



**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.

The Supreme Court is in the home stretch of its 2020 term. Today we'll look at the opinions released so far and explore what they teach us about the Court today. I'm joined by two of America's leading experts on the Supreme Court and the Constitution. Kate Shaw is Professor of Law and Co-Director of the Floersheimer Center for Constitutional Democracy at Cardozo Law. She's also a contributor for ABC news and a Co-Host of the Supreme Court podcast, "Strict Scrutiny." Kate, it is wonderful to have you back on the show.

**Kate Shaw:** [00:00:51] Hi Jeff, thanks so much for having me.

**Jeffrey Rosen:** [00:00:53] And Jonathan Adler is the inaugural Johan Verheij Memorial Professor of Law and Director of the Coleman P. Burke Center for Environmental Law at the Case Western Reserve University School of Law. He's also a contributing editor to National Review Online and a regular contributor to, "The Volokh Conspiracy." Jonathan, it is wonderful to have you back on the show.

**Jonathan Adler:** [00:01:13] Great to be here.

**Rosen:** [00:01:15] The virtue of discussing cases early in June is we have a series of lower profile cases, some unanimous, some with unusual alignments that can teach us much about how the Court operates in the majority of cases that don't divide squarely on familiar lines. We'll begin with a case that just came down this morning, *Borden v. United States*. Jonathan, tell us about the case, the alignment, and to what degree textualism was a methodology that the justices agreed and disagreed about.

**Adler:** [00:01:51] Sure, so *Borden* involved a statute called the Armed Career Criminal Act, and this is a law that imposes greater criminal sentences on individuals who have committed multiple violent crimes. And the idea is that for criminals who are particularly violent, are responsible for a disproportionate share of violent crime and so it's more important to have them behind bars for a longer period of time, that was Congress's theory.

And the issue that the Court has had to deal with repeatedly is what constitutes a predicate offense. What counts as the sort of violent crime that if you commit enough of them, this triggers a longer sentence, and it's a significantly longer sentence. It's the difference between a 10 year sentence and a 15 year sentence.

So in *Borden* you had an individual who had committed three prior crimes, two of them were indisputably violent, the third of them was a reckless aggravated assault conviction. And the question the Court was trying to or was answering was whether or not recklessness was sufficient degree of intent to be the sort of violent crime that can trigger this greater sentence.

And the Court split 4, 1, 4 on that question largely over whether or not reckless satisfied the requirement that a violent act involve the use of force against another individual. That's



clearly true if you have the purpose of harming somebody, it's clearly true if you knowingly engaged in conduct that results in violence against somebody else, but what if you're reckless? What if you are doing something like, say speeding a car through a neighborhood where you know, that that's the sort of thing that can hurt somebody, but you don't know that you're going to hurt somebody, you're not intending to hurt somebody.

And the majority of the Court concluded that that sort of offense does not trigger the Armed Career Criminal Act the way more deliberate violent conduct would. The way knowing or purposeful violent conduct would, four justices, led by Justice Kagan believed that this was because reckless conduct is not targeted against an individual. Justice Thomas provided the fifth vote on a very different theory and in part, because he disagreed with some of the precedents upon which the Court was relying and then Justice Kavanaugh wrote the dissent. The really interesting thing about this lineup given the current Court's composition is that Justice Kagan's opinion is joined not only by Justice Breyer and Justice Sotomayor but also by Justice Gorsuch.

And then the dissent was Justice Kavanaugh joined by justices Alito, Barrett, and the Chief Justice. This was the first case ever in which Justices Barrett and Gorsuch were on opposite sides from one another. And given both of their stated commitment to textualism, that is quite interesting.

And then as you noted, the opinions themselves spend a lot of time on how to interpret the particular language of the Armed Career Criminal Act and whether reckless conduct has the sort of mens rea that constitutes the use of force against another individual. And I don't know what big lessons I would draw from the case other than it does show that Justice Gorsuch is certainly much more comfortable with approaches to textualism that work to the benefit of criminal defendants, something that split Justice Gorsuch and Justice Thomas in this case, one of the reasons Justice Thomas writes separately is Justice Thomas is not comfortable with the idea that we invalidate criminal statutes because they are unduly vague. Justice Gorsuch is comfortable with that and Justice Thomas flags, some decisions where he has disagreed with, of course, before that, that raised that distinction. And that's certainly one split among the more textualist judges that this case helps bring to the surface.

**Rosen:** [00:05:57] Thank you very much for that extremely clear and helpful analysis of the case and also for that suggestion about what might have divided the textualist justices. Kate, the majority does say the following quoting the majority, the dissent goes to a complicated counting exercises about how different justices are divided in this and other cases, but there's nothing particularly unusual about today's lineup. Four justices think they use phrase as modified by the against phrase. Excludes reckless conduct. One thinks that the used phrase alone accomplishes that result that's Thomas. And that makes five to answer the question presented, question: does the elements clause exclude reckless conduct? Answer: yes, it does. What do you make of the lineup and what do you think can explain the division between Justice Kagan and the majority and Justice Kavanaugh and the dissenters?

**Shaw:** [00:06:45] So it's a fascinating opinion. You know, both, I think in its content and in the lineup. And you know, Jonathan described it as, suggesting that this is evidence that



Gorsuch is on board with a textualist opinion whose result benefits, criminal defendants. And I think that's definitely true, but I maybe want to push back a little bit on the description of this as a purely textualist opinion.

And of course, whether it is, or not turns a little bit on what we mean by textualism. The opinion very much, parses the phrase, offenses that have as an element, the use of force against another person. So the language is centered and taken quite seriously but you know the Court looks to dictionary definitions.

Although says, I think quite forthrightly dictionaries offer definitions of against consistent with both parties, views. So suggest that dictionaries actually aren't going to answer the hard question of meaning for us and you know, places, a lot of emphasis on not just the term against but the surrounding words, right.

