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**Anthony Sanders** 00:06

Hello, and welcome to Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. Except, this is a special Short Circuit, where we talk about other things, than the Federal Courts of Appeals, things going on in the wider constitutional world. Today, we have two special guests joining us, both old friends of the center, and they're here for a fun and increasingly relevant topic, originalism and the 14th Amendment. Now, you've probably heard of originalism, the view that we should interpret text according to its meaning at the time it became law, at least that's how I explain it. And you're very likely heard of the 14th Amendment adopted in 1868. And which applies restrictions to state governments of an often debated nature. Well, what happens when we put these together? We're going to talk about that issue from a few different angles today. But here's one we're especially interested in: when a provision from the Bill of Rights is applied to the states because of the 14th Amendment, such as the First Amendment's right to free speech, the Second Amendment's right to keep and bear arms, or the Eighth Amendments right to be free from excessive fines. Does an originalist judge apply the meaning that provision had in 1791, when the Bill of Rights was adopted, or the meaning it had in 1868 when the 14th Amendment was adopted? So far, the Supreme Court, including its self proclaimed originalists, have partied like it's 1791 and in corporation cases without much exception. Parties and amicis before the court party the same way. Well, I have with me today, two gentlemen who say it's time to send out invitations to a new party with 77 fewer birthday candles. One of them is someone that longtime Short Circuit listeners will remember very well. Evan Bernick is the executive director of the Georgetown Center for the Constitution, and a visiting professor of law at Georgetown. He's a graduate of the University of Chicago School of Law, was a clerk to Seventh Circuit Judge Diane Sykes, and years before he went on to so much bigger and better things, he was assistant director at the Center for Judicial Engagement. Evan, welcome back to the center and back to Short Circuit.

**Evan Bernick** 02:28

Thanks so much, Anthony. I'm glad to be here.

**Anthony Sanders** 02:31

Our other guest is Christopher Green. Chris is a professor of law and H.L.A Hart scholar in law and philosophy at the University of Mississippi. He and Evan helped us celebrate our 150th anniversary of the 14th Amendment a few years ago, by writing an article for a symposium we held. He clerked for Judge Rhesa Barksdale on the Fifth Circuit, is a graduate of Yale School of Law, and also has a PhD in Philosophy from the University of Notre Dame. Chris, welcome to Short Circuit.

**Chris Green** 03:02

Thanks again for having me.

**Anthony Sanders** 03:03

Now, finally, I should add that both of these esteemed academics use Twitter, as do I. And it was through that insidious website that we came up for the idea for this episode. So this is proof that there is something perhaps, not much, but something useful about it, although some kind of disagree.

**Chris Green** 03:23

This is the kind of thing. I talked to my wife when she says, gah, you know, just what are you doing fighting with those folks again, and I said, I have this list of gigs that I've gotten through Twitter engagement. So this is this is one of the one of the list definitely

**Anthony Sanders** 03:38

Wow, you can send that to Jack Dorsey.

**Evan Bernick** 03:41

Sorry, go ahead didn't mean to cut you off.

**Anthony Sanders** 03:44

I just saying you should send that the Jack Dorsey and you know, maybe that it'll help the stock price. Well, um, well, speaking of which, speaking of stock price, Chris, most listeners are familiar with the term “originalism.” I gave a kind of definition a little while ago. For those who you know, are somewhat familiar with it, please tell us what it's all about. And, and maybe also for those of us who, you know, maybe read a little bit in law school or in college a while ago, but you know, don't follow the standings. Tell us where originalism is at today. What are some of the latest developments?

**Chris Green** 04:22

Well, thanks. So, originalism is in general, the idea that the meaning expressed by the constitutional text in its original context, whatever that is, so for text that was adopted in 1791, you're talking about in the context of 1791, for text adopted during Reconstruction, its the context of reconstruction, the meaning expressed by that text in its original context, is what is binding on interpreters. So it's a view. It's not a political project, it's not something we want to get done, so much as a view about the nature of the Constitution. So when we use the term “The Constitution,” what are we talking about? An originalist says that the thing we're talking about, the thing that makes those claims involving the constitution true, is something that's historically situated. So when we talk about the 14th Amendment, we are using a term that points back to this expression of meaning during Reconstruction in the 1860s, not an expression of meaning during the 1790’s, so the words of the 14th Amendment are what we should be looking at, and looking at what they said, what they expressed in reconstruction. Now, there are a number of nuances here. So I've just presented one version of originalism. Some people don't stress the meaning as much as the application. So, there's a distinction between what words express the general categories they express and the particular things that fall under those categories. There's a lot of lot of water under the bridge about philosophy of language that I've I tried to bring in a little bit in recent years, philosopher Gottlob Frege, on the sense referenced distinction. Most if you've heard a little bit about philosophy probably heard about the analytic, synthetic distinction. So analytic statements are true just in virtue of meaning of words. And synthetic propositions include the facts. So there's a bunch of Frou Frou philosophy stuff that you can get into to make these distinctions. Clear and rigorous. And there are some people who respond philosophically in ways saying, Oh, those are bad distinctions. It needs to be messy. So depending on your view of the nature of language, you might be looking at slightly different things. If you think there is no distinction between meaning and application, between sense and reference, well, then it's going to be a messier situation. Another thing that's been talking about recently, is the nature of what we're looking for in terms of, are we looking for what ordinary people think the words express? Are we looking at the more elite opinion? Legally trained people? That is something that sometimes will, you know, it might show up. I've certainly heard it show up on some recent discussions about the 14th Amendment. Is, so we can put it this way, is the 14th Amendment written in the language of the law? Or is it written in the language of the people, the language of abolitionism? Do all of these ultimately lead to the same place? I, you know, we certainly can talk about that issue in a minute. But that's one thing that has been, there has been some back and forth, some people have really pushed for a much more populist orientation of, the way we think about is what linguistic conventions are we looking for? Are we looking for legal conventions? Or are we looking for more popular conventions? How do we know when there's a difference? Is there a difference? I think there's probably not a big difference. So, I don't think this debate cuts as much eyes as some folks think it cuts, in the context of the 14th Amendment, but it's certainly something that is going to affect where we start, it might not change where we end up, but I think it changed like, like, you know, what's the paradigmatic thing you want to look at it? Or is it you know, there's a lot of really, really, really fantastic abolitionist literature. Just popular literature from folks like the conventions in South Carolina of African American folks just talking about 14th Amendment type concepts. Is that going to be the focus? Or should we really, really fuss over things like John Bingham and Jacob Howard in the congressional blob as they propose various kinds of language. So that sort of issue in terms of the theoretical landscape has been a big discussion point of the originalist world lately.

