Originalism: A Matter of Interpretation

Thursday, September 16, 2022

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[00:00:00] Jeffrey Rosen: Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to *We The People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. Saturday, September 17th is Constitution Day. Happy Constitution Day, dear *We The People* listeners.

[00:00:27] Jeffrey Rosen: This is the day that members of the Constitutional Convention signed the Constitution here in Philadelphia, in 1787. I'm here at the National Constitution Center at 525 Arch Street in Philadelphia. 525 is the day the Constitutional Convention started. September 17th is when it ended, and as part of our Constitution Day Week, we hosted a great panel called Originalism: A Matter of Interpretation, and I'm thrilled to share that conversation with you, dear We the People listeners, today.

[00:01:00] Jeffrey Rosen: Our panelists were Emily Bazelon of the New York Times Magazine, Rich Lowry of the National Review, Steven Mazie of The Economist, and Ilan Wurman of Arizona State University. Enjoy the conversation.

[00:01:15] Jeffrey Rosen: Ladies and gentlemen, welcome to the National Constitution Center, and Happy Constitution Day. I'm Jeffrey Rosen, president of this wonderful institution. What a joy to welcome you back to our first in-person convening for a long time, and let's begin by inspiring ourselves with the National Constitution Center's mission statement. You can still do it by heart. It's been about two years since we've all been together in Kirby. Here we go.

[00:01:46] Jeffrey Rosen: National Constitution Center is the only institution in America, chartered by Congress-

[00:01:52] Jeffrey Rosen: ... to increase awareness and understanding of the Constitution among the American people on a nonpartisan basis.

[00:01:59] Jeffrey Rosen: Beautiful, you can still do it as well as always, and it's so great to be back together, friends. It's been a wonderful Constitution Day. We started with a inspiring nationalization ceremony. We had a superb panel with Third Circuit judges on the methodologies

of constitutional interpretation for middle school students who were sitting there and heard the methodologies in such a great way. And now, we're just honored to have four of America's great legal thinkers, journalists and scholars, debating one of the central questions of our time at the Supreme Court, "What is originalism, and should judges adopt it?". And I'm going to introduce them and we're gonna jump right in, because you could not have four people better-equipped to debate this crucially important question.

[00:02:47] Jeffrey Rosen: Rich Lowry is the editor of National Review, and I'm so honored and delighted that, it was Rich's idea to have this great panel. He said, "This is a crucial question. The Supreme Court is debating it. Why don't we cohost a panel about it?" So, it's been superb to work with the National Review Institute, including President Lindsay Craig and Miranda Melvin, and the rest of their great team. Thanks to them for their collaboration in making this possible, and so glad that Rich Lowry is here. He's editor-in-chief of National Review, and he writes for Politico. He's an astute commentator and has written many books, including, most recently, The Case for Nationalism: How It Made Us Powerful, United, and Free.

[00:03:35] Jeffrey Rosen: It is an honor to welcome Emily Bazelon, staff writer at the New York Times Magazine and lecturer in law and Truman Capote Fellow at Yale Law School. She's cohost of Slate's Great Podcast, Political Gabfest, and the author of two national bestsellers, including her most recent book, Charged: The Movement to Transform American Prosecution and End Mass Incarceration.

[00:03:59] Jeffrey Rosen: Ilan Wurman is associate professor at the Sandra Day O'Connor College of Law at Arizona State. He is the author of two books highly relevant to today's debate, A Debt Against the Living: An Introduction to Originalism, and The Second Founding: An Introduction to the Fourteenth Amendment. He is the team leader of Team Conservative, in our Constitution Drafting Project.

[00:04:23] Jeffrey Rosen: And Ilan will return to the NCC

[00:04:24] Jeffrey Rosen: ... on Monday, when the three team leaders will sit on this stage and propose five amendments to the Constitution.

[00:04:32] Jeffrey Rosen: Friends, it just blew us all away that these three teams with Ilan's leadership and those of his colleagues were able to actually agree on five constitutional amendments, and we will present them on Monday. So please join us on Monday at noon to hear that amazing program.

[00:04:47] Jeffrey Rosen: And Steven Mazie is Supreme Court correspondent for The Economist and Professor of Political Studies at Bard high school, early college in Manhattan. He's the author of American Justice 2015: The Dramatic Tenth Term of the Roberts Court and it is such a joy to welcome all four of these great scholars and thinkers to the NCC. Rich, you convened us …

[00:05:12] Jeffrey Rosen: ... so I'll start with you. What is originalism and should judges adopt it?

[00:05:17] Rich Lowry: Sure. So first of all, let me say, in debates and discussions like this, one thing you always want is to kind of do away with euphemism. You don't, you know... the debate over terms is a big part of it. You want everyone not to give themselves the better part of the argument just based on word choice. This will never happen now. And it's just human nature and I'll give you a little example from my lived life at home. So my little daughter not too long ago came across the word stupid. She learned the word stupid. And of course, was quite delighted with herself. She was saying it all the time, which is sort of annoying, you know, stupid, stupid, stupid. So, I took her aside and said, "You know what, why don't you instead say, ill considered." Right.

[00:05:54] Rich Lowry: So, I'm the editor of National Review, I had to try, but this didn't work, stupid, stupid, stupid. "No, honey, say ill considerate." Stupid, stupid, stupid. So, went on like this. And just around the same time, she was getting potty trained. And my wife in the excess of caution would have a little pad in her pants just in case there's an accident. So one morning she got up, she went to the potty, marvelous job, little too zealous, she throws in the pad, flushes the whole thing. It all comes up. I mean, it's a sewage disaster in there. I have to go clean it out. I'm mopping, and wiping, and the whole thing. And my wife, when everything happens like that, it's presumed to be my fault, maybe it is. But she's, "Rich, you gotta talk to her. What did she do? You gotta talk to her." So I'm cleaning up cleaning, but finally come out. I get her on my knee and we're gonna have this great, you know, father-daughter moment.

[00:06:36] Rich Lowry: And, I'm like "Honey, what did you do?" She said, "Daddy, I did something ill considered."

