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Unknown Speaker 0:17

Hello, fellow law nerd, welcome to a very special summer session of Boone lawyer, a rewire News Group podcast hosted by the legal journalism team that is excited to be having fun during this election. So let's celebrate that. I'm rewire news group's editor at large, Imani Gandy, and I'm Jess Picolo. Rewire news group's Executive Editor. Rewire News Group is the one and only home for expert repro journalism that inspires you to hold two truths at the same time, yes, the Olympics are bad, but also they are fun, and the boom lawyered podcast is part of that mission. So a big thanks to our subscribers, and a welcome to our new listeners and welcome to summer session. Summer Session is a special summer season of boom lawyered where we bring out some guests to talk about law, politics and well, really, whatever the hell we want, because this is our show, damn it. Today, we are talking with Madiba K Denny. She is an attorney, columnist and professor whose work focuses on fostering an equitable multiracial democracy. Her debut book *The originalism trap* colon how extremists stole the Constitution and how we, the people, can take it back is now available wherever books are sold. Madiba is the deputy editor and senior contributor at the critical legal commentary outlet balls and strikes. Love balls and strikes. And in her previous role as counsel at the Brennan Center for Justice, she provided legal and policy analysis regarding a range of democracy issues, including the census, the courts and attempts to disempower communities of color. And she would like you to know that though she has many a hot take, none of her hot takes are legal advice. Yeah, that is correct me, but we are so jazzed to have you on this show. Thank you so much for having me. I'm already having fun. Fantastic. We're only in like, the first minute. So first I want to say, congratulations on your book. And everyone, all of our listeners, really should go out and buy it if they haven't already. I bought it. I bought it on Kindle. I'm making my way through it. And what strikes me the most about this book is that you really put originalism through the wood chipper right like Argo style just shoved it down there. Threads of originalism are pouring out. And you say that originalism is not a legitimate intellectual theory, and instead, it's a tool that's been used by conservatives to undermine civil rights and social progress.

You also talk about conservatives deliberately downplaying the significance of the Reconstruction amendments, which I personally have consistently referred to as black ass amendments. I'd love for you to say more about those things, more about how original, originalism is a crock. More about why it is they downplay like the best amendments in the Constitution, besides, like the first right, the Reconstruction amendments are truly revolutionary. Just transform the Constitution into actually, finally, for the first time, trying to construct a real multiracial democracy. These were the amendments that said, hey, you know, maybe black people are actually citizens, and maybe we should be incorporating everyone into the political process, and we've only improved the understanding of the Reconstruction amendments over time by applying it to more and more groups, whether they be like women or queer people or so on and so forth. And so it is very telling that was the most who hit the Reconstruction amendments. Originalism stops suddenly. Originalists are no longer concerned with what the intent might have been behind them or how these terms would have been understood. And I think it is just very transparent that originalism, which for any new folks who might be tuning in,

and it's like I've never heard that word before. This refers to the idea that the Constitution's meeting is frozen in time, and we have to understand it today the same way allegedly would have been understood then. And I think that this is something that only actually matters to the conservative legal movement in so far as they have a direct link to a time when everything was worse off, or groups that they don't care about, so women, people of color, queer people, all of all of these groups that did not have recognized rights then, under originalism, you don't have recognized rights now. So really, the whole thing is a setup, as I say in the title, it's a trap. And I think that everyone who actually cares about having a multi racial democracy that works for everyone really ought to be rejecting originalism. It's kind of like a constitutional gerrymandering, yeah, just like rigging it from the get go, yeah? As to how it would function. Yeah. I also like how you use the word, how it would be interpreted, allegedly, yeah, because we really don't know, like, we can't get into their mind. We can sort of interpret what they might have, you know, what they might have thought based on the things that they did. But as you said, why should, why should we be beholden to that now, right? It's the age of Tiktok. Why do I care what a bunch of white guys with wigs thought, right? Like, could you imagine if any of the founders were alive now and they saw what was going on on Tiktok, it would lose their mind. You know what I mean? There is, there is a fundamental foolishness in the idea of, like, what would George Washington has thought about this? Because, because I recall immediately one of my favorite, favorite posts that just like cracked me up. When someone was like, why would I be bound by someone who, if I gave them a like, Nacho Cheese Dorito, they would just die on the spot?

