Episode 1,380: Don’t Get Snookered by Phony Constitutional Originalists

Guest: Mark Pulliam

WOODS: Well, let's dive in here. I bet a lot of people who are reasonably well informed hear the term "originalism" when applied to constitutional interpretation, and they're pretty sure they know what it means. But it turns out that originalism has spawned a number of, well, let's just say different tributaries of thought that come out of that original source, and these are not really always compatible with one another. And so you've been writing a series of articles staking out your own position. I'm going to link to those on my show notes page for this episode. And I thought it was an interesting topic to talk about it, particularly because, as I say, I think people, they hear "originalism," maybe they know there were a couple of approaches to it, original intent, original meaning that's more textual based, but that's as far as it goes. And it's easy not even to be aware of these distinctions., because as I was telling you before we went on, obviously people on the complete other side, people on the left side of the spectrum, they can't even perceive difference. We're all just extremists. They can't even perceive the differences. But the differences are really where the interesting stuff is to be found. So can you start off by maybe situating us in the problem by describing what the different ways of looking at it are?

PULLIAM: Sure. Now, I think everybody is generally aware that during the 1950s and '60s, the Supreme Court was dominated by liberal judicial activists under the leadership of Chief Justice Earl Warren. And this liberal court is generally referred to as the Warren Court. And on the Warren Court, you had William O. Douglas, you had Bill Brennan, you had a lot of famous liberals who served on the court for, in some cases, many decades. And they accomplished a great deal towards advancing the liberal agenda.

And in the late '60s, this began to become a political issue. Richard Nixon, when he was elected president, made a big point out of appointing strict constructionists to the court. And this is the divide that it sort of surfaced, emerged, liberal activism versus strict constructionism. And then with the election of Ronald Reagan and, in particular, the appointment of Ed Meese to be his attorney general, we began to formalize this divide. And on the liberal side, it sort of became called the living Constitution, that Supreme Court justices should make decisions based on their sense of what's best for society, and on the conservative side, you had Ed Meese talk about, no, judges should be applying the Constitution as it was originally understood.

And Robert Bork, the famous law professor and in juris who Ronald Reagan unsuccessfully tried to put on the Supreme Court, he kind of coined this name originalism, the jurisprudence of original intent. And that baton got picked up, as often happens, in intellectual movements by successors. And his immediate successor for the purpose of advancing this constitutional

philosophy was the late Supreme Court Justice Antonin Scalia. And Scalia's big advance of this was to get away from what the framers individually intended when they wrote the Constitution to what did the words that they came up with, how were those words understood, what was the original public meaning of those words. And so things stood for many decades, with Scalia being the principal influence and leader of conservative legal thought.

Now, unfortunately, with the demise of Robert Bork and the demise of Antonin Scalia, we no longer have a clear guiding voice in the conservative legal movement, and so things have kind of percolated back to the law schools, where you have many, many enterprising scholars engaged in this cottage industry of constitutional law. And if your specialty is constitutional law, you don't want your message to students to be that Robert Bork was right, Raoul Berger was right, that Antonin Scalia was right. You want to put your own stamp on this, and so you want to be the thought leader, so to speak.

And so this new group of scholars has run off in many different directions, saying that Bork's vision and Scalia's vision and this old-fashioned vision is no longer the correct vision. That is what they call the old originalism. And they have rebranded a new movement, which they call a new originalism. And new originalism means that judges shouldn't be particularly humble or they shouldn't be modest and they shouldn't be constrained, that they should interpret the Constitution in however creative a way they feel that it was meant to be interpreted. And so if you look at the last ten years or so of law review articles, even by so-called conservatives and libertarians, you see them all over the map, but moving away from the idea that the judicial role is somewhat narrowly circumscribed. And they want to dig up constitutional provisions that have been moribund for, in some cases, 150 years, and breathe new meaning into them. And they insist that what they're doing is, in fact, originalism; it's just originalism 2.0 or originalism 3.0.

And I'm somebody that thought originalism 1.0 got it pretty much correct, and so when I recently wrote an article — which I didn't even think would be all that controversial, defending Josh Holly, the senator from Missouri who had been criticized from a number of sources, including *The Wall Street Journal*, for criticizing substantive due process and saying that he would be reluctant to confirm any judge that embraced substantive due process, which was one of the things that used to be associated with liberal activism and the living Constitution — I instead opened this can of worms and got a lot of pushback from a lot of different sources, not just the new originalists, but libertarians, some of the West Coast Straussians associated with the Claremont school, etc. And I realized that this group of people is not used to criticism, and when they get even a little bit of criticism, they react, like all people with thin skin, by kind of hysterically responding.

