NATIONAL CONSTITUTION CENTER

Solicitors General and the Supreme Court

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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. The US Supreme Court decides some of the most challenging and important constitutional and statutory issues facing America through its interpretive methodologies. In this episode, we explore the various approaches to constitutional interpretation and key doctrines including originalism, textualism, and the major questions doctrine through the lens of recent Supreme Court cases with solicitors general Ben Flowers of Ohio and Caroline van Zile of Washington DC. Jeffrey Rosen, president and CEO of the National Constitution Center moderates.

[00:00:54] Tanaya Tauber: This program is presented in partnership with the National Association of Attorneys General Center for Excellence and Governance. Here's Jeff to get the conversation started.

[00:01:07] Jeffrey Rosen: Hello friends and welcome to the National Constitution Center. I am Jeffrey Rosen, the president of this wonderful institution, it's such an honor to welcome the members of NAAG to the Center on this spectacular day in this significant space. So, behind me are the words of the First Amendment which were just installed last spring. This was the old First Amendment tablet that used to hang outside the museum building in Washington DC. Some of you may have remember it from Washington. We took it brick by brick, drove it on I-95 and reassembled it here. And friends, it's so meaningful to be in this space, the most constitutionally significant space in America with the most inspiring views of Independence Hall in America, with the words of the First Amendment behind us. And we see in this space the connection between the Declaration of Independence, the Constitution, and the Bill of Rights and it's always significant to talk about the Constitution here.

[00:02:17] Jeffrey Rosen: It's great to welcome you in person to the NCC, we've had a superb collaboration with NAAG over the past couple years, and have had a bunch of really inspiring panels in Washington DC, online, and now here in Philadelphia that unite solicitors general of different perspectives, some Republicans, others Democrats, but all united by your commitment to the Constitution.

[00:02:44] Jeffrey Rosen: And the conversation that you're about to hear is a model of what we do at the NCC in all venues and all of our platforms, we convene liberals and conservatives for constitutional civil dialogue and debate, ranging from our current board chairs, Justices Gorsuch and Breyer, to our We the People podcast, which brings scholars together every week for these conversations, to our amazing Constitution 101 classes, which you can find online and which I want you to show your kids and introduce to your school districts, which we're doing now in partnership with Khan Academy, which unite liberal and conservative scholars for constitutional discussion.

[00:03:26] Jeffrey Rosen: Friends, in this amazingly polarized time, it's so meaningful to play this role as a convener of civil, constitutional dialogue and debate. It's what NAAG does as well and that's why our partnership is so valuable. So we have a great privilege, which is a conversation with two of your very distinguished colleagues about how to interpret the Constitution. Before I jump in, I should thank the great partners at NAAG, and I need my constitutional reading glasses to do this. But Dave Yost, your president, the Ohio attorney general, your executive director, Brian Kane, of course Mike Kuykendall at the Center for Excellence who's been such a great partner and Dan Schweitzer, the Supreme Court director and chief counsel have been invaluable and we really value this partnership.

[00:04:15] Jeffrey Rosen: I think I will also begin by doing something we do at the beginning of all of our programs, by reciting together the Constitution Center's mission statement. I- here's some last, 'cause there's some podcast listeners out there, it's a combination of a mantra and a secular incantation. But it inspires ourselves for the conversation ahead. Here we go. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the Constitution among the American people on a non-partisan basis. Absolutely. Thank you for that radical act of faith in America's, Constitution and constitutive documents.

[00:05:00] Jeffrey Rosen: So our friends, I'll introduce them quickly. Ben Flowers, solicitor general of Ohio, litigated so many important cases including most recently arguing the vaccine mandate case before the Court last term, which we'll talk about. He was a law clerk to Justice Scalia and Judge Sandra Ikuta of the 9th Circuit. And Caroline van Zile is solicitor general for the District of Columbia. She has, as an attorney at Skadden, handled appellate matters at the Supreme Court and many federal appellate and state courts. And she previously clerked for Justice Kennedy, then Judge Kavanaugh and Judge Boasberg. Please join me in welcoming solicitors general Flowers and van Zile.

[00:05:57] Jeffrey Rosen: Wonderful. So this is a discussion about methodology and how to interpret the Constitution. And there's a vigorous debate on the Supreme Court and the country right now between people who have different methodologies. And to paint with a broad brush, there's a group of justices who insist that text, history, and tradition are the lodestars in legal interpretation. Some calls themselves originalists, others textualists. But text, history, and tradition are their north stars. And then there are other justices who agree that text, history, and tradition are important interpretive elements, but they would broaden the lens to include other considerations including precedent, pragmatic considerations, and more.

[00:06:43] Jeffrey Rosen: So, we're gonna talk about the nature of the debate and then we'll tee up a series of cases to examine it and debate how the Court applied these methodologies, and whether they did so convincingly or not. So let's just begin with the debate, General Flowers, would you call yourself a textualist and or an originalist? What would you, what label would you embrace if any? And why are you a textualist or an originalist?

[00:07:15] Ben Flowers: Sure. First of all, thank you for having me. It's a pleasure to be here with you, with my former co-clerk Caroline. We were at the Court together, so it's nice to be talking about these issues once again. You know, I have sort of two capacities. As a lawyer, my, I guess my jurisprudential idol would be former Raiders owner Al Davis who said, "Just win baby."

[00:07:35] Jeffrey Rosen: [laughs].

[00:07:35] Audience: [laughs].

[00:07:36] Ben Flowers: I'll make- I'm not an originalist, I'm not a living constitutionalist, we'll make the arguments we think will prevail. But more intellectually, I would call myself an originalist. I personally don't draw a distinction between originalism and textualism. I think if you wanted to nitpick you could say originalism is textualism applied to the Constitution. But both ask, but both start from the premise that words have meanings and those meanings are fixed when they're written down and they don't evolve over time. And that's true whether you're reading a constitution or a cookbook or Shakespeare or a poem or anything else.

[00:08:09] Ben Flowers: I suppose the reason I'm an originalist is I think that's how language works. And if we don't have fixed meaning, then in my view we don't in any meaningful sense have a Constitution. If the Constitution can change based on what judges would like it to mean or how they think it ought to evolve, that's not a particularly useful written text at all. It doesn't constitute the government. It at most provides words that courts can manipulate to make them mean whatever they want. So, that's what led me to be an originalist.

