

303 Creative and Other Key Cases From SCOTUS's 2022-23 Term

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[00:00:00] Jeffrey Rosen: ... In a 6:3 ruling at the end of the Supreme Court term, the court handed down 303 Creative LLC v. Elenis, a major First Amendment decision about the intersection of free expression rights and anti-discrimination law.

[00:00:15] Jeffrey Rosen: Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit, chartered by Congress, to increase awareness and understanding of the Constitution among the American people.

[00:00:33] Jeffrey Rosen: In this episode, I am honored to convene two of America's most thoughtful legal commentators, the ACLU National Legal Director David Cole and the New York Times Opinion columnist David French. This is a dream team of constitutional Davids and it will be great to hear their insights about 303 and the other cases at the end of this important term.

[00:00:56] Jeffrey Rosen: David Cole is the National Legal Director of the ACLU and has litigated many cases in the court. His most recent book is Engines of Liberty, How Citizens Movements Succeed. David Cole, welcome to We the People.

[00:01:11] David Cole: Thanks for having me again, Jeff.

[00:01:13] Jeffrey Rosen: And David French is a New York Times opinion columnist. Before that, he was senior editor at the Dispatch, which he helped to start, and a tributing writer at the Atlantic. His most recent book is Divided We Fall, America's Secession Threat and How to Restore Our Nation. David French, welcome back to We The People.

[00:01:30] David French: Well, thanks so much for having me, Jeff. I always love to join you.

[00:01:34] Jeffrey Rosen: Let's begin with 303 Creative. David French, you filed a brief in the case and you think it was correctly decided. Why?

[00:01:43] David French: Yeah, I think if you're looking at the 303 Creative case, this was the case involving a website designer who was not wanting to design websites for same sex weddings because gay marriage violates her religious beliefs.

[00:02:00] David French: And really the case, in my mind, boiled down to a key question. And that key question was, was she providing goods and services sort of like cooking

hamburgers or, you know, providing folding chairs at a wedding venue? Or something along those lines. Or was she providing her own expression? Was what she was selling her own expression.

[00:02:24] David French: And the reason why that's really important is because we have many long years of precedent that cut in different ways depending on the answer to that question. So, for example, if you go back to *Newman v. Piggie Park* a case from the Civil Rights era where someone raised a religious liberty objection to serving Black customers, the court essentially laughed that out.

[00:02:48] David French: Laughed that out of the courtroom. I believe the phrase was patently frivolous was the phrase used to describe the assertion that you would have a kind of blanket religious liberty exemption to non-discrimination statutes. And so if she's someone who is refusing to provide goods and services to a class of individuals on the basis of their sexual orientation, then that's a case she should lose.

[00:03:14] David French: At the same time however, we have very strong prohibitions historically against compelled speech. In other words, the government's for 80 years since the seminal case of *West Virginia v. Barnette*. The government just doesn't have the ability to tell you to tell any listener here is what you must say on a given matter of political, religious, cultural consequence.

[00:03:39] David French: And so from my perspective the case was about compelled speech, not about a refusal to provide goods and services and a really key element of this, of this case was the stipulations in play here. So the state of Colorado and the plaintiffs 303 Creative entered into a set of stipulations agreements about the case. And one of the stipulations was that Lorie Smith, who owns 303 Creative, was willing to work with all people regardless of classification, such as race, creed, sexual orientation and gender, and that she will gladly create custom graphics and websites for clients of any sexual orientation.

[00:04:16] David French: So, so she was not engaging in identity based discrimination, and then Colorado agreed that the design services were expressive, and they agreed that they were original, customized creations that contribute to the overall message her business conveys through the websites it creates. This is the Gorsuch summary of the stipulations.

[00:04:39] David French: And once you had those stipulations at play in the case, in my mind, it put it squarely in the category of these, this is compelled expression as opposed to status based discrimination in the provision of goods and services. And if you go back and you see, and David and I were talking a little bit offline about this that goods and services distinction versus expression and these stipulations in play really, you know, matter a lot.

[00:05:11] David French: But it was very interesting to me. If you go back to both the *Masterpiece Cake Shop* case, which involved a baker designing custom cakes and this case, a lot of the oral argument really focuses on this line between goods and services and expression and what those stipulations did was allowed the majority of the court to say wherever that line is between goods and services and expression, we don't have to really explore that. Because in this case, Colorado agreed that it was expression.

[00:05:44] David French: And so, that's, that's sort of the heart of the why I weighed in on this case, because it was, in my view, a compelled speech case, not a denial of services case. And so that was, that's how I parsed the issues.

[00:06:00] Jeffrey Rosen: David Cole, you were unconvinced by the distinction between goods and services and creative expression. You filed a brief for the ACLU saying the critical inquiry is not whether the website design service is expressive, but whether Colorado's interest in prohibiting discrimination is unrelated to the suppression of free expression and you wrote a really thoughtful end of term essay in the New York Review of Books published on July 4th reiterating your skepticism about the result in this case. Tell us why and why you think it was wrongly decided?

