Previewing the Supreme Court's October 2023 Term

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[00:00:00] Jeffrey Rosen: Hello, friends. On Monday October 2nd, the Supreme Court is hearing cases at the beginning of its 2023 term. There are cases on the docket about the Second Amendment and the administrative state and the First Amendment. And there's much to discuss.

[00:00:18] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, we're previewing the upcoming Supreme Court term, and it is an honor to convene two of America's great constitutional commentators and Supreme Court observers, Sarah Isgur and Adam Liptak.

[00:00:49] Jeffrey Rosen: Sarah Isgur is a staff writer at The Dispatch, host of the legal podcast, Advisory Opinions, and a great commentator on the Constitution. Sarah, welcome back to We the People.

[00:01:00] Sarah Isgur: Thanks for having me.

[00:01:02] Jeffrey Rosen: And Adam Liptak is a columnist for The New York Times. He covers the Supreme Court and writes Sidebar, a superb column on legal developments. Adam, wonderful to welcome you back to We the People.

[00:01:12] Adam Liptak: It's great to be here, Jeff.

[00:01:14] Jeffrey Rosen: Sarah, some opening thoughts for We the People listeners. What are you looking for at the beginning of this Supreme Court term?

[00:01:20] Sarah Isgur: Well, we're sort of getting to know this new Supreme Court with these nine justices together. And last term, not surprising, but about 50% of the cases were unanimous. But overall, what you saw was the Conservatives kind of feeling each other out. About nine in 10 of the cases, 89% of the cases, were not decided six-three or five-four, with sort of the ideological groups clumping together. And so, for me, what's most interesting often isn't the individual case outcomes, but how the Conservatives are talking to each other and grappling with that, why they're not deciding the same way.

[00:02:02] Sarah Isgur: And I'd like to point out, for instance, Gorsuch and Kavanaugh could not be more twin-ish on paper. They literally went to high school together. They're the same age, very similar backgrounds in education and conservative thought. I think it's really hard to say that one is more conservative than the other, for instance, along just a pure ideological test. And yet, they're deciding cases so differently. And so you have to come up with some other theory as to why that's happening. And that, for me, is the fun part, is trying to discern the Gorsuchian versus Kavanaughsers ideology.

[00:02:41] Sarah Isgur: So that's what I'll be all in on. For last term, it was definitely the pork producers case. That was California saying that pigs had to be raised in a certain way if their meat was going to be sold in the state. And this term, I think, will have some good Gorsuch versus Kavanaugh doozies as well.

[00:02:58] Jeffrey Rosen: Love it. Gorsuchian versus Kavanaughsers. Ah, superb. Adam Liptak, what are you looking for at the beginning of the term?

[00:03:07] Adam Liptak: So everything Sarah says is right. Although, we shouldn't lose track of the fact that the very biggest cases, you could slice and dice the data in a lot of ways, but the very biggest cases two terms ago were overwhelming conservative victories on abortion, guns, religion, climate. And the biggest cases this last term, although I agree with Sarah, it was a much more complicated term. But the biggest cases on affirmative action, student loans, free speech versus gay rights were all six-three decisions in the usual array.

[00:03:43] Adam Liptak: But nonetheless, and I think this term will yield some surprises also, there are divisions, especially on the right. And we will now see the Court return to…some call it unfinished business. They'll have a chance to explain whether they were really serious about an originalist, a truly originalist, approach to the Second Amendment. And they'll take a look at a trio of cases on the

administrative state, which has long been a project of the conservative legal movement. And the Court has chipped away in some often-symbolic ways at the administrative state, but it may be poised to do much bigger things this term.

[00:04:31] Jeffrey Rosen: Thank you so much for that and for teeing up those big categories - the Second Amendment cases, the three administrative state cases, and also some important First Amendment and social media cases that you both have written about. Well, let's start with the Second Amendment. The case is United States v. Rahimi. The question is whether a prohibition on firearms by people subject to domestic violence orders violates the Second Amendment.

[00:04:56] Jeffrey Rosen: The Court is asked to apply the text, history, and tradition test from the landmark Bruen case that came out recently. And this test has created confusion among the lower courts and a vigorous debate about how exactly to do originalism. Sarah Isgur, you teed up this case so well in a panel discussion that you moderated recently for the Federalist Society that I had the pleasure of joining. Describe what the jurisprudential debate in Rahimi is, as well as the practical stakes of the case.

[00:05:33] Sarah Isgur: Well, we have to go back. I mean, to some extent, you have to go back to Heller, which is the beginning of Second Amendment jurisprudence in the modern era. And the Court says there's an individual right to keep arms under the Second Amendment. Fast forward to Bruen and the Supreme Court, with the Justice Thomas opinion, says there's an individual right to keep and bear arms under the Second Amendment. And the way we're going to know that is through this text, history, and tradition test. And you're going to see this pop up in other cases as well. You're going to see it pop up in Dobbs, for instance, the abortion case. And in all of these other contexts as originalism moves into, I don't know what Adam would refer to it as, are we in originalism 3.0, maybe? Maybe we're only in 2.0.

