

# ShortCircuit413

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## SPEAKERS

Ryan Snyder, John Wrench, Jonathan Green, Anthony Sanders, Kenneth Rosen

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Anthony Sanders 00:00

Hey everybody. Quick word here before we go on to the podcast. So my colleague John Wrench went down to New Orleans to the American Association of Law Schools' annual conference, which was earlier in January 2026, and also a part of that is the Federalist Society's annual faculty conference, and instead of having a big old Short Circuit Live, what he did was speak to a few scholars about their work that they were presenting at the conference that would be of interest to our fans at IJ. So I think you'll really enjoy these conversations. He spoke to Jonathan Green and Ryan Snyder, who are two young scholars, one at ASU and one at the University of Missouri, and then before that to Kenneth Rosen of Alabama. I think you'll really enjoy the conversations. I just want to give a heads up that John literally spoke to them in the hallway of the hotel to get their thoughts about their articles, and so there's a little bit of noise in the background at times, of people going by, perhaps some professors and their young children trying to make a family trip of it in New Orleans, if that's possible. So just be warned. But I think it'll be just fine for you, and you'll really enjoy the conversations between John and these scholars, so on with the podcast.

J

John Wrench 01:34

Hello and welcome to a special episode of the Short Circuit podcast, which we're recording on January 7, 2026 in New Orleans, in the penumbra of both the Association of American Law Schools' annual meeting and the Federalist Society's annual faculty conference. I have with me a very special guest, Professor Kenneth Rosen. Professor Rosen is a professor of law at the University of Alabama School of Law, and he has a very impressive background that includes an LLM from the London School of Economics, a JD from Yale Law School. He worked for the SEC Division of Market Regulation as a special counsel. He is a member of the American Law Institute and was appointed to represent Alabama on the Uniform Law Commission, just a few of many, many notable accomplishments. Professor Rosen, thank you for being on the podcast.

K

Kenneth Rosen 02:29

Well, thank you for having me. I'm really excited to get to speak to you, and particularly about a topic I really am pretty passionate about.

J

John Wrench 02:37

So I'm very excited too. You have a work in progress that you'll be presenting at this conference, and its title is "Celebrating the Declaration of Independence, the under appreciated importance of economic freedom for the founders, and its lessons for today," which is an awesome title, and it's very exciting. Could you just tell me a bit about the project and kind of how it came about in the first place?

K

Kenneth Rosen 03:03

Sure, so as a law professor, obviously the beginning of the legal framework of our country and the Declaration of Independence is something that we should reflect on really all the time, but I think maybe more notably on a big anniversary like the one that's coming up, but I am a business finance regulatory scholar, so I was really interested in talking about what that means to me and how it intersects with my work. And I came up with this idea that a lot of the times when we think of the founders, we think of them as almost superhuman figures who really are noteworthy politically, but we pay a lot less attention to the nuance of their motivations, I think particularly to what interests me, the economic freedom motivation that they had. And part of the project starts out by thinking about who were these folks, and when you look at them, they were, from my perspective, a bunch of small business people, and I think a lot of the reason that they decided to revolt, and a lot of the law that would come in the early American period, was because of that. So I want to look a little bit more into that first, then to see how those ideas got incorporated into early American law, and finally on the back end to discuss what they can teach us today, particularly as we kind of see a rise of certain movements like the democratic socialists in the US today.

J

John Wrench 05:11

Yeah, there's so much there to jump on. So just to start, I think a lot of our listeners will be familiar with the concept of economic freedom and economic liberty. But for people who might not really know what that means, or kind of the constellation of ideas that are there, could you kind of give me an idea of what that is?

K

Kenneth Rosen 05:33

Sure, so in the colonial period, I think one of the things that was going on for a long time, and maybe why the colonists thought economic freedom was so important, was a bit of benign negligence, if you will, by the British. But then all of a sudden, the British started to come in with a lot of what I would characterize, maybe in a more colloquial way, as regulation, right? You have the Stamp Act and so forth, and it really, I think, made folks of that period reflect on, we liked when the government left us alone more because that allowed us to actually engage in the things that would improve our livelihoods, our families, our communities. And there are reasons, I think, that others have talked about as well as to why the British attitude may have changed a bit—we're talking about the end of the French and Indian Wars, so they accumulated debt related to that, maybe wanted to extract more from the colonies. They were realizing the colonies were a lot of the source of their wealth, so they were fearful of not having control. But I think the efforts to assert more governmental control, as we all know, backfired, but I think it was a very organic, natural thing for the colonists to want. By the way, I would contrast the American Revolution to other historic revolutions, just one of the ways of things being exceptional. So was there democracy in the past before the Revolution? People would argue Athenian democracy, things like that. Were there revolts or uprisings? Absolutely—peasant revolutions, palace coups, and the like. But what makes the American Revolution, to me, so interesting is people were revolting for a very particular purpose of instituting a replacement governance regime that really focused on them having those kinds of freedoms guaranteed.