[00:06:29] David Cole: Sure. I, We at the ACLU are very much defenders of free speech have you know, challenged many laws that compel speech and successfully done so. We didn't see it that way in this case. A law like Colorado's that simply says, if you choose to go into business to serve the public you can't discriminate among the public based on who they are, is not a regulation of speech.

[00:07:00] David Cole: And that law applies equally to businesses that have no expressive component, say, hardware stores and businesses that are clearly protected by the First Amendment, say, bookstores or architects or photography studios. So I think it's really you're sort of looking at the problem from the wrong end if you ask, is the business expressive and if the business is expressive, they don't have to comply with the non-discrimination law.

[00:07:33] David Cole: I think the way the court previously has looked at this and has always rejected arguments by businesses that they have a First Amendment right to discriminate is to say, we don't ask whether the business is expressive. We ask whether the government's interest in enacting the law is targeted at expression, or whether it's targeted at conduct.

[00:07:57] David Cole: And if it's targeted at conduct, without regard to whether it's expressive, the fact that it's applied in a particular instance to a business that's expressive doesn't turn it into a First Amendment case where the business gets to discriminate. That's why bookstores can't put up signs saying whites only, even if they're run by white supremacists.

[00:08:21] David Cole: You know, that's why architecture firms can't put up signs saying no Mexican Americans need apply, even if they're opposed to immigration. And they would object to the message that serving Mexican Americans, would send. That's why a corporate photography studio that is open to the public can't say we won't take pictures of women because we believe women's place is in the home. And so we're not going to take a corporate headshot of a woman.

[00:08:51] David Cole: It violates our commitments. It violates our principles. It requires us to express a message with which we disagree. The law has generally been and the court said this in Masterpiece, the fact that a business that chooses to open itself to the public has a philosophical or religious objection does not give it a right to an exemption from a content neutral non-discrimination law targeted at the conduct of discriminatory sales.

[00:09:23] David Cole: So I, you know, and Justice Gorsuch, in his opinion, really doesn't even grapple with that argument. He, he doesn't address... I mean, you know, in cases like the affirmative action case last year in Dobbs, the court takes on and overturns precedent directly. In this case, he doesn't even really grapple with the key argument in the case, which the court has all heretofore always relied upon, which is that non-discrimination laws targeted at the conduct of sales don't create an out for on the First Amendment simply because a particular business is engaged in expressive activity. The court held that with respect to schools that are obviously engaged in expressive activity, to law firms that are obviously engaged in expressive activities and it should have done the same here.

[00:10:14] Jeffrey Rosen: David French. What is Justice Gorsuch's response to David Cole's claim that anti-discrimination laws targeted [inaudible 00:10:38] conduct shouldn't create an exception for creative activities. Justice Gorsuch does say, it's difficult to read the dissent and conclude we're looking at the same case and he cites the stipulation of Colorado that Ms. Smith's activities are expressive as an answer to the claim. But what is Justice Gorsuch's response and do you find it persuasive?

[00:10:42] David French: Yeah. That's a really good question, Jeff. And I actually think Justice Gorsuch would agree with a lot of what David said, but what, where I think that the departure would come is he would say, "Well, look, if you're open for business we're going to agree that you can't engage in status based discrimination or identity based discrimination in the identity of your customers.

[00:11:07] David French: So, let's say you've hung out your shingle, you're a lawyer and you've hung out your shingle and you can't put up a sign that says, "I'm not going to serve gay clients", or, "I'm not going to serve you know, I'm not going to serve Black clients." You can't do that. But if you, a client walks in regardless of their identity and says, "I want you to make this argument for me in court and I'm hiring you to make this argument for me in court."

[00:11:33] David French: And it's an argument you find to be morally objectionable, then I'm not engaging in that class or status based discrimination by saying, "No, I refuse to be hired to make that argument. I'm not going to do that." and so I think that you really, how you think of this case so much depends on the frame. This sort of default frame that you're, that it's viewed through is this status based discrimination where they're saying to a class of people that we don't want to serve you versus is what fundamentally what I'm doing is using my talents to make a statement to make to advance messages in the public square that with which that I, that I fundamentally disagree with.

[00:12:20] David French: And that circumstance, even though we can, absolutely spin out hypotheticals that I would find, like, really morally objectionable as far as how someone would choose to wield or not wield their expressive power. It is still theirs to wield or not wield. And, and I think that's sort of the fundamental disagreement about this case. But I would say that Justice Gorsuch would agree with a lot of what David said, but this was really a case that I think when you're trying to figure out why cases come at, came out one way versus another way, often, there are very mundane details about the case that are dispositive, that make it much more likely to come out one way or the other way.

