Recapping the Supreme Court's 2023-24 Term

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[00:00:00.0] Jeffrey Rosen: Another blockbuster Supreme Court term is nearing its end, and the court has already issued decisions in cases overturning Chevron deference, upholding a law, disarming domestic violence offenders, and more.

[00:00:17.0] Jeffrey Rosen: Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We The People Weekly Show of Constitutional Debate. The National Constitution Center's a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this end of term recap, I am honored to convene two great Supreme Court commentators, Sarah Isgur of the dispatch, and Marcia Coyle of the National Law Journal. Sarah Isgur is staff writer at the dispatch host of the legal podcast, advisory Opinions and a frequent analyst and commentator. She previously served in the Justice Department and the Attorney General's office. Sarah, it is wonderful to welcome you back to We the People.

[00:01:02.1] Sarah Isgur: Thanks for having me.

[00:01:07.3] Jeffrey Rosen: And Marcia Coyle is Chief Washington correspondent for the National Law Journal. She has covered the Supreme Court for 20 years. She regularly appears on PBS NewsHour, and we're so honored that she's a regular contributor to the N'S Constitution daily blog. Marcia, it is wonderful to welcome you back to we the people.

[00:01:24.8] Marcia Coyle: Good to be with you.

[00:01:29.6] Jeffrey Rosen: The court has issued decisions in all of the major cases in the term, except we're recording on Friday for the Trump immunity case and net choice, which will come down on Monday. Based on what we have so far. Sarah Isgur, what are your thoughts on this important Supreme Court term?

[00:01:44.4] Sarah Isgur: So this term looks quite different than last term. From a statistical level, we actually have about the same number of unanimous opinions. It's running at about half. And I expect when we get the other three cases on Monday, that won't be unanimous. It'll drop just below half. But that's about what we've seen for many of the last terms. But last term, we saw very few decisions without one of the three liberal justices in the majority. Only about 10% of the cases last term were along any ideological grounds, either six three or five four. This term we're already heading toward closer to 20% of the cases, so twice as many cases decided with all

three liberal justices in the dissent. Also, similarly, a difference from last term that follows on from that last term, the justices most likely to be in dissent were Justices Thomas and Alito, which really cut against the narrative of it being, you know, this conservative juggernaut court.

[00:02:42.5] Sarah Isgur: This term, however, we are saying that the three justices most likely to be into the dissent are the three liberal justices. So that's been reflected I think in the types of cases that the court took this term. A lot of administrative law cases where, you know, courts are always a lagging indicator in some ways of where the ideological splits are. It almost reflects this like you know, KT boundary fossil line of when there was one party that was for limited government and one party that was in favor of bigger government. Now of course, if you were to sort of take a poll, I think the Trump right loves the expansion of executive power and has every intention of using it. So I find it interesting, you know, especially after this debate we saw this week. On the one hand, you have a lot on the left sort of panicking about another four years of Trump, but then those same people on the left are really upset about the limitations on executive power coming out of this court. Which, you know, maybe they'll rethink once there's someone else in the White House.

[00:03:43.3] Jeffrey Rosen: Very interesting. Thank you for that. Marcia Coyle, what are your broad thoughts on the terms so far?

[00:03:48.4] Marcia Coyle: Well, I think it's been really interesting, Jeff, to see some of the lineups in these cases that go against the grain. Just today, for example, you had Justice Barrett joining the court's liberal members in dissent in the Fisher Criminal case that's related to the January six indictments and convictions. And you've seen Justice Jackson, who's usually on the left with the liberals. She joined the majority in the Fisher case. So there's been more crossover. The other thing that struck me is that we're learning a lot more about some of the newer justices, and again, I'll come back to Justices Barrett and Jackson. We're learning what kind of textualist and originalist Justice Barrett is. She's been writing more this term. She is not the same as Clarence Thomas when it comes to originalism and textualism. Justice Jackson, she found her voice the first week on the bench, no question about it. But she also has an interesting take on some of the cases that they're deciding right now. And she called herself an originalist when she was in her confirmation hearings, but she has a very different lens in which to view history which has continued to be this term quite a debate within the court itself in some very major cases.

[00:05:19.4] Jeffrey Rosen: So, interesting. Maybe another beat on this important dynamic. Sarah, you've written about how this is a three to three to three courts. Tell us about that and how the emerging jurisprudence of Justices Barrett and Jackson fits into it.

[00:05:37.0] Sarah Isgur: So, previously in the Rehnquist Court, in the first several years of the Roberts Court where we had a five four alignment of the justices, it created a lot of stability actually around the court when we got the, you know, the loss of Justice Scalia and the loss of Justice Ginsburg and the three Trump appointees, Barrett Gorsuch and Kavanaugh. There was this moment where everyone just thought that the five four Court would turn into a six three court, and it would basically be the same vibe, if you will, but now six three instead of five four, and that's not what we've seen instead, which actually makes more sense. The court has become

less stable, less predictable in terms of who's gonna be in sort of these clumps. And so I think instead it makes more sense to think of them in three different clumps.

