NATIONAL CONSTITUTION CENTER

The Modern History of Originalism
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[00:00:00] 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 the only institution in America whose mission is to increase awareness and understanding of the US Constitution among the American people on a non-partisan basis. This week, we're sharing an episode from our companion podcast Live at the National Constitution Center. In this episode, we explore the modern history of originalism and textualism. I'm joined by three leading originalist scholars, J. Joel Alicea, Anastasia Boden, and Sherif Girgis for a conversation about the different strands of originalism as a constitutional methodology. The program was streamed live on June 28th, 2023. Enjoy the show.

[00:00:52] 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 the NCC. Let's inspire ourselves as always for the learning ahead by reciting together the National Constitution Center's mission statement. Here we go. 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. And now it is an honor to introduce our dream team panel to learn about the various strands of originalism. J. Joel Alicea is assistant professor of law and co-director of the project on constitutional originalism and the Catholic intellectual tradition at the Catholic University of America's Columbus School of Law. He's a fellow at the Columbus School of Law Center for Religious Liberty, a non-resident fellow at the American Enterprise Institute, and the Director of the Hispanic Student Mentoring and Leadership Program. He's a previously practiced law at Cooper Kirk and served as a law clerk for Justice Samuel Alito.

[00:02:00] Jeffrey Rosen: Anastasia Boden is director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute. Before joining Cato, she was a civil rights attorney at the Pacific Legal Foundation, where she co-created the superb podcast Dissed, which I hope you all check out. And her writings have been featured in the Washington Post, the Wall Street Journal, and many other outlets. Sherif Girgis is Associate Professor of Law at Notre Dame Law School. He's co-author of What is Marriage?: Man and Woman: A Defense, and Debating Religious Liberty and Discrimination. Before joining Notre Dame, he practiced law at Jones Day and also served as a law clerk to Justice Alito.

[00:02:39] Jeffrey Rosen: Thank you so much for joining us, Joel Alicea, Anastasia Boden, and Sherif Girgis. I'd love to begin by helping our audience understand the various strands of originalism and textualism and then explore their intellectual evolution. Joel, why don't we begin with you? Just yesterday, in the Moore v. Harper case, we saw very different approaches to originalism from Chief Justice John Roberts in the majority, and Justice Thomas leading the dissenters. How would you distinguish between the originalism of Chief Justice Roberts and the textualism of Justice Thomas, and and how does that fit into the various strands of originalism and textualism today?

[00:03:24] J. Joel Alicea: Well, thanks Jeff, and thanks for inviting me to be part of this. I would just begin by saying that I wouldn't classify the Chief as an originalist, and he wouldn't, I think, classify himself as an originalist. But I do think it's fair to classify both Justices Kavanaugh and Barrett as originalists, and they joined the Chief's opinion in Moore. And then you had a dissent by Justice Thomas, joined by Justice Gorsuch in full and Justice Alito joining only on the jurisdictional question. And so there is real disagreement between those two sets of originalists in, in Moore. I should very quickly note that my firm litigated Moore so just for full disclosure on that.

[00:04:03] J. Joel Alicea: I think that what the disagreement in that case shows is one way in which originalists can be classified, which is how they approach stare decisis, how they approach precedent. That's a major division within originalism, the extent to which you take on board prior precedent. Now, Justice Thomas's dissent thought that prior precedent could be reconciled with the position that he was adopting, which he also thought was a better reflection of the original meaning. But I think you saw a broader conception of precedent and the force of precedent in the Chief Justice's opinion.

[00:04:40] J. Joel Alicea: And based on what we've seen so far, that seems to be broadly reflective of how Justices Kavanaugh and Barrett approach stare decisis, they seem to have a broader and perhaps stronger understanding of stare decisis than say Justice Thomas or Justice Gorsuch.

[00:04:59] Jeffrey Rosen: Anastasia, how would you characterize the various strands of originalism? There was certainly more of a textualist focus to Justice Thomas, Justice Gorsuch and Justice Alito, in Moore where they were asking what the word legislature meant—whereas the majority was asking what the word legislature meant at the time of the founding, and how it had been interpreted by state courts, constitutions, and precedents. And Justice Gorsuch is often called a textualist, whereas Justice Barrett perhaps calls herself an originalist. So, so how would you unpack the various strands of originalism and textualism?

[00:05:35] Anastasia Boden: Sure, and thanks for having me, Jeff. I'll start by saying that when originalism really arose to prominence most recently, it was original intent originalism, and that was trying to determine the intent of the framers. And given various difficulties with that theory—that is, first of all, there's many framers. How do we distinguish whose intent or what the majority intent was? So there's, that's a difficulty analytically. But another difficulty would be that it's not really fair to hold people to the unwritten intent of the framers because they

weren't expressed. And so really, we should only be held, as with all laws to the text that we can be aware of, of what the governing rules are.

[00:06:21] Anastasia Boden: Because those difficulties, there was a change from original intent originalism to original public meaning originalism, which tries to ascertain the meaning of the words and the constitution when those words were ratified. And I would say that that's the dominant strain of originalism right now. It's a form of textualism, of course. And I think that's the one that you see most prominently in academia and at the Supreme Court. But something that I'm particularly interested in is I've seen a little bit of a shift in originalism since the Supreme Court's decision last term in Bruen where there is a focus on history and tradition in a way that I don't think conforms to its traditional use within original public meaning originalism.