[00:08:42] Jeffrey Rosen: Great. Thank you so much for putting it on the table so clearly. Would you use a label to describe yourself and what would it be, what is your interpretive methodology that you prefer?

[00:08:52] Caroline van Zile: I think I'd have to agree with Ben that as an attorney, um-

[00:08:56] Ben Flowers: [laughs].

[00:08:56] Caroline van Zile: ... who's job is to convince courts that my client is correct, whatever it takes to win is what I'm in favor of, in terms of what goes into the brief. But, you know, on a personal level and I should perhaps say that the views that I am expressing today are my own, they do not represent necessarily the views of the District of Columbia Office of the Attorney General, but as a personal matter, I am a bit more flexible, I'm a little bit of a pluralist. I do believe in starting with the text because the text is the law in the most meaningful sense. But I do not end with the text when I think about a statute.

[00:09:41] Caroline van Zile: As you noted, I'm open, as the courts in front of which I practice are generally open to thinking about things like broader context, about the problem that the statute is meaning to solve, the consequences that might

happen down the road if one interpretation or another were advanced. And in terms of originalism too, I mean I- I think to me, it makes sense as a starting point, but not necessarily as the point where you end, especially when what we're talking about interpreting is a Constitution that was meant to endure across time.

[00:10:19] Caroline van Zile: And so we can talk about what terms like liberty meant at the Founding, or during Reconstruction, but how they apply today in light of that meaning I think, can be a little bit more flexible than probably the mine-run of originalists might believe.

[00:10:38] Jeffrey Rosen: That's such a powerful way of putting the alternative to originalism. And as you say, those who embrace it on the Court, and they include Justice Breyer and Justice Kagan and Justice Sotomayor and Justice Jackson, start with the text. Justice Kagan once said, "We're all originalists now in the sense of beginning with text and history, but not stopping there and including considerations like consequences, pragmatism, and precedent."

[00:11:05] Jeffrey Rosen: I should share that Justice Breyer is writing a book about, uh, I think it's called Against Textualism. And he and Justice Gorsuch, our current chairs, are gonna convene in Washington for their first conversation about textualism versus its alternative. So this will be a warm-up for my moderating that very significant, [laughs], conversation. And it just puts on the table, friends, something, it's gonna be amazing, the fact that this is where the action is now in law.

[00:11:36] Jeffrey Rosen: And I'll just say descriptively, well let me ask if you agree with this General Flowers, that there of course were methodological debates before. But now that on the Court there is a strong majority that calls itself textualist and originalist, and there's a strong group of dissenters who don't embrace that label, that now this debate is more salient than it ever was, is that a fair statement?

[00:12:07] Ben Flowers: I think it is a fair statement. I would add though that even the dissenters, as you call them, also as you noted, do consider themselves textualists in at least some sense in that they begin with the text, and that is a change. If you go look at Supreme Court opinions from the 1970s, they do not start with the text, they'll sometimes start with the legislative history and they'll never reach the text. I think Justice Scalia was obviously transformative there. But many

other justices as well have really put the text at the forefront, even when they're not self-proclaimed originalists.

[00:12:40] Ben Flowers: And because of that, I think our jobs as Supreme Court litigators has changed. I- no one would ever start a brief now without citing, without beginning with the text of the provision you're construing. That again is a change from 40, 50 years ago.

[00:12:54] Jeffrey Rosen: And General van Zile, you clerked for Justice Kennedy. When he was on the Court, people made their arguments to him that there- there were Kennedy briefs because he was the swing vote. And maybe less attention to text and original understanding. Just describe how the debate has changed now that the majority has changed.

[00:13:11] Caroline van Zile: I mean I- I think that it has indeed changed. It's more of an open field in terms of there not being any one definite swing justice in any given case. And I think because, as General Flowers mentioned, there is this broad commitment to textualism, you do see briefs invariably starting with that. That doesn't mean that the briefs discount legislative history or other indicia that might be persuasive to at least some cohort of the justices.

[00:13:42] Caroline van Zile: I think now too though you do see on both sides a lot more originalism. To me in the last few years, that's been really the biggest change is that both groups that are arguing for what might be called a conservative outcome and those arguing for what might be called a progressive outcome are attempting to marshal history in their favor, in Founding era history or Reconstruction era history often. We see that in the Affirmative Action cases that were litigated this term. Both sides were really in large part battling on the same textualist and originalist grounds, in addition to leveraging precedent. But sometimes that felt a little more secondary.

[00:14:32] Jeffrey Rosen: That's such an important description of the debate. And just as you say, both sides are now arguing vigorously about what text requires and what history requires. And in the Affirmative Action case, of course, there was a vigorous debate between the majority, including Justice Alito in that case, and Justice Jackson, who jumped right in and talked, had a different understanding of what the framers of the 14th Amendment intended when it came to race conscious laws.

[00:15:02] Jeffrey Rosen: Well, let's take a bunch of illustrative cases, in particular Bostock for textualism, Bruen and Dobbs for originalism, and then we wanna talk about the major questions doctrine as well 'cause it was so central to your vaccine case and also to the EPA case. And both describe the debate among and between the justices and then ask what you think of it. So why don't we start with Bostock 'cause it's the clearest example of a debate among the textualists. In that case we have Justice Gorsuch joining the liberals in holding that the phrase, "Because of sex," in the Civil Rights Act of '64 included discrimination on the basis of sexual orientation.

[00:15:46] Jeffrey Rosen: Justice Gorsuch said that only the written word is the law and all persons are entitled to its benefits. But there was a dissent from Justices Thomas, Alito and Kavanaugh, and in particular Justice Alito wrote, "The Court's attempt to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under the textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated, the theory that Court should update old statutes so they better reflect the current values of society."

[00:16:23] Jeffrey Rosen: I read it 'cause I've got the text here. General Flowers, describe what Justice Gorsuch held in Bostock and why the dissenters thought he was not a convincing textualist?