[00:06:30.3] Sarah Isgur: It's Gorsuch, Thomas, Alito, Clump which I sort of refer to as the conservative non-institutional. They're like the Yolo Justices. They don't care about the consequences of this decision. They're just there to apply the facts to the law. Thank you. We are leaving now. You then have the three liberal justices, justices Jackson, Sotomayor, and Kagan. They do not always agree. And I think especially now that it's not a five four court, you're seeing more differences emerge between those three justices. That's really fascinating. I've, I've really enjoyed watching Justice Jackson come into her own in terms of her writing this term, getting to know her as a Supreme Court justice, her judicial philosophy better. It's fascinating and it's why you're seeing her and Justice Gorsuch not just end up in concurrences together and on the same side of cases, but even echoing each other which hopefully we'll get to talk about in Justice.

[00:07:28.3] Sarah Isgur: Gorsuch's Chevron concurrence, him echoing Justice Jackson from one of the tech cases from last term in a fun way. And then the other three justices are the swing justices right now it's the Chief Justice Justice Kavanaugh. Justice Barrett. They're the justices most likely to be in the majority for all of these terms right now. They're also sort of conservative, but institutionalists, they care a lot about precedent. They care a lot about whether lower courts are gonna be able to follow this or whether they're creating chaos in the country or in the court system. And so they're gonna hue more to small changes in the law, aim small, Ms. Small, if you will, to Coyle the Patriot. And so I think it makes more sense when you're thinking about any case of where those clumps are gonna be, rather than thinking of it as just left versus right.

[00:08:13.0] Jeffrey Rosen: Very interesting. Marcia, what do you think about Sarah's three to three to three division, and how does her identification of justice as Roberts, Kavanaugh and Barrett as Institutionalists fit into the important overturning of precedent that we saw in the overturning of the Chevron case?

[00:08:31.8] Marcia Coyle: Mm-Hmm. I have to say, I think it's a good way of thinking about how they generally are breaking down currently. But I would say that, you know, there are always surprises and I still have to, before I, quickly anoint Justice Barrett as you know, in the middle, a moderate and institutionalist. We all have to remember how quickly she was able to overturn Roe v Wade when she got on the court. And Kavanaugh too. I'm not quite sure of him either. I'd like to see more from him. I think Roberts truly is the institutionalist and in the middle of those three and how persuasive he can be I think really determines what happens to major opinions on the court. In fact, I think very much this term he has sort of gotten back his court and but I think Sarah's absolutely right about the 3 3 3 in general as long as we keep open the, keep the door open to some of the surprises that we've seen thus far this term, and we may see a few more on Monday.

[00:09:48.4] Sarah Isgur: Fun fact, Jeff, so far this term, there have been more than six three cases not aligned on ideological grounds. There have been six, three cases along the ideological grounds. And to Marcia's point the chief justice for the first time since Justice Kavanaugh joined

the court is currently at least the justice most likely to be in the majority. So he's taken back his swing justice status as Chief and swinger.

[00:10:14.1] Jeffrey Rosen: Excellent. Let us turn to the lower case, which overturned Chevron long in the making, and significant in both its discussion of the standard for reviewing administrative action and also its discussion of when it's appropriate to overturn precedents. Marcia what did the court hold and how is it significant?

[00:10:44.2] Marcia Coyle: Well, the court basically overruled Chevron a 1984 precedent that said very, I'll make this very sort of brief that when a court faces a challenge to an agency regulation and that regulation appears to be ambiguous in some way, and after the court has used all of the tools in its tool belt trying to interpret that regulation, if it still can't discern the meaning or in what direction it should go, it has to defer to the agency's reasonable interpretation of that regulation. Chevron, which is what we know it as, has long been a target by business and conservative legal groups. They want it overturned. They've repeatedly asked to have the court throw it out. There may be two things that sort of work with their opposition to Chevron.

[00:11:42.7] Marcia Coyle: One is, you know, an honest perception that agencies have grown too powerful. The administrative state has grown too big. On the other hand, they also may feel that they will get a better deal if they have to go to court and face judges and don't have to deal with an agency's interpretation. So that's been at work for a long time. And today they got their wish. The court in a six three opinion overturned Chevron the Chief Justice wrote the opinion, which didn't surprise me at all, Jeff and probably not Sarah, because he is very interested in and feels very responsible for cases that deal with the structure of government. And also separation of powers and separation of powers has been one of the complaints raised by even some of his colleagues about Chevron.

[00:12:40.4] Marcia Coyle: But I wasn't surprised that he took on this case in particular, and also because he knew how important it would be, how overturning Chevron was going to cut across a large swath of federal agencies and how they operate and how courts will be review will be viewing agency regulations going forward. He said basically that Chevron was inconsistent with what he said. The great Chief Justice John Marshall said, basically the duty and obligation of courts to say what the law is and Chevron is giving that duty and obligation to a federal agency and not the courts. And he said that agencies didn't have any special competency and interpreting law and courts do. He also said that Chevron was inconsistent with the administrative procedure act. Now that's, that's a, you know, that's sort of a seminal law. That's a roadmap for how agencies are to issue regulations and how they crossed their t's and dot their I's.