J

John Wrench 08:13

Right, not trading it for chaos, but something that actually resolved the problems and built something new. That's very interesting, this connection to the Stamp Act and the British maybe overextending themselves. I was thinking of how often issues with search and seizure are used as an example of having a significant impact on sparking the Revolution, but it is interesting that if you ask why those searches and seizures were happening in the first place, it does all kind of come back to these economic issues that are in the background, both the British trying to extract more from the colonists and the colonists experiencing the searches and seizures as a consequence of a government that, to exercise the kind of economic control it wants, has to start breaking down doors in a very, very literal way. In my experience, when some people hear ideas about economic freedom or economic liberty, they often think of something like, in the modern age at least, deregulating big business, and that's basically where that idea ends. And so I think sometimes they view any talk about economic freedom or economic liberty as the kind of stalking horse to achieve just that kind of deregulation. But you were talking about how a lot of people at the founding, it was really like a revolt of small businesses. Could you talk a little bit more about that, like these people whose economic interests were actually at stake?

K

Kenneth Rosen 09:53

So, let's kind of think of a couple of the founders, right? On maybe the more famous level, we had folks like John Adams, a lawyer, but I think at that time this was not the age of the gigantic law firm—this was a hang-your-shingle-out kind of practice of law. And then more to the South, you had farmers who sometimes also were lawyers too, folks like Thomas Jefferson. So it wasn't that there was one type of business enterprise; it was more that these were entrepreneurial folks who were engaged in coming up with business production, if you will, that would be useful in their community, and basically making a living off of it, and again kind of helping their families. Maybe I'll channel a little bit of my inner Justice Scalia for a moment—if we look at the text of the Declaration of Independence itself, of course one of the earliest and most famous lines, and I take them at their word in what they put in the text, is that the founders wanted life, liberty, and the pursuit of happiness. I think that was not accidental language—life, the most basic in many ways of needs, but liberty, I think, as it directly relates to the pursuit of happiness. To me, it was fascinating, right? Again, comparing it to maybe other revolutions, they weren't asking for some particular piece of property per se; what they were saying was we want to be able to pursue property, wealth, as we see fit—our happiness. And again, you look at maybe some of the lesser-known founders, people who were merchants who started out as apprentices sweeping shop floors—our natural inclination, once again, is to think of these folks as superhuman, but they were living normal lives, and they wanted to make their lives better, and I think that was at the heart of the Revolution. Yeah, well, I think there is an ebb and flow within all things, that sometimes there are counterpoints being made more vocally, like the socialist movement today in the United States. I don't think it's that we ever lost what the founders were thinking; it's that sometimes we don't make enough effort to talk about what they were thinking and to remind people. So I think if you were to talk to an average person, they would still be aligned with that ethos that we're talking about, but maybe they just don't think about it as much anymore. That's why the 250th anniversary, I think, is such a valuable thing—it gives us an opportunity to talk more about it. But part of the reason I'm doing this project is not really to be a one-off, if you will, of let's save something for the anniversary and be done with it, but rather on the back end of the paper to talk about some things we can do in the longer term that will hopefully create a more continuous memory, if you will, of why the founders' way was so valuable and why some of the alternatives today that are being presented are quite problematic.

J

John Wrench 14:51

Turning to the future with this- what are some of those things, those lessons that that people should take away from this, and how those can be operationalized in a way that maybe helps us to remember a bit.

K

Kenneth Rosen 15:07

Yeah, so I think part of it—maybe I'll start a little bit on the negative and move to the positive—when I was a student, as an undergraduate at Cornell and in other aspects of my education, we talked about Marxism, communism, socialism, in large part to offer the opportunity for critique and to explain why those ideas were really false promises. If I've done this before, I'll ask a group, you know, raise your hand if you've read the Communist Manifesto, and you have blank stares coming back to you, as opposed to a lot of hands going up.

J

John Wrench 15:59

Which paradoxically, it might seem like a good thing if you don't like those ideas, but it actually sounds like it's actually a problem.

K

Kenneth Rosen 16:07

Yes, and I will kind of joke with the audience, well, no one wants to admit it, because maybe you don't want to be associated with it, but frankly part of classical education that's being lost, not only on this issue but on other ones, was putting out a variety of ideas and letting those ideas be tested. And I think, quite frankly, when you test socialism and communism, it's very easy to critique them, but you have to have that dialogue. So oddly, you might think, for a professor who writes about the things that I do, one of my concrete suggestions is maybe we should start talking about those things again.

J

John Wrench 17:01

Yeah, that's super interesting. I don't think, at least not all constitutional law courses, for example, are going to do a primer on the founding ideas, right? Many, many students are going to learn doctrine, they're going to learn cases, and even many of those cases—and I think *Lochner* is a good example of this—are probably going to be passed over mostly, and to the degree that there is commentary on it, it's probably going to be, as you know, a dark night of the soul for the U.S. Supreme Court, and not really a why did a court majority reach this decision, and there's only really one dissenting opinion that says we should do something totally different, you know, like, why do you have a court there? It seems like that probably fits in this—it's an example of the treatment of economic freedom in law schools.