Kind of text in context suggesting that the fact that the language against another modifies, the use of physical force as kind of relevant in, in terms of the interpretive task and basically ends up concluding based on both text ya know and context and sort of common sense and consequences that the term "against" expresses a kind of targeting or directness that an offense that just has recklessness as a state of mind requirement does not satisfy.

So think it is, you know, an opinion that is in some senses, superficially textualist and it takes text quite seriously, but does not view text and particularly a snippet of text in isolation as sort of the most important thing, or the only thing to examine when deciding what a statute does and does not encompass.

And so I actually view Gorsuch's decision to join in full this opinion as suggesting that, you know, there, that he is comfortable with a form of textualism that is somewhat pluralistic or kind of multi-modality, and that it views grappling with taxed as one, but not the only component of the interpretive task.

And then in terms of the dispute about what the actual bottom line holding of the case is because of course it is a 4, 1, 4 decision. I think the majority very clearly establishes, that whatever the dissent might suggest you have four clear votes for Justice Kagan's opinion and Justice Thomas.

Although he gets there via a different route that basically says a different provision of the Armed Career Criminal Act. One that we have found unconstitutionally vague would have encompassed this conduct. And thus this conduct, you know, does, or, or this offense should be properly understood as a qualifying offense that would trigger the sentencing enhancement, which is really what the Armed Career Criminal Act creates.

But because we have already crossed that bridge and I fear the confusion we would. So if I did not, you know, definitively cast my vote right to find this conviction does not qualify. I'm going to go along in full with the result although it's like one of the grumpiest and sort of most grudging concurrences, I can remember seeing, because he's so unhappy with the state of the law that he says compels him to vote the way he does here. But that fact Kagan



is fright. Doesn't change the math. There are still five votes with the majority however unhappy the concurrence or the dissent may be

**Rosen:** [00:10:00] Thanks so much for that. Our next case is *Van Buren v. United States*. Another unusual lineup, The Court's newest justice, Justice Barrett writing the majority opinion for herself and Justice's Breyer, Sotomayor, Kagan, and Gorsuch and Kavanaugh. The dissenters are Justices Thomas, Alito and Chief Justice Roberts. Some speculated that this is the first decision that Justice Breyer assigned as the senior associate justice in the majority. And unless Chief Justice Roberts switched his vote at conference he assigned it to Justice Barrett. Jonathan help us unpack the *Van Buren* decision and it's parsing of the word, "so."

**Adler:** [00:10:40] This is a, this is a fascinating case. So, and the facts are worth a minute. If we have the time for that. So *Van Buren* is a police Sergeant and he took a bribe or was paid to use the database to look up license plate information about somebody. And while he was allowed to use the database, because he was a police officer and one of the things as a police officer, he's allowed to look up people's license plates and get information about them. But obviously not allowed to do that for this purpose. He's supposed to do it as part of his job as a police officer looking, identifying suspects and so on, not to get paid for other purposes.

And so the question is whether or not this sort of access of the computer database, But violates The Computer Fraud and Abuse Act of 1986, which prohibits people from intentionally accessing a computer without authorization or exceeds their authorized access. And the phrase in the statute is that exceeding authorized access is defined as, "to access a computer with authorization and to use such access, to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter." And the dispute in this case comes down to whether or not this is about obtaining access to a computer or part of a computer or a database by getting around or hacking some sort of gate or some sort of protective measure, or whether it also includes accessing information in a database in a way that one was not authorized to use it.

Right, so the difference might be, did you pick the lock to get into the box or did you do something with the information in the box or look at things within the box that you weren't supposed to look at, even though you didn't break anything, you didn't go through a gate to get into it.

And the majority decides in part based on this language and this phrase is not entitled. So to obtain or alter, that it only involves offenses of getting around the security mechanism, hacking going through the gate without permission. Not about exceeding the precise rules about how one is allowed to use or not use the information involved and that the opinions focus a lot on different views of texts.

I will confess, I think there's another interesting dynamic here that that's worth observing and it certainly cuts against my, my formalist sympathies, which is at least among the conservative justices there is a generational split and this is a statute that was written in 1986 when we didn't know a lot about databases in the internet.



I mean, a lot of this stuff wasn't around and the sense interpretation of the language would potentially criminalize the 12 year old who has an account on Facebook, which says the terms of service are you're only allowed to be involved on this if you're 13 or over, or people that accidentally look at folders on their office computer network that they're not supposed to access but aren't actually protected in a way that requires getting around some sort of protection or password.

And I suspect that that may have influenced the interpretations of some of the justices. And then the last point I think a connection between hearing the prior case is to what extent are the justices concerned about construing criminal law in a way that casts a really broad net?

And I think certainly the liberal justices are concerned about that, whether they say so overtly or not. And I think at least some of the conservative justices are aware that interpreting criminal laws in an overly broad way has broader systemic effects that as a country, we are certainly in the process of reconsidering. And it's hard not to imagine that doesn't influence the justices on the margin

**Rosen:** [00:14:59] Kate, what do you think of Jonathan's suggestion that a group of justices knew divided over the meaning of the word, "so" may have been moved by generational differences about whether or not criminal laws should be construed broadly or not?

**Shaw:** [00:15:15] You know, I, I do think that's a real possibility. And I do think in terms of the last point that Jonathan made is there kind of a shadow of the sort of lenity principle hanging over maybe both of the last two cases that we have discussed? So this, rule of lenity or canon of lenity the idea that criminal statutes, if they're ambiguous should be construed to benefit criminal defendants is a long-standing principle of interpretation. Different justices have been more and less sympathetic to kind of the relevance of that principle. If I'm not mistaken. I think in Van Buren Barrett says, well, we only bring in lenity if a statute is ambiguous and the statute is not ambiguous, so we actually don't need to, but is that somehow a subtextual consideration?

I think it could well be, although it's not something that is front and center in any of these opinions. I mean I also do think that the generational divide, is an interesting possibility. And I do think you have seen sometimes both Gorsuch and Kavanaugh, sometimes one of Gorsuch or Kavanaugh joining the younger, more liberal justices as the Chief Justice, Thomas, Alito end up on the other side of the case, we have seen, I've seen a few, you know, potential generational divide cases like that.