[00:13:53.2] Marcia Coyle: That law was passed before Chevron. And that law, he said, embodied the traditional understanding of the duties and responsibilities of a court. So he had to address as well though stare decisis, which is the judicial doctrine of standing by former precedents even if some of them are wrong. And he took it step by step and said that Chevron was not a workable precedent. It didn't have a huge reliance, which was a little odd, I thought, because Chevron is probably the one of the most cited cases by federal courts, and I think they undergird some 17,000, 18,000 judicial decisions in the United States. So courts have been

working with this a long time. But basically he came to the decision that stare decisis did not require the court to stand by Chevron any longer.

[00:14:53.7] Jeffrey Rosen: Thanks for that great summary of this really important case. Sarah. Help us think through how the overturning of Chevron has fit into the conservative judicial movement. On the one hand as Justice Gorsuch noted in his concurrence, Justice Scalia was originally a huge fan of Chevron and supported court deference to administrative actions. Although he shifted his view and the original lower court opinion in Chevron was written by Judge Ruth Bader Ginsburg on the lower court who was not arguing for deference. And yet, ever since president Reagan took office, reigning in the administrative state has been a central goal of conservatives. So how does the overturning of Chevron fit into this and have they now achieved their goals?

[00:15:38.6] Sarah Isgur: So let's look really big picture at this because as you say, conservatives actually loved Chevron when they controlled the administrative agencies, and then come the Clinton administration, they didn't love it so much, but now the Democrats loved administrative agency deference 'cause they controlled the agencies. So I think there has just been a lot of historical politics at work. The problem is that Chevrons spun off a lot of babies that made the whole thing a mess. And so let's start just with the point that I actually don't think this case will make one bit of difference. Overturning Chevron will have no effect on anything. One Chevron hasn't been cited by the Supreme Court since 2016. It's been a zombie precedent for about just under 20 years at the Supreme Court. Now, the lower courts have been citing it, but that's assuming that suddenly the lower courts are actually gonna decide the case differently.

[00:16:29.9] Sarah Isgur: I would argue that the lower courts have been using Chevron for the last 20 years as a shortcut to get to the decision they were gonna reach anyway. So I just don't think this will actually matter, but here's why it does matter, because it's part of what I'm now gonna call the admin law triumvirate of the Roberts Court from the last two terms. One overturning or rather striking down president Biden's student loan debt forgiveness program, which was done while sort of beefing up the major questions doctrine. This idea that Congress needs to speak clearly for the President to use and wield like huge powers that weren't specifically mentioned in these statutes. So that's really moving power from the executive back to Congress. The second case is the SEC case. It was actually also decided this week on whether for the sort of civil penalty type cases from the SEC that the SEC can be the judge and the prosecutor in those cases, or whether you get to do that in an Article three court with a jury, with the due process protections and federal evidentiary rules.

[00:17:39.1] Sarah Isgur: And the Supreme Court in that case also six three said, yeah, you get to go to a court for those things. And you have Justice Gorsuch noting in that case, for instance, that the SEC wins 90% of the cases that the SEC brings before the SEC, they can take six years to hear your appeal. You're sort of trapped in this administrative law anti-process. Hell versus 90% if the SEC tries you in front of the SEC only 69% when they're in Article III courts. So we know that it makes a huge difference. And for those who you know, I saw some of this conversation online. Well, but you could always appeal your case from the administrative law judge to the Article III courts. Yes. But they accepted the evidentiary findings and the fact findings of the A LJ and that was a huge problem because they were using non-federal court

evidentiary rules. So different hearsay rules, no discovery, you know that was systematic like it would be in the federal courts.

[00:18:45.0] Sarah Isgur: So I think that's a really second pillar where you're moving power away from the executive branch and into Article III courts. The third pillar of this admin law revolution is Chevron. And it's, again, I said, I don't think this will make a huge difference, but the point is Congress is always gonna write statutes that can't cover everything. There's gonna be some ambiguity or some situation that has arisen. Who gets to decide what then the law says? Is it the executive branch or is it the courts that decide what the law says like they do in everything else? So this is, again, moving power from the executive into the courts. And of course, the theme of all this is moving power away from the executive. And so I think the Chevron case is important from sort of that first principles philosophical idea that our three branches of government has really been distorted over the last 40 years, and in particular, I would argue the last 15 years, as the executive branch grew first from administrative agency bloat, I would call it, just the huge proliferation of administrative agency actors and regulations, but then following on that and related to it are the executive action and the executive orders so that Congress had basically come to a standstill. So I see the court sort of trying to rebalance a healthy ecosystem there.

[00:20:06.7] Sarah Isgur: Another interesting point about the Chevron case was Justice Gorsuch's concurrence about how to think about stare decisis and when precedents can or should be overturned. And this is very much like Gorsuch being Gorsuch. As I said, I sort of refer to him as the Yolo justice. And so for him, precedent is, precedent serves a purpose as vibes, as he's sort of putting it in this concurrence. If there's a whole lot of cases that are all coming out the same way from our elders, they're probably onto something. But think of it more like Chesterton's fence. Instead of just taking down the fence before figuring out why it's there, assume that it's probably there for a reason and look into the wisdom behind that fence. But if there's just one plank of wood sticking up out of the ground, that does not make a stare decisis precedent make. And so he set out his three standards. One, a past decision may bind the parties to a dispute, but it provides this court no authority in future cases to depart from what the constitution or the laws of the United States ordain.

