

3 Takeaways Podcast Transcript

Lynn Thoman

(<https://www.3takeaways.com/>)

Ep 17: Princeton Professor, Robert George: On Why Supreme Court Justices Are Unlike Umpires and Are Political

00:00 INTRO male voice: Welcome to the 3 Takeaways podcast, which features short memorable conversations with the world's best thinkers, business leaders, writers, politicians, scientists, and other news makers. Each episode ends with the three key takeaways that person has learned over their lives and their careers, and now your host and board member of schools at Harvard, Princeton, and Columbia Lynn Thoman.

00:24 Lynn Thoman: Hi everyone, it's Lynn Thoman, welcome to another episode. Today, I'm delighted to be here with Robert George. He is the director of the James Madison Program in American Ideals and Institutions at Princeton University. He has been praised by both Democrats, including Supreme Court Justice Elena Kagan, who had said he is "one of the nation's most respected legal theorists due to his sheer brilliance, the analytic power of his arguments and the range of his knowledge." And he has also been praised by Republicans such as George W. Bush who awarded him the Presidential Citizens Medal in the Oval Office. Today, we're going to uncover the reasons that judges, including Supreme Court Justices, have gone from being viewed as benign and objective interpreters of the law, whose opinions couldn't be guessed in advance to essentially partisan Republican and Democratic judges, many of whose decisions can be forecast based on whether they were appointed under Republican or Democratic Presidents. Thank you so much for being here today, Robby.

01:32 Robert George: It's my pleasure, Lynn, thanks for inviting me.

01:35 LT: Robby, we used to think that judges were like umpires and that judicial power was benign and objective. How did that change? How did we get to today where judges seem to make decisions based on their political leanings or the political leanings of the governments that appointed them?

01:52 RG: Well Lynn, if we ever thought that judges were apolitical, we shouldn't have thought that, because if you look at our history here in the United States, going all the way back to the very beginning, the Supreme Court from the earliest period of the republic, you find rulings that can only be described as political in nature, as reflecting the political ideologies, and indeed the political parties of the justices. So there was never a golden age when judges weren't political. Now, that's not to say that it's good for judges to be political, that's not to say that every judge has been a political partisan, but there really has never been a golden age when judges were not political.

02:30 LT: What are the basic alternatives in interpreting the Constitution? Can you tell us what original intent is as compared to the idea of a living Constitution?

02:41 RG: Originalism is the philosophy that says, we should interpret the Constitution in its particular provisions. In light of the original public meaning of the words of the provision. The principle that's articulated should be interpreted the way the people who turned that principle from

being just somebody's idea into law interpreted it. They turned it into law by ratifying it as part of the Constitution, that's what makes a provision of the Constitution law ratification. So, originalism is not the idea as it sometimes supposed to be, that you should try to subjectively get into the head of a draftsman of the Constitution, get into the head of James Madison and try to figure out how James Madison would resolve this or that particular case. No, it's trying to understand what the public understood the meaning of the provision they were ratifying and turning into law, to be.

03:37 RG: Now, there were some drawbacks and obvious criticisms of that theory of interpretation, which has caused some people to say, "Well, we shouldn't interpret so narrowly, we shouldn't interpret the Constitution by reference to its original understanding, especially because times change and people's attitudes change, and we have faced new challenges, technology changes, and therefore we should have what's called the living Constitution view of Constitutional interpretation. And according to that view, we have our judges keep the Constitution up-to-date with the times by interpreting it in ways that produce results that are more congenial to the minds of contemporary people. Now, there are some obvious problems with that view as well, but I'll leave it there for the moment, and you can tell me whether you'd like me to talk about the rather obvious problems with both views.

04:28 LT: Could you give an example of both views, and talk very briefly about the obvious issues with both?

