

Covering the Supreme Court

Thursday, July 10, 2025

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[00:00:00.2] Jeffrey Rosen: This week, the National Constitution Center and Texas A&M University School of Law convened a Supreme Court Review Symposium with leading constitutional scholars and commentators. 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. In this episode, I'm joined by three of America's leading Supreme Court commentators, Jess Bravin of *The Wall Street Journal*, Jan Crawford of CBS News, and Fred Smith, Jr. Of Stanford Law School. Together, we explore polarization on the Court and the role of the media and the president in shaping public perceptions. Enjoy the show.

[00:00:55.0] Jeffrey Rosen: Friends, our last panel ended with a vigorous discussion of whether the current court represents the triumph of John Marshall or Neville Chamberlain, and also the competing visions of Justice Jackson and Justice Barrett. And I want to start with that remarkable debate now. In the *Trump v. CASA* case, Justice Jackson, in her separate dissent, accused the conservative majority of creating a zone of lawlessness that represented an existential threat to the rule of law. And Justice Barrett responded for six justices in the majority that Justice Jackson's dissent has no basis in two centuries of precedent, not to mention the Constitution. Jess, you're so thoughtful in your reporting. Who's right? And is this historically unusual?

[00:01:54.8] Jess Bravin: Well, it's emphatically the province and duty of the news department not to say who's right, but simply to say what they have to say and take readers up to the step of drawing their own conclusions. And I think that it really starts with the presumptions that readers and audiences have about whether this is a moment of tremendous tension and crisis for the country, as Justice Jackson suggested, or whether that's an exaggeration and things are not so different than they are as they normally are. And that's really the majority's take of what's going on. This is not some kind of crazy emergency, says the majority, and yes, it is, says Justice Jackson. And some of the other opinions we've seen, also other liberals in dissent saying the same thing. So what they are doing is, I mean, they are reflecting the tensions in the country as a whole. And those are not so much legal arguments as they are senses of what the national mood is, what the zeitgeist is in the United States, and whether the Trump administration is something anomalous and horrific or something that is just another evolution of the line of democratic succession.

[00:03:15.1] Jeffrey Rosen: Thanks so much for that. Jan, a version of the same question, but could they both be right? And is this unusual?

[00:03:23.7] Jan Crawford: What was the last part?

[00:03:26.1] Jeffrey Rosen: Is this unusual historically? Have we seen before justices accusing each other of either existentially threatening the rule of law or crying wolf?

[00:03:35.7] Jan Crawford: I think the language may be a little more pronounced in some of the things, but it's not unusual for justices to have pretty strong views in their dissents. And what I've been most struck by seeing kind of this clash between Justice Barrett and Justice Jackson is when I think back to the 1991-1992 term when Justice Clarence Thomas joined the Court. And unlike some of the other justices, Justice Alito told me once when he came on the Court, he felt like he had made a mistake when he was on the Third Circuit. He immediately started arguing to re-argue cases and rethink different issues. And so he decided that he was going to spend a year, just that first year, just kind of getting a lay of the land, a feel for the court. When you move into a new neighborhood, the first thing you do is you don't go and tell your neighbors they need to repaint their houses and the color of your choice. So that was mainly how most justices do it. Not Justice Jackson. She's going to tell you, yeah, you need to repaint your house. And in fact, you need to tear that whole thing down.

[00:04:43.5] Jan Crawford: And so that has been very unusual to see her being so assertive, not only in the dissents this year, but certainly in her questions from the bench where she is literally talking the most from the bench of any of the justices. That's highly unusual. Why I say it reminds me of Justice Thomas is when we think back to, and it's really nice to be here, and I hope you don't take offense at this, but when I go speak at law schools, I'll say like, when we think back to 1991 or when we think back to the year 2000 and *Bush v. Gore*, and you know, they're like, they're not even born yet. So it makes you realize these years go fast. But when we think back to 1991, you know, when Justice Thomas joined the Court, after that brutal confirmation hearing, a narrative very quickly developed that he didn't belong on the Court, that he was really Scalia's intellectual understudy, his puppet. And that narrative, which I think persists to some extent today, is patently and demonstrably false. You can go to the papers of Justice Harry Blackmun.

