CONSERVATIVE CAUTION V. PROGRESSIVE ORIGINALISM:

HOW JUSTICES BARRETT AND JACKSON ARE PAVING THEIR OWN PATHS ON THE COURT

CARDOZO JOURNAL OF EQUAL RIGHTS AND SOCIAL JUSTICE SYMPOSIUM

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I. WELCOME AND OPENING REMARKS

MS. PERARIA: Good morning, everybody. My name is Hope Peraria, and I am the Editor-in-Chief of the Cardozo Journal of Equal Rights and Social Justice. Formerly the Cardozo Journal of Law and Gender, our Journal now features intersectional analyses of a broad range of topics related to anti-racism, human rights, international law, immigration, civil rights, family law, criminal law, environmental justice, and more.

Right now, much of the scholarship and litigation on individual rights and separation of powers is grappling with the Court's originalist turn and the different approaches of each Justice. Notably, the Court's newest Justices, Barrett and Jackson, have been differentiating themselves from their respective conservative and liberal blocs.

Our advisor, Professor Rudenstine, suggested this symposium topic after the Court passed down its June 2024 decision, which featured surprising opinions by each Justice. The topic was inspired by the 1991 symposium that Professor Rudenstine organized shortly after Justice Scalia joined the Court and it became clear that his jurisprudence would be influential.

Today, we are excited to take an in-depth look at Justice Barrett's willingness to side with the liberal justices and her "workable" model of originalism, and Justice Jackson's independence and take on progressive originalism. And we have three panels in which we will do so.

The first panel will focus on the Justices' take on presidential immunity, and the second on their opinions on firearms. The final panel will discuss their ideologies more broadly and their beliefs about judicial decision-making.

We are really excited for the powerhouses of constitutional scholarship that we have assembled today to cover these issues. We are grateful to have you join us today and learn from your expertise.

II. PANEL 1: PRESIDENTIAL IMMUNITY

MS. OLIVIA COHEN: Thank you, Hope. Thank you all for coming, and we hope you enjoy the event today. The first panel will specifically focus on the Supreme Court's opinion in *Trump v. United States*, which was decided in 2024. The Court established that presidents exercising core constitutional powers may not be prosecuted and that former presidents are entitled to presumptive immunity from prosecution for official actions they took while in office.

The Court then determined that then-President Donald Trump had substantial immunity from prosecution for the events surrounding January 6th and his efforts to overturn the 2020 election.

Today's panel will be moderated by Professor David Rudenstine. Professor Rudenstine is a prominent legal scholar and a Sheldon H. Sloan Professor of Law at Cardozo School of Law, where he served as the Dean from 2001 to 2009 and has taught constitutional law since 1979. Professor Rudenstine has specialized in the topics of free speech, freedom of the press, national security, and terrorism.

He has also published numerous works on constitutional law, including four books. Notably, his book, *The Day the Presses Stopped: A History of the Pentagon Papers Case*, was nominated for a Pulitzer Prize and has been highly influential in examining the First Amendment. Currently, he is writing a manuscript on Chief Justice Charles Evan Hughes.

Finally, Professor Rudenstine served as the Journal's Faculty Advisor this year, and we are so thankful for all his help in inspiring and supporting the symposium from the beginning.

Today, we are excited to welcome Michael Waldman to Cardozo as one of our many esteemed panelists. Michael Waldman is the President and CEO of the Brennan Center for Justice at NYU School of Law, which focuses on raising awareness of various issues, including voting rights and constitutional law.

Mr. Waldman specializes in the presidency and American democracy. From 1995 to 1999, Mr. Waldman was the Director of Speech Writing for President Bill Clinton. In 2021, he was a member of the Presidential Commission on the U.S. Supreme Court. Additionally, Mr. Waldman has sent numerous works published on constitutional law issues, including voting rights and the impact of presidential speeches.

Finally, Mr. Waldman has also made television appearances on *60 Minutes*, *PBS NewsHour*, and *Good Morning America*. We are excited to hear Mr. Waldman's insights on presidential immunity in the wake of *Trump v. United States*.

Please also give a warm welcome to Eric Freedman, our second panelist here today, to discuss presidential immunity and *Trump v. United States*. Mr. Freedman is a Siggi B. Wilzig Distinguished Professor of Constitutional Rights at Hofstra Law School.

Mr. Freedman is a scholar and a leader in a variety of civil liberties fields, and his scholarly works include *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?* and *Naming Robert Mueller as Special Prosecutor Isn't Enough*. Mr. Freedman has also testified on these topics before Congress and is frequently quoted in the media.

In addition to teaching constitutional law, Mr. Freedman is actively involved in the American Law Institute, the American Bar Association, and the National Coalition Against Censorship. We look forward to hearing Mr.

Freedman's thoughts on presidential immunity and how the Court's interpretation of it has expanded in recent years.

I will hand it over to Professor David Rudenstine.

PROF. RUDENSTINE: Okay, thank you very, very much. It's a real pleasure for me to be here, and it's an honor to be moderating the panel with Eric and Michael as our guest speakers. Eric will speak first, Michael will speak, and then we might have a back-and-forth for a few minutes about issues that they agree or disagree about, and then we'll open it up for questions from all of you. And then sometime around 10:30 or so, we'll end and there'll be a little bit more food before the next panel.

Let's see, a few words about the two justices that prompted the symposium for today. Justice Barrett, born in 1972, she's 53 years of age. She's the fifth woman to be appointed to the U.S. Supreme Court following Justices O'Connor, Ginsburg, Kagan, and Sotomayor. She clerked for Justice Scalia.

She professes to be an adherent to originalism. Her own appointment to the Court was highly controversial because she was nominated by President Trump only 38 days before the 2020 election, and that was against the background where the Republican Party refused to have a hearing with regard to Obama's nomination of Merrick Garland to the Supreme Court, and that nomination was many months before the 2016 election. Barrett was confirmed by a vote of 52 to 48.

She is now possibly a critical swing vote on the United States Supreme Court, and as you all may have seen in Adam Liptak's newspaper article yesterday, he emphasizes this, and I'm just going to read his first paragraph. Justice Barrett is a junior member of the Supreme Court's conservative majority, having served just three full terms, but her vote may be decisive as the justices consider whether and how hard to push back against President Trump's efforts to reshape American government. Her vote is the fifth vote, assuming for the moment that Chief Justice Roberts joins the three liberals on occasion, as he did in the opinion that prompted the article yesterday.

Justice Jackson was born in 1970. Now, she's 54. She's the first African-American woman to serve on the Supreme Court, and she's the first former federal public defender to be on the United States Supreme Court.

She clerked for Justice Breyer. Before she made it to the Court, President Obama appointed her to the U.S. District Court in 2013. President Biden appointed her to the D.C. Circuit Court in 2021, and then President Biden nominated her for the Supreme Court of the United States in 2022. She was confirmed by the United States Senate by a vote of 53 to 47. She is considered to be part of the liberal wing of the Court.

Today's focus, or this panel's focus, is on *Trump v. United States*, which the United States Supreme Court decided on July 1st of 2024. The vote in

the case, I think, was 6 to 3, and more or less, the United States Supreme Court said that when the president is exercising core executive functions, he may not be criminally prosecuted for any action taken with regard to his business within that framework because of an absolute immunity guarantee to the president by the Constitution.

So with that, let me turn it over to Eric, and then he will be followed by Michael.

PROF. FREEDMAN: Thank you so much. Professor Rudenstine has been characteristically generous in assigning roles on this panel because if someone on this panel were going to play the role of designated old guy, it should be him. But instead, he's generously ceded that slot to me.

And the basic point I want to make to you about *Trump v. United States* before we get into the weeds is that, in terms of disrupting the fundamental architecture of the Constitution, it may be the most revolutionary decision in United States history. And I want to make sure that is clear before we normalize it and start parsing out the nuances of this opinion or that opinion.

My point is not that it's a thoroughly pernicious opinion because it is contrary to original intent, although it is, but because as a functional matter, it wrongly ignores all of the critical considerations that have repeatedly led every public official and every Court since the founding era right up to the Court of Appeals in this very case to reject the idea that a former president was immune from criminal prosecution.

All right, so let me lay out the main features of the path that got us to the current Court before I end with a few words about the opinion. Because what we're talking about here in the *Trump* case is a bit like an airplane disaster, right?

A part of the plane that nobody's paying a lot of attention to gets worn and chafed and stressed over time. And for various reasons, nobody intervenes. And then all of a sudden, there's a spectacular mid-air explosion of the airplane that grabs everybody's attention, and we convene an academic panel to look at all of the colors of the fireball and the smoke swirls, and we see if those patterns tell us anything.

Well, that's certainly an appropriate response. But before we turn our attention to the explosion, I want to provide a bit of the background. And so, vindicating my old guy credentials, when I wrote a letter to the Editor of the *New York Times* in 1973, when I was still in college but Professor Rudenstine was already four years out of law school [laughter], at that time, it was an open question whether President Nixon could be indicted while he was still in office. And that disagreement, whether a president could be prosecuted while still in office, was a very reasonable debate over an open constitutional question.

In fact, in a rather rare phenomenon in constitutional history, we have direct evidence of what the framers thought about that very issue, and what we know as clearly as we know anything in history is they disagreed about it. We know this from the pamphlets they wrote, like *The Federalist Papers*, but the equivalent ones elsewhere, from the debates in the state ratifying conventions, which are recorded, and from a rather dramatic exchange on the sidelines of the U.S. Senate, which I'll get to.

The text of the Constitution says, "Judgment in cases of impeachment shall not reach further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States, but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and impeachment according to law." And some people thought that that nevertheless meant "afterwards" and praised or damned the Constitution accordingly. Some people thought it meant "in addition" and praised or damned the Constitution accordingly.

And those competing views were extensively debated, and for anybody who's interested, I've got an article with lots and lots of quotes, people taking those various positions, and I can even tell you about the Senate vote, which split 10 to 10 on that very question.

But let me give you just one example of the dialogue, and this comes from the diary of Senator William Maclay, who was a Jeffersonian from Pennsylvania and a member of the very first Senate. And on September 26, 1789, just before the day's session started, he joined a conversation, which was then in progress, between Vice President Adams and a couple of other senators, including Oliver Ellsworth, who had been at the Constitutional Convention and was about to be the author of the first Judiciary Act of 1789.

And they were saying, and I quote from the diary, that the president personally was not subject to any process whatever, could have no action whatever brought against him, was above the power of all judges, justices, et cetera. For what, they said, would you put it in the power of a common justice to exercise any authority over him and stop the whole machine of government? I said that, although president, he is not above the laws.

Both of them declared that you could only impeach him and no other process whatever lay against him. I put the case. Suppose the president committed murder in the street—like Fifth Avenue—impeach him, but you can only remove him from office on impeachment. Why then? When he is no longer president, you can indict him.

But in the meantime, he runs away. But I will put up another case. Suppose he continues his murders daily and neither house is sitting to impeach him. All the people would arise and restrain him. Very well, you will allow the mob to do what legal justice must abstain from? Mr. Adams said, I was arguing from cases nearly impossible. There had been some

hundreds of crowned heads within these two centuries in Europe and there was no instance of any of them having committed murder.

Very true in the retail way, Charles IX of France excepted, responds Maclay. They generally do these things on a great scale. I am, however, certainly within the bounds of possibility, though it may be improbable. General Schuyler joined us. What think you, General, said I.

I am not a good civilian—that is, a civil law expert—but I think the president a kind of sacred person, says Schyler. Bravo, comments Maclay, my jure divino— divine right of kings—man not a word of the above is worth minuting, but it shows clearly how amazingly fond of the old leven many people are.

Okay, so, on the floor of the first senate, they are having an argument about whether the president, while in office, may be criminally prosecuted, everyone agreeing. Then, and ever since right up to the Court of Appeals decision in this case, that of course, he can be prosecuted afterwards.

Meanwhile, as to that undecided point about prosecuting him while in office, future generations were left to muddle along on their own and skipping over some episodes of greater or lesser relevance—like Aaron Burr, while he was Vice President, being indicted by the states of both New York and New Jersey for the murder of Alexander Hamilton—we get to Richard Nixon. If you want to know what happened between Aaron Burr and Richard Nixon, you got to read my article.

