



The Roberts Court

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[00:00:00.2] Julie Silverbrook: From the National Constitution Center in Philadelphia, this is We The People.

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[00:00:08.0] Julie Silverbrook: I'm Julie Silverbrook, Chief Content and Learning Officer. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. Each summer, after the Supreme Court's term, we have the opportunity to step back from individual cases and reflect on what the term as a whole reveals about the Court itself. Looking across an entire term allows us to see patterns that individual cases can't always capture. How the Justices build majorities, where their judicial philosophies converge and diverge, how they understand the Court's institutional role, and the constitutional questions that will shape its work in the years ahead. In this episode, we're taking that broader view of the Roberts Court. And to help us explore this, we are joined by two distinguished Supreme Court advocates and observers. Jonathan Adler is the Tazewell Taylor Professor of Law at William & Mary Law School. He is the author and editor of seven books, including *Business and the Roberts Court*. Jonathan, welcome back to We The People.

[00:01:04.0] Jonathan Adler: Great to be here.

[00:01:05.3] Julie Silverbrook: And Masha Hansford is a partner in Davis Polk's Supreme Court and Appellate practice. She has extensive experience advocating before the United States Supreme Court and federal courts of appeals. Masha, welcome to We The People.

[00:01:17.3] Masha Hansford: Thank you, Julie. I'm thrilled to be here.

[00:01:19.2] Julie Silverbrook: Wonderful. Jonathan, I'm gonna start with you. When you step back from the individual cases, what did this past term reveal most distinctly about the Roberts Court? Was there a defining theme or institutional story that connected the term?

[00:01:32.3] Jonathan Adler: Well, in my view, this term really shows that we have a Court that's both quite conservative but also quite independent. In a lot of the issues that came before

the Court that have some sort of political character or ideological character, the Court generally ruled in a conservative direction, but it was not particularly sympathetic to the Trump administration's priorities, being more committed to a conservative jurisprudence and less committed to aligning itself with the presidency.

[00:02:01.3] Julie Silverbrook: Masha, do you agree with Jonathan's assessment of the term, or was there a different theme or institutional story that you felt defined this past term?

[00:02:10.3] Masha Hansford: I do agree with it. This was a term with huge wins for the traditional conservative legal movement, but meaningful losses for this particular president. So, of course, the wins were cases like *Trump v. Slaughter* that overruled *Humphrey's Executor* and held that for-cause removal provisions violate separation of powers. Huge win for executive power. *Cisco*, a case that we litigated that closed off the creation of new causes of action under the Alien Tort Statute. *Landor*, which narrowed Congress's spending clause power to regulate the conduct of recipients of federal funds. But those huge wins on really important issues for the Federalist Society wing of the Court were paired with really big losses for the administration in several cases like *Learning Resources*, the tariffs case, which of course struck down President Trump's tariffs. *Cook*, which was a little bit of a surprise decision that held that Congress's for-cause limits on the president's removal of the Federal Reserve Board of Governors was constitutional. And it was not a surprise that the court held that, but that the court went ahead and resolved that. And so I do think that this was... I think saying that this is a very conservative but independent court is a fair takeaway.

[00:03:32.4] Julie Silverbrook: I want to talk a little bit less about the left-right divide and talk a little bit about the ideological camps. I think Sarah Isgur, very colorfully, I'm gonna explain this in slightly less colorful terms than she does, describes today's Court actually as three distinct groups, not two distinct groups. And she describes them as the institutionalists, that's Roberts, Kavanaugh, and Barrett, the conservative stalwarts, she uses a different descriptor for that. Thomas, Alito, and Gorsuch, and the progressives, Kagan, Sotomayor, and Jackson. Masha, looking at this term's biggest cases, did those groupings largely hold, or did the voting coalitions tell a more complicated story?

[00:04:14.6] Masha Hansford: So, on a big-picture level, I think they largely held. And the classic conservative victories really were the institutionalists and the conservative stalwarts banding together, like *Slaughter*, *Callais*, *Landor*, *Cisco*, *BPJ*, *Mullin v. Doe*, the campaign finance case, the *National Republican Senate Committee v. FEC*. And I think about 23% of decisions were divided along ideological lines, 6:3, up from 9% last term. So in that sense, those groupings were very strong. But I think there were more patterns and divisions when you look beyond that really big picture bumper sticker view. So first, there were no cases where Justice Gorsuch, Alito, and Thomas were in dissent. So there weren't cases where the institutionalists just joined the progressives. The closest were *Watson*, which was a case about early voting. It

was the three conservatives with Justice Kavanaugh in dissent, while Justice Barrett actually wrote the majority opinion. And the *Cook* decision about the Federal Reserve, where it was the three stalwarts in dissent, but also joined by Justice Barrett. And I think, as that reveals, Justice Barrett and Justice Kavanaugh were particularly likely to split up. They agreed overall about 88% of the time, but only 69% of the time in most closely divided cases, which is really pretty low. And I think *Watson*, where Justice Barrett wrote and Justice Kavanaugh dissented, is a particularly stark example of that. In *Learning Resources*, which is the tariffs case, the Chief Justice joined the progressives with Gorsuch and Barrett. So it was two institutionalists and one stalwart to make that majority. And Justice Kavanaugh dissented with Justice Alito and Justice Thomas. I think that one is not that surprising because Justice Kavanaugh has a particularly strong view of executive authority, and that's a clear through line in his opinions. So that wasn't a surprising place for the conservative stalwarts to pull him in. In *Cook*, the Federal Reserve case, Justice Barrett dissented against the majority's broad opinion of the Federal Reserve's constitutional status. And Justice Kavanaugh was actually in the majority, which was also interesting because it was a rare case where his pragmatism outweighed his robust views of executive power. Another place where there was a division was *Chatrie*, a really important Fourth Amendment case that I think is one of the most doctrinally significant cases of the term. And there was the three progressive Justices, with Justice Kagan writing, joined by the Chief and Justice Kavanaugh as the pragmatists, and Justice Gorsuch concurring in the judgment, and then Justice Barrett joining the conservative stalwarts. And then kind of a fun departure just to flag, in *Hemani*, which was the Second Amendment case, it was a case about the statute that criminalized knowingly possessing a gun while being an unlawful user of marijuana, and the court held it was unconstitutional. In that case, Justice Alito and Justice Kagan concurred together in the judgment, finding common ground and endorsing a different approach. And so that was just a fun pairing to see.