04:35 RG: Let's begin with originalism, so we're trying to understand what the original public meaning was of, let's say, the second amendment. Now, the second amendment begins with a little preamble about the necessity of having a well-regulated militia in a free society, and then it goes on to say that in view of the necessity of having a well-regulated militia, the right to keep and bear arms shall not be infringed, the right of the people to keep and bear arms. So the question then naturally arises, well, what the heck does that mean? Does that mean that there is an individual right to gun ownership for self-protection or to stand up against tyrants if our government should become tyrannical or what have you? Or does it mean that the State has the right to commission militias and those militias, of course, can be armed?

05:30 RG: Both sides in most of the cases involving the Second Amendment have taken the so-called originalist approach, and they've asked themselves the question, well, what was the original public meaning? Was the original understanding that the right to bear arms was an individual right or a right of states with respect to arming militias? The trouble is, and this shows you one of the problems with originalism, reasonable justices on the competing sides, narrowly five to four, disagree on what the best historical account is, on what the original understanding, the original public meaning was. The majority rule that the original public meaning was an individual right to bear arms. The minority held that, no, that's a poor reading of the history, properly read the history shows that it was not an individual right, but the right of a militia.

06:21 RG: So you can see that sometimes it's difficult to tell what the history is and to make matters more complicated, and here's another drawback with originalism and another criticism that critics of originalism marshal against it, sometimes the same language, the same words can be agreed to by people who themselves mean different things. So if ratification was achieved with a certain percentage of the people interpreting the words to mean one thing, and another percentage of the people interpreting the words to mean another thing, then whose view counts as the original public meaning? So now let's shift over to the living Constitution idea. An example of that might be

the abortion case of Roe against Wade handed down in 1973, very famous, extremely controversial, still the most controversial decision of the modern period, an issue in every Supreme Court nomination battle or confirmation battle.

07:17 RG: Well, the reason that it's a big issue is that there's nothing in the Constitution about the question of abortion. Abortion was historically a legislative matter. It was handled at the state level. Most states... all states, as a matter of fact, had laws against abortion, there were some variation as to circumstances under which abortion would be permitted as an emergency among the different states. For most of our history, no one even imagined that the matter would be handled at the Constitutional level. But in 1973, the Supreme Court weighs in and it declares that although there's nothing in the Constitution that anyone can find, even with the most powerful magnifying glass about abortion, you don't have to be pro-choice or pro-life to realize that, it's pretty clear if you look at the text of the Constitution, there's just nothing in it about the subject. Nevertheless, the Court held that there is a right to abortion, and then defenders of the Roe versus Wade ruling had to explain why the ruling is justified, given that there is nothing in the text or apparently in the logic or historical understanding of the text that would lead to the conclusion that there's a Constitutional right to abortion.

08:27 RG: So the justification became, well, it's the purpose of the judiciary, the role of the judiciary to keep the Constitution up with the times, and enlightened people are in favor of a more liberal policy on abortion, like the one handed down in Roe versus Wade or established in Roe versus Wade. So in keeping the Constitution up with the times, the Court did its job in fashioning a right to abortion. Well, you can see the obvious problem with that, so in whose opinion is a more liberal view of abortion, the enlightened view? Certainly not in the opinion of those who think that the destruction of embryonic or fetal human life is a bad thing, they don't think it's so enlightened to take the life of an unborn child as they would understand it. So, it's not obvious that the living constitution view is anything more than a justification for some people who consider themselves to be especially enlightened, to impose on the entire country the policies that they support, because they are allegedly enlightened. So the two sides make pretty good criticisms of each other.

09:28 LT: So how do you think that we should interpret the Constitution?

09:32 RG: Well, I'm a mere Constitutional scholar, I'm not a judge, I'm not called on to do that sort of thing, but I'm also [chuckle] not going to dodge your question. I think the Constitution should be interpreted in the following manner. I think we should first look at the text. What do the words actually naturally mean? What's the natural meaning of the words? If the words have a natural meaning and we have no reason to doubt that their natural meaning was the intended meaning, then we go with the words. Constitution says, you have to have attained the age of 35 years to become President of the United States. That's pretty clear. The natural meaning of the word should be followed there. But what if the words aren't clear or don't any longer have a natural meaning? Words change in their meaning. The word fond, F-O-N-D, means one thing. Today, if I say I'm fond of you, that means, I like you. But if we look at Shakespeare, we learn that in Shakespeare's time, the term meant perhaps among other things, silly. But if I say I'm fond of you, I hope you won't be insulted in thinking in Shakespearean terms that I think you're silly or something like that.