Although Breyer obviously sort of bucks that trend generationally. But but I also just think kind of concern about consequences actually might be some provide some explanation for the Van Buren divide. I mean, I think there's this kind of quiet aside near the end of the Barrett opinion that references the kinds of potentially really problematic applications that the government's reading of the statute could lead to the child who accesses Facebook outside of the terms of service, the employee who accesses a dating website on a work computer in violation of on the job rules or norms could that could all of those people, all of a sudden be committing federal crimes?



And that's really concerning I think, to the majority. And, and so I think that, again, although it's buried about 18 or 20 pages or so into this very long majority opinion in *Van Buren*. I think it's driving the core to a real degree. And I think it goes back to my kind of questions about what kind of textualist opinions these opinions are? Because they take texts seriously, but they are also concerned explicitly or implicitly about the consequences of adopting different readings. And I think very much in *Van Buren*, the concern about criminalizing wide swaths of very common conduct was driving the majority.

And I think that for my purposes, for whatever it is worth, I think it would be better if the justices were more explicit about the degree to which these kinds of consequentialist considerations figured in their work interpreting these statutes.

**Rosen:** [00:17:46] Our next decision is *Edwards v. Vannoy*, this also is a six to three decision, but this is with a more familiar lineup. This is Justice Kavanaugh and the conservative justices in the majority and Justice Kagan, Breyer, and Sotomayor in dissent. There is a vigorous disagreement about the way to read precedence. Jonathan, tell us about *Edwards v. Vannoy*, which involved the holding that the jury unanimity rule, which the Court recently announced in a case called *Ramos* does not apply retroactively.

**Adler:** [00:18:18] Right, so the precise question here is what do you do when the Supreme Court recognizes a new constitutional rule, about cases that are in the pipeline in, or are being subject to collateral review. So as listeners may know an individual who is convicted under state law has the opportunity to challenge that conviction. We call collateral review challenge the state conviction in federal court. And here you had an individual who was convicted by a non unanimous jury of multiple offenses and wanted to in the process of his collateral review or collateral challenge to that conviction, raise the *Ramos* claim and say, hey, you know, I was convicted by a non unanimous jury, even though that was not the rule at the time of my conviction it's the rule now, I was not properly convicted. And as a general matter the Court has historically been very reluctant to apply so-called procedural rules or procedural holdings retroactively. And there's a whole debate about what's properly characterized as a procedural holding, and we can kind of bracket that and set that aside.

But the Court has made a distinction between substantive and procedural holdings. And has generally said that if your case is still in the primary pipeline, ongoing, you can raise this new claim, but if you're challenging it collaterally through the habeas process you're too late. And that's what the Court decides here, six-three along in traditional ideological lines, the conservatives and the majority. The liberals in dissent there are two things that I think are, there are lots of things we can talk about in terms of this case.

One is, the Court had previously in a case called *Teague v. Lane* suggested that there was a narrow exception to this general rule of not applying new constitutional holdings about procedural rights retroactively. So called watershed cases would allow to be applied retroactively. The problem for the majority at least, is that while *Teague v. Lane* had said this, the Court had not found any watershed, such watershed holdings since and so the Court says, you know, why pretend as if this exception exists, if we've never found it, this isn't one either and by the way we're just going to announce that the exception, was a



mirage, it wasn't really there. And that is one very, very big point of disagreement between the majority and the dissent.

And then kind of related to that is this other question, which we see being raised in a lot of cases and a big split between the conservatives and liberals on the Court right now, which is how to think about precedent generally. Right? So in declaring that this watershed exception would have been a mirage, the Court is kind of overruling a case.

I mean, it's a little complicated because it was arguably not overruling a holding as much as overruling a rationale or a statement of principle from a prior case. But it flagged for the dissenters for Justice Kagan and dissent this concern that now that there is a solid conservative majority on the Court, that the Court might be less concerned about following stare decisis and upholding precedents than maybe it has been of late. And for the last 15 years, the Court has overturned its own prior decisions at a lower rate than any post-war court. There are good reasons to suspect that that pattern will not hold and Justice Kagan has taken multiple opportunities to sound the alarm about that and this is another case in which she does that. Because I think she is concerned that more broadly the conservative justices may be willing to revisit past precedents that have been longstanding and this case allowed her to raise that concern.

**Rosen:** [00:22:12] Thanks very much for that and for flagging these two questions first was watershed a rule that should be applied retroactively and second, this question about precedent. Kate, thanks for your thoughts on both the questions and on Justice Kagan's rather pointed footnote where she says that the majority says that she can't impugn its ruling because criminal defendants as a group are better off under *Ramos* than they would have been if her justice Kagan's, dissenting view had prevailed in *Ramos*, she said the suggestion of surprising it treats judges as judging as score-keeping and more a score-keeping about how much our decisions or the aggregate of them benefit a particular kinds of party and she says judges should take each case as it comes. What do you make of all that?

**Shaw:** [00:22:57] Yeah, that was such an interesting footnote. I mean, so the background here, just in case it wasn't clear is that Justice Kagan dissented in *Ramos*. *Ramos* itself had overturned a 50 year old precedent called *Apodaca*, which held that unanimous jury verdicts were not required by the Sixth Amendment. So *Ramos* actually held the Sixth Amendment does require jury unanimity and Kagan dissented in that case, you know, I'm sure contra her preferences, right? If she I'm sure she would prefer, you know, unanimity to be required in criminal cases, but said, we have this 50 year old precedent and the very high bar that we should impose before overturning one of our prior cases has not been cleared.

So that's the sort of backdrop with respect to *Ramos*. So the majority here in *Edwards* is saying, you know, somehow if Kagan had prevailed in *Ramos*, criminal defendants as a group would be worse off than they are under our ruling. You know, that *Ramos* holding that unanimous juries are required, but here *Edward's* holding that that ruling is not applicable retroactively.

And I think Kagan comes across as quite principled, both in terms of her votes in the two cases. And in what she says in response in that footnote. And, in both cases, she says, we





should abide by our precedent. She said that as to Apodaca the pre Ramos case and here she says that we should not cavalierly first.