[00:06:41] Group: [laughing]

[00:06:44] Rich Lowry: I should also say, you know, as Jeff mentioned, I did call, you know, a month or so ago, whatever it was, how about a discussion of originalism. And he's like, "Well, why don't you... Do you wanna do it Rich?" I was like, "It's not really my area. But if you have another journalists, I'd be happy to do it." What I meant by that, I write a 650 word column about the Supreme Court or some legal matter like once every six months. And I did not mean other journalists to either cover the Supreme Court or a large part of the work has to do with the Supreme Court. So this is why it's very important-

[00:07:13] Rich Lowry: ... to pay attention to the text and the particular words-

[00:07:16] Group: [laughs]

[00:07:16] Rich Lowry: ... of things that are written down or said to you. But it's a delight to be here, wonderful day, wonderful institution and Jeff, thanks for all that you do. So I would say, the Constitution is the original deal. It is the basis of our Republic, and the founders wrote it

down for a reason because it was the deal. We weren't gonna have a British system. We're gonna have a system based on written law that was meant to be adhered to. And I can read you all sorts of stirring eloquent quotes from Madison, from Hamilton, from Adams, from Washington and the farewell letter, you know, he says, "You can come up with another constitution, you can come up with another system. But until you do, loyalty to this one is a matter of sacred obligation."

[00:08:05] Rich Lowry: So it's the deal. It's what we're supposed to adhere to. Unless you want to have a revolution, which, you know, you can do, there's a right to revolution, if there's some great injustice, there is not and some people argue, "Well, why are we beholden to this, quote on quote, dead hand of the Constitution?" Well, one, every generation is beholden to the choices made by prior generations. That's just reality. And the fact is, if we, you know, overthrew the Constitution and had a revolution, will the next generation be better off? Would it have a choice of having a stable constitution again? Well, maybe not. It would have been determined by the choice of the prior institution.

[00:08:46] Rich Lowry: And just getting the quiz to you, a stable constitution, even if it's not a very good one, and I would argue ours is, is a wonderful benefit. There's a scholar at the American Enterprise Institute named Walter Burns, who told the story years ago, how he went to a conference on written constitutions in South America, and he was the keynote speaker. And someone from Brazil got up and said, "Wait a minute, why is the American giving the keynote address on constitutions? Brazil's had 10 constitutions and they've just had one."

[00:09:14] Group: [laughing]

[00:09:14] Rich Lowry: But that's the point. Right? That's the point. Now there are arguments about how you go about originalism. There are arguments about whether originalist judges are actually true to their creed. This is inherent. Again, the human nature, you can have disagreements. But just because you have disagreements does not mean there's not an answer, right? Or, correct answer. Or, you shouldn't try to discern a correct answer. If I say, you know, January 6, was a wonderful day. It was a peaceful protest, where everyone was sort of waved in by Capitol Police. Not that anyone would ever say that. But if I actually said that, then we said, "No. it was a violent day and they beat up police officers and broke into the Capitol." You wouldn't say "Oh, there's an argument. No one's right." Right? You use your reason and your facts to come down the best that you could. And I'll just leave you with the prudential argument.

[00:10:08] Rich Lowry: If you're a centrist or on the left side of the spectrum, there might be times throughout the course of history where you say, "I want them to do their personal preferences. I want them to look at the circumstances at a time, not be overly adhered to the text. Just come up with what they think is the best answer." You do not want that to happen right now. You do not want that to happen right now. Because I guarantee you, probably for most public policy matters, you have five votes for what I want personally to happen on any given policy. And they could just impose it, "I think that was wrong. That's not the way the system is supposed to work." So even if it's imperfect originalism, you want those justices adhering to something beyond just their personal views. And again, you may argue they're not being 100% pure

originalist, but you want them to adhere to something, what they're supposed to adhere to, and the best thing to adhere to is the original public meaning of the Constitution.

[00:11:07] Jeffrey Rosen: Thank you so much for that. Emily Bazelon, what is originalism and should judges follow it?

[00:11:13] Emily Bazelon: So luckily, I don't think we have only a choice between originalism and revolution. And one of the reasons I don't think that is that the framers of the Constitution didn't say anything about how they thought the Constitution should be interpreted. And originalism dates from the 1980s. It is a theory that a law professor at Yale, Robert Bork came up with, largely in response to *Roe v. Wade* as a way of limiting the power of the Court to as, Rich says, make things up. But this is absolutely not the only methodological move the Court can make and in fact, for many years, the Court didn't define or really think in these terms at all.

[00:12:00] Emily Bazelon: So how is that possible? Well, one reason it's possible is that there are at least two different levels of generality in which the Constitution is written, right? So nobody really argues about really clear phrases like how many senators we elect, though maybe they screwed that up, but we abide by that. It's very clear. When you start talking about phrases like "free speech," or you know, once you have "reconstruction" and the 14th Amendment "equal protection," then you're talking about phrases that are by their nature, capacious. They lend themselves to different interpretations, perhaps at different moments of time. And the Court pretty naturally read different meanings of those kinds of words at different eras, in a way that allowed the Constitution to maintain stability and to provide all the benefits that Rich is talking about. But they didn't cement it in a meaning, in a moment of time, that is utterly exclusive, right?

[00:12:57] Emily Bazelon: So if the Constitution, if the words in it mean only what they meant at the time that they were written, then the Constitution's meaning can only reflect the will of the very small number of people who are able to participate at that point in our democracy, right? That leaves out me, for example, and some other people in this room and it leaves out all the ways in which society has changed since then, in a way that I think, can create some really poor outcomes. And I'll get a chance if necessary to go into some of those later, and I'm sure Steven will have thoughts as well.

[00:13:34] Emily Bazelon: The second problem is this idea of preventing judges and justices from inflicting their personal preferences on all of us. If I thought originalism was consistent and actually constrained judges in any kind of true, real comprehensive way, I would have intellectual respect for it, even if I still disagreed with its outcomes, but it does not. So for example, and there are many examples of this, the Supreme Court takes *Brown v. Board of Education* in the 1950s. This really important case about school desegregation. And Justice Black is on the Court at the time and he's the first justice who thought in originalist terms, even though that wasn't really a full theory at the time yet. And he asked the lawyers, the plaintiffs, the NAACP, all these civil rights lawyers, to go look and find him historical evidence that when, during Reconstruction, the 14th Amendment was written, there was a basis to think that the people who wrote it intended to end school desegregation.