K

Kenneth Rosen 18:02

Yeah, and I think your observation is fair, that we don't talk about the economic freedom aspect in its own right while we're talking about these cases as much as we should, and in a way it's really a shame, because they would provide more context to the opinions. So I'll give you an example of a particular case. One of the things I wanted to look at was how do I prove my point that this was a primary motivator for the founders? Let's look at early American law, both as it is written and as it is interpreted by the early Supreme Court, to see if it is reflecting some of these ideas. So like in the Constitution, I think on economic freedom, if you were to ask people to name something in there that deals with it, maybe the Takings Clause would come to mind very quickly, but there's so much in there, right—the Interstate Commerce Clause, the idea that we have to institutionalize the ability for people to not have their opportunity to widely engage in their business in some way be suppressed. The Contracts Clause is a really interesting one, right, that even though we have had our revolution, we are still going to respect contracts that were around and give them force, which is really critical from an economic perspective, because as I always tell my students, one of the things that businesses need most to help them is predictability. If you do a contract and it may or may not be enforced later on, that cuts against that. One specific early case, and if you're familiar with this, the Dartmouth College case—in that one, you have the interesting question, because the Crown had given the college its charter, basically, should it maybe not have a right to exist in the way that it did after the Revolution? And the Court rejects that idea, but I think Justice Story in particular emphasizes how important it is to the U.S. systemically going forward that we protect these economic contractual rights, and that is kind of why it's in the Constitution, even if people are not necessarily thinking about it all the time.

J

John Wrench 21:00

Yeah, all this context that you're kind of painting a picture of, I do wonder why that seems to have kind of fallen out of fashion. I mean, context is difficult, right, because you have to be a little bit more interdisciplinary, and it seems like one of the reasons that you have been able to articulate it so well is that you think about economics in a way that probably many law professors, unless they're in the law and economics space, don't have that interdisciplinary experience. So in some ways, you have to be maybe calling on people to be a little bit more of a generalist, at least in the areas that are relevant to our Constitution.

K

Kenneth Rosen 21:50

Yeah, and that's really a broader issue with legal education that I've noticed. I mean, when I was a student at Yale, but particularly at the London School of Economics, law was viewed as one department of the whole university, whereas in the U.S., typically I think law is not viewed as a department but as a separate school, and in being a separate school, perhaps implying that the ideas of the other disciplines are not necessarily relevant or worth pursuing or thinking about. So maybe it's kind of an accident of luck that that was the background that I had. It was kind of funny, because I am very much a textualist, so I don't say use those other disciplines to supplant what the law is, but in terms of understanding what the law is, there is relevance.

J

John Wrench 22:58

Yeah, and that, I think, is especially true when it's an area like this, where there is overwhelming evidence—it's fair to say that the founders did have a particular set of views about economic freedom, among many other views, and I think there's a lot of evidence you can rely on, a whole smorgasbord of evidence there from different disciplines to make those points. But the legal field is so siloed, and I do think law is often taught in a way where you aren't getting this kind of why is this provision here, what is its context, and if originalism has been useful for anything, at the very least I think it's kind of turned people toward those maybe first principles and how those first principles should inform the rest of the Constitution.

K

Kenneth Rosen 24:02

Yeah, no, absolutely. I guess the other thing for me too is I didn't start my career as an academic—I started my career working at a private law firm where I had clients who were affected by the law, and working at the SEC where we were, in part, making the law. And when you do that before you become an academic, I think it gives you more sensitivity to the fact that the law greatly affects people, not only lawyers, and that when you're thinking about the recommendations that you're making, even in a scholarly article, to kind of take heed of what the implications of what you're saying are. And I think you try to be humble in engaging in that process. I always, not only in a piece that is so explicitly historical, but I always try to think about what came before the history in a very colloquial sense, and while the history is not necessarily binding, again, it's very informative and makes you, I think, make better choices about what you're going to say.

J

John Wrench 25:31

Yeah, do you have hope in terms of the current Supreme Court or anything about the political climate, or economics, basically, any of the things that would be relevant here. Do you think that it's ripe to kind of return to these ideas? Do you think there will be particular obstacles to that in the current moment?

K

Kenneth Rosen 25:54

Yeah. Well, one thing I think is because of the prominence that's being given to things like the election of socialists and so forth, that maybe will wake people up a little bit more about the issues and provide a natural vehicle for the dialogue, and I hope, at least when I am engaged in that dialogue, to use as a counterpoint not only my own personal arguments but the fact that there is a tradition embedded in the American experience that really supports the counterarguments that are out there. One of the things that I discovered in looking at the founders in this period—so yeah, I've already said what a remarkable type of revolution it was—that begs the question, how on earth did you get so many people from diverse backgrounds, diverse views, to cohesively work together to defeat arguably the greatest military in the world? And I think it was the cohesion of a broader shared experience—they weren't, again, all running the same small business, but they were engaging in activities where the same concerns arose, and frankly those concerns are not unique to the 1700s—that's what IJ is basically fighting about all the time in the 2000s. So I think that experience, that shared experience, is still there for us to draw on. One of the things that people have so much anxiety about right now is how, in our political system, people are so divided, and I hear fewer people talking about how we can shrink that divide. Well, maybe one of the ways to do it is to take as an example what was going on during the Revolutionary period where, again, people had very different views, but they were somehow able to see that there are certain basic things that unite us and kind of build off of that.

J

John Wrench 28:36

Yeah, that really does bring it to the foreground why the Declaration is such a useful opportunity to kind of look back and see life, liberty, and the pursuit of happiness not as this kind of, you know—those weren't there by accident—they're kind of organizing principles, and I really think that your piece will be timely and a good opportunity for people to use that maybe as a mirror into the past that we can kind of use to bring people closer together and to confront some of those same issues. Thank you so much, Professor Rosen, for sitting and chatting with me about this. We're really looking forward to seeing this go out into the world, and I'm sure we'll hear from you again in the future.

K

Kenneth Rosen 29:34

Great! Well, I appreciate the opportunity again. Thank you.