We should hold under our retroactivity precedents this is the kind of watershed rule of criminal procedure that should be applied retroactively. But even if it's not, the Court goes much further than it needs to in disavowing, I think Jonathan's right, is it overruling or is it just disavowing this kind of principle or rule? But whatever it's doing, it is changing the law by saying that no procedural rule will qualify as a watershed rule of criminal procedure that will apply retroactively.

And the Court could very easily have said unexisting retroactivity doctrine, this rule doesn't apply retroactively, right? The Court has said the watershed rules exceedingly narrow, it's never actually found any ruling, satisfies the requirements. But has said that it's, you know, it exists at least in theory or in principle.

And so there was no need for the Court to go out of its way to, again, to project the very possibility of finding in some future case that some procedural rule might qualify for retroactive application. So I think in both cases, she is emerging as this very strong defender of stare decisis and also, you know, appearing principled in suggesting that whatever happened in the case before we sort of take each case on its facts and whatever I wrote or felt about Ramos I'm compelled to adhere to it and accord it binding weight. I think so in a number of different ways, I think she does appear quite principled.

Even if it is true as a numerical matter that had she won in Ramos criminal defendants as a group would be worse off. So, but I do think that there's a conversation about jury unanimity and there's very much a conversation about the Court's treatment of precedent and approach to stare decisis that is happening across these different cases.

**Rosen:** [00:25:51] Many thanks for that, before we turn to the unanimous decision, there was a recent denial of cert as it's called the Supreme Court recently refused to hear a challenge to a federal law that requires only men to register for the draft. There was an interesting, separate statement by Justice Sotomayor joined by Justices Breyer and Kavanaugh and Justice Sotomayor said it remains to be seen whether Congress will end gender based registration under the Military Selective Service Act.

But at least for now the Courts longstanding deference to Congress on matters of national defense and military affairs cautions against granting review, while Congress actively weighs the issue. Jonathan, what do you make of the separate statement and is it significant that Justice Kavanaugh joined it and Justice Kagan did not?

**Adler:** [00:26:36] Well, two things there. So is it significant that Kavanaugh joined it and Kagan did not? Well, one thing is if Kagan had joined it, then you have four justices on the opinion, and then that raises the question, well why weren't there for two grants for search? I think what's interesting about the opinion are two things, one, the explicit reference to the idea that maybe we don't need to do this, because maybe Congress will and you know, different justices of different ideological leanings have at times embraced this idea that the Court can kind of hold back and let the political process solve problems.





And that way the Court doesn't have to answer everything and that's how Justice Sotomayor certainly ends her opinion. And that's interesting because the first two pages of her opinion are identifying all of the factors that had led the Court to uphold male only draft registration in the past, and to point out how they're all gone, right that women are in combat and it being the most significant of that. But there being multiple factors that the Court had identified in *Rostker*. Kavanaugh joining in, I think suggests that there are some lines of precedent that conservatives aren't overly happy with that he is willing to stick with.

And, and that this line of precedent with regard to a heightened scrutiny for gender and sex based classifications are a line of precedents that he is any signaling sympathy to the late Justice Scalia quite notably had no sympathy for that line of cases. He thought that heightened scrutiny was really about racial classifications, but not about sex based classifications.

So it's interesting. I think that Kavanaugh was willing to join this opinion that, that suggests his comfort with this line of cases and suggests a willingness to do the hard work if Congress is not going to revise this policy on its own.

**Rosen:** [00:28:25] Kate, why do you think Justice Kavanaugh joined and is it significant?

**Shaw:** [00:28:31] I was also curious about the conspicuous absence of Justice Kagan and obviously the presence of Justice Kavanaugh. It's an interesting writing. I mean, I kind of liked just how boldly in dialogue with Congress it appeared to be, it was a statement, not a dissent from the denial.

So this is not a group of three that says we should take this case up now, but I read it as both kind of giving a little bit, the encouragement to Congress to continue to take seriously this question of whether to reconsider the gender-based draft registration requirements did seem to suggest real inconsistency with the Court's, you know, sex discrimination, jurisprudence of continuing to maintain you know gender restrictive draft registration requirements.

So, you know, I did read the statement as suggesting Congress, if you don't decide to make a change here, there could well be a successful, constitutional case in the offing. So, don't let this fall by the wayside. Right, there was a report Congress just held hearings on the issue.

So I did hear the Court to be saying, keep your eye on this issue otherwise the Courts may have to take it up. And you know, I'm not sure maybe Kagan doesn't think that's an appropriate role for one of these statements, respecting denial. I have no idea what her views on the question are. It seemed quite refreshing to me, but you know, only minimally kind of involved or only minimally about constitutional doctrine and much more kind of in dialogue with this co-equal branch and suggesting we'll stay our hand and let you address or consider the issue now, but we may well revisit it.

I certainly didn't hear the Court to be saying this is something that we would be unwilling to take up if Congress decides not to address it.



**Adler:** [00:30:06] If I could jump in Jeff, something else that might connect this with our prior conversation, you know, as Kate noted earlier, Justice Kagan is on the Court, the most consistent prostar decisive justice on the court.

And, we can speculate why that is or isn't, doesn't matter, clearly she votes to overturn prior precedents, less often than any other justice on the Court. There are some justices on the Court like Justice Thomas that think precedent is overrated and that's fine. And then there are some justices like Roberts and Kavanaugh that think precedent is very important or have said so.

But they're not as rigid about it as Justice Kagan is. One thing that crossed my mind is, does Kagan in the midst of this battle over how important precedent's going to be want to join a statement, respecting the suggesting a willingness to reconsider precedent, you know, is that, is that the look she wants right now?

