For or Against Constitutional Originalism?

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[00:00:03.3] 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 non-profit, chartered by Congress to increase awareness and understanding of the constitution among the American people. In this episode, Jonathan Gienapp of Stanford University and Stephen Sachs of Harvard Law School join Tom Donnelly, the NCC's Chief Scholar to discuss Jonathan Gienapp's new book *Against Constitutional Originalism: A historical critique*. They review the history of originalism and debate its role in constitutional interpretation today. Here's Tom, and enjoy the show.

[00:00:44.0] Thomas Donnelly: Thank you for joining us, Jonathan and Steve.

[00:00:48.1] Jonathan Gienapp: Thank you.

[00:00:48.9] Stephen Sachs: Thank you for having us.

[00:00:49.9] Thomas Donnelly: And maybe I'll start with you, Jonathan. You know, you've written a book that's arguing very much against originalism, and I wanna get to some of your critiques and some of Steve's responses. But first, just to sort of set the table for us, can you offer us just a definition of originalism?

[00:01:07.6] Jonathan Gienapp: Sure. And thanks again for having me. It's really wonderful to be here with you, Tom, and with you Steve, to have this conversation. So originalism can mean a lot of different things to a lot of different people, and we'll get into some of that variety and some of that nuance, which is very important. But as a general matter, as I see it, originalism is a theory of constitutional interpretation that asks us to interpret and enforce the Constitution today in accordance with its original meaning, something that was originally laid down that ought to be respected. So as a result, what distinguishes originalism is the emphasis and importance it places on history, on things that happened in the past. Now, all theories of constitutional interpretation

for as long as there have been theories of constitutional interpretation have placed emphasis on history. So there's nothing new about that.

[00:01:57.1] Jonathan Gienapp: What distinguishes originalism is investing history with such paramount authority that if the other kinds of things that other interpreters might latch onto as having constitutional salience in deciding cases such as precedent or past practice or public opinion or consequences or doctrine, originalism intends to elevate history or text and history above those things. Again, it can get complicated as we sort of work into the nuances, but it's a basic idea of you take history and you transform it from one of the things you might consider in making a constitutional decision to the thing of paramount significance, sort of orients you at a moment in the past when the constitution was made you recover that and you do your very best to enforce that in constitutional decision-making today. So as a sort of general cut, that's how I would define originalism.

[00:02:49.4] Thomas Donnelly: Excellent. And the same question to you, Steve. You're an originalist. How did Jonathan do in his definition, and would you offer any friendly addenda? And also just like, as Jonathan said, there are different varieties of originalism. Maybe if we could also help capture, what core there is that unifies the family that we call originalism?

[00:03:09.8] Stephen Sachs: Sure. Thank you very much. I mean, there definitely are a number of competing flavors of originalism, maybe not 31 of them, but certainly a number. And all of them, I think, share a feature that Jonathan emphasized, which is they're all making current law in some way vulnerable to some kind of facts about a founding moment, about something original. Where I'd say that they disagree is which facts they care about. And so I would have a slightly broader definition of originalism. I'd say that originalism is anything that makes current law vulnerable to original error of facts. And that might be facts about what the framers intended, it might be about what they expected to have happened, it might be about what people understood from the document, it might be about the methods that they used, it might be about the law that existed at the time, it might be about their values. All of those things can fit under the originalist umbrella. And so debates about which of those things is more important than the other, in some sense, intramural originalist debates and whether or how much we should care about any of them, or whether other things contribute to the law, and in which way those are outside the originalist umbrella. Those are sort of critiques of originalism.

[00:04:24.8] Thomas Donnelly: Excellent. Thanks for that, Steve. Now, originalism itself Jonathan, you talk a little bit in your book about when originalism emerges as an approach to constitutional interpretation. Maybe tell a little bit about that origin story for us.

[00:04:40.7] Jonathan Gienapp: Sure. So it depends exactly what we mean by originalism as an ism, but as an ism, as sort of a recognized, concrete, identifiable, general theory of

constitutional interpretation. So not asking on occasion or with some significance, "Well, what did the framers intend, or what did the text mean at some moment in the past?" Questions that had been circling around the republic for a long time. The idea of originalism as an ism, as a distinctive theory really emerged in the last 3rd of the 20th century in response to what the liberal Warren and Burger Supreme Courts are doing, and the so-called rights revolution that they're presiding over. Complaints among those who were wary of what the court was doing, that it was inventing rights nowhere found or enumerated in the Constitution. That it was straying from the materials and the sort of source of constitutional legitimacy that it ought to be strictly adhering to, and this becomes the complaint that justices on the Supreme Court are behaving more like legislators rather than judges. They're engaged in judicial activism, they are not interpreting the Constitution, but effectively writing it anew.

[00:05:52.7] Jonathan Gienapp: So originalism becomes a call to treat the Constitution's meaning as not living, as not evolving, as not changing to meet the circumstances or needs of society as its values or needs change, but instead to treat the constitution's meaning as fixed, at least from the standpoint of justices and judges, and allow constitutional change to follow along different channels. If the Constitution needs updating or changing, then it's up to the sovereign people through Article 5 Amendment to formally change it. Otherwise, judges should engage in an activity not of asking, "Well, what are our values? What is our morality? What is the best way to answer these pressing questions?"

[00:06:29.8] Jonathan Gienapp: But instead, we have legal materials in front of us that include the Constitution. What did the framers originally intend? What did they originally lay down? Whatever they did back then, that meaning is unchanging and uses that as a way to constrain judges and channel their decision making. And once that really crystallizes in the 1980s, famously when Edmond Meese, Attorney General for Ronald Reagan announces that the jurisprudence of the Reagan administration will be one of original intent, and then self-described originalists like Antonin Scalia are appointed to the Supreme Court in 1986. It becomes very much a clear and identifiable thing that people either rally around or rally against.

[00:07:07.3] Thomas Donnelly: Excellent. Now Steve, maybe you certainly take a beat on the when originalism emerges question, but I'd like to also broaden out the discussion because you've offered some really thoughtful reflections on originalism and its relationship to history and what originalism and practice should look like, and sort of what kind of historical work originalists need to be able to do in practice to remain faithful to the Constitution. And sort of how the work of lawyers is different then, and similar to that of constitutional historians like Jonathan. And I'd love to sort of hear some of your thoughts along that dimension as well.

