



Sarah Isgur on Last Branch Standing

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[00:00:04.6] Julie Silverbrook: Welcome to *Live At The National Constitution Center*, the podcast sharing live constitutional conversations and debates hosted by the center in-person and online. I'm Julie Silverbrook, Chief Content and Learning Officer. 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, we're sharing a live conversation from the Center about a new book by Sarah Isgur. She is the senior editor of *SCOTUSblog*, host of the legal podcast *Advisory Opinions*, and an ABC News contributor. In her book, Sarah draws on history, law and current debates and offers an engaging look at the Supreme Court, exploring its unique role in American constitutional democracy and, according to Sarah, how the court became the nation's last branch standing and what its growing power means for the future of the Constitution. [applause]

[00:01:04.5] Julie Silverbrook: Sarah, welcome. Let me begin by congratulating you. You're a New York Times bestseller with this wonderful book, *Last Branch Standing*. [laughter] It's like, it's applause worthy. Number five on the *New York Times* bestseller list.

[00:01:16.4] Sarah Isgur: Thank you.

[00:01:16.9] Julie Silverbrook: And if my X algorithm is any indication, you are everywhere talking about the Supreme Court right now.

[00:01:21.6] Sarah Isgur: Look, it's me and Lena Dunham. We're crushing it. Yeah, she came in first. So, you know, I didn't quite beat the, you know, girls.

[00:01:29.5] Julie Silverbrook: We're not even in June yet. The Supreme Court isn't at like peak, right?

[00:01:32.7] Sarah Isgur: Give it time. Yeah. Fair.

[00:01:32.9] Julie Silverbrook: You could climb the charts.

[00:01:34.1] Sarah Isgur: Fair.

[00:01:34.4] Julie Silverbrook: You could pull like a Taylor Swift, unseat her at number one. So this is a wonderful book. I have read a lot of books about the United States Supreme Court. I have laughed reading none of them. I laughed multiple times reading this book. It is truly a page-turner, I think it should be required reading for all law students. And if I am... And I will recommend books to the general public, I'm gonna recommend you start with this one. And so please, if you haven't, purchase it because we really wanna get her number one on the *New York Times* list and also because she's here to sign it afterward. So I'm really excited to really dig in on some of the themes in your book. And one of the central aims is actually to challenge the idea that many commentators have shared, which is that the Supreme Court is really just politicians wearing robes. And you, I think, want to shift the reader's perspective away from that view. Can you talk a little bit about what you hope readers take away from reading this book, particularly when it comes to the Justices and politics?

[00:02:42.7] Sarah Isgur: Two big things, one, it's not that I am denying that the Justices have judicial philosophies or ideological priors that they bring to cases. Of course they do. That would be very silly of me. It's that if they were only doing politics by the party that appointed them, you would be getting close to 90% of the cases incorrect. So last term, 15% of the cases fell along ideological lines where five or six of the conservatives are on one side and all of the liberal Justices are in dissent. The exact same number of cases, 15%, had all of the liberal Justices in the majority and only conservatives in dissent in those six, three, five, four cases. Of course, the most common outcome of any Supreme Court case is unanimous. And the pushback I get on that from people is like yeah, but in the big cases. And I got in this fight the other day, so this is more of a discussion topic for the room, perhaps. I think, unfortunately, we're not agreeing on what the big cases are at the beginning of the term and then seeing how they turn out, we're waiting to see that they turn out along ideological lines and then declaring those to be the big cases.

[00:04:03.3] Sarah Isgur: So last term there was a case on gun manufacturer liability and whether Mexico could sue Smith & Wesson for gun violence caused by cartels using weapons made in the United States and black market illegally used by the cartels in Mexico. That's a pretty big case. It was decided unanimously. The decision was written by Justice Sotomayor, and we never talked about it again. And when I brought this up to a professor, his response, which isn't crazy to me, was, "Well, it just isn't a big case because it was unanimous. So obviously it wasn't that hard of a decision." And it's like, well, wait a second. It got to the Supreme Court, meaning there were disagreements at the lower courts. They were overturning a lower court decision from the 2nd Circuit or 1st Circuit, don't remember. And I said, now imagine that that case had turned out six, three along ideological lines with the six conservatives saying that Smith & Wesson was not liable and the three liberals saying that they should have been held liable, that would be the *Citizens United* of gun violence at this point. But because it was unanimous, it's not a big case. So I think the whole big case thing causes some of these problems. So I wish we covered the unanimous cases. I get that it doesn't fit the narrative and it's not very click-baity, but I think it hurts the court. I think it hurts our understanding of the branch. The other thing I want people to take away from the book is this idea that we're blaming the wrong branch a lot of

the time. So this term, for instance, we have a case on whether Mississippi can accept mail-in ballots five days after Election Day. We also have a case pending on whether Donald Trump can prevent people from claiming asylum at the southern border. Those are big cases. I mean, wait 'till they turn out unanimously and no one will care anymore except me.

[00:05:58.3] Julie Silverbrook: That's right.

[00:06:00.3] Sarah Isgur: But stipulate, those are big cases. They are cases of statutory interpretation. All the court is doing is saying, "Look, we read the statute that Congress passed, and we think this way or we think that way." It should not matter, because the next day Congress could be like, "Nope, that's not what we meant. We meant the other way." That used to happen all the time. It happened in the Voting Rights Act in the 1980s, and it completely changed how the Supreme Court interpreted the Voting Rights Act. It happened with the Lilly Ledbetter Act about statute of limitations. That's like the last time it ever really happened. The problem is we don't believe Congress will do that job anymore. And so instead of the Supreme Court being part of the dialogue between our branches, it's the last word. And unfortunately, that's not gonna work because it's not representative, it's not responsive, it's supposed to be counter-majoritarian, it's supposed to say no to bare and fleeting majorities in the country. And so if you keep thinking that they're the last word and you don't put pressure on Congress when you actually don't like a Supreme Court decision, or you don't think it's even possible to ratify the Constitution anymore, which basically none of us believe, then you're gonna blame them, but it's misplaced. And so that's the other thing that I want people to sort of start realizing is that a lot of these cases they're mad at the Supreme Court about, wrong people, wrong branch. The headline, "Supreme Court Strikes Down Biden's Student Loan Debt Forgiveness," "Supreme Court Strikes Down Donald Trump's Tariffs." If you're mad about any of those cases, you're wrong. Congress is the problem. Congress didn't pass...