**Anthony Sanders** 09:36

And Evan, on the 14th Amendment and originalism, specifically, originalist, whatever you want to say the movement started and there are different arguments about that, are often criticized for being slow to warm up to applying their trade to the 14th Amendment. It seems like that's been changing for a while now, could you tell us what that criticism of that has been about and where we're at today?

**Evan Bernick** 10:09

So yes, that is a long standing criticism and I have to say that despite the fact that I think it has been changing over the last couple of decades, originalists today should be prepared to acknowledge that it still has a good deal of validity. The question of why originalists have neglected the reconstruction amendments at first does seem kind of odd because when originalism first emerged on the scene, as a distinctive methodological commitments, either in the late 50s, or the early 60s, or early 70s, depending upon where you start, originalists really couldn't stop talking about the reconstruction amendments. The first major work of originalism, Raoul Berger’s, government by judiciary is all about the 14th Amendments. But here's the thing. The early originalist didn't think that the reconstruction amendments did very much and they didn't really think very much of the framers. So Berger argued that most everything that the Warren Court did in the 1950s and 1960s. With respect to enforcement of the 14th Amendment, all of the Civil Rights decisions that are really now embedded in our cultural consciousness from Brown v Board to Gideon v. Wainwright to Miranda v. Arizona, were inconsistent with original meaning because, and this what Berger argued, all the 14th Amendment really did was constitutionalize the Civil Rights Act of 1866, which in turn, he understood to guarantee nondiscrimination with respect to only a handful of rights, some in the text of the Constitution, others not. He acknowledged that a number of the framers seem to say more than that, but he kind of chalked this up to loose talk reflecting muddled, confused constitutional thinking. Now, not until the late 1980s did originalism become the theory of the conservative movement and effectively become a regime philosophy within the Reagan administration. And only then did originalists get around to the idea that maybe most of what Berger said was wrong in bidding the possibility that the 14th Amendment applied to the states, applied the Bill of Rights in the States. And they only did this under intense political pressure. So originalist Judge Robert Bork refusal to acknowledge incorporation, much less unenumerated rights that aren't specified in the Constitution, particularly rights pertaining to sexual autonomy and reproductive rights, helped torpedo his confirmation, so it became clear to originalists that they needed a different theory. What best suited their purposes was incorporation and nothing buts. So, the 14th Amendment may apply the Bill of Rights the states but it certainly doesn't do anything more than that. In particular, it didn't justify the war and in early Warren Burger courts recognition of unenumerated rights to sexual and reproductive autonomy. And frankly, they weren't really originalist at this time, interested in the methodological conundrums that this posed, it was a concession to political reality more than anything else. So given this environment, it's not surprising that originalists began to fill the ranks of the federal judiciary didn't really pay much attention to the original meaning of the 14th Amendments and concentrated most of their attention on the Constitution’s structural provisions and the original amendments. This is now changing in the academy, but not on the federal bench for reasons that I think we can get into as things goes on. But that's really the source of the charge. And the reason that it has a good deal of merit to its early originalists read the 14th Amendment very narrowly, only gradually that they begin to take a broader view, and they did so more because of political exigency, then through serious engagement with the underlying history.

**Anthony Sanders** 13:49

Now, some people listening might say, you know, it seems like, push back on that a little bit, Evan and Chris, or you please respond to this, they might push back on that and say, Well, that was true for a time, but then we had cases like McDonald where the Second Amendment was said to apply to the States. And of course, both Justice Alito’s opinion in that case, and Justice Thomas took all kinds of history of the 14th Amendment and what was going on at that time and seemed to take it seriously about what the right to keep and bear arms meant at that time. There's been other opinions since then interpreting the 14th Amendment, including the last couple of years with other incorporation cases we can get into, where it seems like that's changing. So, is that kind of the exception there, obviously, there's more work to be done, or is there more to it than that?

