Human Nature, Originalism, and the Origin of Rights
A Conversation with Michael Munger
Interview Conducted and Transcribed by Maclain Conlin (All errors are mine alone.)

Maclain Conlin: Good evening, and welcome to Originalist Angles. My name is Maclain Conlin. Tonight, we are joined by a very special guest, Mr. Michael Munger. Mr. Munger received his PhD in Economics from Washington University in 1984 and has taught political science at a variety of institutions, including Dartmouth College, UNC Chapel Hill, and Duke University, where he served as the chair of the political science department for over ten years. He is the author of numerous books on economics and public policy as well as scholarly papers, including a recent study on public choice theory and the federal judiciary, which we will be discussing today. Professor Munger, thank you for being here.

Michael Munger: It's a pleasure.

MC: Thank you, sir. Since most of our readers probably know more about law than economics, I would like to start off by asking you to give an overview of what public choice theory is. When did it begin, and what are its basic tenets?

MM: Economics is generally defined as the science of analyzing human choice in the face of scarcity. How do we use resources that have alternative uses in a way that's best for us and for society? Often, there is a conflict between what's good for me and what's good for society. It might be that some production process which I can use to produce valuable commodities also creates pollution that causes climate change, so it's bad for society. We're looking at the best use of scarce resources in the face of alternative investments in a way that benefits the individual and that benefits society. Public choice in particular is a sub-branch of economics and political science. If you draw a venn diagram, it's partly economics and it's partly political science. For the most part, the method is economics, but the subject matter is political science. By the subject matter of political science, I mean the institutions that do not involve profit-making firms, but instead involve choosing in groups using voting or some other collective choice mechanism. My 2015 Cambridge University press book *Choosing in Groups* was my statement of what I think public choice theory is.

MC: Interesting, and public choice theory also seems-I know this has a bad connotation but it's not intended to-Machiavellian, recognizing that public officials also have private interests and that they sometimes try to advance those interests at the expense of what is best for society. Would you agree with that characterization?

MM: I guess I would go the other way, and say that anyone who doesn't believe that believes in unicorns and fairies! The bad connotation is someone who does not believe that people primarily act in their own self-interest. Those are the people that terrify me.

I'm not an anarchist. I'm a big fan of trying to work together to make things better, but the idea that public choice people try to work against is, "We all know corporations are selfish, and we all know that elected officials just want what's best for the people!" That just seems outlandish to me. Everyone responds to incentives. The primary public choice observation is that the incentives for how people act are different in market and political settings. People's behavior may very well be different, but by and large, people don't become smarter as they leave the cereal aisle, where we think people have trouble making

choices, and go into a voting booth, where suddenly they become geniuses. People also don't become moral when they leave the corporate CEO suite and become a U.S. Senator. It's the same person.

MC: That's an interesting point, sir, and to go a little bit deeper, I'd like to read aloud a quote from your paper so our readers can start to get a feel for it: "If unelected judges can prevent elected representatives from governing as they like, then doesn't that empower judges to rule as they like? Justices are motivated by two considerations: (1) their own political views and (2) a desire to preserve the power and prestige of their court." Judges take an oath to uphold the Constitution. Do you believe that every decision they make is necessarily motivated by their political views and desire for prestige, or is it possible for them to value the written law over their own personal beliefs? How can we trust judges to make decisions if, under this statement, it is impossible for them to honestly do so?

MM: As you said, there are two considerations. I think that judges actually come the closest to being the ideal of being concerned with the public interest above their own self-interest. We can't rely on that operating perfectly, but one of the reasons that I wrote this paper is because I think some public choice people would say that because elected officials have to seek reelection in a setting where organized interest groups and campaign contributions change the incentives, we can't really rely on elected officials. But judges are a little bit different. I would rely as my source material for this on the work that we see in Federalist 51. The writers of the Federalist Papers in Federalist 51 said that we cannot rely on an enlightened statesman to be at the help. What we need to do is create a set of institutions that limit the ability of a bad person, if they gain power, to harm the collective. In fact, it's in our collective interest to limit the power of the government. Now, the phrase that was used was, "ambition to counteract ambition." We will rely on the self-interest of judges, if nothing else, to limit how much they act badly. But that depends on the institutional settings.

