

NAME

originalism d1_mixdown.mp3

DATE

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DURATION

26m 36s

8 SPEAKERS

Nick Capodice

Hannah McCarthy

Robert Frost

Archival

Mackenzie Joy Brennan

Antonin Scalia

Sonya Sotomayor

Speaker3

START OF TRANSCRIPT

[00:00:00] Nick Capodice

Hannah you know that poem, that Robert Frost poem. Two roads diverged in a yellow wood. What is it called? The road not taken.

[00:00:07] Hannah McCarthy

It sure is, Nick.

[00:00:09] Nick Capodice

What's that poem about?

[00:00:11] Hannah McCarthy

You want me to tell our audience what I firmly believe that poem is about? I believe that poem is about the importance of self-mythology.

[00:00:24] Nick Capodice

Hannah I love Robert Frost. And I love that poem, even though it's read at too many commencement speeches. But I don't think that's what that poem is about at all. If only. If only we could summon the ghost of Robert Frost to come here and say; actually, the poem was about this. Actually, the poem was about my pet.

[00:00:40] Robert Frost

Two roads diverged in a yellow wood. And sorry, I could not travel both and be one traveler long...

[00:00:48] Hannah McCarthy

But aside from the fact that I'm now expecting a lot of people to write emails telling me I'm wrong and I am not wrong, I'm not wrong about this. Uh, What? Why are we talking about this?

[00:01:01] Nick Capodice

Well, we're talking about it because outside of hearing it from the horse's mouth, from the summoned spirit of Robert Frost, outside of the writings of Robert Frost saying why he wrote what he wrote, we have no true way of knowing what somebody meant when they wrote something.

[00:01:18] Archival

You say to America. It ain't in the Constitution. Don't come to me to ask me to decide these things. It's not the responsibility. And the founders never intended it. Whether they knew anything about abortion or any other issue like gay marriage at the time or not. Exactly.

[00:01:38] Nick Capodice

You're listening to Civics 101. I'm Nick Capodice

[00:01:40] Hannah McCarthy

I'm Hannah McCarthy.

[00:01:41] Nick Capodice

Today we are talking about the judicial philosophy of originalism, specifically in the Supreme Court, what it means, where it came from, and how it has been used in many recent court decisions.

[00:01:53] Hannah McCarthy

Okay. All right. Whew. This is a higher stakes version of the what? What did Robert Frost really mean? It's a way higher stakes. Um, so the way we got to start, Nick, is defining originalism. What is it?

[00:02:06] Mackenzie Joy Brennan

It is professed, loudly professed express reliance on the founders society beliefs.

[00:02:14] Nick Capodice

This is Mackenzie Joy Brennan.

[00:02:16] Mackenzie Joy Brennan

Hi, I'm Mackenzie Joy Brennan. I am a lawyer who is licensed to practice in New York and Arizona. And right now I'm working on a book on the Constitution called The Original Original Intent Uncovering the Lost Constitution of the founders, which was started by my late dad.

[00:02:32] Hannah McCarthy

Her dad?

[00:02:33] Nick Capodice

Her dad, Terry Brennan. In 1992, he wrote a fascinating article in the Harvard Journal of Law and Public Policy about originalism.

[00:02:42] Hannah McCarthy

Oh, you know, I just think that that is a pretty special thing that Mackenzie is carrying on the work of her dad. I think that's very cool. So quick question about the word. Is originalism the same thing As to other concepts in terms of constitutional interpretation, constructionism and textualism.

[00:03:05] Nick Capodice

Yeah. Not exactly. There is some overlap. We're not going to get into those two too deeply today. But to your point, originalism was not always called originalism.

[00:03:14] Mackenzie Joy Brennan

Originalism has not been used even since the 90s. It originally was original intent, original meaning, or original understanding, depending on the credulity of the listener. So it's like originalism does not exist outside its adaptation by recent conservatives.

[00:03:34] Hannah McCarthy

So if a Supreme Court justice identifies as an originalist, that justice's claim is that they are not looking to themselves or society or even necessarily precedent to make their decisions. They are looking at what the framers slash founders thought when they wrote the Constitution.

[00:03:57] Nick Capodice

Exactly.