[00:07:29.8] Julie Silverbrook: Jonathan, over to you on what this is telling us about the relationship amongst these Justices on a term like this one, which, to Masha's point, obviously there was a lot related to executive power and separation of powers, but there were also pretty consequential individual rights cases that I think are actually getting less attention than they might otherwise.

[00:07:53.6] Jonathan Adler: Yeah, I mean, I think first I would just note that outside of the cases where the Court split 6:3 on ideological grounds, there's only one decision in which the 3:3:3 actually holds, and that is the *Barbara*, the birthright citizenship case, where the three institutionalists joined the three liberals. And even there, the stalwarts, Alito and Thomas and Gorsuch all had very different views about how to resolve that case. As what Masha was going through I think illustrated is that in a wide range of other cases we saw, particularly among Roberts, Kavanaugh, and Barrett, we saw some amount of splintering. Roberts and Kavanaugh were certainly together as much as any pair this term. They each only dissented three times, although they only dissented together once in a preemption case, which had an interesting divide

where it was the two of them and Justice Alito dissenting. So I do think we still see quite a few cases, as we've seen in recent years, where Justices don't necessarily line up the way we would expect that to happen. And that tends to happen most often in the cases that raise issues that have been less salient or less important to broader political movements, or to say, the conservative legal movement, and raise questions that haven't been thought through and dealt with as extensively for as long a period of time. So in a case like *Dobbs*, to go look several years back, or affirmative action or so on, we have a fairly clear idea of what conservative judicial philosophy does in those sorts of cases. But in a lot of these other instances, it's less clear, and so we do see some splintering in that. And you're certainly right that there were individual rights cases.

[00:09:43.9] Jonathan Adler: There was earlier in the term the case on what is often referred to as conversion therapy, where the Court, quite broadly, a large majority endorsing free speech protection of pure talk therapy in that context, showing that the Court appears to still be a fairly speech-protective court. That's been a theme for quite some time, and there was certainly a lot of speculation that with Justice Kennedy's departure, whether or not the Court would continue to be as speech-protective as it has been in recent years, and that's certainly a sign of that. Whether or not one wants to characterize the *BPJ* case about transgender sports as an individual rights case or not, that's certainly a very important case, but also a case that signaled kind of additional issues that are yet to come or that are going to come back to the Court. Because in that case, the Court rejected a constitutional argument against state laws that limit the ability of transgender women to participate in women's sports, but left aside, the broader question of whether or not Title IX might actually require that result. So the Court basically unanimously said Title IX doesn't prohibit states from doing that, split on whether the Equal Protection Clause permits states to do that and concluded that the Equal Protection Clause does, but then left to what we'll probably see in the next year or two, whether or not Title IX excludes it. And that was certainly a very significant case that may not have gotten as much attention as it might have in other years given all of the executive power cases and the birthright citizenship case that also came down late in the term.

[00:11:34.4] Julie Silverbrook: We are gonna do a podcast which I am jokingly calling, Why Aren't We Chatting About *Chatrie*? Because it was also a really significant case. Masha, I know that you also have curiosities about why that's one that hasn't gotten as much coverage. I wanna talk a little bit more generally about the term, but I do just wanna get from you why you think that's not breaking through. Is it really because so much of the term focused on executive power, and why should people be chatting about *Chatrie*?

[00:12:05.1] Masha Hansford: Yeah, so I think *Chatrie* was a hugely important win and a major victory for Justice Kagan, who held together a five-Justice majority for a really sweeping view of Fourth Amendment privacy. And just to step back, *Chatrie* is a case about geofence warrants, which is a warrant where the government asks a technology company, in this case

Google, in theory it could be others, but as a technical matter it's only been Google who had been able to provide these so far, for information about all users who activated location sharing with that technology company, and information about all the people who were in the vicinity of a particular crime for a very short window of time. And this kind of request to a third-party technology company is something that long had been considered not to be covered by the Fourth Amendment. It is something in the hands of a third party. And the Supreme Court kind of shifted a little bit in the *Carpenter* case, but *Chatrie* is a really big expansion beyond that, both kind of jettisoning the third-party doctrine and also resetting the Fourth Amendment standard for what is a search, and saying that what we need to expect is a level of privacy comparable to what people would have expected at the founding, which I think is a really big doctrinal shift. And so the Court held that this kind of request to the third party was a search that requires a warrant. And what I think is even more interesting is that in this case, the government did have a search warrant. And traditionally, when the government has a search warrant, its authority has been very, very broad. And I think one expectation was that even if the Court said this was a search, it would then say, "Okay, but here there was a warrant, so it was fine." And the Court left that question open. So the combination of leaving open whether the government can even do this pursuant to a search warrant and the kind of recalibration of what it is we're looking for under the reasonable expectation of privacy test, I think, is really transformational. As for why it has gotten less attention, I don't know. I don't know if people find the Fourth Amendment less sexy in general or just the other cases were more exciting. And I do think the practical significance of this particular case is very, very limited because there's a good faith exception reason that this particular defendant is unlikely to get relief. Google actually stopped, changed its technology in a way that prevents it from complying with these warrants. So the practical significance of this particular case is so trivial that it's in some ways a little surprising the Court even granted cert. But doctrinally, I think it's huge, and I'm really glad you're giving it, you're going to give it the attention it deserves.

[00:14:52.3] Julie Silverbrook: We'll get a full podcast episode, but I appreciate you sharing some perspectives now. I wanna talk a little bit about the number of concurring opinions, particularly in the Court's biggest constitutional cases this term. So rather than simply joining the majority, many of the Justices use separate opinions to explain, narrow, or expand the Court's reasoning. Jonathan, what did those opinions reveal about the individual Justices and where the Court may be headed in some of the bigger cases?

