

Peter Robinson: This is Uncommon Knowledge. I am Peter Robinson. Be sure to follow us by the way on Twitter at <http://twitter.com/uncknowledge>; <http://twitter.com/uncknowledge>. Send us comments, send links related to each program and let us know what you think of how we are doing. This is a new departure for us so please let us know. After serving on the National Labor Relations Board at the Departments of Labor and Justice and as Ambassador to Yugoslavia, in 1985 Lawrence Silberman was nominated to the United States Court of Appeals for the District of Columbia. Now a Senior Judge on the Court, Judge Silberman has joined the company of Learned Hand, Henry Friendly and Richard Posner as one of the very few Federal Judges who have achieved national importance without having ascended to the Supreme Court. In 2004 and 2005, Judge Silberman served as co-chairman of the Commission established by President Bush to examine American Intelligence on weapons of mass destruction and in 2008 Judge Silberman received the nation's highest civilian award, the Presidential Medal of Freedom. Judge Silberman thanks for joining us.

Judge Silberman: My pleasure.

Peter Robinson: Segment one – Saving the Second Amendment. In Parker versus the District of Columbia you wrote the 2007 opinion striking down parts of the District of Columbia's ban on hand guns as unconstitutional. In the Heller Decision last year, 2008, the Supreme Court upheld you.

Judge Silberman: That is the same case.

Peter Robinson: The same case.

Judge Silberman: It is a different name

Peter Robinson: Different title.

Judge Silberman: Different name for technical reasons.

Peter Robinson: Okay. But in Parker you wrote Heller Anton Scalia wrote

Judge Silberman: Right.

Peter Robinson: But on the same facts set.

Judge Silberman: It is the same, exactly the same case, Heller and Parker were both plaintiffs.

Peter Robinson: Got it, got it, okay. Let me quote you, you remarked recently “when the case first came to me I had been under the impression that the Second Amendment, the right to bear arms, was a collective right. When I looked into it I concluded to the contrary.” Now explain for this layman what a collective right is and then tell me what changed your thinking.

Judge Silberman: Well the theory had been for much of the 20th Century in Federal Courts and a theory that had attracted the views of Warren Berger who gave a speech on it that the Second Amendments Prefatory Clause which as you know relates to a well ordered militias

Peter Robinson: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms should not be infringed.

Judge Silberman: The notion was that the Prefatory Clause modified the right to keep and bear arms. That is to say the Prefatory Clause indicated to some people and to a number of courts that there was no individual right, the right was only to act in the militia.

Peter Robinson: Right.

Judge Silberman: It is only because I had never looked at the issue in any legal proceeding that I had this background view that came from a speech Warren Berger had given some years ago that it was a collective right. When I started reading the briefs in the case and looking carefully at the language of the Second Amendment, I concluded otherwise.

Peter Robinson: How come? What do you do with that? It seems to me, I am a layman, there is the plain language of the Constitution, a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed so it is pretty clear that at one very reasonable argument is you get to carry a gun only to the extent that securing the defense of the District of Columbia is necessary and nobody is worried about the defense of the District of Columbia, that can be handled by people other than individuals, therefore, you do not actually have a right to bear arms.

Judge Silberman: Well that was the argument. But

Peter Robinson: So what is wrong with the argument?

Judge Silberman: Well, you are asking me to go review my opinion.

Peter Robinson: It is 70 pages long.

Judge Silberman: Yes it is.

Peter Robinson: That is a dirty trick.

Judge Silberman: But the essential point is that the framers of the Constitution were skilled lawyers. The Prefatory Clause describes the Federal purpose. But the operative language, the right to keep and bear arms was perceived by the framers and the way it was drafted is clear that this is true as a preexisting right. It was not a Right granted by the Constitution, it was Right that was protected by the Constitution. It did not say we create a Right, it said the Right shall be as you

Peter Robinson: Shall not be infringed.

Judge Silberman: Shall not be infringed which implies that it preexisted. Now, the reason why there is a Prefatory Clause is simply to suggest what the Federal purpose in maintaining the Right of individuals to bear arms. The Federal purpose was so that they could be used in the event of a militia call. Indeed the First Congress and the Second Congress defined militia to include all able-bodied men between the ages I think of 18 and 40. And you were obliged to own a rifle or a shotgun or a pistol and a sword so that you would be prepared to come to the defense of the Country or the State as a militiaman.