[00:03:58] Mackenzie Joy Brennan

And obviously there you get into some problems with which founders are we looking at? Because most of the record that we have is record of debate. And honestly, that's great. If we were to actually rely on it, there'd be plenty to work with. Um, except for the fact that, again, they did not tell us to do that. They they wrote things down and signed the document for a reason. And so to look for extrinsic evidence is, is a little out of pocket to begin with. The beliefs that originalists tend to espouse and use originalism to support actually have very little proof in the historical record from then or since. And conveniently, they tend to find things that there are the exact analog to pretty socially regressive policy, um, empowering the court.

[00:04:48] Hannah McCarthy

I do understand what Mackenzie means when she says that our record of the framers is a record of debate. The Federalist Papers, the Anti-Federalist papers, Madison's Notes from the Constitutional Convention. These all involve people arguing about the meaning of documents.

[00:05:06] Nick Capodice

Yeah, and this can lead people to say, instead of trying to get into all those people's heads, let's just look at the words. And that is textualism rely only on what the words say.

[00:05:18] Mackenzie Joy Brennan

But the problem there is that it is ambiguous oftentimes for a reason, because it was meant to grow with the country itself. Um, and they even talk about, you know, lamentably, we don't know all the natural rights that will be discovered in future generations. And the ones we have discovered, it's been a laborious and sometimes pendulous process. So there has to be something outside the textual, and that's where you get into what canons do we use for that? And do we rely heavily and without instruction from the founders on 1700 society? And do we rely then on what they expressly said or what? Society was doing, neither of which they instructed any future societies to? Do, by the way. The whole idea of looking to their society came about with Robert Bork in the 1980s.

[00:06:10] Hannah McCarthy

Robert Bork.

[00:06:11] Nick Capodice

Robert Bork.

[00:06:12] Nick Capodice

Truly a fun name to say. Robert Bork.

[00:06:15] Hannah McCarthy

It is fun to say. Bork Bork Bork. Funnily though, like pork is not fun, but Bork is.

[00:06:21] Nick Capodice

The B is a comedy syllable Bs and Ks. Yep.

[00:06:24] Hannah McCarthy

Fascinating. And Mackenzie said the 80s. Like the 1980s, not the 1880s. Breakfast club. Take on me. Teen Wolf. 80s. Yeah.

[00:06:38] Nick Capodice

I mean, technically, Robert Bork's first proposal on the theory was in the 70s, but it started to enter the national lexicon in the Alf era.

[00:06:46] Archival

(Alf)

[00:06:53] Mackenzie Joy Brennan

So, Robert Bork, um, he really has been lost to, I think, this generation, which is good and bad. But he marked he was the first one to use the the concept of original intent. And that was in the 1980s that judicial interpretive theory came about. So when you think of like the whole idea of the semantics of original intent, it really invokes that, like, this has been around forever and it's sacred and this is always what's been done. And I think that's almost intentional. So Robert Bork introduced this idea to support very regressive policies. He did not like single mothers. He didn't like working mothers. Um, he thought they were rotting society. So he was a real treat. And his first prominence on the national scale was during the Nixon administration Saturday Night Massacre.

[00:07:47] Archival

The country tonight is in the midst of what may be the most serious constitutional crisis in its history. The president has fired the special Watergate prosecutor, Archibald Cox.

[00:07:59] Hannah McCarthy

Okay, so we have to explain the Saturday Night Massacre. Nick.

[00:08:03] Nick Capodice

Yep. So Richard Nixon was being investigated for his involvement in the Watergate break in. And on October 20th, 1973, Richard Nixon called the head of the Department of Justice, Attorney General Elliot Richardson, and asked him to fire the special investigator in his case, Archibald Cox. Richardson said, absolutely not. He refused the president's orders and he resigned. So then Richard Nixon went to the deputy attorney general. William Ruckelshaus asked him to do the same thing, and then Ruckelshaus resigned. So finally we get down to the third pick, the solicitor General Robert Bork.

[00:08:41] Hannah McCarthy

I think I know the answer to what Robert Bork said.

[00:08:45] Nick Capodice

Yeah Bork said, you got it, Richard. And he fired Archibald Cox.

[00:08:50] Archival

A grave and profound crisis in which the president has set himself against his own attorney general and the Department of Justice. Nothing like this has ever happened before.

[00:09:01] Mackenzie Joy Brennan

Obviously did not save Nixon in the long run from the investigation, but so he obviously was a pretty political character, and he was very open about his political beliefs after that, about disliking single mothers, um, not supporting the Civil Rights Act of 1964 and not supporting the Supreme Court cases that enshrined the right to birth control access. Reagan nominated him to the Supreme Court in 1987, and he actually lost in the Senate, which is surprising for a political nominee.

