NATIONAL CONSTITUTION CENTER

2021: A Constitutional Year in Review

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[00:00:00] Jeffery Rosen: Hello friends. In honor of the 234th anniversary of the ratification of the US constitution, the national constitution center is launching an exciting crowdfunding campaign. Thanks to our friends at the John Templeton foundation, every dollar you give to support We The People will be doubled with a generous one-to-one match up to a total of $234,000. Right now we have a total of 162 donations from 40 states for a total of $21,098.64 cents. So we are making progress week to week and let's keep the momentum going. We'd love to see donations from all 50 states. We don't have donations yet from Hawaii, Idaho, or Kansas. So if you're a listener in one of those states, it'd be so wonderful if you would consider donating $5, $10 or more. This is such a meaningful opportunity to show your support of constitutional education for all. Please go to constitutioncenter.org/wethepeople. That's all one word, all lower case.

[00:01:03] Now on to today's episode. Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit, chartered by Congress to increase awareness and understanding of the constitution among the American people. What a year in constitutional history from a mob storming the Capitol on January 6th to Supreme Court cases about religious liberty, voting rights, abortion, and guns, to the continuing challenges of a global pandemic. It has been a year to remember. Joining us for this constitutional year in review are two of America's most thoughtful and illuminating commentators about the constitution. Adam Liptak is Supreme Court reporter for The New York times. Before becoming a journalist, he was a practicing lawyer for 14 years. Adam, it is wonderful to have you back on We The People.

[00:02:08] Adam Liptak: It's great to be here, Jeff.

[00:02:10] Jeffery Rosen: And Jennifer Mascott is assistant professor of law and co-executive director of The C. Boyden Gray Center for the study of the administrative state at the Antonin Scalia Law School. Jennifer, it's great to have you back on the show.

[00:02:24] Jennifer Mascott: Thank you so much. It's great to be with you again.

[00:02:27] Jeffery Rosen: Let us begin with January 6th. Adam, after the assault on the Capitol, you wrote a series of pieces about the legal difficulty of proving incitement, both in an

impeachment trial and in a criminal court. Tell us about your reflections on the legal legacy of January 6th.

[00:02:47] Adam Liptak: January 6th has many legal legacies and the house is looking at some of them. A narrow question, and maybe not the most important question is, can people be prosecuted for inciting the attack? And the first amendment imposes, uh, properly, very high **[inaudible 00:03:07]** on that kind of prosecution, because it would be problematic for loose political speech to be prosecuted, even if it plays a role in deeply pernicious consequences. So my conclusion based on, you know, Supreme Court precedent, notably a, a case called Brandenburg, is that such prosecutions are very difficult. So that's not to say it's not gonna get to the courts. In other ways, there are contempt proceedings against Trump administration, allies and officials and momentarily, we're gonna have coming to the Supreme Court, an application from former president Trump, who's seeking to block the disclosure of materials, White House records held at the national archives. And he's going to assert... And has asserted executive privilege over that. There's a live constitutional question about whether a former president can assert executive privilege when the current president has waived it.

[00:04:09] Jeffery Rosen: Jen, what are your thoughts about those open questions arising out of January 6th? Do you think a former president can assert executive privilege when the current president disagrees and, and what are your thoughts about the congressional investigations of January 6th, which which could or could not lead to criminal prosecution?

[00:04:28] Jennifer Mascott: Obviously, in the wake of the January 6th events, the Department of Justice did conduct a lot of investigations and did bring a lot of prosecutions looking at a lot of different aspects of what happened that day in a lot of the various in individual actions that were taking place. 'Cause of course it was a multi-layered event, right? So folks are... And when we talk about questions of executive privilege, people are wanting to analyze sort of the relationship between public figures and what happened. And then of course you have the individuals on the ground and, and perhaps those circumstances and those situations, um, you know, should be evaluated very differently. And one of the questions I guess, is how, or was there a connection and that, and that kind of thing? And so obviously, that's some of what, um, you know, is explored, I guess, through questions of prosecution, and precisely who should be investigated in what capacity.

[00:05:14] As far as the January 6th commission and the executive privilege questions, I do think... agree with Adam that those are very interesting questions. And you know, when I was at the Department of Justice, one of the offices where I worked, the Office of Legal Counsel, generally, is often asked because it, it has sometimes constitutional components to questions of executive privilege. So sometimes we're asked to look into that a lot. So I think here, you know, as Adam pointed out, some of the questions that are not fully answered do deal with the extent to which a former president has an interest in, in, in protecting documents. Now the Supreme Court, generally, has suggested in a case Nixon versus General Services Administrator, that there is some remaining interest that a, that a former president has in the executive privilege applying to what happened when he or she was in office. Now of course, it does have to be balanced, I suppose, against the current president.

[00:06:07] It also here, I think it would raise questions, right, of does executive privilege apply to anything the president's saying, does it matter whether it's involving official business versus something that wasn't official, how far away from the president, how many conversations other than things directly with him about him preparing to advise him. to which does it apply? And then how does the court evaluate past versus former? Is it just the fact that when the, the current president doesn't think the document needs to be protected, does that eliminate the, um, former president's interest? And I'm not sure that... I mean, we'll see what the courts say. Obviously, the DC circuit has weighed in. As Adam points out, the Supreme Court would be the next step.

[00:06:48] I mean, if one looks at, historically, what the executive branch has thought is the purpose of some of the, um, interest in a former president and com- communications that occurred when he was in office, it stems to considerations of making sure that the president can have full deliberative information and advice. And so again, not answering the question of whether we're even talking about official communication here in the first place, right? Because was January 6th involving official business? That's a separate, I think, evaluation in the scope of the records being requested again in all of those things. But if you're just assuming that there's anything that otherwise would, would fall within the scope, the idea of executive privilege is that we want a president to be able to get full, transparent, thoughtful advice. And so if advisors know that the privilege is going to break or evaporate or be able to be completely vetoed by the next president because of political opposition or something like that, then one wonders how an advisor at the time can feel fully protected.

[00:07:49] But you know, again, how far does that extend? And if the current president doesn't think that the type of communications fall within that scope, how much weight should the court give? I think those are all very thorny, obviously not completely explored questions. And I don't know. I mean, my sense is that probably here, because of the scope of the request and some of the factual circumstances, perhaps if the question is, is put to the court, there will be other factors and other grounds on which it can sort of resolve the dispute instead of going to that wheelhouse core question about how far a former president's privilege extends. But, um, just 'cause again, I think this is multi-layered, but, but uh, but we'll see.