**Evan Bernick** 14:47

So, Chris, go ahead.

**Chris Green** 14:50

Oh, specifically with respect to McDonald. It was sort of encouraging in certain ways and really not encouraging in others. So for instance, they look, there's, you know, there's a couple of statements about incorporation. The most prominent statements where you get, and they're not they're not really statements to say its incorporation and nothing else. They’re statements that say you do get at least a lot of the Bill of Rights applying to the states from Jacob Howard introducing the amendment in 1866. And then a speech from John Bingham in 1871. And Justice Alito, is, I guess he's the plurality opinion at this point. He cites this material. But then he prefaces it saying, the 14th Amendment applies things in the bill of rights against the states see e.g. Bingham in 1871, and Howard in 1866. If you look at a context, it's not the 14th Amendment, generally, it's the privileges or immunities clause. And this is particularly striking because a few paragraphs before this, Justice Alito said, we're not going to resurrect the privileges or immunities clause. So you get a treatment of the details of the evidence that I mean, I wouldn't say it's quite sloppy, because I think he was perfectly aware of the fact that there was evidence about a different clause. But we take one clause, evidence about one clause, and we just say, Well, you know, it's back there somewhere. We're not really asking, you know, this specific question, what did these particular words expressed during Reconstruction, we're saying, Well, you know, what did they apply to generally, and we take evidence from one clause and move it over to the other. So it's good that they're getting to their history. It's not good, it's just a recipe for muddled thinking, when we take evidence from one clause and move it to another, so I got a number of other, you know, things to kvetch about McDonald, but I’ll let Evan say what annoyed him the most.

**Evan Bernick** 17:00

Yeah, so let me kvetch a little bit before you get to kvetch again. And what I'm going to kvetch about is that, despite the fact that Justice Alito is engaging, in some way, with the history of reconstruction, he talks about the Cruikshank, which was an abominable decision in which the courts tossed out the convictions of the perpetrators of the bloodiest massacre in the history of reconstruction, on the grounds that largely the Bill of Rights did not apply to the states and therefore the right to bear arms did not nor to the right to free speech, nor did any number of enumerated rights you can think of. The problem with Justice Alito, his opinion is twofold. One, he's sloppy with respect to the basis for which or the, you know, the hook that applies the relevant right to the States. And the second, despite the fact that he goes into this history for the purpose of demonstrating to his satisfaction, that the right to bear arms is incorporated against the states, he doesn't show any interest in engaging the possibility that the right to bear arms was understood differently in 1868, than it was in 1791. Only Justice Thomas in concurrence really gets into that question and engages with the history and a methodologically serious by contemporary originalist standards way. But Thomas's opinion is also frustrating. It's frustrating, because despite his demonstrated capacity to engage in a methodologically rigorous originalism with respect to the Second Amendment, he doesn't do so with respect to other provisions that he believes have to have been incorporated against the states or consider the possibility that rights that he doesn't believe to be incorporated against the states are in fact thus incorporated. So, his treatments of the question of whether the establishment clause is incorporated against the states is very cursory, he cites Akhil Amar, doesn't engage with Kurt Lash’s work purporting to demonstrate that the Establishment Clause was in fact incorporated. So that's one issue. The other issue and this is a real difficulty for originalism more generally, is that Justice Thomas is quite convinced that affirmative action is effectively forbidden by the 14th Amendments, and to my knowledge he has never seriously purported to demonstrate that in a rigorously originalist way. Instead, he cherry picks a couple of quotes from Frederick Douglass and says, well, Q.E.D. Regardless of what wants one wants to say about that, as a matter of normative political theory, it's just not rigorous originalism and the appearance of selectivity when he does that is quite inescapable, giving credence to the non-originalist criticism of originalists that they only do it when they believe it serves their normative priorities.

**Anthony Sanders** 20:00

Now there, of course, you're talking about the original understanding because of the context of those cases of the equal protection clause.

**Evan Bernick** 20:10

Well, he speaks quite generally, um, and like to the extent that one would present him with an argument that actually the privileges or immunities clause allows affirmative action, I don't think that he'd be any more responsive.

**Anthony Sanders** 20:25

And I know, I know, I know, you two, and others listening will have different opinions about equal protection versus privileges immunities, and that, but what I mean for that question is, there's one thing which is interpreting the privileges or immunities clause or the or the equal protection clause, as it applies itself. And then we have this weird thing called incorporation about applying these things that were adopted in 1791 to the States, and that the Supreme Court has said over the years, right, is, however you want to put it through the selective incorporation through the structure of ordered liberty. And so there's this nagging question there about, okay, if you're applying, say, the First Amendment, a provision of the First Amendment, which was adopted in 1791, I understand it might have had a different meaning in 1868, 77 years later, but maybe it seems to me and this is the quandary that I can't quite wrap my head around, it seems to me and 16, or I'm sorry, in 18, we don't need to go there, in 1868. If you were a good originalist in 1868, right, which didn't exist, right. But if you were today's good originalist in 1868, you would interpret the First Amendment as it was interpreted in 1791. And so you're then going to incorporate it in 1868, or 1872, or whatever. There's no problem, you just apply that original meaning to the other. But we're looking back from now to 1868, where today's originalism wasn't a thing, and of course, they believed in, you know, the ideals of 1791. But they also had their own thing, and they add language to change somewhat 77 years. So, what even questions should we be asking them? What should those answers be about? What the meaning was in 1868? Considering that those people weren't today's originalists?

