The Interbellum Constitution

Thursday, June 20, 2024

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[00:00:03.1] 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 non-profit, chartered by congress to increase awareness and understanding of the Constitution among the American people. In this episode, I am delighted to share a great conversation I had recently with Alison LaCroix and William B. Allen. Alison LaCroix is author of *The Interbellum Constitution, Union Commerce, and Slavery in the Age of Federalisms*. And William B. Allen is editor and translator of a new edition of *Montesquieu's, The Spirit of the Laws*. We explored constitutional interpretation during the Interbellum period before the Civil War and the intellectual foundations of Constitutionalism from the founding until today. Enjoy the conversation.

[00:00:56.3] Jeffrey Rosen: Welcome, and thank you so much for joining Alison LaCroix and William Allen. Alison, congratulations on your new book, The Interbellum Constitutions. Tell us about your argument in this very important work, which is that this was a time, not of an age of federalism, but federalisms as you put it, and that the conventional narrative of this period oversimplifies the deeply complex relationship of federal, state, and local authority that was being worked out in the courts, and in the political arena.

[00:01:23.6] Alison LaCroix: Thank you, Jeff. Thanks very much. It's such a pleasure to be here. So let me say that first, and yes, I mean, I think just to clarify or to kind of explicate a little bit for the audience where we are too, in sort of time period here, my focus in the book is this period between the Revolution, what we think of as the founding period and the Civil War and reconstruction, which Eric Foner among other historians describe as the second founding. And I think we spend a lot of time in sort of public discourse and legal discourse, historical and theoretical, talking about those two periods. And they're clearly enormously important, transformational. But then there's this period in between, and that's what I was drawn to in this book. Coming off of my first book, which focused on the founding for this book, I wanted to really dig into this period that I call the Antebellum period between 1815 and 1861.

[00:02:20.0] Alison LaCroix: So 1815 is the end of the war of 1812, which is one that often flies under the radar, but is really important in terms of American politics, society, law, culture, and kind of nation building. And one of my students really aptly once said, this period is treated

by a lot of people like a constitutional flyover country, where we know something important happens before and something important happens after what happens in the middle is kind of interesting from a distance. We don't really need to dig in. So I wanted to really dig in and look at the ways that it's not a period that is only about the coming of the Civil War. I think we tend to look at this period when we do and say, this is when the Civil War became inevitable, or this is when the irrepressible crisis, irrepressible conflict took shape. All of that certainly is plausible. But I think digging into the material and really the people, because it's written in a more narrative way, suggests there's actual change going on. It looks different from the founding period, and it looks different from what we think of as the Civil War and reconstruction period, especially in terms of structured governments interacting, people trying to figure out which government they want to regulate. People think that different governments will actually make different rules. So that's the federalisms, plural in the title.

[00:03:43.9] Jeffrey Rosen: Wonderful. Such an important contribution. And so looking forward to digging into the people in the eras that you discuss so powerfully to illuminate what these federalisms can teach us. Bill Allen, you have written so deeply about the founding and post founding era. You have a speech, the Constitution as critical inquiry, which you delivered in 2021, where you argue that the Constitution reflects a series of historical and political fights and settlements, and in that sense is a dynamic historical process rather than a fixed document. Tell us more about that argument and its implications for constitutional interpretation.

[00:04:28.6] William B. Allen: Thank you, chair. First of all, thanks to the Senator and thanks to the Professor giving me the opportunity to spend a little time with her. Her presentation and summary of her book actually answers your question to me about my presentation. And I think you can immediately see that what I refer to as the complex dynamics in that period between the founding and the revolution and the civil War describes quite aptly what she's describing, that there are lots of transactions taking place, political transactions, and those need to be variously studied and identified.

[00:05:06.0] William B. Allen: To give just one example, going back to the beginning of it, 1815, the end of the war, the Treaty of Get Along represents a very important transaction dealing with the question of how the Constitution should be understood and what its promises mean. And the very fact that John Quincy Adams was in the middle of signing a treaty that guaranteed the return of compensation for slaves is sufficient to tell us that something important was happening. But the fact that the treaty was so constructed that he ended up having it arbitrated by close friends of his from Russia, also shows the politics of the moment and the ways in which we were negotiating the whole question of who's responsible for what and which decisions are gonna be made with what moral and political impact. So this presentation that you're citing is designed precisely to provide a theoretical foundation for the important historical work that Professor LaCroix has published for us.

[00:06:04.1] Jeffrey Rosen: Superb. It really is a unique opportunity to convene both of you to focus on this crucial period right after the founding and what it can't teach us about constitutional interpretation. Allison, if I may, why don't we begin with the Marshall Court? The conventional interpretation is that John Marshall started in cases like we call it Maryland, and then most famously Gibbons and Ogden took a relentlessly nationalistic approach of liberal construction

rejecting Jeffersonian strict constructionism and always favoring national power over state's rights. You argue that this is far too simplistic that you focus on Justice William Johnson, the first great dissenter and talk about how in less known cases, it was really a complicated mix of federal, local and state power that guided the court. Tell us more about your findings.