[00:13:10] David French: And I think of the difference between Masterpiece Cake Shop or a case where cert was denied that came out of Washington called Arlene's Flowers involving a florist, right, who was refusing to make custom floral arrangements for same sex marriages. When I look at the differences in these cases, the one thing that really stands out to me of those three cases was that in this one, the state of Colorado essentially gift wrapped the expression point for the court through its stipulations.

[00:13:42] David French: It almost said, "Hey court, we're leaving beside some of our best arguments and we're going to ask you to flat out determine whether or not we can compel expression, that this is expression. We're going to agree. It's expression. And we're going to agree that she serves you know, gay clients in other contexts."

[00:14:02] David French: And so it actually, in an interesting way, I think both made the decision easier for the majority. And more limited in its reach because there's not a lot of cases that are going to be teed up in this way. And I'm not 100% sure that Masterpiece Cake Shop would come out the same way. Because remember Masterpiece Cake Shop was decided on religious free exercise grounds because they found evidence of explicit targeting, right?

[00:14:31] David French: I'm not 100% sure that a Masterpiece Cake Shop or an Arlene's Flowers would now come out the way 303 Creative did if the defendants in the case are not stipulating that what they're doing is expression, expressive activity. So I think the case is there's probably more agreement with David than people might think and I think the case is actually in many ways narrower than people realize.

[00:14:58] Jeffrey Rosen: Such an interesting point. David, what do you think of that? Justice Sotomayor closely adopted examples in your amicus brief, including offering the same example that you did of a professional photographer being generally free to choose her subjects and the state not regulating that choice. Are you persuaded by David Cole's narrow reading of Justice Gorsuch's opinion and do you agree with him or not that it might not resonate broadly throughout anti discrimination law including to the Masterpiece Cake example?

[00:15:30] David Cole: Yeah. By David French's interpretation.

[00:15:31] Jeffrey Rosen: Forgive me. I'm keeping my very distinguished David's [inaudible 00:16:07]-

[00:15:35] David French: It's a good, it's a good [inaudible 00:16:09]

[00:15:36] Jeffrey Rosen: It's an embarrassment of David's.

[00:15:37] David Cole: Easy to confuse us. So first of all you know, I was pleased, very pleased to see that Justice Sotomayor relied on our amicus brief. You always wonder when you write amicus brief whether anyone reads it. So at least it was read here. Look, you know, I just disagree with David French on the the critical importance of the concession that a business is expressive.

[00:16:02] David Cole: In Masterpiece Cake Shop, we conceded that the cake was expressive in Arlene's flowers, which we also litigated. We conceded that the florist's work is expressive. I would concede that a bookstore's books are protected by the First Amendment. I would still say they are subject to a non-discrimination law that applies equally to all businesses, regardless of whether they're expressive or not. And I think in Masterpiece Cake Shop, in the argument in Masterpiece Cake Shop, it became very clear that sort of creating a carve out for a business that can be characterized as expressive is extraordinarily difficult and extraordinarily dangerous.

[00:16:41] David Cole: So the justices asked about architects. They asked about hair stylists. They asked about beauty salons. They asked about, you know custom caterers. And, you know, all of those can be characterized as expressive. All of those. If that doesn't answer the question, the question is not simply, is the business expressive? If so, it can discriminate.

[00:17:06] David Cole: The question is whether the government's interest in banning discrimination is one that is targeted at the content of what's communicated. In which case you apply heightened First Amendment scrutiny or whether it's a content neutral regulation of conduct. Now, I will say, I think Justice Gorsuch could have written a narrow opinion here and his opinion is so poorly reasoned, it seems to me that maybe it will ultimately be read this narrowly along the lines that David French is suggesting, namely say actually, she was not discriminating on the basis of status. She was choosing not to sell a particular product or a particular service to anybody. And then she's not discriminating at all. Right? So if I'm a t-shirt manufacturer and I make Black Lives Matter t-shirts and a white supremacist comes in and says, "I would like a Proud Boys t-shirt."

[00:18:07] David Cole: I can say to him, "No, I don't make Proud Boys t-shirts. I only make Black Lives Matter t-shirts," and I wouldn't sell a Proud Boys t-shirt to anyone. And Colorado conceded that that is not discrimination, that is protected by their law. It's not... You know, the law doesn't tell a business what it has to sell or not sell.

[00:18:29] David Cole: It simply says, "If you choose to serve the public and you choose to offer something to the public, you can't deny it to some people based on who they are." And what the relief she sought here was relief that would say, I want to provide wedding website services, and I don't want to provide them for gay weddings.

[00:18:49] David Cole: That is, I don't want to provide them to gay couples. Yes, I'll provide gay couples with other things, but, you know, a restaurant doesn't get to say in the example of Piggie Park with David French identified earlier, Piggie Park said, "Hey, we'll sell food to Black people on a takeout basis. We just don't want them sitting in our restaurant."

[00:19:12] David Cole: That was not a defense, right? And so what 303 Creative was seeking here was a categorical right to not provide this service, a wedding website design to any gay couple for their wedding, even though she would provide the exact same service to a straight couple for their wedding, even if the websites looked exactly the same, if the website said John and Kim are getting married on this date in this place, and here's their gift registry.