[00:07:05] Anastasia Boden: That is usually the justices will look at historical practice, sure. But that's only to determine the original public meaning of the words. In Bruen, we saw the court say that a law will only be upheld if there's a historical analog. And I think that's something new and different, and it's showing up in various cases this term, and it's something I'd be happy to explore more later in this discussion.

[00:07:31] Jeffrey Rosen: So, Sherif, we've put on the table already several differences among originalists. First, Joel said there's a difference in their various approaches to precedent. And then Anastasia flagged this question of the role of history and tradition as opposed to the original public meaning at the time of ratification. How would you identify the various strands of originalism, and is there a division among them in their approach to reading the text at the time of ratification as interpreted historically over time, or simply its ordinary meaning to the dictionary what it would mean to an ordinary reader today?

[00:08:12] Sherif Girgis: Sure. Thanks for included me in this. I think the National Constitution Center is doing amazing work, happy to be affiliated. I think what's been identified so far are definitely dimensions along which originalists disagree, how much weight to give to precedent, what the object of the inquiry is. Are you looking for the original intent of the framers, their goal in adopting a particular text, or are you looking to the meaning to members of the public at the time of the text that they adopted? And I agree with Anastasia that the emphasis certainly is on the latter. I would say that within academia in particular—but I think it's gonna have, it's to some extent reflected in court's practice—there's a question about non-textual factors and what role they have.

[00:08:55] Sherif Girgis: So everybody tends to agree—everybody who's an originalist—seems to agree that there's some very special authority to the founding era, to the era in which the text was ratified and that that kind of authority, what it meant at the time, in some sense trumps other factors. But within academia, there are questions, for example, about whether you can consider not only the original meaning of the text, but the original methods or tools of interpretation that prevailed when the text was adopted. So, for example, do you look to background principles of the common law? Do you assume that a criminal statute only governs—well, this is in the case of statutory law, but there are analogs and constitutional law—will only govern, you know, conduct within the jurisdiction, things like that.

[00:09:36] Sherif Girgis: And this starts to connect to what Anastasia was saying about the role of history. Obviously, all originalists will agree that early history can be evidence of original meaning. If the first Congress voted up the First Amendment, the Establishment Clause, and also began its legislative sessions with prayer, then most originalists will think that's evidence that the establishment clause doesn't rule out legislative prayer. But what about the role of later history? Is it one of the other factors that the founders or the other ratifiers of other texts would've thought was fair game for courts that are trying to maybe fill gaps in the text? Those histories have some other role to play when the text and its original meaning, and maybe even the original criteria for interpretation, run out and so on.

[00:10:21] Jeffrey Rosen: Very interesting. Thank you so much. Well, let's put a concrete case on the table and discuss it as a window into various approaches of originalism. And that's Bruen, the Second Amendment case that the court recently decided involving New York's concealed carry law. And there was a vigorous debate between Justice Thomas and the majority who argued that both the original public meaning of the Second Amendment, and its historical gloss over time, required judges to look to historical analogs for restrictions on the right to bear arms throughout the range not only of American history, but also dating back to the statute of Northumberland.

[00:11:01] Jeffrey Rosen: And the dissenters saying that the majority was just playing fast and loose with originalism and changing the baseline about what period of time mattered in order to reach their preferred result. So Joel, how would you describe the debate between the majority and the dissenters in Bruen, and who do you think had the better argument?

[00:11:21] J. Joel Alicea: Well, I think part of the debate between the majority and the dissent in Bruen is just a methodological debate about originalism itself. Justice Breyer's dissent takes issue with what he views as over-reliance on history and historical meaning in interpreting the Second Amendment. And that is no surprise because Justice Breyer has always been a critic of originalism and has always viewed the Second Amendment more through an interest balancing approach weighing various risks of harm and benefits to come up with what at least he would view as the best, most reasonable policy. I don't think that's mischaracterizing him. I think that that's how he would generally view constitutional adjudication more broadly.

[00:12:04] J. Joel Alicea: But I do think that there are a lot of methodological questions that are left unresolved in Bruen that we'll have to look to subsequent cases to see how they're cashed out. So one that Justice Barrett flags in her concurrence in Bruen is—and this goes to something that Sherif was just talking about, and that he's written about in his scholarship—what role does historical practice have after 1791 when the Second Amendment is ratified, or 1868 when the 14th Amendment is ratified? And the reason why those are the kind of two major time periods is because when the the Second Amendment was initially ratified, it only applied against the federal government. The reason it applies against the states, the Supreme Court has said, is because the 14th Amendment incorporates the Second Amendment against the states.

[00:12:54] J. Joel Alicea: And there's an interesting originalist methodological question about, well, when we're trying to figure out how the Second Amendment applies against the states, as

was the case in Bruen, are we focused on the meaning of the Second Amendment in 1868 or in 1791? And that also then helps you figure out what kind of historical practices are relevant? The ones closer in time to 1791, closer in time to 1868, what about the time period between that? How relevant is that? And Justice Barrett was just pointing out that Bruen doesn't really resolve those questions. And those are major methodological questions going forward.

[00:13:33] Jeffrey Rosen: Of that question, I guess Justice Barrett called it historical liquidation. The question of what history matters after those ratification benchmarks of 1791 and 1868. What do you think of the way Justice Thomas treated history iin his majority opinion in Bruen? And and what do you think the right answer is for the uses of history and originalist of liquidation?