[00:08:30] Jeffery Rosen: Thanks so much for that and look forward to reconvening as those cases work their way up to the court. Let's now turn to June, 2021. It's the end of the October, 20 term, Adam, you wrote a fascinating roundup for The New York times, calling this a court that is fluid and unpredictable. You noted that the three member liberal block was in the majority in 13 of the 28 divided decisions. And you also noted that justice Brett Kavanaugh was most likely to be in the majority in divided cases. He was in the majority 93% of the time followed by the chief justice at 86% and the other two Trump appointees at 79% and 75%. What was your perspective on the Roberts Court in June, 2021?

[00:09:20] Adam Liptak: Well, when you look at the array of the justices, you will see that the arrival of justice Amy Coney Barrett has thrust the chief justice out of the center spot, ideologically. And for the time being at least seems to have placed Brett Kavanaugh there. But the important point is that the chief justice, who was briefly not only chief, but the swing justice, first time since 1937 we've seen that, now has less ability to control his court, has five justices to

his right. That didn't fully manifest itself in the last term, which sent all kinds of different messages.

[00:10:00] It ended with a bang and probably the most important decision of the term in which the court dramatically narrowed the remaining piece of the voting rights act, which, uh, it had earlier struck down... in effect struck down the heart of. But in other decisions during the term, the court did things that were unanimous, sometimes truly unanimous, sometimes unanimous as to the bottom line, but importantly fractured as to the reasoning. And it did things that say at the confirmation hearings of Amy Coney Barrett, the left had predicted the opposite of what it would do. Uh, it rejected a third major challenge, for instance, the Affordable Care Act.

[00:10:49] Jeffery Rosen: Jen mascot, you had the remarkable opportunity to teach constitutional law course with justice Kavanaugh last term about the Supreme Court term. And you're going to teach one at George Mason with justice Thomas about the history of administrative law. Tell us about your perspective on the October '20 term from the perspective of justice Kavanaugh, who as Adam said, became the median justice, replacing chief justice Roberts.

[00:11:17] Jennifer Mascott: Well, thanks Jeff. Yeah, so I should just first, I suppose, give a, a shout out to the... my two former bosses and then... So many of the justices who take a lot of time to teach with students, um, justice Thomas and justice Kavanaugh both have taught at a number of institutions over the years have, has, have a lot of the other justices, justice Gorsuch, also does a summer course with Scalia law school. And so we're very great grateful for everybody's, everybody's time in doing that. And I think it's just wonderful for students when they can get to know justices in person and see the thoughtful way in which they all, they all pursue law.

[00:11:49] Before getting too specific with each justice one by one, I do wanna pick up on a theme that I think was implicit in Adam's answer, which I think is actually a, a really, uh, interesting point, is that there were a lot of predictions perhaps of certain rulings or things that might happen in the 2020 term that did not necessarily come to fruition in the way people would've expected or accused, or however you think about that, the court, um, taking them. It's interesting actually that justice Thomas, um, my former boss joined justice Breyer's opinion that Adam mentions in the Affordable Care Act case in deciding that case on stand and instead of reaching the merits. And so I do think folks were surprised about that.

[00:12:25] And then also actually, you know, there were a number of times where the court did not necessarily rule in line with the way that then president Trump or his personal supporters would have asked in some of the election cases. And so I do... I think actually everybody should take heart in a sense on a number of... a number of grounds. Number one, that even when we talk about some of the five to four decisions that I guess we'll talk about on this episode, that still, there's a surprising number of cases where the court has a lot of, um, agreements. And so it's certainly not always in as much tension, I think, as we always like to, to think of it, I think the justices all get along very well. And I think they are all despite the fact that, that some of them have quite distinct jurisprudential approaches are trying to get the law right.

[00:13:11] And so we should try to look at, at the cases as they come and look at them on the merits rather than sometimes getting too, too nervous or critical or prognosticating in a negative nervous way about what, um, what will or won't, won't happen. Um, and also, I think in general, hopefully the system over the years will take some of the spotlight off the court because I think just even more broadly, if we thinking about themes, separation of powers, the federal level, the court of course, was supposed to have the least policy making role, actually, have the smallest role in terms of deciding hot button issues for society. And so hopefully as Congress and the executive, um, deal with those issues among themselves over the years, the political branches will actually have a larger role in policy making. And some of these hot button issues we're about to talk about, like abortion, will not necessarily end up always in the final say with the federal court and can go more out to, uh, decision making bodies that can more, uh, easily reflect political will, electoral will.

[00:14:12] As far as the individual justices themselves, I do agree with Adam that it seems like the chief is playing less of a central role. And I, I almost wonder, I mean, with, with the Texas case with SBA, and I assume we'll talk about that more this time, but I... you know, I think in that case, um, that is sort of emblematic perhaps of maybe him being more in a five to four, like, four person minority role than in the past. And so we'll see if his role in the minority there and the recent decision is indicative of a trend that's going to continue. Now whether that necessarily means on the flip side that justice Kavanaugh is in the middle, you know, perhaps.

[00:14:51] Although, I think in the past when we've thought about people in the middle, sometimes folks conceived of justice Kennedy, or before him justice O'Connor as sort of almost brokering, like, agreements or being middle of the road, and I don't actually, a former Kavanaugh clerk, see him really, um, in that same vein. I do think, you know, he had many, many years of government experience, he had many, many years on the DC circuit. And I think has a very worked out jurisprudential view that is not actually primarily pragmatic. I think it's more, you know, rule of law and what he understands the constitution to be.

[00:15:26] And so to the extent that he is indicative of where the five to four court's gonna come down, I don't know necessarily know that that means because he's middle of the road, as much as just, you know, you have to count to five. And so to the extent that he, and perhaps justice Barrett think similarly about things or take a similar jurisprudential approach, that's gonna put them on the five to four side, even... just because that's kind of the answer that they think as, as a matter of first principles or current precedent is the correct outcome.