[00:19:43] David Cole: If John and Kim was a man and a woman, she would sell that. If John and Kim were both men, she would not sell that, even though the content would be

exactly the same. So, you know, Justice Gorsuch might have written a narrower decision that said, this is not discrimination at all but that's not what he said.

[00:20:02] David Cole: He said, you know, it violates Colorado's law. But, that is status based discrimination, but she gets to discriminate on the basis of status because her business is expressive. That's a very dangerous press.

[00:20:16] Jeffrey Rosen: David French, how broadly might this holding sweep and how does it fit into the broader effort by the court to recognize the rights of religious dissenters to seek exemptions from generally applicable laws in her dissenting opinion in the *Burwell* versus *Hobby Lobby* case, Justice Ginsburg objected to a range of cases where religiously motivated people were seeking such exemptions ranging from the *Piggie Park* case we're talking about to a version of the *Masterpiece Cake* case and suggested that the court was using the First Amendment to drive a tremendous wedge through anti discrimination laws. Is that overstated in your view in terms of this? You see this as a narrow reading only applying to expressive activity or might it sweep more broadly?

[00:21:07] David French: Yeah, I think it's really quite narrow to be honest. I think that the case would be far more consequential had it come out the other way, in, in my view. And the reason why I weighed in on it when the *Mika*'s brief is because I thought it would be more consequential if it came out the other way, because I would see it as undermining 80 years of precedent around compelled speech, which, but once you entered, once you had an agreement in this case about the expressive nature of the activities then, you know, if you look at the Gorsuch opinion, it's very straightforward.

[00:21:47] David French: It's not a complex case at all, because once you identify what's happening here is compelled expression, and then a lot of existing precedent locks in, and this is precedent, precedent we've been operating with throughout the entire civil rights era.

[00:22:08] David French: And so through the entire civil rights era, we have been operating with both non-discrimination laws. And prohibitions against compelled speech and non-discrimination laws have been quite effective very effective. This really is getting into an extremely narrow category of expression that you might, you know... And Gorsuch laid out some of it in the opinion. So, you know, if someone offers her services as a speech writer do they have to write whatever speech someone wants to hire them to write?

[00:22:44] David French: Or you know, I used the lawyer example before, which was my example, but again, let's say a portrait painter, you offer your services to the public, well, I don't have to paint a heroic portrait, portrait of David Duke, right? Or a white nationalist like Richard Spencer. [laughs] and that's not discrimination on the basis of race, if I choose not to paint a portrait of, of David Duke or Richard Spencer.

[00:23:11] David French: And so this is a very narrow category of a very narrow, a very narrow reach, a very narrow category of business activity. And so I saw the main consequence would be if the compelled speech doctrine was undermined because we have, again, had a robust compelled speech doctrine side by side with a robust non-discrimination regime for quite some time.

[00:23:37] David French: And so I think of this as really a status quo decision in almost every important way. Because it's a status quo decision, is not something that people are going to feel the impact of in any substantial way. So this is not cracking the door open to Jim Crow in any way, shape or form or cracking the door open to you know, commercial segregation.

[00:24:03] David French: It's, it is a preservation of an existing legal regime more than a change in my view. I bet David disagrees. [laughs]

[00:24:12] Jeffrey Rosen: With David eager to find out if you disagree. And also, do you see any divisions among the conservative majority on this point, with some being willing to read these religious exemptions more generally to reach the parade of horrors that the dissenters fear, and others being more moderate and reading the decision narrowly, or not?

[00:24:32] David Cole: So I, you know, I think the Gorsuch opinion is very poorly reasoned, and, and therefore I think it's very hard to know what its implications are going to be. I know that Alliance Defending Freedom that represented 303 Creative and represented Masterpiece Cake Shop will be arguing for the broadest possible application of this law.

[00:24:54] David Cole: I know that we at the ACLU will be arguing for the narrowest possible reading. So we hope David French is right that it is a narrow a narrow decision. But I think it's, you know, it's pretty poorly reasoned. So it's hard to know. I do worry about it being a broad, it being read broadly.

[00:25:13] David Cole: Yes, it's true. We've had laws against compelled speech and we've had non-discrimination laws for a long time coexisting, but that's because every time previously, that a business argued it had a right to discriminate because applying a non-discrimination law to it was compelling it to engage in speech or association or religious activity that it opposed, the court rejected it.

[00:25:37] David Cole: This is the 1st time in history that the court has accepted a First Amendment loophole exemption to a non-discrimination law applied to businesses that choose to serve the public. And that's so, you know, it could be the door opening the door to lots of very troubling discrimination.

[00:25:56] David Cole: As to whether the justices, you know, how they're divided, very hard to know because you know, you have Gorsuch's opinion. You don't have any narrowing concurrences. You don't have Justice [inaudible 00:27:04], "Oh, you know, by the way, yeah, this is this. I see this as a case about message not about status." And so that's different. That would have been nice to see, but you don't see that.