[00:07:40.9] Julie Silverbrook: Well, you can be mad about them, but who you're mad at is incorrect. Right.

[00:07:44.1] Sarah Isgur: Yes, yes. You should be mad at Congress all the time. Yes, forever. Yeah. [applause]

[00:07:51.8] Julie Silverbrook: So I wanna do a program that we're going to do, and it sounds like there would be appeal for this on Congress's role. And I jokingly said that the title should be *Congress, Where Are You?* But your book is called *Last Branch Standing*, and it is critical of what's been happening in Congress and with the executive branch. Let's talk a little bit about why you think the court is the last branch standing?

[00:08:19.6] Sarah Isgur: So my argument is that it's the last branch that the founders would recognize at this point. Congress has withered away into nothingness. I have a lot of theories as to why that's happened, sort of the macro-historical theories going back to the Progressive Era, the micro theories over campaign finance and leadership problems where Newt Gingrich basically makes it pointless to be anyone other than the Speaker of the House. I compare the

other 434 members to puppies chewing on the furniture because nobody has given them enough to do.

[00:08:52.5] Julie Silverbrook: This is what I'm talking about with the book, by the way.
[laughter]

[00:08:57.6] Sarah Isgur: The presidency, on the other hand, has grown out of control, understandably. As Congress started to do less and less, the problems continued to pile up. And I think there's an inflection point in the Obama administration when the immigration reform legislation fails and Obama says, "I have a pen and a phone, a pen to sign executive actions and a phone to rally the American people behind my cause." And so he has this year of action where he does 88 executive actions, things that otherwise would have been done by Congress. And there would have been pressure on Congress maybe to get those things done, but because President Obama does them by himself, Congress is like, wait a second, we don't even have to do that anymore? Sweet. We will sit on Instagram and blame the other side for being eviler than we are, and we get this negative polarization whirlpool effect. Trump gets into office and he's like, hold my beer. I can do even more dumber executive actions. And then Biden gets into office and is like, Covid? Now this is some executive action fun time. Trump comes back into office and is like, you thought that was fun time, wait 'till you see what I'm gonna try to do. Birthright citizenship? Why go through Congress when my own party controls both houses? I'm definitely just gonna do a whole bunch of unconstitutional nonsense. And again, the court gets pulled further and further into these political fights because the founders would have been just dumbfounded by a Congress full of people who want to be pundits, a president full of presidents who want to be Congress, and a Supreme Court that's like, oh, no, I'm driving this car and the siblings in the back keep poking each other. And John Roberts is like, "Mr. President, quit hitting Congress with that pillow. And Congress, quit poking Mr. President, or I'm gonna turn this democracy right around." And I think you see that frustration from the Chief, actually. These memos that were leaked from... To the *New York Times*, which we can talk about.

[00:11:13.2] Julie Silverbrook: We are gonna talk about it.

[00:11:14.2] Sarah Isgur: Okay. Well, they're like, "the Chief seems really angry at Obama and he's bulldozing, and blah, blah, blah." Let me offer an alternative narrative. This is the same guy who voted for Obamacare, voted for other executive actions on climate change from Obama. He's not partisan against Obama. He's frustrated as all hell that Obama is, like, screwing up the separation of powers in a new and fun way. And that's before he saw the presidents yet to come. So imagine what the memos look like now.

[00:11:51.6] Julie Silverbrook: Maybe we won't have to imagine whoever's leaking.

[00:11:53.3] Sarah Isgur: Stop leaking the memos.

[00:11:54.4] Julie Silverbrook: We'll talk about leaks and institutional trust, but first, I wanna talk about snails, which might surprise you if you haven't read the book, so you should. You begin your book with Justice Breyer's, I hope now famous, snail story, which is both charming

and, I think, deeply revealing. First, tell the story. And it's really about the nature of judging and how judges look at text and intent and real-world consequences and oftentimes politics, which we think are playing a really important role in their decision making, it's not so much a factor. So tell us about snails.

[00:12:30.5] Sarah Isgur: Justice Breyer is coming here in a few weeks.

[00:12:33.0] Julie Silverbrook: He is. We're gonna serve him... He also is a Francophile, so we'll serve him some escargot. Yeah.

[00:12:39.0] Sarah Isgur: Good. I'm gonna do my best Justice Breyer impression, but when he comes, you'll then be able to backfill what it was supposed to sound like. There's always one clerk a term who just nails Justice Breyer, not just the manner of speech, but his bizarre hypotheticals. And like, well, "If that baguette were a tiger, we'd all be... And you're like, what? How did this happen?" I am not one of those people who can do an amazing Justice Breyer impression, but my neighbor and best friend is, and we... And please don't tell him, but we will spend nights...

[00:13:12.5] Julie Silverbrook: This is being recorded...

[00:13:14.5] Sarah Isgur: With a bottle of wine just doing Justice Breyer all night long. We're very cool, as you can tell. Very cool in junior high.

[00:13:24.6] Julie Silverbrook: You're amongst friends.