Okay, now, Justices Barrett and Jackson were both toddlers at the time, but, in substance, Richard Nixon was suspected, with good reason, of ordering the burglary of the Democratic Party headquarters in the Watergate Hotel complex, and then having various parts of the government cover it up because that burglary was just part of a small—it was just a small part of a whole series of illegal campaign activities involving primarily illegal campaign contributions and a couple of other side jobs.

And the Justice Department appointed a special counsel, Professor Archibald Cox of Harvard, to investigate the matter. But when his investigation got uncomfortably close to Nixon, Nixon ordered the Attorney General to fire Cox. But he, Attorney General Elliot Richardson, who had promised the Senate in his confirmation hearings that he wouldn't do that, resigned, and so did his second-in-command, William Ruckelshaus. And that was the so-called Saturday Night Massacre, which ended when the third-ranking person, Robert Bork, did fire Archibald Cox.

And after the resulting political firestorm, Nixon had to permit the appointment of another special prosecutor, Leon Jaworski, who continued the investigation, and several of the prosecutors in Jaworski's office wrote a memorandum, which you can find reproduced in full in the Hofstra Law Review, recommending that Nixon be indicted. But Jaworski decided not to

do that. And the disagreement in Jaworski's office over the constitutional question of whether the president was immune from indictment was discussed in perfectly sensible constitutional terms as a functional matter.

Some people were of the view that the Constitution had to contain that implied immunity because indicting the president would be the functional equivalent of removing him from office, and you could only do that by impeachment. And other people said those practical objections were not insurmountable, and it was a good idea to have two available tools, both prosecution and impeachment, to control the president.

So, if the president misbehaved in office, you might want to remove him if his conduct reflected on his fitness for office, even though it wasn't a crime, like lying to the American people about whether you were bombing the neutral country of Cambodia. That's not a crime, but it may reflect on your fitness for office.

Whereas, if the misconduct was of another sort, like drunk driving, the right tool for the job might be criminal sanctions. We certainly want to show our disapprobation of that conduct, but there's no reason to remove someone from office who has the confidence of the people. And if that kept him from committing crimes while in office, all the better.

And so it's a perfectly rational, functional discussion, and the upshot was Jaworski did not indict Nixon, but the Supreme Court upheld the subpoenas issued by his office, with the result that Nixon resigned, all of which proved that the country had simply gotten lucky. It would hardly do to have decisions about indicting the president made by an employee of the Justice Department.

So Congress passed a statute in 1978 providing for a panel of judges to appoint an independent counsel, not a special prosecutor, an independent counsel to investigate wrongdoing by high-ranking government officials, and that independent counsel had security in office.

And in 1988, in a case called *Morrison v. Olson*, the Supreme Court, by a vote of 7 to 1 with only Justice Scalia dissenting, upheld the constitutionality of that independent counsel law as a legitimate response to the conflicts of interest that could arise when the executive branch is called upon to investigate its own high-ranking officers.

Right, the problem with that case was that the majority opinion was terrible. And everybody, whether they agree with it or disagree with the outcome, agrees on that point. Okay. The majority opinion spent all its time trying to prove that the independent counsel was not so independent, which wasn't true. It was designed to be independent, but it was how the majority tried to deal with Scalia's statement that prosecution has always and everywhere been conducted by the executive, and so to remove the prosecution function from the control of the executive was unconstitutional.

The problem is that Justice Scalia's statement was not only wildly overstated, there are a variety of examples of divided prosecutorial power, but also a red herring. What the majority should have done would have been to face the situation squarely and say, okay, the history is mixed, let us look to what this independent counsel official really does, and whether it promotes non-tyrannical government to give her tenure in office. And plainly doing that will help forestall tyranny while not opening any new possibilities for abuse, because if she does misuse her power, she can be removed for misconduct, and so giving her tenure will promote effectiveness in office and not violate, but in fact advance liberty, and we uphold the office squarely on that structural basis.

But they didn't write that opinion. Again, they wrote an opinion explaining why the independent counsel was not an independent counsel, and the majority was so weak that everyone, including specifically all the parties to the Trump case, now treats *Morrison* as though Scalia's solo dissent represented the law. And so, everyone is quite sure today that any new independent counsel statute would be invalidated.

Meanwhile, returning to our chronology, after *Morrison v. Olson*, the independent counsels, with normal glitches, were basically doing well in investigating presidential misconduct. In fact, far too well for the comfort of the political world. Republicans were upset with the investigation by Lawrence Walsh into Ronald Reagan's involvement in the Iran Contra Affair, and Democrats were upset by the investigation by Kenneth Starr into the Monica Lewinsky affair. And so, the parties colluded to let the independent counsel statute die when it expired in 1994.

And therefore, we never got someone with independent judgment addressing what was still the open question of whether a sitting president could be indicted. Instead, we went back to that regime of special prosecutors who were Justice Department employees, and the key thing about them was they were bound by Justice Department policy. And the policy of the Justice Department, this is going to shock you all, the policy of the Justice Department was that a sitting president could not be indicted.

And you saw that policy truncating the Mueller inquiry into President Trump during his first term, right. Mueller refused to put into his report material that implicated Trump on the basis that since he couldn't be indicted, he'd have no opportunity to defend himself. But again, it never occurred to anybody that there would be some kind of blanket immunity protecting a former president. In fact, as most of you know, when President Trump was impeached for inciting a mob to attack the Capitol, Majority Leader Mitch McConnell in the Senate took the position that I actually believe he was indeed responsible for the appallingly violent attack that was made on me and my colleagues while performing our constitutional duties in this Capitol,

and he is amenable to being prosecuted for it. Therefore, you should join me in voting against his impeachment.

And that is why no one, including the Court of Appeals, took seriously Trump's claim of immunity when he was prosecuted for those actions. It was universally considered to be a stalling tactic that would be rebuffed by the Supreme Court because the entire predicate of the system of rotation in office, which had been accepted as axiomatic by all those debaters all these years, was that some ordinary person becomes president for a limited time, and when the limited time is over, they go back to being an ordinary person. See George Washington. And the knowledge that when they do, they can be prosecuted for whatever crimes they may have committed while in office isn't an inhibition to their exercise of the vigorous powers of the office, it's an inhibition to their abuse of the powers of the office, which is exactly why there had never been any prosecutions of ex-presidents up until now. As Justice Sotomayor's dissent here correctly says, that fact demonstrates that the system was working as intended.

And so for the Supreme Court to decide to fix that, which only Donald Trump thought was broken, was, as I said at the start, such a revolutionary act that, you know, just as it's a joke to ask, other than that, Mrs. Lincoln, how did you enjoy the show, right? We'd be seriously disconnected from reality if we didn't start a discussion of the Trump opinion by recognizing that background.

And I think it follows that what you have here is a judicial power grab, as in many cases where the Court claims to be preserving the autonomy of other actors by imposing limitations on Congress, what it's really doing is enhancing its own power by coming up with cloudy and manipulable standards, as Justice Jackson correctly emphasizes throughout her opinion.

And that, plus the fact that this case manages to make absolute hash of pretty much every single case it cites, tells me that the real long-range impact is less likely to be in affecting potentially criminal conduct by presidents than in striking down congressional statutes in other unrelated areas that are now somehow within the zone of presumptively presidential powers that we have just declared in this context.

Okay, so now I'm prepared to say a few words about the specific question that I was asked to address and the respective approaches of Justice Jackson and Barrett, not deep philosophical questions about their approaches to originalism, which I will leave to others, but I would start by observing something that they have in common besides their extreme use, namely that the professional environments in which they spent their time before going on the bench were not in the executive branch, and I think that influences both their outlooks.

Now, Justice Barrett, who is a law professor, which has suddenly become a point of attack against her by the people on the right who thinks she's gone soft, tries to bring, in the Trump opinion, a bit of light to the shadowy zone, and she says two things that I would note.

First of all, we don't have to opine on congressional power if it doesn't seek, in some general criminal statute, to control the president. In other words, we apply the very basic principle, going back to John Marshall and repeatedly applied ever since, of going for a statutory ground first and, where reasonably possible, trying to construe a questionable statute as constitutional.

All right, if it's possible to give a statute one meaning or another, we go, and sometimes rather implausibly go, for the one which makes it constitutional. And there are many situations, including the series of Guantanamo cases that took place between 2004 and 2008, in which those techniques can have a major effect on the outcome.

And the next thing Justice Barrett tries to do is to help the poor District Court in figuring out what in the world is meant by statutes that pose no danger of intrusion on the authority and functions of the executive branch. Now, she's not particularly helpful here, only coming up with one extreme example from the indictment, namely the attempt to interfere with the electors in those various states, given that the president and, in fact, the national government does not have any official role in the selection of the electors as a matter of constitutional design. But, because on remand, Smith filed an extensive brief on this very issue. And thereafter, the case mooted out.

Those of you who want to propose limitations on that shady language have a great opportunity to do that in law review notes. And if you do, someday, Justice Barrett may cite you with gratitude. And that's because any actual attempt to indict a former president, which I seriously doubt is going to happen anytime soon, is going to wind up before the Supreme Court prior to a trial.

So the rubber is going to meet the road there, rather than in the arcane dispute about what evidence is and is not admissible at trial. There ain't going to be no trial.

All right, and Justice Jackson whose background is largely in criminal defense, also writes separately. And she proceeds from small to large. On the most focused level, her point is that if the concern is that a successor president will be wrongly prosecuted by the prior one, the criminal law has plenty of safeguards against that. And broadening the frame, as I said, she takes on the majority, quite rightly, for arrogating power to itself.

Right, recall Alito saying at the oral argument, we are writing for the ages here. Well, I thought, and Justice Jackson suggests, actually it's the U.S.

Congress that's supposed to write for the ages, right? You are—after they do—then you're supposed to review it. But you are not supposed to be writing for the ages. And Justice Jackson calls him out on that.

And more broadly, if the concern is that the president is going to be inhibited in doing things because she feels she may break the law, that's a good thing, not a bad one. The fact that the person who becomes president can't just do whatever they like is a design feature, not a bug. The entire structure of the Constitution prioritizes safety from tyranny over rapid, decisive, and unilateral action. That's the very purpose of separation of powers and the very concept that the majority has turned upside down.

So, I guess what I would say about Justices Barrett and Jackson in an overall way is that they both bring valuable new perspectives to the Court. And, without doing anything that would imperil the funding of this fine law school, I would say that diversity of all sorts that brings different perspectives to decision making tends to increase the quality of the decision making. And I would hope that over time, these two youngsters will prove me right about that.

[applause]

PROF. FREEDMAN: Thank you very much.

PROF. RUDENSTINE: Thank you very much, Eric. And before I turn it over to Michael, I have an anecdote to tell you that I've never had an opportunity to tell anybody before. So, maybe they know this story, but it has to do with the Saturday Night Massacre. Okay, so that was in October of 1973, and Nixon had fired everybody, or at least Bork had, on behalf of the president. And the young male prosecutors who were part of the team were worried that the documents that they had accumulated would be gathered by the Nixon administration and then destroyed.

So, within hours of the announcement that Cox had been fired, they went into the office where all the files were, and they were there with their spouses, who at that time were not wearing slacks but wearing dresses and skirts. And then the question was, "How are we going to get these documents out of here?" Because they were worried that they would be searched when they left the building.

So, what I was told by one of these older men now, who was then a young prosecutor, was that they all looked at their spouses and said, "Please put the papers under your dresses and your skirts, and we will hope that the officers in the front of the building will not search you as opposed to searching us." So they did that, and they got all the papers out of the office.

Then it turned out that the Nixon administration wasn't at all interested in destroying the papers. So they brought them all back a couple of days later. But all of these documents were taken out by these young guys with their spouses, and that was in the late evening of October of 1973.

So, anyway, if you haven't heard that story—and I doubt that you have because I was told this only recently and not many people have heard it. Have you heard the story?

PROF. WALDMAN: No.

PROF. RUDENSTINE: Really remarkable, and I actually interviewed him again and wrote elaborate notes, and so if I'm ever subpoenaed I have them.

[laughter]

PROF. RUDENSTINE: There you go.

PROF. WALDMAN: It may be too good to check.

PROF. RUDENSTINE: [laughter]

PROF. WALDMAN: But that's a great story. Thank you so much for being here. Thank you for this panel. Thank you Professor Freedman for a master class. I agree with everything I heard.