[00:06:18] Sarah Isgur: We're definitely past 1.0, the sort of Scalia originalism, the original originalism, if you will. And we're in sort of later generations. And the text, history, and tradition test, on its face, makes a lot of sense. The idea is to replace these levels of scrutiny, which are a-constitutional. Like there's nothing in the Constitution about strict scrutiny, rational basis review. Intermediate scrutiny is particularly made up. And so the idea is you go back to the text of what you're looking at. Here, the Second Amendment. The history at the time that the Second Amendment was ratified. And tradition, which no one knows what that means.

[00:06:57] Sarah Isgur: And so in Bruen, it worked really well. At the time of the founding, could you imagine the government thought that it could bar citizens from taking their guns from their homes? No. Therefore, very easy outcome. Yes, of course, the Second Amendment protects an individual right to bear arms outside the home. However, as you allude to, Jeff, you've got a real problem. The Supreme Court decides, what, 59 cases last term. They do it over the course of a year, basically. They've got four law clerks a piece. They write hundreds of pages on each opinion sometimes, plus 50 concurrences per opinion. They've got lots of time. Maybe they're not trained historians, but they sure have a lot of resources at their fingertips.

[00:07:51] Sarah Isgur: But these cases start in district courts, often, most of the time. And federal district courts have huge dockets - gun cases, drug cases, tax evasion, bankruptcies, and now they're supposed to spend time going through original documents, and founding era debates, and ratification letters back and forth between various founders to determine that text, history, and tradition? That's in the best-case scenario. And that's if we knew what the test meant and how analogous one thing needs to be. So sorry, that's a very long-winded way to get to Rahimi. Which is, Rahimi is a really bad dude. He shoots a lot of people, he has two domestic violence orders against him. And under current federal law, someone with a domestic violence order does not have the right to own a gun.

[00:08:46] Sarah Isgur: However, the Fifth Circuit, in a very interesting, kind of fun-time, opinion, says that that violates the Second Amendment, because there is no analogy to a domestic violence order allowing someone to have their constitutional rights removed from them at the time of the Second Amendment of the founding. But, how analogous does it need to be? Is it just the idea that the state could remove someone's constitutional right to protect public safety, for instance? Any constitutional right, any need for public safety. That would be a really high level of analogy. Or does it need to be actually a domestic violence order? Well, that's not going to happen. And then all the things in between.

[00:09:33] Sarah Isgur: And so what we've seen, whether in the Second Amendment context or in any of these other contexts, is the lower courts really struggling with what text, history, and tradition means. Each of those words. How you find analogies? At what level of generality does the analogy need to be? And so to say we've got circuit splits, I think, actually undersells the split. We've got splits along splits along everything along different types of cases, even. And so the

Court, I think, knows what mess they have, but we'll see whether they actually want to clean it up this term.

[00:10:09] Jeffrey Rosen: That's a really helpful description of some of the questions about tradition that arose post-Bruen. As you say, there are questions about what an analogy means. It doesn't have to be an exact match. But how do you find a comparable regulation? The Court said the modern and historical regulations have to impose a comparable burden and the burden must be comparably justified. But what is comparable when there was an absence of domestic violence regulations? And there are also questions about why tradition is relevant for a texturally enumerated right like the Second Amendment, whose meaning was determined at the time of ratifications in the 1790s and 1868, and not necessarily about the tradition in between those times. Adam, tell us about the confusions that have arisen with the text, history, and tradition test and how the Court might resolve them.

[00:10:59] Adam Liptak: So there's at least two distinct problems, maybe many more, but two distinct problems. One, as Sarah says, history is hard. History is hard for trained historians. History is impossible for a busy district court judge. You're not going to be able to, like a Supreme Court justice, send your clerks to the Library of Congress. And then even if you were capable of nailing down contested history, pointing in different directions, you would have the problem of trying to figure out what counts. And I want to put in a word for tiers of scrutiny. Not because the tiers all make sense. But because it's fundamental to judging to take account of the competing values and come to a sensible conclusion, which is what we do in the First Amendment and with other fundamental rights. And you may have a thumb on the scale that the government interest has to be really important that you have a tight fit.

[00:12:04] Adam Liptak: But that kind of balancing has a place in judging versus what we have here, which is to send a judge off to the history books, and not only have to find the answer, but have to figure out, as Sarah says, the level of generality that counts. So, maybe the government is free to disarm dangerous people, and then these domestic violence orders are fine. Or maybe you have to find some Colonial Era something where there was some practice analogous to domestic violence orders when women had no rights and make that the deciding factor. So, I'm not sure the Court fully thought through what it was doing by introducing what is really a novel, new way of analyzing the constitutional right.

[00:13:02] Sarah Isgur: Jeff, can I also add one more problem, and specifically the Second Amendment context? Which is, under originalism, what you need to make this work is both the floor and the ceiling at the time of ratification, that the government and actors in the government knew and were actually regulating to their both maximum or minimum, depending on what we're looking at. But in the Second Amendment context, for instance, and especially, there's no reason to think that the government at the time of the Second Amendment was regulating to its maximum ability under the Second Amendment. And that's a real problem if you're applying a text, history, and tradition test, because if they weren't, then it doesn't tell us much to look at the history. As in, they regulate it to 10% of what the Second Amendment allows and now we're left to wonder what is 100%. Because that's not going to tell us.

