The Evolution of Originalism

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[00:00:00.3] Jeffrey Rosen: Randy Barnett has published a new book, *A Life for Liberty, The Making of an American Originalist*. It's a memoir about his remarkable legal career and the rise of originalism. Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress, to increase awareness and understanding of the Constitution among the American people. In this episode, we'll discuss Professor Barnett's career as a Supreme Court advocate and a constitutional scholar, and his path-breaking role in transforming the understanding of originalism from a commitment to judicial restraint to a commitment to what he calls constitutional conservatism, under which the court can legitimately enforce limits on congressional power. Randy Barnett is the Patrick Hotung Professor of Constitutional Law at the Georgetown University Law Center and Faculty Director of the Georgetown Center for the Constitution. Randy, it is wonderful to welcome you back to We The People.

[00:01:08.9] Randy Barnett: Well, it's great to be here, Jeff. Thank you so much for scheduling this to talk about my book. I really appreciate it.

[00:01:12.6] Jeffrey Rosen: I'm so glad to have the chance to talk with you about the book. Congratulations. And you note that you are perhaps the first American law professor to have published a memoir. Tell us why you decided to write a memoir.

[00:01:25.3] Randy Barnett: Well, it was because I had a grandson. I now have four grandchildren and a fifth one on the way any week now. But it was when I started having grandchildren that I realized that someday they might want to know what their grandfather did. Since I've done a lot of things, as you now know from reading the book, I've done more things than people realize. And they might want to know what those things were, but they'd never get to find out because I might not be around to tell them, and even if I was around to tell them, they wouldn't sit still long enough to hear all these stories anyway. So I ought to write them down, and I essentially started off the project for my own benefit, not expecting to be publishing it.

[00:02:06.3] Randy Barnett: But as the project developed, certain themes emerged. It turned out it was not only my own history, but the history of the libertarian political movement since the '70s and the history of the conservative legal movement since the '80s, that I've been involved with. So it was kind of a first-person narrative of all those things. Plus, I thought it served as an opportunity to tell young people how they can have a career in advancing the ideas that they believe in, even over some obstacles that may occur in the course of that career. And so how do you live a life that can actually do these sorts of things? And at the same time, relating, as you know, all the mistakes that I made. This book does not stint on going into the things that I wish I had done differently as I was coming up as a professional.

[00:03:04.4] Jeffrey Rosen: Well, I'm so excited to have you on 'cause your career really will allow We The People listeners to understand an intellectual history of originalism and of conservatism and libertarianism, as you said. And there's so much in your early years that led to your becoming an originalist. A transformative moment was when you read Lysander Spooner on the Unconstitutionality of Slavery. Take us up to the point where you read Spooner and give us a sense of your early experiences that led you to become what you call in college a radical libertarian.

[00:03:41.2] Randy Barnett: Yeah, well, I'm probably the only person in the United States that has become an originalist because I read *The Unconstitutionality of Slavery* by Lysander Spooner. Growing up as a conservative kid and then as a libertarian kid, I liked the Constitution, and then I took constitutional law. My law professor was Larry Tribe at Harvard Law School. No, really, this was not his problem, not his fault, but it was reading the Supreme Court opinions that caused me to be completely turned off on the Constitution. Every time I got to what I thought was one of the good parts of the Constitution, I would turn the page of the casebook, the Gunther casebook, and find that the Supreme Court had gutted that clause. And all the clauses they had gutted added up to what I later on called the Lost Constitution.

[00:04:26.3] Randy Barnett: The Lost Constitution, in my book, *Restoring the Lost Constitution*, was not pining for the constitutional law pre-New Deal. It was pining for the clauses of the Constitution that the Supreme Court had read out of the Constitution. But by the time I was done with constitutional law, I was sort of done with the Constitution itself. And I was reminded at that time of an essay written by Lysander Spooner, the only essay I knew by him, which I read when I was a college student, called No Treason, The Constitution of No Authority, in which he argued that, first of all, the Constitution lacked consent in any meaningful sense and therefore was illegitimate. But secondarily, he said, even if it did have that, it had failed to live up to its promise. It had failed to prevent the kind of government growth that it was supposedly put in place to accomplish, and therefore it was a failure.

[00:05:16.4] Randy Barnett: And by the time I was finished with constitutional law, I had agreed with Spooner that it was a failure. And therefore I pursued my original course of career objective to be a criminal trial lawyer, which I had wanted to be since I was 10 years old. I became a criminal prosecutor in Chicago and enjoyed my time there immensely. And when I eventually became a law professor, and the book tells how I made that transition from criminal prosecutor to law professor, I became a contracts professor because I had really no interest in constitutional law. And contracts, I believed in the law of contracts, and in the law of contracts, writings are taken seriously. In fact, the original meaning of writings are taken seriously. And so that's how I started.

[00:06:03.8] Randy Barnett: And how I ended up getting backed into constitutional law had to do with the founding of the Federalist Society, which happened in 1981 after I had graduated from law school. There was no Federalist Society when I was in law school, but I was invited to speak at the fifth annual student symposium at Stanford on the First Amendment. And I was put on a panel about freedom of association. And in my talk, and I was very reluctant to accept this invitation, the student that invited me had to convince me to go. He said, "You're a smart guy." I said, "Brian, I don't do the constitution." He goes, "Well, you're a smart guy. You can come up with 10 minutes of something to say." So I said, "Okay." I wanted to go.

