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SPEAKERS

Jonathan Gienapp, Orin Kerr, Jud Campbell, Anya Bidwell

A Anya Bidwell 00:13

Hi everyone. Welcome to a special live edition of the Short Circuit podcast at Stanford Law School. Tonight, we're discussing three circuit court cases from 2025 that use, or at least try to use, originalism as their methodology. To do so, we're bringing together three scholars whose work forces us to think carefully about what we mean when we talk about originalism. All three teach here at Stanford. Jud Campbell's academic focus is on constitutional history and the First Amendment. Through his research, he has worked to show that the founding generation interpreted the meaning of rights through a flexible common law lens, raising questions about whether modern originalism appropriately captures that complexity. Jonathan Gienapp is a historian of early America. In his work, he argues that the Constitution's meaning emerged through political struggle and evolving practice, challenging the premise of a stable original public meaning. And Orin Kerr is a leading authority on the Fourth Amendment. His work tests the ability of 18th century concepts to map onto 21st century technologies and explores what that means for originalism's practical limits. Welcome to all of you. I'd like to begin our discussion by talking about how we should conceptualize originalism and then touch a bit on current events. After that, we will dive into our cases. So to get us situated, maybe let's talk first about what originalism is not. Who wants to take that on?

J Jud Campbell 01:53

Does anybody here teach a class on originalism

O Orin Kerr 01:56

I once did

J Jonathan Gienapp 01:58

I'm happy to take a stab. It is that I look at many of my students who are taking said class. So I suppose one thing it's not is just simply history, because the way to think about that, which can often be presented that way, is somebody is using historical evidence, therefore they're doing originalism. But history can be used in a lot of different ways and has been used for as long as people have done constitutional interpretation. What makes originalism distinctive is not simply that it appeals to the past for authority, but that, in the words of Jack Balkin, it treats history as a command rather than a resource. So as opposed to the sort of thing we would look to some of the time to inform our decision making, it's one data point, one input along with precedent or longstanding practice or public opinion or evolving social values. It's a thing you look at. It's kind of the trump card. It's the thing above the other inputs that, if it leads in a particular direction, you are duty bound to follow it. So I think what originalism is not is just simply looking to the past for some kind of guidance on interpretive questions. It's a sense of why something in the past, particularly something that is close to the original moment of enactment, requires a command-like legal quality.

J Jud Campbell 03:24

And I guess, to dovetail with that, the way I think about the relationship between originalism and history, if you want to kind of sum it up, is that history moves forward. So if you're a historian, you want to situate yourself in a mindset where you are blinding yourself to what came later. Whenever law is asking a question, it's asking a question with a backward-looking focus on the historical materials. You have a present-day question in mind. You have a whole set of assumptions about the way that law works, and you have to use those assumptions, the traditional moves that we're acclimated to thinking about in law, to filter whatever you're finding in the past. And so there's a sort of backward versus forward-looking dimension to this that can lead to a pretty stark departure, I think, for people who care a lot about how the founders thought and want to ground their understandings in what the actual decisions were at the founding. The goal is to bring that space to as small a dimension as you can, but the orientation of how lawyers and historians think about the past, I think, is different in that way.

O Orin Kerr 04:40

Yeah, and I approach the question a little bit differently. I think I know when I see an originalist argument, that is, a legal argument based on these sorts of claims. I'm not sure I know when I meet someone or hear someone is an originalist, because I almost feel like it's like religion. If somebody says I'm Jewish or I'm Catholic, what does that mean about their belief structure? I kind of assume I don't actually know too much about their belief structure, because "I am Jewish" might mean, well, my parents were Jewish, or it might mean I believe in the following precepts of Judaism, and it could mean an incredible range of different things. So I tend to think when it comes to legal argument, it's like, I know an originalist argument, which is, here is the original public meaning, for example, or here is the history. And I can identify that as a kind of argument, and I can see that argument is absent or present in an opinion. But I don't actually know what an originalist person is, because I don't see anyone who's consistently originalist. I don't know of any actual judge who, in every case, says this is my lodestar. I only do this. This is what I do. They all tend to kind of pick and choose, even the ones that identify or don't identify as originalists. They all seem to have that same attitude.

A Anya Bidwell 05:56

Yeah, that's a very interesting way to think about it. So if you just look at the case law out there, are there strengths of originalism, of originalist argument, that you can identify? Not just one, right? There's several of them. If you were to conceptualize them, what are they?

J Jud Campbell 06:17

Yeah, so I think the most important for everyday judging is still a sort of pairing of text and intentionalism. So a strong focus on the written document as the grounding for our fundamental law, claims about the meaning of the text in history and the resources that people use to argue about that meaning tend to look at what did they think they were doing when they wrote this down, which is still a sort of intentionalist orientation. Now you hear lots of claims about original public meaning, but the resources that are actually deployed to explore questions of original meaning are very rarely the sort of resources that you would use to make reasonable inferences about an average member of the public. I think they tend to be the types of resources that focus on how did elites at the founding think about these terms or these phrases? And so to my mind, that's kind of the dominant strand in the judiciary. The academic literature is full of lots of different theories, including some that are actually quite interesting and challenging the textual focus that a lot of conventional strands of originalism had. I don't think those have penetrated the judiciary yet, but it'll be really interesting to see where that goes in the years ahead.

J Jonathan Gienapp 07:38

I'll just largely echo what Jud said. Certainly, if you look in the academic literature, there is now an extraordinary number of variations of originalism and different defenses for why they are the superior version. In everyday judging, those differences tend to be collapsed. But I do think in the recent cases, some of which we will be talking about, that have begun talking more about traditionalism or certain kinds of practice, you either see a return to a form of originalism that was more on what particular people living in the past intended or thought they were doing as a way to understand the text, or perhaps something a little bit different, which suggests that focusing on the Constitution as a discrete textual object, almost like a super statute, misses the broader important significance it had in the 18th century in the eyes of people who made it, who saw it as entwined with ways of reasoning about morality and political theory and the like that a lot of originalist judges have seen as precisely the kinds of things that should be kept out of law because they can tend to lead to a great deal of discretion. So it'll be interesting if that continues to creep in, because that will definitely be a fault line in what are we actually interpreting?

