

Jeffrey Rosen: [00:00:00] 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 nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

As we approach the anniversary of COVID-19 lockdowns across the globe, today we look back on COVID and the Constitution one year out, here to shed light on the many important constitutional and legal debates that have arisen during the past year are two of America's leading scholars who have litigated and studied these debates.

Joshua Matz is a partner at Kaplan, Hecker, and Fink, LLP. He has litigated cases about the rights of immigrant detainees, pretrial detainees, and voters during the pandemic and successfully represented Governor Beshear at the Supreme Court in defending his COVID-19 public health orders against a free exercise challenge.

He also served as counsel to the House Judiciary Committee for both impeachments of President Trump. Joshua, it is wonderful to have you back on the show.

Joshua Matz: [00:01:11] Thank you so much, Jeff, it's a pleasure to be here.

Jeffrey Rosen: [00:01:13] And Adam White is a resident scholar at the American Enterprise Institute, as well as assistant professor of law and the director of the C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia Law School at George Mason University.

He has written extensively about COVID-19 and the Constitution and discussed these topics in our Town Halls and on previous podcasts, which listeners can check out on our resource page. Adam, it's wonderful to have you back on the show.

Adam White: [00:01:41] Jeff, it's always a pleasure to be here and thanks for inviting me.

Jeffrey Rosen: [00:01:45] Joshua, as I mentioned in the intro, you successfully represented governor Beshear at the Supreme Court in a free exercise challenge involving COVID. Tell us about that case, what the Court decided, and other cases involving the Free Exercise Clause, religious liberty, COVID, and the Constitution.

Joshua Matz: [00:02:04] Happy to do it, Jeff. And again, thank you for hosting both me and Adam for what I'm sure will be a great conversation. So that particular case, it might be helpful to start by putting it in some context, which is that over the course of the pandemic one area that governments have sought to regulate among many others is religious worship and activity, often because there's a particular concern that large numbers of people meeting indoors and singing and chanting and spending hours at a time together creates a particular risk of COVID-19 spreading not only within that religious community, but also more generally among the population.

And so, much as governments have imposed a number of restrictions on various forms of assembly, cities and counties throughout the United States have, to varying extents, sought to impose some limitations on religious worship and activity, particularly in indoor settings.

There's kind of this inflection point in how the courts have handled those cases. So while Justice Ginsburg was still on the Court and Chief Justice Roberts was the swing vote on these issues, the Supreme Court generally took a broad view of the power of States and cities to impose reasonable restrictions on various forms of indoor religious worship and activity.

And the Chief Justice in several of his writings emphasized that principles of judicial deference to the elected officials and to the experts who advise them militated against aggressive judicial intervention in that space. After Justice Ginsburg passed and was replaced by Justice Barrett, the Supreme Court took a fairly dramatic and fairly immediate turn in the direction of subjecting forms of restriction on religious activity to intense scrutiny more than anywhere else.

I mean, it's, it's hard to think of any other civil right or civil liberty that has attracted the degree of attention and protection from the Supreme Court as religious liberty has. If anything, the Supreme Court has abandoned their protection of most other rights, like voting rights and the rights of pretrial detainees and migrant detainees, as we'll probably talk about later today.

And so there was a slew of decisions really starting with *Roman Catholic Diocese of Brooklyn v. Cuomo* in November of 2020, in which the justices, in the posture of emergency applications for relief to the Supreme Court, issued decisions that struck down a shifting array of state and local limitations on religious activity that had been enacted with the purpose of seeking to limit the spread of COVID.

So the *Roman Catholic Diocese* case, as I mentioned, came down in November. In early December, the Supreme Court tossed out rulings that had upheld COVID restrictions on religious activity in New Jersey and Colorado and sent those back for further review. Since then, most recently in the past month in February, the Supreme Court has twice invalidated limitations on religious activity, including bans on indoor worship in parts of California.

The case that I was involved in arose in the thick of that period in December in, in early December, late November of 2020, and I'll just state the facts in the issues very briefly. You know, Governor Andy Beshear of Kentucky on the basis of recommendations from leading public health and education experts in his state, had concluded that all indoor schooling, public or private, religious or secular, should be suspended for a fixed period of time in the end of 2020, and into the very beginning of 2021, because a series of events, including Thanksgiving and travel surrounding the holiday, as well as a spike in COVID rates in the states, made indoor schooling during that period of time, especially dangerous.

So he issued an order, closing the schools within the state for a period of just a number of weeks and indicated that he'd revisit that on the other side of that period to see if there was a need for continued school closures.

Danville Christian Academy, which is a religious school, a Christian school in Kentucky, brought a free exercise challenge to that order in which it was supported by a number of other entities, including the Kentucky Attorney General's office, arguing that the order, by burdening the school's religious activity--in particular its in-person meetings, which the

school argued were an important part of how it performed in practice its religion both including prayer services and also just including the, the conduct of the school and the religious education that occurred there--the school argued that his order in closing the school and prohibiting that improperly burden their free exercise rights.

Governor Beshear at the Supreme Court defended the order. He had prevailed. He lost in the district court. He prevailed on the Sixth Circuit, the Sixth Circuit upheld his order. The case went to the Supreme Court. And at the Supreme Court, the Court by a vote of seven to two denied the request for emergency relief to block his order as applied to Danville Christian Academy, principally emphasizing that the order was time limited.

And that at that point there were only a couple of weeks left in its duration. And given that and given all of the other surrounding circumstances, the Court, the Court's opinion was not a model of clarity on this point. It essentially said we're going to deny emergency relief, and we can look at this down the line of any sort of issue arises.

