley Reed. And the differences between Hugo Black and William O. Douglas and Felix Frankfurter are a chasm. They're as big as the Grand Canyon.

**[00:49:29.2] Steven Calabresi:** The differences between, say, John Roberts, the most liberal of the six Republicans, and Clarence Thomas are much narrower. They're actually talking the same language and arguing from similar premises. And so, you know, I think there's a lot of work that remains to be done in theorizing originalism and also in educating justices and judges and law professors about what the original meaning of various provisions of the constitution really is. I myself think that the privileges or immunities clause of the 14th Amendment was too narrowly interpreted in the slaughterhouse cases and that it does protect some unenumerated rights, and that's so far an issue the Supreme Court has not revisited or considered. I think originalism has produced a set of justices who are much more in accord and speaking the same language than was true of the New Deal justices, or than was true of John F. Kennedy's justices.

**[00:50:42.7] Steven Calabresi:** John F. Kennedy appointed Byron White, who was pretty conservative, and Arthur Goldberg, who was very, very much an activist, and the two of them

completely disagreed with each other. The thing that's so remarkable about the Meese revolution is not the occasional disagreements, but the extent to which the justices all speak the same language and care about the same things.

**[00:51:14.3] Jeffrey Rosen:** It is indeed remarkable, and it is striking that whether or not you approve of the results of The Meese Revolution, whether you agree with the Supreme Court's approach to interpreting the Constitution or not, you've got to accept the transformative influence of Ed Meese in sparking the judicial revolution that has transformed the courts and the Constitution. Steve Calabresi, you were a central part of that revolution. You write about it compellingly in your new book, *The Meese Revolution: The Making of a Constitutional Moment*. Congrats on the book, and thank you so much for joining *We the People*.

**[00:51:53.7] Steven Calabresi:** Thank you so much, Jeff, for having me on *We the People*. And again, I have the highest admiration for the National Constitution Center, for *We the People*, and for your role in running those things. So thank you very much. It's a great honor to be here.

**[00:52:09.3] Jeffrey Rosen:** Today's episode was produced by Samson Mostashari and Bill Pollack. It was engineered by Bill Pollack. Research was provided by Yuhua Li. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination, education, and exaltation. Friends, please check out the new Constitution 101 course that we launched in partnership with Khan Academy. That's at [constitutioncenter.org/Khan101](https://constitutioncenter.org/Khan101). Sign up for the newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). And as the holidays approach, always remember that the National Constitution Center is a private nonprofit. Thanks so much to all of you for your support, your engagement, and for being part of this wonderful learning journey that we're all on together during 2024, and so looking forward to our learning together in 2025. On behalf of the National Constitution Center, I'm Jeffrey Rosen.