How to Interpret the Constitution: A Citizen's Guide

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the Center in person and online. I'm Tanaya Tauber, the senior director of town hall programs. In this episode, New York Times bestselling author Cass Sunstein explores his new book, How to Interpret the Constitution, which is a citizen's guide to the rival approaches of originalism and living constitutionalism.

[00:00:32] Tanaya Tauber: Sunstein is joined by leading constitutional expert Philip Bobbitt, of Columbia Law School, to discuss the current controversies surrounding constitutional interpretation and provide their takes on the competing methodologies. Jeffrey Rosen, president and CEO of the National Constitution Center, moderates. This program was streamed live on September 28th, 2023. Here's Jeff to get the conversation started.

[00:01:00] Jeffrey Rosen: Hello friends, welcome to the National Constitution Center and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Let us inspire ourselves for the discussion ahead by reciting together the National Constitution Center's mission statement, here we go.

[00:01:18] Jeffrey Rosen: The National Constitution Center is the only institution in America, chartered by Congress, to increase awareness and understanding of the US Constitution among the American people on a non-partisan basis. We have some great town hall programs coming up next month. A program on the civil rights movement with Kate Masur and Dylan Penningroth, and a wonderful discussion of the evolution of the modern presidency later on in the month, as well as a celebration of Native American Heritage Month.

[00:01:49] Jeffrey Rosen: Friends, I'm so excited to convene two of America's greatest constitutional scholars to educate us about the methodologies of constitutional interpretation. The question of how to interpret the Constitution is a central question of debate on the Supreme Court. Today, the debate both between and among originalists is being played out in judicial decisions, and we have to help sort all this out.

[00:02:22] Jeffrey Rosen: Two of the scholars in America who thought most deeply and clearly about constitutional methodologies. Cass Sunstein is the Robert Walmsley University professor

at Harvard University and the founder and director of the program on behavioral economics and public policy. He has written a new book, How to Interpret the Constitution, which lays out the methodologies in their current forms of debate more clearly than anyone else and it's such a privilege to learn from him.

[00:02:53] Jeffrey Rosen: And it's wonderful that he's in conversation with Philip Bobbitt, the Herbert Wechsler professor of federal jurisprudence at Columbia Law School. He is the author of 10 books including the celebrated Constitutional Interpretation, which sets out the methodologies so very clearly as well. So I'm going to welcome Cass Sunstein and congratulate you on this superb new book.

[00:03:25] Jeffrey Rosen: And in the book you have a list of 12 methodologies. I'm actually going to ask our town hall team to put them up on the screen because I'm not able to screen share right now. But Cass Sunstein, your methodologies include... Well, I won't read all 12 of them, but I'll just thank you for laying them out so well. And once you have the screen, maybe ask you to run through each of them and tell our audience what each of them is, beginning with textualism.

[00:03:56] Cass Sunstein: Okay, great. Thank you, and it's an honor to be here and an honor to get to talk to so many people. Thank you all for being here. Well, there are some people who are textualists. There we go. And textualists believe that we should follow, prepare to be shocked, the text of the Constitution. Textualism isn't very controversial.

[00:04:19] Cass Sunstein: The question is whether it gives us clear answers. The First Amendment protects the freedom of speech. What does that tell us about, let's say, dangerous speech or sexually explicit speech or blasphemy or commercial advertising? So textualism. Many people are. I confess, I am one. And if you are a textualist, you might have a lot of questions that you don't know how to answer.

[00:04:46] Cass Sunstein: Semantic originalists believe that we should follow the original semantic meaning of the word. So, if the word “executive” comes to mean in the fullness of time some source of energy that's completely clean and fantastic and cheap. It's called executive. It's a great energy source. We wouldn't understand the word “executive” in the Constitution to mean that energy source because it's not the semantic meaning of the term at the founding period.

[00:05:14] Cass Sunstein: Most people are semantic originalists. That if some word like executive or like speech, turns out to mean something very different. Now we look on the original semantic meaning. Now let's get a little more controversial. Some people believe that the original intention is binding. So, if the founders or the ratifiers intended, let's say, that the freedom of speech didn't include blasphemy, then the freedom of speech doesn't include blasphemy. And then you can try to get in the heads of people and figure out what their intention is.

[00:05:48] Cass Sunstein: Some people believe that we don't follow the intention, we follow the original public meaning. And if some of you are getting a little bored by this difference, I can assure you that many people are very agitatedly describing their form of originalism as better than the other form because it's about meaning not intention or because it's about intention not meaning. Original public meaning is ascendant on the Supreme Court now, so let's put the fourth item here in a very large font and put maybe superheroes all around it to give it more noteworthiness. Supervillains, if you don't like it, but something to make it stand out.