[00:07:02.1] Alison LaCroix: Yes, great question. And I think this is an area where for anybody in the audience or broader, more broadly in the conversation in law school, but also hit political history, as you said, Jeff, there's this account that, well, you have John Marshall as Chief Justice setting out this nationalist agenda, and it's very political. I think that's another interesting connection between this period and our current moment, because there's a lot of talk in this period about the justices on the court being political and criticisms of the court, and the court being too embroiled in politics, and that has lots of interesting connections to our current moment. But yes, I mean, I think one thing I wanted to do was to say, again, in law school there's this sort of very internalistic doctrine story about constitutional law that's very detached from politics or society or economics or nitty gritty debates people might be having in the real world.

[00:08:00.6] Alison LaCroix: And John Marshall and the Supreme Court and the Commerce Clause are at the center. So basically the idea is Marshall and the court decide a number of cases where they say the federal government has broad power to regulate commerce, and in many cases, that means states can't regulate. That's the kind of big picture. But one thing I wanted to do, partly because I approached this material in my historical training as an intellectual historian, was to say, hold on a minute. Let's remember how unfamiliar or how strange the concept of commerce was, as in a sense of saying, don't assume what we now know, which is, oh, in everything from healthcare to you name it, the Supreme Court's going to talk about something called the Commerce Clause. Instead, let's try to think about what it meant at the time. And so that's part of the project that the court took up.

[00:08:49.6] Alison LaCroix: I mean, we also have this sense also that John Marshall sort of comes down off the mountaintop and has his project and thus forward with constitutional law. But as you said, Jeff, with other justices on the court who sometimes we read out of the record, it's all Marshall and then a few other people. Well, justice William Johnson is a really important figure here. He's confounding in lots of ways. He's a South Carolinian, he's a slave owner. He's also a nationalist. And so one of the things I try to look at in the book is the cases before the Supreme Court as the Supreme Court adjudicates Commerce Clause cases, because you have these cases where the Supreme Court justices are out riding circuit as they did then. So Marshall is sitting as a regular federal court judge in Richmond, Johnson is sitting as a federal court judge in Charleston, and they're hearing trial court cases, many of which involve commerce in the really rich sense that I'm trying to recapture.

[00:09:49.7] Alison LaCroix: So Johnson gets a case that he's instrumental in bringing before his circuit court. What do we think when South Carolina passes a law that says all black sailors have to be jailed, whether they're British subjects or American subjects, they have to be jailed in South Carolina jails while their ships are in Port. And Johnson says that that violates the federal commerce power and also connects to Bill's comments. He's very concerned with the international context as well, and Great Britain's involved in that case because their ships are having their crews thrown into jail in Charleston. So it's not this simple kind of, people believe in

federal power, therefore they expand the Commerce Clause narrative. And we bring in some of these other figures and these other debates, we see the role that slavery and migration are playing and also international affairs. So I think of it as commerce is the domain or the crucible where they have these arguments about federalism and we live in the world that that created.

[00:10:53.6] Jeffrey Rosen: So interesting. You discuss Madison's approach to federalism, the fact that he wanted a national veto on state laws at the convention. He lost that and considered that his greatest defeat and then had a sophisticated nuanced approach to sovereignty ever since. Bill, Allen, you talk about Madison's evolution on the question of the National Bank as an example of how the debate between strict and loose construction is too simplistic, having initially opposed the bank as being beyond Congress's enumerated powers, you note he came to accept its constitutionality because congress and practice and the President had come to accept it. Tell us more about that evolution and what it says about Madison's approach to how to interpret the constitution.

[00:11:44.4] William B. Allen: Sure, I'm glad you asked that question because that's exactly what I was thinking about as Professor LaCroix was speaking. Remember what Madison did in deciding to approve the second bank of the United States? He took the position that his previous opposition to a national bank was incorrect, not because he originally judged it incorrectly, but because those who approved the original constitution decided differently than he did. And so he argues in 1816, well, that's the authoritative interpretation, and I as president will follow that. So, he reversed himself. We can call it nuance, but actually it's very clear, concrete and political. And that's what I like about Professor LaCroix's work because it underscores that these are decisions being made in the moment by people who actually have points of reference that are politically significant and therefore do not necessarily represent what we call today flip-flopping.

[00:12:40.1] William B. Allen: And to give just one more example of that, take Craig versus Pennsylvania 1842, the other famous dissent by Justice Tani in that case in which Tani disagrees with the decision made about rendering of Maryland slave from Pennsylvania back to Maryland, though he favored the outcome, but disagreed with it because he didn't think the federal government should have that power at all. And he wanted a decision that denied any federal authority. And remember the whole question, not, it doesn't only involve the fugitive slave clause, but the commerce clause. So the very issues that we're talking about were at stake in his dissenting from an outcome that he approved because he was arguing over the appropriate institutional and constitutional framework for accomplishing these ends.

[00:13:27.9] Jeffrey Rosen: Alison, what does this say, first of all, about Madison's approach to originalism? If he didn't believe that the meaning should be fixed by the original public meaning of the tax or even his own understanding of that, but the practice would come to be relevant, then I want you to tell us about the central question of sovereignty. I have to say that ever since law school, my, the first weeks of law school, I had a, it has to be a debate with my dear friend and teacher at QMR about who was sovereign at the founding, the people of the United States, or the people of the several states or both. And I thought that Madison said that there was a kind of dual sovereignty in Federalist 39, Aquil said that the national people were sovereign from the beginning. I think your account seems to suggest that Madison's approach really was adhered to

by many people in the Antebellum era, and it was a complicated mix of sovereignties that really prevailed with different people reaching different conclusions in different cases.