[00:26:17] David Cole: And so I think it's very much up in the air. And just as to David French's notion that a, you know, a portrait artist should not have to take, to not have to draw, you know, paint David Duke we, we addressed that in our brief and Justice Sotomayor addressed that in her dissent.

[00:26:36] David Cole: Nobody suggests that a portrait artist has to paint a portrait of anybody. Writers, artists, speechwriters and the like, I'm a writer, I'm a freelancer, I am not a business that is open to the public. I write for particular magazines and particular places and I could choose to write only for Christian magazines or only for Jewish magazines or only for white supremacist magazines and that would be my right because I'm not a business open to the public. The law doesn't cover me.

[00:27:05] David Cole: Colorado's law only covers businesses that choose to open to the public. So, a portrait artist, of course. If you're a portrait artist, you choose who to paint, and you can paint only Black people, or only white people, or only women, or only men. The law doesn't say anything. Now, if you turn around and say, "I'm going to open up a passport, you know, photography studio, open to the public, generally", you can't put up a sign saying, "But I won't take pictures of white people, or I won't take pictures of Jewish people, or I won't take pictures of Muslim people."

[00:27:39] David Cole: That's the difference. And so all of these examples of, "Oh, well, could you require a Muslim filmmaker to make a film that was you know, pro-Zionist?" No, but that's, the law doesn't apply to the Muslim filmmaker at all. So it only applies to those who choose to serve the public and the condition on serving the public has long been that if you want the benefits of serving the public, you have to actually serve the public and you can't start picking and choosing based on who your customers are.

[00:28:14] Jeffrey Rosen: Many thanks for that. Great exchange. Let's put a few more cases on the table and then think about the court more broadly. David French, you wrote a piece in the New York Times at the end of June, the Supreme Court just helped save American democracy from Trump. And you talked about the Alabama voting rights case. Tell us about that and why you think the court helped to save democracy.

[00:28:37] David French: Yeah, so first in saving democracy, I'm referring to the Moore v. Harper decision, which it's really interesting how very, very consequential decisions kind of get lost very quickly in the public mind, and we focus on the final decisions of the term.

[00:28:55] David French: And that sort of sticks in our mind more than anything else. But I would argue that the Moore v. Harper decision, maybe it's certainly one of the top four most consequential decisions of the term in my view. And this is the case that gutted what is called the independent state legislature doctrine and the independent state legislature doctrine is put forward.

[00:29:14] David French: It's a doctrine that really emerged in 2020, although people had kicked around versions of it before, but strongly emerged in 2020 is this idea that the constitution reserve for state legislatures... And state legislatures alone, not state constitutions, not state judges, not governors or state agencies, reserve for state legislatures the regulation of congressional elections and the election of electors for President of the United States.

[00:29:43] David French: And this was an argument that was used to try to get very radicalized red state legislatures to intervene in the election and to intervene in not just the

outcome, but the conduct of the election in a way that would be immune from, for example, from judicial review.

[00:30:00] David French: Really dangerous doctrine. I mean, just incredibly dangerous doctrine and a historical. And so when cert was granted in more of the Harper, which the facts of this case are. That there was a state drawn, legislatively drawn redistricting map that was overturned by a Democratic dominated state Supreme Court, and it went to the Supreme Court in the United States on the basis that the state Supreme Court didn't really have a say.

[00:30:27] David French: This was up to the state legislature, not the state Supreme Court. What's fascinating about this case is I thought it was an absolute slam dunk. There was no way the independent state legislature doctrine was going to survive Supreme Court review. Well, then there was an election in 2022, and the Democratic dominated... Supreme Court of North Carolina became a Republican dominated Supreme Court, and on their own, they decided to re-hear this case.

[00:30:55] David French: And a lot of folks, me included, thought, well, this, this might moot out the Supreme Court case and there was a strong argument that it mooted the Supreme Court case, but the Supreme Court heard it anyway and gutted the independent state legislature doctrine as we expected it would when cert was granted.

[00:31:14] David French: So, in many ways, it felt like they said, almost intentionally said, brushed past the mootness to deal with this independent state legislature doctrine. Now, in the other case, the Alabama Voting Rights Act case, this is a fascinating case because what the court did is it swept away an Alabama redistricting map that, like many maps before, had reserved one majority minority district out of seven, I believe.

[00:31:40] David French: When Alabama is 27, 28, 26% Black voters in any given election in 27% of the population and always only had one representative. And there was a... Alabama made a maximalist argument before the Supreme Court that would have really truly undermined section two of the Voting Rights Act and the Supreme Court to the surprise of an awful lot of people, sided with the plaintiffs and rejected the Alabama map.