[00:06:27] Cass Sunstein: And [laughs] the original public meaning is, what was the public meaning of the term at the time of ratification? So it might be that equal protection had a public meaning that didn't include, let's say, discrimination on the basis of sex. That wasn't part of the public meaning. And that might be decisive if you follow the original public meaning. Original methods means "what did the founders think the method of interpretation was." Of the first four on the list, did they choose one? Maybe we should follow the one they chose. And if you're an original methods person, you might end up thinking, "Well, on original methods grounds, I'm an original intentions person." So that's what they wanted.

[00:07:08] Cass Sunstein: Original expectations means "what did they expect the reach of their provisions to be?" Do they expect in cruel and unusual punishment that that would forbid capital punishment or not? Maybe that's binding. There's a seventh idea - and the list is going to be described in full very quickly, I promise – is that we should interpret the Constitution to protect democracy. We understand the Constitution on this view to protect the franchise, to protect self-government, to protect the integrity of political processes. And that isn't part of the founding original meaning, maybe, but we still should do it. Some people believe that.

[00:07:50] Cass Sunstein: Some people are traditionalists. They think that over the arc of American history, some things, maybe gun rights for example, have been sanctified, even if they're not part of the original understanding. Even if they don't have a whole lot to do with democracy. Question is what have our longstanding traditions celebrated? And then maybe something was celebrated from 1850 to 1990, and then it has a constitutional status for that reason. Some people think we should read the Constitution to protect morality, best understood. So if there's something that interferes with privacy in a way that's really objectionable because it's just an assault on individual dignity, then we should protect that thing, even if the original understanding wouldn't have done that.

[00:08:42] Cass Sunstein: And if you're getting nervous about moral readings, good. I think we all should. But if you're kind of drawn to them also, good, too. We all should have some part of our mind that at least has sympathy with moral readers, and they are not originalists. They believe that the Constitution protects rights that outrun the original understanding.

[00:09:02] Cass Sunstein: Thayerism is the least lovely term on this list. There was a person once upon a time, a real person named James Bradley Thayer, who said, "Let the political process do what it wants, unless the constitutional violation is very, very clear." On that view, abortion is not constitutionally protected. Maybe the right to be free from discrimination on the basis of race in schools is not protected. Maybe freedom of speech is much littler than we think

it, because the political process gets to make the choice. And Thayer vigorously argued for the Supreme Court to defer to Congress in the interest of allowing We the People to have their say. That would make the space for constitutional law a lot littler than the first nine on the list.

[00:09:54] Cass Sunstein: Some people are common law constitutionalists. They say "down with theory, that we don't want to have big abstractions grounding our approach. We want to go case by case by case." So if the Supreme Court rules, for example, that people have a right to use contraceptives within marriage, then the next case maybe involves the right to use contraceptives outside of marriage. Is that kind of the same? We go case by case. We might end up having a big privacy right in the fullness of time, but we're not thinking abstractly. We're not going in a time machine back to the founding. We're not just thinking about democracy. We're going like ordinary people often go with respect to moral issues by analogy, case by case.

[00:10:40] Cass Sunstein: There's a newer idea, at least newer in constitutional law circles, old in human history, which is there are ideas about common good that maybe have theological foundations, maybe don't. And the common good includes, let's say, ideas that America shares with Rome about flourishing. And on that view, the original understanding of the Constitution doesn't capture everything that even the founders valued.

[00:11:08] Cass Sunstein: And if we want to do things, maybe some common good constitutionalists say to protect the unborn or maybe to sanctify heterosexual marriage, that's very much on the table insofar as those things are connected with the common good. I say those 3 approaches... those 12 approaches are exhaustive and if you want to add a 13th or 14th – any of you on this call – I welcome that, but it makes me a little sad.

[00:11:38] Jeffrey Rosen: [laughs] Well, we won't presume to do that because you have indeed so helpfully brought together the methodologies. And what's so invaluable about your typology is that you break down different aspects of originalism in ways that reflect the current debate. So, just to recap, and I know that viewers will want a copy of the chart as well as the book. Textualism, semantic originalism, original intention, original public meaning, original methods, and original expectation are all versions of textual and originalist approaches that point in very different directions.

[00:12:14] Jeffrey Rosen: And then you have what you call the non-originalist approaches, including traditionalism, which is sometimes put within the originalist framework of text, history, and tradition. But you break it out in ways that we'll explore in a moment. So thank you so much, Cass Sunstein, for this superb introduction to the methodologies of constitutional interpretation. And now it's a privilege to hear from Philip Bobbitt, whose own typologies of interpretation, which I'll ask our great team to put on the screen now, really defined the debate for many generations of constitutional lawyers, including me.

[00:12:50] Jeffrey Rosen: In fact, Philip Bobbitt's modalities of constitutional arguments was so influential that we've used it as the basis at the National Constitution Center for the methodologies of interpretation that we're teaching in our Constitution 101 class to middle and

high school kids. So thank you, Philip Bobbitt, for your six categories. Please help our audience explain each of them.