[00:15:54] Jeffery Rosen: Adam, it's striking to contrast your end of term pieces in June, '20 and June, 2021. In June, '20, you quoted scholars saying that chief justice Roberts was the most influential chief since chief justice Hughes, and that he was, as you just said, both chief and swing. And you quoted the most significant statistic being the fact that chief justice Roberts was in the majority in every one of the 11 rulings, decided by a five to four or five to three votes so far this term. By contrast, a year later everything looked different and it was justice Kavanaugh in the driver's seat. So broadly, as you help our list centers understand where the court is likely to divide in five to four cases, and where it's more likely to be unanimous, should we look to justice

Kavanaugh? And how would you describe the daylight between justice Kavanaugh and chief justice Roberts?

[00:16:47] Adam Liptak: Well, to step back for a second, the, the idea that chief justice Roberts, who's a product of the Conservative Legal Movement should turn out to be in the current judicial political landscape, a relative liberal, would've been shocking when he was appointed to the court in 2005. And to see him, not that infrequently, joining first, uh, the four member liberal wing when justice Ruth Bader Ginsburg was still alive. And that's one thing because if he joined that four member liberal wing, he'd be winning. But then to see him after justice Barrett replaced justice Ginsburg, on not infrequent occasions, joining what is now a three member liberal wing and losing. is really an extraordinary journey.

[00:17:41] So you saw in cases on clashes between government shutdown orders and really just liberty, and as Jen mentioned in the Texas abortion case, being on the losing end of five, four decisions is quite suggestive of something. And I'm not exactly sure what that something is. I mean, on the one... And I'm quite interested in Jen's thoughts. On the one hand, I, I, I'm sure it's just the earnest good faith legal conclusion of what the right answer is. But also you can't help but think that it has been his project all along as an institutionalist to send the message to the American public, that the party of the, the appointing president does not perfectly predict the outcome in controversial cases with a political valence. And I think John Roberts is a complicated person, hard to figure out what motivates him, what set of motivations drive him, but his journey on the court has been an extraordinary one.

[00:18:51] Jeffery Rosen: Jen, what are your thoughts about the question Adam poses? How do you account for chief justice Roberts' journey? Is, is his concern for institutionalism a big accounting for it? And how would you compare chief justice Robertson, justice Kavanaugh with, with whom you've taught a course, that they've voted together most of the time, more frequently than other justices, but there have been important times when they've diverged and particular in the Texas abortion case. So, so how would you describe the differences between them?

[00:19:17] Jennifer Mascott: Sure. Well, I mean, I'm not, you know, obviously a former chief justice Roberts clerk, and so perhaps, you know, his clerks would, would conceive of things differently, but my personal sense, and this is from even just listening, um, back in the day to his testimony at his own confirmation hearing to serve on the Supreme Court. I mean, I think, you know, often we go into these confirmation hearings as the public, very cynical, the justices are sort of trying to say the right thing to get confirmed, and I actually think perhaps he was just being completely earnest and telling us right then and there, what we have seen to be the case. And he used the, um, metaphor of being an umpire calling balls and strikes. He talked a lot about the institution of the court. He himself had been an advocate for many, many years and have quite excellent, quite well prepared.

[00:20:01] And so I think actually both things that Adam are saying is true, is that he's trying to decide things correctly on the law and also being an institutionalist. And my suspicion is that his view of the role of the article three judge and his role as the chief justice might actually be that that is sort of a lawful constitutional role. Just like some jurists believe that part of their

constitutional role is to apply stare decisis, others like justice Thomas would more, uh, frequently say, "Well the institution comes first, and so it Trump's precedent and so my role as a judge is to get the law right," but if you're a judge who thinks the article three role imports stare decisis, or maybe you're a judge who thinks the article three role imports keeping the institution apolitical, and so if that is truly within justice Roberts' construct of what it means to be a judge, he may indeed, as he is being an institutionalist be treating that as if that is his judicial role.

[00:21:00] And so I don't think so far from how they have, they have ruled, not, not that anybody else is trying to be political, I just think that if you look at how they're ruling justice, Kavanaugh, justice Barrett, Alito, Gorsuch, um, Thomas, clearly do not seem to have institutionalism as is primary of a role. Perhaps they all fall along different parts of the spectrum of stare decisis, which is why you might see Kavanaugh veering from Thomas in certain cases or that kind of thing. But I think they are all... Like, Kavanaugh's more talking about text history and tradition. What are the first principles? What are the constitutional principles plus all of the history that has transpired since then? And there's not a lot of discussion in any of his public remarks or his opinions, I don't think, to the same degree about institutionalism.

[00:21:50] And I do think that Adam might be completely right with the chief that there definitely at least seems to be sometimes the main explanation about why one might rule one way in one case and another way and another. That it's more about not wanting to be too political rather than that the answers just align simply on the narrow doctrinal issue that's at stake sometimes when you see how the chief has sort of progressed over the years. And to be honest, I don't know where this will lead, 'cause I do, I do agree with Adam as well, that I think it's...

[00:22:21] You know, surprising on 2005, I would not have necessarily predicted him to be in the minority in the Texas abortion case, or even talking about the importance of being able to apply the prec- the abortion precedent in the way that you sort of see him hinting, he thinks is important in his concurring opinion in that case. Um, whereas, you know, you have Kavanaugh, Barrett, Alito, Gorsuch, and Thomas solidly on the other side there in just applying the Texas statutory scheme to the full extent that they see is required by, by the text of that law and by the, by, uh, their, their precedent and their role as jurists.

[00:22:57] Jeffery Rosen: Adam, what do you think of Jen's interesting hypothesis that the difference between chief justice Roberts and the other conservative justices is a concern for institutionalism and help us think through the five to four cases where chief justice Roberts did join the conservatives last year, most notably in Brnovich, the voting rights case, but also in some of the five to four cases involving religious exemptions from COVID. What explains when chief justice Roberts puts his institutionalism above his more conservative constitutional views and what does that say about the cases that are coming up?

[00:23:35] Adam Liptak: So here's a thought experiment, Jeff. As you recall, in 2005, judge John Roberts was appointed to succeed justice Sandra Day O'Connor. So he was going to be associate justice, John Roberts. As it happened, chief justice William Rehnquist died, and George Bush switched over the nomination and made associate justice Roberts in effect chief justice Roberts. The thought experiment is this, does an associate justice Roberts vote the same

way a chief justice Roberts does? And I think not. I think the burdens of the chief justice are somewhat different and he certainly conceives them as different. He is the custodian of the court's authority, prestige and legitimacy. And I think that weighs on and, to some extent, influences how he votes. And one thing and add to that his long expressed pension for incrementalism to decide less, if it it's possible to decide less rather than more, to move in the stately deliberate pace that the architecture of the Supreme court with its turtles prominently displayed suggests. And in his case, I think to have a decent regard for stare decisis.