Peter Robinson: Judge Silberman, do you mean to tell me that you address this critical issue in the District of Columbia in the 21st Century entirely with reference to 18th Century thinking, custom, practice? Well you originalist you.

Judge Silberman: Yes, of course that is true. I plead guilty. I like your prior interviewee, Nino Scalia, have the view that the Constitution must be read as any body of law whether it is a Statute or a contract or whatever, as it was written. What is its original meaning? That is not the word original intent. That is a misleading phrase. But it is original meaning and therefore when you look at the Second Amendment means today, you have to look at what was meant by it when it was written.

Peter Robinson: Got it. Segment two – Arms and Incorporation. You just mentioned Justice, he may be Nino Scalia to you, he is Mister Justice Scalia to me. “One of the mistakes over the last” I am quoting Justice Scalia “one of the mistakes over the last half century has been the so called Incorporation Doctrine which applied against the States, the provisions of the Bill of Rights. The Bill of Rights begins, Congress shall make no law, not States shall make no law. But it has been accepted for half a century. It is too late”. Where does Judge Silberman stand on incorporation? The Incorporation Doctrine. Was it a mistake, is it too late to fix it?

Judge Silberman: It was Judicial Activists. It is too late. I agree with Nino entirely. Be interesting question which now is going to go to the Supreme Court is whether the Second Amendment is incorporated.

Peter Robinson: That of course is

Judge Silberman: And I think you are getting to. Now, my case involved the District of Columbia so it did not involve an incorporation question. The District of Columbia is a Federal body.

Peter Robinson: Right.

Judge Silberman: But the interesting point about this, I just make an observation. I do not wish to suggest a conclusion to that question because it is going to go up to the Supreme Court from the Seventh and Second Circuit and the Ninth Circuit.

Peter Robinson: The Ninth Circuit is

Judge Silberman: The Ninth Circuit is out here in California

Peter Robinson: California.

Judge Silberman: Plus the whole western states. And the Ninth Circuit has held as I recall that the Incorporation Doctrine does include the Second Amendment.

Peter Robinson: Right.

Judge Silberman: The Second Circuit in an opinion with Judge Sotomayor joined said it does not. The Seventh Circuit recently and in an opinion by Frank Easterberg that Posner joined, Dick Posner joined.

Peter Robinson: Chicago?

Judge Silberman: Yes Chicago, said well we are not going to decide that issue, it should be for the Supreme Court to decide it. The Ninth Circuit thought well.

Peter Robinson: Sell all the trouble you caused.

Judge Silberman: Well of course it was inevitable. But should be noted is the Second Amendment does not say as the First Amendment says there shall be no Federal Law encroaching on the Right of Freedom of Speech or Assembly. It speaks more broadly.

Peter Robinson: The Right of the people to keep and bear arms shall not be infringed.

Judge Silberman: Exactly so there is even a stronger argument that you do not even have to reach the Incorporation question for the Second Amendment literally it could well be thought to apply to the States without the Incorporation Doctrine. The Incorporation Doctrine simply adds to it. I think it would be frankly anomalous for the Supreme Court to include that the Second Amendment creates or protected an individual right to keep and bear arms. But it does not apply Vis a Vis the States. I think it would be anomalous.

Peter Robinson: It would be anomalous. Why has it not been judged until, reading up on your decision in Parker, the last Supreme Court precedent was a case, the Miller Case in 1939, we have gone seven decades and apparently the Miller case I did not read but I read about it, I confess I am a layman, not a jurist, was very technical complicated decision that both sides pro gun force and anti gun right people, both sides claim as precedence. Seven decades without a ruling by the Supreme Court. How come?

Judge Silberman: Because until our court, until my opinion, no Federal Court had held that a Statute was unconstitutional. Of course

Peter Robinson: Under the Second Amendment.

Judge Silberman: Under the Second Amendment, yes of course. And until that time the Supreme Court really was not quite obliged to decide the issue. In fact I think there was perhaps a modification abusive, Justices on the Supreme Court. The Miller case says you correctly point out was sort of very puzzling. Partly was puzzling because the defendants never appeared, they never even filed a Brief in the Supreme Court which is rather a strange situation. So all the Supreme Court had was the government's brief. I very carefully went through that and it seemed to me that the Supreme Court had acidulously avoided deciding what the government then argued, that it was a collective Right. But it was rather puzzling as to what the Supreme Court had said, which is why when I wrote the opinion in Heller-Parker there was a bit of a shock.