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Just cracked me up. But I think you know, as as hilarious as they were being, they were pointing to a serious, a serious concept, which is that there is so much different now there's going to be so much inability to comprehend our current reality, and so it doesn't actually make sense. You can't meaningfully apply these things, if you try to chain them to that limited understanding, and there are really, again, multiple intellectual areas here, because there's the on one hand, there's a point of you don't actually know what these people thought or how this originally would have been understood. They carry on as if they just need to look at the right textbook or find the right 18th century dictionary. While actual historians are like, please, know what are you doing? But that's not how we do things. It's not that simple. And so not only are they getting the history wrong, though, then there's also the idea of, why should we be beholden to that history in the first place? So it's they are tying us to a time where we are worse off as a society, and they're not even doing it right. So there are, there are multiple, there are multiple errors in the way that originalists say we should be doing constitutional interpretation. So speaking of originalists not doing originalism right, we have a new justice on the bench who seems to be doing originalism better than the purported originalist on the bench, right, kentaji Brown Jackson, had been really, I think, forward thinking in terms of sort of trying to grab originalism back for progressives. And I know that you say that, you know that, that she's doing a good job, but you also say that there's some there's some reason that she shouldn't even be trying in the first place, right? Because, you know, we're like you said, we're tying our constitutional imagination to a time period where people were just work worse off. So what approach do you think would be better for Justice Jackson to take as she sort of continues to butt heads with the Sam alitos and Clarence Thomas's and John Roberts is on the bench. Yeah. So in the book, I advocate for this idea that I

call inclusive constitutionalism, and basically I agree that we should focus more on the Reconstruction amendments as Justice Jackson would do, as we've seen her do in cases like the affirmative action decisions. But I think it's a mistake to still do the original listing of thinking, how were the Reconstruction amendments understood then in like 1868 I think we should instead be thinking about the sort of underlying principles of pluralistic society, like extending the democratic process, building an egalitarian democracy where everyone can live and function like freely and with equal dignity. We should be thinking about, how do those principles make sense? Like, how can we extend them today? How can we apply them to the fullest? So I'm not actually so concerned that, oh, well, perhaps in 1868 the concept of equal protection didn't actually include, like, same sex relationships. I don't care. I don't actually care about that. I don't think we should be limited to the 1868 understanding because, but I think that we can take that idea of equality and dignity and that still matters, and we should apply that as far as possible. So I have a question, a follow up question to that. In my view, I've been seeing a sort of perversion of the equal protection clause to protect white people from what they think is unfair to them. So, for example, the Brooking case, right? The case about the Indian Child Welfare Act. You know, we won that case, but Brett Kavanaugh left an equal protection hold big enough to drive a Mack truck through which would, I think, allow white people to bring claims arguing against the idea that they should be in the back of the line when it comes to adopting indigenous children. Do you think that moving away from an actual originalist interpretation of the 14th Amendment would allow white people to sort of squeeze into the door and say, well, if we're just talking about equality and dignity, then how is it fair that I, as you know, a Christian white couple, or we as a Christian white couple, have to stand behind all of these indigenous people when we want to adopt these babies and assimilate them to our our Texan white Christian values? Do you think that there's that opens up a possibility for them to make their argument? That's an excellent question. I have a couple different thoughts and response. So one is, so I'm well, on one hand, I'm like, I don't think it opens up that argument. But also people who are going to make that argument are going to do it regardless of what you give them. They will, they will find a way to make this sort of argument. But I think that you, you raise a really good point, and I should, I should have mentioned this before, like, I think one of the really important ideas within the Reconstruction amendments is that it goes beyond formal equality, that it was about like remedying a system of injustice, and it was about like anti subordination. So I think that this idea of equal application that doesn't actually mean true equality. I would think that an inclusive constitutionalism should not foster that, because it should be concerned about like, remedying these ongoing systems of oppression and getting, like, actual equity, as opposed to formal equality. There's, there's a really simple image that sort of like demonstrates this, whereas people of varying heights, like standing trying to overlook a fence. And there's, like, well, we gave all of them one box, and so, like, now, now it's, you know, now it's equal, but if someone is a good two feet shorter, that, like, one box still doesn't get them to see over the fence. And so Esther points out that, you know, formal equality is also kind of a trap, and we've seen this in original list type cases before. Like something that comes to mind are some of the arguments advanced in Loving versus Virginia, when the state defending the anti miscegenation laws said, Well, there's no equal protection problem here, because the law applies equally to all the racist black people can't marry white people and white people can't marry black people equal.