If she is going to be the justice that is trying to hold back a conservative majority from overturning prior precedents. And, so that may be going on here. And again, I think it's critically important that she's the one not on the opinion because you know, Justice Breyer and Justice Sotomayor have throughout their careers been much more willing to reconsider prior precedents than Justice Kagan has and so if Justice Sotomayor is flagging a precedent for reconsideration it shouldn't seem anomalous that Justice Kagan at the very least is going to say, I'm not going to join that yet. If we accept the case, okay, fine, I'll make a decision when I have to, but I'm not going to lay the groundwork for reconsidering a precedent unnecessarily.

**Rosen:** [00:31:47] Kate, what do you think of Jonathan's suggestion about Justice Kagan's general attitude toward precedent and with all the cases we've discussed so far, tell us about divisions about attitudes toward precedent on this court

**Shaw:** [00:31:58] I think that's an astute observation and could well be true because although, as I said, I think that the male only draft requirement is difficult to square right now with the Court's sex discrimination jurisprudence, the Court has previously upheld it so it would require overturning a prior case in order to give a different answer based on these intervening developments with respect to the role of women in combat today. So my sense is that the Court and precedent are front and center for Kagan in all of these cases and so I could, well imagine that consideration figuring in her decision to join or not to join this statement. I mean I think in some of the statutory cases that we're talking about, the kind of broad questions about precedent don't squarely present themselves because the Court hasn't construed a particular statute in a particular way.

So some of these cases present, you know, technically novel questions, but I do think that kind of the Court's treatment of its prior cases broadly seems to be something that she is laser-focused on. And you know, I think that what the Court is going to be considering next term important cases on abortion, on gun possession and the Second Amendment, most likely on affirmative action you know, many, many other, additional important administrative law cases. I think there's a very big term on deck. And so I think that she is thinking very carefully about what the court is going to do with precedence, not just like Roe



v. Wade, but some of the things the court said in *District of Columbia v. Heller* in the Court's affirmative action precedents *Grutter* and *Gratz*. I think that he's probably thinking about all of these things, even in these cases that are substantively very far afield from those.

**Rosen:** [00:33:39] Many thanks for that. Well, we now have a series of unanimous cases and the first one is *Cooley v. U.S.*, the question is whether the Court should exclude evidence that a tribal police officer collected while detaining and searching a non-Indian driver stopped along a federal highway. It was a unanimous decision by Justice Breyer. Jonathan, what does it say that it's unanimous and does it suggest the Court converging around a textualist methodology since Justice Breyer said that a particular exception that the Court had previously recognizes fits this case like a glove?

**Adler:** [00:34:15] Well, I think in terms of starting with the last question, I do think as Justice Kagan herself has noted the Court does place, text, front and center in statutory interpretation cases or statutory cases.

As Kate noted earlier, there are different ways of engaging with the text. There are different ways of thinking about how the text relates to context or purpose to the historical context, to the broader context of federal law. I mean there are lots of things that may engage with the text or help inform the text but certainly this is a Court that starts with the text. That's the anchor that the decision must be tied to but there's still room for disagreement around that. And so if the text clearly points in a direction, we tend to get unanimity. And we see that in this case in what we might think of as a case pointing in a quote unquote liberal direction, because it's more solicitous of the authority of Native American Tribes.

We see the reverse in some immigration cases. That we might be in a quote unquote conservative direction because they're less sympathetic to immigrants or those are lawfully present in the country. But in all of these cases, we see text being a unifying principle. The other thing that I think is worth remembering is that in a plurality of cases, in any given term, the Court is unanimous.

It's usually somewhere between a third and a half of its decisions right now. I think it's like 54, 53% of cases decided so far have been unanimous. That percentage will drop over the next two or three weeks. But you know, this court has always been able, or at least for a long period of time, has been able to be unanimous around a surprisingly large proportion of its cases, particularly given how few cases it takes right now.

And these are all cases that are splitting lower courts and, you know, smart judges in good faith are reaching contrasting views and opposite results and yet the Court is able to resolve the unanimously text being often the glue that helps bring them together really quickly. On this case, this case is about a tribal police officer having the authority to detain and search a Non-Native American traveling on a public right of way that goes through your reservation.

This brings up an issue that's often very divisive among the justices about what is the nature and the extent of tribal sovereignty and this is a gross overgeneralization, tribes have a lot of sovereignty over their own territory and members of the tribe they have less sovereignty over non tribal members, and that's an interface that generates lots of controversy, but here



are the Court unanimously said, hey look both as a textual matter, I think also as a practical matter, if you listened to the oral argument, how does the police officer know who's a member of the tribe or not a member of the tribe when they pull a car over? Of course, otherwise what they're doing is lawful or within their authority they can temporarily detain and search the vehicle and so a common sense, textually grounded result in an area that often divides the justices.

**Rosen:** [00:37:15] Thanks so much for that and for helping us parse the Cooley case, since we are talking about textualism, I should quote the text of the opinion accurately Justice Breyer in fact said that the exception he was construing fits the present case almost like a glove, not like a glove but the justices did converge on that principle.

Kate as you think about Cooley and we move on to the other unanimous decisions, to what degree does textualism actually constrain and unite the justices, or does it seem to be malleable based on these other background considerations that both of you have already identified?

**Shaw:** [00:37:50] You know, Cooley I think is, is a less textually focused opinion than some of the others we've talked about. It's really about just kind of figuring out where tribal policing powers fit within the various frameworks that the Court has developed for determining the extent of tribal sovereignty and the text that Justice Breyer says fits almost like a glove is really part of actually a test articulated by the Supreme Court in a case called *United States v. Montana*, which basically is about exceptions to the general rule that tribes don't have authority over non tribal members.

So that's kind of background principle, but one of the exceptions and the relevant one here is where non-tribal conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe. And prior to Cooley it has sort of an interesting connection to *Edwards v. Vannoy*. but prior to Cooley this second Montana exception is not something the Court had ever found satisfied. So it like the watershed rules was sort of a theoretical exception the Court had never actually found a case fit within, but here in Cooley, the Court says, no, this theoretical exception actually does fit this case, like a glove. And here the tribal officer, does have jurisdiction over a non tribal member because the conduct of an individual speeding through a reservation with visible drugs, it turned out when the officer approached the car did affect the security, health or welfare of the tribe.