[00:07:45.8] Stephen Sachs: Sure thing. So I would certainly agree that originalism as ism starts relatively recently because you don't need an ism until you have something else that people

might be attracted to as a possible alternative in the way that sort of Warren Burger Court era jurisprudence was. But originalism as a phenomenon pretty much goes all the way back because it's the standard move to criticize someone's incorrect constitutional interpretation, that they are departing from what was laid down at the founding. That's what Roosevelt is saying in his fireside chats accusing the pre-New deal court of departing from what the founders laid down. That's folks who don't like Lochner, folks who don't like Slaughterhouse saying that they took what was meant for bread and made it a stone. That's what Jefferson and Marshall were accusing each other of saying you're Sappers and miners and you're undermining what was actually agreed upon at the founding.

[00:08:43.6] Stephen Sachs: And so in some sense, the idea that departures from the founding are disfavored goes all the way back. And it seems reasonably natural if you're going to make some law and then live under it, that if someone makes the incorrect decision and they have in some way, they must have departed in some way from the original rule or from some other lawful change made sense. In terms of how lawyers use this history, it depends on what flavor of originalist you are. So I tend to favor a theory called original law that what we're trying to do is apply the law that was laid down in the founding and whatever lawful changes have been made to it since. And so they're, the kind of historical work that you're doing is a lot like the kind of historical work that you might be doing in any other case that involves a historical element.

[00:09:38.3] Stephen Sachs: So in one paper of ours that I wrote with, Will Baude at University of Chicago, we compare it to a case about the Old Dominion Boat Club in Virginia. And whether they own their parking lot or not depends in fact, on the scope of the grant to Cecilia's Calvert that created later the state of Maryland dating back to the 17th century. And so it's very strange that in a modern case, you would figure out ownership over a parking lot based on what was the law in 1632. But sometimes that happens through some strange chain of title event that causes you to have to look back and have to say, "Okay, what was the law back then? Using whatever tools we have to discover the facts that are relevant to determining the law, and then what kinds of changes have been made to it since is, whoever owned this spot of land, then the same person who owns it now, or who did they sell it to? What does the chain of title look like, et cetera."

[00:10:33.4] Stephen Sachs: So to my mind, these can be extremely difficult questions. There's no guarantee saying that they're like ordinary property law or other kinds of law questions doesn't make them easy. It just means that the nature of the inquiry is one that's not sort of categorically outside lawyers work in the way that some people fear that the use of very old history is not just hard, not just sort of easy to get wrong, but sort of categorically outside what lawyers ought to be up to.

[00:11:03.7] Thomas Donnelly: Excellent. Thanks for that Steve. And Jonathan, maybe just your thoughts on Steve's account there of the sort of history that at least original law, Originalists

would've to do in order to be faithful to the Constitution. Maybe some thoughts you think a lot in your book about sort of the proper role of history and modern constitutional interpretation and also just thinking about the difference between the kind of history that constitutional historians do versus the sort of history that originalists tend to do. Maybe some of your reflections on some of those issues in light of Steve's response there.

[00:11:38.3] Jonathan Gienapp: Sure. This is great 'cause this gets really to the heart of it, and will give a lot of meat here for Steve and I to chew on because so much of what motivates my book is thinking about this exact question that, as I said at the beginning, originalism chief among theories of interpreting the Constitution places enormous emphasis on history to a great extent turns constitutional interpretation into an exercise in historical recovery. And one way you might think that should be done is to effectively do what constitutional historians have long been doing and have long prioritized, which is to try to sort of fully recapture the original moment in its sort of full breadth to try to understand what the Constitution was about. But part of what motivates my critique is the claim on the part of a lot of different originalists.

[00:12:28.7] Jonathan Gienapp: Now here, original law originalism is an interesting departure from some of the standard moves that a lot of originalists make, many of whom fly under the banner of what Steve called or alluded to earlier as public meaning originalism, which tends to say, "Well, if you're interested in what the framers intended or perhaps what certain people thought were the guiding purposes of the Constitution, then yes, you would need to engage in a fuller kind of historical recovery." But if you're just interested in what the Constitution publicly communicated, it's public meaning at the time, what did these words in this text mean to the public to sort of a hypothetical average reader? Then the historical reconstruction can be considerably narrower and a lot of historical contexts that historians would consider quite central might not be relevant. And what I try to emphasize in the book, what I think is really important is that I think too often originalists of this flavor don't take the history to which they've staked their theory seriously enough.

[00:13:25.4] Jonathan Gienapp: Their focus is often pretty narrow, focused on individual provisions of the Constitution and their textual meaning, or narrow slices of legal doctrine. When I think we need to ask if one is an originalist on its own terms, a broader question is, did they think about the constitution back then the way we do now? Did they think about constitutionalism as we do now? Did they think about law as we do now? What did they think of this category that we take for granted, like constitutional law? And a lot of my argument is that there were significant differences in how founding era Americans thought about constitutionalism, conceived of what constitutions were, how they acquired content, how they communicated it. And that broader reconstruction is important if you're interested in understanding what particular provisions or aspects of the constitution means.

[00:14:16.4] Jonathan Gienapp: So the basic idea being that if you want to know even its public meaning, there are other ways in which you can understand being an originalist. But you have to see how that is embedded in a wider context of constitutional understanding, that if you don't recover that kind of wide and deep understanding that departs from our own, you're gonna end up wrenching the 18th century constitution that you're seeking to recover into the modern era. And you're going to effectively treat it as though it's written on the terms of modern constitutional law, when to my mind it wasn't. So, to me this is really a debate over how wide and deep the contextualization needs to be. And I think a lot of leading originalists think it can be narrower than I tend to think. And I think that really gets to the heart of it. And that picks up on a lot of what Steve was talking about. And I'm sure he also has much to say to that.

[00:15:07.9] Thomas Donnelly: Yeah. And I'll let you come in, Steve, and I'll also place on the table sort of I guess a housekeeping matter that's come up with a lot of the questions in the Q and A was just here's one from Josh Garfinkel, which is, you know, we've thrown around a couple of different concepts here. We've heard original intent, original understanding, original public meaning, you've talked about original law to the degree to which you could, talk a little bit about those differences just to place them on the table for the audience. I think that'd be helpful for everyone. And then I'd love for you to more generally respond to what Jonathan had to say about the nature of history that needs to be done here. And he thought that to do most versions of originalism well, you have to ask broader questions about the nature of the constitution, nature of constitutionalism, what the founders thought of constitutional law. I'd love to know what Steve Sachs thinks about that.