[00:13:25.4] Sarah Isgur: Yeah. Okay, so, Justice Breyer, I love this hypo because I think when we talk about the law, too often we jump to the emotionally charged culture war issues. We're talking about abortion or immigration or something that's in the news and like that's actually a pretty bad way to start a conversation about the law. So Justice Breyer has this great example. There's a train in France, and it has a sign, and it says, all animals must be in baskets and pay half fare. And so this guy gets on the train with some snails, and the conductor is like, "In a basket, half fare." And the guy's like, "I'm not paying. They're snails." And Justice Breyer is like, "Well, are they? Are they animals? Does he have to pay half fare?" And what's great about this hypo is I think it illuminates this larger X-axis, as I call it. This is the ideological divide on the court. It's not partisan. But generally speaking, if you hear this hypo and you're like, no, the guy shouldn't have to pay half fare. That's clearly not what the sign was intended for, you're a judicial liberal ideologically. And if you see that sign and you go, snails are animals, not my problem, you're Justice Gorsuch, first of all. You are also more likely to be ideologically conservative. But if I did a poll and said, do you think snails are animals? That would not have any indicator for whether you are a Republican or a Democrat. And so I was actually interviewing Justice Breyer, love this hypo so much. Got really into it because there's all sorts of questions you would ask, right?

[00:15:05.8] Sarah Isgur: Well, when Congress passed this law, were there debates on the floor that we can look at? Did the law say, cats, dogs, and other animals, in which case we might think they just meant pets? Was it actually that Congress just said the agency in charge should get to

decide what the sign says, and this is an executive action problem? All sorts of questions we might ask. So I asked Justice Breyer all this. All of a sudden, you can just see he's like, "I regret everything that has brought me to this point in my life." And I said, "Well, so what happened? Did the guy get to bring his snails?" He's like, "Sarah, that's not the point. I don't know. They took down the sign and it never came up again." And I was like, "What? Now I hate this so much." But I try through the book to explain these, again, sort of the horizontal spectrum of ideologies in ways that aren't about our culture war. So that when you are applying to the culture war, you may feel less either emotionally invested, maybe some more intellectual humility. I'm all for having very strong opinions. I'm just for holding them loosely. And you can change your mind or learn new facts or maybe think you're more right. But sort of a lesson from the book, I go through all the history of the Supreme Court and, my God, the Supreme Court has gotten some stuff really wrong. And they've gotten some stuff really right that was unpopular at the time. And I hope we all, I mean, very much me, walk away with the knowledge, like the one thing I can be very sure of is there is something that I believe sitting here today that is wrong, morally wrong, and that future generations will judge me for. And I don't know what it is. I can have some guesses.

[00:17:02.2] Julie Silverbrook: Perspectives on snails.

[00:17:04.5] Sarah Isgur: It might be that the snails are animals. They are. I mean, my perspective is that it's actually about animals and the way we think of animals and that we're so special as humans and that they're not. But that's just my opinion of what we might be wrong about. There's gonna be plenty. You think back to Woodrow Wilson and Teddy Roosevelt and they thought they were at the end of history. *Buck v. Bell*, the case upholding Virginia's mandatory sterilization law for a woman who was raped by her foster parents' nephew because, three generations of imbeciles are enough. They were sure they were right because they were at the end of history. Science was settled. There was nothing more to be learned. And so we're just gonna put the smart people in charge. Voters are all dumb-dumbs, Congress is full of dumb-dumbs, and boy, we don't think they were right about everything. And so I want that to be the way we approach our legal conversations about anything. And that's way off topic from what you asked about. But anyways, snails are animals. That's the point. [laughter]

[00:18:08.1] Julie Silverbrook: In addition to snails being animals, you also introduce one of the axes that you talk about in the book. So there's the ideological right-left axis, which I just did... Well, I think I did it correctly for you guys. Right, left. Yeah. Okay. No, just kidding. And then you also introduce this other axis, the institutional axis. And this is an incredibly insightful part of your book, the way that you analyze each of the sitting Justices across both of these axes. So talk a little bit about the difference and the significance of the institutional axis?

[00:18:46.2] Sarah Isgur: So to understand this axis, you must understand Brett Kavanaugh and Neil Gorsuch. They are twins created in a Federalist Society laboratory experiment that was released on humanity. They are both the sons of incredibly powerful DC mothers at a time before women's restrooms were in the United States Senate. They go to the same high school. They

have the same history teacher, shout out to Mr. Oaks. Can you imagine being in that class today? And he's like, "Well, I've already got two on the Supreme Court. What are you bringing to class?" [laughter] They clerk for the Supreme Court the same term for the same Justice. They're both senior administration officials in the W. [Bush] administration who were appointed to the circuit court, and then they go on the Supreme Court appointed by the same president. They are as conservative as one another on that axis. They only agreed with each other 50% of the time last term in closely divided cases. Brett Kavanaugh was more likely to agree with every other Justice, including Kagan and Sotomayor. Justice Jackson was the only one lower on the list than Justice Gorsuch. Now, maybe they had some history in junior high. Maybe Brett stole Neil's girlfriend, I don't know.

[00:20:01.0] Sarah Isgur: But here's my theory about why they're different. Neil Gorsuch is super athletic, far more athletic than you probably know. Like he's... Well, this is public, right? So I probably shouldn't say he's the most athletic Justice on the Supreme Court, that's gonna get me in trouble with other people. But he's super athletic. He is very into skiing, running, biking. Justice Kavanaugh, on the other hand, also very, very into sports. He's very into baseball, basketball. He refers to the court, if you'll notice in his public remarks, as a team of nine. He's very into team sports. Justice Gorsuch, very into solo sports. That's this vertical axis that I'm gonna describe. They literally see their jobs differently. Justice Gorsuch, I call the Great Concurrer. He writes more concurrences than any Justice in American history. It's like, Neil has a thought here, and he would like to share it with you. Justice Kavanaugh, on the other hand, he's one of nine, this is a middle school group project. At the end of the day, you turn in one diorama to the teacher about the Cretaceous period. It doesn't... You're supposed to find ways to get along with everyone involved.