But it's the Courts kind of construing its own precedent more than it's construing statutory language in Cooley. But it still felt because it was a significant development and a significant vindication of tribal sovereignty over non-members in a way that kind of broke new ground.

Those are the kinds of substantive questions that do often divide the justices. And so I did think it was striking that this was a unanimous opinion as it was.

**Rosen:** [00:39:42] We have two more unanimous decisions. Maybe we can talk about them together? One is *Sanchez against Mayorkas* which held that a individual who entered the U.S. Unlawfully is not eligible to become a lawful permanent resident even if the U.S. granted him individual temporary protected status. And then we have the case of *Garland v.*



Dai which raises the question of when federal courts can treat asylum seekers testimony as credible. Jonathan, tell us about both of those cases.

**Adler:** [00:40:11] Well, so here we have two cases involving immigration law, where the Court focuses very much on the relevant statutes to be in ways that are adverse to the non citizens who are seeking to be in the country.

And it's interesting for a variety of reasons. One is you know, this is an area of law that obviously is very divisive. We've seen recent decisions that have split the court on ideological or other lines concerning immigration, we know that immigration is obviously a very politically contentious issue.

There is a lot of dissatisfaction with immigration law , there has been for quite some time. And Congress has not been able to turn that dissatisfaction into reform. And it's interesting against that background. The Court, essentially as a whole saying, we're not going to fix these problems.

There are aspects of immigration law that , if we take the text as it is, are not particularly solicitous or not particularly welcoming. And if we are going to be a more welcoming country to immigrants lower courts should not be stretching the bounds of immigration law to achieve that result. That's something that Congress is going to have to do. And so that's why I found both these cases so interesting because you did not see any justice writing separately to talk about the problem of saying, it's okay that someone can be in the country. But we're not gonna act as if they entered the country legally for being allowed to be here permanently.

I mean, that may strike a lot of people as being inhumane, as being, you know, contrary to the notion that this is a country that welcomes those that want to be here, but it's as Justice Kagan points out in the Sanchez case the text of the status produces that result. It treats, whether it's okay that you're here temporarily different from whether you entered permissibly. And that's a textual distinction that the Court has to observe. And so you know, I found it really interesting that these cases did not divide the justices, given how much immigration is a divisive issue more broadly in our political system.

**Rosen:** [00:42:22] Thanks so much for that. Kate, why do you think that is, that these immigration cases is so controversial, as Jonathan notes were unanimous, and are there certain kinds of cases where textualism produces unanimity and those where it does not?

**Shaw:** [00:42:37] Yeah, maybe I'll take them separately for just a beat. So Sanchez the unanimous opinion that was written by Justice Kagan finding that recipients of temporary protected status or TBS are not just by virtue of that status at thereby eligible to adjust a lawful permanent resident status or green cards. Justice Kagan wrote a very persuasive opinion that seemed to suggest that TPS recipients who entered the country unlawfully could not just, again, by virtue of their TPS status qualify for LPR status. Now, if you were already lawfully in the country and then got TPS status, you may still very much qualify to adjust to LPR status, but not just the TPS status alone.



But her argument really does seem to be that, you know, lawful permanent resident status requires lawful admission. And that TPS status gives you something, but it can't give you lawful admission. And I think that a clear takeaway here is that no matter how sympathetic TPS recipients may be in of course, individuals who get TBS status, it's a designation that exists because of conditions typically of extreme hardship in a home country.

However, sympathetic individuals in that status who may have entered unlawfully or entered lawfully, but overstayed a visa may be the statute only provides what the statute provides and that just seemed to be kind of clear enough in this instance that no one saw fit to write separately to make some of the kind of broader, arguments about immigration in immigration law and policy that Jonathan was just alluding to.

And when I say no one saw fit to write separately Justice Sotomayor is the person that you might expect to write separately. So it did strike me as potentially significant that she did not. And that sometimes text is pretty clear. I mean, I think that most of the time it's not and you know, textualism sort of suggestion that texts and texts alone will answer most questions just isn't born out by the reality of the drafting of statutes. But I think that there are cases in which the text is clear so maybe that's what Sanchez says. I mean, Garland I thought was an interesting case in that it, so that's the unanimous Gorsuch opinion, basically rejecting a Ninth Circuit rule that basically had directed federal courts to presume an asylum seeker testified credibly in the absence of an explicit agency determination on the question of credibility and the Supreme Court basically said, there is no such rule in the INA, that requires federal courts again, to presume credibility in the absence of an explicit finding to the contrary.

And there, I think it's also an opinion that purports to be pretty textualist, but is actually rather purpose of IST in its reasoning, right? It basically says that the overall structure of the INA, carefully circumscribes judicial review of BIA and immigration judge decisions, particularly on questions of fact and credibility, but that's a broad statement. It sort of echoes what Jonathan was just saying, we actually have a lot of our immigration laws are quite restrictive and adverse to the procedural at other rights of immigrants. But that's kind of a broad principle that Gorsuch is using to interpret. There's no provision of the INA that says, what he says, right. That we're going to carefully circumscribed judicial review of BIA decisions.

There's lots of particular provisions that impose specific limitations, but the kind of broad observation that he makes about how federal court review is supposed to be narrow and limited, is just a broad observation that flows from his general understanding of some of the central premises of the immigration statutes and he's also drawing on broad administrative law principles and other provisions of the INA in deciding that this Ninth Circuit rule was kind of unmoored from the text of the federal statute. So I feel like I'm getting a little bit repetitive, but I do think it's an interesting, and it's different from the Sanchez opinion in that it's not just doing a close reading of a particular statutory term and its relation to other statutory terms. It's doing some of that, but it's doing other things too. And so in some ways I think it's even more interesting that this is a unanimous opinion because it doesn't just stick to taxes, sort of sticks.



It ranges well beyond text but also manages to keep the full court on board. And maybe that's, again, further evidence that both Gorsuch is a little bit more of a methodological pluralist then I think he sometimes holds himself out to be but that's sometimes he can write opinions using kind of different modes and methodologies that that are able to keep the full court on board with him.