[00:05:52.8] Jan Crawford: On that first year on the bench, if any justice changed their vote that year to join the other, it was Scalia changing his vote to join Justice Thomas. Justice Thomas joined the Court and immediately began articulating very bold perspectives on the law and arguing the court should be rethinking vast areas of their jurisprudence, particularly in the issue of habeas corpus and criminal law. And toward the back half of the term, he circulated an opinion in a case, a habeas case, that so offended Justice O'Connor that in her dissent, she used his name 18 times. Justice Thomas does not understand. Justice Thomas misstates the law. Justice Thomas mischaracterizes a previous opinion over and over. That is very unusual. Typically, the dissenting justice will say the majority or, you know, my colleague or... It was extremely unusual, and it reflected her response to Justice Thomas' bold views when he first got on the court. And what we see that term is, and why this term is so pivotal and why I would caution liberals who are cheering on Justice Jackson now, is that that term is when you saw Justice O'Connor began to move to the left. She reacted so strongly at some of the positions that

Justice Thomas was taking. She would dissent in cases, but she did not join a single one of his dissents.

[00:07:24.3] Jan Crawford: She would always write separately. Because when a new justice joins the Court, it's like the chess pieces get rearranged, right? And so sometimes it can cause people to rethink their alliances, re-examine different rulings. That term when Justice Thomas joined didn't really just rearrange the chess pieces, it like just turned the whole chessboard upside down. So you saw Justice O'Connor move more to the left. You saw Justice Souter, I think Scalia helped a little bit here, pushed more to the left, Justice Kennedy. And that was the term when the court refused to overturn *Roe v. Wade*, refused to allow school prayer at graduations, over and over a court of seven justices nominated by Republican presidents in case after case was a huge disappointment to conservatives. So when we see this kind of back and forth now in the writings and on the bench between the justices, it does give some concern that perhaps, you know, Justice Barrett has been disappointing sometimes to conservatives. Not on the big cases, and I'm sorry, Sarah, I apologize for, I know the first panel, Sarah gets frustrated with some of the big cases, but you know, some of the big cases like overturning *Roe v. Wade*, I mean, she was the vote with conservatives.

[00:08:38.7] Jan Crawford: But Justice Kagan is very strategic, and in some ways like the Chief Justice. And I think had really thought, I mean, that Justice Barrett and perhaps Justice Kavanaugh, maybe the Chief, those in the middle, you can have a conversation with them, which what does that do? Open things up for compromise potentially, or at least to consider compromise so that there is possibility of finding perhaps some common ground. And now when we see that kind of language in that kind of case, the concern would be that you're really doing yourself no favors if you're hoping to find some kind of compromise or consensus or common ground on anything. Because remember, there are only three liberals on the Supreme Court. You've got to be able to try to get two of those conservatives if you want to have a majority opinion. So that was kind of what I took away. I don't think it's, I think some of the language we've seen this term, and we can talk about this later, does a disservice, but it's not unprecedented. Scalia sure had some doozies too in his day.

[00:09:47.4] Jeffrey Rosen: That's such an important point about how the polarizing rhetoric of justices can drive each other apart. Justice O'Connor's response to Justice Scalia was sticks and stones can break my bones. And then she said that probably isn't true, and she did indeed move to the center, as you said. And Justice Kagan is having a different strategy than Justice Jackson. Fred Smith, you know, same question, a version of who's right, not in the sense of who you think is correct, but these are completely different views of what the court is doing. Can they both be right? And then history. I'm thinking about the great moments of court polarization. After the Court overturned the gold cases after the Civil War, within the space of only a year, the dissenters accused the majority of acting pure politics. Justice Jackson sniped at Justice Black during the Nuremberg trials and accused him of being a politician. Have we ever seen anything like this in history before?

[00:10:45.9] Fred Smith Jr.: I'll start with the substantive question, right, who is right, and specifically the charge from the dissent that the nationwide injunction opinion has created a zone of lawlessness for the president. I think it's too early to entirely say who is right, in part because

there are still three potential possibilities to hold the executive accountable. One is the class action, right? So we don't know just how strictly the Supreme Court is going to kind of rein in that category, but it could be that we're in a situation where what used to be nationwide injunctions, that a lot of them just get funneled into a different mechanism, in which case we're not in a setting in which there's a zone of lawlessness for the president. The second category is situations in which a state is a litigant. And because of the importance of uniformity, they can make the case that only a nationwide injunction will solve their specific injury, which the court also left open in *CASA*. And then the third possibility is that they did seem to reserve for themselves the ability to say what the law is in a way that would bind the president. Now that third one is the trickiest, right, because it depends on a lot, right? So the example I give is a president issues an executive order that says no one can speak ill of me.

[00:12:22.1] Jan Crawford: Don't give him any ideas.

[00:12:23.8] Fred Smith Jr.: This is a complete hypothetical. I have no president in mind.

[00:12:27.7] Jan Crawford: Oh, we're going to get a new executive order.