[00:14:35] Emily Bazelon: So they looked really hard, all these really smart people. And they couldn't find that historical evidence. In fact, they found the opposite. It was really pretty clear that the drafters of the 14th Amendment did not intend at all to desegregate American schools. And if you think about the country in 1867, that makes a lot of sense. So in the end, *Brown v. Board* is unanimous from the Court. And it's based on very modern at the time, sociological evidence about the consequences of school segregation, which were really bad for kids. The Court, including Justice Black, figured out that it was really important to think about the impact of schools segregation, and to think about what equality and equal protection these really important promises and guarantees in our constitution made in light of those facts.

[00:15:23] Emily Bazelon: Justice Scalia, who was the kind of first originalist to talk in those terms on the Court, he's never backtracked from *Brown*. That is not part of originalist thinking that you're gonna go so far as to say that the Constitution doesn't bar school segregation. There are a bunch of other examples like that in the jurisprudence, where conservative justices are absolutely following their personal preferences. Sometimes they do it by just not picking originalism on that day. So what's the point of having a theory if you don't have to follow it all the time? And sometimes they do it by coming up with really problematic bad historical interpretation. When you look, for example, at the case that said, for the first time in American history, less than 20 years ago, that "there is an individual right to bear arms in the Second Amendment," all of the opinions are about the original public meaning of those words, the right to bear arms, to carry arms. What did everyone mean? Justice Stevens for the Liberals is also engaging in this discourse.

[00:16:29] Emily Bazelon: Historians thought that Justice Stevens had the better of the argument. When you look at the brief from constitutional historians, they're saying, "No, there is no individual right to bear arms. It really is about a militia and a misplaced comma or an extra comma." But, the conservatives wanted to get to this individual right to bear arms and so they claimed in the name of originalism to be doing that. There are lots of other examples of that. And so when you have a theory, that so much leaves out our evolution or societal changes, and also many of the people who now live in the United States, and that also is not applied in any consistent manner by the people who are claiming that it limits them, I just can't see how we can argue that this is something that courts should adopt or even that it's like necessarily real in terms of how it functions as opposed to the theory behind it.

[00:17:23] Jeffrey Rosen: Thank you so much for that. Well, thanks to Rich and Emily for joining the debate. So Ilan, just to review where we are now, without fussing much about what originalism is and in your book you talk about the fact that there are different varieties of it. Rich and Emily are disagreeing about whether it should be adopted. And Rich argued that originalism ensures that the text is followed and provides stability. The text has democratic legitimacy because of its popular ratification and to abandon it frees judges up to make stuff up and do whatever they like. And Emily said that the text doesn't always have democratic legitimacy when it was ratified, in ways that excluded, large groups, and that the methodology doesn't constrain judges because when it leads to outcomes they don't like as in *Brown*, they abandon it or pick and choose among methodologies in order to reach preferred outcomes. So which side do you agree with …

[00:18:28] Jeffrey Rosen: ... and why do you believe that judges should adopt an originalist methodology?

[00:18:32] Ilan Wurman: I should have brought a notepad to keep track of all the issues.

[00:18:35] Rich Lowry: Don't mess this up, Ilan.

[00:18:36] Emily Bazelon: I know, [inaudible 00:18:37]. You don't get to [inaudible 00:18:37] that. No, no, no.

[00:18:39] Ilan Wurman: It's okay. So I guess I want to start with a little bit of framing and then I'll address the *Brown v. Board* question. Why should we be originalist? I think Rich Lowry is largely correct. I would frame the question a bit differently. Well, first of all, what is originalism? I mean, it's this idea that we should interpret the Constitution with this original meaning, right? With the meaning the words would have had to the framers who wrote and to the public that ratified it, hopefully they're not too different from each other. But I think originalism is actually, it stands for a much more fundamental proposition than that. Originalism stands for the proposition that there are distinctions between what the law is, what the law ought to be, and whether the law is nevertheless binding. And here's what I mean by that.

[00:19:20] Ilan Wurman: Well, this is how we actually think of other laws in our legal system, like a contract or a statute, or treaty. Usually, we first ask, "Okay, what does this contract or statute actually say? What does it mean? What does it do? What kind of legal effect does it have?" Now, once we figure that out, it may turn out that we entered into a bad business deal or maybe shocker Congress has enacted a bad law. But very much an integral part of our legal system is that we are nevertheless bound even by the bad contracts that we've properly entered into, just as we're bound even by Congress's bad laws. Why are we bound by Congress's bad laws? Well, because in our system, we the people, as a general matter is that our social facts agree that the process through which those laws are enacted are sufficient to confer legitimacy on the laws as a whole, even those that we don't like. Because we're not always gonna win in the political process.

[00:20:13] Ilan Wurman: My point here is there is a difference between what a legal text means and the legal effect that it has, and whether that legal text is binding and should be treated as our law. So I think ultimately, the debate between originalism and non-originalism isn't about original public meaning, right? Even in a non-originalist system, something is going to get its original public meaning. Namely, the judicial opinions posted on the internet in PDF files every Monday and Thursday. Right? When a government official or private actor reads that opinion, which tells you what you can do, what you can't do, what you may do, what you must do. You don't say, "Well, is the Court being ironic? Is it being poetic?" Right? These are legal texts. They're not Socratic dialogues, okay? They're not poems. They're not novels. They're sets of instructions. We interpret them with their original public meaning, okay? Otherwise, they would be ineffective as instructions.

[00:21:08] Ilan Wurman: The debate is entirely whether we should treat as law, the document under the glass at the National Archives, or the documents published in PDF file on Monday and Thursday on the Supreme Court website. That is a normative question that we the people today can only answer as a matter of present day social facts. Whether we think we should continue to be bound by the constitution of our founders as it has been lawfully omitted and corrected. This is largely the argument-

[00:21:35] Ilan Wurman: ... by the way, my book-

[00:21:36] Group: [laughing]

[00:21:37] Ilan Wurman: ... *A Debt Against the Living*. So, in the book the question is, what are the criteria that make a constitution binding? Because it's not the same thing as what makes ordinary laws binding. Truly, truly, in a nutshell, I think the argument is for a free society like ours, a constitution to be binding and legitimate, has to meet this threshold success in balancing self-government and liberty which are in tension with each other, right? Even if it's imperfect. Because remember, something must make the Constitution binding, right? But it can't be that the Constitution is only binding if it says everything you personally would want it to say. Something must make a constitution binding in light of the inevitable disagreements people are gonna have over its particulars, right? This is a threshold success in balancing self-government and liberty. And I argue in the book, and I can say more later, that our constitution largely meets that criteria, even if it's imperfect by your lights. Now, maybe I wouldn't think that, right, if we didn't have the second founding, right, on Reconstruction, because it it's true-

[00:22:37] Rich Lowry: Always be selling people.