The way that I describe it is this: I get up in the morning, I'm a Supreme Court justice and I put on this robe, and I walk out in the street and people look and they say, "Wow! Look at that robe! That's a really important guy!" I get to the office, and arrive at the Supreme Court, and I hear that the President of the United States has done something that encroaches on the powers of the Supreme Court. Maybe I, for political reasons, like the President or the thing that he has done. But I remember that the only reason people admire me is that I hold a powerful office, and that constitutional power is a check and balance on the power of the President. I am led, by my own self-interest, to act in the interests of the public to protect the constitutional limitations on the power of the presidency. Even though I might like what the President has done for political reasons, my own self-interest still leads me to do so, if I'm in the right institutional setting.

This was James Madison's great insight-it's actually derived from the French political thinker Montesquieu. The separation of powers, because it creates jealousy and a conflict of interest, limits what could happen if you had a bad person in office. Now, you might say, "We could never have a bad person in office. That could never happen!" For many of my friends on the left here at Duke it used to be a hypothetical, but after the 2016 presidential election, that's no longer the case for them. What Madison said in Federalist 51 is that men are not angels and men are not governed by angels. In fact, the reason we have a government is that men are angels. We are starting from the premise that we need something to

limit our ability to act badly. The Supreme Court, I argue, is actually an example of, if we make the correct selections for who sits on the Court (and that's what my article is really about-who should we choose to sit on the Supreme Court?), an excellent fulfillment of the Madisonian objective of limiting the powers of the other branches for the public interest.

MC: That's interesting, because many people only think of public choice theory as pointing out the negative consequences of government officials exercising authority.

MM: That's why I wrote this. We need a powerful government, but we need an institutional mechanism for controlling what would happen if a bad person got into office. That's exactly what Madison and Hamilton were talking about in Federalist 51. This is not new. It's simply restating that argument in modern economic language.

MC: You mentioned that the point of your paper was to demonstrate the importance of who we appoint to the Supreme Court. If you were President, what standards and requirements would you use in deciding who to nominate?

MM: What led me to write this paper was that I was working with a certain graphical model. We tend to worry about people with extreme political positions. We think they shouldn't be on the Supreme Court. What I show is that we shouldn't care about that. That's fine. What we need is, regardless of their political positions, people who are really committed to the dignity and power of the Court. As long as that's true, they will always suppress their own political views in favor of preserving the dignity and power of the Court. I think a lot of people would say that John Roberts has done something like that, especially with the Obamacare case (*NFIB v. Sebelius*). Regardless of what you think about the merits, he said that the Court had to preserve its precedent because the prestige of the Supreme Court was at stake. It doesn't matter what individual people's opinions are. What we need to do is find out whether they have what's called, "a judicial temperament." That is, do they obey the rules of *stare decisis*? Do they obey the rule to obey precedent even if they disagree with it? The precedent, and not your opinion, is the binding law. You have to apply the precedent, and not your own opinion. Obviously, if I'm committed to that, it doesn't matter what my opinions are. I can have the strangest opinions in the world, because if I'm committed to applying the precedent, we can probably agree on what the precedent means.

MC: If you don't mind, sir, I'd like to go through the different periods of the Supreme Court's history and hear your thoughts on how the Court either succeeded or failed in upholding those standards. Starting with the *Lochner* era, the Supreme Court struck down a variety of economic regulations, and part of the backlash against those decisions included the New Deal. Do you believe that the Court was right to strike down economic restrictions, or did it put its own prestige at risk?

MM: In *Lochner,* the Court said that states cannot interfere with the freedom of contract. I think it was correctly decided. The problem was the series of cases in response to the New Deal where they started to chip away at the *Lochner* precedent. It's always portrayed as, "Can the government regulate hours?" But if you look at *Lochner,* the reason for its decision was that there were large, unionized bakeries who wanted to prevent small, mom-and-pop companies from operating. Workers for the smaller businesses

worked a morning shift and evening shift and weren't paid much, but it was still by far the best job they could obtain. When they closed down, those workers no longer had a job in the bakery business. That was fine with the union workers, who were trying to get rid of competition.

I don't think there's any question that *Lochner* was correctly decided. The backlash came from when it was misrepresented by its opponents. They said that *Lochner* prevented Congress and the states from regulating in the public interest. But the question is whether the public interest overrules fundamental constitutional rights like the freedom of contract. Justice Fields was not a libertarian. He interpreted the Fourteenth Amendment as guaranteeing certain rights and privileges by virtue of being a U.S. citizen, and he believed that one of these rights was the freedom of contract. That was stripped out in the cases that got rid of *Lochner.* That was the end of freedom of contract. Freedom of contract is no longer a fundamental right of Americans according to the Supreme Court. I happen to think that that's a mistake, but I'm also not a Supreme Court justice, so no one really cares.