[00:16:38] Ben Flowers: Sure. Absolutely. I mean Justice Gorsuch's approach to textualism I would, I think it's fair to say is maybe more literalist than others. And that sets up what I think is the most interesting debate in that case which is in my view between Justice Gorsuch's majority opinion and Justice Kavanaugh's dissent. Which really I think lays out most clearly his view of what the textualist project should be. But let me start with the question, which was what did he say.

[00:17:06] Ben Flowers: The law prohibits, I'm simplifying a bit here, but discrimination because of sex. And relying on- frankly on precedent, Justice Gorsuch said that “because of” there means “but for” cause, and in his view if you fire someone for being gay or for being transgender, then sex is in some sense a "but for” cause. Because if they were of the opposite sex, but behaved in all the same ways, were sexually attracted to the same people, you would not have fired them. So he said, "We have that ‘but for’ definition of ‘because of,’ we can plug

in– we can answer the question, ‘but for’ your sex would you have been treated differently." And in his view the answer should be yes.

[00:17:54] Ben Flowers: Justice Kavanaugh's point was that it shouldn't be so robotic. When you do original public meaning, you should be asking what would the phrase “because of sex” mean to an ordinary English speaker. And I happen to think he's right about this, an ordinary English speaker who found out a friend was fired for being gay would not say they were fired because of their sex. If they were fired for being transgender, it wouldn't say they were fired because of their sex. It would say they were fired because of this other trait.

[00:18:20] Ben Flowers: And I think the reason the original meaning and Justice Gorsuch's literalist interpretation–arguably at least–come apart, is what Justice Alito focuses on more in dissent, which is that "but for” test makes sense when you can hold every trait but one constant. So, if you imagine for example, the person's fired, they say because they were African American, well you can imagine that they were of a different race and then say, "Would they have been fired?" That doesn't quite work as cleanly when you're talking about sexual orientation or gender identity because when you change one trait, you're changing two. You're changing both the person's sex and their sexual orientation, or their sex and their gender identity. They move together. So the “but for” test doesn't work as cleanly.

[00:19:04] Ben Flowers: But circling back I guess to what the real debate is, I view it more as- as I think that the contrast is drawn out more in the discussion between Gorsuch and Kavanaugh, who have this sort of literalist approach on the one hand, versus a more contextual ordinary speaker approach on the other.

[00:19:24] Jeffrey Rosen: That's a great way to describe the differences and I'll restate it to make sure I understand it. The literalist approach, which just asks what the words literally mean, and those that would view the words in context to figure out what an ordinary observer would understand them to mean. General van Zile, what do you make of this debate, and does it– what would Justice Breyer say about it? The liberals joined Justice Gorsuch, but Justice Breyer thinks the purpose is always to figure out the intention of the law, which is why you look at the words in context and purpose matters. How does that fit into this debate, and what does it say about whether textualism is all that constraining at all?

[00:20:07] Caroline van Zile: That is an excellent question. So, obviously if you consider yourself to be a purposivist, you might start with the question of what is it

exactly that Congress was getting at when it passed Title VII. And you can define that at a number of different levels of generality. I mean obviously it was aiming to eliminate, or at least severely curtail, discrimination. And then there's the question, discrimination of what kind. And so I think it is interesting– you could probably answer that question one of two different ways depending on the level of generality at which you're examining the purpose.

[00:20:50] Caroline van Zile: And so too with the text, with this debate between sort of literalism versus the meaning of the provision as a whole to the guy on the street when the relevant statute was passed. And I suppose I would take a little bit of issue with calling Justice Gorsuch's interpretation literalist. I mean I think originalist, textualism, they all sort of have to acknowledge that while the meaning of words are fixed, how they apply to changed circumstances, to circumstances that in some cases may not have been contemplated or even imagined, if you think about some of the Second Amendment cases, right?

[00:21:37] Caroline van Zile: How you apply those same words in those circumstances, I think there needs to be a little bit of flexibility there. You're honoring the meaning of the words, but in applying them to a new circumstance, there's going to have to be a little bit of adaptability, I guess, and imagination maybe.

[00:21:57] Ben Flowers: And but I think every textualist would agree that the laws will apply, text will apply to circumstances that were not foreseen. The Fourth Amendment applies to searches of automobiles, even though automobiles obviously were not in the framers' minds, as smart as they were. So I don't think that's really a problem with textualism. It just makes application more difficult. I think the people who have a lot of explaining to do with Bostock are the purposivists who join the majority opinion.

[00:22:25] Ben Flowers: Because I think it's very difficult to argue that Congress when it passed Title VII was meaning to protect against discrimination based on sexual orientation or gender identity. I think the latter idea probably wouldn't have even made sense to them at the time. And the former was quite controversial and remained controversial for years thereafter. So those defending the purposivist approach I think have quite a bit of work to do when it comes to the majority decision in Bostock, which is probably why the majority opinion, in addition to the fact it was written by Justice Gorsuch, doesn't make use of that methodology at all.

[00:23:02] Jeffrey Rosen: And what might be the purposivists say?

[00:23:04] Caroline van Zile: Well again, I mean I think it goes back to a level of generality. I think General Flowers is probably right, if you put the exact question to folks in Congress or even the people who voted for those representatives at the time that Title VII was passed, you know, is this meant to protect against discrimination on the basis of sexual orientation or gender identity, you know, is it meant to cover that really, they would probably say, "Well, no." But if you ask them, "Is it broadly meant to put people on a level playing field regardless of their gender and how they present in the workplace," I think the answer would be yes. So, again, I mean I think in a lot of these debates, ultimately it is that level of generality and this sort of amount of specificity that's being demanded that makes the difference.

[00:24:02] Jeffrey Rosen: Very much so. Just so I understand, and this is excellent preparation for my moderation of the debate in DC, General Flowers, was it Justice Scalia's position that purpose didn't matter, is that why you should never look to legislative history and you only look to the words and how they would've been understood in context regardless of what the purpose of the legislature was? Is that right?

[00:24:31] Ben Flowers: I qualified a little bit. He was fine with looking at sort of the objective purpose of the law, what is this law achieving on its face. What he was not concerned with, and what he in fact thought was an illegitimate consideration, was what did the men and women who voted for this bill in Congress intend to accomplish with it. That wasn't of concern to him. But he did think you could look at a law and say, "this is intended to allow remediation for certain environmental messes and so that should guide us in interpreting an environment statute when we ask if such damages are available in a particular case," something like that.