[00:13:59] Jeffrey Rosen: That's a really important point. And Bruen says that the absence of a similar historical regulation is evidence that the modern regulation is unconstitutional. And Sarah, you raised the question of whether tradition is meant to establish a right that has to be positively enumerated or if the absence of regulation itself can establish a right. And that question is not worked out by the Court.

[00:14:23] Jeffrey Rosen: Adam, it seems like this is a fundamental methodological question. I'll just put on the table the fact that also this week, the Constitution Center is going to have a town hall on Cass Sunstein's new book and Sunstein lived methodologies that he calls originalist, including textualism, semantic originalism, original intention, original public meaning, original methods, and original expectation. And then among the non-originalist methods, he includes traditionalism, which he says is backward-looking but not focused on what the founders expected or the people intended. What are your reflections about this debate about the nature of tradition among Conservatives and among the justices? Have they thought this through and how are they going to sort it out?

[00:15:11] Adam Liptak: I'm quite sure they haven't thought it through adequately. I fear that on occasion, they will be opportunistic because there's so many ways to manipulate these interpretive methodologies and doctrines that you might be tempted to reason back from the result you want to achieve. This Rahimi case is kind of a nightmare for them. It's the worst possible set of facts. The gun control folks could not be happier that this is the case that follows Bruen to get to the Court. And it's very hard to imagine that the Court will rule in favor of this truly heinous character.

[00:15:56] Adam Liptak: So how they get there may well divide them, and fracture them, as Sarah was suggesting, sometimes they do. But they're going to be powerfully inclined to come to a conclusion that doesn't do damage to their originalist theories, but nonetheless reaches the result that they feel they have to reach here.

[00:16:19] Jeffrey Rosen: Thank you both for putting that important debate on the table. Our next series of cases involve the administrative state and the blockbuster is called Loper. And the question is whether the Court should overrule Chevron versus Natural Resources Defense Council, which is a central question requiring courts to defer to agency's interpretations of ambiguous statutes as long as that interpretation is reasonable. Sarah, tell us about Chevron, the 1984 case, and what the Court is going to think about when it decides whether or not to overrule it.

[00:16:52] Sarah Isgur: Conservatives have desperately wanted to overrule Chevron for quite a long time. But in the last five, maybe a little bit longer, up to 10 years, Chevron already died. Chevron hasn't been mentioned in a long time. And so, to some extent, this would have been a really, really big deal case in 2005. It's far less of a big deal in a 2023 term. Because in order to get to Chevron, and boy, for those who went to law school, I'm going to give you some PTSD. And for those who didn't go, this will be like birth control but for going to law school. There's Chevron step zero, there's Chevron step one, Chevron step two. And largely, what the Court has done is made it so that you never get really to Chevron. There's no ambiguity, the text is clear. This was never delegated. You know, even major questions doctrine, non-delegation doctrine, will prevent you from getting into Chevron world.

[00:17:54] Sarah Isgur: However, here we are, finally, the Court taking a case to overrule a precedent that they haven't been applying in the first place. And I do think the facts are a little bit fun here. This is on fishing boats and the federal monitors that come along the fishing boats, and who pays for them. And basically, the government saying, "You fishermen, you have to pay for the federal monitors." And the fishermen being like, "What, why would I pay for the person who's telling me what I can and can't do?" And of course, the regulation doesn't really say anything at all about it.

[00:18:25] Sarah Isgur: So it is Heartland Chevron but I'll be curious what Adam thinks about this. I just…the outcome matters, these cases, they all matter. That's

why they get the Supreme Court. But it doesn't matter nearly as much as it would have 15 years ago.

[00:18:40] Adam Liptak: I think that's true, Sarah, as regards the Supreme Court. But the lower courts are still applying Chevron. Chevron is still the law. The fishermen lost on a Chevron theory. So, I think the Court should say what the law is and shouldn't kind of silently get rid of a precedent the way it seemed to get rid of the Lemon test, for instance.

[00:19:03] Sarah Isgur: And lower courts were still applying Lemon. So I mean, you're exactly right. Like, the Supreme Court thinks they can wink to each other, but nobody else sees the secret message.

[00:19:12] Jeffrey Rosen: Adam set this debate up in the broader context of the extraordinarily important debate over the scope of the administrative state. The Court has been recognizing a series of other doctrines like the major questions doctrine and the non-delegation doctrine that have vastly restricted the ability of agencies to regulate and the overturning of Chevron is part of that debate. If the Court does overturn Chevron, how important would that be in restricting the scope of the administrative state and is it likely to overturn Chevron?

[00:19:45] Adam Liptak: Well, the Biden administration in its recently filed briefs said it would be a convulsive shock or jolt to the legal system to do away with some…with a doctrine that people and agencies and regulated parties have organized their lives around for decades. So, it's surely a big thing. And it moves power. It's a separation of powers question. Does the executive branch, through agencies, get some deference sometimes when a complicated statute that's in their area of expertise is to be interpreted? Or, should that power move to the courts to say what the law is? And should it reside in Congress, and not agencies? Should Congress be required to enact laws that are much more detailed? Which is also not part of their skill set.