Peter Robinson: Well, 1939 the Court has been wrestling with the Administration of Franklin Roosevelt over New Deal policies and by 1939 the court had affect Franklin Roosevelt had by then advanced his court packing plan and the court had effectively capitulated to Franklin Roosevelt. It seemed to me at least plausible that there is a very touchy political background there that the court does not want to find in 1939 the government correct, that it is a Collective Right, but at the same time they do not want to overrule the government. What I am getting at is the Second Amendment seems to be something that courts do not like dealing with. That is the plain history. Right?

Judge Silberman: I am not sure that is fair.

Peter Robinson: No. What I am really getting at how come you took the case? Why did you take the case?

Judge Silberman: I had no choice, the District Court had reached a decision on the case and there was an appeal.

Peter Robinson: Simple as that.

Judge Silberman: Simple as that. The Court of Appeals must take a case.

Peter Robinson: All right.

Judge Silberman: That is appealed to it. It does not have the discretion, the Supreme Court has in taking cases or not taking cases, through the writs of tertiary so it was proforced, we had to decide the issue. It was squarely put. It is true that Courts of Appeals, Federal Courts of Appeals had held previously that it was a Collective Right. I thought that was wrong. The Ninth Circuit.

Peter Robinson: Can I just, here is the, this is sort of a layman's question, attempting to get a window into the mind of Judge Silberman, you have this strange opinion in 1939, seven decades more or less of silence. A man you admire, Chief Justice Berger had given a speech saying that the Second Amendment amounted to a Collective Right and then Judge Silberman sits down reads the briefs, pulls down the history books and says wait a minute, all of you guys were wrong. What does it feel like when as a Judge you are overruling a large body of opinion put forward at least in part by people you admire? Some of the people you knew.

Judge Silberman: Well admitted is an overstatement.

Peter Robinson: All right.

Judge Silberman: I liked Warren Berger but I did not totally admire his jurist prudence. He was more politically then I am. There were State Supreme Courts that had held the Second Amendment was an Individual Right, but you are quite correct. Federal Courts had almost uniformly in the latter part of the 20th Century concluded that it was a Collective Right. You are probably also correct to say that Federal Judges had sort of shrunk from the Second Amendment. There were those who had such a strong view about gun control I think as a matter of policy that they were inclined to look for a loophole or and out which was the Collective Right notion. To try to explain why I did what I did, as a Judge I just simply look at the legal material before me which includes Supreme Court opinion so I had to read Miller very carefully and it was obscure. There really was not answer to the question before me. I had to make that decision first and then I had to look back at the original material. At that point, what anybody else on the Federal Courts has done, does not dictate what I should do. I have to search my conscious and look at the law and ask myself the question what does the Constitution Second Amendment mean.

Peter Robinson: Segment three – From the Law to your activities off the bench, the Silberman/Robb Commission. Let me give you a few quotations from the report of this, Silberman of course refers to Judge Silberman, Robb you cochairman, Charles Robb, former Senator of

Virginia and it should be noted a Democrat. This Commission was appointed by President Bush but it was clearly bi-partisan in substance and in every way.

Judge Silberman: Yes, I should interrupt to say that Republicans would refer to it as the Silberman/Robb Commission and Democrats as the Robb/Silberman Commission.

Peter Robinson: Right and if I ever interview Senator Robb I cannot promise that I might not go there.

Judge Silberman: I always refer to it as the Robb/Silberman Commission.

Peter Robinson: Because you are a very gracious man. All right. Quotation “the United States government” that is the Bush Administration, I am quoting from the report “asserted that Saddam Hussein had reconstituted his nuclear weapons program, had biological weapons and had stockpiled and was producing chemical weapons. All of this was based on the assessments of the U.S. intelligence community”. So, this can’t phrase Bush lied, people died at a minimum is it a fair interpretation of the findings of the Commission that that is nonsense? George W. Bush and his Administration did not lie; they made statements based on intelligence reports.