[00:13:56] Anastasia Boden: Yeah, I think it's, it's right that Justice Barrett wrote separately to state that concern, and it's something she's actually written separately this term many times to emphasize as we need to get the timing right, we need to get the methodology right to make sure that we have a coherent theory and that it's consistent and respected. But something I'm more interested in is that Justice Thomas also did something different entirely with originalism, in my opinion, which is this over-reliance on historical practice. So not just looking at historical practice at any given time period to determine what the words mean, but instead to say that laws will only be upheld if there is a historical analog. And I think the problem with that is that historical practice can't be determinative because sometimes the government gets it wrong or the courts get it wrong.

[00:14:43] Anastasia Boden: So if you consider something like the Slaughterhouse Cases, where the Supreme Court gutted the Privileges or Immunities clause in a way that almost everyone acknowledges to be wrong, you know, we can't now rely on historical practice to say that that informs the original public meaning, because it's contrary to the original public meaning. Or if you consider racial discrimination up until Brown v. Board or Loving. The fact that the government may have been flouting the Equal Protection Clause’s mandates is not probative of what the Equal Protection Clause requires. And I think even some of the practices cited by Justice Thomas himself in Bruen. I mean, he cites historical practices of denying gun rights to various minorities, whether religious or political or racial. And so those practices are undoubtedly unconstitutional, and why should we look at those to inform the meaning of the closet issue?

[00:15:34] Anastasia Boden: And then of course, one, one other thing I'll add is that when there's new technology, there simply won't be a history to rely on because it won't have been previously regulated. So I think this is something new and different and incorrect, and it's also just analytically wrong. Our Constitution doesn't codify practices. It doesn't say that the government may only do the things that it was doing or may not do, only those things that it could not do at the time that the Constitution was ratified. The Constitution codifies principles, and those principles can yield different results in different times. We take the meaning of the words to be fixed, but the application may change. And so I think this overemphasis on historical practice is wrongheaded.

[00:16:16] Jeffrey Rosen: Sherif, help us understand Justice Thomas's approach to historical practice in Bruen, where he looked to historical practice starting in the Progressive Era around 1900 about gun regulation, and said the New York law was not consistent with that practice. And a case like Moore where he didn't look to practice at all, including the practice of judicial review of state court decisions and simply looked at the word legislature and what it would mean to an ordinary observer. How in particular does Justice Thomas decide the question of when it's relevant to look to history and what periods of history we should look to?

[00:16:58] Sherif Girgis: Sure. So on Moore in particular, I think what he would say is that when the original meaning of the text is clear, then historical practice, whether at the time or much later, can't override that meaning. And I suspect that in Moore, he thinks the word legislature is clear enough that later or even contemporary practice can't override it. In Bruen, history seems to be playing a couple different roles. So at some points it sounds like it's doing the thing that Anastasia and I and others have said is totally benign according to originalist lights, which is looking to practice, especially practice at the time of ratification, to figure out what people thought the text that was ratified meant. At other times, it looks like it's doing something a little bit different, which Heller, the first big Supreme Court case of the modern era on the Second Amendment did, which is to say, look, the Second Amendment codified a preexisting right, it referred to the freedom of the people to keep and bear arms.

[00:17:56] Sherif Girgis: And so that phrase is a shorthand for a right that's constituted by practices leading up to ratification. And that's one other role that practices might play. Another, you mentioned liquidation, is the idea, which that if the text is unclear, then the practices, maybe even of later generations, can be regarded as filling in gaps in the meaning. And we stick by those practices unless we have a strong reason to override them the same way we do with judicial precedents. But I think I agree with Anastasia that in some points in the Bruen ma- majority opinion history is playing a different role, that it's much harder to justify by originalist lights. And the premise seems to be if we have a longstanding history of regulating guns a certain way, even if it's a history that arose very late after ratification, as you point out, then that could justify a regulation that's similar to that today. But if we don't have a long history of regulation of the kind that's under review, then the one that's under review is unconstitutional.

[00:19:06] Sherif Girgis: And I think the reason that doesn't make sense is there, we're not using practice as evidence of original meaning or as a way of filling in gaps in meaning. We're using practice as a kind of straitjacket. We're saying if they haven't done it before, then they can't do it. But there are all kinds of reasons that previous generations might not have passed a regulation beyond the idea that they thought that it was unconstitutional. They may have had no need to, the technology might not have arisen that created the need. They may have had political or other reasons for going in a different direction.

[00:19:35] Sherif Girgis: Now, Justice Thomas in his defense, he anticipates some of these points in the, in the majority opinion, he says, you know, the analysis for what's analogous and so on might look a little different if we're dealing with a regulation that addresses brand new technologies and so on or social problems that weren't apparent in the past. But I still think the

idea of requiring a regulation to be analogous to one that has a longstanding history where the history doesn't focus on the era of ratification it's hard to explain in originalist terms.

[00:20:05] Jeffrey Rosen: So just to sum up some of the different uses of history all of you have identified. Sherif, you just said sometimes the justices look to history to codify original public meaning, and other times they're codifying the practices leading up to ratification. And other times you're looking to history when the text is unclear. But you've expressed questions about using it as a straitjacket and saying, if a regulation hasn't been done before, it can't be done again. Joel, let's focus on something that several of you have identified. Justice Thomas' claim that when the text is clear, you don't have to look to history.