[00:15:26.5] Jonathan Adler: Well, I think first, the last three years we've seen a large number of concurring opinions, all years where we had more than 50. Prior to that, I don't think we'd had more than 50 concurring opinions since like 2009. I mean, so it had been a while. And that year is an outlier. There's like 70 that year. For some reason, that was just concurrent palooza back then. What I think we're seeing on the Court, especially in areas where, as I mentioned before, the doctrinal details of how the various judicial philosophies should play out aren't as fully developed and fully thought out, the Justices, who are all very independent-minded, all very

intellectual about these sorts of questions, are working through some of their differences. They just, even where they may agree on the bottom line, there are important yet subtle differences in the way they approach some of these questions. And so we saw that, certainly in the tariff case, debating over what's the right way to get to this outcome. And Justice Gorsuch extensively going through why everyone in his mind actually has agreed with his approach, just wasn't necessarily willing to do it in that case. So I think some of it is, Justices trying to articulate and make the case for their particular approach to some of these questions and to lay down markers for how these sorts of issues should be looked at in the future. I think there are some other cases where there were separate opinions that really spoke to how broadly or narrowly the Court should address a question.

[00:17:11.9] Jonathan Adler: So in the birthright citizenship case, for example, Justice Kavanaugh's concurrence, the only opinion to really spend any time on the statutory question, and I was someone that argued that that was how the Court should resolve the case. The Court usually wants to avoid reaching constitutional questions if it can. And so Justice Kavanaugh was saying to the majority, "Look, you're reaching a question you don't have to reach and maybe isn't as clear as you think it is." and wrote separately on that point. So in the *Cook* case, we saw there was the dissenters, but these separate opinions very much about how broadly the Court was going and whether or not the Court was reaching things it didn't necessarily need to reach to resolve that. So I think those are kind of the... Those are the two dynamics that I think tend to stick out the most. The one is setting out these doctrinal markers as the Justices are both trying to articulate for themselves, how they approach these issues in a way that's gonna provide guidance in future cases and perhaps make the case and encourage others, perhaps lower court judges, to tack in their direction in thinking about some of these questions. And then kind of a subset where there is a difference of opinion about kind of how aggressive or how broad the Court should be. And that's often a reason why a Justice might write separately. But we saw some of that this term, too.

[00:18:37.2] Julie Silverbrook: Masha, I think it's been really interesting from my perspective to read all of the concurring opinions because it is a really nice window into where individual Justices are on particular issues. And you don't always get that when you just have a majority and a dissent. And so we are gonna pivot to talking a little bit about each of the Justices across this term, but just wanted to get a sense from you of what you felt was interesting in terms of the reveals that came out through some of the tensions and clarifications in concurring opinions?

[00:19:18.1] Masha Hansford: I think really the bottom line is the Justices can't agree to agree. They are not content even on the cases where there is broad consensus to let that lie. I think one example was the *Hemani* case, which was the case about a marijuana user's gun rights that I mentioned earlier. I think that was a unanimous decision or an 8:1 decision, but with lots of separate opinions. Justice Jackson, joined by Justice Sotomayor, called for retiring the *Bruen* framework for firearm regulation. Justice Alito, joined by Justice Kagan, concurred in the

judgment on a different ground and had kind of an ode to marijuana a little bit, which I found quite amusing. And then Justice Thomas wrote a solo concurrence questioning Congress' Commerce Clause authority. But I think you're right that we're really getting insight into how everybody is thinking about these particular issues. Another one, of course, perhaps the most famous example from this term is *Learning Resources*, the tariffs case. That had really interesting concurrences about the Major Questions Doctrine and the role of the Major Questions Doctrine that are quite elucidating and really helpful for advocates thinking about how to build coalitions going forward. But I do think this is a little bit of an era where everybody is writing their own opinion, kind of like in the old days where there would be one judgment and every Justice would write their own view. And I think you see this a little bit at the oral arguments as well, where they're going for a long time. And the Justices, some Justices are different in this, but many of the Justices are not just looking for the easiest path to agreement, but really looking to develop their own doctrinal views and really wanna lay out their individual views as opposed to just resolving this case and getting to whatever the consensus compromise for this case is.

[00:21:08.2] Julie Silverbrook: And it does seem like they want the public, and I think in particular the legal profession to know what their positions are.

[00:21:17.5] Masha Hansford: I think that's right. And maybe that relates to the fact that precedent has a little bit less force in this era than it did before. You even see that in something like the birthright citizenship case, where the Chief Justice's majority opinion puts the kind of critical precedent marking mark kind of at the end as confirmatory instead of starting with it. And I do think in an era where more cases are up for grabs and views that Justice Thomas had expressed for a long time and seemed kind of outliers are coming into the mainstream, maybe more Justices are interested in laying out their particular view of the law and have more hope that in the future that will get picked up and will become a majority view, or giving suggestions to litigants about cases to tee up. But it does seem to be a much more individualistic era for many of the members of the Court. But as I'm sure we'll discuss, not for all of them.

[00:22:11.0] Julie Silverbrook: Jonathan, I wanna talk a little bit about the Chief Justice, who does like to write on behalf of the Court in majority opinions, particularly in its highest-profile executive power and separation of powers cases. How does his decision to write those opinions, keep them for himself, and the opinions themselves, what does that tell us about how he views his role as Chief Justice and how he views the Court as an institution?

[00:22:37.3] Jonathan Adler: Well, he certainly believes that as Chief Justice, he has a particular responsibility to the Court as an institution and to kind of steer the direction of the Court. We have seen in some recent terms him take the majority in cases where there were reasons to suspect he might have been willing to come out differently but wanted to write the majority for the Court. In this term, I think the cases that he wrote the majority for, I suspect that he was reaching the outcome that he in particular wanted in all of those cases. I don't think we

saw that kind of strategic movement here. And we also, in this particular term, certainly with removal cases, an area that he has long been particularly interested in and that he had written the Court's prior decisions in *Seila Law* and in *Free Enterprise Fund* that were precursors certainly to the *Slaughter* decision. But he definitely wants to place his stamp on the big decisions. And if he thinks it's the sort of decision where the Court is asserting its independence and perhaps doing something crosswise with the other branches, and in particular the White House, he likes to be the person doing that. And so I don't think it's a surprise that he kept the *Cook* opinion, that he kept the birthright citizenship opinion, and that he kept the tariff opinion, in addition to the fact that, at least in the case of the removal cases and the tariff cases, the substance of those cases drew upon things that he had made clearly important to himself. So insofar as the tariff case was, on the one hand, a case about how to understand what power Congress has delegated to the executive branch, and secondly, a decision perhaps implicating the Major Questions Doctrine, it is a Chief Justice that has written both the explicit cases setting forth the Major Questions Doctrine in *West Virginia v. EPA* in the student loan case, but he had also written earlier opinions that laid some of the groundwork for that. There's a portion of *King v. Burwell* that presages the development of this doctrinal development. His dissent some years back in a case called *City of Arlington*, very much laying down the seeds of what would come in these later cases. So this was a term where he kind of got to do both in terms of steer the Court, speak for the Court, and also more clearly define some doctrinal areas that have long been important to him.