[00:13:14] Philip Bobbitt: Thank you for having me. Nice to be with you and with Cass. This is a very important and a very timely book. The attacks on judicial review, the calls for stripping the court of its jurisdiction, some highly contested questions during the Trump presidency, I think all make this a really timely and helpful essay.

[00:13:39] Philip Bobbitt: I want to take the various categories that Cass laid out for it and slightly recategorize it, and I'll explain in a moment why I do that. I used the term historical argument to rely on the meaning of the text as it was understood by its ratifiers. And that encompasses the various forms of originalism. But I use the term instead of originalism because, for me, originalism is only a couple of decades old. That tries to claim it is the only legitimate form of argument, tries to de-legitimate the other forms of argument. Textual argument simply says we interpret the plain text as it would have a meaning for the ordinary person today, contemporary American life.

[00:14:22] Philip Bobbitt: Structural argument infers meaning from the relationships between the branches of government, federal and state governments, and the democratic relationship between a government under laws and our people. Doctrinal argument is case law. It's a reliance on precedent, not limited to judicial case law, I might add. Ethical argument is sometimes called the argument from tradition. It draws on the distinct character and values of the American national identity or ethos. And prudential argument weighs the probable practical consequences of one application of the Constitution versus another.

[00:15:02] Philip Bobbitt: Now, I think that all of Cass' various 12 categories can be neatly fit into these. Democracy reinforcing a structural argument, case law is doctrinal argument, arguments from tradition are ethical, and I said that I thought the originalist arguments were all historical. But the salient point I draw from this list is that it is not a matter of choosing a theory. But these forms of argument are implicit in the very idea of putting the state under law and they are not chosen by judges. They were the methods that judges and lawyers and briefs use even now.

[00:15:44] Philip Bobbitt: Now I guess my sermon today can be summed up in one sentence. And that is that these are all legitimate forms of argument. There are forms of argument in other cultures. For example, arguments from religious texts or arguments from kinship, that are not legitimate in our system, but that all of these are. And if I have a criticism of Cass' book, it's that he doesn't mention the sixth form of argument, prudential argument, because he embodies it.

[00:16:17] Jeffrey Rosen: Cass, your thoughts about Philip's broad appreciation for your book, his claim that your central thesis, which is that we need to engage in reflective equilibrium and choosing among the methodologies, is itself a prudential argument. And your thoughts on…and tell our friends what you mean by reflective equilibrium and whether or not you agree with Philip that these are all legitimate forms of argument and we have to choose among them based on our conclusions about correct outcomes.

[00:16:51] Cass Sunstein: Okay, so goal number one, and thank you, Jeff, for highlighting this, is to just get clear on what people who disagree about constitutional interpretation, what their different views are. And that's, I think, not unhelpful, even if you agree with one team and don't like another team. So, the originalists, of whom Justice Thomas is one, don't agree with the traditionalists. Chief Justice Roberts is often a traditionalist, because they want to recover the original public meaning. They don't care about long-standing traditions, and that's a disagreement.

[00:17:30] Cass Sunstein: Justice Ginsburg was, and Justice Sotomayor often is, a kind of democratic reader of the Constitution and emphatically not an originalist. They disagree with one another, and it's important to see what exactly they're disagreeing about. Justice O'Connor was a common law constitutionalist, I think, going case-by-case. She wasn't originalist, certainly not. So they have different views. And to understand the difference maybe makes us have sympathetic appreciation of people who are doing their best with very disparate starting points.

[00:18:10] Cass Sunstein: Okay, there's that. The idea that they're all legitimate – Philip's idea – we need to understand what's meant by legitimate and we need to have criteria for figuring out whether that's true. Justice Thomas emphatically does not agree that they're all legitimate. He thinks originalism is the one that's legitimate. My former colleague at the University of Chicago, Justice Scalia, thought the same way. He thought originalism was legitimate. He even used that word, and the other approaches are not.

[00:18:41] Cass Sunstein: There are people like, let's say, Justice Ginsburg at some moments. She's not with us, so I want to be careful speaking for her on this, who think that originalism is not legitimate, that it runs roughshod over too much of what is laudable in the American constitutional tradition. It undoes… it's a train wreck with respect to so much that we care about. Whether or not she's right or wrong, she's making a claim about the bounds of legitimacy.

[00:19:11] Cass Sunstein: I think to say they're all legitimate is, along one axis, true. None of them is saying that Nazi interpretation is what America needs now, and none of them is saying that anti-constitutionalism is what America needs now. But, they have to... we do have to choose either among them or what mixture, and to say we want 12 or we want 6 that's... then we have to think in what proportion. Suppose that the original meaning runs roughshod over democracy, rightly understood, or that a moral reading of the Constitution makes hash of the original meaning, then what do we do? Justice Thomas has an answer to that. It's not the same as some others.