[00:20:39] Adam Liptak: So, this would be if the Court overruled Chevron, and I think it's more likely than not. A real sea change and a shift and not only symbolic but would withdraw power from executive agencies. And that is a long-sought goal of the conservative legal movement, as a matter of theory on separation of powers grounds, but also as a matter of practice. Because in general Conservatives don't like regulations. And Chevron makes it easier to regulate.

[00:21:15] Jeffrey Rosen: Sarah, isn't Adam right that this has been an open and central goal of the conservative legal movement ever since it got up and running in the 1980s to rollback aspects of the New Deal administrative state that were arguably inconsistent with the original Constitution? And to that degree, whether the work of overturning Chevron has done by other doctrines or not, wouldn't overturning it be both a central goal of the movement and a really big deal?

[00:21:47] Sarah Isgur: Yes. And I think it's worth dwelling a little bit on the philosophical side, because, and this gets to maybe the heart of the creation of the conservative legal movement. I think there's one way to trace the conservative legal movement through Roe v. Wade, for instance, or even through the Warren Court's Fourth Amendment, constitutionally new rights section. But there's another version of the creation of the conservative legal movement that's through this line, which is the creation of the progressive movement. Which is not progressive in the way we use it today, but progressive in the Teddy Roosevelt way really.

[00:22:27] Sarah Isgur: The progressive movement was about expertise. That's where you sort of are going to get eugenics from - this idea of breeding experts, for instance. All sorts of bad ideas come from the progressive movement. Conservatives believe that one of those bad ideas is government by expertise, and that in fact, the American experiment is about political accountability with counter-majoritarian checks. And that the administrative state, by empowering so-called experts, really messed up that balance. Because administrative agencies do not have the political accountability of members of Congress. They're not part of that original constitutional checks-and-balances structure that was envisioned at the founding for a robust system of self-government.

[00:23:16] Sarah Isgur: A hundred years later, you see the effects of that, a huge administrative state and a Congress that becomes really anemic. And I'm skipping over lots of the history here, but you can ... There's plenty of people who've written about this and other podcasts, no doubt. And so, Congress stops doing its job more and more and more. And yes, there are other reasons that Congress stopped doing its job. I have a whole song and dance on campaign finance reform, on small dollars, on social media. But one of the reasons is that Congress realized that it was much easier to say, for instance, "Figure out healthcare, HHS," XOXO, Congress, and then, they get to run on, "Well, I didn't do that. Well, I didn't sign up for that. I'm against Obamacare," or the birth control mandate, or whatever else.

[00:24:09] Sarah Isgur: And those HHS bureaucrats, and I'm not using that in pejorative, I mean literal bureaucrats. They're the ones who come up with all the actual rules. There are going to be compromises deeply unpopular in some ways, whereas Congress was supposed to do the compromising. And then that was supposed to go to voters to decide whether their compromises were too much or too little, or whether they're actually handling the problems of the modern era. And that's a very long way of saying Chevron is part of how you dismantle that thumb on the scale for the administrative state. And the court's, I think, longer term project, this court in particular, these nine justices of what we can call the Make Congress Great Again project.

[00:24:52] Sarah Isgur: In particular here I'm looking at Justice Gorsuch, where the result may be initial chaos when you say an administrative agency doesn't have the power to do X, especially in some of the environmental regulations that Adam referenced even earlier. It's not that nobody can do it. Or, let's take Joe Biden's student loan debt cancellation plan. The Court didn't simply say, "You can't do that." What it said was that Congress has to do it. And so when you get rid of Chevron, it's going to have the same effect. And yes at a principle, first principle, philosophical level, it will be a huge win for Conservatives. I just don't know that at the most practical level, it changes much because this project has been going on for some time.

[00:25:39] Jeffrey Rosen: Adam, give our listeners the progressive counter-narrative, which begins with the idea that it was judges who were substituting their expert views for the economic judgments of legislatures back in the progressive era, in cases like Lochner, that they struck down the New Deal by substituting formalistic doctrines for the people's desire for regulation, and that when judges are empowered to review the texts of the statutes on their own, they're basically substituting their own ideas about policy for that of the people. Spell that out and talk about how important this case is in that debate.

[00:26:25] Adam Liptak: And so, I guess I'm a little surprised by how negative Sarah is to the concept of expertise. Expertise used to be thought to be a valuable thing. And now these are bureaucrats, part of the deep state doing something untoward, when in fact they're regulating the environment, the workplace, the marketplace, in a way that, as you say, Jeff, Progressives think is good and valuable. And I'm not unsympathetic to the idea, in theory, that Congress ought to be doing more. But it's really disingenuous for this Supreme Court to say it's up to Congress, when we know the reality is that this Congress is incapable of doing

anything. And the net effect of this move to diminish the administrative state is not to increase the power of Congress, but to increase the power of the Supreme Court.

[00:27:25] Sarah Isgur: I want to add one thing to that, which is the bump stocks case. We're recording this on Thursday before the long conference and the bump stock case is up at long conference, I believe. But I think it's a really good example, because after the shooting in Las Vegas, both houses of Congress have bills to ban bump stocks. But it would be very unpopular for Republicans to have to take that vote, because it would be seen as a regulation on the Second Amendment to ban bump stocks. And so Donald Trump steps in to take the political heat off his own party and the ATF then reimagines the 1968 machine gun act and tries to ban bump stocks itself. Of course, then there's a lawsuit saying you can't just make a criminal penalty out of thin air when, since 1968, you said it didn't ban bump stocks.