[00:25:13.1] **Masha Hansford:** I agree with that completely. I think this was a really big term for the Chief Justice, both in terms of preserving the Court's institutional legitimacy and then deploying it to some... On some issues that he probably had very long-standing beliefs on. And so, preserving, a couple of examples, Jonathan, as you mentioned, the tariffs case, of course, a huge win from an institutional perspective to strike down such a signature policy of the administration and not bend to potential perceived pressure. And similarly, the birthright citizenship case, which was very important for the Court's legitimacy given the President's strong personal views on the issue and then kind of the broader view that the President's position was quite implausible. And I think that was a particular victory because, as we saw, he was actually... The Chief was working with a much narrower margin, particularly on the constitutional issue, than anyone expected. The constitutional question ended up splitting 5:4. And then I think the way he deployed that institutional power was in the *Slaughter* case, which of course was a long time coming, the case that really enacted unitary executive theory more completely by eliminating the remaining exception and overruling *Humphrey's Executor* and giving the President broad for-cause removal. And then by pairing that immediately with the *Cook* decision that did create that carve-out for the Federal Reserve, which was a little bit tricky as a doctrinal matter to square those, but I think this was a place where the Chief kind of spent some of that institutional legitimacy he had placed in reserve and just got those out and got it done. And I think structurally you also saw the Chief in this really institutionalist role as well. He wrote only six majority opinions.

[00:26:59.8] Masha Hansford: He had no separate writings at all, which is really stark given the point you made, Julie, about just the number of separate writings that permeated the decisions this term. And I think also another small tidbit there is the Chief adopted or expressed a particularly maximalist position of the Court's role, which I think is pretty consistent with his prior views. In the *Mullin v. Doe* case, which was a case about the validity of the TPS rescission for Haiti, there was an interesting plurality part of that opinion authored by Justice Alito that said that on the emergency docket, the Court... The Supreme Court can weigh in on issues even if it doesn't have jurisdiction, which is a really surprising and major step in the Court's power. Surprising to me because the *Steel Co.* principle that the Court cannot reach the merits if it doesn't have jurisdiction is so deeply ingrained. But Justice Alito said that principle doesn't apply for emergency docket cases because those are not resolving the merits, they're just talking about likelihood of success, and so it's fine for the Supreme Court to talk about that. And I do think the Supreme Court has already taken a very broad view of its authority on the emergency docket and has been involved in a large number of cases. And taking away that limit, and the Chief Justice joining that portion of the opinion, signaling a willingness to take away that limit, just reflects the Chief's view of the robust role that the Supreme Court should really have to keep the rest of the judiciary in check.

[00:28:40.4] Julie Silverbrook: I wanna pivot to talk a little bit about Justice Kavanaugh, who was in the majority in virtually every major case this term and also repeatedly wrote separate concurrences, often emphasizing the limits of the Court's holding or raising clarifying questions that he felt were left unresolved. What role do Justice Kavanaugh's concurrences play, and is he emerging as the Justice who explains how broadly the Court's decision should be read?

[00:29:09.3] Masha Hansford: I think he is, and he is likely to concur to explain how the decision should be read. And I think part of that is just trying to provide genuine help and guidance to lower court judges, and part of that is kind of putting his stamp on the majority opinion. So, as you said, he was in the majority overwhelmingly. I think it was 95% of the time overall and 88% of the time in closely divided cases, which is really an extremely high rate. And his concurrences often take an approach of emphasizing the limits of the decision or emphasizing that, kind of giving an olive branch to people on the other side and saying it's limited or there's still room for disagreement. So in *Cook*, for instance, that's the Federal Reserve case, he concurred to emphasize that Congress can remove the for-cause protections if it wants. So it's not the Court making the decision, it's just the Court giving Congress the decision, the classic who decides question. And then also to emphasize that the facts in this particular case as to whether there was cause were yet to be determined. And then the *Barbara*, the birthright citizenship case, as Jonathan mentioned, he would have resolved the case on a statutory ground, which is a narrower and more modest one that leaves more room for Congress to act. I think that is kind of a classic Justice Kavanaugh opinion. The part of the opinion that I found surprising was that that concurrence was paired with a dissent in part, and the decision was styled concurring in part and dissenting in part. And it did have a dissent that actually resolved the

constitutional issue instead of saying, it's a hard question, we'll leave it for another day. And I think Justice Kavanaugh also just exerts a lot of influence over the Court's docket more broadly, signaling to litigants the positions and the cases that should be brought. For instance, in the *Snope* case, he authored a statement respecting the denial of cert. That was an AR-15 case, a Second Amendment case, and kind of signaled that this case is appropriate for the Court's review in a future case. And a petitioner in another case emphasized that language and got a cert grant. And so the Supreme Court is going to resolve the constitutionality of the AR-15 ban next term. But I do think Justice Kavanaugh is interested in expressing his views and willing to kind of exert influence in those ways.

[00:31:30.0] Jonathan Adler: Well, I think a couple of observations about Justice Kavanaugh. First, as Masha noted, he sometimes indicates that he would like to hear a case even if he doesn't write a separate opinion. If one combs through the order lists, more than any other Justice, you'll see the notation that he would have granted the case. In this term, Justice Kavanaugh and the Chief Justice, as we already noted, were in the majority more than any other Justices, they were as paired as often as any other Justices. They also were the Justices that wrote the fewest opinions. And so while Justice Kavanaugh's separate opinions were doing a lot of the things that Masha mentioned, he's a lot more selective. He wrote four concurring opinions this year. He only wrote one dissent, and that was in the Tariffs case. He joined two other dissents. So he's been, at least this term, certainly much more selective in terms of when he wants to play that role of explaining how the Court should either, its opinion should be understood or what he might have done a little bit differently than the majority. And we tend to think of him as being an institutionalist and kind of characterize him that way, but I do think it is interesting that he would have voted with President Trump in support of the tariffs. Right? He dissented in the tariffs case and expressed some concerns about the majority's opinion in the birthright citizenship case, which, if you were just to kind of ahead of time say, "Okay, where would a Justice be that we think of as an institutionalist?" we would not predict those moves. And so I think it's another example of how this term, at one level, a lot of cases came out the way we expected them to. Right? The cases that divide the Court along right-left lines, okay, we know how those are going to come out. The cases that where there were really aggressive claims, we knew how that was going to come out. But when you look into some of the details of how individual Justices behaved in particular cases, there's a lot that people might not have predicted and that certainly suggests in the years to come, depending on what sort of cases come before the Court, we're not gonna see the same sorts of lineups and the same sorts of resolutions.