[00:06:43.8] Randy Barnett: There were all these big time people who were on the program. I wanted to be with them. So that was something I wanted to do, but I didn't know anything about the Federalist Society. I assumed they were a monolithic conservative group that would shun a libertarian like me. Turns out they were a coalition of conservatives and libertarians in which I was welcome. And my remarks were also welcome. As I say, this was a panel on freedom of association. And one of the things I noticed when I gave my talk was that the First Amendment doesn't say anything about freedom of association. It says freedom of speech, press, and assembly, but not association. So that would make it kind of an unenumerated right, protected by the First Amendment somehow.

[00:07:26.3] Randy Barnett: And the punchline to my talk about what would give unelected lifetime appointed judges the power to create, to protect this right that isn't specifically mentioned in the First Amendment, my punchline was to read the words of the Ninth Amendment, which says the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. I expected a negative response. I knew that the Ninth Amendment was in disrepute in all quarters of academia. But I nevertheless thought I could use it as my punchline. I got a very nice, warm response from the audience, which was encouraging. And then I went back to school, which I was then teaching at Chicago, Kent College of Law, and I asked myself, I don't really know anything about the Ninth Amendment.

[00:08:07.3] Randy Barnett: I just know what it says. I mean, maybe I should learn more about it. Again, realizing that it was a matter, it was sort of a disreputable amendment to be concerned about, as in, what are you gonna argue, the Ninth Amendment? Meaning it's ridiculous. The Ninth Amendment doesn't really exist. But I thought, look, I've got tenure now. I also thought that the left, who controls more or less the agenda, the intellectual agenda of the legal academy, was interested in unenumerated rights. They might actually be interested in scholarship on the Ninth Amendment. And I put in the works, a whole bunch of scholarship on the Ninth Amendment. I had an article that was forthcoming in Cornell. I had a book contract with George Mason Press to edit down scholarship that had already been published on the Ninth Amendment.

[00:08:51.9] Randy Barnett: And I had a symposium scheduled in the Chicago County Law Review on the original meaning of or the meaning of the Ninth Amendment, not the original meaning of the Ninth Amendment, but the meaning of the Ninth Amendment. So all of these things were in the works when Robert Bork was nominated to be on the Supreme Court. And in 1987, during his hearings, he was asked about the Ninth Amendment repeatedly. And in response to some questioning by Dennis DeConcini of Arizona, Bork analogized the Ninth Amendment to an inkblot on the Constitution. He said, it's like there's an inkblot on the Constitution and you can't read what's under it. Judges should not make up what's under the inkblot. And even the Wall Street Journal the next day editorialized against that.

[00:09:29.9] Randy Barnett: But within six months, all my Ninth Amendment stuff had come out and I was able to put the Bork quote in the front of every one of these articles that I wrote. That's sort of the lead quote against which these articles were written. And as a result of this, I got put on the map. All my scholarship on the Ninth Amendment was welcomed because everybody wanted it. We're all curious about the Ninth Amendment now and my stuff all came out. And that's what got me over, at least the beginning of being over to being a constitutional law professor. How I got to be an originalist, I was not an originalist at that time. I had been a student of Ronald Dworkin.

[00:10:08.7] Randy Barnett: The book talks about the independent study that I did under Ronald Dworkin, criticizing a chapter of his book, *Taking Rights Seriously*, in which I argued you should take liberty seriously. I tell that story. But I would consider myself a Dworkinian. The views that he, the moral reading approach that he identified in Law's Empire, I thought was brilliant and the most persuasive account that I knew of. And I was also very persuaded by the criticisms of originalism that had been leveled against it by Paul Brest in 1980, when he coined the term originalism itself and constructed several theories of originalism to criticize, and by Jeff Powell in his article in which he argued about the understanding of original intent, I was persuaded by those articles that originalism was a non-starter and had basically been refuted.

[00:11:00.1] Randy Barnett: And then, teaching a seminar at Boston University on constitutional theory, I was reading an anthology edited by Sandy Levinson, and in that was an article in which, in one of the footnotes, was cited this book called *The Unconstitutionality of Slavery*, published in 1945 by a guy named Lysander Spooner, the same guy who had written that No Treason essay that I had read in college. And I thought, well, first of all, I didn't know Spooner had written anything other than No Treason. I thought, what could anybody possibly have said about the unconstitutionality of slavery in 1845? And I had my library get me a copy of whatever this was. I didn't know what it was. It turned out it was a 280-page monograph that was published as part of a six-volume collected writings of Lysander Spooner, who knew the guy wrote so much.

[00:11:50.1] Randy Barnett: And in it, Spooner basically identifies an alternative theory of originalism, which he referred to as original meaning, or the original meaning of the text. And he developed this theory specifically in response to the assertion by the radical abolitionists like William Lloyd Garrison and Wendell Phillips, that the Constitution was a covenant with death and an agreement with hell because it sanctioned slavery. And then when Madison's notes went public in 1840, Wendell Phillips wrote a book called *The Constitution, a Pro-Slavery Compact*, in which he used all the excerpts from Madison's note to prove that the Garrisonians were right, that the founders had intended, the Framers had intended to protect slavery. And Spooner was writing his book as a direct response to Phillips, although he doesn't really mention Phillips in the book, his citation standards were different then.

[00:12:45.6] Randy Barnett: And he wrote this book in which he said, "We should not be concerned with Framers' Intent. That's not what binds us today. We should be bound only by the meaning of the words they used." And then he argued that the meaning of the words they used did not sanction slavery. They never used the term slavery. They only used euphemisms for that term. And we were not bound by the bad meanings of these euphemisms when an innocent meaning was available. And this turned me on to this alternative approach to originalism. And I thought, wow, I think I can do something with this. I do constitutional theory for a living. This seems very appealing to me. It might be appealing to others. And I started working on it. I just want to say, because people do get confused about this, I ultimately came to decide that under an original meaning approach, Spooner was actually wrong about whether the Constitution, whether these provisions that euphemistically refer to slavery actually refer to slavery.