O Orin Kerr 09:00

Yeah, and I'm going to approach this from a different direction. So I'm here with two outstanding leaders of constitutional theory and constitutional history, and I am, by contrast, a simple country Fourth Amendment lawyer. So I basically just read Fourth Amendment cases. I don't know anything that has nothing to do with the Fourth or not. It's an exaggeration, but I focus on it. And what's interesting from my perspective is, if you go back to the earliest Fourth Amendment cases, 19th century, for example, they talk about the original public meaning of the Fourth Amendment, not textually, but it's sort of understood that this amendment followed from a certain history, and there were certain 18th century cases and certain disputes. And so there's sort of a very high-level, like, here are the commitments that led to the warrant clause, which is really what they were focused on, and then there's the separate clause that they weren't focused on, which is what matters today. And so there's that sort of thinking about what the drafters had in mind, or what people would have understood the drafters to mean. You see that basic focus in Fourth Amendment law from the beginning. And it's basically a constant in Fourth Amendment law. They've always talked about this kind of stuff. And interestingly, the most recent Supreme Court case, Casares v. Montana, which came out a couple weeks ago, is striking because it doesn't talk about that at all. It's like, we used to be an originalist court in the '80s or '70s, but today we've lost originalism, if you follow the Supreme Court, at least when it comes to the most recent decision. Now that varies. A couple of years ago, there was a very originalist decision in Torres v. Madrid, and it just sort of comes and goes. It depends in part on who's writing the opinion, but it also, I think, depends in part on some of these problems being new problems where I think the justices look at the old solutions and it just seems so out of place. It just seems like something that's really not a useful starting point. And they all sort of become very pragmatic in that setting. And so you see a lot of these originalist arguments come and go throughout the cases, really from the beginning, without ever really taking any time off.

A Anya Bidwell 11:02

Yeah, that's interesting, because one of the ways originalism is discussed in public, right, like I heard Jill Lepore on PBS just a couple of months ago, she was saying, you know, originalism is a new creation, right? That it's something that really emerged more or less in the 1980s. How do you think about it? Because I think it's much more complicated than that, right? You can't put a date on originalist thinking. How do you think about originalism and what it is and when it emerged?

J Jud Campbell 11:38

Yeah, so I think it really depends on exactly what question you're asking, how you're thinking about what types of uses of history judges are making, and so on. I'll say something about in the right space that I think makes this relevant. So I think Oren is right, that there are lots and lots of really old cases that talk about history and rely a lot on history, including claims about original meaning in the right space. There was a general view that rights were grounded in common law, which was slowly evolving, but never deliberately changing, where it was tied to principles of reason. And there was this kind of iterative process of truth, finding where you were, using the earlier cases as data combined with principles of reason to figure out the truth of the matter as to the right of free speech or what have you. And I think, in the early 20th century, that way of thinking about the legal process that we call common law reasoning just radically breaks down, and people start to think about that process as a judge made decision laden with values that the judge has about how to resolve a case on policy grounds, and so that creates, then, A massive problem for law. What do we do with that attitude about what it is judges are doing when they're locating the meaning of some right provision like the First Amendment speech right? And some people respond by saying, well, judges ought to get out of the game with respect to constitutional rights, and that's justice Holmes's response. Some people say judges should get in the game, but they should be more realistic about what they're doing, which is to say they should be more open about the value judgments that they're making, and put them in the opinions and so on. And then I think the originalist response, so here's where originalism becomes a sort of distinctive move, is to say we should just try to approximate what they would have done. And that's Scalia's move in a lot of rights cases. Think about the Eighth Amendment. Would this have been cruel and unusual in 1791 and so that's a that's a way in which originalism as a kind of distinctive move from just normal legal interpretation emerges in the early 20th century, but there are lots of other answers to the questions, and I'll turn it over to others to comment on that.

J Jonathan Gienapp 14:08

I'll pick up directly on that, because I think what Judd is getting at is part of what animates my thinking. When originalism emerges is a question of what we're talking about, and that's complex. Is it a method of constitutional interpretation? Is it an ideology? Is it a movement? Is it a sort of cultural orientation to the problem of modernity, as Judd was sort of describing, which is common to, you know, Orin's reference to religion? Religions go through modernist dilemmas, which creates splits between people who take a more sort of fundamentalist approach, that if things have changed sufficiently, if you don't work hard to get back to what originally animated the purpose of the religion, you will lose it. You will lose all values. And others say, you know, times change. That was then. This is now. You continue to update. In some ways, you can understand living constitutionalism versus originalism as being saturated in that kind of consciousness, which, if understood in those terms, is not present in the early United States. So if you go back and you find people appealing to the original intent, as they certainly did, there is a question to ask, as someone looking at this, whether they're engaged in the same kind of activity as someone living in the late 20th century who is bringing a lot more on board. That's complex. Certainly the idea, what did the authors of the thing we're reading originally intend when writing it, is an interpretive question that's been around as long as interpretation has been around. But again, part of what makes originalism distinctive is not just to ask that question, but to suggest that that gets to the heart of it, and that other ways of interpreting somehow will miss the essence of what you're interpreting, and that's where it really becomes an ism as well. So there's both the kind of modernist component, which I think is important, but then there's also the way in which it's not just a way of interpreting, it's an entire theory of law baked in. And it's not clear if people in the 19th century, when they made those moves, had the same theory of law in mind, and we need to be careful about that. So it could be that originalism-like stuff has been around, but originalism wasn't, or maybe not, right? Maybe we'd find some of that earlier, but that would be, I think, what we would need to explore.

O Orin Kerr 16:32

I think it's useful in thinking about these questions. Whenever there's something with a right that, in some sense, is based in text, you can kind of approach it at various levels of generality. You can say the right comes from just what the text means. You can alternatively raise the level of generality and say, well, what's the principle that the text is trying to recognize? Or you can raise that a level of generality and ask, what's the concern that motivated the principle that then led to the text? And you see, when you read judicial opinions, judges and justices dancing up and down that level-of-generality chain. And so I think where originalism is somewhat distinctive is that it tends to push downwards, more toward text, more toward the sort of it was answered then, rather than just there's some principle that we need to figure out how it applies. At the same time, you also see a lot of kind of originalist-sounding arguments, going back to the idea of originalist arguments, that are expressed as principle or expressed as concern, and I think that sort of ends up with what I think of as more like a rhetorical originalism. And that's sort of like, you know, the framers, at some level, it becomes like, you know, the founders were really nice people. They only wanted good things. Here's a good thing. And that's some of the words of originalism without really doing any work. But I think they can kind of blend together. Generally, though, originalism is distinctive for pushing more toward the specific and away from the higher levels of generality.