[00:19:58] Cass Sunstein: Okay, now we'll talk about my view, and I'm not going to say my view about constitutional interpretation, but I'm going to describe my view about how one chooses among them. It's very simple. What makes our constitutional order better rather than worse? That there's no way of choosing a theory of interpretation or choosing a mixture of theories of interpretation that doesn't at least implicitly take a stand on that question. So if we choose a theory of interpretation that makes America terrible, we ought to rethink. And how do we know whether it makes America terrible? Well, the only way to think about that is to ask what we – and by we, I mean you – what each of us most cares about.

[00:20:41]Cass Sunstein: And it might be things about self-government, or it might be things about freedom of speech, or it might be things about equality. And we go back and forth between our general commitments, the rule of law, let's say, and our specific commitment. No segregation on the basis of race, let's say. And then we have to line up our theory of interpretation against what it does with the things that we hold most dear. It's tempting to think, "Isn't that too results-oriented? It's kind of putting the cart before the horse. You're kind of reverse engineering your theory of interpretation." That's a fair question to ask. I say that there's no alternative.

[00:21:23] Cass Sunstein: The Constitution doesn't contain the instructions for its own interpretation. It doesn't say this document shall be interpreted to promote self-government. That's not a pro clause. It doesn't say this Constitution shall be interpreted to fit with the original public meaning. It doesn't specify the theory of interpretation. So it's up to us, each of us, to figure out what theory we embrace. And the only way to do that is to think, do you turn our constitutional order into something that you celebrate, or do you turn our constitutional order into something that you feel ashamed of? And that's the only game in town.

[00:22:03] Philip Bobbitt: I guess I take some exception to this on three grounds. First of all, I think it takes the style of a judge, the judge's preference for one form of argument over another, and magnifies that into a theory of interpretation. You mentioned Justice Scalia as an originalist, but Justice Scalia very famously said, "I would not countenance flogging, even though I think flogging was prevalent in the colonies in the early States." I don't think any sane judge [laughs] really takes anything off the table. And by focusing on the Supreme Court, we get a very skewed idea of this. Most judges are not on the Supreme Court. Most briefs are not filed before the Supreme Court.

[00:22:50] Philip Bobbitt: And if you look at the work of state judges, look at the work of people before the circuit bar, you don't find this kind of de-legitimation of the other forms of argument. Second thing that I would disagree with is that the Constitution doesn't have any method of instructions to how it's to be interpreted. If I leave a note on the refrigerator door saying to the children, "Shut the door," I don't have to leave another note saying, "The reason I left this note was so you shut the door." The reason we have a written constitution, I think, implies that the text has some importance.

[00:23:31] Philip Bobbitt: The reason that we convened in what may be the most important event in American history, certainly a very important event in the civilization of man, the reason we convened these ratifying conventions with franchise much larger, Although it seems small to us today, much larger than anything before it, was we wanted the people to buy into this. We wanted their consent. We wanted their authority and not, as had previously been the case, legitimation to come from the state itself. We wanted the state under law. And that, I think, is a very strong argument for trying to give effect to their intentions.

[00:24:10] Philip Bobbitt: The reason why we have structural arguments, because we set up these structures. And we can assume, I think without reaching, that if you set up the structures, you're implying that you want them interpreted and applied so they can carry out the responsibilities you've given, and so on through all six. The last point I'll make is that if you say

you need a theory, that's what you really believe, and not a practice, which is what I'm saying. You've got to say what warrant, what legal warrant, is there for that? You say we have no choice, but when I run through the examples you give of reflective equilibrium, it makes me seem as though the only people who would agree with that are people who agree with your choices.

[00:24:56] Philip Bobbitt: If that's not the case, and we know that many of your choices are controversial. then I think you're sacrificing the common denominator, the common ground on which we can find consent with people who disagree with us. If the basis for interpreting the Constitution is deciding on the theory that produces results you like, then really you've abandoned the legal reasons for choosing any theory. And those reasons I think have to do with getting consent. So those are my objections.

[00:25:29] Jeffrey Rosen: Thank you for those Philip. Cass, your response.

[00:25:32] Cass Sunstein: Well, it's a free country, [laughs] so we can agree with that. Let's see, where to start? I'm thinking that to get very exotic is not a good idea. So let's start with common ground that there are diverse approaches to interpretation, let's say. I'd say theories. Some people in the audience think textualism is obviously right. I'm very confident of that. I think textualism is right. I don't think it's obviously right. Or if it is obviously right, at least one needs a sentence or two to explain why it's obvious. If we didn't follow the text of the Constitution, we'd be in a land of chaos and that wouldn't be a very good land to live in. Some people live in a land of chaos let's not go there. So textualism, I say, hurray for that.

[00:26:32] Cass Sunstein: The fact that people a long, long time ago, all of whom are long dead, were textualists, let's say, or wanted to follow the original intention. I don't believe the latter is true, but let's just suppose it's true. That would get us, along with 50 cents, no newspaper in America. That justifies nothing. The fact that they thought that. Those are the ancestors of some of us, maybe not all of us and they are not kings or queens. They are admirable people, in many cases, who were completely amazing, and bequeathed us something that we are blessed to be able to live under. And all those things are about a good social order if we're textualists.