[00:25:05] So that... You know, you have to give him credit for instance, in a pair of abortion cases where he dissents in a case from Texas, where Kennedy plus the liberals strike down a restrictive Texas abortion law. When essentially that same case comes to the court, now reconfigured from Louisiana, the chief justice, having expressed his legal view about what was the correct decision, goes the other way in Louisiana, out of respect for precedent. That's not always the case at the Supreme Court. Some justices think that they have a kind of personal privilege to keep dissenting, having once taken a position, even if the court says the law is different. I guess I'm trying to make the case, not in a reductive way, but in a complex and respectful way that the chief justice synthesizes strains of jurisprudential approaches, including a fundamentally conservative outlook to come to conclusions different than he would have had he been an associate justice.

[00:26:18] Jeffery Rosen: Jen, what do you think of Adam's thesis? I, I agree with it because chief justice Roberts told me in an interview for the Atlantic and in 2006 that he thinks that he would vote differently as chief than as an associate justice. And he talked extensively about his view that the chief's role was to preserve institutional legitimacy and unanimity, uh, invoking against his model, chief justice Marshall, and suggested that he would approach his job differently than an associate justice might. What do you make of all that? And, and how does that play out for, uh, the cases in which the chief and the other conservative justices are likely to diverge in the future?

[00:26:59] Jennifer Mascott: Well, I wouldn't find it surprising at all to think that the chief justice might be just ac- acting very differently now than, um, he would have had he been just, um, an associate justice. And perhaps that role would've, um, been impacted further still based on who the chief justice would've been appointed to be, had it not been chief justice Roberts. I mean, the other dynamics that I think will come into play, and I think it'll be curious this term to take a look at what happens is I, I think going along with thinking about the chief justice institutional role, at least if chief justice Roberts is following in the footsteps of the former chief justice Rehnquist... I mean, I think sometimes we saw Rehnquist also be influenced not just by the chief role, but sometimes if he could get himself as a rule of law matter or precedent into the majority, sometimes perhaps reaching votes that one might in the initial instance have been surprised by if they thought about the 1970s or 80s Rehnquist. So for example, like, continuing with the constitutionality of the Miranda doctrine.

[00:27:55] But writing the opinion that reaffirms it in a way that perhaps would be more narrow or different than if it had been written by the liberal leader of the court. So I don't don't know how much that will influence th- this current chief. Now this current chief obviously has a

different situation, 'cause he's got five conservatives now who can be a majority and peel that away. So instead of being a Rehnquist taking over a more liberal majority and making the opinion more conservative, now you have the chief where, you know, going the institutional way might mean being four in a five to four.

[00:28:27] So if we think, for example, moving us back to abortion, the Dobbs case this year with the Missi- Mississippi restrictions, if there are five justices who believe that the Mississippi law is constitutional, which I personally think there will be, at least if they stick with jurisprudentially how they seem to understand the constitution and other context, what does the chief justice do in that circumstance? Does his institutional desire mean that he would believe that that outcome's inconsistent with [Roe and Casey 00:28:55], which I think it almost certainly is, most people think it is, feel like he has to vote in the majority. Now that leaves five in the majority for the other side, and it's actually a five that's led a majority by chief justice or by... [laughs] Speaking, like... making mistakes. I was gonna say chief justice Thomas, not chief justice Thomas, by justice Thomas, who would be the most senior justice in majority. And then obviously of the opinion assigning authority, who clearly takes a much more searching approach to constitutional cases with less concern about precedent, not in a bad way, but just because he thinks his role is to get the constitution right.

[00:29:34] Does that opinion assigning authority stick with justice Thomas? If it does, does that mean justice Thomas writes it, does he have to write it in a different way than he would to keep Kavanaugh and Barrett on board, is the chief thinking about these things when he makes his decision? And so if he truly is an institutionalist, one would have to think all of those things could, if you're an institutionalist, be valid considerations. And so I just don't know that we... You know, Adam, tell me, um, if I'm missing... I might be missing something. But to me it seems like perhaps very different from even his role as chief, just a year or two ago, or from the role of chief justice Rehnquist or other people who have tried to figure out how to broker institutionalism now when they have a clear group who on very significant cases is inclined to go the other way. And indeed has gone the other way as recently as just the other day in the Texas abortion case. Which was not on the merits of abortion, clearly it was on jurisdictional issues, but still had... was tied to some hot button concerns that I think people in the country feel very strongly about.

[00:30:37] Jeffery Rosen: Adam, as Jen says, the chief's options as an institutionalist are limited by the court that he's got to answer her question. Maybe take us inside chief justice Roberts' uh, mind as he grapples with Dobbs. What are his options if he wants to keep the opinion for himself and to what degree are they constrained by the views of his fellow conservatives?

[00:30:58] Adam Liptak: Well, I gotta say I love Jen's slip of the tongue, and it's not unusual these days to talk about chief justice Thomas, uh, an advocate in the NCAA, uh, case made the same slip of the tongue. And these days that arguments justice Thomas, who had spent long periods of time, never asking questions for the bench, now routinely, almost uniformly, asked the first questions and it gives him a kind of stature. And he is of course, the second most senior justice after chief justice Roberts. To answer your question about the abortion case, Jeff, in the first instance, the question is not the rationale on which to, uh, uphold or reverse the Mississippi

law, which, uh, banns abortions after 15 weeks, well short of the viability standard required by Roe and Casey of, uh, about 23 weeks. So under Roe and Casey there's no question, but that the Mississippi law is unconstitutional.