A Anya Bidwell 17:59

All right. Well, let's then start kind of applying that framework. And before I get to the cases, I just want to take a moment and talk a little bit about current events and how an originalist, I guess, or a person who engages in originalist arguments, would process things that are happening today, right? So we have ICE raids taking place all across the country, and we are kind of watching the federal government, you know, going around and violating clearly established constitutional rights. For example, not using a warrant when breaking into a house, using excessive force, stopping people without reasonable suspicion, detaining folks who are recording them at work. And we have a situation where federal officials are very difficult to actually bring to court and sue. So if you are an originalist judge and somebody comes to you and says an ICE agent broke into my home without a warrant and dragged me out and took me to jail, how would you be processing that argument, that claim?

O Orin Kerr 19:17

Yeah, so what makes it tricky is that, if you're thinking about it just from the standpoint of constitutional rights, the Fourth Amendment, which is the cause of action here, says nothing about remedies. It's just an abstract right. It's how to draft a warrant is really what they cared about at the time. And so what's hard is that in the 18th century there would have been an understanding that there are these common law writs and these causes of action, and they are just there. And then what we think of as a Fourth Amendment right would have been the scope of an affirmative defense for liability of government officers for committing a trespass or for imprisoning someone or something like that. We no longer have anything like that concept at all. Instead, we think the legislature creates a cause of action, and they are the ones that decide what the cause of action is. And we think about Section 1983, you know, Congress said, here's the cause of action, and you can go into court and here's your statutory cause of action. And then the debate over the Bivens remedy, which is where the Supreme Court creates this civil cause of action for constitutional violations, is it legitimate for them to do that? In the 18th century, it would have been a weird question, because you would have said, like, there is this trespass. What do you mean? It's there. It's in all the books. It's the law. And now we have, I think of it as sort of an Erie-type response, which is like, no, we need the legislature to create the cause of action, and there's no general federal common law, so there is no trespass action necessarily. And then you get into all sorts of hard statutory questions about whether the state trespass actions can apply to federal agents and all that sort of thing, which I think is sort of a core area, a big important area, that you guys are working on. But these concepts wouldn't have really made a lot of sense, the way we're dealing with them today. And I think the fact that the Fourth Amendment says nothing about remedies has really led to confusion among courts, because you see judges say, well, we don't want the exclusionary rule because that's judge made, right? We don't want the common law because that was judge made. And Congress hasn't done anything. But if you ask members of Congress, they say, well, isn't this the courts? And so everyone seems to want to pass the buck to somebody else, and you never had that problem in the 18th century.

Jud Campbell 21:37

Yeah, that seems right, that the right here is a right of personal security, and that the Constitution comes in limiting the government's ability to exercise various authorities that it might otherwise claim when abridging your right to personal security. But the core point here, to reinforce what Orin said, is that what we think of now as your constitutional rights at the time are general law rights largely grounded in common law. And so the right of action and the cause of action and the defenses are all common law. And at the founding, up through the time of Erie, those were generally thought to be grounded in a notion of general law. And so Erie just creates a huge problem. The other thing, just to reinforce what Orin said, is that it creates the problem of do you need a federal right of action, or is it okay for the state to create a state right of action to bring a claim? And that's just not a question that would have occurred to people prior to Erie. The other thing that happens here that's worth pointing out is that we also merge law and equity. So in equity, you don't need a right of action. In law, you do need a writ. And then the question becomes, after you totally transform the pleading system, how do you think about the concept of a right of action? And so that's one of the things that Bivens is struggling with. Bivens, his answer is, in a damages claim, you still need a right of action, so it kind of preserves that lingering aspect of the common law pleading system. But it's the sort of question that couldn't be answered historically, because it just didn't arise historically.

Jonathan Gienapp 23:23

I'll just add, because I strongly agree with both what Orin and Jud said, that this gets to the heart of the fundamental challenge that I think arises from originalism, which is, if you're asking a modern legal question and you're turning to the past for an authoritative input to resolve it, what do you do when the historical material you are consulting is embedded in a legal culture that is gone or has radically transformed? How do you carry that from a time in which common law meant something profoundly different and created a whole bundle of legal rights and remedies that don't cash out the same way for a whole variety of different reasons? And I think connected to that, generally speaking at the founding, I mean, it could work in different ways, but often if Congress had not expressly authorized certain rights to act, officers were personally liable if they exceeded them. They could then petition Congress for indemnification after the fact, which is just a totally different kind of tacit understanding of how immunity and liability works, which shaped everything else. So it's very hard to extract particular nodes from a whole network of assumptions and ways of thinking when they're embedded with one another. And I think the challenge is, what does it mean to extract the kind of original meaning if those things are entangled?

A Anya Bidwell 24:54

That famous case, The Apollon, right, where Justice Joseph Story is talking about how it is the job of the judiciary to determine whether there was a violation and then order a remedy if there was, very straightforward. And then if the officer actually acted in good faith, if Congress feels like indemnifying the officer, then they can do policy. They can figure that out. It's not up to us to worry about that. But it is very difficult to translate that into what's happening today. Unfortunately, though, then people are the ones left carrying the burden of the constitutional violation because you can't enforce it through courts. Well, now let's try to, I guess, have a more positive discussion. Let's start with NRA v. Bondi, the 11th Circuit decision, and it already touches on some of the things that you discussed. And let me just briefly introduce the facts, and then I'll let you guys kind of get into the meat of the disagreements that the judges are having. So here are the facts: after the Parkland shooting, Florida enacts the Marjory Stoneman Douglas Public Safety Act. That law prohibits firearm purchases by anyone under 21, with narrow exceptions, like military, for example, or law enforcement. The NRA and an individual plaintiff who is between 18 and 20 years old sue, arguing the law violates the Second Amendment and equal protection as applied to people between ages 18 and 20. The district court upholds the law. The panel initially affirms. But after Bruen and Rahimi, the 11th Circuit hears the case en banc. The en banc majority upholds the law, finding it consistent with the historical tradition of firearm regulation. There are three dissents, and you have a whole bunch of concurrences. So where should we begin?