10:43 RG: So, since words change their meaning, we have to be careful about words. Constitutions are built to last, they're made for long periods of time. Jefferson wanted to change the Constitution every 20 years, but he didn't get his way. He thought that was the way to keep the Constitution up

with the times. So, sometimes we need to look beyond the words, so where do we go? There I think it is legitimate to look at the historical understanding of the words. So, if a word meant something, in say the 18th century when the original Constitution was drafted, but its meaning has changed, you want to go with the original meaning. I think originalism is right about that. Same if it's an amendment to the Constitution enacted after the Civil War, like the 13th, 14th and 15th amendments, same policy. Now, in addition to the text, I think it's important to understand that when you accept any proposition, you're accepting both the logical presuppositions of the proposition and the logical implications of the proposition.

11:45 RG: So I think it's fair to say that sources of Constitutional meaning include the text and the logic of what follows from the text. Much of what good judges do is tracing out the logic of principles of law and applying the logic of the law. So, what the Constitution says is one thing, but it includes what is presupposed by what it says and what is entailed by what it says. And then a fourth source, so we're looking at text, we're looking at original understanding, we're looking at the logic, the fourth thing I think we need to look for is the structure. Sometimes the meaning of the Constitution becomes clear in a particular area of the Constitution. If we look either at the structure of the provisions of the Constitution, how they relate to each other, or the structure of the institutions that are created by the Constitutions, for example, the three branches of government, as an example, and the separation of powers among those branches of government. Or the relationship between the federal government and the state of governments. So my answer is fourfold, text, logic, structure, historical understanding, those are our main sources of meaning of the constitution.

13:00 LT: It seems very critical for judges to be nominated by Republican or Democratic presidents and administrations. Can you tell us what do judges nominated by Democratic administrations believe as compared to judges nominated by Republican administrations?

13:18 RG: This has changed, Lynn, over the years, and it's so interesting. In the early part of the 20th century, judges who were on the progressive side tended to be what we would today call originalists or even strict constructionists. They wanted the courts to play a limited role and to give much more room, much more latitude for legislative judgment. So progressive judges, for example, thought that legislatures should be free in both the states and at the federal level, should be free to enact worker protection legislation, child protection legislation, minimum wage laws, maximum working hour laws, laws regulating business. Those on the conservative side were more activist, you might say living constitutionalist, because they believed, to keep the Constitution up with the modern economy, you needed to have judges enforce principles of the free market by reading into the Constitution, for example, right to freedom of contract, which prohibited certain invasions by state legislatures of the relationship, the employment relationship between the worker and the owner.

14:32 RG: Well, that has sort of flipped on its head today. By mid-century, things had changed and it became those on the progressive side, who tended to be more activist and less deferential toward legislatures, and those on the conservative side who became the originalist, constructionists and wanted more deference toward legislatures.

14:52 LT: And today, what do judges nominated by Democratic administrations believe and how do they judge as compared to judges nominated by Republican administrations?

15:06 RG: The orthodoxy on the Republican side is originalism or some variant of originalism. So

if we look, for example, at Justice Clarence Thomas. He is an avowed, very devout originalist. Same for Justice Neil Gorsuch. Also true for the most recent justice, that is Justice Amy Coney Barrett. It was famously the position of Justice Nino Scalia, he was one of the great architects of modern originalism and Justice Barrett clerked for Justice Scalia and has identified Justice Scalia as her real role model. The other Republican justices, it's not so clear, they're certainly sympathetic to originalism, Justice Kavanaugh, for example, Chief Justice Roberts, Justice Alito, although sometimes there are some measures of deviation from it.