WOODS: Would you mind explaining the concept of substantive due process? I think I first encountered it as a — I was never a law student, but I did read in high school, just because I was a curious kid, I read *The Tempting of America* by Robert Bork, and that's where I first found out about it. But what is it, and what, if anything, is the problem with it?

PULLIAM: Well, the original Constitution that was written in 1787 had a clause that says that life, liberty, or property shall not be abridged without due process of law, and then the 14th Amendment came up with similar language after the Civil War. And in both contexts, it is procedural. Everybody understands that capital punishment involves depriving somebody of their life. Nobody contends that that's unconstitutional as long as it follows a trial. The

government can impose fines and penalties as long as it does so after a hearing. So due process has always, at least to people who are intellectually honest, has always connoted a procedural aspect, that the government can't do things unless you've received a fair hearing first.

Well, two judges who wanted to expand their own power — and all government bureaucrats are seeking to expand their own power — they figured, well, if we could take the procedural aspect out of that, and use the word "due process" as a mandate or an authorization for us to impose duties on the states — and this is by federal judges — to say that the word "due process" means that certain are all the provisions of the Bill of Rights, for instance, apply to the states. The Bill of Rights were adopted only to constrain the federal government. The states were in charge of enforcing and protecting their own rights.

So one of the things that the Warren Court did during the '50s and '60s was to use the due process clause to incorporate, one by one, the Bill of Rights as obligations that the states have vis-a-vis their own citizens, which basically is an impediment or constraint on the exercise of their police power, as interpreted by federal judges. So it's an expansion of federal power and a diminution of state sovereignty. So this is how we ended up with *Roe vs. Wade*, which not only does not involve incorporation of a Bill of Right, because there is nothing in the Bill of Rights about having a right to abortion — so not only are they applying obligations to the States, but they're making up things as they go. The right to same sex marriage is cut from the same cloth. So substantive due process should be something that all conservatives rally around or rally in opposition to. And so when Josh Holly came out and said that he was opposed to substantive due process and would be unlikely to confirm any advocate, any lawyer or law professor who had supported this, I was surprised when people started complaining about that and saying he's out of line. And so I was kind of taking Josh Holly's side, and I realized that the battle lines are not as clearly drawn as they used to be and not as clearly drawn as I thought they were.

WOODS: You're using the term, and maybe it's not your term, but "judicial engagement" to refer to some of the ideas of some of the people you're opposed to in this. And by judicial engagement, are we talking about the use of the Ninth Amendment and unenumerated rights as a way of expanding basically the scope of the courts to have the power to strike down state laws?

PULLIAM: Yes, so judicial engagement is a label that has been applied to a group of libertarian legal scholars, originally starting off with Roger Pilon of the Cato Institute, but Randy Barnett, who teaches at Georgetown Law School, and now it's embraced by basically everybody over at the Cato Institute. Clark Neily, when he was at the Institute for Justice, wrote a book about judicial engagement. And it's a theory that the Ninth Amendment is part of it, but it also realize in a way that used to be considered quite controversial on the privileges or immunities clause of the 14th Amendment, which had been laid to rest back in 1873.

In the Slaughterhouse Cases, it involves aspects of natural law, it involves a lot of components, each one of which is very controversial. But they connect these dots to end up with a theory that says, all laws should be presumed unconstitutional, that the government should have the obligation, the burden of proving the validity of every law, and federal judges should have the final say in deciding whether or not a law passes muster. And this evaluation will not be based on anything in particular in the Constitution, because proponents

of judicial engagement believe in both enumerated rights and unenumerated rights. So basically, everything is protected, unless the government can make a compelling case that a law is justified, and so basically, the judges decide whether the laws are wise, whether they're efficacious, and whether they're necessary. And again, this theory had been floating around for quite a while, and nobody was really challenging it. And when I sort of stumbled upon it, I thought, well, this is crazy. This is not consistent with representative self-government. This is not consistent with really even the rule of law. And so I made a project out of refuting it, or at least arguing against it, and certainly didn't win a lot of friends over in the libertarian camp as a result of that.