[00:32:10] David French: And it did so in reasoning that was really interesting. It reaffirmed a previous test, what called Jingles test, that took into account racial disparities in voting, racial polarization in voting. And as I read it, and David can tell me if I'm kind of over reading the case, if he thinks I'm over reading the case, as I read it, it was almost like sneaking preclearance back into the process for the most... And this is referring to, we're getting really wonky now, this is referring to Section 5 of the Voting Rights Act where preclearance had been struck down in a weird way for the most racially polarized district, or most racially polarized states in the United States. It was almost like sneaking preclearance back in, and so I found it absolutely fascinating after the oral argument, I had this thought, "Oh, this is not coming out the way everyone thinks. I think Roberts and Kavanaugh are going to go with the three, the more progressive three."

[00:33:10] David French: And they did. And so I think those two cases, one preserving the ability to engage in race conscious evaluation of Voting Rights Act challenges and the other one gutting the independent state legislature doctrine. I think you put those two things

together and you've got two of the more democracy preserving Supreme Court decisions of recent terms.

[00:33:34] Jeffrey Rosen: David Cole, why do you think Justices Roberts and Kavanaugh joined the liberals and they were joined by Justice Barrett in the independent state legislature case, in these two decisions which David French calls democracy preserving? There's a Hamiltonian nationalism, there's a concern about the court's legitimacy, but what is it that distinguishes Roberts and Kavanaugh from the more Jeffersonian or libertarian conservatives in these cases?

[00:34:01] David Cole: So first of all, I, you know, I agree with David French, that these are hugely important decisions for the preservation of our democracy. They leave in place the ability to challenge districts as partisan gerrymandering under state constitutions, which you can't challenge them under the federal constitution as partisan gerrymandering. And they leave section two of the Voting Rights Act intact as it was as it was meant to be applied and as it has been applied for a very long time.

[00:34:29] David Cole: I mean, I think one reading is... Look, the right wing overplayed its hand. It looked... It saw what happened last term where the court was willing to, you know, throw precedent to the winds in a variety of areas and it, and it went for it. It went for the fences. And, and the court wasn't willing to do that here.

[00:34:50] David Cole: It essentially affirmed existing law as to Section 2 of the Voting Rights Act. And it declined to accept you know, as David correctly says, an extreme reading of the Elections Clause in the Independent State Legislature Theory case. So in a sense they're status quo cases.

[00:35:09] David Cole: Now it is true, the case, the court, this court is not that interested in the status quo when it comes to abortion. Not that interested in the status quo when it comes to gun rights. Not that interested in the status quo when it comes to affirmative action. So how do you explain, you know, it's willingness to sort of stick with the sort of civil rights status quo in these cases.

[00:35:28] David Cole: You know, I think, I do think in part it is attributable to the fact that there was so much criticism of the court after last term where it decided a very large number of the cases on 6/3 grounds it overturned, you know, in, in Dobbs, overturned a precedent that had been in place for 50 years and protected half of the country, you know, to take away an existing constitutional right like that, that's really pretty much unprecedented.

[00:35:57] David Cole: And the court heard from people, it heard a lot of p- from people and its legitimacy you know, its favorability ratings went the lowest, went down to the lowest they've been this century. And, you know, if you're, if you're a member of the court, you have to be concerned about your institutional legitimacy.

[00:36:16] David Cole: And I think their institutional legitimacy is, was questioned by the way they decided cases last term and this term, with the exceptions of cases like 303 Creative and the Affirmative Action decisions and the student loan case. They avoided 6/3 results,

they reached narrower results, they stuck with the status quo, they applied precedent rather than overturning precedent.

[00:36:39] David Cole: And, you know, as a result you, you had something like 5 or 6, 6:3 Republican Democratic pointed justices cases this term, as opposed to something like 16 last term. And in some of the most consequential cases including these two. You know, you had bipartisan agreement to uphold the status quo, apply precedent, act like judges for God's sake.

[00:37:04] David Cole: And that's what we saw. And, and I, you know, I think it's a very, a good sign that we're seeing that, it's a sign that the court is responsive to public criticism about, you know, how it's acting. It's a sign that, you know, even though these are six very conservative justices, and if they were members of Congress, they would have no compunction about reaching certain results, they're judges. And they feel constrained by precedent and by the requirement that they act as you know, as interpreters of law, not as imposing their partisan will, at least sometimes.

[00:37:40] Jeffrey Rosen: A powerful thesis which you also raised at the end of your New York Review piece where you said, "Had Americans accepted last term's radical decision without protest or criticism, it seems likely that this term's cases would not have come out as favorably as they did."

[00:37:56] Jeffrey Rosen: David French, do you agree or disagree with David Cole's thesis that the court was responding to public protest and that as a result there were fewer 6/3 decisions on polarized grounds?

[00:38:09] David French: Boy, that's a great question. You know, one of the things that we really don't have the... One of the things that really doesn't happen with Supreme Court justices in the way that it happens, say, with Senators or Presidents is they don't exactly sit down for searching inquiry as to our various ideas about the way they do what they do, the reason why they do what they do. And, and I will say, I do believe that there is an emerging, it's hard to say split, maybe split is too big a word, but they're emerging distinctions amongst the six Republican nominees.