**Chris Green** 22:39

So it seems to me that the big question that, it's a question right in 1866, just interpreting Jacob Howard's introduction, his mention of the Bill of Rights alongside this case, from 1825, Corfield v. Coryell. The big question is, how do we relate these statements about the Bill of Rights statements about things like freedom of speech, and the right to keep and bear arms, to these general standards of the rights enjoyed by the citizens of all free governments? Okay. So, there are a lot of people who looking at Article Four, Section Two, Clause One and the way it was interpreted, so this is the privileges and immunities clause, the comedy clause, they say, well, the rights that we enjoy, under the comedy clause, the things that you have to get when you go to a different state. Those are the things that are described in this 1825 opinion, what is the privileges or immunities clause of the 14th Amendment do well, it takes those sorts of rights, and says that all states have to protect them for everybody. And what are those rights? Well, one way you could do it, to think about incorporation at this point would be say, you take that standard, the Corfield Standard, and say that, in fact, all or most of the things in the Bill of Rights are the kinds of rights that are enjoyed by the citizens of all free governments, that things in the Bill of Rights satisfy the Corfield Standard. So, it's in 1871, when Bingham talks about the Bill of Rights, he says the rights of citizens of the United States are chiefly, he has this word, chiefly, defined in the Bill of Rights. Later in the speech, he talks about rights to work, and it's seems pretty clear from the context that he's talking about those as privileges of citizens United States, it's sometimes not perfectly clear, you know what Bingham is saying, but he says chiefly, so one big issue is you've got stuff in the Bill of Rights. And then you've got stuff near the Bill of Rights, which if the stuff in the Bill of Rights is fundamental and the rights of citizens of all three governments, it stands to reason that stuff it's very similar to stuff in the Bill of Rights is also going to be covered. But there's a case, Graham v. Connor, this is a very important, an extraordinarily important case in a number of respects, it's the standard, it's a very, very general standard about what kind of force you can use when you arrest people. So this is what, you know, claims of excessive force that we see all over the place. This is the key standard. But one of the things in that opinion, that is I think, just dreadfully wrong, says that if a right is quote, covered by something in the Bill of Rights, then you don't have any additional 14th Amendment coverage beyond that. So, because a seizure is covered by the Fourth Amendment, because words in 1791, therefore, they say you don't get any substantive protection beyond that. And, you know, just looking at the relationship of a Corfield standard and the Bill of Rights, that makes no sense to say that things nearby the Bill of Rights, but not quite in the Bill of Rights of 1791 don't count. And this is from a couple weeks ago, we had a 4th Amendment, incorporated Fourth Amendment case. And they were fussing about these words in 1791. As if well, if it doesn't get applied, if the if the Fourth Amendment from 1791 doesn't apply, well, then you certainly don't get any 14th Amendment coverage. Whereas if you if you think of incorporation as the application of a Corfield standard, you think Well, yeah, 1791 4th Amendment rights might not cover this, but something very close to that is extremely likely to also be a privilege of citizens, the United States,

**Anthony Sanders** 26:48

And this is the Torres vs. Madrid case from a few weeks ago, you're talking about?

**Chris Green** 26:53

Right. The jury doesn’t face this issue, because they say the Fourth Amendment of 1791 does apply. But the dissent goes into a great amount of detail about what the Fourth Amendment expressed in 1791. When, if you got rid of the Graham v. Connor mistake about you know, something being covered by something in the Bill of Rights, therefore, there's no substantive protection elsewhere in the 14th Amendment. If you got rid of that mistake, that all that discussion wouldn't matter at all. You just look at the Corfield Standard or what you know, whatever the standard is going to be for fundamental rights under the privileges or immunities clause, rather than, you know, specifically what's going on in 1791.

**Evan Bernick** 27:39

Just to build up on that a little bit, Justice Gorsuch is actually frequently done this to both Chris and mine’s frustration. He engages in methodologically rigorous inquiry with respect to determining the meaning of 1791 rights in the 14th Amendment cases where the relevant question for an originalist is what the 14th Amendments means. And just assumes that if we assume incorporation, that right frozen in 1791, and is just sky hooked into our current constitutional law. He did this in the majority opinion in Ramos, he did this in a double jeopardy case, the name of which I can't call immediately to mind, and he did this in the dissents in Torres that we just mentioned. There may be something to be said for adopting a presumption of carryover between 1791 and 1868. But it would not be an originalist presumption, it would pertain to judicial economy, there would be some rule of law argument you could make for not destabilizing settled expectations associated with long standing precedent, according to which we party like it's 1791. But it's not defensible from the standpoint of methodologically rigorous originalism, at least nobody of which I'm aware, of whom I'm aware, who is contemporarily currently working in originalism as a scholarly endeavor defends the proposition of 1791 rights carry over. Even Kurt Lash, who takes and then broadly speaking, and incorporation and nothing but approach to the 14th Amendments, agrees with Akhil Amar that we have refined incorporation, you need to look at what the rights meant in 1868. That's why he's capable of saying things like the establishment clause in 1791 means something different from the non establishment guarantee that is imposed on the states in 1868.