[00:31:58] The chief justice alone at the argument seemed to propose that the answer is let's uphold 15 weeks. I'm not sure what the rationale is, but 15 weeks sounds about right. It's a point in time at which the vast majority of women already are able to get abortions. About 95% of American women get abortions before 15 weeks. It's only a week shy of what the sole remaining abortion clinic in Mississippi does, it only does abortions up to 16 weeks. It's consistent with polling preferences of the American public and it's consistent with what in different social context to be sure much of Europe does. A lot of Europe is at 12 to 15 weeks. So the chief justice makes the case that that's a sensible place to draw the line. Although, it might be a little hard to articulate the constitutional principle that would get you to the line. And it didn't seem at least an argument that in the other justice to his right was on board for lets uphold 15 weeks but leave it there.

[00:33:09] The rest of the court on the right seemed to be inclined to say, "We can't identify a right to abortion in the constitution. There's no other place to draw the line and we should return this question to the States. Now in the face of that is 50 years of precedent, and not only an initial precedent, but a reconfirm precedent. And if you take stare decisis at all seriously, you have to really grapple with that. But the question at conference is going to be affirm or reverse. And I think six justices, including the chief would vote to reverse the appeals court decision, which had as... you had to, under Roe and Casey, struck down the Mississippi law and uphold it.

[00:33:58] And my understanding, but I haven't been a clerk and Jen has, but my understanding is that that gives the chief, if he is in that group, even if their rationales are different, the opinion assignment power. And I believe he'll assign it to himself and do his level best to pick up additional votes. But it may be that at the end of the day, there's a divergence on rationale with only the chief saying 15 weeks is okay, and everybody else on the right voting to overturn Roe and Casey outright. At which point I think it probably does as a practical matter, fall to justice Thomas to assign the opinion. I don't have a good reason to think this, but my gut is that he doesn't assign it to himself, that he assigns it to justice Gorsuch.

[00:34:52] Jeffery Rosen: The national constitution center relies on support from lifelong learners like you to provide nonpartisan constitutional education to Americans of all ages. Every dollar you give to support the We the People podcast will be doubled with a generous one to one match up to a total of $234,000. That's made possible at the John Templeton foundation. Please visit wethepeople.org/wethepeople. And thanks so much for your crucial support that's constitutioncenter.org/wethepeople all one word all lowercase. Now back to the show.

[00:35:29] Jen, think through the options for We the People listeners in Dobbs. Can you imagine any scenario in which chief justice Roberts could keep the opinion for himself and narrowly uphold the Mississippi law without saying more? Or do you agree with Adam that the opinion will be written by someone else? And if so who would that be? And what will it say?

[00:35:48] Jennifer Mascott: To the extent that our earlier predictions or, or comments are correct and we think that the chief is still really gonna be primarily concerned about stare decisis, I would hope that he would not, in this sense, just from my own jurisprudential understanding about substantive due process and the meaning of the 14th amendment, that he would not keep it, because I think there are a number of justices who don't think that there would be, at least it seems like from oral argument, in other cases and things, a substantive due process right for the court to be making decisions about abortion. And then it should be something that the States can regulate. And so, you know, hopefully people will feel comfortable sticking with the same approach in this case, as they would, in cases that don't have the same kind of social or political significance, you know, that don't have as much attention that they'll still do, what they, they would've thought would've been right on the law.

[00:36:37] Um, anyway, and I think that they will. Um, as far as the point about stare decisis, I do think that's interesting to think through, because a lot of the briefing has made the case that, you know, you might think about it like, "Oh, Roe is now decades old, and then it's reaffirmed in Casey." But alternatively, you might say, "Well, if Roe had won ground and then Casey's reasoning in a different way, and then Whole Woman's Health later in 2016 is thinking, taking more of a cost benefit approach. Is that, is that reaffirming the precedent? Is it changing it? Is it sort of saying we as a court have never really felt comfortable with what the right evaluation is here, and so therefore a lot of the impetus for the normal reliance in stare decisis goes away? I mean, you might think that based on some of justice Kavanaugh's recent writings and other context on the factors. You look at in stare decisis, they certainly don't hold true here.

[00:37:26] Another interesting thing to think through is even though it was in a different context, Luxford of course dealt with what rights... substantive rights are in the 14th amendment in the context of assisted suicide. And this was a Rehnquist opinion, interestingly, talking about text history and tradition and finding no such, right. And so even though the court has yet to apply that in the abortion context, would that actually mean that there is a precedent that went applied means there's no right to abortion. And so Roe and Casey are no longer there and viable, but you might be able to figure out a way that they're not on, on multiple different fronts, and who knows which justice feels comfortable with which things. But I think all of those things might be different approaches than the chief would take. If he doesn't... If he, if he's thinking more along the lines that it sounded, he was thinking a little bit in the Texas abortion separate writing.

[00:38:16] And so again, if that's the case, I would like to see, you know, a group of five hold firm on what they think is actually, um, the right constitutional answer. You asked if I thought justice Thomas would keep the opinion or what would happen if he was leading a group of five. You know, it... At... Actually this, um, event that I had to celebrate the justices' 30 years on the court, we had a panel during the day with some of the former solicitors general or other longtime advocates like Lisa Blatt. And during that discussion, the topic came up of justice Thomas' seniority now over all these years. And what would happen when he had opinion assigning authority, or would the Chief just give him even more opinions because of that senior role and one of the predictions, or at least things... not... maybe not prediction, but what some of the

panelists were saying might be kind of fitting or match with his stature would be, for example, having a, a key opinion in a case like the second amendment case coming out of New York.

[00:39:15] And so I don't know if, if he ends up writing in a case like that, I could certainly see, you know, somebody different writing in Dobs like Adam is suggesting. You know, perhaps Gorsuch, Alito. So I, I think it'll be interesting to see. But the point that the panelists were making is after being there 30 years, he's been an intellectual leader, he's done a lot of separate writing, he's talking a lot now at oral arguments. We all can now see justice Thomas fully in his glory of this thoughtful jurist he's always been and that certainly that should be translating into significant weighty, majority opinions, like the kinds of things he's already been writing often in concurrence and dissent. So which cases will that come, come up in? I don't know, but as a former clerk, I cannot wait to read them. So I'm excited.

[00:39:59] Jeffery Rosen: Adam, your further reflections on the emergence of justice Thomas, as a leader of the court, remind our listeners, why he began speaking at oral argument, once it was telephonic in a way that he hadn't before. Do you agree with Jen that perhaps he'll write in the second amendment case and what might a broad reading of the second amendment led by justice Thomas look like?