WOODS: All right, and here's where I want to go with this, because my audience is overwhelmingly libertarian, yet in general, I think they're skeptical of novel interpretations of the Constitution, but they would probably in their heart of hearts want to reconcile these things somehow. And I think I probably have a lot of folks who say, yeah, representative self-government is better than a dictatorship, but what I really care about are outcomes. I care about results. I couldn't care less what the procedure is. Maybe the procedure is phony and made up and insincere and is just intended to bring about the desired result. But the fact is, that is the result I desire. I do think that state laws ought to have to be answerable to somebody, and generally, they're all terrible, and we would probably be better off without 95% of them. So why wouldn't this be something that, yeah, I get that on the reasoning and the logic, you probably win, but in terms of pro-liberty outcomes, we think these people win? Is there a way you can answer that?

PULLIAM: Yes, I can, and I have thought about that a great deal, because as a young man, I considered myself to be both a libertarian and a conservative, and there wasn't necessarily a binary aspect to it back in the day. And I wrote for *Reason*; I wrote for *The Freeman*, I attended and spoke at events for the Institute for Humane Studies. And that was back in the days of the Old Right, and the Old Right is sort of like the old originalism: people want to kind of push it into the grave and move on. But back in the days of the Old Right, libertarians and conservatives were allies on many points.

So to this new generation of libertarians, I would say this: that the faith and the hope that the proponents of judicial engagement place in judges to make wise decisions is misplaced, and that you should not believe the judges, just because they wear a black robe, are motivated by anything other than the same human frailties that motivate elected politicians, that they are not going to get things right just because they sit on a dais and have a gavel in their hand. And in fact, the pool of talent that serves as the feeder for judges — and that consists of the organized bar, large law firms, and the legal academy — are collectively the most left-leaning arenas in modern public life, that are the least hospitable to private property, to free market exchanges. And libertarians like to think that because they share certain beliefs with the left, such as favoring homosexual rights or not being aligned with Judeo-Christian religious beliefs, etc., that they will be accepted by the left.

And then recently something happened that jarred a lot of libertarians out of that complacency, and that's when the woman who teaches history at Duke — I don't remember her name — wrote a book about James Buchanan —

WOODS: Nancy MacLean.

PULLIAM: Nancy MacLean wrote a book about James Buchanan, who was a Nobel Prize-winning economist, a terrific economist, and defamed him as a Nazi sympathizer, as a white supremacist, etc., on no basis at all. It was just an ugly smear. And James Buchanan was not a Trumpian; he was not a moral-majority person. But because he was a libertarian and believed in free markets and private property and limited government, he is the left's enemy.

So I think libertarians need to understand that the best way to protect their rights is through representative self-government and that surrendering control to federal judges is only going to make things worse, because those federal judges at the end of the day are more likely to be like Sonia Sotomayor, Elena Kagan, and you go through the whole list of leftist judges, and people like this MacLean woman, rather than like Randy Barnett or the libertarian that they think of that they would like to be the person in charge. That person is not going to be the person you get making the decisions. So at the end of the day, you are better off with you making the decisions, whether they're in the marketplace or in the ballot box.

WOODS: This has been an issue with libertarians for a long time, that, let's say, the official precincts of libertarianism, where all the respective goals are — where I'm not, by the way. I'm not in that that category — they seem to want what one of my friends calls libertarian centralism, where they're just sure that if there's a central authority that can impose liberty on communities around the country, that's the way to go. But as you say, maybe that's a bit shortsighted. In addition to not really having any constitutional grounding, may it's short-sighted as a strategy.

Now I want to ask you, if you wouldn't mind ,about a term you used: the West Coast Straussians. Now, that's kind of inside baseball for a lot of us, but you've referred to the Claremont Institute, where you and I have both had some run-ins. Can you describe for us exactly where they're coming from? I know that they look at the Constitution more or less the way you've described, but can you just tell us a little bit about who they are and how and why they come to these conclusions?

PULLIAM: Sure, and I don't want to disparage West Coast Straussians across the board. The Claremont school has produced many excellent political philosophers. Some of our great conservative writers have spent some time at Claremont, and *Claremont Review of Books* is a great publication. A lot of the Claremont people are now associated with Hillsdale, which I have a lot of respect for.

WOODS: Me too.

PULLIAM: Okay. But Harry Jaffa was very — all this sort of — you know, there's Straussians, people that are disciples of Leo Strauss, and you have East Coast Straussians and West Coast Straussians. The West Coast Straussians tend to be associated with Claremont. The most prominent person, who for many, many decades was associated with Claremont, is Harry Jaffa. And Harry Jaffa spent his entire scholarly career talking about Abraham Lincoln, the Declaration of Independence, and the Constitution. And in his mind, the three things are inextricably intertwined in a way that makes the Declaration more important than the Constitution, and that the entire project was poorly understood and not properly executed until Lincoln fixed it during the Civil War. Now, this is something that at one point was considered very controversial to conservatives. Lincoln was not regarded as the greatest president ever. He was regarded as somebody that took liberties with the Constitution, that

he may have saved the Union, but he bent a lot of rules getting there, etc. But in the hindsight of history, Jaffa has sort of taken on almost sort of godlike prestige.