Jeffrey Rosen: [00:07:27] Adam, Joshua has really helpfully given us a sense of the broad range of free exercise cases, as well as telling us about the Danville Christian Academy case. Tell us about the constitutional debates on the Court on this question. Justice Neil Gorsuch wrote a four-page dissent in the Danville case saying that whatever the ultimate merits of the case, the court of appeals should have considered the challengers' arguments and it would have been better for everyone to resolve the case now under accurate legal rules.

And of course, in the New York case Justice Gorsuch also wrote a separate concurring opinion saying that there's a pattern of States using the pandemic as an excuse to treat religious exercise worse than secular activities and that religious freedom shouldn't be a second class right. So describe the position of Justice Gorsuch and Justice Alito, and maybe help us understand how that contrasts with that of other justices on the Court. And give us a sense of how you think these COVID cases should be decided.

Adam White: [00:08:26] Well, sure. And Josh used I think a really great term. He described an inflection point. I think that's right. Or at least circumstances seem to have changed in these cases and at the Court from when they first started hearing these cases in almost mid 2020 until the most recent cases. Obviously one of the changes is the change in personnel, the arrival of Justice Barrett to succeed the late Justice Ginsburg.

But there, there are a few other things as well. Just in broad terms, there's the passage of time sort of the, the, the shifting sort of mindset and, and deferential tone of the Court from this initial moment of emergency to the continued public health crisis. Although the question is how long do we stay in an actual, an emergency?

And that's something I was writing about in, in mid last year saying one of the greatest challenges for the Court and for all of, for the Supreme Court and for all of American government is going to be reconstituting government from the, the, the emergency footing where we rightly give a lot of power to executives and a lot of deference to them, to the part where the other parts of government began to play more of their role.

And so that's one of the, I think the changes over time second is some of the cases where the Court actually invalidated or enjoined state action or county action. I just think the facts of those cases were tougher for the governments to defend total you know, a hundred percent prohibition against in-person worship services, when other sort of large volume organizations or high capacity locations were allowed to have at least some people in place. In the, the case in New York involving the Catholic Diocese of Brooklyn and Agudath Israel Synagogue. There you had Governor Cuomo's statements surrounding the situation, which I think colored the case a bit. But I wouldn't deny that these are all sort of often hard cases to parse because they're so fact sensitive.

And to answer your question, Jeff, you look at the varying opinions that have come from the justices and you see some real distinct lines of, of emphasis and disagreement. Chief Justice Roberts, who you've studied, Jeff, more than just about anybody we see in these cases, a few of his themes of jurisprudence, right?

His openness to deference to the executive branch, particularly on matters of expertise. We see Chief Justice Roberts's wariness of of preliminary injunctions, nationwide injunctions in, in one of the cases involving the FDA and, and just his wariness about the lower courts and the Supreme Court jumping into things too quickly.

And we see Chief Justice Roberts really focusing on the facts of each case. Justice Barrett, though, she, you know, her, her arrival on the court adds to the inflection point. She's been pretty measured in these cases. She had a concurring opinion in the second case out of California, *South Bay United Pentecostal Church*, where she sort of joined the Court on some of its some of its pushback against the state of California, but, but did not sort of call broadly to negate state law. She wouldn't have gone as far as I think Justice Gorsuch wanted to go in that case.

We see Justice Alito's impatience in so many of these cases dating back to the first Pentecostal case where he thinks that these cases have a whiff of discrimination even while the government can sort of point to distinctions between church services and other in-person services, right? Either in terms of the number of people, in terms of the activities, singing and so on, and all that, Justice Alito just seems to have his, his radar up for, for a whiff of discrimination.

And, and Justice Gorsuch has been the most full-throated critic of government actions in these policies. And so what you get in these cases, there's an interesting mix of emphases, even just among the conservative judges. And since the November case, the New York case, you have seen the court begin to strike down limitations in at least a couple of these cases. And I think what we're seeing is the Court trying to grapple its way, the justices each of them trying to grapple their way to the end of the emergency footing and back towards something that resembles ordinary First Amendment cases.

And just one last note, So much of this is complicated by just the procedural footing of these cases, right? TROs, preliminary injunctions, nationwide injunctions in the FDA case. It

scrambles so much of just the normal analysis of these cases. Since they're not fully briefed and argued in the normal way.

Jeffrey Rosen: [00:12:59] Joshua, let's talk now about limitations on travel, assembly, and mask mandates and the constitutional issues they raise. There's a dispute in Texas right now about whether or not the city of Austin can require the wearing of masks in public. And more broadly, there are questions about mandatory vaccinations. What if all residents were required to get a vaccine enforced by legal sanctions, or if children are attending public school were required to get a vaccine. Tell us about current and possibly future issues involving restrictions on rights of travel and assembly, and also requirements of wearing masks.

Joshua Matz: [00:13:42] You know, those are incredibly interesting questions, Jeff, and. I think one of the challenges that many people face in trying to figure out how those issues will get resolved as a matter of constitutional law. And here I'll just dip back quickly into some of what Adam was saying 'cause I thought that was a very interesting and effective summary of how the Court is thinking about this.

You know, one of the challenges is that the Supreme Court has made drastic amounts of law over the past year. You know, he, the way Adam put it, is they're trying to get back to ordinary First Amendment, you know, practice. You know, to me, this, the opposite is true. I actually think what we see is a Court that is, has substantially changed what the law of free exercise looks like and what the applicable balancing tests are and the kinds of questions it asks.