J Jonathan Gienapp 26:53

Well, we might begin with the reason they're talking about history and tradition, okay, which is that in 2022 the Supreme Court, in its first major Second Amendment case after District of Columbia v. Heller, in New York State Rifle & Pistol Association v. Bruen, considering a challenge to a concealed carry law in New York, got into the question of what kinds of regulations are permissible under an originalist understanding of the Second Amendment, with an eye, it seems, to tackling and eliminating the sort of tiers-of-scrutiny analysis that had been so common in constitutional law for a while, and saying that for a regulation to pass muster, it must be analogous to those that are deeply rooted in the nation's history and tradition. So then the challenge becomes, is the concealed carry law in New York sufficiently analogous to those that you can find in, you know, exactly when is hard to say. Is it close to the founding? Is it just sometime in the prior 200 years? But something that can be established as part of the tradition. And then two years later, in United States v. Rahimi, extending the same analysis again in the Second Amendment, this time pertaining to the law disarming somebody who has a domestic violence restraining order on them, is that consistent with historical regulations? And it all becomes this question of analogies. And you can either say, as some would say happened in Bruen, you found a lot of laws regulating the carry of guns, and they're kind of close, but close is not analogous, right? Not analogous enough. Then in Rahimi saying, yeah, you found laws and they're not identical, but it doesn't have to be a twin. It just has to be analogous. And this isn't out. So what does it mean for a regulation in the past to be analogous to a regulation today? And this is the latest example, as I see it, trying to answer that question: is this law analogous enough to lots of other laws that existed in the early United States or in the nation's traditions? And as we can see from the opinions and the concurrences, people have lots of stuff to say about that particular methodological question.

A Anya Bidwell 29:07

Yes, and where do they disagree?

J Jud Campbell 29:12

I mean, there's lots of stuff going on in this opinion. So they've got a disagreement about whether we should pin the meaning to 1791 or to 1868. So are we thinking about this in reference to when the original Second Amendment is passed, or when the 14th Amendment that incorporates the Second Amendment is passed? Then we've got a discussion, this is Judge Newsom reprising a familiar critique that he's made a couple of times, asking the question, well, why are we looking into post-ratification evidence at all? What's the probative value of looking to tradition after ratification? How does that fit within an originalist methodology? He says, in general, it doesn't, although he has a kind of interesting spin here on maybe how it could possibly be relevant. And then you get all the level-of-generality debates that Orin was mentioning earlier about how to think about the types of justifications the government's offering, the means that the government is using when it's restricting firearms. This is what Rahimi calls the how and the why of the firearms restrictions. And so, yeah, it's a really nice illustration of how some of these methodological issues matter, because the justices are in very different places on these questions.

A Anya Bidwell 30:34

Okay, it's interesting when they're talking about militia laws, for example, and what role militia laws play in understanding whether 18- to 20-year-old folks had a right to own a gun, versus when they are talking about what it means to actually be under 21 and what kind of rights you had if you weren't 21. And they're kind of almost talking past each other because they've each got their own things that they're going after.

J Jud Campbell 31:04

Yeah, so to kind of set the stage here, one thing to keep in mind is that at the founding, 21 is the age of majority. So we have then something to wrestle with, which is, is the relevant category people under 21, or is the relevant category minors? And that matters a lot, because at the founding, people under 21 were minors, but today, people under 21 generally, at least, are not minors. And so the majority and the dissent have different answers to that question. The majority is focused on whether or not these people are under 21, and the dissent is focused on whether or not these people are minors. So that's a kind of just ground-setting debate at the founding that wouldn't have, there's no question to ask at the founding, but it's a really important one. As you mentioned, though, there are militia laws at the founding that allow for people who are younger, I mean, sometimes it's even 15 years old, 16 years old, to serve in militias. And so they're still minors. They're under the guardianship of their parents. Presumably, they're under their parents' protection, and yet they're also serving in militias, doing the sorts of things that we would conventionally associate with the Second Amendment because it's so heavily tied to militia service. So that's kind of an interesting puzzle. And the other thing that they're talking about at the founding is the way in which firearms were restricted. The majority says it was through a sort of incidental byproduct of contract law, which is that, as minors, contracts were voidable for anybody under 21, and therefore anybody who entered into a contract to purchase a weapon, which, by the way, were usually purchased on credit, and therefore you need contract-like analysis because it's not just an exchange of cash that's giving you the weapon, that person is not going to have at least a non-voidable contract to purchase the weapon. And the dissenters say, what are you talking about? That's not a restriction on firearms. That's not a limitation on your ability to purchase a weapon. Sure, it prevents lots of minors from having weapons, but that's not what Bruen wants us to look for. Bruen wants us to look for firearms restrictions, and this is not one of them. This is just a contract provision, an aspect of common law contract. And so it's just a really fascinating range of issues where the majority and the dissent are thinking about the problem in totally different ways.

O Orin Kerr 33:36

Could I just flag one interesting aspect where this case is different from the other cases that we are going to talk about, which is this is a context in which the Supreme Court has said the doctrine calls on lower courts to answer these historical questions, like, you have to do this. And so you get briefing on these questions, and that's naturally, in an adversarial system, going to really draw out all of these tensions, level of generality, all these questions. Basically, you know, you're litigating the case on behalf of your client, you're obviously going to pick the level of generality that is the one you need. And so it's just inevitable that you're going to get these dramatically different ways of looking at the history. And it's different from the other cases that we're planning to talk about, which are much more ones where there's precedent on the books, and then you can bring in the history, but there's a lot of doctrine too, which you have to follow as a lower court judge. And so the role of originalism is much lesser in those other contexts than in this one.

Jonathan Gienapp 34:33

Yeah, I think one thing that really stands out to that point is you have a set of judges here who are doing originalism, or doing this history and tradition test, not because they think it's the right way to do things, but because they have to because of the Supreme Court's rule, right? And then you have other judges, like Judge Newsom, who are firmly committed and long have been to originalism, and are very eager to include, in this case, in his concurrence, a sort of explanation of how he thinks it should work. And part of what he's sounding here, which people have been sounding since Bruen and the other decisions of that term, Kennedy and Dobbs being the other ones that talked about history and tradition, is this note of sort of general skepticism. Why are we really talking about any of this? Originalism is supposed to be about the fixed-origins point, right? The Constitution is written and ratified at a moment in time that fixes the meaning. We're supposed to figure out what it meant then. Why are we spending all this time talking about what happened after, as he amusingly calls it, the latter-day but still kind of oldish understandings? Like, well, you know, it almost becomes kind of criticizing this as original vibes originalism, this long founding. It's all stuff from yesteryear. He's very, I think like a number of originalists, convinced that this is very problematic. Justice Barrett in Rahimi said this as well. Why are we looking at stuff from 1830? Is it because the meaning is fixed, but it's at a certain level of generality, so it's not obvious what regulations are permissible under it, so we need a different test to understand that? Is it because we're trying to figure out what the meaning was because it was unclear, and something that happened 30 or 40 years later can help with that? Is it because of this new idea, or maybe older idea that's become new again in constitutional liquidation? Is this evidence of an ambiguous meaning or somewhat uncertain meaning being liquidated, settled over time? Depending on your answer to that, what it is evidence of is totally different. And I think Judge Newsom, it's interesting to see him say, before we just continue grabbing hold of any statute or regulation we can find from the early U.S. and talking about traditions of regulation, we really need to get clear on what is or is not consistent with originalism and why. But that also connects to what he starts with, his founding principle, which is as deeply Scalian as you could have, which is the United States Constitution is a text, and that is how we should understand it and interpret it. And part of the reason why other people have been drawn to the history and tradition is perhaps because, even though they agree with Judge Newsom that originalism is correct, they don't necessarily agree with him that it should be so textualist in nature, and looking at these broader sources of evidence as a way of getting at those underlying principles or concerns that you must understand to read the text. All of this is on the table here, and it's, as Judd said, quite fascinating.