[00:22:38] Ilan Wurman: Yeah.

[00:22:38] Rich Lowry: Always be selling people.

[00:22:39] Ilan Wurman: [laughs] [inaudible 00:22:40] would be very upset with me if I did at least show it once. Right? So in this book, it's much easier to defend the founding, since we're actually living under the second founding, maybe even the third founding, right, if you include the 19th amendment. If the Constitution hadn't plugged, we hadn't plugged those great defects after the Civil War, then, you know, it'd be a different story, I think. But it did. And I actually think the originalist case for *Brown v. Board*, is actually a pretty straightforward one. I can't explain why. I mean, I have theories about why the Warren Court responded the way it did to the history at the time. But it's actually a pretty straightforward case under the Privileges and Immunities Clause, which the 14th Amendment says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It's an equality provision with respect to civil rights. We can get into that a bit later.

[00:23:30] Ilan Wurman: I think it's actually a pretty clear. But in terms of the history, when you actually look at the 39th Congress, only two Republicans, advocates of the Reconstruction

amendments, said something about how it wouldn't apply to schools and school desegregation. No one responded to that. No one otherwise made a comment about that. And when they were debating school desegregation, and what would become the Civil Rights Act of 1875, all, but one Republican who had been there said that the 14th Amendment required school desegregation. And the reason it never became law was because the Democrats won in a landslide, in 1874, preventing that from becoming law. So, I think there's a lot stronger originalist evidence for, at least, *Brown v. Board*.

[00:24:10] Jeffrey Rosen: Thank you so much for that. Thank you for bringing your books which well deserved to be read and I mentioned to you that in the constitutional law class that I taught, well, yesterday, at GW law, a student brought up your books as definitive guides to originalism, not knowing that you'd be here today, they're absolutely clarifying. Steve Mazie, you heard Ilan Wurman's defense of originalism as being connected to the legitimacy of a binding text. And saying that even if it's imperfect, once the text is enacted, it has to be construed according to its original public meaning in order to have the status of continuing law, and he also gave an originalist defense of *Brown*.

[00:24:55] Jeffrey Rosen: Why don't you begin, Emily Bazelon also argued that *Brown* was not consistent with original understanding, and indeed, not only did people stand up in Congress at the time the 14th Amendment was ratified and said, "Don't worry, this won't apply to schools." But they also didn't desegregate the schools of Washington D.C. And broadly, they thought that only civil rights were covered by anti-discrimination protection, and they didn't think schools were civil rights. So are you persuaded or not by the Ilan's effort to defend *Brown* on originalist grounds? And then more broadly, what is your response to his claim that in order for the constitution to have binding status as law, it must be interpreted in terms of its original public meaning?

[00:25:42] Steven Mazie: Well, I should say that even before Ilan brought his book to show it to us, I ordered it a few days ago. I haven't been able to read it yet. I look forward to ordering-

[00:25:50] Ilan Wurman: As long as you bought it.

[00:25:50] Group: [laughing]

[00:25:51] Steven Mazie: ... and reading a second book also. Yes.

[00:25:52] Ilan Wurman: [inaudible 00:25:52].

[00:25:52] Steven Mazie: Actually good money for that.

[00:25:54] Ilan Wurman: Hardback.

[00:25:55] Steven Mazie: Yes. But just as a kind of framing, it's important to think about the distinction between originalism as a theory which has been expounded upon by law professors now for decades, and interestingly, maybe curiously, it has evolved into many different forms. Some of which are not recognizable, I think, to the original originalists.

[00:26:20] Group: [laughing]

[00:26:21] Steven Mazie: And it's, you know, given that originalism put such a premium on fixity and stability, it's interesting just how much it has changed. There's even a blog devoted to originalism which has new things going up every day. So it's a very active and changing and fertile ground for legal research and legal thinking. There's that and then there's what the Supreme Court is doing. And whatever its virtues in the abstract, originalism as a doctrine, as an interpretive theory on the Supreme Court today, I think is best described as an engine for legal change, an engine for significant and sweeping legal change. And this past term that ended in June, maybe that engine should be described as turbocharged, right? There are changes to the law being made by the current Supreme Court that are thoroughgoing and rapid and across many areas of law.

[00:27:30] Steven Mazie: So, I know we will disagree on the outcomes of these cases. But from my point of view, there were two religion cases decided this term that effectively pulverized the wall of separation between church and state. There are a few bricks left, but not a whole lot. The Second Amendment has been fundamentally rethought, expanded. And of course, we haven't really mentioned it yet, but abortion rights, which were a constitutional fact for almost 50 years, have been thrown out the window and all those changes happened in the course of a few days. So whatever the virtues of originalism, I think they do not include nourishing the judicial virtues of judicial restraint, of judicial modesty, humility. Any objective observer who's looking at what the Supreme Court is doing, is not going to see a modest or a slow moving Supreme Court.

[00:28:37] Steven Mazie: And the slowness of justice at the Court is important to its work, and it's even engraved into the structures of the Court. Very happy to hear that the Court is gonna be opening up again to the public after two and a half years. Uh, if you go there, and you look carefully, you'll find turtles engraved into

[00:28:59] Steven Mazie: ... the supports of the lampposts on the plaza outdoors. And you also see turtles paring down to you from the hallways if you go inside. Those turtles represent the slow steady Justice of the Supreme Court is supposed to be or is meant to be pursuing. And originalism as it's being practiced by the current majority is not doing that. So just one more word about nomenclature. Originalism is a great term for people who are originalist, right?

[00:29:36] Group: [laughing]

[00:29:36] Steven Mazie: Has a great ring to it. The kids call it the OG, right? This is the original, this is the heart of things

[00:29:44] Steven Mazie: ... we should return to it. The other side, what is the other theory? It's called “non-originalism.”

[00:29:49] Group: [laughing]

[00:29:50] Steven Mazie: Is there a worse name for a theory in the history of names. Right? Marching under a flag that says, "I'm not for this?"