At the founding, Thomas Paine wrote, "In America the law is king." And we as a country right now are testing whether that is still true. We're having this conversation, I would argue, at a time of constitutional emergency for the country. In the first weeks of this new administration, we've seen a presidential law-breaking spree, unprecedented in American history. Executive action on the first day purporting to end birthright citizenship, which is literally written into the Constitution in the 14th Amendment. Widespread impoundment of funds, the use of DOGE to shut down government agencies, and spending over and over and over again. Dozens of court cases that have already, in many instances, blocked, at least on a temporary basis, the actions of the administration. The Vice President of the United States responding by saying, "Why should we have to follow court order?" And the President tweeting out an image of himself with a crown as a king.

As I say, this is a constitutional emergency of a kind we have not really lived through—any of us before. And all of this in the shadow of what was, I agree, one of the most radical and most destructive decisions in American history, ranking among other things with Dred Scott and its impact on the constitutional order, *Trump v. United States*.

Justice Barrett, in particular, and I'll talk a little bit about her concurrence and her jurisprudence, as well as Justice Jackson. She really has a choice to make in the constitutional clashes coming over the months of this year. Will she be—if I can use a contemporary political analogy, will she be the Susan Collins of the U.S. Supreme Court? Somebody who can be relied on to express some worry to say the right things, but ultimately, then, to vote with the malevolent majority, [laughter] or will she cut her own path even if it means standing out on her own? And as we can see in some of these recent

cases, bringing a majority with her, she has a very significant role to play and a choice to make.

Start with the magnitude of what we're really talking about, which by the way, it's important to note, if you look at the majority opinion in *Trump v. United States*, it simply ignored the context of it. What Donald Trump did in trying to overthrow the results of a free and fair presidential election using the power of the presidency and leading up to January 6th was perhaps the worst crime in American history. It was certainly arguably the worst thing any president had ever done, and this prosecution about which this case focused—what this case revolved around—was emphatically appropriate to bring.

There are many questions about whether you should be prosecuting former presidents about other things. I have actually considerable doubts, for example, about the prosecution by Jack Smith in the documents case. But, to my mind, of all the legal actions taken against Donald Trump, the federal prosecution on January 6th was entirely emphatically appropriate and vital to be heard by a jury before the election. That was the basic fact. And everybody understood that, not just that all the presidents had said the same thing beforehand, but that the real issue was the timing.

People talked about "Stop the Steal." We said, when you saw the slow walking of this, it was sort of "Start the Stall." Smith appealed to the Supreme Court in December of 2023. They chose instead to hear the arguments in the last hour of the term in June of 2024. Even then, people assumed, "Well, they're obviously just kind of dragging this thing out and figuring that they'd make some ruling. And that if there were a trial, it would be way in the future."

Pretty much nobody expected what they actually did. One of the reasons that that was such a surprise is that on issues of presidential power, in those cases where the Supreme Court is called upon to check the power of the executive branch and the presidency, Justices, and especially Chief Justices, strive for unanimity or at least as close to it as possible.

The Nixon tapes case from July 1974, *United States v. Nixon*, was 9 to nothing. And the New York Times actually reported on the front page two weeks before, erroneously, that it was going to be 7 to 2 and that Chief Justice Warren Burger was running in dissent. But actually, that was something that may not have been so erroneous, but he joined the majority, so it would be unanimous. Just the way, if you think about it, *Brown v. Board of Education* had been.

In the case that was most relevant from the time I was working in the White House for 7 years for Bill Clinton, in the Paula Jones case, that was also 9 to nothing. The magnitude of addressing this issue of presidential accountability was deemed to be something significant enough that the Chief

Justice and others would want to speak with one voice. According to Jodi Kantor and Adam Liptak's coverage in the New York Times, John Roberts did not care about winning over what was possible, which was the votes of what became the dissenters. They were perfectly happy, perhaps even preferred, to have a MAGA majority rather than to speak as an institutional voice for the Supreme Court.

That in and of itself was quite consequential and is why, one of the reasons, the opinion was as broad and sweeping as it is. And when we talk about it I think it's important that we not say, "Well, now, it's been established that presidents cannot—former presidents—cannot be prosecuted." This Supreme Court, in a radical decision, said it, but I certainly hope we don't accept in our minds that this has been what's established. Because this is one of those Supreme Court rulings, like Dred Scott, that will be, and I hope should be, and I hope will be, in one way or another, overturned.

The opinion itself is worth looking at. It is not well done given the magnitude of it, given that the idea was to quote right for the ages as opposed to dealing with the case in front of it. And I say that as somebody who, in some way, understands there's a real risk in having too many prosecutions of former presidents. It's not crazy to come up with some limited principle. The limited principle, as Justice Jackson writes in her dissent, if nothing else, is the series of checks inside the criminal justice system that make it hard to prosecute anybody in a position of power—or why we haven't had those prosecutions before.

But when you actually look at the opinion itself, it really makes some outlandish claims with significant logical or factual or historical challenges. Robert's main sweeping language is that we thus conclude that the president is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

Well, to start with, Donald Trump was not the president. He was a private citizen who had once been the president. But he is—this is—an absolute immunity from the exclusive sphere of constitutional authority. Well, what is that "exclusive sphere of constitutional authority"? Presumably, that includes things like pardons, which are mentioned in the constitution as something presidents get to do.

Yet, there have been investigations. Bill Clinton was investigated to see whether he had sold pardons, which he did not. But that nobody at the time thought it was an illegitimate question to ask if there was evidence that bribery or some other thing like that had taken place relating to pardons. The mere fact that a pardon involves a presidential core power did not seem to turn it into some different category if it was part of some other unconstitutional scheme.

Even broader than that, there's language in the opinion that says that one of these core powers is not just something like a pardon, which is in the Constitution, but that the president has exclusive power over the prosecution decisions of the Justice Department. And, therefore, that the president telling the Justice Department, as Trump did, to lie about voter fraud to try to persuade state legislatures and others to overthrow the results of the election. That counted as being within his exclusive constitutional purview.

Even if you think it's the right move to say that there is some core power that cannot in some way be touched by the law, the definition of what that is was breathtakingly sweeping. And again, of course, the actual language of the actual Constitution does refer to prosecution of presidents after impeachment and removal, and doesn't make any distinction whatsoever about whether it's about core or non-core presidential power.

The second part—and some people say "well, yeah, but, really look, it's not as sweeping a ruling as you might think because there's the second category"—which is that presidents cannot be diverted by proceedings that might render him unduly cautious in the discharge of official duties. So things where there are presidential power but Congress also has an appropriate role under the *Youngstown Steel* case where there's kind of mixed sovereignty over a lot of things.

But that in those cases, the president is still presumptively immune and in fact really immune, because the standard according to the Court was that the president—they were worried that "the president would be chilled from taking the bold and unhesitating action required of an independent executive"—was immune unless the government, the prosecution, proves that applying a criminal law to the actions of an ex-president would impose no dangers of intrusion on the authority of the executive branch.

That is a very, very high bar. And they said, in making this point, that the president's motives in doing something that might otherwise be okay. But if it's done for a criminal purpose or as part of a criminal conspiracy, you are not allowed to introduce evidence of the motives into prosecution. It is a de facto immunity for those—I would argue—for those actions as well.

The third category supposedly is well private conduct, of course, presidents can be prosecuted for—ex-presidents can be prosecuted for—solely private conduct that a president engaged in while president. But, of course, it's very hard to parse out what that is. And again, it is easy for presidents to say, "Well, look, I was really doing this illegal thing as a president."

The underlying basic result of this ruling is that it is a road map for presidents who want to break the law of how to do it. Very simple. If you want to break the law make sure that your co-conspirators, like you, are drawing a taxpayer paycheck, and then it's okay.

John Dean—John Dean was the White House counsel under Richard Nixon, who orchestrated the cover-up on his behalf of Watergate and then turned state's evidence. He's alive. I'm sure he's spoken at the law school here. John Dean said, "look, under this ruling, so many of the things that Nixon was accused of doing, he would have been immune for." After a year and a half of fighting over the tapes and Watergate and everything like that, the tape that actually caused Nixon to have to resign in August of 1974—it was called the "Smoking Gun" tape. And it was a conversation a few days after the break-in with his Chief of Staff, in other words an official act, where he said, "Oh, I know how to turn off this investigation of my campaign. We'll order the CIA to go to the FBI and say 'oh, this is national security.'"

The revelation of that was explosive enough that days later Nixon had to resign. That would be immune. That is an official act. You cannot ascribe the motive to why did he ask the FBI—the CIA to go to the FBI and say, "Get off this case."

It's a breathtaking rewriting of many of the key moments in American history. Which brings us to Justice Barrett. There was a case, and the more you look at it, it doesn't get any better, I'll be honest. Justice Barrett, as you may know, wrote a concurrence. She voted with the majority on the key destructive elements of this ruling, and that is—when I say—she has a choice to make. But she also did a concurrence which would have taken the Court in a very different path.

It recognized, first of all, that the timing was a key issue. She said, "well, look, there's a distinct—" And she did this in the oral argument. She said, "look, there's a distinction to be made here between private acts and public acts, but we don't need to send it back down to the trial court." She asked a series of interlocutory questions and said, "Well, what about this one? What about that one?" She said, "We have to rule on this case, and we could decide right now which ones are the things that a trial could go forward to adjudicate." Instead they sent it back down.

But even beyond that, she dissented, in particular, on the notion that when—which was in the majority opinion—private conduct, which supposedly is still prosecutable, was being prosecuted, motive and public acts related to that private conduct could not be brought into court. And, if you think about it, that really neuters the idea of the ability to prosecute the private conduct.

Let's say there is a person who sells pardons. Bribery is illegal. Pardons are not illegal. But, if you can't talk about the pardon, a bribery prosecution is not going to make a great deal of sense.

She had a different path, yet she chose to vote with the majority. What would have been a different approach she could have taken? If she'd said, "I'm not voting for this opinion. I'm going to write my own opinion," or

maybe "I'm not going to go with Sotomayor and the others, but I'm going to write my own opinion." The optics of it would have looked very different. And perhaps she would have brought the Court more broadly around toward a more consensus position.

It was an intellectual—it was an instance where she was intellectually strong but weak in her execution, I would argue. And that again continues to be the question for her. She's an interesting person. She, as you've perhaps seen in recent days, she voted with Roberts to allow the sentencing of Donald Trump in the New York State court case although that was, you know, as they noted, the judge had already said there would be no prison time so that in a sense was not that hard.

In the last few days, they allowed a federal court order to freeze the government's—the administration's—effort to freeze spending to stay in place. In other words, the spending had to go forward; the four other justices who dissented were "stunned" that the president is not a king, but she ruled with Roberts and the liberals on that.

Perhaps she will cut her own path on this, but there will be four or five cases coming up in the next six months that will perhaps be the most important cases she will rule on in her whole time on the Court. And this is a matter where she needs to decide what she's going to stand for.

As you've heard, some of the political conservatives are mad at her and are saying she was, "DEI hire" and so forth. It is the case that she had a very short record before being put on the Court. She was a sort of factory setting originalist law professor just a couple of years before she joined the Court. We actually don't know all the permutations of her views, but she could have an important role here, even though she's only one vote, and we need to bring others with her.

I'll mention something quickly about Justice Jackson because she didn't play a significant role in this case, though she did write her own concurrence. What's noteworthy about Justice Jackson, as we will hear more in the later conversations, is that she has set herself forward in some ways as a progressive originalist. When she went before the Senate Judiciary Committee for her confirmation hearings, and she did very well in the hearings. One of the ways she did well was she, it seemed to me at the time, perhaps wrongly, to be mouthing the language that she thought she needed to say to get through the committee. "I pledge to only enforce those rights—unenumerated rights that are deeply rooted in history and tradition and other things of that nature."

And I said at the time that I thought it was—I understood why she was doing it, but I thought it was really too bad. Because it was a catechism of fealty to originalism that merely reinforced a misguided notion, in my view,

of how the Constitution ought to be read. I thought she was just kind of faking it.

This is something, by the way, that if you look at all of these confirmation hearings, not only for Supreme Court Justices but for any federal court, you go before the Senate Judiciary Committee. It's a one sided argument: the Republican Senators say, "Are you now or have you ever been a living Constitutionalist? Yes or no? Do you believe in originalism?" And the nominees all say some version of what she said. And the Democratic Senators, instead of having an alternative vision of the Constitution, say to the nominees, "Tell me about your family. Did you learn lessons of perseverance from your parents?"