[00:27:21] Cass Sunstein: If you have a practice of a certain kind. Let's say I have a practice of being very nice to my dogs who are in the next room, that's not just a thing. That's based on an account of how one should interact with one's dogs. The word theory [laughs] is a little highfalutin for that, but there is one. It has to do with considerateness and reciprocity and gratitude and those things. If judges on the lowest state court in the land say, "I'm going to try to understand the state constitution so as to make our state as democratic as I can," or they don't even say that, but they do that, they're in the grip of a theory.

[00:28:11] Cass Sunstein: If a judge says, "I hate theory," or if anyone who's listening to this says, "I hate theory," then thinking about how you're going to interpret the First Amendment of the Constitution in your home, in your head, right now, does it protect blasphemy? Does it protect obscenity? Does it protect dangerous speech, calling for something terrible to happen? How can you answer that? The words, the freedom of speech, won't tell you. You'll need at least

an implicit account. And that's kind of abstract terms, but it's life. If you deal with a friend in a certain way, or a student, or a teacher, or a parent, there's an account that you have.

[00:28:56] Cass Sunstein: And if you elaborate it, you'll know it, but you probably don't need to know it. The idea that I'm actually not that interested in my own views about how to interpret the Constitution. I tend to think pretty strongly that a robust free speech principle is a really good idea and that that doesn't fall out of originalism, but that's not what the book is about. If you choose a theory of interpretation, and you're going to, even if you say you're not, because you're going to have to decide cases and there's an implicit theory there, you need an account of why.

[00:29:36] Cass Sunstein: And there's no other thing to do than to think it's going to make our system good. The example you gave of shut the door, that doesn't justify your account. There's pragmatics of communication by which if someone gives an instruction to someone else, a principal to an agent, typically the agent is interested in knowing the intention of the principal. If my boss tells me, "Work late tonight." I'm not going to think, does the word late mean something having to do with coffee in his private language, because that would be too unexpected an understanding of how he's thinking. I would think, what is his actual intention?

[00:30:19] Cass Sunstein: And... But that's not necessarily the case with constitutional law. To think what was Madison and Hamilton's intention with respect to, let's say, freedom of religion is a contentious approach to interpretation. It might be the right approach. Why would it be the right approach? And I say it because it would make our system better.

[00:30:40] Jeffrey Rosen: Philip, as you respond, I wonder if you could also address Cass' argument that not only should judges, but judges do, consult questions about what they think the right answer is. In choosing among these theories of interpretation, Justice Breyer, during a recent Constitution Center program, made the powerful point, in response to those who say that interpretation is all politics, he said, "It's not politics. Judges don't reach outcomes based on their partisan outcomes, but based on their political philosophy, their view of what the right outcome is as a philosophical matter, libertarian or progressive or whatnot," which supports Cass' argument that judges do in fact make their decisions based on their view of correct philosophical outcomes. As a descriptive matter, are Cass and Justice Breyer right?

[00:31:37] Philip Bobbitt: No, I don't think so. I think they give partial answers. They announce it. They say, "It has to be this way. You have to have a theory." But I just don't think that's an accurate description. Let's take a couple of examples. Take the portion of the Senate. Now we have a system where Wyoming has the same number of senators as California. Many people feel this is undemocratic. Many people feel the constitutional order would be better served by some sort of proportion representation in the second chamber.

[00:32:11] Philip Bobbitt: If you're a judge and you've had this conviction, judges I'm sure do, you are not going to stop enforcing statutes passed by the Senate. You're not going to enjoin the Senate because it's not in sync with your theory. My objection... It's Cass' book, he can call them theories if he likes. But my objection is that when you de-legitimate other forms of argument, you are doing something for which there is no warrant. And in Cass' case, and maybe in Steve

Breyer's case announcing [laughs] that one particular form, in this case, prudentialism, practically – the political consequences of something – has a precedent, has a hierarchy, has a dominant or in some cases, maybe Justice Thomas believes this, a sole role, de-legitimates the entire system.

[00:33:07] Philip Bobbitt: It not only destroys the common ground, which we have to discuss these things. There is simply no legal warrant for doing so. And Cass can say that his relationship with his dogs is governed by theories. My dogs will never stand for that. They expect responses from me that they've been accustomed to over the lifetime of their dogginess.

[00:33:31] Cass Sunstein: The book is actually a very genial book.

[00:33:35] Philip Bobbitt: It is indeed.

[00:33:35] Cass Sunstein: So [laughs] It might be contentious in its selection of the ground. I don't want to be esoteric here. This is very commonsensical stuff. Should we be an originalist? That's a question. And it's very much on the table. Maybe. And how do we turn maybe into yes or no? And then there's a question I want to ask, which is whether it makes our constitutional order good rather than terrible. Now if there's a text that clearly says Wyoming gets two senators, and so does Massachusetts and New York, and there is, then there's no theory of interpretation that says that Wyoming gets fewer than New York because its population is smaller.