Judge Silberman: I think your statement is fair and the statement that the Administration lied about the intelligence is false. We did not consider, we were not instructed to and we would not have wanted to consider the Administration’s statements concerning the intelligence that they received. That was too political at the time. We were focusing only on the intelligence product itself.

Peter Robinson: Right.

Judge Silberman: Implicitly however, your point is quite correct. Because the intelligence community clearly indicated Saddam had weapons of mass destruction they had made that clear to both President Clinton and President Bush. They made that clear in the national intelligence estimate of 2002. There is an argument some partisans have put forward but nevertheless, the Administration glossed the intelligence in some way. Eventually I would like to speak to that but I did not, our report did not speak to that because that was more of a political issue and we were bipartisan and of course this is a Federal Judge I was very careful to stay out of politics.

Peter Robinson: Right

Judge Silberman: But I am inclined to think we are getting close to the period where for historical purposes I can give an opinion that would support your statement. That is to say the notion that Bush lied about intelligence to get into war is an absurd and outrageous liable.

Peter Robinson: Thank you. Again from the report of the Commission “our intelligence agencies collected” this is almost unbelievable to me “precious little intelligence for the analysts to analyze and much of what they did collect was either worthless or misleading.” Now let it be noted that the Clinton Administration made regime change in Iraq official American policy in 1998, some five years before the Bush Administration chose to invade. Five years during which it was the official policy of the Administration of the United States to change the regime in Iraq and our intelligence agencies had not produced any useful information in Iraq, roughly.

Judge Silberman: Well now you overstated.

Peter Robinson: Okay.

Judge Silberman: You said had not produced intelligence on Iraq.

Peter Robinson: Excuse me on the central question about Iraq, which were the weapons of mass destruction program.

Judge Silberman: Well the information they had was not very good. It was based as our report indicated on a lot of fundamental and almost amateurish mistakes. Some of them attributable to a lack of sharing of information in the intelligence community. So that for instance on the, I will just give you one example, the claim that Saddam had resumed his biological weapons program was based on the ostensible appearance of the mobile labs. And the contention that the mobile labs were used to create biological weapons, very serious stuff. It turned out that all came from one source. It was a source that was fraudulent. Somebody who had gone to German intelligence and made the claim. Unfortunately, that claim came to the American intelligence community from several different entry points and nobody in the intelligence community realized that when they had three or four corroborating bits of evidence it was all the same thing and it was a phony. So that was quite disconcerting. However, there is something important

Peter Robinson: You are telling me that the intelligence agencies of the United States of America did a worse job confirming a piece of evidence than Ben Bradley would have permitted reporters to do at the *Washington Post*.

Judge Silberman: I would rather not get into that comparison.

Peter Robinson: All right.

Judge Silberman: But let me go on to say something that is very important. We now know that Saddam destroyed his weapons of mass destruction and abandoned his program after he was caught by the Inspectors. We also know from the Delpha Report that he planned to resume his weapons of mass destruction program as soon as the Sanctions Regime ended. So we know those facts. We are pretty sure of that. But it would have been impossible for any intelligence agency in the world, even the very best intelligence agency to have determined that Saddam had destroyed his weapons of mass destruction program in 2002. The reason why is even people at the highest level of the Iraq regime believed he had the weapons of mass destruction because he was running a big bluff.

Peter Robinson: He was bluffing his own generals?

Judge Silberman: He was bluffing his own people and Iran. He has recently said, we now know from recent material when he was interrogated post war he said he wanted to run a bluff. So it would have been impossible for the intelligence community come up with a conclusion that he destroyed his weapons of mass destruction. A first class decision would have been, a first class opinion would have been, we think it is probably that he has these weapons of mass destruction. He actually had them, we know that, he has used them in the past, we have no evidence that he destroyed them ergo we think it is highly likely that he has weapons of mass destruction, but we cannot prove it. Had the intelligence community said that, I think probably the country would have gone to war anyway.

Peter Robinson: Right

Judge Silberman: Since most people were quite convinced that he had them. It was counter intuitive to believe that he had destroyed them and was running this bluff. So it is a bit unfair to say we went to war because of the intelligence community mistakes because even if they had done an absolutely first class job it would have been impossible to have concluded that he destroyed his weapons of mass destruction and beyond that even then he was planning to resume his weapons of mass destruction after the sanctioned regime.