And this has actually been a choice by the Democrats because they've wanted to move the nominees along, but it has led to a very lopsided concept of what the Constitution is and how it ought to be read at that very public level.

Then Justice Jackson went on the Court, and it turned out she wasn't faking. Some aspect of her jurisprudence emphatically is a version of progressive originalism, by which I believe she would argue it means that when you really look at the real original intent, when you look at the original public meaning, when you look at the purpose of these various constitutional provisions, they in fact don't necessarily lead to a current and reactionary current approach.

I think there are great limits to that kind of progressive originalism. I think in many ways it is a cul-de-sac. Even in her own time on the Court, she was extraordinarily effective and impressive, I would say, in asking questions during the hearings, during the arguments, for example, on affirmative action.

When you look at the 14th Amendment, how could you possibly say that the Reconstruction Era radical Republicans did not want race taken into account in the Constitution or in public policy? She had a pretty strong point.

I would say two things about that. Number one, it didn't move the conservative justices, and the second is that, even that while accurate, is a very limited claim. Yes, you can look at the 14th Amendment and say, "Yeah, when it came to race and the reconstruction of the country, and things like the Freedman's Bureau, which was designed to help the formerly enslaved people, they understood the need for race-conscious policy." But around women's rights, LGBTQ rights, do we really think that the original public meaning of the 14th Amendment leads to the equality and rights that we now take for granted or have taken for granted as a society?

I think that it does not avoid the underlying problems that I would argue are those of originalism. The idea that we need to be governed in 2025 by the social mores of people of white, property-owning men from the late 1700s, or maybe from the 1860s. I think that it will not ultimately be as

important as an alternative vision of the Constitution and how to interpret it that would eventually contest and supplant the kind of originalism we see now.

Very quickly, what are the implications for this moment, this constitutional emergency I mentioned, for this case? I would suggest there's a few. One is very specific and technical. The case was about the President. It was not about the entire executive branch. So, maybe you could say, "well, the law still applies to the appointees of the executive branch, to officials of the executive branch."

But as a practical matter, Donald Trump, or any president, could order illegal acts knowing that he will not be prosecuted for them ever if he can claim colorably that they are official. And then pardon the people he's ordered to do it and say, "don't worry, you don't have to worry about any legal accountability. I can pardon you, and the Supreme Court has said that, but they can't even question why I pardoned you." That's also an official act. It is, as a hydraulics of the Constitution, a get-out-of-jail-free card for a lot of people. So that's one of the consequences, very tangible, from that ruling.

The second one is going to help set the stage for these significant rulings coming up over the coming months about presidential power, about the spending power, about the ability of presidents to fire independent agency heads, and things like that. You all have studied or are studying the unitary executive theory: The claim that the Constitution gave the power of the executive branch to one person, the president, and in its most radical form that that power is complete and that the rule of law in effect does not apply to the executive branch, if you think of that as something Congress or the courts have done.

This case was not precisely about the unitary executive theory, but it made arguments and had a sense of the executive that is a version of the most expansive and dangerous versions of the unitary executive theory. As Jack Goldsmith, the conservative law professor at Harvard wrote, "If you really look at this case, it treats the immunity not as a shield but as a sword to give the presidents the ability to do a lot more than they would otherwise be able to do." The language in the case says, "Unlike anyone else, the president is a branch of government." And again, the law is not seen as the law that everybody has to follow, but the other branches meddling in what that one individual gets to do or not do.

So, I think that the tenor, as a predictive matter, whether this Supreme Court is going to be willing to stand up to even the most egregious abuses in coming months, it's not a good sign. And that helps build momentum for this unitary executive theory.

The third thing I would say is this, and this goes back to some of the things that Professor Freedman said. This ruling and the ending of the potential criminal sanction post-presidency for even the most outrageous criminal conduct by a president comes after the falling away of the other ways we hold presidents accountable.

Impeachment is effectively a null and void sanction and threat. It really rarely happened. The first presidential impeachment proceeding was with Andrew Johnson. It didn't happen again until the 1970s. The stigma of impeachment was so great that Richard Nixon resigned rather than facing conviction in the Senate because he knew he would get convicted, even by Republicans.

Then you had Bill Clinton, where I worked, who was impeached for the very kind of private conduct, lying in a deposition about an affair that the American people did not think was the high crime and misdemeanor that should have led to impeachment. But the most important thing there is that none of the counts brought against Clinton got even a majority in the Senate.

And then came Donald Trump's two impeachments, one after another, failing. The most significant of which was the January 6th, after the term was over, where you actually had quite a few Republicans voting for conviction, but not enough. The end result is, if you're a president and you're really worried about getting impeached, you're a worrywart. You're not really going to actually ever get removed from office. It will become something akin to a censure. It's kind of a pain in the neck to deal with, but it's not really a sword of Damocles hanging over the Oval Office. Now, it turns out, criminal accountability is not either.

And so, we are in dangerous and uncharted waters as a country. You have an extraordinary flood of power to the presidency, and in the hands, right now, of somebody who has strutted his unwillingness to restrain that power. It's going to be up to all of us. It's going to be up to the legal community as we see the crackdown on law firms and law firm representation. It's going to be up to all of us to demand that the Supreme Court, especially in the coming months, do its part to stand up to abuses of power by one of the other branches.

If it does so, it can be a really signal moment in our Constitution. But if it does what it did in this case, just about a year ago, it's a very, very distressing moment for the new constitutional order we find ourselves living in.

[applause]

PROF. RUDENSTINE: I wish I can say we're having an upbeat moment here. You both have considered this opinion to be dangerous. I think Eric calls it the most revolutionary decision in United States history. And I think, Michael, you call it dangerous and uncharted waters, right?

So, I know you are lawyers and not psychiatrists, but if it's so clear that this is a horrible decision that threatens the underpinnings of the United States constitutional system, then why would the six people on the Supreme Court vote the way that they did here, because they're also citizens. They also have families. They're going to have kids and grandkids who are going to be growing up here.

So, why would they want a country or create a political structure for a country which opens the door to such dangerous and uncharted waters? So, it doesn't matter to me which of the two of you go first. Go ahead, Michael.

PROF. WALDMAN: It's a good question because, you know, one of the things that was noteworthy was in Trump's first term, the Supreme Court did not bail him out of his legal accountability, quite frequently chose to not bail him out, and in the period of him trying to overthrow the results of the election, the Supreme Court, along with dozens of other courts, would not go along with that. So, what caused this radicalism of this decision? Some of this, I think, flows from many years of response to, on the part of pro-executive branch attorneys and judges, what they view as a bit of a stab in the back, which is that they really didn't like the regime of legal accountability for presidents going back to Watergate.

And it is hard to avoid the partisan analysis as well. I'll say something that is not, you know, usually said in polite company at a law school, but it's important to understand and analyze institutions, including the Supreme Court, in partisan terms. The six justices who voted for this ruling all were appointed by Republican presidents.

And the Supreme Court often is best understood as a factional fight among Republican factions. We don't like to think of it that way because we want to have a real, strong independent Supreme Court. But think about this. Democrats and Republicans have kind of roughly split control of the White House for about half a century, in terms of who occupies it. The last time a Democratic-appointed majority sat on the United States Supreme Court was 1969. The last Chief Justice of the United States appointed by a Democratic president was in 1946.

A lot of that is just luck. But it is a functionally conservative and, in fact, a functionally partisan institution in many ways. And this ruling came at a time not when Trump had just lost the election, but when his poll numbers were rising.

And when I think that the various prosecutions kind of offended the sensibilities of a lot of these justices, and they thought they were going to do a job to protect the presidency, but in doing that, they protected a presidency unbound by law.

PROF. FREEDMAN: I guess I would say, you know, in historical perspective, King George was a long time ago. Oh, and P.S., you know, latest

scholarship suggests King George was not such a bad guy. And certainly, that's been the position of Attorney General Barr for some time.

It's all grossly overstated what a horrible guy King George was, but more seriously, right? And none of that can happen here. That's all archaic nonsense.

And the concept of tyranny in that sense is something for law professors. At the time this case came down, they hadn't seen what just has happened in the last six months. It may well be that all of a sudden, all these warnings about the dangers of an imperial presidency and the unchecked ability to run roughshod over all the branches of government, including the U.S. Supreme Court, would have had more resonance if they could have imagined some of the stuff that happened. They should have because, again, anybody who believes in original intent or even, you know, anybody since then who believes in a structure that, as I said, is designed more for safety than for efficiency, right, should be disposed to have a healthy paranoia about destroying guardrails. But I think, you know, being more historical and less psychological, those fears were not as salient as they should have been, and therefore we could engage our sense of grievance about how the executive branch has been emasculated over the years by administrative agencies, by Congress, by all these meddling investigators, by the press, by, you know, all these things that prevent us from doing what's the right thing for the good of the country, which I think it's fair to say all, everybody in the executive branch, whoever the president is, thinks, you know, if only I weren't being checked by the courts, by the press, by the investigations, by the majority leader in Congress, I would, you know, I'd get some stuff done around here.

Well, that's, you know, that goes with the territory, and a number of these Supreme Court justices served in administrations where, you know, that was their view, and, you know, we're now in a position to do something about it without understanding, as, you know, most presidents have, that yes, it's a goddamn nuisance, but I'm lucky, in fact, being, you know, in the dead of night being rational, I am lucky that I am not a dictator because that would be worse.

PROF. RUDENSTINE: Okay, so we have about ten or eleven minutes before we're supposed to have a mandatory break so you can have more coffee and stuff like that. So, we have some minutes, we have a little bit of time for some questions. If you keep your questions short and to the point, then we'll get an opportunity for more questions and more answers.

So, yeah, go ahead.

AUDIENCE MEMBER: I'm sort of curious, given the ruling of a few days ago where Barrett sided with Roberts and the liberals, do you think that that was something that Trump and his people would have expected to happen, given how *Trump v. United States* went? Do you think they were

expecting it to go the other way, as if *Trump v. United States* had set up some sort of precedent that it would sort of always go his way, this court split?

PROF. FREEDMAN: Well, no one has ever, no one has ever confused Donald Trump with a legal analyst. But, you know, sitting in a law school, there really is a difference between the sort of one-off business about indicting a president and the idea that Congress says "spend money on X," but the president says "since I think that that's a terrible idea, I'm just not going to do it because I'm the president and, you know, right?" In fact, from a little historical perspective, there's a king of England who lost his head this exact same way. And he didn't call Parliament into session for 12 years because they were going to put conditions on appropriated funds, which then he would have to abide by.

So, therefore, this business about funds in which I don't want to jinx myself, but I actually think at the end of the day, Trump is going to lose about that because that same claim was made once in the 1870s, was made in 1974 and has been repeatedly rejected for that very good reason. Because if the concept that Congress can appropriate money and then the president doesn't spend it because he doesn't like the policy puts the entire policymaking power of the country into the president.

And I think even for these people, that's a bridge too far. And I may say that the Office of Legal Counsel opinion, rather forcefully taking the view that there is no constitutional basis for that claim of authority, was written by the head of the Office of Legal Counsel, a guy by the name of William Rehnquist.

PROF. WALDMAN: I'll say I think if you look at the cases that are coming before the Court now, some of them—and I say this, the Brennan Center, we have a Constitutional Crisis Litigation Project, as we call it, with capital letters, doing a lot of amicus briefs and working with others on the front of the court briefs that will, we hope, have an impact on the adjudication coming up. Something like an executive order purporting to end birthright citizenship is so flatly unconstitutional. Within three days, a judge appointed by Ronald Reagan called it flagrantly unconstitutional. I think this Court, for example, will find that.

On the other hand, I think that a lot of the things relating to the president's power of appointment and the role of independent agencies, I think overturning the case of *Humphrey's Executor*—which limited the ability of a president, when Congress has set a term for a kind of commissioner or something like that—I think that many of the Justices on this Court were pining to do that when Donald Trump was a liberal Democrat. And I think that the biggest questions are these questions of presidential versus congressional power over spending.

And I hope the Professor is right. I think that four votes here were rather unnerving and that the ruling this past week was not on the substance. It was just whether a lower court order could stand.

But that it is the case that if presidents can just decide on spending, hiring and firing, ignoring the law, because anything that happens within the executive branch is the personal purview of the president, then Congress is merely rendered an advisory body.

I hope that if this Court takes seriously what a number of Justices have written in other cases, they will see it that way. But those cases, I will note, and I don't mean to sound cynical, were about Democratic presidents and their responses to Congress. And I'd like to see how they treat a Republican president with a Republican Congress.