[00:12:32.1] Fred Smith Jr.: I mean, I actually picked this example in part because it's not necessarily left or right. It's a First Amendment issue. And so Johnny goes to court and says, I want to be able to say the following thing against the president. A federal district court can issue an injunction for Johnny, but not for anybody else, right? And what matters at that moment is does the executive appeal? Because if the executive doesn't appeal, it never gets to the Supreme Court. And that third mechanism, the Supreme Court speaking, doesn't really exist, right? It would require me to sue and you to sue and you to sue. Anyone in this room who wants to ever say anything bad about a president, it would require them to sue in order to get relief. It also depends on the possibility of whether or not if a lot of district courts are saying something is unconstitutional, will the executives just press the pause button or not, right? And at oral argument at least, the Solicitor General strongly suggested that they certainly. That it's not a policy, it's not a uniform policy of the executive to follow even what a circuit court says within a circuit.

[00:13:45.8] Fred Smith Jr.: And so are we in a zone of lawlessness? A lot depends on those three mechanisms of accountability and how they wind up. On the question of is this rhetoric historically unprecedented, I would say no. And I would say that even in this century, in my mind, isn't at all unprecedented. I think about the *Obergefell* dissent by Justice Scalia where he said that he would rather hide his head in a bag than join an opinion that the majority said. He said that the majority opinion was like aphorisms from a fortune cookie. He said that there were no, that everyone on the court was essentially from the Northeast, that none of the people in the majority were from the West. And then he said, because Justice Kennedy was from California, California doesn't count. In my mind, just in terms of at least from a collegiality perspective and debates between the justices, at least, to me, this doesn't really register.

[00:15:05.7] Jeffrey Rosen: Neville Chamberlain or John Marshall, and let's talk about the question of presidential defiance of the Supreme Court. Our previous panelists suggested that if the president disobeyed an unambiguous order of the U.S. Supreme Court, that would be a

constitutional crisis. We've never seen it before in American history. Andrew Jackson is supposed to have said, "John Marshall's made his decision, now let him enforce it." But even if he didn't utter the words, the court never ordered him to do anything, and he never had to defy Marshall. Lincoln briefly defied Chief Justice Taney on suspending the writ of habeas corpus during the Civil War, but Taney was sitting as a district judge, and it wasn't an order of the full court. So we haven't seen it before. And the big question, Jess, is, is the court afraid that President Trump will defy it? Is Chief Justice Roberts trying to avoid a direct confrontation? Steve Vladeck quoted Marshall, who said, "I'm not fond of butting my head against a wall in sport." So he tried to avoid those direct conflicts with President Jefferson. And are we going to see the president defying the court or not?

[00:16:14.9] Jess Bravin: Well, Nazi analogies are always tough, but there's also Marshall Patin. The question is, a question like that assumes that the Court knows that Trump is wrong and disagrees with him and is for strategic reasons choosing not to say so. And I think there is another possibility, which some people perhaps overlook, which is that they think Trump is right, and they don't believe that, like all right-thinking people, they have to stop him, and they're just waiting until he's looking the other way to do it. I think that we have, you have to look at this court, the majority of the court, the members, their legal careers were built viewing much of the jurisprudence that they had inherited as mistaken and misguided, thinking their job was to correct that, believing strongly in executive power, and not looking at Trump as this malignant force that they have to find some way to resist. I don't know that they are the resistance. I think that we should take much of what the court does as reflecting what they think. And when they say, as they did today in the emergency order on the reduction in force memorandum, that the government is likely to prevail, it's because they get to decide who prevails, and they think that he is going to prevail.

[00:17:49.4] Jess Bravin: So we know, yes, there have been a couple of orders involving habeas corpus and deportations where the court did stop the president from moving forward. There was the comment from the Chief Justice earlier in the year about impeachment maybe being a little bit out of bounds when you disagree with a court decision. But I think that we shouldn't assume that they know better than the actual orders that they are issuing.

[00:18:20.7] Jeffrey Rosen: Jan, Jess suggests that the Court is unlikely to issue orders the president defies because it may not check him on the big questions. What about the lower courts? Is the administration complying in good faith with the orders of lower courts, including Judge Boasberg? And how is the U.S. Supreme Court responding?

[00:18:42.5] Jan Crawford: You know, I think that I actually have been quite impressed with some of the briefing in these cases, the filings that the government has made. It's actually been pretty good considering that it's just a deluge. And I'm not really sure how some of these district court and appeals court judges are even keeping up with some of this. And that is obviously part of the strategy. I think the concern is that they are going to defy the lower courts and certainly the Supreme Court, but they haven't yet. I mean, they've come close. And I know our previous panel would disagree with this, but I do think the court is worried about that, which explains some of their, one of the rulings that you mentioned and how they handled that and said that had to be sent back to Texas with the habeas matter. But they haven't yet. I think one of the things

that's notable is that in the case involving the third party removals, you could argue that it was the federal district court judge that was defying the Supreme Court when the Court said that, you know, they were lifting this injunction and the judge said, well, only part of it, the other part's still going to be in place, which prompted a pretty extraordinary clarifying order from the Supreme Court that they really meant what they said.