And we've seen this in a number of areas of law as well, where the Supreme Court has been issuing huge numbers of unreasoned, unsigned orders, with a bunch of concurring opinions that don't clarify what a majority of the court actually thinks. And in the course of doing that, we can tell from the outcomes and the way that some of the justices are talking about it, that they're evolving the law in pretty major ways.

But we don't know exactly where, and we don't know exactly on what basis. And it's not always clear why certain rights seem to be favored by the Court like rights of religious free exercise, but other equally fundamental constitutional rights seem to get the back of the hand when they arrive at the Supreme Court in otherwise identical procedural postures.

And so, because there has been this intense uncertainty and instability in how the Court has seemed to approach these issues, and because courts generally have not given that much guidance, it's hard to know--and this goes to, you know, to the question that you were asking--it can be hard to know what principles will get applied as they seek to resolve some of the conflicts of rights that come up, right?

There are some areas where the justices seem very comfortable making judgements that frankly don't seem to me like legal judgements. They seem to be acting more like epidemiologists. That's true in many of the religious freedom cases in particular where the Court will say, you know, you impose this regulation on a church, you've imposed a bunch of other regulations on secular activity.

It seems to us like the religious activity is disadvantaged because the regulation may not account for as much risk of the spread of the virus, or it may not mitigate the spread of the virus as much. And so on that basis, we think that religious conduct is being treated worse than secular conduct.

Right? So you have these cases where the judgments the Court is making are not really legal judgments, they're judgments about how much public health risk certain activity poses. And then they're using that decision to drive a legal conclusion about whether government regulation is justified or not.

You have other areas where you see the Court take a totally different approach where they say, boy, we really need to defer. Boy, we're really uncomfortable overruling anything the government has done. We need to be very respectful of how the government has weighed these costs and benefits. Again, in the voting area, in the context of prisons and immigrant detention in the context of access to abortion, there've been a number of areas where that's really driven the Court.

And so I think the answer to your question at bottom is it's hard to know, because questions about mask mandates, questions about limitations on assembly, questions about requiring vaccination in order to return to a public school, can give rise to conflicting rights claims. And can give rise to questions about how strong the government's empirical justification needs to be for its policy and how tightly tailored that policy is to, you know, the epidemiological and public health objectives the government is trying to meet.

And what we've seen from the Supreme Court, I think has been a bit more confusion than clarity about, you know, how generally across constitutional law they're going to strike that balance. And layered over all of this, you know, and then I'll turn back to Adam, layered over all of this are these questions of, you know, how long is this going to last?

Are we going to be talking about mask mandates or vaccination requirements for months or for years, you know, how long will the Supreme Court accept arguments that were in an emergency setting or accept arguments that the strength of the government's justification for these restrictions is unusually strong because of the coronavirus.

And at what point may the Court say, enough people are vaccinated, or we've taken enough other measures, we need to start going back to something that looks more like normalcy, in which case the Court may start to look a bit more doubtfully at the strength of the government's justifications as measured against any infringements on individual liberty.

And again, that's another area. It's one of so many where we've gotten so little guidance and arguably some conflicting signals out of the judiciary.

Jeffrey Rosen: [00:18:36] Adam, in a review of a recent book by John Witt, *American Contagions: Of Policy and Pandemics*, you wrote that the line that Justice Alito has drawn in some of these cases between long and too long, broad discretion and carte blanche is less legal than a prudential line, and you asked whether judges can be trusted to decide these

important matters without becoming policymakers. And you talk about John Witt's approach to this historically.

Just beginning with that Texas case that I mentioned where just this week, Texas lifted its statewide mask mandate, but Democrats in Austin refused to end similar restrictions and the Texas Attorney General sued Austin, saying that the refusal to abide by state policy was illegal. How should the Court approach a case like that Austin case in a principled way, and more broadly, what broad principles should guide the judges in making these decisions?

Adam White: [00:19:34] It is true, as I pointed out, that the Court in drawing these lines is drawing lines that are not sort of straightforward self-evident lines of law.

It makes this area of American government right now, really difficult, especially when things move from the, the elected branches into the courts. That's an area that transcends constitutional law and the Supreme Court, of course, it's not limited to that. So many areas of law where we deal with substantial burdens, undue burdens, things like that.

The Court is always in the business of, of making factual judgements and that has sort of plagued the Court at times, or, or I think thrust the court into areas of politics. And this is the latest example of that. Of course, sometimes the courts do have to draw pragmatic practical lines under existing doctrine or under new doctrine.

So I don't want to overstate the point I made in that review. In the case of Texas, that's an interesting case because while the practical or prudential judgements about whether masking is required is justified or justifiable who ought to wear masks and in what contexts as I understand that case, it will be fundamentally a case about state authority and the governor versus local municipal authority. And those are lines that the Texas Supreme Court might be able to draw under clear law.

I don't know whether that case will get to the Supreme Court. I'm not aware. I, I have, I'll be honest. I haven't followed it that closely. I used to work for a Texas law firm and I followed Texas law a lot more closely in those days. I'm a little out of practice now, but this seems like an area of law where there is probably a right or wrong answer about how much authority the municipal governments and executives have. And it's the kind of thing that the Texas state Supreme Court can take care of.

Some of the other areas of law that you alluded to earlier in your question to Josh on say travel the rights of prisoners, the rights of, of detained immigrants, those I think are gonna fall into the much more complicated buckets of, of prudential judgments. And, I, I'm not sure how they'll play out.