[00:15:54.8] Stephen Sachs: Sure thing. So to start with, a lot of the early versions of originalism early here being, once it became an ism sort of '70s and '80s were framed in terms of original intent. That's what people thought originalism was. A lot of discussions of originalism, even today, talk about the intent of the founders. And some people see the idea essentially that if we are following the document that they wrote down, they must have written it down for reasons. So we should know what those reasons are and do what they wanted us to do with sort of an intuitive picture. And that can mean different things. It can mean following the rules that they had in mind, even if they didn't write them down all that clearly. It can mean achieving the outcomes that they wanted to achieve, even if the rules they wrote down don't necessarily yield those outcomes.

[00:16:48.7] Stephen Sachs: There are also folks who argue in a newer sort of public meaning school. That say, look, the constitution is law, it's like a parking sign. Maybe the person who wrote the parking sign wasn't really thinking when they said, "No parking Tuesday is 5:00 to 7:00, that that was actually allowing parking on Wednesdays." But that's what the sign says, and that's what a reasonable person looking at it would think, and therefore it'd be unfair to hold them to whatever was in the heads of the person who made the sign. You should hold them to what the

reasonable person seeing the sign would think. And so that's the sort of public meaning school that's probably the majority of originalists today. But there are also folks who argue, no, what we really care about is not what the member of the public would think, but what someone who was legally educated or legally well acculturated would think, because after all, the Constitution is operating as a legal document here, and lawyers use words differently than the general public does.

[00:17:47.0] Stephen Sachs: And so we need to know when it says, "No a chamber of treason shall work corruption of blood," what did that mean to a lawyer? And it probably didn't mean sepsis, it meant something about inheritance. And so there are going to be distinctions there. My own view is that of original law, which is a little bit more general. It says, look, the whole point of all this is to know what the constitution added to the law as it stood in 1788. And questions of public meaning and other things like that are going to matter for that. So there's a great example in a paper by Michael Stokes Paulsen and Vasan Kesavan, is West Virginia unconstitutional? Where they argue that the constitutionality of West Virginia comes down to how people used semicolons for a particular semicolon in Article 4. And the constitution could have expressed one kind of rule and it could have expressed another. And we sort of do need to know things about grammar to know what rules it expresses. But those aren't the only kinds of disputes we might have about the constitution.

[00:18:50.0] Stephen Sachs: We also have to know what kind of enactment it was and what else was out in the world, in the legal world that it was adding to, and that it was crafted in light of. Those are all things that are part of the corpus eras of 1788 and indeed of today, to the extent that we haven't thrown over the law of an earlier era, except in certain kinds of ways. So for someone like me, if you're looking at a rule like the Fair Labor Standards Act, say, "Well, okay, when did Congress get the authority to pass this kind of thing? Was it in 1788? Was it in the 1860s? Was it in the 1930s? What caused it to be the case that Congress can pass this?" And so you'd have to have some historical story about American law, which would have a certain kind of continuity to it, where you'd say, this is why that kind of move was legal at the time, or has somehow become legal since. What was it that made that change?

[00:19:51.4] Thomas Donnelly: Thank you. Thanks so much for that. I think that's a very helpful table setting for a lot of the audience. 'Cause this could get very weedy obviously, these sorts of differences. And I think that's a great way to sort of discuss some of the distinctions between the varieties of originalism. I mean, maybe going to some of the meat of your book, Jonathan. I mean, you talk about, one of the things you try to flag is that at least in your view, one of the core problems with originalism is not one of linguistic drift, but it's one of conceptual drift. And you sort of flag some big conceptual differences that you find when you study deeply Constitutionalism at the founding, sort of from the declaration up through the Constitution, and even a little bit after that. And big, as you say, core constitutional concepts among them, liberty,

rights, state power, separation of powers, Republican governance. We see just different views of what those concepts meant at the time. Maybe highlight a few of the most important ones for us. And then I'd love to hear some of Steve's thoughts on them.

[00:20:51.9] Jonathan Gienapp: Yeah. Great. So, picking up on what Steve said as a way to sort of bridge this. So most originalists, many originalists emphasize as sort of an initial matter, as an organizing premise that what the United States Constitution is and what allows us to get off the ground is that it is a written text. That's what it is. And someone like Justice Antonin Scalia, when he basically said, quite famously, and this became very popular, that originalism is basically textualism applied to constitutional interpretation. That basically the same general principles you would use to understand other forms of written law you should apply to the Constitution. And that has been a very popular idea for quite a while. Now, this is among the things that distinguish Steve and his often co-author Will Baude, unlike a lot of originalists, something I really appreciated about their work is how seriously they take unwritten law at the founding. Things that are unwritten, that the Constitution leaves in place or takes for granted or works as a background principle.

[00:21:52.9] Jonathan Gienapp: And we have disagreements on exactly how we should think about that, but there's a broad agreement there that I think is really important. 'Cause whether you're talking about Justice Scalia or Justice Gorsuch, it's, well, you wanna understand the second Amendment, understand what the words mean. The words are sort of the repository of constitutional content. They communicate something. So this gets to your question, Tom. As an initial matter, I don't think you can really understand or read these complex constitutional provisions unless you're already presupposing some really important robust concepts. Like what is a constitutional right in the first place? What defines one? How does it work? What is it's sort of organizing purpose? And beneath that, how do you conceptualize liberty and then its relationship to governmental power. And I think one of the distinctive things of the founding era before the sort of modern liberal rights revolution that reoriented in sort of broad strokes being very general here, how a lot of people in the United States and the western world thought about the nature of individual liberty and rights.