[00:40:25] Adam Liptak: So justice Thomas has, partly as a consequence of his decision to remain silent on the bench for so many years. A decision that I think was driven by in large part simple courtesy. He thought the justices were asking too many questions, not letting the advocates say their piece. And even now, he will very seldom interrupt an advocate and in going first, he gets a chance to do it outside the argument's flow. This was, as you suggested Jeff, a consequence of the court's reaction to the pandemic when, for an entire term, it went solely telephonic. And not only solely telephonic, but it substituted for the free form... free for all kind of chaotic form of argument that it usually had to a different one where justices asked questions one at a time in lockstep formation in order of seniority. So in a sense, the microphone was handed to justice Thomas and he asked questions and it allowed the public to see that he is a sharp and sensible and good questioner. And it gave the public a different sense of justice Thomas.

[00:41:41] A second thing, maybe not widely known, uh, and, but Jen is an example of this, his former clerks have fanned out through the academy and through the government and through other institutions and have really taken a leading role in expressing a view of the law that has become quite prominent. Now, as for the second amendment case, the question in the case was whether New York could make it quite difficult for, uh, people to carry guns in public, to require them to meet a fairly high standard to justify their exercise of what many people think is [laugh] and how, and how could they not it, a constitutional right in the second amendment, particularly after the Supreme court has said the second amendment guarantees an individual right to bear arms unconnected to the militia.

[00:42:41] Now, we might get two decisions in a kind of tension. In one of them, the abortion case, the court may say, "States can do what they like on abortion." In the other, the guns case, the court will say that states can't what they like on guns. And I think Jen's suggestion that justice

Thomas might well be the writer of that opinion is a good one, particularly because justice Thomas has, in separate writings in dissents from denials of the court's decision not to review second amendment cases, been quite adamant that he views the second amendment right as a full bill of rights, right? Not as a constitutional orphan, not as a second class right, but one that needs to be treated as seriously as the first amendment.

[00:43:29] Jeffery Rosen: Jen, as a former clerk for justice Thomas, what are your views about why he's come to his own as a questioner? Is it just the telephonic format? Or is there something else involved? Uh, give us a sense of, of him as a, a scholar and a person, how exciting you're gonna teach a course on the history of administrative law with him. And then if he does write the second amendment opinion, do you think there are five votes for his view that the second amendment should no longer be considered a second class right? And what might the decision look like?

[00:43:56] Jennifer Mascott: I do think that there, I mean, it's always hard to predict these things, but again, based on the justices, jurisprudential views, I do think there would be five folks whose approach historically would be consistent with finding that the current way that the New York law is, is being applied and carried out and the regulations taking place is too intrusive on, you know, the second amendment right to bear arms. I mean, and we have actually separate writing from then judge Kavanaugh on the DC circuit, again, telling us about the text history tradition approach. And so I think that that case is going to come out. If again, if the justices are consistent with continue to apply what they've indicated they would i- in the p- in past opinions with their constitutional views will, um, find that there's been, an infringement on the second amendment right there. And we talked about the possibility of justice Thomas writing, that he would be a great author.

[00:44:43] I mean, the one, I guess, caveat that I should bring up is, you know, in the McDonald case from a few years back, he took the opportunity to write separately to explain the idea that the incorporation of the f- of the federal rights to the states should come through the Privileges and Immunities Clause rather than the Due Process Clause. And so I'm not sure the extent to which there are opportunities to write in general, on bill of rights cases, that distinction will influence whether he's writing, uh, in a majority or not. But in any case, any opinion by justice Thomas is gonna be typically full of a lot of history, a lot of thoughtful, theoretical, um, context about separation of powers and federalism, and really trying to peel things back.

[00:45:28] And one thing he like to talk to the law clerks about is, "You always go to the beginning of the train. Figure out where did the place that we are now as a court start? And if we think perhaps we're at a different spot than we would've been back in the 1700s with the original text of the document, or, you know, with, with the 14th amendment, obviously in the 1800s, um, what... where exactly in the length did we go astray?" And so he takes an effort to try to figure all that out. Even if it's a lot of work. And so that's why there have been multiple terms where he has written more pages of opinions than any other justices, even though many of them are in concurrence or dissent. So it's not surprising, I guess, that a justice who wants to go back to the beginning of where the train got off the track, would be interested in the history of administrative law.

[00:46:11] So in that class, it's a seminar style and what's really fantastic about it, and I think this is probably true of the format when a lot of justices teach, but, you know, we literally sit around a conference table with students and have a discussion. And so they will ask us questions. We will ask them questions. And so it's just a very... It, it's a more advanced course. And it's exploring now that we know the general separation of powers principles, we know generally how regulation operates, adjudication operates, let's figure out, is it operating now the same way as it has been, uh, since the beginning of the federal government here in the US. If not, are there outside influences? Or other changes that are influencing that? And so it's just a very rich class where we will hopefully read a lot of theory, but also a lot of historical cases and then current cases, and then even statutes, you know, figuring out how administration operates and I should give credit to now a DC circuit judge, Naomi Rao actually taught this class with the justice for the first time back in either 2015 or 2016.

[00:47:12] So you know, it's, it's great to be a law clerk in the same town as your former boss, because there are lots of opportunities to sort of, you know, benefit from their, uh, close proximity and love of students. Uh, so that's really delightful. And I think with the oral argument, I mean, I think so much of what Adam is saying is correct. Is that justice Thomas has always been sitting there dealing with these questions. In fact, back in the day when, you know, the public could come into the courtroom prior to the pandemic, it wasn't that infrequent that one would see justice Thomas and justice Breyer when they used to sit next to each other, sometimes talking or exchanging notes and sort of actively themselves, almost having a little side conversation about the advocacy and the case. And I do think... And, you know, look, and no one can jump into the mind of anybody else, least of all Supreme court justice.

[00:47:58] So, um, and I think justice Thomas has told us, you know, in different public remarks, what's, what's going on, which is that he does think the advocates come and you should have a chance to speak and, and be heard. And that there was often times a lot of, you know, kind of free form, maybe not sort of, orderly is the wrong word, but, you know, conversation where it wasn't necessarily always conducive to one person sort of easily kind of being heard or the advocate answering. And it is telling and interesting that when the pandemic, uh, format changed and they person by person by person that justice Thomas did fully participate in that tech advantage. And I, I don't know. I just think that now that the world has heard the kinds of questions he's asking, which often get followed up on by subsequent justices in their own questioning and often tend to press on key points of tension in the case, I think it's really that he's continuing to do that.