[00:20:40] Jeffrey Rosen: And as I understand it in Moore, he's saying the word legislature is clear. It can only mean legislature, it can't mean legislature as constrained by a state constitution, and therefore you don't have to look to the history, which suggests that the framers thought the legislatures were constrained by state constitutions. And then a case like the affirmative action cases, where in the Grutter case, he said, "The text is clear, it, it clearly means colorblindness, therefore practice suggesting that the framers might not have thought colorblindness isn't relevant." Do I have that right? And, and that, that raises the obvious question, how can he be so confident the text is clear when, you know, people fought civil wars about this meeting and they didn't think it was clear at all?

[00:21:21] J. Joel Alicea: So you're asking specifically about in the affirmative action context?

[00:21:24] Jeffrey Rosen: Both in affirmative action and Moore. Those are two cases where Justice Thomas says that the text is clear, and his colleagues who include Chief Justice Roberts, Justice Kavanaugh and Justice Barrett, don't find the text clear at all. So when does he decide when the text is so clear that he doesn't have to look to history?

[00:21:43] J. Joel Alicea: So I, I think that the fact that originalists or textualists disagree on whether a text is clear isn't really that probative about whether the text is in fact clear. It could be clear and that one side of that debate is just wrong in its analysis. And originalists bring to bear, textualists bring to bear all sorts of traditional tools of interpretation to try to clarify the meaning of text. Canons of interpretation about how words used in one part of the document are also used in other parts of the document.

[00:22:16] J. Joel Alicea: So for example, in Heller, one of the ways in which the court gets to the conclusion that the Second Amendment protects an individual right to keep and bear arms is to say that the Second Amendment refers to the right of the people, and the majority opinion by Justice Scalia looks at how has the phrase the people been used throughout the rest of the Constitution. And it always is used to denote some sort of individual right. So therefore that suggests that in Second Amendment, it's also an individual right, as opposed to some sort of collective right.

[00:22:46] J. Joel Alicea: So that's just one example of the kind of textual tools that can be used to clarify the meaning of the text quite apart from historical practices. I will just quickly say, Jeff, if I may, in response to something that Anastasia said earlier, I probably do disagree with her on

the role of practices to this extent. It seems to me that the relevant question—I don't disagree with her when she says that originalism insofar as you have a constitutional provision that is codifying a principle rather than some very specific rule (Like, you know, president has to be 35 years old. That's a very specific rule. That's not some general principle) But sometimes the text codifies more of a principle, as she said.

[00:23:29] J. Joel Alicea: And it seems to me that the relevant question in that case is what was the understanding of that principle at the time that the text was ratified? Because there are many different versions of a principle that could be with more or less plausibility reconciled with the text of a provision. So the freedom of speech could be understood in many different ways, and you could still try to conform it to the words, the freedom of speech. So it seems to me what matters is how did the people in 1791 understand the phrase the freedom of speech? What was the principle they thought they were putting into the text? And the best way to get at that is to figure out, well, what did they do in terms of their practices relating to speech? That gives you a very strong indication of what is the principle they had in mind when they put in place the freedom of speech?

[00:24:21] J. Joel Alicea: So practices at the time of ratification of any constitutional provision, strike me as essential to understanding what that language meant, what the principle was. And to the extent that Anastasia disagrees with that, then I think we do have a disagreement. But if she's just criticizing the kind of later subsequent practices that could be sometimes decades removed from the ratification, as were some of the practices relied upon in Bruen, that strikes me as a very fair criticism of the use of practices along the line Sherif also mentioned.

[00:24:54] Jeffrey Rosen: Thanks so much for that. Anastasia, your response?

[00:24:59] Anastasia Boden: My response is that I don't think we disagree at all. I do think, of course, historical practice is relevant to figuring out what the principle is. What I was bringing out from Justice Thomas's opinion in Bruen is a test wherein he says the existence of a historical practice alone is determinative of whether current practices are constitutional. It can't just be that the existence of a historical analog or absence of a historical analog is the constitutional test. I agree with you that the practice is solely relevant to the meaning of the term. So I don't think there's as big, if I'm understanding you correctly, that there's big of a disagreement as you may think.

[00:25:37] Anastasia Boden: But turning back to the question of—actually, Joel just said something that he took the words right out of my mouth in response to your previous question, Jeff, which had to do with how Justice Thomas determines whether a word is clear at the outset, and whether that is different from how other justices determine that words are clear and require more inquiry. I think my comment on that would be that the fact that originalists disagree doesn't discredit the endeavor. Because the endeavor is aimed at seeking out public meaning. And that's difficult, and people may disagree.

[00:26:09] Anastasia Boden: We saw that this term in the Indian Child Welfare Act case, where there was an extended debate between Justices Gorsuch and Thomas, who are the two leading originalists, and they came out on other sides of the inquiry. But the fact that they disagree

doesn't mean that originalism itself is wrong. It just means that one or the other is correct about the original public meaning of the Constitution. And what's nice about originalism is it gives us a sort of neutral baseline to judge each opinion and to determine who's doing it correctly or who may be biased in some way or sort of picking and choosing different histories.

[00:26:46] Anastasia Boden: And so while originalism cannot eliminate bias, but it seeks to minimize bias, and it gives us a neutral baseline to determine who's doing originalism correctly or who's who's letting their biases show through. And so I think that's something that I wanna point out, because people always point to these disagreements. There were disagreements between Scalia and Thomas too, right? But that doesn't mean that originalism is meaningless or valueless. It just means that that we can still use it as a tool to check the justices in a valuable way.