[00:22:54.3] Jonathan Gienapp: They thought about it in ways that can seem very different to us, that liberty was less defined as non interference as a sort of space of action where you were not properly coerced. So if the government regulates you, they're interfering with their liberty in some sense. And you have to come up with some sort of balancing test to deal with it. A very different way that had grown out of the English civil war years and just dominated colonial American thinking as they protested British efforts to regulate the colonies long before the imperial crisis. And then it explodes in the eve of the American Revolution is this much different understanding of liberty that defines it not as non interference, but as not being subject to an

alien will, to a will outside of yourself. So the key idea here is there's nothing wrong with being governed that doesn't interfere with your liberty if it's you doing the governing.

[00:23:46.1] Jonathan Gienapp: So this places enormous emphasis on consent in representation, which was why taxation without representation was so central to not just the stamp activates, but thereafter. The idea being that legislatures and other institutions can curtail what you're doing, but only if it's you in a very real political and legal sense. So liberty is therefore not defined in terms of how much are you being interfered with. It's an account of what makes legitimate public force in public law. And if that's legitimate, it potentially could regulate a great deal without interfering with your liberty. And I think it's very difficult to read, say the First Amendment or the Second Amendment, or what these things are all about unless we first bring into view that much different way of thinking about liberty and its relationship to government power.

[00:24:35.2] Jonathan Gienapp: So for instance, if you think Liberty is by definition the absence of government power, it's kind of a zero sum game. I think you're already in a space that is quite foreign to how most people at the founding thought. And then it becomes very difficult to perform the linguistic exercise of what the words mean. So you need this broader intellectual reconstruction in my mind to begin to understand what these things are saying. And there's far more I can say about constitutional written-ness and the like, but I'll leave it there for now, to get Steve's reactions.

[00:25:04.2] Thomas Donnelly: Yeah. No, I'd love to know how much daylight there is here, methodologically, Steve, between you and Jonathan, like to what degree some of these broader questions, Jonathan's asking some of the broader conceptual differences he's flagging in his book. Sort of part of the universe of things that you'd look at it as an originalist to try to figure out what the original law is versus this is just sort of outside of the bounds of what the work originalism should be and that you're looking for a narrower inquiry. I'm just curious about your reaction.

[00:25:34.0] Stephen Sachs: Sure thing. So, there's a lot of common ground here. Will Baude and I just co-wrote a paper with Jonathan's colleague Jud Campbell on the general law and the 14th Amendment in Stanford Law Review that talks about the implications of this view of rights for the 14th Amendment and for federal enforcement of rights against the states. And you know, I'd absolutely agree that if we want to know what's going on when they say that Congress can't bridge, among other things, the freedom of speech, well what do they mean? What is this thing that Congress can't bridge? And you're not gonna learn that just by looking at the words, the, freedom of, and speech and sort of combining them in some way. You're gonna say, well, that's some kind of object in the legal world.

[00:26:18.4] Stephen Sachs: And indeed it's sort of part of a concept of how rights are being protected. So it's not just that there is a definition, you can just flip open a book to this is what the freedom of speech concludes. It's a lot of things and you need to be able to be sort of fully marinated in that, to be sure that you're right when you're making claims about what that provision's inclusion in the First Amendment did to the law of the founding. I think in the interest of sort of finding disagreements that we can fight over for the audience's enjoyment, I think that, one way of articulating where we might disagree is I worry a little bit that there is an illusion between what we today would call something like the small-c Constitution, which is not what they would've called it from another thing, they capitalize their nouns differently.

[00:27:07.6] Stephen Sachs: But what we would call the small-c Constitution, the sense of the fundamental law of the United States. And that might include things that are rules that are not in the Constitution, meaning the Big-C Constitution, the instrument that was adopted in 1788 and amended at various times later, but that are still very important to the structure of our system. So a standard example would be the law of state borders. Nothing in the Constitution tells you where the borders of the states are. Nothing tells you when the river changes course, whether the border moves. Also, all of those things were left up to international law. And in fact, the Constitution explicitly says, "We are not touching this one with a 10 foot pole. Nothing in this constitution should be construed to prejudice the claims of any state. Please don't look to us to figure out where the state borders are. You've gotta figure that out yourself."

[00:28:01.1] Stephen Sachs: Those rules are not big-C constitutional rules. They're not somehow hidden inside the instrument somewhere, but they are rules that are of small-c constitutional moment. Because a state that says we're expanding our borders, now we own New Jersey, that's not gonna fly. Other states are gonna say no, the federal courts are gonna say no, Congress is gonna say no. There are other rules that apply to them, not because they're necessarily in the instrument adopted in 1788, but because they're outside that state's ability to change and nothing else in the instrument allows anyone else to change them later. Congress couldn't necessarily change those rules if it wanted to. And so if you have things like that, I think it's important to distinguish which of these various rules are rules of common law, rules of equity, rules of the law of nations, rules of general law, rules of admiralty.

[00:28:54.5] Stephen Sachs: Where are they all coming from and are they unwritten constitutional rules or are they just unwritten law that for various reasons will be of constitutional importance? And so again, I worry just a little bit that the two categories are a little bit squished together, in the book's approach, because it might be that what's in the instrument, we've gotta care a little bit more about the language. 'Cause even with all the framework and all the context, we still need to know what it was saying. But that 's stuff that's really fully outside the instrument where the language really is not of much use.

[00:29:29.3] Thomas Donnelly: Excellent. No, and I definitely want to dig into this history forever. I want to transition us to some modern questions too, which are coming up a lot in the chat. But before we get there, maybe one more round of the history here. One, to give Jonathan a chance to respond to anything Steve said on our previous line. The other is Jonathan, I'd love for you to take a beat on sort of the popular constitutionalism that you identify at the founding. For instance, you have a great quote where at first, and for years to come, many in the founding generation believed that the Constitution was a people's document, not a lawyer's document. Heard Steve bring up FDR earlier in this discussion. FDR very much said similar things in his fireside chat, but loved to hear a bit about that popular constitutionalism at the founding and what you see as its relevance.

[00:30:17.5] Jonathan Gienapp: Yeah. Great. And if I could just take a beat to respond to what Steve said. 'Cause I think that's a really good way of putting it. That we have to be very careful. And I take his point that in one instance, we could be talking about things outside of the written constitution, unwritten that merely have authority because nothing in the written constitution kind of preempts them or unsettles them, but they don't have the sort of same status as constitutional law. But there are also things that are a kind of unwritten fundamental law. And I think very important here was a framework. Steve mentioned my colleague Jud Campbell, who has done the best work on this, the importance of social compact theory or social contract theory to founding era constitutional thinking. It's very hard to find a constitutional debate or read a treatise or anything that does not presuppose this framework in some sense.