J

John Wrench 29:39

Hello and welcome to a special episode of the Short Circuit podcast, which we're recording on January 7 in New Orleans, in the penumbra of both the Association of American Law Schools' annual meeting and the Federalist Society's annual faculty conference. I have with me two very special guests, Professor Ryan Snyder and Professor Jonathan Green. Professor Snyder is an associate professor of law at the University of Missouri School of Law. He previously clerked for Chief Justice Roberts on the U.S. Supreme Court, Judge Raymond Kethledge on the Sixth Circuit, and was a fellow at the Stanford Constitutional Law Center. Professor Green is an associate professor at Arizona State University. He clerked for Judge Naomi Rao on the D.C. Circuit, and relevant to what we're hoping to chat about a bit, he received his PhD in history from Cambridge. Professor Snyder and Professor Green, thank you so much for coming on Short Circuit.

J

Jonathan Green 30:34

Thanks for having us.

R

Ryan Snyder 30:35

Pleasure to be here.

J

John Wrench 30:35

So we're planning to chat a bit about Professor Snyder's research paper, which is called Historical Practice at the Founding, and Professor Green's work in progress called Some Traditional Questions About History and Tradition. Before we chat about those specific pieces, I get the sense that they are both, in different ways and maybe from different angles, reacting to the same kind of backdrop that's going on, especially in originalist scholarship and some flavors of it that have been developing, and specifically this idea that if originalism is a methodology that looks at the meaning of the Constitution as it was at the time it was enacted, does that come into tension with some of the Court's more recent practices of looking at things post-enactment, usually with words like history, tradition, and practice? And so if that's the kind of backdrop, I was wondering if one of you, or both of you, could give us a quick catch-up for our listeners so they can kind of understand what's been going on over the last few years that's led to that tension?

J

Jonathan Green 31:49

Yeah, absolutely, I'd be happy to take that. So the Court has been interested in history and tradition in its substantive due process cases for quite a while, going all the way back to cases like *Clarksburg* and even before that to some of the late 19th and early 20th century cases, and the intuition in that line of cases is that a right is impliedly protected against state interference, even if it's not enumerated in the Constitution textually, if that right is deeply rooted in our nation's history and traditions. And what I think is interesting about the Court's use of history and tradition more recently is that it's begun using what it calls tradition—in other words, the enacted, popularly understood limits of constitutional rights, through custom, through state legislation, through federal legislation, perhaps executive action—as a means of sounding the outer bounds of enumerated rights, like the right to keep and bear arms or the right to speak freely. This same move has been made in some of the Court's Confrontation Clause jurisprudence, and exactly as you say, John, that's raised questions, which Justice Barrett has flagged on the Court and a number of scholars have flagged, about why, if originalism is committed to the proposition that the Constitution's legal content is equivalent to the meaning of its terms as popularly understood when they were enacted, we should care what restrictions on the use of firearms were thought to be permissible in the 1820s or the 1880s or the 1930s, or what sorts of restrictions on speech were not thought to be constitutionally licit in the decades or even centuries after the text was ratified. So that's the kind of paradox that I think the Court's recent jurisprudence has flagged for a number of scholars in this area.

R

Ryan Snyder 34:06

And just to add a couple of extra points, I agree with all of that. Originalists have long been comfortable with looking at post-ratification practice that takes place shortly after the Constitution is ratified, so contemporaneous practices—even though they happen after ratification—there's a general understanding that those practices can still shed light on what the original meaning of the text was. They're close in time, those people are likely to understand the language that's being used and the purpose of the provision that's being adopted. The real controversial move has been to look at practice that doesn't come shortly after the Constitution is ratified, but instead comes 50, 100, sometimes 150 years after ratification—what relevance does that have for the original meaning? A lot of this has taken place in the individual rights context, but it's not just limited to individual rights. The Court has done the same kind of thing in constitutional structure cases, looking at the Recess Appointments Clause, for example, in *NLRB v. Noel Canning*, so it's something that the Court is doing across the board, and it's not immediately obvious why that is consistent with originalism, which the Court professes to believe.

J

John Wrench 35:28

That's super helpful. And could you tell me a bit about how each of the pieces that you're working on kind of fits into that puzzle? Professor Green, if you want to go first.

J

Jonathan Green 35:39

Sure, so the work in progress that you mentioned earlier, John, is called *Some Traditional Questions About History and Tradition*, and it's an attempt to recover a largely neglected tradition of English constitutional thought in the run-up to the Constitution's enactment and to see whether that might help us square this circle, at least to some degree. The basic claim of the paper is relatively straightforward—that constitutional rights in the English tradition were constitutional before they were enacted in text. They were thought to be conditions of the state's formation in the first instance—the right to a jury trial, to habeas corpus, to due process of law—these were thought to inhere in the constitutional settlement that was made between the English people and the English Crown way back in time immemorial, before anyone could remember. And so that's the first thing to say. The second thing is that when those rights were codified textually in Magna Carta and in the Bill of Rights of 1689, that codification of those unwritten rights wasn't thought to change their status as a form of customary law, as rights that had been passed down across generations as part of the original constitutional settlement, and those rights were thought to be delimited by custom, by the customary practices of the English state, including the judiciary, and by the customs of the people writ large. And so as the relevant customs that set the bounds of, for instance, the jury trial right evolved and changed over time, the limits of what the jury trial did and did not entail—the kinds of cases in which one was or was not entitled to a jury trial—waxed and waned along with that shifting body of custom. It didn't necessarily require parliamentary intervention for the scope of the jury trial right to change. And so that's the basic historical point the piece tries to make. If it were the case—and to be clear, I don't try to fully flesh this argument out in the paper—but if it were the case, for instance, that rights picked out in the Bill of Rights were identifying a legal object that preexisted the Bill of Rights' adoption, something like the customary, ancient constitutional right to keep and bear arms or to speak freely or to a civil and criminal jury, well, if that object was thought to be delimited by custom in the decades and centuries before the Constitution's enactment, then it would have been quite natural for an English lawyer in the 18th century to think that changes in customary understandings of those rights going forward would likewise shape the scope of those rights. And so in that respect, it might make sense for an originalist to look at how the right to keep and bear arms or the right to speak freely were understood in the decades after the Constitution's ratification, because the object that the Constitution codified as fundamental law—these rights—remained customary rights even after they were set down in text.