[00:14:35.4] Alison LaCroix: Yes. I mean, I think one of the most striking things about the period that makes it really fascinating for us and for the way we think about constitutional interpretation today, including originalism, is that Madison was around for much of this period, he lived till 1836. And so now I think we sometimes have this construct of what would Madison think or say? And people had it then, and in many cases they wrote to him to ask, and he wrote back. So, there's this great exchange of letters in, there are two waves of it, but the principle one is in about 1830. And so Andrew Jackson is president and his right hand man, Martin Van Buren writes to Madison to basically say, we would like in constructing one of Jackson's famous vetoes, this is the Maysville Road veto.

[00:15:28.7] Alison LaCroix: We'd like to use one of your vetoes from when you were President Madison as precedent, and they've actually already done it in the veto message of Jackson. So basically, they're claiming Madison's authority. So it's interesting that even by 1830 Madison was still alive, but had this tremendous mantle of authority as the father of the Constitution and Van Buren on behalf of Jackson wanted to claim that. So they write to Madison and they basically say, love the veto, love your work. Can we have more? In fact, would you draft a constitutional amendment for us? And Madison basically writes back in what I think of as the, I'm James Madison and you know nothing of my work mode, although he's more Jen Peele. And he basically says, what I thought I was saying in this veto of 1817 from his presidency, really doesn't have weight anymore.

[00:16:27.2] Alison LaCroix: It's about how people have interpreted it since. So it connects exactly to what Bill was saying about Madison on the bank. So to the extent we think, I mean, I wrote an essay, sometime in the last few months about this, basically saying Madison was not an originalist. Because he's in fact saying interpretation happens what the Supreme Court in the 1950s in the Youngstown Steele seizure case says, Justice Frankfurt calls historical gloss or the gloss of history practice, kind of how things are worked through. Now, the other thing I'll say is that I think sometimes today we hear this referred to as liquidation, which is a word Madison used. So the Antebellum period is not a flyover country, but it's liquidation. And I take some issue with that as a description of what's going on, because to me, that implies, as it's used today, the meaning of the constitution was fixed at the founding and people just had to give it content and figure out what it meant.

[00:17:27.1] Alison LaCroix: And I would say instead, there wasn't a, what it meant in 1787 that was necessarily clear and in fact that was quite different from what it meant in say, 1830. They were actually being creative in some ways, even as they looked to someone like Madison for authority. And yeah, sovereignty. Boy, it's such a, it's an endlessly fascinating topic, and I think, and this connects to Madison at the Constitutional Convention, wanting the federal government to have a veto, the congress, the Senate, to have a veto on state laws because I think they took structure seriously and thought sovereignty clearly in the sense of real sovereignty who can deal with foreign powers, for instance, that's in the national government. In a political theory sense, it resides with the people. But what you start to see in the Antebellum period also is states asserting themselves as really sovereign. And that's on all different sides of the political

spectrum. We tend to think of it as South Carolina nullifying later secession in defense of slavery, and that's part of it. But the state claims of sovereignty are very much alive and well throughout this period, and not only from southern slaveholders protecting states.

[00:18:47.0] Jeffrey Rosen: Fascinating. And you just do so much to illuminate that the complexity of the argument over sovereignty and the different positions taken by different people in the same debates, Bill Allen, what does this say about originalism that Madison himself was not an originalist in the sense of believing that the Constitution was fixed in terms of its original public meaning? What is the role of, what's called liquidation, that is subsequent historical practice in illuminating the original public meaning of the text? And is it relevant that Hamilton and Jefferson each had distinct approaches to constitutional interpretation. Jefferson, constrict constructionist of the tax, Hamilton, the implied powers liberal constructionist guy, should we care that the three founders had completely different approaches to interpreting the Constitution or not?

[00:19:44.0] William B. Allen: You've asked a lot in that question. I'm gonna try to tie it into what went before as well. Let's start with the question of sovereignty itself. I think we can be over glib in separating out what was said at the convention and what happened subsequently. It is important that although Madison lost the state veto, he did succeed in assuring a ratification process for the express purpose of making it a national government. So he did not want ratification to be referred to the legislative authority of the states. That's absolutely fundamental from the point of view of the discussion of sovereignty or nationalism, if you want to put it in those terms. Madison never abandoned that line, and that's why he would repeal the tariff controversies in the '30s and he could repel the claims to his authority for the state's rights arguments that emerged in that period.

[00:20:37.4] William B. Allen: 'Cause he still cued to the line he laid out in the constitutional convention. Therefore, it is important to put to places where he did have to make adjustments in perspective and what you refer to as the public view of the Constitution. That Madison, in a way, raised to a holy standard, that mustn't be treated as an equivocation on his part that must be treated seriously both theoretically and politically. He is not at all being disingenuous in 1816 when he says that these are the people who ratified the Constitution and therefore their view about what the Constitution means has greater authority than my individual view. That's an originalist argument. We need to understand that. Now, it doesn't mean when you refer to originalism that people do not continue to make decisions and constitutional decisions. That's why the dynamic process is so important, because the foundation of originalism is precisely the dynamic of decision making in the body at large.