[00:13:39.9] Randy Barnett: I think they do actually refer to slavery. So I disagree with his conclusion about that. I just want to get that out of the way. But the approach itself, I thought, was very practical and a fantastic response to the criticisms that had been made of Framers' Intent originalism. And the last thing I'll say before I shut up and let you ask a question 'cause I've been basically filibustering this podcast so far, is that unbeknownst to me, at Chicago Kent College of Law, working on this stuff by myself, unbeknownst, and eventually then in Boston

University, unbeknownst to me, Antonin Scalia had been pushing people to abandon Framers' Intent in favor of original meaning as well. I just didn't know about that.

[00:14:23.3] Randy Barnett: When he was a circuit court judge, he went to the Mies Justice Department and he gave talks to the lawyers there who were doing originalism of some kind, saying, "Don't talk about Framers' Intent, talk about original meaning instead." When I finally came out as an originalist in a piece in 1999 called An Originalism for Non-Originalists, it was helpful to me that by this time I had learned that Scalia was basically arguing for the same position. And it wasn't just Randy Barnett anymore. And it certainly wasn't just Lysander Spooner. It was the great Antonin Scalia also. And that actually created a market for my book, *Restoring the Lost Constitution in 2004*, in which I describe what original meaning originalism is and how it's different from original Framers Intent originalism.

[00:15:09.1] Jeffrey Rosen: So, as you say, right before he was nominated to the US Supreme Court, Justice Scalia insisted that the focus should be original public meaning, not original intent. Ed Meese, when he first proposed a jurisprudence of original intent, had said the opposite, as had Robert Bork. But Justice Scalia said that we should focus on original meaning. At the same time, Justice Scalia, as well as President Reagan when he nominated Justice Scalia, had insisted that the purpose of originalism was to do two things. First, to constrain judicial discretion, and second, to lead to judicial restraint, to have judges defer to the democratic process. And the big intellectual evolution that you trace in your book was a movement away from judicial deference toward what you call constitutional conservatism, which is checking congressional power. I want to ask, the whole original promise of originalism by President Reagan and when he nominated Justice Scalia as well as subsequent justices was judicial deference. Were they wrong about that? And how is it possible that originalism was presented as a mechanism for deference and evolved into something very different?

[00:16:27.9] Randy Barnett: Well, the conservative legal movement was always riding two horses at the same time. And Mies' speech, which is in fact called the Philosophy of Original Intent, actually is really more about public meaning than it is about original Framers' Intent. So there was a theoretical confusion, and this was partly because there was no real theory of originalism at all. Originalism is a practice that goes all the way back to the founding. And in fact, maybe I should define what originalism is for your listeners, at least what I think originalism is, because a lot of people ask me that question right up front. And it is basically summarized in one sentence, and that is the meaning of the Constitution should remain the same until it's properly changed by amendment.

[00:17:16.3] Randy Barnett: That's one sentence. The meaning of the Constitution should remain the same until it's properly changed by amendment. That was the philosophy that Mies was describing in his famous ABA speech about original Framers' Intent, because basically the

connective tissue there is that we know what the Framers' Intent is from the public meaning of what they say. That sort of reduces the tension there. But nevertheless, I think you're right, Jeff. The conservative legal movement was riding two horses at the same time. They had a team of two horses at the same time. One was, original meaning or originalism, whether it's Framers Intent or its original meaning, which is what it came to be. And the other was judicial restraint or deference to the other branches of government and also to the states.

[00:18:03.5] Randy Barnett: I mean, so this is not only about enforcing the Constitution against Congress, as you've said, it's also enforcing the Constitution, in particular, the 14th Amendment against the states as well. So it had these two horses, originalism and restraint. And when I first got into the conservative legal movement, restraint certainly had the higher ground. It was the most compelling of those things. Originalism was sort of the lesser of the two things. But that gradually started to shift over the years through a number of events, I think, that took place. I think the most significant event that helped tip, and I was always on, by the way, I was always on the originalism should trump judicial restraint view, but I was in the small minority amongst the conservative legal movement. I think what ultimately ended up tipping the balance and moving it in the other direction is the Affordable Care Act case. It was decided in 2012 when we basically won the case.

[00:19:00.4] Randy Barnett: We had five votes for our argument that an individual purchase mandate was unconstitutional, because Congress lacked power under both the Commerce Clause and the Necessary and Proper Clause to enact a purchase mandate. We got five votes for that, normally, if you get five votes, you win the case, if you've lost the case, it's 'cause you didn't present the court with a theory that could get five votes. But we got five votes for this, and how did we end up losing the case? We ended up losing the case, as I explain in the book, because of John Roberts asserting judicial restraint. And saying even though the natural reading of the statute was that it's a requirement to be enforced by a penalty, and if it was a requirement to be enforced by a penalty, he agreed it would be unconstitutional for all the reasons that I argued for for two years after I had developed the argument for why the individual insurance mandate was unconstitutional.

[00:19:49.7] Randy Barnett: But he said it was also reasonably possible to interpret the words of the text of the statute to be an option to buy health insurance or pay a non-coercive tax. And because he said it was his duty to defer to the statute, he didn't even say defer to Congress, Jeff, he said, in his opinion, to defer to the statute. Since that was his duty, he had to pick this reasonably possible meaning and elevate it over the natural reading of the statute so that he could uphold the statute. This did not go down well among political conservatives, much less constitutional conservatives. And it really did bolster the argument that I had been making at this point for about 10 or 15 years, about why it was that the first duty of the courts is to enforce the meaning of the Constitution against all constitutional actors. The Congress, the executive and the

states, and not to defer to other people, to the other branches' conception of what their powers were.