[00:20:00.2] Jan Crawford: I think my biggest frustration with some of these emergency orders is that they're coming to the court in a preliminary posture. For example, the case today, the reduction of force case. Obviously, we all know, or I'm sure most of you, I mean, you obviously are very engaged and follow the news closely. And Jeff, you do such a terrific job here. We are so lucky to have Jeff helming the Constitution Center. And y'all are so lucky to be in Philadelphia to get to come to these things.

[00:20:32.4] Jeffrey Rosen: Thank you very much.

[00:20:36.3] Jan Crawford: But the order today in the reduction of force, obviously, President Trump issued an executive order and a memo directing the agencies to just basically develop plans for cutting massive numbers of federal employees in their workforce. So it's consistent with the law. The federal judge said that that order and memorandum was unlawful. The Supreme Court today in an 8-1 order, which means that Justice Kagan and Justice Sotomayor agree with it, said, well, no, the executive order and the memo are not lawful, and the government was likely to prevail on that, in the unsigned order, the court said. But so the agencies can go about formulating these plans, but when you get those plans, those could all be challenged. So the order today was extremely preliminary, really didn't decide anything other than, okay, the lower federal court went way too far in blocking the order as unlawful. And so, sure, the agencies can go about developing restructuring plans under the terms of this executive order, but all of those plans can be challenged in court. So bring them back when you want to challenge them, and you know that's what's going to happen.

[00:21:48.7] Jan Crawford: So this was really kind of the initial volley in any of these cases. They're very premature. So I agree that it's very difficult to draw any conclusions on what the court's going to do when they actually get to the merits of some of these cases, especially the case that everyone calls birthright citizenship, which was never about birthright citizenship. That case was about whether or not federal district court judges could issue these sweeping nationwide injunctions that would bind every person across the country in any issue, even if they weren't parties before the court. And as we heard, the presidents in both parties have long opposed these. President Biden's solicitor general urged the Supreme Court to please rein in some of these nationwide injunctions, and that's all the court did in that case. The court said that, you know, limited, and I agree with you, Fred, that it's probably not going to have that much of an impact at all, limited the kind of circumstances when judges could enter these nationwide injunctions. But that doesn't mean that birthright citizenship will ever, ever see the light of day. They're just going to have to challenge it in the proper way.

[00:23:02.8] Jan Crawford: So one way of looking at this Court, it's not they're rubber stamping things Trump's doing, but they're actually demanding that process and procedures be followed.

[00:23:14.6] Jeffrey Rosen: Fred Smith, you've written a lot about judicial legitimacy. The moments when the court's been most concerned about its legitimacy include Little Rock, where all nine justices signed *Cooper v. Aaron* in hand because they're so afraid of being defied. Is this court afraid of being defied? We've seen it act together in saying that President Trump had to facilitate the return of Mr. Garcia, and will its concern about legitimacy affect its confrontations with the president moving forward?

[00:23:48.3] Fred Smith Jr.: Yeah, so first I want to just clarify. I didn't say that the opinion isn't going to have a big effect. Oh, I'm sorry. That's okay, yeah. What I said was that we don't know how far, we don't yet know just how, what the effect will be. You mentioned the APA cases. So since you did, this is something that I am concerned about. I am concerned that the Supreme Court's nationwide injunction opinion may have made one of the biggest problems with nationwide injunctions worse. So one of the biggest problems with nationwide injunctions is that people go to courts in a place where they're quite certain or they feel quite certain that they're going to win, and then you have these situations where a judge of one party is issuing a ruling against the president of the other party, and then you just see that over and over again, and it affects the perception of the Supreme Court in ways that are troubling. It's not clear to me that this opinion is going to solve that problem, and I think it might make it worse because of the APA. So this is something that we're not going to necessarily immediately see, but I'll give the example of the Mifepristone case where a judge issued what it looks like.

[00:25:20.6] Fred Smith Jr.: There were a lot of critiques and people referenced it as a nationwide injunction because it was a nationwide order vacating a regulation by the FDA. Justice Kavanaugh's concurrence makes clear that setting aside regulations does not fall within the sweep of *CASA*, right? So when it comes to environmental regulations, etcetera, in a future administration, when there are lower court judges who are doing that and the American public was told lower court judges can't do that anymore, I think that the problem will even be worse. And only Congress, only Congress is institutionally situated to solve the national injunction problem by mechanisms like three-judge panels or specialized courts, things that the Supreme Court just isn't institutionally capable of doing. So that's my fuller, I wasn't on the nationwide injunction panel, that's my fuller perspective on that. In terms of, is the Supreme Court concerned about future confrontations with the presidency? You know, it's really kind of hard to say, but historically that is something that the court has been concerned about. You know, the *Marbury v. Madison* example is, of course, the clearest. And even in Federalist 78, right, Alexander Hamilton reminds that the courts, they don't have the power of the purse, they don't have the power of the sword, right?