[00:29:57] Group: [laughing]

[00:29:58] Steven Mazie: It has been called Living Constitutionalism also, although I think not a lot of non-originalist call themselves living constitutionalist today because it seems a bit too freewheeling. Ultimately, what I think the main distinction is between originalist judges and non-originalist judges, to keep using those terms, since they're the ones that people use, is not that one side looks at texts in history and the other doesn't. So it really is not this great divide. Justices like Stephen Breyer, Elena Kagan, they're concerned with the text. They're often concerned with history too. It's just that they don't rivet on one particular conception of what the Constitution meant at a particular frozen point in time as the only thing that they look to.

[00:30:50] Steven Mazie: So, Justice Breyer, both in his books and in his judicial opinions, is clear that he takes in multiple sources when he's deciding hard cases. He looks at texts in history. And he also considers context, precedent, which is something the more originalist you are, the less you seem interested in precedent and respecting it. And also things that originalists will be allergic to which are purposes of the law and are provisions of the Constitution and consequences. Right? What are the consequences of the decision that are going to be rendered, that will follow from the decision that is rendered? So, I think maybe, I don't know, we need to like liberal Frank Luntz to come up

[00:31:45] Steven Mazie: ... with a better name for non-originalism. But I think, from a clarity point of view, the two theories are maybe better described as monism and pluralism, right? Looking only at one thing, which is the original public meaning of the Constitution, or looking at that plus these other factors that go into a judge and usually a justice making a decision about what the Constitution means.

[00:32:15] Jeffrey Rosen: Thank you so much for that, and I'm just gonna sum it up to keep the arguments straight in my head and so I can repeat them back. You said that although originalism was originally justified as a way of constraining judges and deferring to Democratic legislators, it hasn't done that at all, and has left judges free, both to choose among methodologies and also to radically change the law. You also said that the alternative to originalism is not abandoning it because all Justices, including Justices Kagan and Breyer, as you noted, have said we're all originalist now in the sense of caring about text, history and tradition. But you said they also embrace other methodologies like pragmatism, prudence, precedent, which more accurately constrained judges and are consistent with what courts have ordinarily done.

[00:33:10] Jeffrey Rosen: This is a great conversation rather than a formal debate. But Rich, I think we've very well put on the table, what originalism is, and you've made a case for why it should be adopted, and you've heard the case for the claim that the Court is adopting it in an inconsistent and results oriented way and that it should take a broader approach. Maybe let's focus on the recent decisions of the Court, in particular, those involving the Second Amendment, abortion, religion, and the administrative state. And tell us why you think those decisions are originalists and are correct.

[00:33:45] Rich Lowry: Yeah, so, first of all, to Emily's point that no one at the beginning call themselves originalist—they didn't have to, it was just taken as a given. And it was when the Court moved away from that sort of understanding that you had the countervailing push. That the text and the public meaning are the main thing and few originalists on the Court with the exception, perhaps of Clarence Thomas, just say, "No, precedent doesn't matter and can totally be ignored." You know, Amy Coney Barrett, prior to going on the Court, thought about precedent and wrote about it extensively. Kavanaugh has as well. But the main thing is the public media, and that's the first thing you go to. And just think about it, is there any other element of law where we wouldn't say that. You know, statutes written by Congress, they're just suggestions and they change over time. Or contracts that writers have with their publishers, they can be capaciously interpreted, depending on circumstances. No, it's written down. It's a written law for a reason. If that's true of anything, it should be true of the fundamental law.

[00:34:45] Rich Lowry: Now particular cases. So *Heller* and the Second Amendment, there was a brief parenthesis in American legal history, where the meaning of the Second Amendment was lost, and forgotten and obscure, about 50 years in the middle of the 20th century. Everyone at the time knew it protected an individual rights to bear arms. They knew it before the adoption of the Constitution, during the convention, and afterwards. Every major legal commentary, next 50 years, Justice Story, others—individual right to bear arms. One of the most infamous non-originalist decisions in the history of the country, *Dred Scott*, what's Justice Taney say, one of the reasons that African Americans shouldn't have citizenship. “You know what, you give them citizenship, they're going to be able to carry around guns whenever they want,” and no one's gonna do it because it was taken for granted that that's what the Second Amendment said. And for whatever reason this was lost.

[00:35:42] Rich Lowry: And the originalist excavation that went on was not like an NRA plot. It was liberal scholars, Sanford Levinson, Laurence Tribe, who began to look at and say, “You know what, for whatever reason, we've ignored this, and we've lost touch with its original meaning.” You look at Laurence Tribes’ textbooks, 1978, Second Amendment is a footnote. I might be wrong about the exact dates. By 2000, it's the section it is an individual right. So if you’re the Court and you're looking at the evidence and believe it’s correct as you should, it is correct. What are you supposed to do? Oh, we've been wrong all along. We always leave wrong opinions on the books and impinge on people’s individual constitutional rights just if we were wrong and prior courts said so. No. You know, the Court as of 2020, I think it overturned 232 decisions. It never leaves just things on the books that are wrongly decided.

[00:36:37] Rich Lowry: So the Court made the correct decision in *Heller* and then, *Brown*. *Brown* this time around was just a natural extension of that. Same thing with *Roe*. Again, I might sound like a Laurence Tribe fan. Even Laurence Tribe was saying at the time, "I don't see where the constitutional warrant is for this decision." And *Roe* so unstable as a precedent, in 1992, the Supreme Court totally on the fly, rewrote it, because there's no clear warrant for it, it's making it up as it goes. That *Casey* decision, the Court talked about, you know, we're going to settle this. We have such authority and legitimacy, we're gonna settle this hotly contested moral and social issue. And that just never works out. Unless it's, you know a right written in the Constitution, yes. If it's not, you just can't make it up because it's your social preference.

[00:37:27] Rich Lowry: Again, this goes to what Steven was pointing to, legitimately, you know, there are potential questions, right? How fast does the turtle crawl? Right? How fast does a turtle move? Roberts is like, "No, we're just moving to 15 weeks, you know." And politically, that would be much better for Republicans. I mean, they're getting murdered on the issue right now, but it's not the role of the Court to come up with a viable political compromise. That's for political branches and the American people to do. So, the correct answer was, "No, this goes to the elected bodies, and they debate it and argue about it." And look, it'll be intense. It'll be fierce. It'll be rambunctious. That's what a democratic society is.

[00:38:09] Rich Lowry: And to the extent it can, as long as it's not involving, you know, violations of the structure of government that are quite fundamental. As long as they're not violating fundamental rights, the Court should let that kind of debate happen and our constitutional system allows it. You have California, which is governed radically differently than Texas. And as long as they're not, you know, infringing on free speech rights and the rest of it, that's fine, and that's how it should work.