[00:34:22] Cass Sunstein: So ignoring the text or overriding the text, that's not interpretation. That's why I say with a few qualifications, we're all textualists. But if the Constitution protects the freedom of speech or prevents states from denying people equal protection of the laws, what is the account you bring to bear on interpretation of those words? And this may sound a little academic, but it really isn't. It's true for your representatives in the state government, as well as for the lowest of the federal courts. They're thinking, can Congress grant broad discretion, let's say, to administrative agency? That's a disputed constitutional question.

[00:35:04] Cass Sunstein: Well, the Constitution puts legislative power in Congress. Does that forbid Congress from giving broad discretion? Textually, maybe. Textually, maybe not. And now we're off to the races. And to say... Let me state two views that seem to be very difficult to defend. To say that my approach is just the right approach, period, that would be very hard to defend because there are other approaches that people in good faith hold, and we have to figure out why your approach is preferable to theirs. Or to say there are 12 approaches and they're all around, that's accurate. Maybe there are 6, maybe there are 18, but some people are applying one and abhorring others and some people have the exact opposite valence.

[00:35:58] Cass Sunstein: And should we be with, let's say, Chief Justice Warren, or should we be with Justice Scalia? Should we be with Justice Alito, who often is a traditionalist? Or should we be with Justice Gorsuch, who's an originalist? Or should we be with Justice Sotomayor, who's neither? These aren't questions that we can respect them all, and I think we better but-

[00:36:25] Philip Bobbitt: Mm. Yeah.

[00:36:25] Cass Sunstein: ... we have to decide with whom we agree.

[00:36:28] Philip Bobbitt: Let me make one suggestion to the audience.

[00:36:29] Jeffrey Rosen: Philip, if I could put on the table this question because I want in our remaining time to have each of you apply the methodologies. Cass has a powerful chapter on Dobbs and explaining to what degree it applies traditionalism rather than originalism. And in particular, the court asked not only what did the framers think that the due process clause meant in 1789 and 1868, but what were the traditions regarding the regulation of abortion over the course of American history?

[00:37:08] Jeffrey Rosen: Philip, there's a big debate on the court now about when you should look at tradition. Is it before the founding, after reconstruction, up to today? Is tradition a living thing, as Justice Harlan said in the Poe v. Ullman case, or is it fixed and backward-looking, and when should we look at tradition? When should we look at original understanding? How would you describe what the court did in Dobbs? Was it a traditionalist, originalist, or some other version of those methodologies, and did you find it convincing?

[00:37:41] Philip Bobbitt: I'd call it an ethical argument. I think that Cass' analysis is exactly right. If you read a lot of the journalism right after Dobbs came down, people treated it as though it were relying on historical argument and they combine these two. But really that was a mistake. I don't think it's a successful riposte to say to Alito that the history he's using isn't the history around the ratification of the 14th Amendment or around ratification of the 5th Amendment. I don't think that's right. The history he's using is to establish a tradition.

[00:38:19] Philip Bobbitt: I think that Harlan's account in Poe v. Ullman is an elegant and beautiful expression of ethical argument. And some people call it arguments from tradition. But there's one exercise I wanted to suggest to the audience. I teach McCulloch v. Maryland in con law one. My guess is Cass does and you have, Jeff. If you take a box of colored pencils, assign six different colors, and go through the opinion in McCulloch, you'll find that those six colors occupy every single part of the opinion except for the facts. There are no other colors, nothing is left out, but nothing is subordinated either. Yes, I think we have to choose sometimes in hard cases when these different forms of argument conflict.

[00:39:10] Philip Bobbitt: I think that's absolutely right. And one of the things I love about this book is it repeatedly says there are no algorithms. There is no substitute for human choice, human decision in the hard cases where they conflict. Anyway, try this exercise sometime with an opinion. You may find a dissent that relies just on one form of argument. You may find an after-dinner speech after a couple of martinis that a justice may have made, but if you actually look at the foundation cases in our law, you'll find they take nothing, none of these, off the table. And I think it is a mistake to try to subordinate the others to one or two or something.

[00:39:50] Jeffrey Rosen: Thank you for that. Cass, you have a powerful chapter, chapter five – traditions, a fourth history – yelling stop where you argue that Dobbs is an example not of originalism but of traditionalism. And the traditionalism, the court understands it, is limited to rights deeply rooted in the scheme of ordered liberty, and so understood the list does not expand or evolve. Unlike Justice Harlan's suggestions, it is backward-looking rather than a living thing. Tell us about that argument and what you think of the methodologies as they're used in Dobbs.