And he had taught many people over the years ,and those people blindly follow his lead, and many of them are still actively involved in scholarship. One of the people that came out and disputed the series of articles that I wrote in *American Greatness* and in *Law & Liberty* is Ed Erler, who is a West Coast Straussian and a former student of Jaffa.

Now, they end up, ironically, agreeing with Randy Barnett and Roger Pilon and the libertarians in embracing the Ninth Amendment and the idea that the Constitution is full of unenumerated rights, and they're also in bed with the judicial engagement people in so far as they would reverse the Slaughterhouse Cases from 1873 and embrace the position of the dissenters in that case, which would give federal courts almost unlimited ability to reviews state laws as violating these unincorporated rights. And all this in their mind is perfectly consistent with vindicating the promise of the Declaration, which, you know, all men are created equal.

And they view that is an embodiment of natural law and natural rights, which even though they're not written down, we could trust federal judges to apply correctly. And I'm enough of a skeptic — I kind of grew up under the Warren Court, and I know that federal judges more often than not it get things wrong, that they look for chances to engage in mischief, and that giving them basically a blank check, which is what this open-ended role for judges would do, is a prescription for disaster. So it baffles me why so many conservatives still tip their hat to Harry Jaffa and this whole notion that the Declaration is embodied in the Constitution, even though the Constitution doesn't mention it. *The Federalist Papers* barely refers to it. Thomas Jefferson, the author of the Declaration, wasn't even in the United States when the Constitution was written. He was a minister to France. So it's, in my estimation, a crazy theory, but they all embrace it with religious fervor. And that's the scary part. And if you criticize any aspect of it, you receive constant criticism. They start accusing you of being a neoconfederate, compare you to John Calhoun, that you're justifying slavery, a really absurd litany of accusations.

WOODS: I want to say I know this is a bit self-serving, but you were saying that there are some decent folks that have come out of these circles and so on and so forth. But it was interesting that one of the folks over there, Thomas West from University of Dallas — now, he publishes with Claremont. I don't know if he's considered a West Coast Straussian or not, but reading his stuff, he certainly sounds like one. But around 2009, he wrote a really nice little review of my book *Meltdown* on the financial crisis. And he said, look, if Woods is right in the history that he tells here, because I do spend some time on some historical episodes, then we really would need to rethink the way we look at the 1790s, being so pro-Hamilton as we are. And I thought, well, for the Claremont people to say that is a high compliment. So I want to acknowledge that.

All right, we've talked about critics. How would you — let's say, y you're doing a debate. In fact, I saw Randy Barnett, in person, debate another fellow on the subject of originalism, and he was debating somebody on the left. And unfortunately, Barnett spent, I don't know, probably almost half his time telling a story that was not really that compelling. And so he ended up losing the debate. It was very frustrating and irritating, because you should not lose the debate on whether the Constitution is a living, breathing document. How hard is that? But I want to know if, let's say, you were up there onstage and you had several minutes to lay out

your case, not addressing what the other side has to say, but just purely the positive case for your kind of, let's say, originalist originalism. What would that case sound like?

PULLIAM: Well, the Constitution is a law, and like all laws, it has to derive its moral authority from somewhere. And a lot of people say, how can we be bound by a law that was written before we were born? Well, that's true of many laws. They were passed before we were born. We didn't get a chance to vote on them. Our concept of government is that we exist in a — it may be a fictitious social contract, but it's a social contract — that we are governed by institutions that our predecessors consented to. And the charter that they came up with, which they intended to be permanent — it was amendable; it could be changed, but absent change, this was our permanent charter that was superior to mirror legislation that was passed at the state or federal level — was put in place.

Judges have authority to interpret that document as they would any other law, but they have to do so honestly, and it has to be based on the words that are written on the piece of paper. And when they depart from honestly interpreting the words on the piece of paper, they are substituting their will, their judgment for the will and judgment of our predecessors that was at one point consented to through the ratification of this document. And so therefore, when judges depart from the Constitution, they are literally acting in a tyrannical role. They are using their power as government officers to impose their personal predilections on the rest of the 320 million people residing in the United States. And that ought to be regarded as offensive and objectionable to everyone.