[00:48:53] And so I don't know... have any more information than the rest of us about, um, how the chief and the rest of the court settled on the current procedures, which seemed to be like a hybrid between how it used to be and then how it was during the pandemic when they weren't in person. But it just seems to be delightful. And I think the, the advocates themselves and the justices have all been doing quite a fantastic job at, um, really trying to explore some of the consequences and implications of the various views that the advocates are putting in their briefs in a way that's very, um, enriching for the decisions that are being issued and also for the discussion, um, in the courtroom itself,

[00:49:31] Jeffery Rosen: Let's talk about the shadow docket. Adam, you wrote a piece at the end of September describing justice Alitos defense of the Supreme court against what critics, including justice Elena Kagan, called the shadow docket. What is the shadow docket? And do you think the court is responding to criticisms? Including by the Biden Supreme court commission, which tentatively talked about the virtues of transparency and accountability, and when it decided to hear the Texas abortion case more quickly on the merits.

[00:50:04] Adam Liptak: So just to define things, first of all, Jeff, the shadow docket i- is when the court hears emergency applications. It's different from what we're used to thinking about the Supreme court. What we're used to thinking about the court is that it acts over many months. It decides whether to hear a case. If it grants a petition seeking review, it gets a second round of briefs. It hears oral arguments, and many months later, it, uh, issues an elaborate decision, often accompanied by concurrences and dissents. So it's like a term-long project, and that happens maybe 65 times a year.

[00:50:45] Jennifer Mascott: In addition to that, the courts sometimes in very short notice on thin briefing without oral argument in a matter of days, jumps into cases on emergency requests from parties who say, "A lower court has done something and you Supreme court need to fix this right away? And the court issues orders that sometimes have no reasoning, sometimes very little reasoning. And that's what people call the shadow docket, these emergency applications. It's well documented that there are many more of these these days than there used to be. As we speak, we're waiting on literally five different decisions on things like the OSHA vaccine or test mandate, the mandate for federal healthcare workers request that the court revive an Arizona law, that forbids abortions when the sole reason for seeking the abortion is a genetic defect, the San Diego school district's vaccine mandate without a rule exemption and on and on and on. And nobody thinks this is a satisfactory way of issuing major constitutional rulings, but justice Alito said, "Hey, it's not our fault. These things come to us and we have to deal with them as best we can and there's truth in that."

[00:52:08] But I thought there was a very telling and smart concurrence from justice Barrett joined by justice Kavanaugh, maybe about a month ago in a case about vaccine mandate, uh, for healthcare workers in Maine where justice Barrett said, "Let's slow down. We ordinarily leave lower court decisions in place when parties seek review, when they filed petitions for writs of certiorari. 99 times out of a hundred, we let the lower court decision stand. And that ought to be the default in these emergency applications too. We shouldn't necessarily take the bait and issue major decisions in this kind of rushed way." And I, I thought that was quite sensible. And that goes to your point, Jeff, that one response to these emergency applications time permitting is to set them down for oral argument in the usual course. And that's what the court did in two cases, challenging the Texas abortion law. The court also did the same thing in a case on whether a Texas death row inmate could be prayed with touched by his pastor in the death chamber. And so I think the court is taking these criticism seriously and the... these two choices. One, just leave the lower court ruling in place, unless there's an extraordinary reason to intervene, or two, send it down for regular argument are the beginnings of a solution to what has really turned into a very unsatisfactory way, way to run a Justice system.

[00:53:51] Jeffery Rosen: Jen, you joined us in October for a wonderful We the People discussion with Steve Ladik about the shadow docket. And you testified before Congress about it. What do you think of justice Barrett and justice Kavanaugh's concurrence suggesting that the default should be let lower court decision stand? Do you think that the court is responding to criticisms of the shadow docket by setting more cases like the Texas ones for oral argument? And what do you think the future of the shadow docket looks like?

[00:54:19] Jennifer Mascott: So I don't think there are really easy answers to this problem, which at this point does seem somewhat intractable in the sense is that I'm saying there are so many emergency petitions and motions before the court. I mean, and in my own view, just as a scholar stepping, stepping one step back is, you know, over the years, more and more questions have come to the federal government. Generally the federal government's doing more things, broader policies, executive branch is taking more actions calling for more emergencies, issuing more broad rules and so there are very, very big weighty actions being taken at the federal level that then litigants are challenging. And initially now some of the response has been in the lower courts than to have a big hammer to respond to some of these big actions, which is the rise over of the years of the, uh, issuance of the national injunction.

[00:55:11] And so all of these things then mean the pressure keeps moving upward and eventually comes to the court, because if you have a broad governmental action that then a litigant tries to go and get a broad remedy, and then the Supreme court's reviewing that, it's in a very sort of tense emergency posture. And it's kind of... I think justice [inaudible] correct, the court is receiving only the cases that are being brought to it. And they're being brought in an, not only an emergency posture, but in a posture that has greater and greater stakes. Now, to the extent that you think some of that pressure is starting earlier than when it gets to the court, I don't know if the right answer is always to assume we're gonna leave it with the lower court until we can take more time. Because... I mean, if the national injunction truly is a broad remedy and one that's being used more frequently than it was in the past it's the least intrusive answer for the Supreme court to just let that stand. And then all you've done is push back down to the district court level with one jurist rather than a body of nine or a three-judge -panel of the appeals court is then doing the emergency decision.

[00:56:12] Is that better than the nine jurists that a President and the Senate have concluded are the best top jurists in the country, deciding something in emergency posture? It's not, it's not entirely clear to me that that is the right answer. I mean, I suppose on the flip side right off the Supreme court acts, it's got broader implication generally, but not when you're talking about a national injunction. So I think the answer generally is to just think about the role that we have, article three courts playing in general and the issues that we're trying to kick to them as a, as a country. And have we inadvertently put ourself in a situation where the court is just being asked to be the final word and too many big, broad policy decisions, and we're gonna have trouble until, uh, that ceases to be their role. I think that that might be the case.