[00:28:17] Sarah Isgur: Congress, we know, would do its job more when there's political pressure. It's when that political pressure gets taken off. You saw the same thing with DACA around, and DARPA, with President Obama saying I've got a pen and a phone. That, he was saying that because there was legislation moving. When he says I've got a pen and a phone and basically, I don't need Congress anymore, the legislation dies. He does it through executive order. Same thing happens with student loans. There were bills in Congress. I agree with that and they never were going to go anywhere. That's not though because of Congress per se, that's because they weren't politically popular. There was no appetite for it. And then Biden does it himself through executive order and it gets struck down and the Court gets blamed for it instead of Congress, instead of voters, frankly.

[00:29:00] Sarah Isgur: And so, I think Adam' s exactly right. Jeff, I think you're exactly right to point out the history of judges substituting their own, which is just as anti-constitutional if you will, sort of originalist, as anything else. But, I don't know that we know what Congress would do if there were political pressure, that that valve was being released by stronger and stronger executive action.

[00:29:27] Jeffrey Rosen: Adam, there was that striking moment in the EPA case not long ago where Justice Kagan said the idea of "we nine justices making our own judgments about what good environmental regulations are is scary." And it is an irony that the original Chevron decision was written by Justice Ginsburg, when she was a judge on the DC Circuit. She always reminded me of this. Justice Stevens overturned her decision which would have had more rigorous review of agency decisions. So this didn't used to have a partisan balance, but the Liberals

are claiming today that if justices are interpreting the text of laws on their own, they're going to be substituting their judgments for the people. Tell us more about that debate.

[00:30:10] Adam Liptak: So, as you say, and I might say it even more strongly, Chevron, although written by Justice Stevens, was embraced by Conservatives and Scalia was a big proponent of it. And I actually don't know the answer. I'd love to get Sarah's answer for what happened, why the U-turn?

[00:30:32] Sarah Isgur: Oh. So, we've talked about first principles. We haven't talked about sort of the on the ground politics. And I don't mean partisan politics of this, but conservative to liberal legal politics of this, which is that I think Conservatives saw the administrative state slipping away from them. That the people who were in those jobs, who are not really removable from those jobs, became more and more and more left-wing and not conservative. So I mean, there's a power dynamic here as well, they're just sort of a real politic version.

[00:31:09] Jeffrey Rosen: This Chevron case is the first of the big cases involving the future of the administrative state. And the next is the Consumer Financial Protection Bureau case, whether a court erred in holding that the statute providing funding to the CFPB violates the appropriation clause in Article I, Section 9 of the Constitution. Adam, tell us about this case and why, if the Court strikes down the CFPB, Progressives fear that this could be the beginning of a broader takedown of the administrative state.

[00:31:44] Adam Liptak: So this case, like Rahimi, comes out of the Fifth Circuit, and there's reason to think that this case also may be an example of a circuit court to the right, even the current Supreme Court. The question in the case is whether the way the CFPB is funded violates the appropriations clause, which says no money shall be drawn from the treasury, but in consequence of appropriation made by law. And the argument is that because the CFPB gets its appropriations from the Federal Reserve System and not through periodic appropriations by Congress, that violates the appropriations clause.

[00:32:27] Adam Liptak: The appropriations clause, typically, is meant to constrain the executive. But here, the theory is that Congress did something untoward. If it did, it's done that in many other settings with many other agencies, including the Fed itself. And if the Court was going to say that this method of appropriations is unconstitutional, it's very hard to see how it doesn't wipe out

thousands of regulatory actions by the CFPB and essentially destroys it. And probably has ripple effects across all kinds of other agencies.

[00:33:09] Adam Liptak: So this is a little bit of a nuclear bomb of a case and it's hard to see how you do what the Court has done in earlier cases, which is make a symbolic ruling, say that the head of the CFPB is not subject to appropriate removal procedures, but leave in place everything the agency has done. Here, it's a little hard to untie the remedy from the claim. And the Court at a minimum is going to be a little bit scared of how big a decision it might render.

[00:33:44] Jeffrey Rosen: Sarah, as Adam says, the case could have broad effects. And indeed, the government argues that the funding structure for the CFPB is commonplace in agencies such as the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. How will the Court cabin its decision? And if it does strike down the CFPB, are all of those other agencies at risk?

[00:34:10] Sarah Isgur: So I'm not on the Supreme Court as some of your listeners may know but [laughs] I have just a totally, I think, different view of this case that probably makes my view largely irrelevant. Which is the funding mechanism doesn't seem to be the problem here. In fact, to go back to our previous conversation, Congress actually did do its job. It came up with a funding mechanism. If it had just said "CFPB, go with a can out on the corner of 17th and Pennsylvania and see what you can get," that's not putting in an appropriations. But they did. It's just that we don't like the way that they did the…how the appropriations works. That's not an appropriations clause problem to me.