[00:27:15] Jeffrey Rosen: Sherif, what's your thought about this important discussion about when originalists disagree, about whether the text is clear? So in a case like Moore, is Justice Thomas saying the word legislature so obviously means legislature and not legislature as constrained by a state constitution, that it doesn't matter the fact that the original public meaning of legislature was something different, and that those who ratified it assume that it would include legislatures? Or is he saying that the original public meaning as the text would've been understood, was that state courts couldn't have constrained the legislature even if the practice was to the contrary?

[00:27:58] Jeffrey Rosen: I'm just trying to understand methodologically when it is that Justice Thomas thinks that if the meaning is clear, we just don't have to look to history at all because the meaning should be obvious.

[00:28:10] Sherif Girgis: Yeah, I do think original meaning, not just the the way the text strikes us in isolation, or the meaning we would assign to the text today, should be controlling. And, you know, it's always gonna be a difficult question. I agree with Joel that even though there's something paradoxical about saying that the meaning is clear, if there's another justice who's disagreeing with you, it's it's not a contradiction. It is possible that things could end up that way. On Moore in particular, my sense is that his view is something like if we think that legislature means not just the assembly that passes laws, but also the entire apparatus of the legal system that provides checks on those laws, including state courts and so on, then there was no reason for the Framers to use the word legislature rather than state.

[00:28:57] Sherif Girgis: And this is a move that you see in textualist and originalist arguments of various kinds in constitutional law and statutory law, even in contract interpretation. You know, you want to give every word a role to play if you can. And so if they said state legislature rather than state, they must have meant something more specific than the entire lawmaking apparatus of the state. I think more broadly, just picking up on something on Anastasia said, the presence of these disagreements can count as a point against one of the arguments for originalism, which is that it provides a more predictable, objective, and determinate criterion for deciding these cases.

[00:29:35] Sherif Girgis: But whether it does, or how much of a point against originalism it provides is always a comparative question, you have to ask compared to what? And if it's compared to a position that gives freer play to a lot more factors, any one of which might be or might not be decisive or get different weights in different cases, then that's that might not be a reason to think that originalism is devoid of the kinds of arguments that are usually given for it.

[00:29:59] Jeffrey Rosen: One more question about this, because I wanna make sure I understand it. And Joel, Justice Thomas, is he saying that the word legislature must have only meant legislature and not more, or they would've used a different word? And is that the case despite the fact that all the practice when the constitution was ratified, as the majority points out, was to the contrary, and the assumption in fact seems to have been that legislatures were constrained by state courts, and other cannons of interpretation that would lead Justice Thomas in some cases to say that the word must have meant something, even if the practice was to the contrary?

[00:30:39] Jeffrey Rosen: Let me just ask you that question and just help me understand how the justices—and again, Justices Thomas, Gorsuch and Alito tend to be more textualist and tend more often to say, "The meaning's clear, we don't have to look to history." What theories or approaches are they relying on?

[00:30:56] J. Joel Alicea: So to take your specific question about Moore and then your more general question. So first on the specific question about Moore, I actually think that the argument embraced by the dissent, by Justice Thomas's dissent on the merits in Moore, is a little more complicated than just a question of is the term legislature unambiguous? Because the argument for the theory that Justice Thomas embraced in his dissent includes for example, the idea that, well, where does the state legislature get the authority to draw congressional districts, for example? Not from their state constitutions, but from the federal constitution.

[00:31:38] J. Joel Alicea: It's the federal constitution that gives it that authority, and therefore, it would seem to follow, it is the federal constitution that restricts and governs the substantive decisions that the state legislature makes in determining congressional districts, not the state constitution's substance, because the legislature is not deriving its authority to draw congressional districts from its state constitution. And so that's a major part of the theory as well as to why this assignment of power to the state legislatures to draw congressional districts and to make other rules relating to federal elections cannot be constrained by substantive provisions in state constitutions.

[00:32:19] J. Joel Alicea: And I think that there would also be disagreement by those who embrace Justice Thomas's view in Moore with your characterization of the practices as being contrary to that view. And the petitioners in this case in Moore—and again, my firm was the one litigating the case. So again, disclosing that—the petitioners in Moore argued that all these practices that were put forward by the other side, and embraced by Chief Justice Roberts in his majority opinion, could actually be understood as consistent with the independent state legislature theory.

[00:32:53] J. Joel Alicea: So I think it's a more complicated argument than just the term legislature clear and then nothing else kind of matters. But I think that your broader question about, well, how do you know whether something is clear? And then how does that prevent you from having to go to historical evidence? I mean, it's a very good methodological question. It's one that actually Justice Kavanaugh, before he got onto the court, he gave a lecture, and I think he published a piece in Harvard Law Review on this too, if I recall correctly, arguing against methodologies that rely on how clear or how ambiguous is a text before resorting to something else—deference or whatever.

[00:33:35] J. Joel Alicea: Because he just says it's really difficult to figure out whether something is sufficiently clear that can lead to all sorts of line drawing problems. And I suspect that Justice Kavanaugh, if he were to ask him the kind of question you just asked me, would resist the idea that originalism should come down to some inquiry into whether something is sufficiently clear before you resort to other forms of evidence.