[00:20:51.8] Randy Barnett: You could defer to them on matters of policy and expertise, for sure. But when it came to defining the scope of their own power, it was the Constitution that should govern. And ultimately, when a proper case is before the court, a case in controversy is before the court. In the words of Alexander Hamilton, they had a judicial duty to follow the higher law of the Constitution and not a lesser law, which was basically a statute enacted by a legislature.

[00:21:16.7] Jeffrey Rosen: Yes, as you say, the health care case was central and it transformed the conservative movement from one committed to restraint to engagement. I was surprised to find that I turned up as a footnote, a zealot in this book. You note the piece that I had written calling on John Roberts to embrace judicial restraint in the health care case, which George Will later said.

[00:21:39.3] Randy Barnett: He listened to you. You were the Roberts whisperer in those days.

[00:21:43.0] Jeffrey Rosen: Hardly, it was presented as a kind of conspiracy to change his mind. I didn't know that the court was voting and was just recalling that in his confirmation hearings, he'd embraced John Marshall as his model and talked about deference to congressional power. But George Will wrote about that case and then he had both of us over to dinner, so we all made up. But what I want to stress about that case is that John Roberts and Justice Scalia represented a part of the conservative judicial movement that said that the court should defer to Congress. It should be restrained, its goal was to enforce the law, not make it. And after Sebelius, the conservative movement turned to a position of Justice Thomas, which was much more willing to enforce limits on congressional power.

[00:22:35.3] Randy Barnett: At this point, Jeff, it's worth it to introduce a distinction made by your colleague, Tom Colby. And that is the distinction between judicial restraint and restraint and constraint. Because those of us who are originalists and believed in the meaning of the Constitution should take priority, do believe in constraint. They think judges, legislators, executive branch, and state should all be constrained by the meaning of the Constitution as opposed to doing whatever they want. But judicial restraint or what used to be called judicial self-restraint is something where it's basically arguing that the judicial power is sort of discretionary. And discretion is the better part of valor and one should just defer to the other branches. That's what we are opposing. But I also wanna say that even though I do think that in some respects, constraint now has the upper hand over restraint, restraint has not gone away. And we've seen this in many contexts.

[00:23:30.0] Randy Barnett: In particular during COVID and various other contexts. We see restraint coming back again and again. So even though I do think constraint has the upper hand, original meaning has the upper hand, the other horse of the conservative legal movement still exists, and it will emerge in all kinds of contexts to assert, to determine outcomes of cases where the Constitution says one thing and the court says, "Yeah, but we must defer." That still does happen.

[00:24:00.5] Jeffrey Rosen: As a matter of intellectual history, is it right to say that Justice Scalia and Justice Thomas have very different views about restraint, and that Scalia was a Hamiltonian in his view of federal power and Justice Thomas more of a Jeffersonian?

[00:24:18.0] Randy Barnett: That sounds about right. I hadn't really thought of it in those terms, but yeah, I would think that's about right. I think Justice Scalia moved somewhat away from the restraint and towards the constraint principle in his later years. I think when we decided the Rage case, which is the case that I started the book by talking about my involvement in bringing the lawsuit that became Gonzales versus Rage. And I argued that case in the Supreme Court, in fact, it's the only argument that I've ever made in the Supreme Court and we lost that case six to three. So Justice Scalia was the sixth vote, he was not the pivotal fifth vote, we lost Justice Kennedy as well. We got, just for the record, Justices Rehnquist, O'Connor, and Thomas to side with our view of the Commerce Clause. But Justice Scalia, the reason he gave in his concurring opinion in Rage was entirely based on judicial deference. In the United States versus Lopez, the Gun-Free School Zone Act case.

[00:25:11.0] Randy Barnett: Had within it sort of a little bit of an exception, which said that it's not as though the Gun-Free School Zone Act was an essential part of a larger regulation of interstate commerce, there were different formulations of that. So that was in the Lopez case. And what Justice Scalia said in his concurring opinion is that the prohibition on marijuana was part of a larger regulatory scheme called the Control Substances Act. And then the question is whether it was essential to that scheme or not. Okay, so I had actually already made the argument that essential to a broader regulatory scheme was, in fact, a principle that needed to be dealt with. But I argued that we were entitled to a hearing on whether controlling locally grown marijuana that had been authorized by state law really was essential to a broader regulatory scheme. That was our position in the case.

[00:26:03.7] Randy Barnett: And Justice Scalia came out the other way precisely because he said he needed to defer to Congress, that a Congress could reasonably have concluded that reaching local marijuana was essential to a broader regulatory scheme. And that was good enough for him. And that actually tipped the balance. That's the difference between him voting for, at least in terms of what he wrote, that's the difference between us winning and losing his vote, was his assertion of judicial restraint. So I do think as in 2004, the cases decided in 2005,

he was still asserting judicial restraint. I think in his later years, particularly by the time we get to NFIB vs Sebelius and beyond, he was coming around a little more to the constraint position over the restraint position. But I don't think he ever completely abandoned the restraint position.