[00:34:49] Sarah Isgur: The problem here is that what it says is that the director of the CFPB will go to the Fed for any money that they believe they reasonably need, basically, to do their job. So there's no actual standard here for the budget. It's not where the money is coming from. And so I think you could end up with something more like a non-delegation, a major, well not major questions, maybe more just non-delegation problem around the CFPB.

[00:35:16] Sarah Isgur: And, to be clear, I come from a place where, yeah, all of those independent agencies, I don't quite see how they fit into the constitutional structure from sort of a first principles way. But at some point that argument is a little like freshmen in college who read Ayn Rand for the first time, talking about how we shouldn't have fire departments, and everyone should just pay for ... Like,

no, we need fire departments. Like, get over it. We're not going that libertarian. I don't think we're getting rid of independent agencies tomorrow.

[00:35:43] Jeffrey Rosen: Well, speaking of Ayn Rand, indeed, the Libertarian Richard Epstein has argued that much of the administrative state is unconstitutional and Justice Thomas citing his arguments in a federalism case years ago, said that it was too late in the day to strike down the administrative state, even though it might be justified as a matter of libertarian first principles. Adam, do we see any division among the Conservatives about how far they're willing to go? And is there a difference between, for example, Justice Gorsuch and Justice Thomas on one hand, and the Chief Justice and Justice Kavanaugh on the other?

[00:36:18] Adam Liptak: Oh, for sure. The Chief and Justice Kavanaugh care about practicalities, care about consequences. Justice Gorsuch, you might think, will sometimes drive his theory right off a cliff irrespective of the consequences, because he believes in the formal truth of what he's pursuing. And Justice Thomas is also much more of a formalist than a consequentialist. Justice Alito is a tougher person to call. I probably put Justice Barrett… Our information on her is incomplete…More in the center of the Court with the Chief and Justice Kavanaugh.

[00:37:01] Jeffrey Rosen: Well, let us turn now to the First Amendment cases. There are two involving the power of state officials to block users they don't like on social media, and there's a case involving the Biden administration that the Court hasn't yet decided to take. Sarah, tell us about the social media cases and what the stakes are.

[00:37:22] Sarah Isgur: A lot of listeners may remember that back during the Trump administration, Donald Trump had a Twitter account and he blocked people on Twitter from accessing his Twitter account. They sued ... The Second Circuit held that Donald Trump couldn't block people on Twitter. After January 6th, Twitter removes Donald Trump's Twitter account and the Supreme Court takes the case just to moot it out. Donald Trump was no longer president at that point. He no longer had a Twitter account.

[00:37:50] Sarah Isgur: And you have this interesting statement concurring in mooting out the case by Justice Thomas in which he says, "Look, I'm sympathetic here to this idea that the social media accounts create something that looks kind of like a public forum, and that, therefore, it has some First Amendment protections."

However, wouldn't it be strange if a public forum could be disappeared, if you will, by a private company? Like when Twitter just gets rid of the account to begin with. And that's sort of where things were left. Fast forward, you have two school board officials in California and one city manager out in Michigan, both of whom block people from their social media accounts, Facebook in the Michigan one, and I forget which one it was in California.

[00:38:44] Sarah Isgur: They sue. The Ninth Circuit says you can't block. The Sixth Circuit says you can block. And so then, the Supreme Court takes the circuit split, both of the circuits' splits, in this case. Overall, yes, it's an interesting First Amendment case. But what's more interesting to me is the Supreme Court has really not found their footing in these tech cases. We had the Section 230 cases last term that ended with a real whimper, not a bang at all. We have the pending NetChoice cases and disclosure. My husband is involved in those cases. But, in short, these are the Texas and Florida social media bills with NetChoice, which is a, let's call it a social media trade organization, saying that those bills are unconstitutional because they hurt their free speech rights, the free speech rights of a Facebook or a Google, et cetera, by forcing them to keep up content that they don't want to keep up.

[00:39:46] Sarah Isgur: And, just to go back to Justice Kagan, who definitely has the best one-liners of anyone on the Court, "we're not the nine foremost experts on the internet." And you really have seen that. They're just not quite sure what the analogies are to social media, how to think about the Court's role itself, like the Court's role in approaching these types of cases. And they've let it percolate for a long time. But it's coming home to roost now. And this is, in theory, going to be one of those cases where we're going to start to see the Court grapple with this. And Justice Thomas's concurrence in that Trump case, I think, gives us the first inkling.

[00:40:27] Jeffrey Rosen: Very interesting. Adam, you wrote an extremely helpful piece about these cases in April, when the Court decided to take them. And in the Ninth Circuit case, the judges held that social media will play an essential role in hosting public debate, and when state actors enter that virtual world, the First Amendment enters with them. By contrast, in the case out of Cincinnati, Judge Thapar, writing for a unanimous court, said the account was personal and the First Amendment had no role to play. Is there a liberal conservative valence in these cases? And how might the justices approach them?

[00:41:01] Adam Liptak: You know, I'm not sure I can identify the valence. The legal question is whether, call it official activity on a private account, amounts to state action. And that's really context-driven. But if President Trump or these officials are basically communicating with their constituents, sitting on policy - in Trump's case firing people on Twitter - that might seem to be enough state action to justify prohibiting them from throwing citizens out of the room as it were by blocking them.