PROF. RUDENSTINE: Yeah. I might offer just a slightly different perspective, although I think it's totally consistent with what's been said. Chief Justice Roberts is sometimes caught between two ends of the spectrum. On the one hand, being somebody perhaps who has some allegiance to originalism and a kind of unitary executive and a conservative bent.

And at the other end of the spectrum, he's sometimes called an institutionalist, which means that he's trying to distance himself from a political perspective, an originalist perspective, and trying to decide what's in the best interest of the country, what's in the best interest of the Supreme Court, protecting its legitimacy.

So, one example of that is he voted to sustain Obamacare under taxing power, and he probably did that at the last minute, and as I remember the political conversation at the time, was he changed his mind and that infuriated the conservatives on the Court who voted, you know, who were "in dissent." And if you read Scalia's opinion in the case, it sounds like it was originally written as a majority opinion, and then gets converted into a dissent.

On the other hand, Chief Justice Roberts votes to invalidate the 1965 Voting Rights Act, and this is somebody who, in other opinions, says that he has enormous respect for the democratic process, and although Congress passed the Act, he said it was unconstitutional at that time, in the 19, I think, 12 or 13 period. So, what you have here is somebody who's caught between two ends of the spectrum, and the question is, how is he going to decide these cases going forward? If he's going to have a majority, he needs either Barrett or Kavanaugh to come with him.

I don't think he's going to get the other members of the Supreme Court to join him. And Kavanaugh has sent some signals that he might be willing to swing here and there, but he didn't in this case of this last week, and it was Barrett. And so, what you have here, hopefully, from the point of view, I think, of the longer-term interests of the United States, is two justices who

are torn a little bit between, let's say, some political inclinations that lead them to unitary executivism or originalism, and a different leaning.

And what we have here in this last week was where they lean more towards what you might call institutionalism or protecting the country. And maybe, as Eric suggested, the difference between now and last June was Donald Trump's performance during the last six weeks. It may be that he's basically shaking the cage and that's changing the tilt.

Let's see. I think we have one more question, which could be very brief.

AUDIENCE MEMBER: Thank you so much for taking the time this morning to speak with us. I guess my question is are we kind of stuck with this, or is there any—do you have any predictions for whether this would be overruled, or are we kind of just stuck until the Court composition changes and the president does something particularly egregious? What was our path forward here?

PROF. WALDMAN: There is a path forward, although with limited options. There are proposals already for constitutional amendments to overturn this. We will see in the challenges—there won't be cases to assess a lot of this stuff unless there's a prosecution of a president, which is unlikely to happen anytime soon.

Had this gone to the trial court in a manner that they could have actually, Judge Tereshko could have actually parsed a lot of this out, it's very possible that even this prosecution would have moved forward, although it would have been tough. The problem is that there's not a live case. I think that the ultimate answer in cases like this is that this becomes an issue in the campaigns and that people run on this and that there are both new justices or changes in the composition and structure of the Supreme Court to bring it in line with what the Constitution needs.

We, for example, strongly support an 18-year term limit for Supreme Court justices because we don't think anybody should have that much public power for that long. But the role of the Supreme Court in a case like this properly is a major public and political issue and should be something that is discussed much more than it was in this last election.

But going forward, a lot will depend on what happens in the coming cases, but whether the Court is a rubber stamp or not for abuse of power will, in fact, become one of the central issues in the country.

PROF. FREEDMAN: Yeah, I agree with that, and I think that path forward on this particular issue is a model for a path forward on all other issues, which is all of the above, right? We need to write law review articles that can be cited, that can be part of the long-range legal process. We need to create a political issue in campaigns, which the Democrats never successfully did about the one-year freeze on the merit guard.

There were a couple of things about do your job, but they didn't make it a campaign. They never tried. They never tried, even though Obama put up the most milquetoast candidate he could possibly think of.

So, we need to be working to build long-term in the legal system, just the way the gun rights people did for many years, the people to overturn limits on punitive damages, the people on all rights, and in the political sphere, and in the streets, right? Anything that has led to a major change in the law, take your pick, Civil Rights Movement, take your pick, gun rights movement, it doesn't matter. Anything that has led to a major change in the law has been a multi-pronged campaign designed to use all the tools of a democratic society to bring about change.

And in this case, because the hour is late and the ship is burning, it needs to happen with greater speed and greater urgency than we have seen on all those fronts. The only one, unfortunately, that has shown some vigor and activity is the legal one. The legal response by the interest groups in the lawsuits has been, in fact, very strong, very well thought out, and quite impressive.

But, of course, that's the weakest leg of the stool, and the others really need to catch up.

PROF. WALDMAN: And I'll say the conservative legal movement that has so succeeded in this and other cases understood that the most important court to win in was the court of public opinion over many years. And they also understood that it's not transgressive to yell about the Supreme Court and its rulings. It's the heart of democracy.

PROF. FREEDMAN: And, P.S., the disconnect between reality as perceived in Manhattan and perceived everywhere else in the country is also incredibly serious and is something that those people who don't get their information from the print copy of the *New York Times* had better be addressing themselves to if, in fact, you want to change hearts and minds outside of Manhattan.

PROF. WALDMAN: It was Brooklyn.

PROF. FREEDMAN: And Brooklyn, sorry.

PROF. RUDENSTINE: Okay, so this has been a very enlightening and helpful conversation. I want to thank Eric and Michael very much, and please join me in thanking them.

III. PANEL 2: GUN RIGHTS

MS. PERARIA: Hi everybody. All right, so we're going to transition to our next panel about Gun Rights. This panel will discuss *New York State Rifle and Pistol Association, Inc. v. Bruen*, which Justice Barrett took part in,

with Justice Jackson joining the Court only eight days later, and *Rahimi v. United States*, in which both Justices filed concurring opinions.

In *Rahimi*, the court faced a challenge to *Bruen*'s workability, and while it upheld the test in *Bruen* that looks to the historical tradition of gun regulations to determine the constitutionality of modern gun law, the Court slightly broadened the test by clarifying that regulations need only be sufficiently analogous to historical ones. Justice Barrett's concurrence parsed exactly how "tradition" should be understood, and Justice Jackson's concurrence called on the court to take responsibility for creating legal standards that are unworkable. We're excited to dig into these opinions.

First, I would like to introduce our moderator, Professor Damon-Feng. Professor Damon-Feng is an Assistant Professor of Law at Cardozo, where she teaches immigration law and constitutional law. Her scholarship has been published in journals such as *Duke Law Journal*, the *Washington International Law Journal*, and the *Harvard Law Review Blog*. She conducts research at the intersection of administrative law and immigration law and policy, and focuses on issues relating to executive power, federalism, procedure, and race. She previously taught at the NYU School of Law and the University of Washington School of Law. Professor Damon-Feng is the co-founder of the Adelante Pro Bono Project, which is a cross-border immigration law response initiative.

Professor Araiza is the first panelist here to talk with us today about the Justices' takes on gun rights. Professor Araiza is a Stanley A. August Professor of Law at Brooklyn Law School, where he has taught since 2009, focusing on administrative and constitutional law. His scholarship has been featured in publications such as *NYU Law Review*, *Cornell Law Review*, *Northwestern Law Review*, and *Constitutional Commentary*. He has written case books on First Amendment law and constitutional law, as well as a constitutional law treatise, and the books *Enforcing the Equal Protection Clause*, *Animus: A Brief Introduction to Bias in the Law*, and *Rebuilding Expertise*.

Our next panelist is Mark Anthony Frassetto. Mark is the Deputy Director of Second Amendment History and Scholarship at Everytown Law. There, he focuses on developing a historical and scholarly record supporting the constitutionality of gun regulation, making up much of the originalist defense of gun laws under the Second Amendment. His work has been published in the *Smithsonian Institution Press*, the *William & Mary Bill of Rights Journal*, *Hastings Constitutional Law Quarterly*, the *Southern Illinois Law Review*, and *Cornell Law Review*. Further, his work is frequently cited in briefs and relied on by courts across the country.

Finally, we are joined by Jake Meiseles. Jake is the Senior Staff Attorney at Global Action on Gun Violence, which is the only nonprofit

working with countries and people internationally to stop the global harm from guns through litigation and human rights strategies. There, through litigation, he seeks to hold gun companies accountable for their contributions to gun violence and to require reforms to dangerous gun industry practices. Prior to that, Jake was a Complex Litigation Associate at Skadden, and he clerked for the Honorable Cynthia M. Rufe of the U.S. District Court for the Eastern District of Pennsylvania and the Honorable Eric L. Clay of the U.S. Court of Appeals for the Sixth Circuit. Panelists, we are grateful to have your time today, and we look forward to a spirited discussion about gun rights.

I'll hand it over now to Professor Damon-Feng. Thank you.

PROF. DAMON-FENG: Well, thanks so much, Hope and Olivia, for convening this symposium, to the *Journal of Equal Rights and Social Justice* for bringing us all together, to the panelists for sharing your expertise, and to all of you for being here to join us in this conversation.

So, Hope gave a little overview of *Bruen* and *Rahimi*. I thought we'd start by just kind of putting a little bit more color and go through more scaffolding around those cases before kicking off the conversation about kind of jurisprudence of Justices Barrett and Jackson and where that kind of leads us today.

So, in the *Bruen* case—this came out in 2022—the Supreme Court invalidated the State of New York's concealed carry law, which required that a person show a special need for self-protection before they were issued a license to carry your gun in public. And the court held that the law was unconstitutional because it was not consistent with the nation's historical tradition of regulating firearms, thus kind of putting forth the *Bruen* history and tradition test.

Now, this test has been notoriously difficult for lower courts and state legislatures to operationalize, and that's for, I think, two primary and related reasons. The first is that it's not clear what history is, what the relevant history is. And second, it's not clear how closely any modern regulation has to really mirror the historical or traditional regulation in whatever relevant history period it is.

So then two years later, in the case of U.S. versus *Rahimi*, the Court sought to provide some clarity around this second question and how the test from *Bruen* is applied. So, in *Rahimi*, the Court upheld a federal law that prohibited individuals who had domestic violence restraining orders on them from possessing a firearm.

The Court applied the *Bruen* history and tradition test and explained that the test does not require finding a historical twin or a regulation that's identical to historical restrictions. Instead, the *Rahimi* court said the relevant question is whether the challenged regulation at issue is consistent with the principles that underpin the nation's regulatory tradition.

So *Rahimi* kind of addressed that second question that I talked about, how closely the modern regulation has to be to historical regulations, but it's still kind of a vague standard. And neither *Bruen* nor *Rahimi* addressed that first question of what the relevant history or the relevant period is.

And both questions are ones that have divided the Justices, and, in particular, that first question is one that Justice Barrett has focused on and that has kind of been quite mysterious for folks to apply. So, I was wondering if you could maybe start there.

Our panel is going to be more of a conversational one. So, folks should feel free to jump in whenever. I mean, Mark, you might walk through kind of what the various perspectives are on this historical question and how we ought to think about that.

MR. MARK ANTHONY FRASSETTO: Sure. So first off, just thank you to everyone for hosting this panel. Thank you to the *Cardozo Journal of Equal Rights and Social Justice*. You know, when I was in law school, hosting this kind of journal was sort of an important, but sort of like a humdrum law school thing, and that's not really true anymore. It takes courage for a law school to host a journal like this. I'm a graduate of Georgetown University Law Center, and I'm sure as a lot of you saw, Georgetown was attacked by the interim U.S. Attorney in D.C. for its diversity, equity, and inclusion activities. So in this day and age, hosting a journal like this really does take courage from a law school, so it's very exciting to be here.

So, to speak to the question, one of the big disputes among the Court's originalist Justices right now is about the role of tradition in the originalist analysis. And it's sort of across the Justices, but I think looking at the views of Justice Barrett as compared to Justice Kavanaugh are really interesting on this point. So Justice Kavanaugh's view aligns a lot with what the *Bruen* decision looked like, sort of taking a broad view of history, looking at tradition of regulation across the 18th and 19th—maybe into the early 20th—centuries, and sort of identifying whether a modern gun law is consistent with that tradition of regulation that existed, with kind of a high degree of specificity. Was there an identical law or a law that was, you know, analogous enough during that historical period? And if there was, then the law is constitutional, and if there wasn't, then maybe it's not.