[00:31:03.5] Jonathan Gienapp: And the basic idea here was people are in the state of nature, they leave the state of nature to form a political community, a social compact, a we, a distinct political entity. And then second, they draw up a constitution of government. And they always assumed that these two constitutions, the social compact and the constitution of government or what we tend to call the constitution, were intertwined and had the same priority. And this was especially important because most fundamental rights were established and entrenched and protected of the social compact, which is why enumerating and declaring rights was not of legal significance in the same way at the founding.

[00:31:39.2] Jonathan Gienapp: So I take Steve's point, absolutely, there are certain rules that I would not say are outside the constitution and have equivalent constitutional status, but there's other kinds of fundamental law that I just think it's really, really hard to understand what they thought they were creating from the standpoint of fundamental law without that, if we don't take those seriously. Now, I imagine that Steve would generally agree. Where we might disagree because I very much appreciate his desire to get us to build some friction here is to your question, Tom, which is, well, what is the character of this fundamental law? Is it distinctively, law-like or legalistic? And what I try to draw attention to, and my sense is this is going to be

something, where there is some very interesting disagreement is the way in which people debated fiercely at the founding, the status of the constitution as a kind of law.

[00:32:33.5] Jonathan Gienapp: Now, everyone thought it was some kind of law, it's fundamental law, but is it a like in kind to other sorts of conventional law and legal instruments? Is it like statutes, contracts, treaties, fiduciary trusts? And related to that, can the various rules of interpretation that existed to the extent they did within those domains be imported into American constitutional law and interpretation? And one of the things I find most striking about the period is, at any point when somebody tried to do that, someone bitterly contested the matter, usually making some big argument about whether that's the wrong way to interpret a constitution because it is a special instrument based on the people's sovereign authority.

[00:33:12.4] Jonathan Gienapp: Stop trying to take things that are suitable for one area of law and bring your lawyers' sophistry over here. Or they would make arguments about the revolution that are really interesting. Somebody would try to say, "Blackstone gives us a pretty useful set of tools for interpreting statutes and written instruments. What about those?" And somebody would say, "Newsflash, we had this thing called the American Revolution, which cut us off from those sorts of evil sources of law." So for a lot of people, this became the basis of a different way of thinking about constitutionalism that was once alive and well and has somewhat disappeared from our constitutional culture. Popular constitutionalism, which was both the idea that the fundamental law of the United States needed to be understood through the prism of this is a people's document fundamentally predicated on the people's sovereignty. And that people's sovereignty has an ongoing capacity to interpret and enforce it.

[00:34:05.7] Jonathan Gienapp: So today, I think you'd find a lot of sympathy maybe for the first idea, but the second one is a little more foreign. What does it mean for the people themselves in some capacity to be the sign of final interpreter and enforcer of the Constitution? And I think what's striking about the early republic is even among legal elites, people like James Madison and Thomas Jefferson, they often resisted a juricentric view of the constitution, let alone judicial supremacy. The idea that federal courts or the Supreme Court has final say on the basis that it was not consistent with an understanding of a document predicated on popular sovereignty. And then there were more radical people that I think have as much say at the founding, and we should at least as an initial matter, take their views seriously, even if for different reasons we might ultimately discount them, who were quite adamant that the promise of the American Revolution and the entire basis of the constitution's legitimacy was bound up in the idea that in the final instance, the people through their sovereign exercise could ultimately enforce it.

[00:35:02.8] Jonathan Gienapp: So today we have an idea where the people are sovereign, but they're kind of asleep. They can be awakened if we call a constitutional convention or send them

an amendment. And there were people at the time who were federalists, especially more elitist, elite-minded legal thinkers who were drawn to that model. But a lot of what organized the effort, the sort of energy in the Jeffersonian Republican party was this idea that people are not asleep. The sovereign people are a mobile dynamic active force, which doesn't mean that anything certain popular majorities do counts as the people. No, like most questions in our constitutional culture and tradition, they're hard to answer, but a real belief that the people in different ways could flex their muscle. And just one concrete example of this that I think is interesting is prior to the famous Supreme Court case, Fletcher v. Peck that tried to resolve the Yazoo land crisis. To just boil this down to size, Georgia's state legislatures have basically given away this massive amount of valuable land they have to the western part of the state.

[00:36:04.2] Jonathan Gienapp: And they've basically done so for corrupt reasons, they've been bought off by northern speculators. This really enrages people in Georgia. So they immediately call an election, they throw the bums out, they replace the legislature, and they convene themselves. The new legislature is a supreme constitutional tribunal. They're not merely gonna repeal the previous statute. They're gonna stand in judgment as kind of a final court, the people's court of law over this legal enactment. And they denounce it and strike it down on those terms. And there are many examples of this in the early republic, which is, I think a big part of, if we're trying to understand original law in the most capacious sense, it's not just what jurists, who really knew what they were talking about from our perspective had to say, but also these people who took very seriously the idea that the people were sovereign and that the Constitution could only be law if the people had an ongoing say over its enforcement.

[00:36:54.0] Thomas Donnelly: Excellent. So Steve, I'd love some of your thoughts about Jonathan's observations here about popular constitutionalism, how it informs your views of original law, and it intersects more broadly with the question we've gotten from a few different members of the audience, including Donna Smyth and Joshua from Del. Jonathan's gotten into this to an extent, but sort of what do we know about what the founding generation thought about constitutional interpretation? There were obviously great disagreements as there are in any generation, but are there sort of common threads that we can pull out if we wanted to sort of generalize for the founding generation's overall orientation towards constitutional interpretation?

[00:37:37.0] Stephen Sachs: Sure thing. There are a lot of different threads that make it very hard to make very broad statements. So a lot of you know, especially with popular constitutionalism, there are lots of different ways in which the people's sovereignty is exercised. So, for instance when Madison is talking about the Constitution being parchment barriers, the Constitution does not reach out and grab you and shake you until you comply. It needs actual people to comply with it, and if the folks in power are not doing what they're supposed to, then somebody needs to vote them out. And if you don't have popular buy-in of the various kinds, you will not find substantive compliance for very long. That said, it doesn't necessarily mean that the

people are sovereign in the sense that whatever they think the law is, therefore is the law. You know, everyone who has had the experience of sitting down on a plane and telling the person next to you that you do constitutional law, they have lots of opinions about what the Constitution says. And those opinions might be widely held, but that doesn't make them sort of accurate as a read of what is the nature of this aspect of human culture known as the legal system, which often is a very elite phenomenon.