[00:21:08.8] Sarah Isgur: I mean, that's basically saying it has no purpose unless it is showing some wisdom, unless it has a point. That's very different from how stare decisis has been understood where incorrect decisions stand for the sake of stability and reliability. He noted that back in sort of the strong stare decisis days, think of like the Roe v. Wade era, the court was overturning about three precedents a year. Today it's only doing one to two, and yet it's known as the court that somehow is overturning a lot more. His second one, another lesson tempers the first. While judicial decisions may not supersede or revise the constitution or federal statutory law, they merit our respect as embodying the considered views of those who've come before. So that's the fence versus the single post. And then third, and this is the part that I found sort of most interesting and persuasive, it would be a mistake to read judicial opinions like statutes adopted through a robust and democratic process. Statutes often apply in all their particulars to all persons. By contrast, when judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop.

[00:22:17.9] Sarah Isgur: A later court assessing a past decision must therefore appreciate the possibility that different facts and different legal arguments may dictate a different outcome. That last line is actually quoting Justice Jackson without attribution, because I think it would have seemed sarcastic if he had put the attribution there, but quoting her from last term, because that's exactly something that she believes very strongly. And so, one of the Chevron babies was called Brand X, and it basically said that not only do you defer to the agency interpretation, but the agency can change its interpretation in different administrations. And in fact, the Brand X case was about broadband. That agency interpretation changed through all of the last four administrations each time there was a new president. So Chevron didn't create stability. It didn't sort of create the purpose of precedent and stare decisis to have reliance on the law. In fact, it had created the opposite. The laws were flip-flopping around every four years, even though the law from Congress had never changed. So if anything, I think my hope is less power to the executive branch, because again, if you watch that debate, I just think we should all be rooting for less power in the executive. And two, in theory, we should actually be seeing more stability in the law as agencies are tied down to a single interpretation of the laws that Congress passes rather than getting to change it as the president changes.

[00:23:41.7] Jeffrey Rosen: Thank you so much for that. Lots of important thoughts in there, ranging from the dramatic shift from the executive branch to the courts, to your observations about Justice Gorsuch and stare decisis. Marcia, eager for your thoughts on all scores and on the two points that Sarah raised, I wonder if there's a tension between the general pro-courts tenor of the opinion, quoting Justice Marshall, and then at the same time, Justice Gorsuch quotes Jefferson on the fact that precedent shouldn't be respected unless they're repeatedly reaffirmed. Jefferson, of course, is an anti-courts guy who thinks that the Supreme Court should not have the last word in constitutional interpretation and all the branches should be able to make up their own mind. Help us sort out these important themes.

[00:24:27.3] Marcia Coyle: I think there absolutely is tension there, and I think there's tension within the court that this is an ongoing debate over stare decisis. In fact, if you look at Justice Kagan's dissent in the Chevron case, she deals at length with that. In fact, she has been very vocal on stare decisis, and her vision of stare decisis is diametrically opposed to what we're learning from the other justices in the conservative wing of the court. And you have to admit there is some truth to what she was writing, that she sees this pattern where I think she laid it out that, one, you ignore a precedent for a couple of years. You write a few things that are critical of it, but you don't overturn it. You just start planting seeds that there's something wrong with the precedent. And then you start being even more critical until, boom, you have the opportunity and you throw it out. So it doesn't look as though you're suddenly delivering, as the Chief Justice would say, a jolt to the legal system. The precedent is gone.

[00:25:42.8] Marcia Coyle: And I think she felt that, from her dissent, that that's what the court has been doing. And she laid out the, it's not just Chevron, but she laid out what the court has done in other decisions in other areas, even criminal law, where they're ignoring stare decisis or using stare decisis in such a way that enables them to get rid of a precedent that she thinks there's really no justification for doing it. But as I said, Jeff, this is a long-term debate that's been going on, and it even predates the three Trump appointees on the court. And now we're starting to learn

more about how they view precedent and stare decisis. We saw that a bit in the Dobbs decision. We certainly heard what Justice Alito thinks of stare decisis in Dobbs, overturning Roe v. Wade. So, I think Sarah makes some very excellent points, and this is just something that all of us should be interested in watching, how the court deals with precedent and this ongoing debate. Right now, Kagan is definitely on the losing side.

[00:26:55.2] Jeffrey Rosen: Well, maybe this is the time to introduce the Rahimi case involving the Second Amendment. This is an important parsing of the Bruen decision from a few years ago, in which the court repudiated the strictest construction of Bruen and said you didn't need an exact historical analog for gun laws in order to uphold them, but that, and because the law wasn't frozen in amber. Sarah, tell us about what Chief Justice Roberts held and what the other justices held, including Justice Thomas's descendant.