[00:34:01] Jeffrey Rosen: Thank you very much and very helpful to flag that piece by Justice Kavanaugh. Anastasia, can you say more about the differences and approach among the justices? Justice Gorsuch is famously a proud textualist and in cases involving statutory interpretation, like Bostock, he joined the liberals in saying that the text of Title VII was clear and included sexual orientation discrimination, even if the framers of Title VII didn't intend that result. So in what ways does Justice Gorsuch's statutory and constitutional textualism differ from the originalism of Justice Kavanaugh and others?

[00:34:39] Anastasia Boden: Yeah, I think most would say that he has a greater focus on the text and the literal text than other justices who take history more into account, right? And of course, we see that Justice Thomas generally caress a good deal about history. Justice Barrett has written extensively this term to say that she thinks that history is extremely important, but that there are unanswered questions about what periods of history matter. And so in general everyone's on the same general page. It's just the extent to which they take these different pieces of history into account. And then, as was mentioned earlier, how much they care about precedent.

[00:35:16] Anastasia Boden: You know, Scalia for instance was called a faint-hearted originalist because he himself recognized that he would sometimes rely on earlier cases that were contrary to the original public meaning because of stare decisis. You know, I think there is a great debate within originalists about the role of precedent in stare decisis and whether we should adhere to decisions that are acknowledgedly contrary to the original public meaning for good reason. I mean, the interesting thing about stare decisis is it only comes up when everyone acknowledges that the previous opinion is wrong, right? But we're determining whether to keep the decision or not.

[00:35:50] Anastasia Boden: So I think, you know, this conversation has highlighted all these debates within originalism. But in general, I think the primary mode of originalism is textualist. It's just determining how to elucidate the meaning of the terms.

[00:36:06] Jeffrey Rosen: Sharif, your thoughts about that question of when the textualist justices decide that the text is clear or not do they rely on cannons of interpretation? And how do you see the differences in approach between the more textualist justices like Justice Gorsuch and the more historically oriented justices, like Justice Kavanaugh?

[00:36:25] Sherif Girgis: The question is to think about the role of consequences. Now critics of originalists, including critics who think that the justices are acting in bad faith, will say, "Well, the originalists go by original meaning, except when they don't like the policy valence of the outcome. And in those cases, they conveniently fall back on some other factor." I don't think that's generally the case, but I do think there is a more subtle role for consequences. So Justice Alito, for example, has described himself as a practical originalist, and one possible way of understanding that, though he hasn't spelled it out in detail as far as I can tell, is that he will require a higher bar for the historical arguments about original meaning before he will adopt a ruling that would, for example, have very disruptive impact or disrupt expectations.

[00:37:16] Sherif Girgis: So in the Bostock case that you mentioned, that's a statutory case that's instructive in this context. The question was whether Title VII of the Civil Rights Act when it says you can't discriminate based on sex in employment, also extends to discrimination based on sexual orientation or gender identity. Justice Gorsuch said if you look at the terms in isolation and then you put them together, the answer you get is yes. And it doesn't matter that nobody at the time or for decades afterward foresaw that. And Justice Alito contests his claim on the sort of public meaning of the text. But also clear throughout his dissent in that case, is the sense that if the outcome in this case is contrary to the expectations of everybody who voted for the law, every American who voted for those lawmakers, and everyone's expectations for decades afterward, then perhaps our application of originalism has—and in that case, textualism—has come apart from the arguments for these methods in the first place, arguments about fair notice to people who are governed by the law about expectations, predictability, stability coordination, and so on.

[00:38:23] Sherif Girgis: So there's a way in which consequences might figure in when justices will regard an answer as clear, or when they will adopt the apparent answer to the interpretive question and when they will rely on precedents and sort of practices as a fallback.

[00:38:41] Jeffrey Rosen: Thank you very much and very helpful to learn that Justice Alito describes himself as a practical originalist. Joel, more to say about the differences among the originalism of the various justices. We have several comments. Mark Cohn says, from this conversation, there appears to be no coherent definition of originalism. Can you please provide a definition of originalism that all three panelists agree on? That it's helpful to see the different approaches of the justices. Is there a single difference everyone agrees on? Or can you provide further nuances that distinguish between Justices, Alito, Gorsuch, Thomas, Kavanaugh, and Barrett?

[00:39:24] J. Joel Alicea: Sure. I think that's a completely fair concern that that was raised about is there any coherence to originalism, given all the varieties that we've been exploring here? I think that at a very high level of generality you could come up with a definition that the vast

majority of originalists would agree to. So it would probably be something to the effect of federal judges should interpret the Constitution in accordance with the meaning that the Constitution had at the time it was ratified. And that any other methods of constitutional adjudication are subordinate to that ultimate endeavor of figuring out what did the constitution mean when it was originally ratified. So that general definition then allows you to dive into some of these disagreements.

[00:40:12] J. Joel Alicea: So some of those disagreements are about, as Sherif said, the object of the interpretive enterprise. Are we looking to original intent, original public, meaning some other form of objective that we're trying to get to? Another would be, well, how do we treat some of these subordinate methodologies below the original public meaning like stare decisis? What role does stare decisis play in adjudicating cases? And then yet another set of disagreements could be about justifications for originalism. Why should you be an originalist? There are a lot of different theories as to why you should be an originalist. I've put forward a natural law justification for originalism. Scholars named John McGinnis and Michael Rappaport have put forward a consequentialist justification for originalism. You have Randy Barnett who's given kind of libertarian natural rights justification for originalism.