15:55 RG: Over on the Democratic side, originalism is not the guiding philosophy, although sometimes it is used, appealed to by the Democratic appointed Justices, Justice Kagan and Justice Sotomayor, or is it... Was sometimes by Justice Ginsburg, but the tendency is more toward what they would identify, I think as the living Constitution approach, that it's our job to keep the Constitution up with the times and we believe enlightened opinion should lead to these results. And therefore, we're justified in imposing those results or ruling in favor of those results, creating those results as a result of our rulings, even if there's not something that you can put your finger on in the text of the Constitution itself or in its history, or strictly speaking in its logic or structure. Same with, for example, the Democratic justice... I didn't mention Justice Stephen Breyer.

16:45 LT: Alexander Hamilton argued that the judiciary "is the least dangerous branch of government, possessing neither force nor will, but merely judgment." How do you see the judiciary?

17:02 RG: Hamilton was not prescient about that matter. [chuckle] Had he lived only a little longer, he would have seen that he was not prescient in that matter. He expected the judiciary to be a very weak branch of government and not to make decisions that would have huge national impacts. He thought it would mainly just resolve cases between parties, and that sometimes those cases would have some presidential value more broadly, but on the whole, they wouldn't settle or determine national policy on issues. Well, from the earliest period, from about 1803 to '04 and all the way to the present day in decision after decision after decision, Supreme Court rulings and sometimes rulings of other lower courts that are not reversed by the Supreme Court have had profound consequences for our general country or policy. Abortion is an example, gun control or gun rights is another example, affirmative action is another example, campaign finance reform, another example. And you will find people complaining about this outsized role played by the courts on both sides of the spectrum. So people on the progressive side, think that the Supreme Court wildly over-reached in striking down some of the McCain, Feingold, campaign finance laws in the name of the first amendment's free speech protection.

18:23 RG: People on the conservative side have a similar criticism of the Court's role in establishing the policy of the nation on abortion. I think it's fair to say Hamilton would not have expected courts to be making policy in either of those areas, so as institutions, courts have turned out to be much more powerful than Hamilton imagined, they are not weak.

18:43 LT: What does it mean to legislate from the bench, and what role do you think the court should play relative to the other branches of government?

18:51 RG: I think the court's role should be limited, the very first word of the very first sentence of the very first paragraph of the very first article of the Constitution is the word all, and it refers to Congress, it says, "All Legislative power shall be vested in the Congress of the United States,

consisting of a House of Representatives and a Senate.” The court's legislate from the bench when they usurp, steal some of that legislative power, they're not entitled to any. The Constitution is very plain. That's why I put the focus on that first word, “all” and “all” really means all. The Supreme Court and the other lower federal courts should not be making policy judgments and in so many areas, of course, that's what it's doing. So I think the way to avoid legislating from the bench, the way judges can rightly restrain themselves to stay in their own lanes, stay within Article Three of the Constitution, which is about the judicial power and stop usurping the legislative power is to stick to the text, logic, structure and historical understanding of the constitution.

20:02 RG: If you stick with those as your sources of constitutional meaning, I don't think you can go too far wrong, you won't be invading the powers of the elected representatives of the people, but when you go beyond that... Well really, if you go beyond that, it seems to me by definition, you're exercising legislative power, you're making policy judgments, and therefore you're violating that very first word of the very first sentence of the very first paragraph of the very first article of the constitution.

20:29 LT: And what role could or should a justice's personal views have?

20:34 RG: None in my opinion. Now, it's very hard to keep your personal views out of things, but you're not supposed to be legislating, the legislative power is exclusively in the hands of the Congress, so here again, I think that justices would do very well to stick to the text, and it's logic, its structure and its historical understanding, so that they within their lane.