[00:33:50.3] Julie Silverbrook: It's a lot more reading.

[00:33:52.5] Jonathan Adler: Yes.

[00:33:52.3] Julie Silverbrook: You have to read all of the opinions. But it's incredibly revealing. But for people who just like top line, it's so much more complicated than just the 6:3

divide. It's oftentimes much more nuanced. And a Justice who I think has often added some nuance is Justice Barrett. And Jonathan, I wanna talk to you a little bit about Justice Barrett, who I think continues to surprise court watchers. She joins the Chief Justice in some of the term's biggest institutional cases while breaking with other conservatives in others. Were there a few opinions this term that gave you a clearer picture of her judicial philosophy?

[00:34:35.3] Jonathan Adler: Well, first thing I would say is that Justice Barrett, I think, is simultaneously both an originalist Justice but also kind of a very careful doctrinalist. She really... And perhaps this is the background of being an academic, but she really cares about how the doctrinal pieces fit together and how the cases relate to what came before and what they may or may not say in future cases. She thus far has shown herself less interested than some of her colleagues in articulating or embracing some sort of broader vision about the nature of the Constitution and so on. One exception I will say is that we have seen... And I would say this has been over a few terms, she has repeatedly embraced the view that the role of the courts is not this big-picture role, but the role of the courts is to resolve disputes. And that a dispute comes before the Court and it's the job of the Court to resolve it. And it's not the job of the Court to pronounce more broadly. It's not the job of the Court to kind of pronounce what the Constitution means in some respects, but really just to resolve disputes. And I think that, you see that in both the opinions she writes and in some of her separate opinions. And I think it even helps explain some of her separate opinions that might have been surprising. So I think some people were surprised that she did not join the majority in the *Cook* opinion. And I think one reason for that might be is that, on the one hand, the Chief's opinion was broader than it needed to be to resolve the case. And she was particularly interested in the procedural way the case got to the Court and therefore what was actually before the Court and that needed to be resolved. And she didn't see this as figure out what happens with the Fed and is someone from the Fed removable. It was very much about, okay, someone has been removed. This is what the lower courts did. What sort of remedy is available under what sorts of posture and what needs to be shown for that? Very focusing on the particular dispute that was before the Court. And I think that's really a hallmark of her jurisprudence.

[00:36:46.7] Julie Silverbrook: And it definitely distinguishes her from some of the other conservative Justices, Justices Thomas and Alito, for example, who I think really do want to express in their opinions how they believe the Constitution should be interpreted, their view of the Court and Congress's and the President's role. And so, Masha, how would you compare Justice Barrett to Justices like Thomas and Alito?

[00:37:20.1] Masha Hansford: I think that that's exactly the distinction, Julie. She is an incrementalist. She's really, really thoughtful. You see this in how she poses questions at arguments. She's really just grappling with the doctrine, kind of no agenda, just wanting in a very academic way to get it completely right. And she wants to, for that reason, usually to proceed slowly. I'm thinking about the *Fulton v. City of Philadelphia* case a few terms back that

had to do with religious liberty. And she authored a concurrence in that case, expressing concern about what would replace *Employment Division v. Smith* when a lot of people had expected her to jump at the opportunity to overrule it. And I think *Cook* reflects that a little bit. And also, I think doctrinalist is a perfect term for her, Jonathan. She tends to be really, really principled on doctrine. She's also very principled in how she applies history. And I do think that someone like Justice Thomas or Justice Alito, they genuinely see kind of all the history supporting whatever their view of the right result is as a matter of doctrine in other ways, but they really tend to find the history really supports them. Whereas I think Justice Barrett has a more rigorous approach to the history and a more nuanced approach. And you saw that in the *Watson* case, where she... Which was the case about early voting. It was not the result that Republicans wanted, but it's just this really nice, tight statutory analysis. And she really criticizes the other side's use of history just to try to throw history there and say history supports the narrowing position of the voting... Of the ability to cast ballots, and really tests whether historical practice was a result of legislatures' consideration of the limitations of federal law or of other reasons. And I think it's the kind of rigorous engagement with historical arguments that is her brand. And she very expressly embraces it in the Second Amendment cases. And here in *Wolford*, she concurred to emphasize what she thinks the right Second Amendment analysis is.

[00:39:33.4] Julie Silverbrook: I wanna talk more specifically about Justice Thomas and Justice Alito. They were often aligned in the Court's most consequential constitutional cases this term, particularly those involving executive power and the scope of judicial authority. But their opinions often reflected different instincts and definitely different styles of constitutional reasoning. Masha, what did this term reveal about the relationship between their jurisprudence, and where do you see the clearest differences in the way that they approach constitutional interpretation?

[00:40:03.3] Masha Hansford: They are very, very aligned in outcome. I think it was something like 96% agreement in closely divided cases. But I think they're quite different in their approaches. Justice Thomas is very formalist, very focused on first principles, and gives very little weight to precedent in how he approaches cases. Justice Alito is quite pragmatic. And he's certainly willing to overrule precedent, but I don't think he's looking to disturb it when it's not necessary to reach what he thinks is the correct result in a particular case. And I think the *Barbara*, the birthright citizenship case dissents are one example. Justice Thomas authors this opus on his view of history, and Justice Alito authors a much shorter opinion that's more about the kind of practical concerns about this constitutional interpretation and not being able to ban things like birth tourism. I think the *Cook* dissent is another example where Justice Thomas wrote this very long dissent emphasizing that the administration should have been... Should have prevailed and received the stay it wanted for many different grounds and resolving all kinds of issues. And Justice Alito did a much narrower dissent that was just kind of the minimum way to get to what was the right result there. There are other smaller differences. Justice Alito tends to

be much more government friendly in criminal cases. For instance, he was the sole dissenter in *Rico* but I think those differences in approach are the more fundamental ones.