On travel in a way, the timing of the COVID vaccine or the COVID pandemic affected the urgency of the travel cases. You know, we, the, the pandemic erupted in the mid to late spring. So when last summer happened, when most people would be traveling, a lot of people just weren't in the mood to travel anyway, we were all hunkered down. If maybe the pandemic had arisen five months earlier, six months earlier, the summer travel season last year would have arrived just as people might be feeling sort of tired, they would have felt

more tired of being cooped up and you might've seen more bristling over travel restrictions and then we might have seen more lawsuits then.

Ironically though, now I'm not sure how many of those lawsuits we'll see over travel now because thank goodness the, the, the rollout of the vaccine and so on, we just might not see as many restrictions. The other buckets of cases, I keep an eye on our policy reforms on COVID restrictions coming out of the Biden administration, through their agencies.

Those will be filtered through a lot of the normal doctrines of administrative law, which, again, for better or for worse are often very fact specific. You know, questions about, did an agency give a sufficiently reasoned justification for its policy. And so there too, we'll be back in kind of a nebulous categories of decision-making.

The last area of law I'd keep an eye out for is in the private sector. Whether private sector, vaccination requirements might raise issues under employment law, under collective bargaining law, to the extent that it's union members, who, who are required to vaccinate themselves. And I'm just, I'm very curious to see how that plays out. That's not an area I focus on as much, and so I don't have any great predictions, but it could give rise to some interesting cases.

Jeffrey Rosen: [00:23:11] Thanks for raising all those areas of law. And I think another round on this question would be helpful. Joshua, as Adam noted, the Texas case may involve issues of state versus municipal law.

Austin is arguing that its restrictions are legal because they came from a local health official rather than from the city-wide office. And the state is saying that its state law preempts city policy to the contrary. So you objected that the courts treated religious liberty rights differently than these other public health rights.

What principles should govern the, the questions we're talking about now, many of which do involve administrative law and help us think through some of those other issues that Adam flagged.

Yeah, that's

Joshua Matz: [00:23:58] an incredibly interesting question. And again, I appreciate how nicely Adam framed and teed up these issues.

You know, I think it's hard to give a comprehensive general account of the relevant principles. I apologize for being the guy on this conversation that keeps saying it's complicated and who knows. But, but let me try to unpack just a little bit, cause I think I can do a bit better than just that this time around.

You know, for some of these cases, the questions at stake are about essentially who decides, which is one of the most common questions in constitutional law. In other cases, the questions are about how must they decide, which is the most common question in administrative law. So in the, who decides bucket, we've seen a number of cases like this.

In Michigan, there were those big conflicts between the governor and the legislature over whether her emergency powers under state law allowed her to issue many of the COVID restrictions there that were among the, the country's most muscular, but also controversial. And ultimately the Michigan Supreme Court applying Michigan separation of powers, law concluded in my view incorrectly, but it concluded that she didn't have the authority to issue those orders. So some of these have been disputes within the separation of powers, others, like the Austin Case are disputes between cities and States governed by state principles of essentially localism versus central control.

There's also been some cases that present questions of the scope of federal power generally. Another one out of Texas, in fact, a federal judge there who had been appointed by President Trump struck down a federal policy that imposed an eviction on moratoriums, a policy that had begun under the Trump administration, and that had governed an estimated 40 million people and ensured that they were not removed from their homes.

In that case, Judge J. Campbell Barker held that the federal government lacked the power to regulate evictions under the Commerce Clause of the Constitution, which ordinarily gives the government incredibly broad power to regulate activity that either on its own or in the aggregate has important interstate economic effects.

And he reasoned, I have to admit, I struggled to understand the reasoning, to the extent I can, the logic seems to be that evictions are not themselves economic activity. Even though the reason a person is evicted is for, you know, an alleged violation of the contract. And even though a pattern of widespread evictions has massive interstate economic effects, you know, but the premise of that case was a point about the structure of the federal government and a federal power.

So there's one bucket of cases that should be decided under the ordinary application of principles that, that sort of structure the government and structure who decides. And in my view, the pandemic should change. None of those underlying principles. You know, similarly in the administrative law context, and as Adam pointed out, they'll presumably be many more of these cases on the way, right?

There are questions about what processes, what reasoning, what steps must agencies of various kind take to justify and to issue regulations that relate to public health and safety measures regarding the pandemic. And we've seen some of those cases. I'm sure we're going to see many more of them as the Biden administration gets more muscularly engaged.

You know, there'll be another set of questions, as Adam pointed out, about private market actors. I doubt we're going to see much if any constitutional law there, but as he pointed out, there are bodies of private law and public law, including employment, law and labor law that apply to the private sector.

There's also HIPAA and privacy regulations that could have significant implications for employers in that space. And there's already been tons of litigation in that, in that area. Everything from class action lawsuits over whether universities have to refund tuition

because of their decision to not continue in person classes to disputes in the real estate market.

Again, those cases should all be governed by the ordinary principles of private and public law that work in that space. And I don't see that there should be any sort of pandemic exceptionalism. The most challenging class of cases are the ones that as Adam described and, you know, I think I had been trying to emphasize earlier involve balancing, and most of modern constitutional law involves balancing tests.

There are relatively few hard and fast rules when it comes to First Amendment rights, Fourth Amendment rights, Fifth Amendment rights. And in a lot of those cases, you know, the challenge is that, you know, the government will have an interest in preventing the spread of the virus or will have other interests that it puts forward.

And those interests have to get balanced against the burden on liberty that results from its activity. And that burden could be that you can't dissemble, that you can't pray indoors without a mask that you are in a prison and you can't socially distance, right? There are all sorts of effects that, you know, you might be required to share data for purposes of contact tracing, which would raise privacy issues.