[00:21:20.1] Sarah Isgur: And so I call it the institutionalist axis. Maybe there's a better term for it. It has to do with whether, for instance, you think stare decisis, the stability over time of precedent, is this one court that lasts for 200 years, or is it just me on the court and I'm just supposed to tell you what I think of the law, nothing else particularly should matter than whether this case is rightly decided for these people in this moment? I don't think that one way is right or one way is wrong or one way is better and one way is worse. But if you don't understand the Justices along that axis, you're gonna get a lot wrong. Because while Kavanaugh and Gorsuch may be together conservatively, Kavanaugh and Kagan are right next to each other on that institutionalist axis, and Justice Gorsuch and Justice Jackson are right next to each other on the institutionalist axis at the bottom of it, my non-institutionalists. And it's why you'll see, for instance, Justice Gorsuch and Justice Jackson joining each other's concurrences a lot last term. They are far apart ideologically. But if you see your job in a similar way, you're gonna find a lot of areas to agree on. And so when I say you're gonna get it wrong 85% of the time along that ideological axis, you're gonna actually get it right a lot more of the time if you sort of understand what I'm calling the vertical axis.

[00:22:47.9] **Julie Silverbrook:** I do have two things. Pitch you on something, which is I think you should have a quiz mapping people on both axes for people to take, because I think it's actually really interesting.

[00:22:58.3] **Sarah Isgur:** Yeah.

[00:22:58.8] **Julie Silverbrook:** And I think you are...

[00:23:00.5] **Sarah Isgur:** Are you Gorsuch or Kavanaugh? Like a BuzzFeed cat quiz?

[00:23:02.9] **Julie Silverbrook:** No, not which Supreme Court Justice are you, but where you map on the axes. It's a dangerous game, although maybe more newsworthy of which Justice are you, like a BuzzFeed quiz.

[00:23:12.5] **Sarah Isgur:** Yeah.

[00:23:14.6] **Julie Silverbrook:** But I do think that maybe one of your missions for this book is to have people higher up on the institutionalist axis. Yes, no?

[00:23:24.3] **Sarah Isgur:** Again, I wouldn't want nine Justice Gorsuches on the court on that axis. I wouldn't want all Gorsuches and Jacksons. But I don't know that we don't want a Gorsuch and a Jackson on the court. I think that there's a value to having a voice that says, I just am here to tell you what I think of this case right now, me and YOLO.

[00:23:55.5] **Julie Silverbrook:** You only live once, for people who've not heard the term.
[laughter]

[00:24:02.3] **Sarah Isgur:** I think the balance is important. Moderation in all things, including moderation.

[00:24:05.6] **Julie Silverbrook:** Got it. So one of the, I think, most interesting parts of the book, but I'm a super nerdy Supreme Court fangirl. I could tell you some stories about stalking Justices, not stalking legally, but trying to be near Justices in the greater Washington D.C. Area. You tell these really vividly human stories about the Justices. And it's a really, I think, important reminder that these aren't just sort of these abstract people declaring things that you either like or don't like from the bench. They're real human beings. And I would love... And you've hinted at it with Justices Gorsuch and Kavanaugh, and I love the description of them as twins, but when the egg split, somewhat different personalities, right?

[00:24:53.0] **Sarah Isgur:** Fraternal.

[00:24:54.5] **Julie Silverbrook:** Fraternal with some values the same. And so tell us some of these stories. You've got a great personal connection to Justice Kagan, so you could talk a little bit about her. And then I think two other Justices who are, I think, profoundly misunderstood by the public are Justices Thomas and Alito. So we'd love more of the human portraits of those two Justices.

[00:25:18.8] **Sarah Isgur:** So Justice Kagan was my dean in law school. She transformed Harvard Law School, and she should get a lot of credit for being a great Justice. I think she's the best writer on the court. She was a great lawyer and a great academic. But frankly, I hope that

any sort of obits down the line mention what she did at Harvard Law School because it was a real commitment to a lot of things. One, having law students not hate their lives for three years. I think she's the first one to put tampons in the bathroom. And if you don't think that's important, you're a man. [laughter] But I remember this day walking back from lunch, and it's just the two of us, and I'm in awe of her, and I'm trying to find something to talk about that doesn't make me sound like a moron. And so I'm like, "So, do you wanna be Attorney General or a Supreme Court Justice someday?" And she's like, "You sound like a moron." And she's like, "What do you think, Sarah?" And I was like, "Attorney General." And she was like, "Yes, definitely." So I have this whole theory, actually, that the next Democratic president will appoint her Attorney General. And it's a twofer, right? You get Elena Kagan as your Attorney General, who would be a fabulous AG, and you get an opening on the Supreme Court. So like why would you not do that?

[00:26:45.9] Julie Silverbrook: It depends on what Congress is composed of, the same party or different party, right?

[00:26:51.3] Sarah Isgur: It's a whole album side there, that I get into in the book as well. When she... So I was president of the Harvard Federalist Society. There's a great moment where the American Constitution Society was relatively, well, brand new when I was in law school. And so we put our dinner on whatever night in April, and so they put their dinner on that night too, after we had already put ours on. And then they invited the dean to come to their dinner, and she came to ours. And she said, "You are not my people, but I love the Federalist Society." And we immediately made T-shirts that said that and handed them out across the school to brag about. But we became the largest student group on campus thanks to her support at a time when that was deeply unpopular. And when she was then nominated by President Obama, reached out and was like, "Would you say I'm qualified to be on the Supreme Court?" And what I talk about in the book, and it's sort of this meta thing, it's not so much about her, frankly, that was actually a hard decision for me, and I'm embarrassed about that.