[00:41:30.7] Julie Silverbrook: Jonathan, let's talk a little bit about their differences in style, how they write, how they address other Justices in their opinion writing?

[00:41:40.4] Jonathan Adler: Well, I mean, Justice Thomas sees himself as kind of the one true Scotsman, one true originalist, or the most originalist Justice. He's most interested in really laying out his theory. Alito's opinions, his written opinions often are more... Are sharper. You often see in Alito's opinions concern about whether the Court's being consistent or not. And Alito often raises the concern that the Court isn't as consistent and that if the Court had handled a particular case a particular sort of way, it should continue to do so. And if not, he's going to raise that sort of concern. Whereas Justice Thomas is much more likely to just talk about his view of the history and how his view of what the original meaning means in a particular case. I think that's... Alito, I think, also tends to be a little sharper, having more of an edge, I think in his writing than Justice Thomas does, although most of the time his opinions are also, fairly clear in what their implications are. And this is certainly true of Alito's majorities. That they tend to... They... Alito's majorities are often very good cases to teach because you can... You really understand what he's doing and why he's doing it and what it means. Whereas Justice Thomas may want to spend a lot more time kind of laying things out and telling you the whole history as the background, and that may be more to get through to kind of figure out what the ultimate bottom line effects are.

[00:43:23.7] Julie Silverbrook: I wanna talk about their conservative colleague, Justice Gorsuch, who continued to distinguish himself through separate writings, whether it was on the major questions doctrine, birthright citizenship, or in several other cases where he declined to fully join his conservative colleagues. Jonathan, what through lines do you see in those opinions, not just this term, but really across Justice Gorsuch's writing?

[00:43:45.0] Jonathan Adler: Well, in general, Justice Gorsuch also sees himself as an originalist, but also has a very, hostile is not the right word, but he's very skeptical of governmental power and federal governmental power in particular. I mean, there are people that have carried it... Characterized his jurisprudence as libertarian, and I'm not sure that's quite right because he's much more concerned about federal power than he is about state power. And so he is very often in the majority in cases that say the federal government can't do something, or it can't do the tariffs, things of that nature. He writes the majority in the conversion therapy case, protecting the speech rights of the talk therapists. But he also then dissents in a case like *Monsanto*. He and Justice Jackson dissent, a very odd lineup, rejecting preemption under the federal pesticide law, FIFRA. And I think it's because he's skeptical of federal power and not particularly concerned about state power. And what's interesting is that on some of those sorts of questions, he's sometimes with... Justice Thomas sometimes will join him on that. Justice

Thomas didn't join him in *Monsanto*, but they were aligned in the *Hensley* case, which was another preemption case where Thomas had written. Gorsuch joined that opinion finding no preemption, whereas Justice Alito would have found preemption and was in dissent on that.

[00:45:13.4] Jonathan Adler: But in general, I think Gorsuch is very much, again, skeptical of federal government power and really wants to explain why and explain how skepticism of federal power in one context should have repercussions in other contexts. So in *Slaughter*, he writes this separate opinion saying, "Look, really important that we have a unitary executive, but Congress gave all this power to the executive branch not thinking it was unitary. And if we're really gonna... We really need to complete the job, and that it's not enough for the executive branch to be unitary. It also has to be constrained, and hopefully we'll do that." And that was a good example of him kind of laying down a marker, saying we shouldn't hive off these separate doctrinal questions because for the constitutional system to operate properly, we have to recognize how doctrinal moves in one space pair with needed doctrinal moves in others. And if we're not paying attention to that, we can actually replace one imbalance with a different imbalance. And that's something that we saw quite a bit this term, him raising those sorts of concerns. And I think more broadly, it's part of his jurisprudence. I think when he makes these sorts of points, he really is aiming to speak to a broader audience. He's not just speaking to his colleagues. He's speaking to lower court judges, he's speaking to law students, he's speaking to the public. He wants to evangelize for this broader vision of what the constitutional structure should look like.

[00:46:42.6] Julie Silverbrook: Masha, I wanna talk a little bit more specifically about his separate opinion in the birthright citizenship case.

[00:46:51.0] Masha Hansford: Yes. So I think in addition to the things that Jonathan said, another thing that really characterizes Justice Gorsuch is his go-it-alone approach. So it's very fitting we're talking about him alone instead of in a pairing. And I think the birthright citizenship opinion really reflects that. On the one hand, I do think commentators expected him to strike down the constitutionality, to be in the majority, and to say the birthright citizenship executive order was unconstitutional because of his defense of the little guy, skepticism of federal power. But I think this was a case where his desire to go it alone and kind of go against the consensus of history and practice for the last century and a half outweighed that. And I think this is also a case that shows his desire to really stand out and present his own views and not be limited by anyone else. He joined Justice Thomas's dissent, but he also authors his own dissent. And I think that that dissent sets out a pretty narrow view of how the domicile rule he endorses would be applied and actually leaves a lot of room for children of undocumented immigrants to be natural-born citizens. But he styles his opinion in a way, and the way he approaches it emphasizes the disagreement with the majority instead of the points of agreement. And so I think it's kind of emblematic of his approach to the jurisprudence more broadly.

[00:48:18.4] Julie Silverbrook: I wanna shift to talking about the three progressive Justices. Justice Kagan often writes with an eye toward persuading future courts as much as the current majority. Jonathan, were there dissents or concurrences this term where you think she successfully narrowed the majority's reasoning or laid down an argument that could shape future decisions?

[00:48:40.4] Jonathan Adler: Yeah, I'm not entirely sure. I mean, one thing that I think is worth noting is that she doesn't write as much as the other two progressives. And I think that's deliberate, and there's certainly speculation that the time and energy that could be spent writing is spent working with the other Justices behind the scenes to try and shape opinions. And I suspect that that speculation is accurate. I do think in a case like *Chiles*, she wrote separately to stress both, I think, the narrowness of the opinion, but also in her view, kind of like why it had to be right. In the tariff case, her separate concurrence was jousting with the conservatives who were in the majority about whether this was a major questions doctrine case and whether or not, or whether it was just pure statutory interpretation. She likes statutory interpretation cases. She did have a solo dissent this term, which was extremely unusual for her. It... I don't recall if it's her first, but solo dissents from Kagan are very rare. I also suspect she was right in that case.