**Chris Green** 29:44

One thing I know another thing to complain about Justice Thomas, for a second. So, one thing if you look at the rise of incorporation only views where it's stuff in the Bill of Rights and nothing else, you see this arise historically, three separate times when different people get really upset at people who want the 14th Amendment to cover unenumerated rights. So, the first time, we can see this very, very specifically being born in 1872, in response to what becomes the Civil Rights Act of 1875. So, Alan Thurman, Senator from Ohio, in January 1872, it seems very clear, he thinks the privileges or immunities clause applies to things like the right to testify, which is outside the Bill of Rights. But then on February 6, he says, Oh, I figured out what…So this is his argument, why common carrier rights, like rights to be on a railroad, rights to go to be free from racial segregation in places of public amusement, that kind of thing, here's why that's not something we can impose on the states: It's because the privileges of citizens the United States are the things in the Bill of Rights or elsewhere enumerated in the constitution and nothing else. So, Thurman brings up this view, is specifically to oppose the Civil Rights Act of 1875. John Sherman jumps up immediately and says, Well, that's not how you figure out what a privilege of citizens The United States is, remember the Ninth Amendment. So, in the context, even at the founding, we didn't write the Bill of Rights to be a catalog of all our important rights. We shouldn't construe, you know, this view, I mean, there's stuff in the Civil Rights Act of 1866 that's not in the Bill of Rights, the right to own land, the right to test, the right to work, right to make contracts. And it just, this view doesn't fit the history at all. But Thurman makes this view up. I think. It has a similar vibe with part of what what's in 1866. But as an exclusive view, it just doesn't fit the history, Justice Hugo Black, in the 40s, he's responding to Lochner. So he doesn't want the right to work to be a 14th Amendment right. And he says its incorporation of the Bill of Rights and nothing else for a very, very similar purpose as Thurman. Thurman did not want an expansive open ended abstract guarantee in the 14th Amendment. And he comes up with this incorporation only view as a way to, to cabin, that you have something in the 14th Amendment, but not potentially everything. Hugo Black has adopted the same view for basically the same reason. He says we don't want the 14th Amendment going out and giving rights to people to work for low wages or for long hours, or he just he doesn't want a constitutional laissez faire. A third time this view comes up is in response to things like Roe v. Wade. So, some people say well, the problem with Roe v. Wade, I mean, there's a bunch of different problems you could raise with Roe v. Wade, but some people say let's just get rid of this whole idea of unenumerated rights, root and branch. And the way to do it is to go back to what Justice Black said, in you know, in the incorporation cases in the 40s to the 60s, you know, go back to Justice Black’s dissent from Griswold v. Connecticut. So just get rid of the right to privacy entirely because there are no unenumerated rights. And I think something like this is behind, at least some of the people who are enthusiastic about receiving current lashes. I think Justice Thomas is probably at least somewhat motivated by this. He hasn't, you know, laid all his cards on the table. But they’re just kind of hooking this back. And you know what, you're Why are you complaining about Justice Thomas in this respect, he cites people like Thurman he cites the 1872, 1874, 1875 democratic opponents of the Civil Rights Act of 1875 as if they are reliable guides to the meaning of the 14th Amendment rights. This is in his Timb’s concurrency, he cites more in his Ramos opinion. And it's you know, you can go to other folks like Sherman, you can go to people like Howard, and Bingham and say, Look, they're all republicans who say you do get at least something like incorporation of the Bill of Rights. But, citing the folks who say it's incorporation and nothing else, that's really people from the wrong side of the debate if you're looking for fans of the 14th Amendment, and during Reconstruction.

**Evan Bernick** 34:34

Just to footnote all this and maybe put a pin on it. It may sound as if we are a couple of methodological purists, kvetching about methodological impurities on the parts of professedly originalist justices. Two things that I can say in response to that. First, these justices are holding themselves out as methodological purists. Justice Scalia may have said he was a fainthearted originalist earlier in his career, but he later retracted that and specifically said that he was prepared to go wherever the evidence leads. Justice Thomas again, you can see in his concurrence in McDonald that he is capable of doing methodologically rigorous originalism sometimes, which raises the question of why he doesn't do it in other cases where he is clearly able to do it. Justice Gorsuch takes his craft extremely seriously. He's familiar with the scholarship he cites Will Baude on the Fourth Amendment. He cites Philip Hamburger in his administrative state opinions, he's well versed in the literature, and he is making methodologically indefensible moves. To the extent that the most visible originalist in the country continue to do this. They give credence to the idea that really this is just a means of entrenching one's normative views. When history enables them to do it, rather than following the evidence wherever it leads. That's number one. Number two, it's quite frankly, a matter of justice to both the living in the dead that we take this history seriously. The 14th Amendment is entrenched into our law, through blood and toil and war. It was the product of a mass anti-slavery movement that suffered in measurably in order to entrench these guarantees, and to make the constitution into what the most radical of abolitionists said that it always was: a glorious liberty documents. We completely erased that struggle when we just failed to reckon with that history. And that has impacts on people today. We just talked about Graham v. Connor. That is a decision that has enabled police violence, it makes it more difficult than it otherwise would be to achieve constitutional relief for constitutional injuries. And it is methodologically indefensible written by an originalist. One of the leading, you know, leading lights of early originalism was Chief Justice Rehnquist, then Justice Rehnquist. So, this is not just a matter of high theory, it is a matter of justice to history and justice to people who are currently living under these decisions that I believe in many cases give people less than what the 14th Amendment promises.