J

John Wrench 39:07

That's super interesting. And I'm going to have a few questions after- and Snyder, if you have any questions too we can kind of go through those. But I thought I'd ask you about your piece as well and get a broad overview. And then I think we can probably jump back and forth between some of those ideas. So could you kind of sketch for our listeners what your piece is about and how it's kind of fitting into this tension we were chatting about.

R

Ryan Snyder 39:34

So my piece is called Historical Practice at the Founding, and it is also an attempt to try to reconcile the Supreme Court's originalist commitments to look for the original meaning of the Constitution with its use of post-enactment practice. The Court has given several explanations for why it can use post-enactment practice—the most common one, or one of the most common ones, is this is what the founders did, and interpreters today should interpret the Constitution in the same way that the founders would have interpreted it, and so we should look back to the founding to figure out how they would have interpreted the Constitution. Several scholars have also made similar arguments, and probably the most influential version of this theory is known as constitutional liquidation, and it likewise argues that we should interpret the Constitution using historical practice in the way that the founders would have. The problem is nobody has really looked into how the founders actually used historical practice. Both the Court and the scholars that I referenced look almost exclusively at James Madison's understanding of how practice should be used, but even if we understand Madison correctly—and I'm not sure that we do at this point—even if we do, that does not necessarily tell us how the framers as a whole thought about practice. So I approached it from a different angle, and instead I tried to look at what courts were doing around the time of the founding. I start well before the founding with English judicial practice in the 16th, 17th, and 18th centuries, and then look at what early federal courts do from shortly after the Constitution is ratified up until around the Civil War. And what I found is that for approximately 250 years, courts were very consistent in how they used practice, and they used practice as a tool for discovering the original meaning of the law. So it was not a tool to update the law, it was not a tool to allow the law to evolve, it was a way of trying to figure out what the original meaning of the law was. For reasons we can go into, not all practice will actually serve that function—some practices will be misleading—and so courts also developed a rigorous screening test that they would use to try to separate out practices that were likely to give reliable evidence of the law's original meaning from practices that were unlikely to be reliable in finding original meaning. And that is what the paper does—it tries to look at all the cases I was able to find that use historical practice and all of the treatises that discuss this topic, so I march through 75 or so cases, both before and after the founding, and 20 or so treatises that do the same and try to understand what they were actually using practice to do so that we can compare it to what the modern Court is doing.

J

John Wrench 42:58

That's super interesting. So in trying to kind of synthesize the ways in which those works are similar and different, do you think it's fair to say that, Professor Green, your paper is making the claim that there are some codifications that kind of brought with them a reference to custom, such that relying on practice post-enactment is a feature and not a bug of that approach, and then, Professor Snyder, your claim in the paper is something like a way to discipline, in an epistemic way, what evidence courts look at to determine practice and how to weigh it? Any dispute with that synthesis?

J

Jonathan Green 44:06

Yeah, I mean, obviously our papers are swimming in very similar waters. I have a lot of questions for Ryan, but I'll answer your question first, John. I think that's right. Look, if the text of the First Amendment read, "Congress shall make no law abridging the freedom of speech, except through such regulations as are consistent with our nation's history and tradition of speech regulations, both as they exist in the 18th century and as they develop moving forward," well, an originalist, in order to understand the circumstances under which Congress may abridge the freedom of speech, would just need to look to that tradition, because that's where the text would point the interpreter. And a simple way of making the point in my paper is just to say that, in context, that's something like what the freedom of speech would have been understood as—it was a right that had been delimited by custom. Traditionally it had been codified, yes, but the codification didn't necessarily change the right's character as a customary right, and so debates about, for instance, the original meaning of the words "the freedom of speech" just wouldn't have registered. That wouldn't have been a natural way for an interpreter to attempt to understand the conditions under which Congress could or could not legislate in this area, because there was an object in the world, a legal object, this preexisting right that simply had been codified as fundamental law in the First Amendment. Now I think this maybe goes to the question that I had for Ryan—there are lots of other instances, both in the Constitution and in very old statutes, where either the legislature or the relevant constitutional ratifiers change the underlying customary law baseline in very deliberate ways, and there, when the law is doing something to the world other than simply declaring that what has been in existence to this point will continue to be law, I think we would, I think an 18th-century jurist would quite naturally want to understand what the authors of this law understood this change to be, and there it seems to me exactly right that the kinds of evidence of practice would have limited probative value, especially as you get further and further away from the enactment of that particular provision. And so I suppose we might be talking about the use of practice in two different contexts—English judges sometimes distinguish between declaratory and remedial statutes, and it strikes me that the Court's posture toward practice might be different in those two contexts in the 18th century, but I'm curious what you think, Ryan.