[00:40:22] Cass Sunstein: Okay, so I'd love the audience to have a sympathetic appreciation of why people on the Supreme Court disagree with one another with maybe a provisional view of the side to which you're inclined. Okay, so Justice Alito's opinion in overruling Roe against Wade has a couple of themes and I use the word couple to mean two. One is the original understanding of the 14th Amendment did not include protection of the right to choose abortion. That's there. And if you are an originalist and/or inclined to it, you will recognize and appreciate that. But it doesn't stop there. It asks what have our traditions been over an extensive period of time on abortion.

[00:41:17] Cass Sunstein: So is the right to choose sanctified by American traditions? And the court says no, it really isn't. It's a new thing, and kind of 1970s, maybe 1960. And there is a view that says traditions have a kind of wisdom and a democratic legitimacy in them that complements maybe the original understanding of the people who ratified the Constitution. And you can imagine a traditionalist who says a robust right of possession of guns is something that our tradition recognizes, whether or not the original understanding did. And then you could be pro-gun under the Second Amendment, even if you weren't an originalist.

[00:42:05] Cass Sunstein: Now, there's another view of the abortion question, which says either... I have to divide into two parts, unfortunately…either the traditions evolve and grow and become better, let's say the arc of history bends toward justice. And that's not what Alito likes. That makes him very nervous on the ground that then judges are kind of picking history's winners. But on that view, same-sex marriage would be recognized. That that's part of evolving tradition in favor of respect for, let's say, freedom of choice with respect to whom you love, something like that.

[00:41:21] Cass Sunstein: The same-sex marriage right is in big trouble under originalism and also under traditionalism. Then you should ask yourself, is that a point against traditionalism and originalism? I tend to think so, but reasonable people can disagree. The other face of this anti-traditionalist approach, let's say, first face is traditions live, they're not frozen. The other face is about moral argument, period, where the idea is that just human beings, because of their dignity, have a right to, let's say, marry the person they love. And even if our traditions don't sanctify that, that is what human dignity is about. Justice Kennedy thought that. Justice Kennedy said that.

[00:43:26] Cass Sunstein: Now, Justice Kennedy, in vindicating a right to same-sex marriage, was rejecting originalism. In fact, he explicitly rejected originalism, and he was rejecting a form of traditionalism that says we take long-standing practices and entrench them. He thought that was inconsistent with learning about what justice requires. This is why I say the stakes are high

and that it's not right to say that we do them all. Because if we did them all, we'd be swimming in a sea and stuck.

[00:44:06] Philip Bobbitt: Well, if I may respond to that.

[00:44:08] Jeffrey Rosen: Please do. And in the course of responding, Cass just said the stakes are high. Often the outcome will turn on what vision of traditionalism you embrace. And as he just said, there's the forward-looking vision of Justice Kennedy, which sees tradition evolving to include autonomy rights like gay marriage, and the backward-looking one of Justice Alito, which doesn't see that. Just to put the question starkly, in the Bruen case, the court said that you have to find an example of a tradition of gun regulation in order to justify it.

[00:44:43] Jeffrey Rosen: And yet, I had thought from your originalist methodologies that if there's a text, you just ask what the ratifiers thought when it was adopted and not look to tradition to identify the source of rights. So help me understand, according to your methodologies, how tradition works. Is it backward or forward-looking and when can it trump the original understanding?

[00:45:06] Philip Bobbitt: Well, I'd say two things about that. First of all, I think you have to distinguish between historical argument and ethical argument. Ethical argument, it seems to me, is sometimes called argument from tradition and it depends on the level of generality. I like the construction that Cass gave to gay marriage, that we have a very long tradition in this country, but not in all countries, of recognizing the autonomy of people to fall in love, people who want to live together, of making their own choices rather than having arranged marriages or marriages that are arranged by the state, or the state determining how many children you can have, where you have to live, what profession you choose.

[00:45:46] Philip Bobbitt: Now, all of those are examples of tradition. Now, it may manifest itself in different ways for different generations, but that is a tradition and that's an argument that I think counts against Justice Alito. I don't doubt that in very difficult cases that these six forms of argument may not cohere. In hard cases, you have to make a choice. That's right. And you may fall back on your spiritual and your religious and your political views in making that choice. But there's a reason why you have to go through all of these first. You don't begin with a result and then pick the theory that fits your political or personal or religious or cultural preferences.

[00:46:31] Philip Bobbitt: And that reason is that a decision is not simply who wins and who loses. A decision is a rationale. The most important thing about a decision is not the past, it's not the present, it's what it does for the future. The rationale it provides for dozens, hundreds, thousands of decisions that are made on the basis of that rationale going forward, both in litigation and in life that isn't litigated. And if it is a truly hard case, and if one of the modalities conflicts with another, it's a tough, tough choice, then you know you have a legitimate rationale. That's where you end up, not where you begin, in my view.