[00:26:55.2] Fred Smith Jr.: And so they really have always understood that a reservoir of some degree of acceptance from the American public, at least enough that the American public believes that it's important to follow their orders, that that has always been an important part of the court's institutional capital. And what's hard in these moments is that there's kind of these short-term ways of thinking about this and longer-term ways of thinking about this, and it's impossible sometimes to predict how things will be viewed in the longer term, right? So sometimes the way we think about this is, well, if the court just kind of steps back and they don't have the confrontation and they save their capital, then, you know, they're kind of protecting

themselves, right? But historically, there's moments in which the court looks worse because it didn't act, right? And there's instances in which the court acting ended up giving it more capital. No opinion gave the Supreme Court more capital than *Brown*, right? And that was not a moment of the Supreme Court stepping back. But in terms of kind of the longer-term perception, in terms of where the American public ultimately went on those issues, it ended up benefiting them, right?

[00:28:13.4] Fred Smith Jr.: And so it's a difficult kind of prediction to sort of make in terms of whether or not standing back versus acting is the move that's going to best preserve the court's capital. But I would say that in the close cases, it's better to act. And I'm going to say my kind of bomb-throwing sort of statement. I think that if a court has jurisdiction and has the ability to stop an ongoing constitutional violation and refuses to do so, it is ethically the equivalent of when a police officer is watching a fellow officer commit a violation and doesn't intervene to stop it. They become complicit in the violation. And so to the extent, if a court really believes that it has the jurisdiction, it has the ability to stop an ongoing constitutional violation, and it does not do so, I find that concerning.

[00:29:24.6] Jeffrey Rosen: A powerful point that the Court sometimes establishes its legitimacy by acting, and also that it's hard to tell, and that the Court thought it was being heroic in *Dred Scott* but proved to be wrong, but in *Brown* it was the source of its capital. When you think of the areas where the court is most likely to confront the president, Jess, what will it be? After all, in the first Trump administration, President Trump lost a fair amount before the Court, so surely he's going to suffer some important defeats. What are the big areas where the Court is likely to check him?

[00:30:03.3] Jess Bravin: Well, one thing, the question of whether President Trump would defy the Supreme Court was a question that also occurred in his first term, and he came close in at least one case, and that was the citizenship question on the census form. And after the Supreme Court was quite clear, the Chief Justice writing that opinion, saying that the disingenuous reasons given for placing that question on the form invalidated the process under the Administrative Procedure Act, the president, you know, through his preferred medium, then known as Twitter, gave various contradictory instructions to DOJ attorneys who were often left sort of unsure what to say when they were in courts in follow-up hearings after that decision. And I certainly know from our reporting at the time, and you probably too, that there was discussion at the Department of Justice and the White House about whether there was some way to decide that they didn't have to comply with what that opinion seemed to say. So it's been, you know, in the background throughout the Trump approach to Article II. In terms of what cases are going to really raise, you know, give the court less breathing room than something about, you know, whether agencies can prepare layoff plans, you know, one thing I would say maybe is the punitive orders against law firms.

[00:31:31.9] Jan Crawford: Oh, yeah. But that hasn't even gotten to the Court, right?

[00:31:31.4] Jess Bravin: No, it's not there yet. Well, the government has lost, and they've not filed any emergency applications on that yet, but they just did appeal one of them to the D.C. Circuit. I mean, we thought, you know, it's possible they'll just kind of drop it until they run out

of law firms to issue executive orders against. But no, they are appealing one, and they may appeal the others. And if they take that one to the Supreme Court, I think it will be a very interesting test for them because it's a novel use of an executive order. And there are, you know, we haven't had a lot of bill of attainder-type questions, you know, come before the Supreme Court recently. I think that one is one where they may push back. And similarly, when there seem to be, you know, viewpoint discrimination cases targeting of universities because of their, you know, internal organization or their curricular choices, I think that when the court's sort of very aggressive free speech jurisprudence runs into executive orders, unilateral actions by the president intended to punish speech he doesn't like or to repress political opposition, I think those are the ones will be the most interesting. Ones involving the organization of the executive branch, I think the court is more likely to give the president much more leeway.