21:00 LT: Federal judges, including Supreme Court Justices, many believe are unaccountable because they are elected for life. The longest serving Supreme Court justice served for 36 years. In your view, should we have terms for judges, say 20 years or some other number of maximum years?

21:21 RG: People are living longer, much longer on average than they did, certainly a lot longer than they did in the late 18th century, when the third article of the Constitution was adopted that included the provision that federal judges serve on good behavior, which we've always interpreted to mean life tenure. So I think in view of the fact that judges are living so much longer, people are living so much longer, although living healthier, they're not living indefinitely healthier, and we have had cases in the past, there was an especially difficult one of Justice William O. Douglas who was suffering from dementia, including paranoia toward the end of his life and refusing to leave the bench. I do think in view of these changes, it would make sense to have term limits exactly what the term limits would be, is I think something that we Americans should deliberate about and use our best prudential judgment to come up with. But I would not be averse to having term limits for federal judges. One proposal that's been made that's sort of interesting with respect to Supreme Court justices to give Supreme Court justices a certain term of years, say 18 years, stagger the terms in such a way, that every President who managed to serve out a four-year term would have a minimum two nominations to make.

22:40 RG: And that when justices hit their 18-year term limit, they would go to the US courts of appeal, that is the next level down in the judicial system, so they would still be appellate judges, but they would no longer serve on the Supreme Court, so their life tenure would be a life tenure as judges, they wouldn't be expected to go back and get a job in the private practice of law or some other role in government or something like that, they would still be in the Federal Judicial System,

they would still be judges, they'd still be the kinds of judges Supreme Court justices are appellate judges, they wouldn't be conducting trials, which some of them would never have done, and others would be far out of practice in doing, but they could continue to serve, and that strikes me also is a very reasonable idea, something worth considering.

23:23 LT: Is there anything else you think we should consider with respect to judges in addition to some kind of a term limit?

23:31 RG: Well, one thing I don't think we should do, I'm going to answer that question via negativa is to expand the number of justices on the court. I think nine is a good number. The court can be deliberative with nine members. I don't think it's too small. We have had courts as small as five, the most we've ever had was 10, of course the trouble with 10 is it's an even number, and you do need an odd number so that you don't end up with ties. So I'd like to keep the number at nine. Now, the constitution doesn't require its being at nine. Congress can, in its wisdom, reduce it to three, it could increase it to 150, Congress has unlimited discretion in this area, and yet I think I would keep it at nine and I certainly wouldn't expand it under any sort of political pressure or for any sorts of political motivations as the late Justice Ruth Bader Ginsburg warned, if you start going down that road, then every time you have a change of power in Washington DC and it becomes possible for one party to get the courts on its side by simply increasing the number of justices, they would do it and the situation would get out of control and eventually what would be lost is a very precious thing and that's the independence of the judiciary.

24:44 RG: But there's nobody who's completely happy with our judiciary, there's so many decisions going in different ways that progressives are unhappy with the judges on some cases and conservatives are unhappy with the judges on other cases, and moderates often don't like the decisions going in either direction, and yet if we try to solve that, if we address that ideologically and allow politics, which is already intruded pretty far into the judicial selection process, to get that far into the judicial selection process, I think we really will compromise and destroy judicial independence. When Franklin Roosevelt motivated by anger at the Supreme Court being an impediment to his New Deal social programs in the 1930s, proposed court packing expanding the number of Justices to get enough on to the court to uphold his programs, even people in his own party to their very great credit, even great supporters of the New Deal said, "No Mr. President, this is not the way to do this. In trying to get your goals through, and we think they're noble goals, but in trying to get them through, you're going to damage the country irreparably by destroying something precious, the independence of the judiciary."

25:53 RG: So it didn't happen in the 1930s, thank God. And I hope it doesn't happen in the future, I give the same advice to Republicans as well as Democrats, this is not a partisan thing, do not further politicize an already too politicized judiciary.

26:06 LT: Before I ask you for your three key takeaways, is there anything else that you'd like to discuss that you haven't already touched upon?