**Anthony Sanders** 37:24

So, on that point, at first, I want to in a little bit turn to how the Supreme Court, the originalists on the Supreme Court could start rectifying these errors and a bit of a chicken in the egg on why they're doing this, or why they're not doing this. But first to pick up on that last point, Evan, definitely, people might say that for the interpretation of the privileges or immunities clause, of course, we at IJ would argue this, or the Equal Protection Clause or the due process clause. There are originalist arguments that can be made that could rectify a lot of bad things the Supreme Court has done, but on the incorporation question specifically, and the difference in meaning from, you know, 1791 to 1868. Chris, you alluded to this a little bit earlier, that at the end of the day, what any part of the Bill of Rights meant in 1791 and 1868? I keep going back to the English bill of rights of 1689. 1868, that isn't really going to be that different. Now. I think there's a couple examples, definitely where, the right to keep and bear arms is definitely one, maybe there's a couple others. But is this mostly just getting the roadmap right, and we want to be true to the methodology? Or are there instances where people are better protected versus state actors because of the changed meaning. But conversely, are there some examples maybe where they'd be less protected? And would we want to go there?

**Chris Green** 39:09

Yeah, so in general, I mean, so you look at the briefing in cases like, Masterpiece Cakeshop. Um, I coauthored an amicus brief with David Upham, focusing on the 14th Amendment. And there were a huge number of amicus briefs in this case. It was briefed as entirely a First Amendment case, and they're looking at 1791 stuff. I think this is true, every single other brief in the case, look solely at 1791 rather than seeing this as a privileges or immunities clause case. You look at the expansion of things like commercial speech doctrine. And this huge, huge question gets raised whether something is speech or not, the recent cases on, you know, thinking about, you know, revising the free exercise doctrine, the Smith doctrine. These are almost all of them 14th Amendment cases about what states are doing, and seeing the Free Exercise Clause through a privileges or immunities clause lens is going to have a much more sensible way of resolving these things through history. And it could be more, it could be less. In general, I think that the second Justice Harlan was right that the meaning expressed in 1791 is not necessarily applied full force to the states. So, the general way that we thought about rights in the 19th century was we would look at whether there's an infringement of someone's right and then look carefully at whether there's a police power justification for it. So, you would look at what the asserted interests are, whether there's a means and fit these sorts of questions are, if you look at the history of the privileges or immunities clause very clearly in the background, okay. You can look at you know, there's some similar stuff in in 1791. But it's a very clear a question in in 1868. So, the question about, you know, whether, you know, somebody’s business is oriented towards speech, you know, that particular question, you don't have to worry about it. If you're really looking at it through a 14th amendment lens, they're running a business and running a business is generally supposed to be one of the privileges of citizens united states, you can restrict it for certain reasons and the public good, but you can't you know, you have to have a good police power justification, it has to be a genuine thing, not just something that's in the interest of certain citizens and not others. So that that might allow more restrictions than the federal government could impose. There's certain things the federal government just can't do. Okay. So even the fact that the federal government is barred from something that doesn't necessarily mean that states are barred from doing it, because the Bill of Rights was written as a supplement to a government of limited power, unlike the 14th Amendment.

**Anthony Sanders** 42:25

Evan, your thoughts on those distinctions?

**Evan Bernick** 42:27

So beyond what Chris has already said, I would just draw attention to basically any substantive right you can think of that would be relevant to modern policing. In 1791, you did not even have a transitional form of the police in existence, you did not have people who were regularly paid to chase down and arrest fleeing felons, you did start to get that in the early antebellum period in the form of slave patrols that were designed in order to preserve a racial hierarchy by controlling the labor force from which slaveholders systematically extracted wealth. And abolitionists did advance Fourth Amendment arguments against the activities of the slave patrollers, as well as against Southern police that were actually fairly developed, if not as rigorously hierarchical and specified as they were in the late antebellum period, in the enforcement of the black codes, which were basically an effort to reestablish slave law, after the 13th Amendment abolish slavery. So looking into that history with a specific eye to criminal procedural protections that are relevant to policing make sense. And we would expect that the contours of those rights, I think, would look quite differently than they did in 1791, simply because policing was much more developed. And there was more contact between police and individuals. And it was the kind of contact that gave rise to abolitionists’ complaints that informed republican constitutional understandings that made their way into the 14th Amendment. But more research does need to be done in this area.