[00:32:54.1] Jan Crawford: Well, they've signaled that in, you know, recent cases, including one when Biden was in the White House, that they're going to give him, the president should have more leeway in replacing some of those, like NLRB and some of those boards.

[00:33:07.3] Jess Bravin: I wanted, though, just to add a little gloss on what Fred said about *Brown*. And while, you know, *Brown* had been argued once under Chief Justice Vinson, they couldn't reach a decision. Chief Justice Warren comes in and says, we're going to do this. And that was true. But then a few years later, when they had the interracial marriage cases, they did, we know from looking at the justices' papers, that they chose not to go forward in striking down those miscegenation laws because they were afraid it was too much to add that on top of school desegregation. I mean, they eventually did. They got around to it in *Loving v. Virginia*. But that question arose years before, and they already knew that was unconstitutional, and they decided to wait because of this very issue, I think, if I'm not mistaken, Jeff.

[00:33:56.7] Jeffrey Rosen: A crucial observation. Absolutely. Justice Frankfurter thought it would be bad for the country, and the South wasn't ready for it, and as a result, he delayed for more than a decade after *Brown* until the court finally struck down anti-miscegenation laws. Fred Smith, what is the role of pragmatism on this court? In *Trump v. U.S.*, Chief Justice Roberts' majority opinion seemed to be based not in text or original understanding but on a pragmatic concern that future presidents not prosecute their predecessors. And we've seen the liberals accusing the conservatives of being guided by pragmatism also in the Section 3 14th Amendment cases. Are these conservatives, in fact, pragmatists?

[00:34:41.9] Fred Smith Jr.: I think in the two cases that you just mentioned, it's hard to fully understand them on any other basis. And attempting to sort of describe them in any other basis, actually, I found distorts the, it's less clarifying in terms of what the Constitution means than not, that it's actually better just to acknowledge that in the Section 3 case, that a big part of what was going on was the practical concern that if states were in a position of disqualifying presidents, that it could lead to untold potential problems for the democracy. And they reached the conclusion that as a result, they needed to intervene, and then they found enough things that looked enough like law to get there. And because if you try to actually parse it out and describe it as, well, this is what Section 5 of the 14th Amendment means in terms of congressional power, etc., it actually makes it harder to really understand what Section 5 of the 14th Amendment is all about than to kind of understand the practical reality. Now, in the criminal prosecution case, that

one is in some ways trickier because it's not all together out of bounds compared to where the court reached with respect to civil suits against the president in *Nixon v. Fitzgerald*.

[00:36:18.1] Fred Smith Jr.: So it can be explained, actually, on the legal basis of precedent. I think what gives people cause about that one is that there was no originalism. And so people have kind of come to accept that when it comes to novel constitutional questions, that that's where this court is going to look. And instead, it looked to a precedent from 40 years ago and extended it. And so, you know, in terms of the question of why did they look to precedent versus why did they look to originalism, that might be able to be explained on practical grounds. But I think the opinion itself can be explained by virtue of kind of extending some principles that were already present in *Nixon v. Fitzgerald*. But on Section 3 specifically, I think that one's hard to understand on any other basis than they thought that this was the best way to protect the republic.

[00:37:18.9] Jeffrey Rosen: Jess, Jan, and you and I have been covering the Court for a very long time, and things sure look different today than they did when I started at the beginning of the 90s and when both of you started in journalism. How has the coverage of the court affected the court itself, if it has? And are the justices responsive to the explosion of new media outlets from blogs to social media, partisan and nonpartisan alike? How are they responding? Jess?

[00:37:53.6] Jess Bravin: Well, actually when we heard the other panel and there was a, or actually, I'm sorry, when Jan was talking about Sandra Day O'Connor, I thought of your famous cover story about it's just Justice O'Connor's world and we're just living in it. And I was thinking, boy, it's a really different world now. I don't think we're living in her world anymore. We're living in a different one today. Well, I think the Supreme Court members have a bifurcated view of these things. I think they simultaneously don't care at all about the coverage of the Court, and they also care intensely about it at the same time. They don't believe they're influenced by it, but from offhand comments, I'd say they read a lot. They're very familiar with podcasts and blogs and they're interested in what people are saying about them, whether that affects what they do. We don't know, but there was a lot of criticism from the right wing of Justice Barrett earlier in this term when she cast a number of votes that went against the Trump administration's interest. And I know that we've seen some people, some of the people in the exosphere or whatever it's called, claiming some responsibility for helping her get back on the right path in more recent decisions.