MC: Is it ever appropriate to overrule a prior precedent?

MM: I've had that talk with a lot of people lately. In 1973, a case was argued and decided called *Roe v. Wade,* in which the Court "discovered" a right to privacy, and used it to justify a restriction on states being able to impose certain laws against abortion. Whatever you think about that on the merits, almost fifty years later, there was another case, the *Dobbs* case, in which the Supreme Court overruled the *Roe v. Wade* decision. I had some friends who said, "That's unconstitutional! They can't do that!" But actually, the Supreme Court created the right in *Roe v. Wade,* and it's certainly not unconstitutional for the Court to say that it made a mistake. The question is whether the fact that it was precedent for so long tells you anything about whether that should still be precedent. Well, consider history. *Plessy v. Ferguson,* which established the constitutionality of "separate but equal," was handed down in 1896. It was overturned in 1954 in *Brown v. Board of Education.* That's 58 years. Don't you think *Plessy v. Ferguson* was wrong and should have been overturned? People who believe that *Roe v. Wade* was wrong overturned it after only 49 years. Apparently, it's okay to overturn longstanding precedents if you think they are. I happen, on the merits, to agree with *Roe v. Wade* and think *Dobbs* was wrong, but I can't say it was wrongly *decided.*

You can't say it's always wrong to overturn longstanding precedent unless you also say *Brown v. Board of Education* was wrongly decided, and then we are heading in a new and interesting direction!

MC: You said that in *Roe* the Court invented a right to privacy. But you also said that the Constitution does protect other rights such as the freedom of contract. Would you argue that economic rights have a greater textual basis than the right to privacy?

MM: The Constitution actually mentions the freedom of contract. The absence of any mention of the right to privacy means that, in relative terms, one is mentioned and the other is not. That's just an objective fact. I'm a libertarian. This has nothing to do with my views on the merits. I happen to think that the government should stay out of virtually every aspect of our private lives. That's not the question. I have many friends on the left who think that gun ownership should be outlawed. But there's actually a

Second Amendment. There are actually words in the Constitution that say the right to keep and bear arms shall not be infringed. There's nothing about these other things that they believe are constitutional rights.

I'm not an originalist, but I'm a textualist. I think that words have meanings and judges interpret the meanings of contracts all the time. The Constitution is the founding contract of the United States. If you don't like the words in it, there's a process for you to amend it. Those amendments can either take out words that are in it now or add words that you think are lacking. Failing that, those are not constitutional rights. They're just something you made up.

MC: In several cases this past Term, the Supreme Court has refused to decide the legal question at issue because of a lack of standing. It refused to decide parts of the Indian Child Welfare Act case (*Haaland v. Brackeen*), the federal immigration law case (*United States v. Texas*), and may do the same in the student loan case (*Biden v. Nebraska*). Do you think the Court has chosen to aggressively enforce standing rules in the last couple of years, and if so, is there a public choice reason for why they have done so?

MM: I don't think there's a major shift. They've always aggressively enforced those rules. They've always rejected cases based on standing. That's been a frustration to me for my entire life. For example, I'm really interested in campaign finance law, but very often, instead of making a decision, they just reject it for lack of standing. Someone runs for office and is not allowed to receive campaign contributions, but then they lose the election and so the election is no longer on, and since the election is moot, they have no standing. Rather than just saying, "This is an interesting case, so we're going to decide it," there's a complicated Simon-says dance that the Court does, and unless Simon says, they won't decide. I think that's very frustrating, but what has surprised me in particular is when a case is granted cert but then dismissed for lack of standing. Basically, they write a full opinion saying they won't decide anything. If a writ of certiorari is granted, you'd think they wouldn't waste any time and would just make that call at the beginning. Perhaps that just means that they thought about it and decided that they don't want to touch the issue with a ten-foot pole.

MC: If you could amend Article III, what would your new standing rules be?

MM: I doubt I could do any better. G.K. Chesterton had a rule. If he went through a forest and found a gate, he could go through it, but made sure that he closed it behind him because he's not sure what it contains, and on which side. The Chesterton fence is that if you see a rule that you think is stupid, you need to find out why it's there and the consequences of eliminating it before you advocate for getting rid of it. It's a kind of small-c conservatism. You don't know-I certainly don't know-the consequences of changing these fundamental rules about how cases are decided. The Chesterton fence rule would say that we should not turn standing upside-down even if we think that it's frustrating.