[00:38:34] Jeffrey Rosen: Thanks so much for that. Emily, Rich mentioned abortion and guns, and said that the Court has correctly interpreted both decisions in line with the original understanding. Do you agree or disagree and how consistent do you think the Court has been in applying originalism in other major hot button issues?

[00:38:55] Emily Bazelon: So on the Second Amendment case, it is true that Sandy Levinson and Larry Tribe were talking about an individual right to bear arms in a kind of academic like, "Well, this is an interesting idea to explore" way. I think they would both—well, I don't know, maybe this is true. I would hope they would admit they maybe didn't do a lot of deep historical research when they talked about that and kind of put that idea on the wall. Since then, there's been a lot more research and the view of most constitutional historians, is what I said before, and there's this recent, I guess, archive would be one way to think of it, that supports that view. A couple of different institutions put together this huge collection of documents from the relevant periods 1780 to 1785, or 89. You know, old newspapers, and books and documents of people writing letters to each other all the ways in which we would look to see what the meanings of these words are.

[00:39:59] Emily Bazelon: Now, you know, I will just continue to call myself a pluralist, in Steven's helpful way of thinking about this. I'm not sure I think this is certainly the only way we

should be thinking about the Second Amendment. But let's just forget that for a second. Here is this huge box of source material about the meaning of the time. And even conservative scholars who have studied this, who very much support the outcome of an individual right to bear arms and would like to side with Scalia in his historical analysis from the time, are super skeptical after they look at the source material, because they're actually very few references to any kind of individual right to bear arms in the source material from the time. Have some conservatives in the Supreme Court changed their view of the Second Amendment based on the source material or even mentioned it? No, they haven't. They don't care because they got to the outcome that interests them.

[00:41:00] Emily Bazelon: That's the sort of biggest, I think problem with this theory. Again, is that it just doesn't actually bind the people who claim to be bound. Abortion is a tricky one. I think for liberals in that it rests on these foundations, of a right to privacy that are hard to justify in the text itself in that part of the 14th Amendment. The people who were wrestling with those questions in the 1970s, all of them men on the Supreme Court, were not particularly receptive to a much, kind of more, I think, clear path to a constitutional right for abortion which runs through the Equal Protection Clause and the 14th Amendment and says that gender is a kind of basis that is really important to have equality for. This is a critique that Justice Ruth Bader Ginsburg started to mount in the 1980s. It worried her. She never had majority on the Supreme Court to kind of take the right to have an abortion and firmly anchor it in the 14th Amendment's Equal Protection Clause. And so you have this vulnerability.

[00:42:06] Emily Bazelon: But then, if you look at the Court's opinions in *Dobbs* this last term, what you see is Justice Alito, from the majority saying that because, supposedly of originalism, the right to abortion has to be only analyzed in terms of our history and tradition. And so, you have him going back and looking at judges written from hundreds of years ago, who believed in witchcraft, and those are his beginning source material if you're only going to do this originalist analysis. So there's this kind of way in which the conservatives and liberals when you look at what's actually on the page and Supreme Court opinions about abortion, they're almost arguing past each other because the firm "more originalist" I would argue basis, which I think is very much rooted in the text, isn't really a part of the jurisprudence. And just again, to hopefully make this point clear, the point is not that you set aside the text, right? Of course, that doesn't make any sense. Of course, the Constitution is our law. The question is how you interpret the phrases in it. Judges always have those problems when people write in more sweeping terms, right? It is much easier to know what contractual language says when it's super clear, and it's about things like dates and proper nouns and numbers…

[00:43:25] Emily Bazelon: Than when people put phrases in it, that can have different kinds of meanings. Those are the parts of the Constitution we're talking about. They don't come up all the time in law, right? Somewhere, something like 90% of what federal judges do, are not affected by these debates we're having up here because they're interpreting much more clear language, a lot of its statutory, not constitutional. They can do something called law that really feels different from politics. Unfortunately, for us, I think, it's these incredibly hot button sensitive issues that really do in the end come down to choices of values that are affected by these debates over interpretive methodology in the Constitution.

[00:44:07] Emily Bazelon: And that has created this. Because the Supreme Court has decided in *Marbury* that it was the final word on the Constitution, that put this pressure, I think, on conservatives to come up with this claim that their hands were bound, that just doesn't really pan out in the every day. And I think that's the gap Steven was talking about, to some degree, between the kind of more abstract, academic definition and an idea of originalism, that realism that Ilan worked out for us here, and what we actually see happening all the time in court which is super different.

[00:44:44] Jeffrey Rosen: Thank you very much for that. Ilan, let's focus on the application of originalism and the Second Amendment cases. Because both Emily and Steven are saying, this is a powerful example of the current Court not being consistent originalist. And as Emily just said, even after all this evidence by historians showing what the original understanding of the right to bear arms was, Justice Breyer said to the majority in the McDonald case, "Hey, why don't you reconsider your historical analysis?" And they just ignored it, they refused to do so. And more recently, in the *Bruen* case from New York, the liberal dissenters are saying to the conservatives, "You are picking and choosing among history, tradition and text in order to jerry rig the results." Justice Kagan basically accused the majority of playing whack-a-mole with text and history and shifting the baseline for results oriented reason. What's your response?

[00:45:34] Ilan Wurman: I plead the Fifth Amendment-

[00:45:36] Jeffrey Rosen: [laughing]

[00:45:36] Ilan Wurman: Is that an option? I'm going to get in trouble with some friends I presume-

[00:45:39] Jeffrey Rosen: What's your interpretation of the Fifth Amendment?

[00:45:41] Group: [laughing]

[00:45:43] Ilan Wurman: Well, so I do not think the Supreme Court has been originalist in any of the four areas that you've described. That doesn't mean the results in the cases would be different, but they might be and it's a bit hard to know. Now, you might not be surprised to learn that the answer to three of the four buckets of cases *Bruen*, *Dobbs*, the Free Exercise cases, is the Privileges or Immunities Clause. Which perhaps unsurprisingly, is my sort of area of scholarship. Just to explain what I mean by this.