[00:41:02] J. Joel Alicea: So there are all sorts of different justifications for originalism. That's another dimension on which originalists disagree. So the, the point that I'm trying to underscore is you have different ways of categorizing originalists—according to their justifications, according to the object of interpretation, according to how they regard various methodologies that are part of the adjudicatory process, but are subordinate to original meaning—but I think they all broadly agree on the definition that in adjudicating constitutional cases federal judges should apply the meaning of the Constitution as it was understood at the time of ratification.

[00:41:36] Anastasia Boden: Jeff, can I add something there?

[00:41:38] Jeffrey Rosen: Please do. Of course.

[00:41:39] Anastasia Boden: I think one thing that's important to clear up is regardless of some of these minor differences, we have most justices trying to engage in some form of originalism or textualism. Justice Kagan famously said, "We're all textualists now," or "we're all originalists now" at different times. And so you get these really interesting decisions like this term Counterman v Colorado, where the court is trying to determine the proper mens rea or mental state requirement when it comes to true threats. The government can ban true threats, but what mental requirement is required for the speaker so as to not violate his first Amendment rights.

[00:42:18] Anastasia Boden: And you get Justice Kagan writing an opinion 7-2, saying, "Well, looking at history to fill out the meaning of the First Amendment. Historically true threats were banned." So we're gonna say that the government can ban true threats. And then she ends up saying that recklessness is the appropriate standard. And what's really interesting is then you get a concurrence by Justice Sotomayor joined by Gorsuch, the ultimate originalist. And Sotomayor is saying, "Hey, you're doing it wrong. You're doing this originalism wrong. You know, it's true that true threats have been unprotected, but you have to look at what mens rea was required throughout history and you didn't do that."

[00:42:56] Anastasia Boden: And so I just want to point out that all of the justices find textualism and originalism at the very least, to some extent persuasive, and are engaging in it more and more. It's not just a so-called conservative interpretive tool anymore.

[00:43:13] Jeffrey Rosen: Absolutely important to note Justice Kagan's important remark. "We're all originalists now." She said that at a tribute to Justice Scalia, meaning that text and history is relevant, but also flagging, as this discussion does, the vigorous disagreement among the justices, both liberal and conservative, and within the conservative justices, about how to look to text and history.

[00:43:35] Jeffrey Rosen: Sherif, to sum up the disagreements that Joel and Anastasia flagged, original intent or original public meaning, what role does stare decisis play? What's the role of history and liquidation? Why be an originalist for natural law reasons, for consequentialist reasons, or for natural rights reasons? And what are the consequences of originalism? Do they lead to judicial deference to democratic outcomes? Do they constrain judges from applying their own policy preferences, or do they simply tether justices to the constitutional text? Given that range of disagreements, I have to ask the the obvious question. In what sense could we really say that originalism constraints at all?

[00:44:20] Sherif Girgis: Yeah. It's a serious question, and I think we might shed some light on it by going back to what I think of as the most primordial motivation for originalism as a modern movement that began with people like the former Attorney General Robert Bork—the professor and then federal judge, and then failed Supreme Court nominee—and that runs right through Scalia, and then right through the ever-more elaborate and detailed and fine-grained distinctions that are being drawn by academic and even some judicial originalists today. Which I would sum up with a kind of jargony word of "formalism," but which I think of as a view about the judicial role, at least the role of federal judges in our system applying written laws.

[00:45:09] Sherif Girgis: And the basic impulse behind it is the sense that to the extent possible—and it isn't always possible because sometimes the sources run out—but to the extent possible, the judge's job is to follow the say so of somebody else. The Congress that adopted a statute—the Congress, and then ratifying conventions of the states that together adopted a constitutional provision—If that provision, if that other legal source delivers an answer for how to resolve this case, it's not the judge's role to second guess the judgment of those other actors based on a moral or policy disagreement with their judgment.

[00:45:56] Sherif Girgis: In other words, that's to coordinate across a huge nation to make sure that there is enough stability and predictability that people can order their affairs, we need it to be the case that some people decide what the right policy is and others defer to their decision and just apply it in more or less predictable ways. So it's this idea, sometimes it's described as faithful agency, that judges are the faithful agents of Congress or of the ratifiers of the Constitution. Sometimes it's defined in terms of judicial deference or non activism or something like that. But there are fine grain differences. But I think all of those are getting at this idea that to the extent possible, and again, it's not always possible, the judge's role is to defer to the policy and value judgments of other actors.

[00:46:42] Sherif Girgis: And number one, I think the original motivation for this as a movement, as I said. Number two, I still think it's doing a lot of work in motivating people who are originalists today, even across all the differences that you identify. And number three, I think it's also the element of originalism that is most widely shared, and that most justifies and warrants Justice Kagan's comment that we're all originalists now. You will not find a judicial nominee for any level of the federal judiciary saying at a Senate confirmation hearing, "Yeah, there are cases where I can judge that the statute, the constitutional provision requires X, Y, Z if you just grant it all its value and policy judgment. But I'm gonna rule the opposite because I have a substantive disagreement with those values."

[00:47:29] Jeffrey Rosen: That is such a helpful account of the justification for originalism, despite the many disagreements we've identified. You, you say that a basic commitment to judicial formalism and an aversion to having judges second guess the policy choices of other actors is one plausible uniting force. This discussion has been so illuminating in revealing the evolution among different justices and scholars of the original purpose and theoretical and constitutional justification for originalism.