Peter Robinson: But you do not mean to provide a kind of sort of exculpatory comments about the intelligence community. They did a lousy job.

Judge Silberman: No, they did a lousy job, but I am discussing the fact

Peter Robinson: The difficulty of the problem.

Judge Silberman: Counterfactual history.

Peter Robinson: Okay.

Judge Silberman: What I think historians will have to look at and they will begin to look at that when the political winds die down in Washington is did we go to war based on mistaken intelligence or even if there had been good intelligence would we still have gone to war. It would have been impossible to know that he destroyed his weapons of mass destruction and even if we had known that, we would also have known that he planned to resume them.

Peter Robinson: Right.

Judge Silberman: So I sometimes wonder whether it could be said this was a war of choice or really whether it was an inevitable war but the choice was more of a question of timing.

Peter Robinson: There is an argument that if you were the President of the United States and a very, very bad actor might and indeed probably had weapons of mass destruction it would have been irresponsible not to take out that regime. That is to say it was not a war of choice. Right? You could at least make the argument.

Judge Silberman: Yes that argument. But

Peter Robinson: But you do not find persuasive in itself.

Judge Silberman: I do not want to say that yet given the fact that I am a Federal Judge but I do think it may well be contended and it may well be decided by historians that this sort of a can do Germany going in the Rhineland in 1936 when France and Britain did not respond. I am sure in France and Britain they thought well if we go to war now, it is a war of choice, we do not have to.

Peter Robinson: Right

Judge Silberman: It is not that big a deal. Well we know now from historical material that if France and Britain had gone in to stop the Germans when they were in the Rhineland, the German army

would have overthrown Hitler and it would have been rather easy to keep the Germans out of the Rhineland.

Peter Robinson: Right.

Judge Silberman: That was a choice, but was it a war of choice? Of course not because in 1939 there was no choice.

Peter Robinson: Right

Judge Silberman: So it may well be that at the time the Bush Administration went into Iraq, the timing was a matter of choice but the war probably might have been thought was inevitable.

Peter Robinson: All right. Segment four

Judge Silberman: That gets you far removed from what you were asking.

Peter Robinson: No, no, no. Actually I find all the fascinating and it is also interesting to see your mind at work on this. I can see you calculating what you can say and cannot say as you speak. Segment four – Will Lawyering Strangle us? Just over 30 years ago you published a very famous essay title *Will Lawyering Strangle Democratic Capitalism*. Let me read you a few assertions from that essay of three decades ago. You tell me in which instances you make the same assertion today and in which instances you might change your mind or put something a little bit differently. I am quoting you “the legal process because of its unbridled growth has become a cancer which threatens the vitality of our forms of capitalism and Democracy”. Want to stick with that?

Judge Silberman: It might have been slightly hyperbolic but I would stick with it yes. In fact I did write a subsequent essay 25 or 30 years later and it was included in a law review article somewhere in which I went back to consider the validity of the statements I had made before and I concluded yes and if anything had become worse. When I graduated from Harvard Law School there was actually

Peter Robinson: In which year?

Judge Silberman: In 1961.

Peter Robinson: Right

Judge Silberman: There was a serious concern expressed by the American Bar Association that we had too few lawyers. The Warren Court of course had an enormous impact on the growth of the legal profession because after all with all of its judicial activism there was more and more power given to lawyers. As a result I think when I did this latest redraft or rethinking of that topic I noted that the number of lawyers in the United States was twice the number per capita as it was true in 1951.

Peter Robinson: I got some figures for you to try on for size. The number of lawyers in the country when you published the article in 1977, 448,000. The number of lawyers as of last year, 1,014,000. The population increased 40% the number of lawyers increased 126%.

Judge Silberman: Exactly.

Peter Robinson: So how many lawyers is too many? You are a Judge, you love the law, this is a good way to lead your life and serve the nation. Why wouldn't you want more people doing that?

Judge Silberman: Because although lawyering is an essential component of Democratic capitalism and I pointed out in the article that Britain achieved enormous economic growth in the 17th and 18th Centuries in part because they had a more supple and better legal system than the continent.