[00:38:46.6] Stephen Sachs: You send your kids to law school for tens of thousands of dollars a year for which I thank you, in order to teach them stuff that they wouldn't know outside those institutions. And so there are lots of ways in which what some legal philosophers call the recognition of community, the people whose attitudes and beliefs about the law determine what the content of the law is, might depart from sort of the people at large. It might be that even if it's not a judicial centered constitution or judicial centered legal system, that might in some sense be up to the opinions of jurists. If the jurists tell us this is a doctrine of admiralty law. They're the folks who would know. And it might well be the case that often that's true about constitutions, even if we might prefer that it be otherwise under certain circumstances. So if we look back at the founding era and try to figure out what were the modes of interpretation that were in the mix? One other sort of slight disagreement I would have with Jonathan, although maybe it's not such a slight implication, is that I actually think that the analogy between the Constitution and statutes was much more common and much more central than the book suggests.

[00:40:00.1] Stephen Sachs: There certainly were other ways of seeing it. You could see the Constitution as a treaty between sovereign states. That was definitely the more strict constructionist view of the Jeffersonians, especially late in the decade of the 1790s into the 1800s. After the Alien and Sedition Acts get started, people see this as a way of responding to them. But I am persuaded by work by my former colleague Jeff Powell and also by certain aspects of the work of Farrah Peterson in Chicago, that the statutory analogy was much stronger. You see a lot of people on both sides of issues at the very founding, the Anti-Federalist Brutus saying, "This is terrible. They're going to read it as a statute and then it's going to let them do X, Y, Z." And then Hamilton responds saying, "No, no, no, it's fine. We're going to read it as a statute and we won't do X, Y, Z because that would be crazy. We'll just do all the stuff you're used to with normal statutory interpretation. Don't worry about it."

[00:41:00.3] Stephen Sachs: And so there are definitely differences in emphasis and in sort of thumbs on the scale. So when you're reading different kinds of statutes, some of them are more technical than others. And there are sort of reasons to interpret them differently. As a result, the Constitution does not have the prolixity of illegal codes. There are certain kinds of inferences that you can't make. But we do see people making sort of ordinary statutory interpretation like inferences all the time. So Madison in the ratification conventions, people ask about state sovereign immunity and he says, well the existence of diversity jurisdiction for suits between

citizens of different states wouldn't override rules about whether 10 year olds can sue in their own name. Yeah, sure, they're citizens of a different state. But the specific, controls the general and sort of all of these standard moves that we would have if we had a statute like this can be used here, too. And so I raise this not to say that the Constitution is exactly like a statute because it certainly wasn't. There are certainly ways that people read it differently. But just that I don't think that how to approach this new document was as much of an open question or at least so much of an open question that we cannot say that particular modes of approaching it were more dominant than others, were more prominent than others, were more accepted than others.

[00:42:19.4] Thomas Donnelly: Thanks for that, Steve. And I mean, Jonathan, certainly feel free to respond to any of that. But I'd like to transition in our final third of the conversation here to just some modern applications, both of some of your observations, Jonathan, and also of original law, originalism to sort of get a sense of how it matches up to what the court has been doing in recent terms. And one of the most prominent questions in the Q&A has been sort of how do we take what Jonathan's saying and what Steve was saying and apply it to the area of the Second Amendment where the courts obviously have been active from Heller through Rahimi, just this past year. And so maybe starting with you, Jonathan, take a beat on what some of the lessons you learned from your history, how that should inform how we might think about the Second Amendment and some of those decisions. And I'll similarly ask you after Steve to respond to some of what Jonathan says and then bring in the original law, originalism perspective.

[00:43:14.5] Jonathan Gienapp: I really appreciated what Steve said in the last answer, 'cause I do think that sharpens up an important area of difference, the one that is more of emphasis than not. I think Steve is right that there are lots of instances in which people analogize it to a statute. And this becomes very common, especially on the Marshall Court. But naturally, supporting the argument I made earlier, my emphasis would be, well, in so many of the instances where those efforts to analogize the statutes were made, people pushed back against that analogy or pointed out the ways in which the fit wasn't quite perfect. So it can maybe get us off the ground. But then what? And I think this is especially important with so many of the areas that roiled constitutional controversy at the time and continue to today, such as what do we do with fundamental rights? Because it was tricky to take statutory concepts and apply them. And in fact, when I think those have been applied, like when Justice Scalia and some originalists who tried to be textualists did it, they often misstepped in a lot of ways precisely because of that. So what are the fundamental rights of Americans in the United States?

[00:44:17.1] Jonathan Gienapp: And I think this gets exactly to what's going on in Second Amendment jurisprudence, which helps sharpen up to my mind what happens when you don't just ask a question, what do the words of the Second Amendment mean? But you try to recreate a broader form of constitutionalism and ask yourself, what does it mean that the court, if I am

correct, has departed from that in a sort of big sense? Is that consistent with originalism? So to boil it down to size, and here I draw in significant ways on my colleague, Jud Campbell's excellent work on this front as well. When the court approached the Second Amendment, as they have in so many fundamental rights cases in DC versus Heller in 2008, this case about whether this law prohibiting handguns in the District of Columbia violated the Second Amendment. They basically presupposed a variety of things about rights and liberty that I think immediately got them off track. They had assumptions about where rights came from, what purpose they served in the constitutional order, and who had authority to define their meaning. So their three answers to this were constitutional rights are created by text. You have constitutional rights because they are codified and enumerated in textual form. So it matters that the Second Amendment as a textual matter, exists and was added. That's what creates the constitutional right. Second, the point of the right is to serve as a counter majoritarian limit on governmental power.