[00:21:47.8] William B. Allen: The original Constitution seeks to create what I've described in one of my books as political homogeneity, but political homogeneity does not rule out the extraordinary diversity in the society at large. And the whole point, of course, is to equilibrate political homogeneity with the extraordinary diversity in the society at large. Madison never lost sight of that. I don't think Hamilton lost sight of it either. And I think it's important that Thomas Jefferson, though a strict constructionist with regard to constitutional theory as an administrator, used employed construction and did not overturn the Hamiltonian framework. So we have to pay attention to the actual practices. I love that emphasis in Professor LaCroix's work to the actual

practices, the decisions made in the ways they were justified, not as departing from originalism, but being itself an expression of the demand of originalism itself. What we have to remember is that the most important aspect of originalism is the responsibility that evolves upon decision makers. That includes those in government, and it includes those people as sovereign themselves. It is an ongoing process of decision making, and that's what is most greatly in conformity with the original intent of the Constitution.

[00:23:13.9] Jeffrey Rosen: Fascinating. Alison, one of your amazing chapters is chapter nine, which talks about Wisconsin's nullification and secession arguments in the '50s about the Fugitive Slave Act. And you show that far from only being enlisted on behalf of the slave power as it was in resistance. South Carolina's decrying Congress's tariff or Georgia decrying the Supreme Court's power to reorganize the Native Nations, Wisconsin actually invoked these nullification claims on behalf of resistance to the Federal Fugitive Sway Act. Tell us about that amazing story and its significance.

[00:23:52.3] Alison LaCroix: Yes, it's one of my favorite episodes in terms of just drama and also surprise. I mean, I think one of the things I wanted to do with the book was really to say this is not the period that we've thought it is. And some of that sense of surprise really comes through in that chapter, so I'm really glad you asked about it. So yeah, I mean, we have this rhetoric and where I start the chapter is by quoting some of the Wisconsin state officials and lawyers. So in 1850, Congress passed a second fugitive slave act that really bolstered and put federal power very forcefully and clearly on the side of returning alleged fugitive slaves. So Federal Power is doing the handy work and the force and the violence of slave holders. So any notion, and many people raised this objection at the time, any notion that slavery is a local institution governed by norms of comedy among the states is basically eliminated in 1850 when Congress says federal officials in the states, federal judges, federal marshals, you are all obliged to carry out this Fugitive Slave Act rendition and these processes that are essentially kidnapping people.

[00:25:11.1] Alison LaCroix: And so that comes to a very dramatic climax in Wisconsin in 1854 when a man named Joshua Glover, who had been enslaved in Missouri, who lives in Racine, Wisconsin for a couple of years, he's a member of the community, but he in the middle of the night is basically arrested, seized, thrown into a wagon by his enslave and some federal officials. So it's all lawful in terms of the federal law of the day. He's carried up to Milwaukee. He's put in jail there for the awaiting process. Meanwhile, state officials and journalists, it's a really interesting story in terms of the press getting wind of this, and you have telegraphs going up and down between Racine and Milwaukee and anti-slavery mobs for me, and they stormed the jail in Milwaukee. And I have to say, I am, I was born in Milwaukee. So this story really has a lot of local and kind of hometown import to me.

[00:26:11.4] Alison LaCroix: The square is still there, but now it's called Cathedral Square. At this point it was called Courthouse Square, and you have a mob storming a jail, and there's this African American man there, and we think we know how this is gonna go. This looks like a mob, this looks like a lynch mob, but they're there to break him out and help him escape, which he does. Then we get a lot of litigation. It goes to the Supreme Court. But one of the things that's so interesting about it is you get mass meetings, political meetings, newspaper essays. An editor in Milwaukee named Sherman Booth is at the center of this and all of their language. If you

removed the word Wisconsin, and you, and I've done this, I've shown it to students, and I've said, "Who do you think is saying this?" And they think South Carolina null fires are secessionists, but it's not.

[00:26:58.0] Alison LaCroix: It's the state's rights language that is Wisconsin state's rights language. And we might think, "Well, they're kind of appropriating it, they're being strategic. It's the late 1850s. They see how things are going, but they actually mean it." And I think one of the most interesting points about this is to think, as I say in the chapter, in the end, Wisconsin deciding to join forces with the union a few years later in the Civil War did it in part out of state's rights, but it was Wisconsin's sense that it was being invaded by these southern slave owners who had captured the federal government. So I think of it as federalism turned upside down, who's on which side? And that's another part of the book, which is to say, we have a certain script, I think from the 20th century, probably reconstruction through the 20th century about who's on which side of federal power versus state's rights. This looks very different, and it's just a fascinating story.

[00:27:54.8] Jeffrey Rosen: It's completely fascinating. Bill Allen, what do you make of the fact that in these central debates, people seem to switch sides based on the political imperative? So you've mentioned Jefferson abandoning strict constructionist principles as president for the Louisiana purchase. Here we have Wisconsin abolitionists supposedly being nationalists, suddenly becoming advocates of nullification. We have Andrew Jackson, a big Jeffersonian in the end defending the Union. Do people embrace their constitutional position as purely opportunistically on the basis of the political imperatives of the moment or not?

[00:28:35.8] William B. Allen: I actually believe, Jeff, that we use a sign the term constitutional to these views that people hold, when they're making these decisions in a political context. They're looking for the strongest argument to express the outcomes that they desire within the framework of the Constitution. Now, let us remember that Abraham Lincoln's primary position throughout the buildup towards the Civil War was a state's rights position. I.e states have a right not to have slavery and not to be penetrated by slavery. The effect of the Dred Scott decision was to federalize slavery, nationalize slavery, and anti-state rights. So it's not at all surprising in Wisconsin that people say, "Wait a minute, that's not acceptable." State's rights require us to be able to live free and not to be forced to put up with slavery in the state. So I think the core rules, reversals of constitutional positions, is a mistake. Those are constitutional positions consistent with the arguments that people are making on both sides about what the importable constitution is.