**Rosen:** [00:47:09] Thank you very much for that and that's a very illuminating suggestion that textualism is a broad umbrella and that in fact Justice Gorsuch, as you just said, may in fact, be a pluralist and thanks to you both for helping us dis-aggregate these various pluralistic methods of interpretation that in these cases, the Court unanimously is converging around. I'll ask if there are any cases you want to call out before we turn to closing thoughts in this fascinating discussion. Jonathan, I think you were interested in a case called *CIC Services*, tell us why and what our listeners should know about it.

**Adler:** [00:47:46] So quick warning, this is a case that administrative law folks like me geek out on, and that's definitely an acquired taste for some, but it's actually a very significant case. It's *CIC Services, LLC v. Internal Revenue Service*, and the broader context of this case is the IRS we think of as a tax collection agency, it plucks taxes. But as we know over the last few decades, the IRS has been given more responsibility to engage in social policy. It helps administer The Affordable Care Act.

It helps administer all sorts of programs and subsidies that are done through the tax code. And so a percentage question that is arising as to what extent when the IRS is doing something other than collecting taxes, is it bound by the set of legal rules that we generally impose upon other government agencies and in particular the constraints of administrative law and The Administrative Procedure Act. And over the last decade or so, the Court has given several signals that the idea of tax exceptionalism, the idea that the IRS is special and gets to play by a different set of rules is mistaken. And that the IRS doesn't get more or less deference than other agencies under *Chevron* and it doesn't get more or less procedural flexibility than other agencies. And so that's really what *CIC Services* was about. The precise dispute was the IRS issues, a notice telling both taxpayers and then some service providers that do financial work for taxpayers to provide certain information to the IRS, if you fail to provide the required information, you pay a penalty. That penalty is assessed in the form of a tax.

*CIC Services* thinks this is unlawful. Thinks to the IRS did not have the authority to do this, they want to challenge it. In administrative law, they'd be allowed to do that, they'd challenge this as an impact promulgated rule guidance that's masquerading as a guidance, but that's really an effort by an agency to impose a substantive requirement that can be challenged under The Administrative Procedure Act. The problem is we have this other law, The Anti-Injunction Act that says you're not allowed to sue the IRS to prevent the collection of a tax. The idea is if you think a tax is unlawful, you first pay the tax and then you seek a refund to action. And so the question is can *CIC Services* challenge this notice under administrative law principles or because the notice is enforced by a penalty that is assessed as a tax, does it actually have to violate the notice, be assessed the penalty, pay the penalty and then seek a refund?





And the Court unanimously in opinion by Justice Kagan says no that not only when we look at the way he mentioned The Procedure Act operates and the Tax Injunction Act operates, but when we think more broadly about how governmental agencies operate, when the IRS is acting like an administrative agency, it plays by administrative agency rules.

And so that even though the practical effect of this suit would be that CIC Services doesn't violate this requirement and then doesn't end up having to pay a penalty that's assessed as a tax. That's not really why they're suing, they're suing because they want to challenge this substantive regulatory requirement.

Therefore, the Anti-Injunction Act does not bore the suit. And one of the things that was important in Justice Kagan's analysis is that not only would CIC Services have to pay this tax, but they could potentially be exposing themselves to criminal prosecution if they failed to comply with the notice.

But the big picture is this is the Court unanimously saying, if Congress gives the IRS or allows the IRS to do things beyond assessing taxes, it's going to have to play by the same rules that other regulatory agencies or other federal agencies play by. It's a very important principle arising in an admittedly obscure and complex case but something that I think is important to flag and interesting the Court was unanimous about.

**Rosen:** [00:51:36] Thank you for evangelizing on behalf of the relevance and interest of that, of the CIC case and for spreading light. Kate, are there any other unanimous cases you'd like to call out or do you have any thoughts about the unusually high unanimity rate so far, although of course that'll come way down later this month.

**Shaw:** [00:51:54] Yeah, I am sure that the number is going to look very different at the end of the term when we have 21 more opinions, but at least to date, I think it is striking. Some of the cases that we have discussed today have been cases that I might have predicted would draw a dissent or two.

And so I think that it is partly that some of these majority opinion authors are writing very persuasive opinions, but the justices do seem to me to be stretching, to hang together in some of these cases and to send something of a message of a united front to the public. I think I'll be better able to evaluate what it all means when we've got the rest of the opinions for the term, but maybe the only other unanimous opinion that I might flag is a case called, *Facebook v. Duguid* which basically held that Facebook doesn't count as an automatic telephone dialing system under The Telephone Consumer Protection Act, the TCPA.

Basically the question was whether when Facebook texts you to notify users, there's a new account access attempt from an unknown device. That's like a robocall, right under the relevant federal statute. And Sotomayor for a unanimous court concludes that for reasons having to do with the language of the statute, Facebook's notification system does not qualify.

It's both a pretty textually focused opinion, but it does cite legislative history, which I thought was interesting because it, again, it's unanimous, so none of the justices in that



opinion did what Justice Scalia used to do, which was to withhold his join from portions of an opinion that cited, legislative history, which in his mind was verboten.

So interestingly, it doesn't seem as though any of the new textualists on the Court are quite so doctrinaire is to withhold their joined from a part 2a so that I thought was kind of interesting. So its a majority opinion by Justice Sotomayor, but Justice Alito, concurs. And it's interesting, he's not one of the new textualists, I don't think he's quite as much of a textualist as a lot of people on the Court. But he writes a separate concurrence basically to say, statutes are written in English prose and interpretation is not a technical exercise to be carried out by mechanically applying a set of arcane rules, canons of interpretation can help in figuring out the meaning of troublesome statutory language. But if they're treated like rigid rules, they can lead us astray.

So I thought that was actually a useful note to end on, and that we've talked so much about statutory interpretation. And I do think that there is a tendency to reach for these canons of interpretation, these kinds of supposedly neutral rules of the road that textualism is very fond of and that Justice Scalia really endorsed both in his opinions and in his scholarly writing about statutory interpretation.