R

Ryan Snyder 47:15

So a few things. I do think your discussion of texts that incorporate preexisting common law rights is a separate category that needs to be discussed separately. I have thoughts, which I'm happy to talk more about, but I do think that is distinct from provisions of law that are entirely new, and so you may see our analyses differ quite a bit if you're looking at an individual rights case that does codify a preexisting common law right, as opposed to looking at some other provision of the Constitution, a structural provision that is creating something new, not codifying a preexisting right but instead creating a new structure of government. And there, I don't know if we disagree—Professor Green can talk more about whether he disagrees. So I think the area where we're likely to disagree the most is on these codifications of preexisting rights, which is mostly going to take place in the Bill of Rights, perhaps not exclusively, but mostly.

J

John Wrench 48:26

Yeah, I had one question about the kind of jump from you both looking at English practice. I was wondering, in determining how to treat rights that are in the U.S. Constitution—but not even just rights, really the Constitution generally—it makes sense that it depends a bit on whether the Constitution is referencing something, but the questions that came to mind were whether the change in system from parliamentary supremacy to the American system, with separation of powers and the enumeration of certain rights, might affect that analysis, and how that plays into things. And I guess my second, kind of attached thought is what about situations where the framers' understanding of the customary right was incorrect—are we referencing their misunderstanding, or should we be looking to the thing that they meant to be referencing in terms of customs? Do either of you have any thoughts about that?

R

Ryan Snyder 49:56

Yeah, so I'll start with the difference between the English constitutional system and the U.S. constitutional system, and then maybe leave the other question for you—obviously you can address both. So I think this matters a lot. English history is certainly relevant—the founders were English, they read English sources, they thought of themselves as English—and so in a lot of ways, looking to English law to understand how the founders would have interpreted the Constitution or a statute makes a lot of sense, but I don't think we can just automatically assume that if they did something in England, they would have done it in the United States. Interpretation and the judicial power depend on the underlying system of government that gives courts their power in the first place, so if you set up a judicial system in different ways, it might change the appropriate way of interpreting a statute. The English constitutional system is very different in this way—the separation of powers in England is not nearly as clear as in the United States. So the Supreme Court of England is the House of Lords, which is also part of Parliament, so you have this blending of legislative and judicial power that leads courts to act in much more of a legislative manner. There are lots of things that English courts can do, like issue advisory opinions, that are no longer appropriate for the United States, and I think arguably how courts thought about practice is one of those things that might have changed between the two systems, in particular because of the independence that courts have, which they gained in England, but not until 1701, so for a long time courts were not independent of the Crown. This blending of legislative and judicial power—judges used to write the statutes—is going to give them a much different perspective on what those statutes mean and how they should be interpreted. That all changes with the new American Constitution, so I think we have to be really careful—we should look at what English courts did, but we should always ask whether those English interpretive practices reflect some aspect of the English constitutional system, and whether that aspect changed in a way that would make the interpretive practice inappropriate.

J

Jonathan Green 52:28

I suppose picking up on that, I think I would disagree, maybe not entirely, but it's not clear to me in the late 18th century that the line between English constitutionalism and the new written constitutionalism of the Americans was quite so sharp as we sometimes presume today. I've learned a lot from Judd Campbell and Jonathan Gienapp, who've written on this. The Supreme Court in *Calder v. Bull*, just 1796 I believe, refers to the Constitution of Connecticut, by which it means Connecticut's corporate charter from the 17th century and the statute law that had been enacted by Connecticut's colonial legislature and its newly independent state legislature. I think constitutionalism as a field of law entailed more in the late 18th century than just the words of the constitutional text. Obviously, to the extent that those words conflict with other sources of law, the Constitution takes priority—that's pretty clear from the beginning—but the written Constitution, at least as I see a lot of these debates, was embedded in a deeper and richer tradition of constitutional reflection that involves social contract theory. Very early on in the American tradition, we get these questions about the relations between the states and the federal government and what kind of sovereignty the federal government is—have the states delegated some powers to the central government but ultimately retained sovereignty, and some argue a veto right on the federal government's exercise of its delegated powers, or has there been, in either 1776 or 1789, the creation of a separate second sovereign, a national sovereign, and if so, how does that relate to the preexisting sovereignty of the states? I think if anything, it's the federal dimension of the American Constitution that really throws up some of the earliest and most difficult problems for understanding the scope of constitutional rights in the late 18th and early 19th century. Simply because the English have a unitary system—the common law of England is the common law of the English people—but it's very difficult to start to think about whose customs would do the relevant scope-setting work in cases where, for instance, the Bill of Rights has codified customary law. Are these laws that cross-reference the customs of the American people writ large? Well, that presupposes that there's something like an American people, as opposed to a confederation of 13 different peoples, and I think these questions really are not answered by the English tradition and have to be worked out in the years after ratification.

J

John Wrench 55:43

I think you mentioned that you aren't making the claim that there are particular rights in the Bill of Rights, the American Bill of Rights, that fit within the category of customary, codified rights or there are?

J

Jonathan Green 56:02

Are there rights that were not recognized as rights at common law? Is that the question?