Peter Robinson: Right

Judge Silberman: But too much lawyering can be too much of a good thing. I believe then and I believe now that a disproportionate amount of our talent in the United States goes into law as opposed to business or other areas, which are welfare enhancing and create wealth. Lawyers redistribute the wealth but they do not generally produce wealth.

Peter Robinson: Once again from *Will Lawyering Strangle Democratic Capitalism* "the growth of the legal process is not occurring without the wholehearted support of the American intelligencia. Those who fundamentally distrust choices made by the population as a whole wish to divert as many issues as possible to the legal process." You are a graduate of Dartmouth College, a fancy pants institution and Harvard College another fancy pants institution.

Judge Silberman: Harvard Law School

Peter Robinson: Harvard Law School. You have taught for years at Georgetown University Law School. You have spent some time in elite institutions of higher learning Judge and here you are slamming those folks. Are you not?

Judge Silberman: Well I hope not. I am not slamming those particular institutions. I am concerned about the disproportion amount of talent in the United States that goes into the legal profession because it is not I do not think good for the country. I would rather see a smaller percentage of our talented people go into law more going into business and other associated professions.

Peter Robinson: Okay.

Judge Silberman: Which create wealth.

Peter Robinson: One more quotation here.

Judge Silberman: Incidentally

Peter Robinson: Go ahead.

Judge Silberman: Derrick Bock who was President of Harvard, who was my professor at Harvard Law School, some years after I gave that article gave a speech in which he reflected the same views that disproportionate amount of our talent was going into law.

Peter Robinson: All right. Slightly different point however, but it is your point. "Law schools are centers of distrust for capitalism, distrust for capitalism as well as impatience with Democratic

institutions”. Here is what I am getting at. In your article you are concerned about the growth of lawyering, but you also make the point at a number of places, in 1997 that academia is distrustful to a remarkable extent of capitalism and business and indeed of the Democratic process. Would you care to stand by that statement today, that point?

Judge Silberman: Absolutely.

Peter Robinson: How come? What is it about academia that does that?

Judge Silberman: You know it is an interesting question. I had a discussion once with the Dean of Harvard Law School in which I was complaining about the onslaught of law professors who were so hostile to Democratic capitalism or certainly hostile to capitalism. He who was our first class person, with some balance said well academics are always on the left. I thought about that and wrote him back a note. I said you know that is not true. First of all, academics in the United States in the 1920’s were generally conservative, particularly in elite institutions. But a more dramatic example might be brought to bear from Germany. When academics in Germany were one of the first groups to embrace Nazism. So I am not sure academics are necessarily drawn to the left they are drawn to overall systems. Just as the academics in Germany were drawn on to Fascism, some academics are drawn to Quasi-Marxism, which generates hostility to Capitalism. For that matter so did some of Fascism had its hostility to Capitalism too.

Peter Robinson: Right.

Judge Silberman: It does not necessarily mean that academics are on the left.

Peter Robinson: Is it that they essentially the want, is it the dream of Plato’s philosopher

Judge Silberman: Yes, yes

Peter Robinson: They are smarter then these crude businessman why shouldn’t they be running things.

Judge Silberman: Exactly correct.

Peter Robinson: That is it?

Judge Silberman: Exactly correct.

Peter Robinson: All right. Segment five – Back to Lawrence Silberman Jurist. Once again your friend Mr. Justice Scalia “the theory of originalism give the Constitution the meaning that its words were understood to bear at the time they were promulgated”. You subscribe to that?

Judge Silberman: Absolutely.

Peter Robinson: You are an originalist?

Judge Silberman: Absolutely.

Peter Robinson: All right. Here come the problems. To be an originalist is to hold that a lot of decisions over the last half-century and particularly those of the Warren Court were wrongly decided. But, it is also to grant a great deal of weight to Stare Decisis, to precedent. So how do you handle the problem, which an originalist must confront again and again and again? Here is the meaning of the Constitution, aw, but here is the body of precedent with which I as Jurist am forced to contend. How do you think through that problem?

Judge Silberman: It is a good question Peter but it is not, I do not think it is quite true to say that originalism and Stare Decisis are intention as a Doctrine. They are not intention as a Doctrine.

Peter Robinson: Oh they are not.