[00:26:49.5] Jeffrey Rosen: I'm glad to hear that you think that the Hamilton-Jefferson division is right. And I wonder, I'm getting that from, Jefferson had two rules for interpretation of the Constitution. This is in Lysander Spooner's book. The first is essentially federalism, that the leading object of the Constitution was to leave to the states all authorities which were respected to their own citizens and to construe the Constitution as narrowly when it comes to intruding on states rights. And the second was original intent versus original meaning. Do you think that this idea of strictly construing federal power is the difference between Jeffersonian, Hamiltonian approach to the Constitution and is that what distinguished Scalia from Thomas?

[00:27:41.0] Randy Barnett: I honestly don't know the answer, I'd have to think about that, Jeff. These historical figures are complicated, Hamilton's complicated and so is Jefferson. And for that matter, so are Scalia and Thomas. So I would have to think of all four players and figure out where they overlap and where they diverge. The original conception of strict construction, I think you're right to say, it can be found in St. George Tucker's writings is the idea of strict construction of federal power, strict construction of legislative power, as opposed to what St. George Tucker favored as liberal construction of constitutional rights or liberties. Later on during Nixon and other later eras, strict construction became kind of a freestanding concept rather than strict construction of legislative powers. It became just strict construction.

[00:28:34.0] Randy Barnett: But whether that actually describes, Justice Scalia rejected the idea of strict construction as you know, he said, "I believe in accurate construction as opposed to overly strict construction. Why would we wanna be strict as opposed to accurate?" I don't know that Justice Thomas disagrees with that. So I think that trying to impose the framework of those two complicated gentlemen, Hamilton and Jefferson, on the thinking of these other complicated guys is something I'd have to give a lot more thought to.

[00:29:03.0] Jeffrey Rosen: Say something about the view of the founders toward the federal courts. Jefferson is notoriously suspicious of federal court power and thinks that both the president in Congress and the state court should be able to ignore Supreme Court decisions. Hamilton talks about the judiciary as the least dangerous branch, Madison talks about constitutional meaning changing in light of practice. Did any of the founders combine strict constructionism with judicial supremacy? It seems that this is the first time in history that we're calling on federal courts to strictly enforce limits on congressional power.

[00:29:40.7] Randy Barnett: Well, that, I don't equate whatever you just said with judicial supremacy. I think judicial supremacy is the idea that the courts have the last word and the final

word on what the constitution means, and then everybody else has to fall in line to whatever the court says. I don't think that's true, I'm a departmentalist when it comes to other duties that every person who takes an oath to the constitution owes to the constitution, not to the Supreme Court. They don't take an oath to the Supreme Court, they take an oath to the Constitution. I do think, however, when a case or controversy comes before the court, a proper case comes before the court, as John Marshall explained in Marbury vs Madison, which, as you know, did not invent the concept of judicial review. But simply was the first instance in which they found a statute was unconstitutional using what we today call judicial review.

[00:30:27.7] Randy Barnett: Marshall uses Hamilton's argument for why this is not a matter of discretion on the part of the judiciary, it's a matter of duty. The term judicial review is a 20th century term, it isn't to be found in the founding, instead, they had the concept of judicial duty that a judge had a duty to follow the higher law in deciding a case of controversy as opposed to a lesser law, which was a statute. Higher law is the constitution, and it was obligatory on judges to do that. So I don't equate that with judicial supremacy. What that just means is that Congress first gets to take a crack at whether they think something is within its powers and if they think it's not within its powers, they can refuse to pass the law because it's unconstitutional. I'm smiling here in this audio recording because it seems kind of amazing to think that Congress would ever refuse to pass a law today because it was outside their powers.

[00:31:22.0] Randy Barnett: That used to be the case. By the way, when Congress was scrupulously assessing whether something was within their powers, there was more to defer to them than there is today when Congress basically says, "We can do what we want 'cause the courts will uphold us." That's not an independent judgment of their own scope of their own powers. But they get to make the first crack at it, the president and the courts have no say so if the Congress says something's unconstitutional. The president gets a say so if Congress passes the law, the president can veto it on the grounds that it's unconstitutional. And the courts only get to say in it if the other two branches decide something's constitutional. If either branch decides it's unconstitutional, the courts never get to see it, they're just the third in time. Third in time doesn't make them prime and first and right, they're just the last branch of government that gets to sign off. That has to sign off on the constitutionality of an act before it can be imposed on we the people.

[00:32:17.8] Jeffrey Rosen: Descriptively, I'm trying to understand the remarkable transformation. And that's why I'm so glad to have this conversation, between an entire conservative judicial movement dedicated to a limited role for the federal courts, one that generally defers to democratic outcomes, to one that takes the opposite position. And I wonder how exactly that happened. You note that it wasn't until the appointment of Justices Gorsuch, Kavanaugh, and Barrett that justices identified themselves as originalists during their

confirmation hearings. And how did it happen that all of those Justices embraced a version of judicial engagement that the earlier generation, such as Justices Scalia and Bork, had rejected?

[00:33:05.0] Randy Barnett: Well, first of all, I don't think embracing originalism is the same thing as embracing judicial engagement, which is where we keep going. For example, I think Justice Barrett, a former clerk to Justice Scalia, is very Scalia-esque in her belief in deference. And in fact, she wrote an article that is in a symposium issue that was of the University of Illinois Law Forum, which was dedicated to my book, *Our Republican Constitution*. In which she criticizes my approach as being overly ambitious and something beyond the appropriate scope of the judiciary. And then she wrote that article and she got some heat for that article during her confirmation hearings, 'cause she also happened to say that she disagreed with John Robert's interpretation of the Commerce Clause in NFIB. So the Democrats gave her heck for that, even though her ultimate point was to argue against the kind of judicial engagement I was arguing for in that book.