There's many forms that those issues could take. And, and in those areas, courts are making judgements. They're making epidemiological judgements. About the strength of the government's public health justification, right? How much will the regulation actually achieve what the government says? They're making judgements about the weight and importance of the civil liberty at stake, and then they're balancing those in a somewhat ad hoc way where I do think it's hard to avoid the impression that certain rights are favored and certain rights are not at least under the courts as they are now currently composed.

And most emphatically since Justice Ginsburg was replaced with Justice Barrett in at least some fields, you know. And there, you know, when you ask what the principles ought to be, and I'll wrap up with this point, you know, in my view, the principles ought to be that fundamental rights are fundamental rights and there should not be disfavored classes of fundamental rights, nor should there be preferred classes of fundamental rights.

And what I have struggled with as sort of the inconsistency with which the Court has approached many of these cases, and it's, you know, the idea that in some places, it trips over itself with deference and in others, it rushes forward to make sweeping public health judgements that seem obviously beyond its capacity.

And so what I think we would look for there is a measure of humility and a more a more stable approach to how it's applying these balancing tests, that, that account for competing constitutional values--an effort that might be helped if the court could be troubled to issue a written opinion explaining any of these decisions, which at the Supreme Court we've seen virtually none of, and instead have seen a confusing cacophony of concurrences plus a few dissents and a fair number of just totally unreasoned orders. And so I think that common law project would help answer your question about what they're doing and how they ought to be doing it.

Jeffrey Rosen: [00:30:21] Adam, what do you think of Joshua's distinction between two big questions who decides and how do they decide? And in your piece from August, COVID 19 and the Cost of Unsteady Administration you said that Congress, rather than the president should decide. You called on Congress in the interest of steady administration to seek out points of common ground on which to legislate policy solutions suited to the specific economic and public health issues now confronting us. And if Congress were indeed to legislate, what substantively would the legislation look like?

Adam White: [00:30:57] Yeah. Well, when you call on Congress to pass legislation, I mean, it really is the triumph of hope over experience, right?

I hoped to see Congress do more last year. They didn't do that much on the sort of the side of providing clarity. Whether it was on at the time questions of COVID liability, right. Who, in terms of businesses and employers would bear liability for catching for, for people who caught COVID on their premises

Congress didn't do much, then they left it basically to the administration and to the States as Congress seems to always do. At this point now as things come into clearer view, I don't know what's what much is left for Congress to do at this point? Maybe clarifying the law on masking requirements, since that's probably going to be the longest lasting of the preventative measures we see out there.

So many of the federal statutes that have been invoked in this pandemic, they're very broadly written public health and safety standards. I don't fault those statutes were being written very broadly because the whole point is to give the, the government, the, the administrations flexibility in responding to crises that we couldn't possibly predict in advance.

That said the eviction moratorium was a good example of that. If I remember correctly, the statutory basis for that was a pretty broad-- and Josh can correct me here, it feels like a thousand years ago--um, but, but the, I remember correctly, one of the statutes that was invoked as a possible justification for that, maybe it wasn't in the end was public health statute for the, maybe from the Surgeon General, if I remember correctly. I can't remember. In any event, some of those statutes, it would be nice of Congress now having been through the pro, this pandemic would be nice if Congress could sort of apply some of its wisdom that it's gained in the last year to actually reform some of those statutes.

Maybe put a little bit more specificity into them about how far these open-ended powers range because especially against the background of a federal government that's bound by limits of federalism a federal government that that gives a lot of power, but not totally open-ended power to the executive branch.

It would be good now for Congress to go back to those statutes. Maybe I'll leave it at that since I think I'm already out over my skis on some of the issues I raised.

Jeffrey Rosen: [00:33:08] Joshua, let's talk now about the rights of inmates, pretrial detainees, immigration detainees, and others. In an April piece for the Atlantic, The

Coronavirus is Testing America's Commitment to People's Constitutional Rights, you wrote, "Nowhere is the challenge posed by COVID 19 more urgent than America's jails, prisons, immigration and detention facilities." And you gave us a sense of the legal framework that governed some of these cases, including the Due Process Clause of the Fifth Amendment. What are some of the most important issues raised by the rights of immigrants and inmates and pretrial detainees?

Joshua Matz: [00:33:44] Yeah, I mean, you know, most, most fundamentally the issue is that in detention settings, you have often very large numbers of people, hundreds or thousands of them, crowded into shared unsanitary living spaces with limited medical care and sometimes an impossibility of adhering to very basic protective measures like social distancing or wearing a mask or engaging in frequent hand-washing. You also often have a flood of people in and out of that context, right?

You might have detainees coming and going. Most importantly actually is the staff of the prison itself which then creates a risk that outbreaks of COVID in jails and detention centers spread to the local community and very quickly overtake local hospital capacity. And that has been an issue throughout the pandemic.

You know, one of the major epicenters of the spread of COVID over the course of the past year has been jails, prisons and immigration detention centers. I checked this morning, according to the Marshall Project at least 386,765 people in prison have tested positive. Of those at least 2,459 have died of COVID.

There have also been over 105,000 cases and about 191 deaths of COVID among prison staff. And so in thinking about those areas and this actually, I want to tie back to the point that Adam was making. because I thought it was an incredibly important one, you know? You have a place, you know, jails, prisons, detention centers that are sort of obviously a nightmare from a public health point of view of trying to limit the spread of COVID.

You have a population there that essentially depends completely on the government to protect it from the spread of COVID and to treat it if they do in fact catch COVID. Right. And so in that setting, you know, you might think Congress could have acted to address what everyone in the public policies theater knew was a major crisis.