J

John Wrench 56:08

No, that was helpful, and I could have said that more clearly. So what I'm thinking of is this category of rights that you're discussing that kind of bring the soil of the custom with them, where the assumption is you would interpret the right in light of that custom, which could be evolving over time, and so I'm wondering, are there rights in the U.S. Bill of Rights or Constitution that you think fall into that category, or are you not making that jump?

J

Jonathan Green 56:48

So in the paper, I don't take a position on which of the enumerated individual rights in the Bill of Rights are or are not cross-referencing preexisting constitutional rights at common law, but I don't think the list would surprise you. I mean, the jury trial right—if there's any right that was thought to be essential to the English constitutional tradition, the jury trial right has to be one. The right to habeas corpus, the right to keep and bear arms—these ancient rights, I mean, that's what makes a right constitutional in the English tradition, is that no one knows when it began. Conversely, for instance, the Establishment Clause can't have been a cross-reference to a common law right because the English had an established church, as did at least some of the colonies, right? And so I think it would be really quite odd to try to use history and tradition, as in fact the Court has done in some of its Establishment Clause cases, to try to understand the outer bounds of that right, because in the language of the 18th-century jurists, that's clearly a remedial provision that's added to the Constitution. It's a limitation on the power of the state that simply didn't exist at common law. The English state was, and is, perfectly free to establish a church in a way that our federal government is not. And so I think carefully going through and understanding the pre-ratification history of a lot of these individual rights is really important for getting straight about the extent to which originalism and traditionalism about rights are and are not compatible with one another.

J

John Wrench 58:41

Yeah, that makes me think of something that Professor Snyder said about carefully thinking through the jump from the English system to our system, because I'm thinking of the Fourth Amendment, for example. Someone could make the argument that general warrants were always inconsistent with custom in England, but there were lots of general warrants, and they expanded in use and existed for quite a while, and so it's an interesting question how we should think about that in this context. Are the framers of the Fourth Amendment bringing the soil of a custom in some sense, but excising general warrants and saying actually we think that was inconsistent with English custom, while bringing the rest of it? Do you think that kind of slicing and dicing is the more accurate way to do it, or is it more that you bring the right and its entire custom with it?

J

Jonathan Green 59:47

Well, I think it has to be a case-by-case inquiry. One of the other complicating dimensions to this question is that, of course, the English state, like any state, could act unlawfully on occasion, and so the existence of a practice—and here I entirely agree with Ryan—is not proof that that practice has matured into a universally recognized legal custom. The English state did all sorts of unconstitutional things across its history, but the point of asserting that the English state was constitutionally limited was precisely to give critics of the state, of the executive, a legal vantage point from which to indict some of its practices as unlawful. And this is exactly what we see in a lot of the debates over general warrants in the 1760s and 1770s in the American context. I'm not a Fourth Amendment scholar, and I'm hesitant to say a whole lot more about this particular question than that, but I think what we're looking for is something like a broad settlement as to the limits of the state's authority. And so the Fourth Amendment is a great example of the point I was making earlier, which is to say I think the right against unreasonable searches and seizures clearly has to be cross-referencing a preexisting common law right, but the language of the Constitution itself points us to this question of, okay, fine, but what searches and seizures are reasonable and which aren't? And that's a question that in the 18th century would not have simply turned on a judge's intuitions about what is or is not reasonable. There was a well-developed body of customary common law that answered that question, that had evolved considerably across the 17th and 18th centuries, and I don't think it's implausible to think that that body of law was expected to continue developing along those lines going forward. This is effectively the point that Orin Kerr makes in his Katz's Originalism article, which I think is great and makes this point much better than I could hope to here, so I'd recommend that to your listeners.

J

John Wrench 1:02:09

Yes, please. I was going to ask, in terms of parsing the practices that are legitimate versus illegitimate, your paper talks about a set of factors or a list, and you were describing this before—I was wondering, were courts themselves describing them as factors, or were these more the practices that they were engaging in that you then synthesized into this kind of set of factors? Which of those was going on there?

R

Ryan Snyder 1:02:40

I'm definitely synthesizing what courts are doing. So what you'll find when you look at cases that actually rely on historical practice is that oftentimes the court will rely on the practice and explain why it's doing that—it will say this practice started shortly after the law was adopted, it's been going on for 200 years, nobody has ever challenged it, that's good evidence that this practice is actually a good description of what the law means. Other times, you'll find courts giving reasons why they're not going to rely on a particular practice, so a court might say this practice didn't start until 100 years after the law was adopted, we have good reason to think that the people engaging in the practice weren't actually thinking about whether it was lawful, so it doesn't really tell us very much about whether it was lawful or not. And if you look at all of those cases, you eventually see that the same factors are popping up time and time again, and so what my paper tries to do is pull out all of those factors and really isolate the ones that a practice had to satisfy in order to be considered. So one of them is that the practice has to begin shortly after the law is adopted—what I call a contemporaneous beginning—and I looked at 75 or so cases and have not found a single case where a court, either in England or in the United States, relied on a practice that didn't start shortly after the law was adopted. So the court doesn't necessarily always say this is a requirement that every practice must meet, but across all of those cases, I think we can fairly say they required a practice to have a contemporaneous beginning, otherwise we would find some where the practice starts much later. So I'm trying to pull all of that together and figure out what really mattered to them

J

John Wrench 1:04:49

Do you have a sense of if any of those factors weighed more or were more determinative, or do they seem like they were just they were on the plate as considerations and the court kind of picked at them as they were useful?