[00:34:00.0] Randy Barnett: So I totally disagree with the equation of constitutional originalism with judicial engagement, both of which, as you know, I'm for. But what brought about the acceptance of originalism to the point where Justice Gorsuch could identify as an originalist, as did Justices Kavanaugh and Barrett, I think were two things. One was the development of an intellectual case for originalism amongst law, legal academics, that has withstood a lot of challenges. It is now the most robust theory of interpretation non-offer, and that took 25 years of hard academic work and debate amongst originalists to make that argument as tight and strong as it has been so that it has to become persuasive. So in some sense, I credit legal academics for this. But the other part is a political movement that was responsible for a culture in which a Republican president named Donald Trump would look to his White House counsel who would then select people who were expressly originalists to be his nominees, both to the circuit courts as well as to the Supreme Court. That was a political movement that made that possible.

[00:35:09.2] Randy Barnett: And the federal society obviously is involved in that as a network that could inform a political administration like the Trump administration, who picked these judges precisely because they identified as originalists. So if you combine the intellectual development with the political development, I think that's the answer to your question of how we came to that, how we came to three justices identifying as originalists, however deferential they may choose to be. And again, I just don't think that I have completely won that fight within the conservative legal movement, even though I do think that originalism as a theory of interpretation is now very, very dominant.

[00:35:51.0] Jeffrey Rosen: I hear you saying that there's a difference between Justice Barrett and, for example, Justice Gorsuch when it comes to deference, yet both are originalists and both

were the result of this intellectual and political movement of 25 years transforming legal culture in the law schools and in a way that would allow President Trump to appoint them to the Supreme Court. You were a central part of this transformation, tell us about the seminal intellectual shifts that were responsible for it. You credit your discussions with Larry Solum and some of your books into developing the academic case for originalism. What were the turning points?

[00:36:35.3] Randy Barnett: Well, the biggest one I've already talked about is the movement from Framers' Intent to public meaning originalists. That was a huge change. But I wanna stress, as I mentioned earlier, when Paul Brest wrote his famous critique of originalism in 1980 in which the subject of his criticisms were Robert Bork and Raul Berger, there was no theory of originalism in 1980. There wasn't even the word originalism, Brest coined the term originalism in his article to describe what Bork and Berger were, originalists. Brest had to construct several theories of originalism, theories of originalism in his article in order to refute them 'cause there was no prior theory of originalism. So you can date the beginning of the intellectual movement, the development of the theory of originalism from 1980. 'Cause it was after that that people who were on the other side started developing the theory of originalism.

[00:37:28.7] Randy Barnett: And the move from Framers' Intent to public meaning originalism was crucial. And the other thing that has happened, I think, on the right is that there has been a robust debate among originalists over the exact contours of what originalism should be. This is sometimes lampooned by non-originalists saying, "Oh, well, there's 37 varieties of originalism. Isn't that funny?" Well, in fact, first of all, there aren't that many varieties of originalism. Secondly, originalism is not a single theory, it's a family of theories that has certain features in common. We could talk about that. But more fundamentally than that, these originalists were arguing with each other. And as a result of the social intercourse that was taking place amongst them for all of those really decades, now. The theory of originalism became tighter and tighter and stronger and stronger.

[00:38:21.9] Randy Barnett: You don't really see comparable intellectual activity happening amongst non-originalists. I'm not saying there aren't good non-originalists out there who make arguments. You have the moral readings of people like Jim Fleming, and you've got Mitch Berman, and you've got some other people. You've got, you know, I could identify, you have Dick Fallon. You've got non-originalists out there, but it's not like they're arguing with each other to tighten up what they really mean by non-originalism. You have David Strauss, common law and constitutional, you got a few contenders out there, but the left or the non-originalists are not really working hard on figuring out what the alternative to originalism really is. But originalists were doing that work, and as a result, the theory became more and more robust.

[00:39:04.8] Randy Barnett: It's not a perfect theory, no theory is a perfect theory. And I'm sure it needs work, but this is one of the things that really set originalism apart from its rivals. And that is the degree to which there was internal debate about it that has created, and I myself have changed my positions since 2004 when I published Restoring the Lost Constitution. I do not hold to the same view of constitutional construction today that I did in 2004, in part because of the interaction I've had with my fellow originalists.

[00:39:38.2] Jeffrey Rosen: One of the biggest debates among originalists is the role of history and tradition. You and Larry Solum have just published a piece originalism after Dobbs, Bruen and Kennedy, the role of history and tradition. Sum up the debate and explain to me, I had thought that history and tradition were consulted when you were identifying unenumerated rights under the due process clause or elsewhere. And then when it came to enumerated textual rights, you looked at the original public meaning. But some on the court, including Justice Thomas, are now saying that history and tradition should gloss enumerated as well as unenumerated rights. Describe to me the contours of the debate.

[00:40:18.1] Randy Barnett: Well, as you know, from the piece with Larry, this is really complicated stuff. So, in the context of a podcast, I don't know how deep I can get into exactly what we're talking about here.

[00:40:33.2] Jeffrey Rosen: Give the broad overview, 'cause I want our listeners just to understand, not the technicalities, but the range of positions 'cause a lot hangs on it, including whether or not to recognize unenumerated natural rights.

[00:40:43.5] Randy Barnett: Right. Well, when I was a prosecutor and I was in court and somebody made an objection on the grounds of relevance, somebody would object or I would object to a particular thing being relevant or irrelevant. What the, the only way that the judge could rule on the motion is to ask or to figure out, Counsel, what are you trying to prove? I can only decide if something, if evidence is relevant or irrelevant, depending on what you're trying to prove. Tell me what you're trying to prove, and I can rule on relevance. And that same thing is true with the use of history and tradition in legal reasoning and constitutional reasoning. It depends on what you're trying to prove. Clearly, if you're trying to figure out the original meaning of the right of freedom of speech, or the original meaning of the right to keep and bear arms, you're going to consult history in order to figure out what the meaning was in 1791 of those provisions. You're gonna look at the history of the reconstruction to figure out what the 14th Amendment meant in 1868. So history is clearly relevant to prove original meaning. The question really is, does it also provide an alternative to original meaning?