**Chris Green** 44:15

Get back into that in terms of like, how could this change? I mean, one thing you really would that would change it immediately would be getting just questions about these issues from the bench. So they look at this briefing, and there's it's all 1791 focused, they could just make a comment saying, you know, is there anything you've run across about reconstruction in this? I mean, a more aggressive, I sort of think, you know, what would you know, sometimes people ask me, What would you do if you were a justice? Well the first thing I would do is add more questions presented, and just like say, hey, when you when you brief these things, brief, you know, the extent of the reconstruction history bears on it, so we can at least make an intelligent decision about whether it is you know, going to have total incorporation or nothing. Or, you know, is this going to be one of the areas where it doesn't apply? Is this where an area where, you know, privileges of citizens of the United States goes beyond the Bill of Rights? If you just got quiet, I mean, it's very simple for the justices to ask questions, it might embarrass the first few when you don't have any briefing. But adding questions presented? You know, going beyond that. I mean, you know, if they just don't have good briefing, they could add a question presented, have re argument about these questions. So a lot of these things, I think, well, you really need to have a full round of briefing with eyes looking clearly at reconstruction, because that's the relevant point, that's when the relevant text was actually enacted. And you got to be looking at what was going on then if you're going to get a handle on things.

**Evan Bernick** 45:49

Yeah. And just to build on that, it's comparatively, you know, cheap for justices to acknowledge that there hasn't been briefing on a potentially relevant issue. In Gorsuch and Carpenter does this entire exegesis of possible Fourth Amendment theories that might be applicable to the case draws upon originalist scholarship as well as non-originalist scholarship, and ultimately concludes that there just hasn't been enough briefing on the issue for him to unveil his full fledged theory of the Fourth Amendment's. If he can do that, other justices can do that too. Justice Thomas sometimes notes that he hasn't had extensive briefing on an issue. So there's plenty of space for justices or clerks who are alert to these issues, to flag the possibility that a, you know, evidentiary source might shed light on something relevant in a future case, even if that evidence isn't available in a particular case.

**Anthony Sanders** 46:46

And I'll flag that, for those listening who ever filed briefs at the Supreme Court, have cases of Supreme Court, file amicus briefs to the Supreme Court. And I know some of you do listen, from time to time, please take this really to heart because this is how the three of us started talking on this issue is that in these cases, you get all these amicus briefs, I checked this and the Torres case, the recent case, that had some great opinions in it, but I think both sides were interesting. But when then the opinions themselves don't talk about 1868 originalism. And then when you go into the briefs, there was like, it was like a sentence or two on any amicus briefs and the merits briefs talk about what this stuff meant. This stuff, meaning the fourth words of the Fourth Amendment meant in 1868, there could be a lot of good done by scholars, lawyers, whoever talking about this, goading these stubborn justices into thinking more about these questions and asking these questions. And it'd be great if they did it on their own as Evan saying. But, you know, they're public servants. And often they need to be led to the to the right place. So, if this is anything else, please have today be just imploring of you the bar sitting out there and the bench sitting out there to start thinking more about these issues. Now, I'm going to be remiss if I don't ask a state constitutional question, as you gentlemen probably knew I would before, before we close. This question of originalism. And you know what, something meant at one time and another comes up in state constitutions, which are often of course, re adopted. And I just wanted to pose a hypothetical and how maybe we might think about this. So, the Montana Constitution, the Supreme Court of which, where I clerked, was first adopted in 1889. It has a full bill of rights that says all kinds of great stuff that that were adopted by the western states of that time. And then they had a new constitution almost 100 years later, in 1972. A lot of that bill of rights is the same. Now they changed a lot of the Constitution. But you know, a lot of the words of the bill of rights are the same, the excessive fines clause, for example, it says what it says there, it says pretty much what it says and in 1689 and in England, and right after the Glorious Revolution. So those words have been interpreted over the years by the court, the Montana courts before 1972. So how should an originalist judge in Montana interpret the 1972 constitution when the words are exactly the same as the 1889 constitution? And the Court has said things like, well, we interpret it the same as the old constitution because they didn't change anything. Where do you start there?

**Chris Green** 49:55

Well, this was an issue. There’s a paper at the Originalism Works in Progress Conference this year on exactly this issue, so a fascinating issue looking at state constitutions by Jason Mazzone and Cem Tecimer. And I think, I remember that I was surprised at the pronunciation, so I think garbling. I think I've got Jason's name, but I think Jeff, maybe was his name. But this is a fascinating issue that I think the key would be looking at how the terms and the starting point is the actual constitution. So you start at, for Montana, you'd start in your 1972 time. So, you set your time machine initially for 1972. And then you look for the legal conventions at the time in 1972, about what words express, those conventions themselves, they push us back to 1889. And so, I've run across this a number of times where I, you know, interpreting Mississippi constitution, and I, you know, I've got, you know, the, you know, one case from 1895, and another from 1821. Well, you know, I've got a constitution of 1890. And the 1895 case might think, Wow, that's really close to the adoption, but it's an identically worded provision to something initially to an 1817. So maybe the 1821 case is a lot more probative. I think the key is the linguistic conventions, the linguistic legal conventions, at the time, the actual constitution you're interpreting was adopted. So, to the extent that people ratifying the Montana constitution of 1972 would have said, “Oh, yeah, that's the those are the same words, we want to preserve the same right, we have.” It might depend on how the words, how the constitutional provision was written. So if it says, you know, the right to jury shall be preserved. If we say that in an early constitution that we say the same thing, and a later constitution, well, presumably, I mean, one way to think about it might be well, we're assuming that it has been preserved faithfully, all during that that history. And if it hasn't been we should, we want to correct those mistakes, we still want to correct those mistakes. We're not abandoning the right to correct those mistakes, merely by repeating the language. But there are other there's sometimes there's a candidate that, you know, if the courts themselves have done a very prominent job of misinterpreting the early provision, then those new mistakes are baked in when you readopted. Right. So the Mazzone article goes into these things in a bunch of detail, but Evan there. I can't remember what exactly your reaction was to that paper.