[00:46:16] Ilan Wurman: These cases, are substantive Due Process cases, okay. We have a clause that says, "No State shall deprive any person of life, liberty or property without due process of law." What is the sound like? It sounds like the state can in fact take away your life, your liberty and your property, as long as it gives you due process of law. Whatever that is. The laws established by legislature, your violation of the law is adjudicated in a court according to fair procedures, and so on. But otherwise, there's no substantive limit on the content of the law

prohibiting whatever conduct, okay. That's a procedural understanding. Substantive due process, right, "substance" "process." Isn't this already... Like, you should be on the edge of your seats.

[00:46:55] Emily Bazelon: The opposite of originalism, really bad branding.

[00:46:58] Ilan Wurman: Exactly. Right? So even liberals accept that substantive due process is sort of this made up contradiction. And this idea that the Due Process Clause isn't merely about process, but also imposes substantive and unwritten limits on state legislative power. Substantive due process is clearly wrong as a matter of the original meaning. Yet, free exercise cases, the *Bruen* Second Amendment case, we're dealing with the Bill of Rights as applied to the States through the 14th Amendment, substantive due process. And *Roe v. Wade*, unenumerated rights. These are all substantive due process cases, and they were all decided as substantive due process cases. The Supreme Court in *Dobbs* accepted substantive due process. They just said, "Look, if we're gonna do substantive due process, how do we reign in the judicial role? Where should we focus on those rights deeply rooted in American history and tradition?" So judges don't just get to make things up whether they can still make things up doing that historical analysis, right, is open to question.

[00:47:55] Ilan Wurman: Whether the answers would change depends on the Privileges or Immunities Clause, right? Maybe it wouldn't. Again, no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. There is a huge scholarly debate over the meaning of this clause, right? One possibility is that substantive due process is correct after all-

[00:48:17] Emily Bazelon: Just call it something else.

[00:48:18] Ilan Wurman: Right, the Privileges or Immunities Clause, what are the privileges or immunities of citizens of the United States? Maybe those rights deeply rooted in American history and what does it mean to abridge them? So maybe *Dobbs* comes out the same way. But maybe not. It turns out, actually, that the Privileges or Immunities Clause is probably the Constitution's equality provision, right? That the states have a wide breadth to regulate all rights, contract, property, gun rights, speech rights, search and seizure rights, they just can't discriminate in the provision of those rights. What is an abridgment? Well, the black codes are an abridgment, right? The codes enacted in the South after abolition that said, "the newly freed people can't own property, right? That they couldn't enter into certain kinds of contracts. That they couldn't assemble at certain hours with certain people, right?" Nothing that applied to white persons. That's an abridgment. It gives a lesser an abridged set of rights to a class of people arbitrarily.

[00:49:07] Ilan Wurman: Well, if that's true, then I don't think you have incorporation with the Bill of Rights. I think it means California can ban handguns. I don't think California can say only white people are allowed to have guns, that's an abridgment, right? The question is what's the regulation of a content of a right that has to be reasonably related to the purpose of the right. Skin color has nothing to do with contract rights, property rights. Being gay, saying gay people can't own property, has nothing to do with property rights. Right? You don't have to be a protected

class. Okay. It's just totally, it's just as bad as the black codes, a lot like that. Right? Okay. How would *Bruen* come out, right?

[00:49:45] Ilan Wurman: Let's go back to *McDonald*. Right? Is the Second Amendment incorporated against the state. If you look at the liberal justices, in dissent in the *City of Chicago v. MacDonald*, where the Second Amendment was incorporated against the states, they say, "Look at the history. It's all about equality, equality, equality." Yes, they were right. The liberals were right. The problem is they only wanted to apply that argument to the particular right, the Second Amendment that they didn't like, right? Rather than to all the other rights that would be implicated by that reading, like free speech, right, and search and seizure rights or what have you.

[00:50:18] Ilan Wurman: So, how would *Bruen* come out? Well, I don't think the Second Amendment is incorporated. I think the state can regulate and define gun rights as long as it isn't discriminatory. Might *Bruen* have come out the same way anyway. Maybe, because the licensing regime was so open ended, it basically said you get a public carry license if you have a special need. Well, who has a special need? The politically powerful, the politicians, the very rich and famous, right? They all got their guns. So it sounds like an abridgment. It sounds like class legislation, one code for rich people, one code for the poor classes. And so, might have come up the same way but we don't know.

[00:50:54] Ilan Wurman: Same thing, Free Exercise, whose religion has been prohibited? Okay, so "Congress shall make no law respecting the establishment of religion, nor prohibiting the Free Exercise thereof." The coach who was not allowed to pray on the football field. Has anyone prohibited his Free Exercise of his religion by saying, "You know, on a football field, in a public school, after football practice, you can't pray?" Right? I don't think so. Is anyone's religious practices been prohibited when the state gives public monies to private secular school? Of course not, you can still go to church, you can still believe in your God. These are totally non-originalist cases. Whether that violates the Privileges or Immunities Clause is the real question that no one seems to wants to answer. I've been accused before of being scholastic.

[00:51:38] Ilan Wurman: The Supreme Court is never gonna do any of this, right? But that's the virtue of being an academic is we get paid just the same.

[00:51:43] Group: [laughing]

[00:51:45] Jeffrey Rosen: Wonderful. Well Steven, the last substantive intervention is to you. And you just heard Ilan Wurman, one of the most distinguished young conservative intellectuals plead the fifth if not plead guilty-

[00:51:59] Group: [laughing]

[00:51:59] Jeffrey Rosen: ... to the idea that the Court is not applying originalism in a consistent way. He says it might be done better. What do you want to tell the audience, because both sides

are trying to persuade the audience about whether or not to adopt originalism. Is the answer that justices should just be better originalist? Or do you have an alternative or a more pluralistic alternative that you think might better constrain judges and defend democratic legitimacy than originalism?

[00:52:29] Steven Mazie: I don't know if I'm equipped to lay out-

[00:52:30] Steven Mazie: ... a full theory of interpretation-

[00:52:33] Emily Bazelon: Solve the whole thing.

[00:52:34] Emily Bazelon: Come on, you have five minutes.

[00:52:36] Steven Mazie: How many more minutes do we have?

[00:52:36] Jeffrey Rosen: We have

[00:52:37] Steven Mazie: Seven minutes.

[00:52:38] Jeffrey Rosen: It's seven because-

[00:52:38] Jeffrey Rosen: ... Emily must get patient, we're gonna end this.

[00:52:42] Steven Mazie: You got a decent time for us to conclude.