J Jud Campbell 37:35

So Anya, you started us off by asking, what is originalism? And I think one of the answers I gave was emphasizing sort of general continuity with how people have used originalism in court for a long time. I do think this is an area, speaking to Jonathan's last comment, where there is evidence of a shift in what originalists are up to, where for a long time, originalism was primarily about disciplining judicial discretion. And Justice Scalia therefore used tradition as another way of disciplining judicial discretion. So he would principally rely on originalism, but in cases where he couldn't find a clear meaning one way or the other on the original meaning evidence, he would rely on stuff that had happened for a really long time. And so for him, it was a little less about truth claims, about the only way that we get valid constitutional law, and it was more like, I'm a judge. I got to resolve this case. Let's find a way of resolving it that is neutral, or at least as neutral as I can make it. And that seems to be shifting, where the judges now have grown up as originalists, so they're used to thinking about the Constitution as just the way that Justice Scalia often framed it, which was a text passed in 1788 or '89 or a text that, in the case of the 14th Amendment, was passed from 1866 up to 1868, and that then you can see evidence of in these opinions where people are just insisting, well, why is it that I'm going to look to post-ratification evidence? The only thing that creates constitutional law is the passage of a constitutional document. So I think this is actually, even though I agree with Jonathan that the move that Newsom and Barrett and others today are making is very Scalian in its emphasis on the text, in some ways it's a kind of new development, because it's moving us past this way of thinking about judicial discretion limitations and emphasizing more of this kind of the only valid grounding of claims about constitutional law.

A Anya Bidwell 39:54

And it's interesting how the judges, when they disagree with each other on the originalist interpretation, kind of accuse each other of telling tales, right? Like you have Judge Pryor basically saying, oh, the dissent is telling tales of the founders shooting guns, you know. And it's very easy to do, isn't it? If you disagree with something, you just say, oh, you're just telling a story, but it has nothing to do with the rigorous methodology.

J Jonathan Gienapp 40:21

Especially if you're trying to locate a tradition. Because what is a tradition? Is it a tradition of state legislative enactment? Is it a tradition of practice that legislatures are then responding to? And of course, you can have competing traditions. So, you know, to Judd's point, originalism is born of a desire to kind of constrain interpretation. And a lot of people have pointed out that this sort of methodology can create conditions where you have a lot of choices to make about what counts.

A Anya Bidwell 40:55

And what do you do, and I'm thinking back to the Wolford argument this term, what do you do with kind of negative history and bad examples? And Justice Jackson in that case involving a Hawaii law that basically said if you're carrying a weapon into a private place that's publicly attended, you must have consent, right? They point to a Black Code law from 1865 in Louisiana, and they're saying it's exactly the same law, you know, and that law was on the books. And you can feel the frustration in Justice Gorsuch's voice, right, basically saying, but this is a Black Code law, and it's unconstitutional, and what role should it even play in the analysis? And Justice Jackson saying, well, shouldn't it play a role in the analysis? Like, what do you do with that?

J Jud Campbell 41:48

Yeah, I think it's really hard to come up with an account of tradition that is totally neutral, that you don't have to make value choices about what sorts of things you're looking for in the first place and how you filter the evidence. This is obviously a huge problem if you're thinking about religious freedom, because you're not going to pin principles of religious freedom to the biases that existed at the founding with respect to Catholics, or in the 1860s with respect to Catholics and Mormons. We would think that's absurd, and yet, why not? I mean, what is it about original questions of original meaning that call for you to disregard some attitudes or pieces of evidence and not others? And so you need some account of what it is that creates the tradition. I think another way that this is difficult is exactly as Orin was saying earlier in defining what the relevant level of generality is. So I had a student who wrote a research paper for me last year who was interrogating the question, well, how did people in the 19th century define why they were restricting firearms? So if we're trying to identify the pertinent level of generality, maybe we should look to how they thought about the reasons for their gun regulations. What were the reasons for their gun regulations? Well, the problem here is that if you actually look at what they say in statutes or in legislative sessions or in the titles of statutes or in judicial decisions, they said, we're trying to protect public safety. They said that a lot, like we're trying to limit the harms that are caused by the use of firearms in terms of the dangers they pose to other people. Well, if that's your why, then that's not going to limit the government's ability to restrict firearms, which, of course, is counter to what the Court is trying to do in Rahimi, which is create an operable methodology to impose some limitations on the government's ability to restrict firearms. So they can't use a historically grounded way of identifying the level of generality. The alternative that Justice Thomas is pushing for in Rahimi is to just artificially narrow what it is you can point to, lower the level of generality, sort of along the lines that Justice Scalia often proposed in substantive due process cases. That has its own problems, as Rahimi illustrates. And so it's a big problem. The other thing that's kind of interesting about the majority here is one of their most effective arguments. They pitch it as an originalist opinion because, of course, it's a Rahimi follow-up opinion, but one of their most effective arguments here is not originalist at all, but it's a really powerful argument. It's basically that the dissent has no way of explaining why it is that a 10-year-old can be restricted from buying a firearm, and that's a pretty powerful argument. You don't need to be an expert in tea leaf reading at the Supreme Court to figure out the justices probably aren't going to buy an argument that 10-year-olds have a constitutional right to buy a firearm. But why not? There actually isn't, according to the dissenters, a tradition of regulating 10-year-olds purchasing firearms. So it's a deep puzzle there. The dissenters don't offer an answer to it. It's not exactly an originalist problem with their decision, but it is one that kind of illustrates some of the difficulties that the Rahimi approach and the Bruen approach set up.

A Anya Bidwell 45:16

So what is our verdict here, in terms of whose originalism methodology we should be going with when it comes to the 11th Circuit.

Jud Campbell 45:25

I mean, I kind of like the dissenters answer under the framework of Rahimi, but I'm not convinced that that's a vindication of the approaches,

Anya Bidwell 45:36

- because it actually exposes the problem,

Jud Campbell 45:37

Because it may actually expose the problem exactly.