[00:49:48.4] Jonathan Adler: This is a case about whether or not cruise lines that are using these docks in Cuba are violating federal law and can be sued for using the docks and so on. And there was a whole Justice Thomas wrote the majority there. She wrote the dissent. And as somebody who teaches property, I think actually she understood the property question correct, but she was by herself. So this term, I think she also wanted to write dissents kind of not really for future courts in that two years from now, five years from here, 10 years from now, to influence, but kind of laying down a marker about what she thinks are profound mistakes by the Court. Certainly her *Callais* dissent was a very strong dissent in objecting to the direction that the Court was going. I was surprised that she didn't write the principal dissent in *Slaughter* and that instead Justice Sotomayor did, largely because Justice Kagan has so often written the dissents in those sorts of cases. And in the few appointments and removal related cases where she's joined the majority, she sometimes has written the majority. So it was interesting that she didn't. Perhaps she felt she had said all she had to say on that question, and since she hadn't convinced the majority, she'd let someone else take a chance... Or take a shot at it. But I thought that was quite interesting and certainly not what I expected this term.

[00:51:20.5] Julie Silverbrook: Masha, I know you're chomping at the bit to jump in on Justice Kagan.

[00:51:23.9] Masha Hansford: Well, I mainly, I really wanted to jump in on the *Havana Docks* case because I am pretty sure it was her first ever solo dissent. And I do think she was right, and she couldn't persuade anyone else despite writing this beautiful dissent. My former colleague Amy Brown actually argued this case on the winning side, and I think it's really a testament to

her advocacy that she out-argued Justice Kagan and got the other eight Justices on board. But it's also just nice that the case that moved Justice Kagan to write her first solo dissent was really this nice doctrinal issue with no meaningful political valence to speak of, and she just really thought they were getting property law and statutory interpretation wrong. But I think kind of more broadly on Justice Kagan, Julie, I actually think of Justice Kagan as someone who is very rooted in the here and now and less somebody who writes with an eye towards the future. I think she is trying... Justice Kagan is trying to win everything she possibly can.

[00:52:20.9] Masha Hansford: She's in the minority of the Court, and she is building coalitions and fighting to get the narrowest bad opinions and to get the wins that she can. And of course, we talked about *Chatrie*, which I think is a great example of her securing a major victory despite kind of the odds stacked against her in many ways. And I think that the fact that she writes so few concurrences and solo dissents emphasizes that she's focused on building coalitions and winning as many cases as she can, as opposed to laying out her own personal, deeply held views. And I think one example is a case like *Wolford*, the Hawaii gun regulation case, where Justice Jackson, with Justice Sotomayor, dissented to say that *Bruen* should be overruled. But Justice Kagan instead was arguing that a fair application of *Bruen* would uphold the challenged Hawaii law. And so she knows that overruling *Bruen* is not going to happen anytime soon, and she's much more focused on the wins that she can get of narrowing the precedents she disagrees with, as opposed to calling for them to be overruled.

[00:53:29.7] Jonathan Adler: Justice Kagan, more than any other Justice on the Court, is... She's the least likely to join an opinion expressly calling for overruling a precedent, either as part of the majority overruling a precedent, or as in a dissent saying, hey, there's this precedent that we should overrule, or even, this is a big mistake and we will overrule in the future. It is notable that even among the liberal Justices, she's the least likely to endorse or make that move in her own writing.

[00:54:04.3] Julie Silverbrook: I wanna talk about the two other progressive Justices, Justices Sotomayor and Jackson, who do frequently vote together, but their separate opinions often had different voices and purposes. Masha, looking across this term, how would you distinguish their approaches to dissent and what did each contribute to the Court's progressive jurisprudence?

[00:54:25.3] Masha Hansford: Justice Sotomayor is someone who really does her homework and digs into the record in a particular case, very rigorous preparation. You see that in how she asks questions at oral argument, and she voices a more institutional perspective, emphasizing the importance of stare decisis and the like. Justice Jackson, I think, has a much more thematic approach, and I think she is the Justice who, more than anyone else, really writes to the future and is really focusing on where the law is going to go 20 years from now. In the birthright citizenship case in *Barbara*, she... Her concurrence laid out this whole vision for the 14th Amendment and thinking about anti-subordination versus anti-classification principles that are

more directly relevant to things like affirmative action, but really laying out her vision of the law. And I think she is not trying to build coalitions in the here and now. She's focused on the future and developing her own jurisprudence and getting that out there and kind of shaping history on a much longer timeline. And so methodologically, I find Justice Jackson kind of the most different from Justice Kagan, even though, of course, in result, they are pretty closely aligned. And I think she's more of the Justice Gorsuch go-it-alone approach, but on the left. And I do think there were... Have been a surprising number of cases across the terms where you see a dissent or a concurrence that are just Justice Jackson and Justice Gorsuch. And I do think they really approach the law in more similar ways often.

[00:55:56.5] Julie Silverbrook: Jonathan, what's your take on Justices Sotomayor and Jackson from this term?

[00:56:01.6] Jonathan Adler: Well, I certainly agree with that. I mean, I think it's absolutely true that Sotomayor does spend a lot of time with the record. Does... We've long known with Justice Sotomayor that her experience as a district court judge really affects the way she thinks about cases, really affects the way she thinks about the procedural posture of cases and kind of how they got to the Court, how to think about the record. You see some of that from Justice Jackson, but I do think that kind of former trial court judge voice is something we see more in Justice Sotomayor's writing and certainly saw that this term as well. I also agree that Justice Jackson is trying to articulate a broader vision. I noted before that Justice Barrett has this view of the role of the Court is resolution of disputes. Justice Jackson's view, I would characterize as more, no, the role of the Court is to declare what the law is, and to speak more broadly. And she does have a very different vision than the conservatives. And unlike Justice Sotomayor, she really wants to lay that vision out. And perhaps it's for the future, perhaps it's for a broader audience, perhaps it's for the public, I'm not entirely sure, but she definitely does want to articulate this broader vision. She is not necessarily interested in playing the Court's game or debating cases or arguing about cases on the terms that are set by the majority. If she views the case differently, if she thinks it fits into American history in a way that the majority isn't acknowledging, she's gonna say so, and she's gonna take the time that it takes to lay that out.