[00:38:49] David French: And I would put these distinctions like this, there's an institutional sort of axis and an philosophical axis. And there are some justices who are much more willing to say, "When I am writing my opinion, I'm considering the philosophy, the legal principle, more than the consequences."

[00:39:11] David French: And then there's other justices who say, might say, "I, there are a lot, there's a lot that I agree when you're talking about your underlying legal principles, but I'm also looking at the consequences," and so that's sort of your institutional access, and that's where I see Roberts and Kavanaugh as being much more on that institutional access versus the moving more towards the institutional access.

[00:39:37] David French: And maybe away from sort of the more pure philosophical that says, we're going to apply a legal philosophy come what may. And I think that's the distinction. And that's where when David writes about sort of public protest and public concerns raised about the court, I think it's entirely plausible that if you're in that institutional,

you're thinking institutionally that that plays a role. I think that's very plausible but I do think that there is a strong, if as we watch this court develop over the next few terms, you're going to see that distinction emerge.

[00:40:12] David French: And the interesting wild card here is Justice Barrett. Because she has demonstrated that she kind of goes her own way. The three justices most frequently in the majority were Kavanaugh, Roberts, and Barrett. And, and not the other three, not Gorsuch, Alito, and Thomas. And so I do think there is an interesting emerging, and again, split is too much, but distinction that you can draw between the six more conservative justices, and I think there are distinctions amongst the three more progressive justices.

[00:40:48] David French: They're not a monolith, you know. One of the more interesting and I thought kind of fun elements of this term was, you saw what was it? Three concurrences between Gorsuch and Jackson. So they, there's your unlikely pairing in three cases. Elena Kagan has demonstrated that she will go her own way. And so there's, there are interesting distinctions, and I think it's way too simplistic to say it's just a 6/3 court, and that is that.

[00:41:16] David French: I think we have enough examples from *Moore v. Harper*, Alabama redistricting, we had the Indian Child Welfare Act case that we have not talked about yet. We're saying it's 6/3, and that's that. At this point, just way too simplistic.

[00:41:31] Jeffrey Rosen: David Cole, your thoughts about David French's distinction between institutional and philosophical approaches, where you see Justice Barrett fitting in, and in addition to the court's responsiveness to public protest, how do you see the distinctions among the liberals and the conservatives on the court playing out?

[00:41:51] David Cole: Yeah. So I think actually, my guess is that every justice on the court cares about the institutional legitimacy of the court to some degree. But I agree with David that it, you know, it varies depending on the justice. You know, the fact that, you know, Justice Alito is, is going out there writing pre- you know, preemptive op eds in the Wall Street Journal, defending criticisms of his ethics and, and going out and making speeches saying that we decide cases as judges, not as politicians, suggests that even he hears [laughs] the criticisms and is concerned about the, public perception of the court. You just have to be if you're part of that institution.

[00:42:33] David Cole: However, I do, I agree with David. I think Justices Alito and Thomas, who were the least likely to be in the majority in divided opinions this term that's because they are, they have a very, very rigid worldview and they are willing to go with that worldview, you know, hell or high water, regardless of precedent.

[00:42:53] David Cole: Justice Thomas, I don't think he's ever been [laughs] troubled by precedent, if you know, if he thinks the precedent is wrong, he'll just say it's wrong. And so he's often, often writing for himself or just with Alito and often in dissent. I do think, I think Kavanaugh and Roberts have shown themselves to be concerned about the institutional legitimacy of court and more sort of centrist in their conservatism.

[00:43:16] David Cole: I think it's too early to tell with respect to Justice Barrett, but I think there's some, you know, real... From my standpoint, some real hopeful signs. I've been impressed by Justice Barrett from the beginning in terms of her engagement, oral argument. She always asks really good questions of both sides.

[00:43:33] David Cole: She does not sort of, you know... That is not true of, say, Justice Alito. He is an advocate in there, you know, and he is fighting for his side. He is answering the other justices questions when he doesn't think the lawyer that's representing his side did it, did a good enough job. Justice Barrett is asking hard questions to both sides.

[00:43:51] David Cole: And I, you know, I think, you know, it's often people say you can't really know sort of where justice is going to fit until they've been on the court for five years or so, because it's so different being a Supreme Court justice than being a court of appeals judge where you're much more bound by precedent in a much more strict way.

[00:44:12] David Cole: And so you know, it remains to be seen, but I'm hopeful about Justice Barrett. Yeah, and Justice Gorsuch, you know, I mean, he wrote Bostock, which extended Title VII and many other non-discrimination laws to gay and transgender folks. Fantastic. He also wrote 303 Creative. Which as you know, I'm not very happy about but he is kind of his own person. That's for sure. He's his own person.