[00:27:56.5] Sarah Isgur: But I sort of walk through the process, I'd been offered this chance to support her nomination. I was also offered the chance to work on the Senate Judiciary Committee to defeat the nomination. She had worked on the Senate Judiciary Committee, like this was a big stepping stone. And there's sort of this night of the soul moment where I feel like what I explain in the book to law students or young people reading is, you don't have some moment as an adult where you finally get to live your principles. It's all of these little pivots along the way. It's muscles to be worked on. And if you don't exercise those muscles, you won't have them. You'll be, principle-wise, quite flabby in your old age. And that's one of those moments that I am quite proud of where I was like, you know what? I'm gonna tell the truth. The truth is she's incredibly qualified to be on the Supreme Court. And if that's sort of the end of my career in conservative world, well, at least I'll sleep well tonight. Also, they were never gonna defeat her nomination. That was a pipe dream.

[00:29:09.6] Sarah Isgur: So, as I said, she's the best writer on the court. No question that I was right that she was qualified. And the boss who I worked for at the time was Rick Perry's old chief of staff. He was sort of the number one Republican lobbyist in Texas. And I was like, "Are you gonna fire me?" And this was another moment that was really important in my career. He said, "I'm never gonna fire someone for telling the truth." And I was like, those are the bosses you wanna seek out in life, not the tribalist team sports guys, but the ones who believe in truth. Justice Alito, he's an introvert, man. He's not that into people, I'm gonna be honest. But he's really into animals. And so while all of the other Justices are golfing with their vacations, going to fun, exotic places to teach or whatever, he is banding migratory birds. That's banding with a D, putting little ankle bracelets on them so that we can monitor their migration and ensure that they make it up to Canada okay. And you can just picture him sitting in a blind without people, with just birds. He says he has three cats. That's kind of true, but if you actually dig in, he personally has one cat, but he has all these strays that he feeds. And it's like, do you know that they're not going to someone else's house too? And like...

[00:30:44.9] Julie Silverbrook: I bet nobody had on their bingo card that Justice Alito takes in stray cats, right? Anybody have that on their...

[00:30:50.1] Sarah Isgur: Yeah.

[00:30:50.3] Julie Silverbrook: No.

[00:30:50.7] Sarah Isgur: That are using him, I think. Frankly, I think he's getting played a little bit. But he was late to court one day because it's raining, it's miserable weather in D.C., and he's under the deck of his house. I don't know if any of you guys have those houses that sort of are the crossed wooden things and there's a lot of crawl space underneath. Well, one of the cats is under there. The cat is fine. That's what cats do. And he's like, no, I can't leave with the cat under the thing in the rain. And so he's down there, sort of butt hanging out with some food and trying to coax the cat. And the marshals are like, "This is not great, sir." And I feel like it's this very Justice Alito moment. And I try to draw these stories into some case that they've decided so you can sort of get a glimpse of how their priors affect their decisions in a non-ideological way as well. And he has this incredible solo dissent. Right? In *Plessy v. Ferguson*, John Marshall Harlan is the sole dissenter. And you learn a lot about a Justice when they are standing against the rest of their colleagues as a complete outlier. And I think this one's so fascinating because it's about crush videos. I will not describe what crush videos are. Please don't look it up, actually.

[00:32:08.1] Julie Silverbrook: It involves the harming of animals.

[00:32:11.6] Sarah Isgur: Yes.

[00:32:13.3] Julie Silverbrook: That's I think the point of the...

[00:32:13.9] Sarah Isgur: For sexual gratification. It's very gross. He goes into great detail describing these videos, and eight of the Justices basically say that they are constitutionally protected under the First Amendment. And he's like, the hell they are. This has no value in our

society. This is not adding to some political debate. The founders would have been outraged by this, and so am I. And if you look at his First Amendment cases, which again, I'm a First Amendment absolutist, this is very hard for me to deal with because on the one hand, I do love animals a lot, like snails, and on the other hand, I don't think those videos have any value. And he applies that same logic to the Westboro Baptist protesters at military funerals. He applies the same thing to the violent video games case. And so you start to see his First Amendment jurisprudence in a different way when you can find some of that common ground. And he's an outlier on the First Amendment on the court right now. And it's fascinating. Speaking of that, I have this moment with Justice Thomas about the angry cheerleader case where the cheerleader puts on Snapchat... Are we cursing in this event?

[00:33:28.1] Julie Silverbrook: We don't generally, but you can use the letter.

[00:33:31.1] Sarah Isgur: Cool. Okay. So she... I love this, right? Just like we've all been in high school and we've all been there, but we didn't have Snapchat. So it's a weekend, she doesn't make the varsity cheerleading team and she's like, "F cheerleading, F life." And I'm just like, "Yeah, I get it." And her school kicked her off the JV team and she got in a lot of trouble. And the question is, was her off-campus, non-school-hour social media post protected? And the court, frankly, did not go far enough in my view, saying, yes, of course that's protected. But they were like, well, this time it's protected. And there was this tweet about it that said, "Majority opinion, like yeah, kind of. Justice Alito, I resentfully concur. And Justice Thomas, beat the children with sticks." It was actually a great summary of all the opinions. And so I'm speaking at the 11th Circuit Conference. This is the sort of Florida, Georgia, Alabama states. And we talked that we were gonna talk about that case. It was a term-in-review type situation. And so I read that tweet to the audience, but Justice Thomas is right there. And so the whole room does not laugh when I say, beat the children with sticks, and they're horrified that I would read that. And they all look to Justice Thomas and all you hear is this, [vocalization] with his great big laugh. And then the room's like, okay. We're like, that's very funny. We have permission to laugh.