Judge Silberman: Let me put it this way, if you are an originalist, you conclude for instance that let us say hypothetically that Roe versus Wade was Constitutionally an inappropriate decision. I stated that before I became a Judge

Peter Robinson: You are on record on that one.

Judge Silberman: On record, although I also indicated at the time that I was pro choice, but I was very much opposed to Roe versus Wade before I became a Judge. Okay, so you conclude that an issue such as that was improperly decided because it was the Right of Privacy was created out of whole cloth in the Constitution. There is a separate Doctrine, which becomes to bear which is Stare Decisis. It is not inconsistent with originalism, but it may require you as a Judge to consider hard whether you wish originalism trumps Stare Decisis. Do you see what I mean?

Peter Robinson: Yes They are not intellectually inconsistent it is a question of choosing in which case and for which set of reasons may be forced to trump the other.

Judge Silberman: That is exactly.

Peter Robinson: If you choose one trumping the other.

Judge Silberman: That is exactly right. It can be strongly argued today that even if Roe versus Wade incorrectly decided that it would be too much of a traumatic impact on the country to rip it out.

Peter Robinson: Okay, so, next problem that this layman sees for you originalist runs as follows. It came up a moment ago we were talking about I quoted your friend Justice Scalia on the Doctrine of Incorporation and he thinks it was a mistake, it is a misreading of the Fourteenth and Fifteenth Amendments but it is too late to do anything about it. So, what is the point in being an originalist if it is too late to do anything about anything? It reminds me of this quotation from GK Chesterton, "the job of progressives is to keep on making mistakes and the job of conservatives is to keep them from being corrected". Exactly.

Judge Silberman: Well the short answer is if I had not been an originalist I would not have decided the Second Amendment case as I did. After all that was an issue that was open because the Supreme Court had not decided. So, that is a short answer. An originalist still has before him or her often questions that have not been decided.

Peter Robinson: Often. So, here is a layman again what I am sorting out and trying to sort out is

Judge Silberman: I will modify often, I will say occasionally.

Peter Robinson: Okay. I myself personally find the originalist position not only compelling but it just seems to me almost unquestionably correct. That is how compelling I find it. Then I say as a practical matter in the year 2009 what difference does it make? Even as brilliant and committed an originalist as Judge Lawrence Silberman is only able to get back to the original meaning of the Constitution in a case where there was no major decisions for seven decades.

Judge Silberman: No that is an unfair statement.

Peter Robinson: Good, tell me why that is wrong.

Judge Silberman: Well hypothetically had I been on the Supreme Court at the time Casey was decided,

Peter Robinson: Which was 1993 – 1994 – 1992?

Judge Silberman: Yes

Peter Robinson: Perhaps, early 1990's

Judge Silberman: I might well have voted with Scalia and Thomas to overturn Roe versus Wade.

Peter Robinson: That was the moment when they had a choice.

Judge Silberman: Remember that is the case in which Tony Kennedy, David Souter and Sandra Day O'Connor wrote a separate concurring opinion re-endorsing Roe versus Wade although modifying it somewhat. One could say logically that was a time when you could overrule Roe versus Wade. One could logically conclude that well now wait a minute, 20 years later, at that point you have too many settled expectations. The argument in favor of not overruling Roe versus Wade in 2009 is stronger than it was in early 1990's.

Peter Robinson: As a general matter, the argument for a precedent becomes stronger every day.

Judge Silberman: Of course.

Peter Robinson: Okay so last question

Judge Silberman: Although you should be able to pop into my face well what about the Plessy versus Ferguson.

Peter Robinson: Remind me Plessy

Judge Silberman: Plessy versus Ferguson is a case in the 1890's holding that segregated schools are perfectly Constitutional.

Peter Robinson: Right. And it gets overturned in 1954 with Brown.

Judge Silberman: Right Brown versus Polar.

Peter Robinson: Sixty years later.

Judge Silberman: You would quite legitimately point out and say wait a minute, why was not that settled expectations? The answer to your point is there is tension between an originalism view that oh my gosh we made bad mistakes 20 years ago. We should change it. By what Nino pointed out with respect to the Incorporation Doctrine then you are ripping out hundreds of cases if you took the position today that the Incorporation Doctrine was fiction and you should not buy it you would be ripping out not just one case or two cases or three, you would be ripping out hundreds of cases. Incidentally I still make the point even if you did not have an Incorporation Doctrine the Second Amendment could well be interpreted as banning both Statutes, which prohibit gun ownership in the States.