[00:41:43] Adam Liptak: So these cases are interesting, but relatively minor. And the much bigger cases are the ones that Sarah was talking about out of Florida and Texas where those states seek to regulate tech platforms. And I think under classical First Amendment theory, the tech platform has the same First Amendment rights as The New York Times does. We're not required to publish op-eds that we don't want to publish. But that's a fairly glib and simple way to talk about a very complicated subject. Because these platforms are so pervasive and so powerful that the Court may need to come up with a different First Amendment paradigm. But if it does, that will be a huge change in First Amendment doctrine.

[00:42:30] Jeffrey Rosen: Sarah, let's talk about the Florida and Texas cases a bit more. The Florida law imposes fines on large social media platforms that refuse to transmit the views of politicians who break their standards, and the Texas law prohibits some censorship of all speakers when based on the views they express. What legal questions do they raise? And what are the arguments for and against their consistency with the First Amendment?

[00:42:59] Sarah Isgur: I love when cases come in close proximity at the Court, where people have to take off their sort of partisan first impressions. And so, these cases come on the heels of 303 Creative. This was the website case from last term. And the question there was, can you force someone to create a website for someone that they don't want to create a website for? In that case, it was a Christian web designer who didn't want to create same-sex wedding websites, basically. Here, you have sort of the ... Everyone switches teams. You have the social media company saying we don't want to leave up speech on our websites that we don't like. And whether Texas and Florida are claiming a more limited power, like you have to leave up politician speech, there's not a big limiting principle there. It's sort of the same idea. Like, we can tell you what speech you have to have on your websites.

[00:44:00] Sarah Isgur: But here, it's, of course, Conservatives that want them to be forced to have that speech. Whereas in the 303 Creative case, it was Liberals who wanted to force that speech. So, I like those sort of moments because I think it forces everyone to be like, "Wait a second. All right, now, I just need to think about this," because it will now apply to everyone. I think Adam is right in not being glib. And again, I have some conflict here, I suppose, but I'm a pretty free speech absolutist. And here, the free speech right isn't the person who's posting on the social media platform, it's the platform.

[00:44:37] Sarah Isgur: And I disagree that these platforms are sort of a version of too big to fail, if you will. Too big to not be regulated by the First Amendment or something. Because we see the move all the time. Like, how's your Myspace page doing? And Facebook. Now, young people, if you talk to a teenager, they don't have Facebook pages, they're all over TikTok. TikTok's only been around for like a hot second. So, these aren't Goliaths, wandering the desert out there forever and ever. They're actually pretty short-lived. And as people don't like the vibe of the platform, so to speak, the platform withers and dies.

[00:45:16] Sarah Isgur: So, I don't know that the Court does need to do much here aside from traditional First Amendment principles. The biggest problem is this case from the 1980s, early '80s, about a mall owner who tried to exclude a group of children, not…they were minors, they were teenagers who were circulating a petition. They came into the mall and they wanted to get signatures. And the mall owner was like, "Please don't." And in that case, PruneYard, the Supreme Court said, "No, you have to let the petitioners. They're just collecting signatures, you have to let them in your mall. Your mall's kind of a public space, even though it's privately owned."

[00:45:51] Sarah Isgur: I think that case is just wrong. I think you have very sympathetic teenagers just trying to get involved in the political process. I think it's a pretty good example of bad facts make bad law. In this case, the bad facts are that they were too sympathetic, and it clearly infringes on the free speech rights of the mall owner. What if they were circulating a petition for white supremacy or something? I just don't think the case would have turned out the same way. Interestingly, by the way, for those listening, the petition was a sort of proto version of an anti-Israel boycott defund sanction type-ish petition from back in the day.

[00:46:30] Jeffrey Rosen: Wow. PruneYard, 1980, it takes me back to my law school days. Held that the First Amendment doesn't prevent a private shopping center owner from prohibiting distribution on premises of handles unrelated to the center's operations. Adam, differences between Twitter, or now, X, and the PruneYard shopping center? And to the degree that there's a libertarian consensus among the justices when it comes to First Amendment matters on this Court, might they converge around an outcome and what it might be?

[00:47:04] Adam Liptak: So I don't ... I agree with the subtext of Sarah's account of PruneYard. It is problematic when decided it would not be sustained by the Court. It's directly challenged today at odds with the case a couple of terms ago about labor activists, whether they have a right to go on to an agricultural setting. There is, and you see this in particular with Justices Thomas and Alito, a real displeasure with the idea of de-platforming conservative speakers. So I don't know that all of them will approach this in a neutral principles kind of way. But the usual answer to such a question is that you have a site, you can say on it what you wish, you can host on it what you wish, you can exclude from it what you wish, and there would have to be a new reason, a different reason, a reason not contemplated by current Supreme First Amendment doctrine to come to a different conclusion.

[00:48:12] Jeffrey Rosen: Let us end by just a beat on Biden versus Missouri, which the Court is now considering whether to grant cert on, did the Federal government coerce social media platforms to remove COVID-related content in violation of the First Amendment. Sarah, what's going on there?