Justice Barrett does not believe that tradition carries any independent weight in the originalist analysis. She views this as sort of—this post-ratification history—is sort of "original expectations" originalism, which has largely been rejected by originalist scholars. She especially views history that took place well after the ratification as not relevant to determine the original meaning, and instead, she would look to broader principles of

constitutional law that can be drawn from both the founding-era history and the tradition and precedent that existed post-ratification.

You see this in the *Rahimi* concurrences, as well as in some other cases, like *Vidal v. Elster*, which was a First Amendment case dealing with a sort of crass trademark application, where Justice Thomas had written an opinion that looked at the tradition of trademark regulation, mostly in the late 19th century. And then Justice Barrett wrote a concurrence that was actually joined by Justice Jackson, arguing that this tradition of regulation was not sufficient to make the content-based trademark restriction constitutional, but instead the Court should look to the principles of constitutional law underlying the trademark system, and those principles allow for reasonable regulations to help identify the source of a trademark, and this law was consistent with that. So that's sort of the big originalist dispute between Justice Barrett and Justice Kavanaugh, as well as Justice Thomas.

PROF. DAMON-FENG: Yeah, and it's interesting, too, because it—so that seems quite narrowing, right, of how Justice Barrett kind of conceptualizes what's relevant in terms of history and tradition, and yet she says, you know, the Court's analogical approach in *Rahimi*, kind of looking at not just the kind of actual regulations on file, but the principles surrounding regulatory behavior, that that was the relevant consideration. I'm wondering if one of you could maybe speak to how that does or does not kind of expand her view on what "history and tradition" actually means as applied.

MR. JAKE MEISELES: Sure, I mean, I think taking a step back, you know, I think this whole conversation kind of gives rise to the lie of originalism, and, you know, the idea in originalism is supposed to be this objective form of arriving at the right answer that would take judicial ideology and preferences out of the equation. And I think, what we're discussing here is kind of, is all these questions are, the choices that are made are, you know, impact what the resolution is, and so, are you just looking at the history, the pre-ratification history? Does tradition afterwards count? Is it when the 14th Amendment was ratified, or is it earlier? Or do we look at how many regulations do we need to have that are similar? How similar do they need to be? What do we do with outliers?

And so, I mean, I think that Justice Barrett is obviously grappling with a lot of these questions. And for example, you know, differing with someone like Justice Thomas, who can just look at the same law in *Rahimi*, and you can always poke holes and say, oh, well, the regulation that was identified is not, you know, here's the minute differences, here's why it is not directly applicable.

I mean, it seems like Justice Barrett is taking kind of that initial sort of threshold question of assuming that originalism can give that objectively true answer, but then, grappling with—and I think, in a lot of ways, honestly

grappling with a lot of these questions that then arise without kind of rethinking the proposition of is originalism—the proper way to approach these questions, and should that be the sole way of answering these constitutional questions. As opposed to someone like Justice Jackson, who, as you mentioned, is, you know, more pragmatic with her approach, and is not sold on just originalism as the sole answer here.

PROF. WILLIAM AZAIRA: So I'll add just a little bit to what Jake was saying. Oh, and by the way, I also want to add my thanks to the Journal and to Haiyun for moderating. So in her *Rahimi* concurrence, Justice Barrett, on the one hand, really reveals herself as a law professor, because you see that she's probing the assumptions of originalism, she is probing the issues that originalism raises. She makes a very practical point that the problem with looking for exact historical analogs as part of an originalist methodology raises the use-it-or-lose-it problem, that if a legislature in 1793 simply chose not to regulate in a particular area, that must mean that that legislative authority, which may have been allowed by this, by the original meaning of the Second Amendment, simply is lost, because it wasn't used at the framing moment.

So that's a very, I think, sort of a, for want of a better term, and maybe because I'm a law professor myself, everything, you know, I have a hammer, it's called a law review article, and everything looks like a nail, but it does indeed seem like she is probing that issue in a way that a law professor would probe it. But the interesting tension, I think, between that approach to the issue and the approach that a judge needs to take comes later in her very short *Rahimi* concurrence, where she says, you know, we have, beyond this use-it-or-lose-it issue, we have a level of generality issue, that is to say, at what level of specificity does the relevant analog have to be found?

And she identifies that, as well—as a law professor would—as an issue. But on the other hand, as a judge might do, who is looking for a convenient way out, she says, but we don't have to worry about that today, because the majority gets the level of generality analysis just right. This is very much a Goldilocks kind of argument that she makes. And it's striking, at least to me, that she doesn't justify why, in fact, she thinks the majority got the level of generality right. And that, to my mind, raises an issue that maybe we can explore later in the panel, about the problems that arise when this very scholastic enterprise of doing originalist methodology runs into the practicalities of actually having to decide cases.

And I think when she, I don't want to say gives up, but when she essentially gives up and says, I think the majority got the level of generality right, therefore we don't need to worry about that issue today, or I don't have to worry about it in my concurrence, I think that's a concession almost. That it's very hard, as a matter of anything other than law review hypothesizing,

it's very hard to do originalist methodology in a way that sounds credible in the judicial opinion.

MR. FRASSETTO: Just to add to that—my—one of my big notes was that—it's very clear she was a law professor in her opinions. You know, throughout her opinions, there are these sort of digressions that—that very much read like they're from a law review. Like in her *Rahimi* concurrence, she, like, starts from the start and defines originalism. She discusses fixation and constraint. She has this big footnote where she distinguishes between original public meaning originalism and "original expected applications" originalism, and why looking at post-ratification history might be "original expected applications" originalism, which most originalists reject.

I was struck by that, so I looked on Westlaw to see how many judges had talked about "original expectations" originalism in opinions, and I could only find two other opinions, not just in the Supreme Court, but in the circuit courts as well, where—where that was mentioned. So I thought that was pretty striking. Judge Tymkovich in the 10th Circuit, Judge Pillard in the D.C. Circuit, both just in concurrences. And then in her *Kanter* dissent on the 7th Circuit, she has this big digression about whether the Second Amendment analysis is determining whether someone is outside of the scope of the Second Amendment, meaning they wouldn't have standing to raise Second Amendment claims even if there was no law, or if it just identifies the government's ability to regulate within the scope of the Second Amendment right, which I don't think any other judge addressed in any Second Amendment case post *Heller*. It is a very law professor thing to try to clarify, so I thought that was a really interesting point.

PROF. DAMON-FENG: Yeah. I want to pick up on something that you said, Bill, about kind of distinguishing between, you know, the exercise of scholarship and the exercise of judging, right? And one of the big critiques about both *Bruen* and *Rahimi* are that they kind of leave us without really solid frameworks or benchmarks to kind of move forward from. And Justice Jackson picks up on this critique in her concurrence in *Rahimi*, so I'm wondering if you all maybe could talk a little bit about that, what does Justice Jackson do, and then how do we kind of think about those questions?

MR. MEISELES: Sure, I mean, I think the same way that Justice Barrett was a law professor, I think Justice Jackson was a district court judge, you know, on the ground having to make decisions without the benefit at the Supreme Court when these issues come up, you know, you have people like Mark and many others submitting briefs explaining, canvassing all the historical record and giving so much content to sift through that. At least, I still think that it's a really difficult proposition, even with all that, to kind of reach the answer of what the history shows. But I think for an individual district court judge, without the means to have to sift through 17th century,

18th century sources to, you know, across the breadth of this country, looking at England to come, to reach the objective, what the history says is, I think, an exceptionally difficult task. Especially with the caseloads that trial court judges have.

And I think that Justice Jackson is obviously someone who's very, attuned to that—I mean, that experience—and recognizes the burden that it places on district court judges in a way that Justice Barrett, who was briefly on the appellate court, isn't able to, as Bill said, kind of leave that those issues, you know, just say, oh, this is the right level of generality and not really address how, what that level is, how district courts should assess that level of generality. And I think that's something that permeates Justice Jackson's judicial approach, her experience.

You know, one thing I was thinking about was, in a case called *Erlinger*, which concerned Apprendi, which is a doctrine requiring juries to find certain factors that increase a sentence, and that was a pretty, at this point, long-settled precedent. And Justice Jackson was very much seen as defendant-friendly—obviously she has had a lot of experience with public defense—and she issued a solo dissent in that case, calling Apprendi into question, saying that she would not have ruled that way and limiting it, not wanting to go along with the majority. A lot of that was driven by her on-the-ground approach and believing that juries were not best placed and not able to, as well as judges, find these different facts that can be used to increase sentences. And so I think that that is obviously something that she's willing to look at the pragmatics of Supreme Court opinions in a way that I think other Justices are more able to keep their heads in the clouds and just talk theory and things without a worry about how what they say is actually then put into practice.

PROF. AZAIRA: I'll just add really quickly to that. So there's really interesting scholarship that's being written, in fact, by someone who's joining our faculty at Brooklyn, about the idea of lower courts engaging in originalist analysis, and a lot of it, as Jackson said, a lot of what Jake was talking about, sort of comes up in the scholarship. The basic idea: that there are serious capacity issues when we talk about the ability of, for example, a district court judge to do a very deep dive into what is likely, in most cases, a deep and tangled and ambiguous historical record. And then to come up with a legal conclusion is one thing for a historian or even a law professor in a law review article to say, well, it could be this or it could be that, and it's kind of been an interesting exercise figuring that out. But when the judge, in fact, has to reach an actual conclusion, when you add that imperative onto the capacity restrictions that trial court judges in particular experience, it raises real, interesting questions about whether originalism can, in fact, be done at the lower court level.

Which in turn, just really quickly, raises really interesting questions, I think, about whether lower court judges and, for want of a better term, higher court judges, in particular the Supreme Court, maybe ought to have different roles in our system, and whether that, in turn, raises interesting questions about sort of a fundamentally different model of judging when we're talking about appellate judges and trial court judges.

PROF. DAMON-FENG: I mean, and it seems like it doesn't just end there, right? This seems to also have created issues for lawmakers, right? Thinking about how they can draft sustainable gun regulation. I'm curious if you all have seen, kind of on the ground, the impacts—or just kind of talk a little bit more about how this all plays out on the ground at the trial court level and the kind of differing decisions that you see out of trial courts. And just kind of the general, I don't know, vibe, I guess, about how folks are approaching this type of policymaking, lawmaking, and litigation.

MR. FRASSETTO: So at the trial court level, I think the big divide is between civil cases and criminal cases. So in these civil cases, which are oftentimes brought by gun rights organizations, you oftentimes go through discovery. States and local governments defending their laws are bringing in expert witnesses, historians, experts on the technology to go through the whole discovery process, write expert reports, present sometimes hundreds and hundreds of historical gun regulations, often having evidentiary hearings, and then deciding on the question and, you know, oftentimes 50 or 60 page opinions.

Obviously, that can't work in every criminal case. You can't convene a history symposium every time there's a felon in a possession case or an unlicensed carrying of a handgun case. And some lower federal court judges have been complaining that they're really getting very little historical evidence presented in those cases.

Judge Reeves in the Southern District of Mississippi asked the federal government for briefing on whether he should appoint a special expert to discuss history and present history to the court. And the government ultimately said that he shouldn't, and then Judge Reeves ruled against the government in a felony in possession case, a very serious felon in possession case. So I think there's a very significant divide about capabilities and resources depending on the kinds of cases.

MR. MEISELES: Yeah, and I also think, to your question about how the legislatures are trying to craft common sense gun regulations, given how, kind of, amorphous the Supreme Court's test is, and how it can just be easily, you know—is a law analogous, is it not? And you can pick holes. It sort of just depends on what judge you draw, whether your law is going to be upheld or not.

And, you know, what? If you challenge in a place that has overwhelmingly Democratic appointees, and a circuit with overwhelmingly Democratic appointees—obviously, there's always the Supreme Court—but your odds are a lot better of having that law withstand challenge, whereas you get from a different judge a completely different outcome. And so I think for legislatures who are faced with really, really terrible issues and rampant gun violence and trying to come up with legal ways to actually help constituents and make people safer, it kind of leaves them in an interesting, complete quagmire because there isn't a way to reach, like, the legal conclusion, like Bill was saying.

The legislatures can't, like, just say, let's get someone to review all the research and tell us exactly what can we do, what can't we do? I mean, they can try, but it's sort of just up to the whims of a judge and what they say is analogous and whether what they've presented is enough evidence of analogous regulations. And so, yeah, I think it makes it almost impossible for legislatures to really try to address gun violence.