Jonathan Gienapp 45:41

I think at some point, Justice Barrett has, to her credit, been pushing this, and the others have just punted time and again. The Court is going to have to say something about what was ratified in 1791 and what was ratified in 1868 and whether it was different. And I keep saying, for the purposes of this case, it doesn't have to say, but at some point they're going to have to decide whether it was, you know, jot-for-jot incorporation, or whether things changed. There was a kind of common law constitutionalism, living constitutionalism of a sort, between the founding and Reconstruction, and then the sovereign people, through a new kind of fixation, fixed a different understanding of the First Amendment, the Second Amendment, the Fourth Amendment. And I think as long as that is unclear, it's not obvious what you're looking at when you're looking at militia laws, because you could be looking at potentially evidence of how the right is being worked out toward a clearer sense of what 1868 does, or if you believe across the board that 1868 merely took the existing Bill of Rights, with no difference, and applied it against the states. At some point, I think we need to know that if it's going to be one opinion after another between 1810 and 1850 talking about what was regulated.

Jud Campbell 46:59

What they're not going to say is what I'm on record saying, which is that the right is grounded in general law, and therefore you don't need to ask the question whether it's pinned to 1791 or 1868 because it's not pinned to either. It's a recognition of a right that existed and still exists. Maybe, see the debate over Erie and the question about how to timestamp it, is actually the wrong question to ask from a historical standpoint.

A Anya Bidwell 47:28

All right, let's then, on that note, move on to two cases that won't involve as much discussion and back and forth between the judges, both in the Fifth Circuit. The first one is Texas v. Bondi, and it involves the Quorum Clause. Judge Graves writes for the majority, and Judge Wilson dissents briefly. During the COVID-19 pandemic, the U.S. House adopts a resolution allowing members to vote remotely by proxy. They're voting on the Consolidated Appropriations Act of 2023, and it is passed using this procedure, with 226 House members voting by proxy. Texas sues. It argues that the Act violated the Quorum Clause because a majority was not physically present, and therefore Texas argues that certain provisions are unconstitutional. The district court agrees that one of the provisions, because of this, is unconstitutional and issues an injunction. The Fifth Circuit, with Judge Graves here in the majority, the case we're going to discuss next ends up in the dissent, says that the Quorum Clause does not require physical presence. And Judge Wilson dissents. So they are disagreeing on the history of the Quorum Clause, on the text of the Quorum Clause. So let's talk about the major points there too.

J Jud Campbell 48:58

Sure, yeah. So, I mean, I think the position that the majority is taking is pretty easily explained, which is the text doesn't say one way or the other. It's open-ended, and therefore it's up for Congress, pursuant to its rulemaking power, to make the choice. And then the position for the dissent is also pretty easy to explain. When they say presence in the 1780s, we know what that means. It's not about being present in the state-of-mind sense. It's about being present in the physical sense. And of course, when they wrote the Constitution, that's what they had in mind. And so this is a case where you have a kind of level-of-generality-style problem again. How broadly or narrowly should we read a particular provision? How should we read it as being sort of conventionally understood at the founding and heavily informed by the context in which it's used, or should we think about it more as just a text that is the beginning point for an exploration of how this might look? And again, in the background of this is a kind of looming problem, which is that the Supreme Court has said it's fine for Congress to use a unanimous consent process to pass legislation where there are exactly, well, usually two people in the legislative chamber, whoever's presiding and whoever the majority leader has designated to push through various things that Congress is considering. And since that obviously is a situation in which there is no quorum present, it poses a real problem. And so that's not about the actual originalist analysis, but it is, again, sort of like the 10-year-old problem in the previous case, creating, I think, some background difficulty for the justices in the majority and the dissent.

Jonathan Gienapp 51:02

If I'm not mistaken, our good friend and colleague Michael McConnell was appointed to the federal bench through unanimous consent in the Senate, right? So I like the idea that maybe he was never really a judge. It turns out that violated originalism. Yeah, I mean, there are really interesting questions here, because the founding generation cared deeply about quorum, very deeply. I mean, one of the standard ways in which republicanism and representative government can be undermined is that the exception becomes the norm. In the 18th century, one of the many ways in which corrupt people ensured that the people did not genuinely govern themselves was by abusing rules like this. So it was something that was very strongly on people's minds, especially when the Constitution was put up for ratification. So you have a robust sort of practice and record of people thinking that quorum really matters, but not necessarily speaking to the question of what exactly counts as being present. You can kind of infer principles, and then it's a question of what does or does not translate, especially given technological changes that they didn't anticipate, which is something I'm sure we will be talking a lot about, and that's a hard one to sort out exactly. And I think part of the difficulty here is that people will interpret one way in one setting and a different way in another, and what they will often look to, to get back to the very beginning, the different kinds of originalism and how they work, one of the reasons why the many different theories of originalism tend to collapse back on one another is if you are, say, a public meaning originalist, and you've come up with a variety of reasons why focusing on or privileging the original intent of the authors or ratifiers or the original understanding or their original expected application, as it's called, what they actually thought cruel or unusual would mean applied to the world in which they lived, or original interpretive practice or what have you, is that it can deal with the problem of disagreement. There's lots of different ways people interpreted things. There were different intents. It can seem like a much more unitary interpretive object, and it doesn't necessarily require you to litigate the intramural disputes of the founding generation. The problem being, though, any litigated case is going to turn on a provision in the Constitution that does not self-define, that different people read differently. So you need to turn to other evidence to figure out what its original public meaning was. And you invariably will be looking at just the kinds of evidence that one would look to to figure out the original intent or the original understanding or the original expected application or the original practice. Just now with the claim being that this original practice is not good because original practice trumps original public meaning. It's useful because it's our best evidence of original public meaning. And you see that in this case. They say the people who wrote the Constitution turned around in the first Congresses and wrote these unanimous consent rules. They wouldn't have deliberately subverted the Constitution. We can assume that, so it must be good evidence of what it meant. But does that also mean when the Supreme Court in the Slaughter-House Cases says that privileges or immunities means very little? I know a lot of people who would say no, that even though they are there at the founding of the second, you know, the second founding, this is just them getting the Constitution wrong. So when is early interpretation and practice evidence of public meaning, and when is it just not public meaning? And we see that coming up here, I think.