MC: You wrote in your paper that, "In other nations, the will of the people is embodied in acts of the legislature. It makes no sense to think of judicial review as serving democracy in such a context. Instead, restrictive judicial review of the legislature must, by definition, thwart the will of the people. The American Founders, of course, viewed the will of the people as being embodied in the Constitution, not

the emissions of the legislature." I'd really appreciate it if you could spend a moment on how other countries view the political process versus how Americans see it.

MM: In the summer of 1789, two sets of goals for rights were written. One was written in the United States and it took the form of the first ten amendments to the U.S. Constitution, which we call the Bill of Rights. It was finished in August of 1789. In August and September of 1789, across the Atlantic-at a time, of course, when there was no email, so they weren't in contact-, in France, the Assembly was writing a document that they called the Rights of Man. It's interesting that at the exact same time these two democracies were both wrestling with this problem of what are the rights of man. In the U.S., we decided on protections for five basic freedoms in the First Amendment. It starts with, "Congress shall make *no law,"* and then describes the five freedoms that Congress shall make no law about. In France, in the Declaration of the Rights of Man, they wrote that no man shall be disquieted on account of his political opinions *unless it is in violation of the law*. That means that you can't criticize me, but the government can come arrest me. The idea was that individuals can't prevent each other, but the law is an expression of the will of the people and is therefore binding me and can restrict my speech. In the U.S., the Constitution is carrying out the will of the people.

The first says, "Congress shall make no law," which means that it's Congress we're worried about, which makes sense because they have guns! My neighbors, maybe they have guns and maybe they don't but the government definitely has coercive power. In France, it was no one shall be disquieted on account of his political opinions unless it violates the public order as established by law. It goes that same way with all the other freedoms as well, almost parallel. These were written independently, unbeknownst to each other, but within a couple of weeks.

MC: Wow!

MM: It's such a fascinating time in history. From August to September of 1789, they wrote down a fundamental difference about the way they think about how people govern themselves.

MC: I've heard some people portray the French Revolution as being individualistic, but from what you've said, it seems very collectivistic. Is that correct?

MM: It was absolutely collectivistic. That's why before long Robespierre was able to impose a reign of terror against anyone he said was an anti-revolutionary. China under Mao, Cambodia under Pol Pot, each of those regimes were extremely collectivistic. The French Revolution was not individualistic. It was small-r republican. If you were anti-small-r republican, you could be beheaded, and many people were. It was not individualistic at all. It was for equality, justice, and fraternity.

MC: Was part of the difference between the American and French Revolutions also that the American Revolution was largely grounded in private property rights?

MM: If you look at the Declaration of Independence, it accuses England of violating the rights of the colonists *as Englishmen.* As Englishmen, they felt that they had a set of common-law rights, one of which was the protection of property. There are many other common-law rights. It was these Anglo-Saxon rights that motivated the Revolution, and it influenced the way in which the Constitution sought to protect property-including, to our everlasting shame, slavery.
France didn't have that common-law tradition. The law was all created by statute. Once it was all created by legislation, the French *philosophes* like Jean-Jacques Rousseau in the 1730s and 1740s wrote about the "general will," and the fact that all of us are obliged to defer to the general will. The Rousseuvian definition of property is something that the collective allows the individual to have for the good of society. The American definition is Lockean, in the sense that property is ours, full-stop. Government is created to protect the rights that pre-exist. In the French system, rights are created by the collective and by the Revolution. In the United States, the Revolution happened as a way of protecting rights that already existed.

MC: Some libertarian scholars, including more radical theorists like Murray Rothbard, have argued that rights come from nature. Would you agree with that? Or do you believe they come from history and the common-law?

MM: I do not agree with the natural-rights theorists. I am a Humean being, and David Hume would argue that rights are a convention. They're a convention, like the Chesterton fence, which have been shown over time to produce a society where we get the highest degree of prosperity, the most freedom, and the ability of people to fully realize themselves as human beings. I've never understood the Rothbardian theory because it basically just asserts the existence of these rights. That would be very convenient, I admit, for Rothbard's argument if that were true. But I don't see where it comes from, whereas I understand the emergence of the convention if we have private property and a judicial system for adjudicating private property leading to beneficial results. That's an empirical observation, and a better argument for private property.

MC: Would you consider yourself a utilitarian? In other words, do you believe that property rights have shown themselves over many generations to benefit society and accord with human nature?