[00:29:37.0] William B. Allen: Remember that in the original Constitution, there was a reserve clause in what became the 10th Amendment. And remember who surfaced the 10th Amendment. I don't mean James Madison as author in the first Congress, but I mean the anti-Federalists who led the campaign for this and for whom. Therefore, these things were at stake from the beginning. What we call today loosely states rights claims, but probably would be more appropriately called rights claims. And the rights claims address the question of who properly exercises power on what questions. And if it is to be the case that states are the primary authority for the exercise of power with regard to health, safety and morals, then you could easily see

state's rights claim being made from either side of any political confrontation without inconsistency. And that seems to be what is going on.

[00:30:30.6] Jeffrey Rosen: Very interesting. So Alison, you heard Bill say that you can make states rights arguments on behalf of any question in constitutional history and people do on both sides, but I wonder whether they employ them when the state's rights claims favor their preferred results and abandon them what they don't. And let's talk about Andrew Jackson. You have a chapter on the Cherokee case, which you tell in really riveting detail. Jackson is a big Jeffersonian and vetoing the bank and embracing a constrained vision of federal power. And then he just flips when he embraces broad federal power for Indian removal, but then kind of coily stays on the sidelines during the Cherokee case. And let Georgia defy the court without declaring himself. Tell us about his performance and what, whether it's constitutionally principled or purely opportunistic and most of all just tell the amazing Cherokee Indian story so that our listeners understand it.

[00:31:28.5] Alison LaCroix: Yes. I mean, so starting, I guess starting with Jackson specifically, one thing to note, and this ties back to something that I think we mentioned a few minutes ago, is thinking about the role of the executive. And when we think about practice and implementation and constitutional law on the ground, a lot of the time, the body doing that, the institution of government doing that is the executive branch and the president. And so that's a big part of Andrew Jackson here and Jefferson and the Louisiana purchase that people in this period, which again, if you think of it as flyover country, you miss this. The way the executive branch was developing and developing its powers is really quite interesting and not necessarily what we think, but it also shows how we got to a lot of where we have ended up.

[00:32:24.6] Alison LaCroix: Because the reason that's relevant here is yes, a lot of the Jacksonian rhetoric and even Jackson and also Jacksonian is more broadly, seems like it's about states rights. This sort of, this notion that Jackson is a Southerner and he believes in states rights, and he sort of talks that way. But then we look at the nullification proclamation. So this is earlier, this is 1830 through '32. South Carolina says, "We are not only going to nullify federal tariff laws, but we're going to stop the federal government from sending officials in to collect the money." Like, that's a sort of where things actually cash out on the ground. And Jackson issues one of the most forceful statements of federal power still, I mean, it's in case books, in constitutional law and federal courts, because he basically says, "You don't get to do that, South Carolina."

[00:33:13.4] Alison LaCroix: And he was, South Carolina claims him as having been born there. There's a sort of question of was it North or South Carolina later? But I mean, he is a southerner, he is very kind of, of a mind similar to that of South Carolinians. But he says, "You don't get to do this because it's an affront to executive power. And so I, as the executive can say, I'm gonna ask Congress for appropriate funds, I will send in the military." And I think we would think of that as a generally kind of a use of federal power, executive power that's consistent with things later in the 20th century. I mean, there are technical aspects of the nullification proclamation that get picked up in reconstruction and in the 20th century civil rights movement. But at the same time, as you said, Jeff, he ran for president in 1828 and again in 1832, very

explicitly on what we need to do. We being the federal government, we're not making treaties with Native Nations anymore.

[00:34:15.1] Alison LaCroix: We've done that. It's nonsensical. I mean, he's much more derogatory, basically, like Native Nations don't get treaty status. Congress can just legislate for them. We have a lot of treaties, but from now on, when states like Georgia want to say we have jurisdiction over everything in the physical territory of Georgia, the federal government's going to let them do that. And he pairs it with a kind of yeoman farmer, Jacksonian small d democracy vision. And this is politically, it's genius of a terrible sort because he says, and all of his kind of party affiliates in Georgia say this, they say, "Hey, white farmers in Georgia, wouldn't you like to have your own farm too? We'll enter this lottery, buy literal lottery tickets for land, and the land that will be auctioned or lotteried off is Cherokee and others, especially the five tribes' land.

[00:35:12.2] Alison LaCroix: And so you give the kind of small farmer white yeoman a stake in dispossession of the Native Nations. And then he kind of is willing to allow Georgia to exercise this vast power to expel native nations, even though at the same time, or roughly at the same time, he's issuing this very, very strong message against South Carolina. And you look at the story of the sort of inner workings, and they were really worried about the Jackson administration about Georgia and South Carolina joining forces. So they work through back channels to get Georgia and the Cherokees allies to kind of stop contesting because they fear that Georgia and South Carolina will join forces, which was very plausible, even though they had the facts on the ground were somewhat different.