[00:25:13] Jeffrey Rosen: So you can have a broad objective purpose, discernible from the text, but not the subjective intentions of the people who voted for it.

[00:25:21] Ben Flowers: Exactly. And I think it's one of the first canons in his reading law book on statutory interpretation in fact. Is that the objective purpose of a statute’s a legitimate consideration, but not the subjective intents of the legislatures.

[00:25:35] Jeffrey Rosen: And General van Zile, there were of course many responses to Justice Scalia by Justice Breyer, by Judge Robert Katzmann who I guess has the main book on statutory interpretation, the late Judge Katzmann of very blessed memory wrote a superb book which we discussed here at the Center. But now you're helping me understand these debates, General van Zile, what was the response of Justice Scalia's critics in particular about the consistency of his view of statutory interpretation and his embrace of originalism in the constitutional context?

[00:26:12] Caroline van Zile: Well I think there's both a critique that can be applied to originalism and then there's the response actually of the originalists. Which to be totally candid, I actually find to be persuasive. So there is a criticism of textualists that also adhere to originalism in the sense that oh well, you know, if you're not willing to consider the subjective intent or words of members of Congress who voted for laws, then why are we here lionizing the Founders and what they thought?

[00:26:48] Caroline van Zile: And I think the traditional rejoinder is, no, no, I mean even originalists are not necessarily looking to what the Founders subjectively thought or believed. They're looking to original public meaning. And it's not unusual or unwarranted to think that the Founders might have also had some sense of what the original public meaning of these words was. I would argue that also applies to members of Congress when we're talking about textualism and statutory interpretation. And as a result, maybe you don't prioritize what legislators said or what a report contained over the text itself.

[00:27:38] Caroline van Zile: But surely it's some indication of what some very smart people who looked at the problem very carefully thought at the time. And so, to me, that's why that sort of evidence is relevant when you're broadly trying to understand what it is that a statute means or what it is that a statute does. Maybe you don't prioritize it, but it certainly seems to be relevant evidence. And some of it is more relevant than others. A report that was voted on should probably get a little bit more weight than a floor statement by some member of the House of Representatives, who may or may not have had anything to do with writing the bill.

[00:28:19] Ben Flowers: And I also think legislative history became less useful the more it was used. Because once courts set the precedent that what you say on the floor or what's in a report can inform the meaning of a bill, then legislators

knew, and there's even records of this, that they could agree to a vague provision and then go down on the floor of the Senate, give a speech, and later litigants could use that to say, "See, this is what they meant all along." Even though it's only one person and if it had actually been in the bill it never would've passed.

[00:28:48] Ben Flowers: So I think that argument works better if you're talking about legislative history, and I'm not convinced of any way, by the way, but insofar as it works, I think it works for the period before the Court was actively considering such evidence better than it does today.

[00:29:02] Jeffrey Rosen: Great. This is a superb seminar on sort of textualism 101 and what I hear you both saying is that for Justice Scalia, as one of the most prominent first originalists and textualists, original public meaning mattered for both the Constitution and for statutes, but Justice Scalia felt that legislative history was unreliable evidence of original public meaning, whereas the Framers' intentions in the Convention, and in particular the Federalist Papers, might be more reliable evidence for the Constitution. But just one more round on this.

[00:29:36] Jeffrey Rosen: I, to prepare for this panel, went back and read Ed Meese's speech in 1985 where he embraced a jurisprudence of original understanding, which, let's posit, is the opening salvo in what led to an originalist, textualist majority on the Court. It was written, he acknowledged, with the help of Gary McDowell, the late scholar, who wrote a great book on this debate. And McDowell acknowledged that the project began by focusing on original intentions and on the framers, but evolved into one that focused more on original public meaning. Do I have that right?

[00:30:14] Ben Flowers: Yeah. I think that's absolutely right.

[00:30:15] Jeffrey Rosen: Yeah. Okay. All right. And, well then now let's put on the table the leading originalist decisions in recent terms, Dobbs and Bruen. Let's begin with Bruen because it's such a powerful example of the liberals and conservatives disagreeing about what original understanding required. And the majority of course held that Justice Thomas focused on the history and traditions of firearm regulations in five historical areas: medieval to early modern England, the American colonies, antebellum America, Reconstruction, the late 19th and 20th centuries, and he found no historical analogs for the New York law and concluded there was no support in history and tradition for a prohibition on public carry for firearms used in self-defense.

[00:31:08] Jeffrey Rosen: And Justice Breyer and the dissenters accused Justice Thomas of playing whack-a-mole with history and tradition, and Justice Breyer had a memorable line. He said "The Court is picking friends out of history's crowd. Laws addressing repeating crossbows, launcegays, dirks, dagges, skeines, stilladders, and other ancient weapons will be of little help to courts confronting modern problems." So, both in your great descriptive mode, what did the majority hold and what did the dissent object and what do you think?

[00:31:38] Ben Flowers: So I think they both started from the premise that Heller was good law. So Heller's the case in which the Supreme Court held that the Second Amendment confers an individual right. There's an individual right to bear arms, uh, keep and bear arms. From the perspective of an originalist, I think it's fair to say, in fact Heller says this, when it says the right to keep and bear arms shall not be infringed, it is referring to a preexisting right. In other words, the Constitution doesn't confer the right so much as it recognizes and protects the preexisting right.

[00:32:12] Ben Flowers: And so, Justice Thomas would say that to determine what that preexisting right is, we can look to what rights to keep and bear arms people were understood to have at the time. What were people allowed to do or not allowed to do with firearms at the time the Second Amendment was ratified and at the time it was incorporated again the states through the 14th Amendment.

[00:32:33] Ben Flowers: And so, I see some caricatures in the news that they adopted history for history's sake. They just, you go back to the gun laws of 1789 just 'cause. And that's not right. The reason they're looking at those is to say what was the meaning of the right to keep and bear arms, and one way you'd try to understand that is look to state constitutions that had similar language and what were people understood, what rights were they understood to have under the umbrella of that right to keep and bear arms.