[00:41:50.0] Randy Barnett: And what you're witnessing now, Jeff, and I think you know this is a pushback in some respects from the right who are arguing that original meaning, originalism

is too tepid, it's not hard-edged enough, it's not political enough, it's too neutral. And what we really need is to have a more aggressive judiciary who are going to be enforcing our values. Our values, meaning conservative values. We're getting in sort of an undercurrent of resistance on the right to originalism. And part of what these folks are putting their chips on is a history and tradition approach. Which I think they intend it to lead to more deference in some cases and more aggressive Supreme Court in other cases. And it would sort of be untethered from original meaning if they were to have their way. This is the Adrian Vermeule position, as he identified it in his Atlantic essay on atlantic.com as opposed to his book. So, that's the reason why Larry and I decided we had to write this article because we had to disentangle when history and tradition was relevant to identifying even the contours of a constitutional right, which I think is relevant, or whether it is in fact a freestanding standard that is over and above or somehow separate from the original meaning of the text.

[00:43:15.8] Jeffrey Rosen: It's very helpful to identify the desire by some conservatives to use the courts openly to reach conservative results. And of course, the liberal dissenters on the court are saying that that's exactly what the conservative majority is doing now, and it's shifting among history and tradition and original meaning, in order to reach conservative results to the degree that the movement was originally pitched as constraining judicial discretion. What do you say to the critics who say that it has proved no more able to constrain discretion than its non-originalist alternatives?

[00:43:51.5] Randy Barnett: Well, I'm really glad you asked that question, because it gives me the opportunity to stress that originalism is a theory. It's a theory of a methodology. So it's a methodology and methodologies don't enforce themselves. There is no superpower that basically makes everybody do originalism correctly, but what it does provide, and the reason why it's valuable is it provides a means of critiquing people who are either purporting to do originalism but aren't or aren't even purporting to do originalism at all. That's a different critique. One is you should be doing originalism and you're not, so you're doing something wrong and you guys over here claim to be doing originalism, but you're doing it wrong, and here's how it should be done. And in fact, the original meaning of the text of the Constitution should not be left or right. It is what it is. The Constitution is left or right depending on what it says, but it's not, it really shouldn't be up to the judges to make it left or right. So originalism doesn't enforce itself. It doesn't apply itself. It provides a means by which, or a theory by which, or a criteria by which you can critique what the judges are doing. And so it's fair for dissenters to say, "Hey, look, you guys are originalist over here, but over there you seem not to be."

[00:45:06.5] Randy Barnett: That's a fair critique of somebody who purports to be an originalist. Now, you know that originalists is precisely because originalists justices also have theories of stare decisis that qualify their commitment to originalism. And they have other principles that they adhere to, including deference, by the way. They still have deference that

they will invoke sometimes. The more of these outs you have, the more ways in which you can not be originalist if you don't wanna be the less constraining originalism will be. And that was the critique I made of Justice Scalia after the Raich case in an article I had in the University of Cincinnati Law Review called Scalia's Infidelity, in which I argued that Justice Scalia gave himself, I can't remember, three or four different outs for why he didn't have to follow original meaning. Well, if you've got three or four different outs you can appeal to depending on the case, then you're not gonna be that constrained by the original meaning. And that was my critique of him then. And you can still make that critique of conservative judges or justices today. On the other hand, originalism gives you a basis for critique. And that's one, that's the only thing a theory of interpretation can do really.

[00:46:17.9] Jeffrey Rosen: Well, I guess the question is, what's the response to the critique? We have a moment in American constitutional history where critics of the court perceive it as political and say that the methodology is not constraining and it's ending up leading to conservative results in all the major cases. And to the degree that originalism did promise to constrain, has it failed?

[00:46:42.3] Randy Barnett: It has not, it continues to constrain up to a point. But then again, none of the people who are on the court are pure originalists, as I've said already. And therefore, their originalism when it is operating, will operate well. And when they choose not to operate under it, then they're subject to that criticism. But I just wanna say that the criticism of the majority are the conservatives for being political, certainly could apply to the voting block that is progressive. I mean, why aren't they being political? Their votes are also seemingly predicted on the basis of political outcome as well. So it is sort of the pot calling the kettle black, to make these accusations. And in fact, I think it's very dangerous rhetoric that many people have decided to employ. And that should bother you a great deal, Jeff, because there is a deliberate effort in this country, as you well know, to undermine the legitimacy of the Supreme Court. And the way one does that is by arguing, "Well, they're just political actors, they're just reaching political results." Their voting record doesn't really support that. As you know, there are many, many unanimous judgments of the court. There are many 6-3 or 5-4 divides on the court that are not aligned by politics.

[00:47:56.8] Randy Barnett: Now, there are a few cases which are obviously not that way. There are a few cases which do come out that way seemingly politically. But I would say that this, whatever the politics are going on in those cases could equally be applied to the three descending justices as to the six justices in the majority. But I think it's a very dangerous thing in this country to undermine the third branch of government to such an extent. The legitimacy of the third branch of government to the extent that this is a concerted effort on the part of a certain group of intellectuals and political actors to do this, and it's just very, very dangerous to what some people refer to as our democracy.