O Orin Kerr 54:40

I would just add that, in addition to the levels of generality being a constant theme and very much present in this case, there's also the issue of just textually, to what extent does the text encompass the levels of generality or set the correct level of generality? So sometimes the terms that are used are ones that are very specific and have a very sort of specific understanding. Sometimes they're pretty broad. A lot of times that becomes something that a judge can use to be like, okay, this sets the level of generality in this kind of case. Not that necessarily what judges will do really kind of matches up with that, and you get a lot of flexibility there. But sometimes the text itself will set the level of generality, and you can play with that without having to really deviate from the text and just go to principle, which sometimes can lead to a dramatically different rule.

A Anya Bidwell 55:28

Right. And how do you deal with this idea that I'm sure just a person reading this opinion would be thinking about, which is it is much easier now to not be physically present, something that the founders couldn't even contemplate as a possibility. So how do you, and maybe Orin you should answer this question because you've thought a lot about it in the Fourth Amendment context, approach that as you're dealing with that question?

O Orin Kerr 55:56

Yeah, so I think something like a requirement that you be present is naturally subject to various different ways in which a person would be present. Physically present, virtually present, present by telephone.

A Anya Bidwell 56:10

But not present in the mind.

O Orin Kerr 56:11

Maybe not present in the mind. But I think that term is one that is subject to different meanings today, and so that also raises a question of different meanings of the term today versus different meanings that existed at the time. But that's one where certainly the principle is one that can be applied in different settings if you raise the level of generality, but the language itself, that term, is one that can be pretty broad, or at least it's subject to a range of meanings. And that's one where I think, in other settings where the technology is quickly changing, you see a lot of judges say, well, we're going to adopt that sort of more principles-based approach, which is going to allow us to maintain the role of the Constitution over time, rather than say that thing that's written in our fundamental law, well, that's a really quirky rule today because the technology changed. That's an instinct that a lot of judges have. They want to avoid that.

A Anya Bidwell 57:01

Yeah, I'm reminded of this oral argument that they had a while back about video games. And Justice Scalia was grilling somebody, and finally, Justice Alito basically stepped in and he said what he wants to know is, what did James Madison think of video games? Did he enjoy them? All right. So again, what's the verdict? Wilson or Graves?

J Jud Campbell 57:28

So I think I'm in the same boat as I was last time, which is I think that the majority does a really nice job of framing its answer in the same way that the Supreme Court did in Noel Canning, basically saying we're dealing here with a procedural, technical issue. The way the Supreme Court approached this type of question was to look at the text pretty broadly and then try to fit it into the post-enactment evidence as best it could. I think that's probably right again. Maybe that's an indictment of the method in Noel Canning as a matter of original meaning. I thought Justice Scalia's opinion in that case was pretty persuasive as an originalist matter.

J Jonathan Gienapp 58:16

I'm not sure which side is making the better originalist argument, but it is very difficult to get around what Judd said of the long practice that would be directly undermined by the reading. But it seems to me, I mean, what makes it especially interesting, sort of like challenges to mail-in voting, is a sense that there are certain kinds of practices that, by their nature, just deviate from what the practice was about and how a lot of that swims through constitutional law without being clearly articulated. So a sense of, well, the point of the legislature is to be there because it's a deliberative democratic institution, and even if you can find all these examples of it not living up to that, even remotely, that's what it's supposed to be. And I think that does a lot more work in some of these opinions than sometimes people would want it to, but that says something.

J Jud Campbell 59:09

Graves for me. Yeah, this is very silly. You're talking about what is a legislature? This is actually a very similar problem to what they dealt with in the Arizona redistricting case also, which is how to define what a legislature is. Do you think of it as a specific institution, or do you think of it as a kind of idea tied to representation in some way? And it's the same type of debate that's playing out in that case as what you see here.

A Anya Bidwell 59:36

All right. And since it's Graves for you, Orin, let's talk about United States v. Wilson, another Fifth Circuit decision. And in this case, Judge Graves actually ends up dissenting, and he doesn't even understand why we need to answer that question, to pose it in the first place and then answer it. But briefly, the facts: federal agents approach Damion Wilson while investigating a fugitive who had been involved in a marijuana-related shootout. As they approach, they see a bulge in Wilson's waistband that looks like a concealed firearm. Agents stop Wilson, handcuff him, and recover a loaded handgun with an extended magazine. Wilson admits he has no permit. Wilson denies, however, seeing the fugitive for six years, but agents find a recent publicly available Instagram photo of Wilson and the fugitive together. Neighbors had seen the fugitive around Wilson's apartment. A deputy had recently tried to stop a car driven by Wilson with the fugitive in the passenger seat. So plenty of other evidence outside of the gun. After Wilson is arrested for the gun, police search his backpack and later his apartment, finding marijuana, paraphernalia, and cash. Wilson is convicted of possession with intent to distribute marijuana, possession of a firearm in furtherance of drug trafficking, maintaining a drug-involved premises, and making a false statement to federal agents. He appeals, challenging the stop, the evidence, the prosecutor's comments, and the sentencing guideline cross-reference. Judge Oldham's majority opinion begins by asking and answering a question that Judge Graves says didn't really need to be asked and answered for its eventual holding. So let's talk about what Judge Oldham says about the Second and Fourth Amendments.