And you might say, well, but if I agree with what they're doing, it's okay. But we do not know in advance whether we're going to agree or not. The way that we enforce our preferences is through elections, and if somebody, a legislator does something we don't like, we can recall them and we can vote for their opponent in the next election. If a lifetime-appointed federal judge who's never been elected goes off the rails, we have no recourse at all. And anybody that cherishes their lives, liberty, as well as their sovereignty, ought to consider that to be a huge intrusion and imposition. And that, I think, transcends any of these political alignments. Whether you think judges will do things that you find hospitable or not, the fact is that's not their job. Their job is to interpret the law, not to make the law. We have the executive and the legislative branches to make law, and that's just not their role.

And so this is sort of like a big-picture civics lesson, but people have completely lost their understanding of civics. And they think that, well, I'm in favor of judicial activism as long as it serves my agenda. The trouble is — and we see this meltdown as a result of the 2016 election — you can't always predict who's going to be in charge, and the whole point is to have rules that make sense, regardless of who's in charge, because ultimately, it's the people who should be in charge.

WOODS: Mark, just two more quick things before I let you go. The first is, I'm curious, given what you just said, how you feel about term limits for federal judges. I mean, my own opinion is, if they're going to really act like judges, then we don't need the term limits. But if they're going to be super legislators, then yeah, I guess we need term limits.

PULLIAM: I'm not as opposed to term limits for judges as I am for legislators, because elections, you give term limits to legislators. You know, the framers anticipated that federal judges would have life tenure, but life expectancy wasn't what it is now. And now you look at Ruth Bader Ginsburg. She's extremely frail, but she's hanging in there. And we've had judges

like Douglas, who became incontinent and incapacitated on the bench. So people should not be lingering past the point that they're really sentient. So I'm not opposed, necessarily, to the idea that a federal judge would only serve ten years or whatever. The trouble is you'd have to amend the Constitution to do it, and I don't think that you could probably get requisite supermajority support to make that happen. But philosophically, I'm not opposed to it.

WOODS: And then finally, how do these competing views that you have as compared to these other folks, how are they reflected in the way you guys evaluate potential Supreme Court nominees? Are there names that you prefer that that they don't like, or names that they prefer that you don't like? How does that all shake out in reality?

PULLIAM: Well, if you've kind of take these different camps, the libertarians, the Straussians, the new originalists, the old originalists, and they were all Venn diagramed, there is overlap. So we're not completely disparate. Ironically, Neil Gorsuch made everybody happy, and so if we could find more people like Neil Gorsuch, I think we wouldn't have any disagreement on our side.

The one cause that all of these different camps seem to agree upon, right now at least, is the importance of dismantling the administrative state, that this concept of Chevron deference, reviving the non-delegation doctrine, the whole concept of administrative agencies having taken on a life of their own, even though it's very difficult to reconcile with the constitutional structure. They're not elected; they're not accountable. They make laws without being elected; they decide cases, even though they're not part of the judicial branch. It's really a constitutional hybrid that violates the whole notion of separation of powers. Everybody seems to have agreed that we need to fix that. And ironically, and just to show that not all the old originalists were right, Antonin Scalia was one of the big proponents of administrative law, and he was a big admirer of the Chevron doctrine up until shortly before he died. So there are things that we can agree upon.

I guess the most controversial aspect right now is this idea of reviving the privileges or immunities clause. And ironically, Neil Gorsuch joined with Clarence Thomas, recently. Clarence Thomas has already shown a little more sympathy for that than anybody else on the court. Now he's got an ally, which is something that made the libertarians very happy. And it's one of the things that I commented on negatively and received a lot of criticism for that.

WOODS: As we depart, can you just tell folks about *Law & Liberty*, which they can find at LawLiberty.org?

PULLIAM: So the *Law & Liberty*, I'm a contributing editor at *Law & Liberty*. It's a project of the Liberty Fund, which used to be regarded as sort of an Old Right institution. They have a great catalog of books of all sorts, and they have a website, which offers up every day some informative, scholarly, but at the same time, accessible commentary on not just legal issues, but movie reviews, book reviews of political essays, etc. And if I could put in a plug, I have a website, Misrule of Law that compiles all of my essays that I've written for *Law & Liberty*, as well as commentary that I've done for *American Greatness* and other publications. And so I intend to continue to write for *Law & Liberty*, but your viewers might also be interested in checking out Misrule of Law.

WOODS: All right, so I'll link to that at TomWoods.com/1380. At and, as always, Mark, very enlightening and helpful. Thanks so much.

PULLIAM: It's a pleasure.