And sadly Congress did not. You might expect the federal government or state governments to take a major emergency action. In some cases they did. In some cases we saw changes to bail policies and expansion of compassionate release, you know, the, the effort to allow some measure of social distancing and the provision of personal protective equipment.

You know, and, and, and I commend those jurisdictions, but in far too many jurisdictions, we didn't see that. And the result is that in quite a few places you know, inmates and detainees and pretrial detainees had no choice, but to go to court and to ask courts to protect their rights, which include under the Fifth Amendment, the Eighth Amendment, you know, for Eighth Amendment as applied to convicted criminals and the Fifth Amendment as applied to pretrial detainees and immigration detainees, you know, rights to very basic safety and protection, and to be freed from exposure to life-threatening harm.

Right. Nobody thinks that if you're arrested and put in pretrial detention, you should also face, you know, a de facto death sentence as a result of that. And you know, initially there were a wave of decisions in the lower federal courts. I represented the clients in a number of cases successfully.

There were a wave of decisions in the lower federal courts that required jails and immigration detention facilities to increase transparency and to take more substantial protective measures. But unfortunately over the course of the past year, as those issues percolated up to the Supreme Court, the justices uniformly ruled against and overturned decisions that had required the criminal justice system and its actors to better protect inmates and detainees. In June, August, and November of last year, there were decisions that came down in Ohio, California, and Texas respectively from the Supreme Court that had that effect.

And so, you know, this is one of those cases where there were a lot of institutional actors, it could have been Congress, it could have been state legislatures. It could have been local criminal justice actors or executive actors. And in some places, those people did step up, but in some places where they didn't, it was left to the courts.

And sadly, you know, this is an area where the courts really just, I think didn't hold up their end of the bargain under the Constitution. And there are people out there who paid for that with their lives.

Jeffrey Rosen: [00:37:50] Adam, what's your response? Both to the heartbreaking statistics that Adam shared about the number of detainees who have died of COVID and also the complicated legal issues of whether or not release is required as a legal or constitutional matter or advisable as a matter of policy.

Adam White: [00:38:10] Well, Josh is right to highlight like these issues. I mean, as you said, they're heartbreaking, they really are. And I'd say they're the latest example of a sad story in America of just a real lack of, of, of mercy empathy, generosity for people who are imprisoned in the United States, whether they are as Josh laid it out pretrial detainees, convicted prisoners criminal, criminal prisoners, and immigrants.

I maybe categorize that-- I can, might, I might parse those a little bit and focus more on prisoners than on, on immigrants saying that prisoners, you know, had their liberty taken away by the federal government and placed in prison, immigrants go through a, an immigration process and their way in, although that process is itself broken, but I'm not going to parse those beyond that, because at the end of the day, there is a profound injustice that happens in all these contexts.

And I think COVID has been a very, very sad example of all of those things. And it's also been counterproductive in many ways, I read a great essay by William Saletan just a day or two ago, focusing on the debates around the vaccinations for, for illegal immigrants. And how, what everyone thinks of that, of the immigration issues, whatever, whether you believe these people should be in the country or not, the fact is they're here and we're all in this together, as far as public health goes, and to deny vaccinations to people because you don't

like their immigration status is to re literally, I mean, literally metaphorically cut off the nation's nose to spite its face.

And, and so I really would like to see more done here, you know, my own sort of judicial humility hat though, does get activated on these issues too.

I don't know that the, I, I'm not familiar with Joshua's specific cases and so I can't speak directly to them. And I don't mean to do an injustice to them myself here, but I am wary of the application of definitely the, the Eighth, the Eighth Amendment. I've --like, like the late Justice Scalia, I have a pretty limited view of, of, of the original meaning of, of the Eighth Amendment and what it, what encompasses punishment for the purposes of that right.

And due process, that's a much closer call. I wonder whether the government, when it sort of fails to act, or when it acts unwisely, whether in this context, the government itself is depriving these, these, these inmates or these, these, these immigrants of life within the meaning of the 14th, sorry, the Fifth Amendment.

But that's a much closer case and I would be very interested in seeing that play out. But once again, with these lower court decisions, you see the other theme that we talked about in terms of who decides. The Roberts Court and Chief Justice Roberts has real wariness of, of the energetic district courts laying down a lot of injunctions.

That's a theme that long precedes COVID, it's gonna long follow it, I think. And so you get this intersection of these difficult constitutional issues in the vehicle of these preliminary injunctions and nationwide injunctions which Chief Justice Roberts just does not like, and, and he doesn't like the court sort of springing into action to stop the elected branches of government, and he doesn't like the lower courts doing it either.

Jeffrey Rosen: [00:41:10] We have one last large category of cases and those involve voting rights. Joshua tell us about the many voting rights cases that have been filed, seeking to protect voters in the COVID 19 era by expanding access to the ballot and how courts have dealt with them.

Joshua Matz: [00:41:29] Happy to do it, you know, and, and what I'd highlight is, you know, Adam referred to his judicial humility hat, which gets, which I guess, you know, in his view gets triggered when it comes to certain classes of rights and perhaps, you know, not others that we discussed earlier in this conversation, you know, and that's a fair description at least of how a majority of the Supreme Court feels too.

Not only about the rights of immigrant detainees and pretrial, detainees and inmates. But also about voting rights. This is another area where I think it's fair to say that the Supreme Court has taken a disfavored claim of voting rights arguments. And you know, the clear evidence of that really comes from a slew of decisions that we saw last year.