[00:27:30.9] Sarah Isgur: So there's a really easy way to think about this case, which is that nobody was going to give a gun back to Mr. Rahimi, right? This guy is the quintessential bad man who stays in jail as a doctor and poster child. In fact, if I ever create a poster for my bad man stays in jail doctrine, it will have Mr. Rahimi on it. So in that sense, this was an outcome looking for a judicial philosophy. The outcome was always known. And what's interesting is it's an eight one case. And so a lot of people have pointed out like, aha, but Justice Thomas would give the gun back to Rahimi. No, when you're the only justice who says something, you're not giving the gun back to Rahimi. I'd be very curious if Justice Thomas were the fifth vote, what his opinion or vote might have been, and we'll never know. And so when you see a justice sort of doing a sole dissent or even a larger dissent though, you always have to sort of wonder, heavy is the head that wears the crown. And we've certainly seen that, I think with the Chief Justice, is the swing vote a few times where he votes in a surprising fashion because he's the swing vote, as opposed to when he was first joining the court and was not the swing vote. Now, why is Rahimi the most interesting case of this term and probably will remain so even after the Trump immunity case comes out if you're an actual law nerd?

[00:28:52.5] Sarah Isgur: Because I said that it was an outcome looking for a judicial philosophy. So everyone wrote their judicial philosophy and you show this really intra-conservative fight over how to think about originalism. And boy, we could spend an hour. I mean, Marcia and I could spend a whole week, I'm sure, just talking about the evolution of originalism since it first came on the scene in the late '70s. But I'll just give my shorthand. You have originalism 1.0, original intent, let's call it. That's pretty short-lived. It's, as originalism is gonna evolve, it's like the amoebas as they're getting to the sand or whatever. So then originalism 2.0 is original public meaning. That's sort of the originalism we all know and love or hate that lasted for roughly 30 years. But original public meaning originalism had a lot of questions. So think of that as like all the little dinosaurs and mammals running around. So now we're in originalism 3.0, the text history and tradition originalism. This is where they're sort of trying to I don't know, high tech originalism maybe we'll call it. Text history and traditional originalism could not exist without technology, frankly. It couldn't exist without the internet and all these databases and digitalization of various statutes and opinions back from the founding, et cetera.

[00:30:20.5] Sarah Isgur: But it's trying to answer the questions of the difference between the intent of the people who wrote it, the text and how that was understood by people who read it at

the time, and the expectations of all of those people. And all of those three can be in tension with one another. And so with text history and tradition, it's trying to fix some of those inherent tensions and conflicts. And the Rahimi case is trying to fix text history and tradition, which is new on the scene. We've had it for about three terms now. And here, I mean, the problems are laid bare because basically none of the conservative justices actually really agree on what text history and tradition is. So text history and tradition kind of comes on the scene in the Bruen case, the previous gun case to this one. Justice Thomas wrote it. He wrote Bruen, he wrote text history and tradition as its original inception. And yet he's the one in dissent. And so he's yelling from the dissenting, cheap seats, if you will. I'm telling you what text history and tradition is. How are you possibly disagreeing with the guy who made Fetch happen? You then have the chief, Justice Gorsuch, Justice Kavanaugh, Justice Barrett, all giving different versions of why Justice Thomas is wrong about his own version of originalism. And it's hard to square them. It's hard to see how this moves forward.

[00:31:54.6] Sarah Isgur: It's hard to see how text history and tradition survives, frankly, if they can't get on the same page about how much you can use post-ratification or post-enactment history, for instance. What's it good for? What's actually helpful? Because, and Jeff, you know this better than any of us, the whole problem with part of the process of originalism is that on the one hand, we fought a revolution to stop all of these things that we felt that the king was doing that was unfair. And on the other hand, we also wanted to preserve a lot of the tradition of what was happening in England for the previous 600 or so years. And how are you supposed to know the difference? And so what precedent from that pre-revolution, if you will, is the precedent we're trying to break from, and what's the precedent we're trying to preserve as part of our common law tradition, and what are the times where the ratifiers are maintaining the spirit in which they were enacting it, and what are the times in which they're falling prey to the failures of King George, for instance? We see that certainly in the First Amendment with the Alien Sedition Acts during John Adams' administration. Is that his vision of what the First Amendment actually was meant to protect?

[00:33:14.5] Sarah Isgur: In which case, the First Amendment doesn't protect very much at all. Or was that a failure to live up to the ideals of the First Amendment? And so this is the great struggle of originalism, and I, as a legal nerd, am just having such a good time watching, like we get to watch in real time as this evolution plays out, and that's neat.

[00:33:35.0] Jeffrey Rosen: Absolutely, will you help us understand how central this case is in the evolution of originalism? And we see Justice Barrett grappling with the question you raised, when is pre-ratification history or subsequent ratification history relevant? And Justice Barrett emphasizes that history and tradition is only useful insofar as it elucidates the text. Other justices have different views about this. Justice Gorsuch is quite sympathetic to pre-ratification history. Marcia, help us understand the different positions of the various justices, including Justice Roberts, Barrett, and Gorsuch, and Thomas, on text history and tradition, and how that plays out in Rahimi.