[00:33:01] Ben Flowers: So that's how he would've approached it, or that's how he did approach it. The dissent approached it, I think it's fair to say through a more pragmatic lens. They accept Heller, they accept there's an individual right, but are critical of the practicality of applying that test, I think what will be difficult for courts to do in a lot of circumstances. And then also took issue with the application of the history in this particular case to the law at issue, which was New York’s may issue law for carry and conceal firearms. They thought there was more historical support for that than the majority was giving them credit to.

[00:33:37] Ben Flowers: I think that debate's less interesting for our current purposes because that's just about who's right or wrong, accepting the methodology. For me, the more interesting question is whose methodology is correct in the first place. It won't come as a surprise that I agree with Justice Thomas's, but you may have a more sympathetic, spokesman for the dissenting view in my colleague to my right.

[00:33:58] Jeffrey Rosen: Well maybe if I- if I may before, of course I'm very eager to hear what you think is convincing. But spell out the dissent's objection to the majority, on its own terms, they said you're just moving historical periods around. If you look at 1868, when the 14th Amendment was ratified, there was broad support for prohibiting public carry, which continued into the progressive era and then became more restrictive earlier and later and they basically said the majority was being selective in picking their historical windows. Is that basically right?

[00:34:29] Caroline van Zile: I think that's accurate. And I think it illustrates something about this methodological debate, right? One of the virtues of originalism is allegedly that it is more fixed and discernible and knowable. And I think what we're seeing particularly in lower courts in the wake of Bruen, is that looking at history is really not all that different than looking at legislative history, in that you can look out over a crowd and pick out your friends. So when you're using history as the touchstone, I think you do have to be very wary about that.

[00:35:13] Caroline van Zile: And you can see, I mean some of the historical moves that the dissent criticizes the majority for, you know, discounting three colonies' laws as perhaps not being enough, ignoring certain or discounting certain state Supreme Court decisions, possibly sort of changing the meaning of the statute of Northampton, which is a very old statute that kind of had analogs in the colonies and then in the early states. There are some very legitimate disagreements there about what history shows.

[00:35:57] Caroline van Zile: And I mean, beyond that, I might even go a little bit further and ask the question whether Bruen really even is a fully originalist opinion, in the sense that one scholar has called it originalish, which seems about right to me. It might seem paradoxical given how moored it is to history and tradition. But one of the things that Bruen did was break the Second Amendment inquiry down into two steps. The first step being so what does this text say? Does it cover this conduct? And then the second step, which places the burden on the

government who's trying to regulate the conduct in question, the second step then becomes this historical inquiry, where you're sort of counting different historical restrictions and asking are they analogous enough, are they pervasive enough.

[00:36:56] Caroline van Zile: And that second step, if you're an original public meaning originalist, the question you'd probably really wanna ask there is well, what did people think that this preexisting right to bear arms meant. What did people think that it constituted broadly, either at the time of the Founding or at the time of Reconstruction, that's sort of up for debate which is the most relevant time period. And if you look at that question, if you look at it through that lens, it's not entirely clear that what people thought was permitted or could be prohibited is entirely governed or is evidenced by what restrictions happened to exist, either at the time of the Founding or at the time of Reconstruction.

[00:37:52] Caroline van Zile: So just to give an example right, I am from the District of Columbia. We have not yet banned electric scooters, annoying though they may be. Find them on every street corner, you can rent them, they may be a hazard to public safety and public health, but-

[00:38:10] Ben Flowers: I thought you were gonna say they're an arm.

[00:38:12] Caroline van Zile: [laughs]. They're there. Um, no. I wouldn't argue that they're arms. But that's-

[00:38:15] Ben Flowers: [laughs].

[00:38:16] Caroline van Zile: ... that would be an interesting debate. We haven't banned them. Does that mean that we couldn't ban them? That the Constitution would prevent us from doing so? Of course not. It just means that we haven't, maybe for reasons of administrability, maybe for reasons of policy, there can be a whole host of reasons why something might not be regulated. That in and of itself probably isn't the best indicator of original public meaning. It might be an indicator, but I don't think that it makes sense to treat it as a sole touchstone, which is what Bruen essentially now does.

[00:38:53] Jeffrey Rosen: Thank you for putting that critique on the table, and if you would General Flowers, respond to it. General van Zile said the critique is, if you're an originalist and there's a text, you ask what was the original public meaning in 1789 or 1868, you don't look at everything that could've been enacted

but wasn't or what happened in between. Those are the two timeframes and the majority wasn't doing that. What's the response of Justice Thomas?

[00:39:17] Ben Flowers: I think his response would be that the first step is does the regulation involve the keeping or bearing of arms. So now you're dealing with the text, and then to figure out whether it falls outside of that right, you would look for some evidence of that. Which, I suppose it could include other things, but the easiest, or the most readily available evidence will be the laws that existed at the time. What were people prohibited from doing. At least then you see a practice that is not prohibited across a wide array of jurisdictions with similar constitutional protections. That's pretty good evidence that the right in question did not, was not understood to fall outside of the preexisting right.

[00:39:58] Ben Flowers: But I- and I think in some ways though, this really goes to the virtue of originalism, which is it can be falsified. Every originalist jurist gives you a way to score their work, because being an originalist of course doesn't mean you'll get every case right. It provides a basis to analyze the opinions to determine whether they're right or wrong. It's much harder to do that when you're dealing with purposivism or some other more open-ended approach where judges are aiming to make policy instead of aiming to determine what the text meant.

[00:40:34] Jeffrey Rosen: And just one final beat on Bruen and then we'll do Dobbs. The liberals say that the conservatives are being inconsistent from case to case about what the timeframe is. And Justice Barrett has acknowledged that this is a debate among the conservatives about the relevance of what she calls liquidation, or subsequent historical practice. Do you detect the conservatives are undecided about this and what do the liberals say?

[00:41:00] Caroline van Zile: In terms of which time period is-

[00:41:02] Jeffrey Rosen: Yeah.