[00:36:04.9] Jeffrey Rosen: That fear was so probable that Jackson threatened to arrest John Calhoun for treason, his own vice president for siding with the null flyers. And as you suggest the crisis was averted for political negotiation. Bill Allen, what do you make of Jackson's performance in this period? He does embrace both stage rights and very strong federal power arguments. Does this make him an opportunist or is this just what people do as you suggested, making the arguments that best serve their positions? And then tell us about Jackson and the courts, because the real contribution here is his claim like Jefferson, that the President can interpret the Constitution in ways that differ from the courts. What does that say about who gets to enforce constitutional meaning?

[00:36:57.9] William B. Allen: So let's go back to the original Constitution, Jeff, as I like to observe, there isn't an office in the Constitution that doesn't carry with it the responsibility to judge. That's something that we tend to neglect today in our conversations, that everyone who holds an official position has a responsibility to make a judgment. Now, what is the status of the judgment that's made in the respective offices? Are they all equivalent status to that of the Supreme Court when it is pronounced? Well, with respect to the primary division, executive, legislative, and judicial, I think the argument is a sound argument that they have the same status. Not to say that they determine legal process, but they have the same status with respect to cooperate interpretations of the constitution.

[00:37:48.0] William B. Allen: Now you're still bound to work through legal processes. So a president may say, I disagree with the court on a constitutional ruling. It still happens today. We hear it all the time. A ruling comes out and the President says, that's wrong. Well, the president

saying it's wrong does not change what's going to happen in the courtroom and what the court decides governs what happens in the courtroom. So then the question becomes, are there other arenas in which executives and legislators may act in such a way as to compensate for decisions being made judicially? And we know that's true because we remember, of course, the Religious Freedom Restoration Act, which is especially and explicitly regarded as a correction of Supreme Court decisions. And this happens on numerous occasions in different venues. So again, not surprising. Why, because everybody has a responsibility to judge and to act in accordance with that judgment.

[00:38:46.1] William B. Allen: Therefore, what we're observing, and Jackson, I'm gonna defer to Professor LaCroix about, with regard to his overall administration and his practices. But I think it's safe to say of him that the strong position he took with regard to the courts was a position which could be defended politically, even if he couldn't defend it judicially. And that's not an insignificant distinction to make. So that, I don't regard Jefferson as being inconsistent because he was a strong nationalist in terms of the effect of many of his endeavors. And I don't regard him as being, how shall I express this acting, injudiciously because he disagreed with judicial judgements that he would in fact participating in a dynamic environment in which all the participants have to react to one another because that's the nature of the transaction, that there are no pristine transactions in politics.

[00:39:49.4] William B. Allen: And I know we have a tendency, and I think our legal education is responsible for our thinking this way, to be honest with you. But we have a tendency to think we can somehow make decision making and then determine what the decision should be based on the silos. That does not describe a dynamic environment. Politics is a dynamic environment, and therefore there ought to be interactions, de facto negotiations whether face to face or through the effective political decision. And that's what's going on. That's what the dynamic is about. So I would say of Jackson that he carried out his responsibility to judge in light of his judgment of what was appropriate. And he was, in most respects, successful.

[00:40:40.8] Jeffrey Rosen: Alison,the base was the combination of this period was over secession and the war came as Lincoln said. And although some of Jefferson's nullification language, was invoked by Calhoun and the nullifiers to endorse secession Madison in one of those famous letters that you mentioned, for sources secession and said that that was not a constitutional move, tell us about that debate and how at the end of the incredible story that you tell in this Interbellum era as you call it, is there then a settlement that secession is unconstitutional, after the war reinforces Lincoln's judgment than it is or does the question of secession remain one of contestation that has to be solved anew in each era?

[00:41:30.3] Alison LaCroix: Well, great questions. Big questions, a few thoughts. I mean, and this picks up on something that Bill just mentioned. I mean, one thing about this period, and one of the things that has drawn me to it is that it sometimes is treated as all politics, no law, especially again, by constitutional law folks. So there's no constitutional amendment, so there's nothing in the text we can point to. Sure. A lot of things happened, all the things we've been talking about and then many others. But that's all politics. It's not law. I really resist that for obvious reasons, because first of all, that stark distinction, as Bill was saying, between law and politics, is itself false. That's not how people experience it at the time. It's not a useful distinction.

And so I wanna bring both back in and this goes, I think directly to your question also, Jeff, because one thing that I draw out of the whole period is this focus on what they sometimes call umpires.

[00:42:35.9] Alison LaCroix: Where is the umpire? And you see this back in 1815, one of the earliest, kind of debates that I focus on in the book, as the War of 1812 is ending the famous Supreme Court case, Martin Against Hunters Lessie, where the Virginia High Court essentially says, we just don't think you're the umpire on this question. Supreme Court. And they go back and forth, and the Supreme Court of the US sort of forcefully says, yes, we are the umpire. But this question or revising power, like sometimes we think of it, I, what I tell in my constitutional law classes, it's this question, not just who decides, but it's who decides, who decides. And this again, goes to the different branches, who have a duty to make constitutional assessments, but what happens then. Who decides who decides? And what's very important to me is that for all of us, I think people in this period disagree about that just as we do today, just as people did at the founding.