[00:35:10.1] Julie Silverbrook: But a lot of people don't realize that he is actually a warm person. You would not get that from his demeanor on the court.

[00:35:19.6] Sarah Isgur: No. But you should...

[00:35:20.4] Julie Silverbrook: And he has a very tight clerk family. And I wanna talk a little bit about that because I think that says a lot about who he is as a person.

[00:35:27.0] Sarah Isgur: He has the most rabid clerk family. So those of us not in the Thomas Clerk family may sometimes refer to them as the Mujahideen. Like, you will know them by their works. They're very, very protective of him. And I think it's because they get him in a way that the public narrative is just wrong about... Forget whether... You can disagree with every single decision he made, and you will have plenty of material for that. But calling him an Uncle Tom publicly, if you're one of his clerks and actually understand his story, that's an insane perspective. He grew up with English as a second language in the deeply... Not just deeply segregated South, in a very, very rural part of Georgia where he didn't have enough to eat. He

was cold in a way that you weren't gonna get warm. Eventually, he and his brother were raised by their grandparents, and he was a race radical for many years. He comes to his beliefs in a way that, again, welcome to disagree with them, but I would encourage everyone to actually understand them before assuming that he's an idiot. And that was the whole bit.

[00:37:01.9] Sarah Isgur: Right? He was just doing whatever Justice Scalia told him. And it's always been this racially tinged, he's not allowed to have those beliefs. He's a traitor to something, instead of, you know what? You weren't there. Far be it from me to know how I would turn out if that were my background. And so the speech that he just gave on the Progressive Era, and everyone's mad about that and, how dare he, and, he doesn't understand this. He's talking about his own experience. The Progressive Era folks are the ones that resegregated the federal government. My God, the man is allowed to have his opinion on this without, again, [being told] he's an idiot. He doesn't know history. No, he lived it. You're free to disagree with it. But this idea that he's stupid or evil or something, this goes to the point about humanizing all of them. None of them are there to hurt the country. All of them took these massive pay cuts because they love the country, because they love the rule of law, because they want to be part of this project. You can disagree with any of them all you want, but this idea that they're out to get us bothers me.

[00:38:10.0] Julie Silverbrook: I think there's a biographical detail that's related to his clerks, which is he always takes his clerks on an annual trip to Gettysburg. And I feel like that is a detail that gave me a greater appreciation for who Justice Thomas is. But you should... He wrote a book, a biography, and I think it's worth reading to better understand the man. And I'm glad that you did this. And also, we know what their cafeteria, Supreme Court cafeteria orders are as well, which is a critical detail for understanding them as human beings.

[00:38:37.8] Sarah Isgur: It is. And it's important to know that the junior Justice is the head of the cafeteria committee and that each Justice is expected to make a real contribution to that committee. So Justice Kagan got the froyo machine. Justice Kavanaugh was the first one to bring in pizza. How was there not pizza before 2018? That seems bizarre. Justice Jackson now, like jury's out. We'll see. But she's got a lot of work to do, you know.

[00:39:07.0] Julie Silverbrook: Has she... Is it grain bowls? Is that...

[00:39:08.7] Sarah Isgur: She did not do the grain bowls. However, I think she should be quite proud of the fact that she is the Justice who introduced app ordering for the employees so they don't have to wait for their food in the normal line. Like with... Anyone can go to the Supreme Court cafeteria during normal hours, but now the clerks and staff can pick up their food by pre-ordering it. I think that's a great contribution. [laughter]

[00:39:36.1] Julie Silverbrook: Speaking of cafeterias and cliques, let's talk about the three cliques at the Supreme Court. You describe the three distinct groups, the deciders, that's Roberts, Barrett, and Kavanaugh. This is another area where I laughed. The conservative honey badgers, that's the species that doesn't care, that's Thomas, Alito, and Gorsuch; and then the lonely liberals, the three, Sotomayor, Kagan, and Jackson. Tell us a little bit about these three groups

and then how coalitions like this form, how influence is exercised both within them and on the other cliques or groups, and then how decisions ultimately take shape with these different sort of ideological groupings on the court?

[00:40:26.8] Sarah Isgur: So if you've seen *Mean Girls*, I think you've got the gist. That opening scene where she discusses the different lunch tables à la the Serengeti, like applicable to a lot of parts of life. And so these are sort of the high school lunch tables that the Justices sit at, though, again, literally speaking, they eat lunch together 63 days out of the year. They are not allowed to talk about work at those lunches. Nobody else is allowed in the room. It's just them and a portrait of Marbury and Madison sitting with them, eating their lunches as well, no doubt happily together forever. By the way, I thought they should be on opposite walls, but they actually are next to each other. That was, for some reason, one of the hardest things to get locked down because nobody could remember where they were in the room. And I was like, somebody, please just tell me...

[00:41:15.9] Julie Silverbrook: Those two would 100% not have dined together, by the way.

[00:41:19.9] Sarah Isgur: No.

[00:41:20.8] Julie Silverbrook: No.

[00:41:20.9] Sarah Isgur: No. Very much not. I mean, if you think our moment's partisan now, 1800 more partisan. If you're calling Adams a hermaphrodite, I think we've all jumped the shark. So these three lunch tables, they are the groups that are most likely to be together in any given opinion, for sure. But what's also kind of interesting is when someone leaves their lunch table. So, for instance, Justice Gorsuch is the one most likely to break away from Justices Alito and Thomas in his table. You're gonna see that a lot in Native American rights cases, anything involving someone suing the government. He was like the sole dissenter in a case about the IRS where everyone else was like, clearly, the IRS does not owe them money, and Justice Gorsuch is like, I hate the IRS. I don't really care. He's the libertarian on the court. For the lonely liberals, it's obviously Justice Kagan. She is the most institutionalist of the liberal Justices. So you will see her break away based on stare decisis, any sort of precedent, and she'll be like, look, I didn't like that case. I was in dissent on that case. But now it's the precedent of the court, so here I am. trying to remind everyone that we do precedent here.