**Evan Bernick** 52:55

I thought it was fascinating. And I agree with 95% of what Chris just said, the 5% that I disagree with, stems from his emphasis on linguistic legal conventions, I think it is an empirical question, as a matter of public meaning whether the meaning expressed by the text at a particular time incorporates legal conventions, or its tracks, broader conventions within the broader linguistic community. And it may be that public discourse around the meaning of a particular text that was adopted at one time has caused linguistic drift such that at time be, some years hence, it carries a different meaning within the broader community than it once did. And this is independent of anything that happens in the course of litigation and glossing other texts that maybe have a more discreet indeterminate, legal meaning. It happened in the context of the 14th Amendment, but really dwelling upon that would lead to a modest point of disagreement between Chris and myself that I think would consume at least another hour, so I'm prepared to leave it right there.

**Chris Green** 54:02

Well, I didn't want to, if I can just jump back to 1872, for a minute. On the state constitutions, I think there's one fascinating moment, and it relates to the incorporation issue. So at one point, and they say Civil Rights Act of 1875 has a jury provision and says you can't have racial discrimination in juries. And Matthew Carpenter, who is probably the sharpest guy on common law issues in the Senate in 1872. I mean, just a fantastic litigator, he argues both Bradwell and the Slaughterhouse cases. He is arguing for Myra Bradwell in January 1872 argues on behalf of the slaughterhouse monopoly, the same month, and then just weeks after this. He's he says well, the right to be on a jury, that's a political right, not a civil right. And Sherman jumps up there and jumps up in response to a bunch of these things, but he jumps up and he says “Well, what about the Sixth Amendment? We have a right to an impartial jury. And an impartial jury means a jury that doesn't include racial discrimination.” And Carpenter says, well wait a minute, and this I think, is actually really powerful evidence that, you know, just straight up incorporation, without any ifs ands or buts from 1791 really was not obviously, the dominant view among the republican. Carpenter jumps up and says, well, the Sixth Amendment, remember Barron v. Baltimore, the original bill of rights doesn't apply against the state. Sherman's response is “well, okay. Yeah, yeah, yeah. True. The Sixth Amendment itself doesn't apply. But remember the privileges or immunities of citizens of the United States, he says the privileges or immunities of citizens of the United States, that does include the right to an impartial jury, how do I know that? The first piece of evidence he looks to is the consensus among state constitutions. He says, look to what rights are actually protected in state constitutions.” And a is somewhat vague, he says, “I think almost all of them all, but all but maybe two or three have a right to an impartial jury.” That's a really good indication at about the fact that something is a privilege of citizens of the United States, and I think he might have even been underselling, I think it may have even been a unanimous opinion amongst state constitutions. So, there's a big feedback loop. So similar things going on in state constitutional realm. You know, this kind of parallel issue about time on time two originalism for state constitutions, but also I think attitudes are super important for federal litigators to know about just so you can understand what the consensus is, both the consensus in 1868 and the consensus today. Steve Calabrese has a couple of articles looking at these exhaustive detail, both in 1868 and today and you know, there's scholarly work is out there for people who are interested in state constitutions, definitely.

**Anthony Sanders** 57:01

Well, it sounds like Chris, what you brought us around to what we all knew the whole time, which is that what we need to do is overturn the Slaughterhouse cases and Cruikshank, and reinvigorate the privileges or immunities clause, then we won't have to worry about all of these 1791 questions.

**Chris Green** 57:21

You worry about them in the right way?

**Anthony Sanders** 57:23

Yeah, well, other worries, well, better problems to deal with. Well, I want to thank both of these gentlemen, for coming out of their busy schedules, and talking with us as Short Circuit about all of this. I'd also like to thank those of you listening who joined us just a couple of days ago at our 150th anniversary celebration of Section 1983, and the Ku Klux Klan act of 1871, which involved many of the issues that we've been talking about today. Both that Chris and Evan’s history have been discussing, and we're going to put a link up on the show notes for this to the recording, which is pretty good quality, to our YouTube channel of that event. So, after listening to an hour of originalism and the 14th Amendment here, you can now listen to two hours of Section 1983 and what was going on in reconstruction. So, this is very much reconstruction week here at the Institute for Justice. So thanks again to both of you for coming. I hope that the listeners enjoyed this something to think about for the future. But in the meantime, we ask that all of you get engaged.