But that there does seem to be an emerging consensus on the Court. I think if we can try to read some through lines from these statutory cases that cannons and dictionaries are not going to give us the definitive answer to the question of statutory, meaning they may be useful tools, but standing alone, they're not going to get us all the way there.

And again, we're far from the end of the term, but I do think that's a pretty important take away from the statutory cases at least today.

**Rosen:** [00:54:39] Thank you very much for that. Well, it's time for closing thoughts in this really interesting discussion. It is a unique opportunity to think about the Court before the more familiar divisions emerge at the end of the term.

And Kate, you just used a very interesting term, "the new textualism" that has appeared in places, including a 2011 article by James Ryan laying claim to the Constitution, the promise of new textualism, which said that a new textualism was a methodology that liberals and conservatives could converge around. So I'll just ask for your thoughts, in what ways in the majority of cases that don't involve the end of term divisive ones, the Court is, or is not converging around the new textualism, Jonathan?

**Adler:** [00:55:27] Well, as noted before I do think that the Court is has converged around the idea that text is central, it is the anchor, it is the starting point. Whatever the ultimate conclusion the Court makes the justices seem to all believe that they need to reconcile that conclusion with the text. And also start with the text in terms of their analysis, now that doesn't mean that they aren't ever going to deviate from the text, it doesn't mean they might not approach the text in different ways or believe that a different set of materials is probative in discerning the meaning of that text. But they are starting from some shared ground. And I think that that's one of the reasons we see some of these cases coming out unanimous.



I also, as I noted before, I think it's important to remember that the Supreme Court in the last few decades has been unanimous in a remarkable percentage of its cases. Given how few cases they take and given that almost all of their docket is the result of circuit splits. That is to say, in a given term, 80, 90% of their cases, are cases they took only because lower court judges had disagreed. And so that means really smart individuals operating in good faith couldn't agree and yet the justices are able to. And I think that's notable. And that I think that reaching common ground about the centrality of text is something that facilitates that process, that having a shared sense of what it is they should be doing helps that, and throughout history, we've seen the Court coalesce at different times around different, what you might call organizing principles about how they see judging and that has helped the Court cohere and help the Court produce broader unanimity across a wider range of cases. Right now, text is helping provide that function, function of our current moment.

We, as I tell my students, you can teleport yourself to other periods of time and read a range of Supreme Court cases and you see that text is not the unifying principle it's something else. Maybe it's the past virtues, maybe it's concerned about legislative purpose, maybe it's concerns about something else.

But right now text is certainly something that does provide this function of central organizing principle or a central starting point that allows the justices to cohere in a large number of cases. But certainly not all because as we've already noted, sometimes the text runs out and sometimes there are other things on the table that the justice has care just as much about.

**Rosen:** [00:57:58] Kate, the last word in this great discussion is to you, when does, and when doesn't text in the new textualism, provide a unifying methodology for the justices?

**Shaw:** [00:58:08] Well, first let me just say, I'm happy to see kind of this debate about statutory interpretation, get its moment in the sun.

I think that in the public imagination, constitutional interpretation is the most important thing the Supreme Court does. And it is because it gets the last word on the Constitution, it is probably the most important thing the Supreme Court does. But many, many more of its cases are statutory interpretation cases and so I do think that we would all benefit from a more robust public debate about how the justices approach, the task of interpreting statutes. I think both because it would help clarify to the public how the Court does this very important work, the bulk of its workload. Because some kind of methodological consensus on the Court would actually be very helpful for Congress.

For years, Congress has been legislating against a backdrop of very divided methods on the Supreme Court. So if in fact the Court is converging around a modified textualism in which text is front and center, you read statutory cases from the 1970s and often the text of the statute just doesn't appear in the opinion at all. The Court talks about what the statute does, but never actually quotes what the statute says.

So those days of course are long gone. So we know the text is front and center, but what else the Court considers and how it values or waits those other kinds of sources? I think is



very much still in development, but I think it's healthy and productive. Somehow there are a number of these cases in which the authors of the opinions. I'm sure in that the, in conjunction with their colleagues, through a process of editing and revision behind the scenes, are getting to consensus and to unanimity around a number of important statutory cases. In which again, text is centered and maybe they broadly do kind of fall under the banner of textualism, but it's a kind of textualism that does admit of the need to consult other sources in most, if not all statutory cases.

And I guess I'm not a textualist, but I guess if that's what we're going to call textualism, I'm not sure I strongly object to it centering text, but allowing lots of other kinds of sources and methods to enter the interpretive enterprise. I think maybe is something that you could well, imagine, unanimity or near unanimity kind of coalescing around. So I think I'm ending this conversation feeling pretty optimistic about the possibility that the Court could get to some consensus on some statutory cases. But again, maybe there'll be some terribly divisive, statutory cases that come down the last couple of weeks in June that will cause us to revise our assessment but I think that's sort of how things look from here.

**Rosen:** [01:00:31] Thank you so much, Jonathan Adler and Kate Shaw for an illuminating, a civil and indeed an optimistic discussion about textualism, unanimity, and the Roberts Court. Kate, Jonathan, thank you so much for joining.

**Shaw:** [01:00:47] Thank you, Jeff.

**Adler:** [01:00:48] Thank you.

**Rosen:** [01:00:52] Today's show was engineered by David Stotts and produced by Jackie McKinney. Research was provided by Jackie McDermott, Anna Salvatore and Lana Ulrich. We The People friends, Judge Robert Katzmann has died at the age of 68. He served on the U.S. Court of Appeals for the Second Circuit from 1999 until his death and he was chief judge from 2013 to 2020. He was a great friend of civic education and at the National Constitution Center, the author of "Judging Statutes," an inspiring book about statutory interpretation. And all of us at the NCC would like to dedicate today's show to his blessed memory. Please rate, review and subscribe to We The People on Apple Podcasts and recommend this show to friends, colleagues, or anyone, anywhere who is eager for a weekly dose of constitutional debates.

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