[00:45:38.6] Jonathan Gienapp: And then third, the content of the right is defined by judges. I think you can see these three premises running through Heller, through Bruen, and then being picked up in Rahimi. And to just make things simple, what I would say is the founding generation, generally, when thinking about how fundamental rights worked, departed from all three of these assumptions in big ways. They thought that most constitutional rights, many fundamental rights, existed prior to textual codification. What we call the federal bill of rights, were mostly declaratory in character. Not all of it, but mostly they were declaring, announcing pre-existing rights that already were part of the social compact and already had constitutional force. Two, these rights were not limits on government action, but conditions of legitimate governance. So they were not counter-majoritarian in nature. Instead, what they were were essential broad principles that made it clear that these could only be regulated or infringed by a truly representative government and in the interest of the public good. So if the government doing the regulating violated either principle, no good.

[00:46:51.3] Jonathan Gienapp: But if they're consistent with both principles, there's nothing inconsistent about the right and you're enjoying it and the regulation of it. And then three, the content of the rights were generally to be determined by the people themselves, not by judges. Judges could in different ways pick up things that were settled in common law if that was rightfully understood as a representation of what the people's law was. That leads to conflicts in the early republic about whether judges picking up the common law are actually doing that. I'll leave that to the side for now. But this gets to some things that I think are really thorny and tricky and are part of what I draw attention to in the book. So is the meaning of the Second Amendment fixed? Or how should we understand what was laid down? Well, the broad principle that is being declared is as a general matter fixed. This is one of the sort of essential features of liberty that it is seeking to announce. It is not creating that principle through textual codification, it's calling attention to it. But it's a general declaratory principle. It's announcing a general premise of

liberty. The actual legal determinations that will establish the scope of the right will be part of an ongoing process.

[00:48:04.7] Jonathan Gienapp: I mean, it's basically left to them because it's nothing more than a declaratory right for the people themselves through their representative institutions to figure out the contours of that right and what kinds of limits can be placed on it. So it gives the people themselves the capacity through local and national governance to do that more than judges. Whereas in Heller and Bruen, the idea is in the case of Bruen, this concealed carry law that was struck down in the State of New York. Oh, the New York legislature has engaged in a sort of end means analysis to try to figure out how to deal with the problem of guns in the state of New York. The right way to do it is to actually see what kinds of regulations are deeply rooted in the nation's historical traditions. But I think if we take the historical tradition seriously, what we find is this tradition of letting the people themselves flesh out the right through their conventional representative institutions. So, again, I think a lot of this Steve would agree with 'cause he takes unwritten law and social compact theory and things like this seriously in ways that Justice Scalia and others often didn't.

[00:49:11.2] Jonathan Gienapp: They usually said, "Well, the right is written down." So it's this area that sort of removed from a certain kind of government regulation or government regulations are now going to be viewed really, really strictly. And we, the judges are going to sort of sort out what the proper limits that are baked into that provision are. When I would say, "No, not much is baked in." It's a general declaratory principle that leaves to future generations the capacity to develop it. So we see here maybe a kind of originalism and living constitutionalism that work together, which makes it so hard and anachronistic to ask where the founders are one or the other.

[00:49:43.6] Thomas Donnelly: So Steve, I'd love for you to weigh in on certainly Jonathan's take there, but more broadly if we're looking at the Roberts court here from an original law perspective, originalist perspective, how has the Roberts court done on the Second Amendment in your view?

[00:50:00.2] Stephen Sachs: So in general, what I would say about how any court has done on any position is put not your trust in princes. You know, judges, they work very hard. They tried to do a good job. Human beings are fallible, and they have a lot of cases coming in the door. And sort of it's our job as academics to say, "Hey, actually, you should be thinking about this, this different way." But we should not in any way expect the judges to have anticipated us and to have worked out all of these theories in great detail. Because some of this stuff the original historical work is still being done. You know, Jud Campbell's work on natural rights in the First Amendment is an excellent contribution to our understanding. And for various reasons, many I mean, I would put the blame on Holmes and Brandeis and Erie. But for various reasons, we

haven't been looking in the right place for a lot of this historical information for a very long time. And as a result, we really have a lot of work to do to uncover the nature of rights at the founding and their content before we should expect the courts to be batting 500 even. With respect to the Second Amendment in particular, I think Jonathan identifies and other Jud has as well, three sort of categories of rights. One is to sort of retain natural rights. So I might have a right to pursue a profession.

[00:51:20.9] Stephen Sachs: And the government can regulate that in various ways for health and safety and welfare and morals and all sorts of things. And there's no sense that when it's regulated for the public good, if it is representative in the necessary way, that my right has been violated. There are other kinds of rights that are a little sort of stronger than that. There are some that are even inalienable rights, things like the right to good faith expression of opinion was one of the things that many people in the founding generation saw in that category, that the people sort of could not alienate their right to express their views in good faith. And so when the Constitution protects the freedom of speech, it's not just saying you have a natural right to speak, but the government can regulate that in the service of the public good. There are certain things that are incorporated in there that the government can't regulate, even if it thinks it has a very good reason for doing so. And then there are some other things that are sort of an intermediate category, which are fundamental positive rights. An example would be freedom of the press, the right to print without needing a government license. And that was not something you would get from the sort of natural right considerations.

[00:52:31.1] Stephen Sachs: But it was something that was so clearly part of the common law tradition that we would not read a generic grant of legislative power, whether to the federal Congress or to a state legislature, to include the power to override that. So when the federalists are being challenged, people say, "Hey, we need a bill of rights, we need freedom of the press." Their response is, "Don't worry about it." Not just Congress won't try to restrict the freedom of the press, but Congress can't, because the generic grant of certain legislative powers to Congress would not include a power to license printers. Of course, people are still pretty nervous. So as a belt and suspenders, we're going to put it in there anyway. And we have the First Amendment. The Second Amendment has elements of some of these. So some gun ownership would just have been a retained natural right. And so if the relevant legislature, federal or state wanted to regulate it, needed public good, that would be something they could do. But there might also be certain aspects of it that might have been fundamental positive rights.

[00:53:33.7] Stephen Sachs: This is not an area that I have great expertise on. I generally rely on Rob Lider at George Mason University for some of the details. But there may have been areas that in the British common law tradition were seen as fundamental positive rights. The right to take part in militia service, the right to have the sorts of weapons that would be appropriate for that. That may or may not have been fully up to the legislature to abolish. That's why in the

1840s in Nunn v. State in Georgia, Georgia's Bill of Rights or Georgia's Constitution didn't have a Second Amendment equivalent. But the court said, nonetheless, the existence of the Second Amendment in the federal constitution is good evidence that this is the kind of right that would not have been up to a generic grant of legislative power to override. They might have been right about that. They might have been wrong about that. But that would be the kind of argument that an original law originalist would be very interested in trying to determine whether there was such a right or not.