PROF. AZAIRA: So I'm going to jump in, if that's okay, and ask Mark and Jake a question because I don't do the kind of on-the-ground work with legislatures that sounds like you folks are familiar with. And this is going to sound like a snarky question, which is kind of how I framed it originally, and then I thought, well, maybe this is kind of serious.

So in *Rahimi*, the domestic abuser case, one of the reasons that the Court upheld that law was because it was analogous to what are called affray laws. Has a legislature post-*Rahimi* thought of simply writing a law called affray? I mean, you know, literally going back to the late 18th century and writing statutes based on that model in order to survive Second Amendment scrutiny?

MR. FRASSETTO: I don't think so. And I think this raises a larger issue about originalism and making these analogies in that at the founding most—a lot of—criminal law was through these common law principles like affray, where they were sort of, it's kind of a silly way to say it, but like vibes-based. It is like, is this person acting scary with a gun? Like, is the carrying of a gun in this context something that would terrify people?

And laws just don't really work like that anymore. So in—nah, I think it'd probably be unconstitutionally vague under current Supreme Court law, case law. So I just think you can't go back to that sort of system. And I think the Supreme Court acknowledged that in *Rahimi*. Justice Roberts said the Second Amendment does not create a right frozen in amber.

PROF. AZAIRA: You're trying to freeze in amber - -

[crosstalk]

MR. FRASSETTO: There it is, like Jurassic Park. So I think the Court recognizes that. And I think the work of sort of identifying these historical restrictions and analogizing them to modern laws really isn't taking place at

the legislature level. I mean, they're looking at the decisions and seeing that the Court struck this sort of law down, so maybe we shouldn't pass that kind of law, but the legislators aren't like going and looking at the Duke repository of historical gun laws and like trying to make judgments about what they can or can't do.

PROF. DAMON-FENG: Interesting. So, you know, we've talked a little bit about kind of some of the problems with this kind of originalist approach. And Justice Jackson talked about a few more that had touched on some of the things that were brought up in the first panel as well, right? She writes in her opinion that there are a bunch of other unresolved questions, right? Who was protected by the Second Amendment from a historical perspective? To what extent does the Second Amendment apply? Does this plain text apply? To what era should we look to define historical restrictions of gun regulation, and how many analogs add up to a tradition?

And focusing on that first question, right, who is protected by the Second Amendment, and what is the extent of it? You know, and what is it protected by, right, is kind of a—there's two sides to that question. On the one hand, does it protect kind of individual gun ownership, possession and use? And then the other, in *Rahimi*, we saw, right, gun regulation intended to protect victims of domestic violence. And so I'm wondering if you might speak a little bit to how we think about those questions from the Court's approach, or just kind of generally, from your perspectives.

MR. FRASSETTO: Sure. I mean, I think this is really the core question in *Rahimi*. And, you know, speaking specifically to Justice Barrett, something she talked a lot about in her *Kanter* dissent when she was on the Seventh Circuit. There weren't an enormous amount of—I mean, there weren't modern restrictions on possession of firearms by people like felons. There weren't restrictions on possession by people subject to domestic violence restraining orders or people convicted of domestic violence to the extent that those laws existed at all during the founding period or into the late 19th century. So you have to sort of draw analogies from other areas about who can be prohibited.

And in *Kanter*, Justice Barrett looked at a variety of history, some of it racist or otherwise troubling, and identified that principle as people who pose a danger to the public. You can prevent people who pose a danger to the public from possessing guns. And she said that is an allowance for government regulation rather than something that puts those people outside the scope of the Second Amendment, just as a matter of law. And, I think that's sort of analysis you're going to have to do in these prohibitive person cases going forward. And then obviously drawing the line of who is the person who poses a danger, and how long that danger lasts, or when it ceases, is another huge area of law that's going to have to be fleshed out by the Court.

MR. MEISELES: Yeah, and I think that that goes to the choices that adopting an originalist perspective takes, where it's saying that the lodestar or what we're looking at is a time where the law did not protect women, did not protect minorities, and saying that, that is the law, that those people's approach to the law is what should govern us. Today, I think that that's, again, a policy choice to say that that is how we want our law to apply. And I think it goes exactly to what Mark is saying, that the choices that leaves you, if you are going to adopt that originalist framework and what you do to address the laws that are modern conception—which I think most people would want—and how they fit into an originalist perspective. It could be all sorts of, I mean, there wasn't schools—schools were all segregated then. If you're really taking an originalist approach, it really opens up a whole Pandora's Box of really negative effects for society.

PROF. ARAIZA: And I'll just close the circle maybe on that issue, but just reminding everyone of what Justice Scalia wrote in *Heller* toward the end of his opinion, where, without any analysis or any pretention, I think, to any originalism. He just basically said, of course, none of this is designed. None of what we said is designed to cast any doubt on what I think he might have described as longstanding restrictions on guns in sensitive places and guns being held by dangerous people. There may well be some, and I believe, if I recall either in *Rahimi* or in *Bruen* there was some kind of side-long glance at that phrase as if maybe that phrase is going to start coming under pressure once the Court really starts ramping up its thinking about these things in originalist terms. Am I right? Did they—someone—kind of suggest something about that?

PROF. DAMON-FENG: Yeah, I do wonder also. So, does the idea that we would have the incorporation of post-ratification history, right, in practice? Does that get us anywhere? If you start from the premises, the Court currently does, right? That history is very important. And all of this, at this point, has been some history is relevant in some way, right? Does post-ratification history help us incorporate some of these critical perspectives and attacks on originalism to incorporate more people in the sphere of who was protected in terms of those rights-based claims?

PROF. ARAIZA: I mean, the difficulty is that if it's post-ratification history, it's not original meaning. And so, Justice Barrett makes—she raises that point, which raises another, I mean, which raises a related issue. I mean, I take your question here to be broad enough that I can trust this. So, one of the things she asked in *Rahimi* is, as an unresolved issue in Second Amendment doctrine, are we talking about 1791, or are we talking about 1868 in terms of original meaning?

And as someone who just did incorporation in constitutional law, this is a really interesting question, I think. Because if, in fact, it is 1791 that

matters, even for state restrictions, then what we're talking about is a situation where incorporation actually was the Second Amendment itself, rather than incorporation as a matter of freestanding due process of a right to possess guns.

And that, as we're going to talk about after spring break, is going to implicate substantive due process more generally. And so I think the 1791, 1868 question, this post-ratification evidence question, I actually think it has broader implications for how we think about Fourteenth Amendment rights more generally.

MR. FRASSETTO: Just to speak a bit more about that, so as I mentioned earlier about Justice Barrett bringing up fixation constraint. Under the basic premises of originalism, the meaning of the Constitution is fixed at the time it was ratified, and that fixed meaning constrains judges and courts going forward. The Fourteenth Amendment was obviously ratified in 1868. And to the extent it incorporates rights, it seems like the meaning of those rights should be fixed at the time it was ratified, which is 1868. Which is also kind of the consensus view of originalist scholars across the country, that the meaning of the rights incorporated in the Fourteenth Amendment should be fixed at 1868. That, of course, creates the pretty significant constitutional problem with there being two bills of rights, which the Court has been pretty averse to across its body of constitutional law.

Since the 1960s, they've adopted jot-for-jot incorporation, where the right protected against the states is the same as the right protected against the federal government. That was mostly because earlier versions of incorporation were sort of a watered down right for the states. So, it's a little different as a concept, but courts have generally said they're the same.

So then what do you do? Do you adopt an incorporated Fourteenth Amendment that completely excludes the views of the people that ratified it, which would seem pretty bizarre and anti-originalist? Do you move the original Bill of Rights forward in time and take the meaning that existed at the time of the Fourteenth Amendment and apply it to the federal government as well? Which, you know, has happened in some cases and the reverse incorporation cases about segregation. Or do you do what the Court has often done in its originalist cases, and which I think is likely to do rather than decide this issue decisively, do you just kind of look to both history and jam it all together and say it's the same enough and it's all kind of evidence of the same thing?

And that's what the Court kind of pretty explicitly did in *Bruen*. It's what the Court did to a degree in *Rahimi*. It's what the Court does across cases in constitutional law now. It's what Justice Barrett did in some of her other cases, like *Vidal*, which I mentioned earlier, like the case in *Muñoz*, which dealt with whether the right to due process about your non-citizen

spouse immigrating was protected by the Due Process Clause. And it's what the Court has sort of done across constitutional law.

MR. MEISELES: And I would say it does seem that that is, at the same time, something that Justice Barrett is potentially the one who's most grappling with, where it seems like everyone else is like, yeah, let's just look at all that stuff from the 16th century through the early 20th century. And while she is, as you're saying, still doing that, she is also kind of raising these questions. Maybe it's like Bill was saying earlier, this law professor way of raising them, and then not actually reaching an answer, but she just at least, it seems like, identifying the problems that you're saying, and at least saying, well, we have kind of an issue that we're not addressing here. Should we be looking in 1791, or should we be looking in the 1880s, the 19th century? And so, I don't know where it's going to go from there, but at least there is some sort of identification of that problem with originalism. And maybe because there isn't a good solution, that's maybe why she's stuck.

PROF. ARAIZA: And just to speak to, substantively, why that's important, rather than just the important methodological question. By 1868, the problem of gun violence looked a lot more like it does today. And the law also looked a lot more like it does today. We sort of moved out from this common law, as I called it, like vibes-based enforcement, and moved to much more modern criminal law, where specific conduct was prohibited. So the analogies are much easier to draw in 1868, and there's just a lot more of them because there were more states and much less was done through the common law. Much more was done through the legislative process.

PROF. DAMON-FENG: So, is Justice Barrett, I mean, I'm talking about her theory around this, but she seems to actually also probably believe that the right history is from the 1791 era, right? Justice Thomas seems like maybe he's also sort of maybe there. The other—Kavanaugh seems like he doesn't quite, he's maybe, you know, more in the 1868 amendment vein. I'm wondering, for counting heads, right, like where do you see the court as a whole settling on this question?

MR. MEISELES: I mean, I would just say on Justice Thomas, I think that he goes with whichever will give him his preferred outcome. I don't know if a real decision there, what—which—you know, what century should apply. But, sorry, but the counting heads is, I will leave that to you two, because I don't.

PROF. ARAIZA: I honestly wouldn't even try to speculate. I mean, part of the problem is once you throw in the relevance of tradition more generally, then I think the question becomes really muddy. Because—so you use late 19th century evidence as something. And it's like, well, are you really—are you doing that because you're choosing 1868, or are you doing

that because methodologically you think that it's not just original meaning but tradition that also is relevant?

And so, it is so easy to tack between different justifications for using different types of evidence that it might well be difficult to pin any of the Justices down, except maybe for Justice Barrett to the extent that she's trying, in some good-faith way to kind of stake out a principled position. And maybe she is, and maybe she isn't. She's identifying the issues when she's trying to really resolve them is another question.

MR. FRASSETTO: I think from *Bruen*, it seems like Justice Thomas is the most open to sort of adopting the move-it-all-forward-to-1868 view, although obviously that would be a fairly significant shift in constitutional law. Justice Barrett seems the most fixed at 1791. And it seems like Justice Kavanaugh is the most and sort of mixed altogether camp. But, again, like if you're looking for consistency in Supreme Court decision-making, you're never going to find it. And that's really not even a critique. I think it's just like an unavoidable result of the judicial process.

PROF. DAMON-FENG: I wanted to talk a little bit, too, about kind of just being inconsistency, right? Justice Barrett's views on originalism, I guess, the first panel in our discussion, it seems like she is an originalist in some ways and maybe is more willing to deviate from kind of original meaning and intent in other ways, thinking about kind of presidential immunities and the history that we heard unfold about the tradition of prosecution of presidents and we allow to see that both in the text and also the history or in the Constitution.

But I'm wondering if you think that there is any consistency in Barrett's jurisprudence there, if it's as easy as saying, well, should we mix up instructional questions one way and rights questions another way, or if there's some other unifying or not unifying, right, conclusions that we can draw about where she is thinking, if she is, in fact, as people speculated, going to be a really important kind of swing vote in the cases that are to come.