[00:09:33] Hannah McCarthy

I have heard of Supreme Court nominees being withdrawn like Harriet Miers in 2005.

[00:09:39] Archival

Well, I'm I must say that. I'm disappointed that Harriet Miers found it necessary to withdraw her nomination. But this process, the nomination process has gotten, in my view, unnecessarily surly, contentious and downright nasty.

[00:09:55] Hannah McCarthy

Or a nomination being unsuccessful due to political hardball like in the Merrick Garland nomination in 2016.

[00:10:02] Archival

One of my proudest moments is when I looked at Barack Obama in the eye and I said, Mr. President, you will not fill this Supreme Court vacancy.

[00:10:08] Hannah McCarthy

But I cannot remember a time a Supreme Court nominee was flat out rejected.

[00:10:15] Nick Capodice

Yeah, because this is the most recent one. It hasn't happened since then. And Bork's Supreme Court nomination hearing was watched all over the country. Senator Ted Kennedy gave impassioned speeches.

[00:10:25] Archival

Robert Bork's America is a land in which women would be forced into back alley abortions.

[00:10:31] Nick Capodice

Then Senator Joe Biden gave speeches.

[00:10:34] Archival

Where I come from they call that making things up out of whole cloth. It's bizarre. It's ridiculous. Look at the record.

[00:10:43] Nick Capodice

An advocacy group made an anti Bork commercial with Gregory Peck.

[00:10:48] Hannah McCarthy

What?

[00:10:49] Nick Capodice

Yeah.

[00:10:50] Archival

Robert Bork wants to be a Supreme Court justice, but the record shows that he has a strange idea of what justice is. He defended poll taxes and literacy tests

[00:10:59] Nick Capodice

All those efforts were not in vain. The Senate ultimately rejected Bork's nomination.

[00:11:04] Mackenzie Joy Brennan

I think it really marked this new era of politicization. In addition to introducing originalism, people got very, very upset about it. On the right side of the aisle, they turned his name into a verb. They said that like martyrdom was being borked. And if you're borked, you're somebody who's been denied the opportunity that you deserved. When in reality, you know, Senate approvals are job interviews. So he basically just lost a job. He wasn't entitled to it. But that was really a turning point. And I think that's when originalism got its formal recognition on the Supreme Court, because conservative appointees after him picked up that torch and brought it to the highest court in the land.

[00:11:49] Antonin Scalia

If you you give to those many provisions of the Constitution that that are necessarily broad, such as due process of law, cruel and unusual punishments, equal protection of the laws if you give them an evolving meaning so that they have whatever meaning the current society thinks they ought to have, they are no longer they are no limitation on the current society at all.

[00:12:16] Mackenzie Joy Brennan

Scalia picked up that torch and the Bork grudge, and he was the first one to bring it to the Supreme Court, because obviously Bork didn't make it onto the court. Scalia, um, lived and died by the originalist theory, really enjoyed it, brought it to a lot of different social issues, and thus introduced some pretty radical new precedent under the banner of originalism. And on the current court, you have Alito and Thomas, who are part of that originalist cohort in the the court when Scalia came. And I think Gorsuch also calls himself an originalist. A lot of the conservatives on the bench right now call themselves originalists. But the first one to bring it to the Supreme Court was Scalia.

[00:13:02] Hannah McCarthy

All right. So this is how originalism came about. Now, can we have some examples? Are there any particular rulings that demonstrate the idea of originalism?

[00:13:13] Nick Capodice

Yeah, Mackenzie has a few. And we're going to get to it right after the break.

[00:13:17] Hannah McCarthy

But before that break, if you like our show, consider leaving us a review. You can do it on most platforms where you listen, and it really helps listeners know who we are and what we do.

[00:13:29] Hannah McCarthy

We're back. We're talking about the judicial theory of originalism, using the assumed intent of the people who wrote our Constitution to interpret it. And, Nick, you said that you have some examples of originalism in action.

[00:13:50] Nick Capodice

I sure do, Hannah. And to be clear, our guest, Mackenzie Joy Brennan, is, as was her father, very critical of the modern interpretation of originalism. She is not, though, and we're going to get to this in a bit. She is not against the idea of considering what the framers intended. They made our system of government. So her examples are when justices very selectively pick what original intent to use.

[00:14:17] Mackenzie Joy Brennan

D.c. versus Heller was the first case where the Supreme Court recognized and they have the power to interpret the Constitution. So they read in Heller into the Second Amendment an individual right to bear arms.