[00:42:45.6] Sarah Isgur: And then the deciders, you know, the Chief, Barrett and Kavanaugh are the fifth vote in over 90% of the cases, they are gonna be in the majority. It makes the Chief the most powerful Chief Justice that we've had in modern history. It makes Justice Kavanaugh, the Justice, more likely to be in the majority than any Justice since sort of the modern court of the last 100 years. He replaced, remember, Justice Kennedy, the swing Justice. He beats Justice Kennedy's record. That's kind of crazy. And Justice Barrett, I call the most interesting Justice in the world. Like the Dos Equis guy, she is fascinating. She is the hardest to predict in a lot of ways. She has voted against the Trump administration more than any of the other Republican appointees. She is also the only Justice of the conservatives, I believe not to have worked in the executive branch. She's the only Justice not to have gone to an Ivy League school. And she was

the first Justice ever to be on the court as a mother of young children. So I talk a lot about how I think we've too narrowly created a path to become a Supreme Court Justice. Three of the current Justices replaced the Justice they clerked for. This is now a hereditary peerage. And it's not coincidental. The Chief replacing the Chief, maybe that's a little coincidental, but it is not a coincidence that Kavanaugh replaced Kennedy. It is not a coincidence that Jackson replaced Breyer. These are now how we're getting the Justices to retire. We're like coaxing them out from under the deck with the cat food.

[00:44:32.6] Julie Silverbrook: And just to be clear, they clerked for the Justice they replaced, just so we're...

[00:44:36.5] Sarah Isgur: Yes. And it's like, look, if you retire, we'll make sure your legacy continues with someone who you spent a year sort of training up in the law with your views of the law. In order to have clerked at the Supreme Court, we've already narrowed the field so much. These people have to have had multiple circuit clerkships. Do you know the type of people who can spend multiple years moving across the country clerking for a lot less money than they would make at a law firm? People who can afford to move across the country multiple times and clerk for a lot less money than you would make at a law firm. You also almost certainly went to an Ivy League school or Ivy League adjacent. In order to get into an Ivy League school, you had almost certainly certain types of parents. You grew up with a certain type of background. We're picking our Supreme Court Justices at 13 years old, basically, by narrowing this pool so much. I think it's a bad thing. But Justice Barrett, a little bit breaks that trend. I've said, look, there's lots of reasons why you might not want Ted Cruz on the Supreme Court. And my God, he's barely diverse given everything I've told you about, but at least he worked in the legislative branch. This court is so undiverse in terms of experience. You look at the *Brown v. Board of Education* court. Five of them had held elected office. Two had been Attorneys General. Five had gone to public law schools. One didn't even go to law school. Eight had served in the military. This is a diversity of experience that we have simply abandoned entirely. Someone with those resumes wouldn't even be on a short list today. And that's for the worse, for the court, for the country, for all of it. Again, I'm for moderation in all things, including how we pick our Supreme Court Justices. And that was a rant. I'm sorry about that. That was not at all related to the question, but I feel better, so I hope you do.

[00:46:39.7] Julie Silverbrook: We have about 10 minutes left and we have a lot of audience questions. Some that were...

[00:46:43.7] Sarah Isgur: Okay, I'm gonna keep it super tight.

[00:46:44.7] Julie Silverbrook: Some that were submitted online, but first, a comment that I just think will tickle you. A lawyer for 23 years here. Yes. No question from me, but a comment, when it comes to law school, you are right and David French is wrong. So I thought you would appreciate that, and I'm gonna give you the card.

[00:47:00.0] Sarah Isgur: Thank you.

[00:47:00.5] Julie Silverbrook: For...

[00:47:00.6] Sarah Isgur: That's in the appendix, "Don't Go to Law School and Other Advice to Would Be Lawyers."

[00:47:07.7] Julie Silverbrook: I have a question here that was submitted online about John Marshall, and I think I know the answer to this. Do you think John Marshall could have envisioned that the court would have the influence it does today?

[00:47:23.5] Sarah Isgur: Yes.

[00:47:23.8] Julie Silverbrook: I think that's what he was going for.

[00:47:24.8] Sarah Isgur: That was it. He wanted a...John Jay had been the first Chief Justice. John Jay refused to come back as Chief Justice when Adams asked him to because he said it was beneath his dignity. He was like, "This court doesn't do anything." And I'm like, "Whose fault is that, John? You were Chief Justice." So John Marshall kind of gets it by accident. He was the third pick. Third picks are very popular at the Supreme Court. Breyer was a third pick. Kennedy was a third pick. So we have some really great third-pickers that make it on the court. And John Marshall is, of course, the best of the third picks. He goes to battle against his cousin, Thomas Jefferson, and creates an independent branch of government. Not just *Marbury v. Madison*. In fact, I would put that third on the list of things John Marshall did. Number one is the impeachment of Samuel Chase. Thomas Jefferson wanted Samuel Chase off the court. He thought he was a rabid partisan. Fair enough, he was right about that. But he was then gonna take John Marshall off the court. And John Marshall really protects the court against that sort of partisan influence. And without that, if Jefferson had succeeded, we would not have a counter majoritarian branch of government at all. You wouldn't have a First Amendment. You wouldn't have rights for criminal defendants because the majority would get its say. And guess what? Criminal defendants are not popular with majorities ever, by definition. And the First Amendment, we don't need the First Amendment for popular speech. We need it for unpopular speech that the majority doesn't like. So John Marshall should get all the credit in the world. He was also, I think, very handsome, very sexy guy, and we don't give him enough credit for that either.