[00:43:34.4] Alison LaCroix: So then Lincoln and Secession, I mean, Lincoln is right there even early in his career in 1838, he makes this wonderful speech in Springfield, Illinois to the young men's Lyceum, a very tocquevillian assembly of people getting together to discuss the issues of the day. So they have young politician Lincoln come in and he basically tells them the real danger is mobocracy, that's what he calls it. We need to have the political religion of the Declaration of Independence in the Constitution. And then we see him as president. And this is where I'm going with, I'm working on the next book, which is the Civil War and Reconstruction. So picking up a lot of these issues, because the Lincoln administration sticks to the position throughout the war that secession is unlawful. They are not seceded states. The union is perpetual. But even at the very beginning of the war or even before the war, as you see states claiming to secede, people aren't sure what that means.

[00:44:36.8] Alison LaCroix: I mean, it's funny you have, years and years of threatened secession and Frederick Douglass has this wonderful piece, in his Frederick Douglass monthly as South Carolina and other states have seceded where he is basically kind of, I mean, he's kind of jeering at them, but he's raising a serious question too, which is what does it even mean to secede? You've still got federal post offices, you've got arsenals, you've got forts. Like, what is the secession that you're so proud of? You're having all these balls and celebrations, but what is it really gonna mean? Once Lincoln is elected, Douglass says, I celebrate Disunion because now with an anti-slavery president like Lincoln, unlike say Buchanan, this will unfold in a way that isn't separation, where you just have the slave holding south continuing. Even saying like the Lincoln administration says secession is unlawful, that's, that develops, that takes 'em a while to even figure out what that means.

[00:45:36.4] Jeffrey Rosen: Bill. What do you make of that remarkable debate over secession, which Allison just described. Is there a settlement after the war that establishes the precedent that Ace secession is unconstitutional, as Lincoln said? And what does it mean, and I wanna bring this home? 'cause this discussion is so important to have a political religion of the Declaration and the Constitution. If people do disagree, essentially about what it means in all these issues

we're talking about in every era, is there one fixed meaning that people have to embrace in order to have allegiance to the Constitution and the declaration or not?

[00:46:16.1] William B. Allen: I believe it's fair to say that the question was settled at the end of the Civil War. And I'll explain why I think that, but let me start by saying, I don't think the differences are essential. And that's what it means to have a political religion. The differences are outside the core beliefs that form the politic to begin with, which is why Lincoln and the Gettysburg Address invoked it in the manner that he did. When I referred earlier to political homogeneity, I was describing the same thing that Lincoln meant by political religion in the ICM address, that there is a fundamental commitment to certain foundational political premises, which do not quiet conflict and disagreement, but do provide a basis for resolving disagreements. Everyone has to, as it were, be content to decide the issues in an identifiable forum or on the same ground. Now, as we said before, the point was to create a national institution in which it was the authority of the people of the nation that created the government.

[00:47:28.3] William B. Allen: That's where the argument against secession begins. So that when the secession argument came into its prominence in the 19th century, it was because of people who wanted to make the argument that the states had ratified the Constitution and not the people of the nation. And the war, in effect, reinforced Madison's perspective that it was the people of the nation and not the states who ratified the Constitution. So why do I say there was a settlement? So I, there's a new book just issued in which I have an essay called Counter Reconstruction. And I happen to believe as I presented and worked through the whole process and the reaction to reconstruction, that the whole counter reconstruction was an acceptance of the settlement on the question of secession, I.e., the reintegration of the previously seceding states into the Federal Union ended up taking place on the tacit promise that the people being reintegrated could acquire within the context of the Federal Union, sufficient power to maintain what they regarded as their distinctive way of life, and that they could defend the decisions they wanted to make on their home ground.

[00:48:41.7] William B. Allen: And therefore, they abandoned secession in order to work through the federal structure to accomplish the results that they had hoped to acquire by secession. And I believe that's why secession became settled, in fact. And I explained in the essay that I've just published, that that counter reconstruction view prevails even to this day. It governs the way in which federal power is structured and administered, and the expectations people largely have of the government in relation to the people is not an accident that we still see appeals to state's rights from different perspectives. We have sanctuary cities and sanctuary states, for heaven's sake, which are not very different from what was going on in the 19th century around the question of fugitive slaves and other such questions. Those things will remain every now and again today. Somebody talks about seceding from California, a county here or there, or maybe having Texas secede, but those are all pie in the sky fringe theories. They're not at the heart of any politics at all in the United States today. So, in that sense, if you're asked what its political significance is, you have to conclude that the secession argument was settled at the end of the Civil War.

[00:50:01.3 Jeffrey Rosen: So powerful and such a clear way that you put it, that allegiance to the Declaration and the Constitution are not, embrace of, the same set of principles, but a commitment to resolving a disagreement in an identifiable forum.

[00:50:15.5 William B. Allen: Yes.

[00:50:16.0 Jeffrey Rosen: That is a very helpful way to put it. Well, it's time for closing thoughts in this superb discussion. Alison, and I know our viewers and listeners are eager to hear your thoughts about the implications for, originalist judges today of your rich and important conclusions, in how should judges account for contestation and evolution in constitutional understanding based in history, and what should an originalist make of your arguments?

[00:50:53.7 Alison LaCroix: Well, this is a great, very important question. And I think, I first would say historians doing what historians do is very different from doing what originalists do. So I think, every now and then there's a sort of news article or something, especially at the end of the Supreme Court's terms, especially last term, last spring around this time, history wins again at the Supreme Court. And I have to say I recoiled at that a bit 'cause I thought they're not, they're not doing history, they're doing appeals to history and the history and tradition standard. Now I know why they're doing it. I know there's an authority there that they're trying to seek hold of. But I guess I would say two things. I think the court treats history differently because they have a certain view or they take a certain view that anyone can do it.