Unknown Speaker 12:28

So I think we need to look beyond this sort of elementary school version of these things are the same, and think about what really equal what like an equitable society would mean, and that's what I want to get at in inclusive constitutionalism I love the framing of inclusive constitutionalism too, because it is also a good antidote and retort to the way that we see The conservative legal movement manipulating and trying to change regular principles, like standing, for example, associational standing, to what Imani and I talked about on the podcast quite frequently, into, like, white grievance, standing right so that, like this idea that the that what originalism is capturing is really the centered power of a certain idea of whiteness, right, and that everything emanates from it, and your your framework, is the absolute antidote to that. I so appreciate that. And yeah, that is, that is definitely what I was going for. I think that part, part of why I put in the name like inclusive constitutionalism is that the version of originalism and of legal interpretation, more broadly, that's been put forth by the conservative legal movement is intentionally exclusive. It's trying to shrink who counts as we the people like who has gets to be a person with power in the in the community, to make decisions over their own lives, to make decisions over other people's lives, saying that this belongs to only a sliver of the population that they deem Real Americans. And it's like those who are, you know, like white, Christian, wealthy, male and and conservative. You know, I think even if you I i n and straight as well, like if you even if you are like a white person, if you deviate from some of those boxes, if you're a poor white person or trans white person, then originalists don't care about you. The conservative legal movement does not care about you at all. So, but I want, I think the Constitution is for everyone, that it includes all of us, and so the purpose of our constitutional interpretation should be to make an inclusive democracy for you. I love that. Yeah, I want to pivot to talking about black women law nerds, right? Like black women, you're a black woman law nerd, I'm a black woman law nerd. Kamala Harris is a black woman law nerd. We're having a moment, right? Like we're having a moment, and now she there's a chance that she might be the next president. Just how do you feel about Kamala Harris's the moment that she's having in the moment that black women lawyers have been having basically all year. I mean, it'd be Justice Jackson, yeah, last couple of years, right? I definitely shed real tears during justice Jackson's confirmation hearing. I think, I think in particular the moment, the moment that broke me, I was sort of fighting tears, but the moment that broke me was after she was going through all this sort of racist nonsense and all this, all these attacks on her, on her background, where she was like a public defender, not even a lifetime public defender, but just any amount of time spent working against the carcino system was a problem, and Cory Booker had this great exchange with her, where he was just sort of like, I see you, I acknowledge what's happening here, and you're so strong, and you deserve better than this, but you're going to be on the court and like, this is a great moment, and I just started sobbing in my office. But yeah, so it's a it's a pretty significant moment, and that goes beyond just representation. Like, I think you see that in the way that Justice Jackson has approached many, not, you know, not all. But, like many of her decisions, I think have been informed by having that sort of different than many of the other folks from before. And I think, I think folks are feeling similarly with Kamala Harris right now, like, obviously, you know she, she was a prosecutor. And so folks do have some conflicted feelings, I think, where it's like, Man, I would have, I would have preferred not to be hyping up a prosecutor. But it also seems like an

incredible moment to have a black woman prosecutor going up against a white supremacist felon, and having and having someone who can literally, like, prosecute that case, like make the case about the threat that Trump has posed to America, and make the case for a different version of American future where black Women can have power, where all of us can have some power. And I think that there's just really, it really hits in your heart, and it's, I feel like I'm seeing this a lot as well, just like among Black people like my my mom, I was telling this to my fiance the other day. I was like, my mom was just talking about driving old folks to the polls. I don't think I've ever seen her do that before, but she's just so hyped right now, and it's just a really exciting, energetic time.