[00:52:42] Emily Bazelon: True I have to make my train. [laughs]

[00:52:43] Steven Mazie: I want to say a couple of things about *Bruen*. I thought that would be a good point of discussion for this panel. So on the train ride down yesterday, I pulled it out again, and it's 100 and some pages. And I read the whole thing slowly. I read the whole thing very quickly on June 23 when it came out because I had an article to write and a podcast and a TV spot. But then I realized, I didn't really soak the whole thing up.

[00:53:03] Emily Bazelon: [laughs]

[00:53:03] Steven Mazie: So, I'm gonna put on my charitable hat. I'm gonna read through Justice Thomas's opinion. And it was very hard to get through that opinion without concluding, even trying to be as charitable as I could, that he was not playing whack-a-mole, cherry picking history that suited his favorite result. And we know what his favorite result is, because since 2008, when *Heller* came down, he has been writing opinion, after opinion, after opinion, decrying the Court's failure to take up cases that would expand *Heller*, expand the Second Amendment further. So June 23, was his birthday. This was a great birthday present for him-

[00:53:45] Steven Mazie: ... to be able to write this opinion. It also happens to be my birthday. So I got to enjoy, I could share in the joy.

[00:53:51] Group: [laughing]

[00:53:52] Steven Mazie: But reading that opinion, again. He has a line that says, "Not all history is created equal." Fine. So, some history applies more, tells you more about the original public meaning than other history. But then as he goes through, he looks at medieval history and says, "Oh, that's much too old. That doesn't really apply to the meaning of the Second Amendment, when it was ratified in 1791." So, there is evidence of the statute of Northampton, which was a British law that said that subjects could be limited from in villages-

[00:54:32] Speaker X: Was it Northampton or Southampton?

[00:54:34] Steven Mazie: It was Northampton.

[00:54:35] Speaker X: Okay.

[00:54:37] Steven Mazie: [laughs]

[00:54:37] Ilan Wurman: Martha's Vineyard, maybe?

[00:54:38] Group: [laughing]

[00:54:40] Steven Mazie: Anyway, this law was from the 14th century, but it lasted for centuries. And Justice Thomas didn't think too much of that. And he also didn't think too much of New York's citation of many other laws from various periods around the founding, right before the Civil War, right after the Civil War that were similar to, in some ways, the New York law that was under attack. But each time he had a way to say, "Oh, no, it's totally different. The analogy is not perfect." So, by the time you reach the end of the opinion, your nose has been buried in, you know, centuries of purported examples from New York that show that there is a history of gun regulation that's similar to what New York has been doing since 1911. That's another aspect of it. But the result is without any analysis of current society in America of the scourge of gun violence that we have, just "No, we've never had anything like this so we can't have it now."

[00:55:45] Steven Mazie: Whereas, Justice Breyer, and now I'm getting to the pluralistic version of an interpretive theory that might be more suitable, which I think is Justice Breyer's. He looks at the history too and he says, "I think correctly, that Justice Thomas was, pooh-poohing or excluding certain evidence that does weigh in New York's favor to keep this law." But also he cites statistics about what guns are doing to America today. Right? Between 40,000 and 50,000 Americans die as a result of gun violence every year. There is a mass shooting in this country every day. Over 100 people die from gun related injuries every day. And the way that the courts

of appeals have dealt with gun regulations since *Heller* in 2008, has been to say, "Well, let's see if there's an infringement and if there is, we need to look at the goal that the state legislature is trying to achieve with this law. And if it seems like there's a good connection between the means and the end, then maybe we will let it fly. We won't strike it down under the Second Amendment."

[00:57:07] Steven Mazie: In *Bruen*, Justice Thomas says, "No more means end analysis. The only way you can justify a regulation is if you can pinpoint something super similar in the history of American gun regulation." So, it really it leaves states... I think the implications for New York's gun law might be limited. But for all sorts of other gun regulations, we don't know how this is going to play out. And Justine Breyer had a really interesting concurrence in *Bruen*, where she said, "I agree with everything except there are two major holes in Justice Thomas's [laughs] majority opinion." So it's sort of like a teacher saying, "I agree with your result here with your argument, but I'm gonna give you a B on this paper." He didn't actually give lower courts any guidance as to how to undertake this analogical reasoning for what sort of research are you going to do to find if this law is consistent?

[00:58:03] Steven Mazie: And there's a case in the state of Ohio right now at the state Supreme Court, involving a man who was convicted under a law that says if you're indicted for a violent crime, you cannot have a gun. So he was indicted for a violent crime. He was flashing his gun around on social media and he was arrested for that separate crime with having the gun. And now the question is, is that law consistent with the Second Amendment or not? And the state Supreme Court in Ohio ordered more briefing, they said, "Given that *Bruen* has now come out, tell us what impact, if any, of this has on our analysis." And there was one judge who dissented from that order for more briefing, and she said two interesting things. One, that "an appeals court is not the place for that kind of information to be presented. That's an issue of fact, a trial court should consider these facts and an appeals court should weigh in only later."

[00:59:08] Steven Mazie: And she also said something which is more general about originalism as a practice. She said, "Doing this sort of historical graphical work is kind of like determining whether a modern translation of the Bible is consistent with the original meaning of the Scripture." And that may not be something that judges are all that equipped to do. And especially lower court judges who have such huge dockets so many cases to deal with, to do this archival research and this analogical reasoning just to figure out if a state law to address gun violence is constitutional. Seems like a really heavy lift that the Supreme Court has bestowed upon all the federal district judges around the country.

[00:59:57] Jeffrey Rosen: Thank you so much for that. It's precisely 3:00, ladies and gentlemen, please join me in thanking our panelists. Today's show was produced by John Guerra, Tanaya Tauber, Lana Ulrich, Sam Desai, Melody Rowell. Was engineered by the NCC's superb AB team. Research was provided by Sophia Gardell. We're so grateful to the National Review Institute which partnered with us in bringing you this program. Please rate, review and subscribe to with the people on Apple and recommend the show to friends, colleagues or anyone anywhere who's eager in honor of Constitution Day, in engaging in constitutional education and debate. And always remember that the National Constitution Center is a private nonprofit. There's so

much learning and light ahead of us this year and I’m so grateful to all of you for being part of our mission. You can support it by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support our work including this podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, happy Constitution Day, I'm Jeffrey Rosen.