[00:44:38] David Cole: And, and to what extent he's an institutionalist I think remains to be seen. But I, but I think all of them to some degree, you know, this is a term in which there were many strange bedfellow kinds of opinions and decisions. And that's good for the court. That is good. It is not good when you have a term in which there are 16, 6/3 decisions and all the most controversial cases are decided with the six Republicans on one side and the three Democrats on the other side.

[00:45:08] David Cole: That is just, that's bad for the court. And I think, you know, the, the court as a whole seems to have recognized that this term.

[00:45:16] Jeffrey Rosen: Many thanks for that. Well, time for closing thoughts in this great discussion. It's such a privilege to bring both of you together because as America's most thoughtful, libertarian conservative and civil, libertarian liberal commentators, you helpfully illuminate areas of agreement and disagreement. So that, that's my final question. David French, as you think about the Roberts court in your two or so, of its existence after the appointment of Justice Barrett what would you say to the two, two, two cheers or some other grade as a, as a libertarian conservative? How do you think the court is doing?

[00:45:56] David French: I'm pleased overall. I'm not gonna ever say a full three cheers. No, no American institution is in my view, meriting the full three cheers, but I'm, I'm, I'm pleased overall. And I think David said something very wise, which is, it's really hard to kind of know about these justice to really know where these justices are going to fit for five years.

[00:46:20] David French: And we're still in a process of understanding what this new court is, because we've had, if you think about it, we've had a new justice, new... Gorsuch, Kavanaugh, Barrett and Jackson, all between 2017 and 2022. And so we're really at the beginning of the process of understanding this court. And so my my prediction, and this is

whenever you offer a prediction, you have to add the caveat that may not age well is I think we're going to see a continuation of the trend that Dave had just articulated of more modest rulings. And an interesting test of this is going to be a case that was just taken, the Rahimi case coming out of the Fifth Circuit, which is going to be a very interesting case.

[00:47:09] David French: This is a case involving the Fifth Circuit using the Bruen case. This was the Second Amendment case involving the right to bear arms to strike down federal criminal prohibitions against people subject to domestic violence, restraining orders from possessing firearms. And this is really going to show how much Bruen upset or did not upset existing gun control precedents and or existing gun control standards.

[00:47:36] David French: And so it's very interesting that the court took that case immediately. And I think it's going to be a real test of sort of the breadth, for example, of the Bruen precedent and the outlook of the case, of the court going forward. And there will be others. You don't want to pin it all on one case, but I think that's an interesting bellwether case to watch next term.

[00:47:56] Jeffrey Rosen: Many thanks for that. David Cole, last word in this great discussion to you. How would you grade the Roberts court? And, and, and what cases are you looking at moving forward?

[00:48:07] David Cole: Well, look, I'm not, you know, I'm never going to be super happy with the Roberts court. I don't think it's a matter of degree. But I would say, you know, they've really now been sort of three terms of the court because Barrett came on pretty early, pretty early on into three, three terms ago. The first term, the court reached narrow results bipartisan outcomes the second term, it threw off the, [laughs] you know, the constraints and did what it did on, on Dobbs and Bruen and many other cases.

[00:48:38] David Cole: And then this term was a little bit of a reversion to the [inaudible 00:50:30] the first term, so it remains to be seen. But I, but I will say this. I think, you know, history shows that the court rarely departs very radically from where the country is on fundamental issues and that when it does so, its legitimacy is challenged, and there is some sort of a correction.

[00:49:01] David Cole: I'm hopeful that this term is a sign that there's been some sort of a correction. But look, let's not you know, let's not paint this too [inaudible 00:50:59]. We haven't talked about the affirmative action decision, but that's a very troubling decision that overturned 45 years of precedent, and I think will make it much harder for this country to you know to ensure that we have meaningful equal opportunity for all going forward.

[00:49:28] David Cole: So I'm not happy with the court. I think it's a lot less bad than almost everybody thought it would be after last term. And I do think that's in part because of the way the public responds. So I think it's critical for all of us who care about the Constitution, who care about civil rights and civil liberties to criticize the court when it does the wrong thing and to praise the court when it does the right thing, did a little bit of both this past term.

[00:49:58] David Cole: And so you know, I think hopefully we'll, we'll see, we'll see a continuation of that rather than going back to the extremes that we saw last year.

[00:50:08] Jeffrey Rosen: David French, David Cole. It is always an honor to convene both of you. Thank you so much for joining.

[00:50:15] David French: Thanks for having us.

[00:50:26] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollack and Samson [inaudible 00:52:22], was engineered by Bill Pollack. Research was provided by Yara Derese, Lana Ulrich, Samson [inaudible 00:52:28], Tomas Vallejo, Connor Rust, and Rosemary Lee.

[00:50:40] Jeffrey Rosen: Please recommend this show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Sign up for the newsletter at constitutioncenter.org/connect, and always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion and the engagement of people from across the country and around the world who are inspired by our nonpartisan mission of constitutional education and debate.

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