[00:34:22.8] Marcia Coyle: Well, I think Sarah did a pretty good job of that, to be honest with you. I have to say, I really loved this case when it came to the court, because I could see that this, I could almost feel this was going to happen, that we were going to see, I guess you don't want to

call it fallout from Bruen and Thomas's announcement of the test for the Second Amendment. But you knew that more was going to have to be said. And as a point of fact, seven of the nine justices wrote in this case. That's kind of amazing. Everybody wanted to say something about the Bruen test and how it would work. I do recall during oral arguments, as Sarah pointed out, they really didn't want to strike down this federal law. They did not want Rahimi to go back and have guns. So you knew that it was going to be a real test of the test, so to speak. And I think Justice Barrett has been particularly interesting. And it wasn't just in Rahimi that she spoke about or struggled with where you begin in history to make your analysis.

[00:35:38.5] Marcia Coyle: She has done that before. And she is sort of a more practical originalist, if that's fair to say, and maybe counter to Thomas, who's more of an idealistic originalist who will take it wherever it goes, or his view, he will take wherever it goes regardless of the consequences. But she seems more practical in her approach. I don't think, and Justice Jackson too, is somebody we're going to have to watch to see how she views history. I think it's important too for viewers to know that, and listeners to know that, this has created some problems for lower court judges. The Chief Justice in his majority opinion said, well, those judges have misunderstood Bruen and the test. And then he went on. Well, I don't think they feel they've misunderstood. They just have really struggled with it. They weren't misapplying it. When you have certain judges saying they feel they need to hire a historian in order to get them through it, then you know that there is a problem with what the court's doing.

[00:36:51.9] Marcia Coyle: And I think as Sarah said, what we're seeing in those seven different opinions is the evolution of the text history tradition test. And I'm not sure where they're going to go with it at all. But my sense was that it's almost, with the exception of Thomas, a softening of Bruen. Not exactly a real step back because I think the opinions by Gorsuch and Kavanaugh were clear that they still stand behind this approach. But this case really brought it home to them what could happen if you just take it to its logical end and don't consider what the consequences and the ramifications could be of the test itself. So I think we're gonna have to wait to see other gun cases to see how this continues to evolve. And they do have other gun cases. In fact, they have a petition pending right now that with the same statute, there's a ban in the statute on felons possessing guns.

[00:38:05.3] Marcia Coyle: Point out that when Justice Barrett was on the federal appellate court, the Seventh Circuit, she wrote an opinion in a case involving someone who was convicted of a felony and wanted his gun rights back. And she made a distinction between felons convicted of violent crimes versus non-violent crimes. And the case before her, I think it was a white-collar crime, so there was no real violence involved in it, physical violence involved in it. And felt that, you know, the statute should not apply to someone like that. So even there, we're, you know, she is working through this test as well, and we're gonna see how the rest of the court deals with it, when, if, and when they take up this case. There are also a slew of cases coming to the court once again that have to do with the constitutionality of assault weapons and the ammunition in magazines, the amount of ammunition in magazines. So we're just getting there, Jeff, I think. Bruin was a big, big step, and now we're seeing how it's gonna play out in real life.

[00:38:49.7] Sarah Isgur: And if you're a lower court judge, this decision didn't help you at all.

[00:38:57.4] Marcia Coyle: That's so true.

[00:39:03.2] Sarah Isgur: I think it made it worse. I think you were better off under just Bruin trying to muddle your way through, 'cause, and Jeff, again, this is so in your sort of philosophical legal wheelhouse, 'cause there's two ways to think about how one forms their judicial philosophy. There's behind the veil of ignorance. You sort of think first principles, and then create a philosophy, and then apply it to any law and facts that comes before you. Let the chips fall where they may, and that's really what you're seeing from, I think, Thomas and Gorsuch and Alito, even though they disagreed in this case. But then there's another way to think about your judicial philosophy, which is, okay, I have this judicial philosophy, but if a guy like Rahimi keeps his gun under that judicial philosophy, that means that my judicial philosophy must be incorrect, and so I need to change my judicial philosophy to ensure that it matches with expected outcomes or desired outcomes to some extent. And once you start doing that, you do have to wonder, how different is any judicial philosophy from the sort of living constitutionalism that was decried for so many decades?

[00:39:34.1] Jeffrey Rosen: Well, that's exactly right, and the original promise of originalism 1.0 was that it was gonna do two things, constrain judges and lead to deference to democratic outcomes. That's what Justice Scalia emphasized. Now, the new watchword is judicial engagement, and it's fine to strike down laws when they clash with text and original understanding, but that raises the central new tension that you've just identified between the more pragmatic justices who are liberal constructionists in the spirit of Chief Justice Marshall and the strict constructionists who want to construe laws, let the chips fall where they may, and let the heavens fall in the spirit of Jefferson and his successors. So, as you both said, it's fascinating to see it play out in this case. Marcia, let us put on the table the Fisher case, where the court held that the Sarbanes-Oxley law, which forbids altering or destroying documents in connection with official proceedings or otherwise obstructing the proceedings, doesn't cover the January 6th riots to the degree that they don't involve document destruction. Tell us about the holding, the unusual lineup, and the implications for Jack Smith's indictment of President Trump under the same law.