And so starting in April of 2020, and continuing all the way up through October, we saw a slew of decisions from the Supreme Court in which they repeatedly overturned lower court decisions that had made it easier and safer for people to vote amid the pandemic. And so

those decisions included decisions requiring that people be allowed to drop off their ballots and a dropbox, decisions expanding the period of time for obtaining or casting absentee ballots as well as decisions that eliminated requirements that forced people into close contact with each other, like requirements that you have notaries or witnesses when you cast certain kinds of absentee ballots.

And, you know, lower courts had said, look, whatever the justification for these measures under ordinary circumstances, requiring them now, you know, you're, you're putting people to a choice between their vote and their life, and that's just no way to be a democracy.

And even though a number of lower courts reached those decisions, the Supreme Court overturned virtually all of them sometimes in unreasoned orders, almost, always along ideological lines in ways that really suggested a disfavored status for the right to vote as something sufficiently important to overcome whatever justification the government would usually have for some of the rules that apply to voting.

What you also saw in this period was that the Supreme Court, relying mostly on what had previously been a stray and outlandish theory that Chief Justice Rehnquist articulated in a concurrence in *Bush v Gore*, which was not a decision that anyone had wanted to place particular reliance on for some time--we saw a majority of the Court suddenly say, you know, boy, we really need to start second guessing how state judges and state governors and state election officials are applying their own rules. If they seem at all inconsistent with certain state statutes.

You know, and federal courts do not ordinarily review how state actors interpret and apply state law. And yet suddenly there seemed to be real momentum in that direction. And that all occurred in the context where most of the disputes at issue involved state actors modifying -- reasonably and consistently with state law-- modifying certain rules, again, in response to the pandemic.

And the Supreme Court, you know, started sending off all sorts of warning shots that they were going to kind of bring this brand new doctrine to bear. It's sort of an anti federalism of sorts as applied to election law, that they were going to bring this doctrine to bear to potentially start over invalidating or at least casting doubt on measures that state actors took to protect voters during the pandemic. And so there was this slew of cases where there, there was a very clear trend line as it were.

It's a trend line, similar to what we saw in the realm of criminal justice. And it's sort of the opposite trend line of how we saw religious freedom cases. You know, Justice Gorsuch has laid down some very strong language in the religious freedom cases about the role of the court in times of crisis and insisting upon the Constitution in the face of adversity, you know, that language is nowhere to be found in any other area of law except religious freedom from Justice Gorsuch so far.

And the same is true for Justice Alito and a number of the other justices. And so whatever the explanation may be, and they might just be underlying substantive, constitutional commitments that lead them to treat these kinds of claims differently-- perhaps they're

more skeptical of voting rights claims as an, as a presumptive matter--the end result was that the administration of the election last year was more dangerous than it needed to be, and that the Constitution required it to be as a result of these decisions issued by a majority of the Supreme Court.

Jeffrey Rosen: [00:45:48] Adam, Joshua has just made a strong claim that in response to the pandemic lower courts interpreted state rules to expand access to the ballot and that the Supreme Court taking the opposite approach that it took in the religious freedom cases overturned those decisions. What's your response, and do you think that the Supreme Court's approach has been constitutionally and legally correct or not?

Adam White: [00:46:10] Well, I do share Josh's wariness about the trend lines on voting rights law in America generally. I think we're in a very worrisome place where my friends in the Republican party seem ever more eager to narrow the right to vote one way or another.

And I think that's a mistake of constitutional proportions, not in a legalistic sense, but just the very sort of small -c constitution of what kind of country are we. And so I'm very wary of that. In the context of the last election of course, these are often disputes over the meaning of state laws, state constitutions.

It's not as though the field is totally absent of federal law. There is this question about the, the, the process for, for choosing electors and electoral college. The Constitution's reference to state legislatures. I do not take that nearly as far as say Senator Hawley would, but I do think it's constitutional text that needs to be taken seriously.

I tend to think that that phrase in the Constitution needs to be read against the background of state constitutions, right? That the U.S. Constitution was not attempting to move state constitutions and the state judiciary from the field altogether. But there's ultimately a difficult line drawing exercise between interpreting constitutional provisions at the state and federal level versus writing law afresh.

And I, while I was happy to see as many people get the chance to vote as possible in the last election, I wouldn't vouch for every lower court decision that tried to achieve that aim. And so once again, without sort of knowing the specifics of every single case, I don't recall from the time any cases that really jumped out at me as manifestly unconstitutional decisions by the Supreme Court and even like minimally unconstitutional decisions by the Supreme Court. The Court's work at the time seemed reasonable to me.

And I think ultimately the process played out in a good way. Now is the time, of course, for Congress to take seriously these issues and lay down clear law on this and in the debates around HR-1, which I've got plenty of qualms with, or the John Lewis Voting Rights Act, which seems to be much more appropriate.

But one way or another, this is a really a place where Congress needs to get involved, because I really don't want to see this entire area of law really made by federal district court judges on a case by case basis in the run-up to the next elections.

Jeffrey Rosen: [00:48:25] Well, it's time for closing arguments in this extremely rich and illuminating discussion.

It's difficult to sum up the many legal and constitutional issues we've discussed, but I'm going to ask each of you to do just that. And I know you will do it extremely well in just a few sentences. What should we the People listeners think about the way that the Supreme Court has interpreted the constitution in the wake of the COVID pandemic. Joshua first thoughts to you.

Joshua Matz: [00:48:51] Well, Jeff, that's a great question. I mean, look, the reality is that over the course of the pandemic Americans have accepted and in some cases insisted upon infringements on individual liberty, that would have been unthinkable just two years ago or in virtually any other circumstance.