[00:39:17.3] Jess Bravin: Now, I doubt that she believes that that's what's going on, but there is this question of how much does the reflected view of themselves affect what the justices do? The Court in some ways has made itself more transparent in that they have now live transmission of arguments and the briefs and opinions are posted immediately and there's more opportunity for people to see the product of the Court, but there is certainly no more insight into how the Court is producing that material, especially on the emergency docket, except for the occasional, too occasional in my view, leak of drafts or internal discussions of what's going on. I wish we could say more clearly whether, I mean, the court keeps its distance from most journalists, as you know, more than some former members did, I think, and that is because they are more distrustful of the media. I think that the leak of the *Dobbs* opinion caused things to get tighter around the Supreme Court in a number of ways. It also caused a lot of news organizations to treat the court

more like a political institution and cover it more like a political institution and look at the personal relationships of the justices, look at potential conflicts of interest, look at who they're talking to being influenced by more like they cover political officials.

[00:40:49.3] Jess Bravin: And I don't think the Court likes that and that increases their own cynicism about the way they are being covered. But ultimately, though, all of them pretty much live in a bubble where they're surrounded by people who tell them how brilliant they are and how correct their views are and seek to help them attain the results they are after. They don't, I think, apart from their colleagues who certainly do criticize them, they do have different opinions, but the world that they inhabit in the Supreme Court building and the places they choose to go generally is very favorable to each of the justices. I mean, they select where they go and that tends to be where they go. If you ever look at an interview when a justice gives, whether it's about a book that has come out or they're visiting a judicial conference or law school, usually the interviewer is someone who is very sympathetic and doesn't ask the kinds of questions that Jan would ask if she had the opportunity to do it. And therefore, I don't know that the justices take very, very seriously a lot of the criticism that appears in the press.

[00:42:01.0] Jeffrey Rosen: Thanks for that. Final thoughts from Jan and Fred. Jan, how has the Court responded to the transformation of coverage so that the Court is now covered as if it's a political institution? And has that coverage of the Court as a political institution increased understanding of the Court or not?

[00:42:20.1] Jan Crawford: No. I think obviously there's been tremendous change. I started covering the court in 1994. And like Jess said, I mean, we wouldn't get argument transcripts for 10 to 15 days. Now you get them within the hour. And so when we would go in the press room after an argument, because we all had to attend because there were no live audio, you had to be there to know what was happening. We would literally, and we were competitors, but we wanted to get it right. So we would compare notes like, wait, did the chief justice say that or who said that? So that we could really have this understanding of what the court was doing so we could better explain it to people. I was with the Chicago Tribune then, but who people were reading back home who couldn't be in the court listening to those arguments. Obviously now that's all changed. We have live audio. That only started in 2000 with *Bush v. Gore* and only for very few cases. And I will tell you this *Bush v. Gore*, that was reported on cassette tapes. And so they ran that out to the satellite truck that was doing the feed after the argument concluded and they started the playback.

[00:43:24.5] Jan Crawford: So now we have live instantaneous audio transmission. So it's been, and filings, those are all online. Like Jess said, you used to have to go into the press room and request the briefs. They were all in paper. I mean, I know I'm like sound like some old, we didn't go to horse and buggy them, but you know, whatever. It was pretty close. I don't think we had cell phones then either. But at any rate, you know, so all this technology has meant it's tremendous. I mean, it's opened the court up in ways that people can now listen to the Court. They can have a greater understanding of the Court. They can get more engaged in what the Court is doing. It's also led to new mediums, different people who cover the Court. And I don't think, and that's where I think we've seen the biggest change, setting aside the composition of the Court, the tools and how people do it and technology. The biggest change is how the Court's

covered. And I do not believe that it is necessarily for the better. It is covered as a political institution because most of the people disagree with the outcome.

[00:44:26.4] Jan Crawford: They decided, I mean, this started when, I guess, when Senator McConnell refused to fill Scalia's seat and kept that open. There was tremendous rage there, but we really saw the turning point after the leak of the *Dobbs* decision, which overturned *Roe v. Wade*. And, you know, we really started seeing this drumbeat of that the Court's a political institution, that it's corrupt. I mean, if you believe everything you read, you're going to think the Court is corrupt, lawless, beholden to Trump, driven by politics. All of that is patently false. It's not true. These are justices who have very different views on the law. They're engaged in this titanic struggle over their ideologies. They're not corrupt. They're not in the tank for Trump. I mean, I, you know, I'll leave it at that. But, you know, they're up there. They're nine really engaged, smart people trying to figure out what the right answers are. These are hard cases. They typically take cases that have divided the really smart people on the lower courts. And so they have to figure out what's the answer. And that's always what I look at when the decision comes down, you know, not like, well, they better do this.