[00:14:31] Nick Capodice

Now, I know you know Heller. Hannah, we've got a link to our Second Amendment episode in the show notes down there for anybody who wants to know more. But do you know Heller, the man?

[00:14:42] Hannah McCarthy

Honestly, I don't know too much. He was a police officer, right?

[00:14:45] Mackenzie Joy Brennan

He was he described, almost a romantic attraction to his gun and that he had to visit it across state lines. He talked about he had to keep it at somebody's house in Virginia, and he would go from D.C. to visit it. Um, and that this was because obviously to get cert, you have to show an injury. And so this was the nature of his injury is that he had to basically have somebody else with separate custody of his precious gun.

[00:15:13] Hannah McCarthy

Wow.

[00:15:14] Nick Capodice

Yeah.

[00:15:15] Nick Capodice

So the ten second summary of this case, D.C. v Heller, 2008, is that the Supreme Court had to decide if a law in D.C. that restricted handguns was a violation of the Second Amendment. Frankly, whether or not the Second Amendment was about gun ownership.

[00:15:33] Mackenzie Joy Brennan

It's a weirdly constructed amendment. It's unclear what the subject of the sentence is, and for generations, nobody read it to mean that it gives every single citizen outside of a well-regulated militia to own firearms. Full stop. But in Heller basing it on on zero precedent. And so Scalia both says this is the originalist view. This is what society recognizes. And he also says, well, the dissent criticizes me for not citing enough evidence. But nobody's talked about this before. So obviously there's no evidence. So the only evidence that he's able to conjure up and he says that this, you know, invokes originalist theory is a quote from the Pennsylvania state convention, because when the framing was going on, they had these state conventions for everybody to brainstorm what they would bring to the original constitutional convention. So in the state convention, the minority dissent in Pennsylvania mentioned something that referred to an individual right to bear arms.

[00:16:41] Antonin Scalia

We make no attempt to provide and no excuse for not providing extensive historical justification for those regulations of the right that we describe as permissible.

[00:16:52] Mackenzie Joy Brennan

You know, if we're going to go full original intent and what their society looked like, we're talking about muskets that took like two minutes to reload one round. So it's a little bit of a stretch if you ask me, and a lot of constitutional scholars to read that as you can have a handgun under your bed just because you want one. And so that certainly is not the well-regulated militia bearing arms in the form of muskets that was contemplated. But there is one quote from one state's minority dissent that suggested that an individual right existed. And we're going to apply that to modern firearms.

[00:17:32] Nick Capodice

And there's a second, far more recent example Mackenzie gave me of an originalist choosing what original ideas to use to justify their decision. And it is the decision that came out this year in Trump v US the presidential immunity case.

[00:17:47] Mackenzie Joy Brennan

I think that if people know one thing about the circumstances under which our Constitution was drafted, our country was formed. It was the idea that we did not want a monarch that was pretty much value. One. So to have a majority conservative, originalist, professed originalist court say that presidential immunity is incredibly broad, sweeping to the point that a president could really murder an opponent. And if they're able to argue that it's well enough related to official duties, they can get away with it. That's a monarch.

[00:18:24] Sonya Sotomayor

If the president decides that his rival is a corrupt person and he orders the military or orders someone to assassinate him, is that within his official acts that for which he can get immunity.

[00:18:44] Archival

It would depend on the hypothetical, but we can see that could well be an official. It could.

[00:18:47] Mackenzie Joy Brennan

And why they call themselves originalists, because I think the clout that it implies, um, it implies that essentially you're the conduit. It's like when people say they're the conduit to a higher power. They're like, trust us, we know. But it doesn't mean that they're always doing that. It's just kind of the cloak that they wear.

[00:19:07] Nick Capodice

And to stay in that line. In 1985, Justice William Brennan excoriated this new philosophy in a speech he gave at Georgetown. He said originalism was, quote, arrogance cloaked as humility.

[00:19:23] Hannah McCarthy

Earlier, Nick, you said that McKenzie joins Justice Brennan in criticizing the current banner of originalism, but she also thinks that it's not a bad thing to consider the intent of the framers when we make decisions about what the Constitution means.

[00:19:39] Nick Capodice

Yeah. McKenzie said that there is a misconception that the framers were all socially conservative, that if they had wanted people to have the right or the freedom to do X, y, z, they would have put it in the Constitution. But that is not the case.