Unknown Speaker 17:55

I mean, I'm enjoying myself so immensely. I actually got emotional remembering that moment of from Justice Jackson's confirmation, because it was so poignant, like I I teared up all over again. And I just think it's, I mean, we were talking about it before recording started. It's just good to be having some fun again. It's just the immediate vibe. Shift was so big and and so noticeable, and allows Democrats and progressives to have a different conversation that having Joe Biden at the top of the ticket needed to have happen, but wasn't going to happen with him there. And so, you know, white women, you know the assignment, go do it. Yeah, for real. I think, I think what's so important, even even if you know, if you were to construct a candidate in a lab, like they would, might have, like, further left positions, or whatever you but I think even so, we are now in a position where we don't just have to feel doom, but we can instead think about possibilities we can like, dream for a better future. Think about also to think about, pick your opponent, like, like, pick like, who would be, who would be a better, more pushable person in office. And this is just a whole different conversation from thinking about, what will it take me to survive to Can I actually enable people to thrive? That's an entirely different conversation. And so it just feels incredible that we can start to have that discussion, that we can like wet head in that way, exactly in fact, in the last episode that we did with Lisbon, said Imani and I were talking with her about how this moment allows us to hopefully finally start to take and craft a proactive vision when it comes to reproductive rights, health and justice, for example, rather than a reactive one. And since Dobbs under the Biden administration, policy has been reactive. Even the response codify roe is a reactive response. It's not a proactive response. And it is important that we give people a future looking vision, not a reactive looking one. And I think a candidate Harris is able to do that. And then it's also opened up the conversation on court reform, the idea that this is now something that Joe Biden has said that there is momentum around, and not just a commission to study and issue a report on the Supreme Court. What do you think? Do you think? Do you think something might get done? I think so. I think that there's energy and momentum there, and I think that folks are more aware than they have been at any other point in the past few years, like on in one way, it's almost like the super majority on the Supreme Court OVERPLAYED THEIR hand a little bit like, you know that John Roberts must have been stressing at least a little bit. He's like, I have been working so hard to quietly chip away everybody's rights for years, and now y'all come in here like a bull in a china shop making all this noise, and now people are looking over here flying your flags, just like, let me work in peace.

Unknown Speaker 21:21

But I think that now folks are more like, more tuned in than they have been. Folks on the left are more tuned in than they have been in a long time to the stakes of the court, like, just how bad the court is. And now there's a lot on the table, like, now we can begin to, like, push meaningful reform, and like, introduce these ideas to people. I also, I would say we should, like, get people thinking beyond just an ethics code. Like, obviously they need an ethics code, but it's like, okay, let's, you know, also, we need court expansion. And also, let's maybe talk about, like, jurisdiction stripping, and also, and also, like, we can, we can go further. And these are, these are conditions in which we can actually think about going further and introducing these concepts to people, and like, starting to build a constituency who would support that. Can you explain to our listeners what jurisdiction stripping would entail? Yeah, so jurisdiction stripping is the idea that there are certain types of cases that the court can't hear. This is something that is within Congress's power to do. They have, like, set up courts before to be like, this is a court that hears this type of issue. So it's entirely possible for the for the for Congress to say, Sorry, excuse me, to say you don't get to decide cases about X, you know, it could be, it could be something like, you don't get to decide the constitutionality of the Voting Rights Act, uh, or my, here's my really hot take, yeah, you don't get to decide anything that's enacted under the authority of the Reconstruction amendments, like, if it is designed to like, address, anti subordination, mind your business. That's fantastic. So next term, we gotta talk about

Unknown Speaker 23:21

everyone but, you know, they punted on the mifepristone case, they punted on the EMTALA case, essentially. So we very well may have those same two cases next term, and then on top of that, we've got Title Nine. We've got the trans the gender affirming care for many like, what? What is gonna happen? Are we gonna survive next term? I think

Unknown Speaker 23:50

you're our only hope. Oh my gosh, no, I'm kidding.

Unknown Speaker 23:57

Again. I have multiple responses because I want to, I want to be respectful of the very real threat that this does pose to people's lives. Yeah. So I think, I think that sometimes, while there's power in saying, you know, we've made it through this thing, before we can make it through that, there's always some folks who are like, I mean, not all of us made it right. Which is, which is, like, a really, a really harsh reality to grapple with. At the same time, I'm unwilling to say, No, we're not going to survive this, because I kind of think that that does the conservative legal movements work for them a bit if folks like give in to that sense of there's nothing we can do lost like pessimism, I think that, yeah, that just that just makes it so much easier for them. Like, as soon as we say all is lost, then all is lost. Yeah, as long as long as we say that we're going to fight this, then the fight continues. Um, and so I think so, I think that's something to consider. I think that I would also want to make clear to like voters specifically and Americans more generally, like that those cases are still coming down the pike. Like, I know people have a sort of, maybe even a bit of sense of relief. Like, Oh, thank God. They didn't hear that. They recognize that those folks don't have standing in the mid ether stone case. Or, like, okay, they

did not, and they declined to say that women have to bleed out in Iowa or Idaho, losing the IC right now, Idaho, thank