[00:54:37.4] Thomas Donnelly: Excellent. And one thing that the nature of this conversation is we focused almost exclusively on the founding generation, apart from you, Steve, mentioning your article on the 14th Amendment. But Howard Shire reminds us in the Q&A that there are many different founders and different founding generations, especially vis a vis other parts of the Constitution, like the 14th Amendment. And so my question to Jonathan is that for people who want to similarly reconstruct the conception of rights that we're finding at America's second founding during Reconstruction, is there good scholarship you would suggest that we look at and that you can point to? Is it another book that needs to be written? How do we sort of think about the second founders as part of this story of originalism? 'Cause there are plenty of originalists like Steve who are experts not just on the first founding, but the second founding and other key parts of the American constitutional story.

[00:55:28.7] Jonathan Gienapp: Yeah, a huge part of the story and for a long time was, as these things went, kind of criminally neglected in a certain sense. That is no longer the case. Academic originalists focus enormous attention on the 14th Amendment, not just Steve, Will, and Jud's piece on general law in the 14th Amendment. But many, many books more than I could even name at this point from Kurt Lash to Randy Barnett and Evan Baranek to a whole bunch of literature to Jack Balkin's Living Originalism, which says a lot about the 14th Amendment and the privileges or immunities clause that is really important. John Harrison wrote something, an article a long time ago and on and on and on I could go. But there's a really interesting divide, and people have written on this, between originalist academics' focus on Reconstruction and originalist jurist's arguably reticence to take up the issue. And they seem much more comfortable talking about the founding. And an exception that sort of proves this rule is Justice Amy Coney Barrett, who I think is pretty tuned into the academic debates, maybe 'because she was pretty recently an academic, who in the Bruen concurrence, among other things, says, "At some point when we're figuring out fundamental rights, we have to, in a more serious way than we thus far have, answer this question of what exactly did the 14th Amendment and Reconstruction do to these rights?"

[00:56:49.2] Jonathan Gienapp: Now, she argues in this case, she didn't think it made a difference, but this can't continue to be kicked down the road. At some point, you need to figure this out. But one of the reasons why perhaps Reconstruction is relatively ignored, to the extent

people believe that, so that's an open question if people on the federal judiciary do that, is perhaps because it reminds us that originalism is not just a theory of constitutional interpretation, but is in some ways a cultural anchor. That political originalism breathes as much life into judicial originalism as academic originalism does. And this helps explain why originalism is such a big deal. Usually, isms that come out of the academy or academics talk about are not widely known or discussed on talk radio or at national political conventions. Originalism is something everyone's heard of and has an opinion on. So it's a great success story in that regard. But that clearly has something to do with the cultural mystique and power of this central feature of our civic identity, which is this founding moment and a set of a sort of civil religion that has both a set of patron saints and a set of scriptures that followed from that. So I think there's a lot of reasons why perhaps jurists don't want to transition from a first founding that has such cultural significance to a second founding that a lot of academics know who John Bingham is, but not necessarily a lot of people in the broader American public.

[00:58:07.1] Jonathan Gienapp: And I think that's something we're going to see over the coming years, if that divide grows or if they sort of proceed on parallel tracks or if what the academics are interested in begins informing in a deeper way what the Supreme Court is doing. 'Cause for the moment, I mean, the Second Amendment being a good example, it's very much grounded in 1791 still.

[00:58:26.7] Thomas Donnelly: Excellent. And sadly, we're running out of time here. Maybe the last question to you, Steve, I'd love for you to take a beat on sort of where the second founders fit into the originalist universe. And in particular, how it fits into your approach to original law, Originalism.

[00:58:44.6] Stephen Sachs: So let me first say that I should disclaim being an expert in either the first or second founding. I only sort of dipped my toe into some of the Reconstruction literature. But I think one reason that we don't celebrate Reconstruction and the founding in quite the same way is that they didn't necessarily think of themselves as second founders. You know, they did not create a new constitution for the new union after the war. They tried to fit things into the existing constitution, sometimes at great cost with great difficulty. You have to do a lot if you want to get two thirds of each house and three fourths of the states to ratify an amendment, even when the Southern representatives are excluded from the houses. So it was very important to them that they were not creating a second republic of some kind, but were rather making very significant but still sort of internal changes in the law of the existing republic that they already had. That they were fulfilling the founding rather than breaking away from it and starting something very new.

[00:59:50.9] Stephen Sachs: And I think because of that John Bingham was not trying to be a Madison or a Washington. Neither was Senator Howard, nor was Charles Sumner, et cetera. And

so I think that it's not odd then that we remember them differently and that we assimilate the 13th, 14th and 15th Amendments to the existing Constitution in part because that's what they were trying to do when they were ratified.

[01:00:16.6] Thomas Donnelly: Excellent. Thanks so much for that, Steve. And Stephen Sachs, Jonathan Gienapp, thank you so much for being with us, sharing your thoughts on originalism, one of the most important debates within constitutional law. We are deeply, deeply grateful.

[01:00:29.1] Jonathan Gienapp: Thank you so much.

[01:00:29.2] Stephen Sachs: Thank you.

[01:00:35.4] Jeffrey Rosen: This episode was produced by Tanaya Tauber, Lana Ulrich, Samson Mostashari, and Bill Pollock. It was engineered by Kevin Kilburne and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, Gyuha Lee, and Yara Daraiseh. Dear We The People friends, Happy New Year! Please recommend the show to friends and colleagues who are looking for constitutional illumination and debate. I'm so looking forward to our learning together in 2025, and there's so much to learn. Please mark your support for We The People at the beginning of the year, as many of you generously did at the end of 2024 by making a donation. $5, $10 or more signal your membership in this meaningful community of lifelong learning and your support for everything we're doing at the NCC. That's ConstitutionCenter.org/donate. On behalf of the National Constitution Center, Happy New Year and I'm Jeffrey Rosen.