R

Ryan Snyder 1:05:04

There are two different groups. So there's one set of factors—there are seven of them—I could rattle them all off, but that might get a bit tedious. Having a contemporaneous beginning is one, that the practice actually reflects someone's understanding of what the law means is another, and that it's longstanding, usually meaning decades if not centuries. Those all seem to be requirements—you have to satisfy all of them, so you can't really say that one is more important than the other, because each one has to be met. There's another, much bigger group of factors that give some extra weight to a practice if they happen to be present, but don't prevent the court from relying on the practice if they're absent. So one example here is that courts were more likely to rely on a practice if that practice harmed the person who was engaging in it, kind of a question of incentives—if you have a good incentive not to do this thing but you're doing it anyway, that's extra evidence that that is actually what the law requires.

J

John Wrench 1:06:13

It's like an admission against interest.

R

Ryan Snyder 1:06:15

Exactly, yeah. Conversely, if the practice benefits you, then they might give it less weight, but that's not the kind of thing they looked for in every single case—not every case is going to involve a practice that either harms or benefits the person engaging in it. So they considered it sometimes and not others. One other point that's relevant to all of that is that in all of these cases, practice is just one source of evidence that the court is looking at when it's trying to figure out what the original meaning is. They're also looking at the text, they're also looking at express contemporaneous interpretations—people at the time saying this is what I think the law means—and they're also looking at purpose. So you have to cross a certain threshold, satisfy a certain number of factors to consider practice at all, but after that it becomes more of a multi-factor inquiry—some practices are better than others, and some get more weight than others.

J

John Wrench 1:07:14

It sounds more holistic in that sense. So is there—and I know you were speaking about liquidation before and some problems or critiques that you have about it—I'm wondering, is there any particular doctrine or area of law that you think, if the Court agreed with you on this, would change more drastically than others?

R

Ryan Snyder 1:07:42

Yes, several. Probably the best example is the one that I mentioned earlier with recess appointments, *NLRB v. Noel Canning*. So there, the majority looks at a practice that at the earliest starts in the 1920s, and the Court ultimately says we are going to allow the executive branch to make recess appointments during intra-session recesses—so not the main recess in between congressional sessions, but when Congress goes on shorter recesses, we're going to allow the executive branch to make appointments during those. That, to me, seems inconsistent with how the founders would have thought about historical practice, precisely because that practice does not start shortly after the Constitution's ratification. So that is a situation where I think what the Court actually did is going to be different than what they would do if they were actually following the founding-era approach. There are others—I have found, just in the last decade, approximately 15 or 20 Supreme Court cases that rely on what I call late-arising practices, so practices that start long after the Constitution is ratified. That doesn't mean all of those cases would come out differently—some of them would just rely on different rationales—but certainly some of them would come out differently.

J

Jonathan Green 1:09:10

Can I ask a follow-up question on this point, Ryan? Should we think about the Court's invocation of historical practice differently in the separation of powers context as opposed to the individual rights context? So oftentimes Curtis Bradley and Alison LaCroix have written a lot about historical gloss as a kind of negotiated settlement between the political branches that gives our federal system stability over time, so there might be some kind of Burkean values to these kinds of settlements that the Court's picking up on in Noel Canning and similar cases that don't necessarily go to the original meaning of the words "the legislative power" or "the recess of Congress," but are rather compromises negotiated over time, precisely because the text doesn't give us a whole lot to work with. Should we think about practice differently in that context than in contexts where we have some real constitutional language to sink our teeth into, against which a practice that's arisen later could or could not be tested?

R

Ryan Snyder 1:10:38

I think that depends on why you think practice matters. So my paper takes as a given that what we are trying to figure out is how the founders understood and used practice, and I take that as an assumption because that's what the Court says it cares about and what most of the major originalist scholars in this area have said they care about. And so my paper is just trying to say, okay, if that's true—if we care about practice because the founders cared about practice—how did the founders actually think about practice? So if you take that assumption as a given, I don't think we should think about practice differently in the separation of powers and individual rights contexts. I don't think there's any founding-era evidence that courts treated those two things differently, so I don't think there's a reason for us to do so. That said, I'm not necessarily personally convinced that we should or have to interpret the Constitution using the same interpretive methods that the founders used—I'm unsure about that. Maybe that's the right answer, maybe it's not. If you don't think that's the right answer, then you can come up with other rationales, working in tradition, or other reasons why maybe we should treat practice differently. But even in Noel Canning itself, the Court's rationale for why it cares about practice is because James Madison cared about practice, and I think if that's your argument—if that's what the Court is going to say—then we actually have to figure out how James Madison thought about practice and how the rest of the founders thought about practice.

J

John Wrench 1:12:12

Well, I know that we could probably talk about this for hours. Both of your pieces are extremely fascinating. I have a suspicion that plenty of the Court's cases over the next few years are going to be opportunities for them to get into this, and hopefully we'll see some separate opinions and different justices kind of running down parts of this. And I know that your scholarship will play a role in that. Professor Snyder, Professor Green, thank you so much for being on Short Circuit.



Ryan Snyder 1:12:47

Thanks for having us. This was fun.



Jonathan Green 1:12:48

Yeah, thank you so much. This was great.