[00:41:02] Caroline van Zile: ... perhaps most relevant. Yeah. I mean, there seem to be a strong lean in the text of Bruen towards the Founding era being the most relevant evidence. But it did expressly leave that question open and there is an ongoing scholarly debate about it. The majority was able to leave the question open because it said, "Well, whatever period you look at, the result is the same." I think that most progressives, and there's been a number of briefs filed in lower courts towards this end, would say, "Well, actually, the Reconstruction era is

actually the most pertinent period. Certainly as to state prohibitions because the Second Amendment only applies to the states through the 14th Amendment. And so that is the most relevant time period."

[00:41:55] Caroline van Zile: And obviously we want the Second Amendment to be interpreted consistently, whether it's applied to the states or to the Federal Government or to something like the District of Columbia. And so in a sense, that was almost a reenactment of the Second Amendment, a sort of revivification of it. That kind of made the mores and understandings of that time period both relevant and perhaps decisive.

[00:42:24] Jeffrey Rosen: And just to set up Dobbs, another sort of informational question. I had thought from law school that if there was a text and you were an originalist, you asked what was the original public meaning in 1789 or 1868, but if there wasn't a text, as in Dobbs, and you're looking to tradition, then you look at tradition from the Founding to today. Is that wrong?

[00:42:47] Ben Flowers: So I think the question really goes to what is the substantive due process doctrine require.

[00:42:53] Jeffrey Rosen: Yeah.

[00:42:53] Ben Flowers: And frankly, I think this is part of the problem of the doctrine is it's- uh, I have a difficult time saying with certainty what it requires.

[00:43:00] Jeffrey Rosen: Yeah.

[00:43:00] Ben Flowers: In Glucksberg, the Court said you look to–in determining whether there's a substantive due process right, you require a long recognized tradition of the right's existence. So I don't think that would require focusing strictly on the time of the ratification. I also don't think it would allow ignoring that, it would look, it would require the entire period there to be this long recognized right.

[00:43:25] Ben Flowers: I think the use of history in Dobbs is different than the use of history in Bruen. Because in Bruen, they're trying to define what is the right to keep and bear arms that everyone is acknowledging exists. In the substantive due process context, there's a debate about whether there even should be such a thing as substantive due process and to sort of limit that doctrine to stop it from

being something where judges can willy-nilly make up rights. The Court in Glucksberg announced this test where at least if there's not a very long-established tradition throughout American history or for much of American history, of a practice, then we're not going to have an unenumerated right. So I think that, I see the use of history there as limiting the judge's power to find a right that's not in the text versus defining the nature of a right that is in the text.

[00:44:13] Jeffrey Rosen: Understood. And how would you articulate the difference between the Glucksberg approach to substantive due process rights and the originalist approach? And in Bruen, in terms of this, what timeframe is relevant? Is it right that, I think it is as General Flowers says, that if you accept a substantive due process right, Glucksberg says look to a longstanding tradition from the Founding to today, is that right?

[00:44:35] Caroline van Zile: I mean I think that's right. Glucksberg is sort of–I view Justice Alito's embrace of that as being a nod to precedent more so than anything else. I mean he does start his opinion by talking about the text, but ultimately is a little bit agnostic about what text it is that is even being interpreted. Whether it's the term liberty, due process, privileges or immunities, something entirely different. We don't really know.

[00:45:04] Caroline van Zile: In terms of how Glucksberg contrasts with originalism, yeah, I mean I think if you were going to look at it from an originalist perspective, you would start with the text of the Constitution, you would identify that precisely. And then you would figure out what folks thought that meant at the time of the Founding. And then you have this sort of other option that the dissenters embraced looking at terms like liberty and asking not just what it meant at the Founding, but what it means today and allowing for a bit of change and sort of growth in terms of what we think a term like that, an intentionally broad term would cover.

[00:45:52] Caroline van Zile: I mean obviously at the Founding, women didn't– or even in Reconstruction, women didn't have rights the same way that we have equal rights today. And so, if you're kind of looking at this inquiry on a very specific level frozen in time, I think one of the concerns expressed by the dissenters, and Glucksberg has this same problem, as very kind of literal originalism does, or frozen originalism does, is it doesn't, I mean, it leaves certain people out of the equation arguably. And so if we're putting that third option on the

table, I mean I think that that is what the dissenters would urge us to look at is kind of what do these terms mean today and do we allow for them to evolve.

[00:46:43] Jeffrey Rosen: What do they mean today and do we allow them to evolve. Well, General Flowers, let's just put on the table the Dobbs majority's reading of text, history, and tradition, which focuses on the fact that when the 14th Amendment was ratified, two-thirds of the states banned abortion throughout pregnancy. Tell us about that argument.

[00:47:00] Ben Flowers: Right. So I think if we just look at straight as an original matter, does the Constitution, as it originally understood, protect the right to an abortion, I think pretty much everyone would concede that a straight, an honest originalist would say, "No, it doesn't. At least if you put precedent to the side." But then there's the precedent complication here. So, once you have precedent on the table, you're asking not only was Roe v Wade, Casey v Planned Parenthood wrong, but were they so wrong, are they so destructive that they should be overruled.

[00:47:36] Ben Flowers: And as I read Dobbs, the reason that Justice Alito goes to the history is not only to show there was orig- as originally understood no right to an abortion, but that the right was so unfounded, so lacking in history, historical support in our nation's traditions, that it's not just a misapplication of substantive due process of the Glucksberg test, but in his view at least, an egregious one, which justifies, along with other concerns, actually overruling the precedent rather than saying, "Well, although it was wrong, they decided, it was decided, and we're going to stick by it." The Court said that egregiously incorrect decisions are less deserving of stare decisis.

[00:48:19] Ben Flowers: So I see the history there is filling that sort of dual task, which is helping to define the- or looking to see if one could make a plausible argument for a substantive due process right, I think under Glucksberg, it's very, very hard to do. And then using that to ask should we retain the precedent in the first, at- at all.

[00:48:38] Jeffrey Rosen: And as you say, that language about it being egregiously wrong, which comes from Justice Kavanaugh's test for overturning precedent in the Ramos case, would be–was found to be dispositive here. General van Zile, the liberals in Dobbs did say the history was more complicated than the majority suggested, including the fact that until basically the Civil War, the common law did not prosecute pre-quickening abortions criminally. Tell us about

their historical arguments and what do you think that says about the determinacy of originalism in Dobbs?