[00:51:48.8 Alison LaCroix: And this is where it connects with plain meaning, modes of interpretation. Anyone can pick up a text and read it. The Constitution is written basically in our language. Anyone can do this. It is a transparent act of interpretation. We saw this from the late Justice Scalia, for instance, in District of Columbia versus Heller. He basically abandons the preamble to the Constitution in a sentence or two, and he says, doesn't really add anything, doesn't really mean much, doesn't tell us anything. If you look at the 18th and 19th centuries, the preamble to the Constitution was enormously powerful and held a lot of meaning for people. So I guess first, his history, real history would say there has to be some degree of interpretation. It isn't just obvious on the face of the document what it means. But second, I would say, okay, so now do I want every justice to be a historian?

[00:52:43.2 Alison LaCroix: Do I expect them to do that? No, I would say I, I would like them to have the degree of respect for history as a methodology that they express for other methodologies. So we know the chief justice at one point talked about sociological gobbledygook, but there's a certain sense that sociology, economics, these other fields are fields with methods that are not immediately accessible. Okay. So that would be a sort of appreciation of a methodology. What do I think they should do? I mean, I do think history is highly relevant to constitutional interpretation, but the thing is, when you look at history, you find more possible meanings, not fewer. They look at history, the originalist justices and tend to say, history will tell us the one meaning of the second amendment or the appointments clause, the 14th amendment. That's not what history does. It's gonna show several possible meanings, many of which may be very different from the ones on the table today. And that's what I think a really historically informed justice should be informed by. And then they might decide, my theory of judging says

that I should care about other things, and that's also acceptable. I think it doesn't have to be the only method of doing conscientious adjudication.

[00:53:57.2 Jeffrey Rosen: Such a powerful insight. The fact which you show so indisputably that looking at history reveals more meanings, not fewer, and there's not just one meaning, in historical debates. The long last word in this great conversation is to you, what should judges take in your view from the multiple meanings that history reveals?

[00:54:22.9 William B. Allen: Well, I hate to get my last words to end with something of a slight descent, but I will do so, just because we are academics. And if we don't at some point dissent and people will begin to suspect our credentials, I don't believe history conveys meaning, period. I do think that we who revert to history, discover meaning appropriate to ourselves from what we discover in history, whether that's historical events or biographies or of a number of other things. The history is there and it is unchanging. The text is there and it is unchanging. The only thing that changes in this process is the successive generations being perfectly candid. We change and we are the ones who therefore use history and any other tools we bring to the task, both to access text and also to find authority for what are our most precious wishes of the moment.

[00:55:30.6 William B. Allen: It turns out, they don't stand on their own. No matter what it is we aspire to or wish to see accomplished? What we tend to do is recognize that there's nothing we can say on our own authority to justify it, and therefore we seek authority beyond ourselves. So the question is, where do we find authority beyond ourselves to justify our strongly held preferences? Well, it is in human history, a tradition that is unbroken, that we look back to the past, we look to the authority of the golden age. Now, of course, there was no such thing as a golden age, but there was such a thing as a founding, which even contemporaneously to the founding was recognized as an extraordinary accomplishment. And for a hundred years, at least subsequent to that, recognized as an extraordinary accomplishment. All of which carries the importance of encouraging people to lean on it for authority, because it represents accomplishment beyond the level that we can ordinarily attain to or expect of ourselves.

[00:56:48.9 William B. Allen: So there's not so much that history conveys meaning as that we need meaning, and we revert to history in the hope of eliciting that meaning. And what the courts do, since we were talking primarily about the courts, is of course recognize that they are constrained, they're required by the Constitution to justify their decisions. If they could just decide without explaining, life would be so much easier and say yes or no, whatever your particular question is, and you'd go away and you'd have to accept it. But we don't accept yes or no. We demand reasons. And so the court has to provide reasons for us. Where will they find reasons that are persuasive to us? I know, why not turn to what we respect to what we know to the historical traditions that are important to us. And thus we see structure, the entire process of trying to navigate through what I describe in the book on Allen Montesquieu and the new translation and commentary on the spirit of the laws, the contingencies of life. Because all politics is about navigating the contingencies of life. The contingencies are never fixed. But is there a fixed way to approach contingency? Yes, it's called constitutionalism. That's what it's about. And we probably ought to now graduate and substitute for the word originalism. Constitutionalism.

[00:58:25.8 Jeffrey Rosen: Thank you so much, Alison LaCroix and Bill Allen for an incredibly illuminating, rich, and provocative discussion. Congratulations on your new book, Alison LaCroix, the Interbellum Constitution, Bill Allen on your new translation of Montesquieu. And thank you for shedding so much constitutional light. Thanks to all.

[00:58:46.4 William B. Allen: Thank you.

[00:59:00.5 Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Tanaya Tauber and Bill Pollock. It was engineered by David Stotz and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Sign up for the newsletter at constitutioncenter.org/connect. Always remember the National Constitution Center in your thoughts and your dreams and your prayers and your hopes. And give us some money. That would be great too. Go to the donation button and $5, $10 or more will help support our work, including this podcast, and help us continue to spread constitutional learning and light to people across America. Support the mission by becoming a member at constitutioncenter.org/membership. Or give a donation of any amount at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.