[00:48:33.8] Jeffrey Rosen: How far should the originalist revolution proceed? You talk about the court reaching the wrong decision, of course, in the Raich case, but how much of the post New Deal of regulatory estate is inconsistent with original understanding and should be struck down?

[00:48:52.6] Randy Barnett: This is a great question, 'cause it has to do with transition. How do we go from a system which has been non-originalist in many respects for a long time, from before the New Deal, frankly, but the New Deal obviously amped it up to a system that is more compatible or more consistent with the actual text of the Constitution. And in the case that was the reverse Chevron, Chief Justice Roberts had a very interesting take on this, which if adopted widely would really, would eliminate the threat of an originalist Big Bang, so to speak. That would destroy everything. And that is, he said, even as we go forward by repealing Chevron deference, this does not repeal all the cases that were decided previously utilizing Chevron deference, including Chevron itself and the scope of the powers of the EPA, he called that statutory stare decisis.

[00:49:47.2] Randy Barnett: And if you were to actually hue to that view, it would really mitigate any sort of big bang or major disruption to existing institutions. Essentially what this would mean is, that anything that's been upheld up till now is sort of in some sense, grandfathered in. You're not gonna undo everything that's already been done, but going forward, you're not gonna just draw a straight line from things that have been done before and extrapolate into the future and say, "Well, they did all these things before, therefore they can keep doing more and more things in the future." That extrapolation into the future is what's cut short by that approach to originalism. And I think that would provide what you might call a gradual or soft landing over time as the Constitution, as the practice of the federal government is over time brought more and more in alignment with the original meaning of the text.

[00:50:39.5] Jeffrey Rosen: You end the book with some fascinating thoughts about future directions for the court, including reconsidering natural rights and the public private distinction when it comes to social media. Tell us about some of those areas where you hope that the court will apply original understanding to unforeseen circumstances.

[00:51:06.3] Randy Barnett: Well, the last chapter of the book is called What's Next, and it's what's next for the three things that have been very much a part of my life. What's next for libertarianism? And we haven't talked much about my role in the development of political libertarianism, which is understandable given the subject of this podcast, but that was a major theme of the book. It's also a major theme of what's next, what's next for constitutional originalism, part of which I've already mentioned, which is how do you transition from a non-originalist government to a more originalist respecting government over time without creating

huge disruption? That's a big challenge, which I even talk about in that chapter. For example, I cite Rappaport and McGinnis' proposal that there should be prospective overruling that you overrule for the future. That's very much what Justice Roberts seemed to be calling for in the case that reversed Chevron. And then the final part of the book is what's next for American Jewry. Because as an American, as a Jewish person, I was deeply affected by what happened on October 7th. And I do think that the status or the situation facing American Jews today is not the way it was before October 7th. And this is, and so all of these three movements need to be improved or updated or whatever, adjust to changing circumstances.

[00:52:27.1] Randy Barnett: So part of what I think originalism needs to do is come to grips with stare decisis, come to grips with what I just talked about in terms of whether you can prospectively overrule or how do you implement originalism in a way that is not overly disruptive. The public-private distinction is a distinction that I think that Libertarians need to come to grips with. It was called into question by the Republicans who wrote the Civil Rights Act of 1875, who argued that even though they were non-governmental, places of public accommodation still were subject to a non-discrimination norm, a non-arbitrary discrimination norm. That law, the Civil Rights Act of 1875 was invalidated, as you know, in the civil rights cases by the Supreme Court on the grounds that it went beyond state action to reach private conduct or what is really non-governmental conduct. I think that Libertarians need to come to grips with that, and not equate public-private with government, non-government, since that actually is a part of our law today, and should be, and I think it should properly be a part of our law. And then of course that's gonna have some ancillary bleed over effects to constitutional cases to be sure.

[00:53:40.8] Randy Barnett: But I think first of all, we have to get the theory right. Again, we all understand that privately owned or non-governmental businesses who operate places of public accommodation or are common carriers are subject to non-discrimination norms. And then it's a secondary question of whether social media companies are or, are not close enough, or resemble closely enough common carriers. For example, I think people would assume that cell phone companies are. 'cause cell phone companies, I think, would be deemed to be common carriers. Cell phone companies can't censor what we say using algorithms to allow us to speak or not to speak on our cell phones, our social media companies are like that, or they're more like newspapers, I think actually somewhat in between, and that's the reason why those end up being hard cases.

[00:54:30.0] Jeffrey Rosen: Randy Barnett, there are few law professors whose work has transformed our legal culture and led to a rethinking of constitutional law, and you are one of them. For your new memoir, A Life for Liberty, the Makings of an American Originalist. Congratulations, and thank you so much for discussing it on We the People.

[00:54:52.9] Randy Barnett: Well, I really appreciate you having me, Jeff. I also wanna mention to your audience that there are both black and white and color pictures in this book. So if that's something that you like in your books, you're gonna find that in this memoir, including a picture of me and Ronald Dworkin and Richard Epstein all when we were young and wearing very large glasses.

[00:55:10.4] Jeffrey Rosen: That's one of the many reasons to read A Life for Liberty. Randy Barnett, thank you so much. Today's episode was produced by Lana Ulrich, Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination, elucidation, and debate. Sign up for the newsletter at constitutioncenter.org/connect. And always remember in your dreams and waking moments that the Constitution Center's a private non-profit. We rely on the generosity, the passion, the devotion to lifelong learning of people like you who are inspired by our non-partisan mission. Support it by becoming a member at constitutioncenter.org/membership. Or give a donation of any amount to support our work, including the podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.