[00:47:13] Jeffrey Rosen: Cass, could you address, because you do it so well in your book, the major debates among originalists and textualists as they're playing out on the court? In Bruen, Justice Barrett said that the court hasn't decided about the appropriate role of liquidation or practice in vindicating non-originalist understandings after they occur, and the justices aren't sure about when to consult tradition, and when to ask to look at the meaning of the text when it was ratified, and there's also a vigorous debate among the more textualist justices like Justices Gorsuch and Thomas and the more originalist ones who were more attentive to context. No one can sum it up better, but how would you sum up the major valences of the debate on the court today, and how will and should the justices resolve those debates?

[00:48:06] Cass Sunstein: Okay, this is fantastic, and I'll give it a shot. So some justices believe the original understanding is binding and that's it. And that would be the tool by which we figure out whether a case is easy or hard. So, some cases would turn out to be super easy under that. Chief Justice Roberts, who typically votes with the originalists, isn't on board the originalist train. He is more respectful of traditions. He's nervous about kind of newfangled moral theories being introduced by members of the court. He thinks that's for the democratic process. And a traditionalist will often be more conservative in the literal sense than an originalist, if that makes any sense? Because originalists will often want to change things. And so that's one disagreement.

[00:48:59] Cass Sunstein: As you say, the court hasn't resolved the question, "What do we do with a constitutional term that maybe has an original meaning or maybe not, that in the decades after got specified by practice?" So, suppose there's a term that says the executive power is vested in a president of the United States. Does that mean the president gets to fire everyone who works for him? That's actually a real issue before the court these days. Let's suppose that the original understanding is yes, that was what Madison and Hamilton and they all thought. Secretary of State, Secretary of Treasury, they all can be fired by the president if the president wants them gone. This is something that many presidents would be interested in.

[00:49:43] Cass Sunstein: Is that done or do we ask, "How did that provision get liquidated over the following decades? What did Congress and the president actually do about cabinet heads in the next decades?" Justice Barrett is interested in the question. Well, maybe the practice over the following what, 20, 30 years gives a specification to that provision, it's different from the original understanding and maybe that's what prevails. That's a big difference in at least one case that didn't involve the Constitution, Justice Gorsuch said, "You know, we interpret the words in accordance with their public meaning, even if that results in an outcome that in context would have been believed to be extremely surprising."

[00:50:30] Cass Sunstein: So the law forbids discrimination on the basis of sex. This is a civil rights law, and discrimination on the basis of sexual orientation, according to Justice Gorsuch, that just is discrimination on the basis of sex. Because if you treat a man who's involved with a man differently than you would have treated him were he a woman, that's sex discrimination. That's what Justice Gorsuch said, a very important opinion.

[00:50:54] Cass Sunstein: Justice Alito you can almost see his hands in his [laughs]... his face in his hands on the page. He's saying, "Come on, well, the people who wrote those words,

discrimination on the basis of sex back in the 1960s, they were not thinking about discrimination on the basis of sexual orientation. The contextual meaning was really different from what you're saying is the literal meaning." That was a very sharp disagreement and it could carry over to the constitutional side.

[00:51:23] Jeffrey Rosen: Superb. Thank you. That was just a beautiful job in summing up the various positions. Philip, the last word, because we always end on time at the NCC, in this excellent debate is to you. How would you sum up the interpretive debates among the conservative justices and how do you think that they should resolve them?

[00:51:46] Philip Bobbitt: I think that the battle over different forms of historical argument is partly driven by the fact that historical argument is insufficient by itself. For me, the reasons Cass has given in his book, and so you get slight modifications to original public meaning. But I think the real difficulty isn't in reconciling historical argument with new challenges and unforeseen developments in our polity. The real problem, I believe, is distinguishing between originalism as a movement, as a movement only it's a few decades old, that tries to delegitimize the other forms of argument.

[00:52:35] Philip Bobbitt: I think this is not true to historical argument. I think the framers and ratifiers intended all of these forms of argument to be used and we know that from the early decisions of the court and the public reactions to them. And I think this is a very dangerous method to cut the ground up from the other customary forms of argument. And it comes at a time when the court itself is under great attack, and this can only, I believe, further polarize our public.

[00:53:05] Jeffrey Rosen: Thank you so much, Cass Sunstein and Philip Bobbitt for a great discussion and for educating Americans so thoughtfully about the methodologies of constitutional interpretation. Thank you, dear NCC friends, for taking an hour out in the middle of your day to educate yourselves. And the best way you can continue your learning is to read Cass Sunstein and Philip Bobbitt's books and read the methodologies and study them, and as always, make up your own minds. Cass Sunstein and Philip Bobbitt, thank you so much for joining us.

[00:53:35] Philip Bobbitt: Thank you, Jeff. Thank you, Cass.

[00:53:36] Cass Sunstein: Thanks, Phil.

[00:53:42] Tanaya Tauber: This episode was produced by Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by Greg Sheckler and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, Derek Shavell, and Yara Daraiseh. Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well, or watch the videos. They're available in our media library at constitutioncenter.org/medialibrary. Please rate, review, and

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