[00:49:08.5] Julie Silverbrook: Maybe I know the answer to this question now, which is, who is your favorite Justice, past or present? Is it John Marshall?

[00:49:19.6] Sarah Isgur: So John Marshall is to George Washington what John Marshall Harlan is to Abraham Lincoln. And my father and I have a debate over whether your favorite president is Abraham Lincoln or George Washington. And my father picks Abraham Lincoln, and I get it. That's a super fun thing to get to pick. Isn't that nice for you? But the answer has to be George Washington. We don't get any of this without George Washington. And I know it's not fun, but George Washington walking away is what gets us all the rest of it. It's what gets us Abraham Lincoln. In the same vein, I think you have to pick John Marshall. But shout out to the Benjamin Curtis fans out there. He is the Justice portrait hanging in Justice Gorsuch's chambers.

The only Justice to resign the Supreme Court over a difference in an actual decision, to resign because of the court's choice. And he was the dissenting voice in *Dred Scott*.

[00:50:25.1] Julie Silverbrook: I did not get to ask my question on the Shadow Docket leak, so I'm gonna bring it in in the audience Q&A. So this one is... Well, there are several, but this one is basically, is Justice Roberts big mad about the leaks.

[00:50:40.9] Sarah Isgur: Yeah.

[00:50:41.5] Julie Silverbrook: And then any sense of where the leaks might be? Obviously, there was also a high-profile set of leaks around the *Dobbs* decisions. The shadow or emergency docket itself, not uncontroversial. I think the legal academy is very interested in the birth date of the accuracy of the reporting and the actual birth date of the emergency docket. The general public, I think, interested in the number of decisions being decided that way and their consequence. But I wanna talk about the significance of the leaking itself because it's highly unusual for the court to leak. And of course, there was an investigation with the *Dobbs* leak. We still, at least publicly, don't know what the result really of that investigation was. What is the impact of leaks like this on the institution, both for the public and I think, actually, for the court itself?

[00:51:34.3] Sarah Isgur: So I always like to point out that there's nothing new under the sun. In 1919, a clerk was indicted for leaking the outcome of a decision to speculators. He was not convicted, but he did it. And *Roe v. Wade* leaked. And in fact, it leaked to a reporter named Dave Beckwith for *Time Magazine*, who goes on to be my boss for my first campaign that I ever worked on, which I just thought was like a nice full-circle moment in history. So it's not that it's never leaked, but the outcome of *Dred Scott* was leaked to President Buchanan so that he could include it in his inaugural address. He really, really wanted that decision. He was BFFs with Roger Taney. And how'd that turn out for you guys? So it is not fatal, I guess, is my argument. It has happened many times before. It is not good. But I will say this. I guess I think it's not good for reasons that are a little bit different than everyone else. I mean, it's not good because it's not good, and you shouldn't go work at the court because you wanna leak things to the press.

[00:52:47.1] Sarah Isgur: And I think we all know that. I will argue that I think transparency, radical transparency, transparency as a virtue unto itself in government, is bad. I heard this idea and I have adopted it as my own, though I don't know how well I could defend it in its entirety. But the reason the American Revolution succeeds is because they shut all the windows in Independence Hall so that they could debate the finer points of the Constitution without everyone weighing in and saying so-and-so is a sellout and this person is a bad guy for this reason. They debate it amongst themselves. They make compromises. They propose things that they then later decide they don't mean and they change their minds. And it's because it wasn't transparent that we get the Constitution that has been the longest enduring Constitution in world history.

[00:53:46.1] Julie Silverbrook: Just gonna take issue with this one characterization because it's actually the Massachusetts, it's the longest national Constitution. The people of Massachusetts

get very upset about this. Their constitution of 1780, trust me, you will get hate mail, just letting you know.

[00:54:01.4] Sarah Isgur: Great. The French Revolution, on the other hand, why does it fail? It's right on the heels of the American Revolution. They have every reason to have a French Revolution. It fails because they do it all in public and they do it on literal soapboxes. And the crowds cheer and they boo for people and decisions are made through a kind of mob mentality, and there's a guillotine involved. Fair. Fair difference. The argument is that transparency itself can actually be very detrimental to government. And so, yes, the leaks are bad. But you know what? I don't think the leaks are nearly as bad as cameras in the courtroom would be or what we've done to Congress because they really cannot have private conversations anymore because everyone has a cell phone in the hallways. C-SPAN has cameras everywhere. We've killed the most deliberative body in the world in the United States Senate by too much transparency. And it's a really popular thing to be the girl who's against transparency. So apologies to all of you.

[00:55:04.2] Julie Silverbrook: Well, we are out of time. We could spend another hour.

[00:55:07.3] Sarah Isgur: Sorry.

[00:55:07.4] Julie Silverbrook: No, that's a... It's a nuanced perspective. [laughter] [applause]

[00:55:13.2] Julie Silverbrook: Please join me in thanking Sarah. She will be signing books out in the lobby.

[00:55:18.2] Julie Silverbrook: This program was streamed live from Philadelphia as part of the NCC's Book Club Series on April 27, 2026. This episode was produced and mixed by Bill Pollock. It was recorded by David Stotz and Greg Scheckler, with production support from Charles Sahn. Research was provided by Anna Salvatore, Trey Sullivan, and Tristan Worsham. Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish these programs on the podcast, so stay tuned here as well, or watch the videos, they're available in our media library at constitutioncenter.org/medialibrary. Follow *Live At The National Constitution Center* on Apple Podcasts, Spotify, or your favorite podcast app. On behalf of the National Constitution Center, I'm Julie Silverbrook.