Unknown Speaker 25:33

you. But I think it's useful to point out that those things aren't going anywhere. Also that the reason why the Supreme Court stayed its hand a little bit is because they have calendars and they know that November is coming, right? And they're like, oh, man, this could be bad for my team to decide this right now. Like, I don't want to really rile people up who care about bodily autonomy. So it could be like, Hey, you're not slick, like we still see you, and like you're not going to get away with this. So I think that folks should think that people who are enmeshed in the legal world should try, like, make that clear to like, lay people to so so they know that these things are still a threat. The court is trying to pull a fast one on you, and so we need to take court reform seriously. Because, yeah, the threats not going anywhere unless we make it go someplace. Are there any other cases or like areas that you see storm clouds forming around for this court for next term. Let me think for a second. I mean, I don't, I'm not sure about next term. Specifically, I would have to look and see, you know, like, what all, what all is percolating in the lower courts. But I definitely have post Dobbs, like, been on, been on the lookout for broader attacks on substantive due process, yeah, like Clarence Thomas's concurrence in dogs haunts me, as he said, you know, like, yes, it's correct to overturn, overturn Roe v Wade, but also we should be overturning all these other cases that that are built on substantive due process, such as the right to contraception, such as same sex marriage. Notably, he left out interracial marriage. hilariously, since he is in one again, not subtle Clarence,

Unknown Speaker 27:44

but I but I think that we've already seen, already seen folks making some, some of these sorts of arguments saying Obergefell should be overturned for the same reason that dogs was overturned. So that's something that I have been on the on the lookout for. I mean, Kim Davis is back right from the Obergefell fight. She's back, and could possibly be one of the cases that starts to really tee up in seriously aggressive ways for the conservative legal movement, the Obergefell challenge. I mean, that bitch may just get it done. Can you explain you gotta, you gotta give a listen as a recap of who Kim Davis is, that long do I have two little houses of Perry looking lady. Kim Davis was a county clerk in Kentucky who was refusing to abide by the dictates of Obergefell and grant marriage licenses to same sex couples. And then basically, and I need to go back and look at the at the filings now, but I believe she has been challenging as a result of qualified immunity from her position as a as a clerk, this whole process and fine, and I don't know, I just have visions of her, like standing there with Mike Huckabee, clasping hands. You remember all that nonsense? Oh, wow, we're doing some deep cuts. But yeah, um, yeah. And she did, she very, I mean, Little House on the parish here, but like that, like that, like very, like, stern white woman from Appalachia look with, like, hair down to her waist and not a lot of color in her face at all. Like, very pale, very pale, kind of, like eyebrows matching the skin, kind of pale anyway, I think you know, as you're as we're talking about Kim Davis and her refusal to grant these marriage licenses, it actually made me think a little bit about the abortion bounty hunter law in Texas and about how the function of a lot of these legal attacks from from the right way is like empowering individuals, like random vigilantes to enforce and they're really like

entrenched and maintain their like white supremacist conservative Christian world views like part of part of why the right disregards the Reconstruction amendments is because they don't want to think that the government has the power, much less the obligation, to address discrimination and oppression. They want to live in a sort of might makes right world where the people who have always had power continue to have power. So like the white and wealthy and folks of that ilk, they are able to dominate over everyone else, like people can call in, like, they're like hotline. They're like neighbor who's having an abortion, or someone can reject the ability of gay couples to get married like any other couple. This is all sort of like deputizing people like individual members of the public, to execute this really reactionary vision, and simultaneously rewriting the First Amendment to insulate governmental agencies from doing the same thing, because you can empower individuals to enforce a particular white version of the law while also empowering agencies to, say, deny foster care placements to gay couples, for example, right? So it's there's not a hypocrisy there. It's actually all in the same breath, and to potentially deny health and human services the right to make rules regarding placement of children, right? With the decimation of the chevron doctrine, which is a totally different podcast topic for another time. Fatima, I wanted to ask you, as we're wrapping up here, what are you doing for fun, like you're getting married. So I'm not I'm sure the actual marriage part might be fun, but maybe the planning could be a little stressful. But what are you doing for fun? Yeah, the planning can be a little stressful. I sometimes break and do like, honeymoon planning instead, just like looking at, like, hotels and like, nice places abroad. And my partner was just like, shouldn't we plan the wedding first?

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