[00:49:15] Caroline van Zile: Yeah. I mean, that is exactly the argument, that pre-quickening abortions as a historical matter weren't traditionally regulated. And if we were living in a world where Bruen governed as precedent, you might think that that lack of regulation had dispositive meaning. But not so in this particular context. So they use that in combination with this reasoning about sort of liberty and more recent precedents on substantive due process to push back against and disagree with the majority.

[00:49:56] Caroline van Zile: But I think it's this, you see the same recurring pattern in both Bruen and Dobbs where different groups of justices are looking at the same history and drawing really different conclusions about that same history. Which I think at the very least raises some questions about the determinacy of an approach like originalism. Now maybe it would work, maybe you could verify it, if we all had time machines and could go back and survey people on the original public meaning of these provisions.

[00:50:34] Caroline van Zile: But we don't, and so what we're left doing is sifting through historical records that may change, new ones may resurface, that we may have different interpretations of in their own right, and trying to draw our best conclusions from those. And, depending on who is reading the historical record, you can end up with potentially very different results.

[00:50:59] Jeffrey Rosen: This is a great debate. And what is the response to the claim that the whole point of originalism is supposed to be determinacy and constraining judges personal preferences, but the claim is that far from constraining, it's leading to a lot of indeterminacy and malleability that is empowering judges to reach the results they like. What's the response.

[00:51:22] Ben Flowers: I think the response is the one Justice Scalia would give. He'd tell the story about the two hunters and they're chased by the bear and one hunter stops and ties his shoes and the other guy says, "What are you doing? There's a bear chasing us. You have to run." He says, "I don't have to outrun the bear, I have to outrun you."

[00:51:36] Jeffrey Rosen: [laughs].

[00:51:36] Ben Flowers: And I think the originalist is the same answer. We don't have to outrun the living constitutionalist, we don't have to- or sorry, we don't have to out- we don't have to show that our theory works perfectly, we just have to outrun the living constitutionalist and show that it works better than that. And I do think it works better at providing determinacy than an approach that allows judges to evolve the Constitution as they like. This at least gives us a concrete question to ask. And there'll be difficult cases, there'll always be difficult cases. There will also be some very easy cases.

[00:52:07] Ben Flowers: And again, I think as an original matter, it would be impossible to argue that there ... if, from a purely original perspective, without precedent, that there was a right to abortion. I have a hard time even imagining how it would go because the due process clause wasn't understood to confer substantive rights at all. So that's an example of a case that from a purely originalist perspective, it's very easy. The complication there is stare decisis–in the Dobbs case, not in my view of originalism.

[00:52:34] Jeffrey Rosen: That's such a great response from Justice Scalia. I had the honor of having dinner with him once because a friend brought us together. And after a couple drinks, I screwed up my courage and asked the question that I'd been, you know, as a law professor thinking about for awhile. "Justice Scalia, you know, the whole point of Brown v Brown of Education is, you say you're a textualist and originalist but people stood up in the Congress and passed the 14th Amendment and said, 'Don't worry. This isn't gonna apply to schools.' You know, what's your response? How can originalism accommodate this?" And he paused for a sec, and threw back his head, and said, "You know what? No theory is perfect." [laughs].

[00:53:09] Ben Flowers: [laughs].

[00:53:09] Jeffrey Rosen: Which is a version of the bear story. So what about that as a response? Not perfect, but better than the alternatives in terms of constraining judges.

[00:53:17] Caroline van Zile: Well I think it remains to be seen if it's better than the alternative at constraining judges. I mean certainly we have seen a number of supposedly originalist and textualist precedents kind of turning out the way you might predict just by counting the number of justices who are appointed by a certain party. Now I think Bostock is a notable departure from that. Hopefully we

will see more departures that are sort of in line with whether it's the textualist or originalist ideal that maybe don't neatly line up with politics and ideology.

[00:53:55] Caroline van Zile: But I mean, I think the proof will be in the record. And in, you know, I mean I think you look to it, one of the more recent cases that has kind of thrown the spotlight on textualism again from last term, West Virginia v EPA, there you had a solidly self-professed textualist majority, not really addressing the text of the relevant provision until page 28 of a 31-page opinion.

[00:54:26] Caroline van Zile: And so, I mean, if these methodologies are applied consistently, yeah, I think that they could impose some reasonable constraint. But I don't know that constraints for the sake of having constraints necessarily justify not looking at all of the available evidence when it comes to determining the meaning of the Constitution or of a statute. In other words, I mean I think textualism and originalism if you take a hard line on them, they're very constraining, but is that an unvarnished virtue? Or by leaving some evidence of meaning off the table, does it actually make us less likely to get to the truth, assuming there is such a thing of whatever the statute or constitutional provision means?

[00:55:22] Caroline van Zile: I mean, I don't know. I think that there has been a robust debate on that. I think that debate will continue. But in my mind, there's not a clear winner.

[00:55:35] Ben Flowers: One thing we can agree on is originalists need to practice what they preach. Or, I mean it won't constrain if they just refuse to be constrained. Now I personally think it does constrain and will work because I've seen it done. There's one case in particular, I can't say which case, but I remember as a clerk all four of his clerks arguing with Justice Scalia, telling him the text requires this and he really didn't like the outcome. And he played devil's advocate for a while, and eventually he threw down the briefs and he said, "It's Congress's fault. Garbage in, garbage out. They write a stupid statute. They get a stupid result." And it was very refreshing to see that. That he really engaged with the arguments, he pushed back. And he said, "You know what? The law requires this idiotic result and that's how I'll vote."

[00:56:17] Jeffrey Rosen: A great example. Well you put on the table, General van Zile, the EPA case and as you suggested, that was one in which Justice Kagan called the majority textualish to use the, I think it was originally her great phrase, because the major questions doctrine doesn't appear in the text. So maybe say more

about the case against the major questions doctrine and then, General Flowers, I'll ask you to defend it.

[00:56:44] Caroline van Zile: Right. Well, I mean, I think that there is a very strong textualist case against the major questions doctrine. So as expounded in that case, the major questions doctrine basically says that if an administrative agency is doing something big, either resolving a major political question or promulgating a rule that has a huge economic impact, then in order for that rule to be valid, Congress must've made some sort of clear statement delegating that authority to the agency.