[00:48:13] Sarah Isgur: Whewf. So again, the Supreme Court is just, so many of these tech cases are percolating up and it's not going to stop. Fascinating because it seemed at the beginning pretty obvious that the government had not coerced these social media companies. This was around sort-of COVID disinformation. And then the record comes out. And there are these moments where there are relatively senior members of the administration, clearly without law degrees, basically they are sort of veiled threats. "Why haven't you removed this? I'm going to go talk to someone about this if I don't hear more about it." I'm paraphrasing because I don't have it right in front of me.

[00:49:20] Sarah Isgur: But I think that you're going to end up with the Court taking the case probably and creating just a better and more robust standard for what the coercion test is and that ... It's unclear to me. There's a few moments where they might cross what that coercion test would be. But the idea is something

like simply saying "We want this" or "Please do this" obviously, will not be enough. Saying "If you don't do this, we're going to come regulate you" or punish you or there will be consequences for it, obviously, that's coercion. But drawing out where those lines are going to be with something like social media and how you know based on sort of the backend.

[00:50:02] Sarah Isgur: So in this case, the government's requests were honored about 50% of the time. Is 50% proof that they were being coerced or is 50% proof that they weren't being coerced? You know, wouldn't it be 100, 99% if they were truly fearful of retaliation or something like that? So, those are sort of the bigger picture questions I'm looking at, more so than whether this specific record crosses that line.

[00:50:29] Jeffrey Rosen: Great. Thank you for that. Adam, thoughts on the Biden case?

[00:50:34] Adam Liptak: So note that this case has its premise the question in the Florida and Texas cases, the premise is when the tech platforms act independently, they have a First Amendment right. The question here is, if the government leans on them, does there come a point at which somebody's First Amendment rights are violated? Who that somebody is not entirely clear. But I agree with Sarah that there is such a thing as coercion by the government. That is a true First Amendment violation.

[00:51:05] Adam Liptak: The facts here are a little hard to tease out. I think the Court may well take this case. And if it does, they haven't yet taken Florida and Texas, but I think may do so as soon as tomorrow. If they take those cases, this coercion case, and they've already taken the two state action cases by public officials we'll have a term ... I mean, journalists are always trying to find themes in a term. This will be easy. This will be ad law and First Amendment.

[00:51:43] Jeffrey Rosen: Time for final thoughts in this great discussion. If those are the themes, as they look likely to be, are those six-three decisions in both the First Amendment and ad law cases or not? And what should we expect from the ad law and First Amendment cases broadly? Sarah.

[00:52:03] Sarah Isgur: I think one thing that you should expect is that we will see very similar justices in the majority as the last several terms, which is Justice Kavanaugh, number one as the sort of chief swing vote, meaning he's in the

majority more than any other justice. And Justice Roberts and Barrett sort of making up what I've called the 3-3-3 court, with the three of them being in the majority the most and agreeing with each other the most often. So you want to look to their jurisprudence to think through this. They like precedent more than the other three conservative justices. They don't want huge swings in jurisprudence. They're minimalist justices in that sense. They prefer small changes, see how that goes, see how that percolates at the lower court, then take another case, make another small change. They're for little adjustments versus jerking the wheel.

[00:52:58] Sarah Isgur: And that also applies in the First Amendment context, which is not, or sort of maybe my heart is on some of these. I would jerk the wheel on the First Amendment sometimes. But if you are thinking of it as not wanting to overturn precedent, wanting to make those small, more incremental changes, you're looking at maybe not overturning Chevron in any massive way, but just sort of really cabining it to true ambiguities or something like that. And in the First Amendment context, that will be particularly interesting because you are kind of in a whole new world. There's not a whole lot of precedents, setting aside the PruneYard case that we talked about where I think, as Adam said, that cases wouldn't come out the same at all today anyway. And it kind of stands ... The cheese stands alone in PruneYard.

[00:53:47] Jeffrey Rosen: [laughs] It does indeed.

[00:53:49] Sarah Isgur: [laughs] So I expect pretty robust First Amendment stuff. And on that I think you can expect not six-three. I think you're looking seven-two, eight-one, maybe even nine-zero on some of these tech cases.

[00:54:06] Jeffrey Rosen: Adam, last word in this wonderful discussion. Do you, in the ad law and First Amendment cases, do you expect six-three or not? And what are you looking for?

[00:54:14] Adam Liptak: I agree with Sarah that the First Amendment cases are kind of a jump ball and will likely be lopsided. I think the CFPB case is an example of lower courts and litigants maybe overreaching. And so I wouldn't expect that to be a classic six-three. I think Chevron may well be. But I also agree that the Court has exit ramps, including that it could say that, where a statute is silent we're not going to let the agency make the decision. But if it's authentically ambiguous, maybe we'll leave that question for another day. So I don't know that

this Court, having gone through a couple of terms of really ambitious judicial decision-making, is all that eager to keep its foot on the gas in quite the same way.

[00:55:12] Jeffrey Rosen: Thank you so much, Sarah Isgur and Adam Liptak, for an illuminating, engaging and entertaining discussion of these important cases and for sharing your life with We the People listeners. Sarah, Adam, thank you so much for joining us.

[00:55:27] Adam Liptak: Thank you.

[00:55:28] Sarah Isgur: Thank you.

[00:55:34] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock, and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Lana Ulrich, Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for weekly dose of constitutional deliberation and debate. Sign up for the newsletter at constitutioncenter.org/connect.

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