[00:48:05] Jeffrey Rosen: I have to say that when I studied originalism from the great liberal originalist Akhil Amar in law school, I had thought that the purpose of the project was to constrain judges and have them defer to democratic decisions. And in a recent discussion with Akhil, where I noted that lots of folks think that originalist judges are not doing that now, they're not deferring and they're not constrained, Akhil said that, no, that was never the purpose. It was really just to tether judges to the constitutional text. And I guess that's a version of your response, Sherif, that a formalistic commitment to the text is what justifies originalism, even if it doesn't constrain, and even if it doesn't lead to deference.

[00:48:48] Jeffrey Rosen: But a discussion like this is very illuminating in showing these disagreements. I would love just brief concluding thoughts from each of you on this central question. Given the illuminating disagreements and agreements that we've identified, what's your view about the best justification for originalism today? And Joel, why don't we start with you?

[00:49:13] J. Joel Alicea: My view is gonna be very similar to what Sherif just said, that the best justification for originalism is that if judges do not adhere to the meaning of the constitutional provision as it was understood at the time that it was ratified, they undermine the authority of the people to govern themselves. And in doing so, they do great harm to the common good, because the common good requires that somebody be the authoritative lawmaker within a society. And for us, it is we the people in setting the higher law of the Constitution to govern our our government. And to the extent that you undermine the people's ability to enact constitutional provisions that have real force moving forward, you do great harm to that society. So ultimately, it is justification that is rooted in an an understanding of popular sovereignty.

[00:50:06] Jeffrey Rosen: Thank you very much for that. And for all your great contributions. Anastasia, what do you think is the best justification for originalism?

[00:50:13] Anastasia Boden: Yeah, I have a quite different view of the best justification, which I think points to the fact that there are many justifications, and you can read several of them from

many different scholars about why to support originalism. But for me, I would have to disagree that those are the two most persuasive reasons, because I don't think democracy is the guiding principle of our constitution—individual liberty is. And having been a civil rights attorney, I don't look favorably upon deference because I want judges to engage with the Constitution and to strike down laws. The whole point of the judiciary is to be counter-majoritarian.

[00:50:47] Anastasia Boden: But anyway, I'll give two very quick reasons why you should be an originalist. One is that in order for the constitution to be a document that establishes rule of law, that actually limits government actors, it can't mean whatever we want it to mean at any given moment, it has to have a fixed meaning that constraints' government action. And in that way it bolsters rule of law, it bolsters limited government, and it bolsters separation of powers. But that's probably the one that would appeal to most people.

[00:51:14] Anastasia Boden: For me personally, what I find most persuasive is that originalism locks in an initially legitimate lawmaking scheme, a system of government that is inherently legitimate because it limits government power, it contains strong protections for individual liberty including procedural protections like due process and separation of powers. And because it's locking in something that is initially legitimate and that secures all of our rights I think it's a legitimate form of interpretation.

[00:51:44] Jeffrey Rosen: Thank you very much for that. And Sherif, last word to you.

[00:51:47] Sherif Girgis: Yeah, I guess I would draw in some of the threads from both Joel and Anastasia's answers. For me, there are lots of different ways you could set up a system. You don't have to set up a system to follow in which judges, the people who apply a law, follow the original public meaning or anything very specific like that. I think we in fact, have set up that kind of system and the kind of choices that a community makes, and as a matter of law, whether at the very broad level of creating its structure of government or at the more retail level of regulating particular conduct with particular laws should be followed unless it's grossly unjust or has proven unworkable and needs to be abandoned, that the common good of the community is best served by that.

[00:52:28] Sherif Girgis: And that in, in our system, maybe more specifically to our system, I think our reasons for adopting a written constitution are also reasons for applying the original understanding of it. I would include not just the original meaning, but the original criteria for interpretation, to the extent that they've been lawfully changed since then as the way to understand it. Why is that? Well, the main reason to adopt an unwritten written constitution is that we face a bunch of crucial choices that we have to make as a community and that we are likely to disagree about if we just make them from moment to moment in some kind of free form way. So it's precisely our expectation of future disagreements about what's morally or politically justified that leads us to tie our hands by a text adopted in the past.

[00:53:17] Sherif Girgis: So it's the dead hand in a way, which I understand the moral arguments against being bound by that. But I think the moral argument for it is that whatever reason we had for agreeing to abide by this text is a reason for agreeing to abide by the choices and the decisions and the policy judgments reflected in that text. So it's deference not necessarily

to whatever Congress or the President do today—In that respect, I agree with that Anastasia—but deference to the judgments embodied in the text by the actors in the past that we've agreed to go by, because we don't think that if we just decided each decision from scratch today, we would agree nearly enough.

[00:53:52] Jeffrey Rosen: Thank you so much, Joel Alicea, Anastasia Boden, and Sherif Girgis for a really deep and illuminating discussion of crucially important question of the various justification for originalism. It's an honor to learn from all of you, and thank you so much, dear NCC audience for taking an hour in the middle of your day to learn about the US Constitution on a non-partisan basis. Thanks to all.

[00:54:21] Jeffrey Rosen: This episode was produced by John Guerra, Tanaya Tauber, Lana Ulrich and Bill Pollock. It was engineered by the National Constitution Center's AV team. Research was provided by Sam Desai, Lana Ulrich, and the Constitutional Content Team. Please recommend this show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. And if you enjoyed the episode, please also subscribe to Live at the National Constitution Center on Apple Podcast, Stitcher, or your favorite podcast app.

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