[00:40:08.8] Marcia Coyle: This is the kind of case that is really sort of the meat-and-potatoes work of the Supreme Court. It's a statutory interpretation case. They have a law that has basically, you know, I would say two clauses. The first clause talks about, you know, obstructing official proceedings by the destruction or use of documents, records, blah, blah, blah, you know, that way. And then thrown at the end is, or otherwise obstructing the official proceeding, but not defining otherwise. Does the first part of the step they provision define otherwise? Is otherwise more of a catch-all phrase that there could be other ways of obstructing an official proceeding? So the court had to deal with that. And the Chief Justice said that the first part of the provision does define the otherwise at the end.

[00:40:30.6] Marcia Coyle: And that is an approach to statutory interpretation that is not uncommon at all. In fact, they had another case which he mentioned very recently, in which they faced a similar situation as to whether the first part of the provision governed the last part of the provision. And said that, yes, it did. So that's how he found that, no, this statute, you have to have some destruction or use of records, documents, whatever, as you intend to obstruct an official proceeding. The dissent, of course, saw it very differently. They felt that otherwise could

be read to be a catch-all provision, that certainly there were other ways to do this. But again, the majority said, well, look at what this law originally was intended to do. As Jeff, you pointed out, this was a post-Enron statute in which Enron, you know, did engage in widespread document destruction in order to defeat an obstruction of justice charge. So it was unusual in the lineup here 'cause you saw Justice Jackson joining the conservative members of the court in the majority, and you saw Justice Barrett in the dissent and writing the dissent for the court.

[00:40:48.4] Marcia Coyle: And how important this is going to be, you know, I'm not sold that this is hugely important, to be honest with you. It may affect a couple hundred, well, maybe not even that many, defendants in the January 6th prosecutions for two reasons. One, after the oral arguments, I've been told that the DOJ, the Department of Justice, saw the handwriting on the wall, and so they stopped charging this particular provision. And then, as for those who have been charged under this statute, there were other charges involved, and they may still face prosecution, or their convictions will stand based on other charges. Even Justice Jackson said in her concurring opinion, Mr. Fisher, who was the one who brought the case, he was a January 6th defendant, he may still be prosecuted under this very provision if the prosecution has some evidence of how records or documents may have flown through, you know, his activities when he was in the Capitol. And as far as President Trump goes, this was one of the charges in his indictment. He may still face it. Some have said that the slate of fake electors that went to I think the Vice President, or headed to the Vice President, it depends on whether that passed through his hands or his knowledge. So he may not be totally free from that charge as well.

[00:41:10.6] Marcia Coyle: It was just interesting to see the lineup and to see Justice Barrett. She, again, she's a textualist, and she thought if you look at the text and you read the otherwise language, that it was not confined by the records and documents part of the provision, that there are other ways of obstructing an official proceeding. And Congress, you know, Congress can't always, when it writes legislation, anticipate every possibility and try to cover every possibility. And that's why they had the language otherwise in this provision, so that, you know, if the country faced a similar situation that didn't involve records and documents, but this was an obstruction of an official proceeding and intended to obstruct, that you could still, the law still could apply.

[00:41:27.7] Jeffrey Rosen: Many thanks for that. Sarah, your thoughts on Fisher? Do you think it's a big deal or not? Might it? Affect the Trump prosecution by Jack Smith or not? And since we're beginning to wrap up, maybe thoughts on any other statutory interpretation cases you think are interesting, including perhaps Garland versus Cargill involving bump stocks.

[00:41:44.0] Sarah Isgur: I think the bump stock case is a far bigger deal than this case. I thought the Fisher case was really fun, if you can take it out of the January 6th context. You know, all of the justices have this little football analogy that they're using about a football game rule, and they all are disagreeing over what the correct analogy should be. And Justice Jackson's murdering people on the football field. And, you know, Justice Barrett is kicking and choking people. I mean, it's just a good time. Why they chose football, I find sort of interesting, since we generally associate the Supreme Court and these certain, you know, conglomeration of justices with baseball, between the Chiefs' balls and strikes and Justice Kavanaugh's love of baseball. So,

yeah, there's just, there was a lot to love there. And again, I think you are getting this little insight into Justice Barrett. This term in particular, she is bailing on the conservatives a lot.

[00:42:02.9] Sarah Isgur: And the reasons why she does it and when she does it are starting to get really interesting. So in this case, you have this line about how everyone agrees that they did the thing, basically. And she says, So why does the court hold otherwise? 'cause it simply cannot believe that Congress meant what it said. Section 1512c2 is a very broad provision. And admittedly, events like January 6th were not its target, parentheses. Who could blame Congress for that failure of imagination? But statutes often go further than the problem that inspired them. And under the rules of statutory interpretation, we stick to the text anyway. So just like a fun little moment for Justice Barrett. But the reason that I think the Bump stock case is a much, much, much bigger deal is 'cause it goes and fits actually in my grand unified theory of removing power from the executive. It's not a major questions doctrine case, but I want to put it under that pillar that I was mentioning, the student loans, 'cause this is another example where there's bills pending in Congress. There's public pressure on Congress to ban bump stocks after the Las Vegas shooting, which killed 60 people. There was enormous pressure to ban bump stocks.