Orin Kerr 1:01:47

Yeah, so Judge Oldham is really addressing the district court's ruling. So the district court was answering a question under Terry v. Ohio, this 1968 Supreme Court case that says if there's reasonable suspicion to believe somebody's committing a crime, they can be temporarily stopped. And the district court had looked at Louisiana law relating to firearms possession and said, at least based on the law that existed at the time, it's since been changed, the district court said, well, the fact that somebody seems to be carrying a firearm creates reasonable suspicion to believe that they don't have a license for the firearm and are therefore committing the crime of possessing an unlicensed concealed firearm. And basically that meant you could stop anybody who seemed to be carrying a concealed weapon. And Judge Oldham really takes this on, and he takes it on in a very unusual way. So he goes back to the history and tradition of the Fourth Amendment, and really the original public meaning of the Fourth Amendment. He goes through these disputes, which I'd mentioned earlier, the writs of assistance case with Otis and Wilkes v. Wood and Entick v. Carrington, these 18th century disputes that motivated the enactment of the Fourth Amendment, really focused on the Warrant Clause. And he kind of abstracts from that this principle of individualized suspicion and then says, and incidentally, this is consistent with Terry v. Ohio, which has an individualized suspicion requirement. And it's sort of this very roundabout, abstract way of ultimately getting back to current doctrine. And what Judge Graves was reacting to is, like, why are we even talking about these issues? And at least when I skimmed the briefs just before I came over here, I didn't think any of the briefs talked about any of this stuff. It was really sort of going out of your way to talk about original public meaning. And what's striking about it is that there is an original public meaning, and there's some interesting history on stopping people as opposed to general warrants. So the enactment of the Fourth Amendment is about general warrants, but there's no warrant here. Most importantly, there's no court order. There's no anything. So all of that history, I think, really only comes into play at this very, very abstract level. There's an interesting history as to whether Terry stops were justifiable at common law. In fact, the lower court opinion in Terry v. Ohio was written in an originalist way, talking about how there were these night-walker statutes and basically the constables could stop suspicious persons and make them say what they were up to, basically. And think this is like 17th century, 18th century England, where you've got a town of 100 people, everybody knows everyone, and then someone comes in and no one knows that person. It's like, what are they doing in our town? You could stop them and basically get from them the information of what they were doing in your town. Some have argued, Justice Scalia had a concurrence in Minnesota v. Dickerson arguing that that means that the Terry stop power is justified under an originalist lens. Others have argued, well, maybe that's not analogous, actually, in a debate that's very, very similar to what we were talking about in the Second Amendment context. It's similar, but it's a little bit different. Should that really count? And Judge Oldham doesn't mention any of that, which is interesting, instead sort of going back to the general warrant discussion, and then he circles back to current doctrine and then ultimately says there was reasonable suspicion in this case because, well, this guy's best buddies with a guy who was involved in the shootout, and he has his own convictions. And he said, so, oh yeah, there was reasonable suspicion here. But the facts of the case are actually kind of hard to figure out because they're only at the very end. And there was this long passage which seems to be about honoring the history of the Fourth Amendment and respecting the Second Amendment. And as Judge Graves, I think, correctly pointed out, it's not obvious why any of that was needed.

Jud Campbell 1:06:01

So I think my main comment on this case is less about the substance of the Fourth Amendment argument and more about the debate between the majority and the dissent here, which does tie in both to active debates amongst originalists today and to what I was saying earlier about how do we think about what originalism is, what's its function? There's a really lively debate amongst originalists about how much we should be beholden to things like the party presentation rule. How much should we be injecting originalism? Judges are worried about this. How much should we be thinking about limiting ourselves to originalist arguments only when the parties present it? Should we ask for supplemental briefings? Should we have our clerks do their own research and so on? And you can see why this is tied to that old debate about what is originalism doing. The more originalism is about limiting judicial discretion, the more it makes sense to rely on sort of old-school things like the party presentation rule, because that's a way of grounding judicial discretion in any given case. The more originalism is about trying to create truth and a tie between our law and the true law, the law that we actually follow and the law that we ought to be following, then originalists may have an argument that, well, we should be more active in actually soliciting originalist evidence, about trying to create markers in our legal culture that this sort of thing matters. And I think that's what Judge Oldham is up to here. He really thinks that our legal culture needs a shift in direction so that people actually are putting this stuff in the briefs. And how are you going to do that? Well, you're not going to do it by staying silent when they don't put it in the briefs. You're going to do it by making it an essential part of constitutional analysis across a whole range of cases, whether the parties put it there or not. And so it's a really interesting, I'm not sure you guys should think like that, I mean, I kind of like the old formalism in some ways, but it's worth thinking through exactly how it is and why it is that you're going to use originalist evidence in these sorts of cases. And so that debate matters, I think, for a lot of today's, especially lower court judges, especially given how difficult it is to find good briefing in a lot of these cases.

J Jonathan Gienapp 1:08:21

In that regard, one thing it made me think of, speaking exactly to what Judd was just speaking on, is we find sort of the exact inverse in United States v. Trump, where there is a fair amount of briefing of an originalist flavor about presidential criminal immunity, but the Court largely proceeded, and has been defended for proceeding, as none of the parties asked them to overturn United States v. Nixon or other 1970s precedents. So you just don't go there. But from a certain standpoint of originalism, as I think Judge Oldham is showing here, why not? Because if that is indeed the right way to answer the question, then why would you not try to figure out what the original meaning of the Constitution had to say about that question? So it's interesting to see him here kind of expressly doing that when he didn't have to. I read his opinion as similar in some regards to Judge Newsom's in the Florida case, because it's somebody who's very committed to the theory and working it pure, and wants it to have a certain kind of integrity and logic. But the difference here being, rather than trying to figure out how history and tradition work with originalism, instead it's here the concern being that if he didn't supply this reasoning, somebody might misunderstand. I take him to be kind of, his animating concern is that they would misunderstand what he thinks about the Fourth Amendment and the Second Amendment, that he had to essentially explain why, under most instances, the kind of thing that happened would be inconsistent with not just public meaning, but this whole kind of tale that saturates us in what the American government is all about, right? I mean, it's very much a story from James Otis to St. George Tucker about what liberty was all about. And I think he really wants to treat this as a very, you know, the individualized quality that therefore rests as a kind of exception to the norm is, I think, partly what he's doing, and that jives with other things he's done, as best I understand.

O Orin Kerr 1:10:28

An interesting question if you're litigating a circuit court case is, do you talk about any of these questions? Of course, you don't know who is on your panel exactly, but I think it probably is a good idea if you've got the space and you've got an originalist argument to make, and then you count the judges, not active judges or whoever you might think, what are the odds that I get some? That's probably a smart idea if you've got something where there's a decent argument, or at least to speak in that historical lens, you know, that historical style about some issues, to root it that way, which is going to appeal to judges, even if it ends up not having doctrinal payoff. I think it's probably a smart way to write a brief. Especially in the Fifth Circuit.

A Anya Bidwell 1:11:20

It is striking, though, when he kind of talks about this history and he talks about keeping and bearing a piece of paper, right? And he even uses that kind of language, keeping and bearing an arm is no different than keeping and bearing a piece of paper, and the Fourth Amendment applies with the same vigor to both. And he kind of just leaves it at that. And his originalism seems to be very much at that particular level of abstraction where he doesn't even feel like he needs to be very specific, which is kind of different from the dissenters in the NRA case in the 11th Circuit, where they are specifically requiring an exact law, and if you don't see that, then you can't engage in it. Well, so I guess we can't say whose originalism is right here, because Judge Graves is not engaging. But I guess Judge Oldham wins by default.

O Orin Kerr 1:12:22

I would just say there actually is a great debate to be had on the original public meaning of the Fourth Amendment with respect to Terry stops that has not really ever been had. There's a lot of really interesting stuff out there that has not been explored. So scholars of originalism hopefully will tie into that soon.

A Anya Bidwell 1:12:43

Well, that sounds like a call to action, and a good one to end on. Thank you so very much to all three of you for being here and for engaging in such a fascinating discussion.