26:14 RG: No, but thank you again for inviting me to talk with you, it's a pleasure.

26:18 LT: It is a pleasure, Robby, what are your three key takeaways?

26:23 RG: Number one: For all its faults and flaws, it's a human institution, nevertheless, the

Constitution of the United States, is I think, the greatest charter of freedom that any nation has ever come up with, and so while it's legitimate to think of ways that it could be improved and to propose constitutional amendments, I hope that we never give up on the Constitution itself, the principles that are embodied in our constitution and that the institutions created by the Constitution are designed to effectuate are the highest and best of principles. Let's stick with them. That's number one.

27:03 RG: Number two: Where we have gone wrong in our country, in our history, and we have, fallen fallible human beings in this country has its faults, but where we've gone wrong, it's never been as a result of excessive zeal for our constitutional principles, quite the contrary. Where we've gone wrong, it's always because we have been unfaithful to those principles, going back to the very beginning, slavery sometimes called the original sin of the American Republic, the problem with slavery is that it flew right into the face of a core principle on which the nation was founded, the principle articulated in the Declaration of Independence, we hold these truths to be self-evident that all men are created equal. Endowed by their creator with certain inalienable rights. And among these are life, liberty and the pursuit of happiness. That's a great principle. The problem was not that our principle was bad, it was that, beginning with the institution of slavery, and even before that, the mistreatment of the Native American Indian tribes, we were unfaithful to the principle. So my takeaway number two is, let's remember where we've gone wrong, it's not been because of our principles, it's because we haven't been faithful to our principles.

28:17 RG: And then Lynn, if I may say take away number three is one that I'm just borrowing from the American founders themselves, the framers and ratifiers of our constitution. They understood and we must not fail to understand that the Constitution is not a machine that will go of itself. We're right to love it, in my opinion, we're right to defend it, we're right to hang on to... There are some changes that we could make, you suggested or I suggested the possibility of term limits for example, for Federal judges. It's not written in stone there are ways it can be improved. And yet, I think we should hang on to it, and what we have to understand and what our founders understood is the Constitution by itself can't do the job, you can have a perfect Constitution and be a very bad country.

29:07 RG: Justice Scalia, the late Justice Antonin Scalia used to carry around for purposes of demonstration a copy of the Soviet constitution, and it was a beautiful constitution, it talked about the importance of freedom of speech and freedom of religion, and the right of people to assemble and petition the government and protest, and it seemed like a civil libertarian constitution, but the words on the page are just words on the page. The constitution can only work, and this is true of our Constitution too, if the people understand it and if they're willing to discipline themselves to live by it. You will always have temptations to cut corners, to go around the constitution, to avoid constitutional requirements or constitutional processes, to try to get to the conclusion you want too quickly, as Roosevelt did with the court packing plan.

30:00 RG: We can get frustrated with the limits that the Constitution puts on the exercise of power when we're in a hurry or we're in a bad situation, like a depression or facing a war or something like that, there are always temptations, and there will always be people demagogues who are going to step forward and say, "Look, in return for allowing me to cut the constitutional corners, I'm going to give you what you want, I'm going to give you security, I'm going to give you prosperity," there's always going to be something that's going to be promised. And the Constitution itself can't resist those allurements, the way they're resisted is for the people themselves to believe in their

constitution and to be faithful to it, to restrain themselves, to discipline themselves to live by their constitution.

30:44 LT: Robby, thank you so much for a fascinating conversation.

30:48 RG: My pleasure, Lynn. Thanks for having me on.

30:51 OUTRO Male Voice: If you enjoyed today's episode, you can listen or subscribe for free on Apple Podcasts or wherever you listen. If you would like to receive information on upcoming episodes, be sure to sign up for our newsletter at 3takeaways.com or follow us on Twitter, Instagram, Facebook, and LinkedIn, note that 3takeaways.com is with the number 3, 3 is not spelled out. For all social media and podcast links, go to 3takeaways.com.