Peter Robinson: Here is the question, let me put it to you this way. Somewhere watching this interview, there is going to be some first year, this interview will likely air this summer so let us say that somebody is about to head off to law school, maybe to your institution, your Alma Mater, Harvard Law School, maybe somebody is going to turn up in one of your classes at Georgetown Law School. This young man or woman is thinking should I join the Federalist Society, this is the group of lawyers who are broadly speaking stand with originalism and view themselves as I understand it as a kind of movement within the profession to get back to the Constitution to support originalism. Is it worth my time to join the Federalist Society because A over the period of my career there will be enough marginal decisions this could make a difference. This could actually make a difference to the functioning of the Democracy that the originalist view of the Constitution would gain ground. Or be ah, it is historically correct, it is intellectually interesting but it is not worth my time because it is just a kind of historically debating society. This issue is gone, the Warren Court, these precedents have so much standing, it is all over.

Judge Silberman: It is a very provocative question. I have two answers. The first answer is an originalist stands afford efforts to decide cases in the future, in the form of an evolving Constitution. For instance let us take the case of capital punishment. There are probably three or four Justices on the Supreme Court who I gather would love to conclude that capital punishment is unconstitutional.

Peter Robinson: End it.

Judge Silberman: Originalist would say that is absurd that is utterly absurd. The ground would be

Peter Robinson: Capital punishment,

Judge Silberman: Cruel and unusual punishment, but how in the devil could you say something that was well known to be a standard punishment at the time the Constitution was framed is cruel and unusual. Now it is true that term unusual does have a temporal sense so the timing could change. But nevertheless it is impossible to conclude today that it is unusual and a number of States have it. So a policy maker on the Supreme Court, not an originalist would say, come on let us make that unconstitutional. An originalist would say, you cannot do that that is a policy call, you can change the Constitution, you can amend it but you cannot make that conclusion. There are all kinds of issues that would likely come before the court in the future. For instance, there was a colleague of mine, a classmate of mine who almost was on the Federal Bench who believed that welfare was a

Constitutional right. Not the discontinuance of welfare implicated through process, but the grant of welfare was a Constitutional right. Well an originalist would say, welfare may or may not be a good idea, but sure as the devil it is not a Constitutional right. So there are all kinds of future questions that activists would like to see put in the Supreme Court that an originalist would say that is not appropriate.

Peter Robinson: All right. So the relevance remains.

Judge Silberman: Intensely a relevant remains. Now I could also say your description of the Federalist unfortunately is slightly mistaken. You describe a Federalist as I hope it would be developed when it was first started, I helped start it. My view about half of the Federalists are so called Libertarians and they are included to judicial activism on the conservative side.

Peter Robinson: All right.

Judge Silberman: In other words the free market. Scalia and for that matter I are very much of the view that is just as dangerous and incorrect as judicial activists on the left.

Peter Robinson: Okay. Last we are out of time unfortunately. Here is the last question.

Judge Silberman: Go ahead.

Peter Robinson: I mentioned somebody who is headed off to law school; let us take somebody who is headed off to college. Here is the kind of career you have lead. A long and distinguished career of public service and the law. Let us suppose your grandson who is going to be a Junior at Dartmouth College next year is thinking things over and saying to himself, well my grandfather is a distinguished man, on the other hand I could get a job at Goldman-Sachs. What advice do you offer to somebody who is trying to decide how do I decide if that kind of life is right for me particularly since you graduated from Harvard Law school in 1961, the rewards to kids who go into business at the levels that bright college kids are able to go into it, have grown so substantially.

Judge Silberman: I do not think there is any inherent superiority in my career over a career as a businessman. As a matter of fact, my son, another Dartmouth graduate is the CEO of a publicly traded company, Strayer, and I think it was last year designated by Morningstar as the best CEO in the country. I am very proud of him. So I do not think there is any inherent superiority in my career. I think the answer to your question, in a young man or my grandson would ask it is taken from Shakespeare. To thine own self be true.

Peter Robinson: Judge Lawrence Silberman, thank you very much. I am Peter Robinson, for Uncommon Knowledge and the Hoover Institution, thanks for joining us.