[00:57:23] Caroline van Zile: And the starting premise of the major questions doctrine really is sort of what did the agency do and do we think it's major enough to trigger this, what is now I think a clear statement rule. And that's in stark relief to the usual textualist approach of well what does the statute say? Let's start with the text, let's look at some dictionaries, let's look at the structure and the context, and figure out if there's an unambiguous meaning here.

[00:57:57] Caroline van Zile: And so you have this funny dialogue between the majority by Chief Justice Roberts and the dissent by Justice Kagan where, Justice Kagan in dissent who's starting with the dictionaries and kind of reasoning from text and context. And I think canons like that, especially sort of newly announced substantive canons, should give textualists some heartburn. There are a number of textualist scholars who've argued against the major questions doctrine.

[00:58:31] Caroline van Zile: And I happen to think that they are right. Now, I think the majorness of the question may have something to say or some role to play if you're talking about a genuinely ambiguous statute, would Congress have permitted an agency to do something this huge or transformative through really murky language. I mean, I think it's fair to consider it in that sense. But as a clear statement rule that sort of precedes the text and context inquiry, I don't think it makes much sense.

[00:59:07] Jeffrey Rosen: Now the Court embraced the major questions doctrine both in the EPA case and in the National Federation of Independent Business v Department of Labor case, which you won, General Flowers, congratulations first of all on that impressive victory. And in that case, Justice Gorsuch in particular explicitly linked the major questions doctrine to the non-delegation doctrine and

defended it as a textualist. What was his defense and why do you think he was right?

[00:59:29] Ben Flowers: Right. So I was gonna say, I think Justice Gorsuch has the most sustained defenses both in that case and in the West Virginia case. And I happen to agree with them. So when we ask if it's textualist, I think we should ask first which text are we talking about. And I think we start with the most foundational one, which is the one they wrote over there in Independence Hall and the first section of the first article says that all legislative power is vested in Congress.

[00:59:57] Ben Flowers: We have greatly departed from that original meaning, where we now allow agencies to promulgate the vast majority of the rules that govern private citizens, private companies. The non-delegation doctrine is really just a fancy way of saying Congress has to be the one that make the rules that govern the public, but we've really–the non-delegation doctrine today doesn't have very much teeth. The way it's applied is that as long as Congress announces an intelligible principal somewhere in the statute that gives a little bit of guidance to the agency, then constitutionally it's fine to do that.

[01:00:35] Ben Flowers: The major questions doctrine can be justified in light of the non-delegation doctrine in two different ways. The first is constitutional doubt, the second is a “this far no further" principals. I'll try to lay those out. It probably is the case at this point that we probably cannot go back to a full-throated embrace of non-delegation, and in other words, honestly applying the first section of the first article of our Constitution. There's just too many agencies that have promulgated too many rules, and throwing all that out would be I think too disruptive. It's just not going to happen whether it should or not.

[01:01:08] Ben Flowers: But the major questions doctrine says that at least before we find that Congress gave away its legislative power to an agency, in these very, very big fields, that are very significant, we're going to require Congress to say so exceptionally clearly. And if they don't say so exceptionally clearly, then we're going to say that they never gave the agency the power to do that in the first place. And that brings me back to the two defenses I had.

[01:01:31] Ben Flowers: The first thing that does is it avoids doubt about whether the delegation does violate even the flimsy non-delegation doctrine we have today. It avoids putting the statute in constitutional doubt. People can debate whether the

constitutional doubt canon is a good rule or a bad one. But it's been around a really long time, it's not very controversial, and the major questions doctrine helps enforce that.

[01:01:55] Ben Flowers: But there's also this “this far, no further” point. Judge Bork used to say, or he had a book actually where he said, "Judges live on the slippery slope of analogy and they're not supposed to ski it to the bottom." And I think of that metaphor and think, well, one way you might reasonably apply the brakes is to say, we've pushed this doctrine so far beyond what the Constitution permits that we're never gonna be able to go back. We can't get back to the top of the hill. But we can at least say we're not going to go even further down the hill and just completely abandon the text altogether and allow the doctrine to completely override the Constitution.

[01:02:33] Ben Flowers: So, with the major questions doctrine, what they're saying is agencies shouldn't be getting this power in the first place. We may not be able to go all the way back and undo all the damage that's been done already. But we can at least say that we're not going to allow our failure to take seriously the first section of the first article, we're not going to allow our failure to take that seriously to be extended to allow agencies to resolve even these immensely significant questions, like whether 85 million Americans can be forced to get a vaccine, or whether all coal power plants can be shut down and replaced in some other form of cleaner energy. So that, I think, is Justice Gorsuch's defense and therefore mine as well.

[01:03:15] Jeffrey Rosen: We're out of time. But to preserve the balance in this extremely high level, thoughtful, and civil discussion, the last word, General van Zile, will be to you.

[01:03:25] Caroline van Zile: I do think that that is the best justification for the major questions doctrine. That said, if what it's really about is non-delegation, I think, you know, do that work honestly through the non-delegation doctrine.

[01:03:41] Ben Flowers: Sold.

[01:03:44] Caroline van Zile: [laughs]. If the votes are there. Last time they weren’t, so I guess that would be my rejoinder.

[01:03:53] Jeffrey Rosen: I wanna thank both of you, General Flowers and General van Zile, for giving us an example at the highest level of what a thoughtful, non-partisan discussion about methodology is. It was detailed, it was wonky, I know each of you was following every word because it was so high level. But it's a model for the way that law is supposed to operate. And we're honored at the Constitution Center to bring you together in this incredible space. So impressed at NAAG for being true to your mission of bringing together AGs of different perspectives for this kind of discussion, and much looking forward to our work together in the years ahead. Please join me in thanking our panelists.

[01:04:38] Tanaya Tauber: This conversation was streamed live on April 18th, 2023. This episode was produced by John Guerra, Lana Ulrich, Bill Pollack, and me, Tanaya Tauber. It was engineered by the National Constitution Center's AV team. Research was provided by Sophia Gardell and Sam Desai. 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 subscribe to Live at the National Constitution Center on Apple Podcast or by following us on Spotify. On behalf the National Constitution Center, I'm Tanaya Tauber.