[00:42:39.7] Sarah Isgur: And instead, President Trump stepped in and did an executive action through the ATF to simply wave his hand. And on a Tuesday, you know, bump stocks were legal. And on a Wednesday, they came with a 10 year prison sentence based on the say so of a president that should concern people. But what should concern them more, of course, is that the second the president did that, all legislation died in Congress. And now the public pressure is gone. And the headlines coming out of various outlets are court strikes down gun control measures instead of what I think would actually far better inform the American people. The Court says the President never had the authority to do this, or the Court says Congress needs to ban bump stocks. You know, Justice Alito wrote actually very short but eloquently, I thought, in his concurrence that even tragedies can't change the law, but they should tell us that the law needs to be changed. And he hopes that Congress will now take up this issue as they, he says, probably would have done, but for the president's unlawful action.

[00:43:03.1] Sarah Isgur: So here you had, you know, the conservative justices on the court striking down a Trump measure. And again, it's just this example that we saw with Obama, with Trump, with Biden, of presidents doing something that is popular, pleasing sort of everyone all at once with this cheap thrill in the Rose Garden. And it was never gonna last. They no longer even think it's gonna last. You see President Biden doing it right now with immigration. And it's very, very frustrating 'cause it's really undermining our three branches of government and how it was all supposed to work.

[00:43:24.7] Jeffrey Rosen: Thank you for that. Marcia, any final thoughts on cases we haven't discussed so far?

[00:43:29.7] Marcia Coyle: One more thought about Fisher, and it's a larger trend, I think, and that is that the Roberts Court in particular has been very skeptical of prosecutors' powers and whether they're overreaching. They've cut, they've reined in federal prosecutors in the area of honest services fraud, mail fraud. They had another case just maybe it was last week. My days are running into each other with all these opinions that had to do with whether you could

criminalize gratuities that local officials accept after an act has been performed or whether it's really a bribe. And they said it's not. Gratuities aren't bribes. And now with Fisher, too, they've reined in the prosecution's use of a particular statute. So that is something that they definitely have their eyes out on. And prosecutors, I'm sure, are very aware of that.

[00:43:54.2] Marcia Coyle: The other thing I would say about the term is that sometimes it's a little frustrating. And I'm thinking of the Idaho abortion case that the court intervened in when it probably didn't have to 'cause the lower appellate court had already scheduled arguments on Idaho's appeal of an injunction against its abortion ban. And yet the court, you know, really didn't do anything. It didn't didn't really resolve whether there was a conflict between the state's abortion law and federal law requiring emergency treatment in hospitals that receive federal funds, even if that required an abortion. So that was left for another day. And then, of course, there's delay in the EPA case that they also took as an emergency application that they turned into, you know, full arguments.

[00:44:09.9] Marcia Coyle: They did stay the EPA rule in its good neighbor plan, but it wasn't finally resolved. And, you know, there's all this briefing done, oral arguments, and you still know that these things are coming back to the court and we're gonna go through this all over again until we get it resolved. So I think the delay doesn't really serve the public all that well, although I'm sure some are happier for the delay for fear of what the court might actually do. And again, we did talk about the administrative state. There is deep skepticism on the part of some of the court's conservatives, especially Gorsuch, I believe, of the administrative state, administrative agencies and their expertise. So all of that seemed to come to a head this term. It's been fascinating. It's been a remarkable term and a very, I think, revelatory term in so many ways.

[00:44:25.8] Jeffrey Rosen: Thank you so much, Sarah Isgur and Marcia Coyle. I'm loath to close, as Lincoln said, but we better 'cause we're out of time. But it would be wonderful to reconvene you to discuss the remaining cases and always to cast light on this extraordinarily important Supreme Court term. Sarah Isgur and Marcia Coyle, thank you so much for joining.

[00:44:37.6] Marcia Coyle: Always a pleasure, Jeff.

[00:44:57.7] Sarah Isgur: Thanks.

[00:45:02.9] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and the NCC's wonderful new group of summer interns, Harry Hu, Shailee Desai, and Tyler Shasteen, joined always by the great Yara Daraiseh. Welcome to all of our interns and thanks to them for their great help. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Who wouldn't be during these troubled times? It's so meaningful to convene thoughtful people of different perspectives for these civil and deep dialogues. Please sign up for the newsletter at constitutioncenter.org/connect. And always remember that the National Constitution Center is a private non-profit.

[00:45:25.7] Jeffrey Rosen: Friends, it's so meaningful to hear from lifelong learners like you across the country who love We the People and love learning with us. Please keep letting me know why you like the show and how we can improve. And please consider joining the National Constitution Center.

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