[00:57:42.5] Jonathan Adler: And so she will write these opinions, often by herself, that really lay out what she thinks is going on and what is important in a particular case. And there's speculation that... About how her colleagues view that or not. And in some respects, it's reminiscent of Justice Thomas's early years on the Court, when Justice Thomas would often write separate opinions, typically shorter than Justice Jackson's, but quite often Justice Thomas would write a separate opinion, either as a concurrence or a dissent, saying, "Hey, there's this other issue. We're not dealing with it. We're gonna have to deal with it." And over time, Justice Thomas then started to write these longer, broader opinions about how he saw the history and how he saw the broader context that cases were being decided in, and didn't seem to care whether or not his colleagues were interested in what he had to say or not. He felt it was

important. And at the time, that raised some eyebrows. In retrospect, I think we can say Justice Thomas's doing that over time actually led to him being quite influential, quite influential in the conservative legal movement, quite influential on lower courts, quite influential on the Supreme Court. The question will be whether Justice Jackson doing this and writing these separate opinions will, over time, have the same sort of larger effect. And that's something we'll have to see. Right now, court commentary tends to focus on, "Oh, another Justice Jackson opinion and the other liberal Justices didn't join it. Are they not getting along?" And I think the question is, well, Justice Jackson is sometimes focused on something else, and that it may, in fact, have a larger impact down the line. And if so, those opinions could be quite significant.

[00:59:32.6] Julie Silverbrook: I wanna look ahead to next term. It's August. The first Monday of October feels far away and yet also very close. What is the biggest question you have about the Roberts Court as we look ahead to the next term? Is there a particular Justice, an emerging coalition, or a constitutional issue that you think will define where the Court goes next?

[00:59:53.6] Masha Hansford: I'm really curious to see whether Justice Barrett's separation from Justice Kavanaugh will prove more persistent, whether Justice Kavanaugh will kind of float a little bit more to the conservative stalwart wing, and just to see Justice Barrett's jurisprudence emerge, because she is incrementalist and she's letting us see her views on things gradually. And I think she is developing them, and she wrote some really beautiful opinions this term. So I'm really interested to see where her jurisprudence goes and just read the opinions she writes. But the thing that I'm most interested in for next term is what the Supreme Court is gonna do in my case, which is the *Maxwell* case. We filed the brief in that case this morning, and that's a case about the availability of a habeas petition to challenge a level of custody claim when a prisoner is entitled to be released from prison to a lower level of custody, like home confinement or a halfway house. And so that will be a fun, a little habeas issue on the Court's docket for the fall.

[01:00:53.6] Julie Silverbrook: And Jonathan, are there cases where you have a vested interest, where you are also particularly interested in the outcomes of those cases?

[laughter]

[01:01:01.5] Jonathan Adler: Well, there are, but I'll say a couple of things. One thing we may have seen this past term is a shift in the interim docket. Both the number of petitions has declined, the number of cases that the Court ended up hearing oral argument on that kind of began as interim docket cases inched up a little bit. Justice Kagan recently commented that it shouldn't be called the shadow docket anymore. And so it'll be interesting to see if that continues. And as I've in a prior one of these talked a bunch about some of the dynamics there, but some of those dynamics appear to have been changing over this past term. And so I'm really curious to see, is that a blip or is that actually a more permanent change in the way the Court handles those things? We have a big gun case next term. That's certainly going to be quite important. We have another big immigration case next term. Outside of birthright citizenship, the

Trump administration ran the table in every other immigration case this past term, sometimes on ideological grounds, sometimes in at least one unanimously. It'll be really interesting to see whether or not that continues. So the case about detention without a hearing. I'm very interested in the climate change case, which is the first case the Court is gonna hear. I did file an amicus brief in that case.

[01:02:23.3] Jonathan Adler: One reason I think that's interesting, and there is this kind of constant claim that the Roberts Court is pro-business, and I've written extensively that I think that's an overly simplistic way of understanding the Court because whether the Court rules in a way that the business community likes really depends on the subject matter. And I have an article from a year or so ago suggesting that the Trump Justices, the Justices that Trump appointed, on some very important issues to the business community are much less likely to vote in a pro-business direction than their predecessors. So issues like dormant commerce, preemption, jurisdiction. And we saw that this term, right? The *Hensley* case, 6:3 case rejecting preemption. There was a case, the name of which I'm gonna forget, about trucking brokers where the Court rejected preemption. And the climate change case raises that, and it raises the preemption question in a way that kind of cuts across what we would expect the Justices' kind of ideological or political leanings to be. That is to say, the anti-preemption argument is being made by County of Boulder and folks that wanna sue fossil fuel companies for damages that they claim are a consequence of climate change, and companies are, and the Trump administration are arguing for preemption. I've written a brief saying that the Court's preemption jurisprudence doesn't support preemption in this case. But I think that'll be a big case, and it's the first case of the term. So it'll be very interesting to see that case. Last thing I'll note, there's also a very important kind of procedural jurisdictional issue in that case that is made for Justice Barrett. So if people listen to that oral argument, listen very carefully to questions that Justice Barrett raises about the Court's jurisdiction in that case, because I suspect she'll be very interested in that part of it.

[01:04:19.7] Julie Silverbrook: Jonathan, Masha, thank you so much for a wonderful conversation. This was like a tour de force of both the dynamics of the Court and also, I think we cited almost every case the Court decided this past term, both by name and topic, which I know our listeners will really appreciate. Thank you so much for joining us on We The People.

[music]

[01:04:37.3] Jonathan Adler: My pleasure.

[01:04:38.3] Masha Hansford: That was fun.

[music]

[01:04:45.2] Julie Silverbrook: This episode was produced and mixed by Bill Pollock with production support from Charles Sahm. Research was provided by Anna Salvatore and Tristan Worsham. This year, there is a question that our team at the National Constitution Center has been asking as we celebrate America's 250th anniversary. And we look to the Constitution's 250th anniversary in 2037 and the Bill of Rights' 250th in 2041. The question we keep returning to is, what will future generations say that we chose to build during this decade of milestone anniversaries? I'm excited to share with you that we've launched a new Substack which will explore this question. It's called *The Civic Decade*. This is a moment to not simply celebrate our constitutional inheritance, but to strengthen the institutions, civic habits, and constitutional culture that will determine whether it flourishes for another 250 years. Join us on Substack, civicdecade.org. Please recommend We The People to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional education and debate. And as always, remember that the National Constitution Center is a private, nonpartisan nonprofit, and we rely on your generosity, passion, and engagement for all of our programming, including this podcast. Please consider donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Julie Silverbrook.