Many of the measures we've talked about have enjoyed substantial public support. You know, and you know, many other countries have used much more extreme measures to try to control COVID. America remains one of the more libertarian nations in the world. But what we've seen are, you know, infringements on sort of, you know, pick your amendment of the Constitution.

There have been limitations of all kinds on religious worship on assembly, on privacy on, you know, on our ability to travel, to engage in certain kinds of commercial transactions. You know, on the safety of those whom the government has detained on our ability to, to vote. It really covers the waterfront.

Over the course of the pandemic, I think we have seen that it's not only the Supreme Court, because I know that was what your question is really about, but you know, actors at every level of government, local state and federal and in every branch of government have been put upon to really figure out how to strike the difficult balance that we face.

And we have seen substantial variation across the country in striking that balance, which in some respects is a very good thing because people in different places have different beliefs about what that balance ought to look like. But there've been a number of issues that really, you know, evoke core constitutional concerns and that have gone to the federal courts and that have made their way to the Supreme Court.

And in those cases, I think what we've seen is, you know, the Supreme Court has broadly speaking, taken a balancing approach as is common in American constitutional law. It has tried to weigh public health considerations on the one side against the demands of civil liberty and individual rights on the other you know, the way it has undertaken that balancing, you know, has not seemingly been perfectly consistent across all areas of the law, as we've talked about you know, it has very muscularly protected religious freedom.

You know, seeing discrimination where, you know, the record doesn't, you know, hardly screams that that is what was happening and undervaluing and undercutting claims of public health justification backed by substantial scientific and medical support. In other areas of the law the Supreme Court has readily accepted arguments from the government about,

you know, the demands of public administration and public health, and has really disregarded claims of individual rights and individual liberty.

And the example is of course, that we've spoken about on this call were principally in the criminal justice and immigration and voting systems in the nation. You know, part of the challenge of course, is as we've talked about repeatedly, the Supreme Court has made many of these decisions in an emergency posture.

Many of them are really just like a thumbs up or a thumbs down, maybe sometimes with a concurrence or two. It's very hard to know what kinds of lawmaking project has really been happening. It is hard to discern exactly what the principles are and why certain cases come out the way they do. As a result it's kind of hard to know what the legacy of all of this will be for our constitutional law.

There's actually been shockingly little majority Supreme Court precedent written about any of this you know, and it's really majority opinions of the Supreme Court that, you know, constitute precedent for purposes of defining what our doctrines are and our traditions mean as a matter of law. And so, you know, as we head into this year, as we see the spread of vaccinations, as we also appreciate the risk of variants as we recognize that there might be quick forward action, but also backsliding in our response to the pandemic--

I think one of the great challenges for every level of government, but also for the Supreme Court, will be to continue to strike the balance in a way that is responsive to those evolving circumstances that perhaps gives the American people more clarity about what our law actually is and why they think that's what it is.

That in my view, hopefully reflects less apparent privileging of certain rights over others and that, you know, and that, and then which I hope we see the Supreme Court not relying on kind of reflexive beliefs about how things ought to be, but really engaging with the latest science and evidence and developments and shaping a law and striking a balance, responsive to the changes that I hope and expect we will see in our country over the months ahead.

Jeffrey Rosen: [00:53:11] Adam, the last word is to you. What would you like to leave We the People listeners with about how you think the courts and other decision-makers have interpreted the Constitution in the wake of the COVID crisis one year out?

Adam White: [00:53:26] Well, thanks, Jeff. And thanks, Josh. I've really enjoyed this. I, I end basically where I began, not just in our conversation, but the COVID crisis in general. I think this whole experience has taught us that the Constitution is very well built to help governments spring into action against emergency. That's one of the things that animated the creation of our Constitution and, and in 200 plus years, we've really built that out very well.

Maybe the hardest challenge then in constitutional governance is turning back from the emergency footing, recognizing when that's even right. And then recognizing how to do it.

And I think the crisis has exemplified that as well. We've seen the Court take a few actions particularly in the Court in the context of religious liberty.

I don't think it's, it's, it's coincidental or mistaken that so much of the Court's work has focused on religious liberty in part, because it's such a fundamental human value, religious attachment, and also it's our first constitutional freedom, the freedom from establishment and the right to free exercise right there in the First Amendment.

And so of all the places where the Court might have sprung into action that's for me, I think a good place to start even setting aside my own religious attachments. 'Cause it's right there on the First Amendment. And there's a body of case law, *Employment Division v. Smith*, and the other cases that at least create a structure for, for the Court to engage, as opposed to say kind of vague notions of economic liberty and so on.

At the end of the day, though, we've learned a lot from this process for better and for worse, whatever we think of the issues we've discussed. And the country has suffered through an immense tragedy, it continues to I think it will be a double tragedy if Congress doesn't learn from this experience and the courts, actually, for many of the reasons that Josh has pointed out the, the, what we call the shadow docket, the emergency posture of these things.

Surely the Supreme Court, the federal judiciary as a whole, Congress in addition to the executive branch need to take this experience and put it to good use, to write new rules going forward, or at least to clarify rules. If, if they don't do that, then we're going to have not just one tragedy on our hands, but two.

Jeffrey Rosen: [00:55:27] Thank you so much. Joshua Matz and Adam White for an extraordinarily illuminating discussion of the many complicated and extremely important issues raised by the COVID crisis a year out, related to the Constitution. Joshua, Adam, thank you so much for joining.

Adam White: [00:55:47] Thank you, Jeff.

Joshua Matz: [00:55:48] Thanks, Jeff.

Today's

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