[00:56:57] And even, even in the Texas abortion case. I mean, ironically, that was the case that seemed to prompt most immediately, the Senate judiciary hearing on the so-called shadow docket, which is really just the emergency motion docket. And there was all this concern, but in

the Texas abortion case, the initial ruling had actually been to leave the court of appeals decision in place and still people were concerned. And then the one last point, you know, this term, the shadow docket, it's really fascinating. I have to say as a law professor, that the phrase was really first coined by a law professor, friend of mine, Will Bo, who teaches at the university of Chicago, who's a former chief justice clerk. And that term was not used until he would... came up with an, a title for his law review article, which he has said was actually his second idea, not his first, but it just was so pithy that it really took on.

[00:57:42] He initially I think was, was writing a little bit of about the phenomenon of what happens when the court is not operating with the full consideration, with as much public information available to us, as it does on the regular merits docket and asking questions about whether that's concerning that we don't always know who voted which way, right? Because the justices don't necessarily always reveal who voted full or against the, uh, emergency ruling. But I have heard him in subsequent podcasts say he has himself, as he's seen this operate started wondering actually, do we want more transparency with the emergency rulings? Because maybe it pu- like if, if we make the justices publicly record their votes, then they're going to feel wrongly bound by that. And not willing to revisit in a more fulsome way when a case reaches them on the merit.

[00:58:33] So I, I don't think, as I say, there are easy answers to these questions. I do think the justices are trying to get the law right. And I do think they're responding to circumstances and we should take it as an opportunity not to think about whether the court is structured improperly or needs to be reformed, but whether the system that is causing article three courts generally to have as much jurisdiction and constitutionalized as many questions, if that's the concern. And I just... I don't... I, I think the fact that the Supreme court reform commission really did not come up with major tangible so-called solutions that everybody agreed, agreed upon... sort of suggested that it actually... the Supreme court itself is not really in need of reform at all.

[00:59:17] Jeffery Rosen: Well, it's time for closing thoughts in this wonderful rich discussion. This is a look back on 2021, the first full year that justice Barrett joined the court. Adam, the first thoughts are to you. What did we learn about the constitution in 2021? What are the big themes and what should We the People listeners be looking for as we look ahead to the new year?

[00:59:42] Adam Liptak: Well, a theme we haven't really Touched on, Jeff, is that through all of this and particularly lately and driven in large part by the Texas abortion case where the court... whatever the legal and jurisprudential merits, what the public saw is that the Supreme court left in place a Texas law that effectively banned most abortions after six weeks. And, you know, really flatly in odds with Roe and Casey, uh, and took other aggressive action in such a way that the court's public opinion approval ratings have taken a real hit. And it's caused several of the justices, including justice Breyer, a liberal, uh, to make public statements saying the court is not a political institution. It's a legal institution. But large parts of the American public have their doubts about that. Uh, that's reflected in the public opinion polling.

[01:00:44] It's partly a consequence of what a lot of people, on the left in particular, but not only, saw as an unfortunate sequence of events in the Senate blocking the appointment of judge

Merrick Garland, not even giving him a hearing and then rushing the nominate of justice Amy Coney Barrett. And all of that presents the court with a legitimacy problem. And one that I don't think is going to be helped by the likely outcomes of the two big cases, this term the one on the Mississippi abortion law, the one on the New York gun law. So this is a court in transition. If you're a conservative, you're delighted, it's got the wind that it's back and it's got a lot of room to maneuver and it's got five committed conservatives ready to go, but the court should not be insensitive to some of the legitimacy concerns that have had such a dramatic impact on its public standing.

[01:01:53] Jeffery Rosen: Jen Mascott, the last word in this great discussion is, to you, what are the big themes that we learned about the constitution in 2021? And what should We the People listeners be looking for as the new year approaches?

[01:02:06] Jennifer Mascott: I feel optimistic. I mean, so I would like to say that I think, you know, the theme of the year is the constitution is strong, is the separation of powers is strong. Um, we have a strong country, a strong American electorate. We are... Um, you know, we've struggled. We've had really, really challenging times with a pandemic and a lot of emergency situations, but we are together and cohesive, um, as a country. And I f- I think optimistically we'll be able to use that strength that we've used, um, in many, many times in many, many challenges in, in the past with a lot of division and move forward thinking, um, just generally about how to serve each other and the rule of law and, you know, try to carry out constitutional principles just broadly as an electorate.

[01:02:52] For the court, I do think we see nine justices in very trying hard circumstances laboring to get the answer right. Laboring to apply, um, the constitution. And they've taken a lot of effort and time with a lot of pressure. And I think it's important to keep in mind that in our system, at the federal level in particular, that the article three role was resolving cases in controversies. And so blessedly the role was actually not to be concerned about whether one is seen as a legitimate institution or polling. That is... There's freedom because there's life tenure, there's salary protection and so once that nomination and Senate consent process takes place, there's freedom to be able to protect minority rights and restrain government because of that freedom to not have to worry about one's political future. And so I optimistically am hopeful that Congress and the executive in the States will continue to take a greater role in the policy making. And the court will be able to... Um, they will sit back and respect the court as it takes its role in resolving cases and controversies and look forward to seeing that play itself out in 2022.

[01:03:58] Jeffery Rosen: Thank you so much, Adam Liptak and Jen Mascott for a wonderful discussion, broad ranging, thoughtful and civil. And thank you, dear We the People listeners for all the learning and light that we've shared together in the course of this extraordinary year. Thanks for educating yourself about the constitution and hears to all the learning we'll do together in 2022. Until then, thank you again, Adam Liptak and Jen Mascot and happy holidays, to all.

[01:04:28] Today's show was produced by Melody Rao and engineered by Kevin Kilborn. Research was provided by Michael Esposito, Chase Hanson, Sam Desai, and Lana Orrick. Please

rate, review and subscribe to We the People on Apple podcast and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional illumination and debate. And always remember that the national constitution center is a private nonprofit. Please consider giving to We the People in honor of the new year and having your gift matched. Thanks to a generous matching grant by the John Templeton foundation, every dollar that you give up to $234,000, and we've got a while to go to reach that goal, will be doubled. You can do that by going to constitutioncenter.org/wethepeople, all one word, all lower case. Friends, it has been such a pleasure to learn with you this year. Sending you and your family's warm wishes for the holidays and new year. And look forward to seeing you again and learning together in 2022, on behalf of the national constitution center, I'm Jeffrey Rosen.