MM: I don't mean just for prosperity. I also mean that they accord with our sense of justice. I'm a little worried about being considered a utilitarian. I also have a sense of moral intuitions about the nature of private property that that kind of system accord with. I don't want to argue that it's just a utilitarian result. It also accords with moral intuitions about desert, in the sense that people who work or create something have an entitlement to its fruits. The difference I would make between a natural right and an entitlement can be illustrated by a lottery. Suppose that everybody puts in a dollar, and there are a million people who do so. The winner gets five hundred thousand, and the other five hundred thousand go to charity. We take it to you, and we say, "You've won." Then you hear a knock at your door and we say, "That was just a lottery. We're going to take it back." You don't deserve it, yes, but you are still entitled to it because those are the rules that we set up. For a very long time, we've had a system of private property rights, limited government, and a judicial branch for adjudicating disputes. That's the precedent. This is just *stare*

decisis. People understood private property, and if you go around changing it, that's overruling precedent without cause.

I would actually tie this back into convention as precedent. It's not utilitarian, because then somebody else can come along and say that he can imagine something that works better. Well, I can imagine unicorns!

MC: Do you consider yourself to be a follower of Edmund Burke?

MM: I'm a big fan of Edmund Burke on many issues. Greg Weiner has a book on Edmund Burke on prudence that I found very attractive. I tend to be in favor of a presumption in favor of liberty, but it's a rebuttable presumption, and Burke shared that idea. Prudence is not simply doing nothing. Sometimes, prudence means doing really hard things because if we do nothing it will be even worse.

MC: On this note about the different kinds of rights, I would also like to ask you about one more case study, if you don't mind. In Justice Thomas' dissent from *Obergefell v. Hodges,* the same-sex marriage case, he portrayed the issue as being about the right to have your relationship called a marriage by the government versus the argument that having the government do so is simply a entitlement, not a right, because marriage predates the existence of government. Do you think that's correct, and how would you approach the issue of the state recognition of same-sex marriage as a right versus an entitlement?

MM: My main claim is that the government should allow and protect freedom of contract. I'll admit that the Supreme Court hasn't always done that. But if you accept my claim that the government should recognize and defend freedom of contract, it cannot selectively withhold that freedom based on any consideration other than the inability to sign a binding contract. Suppose you're four or five years old.

You can't sign a binding contract because you haven't reached the age of consent. Suppose I lack the mental capacity to enter the terms of a contract. All the usual terms of being eligible to sign a contract are perfectly legitimate.

Marriage is two things-it has a religious function, and a civil function. The only thing, because of the separation of church and state, that the government gets to talk about is the civil part. Justice Thomas is intentionally sliding this over into the religious part. Nobody, as far as I know, is saying that the Catholic Church should be required to recognize, as a sacrament, same-sex marriage. What they're saying is that two people of the same sex who are otherwise capable of entering into a valid contract-they're old enough, they're of sound mind-cannot be stopped if you allow another set of two people, a man and a woman, from entering into a contract. The legal ability to commit to each other as an economic matter cannot be withheld. I think *Obergefell* was correctly decided but the reason it was decided was wrong. I think it should have been decided because of access to freedom of contract.

MC: Would you say that marriage is a different kind of contract, at least on the civil side, because there are some things that you can get from marriage that you can't get from simply contracting with another

private individual? Tax benefits, for example? Would it still violate the freedom of contract to withhold those tax benefits from same-sex couples?

MM: Perhaps we should use a different word for it. The problem is that we use the word "marriage" for two things. I'm Catholic. I got married in a Catholic church to my Catholic wife by a Catholic priest.

That's marriage. We also went and got a marriage license which gave us permission to have that union legally recognized by the state. The fact that we use the same word to describe both of those things, I admit, is a problem. It is true that I could, piecemeal, assemble a set of private contracts that would approximate the marriage contract. The problem is that it's a big advantage to have all those things united under a civil union. If you want to change what *Obergefell* said, as a matter of legality, from "marriage" to "civil union," recognizing that most people will still refer to it as marriage, I think that would solve the problem. There's a package of contracts called a civil union, and I think that's what *Obergefell* said could not be withheld from two people who otherwise would be able to sign a contract except for the fact that they have genders which don't line up in the way the state likes. The state's likes or dislikes don't matter here. They don't have standing, so to speak.

MC: Thank you for that, sir! I have really enjoyed our discussion.

MM: It was a pleasure!