[00:45:33.3] Jan Crawford: Like, how are they going to figure this one out? What are they going to do? And that's our job as journalists. That is what our mission should be, is to explain to people who are standing in their shoes that can't be there, can't listen, what is the court doing and how it affects your life. And a lot of the stuff that we've seen recently from the court, some of this breathless tone about scandals, which aren't even scandals, people Venmoing money so they can go buy hot dogs for law clerk parties. So, you know, Justice Thomas' role in Horatio Alger Society. The New York Times literally sent a reporter and a photographer to Germany to interview a princess who had hosted Justice Alito for a concert, which he reported, by the way, on his financial disclosures. But there's this narrative that this court is corrupt. And, you know, my point is, where's the other side? You know, why are we just focusing on one side? Because, you know, we've had Justice Ginsburg and Breyer. I mean, they've flown all over the world courtesy of billionaires. So, you know, let's be fair. But when you put this narrative out there that, you know, you've got your thumb on the scale, that doesn't serve anyone. That, in fact, hurts the Court and its view and how people view it as an institution.

[00:46:52.5] Jan Crawford: It undermines the credibility of the court. And that is dangerous, I think, for democracy. I mean, we have a responsibility to cover the court fairly and objectively. I think we try to do that, but not everybody does. And so I guess I would just say be skeptical of some of the things you're seeing and some of the particularly things on social media, edgy law professors who are trying to build their brand, not the one here tonight. But I would be very careful of some of the narratives out there because some of it is just not true.

[00:47:24.7] Jeffrey Rosen: Thank you so much for that. Fred Smith, last word in this great discussion is to you. As Jan mentions, on the one hand, we live in a highly polarized media and political environment. On the other, it's the most marvelous time in history to study the law because all of the primary sources are online. And how lucky we are to live in a world where we can hear the oral arguments and read the briefs and read the majority opinions and the dissents and hear thoughtful discussions like this one and make up our own minds. That's, of course, the mission of the National Constitution Center and our new annual Supreme Court review with the

Texas A&M Structural Center on the Constitution. Fred Smith, when you teach your students about the Court, how do you encourage them to learn about it? And what should our audience here do to educate themselves about the Constitution and the Supreme Court?

[00:48:17.6] Fred Smith Jr.: Oh, wow. Okay. I thought I was going to answer your question.

[00:48:21.7] Jan Crawford: By the way, we did not get any questions tonight in advance. I hope you all appreciate it. We're like, whoa, where is that coming from? I feel like some of the panels before, they had a sense of what was going to be asked.

[00:48:35.4] Jeffrey Rosen: Ours was better.

[00:48:40.3] Fred Smith Jr.: Well, in terms of how I teach my students, my view is that my job is just to teach the law and to help them understand it the best that I can. And I find that I've taught for 15 years, and I found that students' relationship to the Court isn't really linear. It doesn't just go like this, and it doesn't just go like that. It actually, at different moments, students have different kind of reactions. And I think I do have a job of making sure that cynicism doesn't cloud their ability to understand the law. And what that looks like in different moments kind of shifts, because the importance is understanding. That's what I see my job as. I do want to answer the question of just kind of what the press coverage has meant for the Court's own actions. And then I promise I'll end with something optimistic in saying so. I think it has affected some of their institutional practices, right? And we've heard about some of them. I think the relationship to the emergency docket, yes, we don't have nearly enough opinions, but we have more than we used to. We don't have enough oral argument, but we have more than we used to.

[00:50:01.0] Fred Smith Jr.: There used to be none. And I think it's hard to understand that institutional change without appreciating the critiques that the court was facing, and it listened. Some of the critiques around disclosures resulted in the Supreme Court adopting. It's an ethics policy. Again, many people think it doesn't go far enough, but it's more than they had before, right? And so that's an example, too, of there being dialogue between the fourth estate and the Supreme Court. So that's the most optimistic statement that I can end on.

[00:50:41.8] Jeffrey Rosen: Beautifully done. For ending us on a note of optimism, and to all three of our panelists for increasing awareness and understanding of the Constitution, please join me in thanking them.

[00:50:55.5] Jeffrey Rosen: This conversation is presented in partnership with the NCC and the Center on the Structural Constitution at Texas A&M University School of Law. For more from the 2025 Supreme Court Review Symposium, visit constitutioncenter.org/medialibrary. This episode was produced by Bill Pollock and Griffin Richie. It was engineered by Dave Stotz, Greg Sheckler, and Bill Pollock. Research was provided by Gyuhua Lee, Griffin Richie, Cooper Smith, Trey Sullivan, and Tristan Worsham. Friends, I'm so excited that in September, Ken Burns and I are launching a special podcast, *Pursuit: The Founder's Guide to Happiness*. We have interviews with Ken and leading historians, and I can't wait to share it with you in September. Please recommend the 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

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