[00:19:55] Mackenzie Joy Brennan

If you are a history nerd like me, you remember all the Federalist Anti-Federalist debates that happened during the founding, and that was essentially one group of people that for the purposes of of this argument, they were concerned that once you start writing down rights and something isn't on that list, future generations. I mean, it's very prescient because future generations will look at that list and say, well, the right to travel isn't on there, so they must not have meant to protect it because they took all this time and trouble, and they wrote down what our rights are and what they wanted to protect. This isn't on there. It means it's not protected. And then there is the other group of people that, you know, thought that we should list as many things as possible because they were afraid that the government without textual defense would infringe upon those things.

[00:20:49] Hannah McCarthy

And I do know, because I've read the language of the speech that James Madison gave. Right. So this is this is knowing words that came out of an individual's mouth that when the Bill of rights was being debated and proposed, one of the concerns he found most reasonable was that people might be worried that anything not written into the Bill of rights would fall to the responsibility of the government, and if it's at the whims of the government, it's not enshrined, right. It's not something that's that's actually protected forever. The same way that the Bill of rights, you know, ostensibly protects something, quote unquote, forever.

[00:21:26] Nick Capodice

Yeah. And to try to get them all in there, his first draft of the Bill of rights had over 200 amendments. But to solve this problem and to appease people on either side of the debate, he created the Ninth Amendment.

[00:21:38] Speaker3

So the Ninth amendment reads the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. So basically saying, if we missed anything, that doesn't mean that it's not protected. And that kind of pairs nicely with this concept of natural rights, which was recognized by all of these enlightenment philosopher type founders who wrote the Constitution. Almost every I mean, if not everybody that we would recognize as being founders has mentioned them either in the debates or in their own writing. So there's like documented references. And if you're unfamiliar with the term natural rights, it's pretty coextensive with things like inalienable rights. Um, in modern terms, civil rights, human rights, the way that they put it, because they are enlightenment philosophers is the government didn't grant these rights, so they can't take them away. So it almost doesn't have to be mentioned that they're protected because government doesn't give you the right to breathe or sleep or have privacy in your own home or travel. So why would we write down that it's protected if government doesn't even bestow those things to begin with?

[00:22:49] Nick Capodice

And while natural rights aren't necessarily in the Constitution, they sure are in the Declaration of Independence.

[00:22:56] Hannah McCarthy

We're talking about life, liberty, the pursuit of happiness, not property.

[00:23:03] Nick Capodice

And a bunch of other rights. In other documents written by these same men who wrote the Constitution.

[00:23:09] Mackenzie Joy Brennan

If you want to look at some of the evidence from back then, they have things like the right to privacy, protections of brute creatures, protections of the mentally incompetent. I'm not paraphrasing, so please excuse the regressive language, but the right to conscientious objection, right to resist, um, freedom of information and inquiry, prohibition of monopolies. All these things were written in terms of conceptualizing natural rights, but they weren't enumerated because there are things that come from for them, a higher power. And please take all of this with a grain of salt that they were certainly not unimpeachable in terms of their morals. Um, there's a great Thomas Jefferson quote, which is always super funny, because Thomas Jefferson himself was very morally questionable. Sunlight is the best disinfectant sort of idea. We should always talk about that. He's certainly far from a perfect person, but he has a great quote from the founding era that something like forcing a society to live under the laws of its predecessors is like forcing a man in his adulthood to wear a coat that fit him in his youth. And I think that speaks to the whole idea of originalism being unintended, and also to what the Constitution was supposed to do.

[00:24:26] Hannah McCarthy

What does Mackenzie mean when she says it's not what the Constitution was supposed to do?

[00:24:35] Nick Capodice

Her argument, as best as I understand it, is that the Constitution was forged in debate and the Ninth Amendment, the myriad writings of the framers, the amendment process itself, including article five's never yet used method of having conventions in three fourths of the states to amend its words. These are all evidence that the people who wrote it knew things would change, that they weren't predicting whether a police officer unlocking a cell phone would be a constitutional violation of privacy, and that originalists may be doing a disservice to the sometimes quite socially progressive beliefs of the framers.

[00:25:16] Mackenzie Joy Brennan

And I think it's also brought a lot of criticism for the Constitution itself, because folks on the progressive side, if they don't know this history, are like, who the heck are these guys in the founding who own slaves, who didn't respect their wives, who were all straight, white, property owning men, and they're not really seeing the nuance and the progressive options in the actual founding in our our government structure, because it's been co-opted by the originalist banner. Does that make sense?

END OF TRANSCRIPT



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