PROF. ARAIZA: I mean, I'll start. I mean, I think one thing we need to remember as we try to answer really good questions like this, is that we have to remember the dogs that don't bark. And in this case, the dogs that don't bark are cases where the courts or the justices simply ignore originalism altogether. And so we can look at the universe of cases in which the Justices are talking about originalism, and we can try to figure out what they mean about originalism in those opinions. But we can't forget that, in ignoring originalism in other cases, they're basically betraying a kind of much more eclectic approach to deciding cases. So I just think there is some caution that's warranted before we start focusing hyper specifically on cases where they talk about originalism to figure out what they mean by originalism,

when, in fact, in a lot of cases, their silence almost is just as powerful as what they say in these particular ones.

MR. FRASSETTO: I think consistent with that, that Justice Barrett has more respect and a focus on precedent than the other originalist Justices. So in any areas where she might diverge from original meaning or the arguments of originalists, I think oftentimes it's because of her respect for precedent, which is true for like present-day precedent.

But I've also found in her cases that she's more willing to side with 19th-century state supreme court cases, which are no longer binding, than she seems to be with legislative enactments. So to go back to *Vidal*, she cites to a variety of late 19th-century state supreme court trademark cases as evidence of the beginning of the First Amendment to draw her principle from where she would seem to reject looking to late 19th-century legislative enactments, which I thought was interesting to me. I don't have a complete theory here as to why that is.

MR. MEISELES: Yeah. And I think, you know, as we said, hoping for consistency, you're not going to find it. I do think that there is, in some of her opinions, a level of restraining incrementalism. It's not at all like that when she joined, but like thinking about presidential immunity, where she went along—but it felt like she didn't want to go fully along—and went with them a little more narrow conception of presidential immunity.

And I think it does permeate in ways like in *Fulton* where discussing the viability of the *Employment Division v. Smith*, and she was like, well, I don't know about the original history, and I don't really know if there's a—what the right way to go forward is, so let's sort of just not touch it for now, kind of thing. And so I think that that, in some cases, at least permeates.

And even this week, I was at a bar arguing in a case that I counsel to, and she was asking questions like, can you only do two questions, and then she was asking, do we have to reach both or kind of just reach one of them, and really trying to limit how far the opinion would go, and then trying to, I guess, not take the maximum approach every time. But again, I think that for every opinion you come back, you can find counter-examples, so I don't know how persuasive that is.

PROF. DAMON-FENG: I want to talk about Justice Jackson's jurisprudence on this. So there was a concurrence that was penned by Justice Sotomayor that was joined by Justice Kagan in the *Rahimi* case that was not joined by Justice Jackson. If you think about Justice Barrett as being willing a little bit to stray from the conservative bloc, do you see Justice Jackson as being willing to stray from the liberal bloc of the court, or is this—what do you make of her not joining that sort of Sotomayor concurrence in *Rahimi*?

MR. MESEILES: I mean, I would say that I don't—I don't see *Rahimi* as her not going along with kind of the liberal bloc in the sense of she

basically said that *Bruen* was wrong. It's like she said she would have joined the dissent, so I don't necessarily see her as—yeah, I'm not sure I can give the reason why she didn't join it, but I don't think that she was staking out some—we're saying they were too far or there was some reason. I think, in general, I think she's only been on the Court a couple of years, but is not afraid to stake out her own positions, like I mentioned the earlier decision earlier, where she was the sole dissent on the Apprendi issue.

And I think a very technical but another example that comes to mind is on the doctrine where she's kind of staked out this position of not making any decisions as moot. I think that it will be pretty tied to her experience and recognizing that there's value to lower court decisions, that the Supreme Court should not be so quick just to vacate those decisions and remove the presidential effect of lower court decisions.

So, yeah, I mean, I definitely think that she's willing to stake out her own position, but I don't know if the *Rahimi* one necessarily shows that it's one that's not aligned with Kagan and Sotomayor.

PROF. ARAIZA: Well, I'll just say really quickly. I mean—and this may be frankly a little quick and sloppy. But I mean, I think one thing we can say about Jackson in *Rahimi* is that, because she was not in the court for *Bruen*, she really didn't feel any—she might have felt freer simply to critique him in a way that maybe would be seen as re-arguing a lost point.

So, I mean—and there are other examples of this. There's a case called *Allen v. Cooper*, where Breyer and Ginsburg, who had argued against the point that the Court applied in *Allen* as a matter of precedent, basically just went along. And Breyer concurs, when he says something along the lines of "I dissented in the original case that the Court follows today. I lost that battle. That's done."

So I think maybe that's sort of—maybe we can see Sotomayor's opinion of *Rahimi* as doing the same kind of thing implicitly, but Jackson may have felt a little more freer to have, in fact, gone on record as critiquing him, for very good reasons, given that she was a district court judge. She kind of understands how awfully hard it is to do what *Rahimi* demands of lower courts.

PROF. DAMON-FENG: Yeah, and that's actually also how I kind of read the two side by side, right? It seems like the Sotomayor concurrence was kind of talking more to Thomas's dissent and saying, "Look, here is why the Court does the analysis correctly in the majority opinion." And Jackson comes in and says, "Yes, I concur because we have the precedent now. I wasn't on the Court. I would have disagreed, and I would have dissented in *Bruen*."

But here's why it all is still messy, and it's not the right test to apply anyway, because of all the kind of workability issues, which I guess that's

maybe the question that I'll end this on. We're opening it up to you all, is where does this leave us, right? Kind of what do you view as the kind of open questions? But what is the path forward in terms of how you are thinking about gun rights, gun legislation, and the Second Amendment?

MR. FRASSETTO: What *Rahimi* did and its impact on Second Amendment cases post-*Bruen* is clarify that *Bruen* doesn't require the sort of hyper-focused historical analysis that Justice Thomas had in his dissenting opinion in *Rahimi*. It's not a search for identical historical regulations from the 18th or 19th century. You can look to history more broadly, gun regulations more broadly, and draw historical analogies based on principles at a higher level of generality. That's what the court did in *Rahimi*. That's what Justice Barrett advocates for in her concurring opinion.

I think even justices like Kavanaugh are open to that. They just believe you can also look to this tradition more broadly. So it creates more opportunities for historical analogies in Second Amendment cases. And I think we're seeing some of those more broad analogies being drawn, even in unexpected places like the Fifth Circuit.

The Fifth Circuit has looked to things like historical bail conditions, which aren't direct gun regulations at all. You have to stay in jail if you are charged with a capital offense until your trial. And they've used things like those as analogies for modern prohibitions on people who have been indicted for felonies from purchasing new guns while they were under indictment. So I think *Rahimi* leaves room for those broader analogies, which obviously creates more opportunities to have gun laws upheld.

MR. MEISELES: Yeah, and I think *Rahimi* gives the kind of tools to a judge that wants to uphold regulations and allows them to do so. And it gives them that avenue to look to more, maybe not directly, at the same exact law and all that. At the same time, I think it still allows other judges to do the opposite, given how morbid it is.

And I think that *Rahimi* and these other cases, I think it's easy to—if people are not sympathetic, people who are under indictment or convicted of crimes especially, as well as crimes—it is not necessarily easy, I think, for the Supreme Court, or maybe other judges, to then use that precedent to say, "Well, yeah, of course, we don't like these people anyway. We can use this as a tool to restrict them from having a gun." But I think whether the same approach is taken more generally when it comes to different restrictions that are intended to reduce gun violence and to keep our community safer, I think, is a whole other question when it's not just targeting people who have been accused of indictment or convicted of crimes. And so, I think these are kind of—I think *Rahimi* is not the last case that the Supreme Court is going to take in the near future. So I think we will see.

PROF. ARAIZA: So I'm not a gun specialist. But so I'll maybe speak a little more generally. I mean, the allowance of a broader scope for historical analogies in *Rahimi* is, I think, a formula for lower court confusion and disagreement. I think maybe what that means is that one of the interesting questions about where *Rahimi* leaves us with is whether the Supreme Court is going to start granting cert in a lot of these circuit splits which are inevitably going to come up. And if they are, are they going to be able to create not just a set of results, but a doctrine that specifies the level of generality that's appropriate? And that seems, as a non-specialist, to be a really tough task. And it wouldn't necessarily surprise me if the court simply does what it did in the years after *McDonald* and just stopped taking gun cases, now that they've sort of mucked it up a little.

PROF. DAMON-FENG: So lots to look forward to. Do you folks have questions?

AUDIENCE MEMBER: Thank you all for your really thoughtful responses. This is a really interesting panel. I'm curious if you have anything to say or, I suppose, any foresight as to what we may see coming down the pipeline in terms of Second Amendment jurisprudence.

Obviously, it's sort of changed over the years. It feels like we're in a specific time with how conservative politics have gotten that the conversation around gun rights has maybe fallen to the wayside a little bit in this current political moment. But we know it sort of never goes away, and it always comes back. So I'm curious if, either from a political and legislative perspective or from a jurisprudential perspective, if you kind of see anything coming specifically.

PROF. ARAIZA: Well, I'll just start by—I'll start my answer by repeating the point that maybe the court is going to have to start thinking hard about whether it wants to resolve the splits that are inevitable under the *Rahimi* regime. How legislatures respond to *Rahimi*, I think, is going to be a really interesting question. In this current political moment, there seems to be kind of a lull, maybe because everyone is sort of dizzy with other things, with regard to gun advocacy or gun regulation advocacy.

But if legislatures eventually start regulating again, I mean, maybe a lot of where the courts are going to go is going to be determined by where the legislatures go in terms of how they craft their laws. So, again, I completely get that they're not going to be passing affray laws or 18th-century laws like that. But if, in fact, they do start crafting laws that in some ways respond to *Rahimi*, then it'll be an interesting question whether the court is going to be aggressive about reviewing them.

MR. MEISELES: Yeah, I also think there is—*Rahimi* dealt with a very specific instance of a category of people who are not allowed to possess guns. And I think that there's a long list of people who are, in federal law,

prohibited from possessing guns. And those are all potential questions that there are—there will be—challenges to all of these restrictions on the types of person, in addition to sort of the broad, maybe like the places, or how you carry things like that. And so, I think that there's all manner of cases—that if the court is inclined to wade into it, these issues that will arise, can be fodder for more Supreme Court opinions here.

MR. FRASSETTO: Yeah, I mean, there's an enormous amount of cases working their way through the lower federal courts. Most of them were filed post-*Bruen*, so they are getting to the point where they'd be going to the Supreme Court. There's currently an assault in a large capacity magazine case that the Supreme Court has been considering for the last several months. Reading the tea leaves and knocking on plastic, I suppose. It seems like certs probably going to get denied with a dissent from denial, just from what other cases look like. But there's also a bunch of sensitive places, cases coming up, a bunch of prohibited person cases coming up.

And obviously, from the last panel, we know the court's going to be pretty busy with other serious cases. So it's possible they want to wade into this. And I think there's some pretty serious methodological questions and, frankly, like judicial competence questions, as far as how you administer any tests the court would adopt. But eventually, there's going to be another Second Amendment case. It's not going to be a 10-year wait like it was after Heller and McDonald.

AUDIENCE MEMBER: I have a question. So Professor Araiza, you cautioned a hyper-focus on originalism because there's also a bunch of these cases in which you said—"dogs that don't bark"—that the Justices ignore originalism. So, in Barrett offering a kind of a more workable—where she starts to carve out originalism that's more workable—is that dangerous in ossifying originalism? And is our hyper-focus on responding to it also ossifying it?

PROF. ARAIZA: So by—so I'm going to throw it back to you. So when you say ossifying originalism, do you mean—I mean, originalism is ossification, sort of. And I think Justice Scalia would agree with that, right? And he says, "The Constitution is dead, dead, dead." So…

AUDIENCE MEMBER: I think I mean: are we just making it harder to grapple with and move on from potentially?

PROF. ARAIZA: In a lot of ways, I would actually say that, especially Justice Barrett—well, not just Justice Barrett, actually, but the majority of *Rahimi*—I think, in some ways, it opens up or it reanimates originalism, if you want to think about it in those terms. Because now there is this new impetus to sort of be thinking more broadly about the original principles rather than original carbon copy analogs from the founding period.

And so, it may well be that we're going to be in this new era where the Court's going to—if the Court and lower courts are going to—have to be thinking not just about how we do, not just about the results of an originalist analysis, but what does originalism actually require us to do, right? How broadly or how narrowly are we going to look for analogs? How far into the post-ratification future are we willing to go to figure out original meaning? And I think those are kind of new, not new necessarily, but reanimated questions that I think the court, including Justice Barrett, but not only her, have kind of reopened.

MR. FRASSETTO: Just to jump in, as someone who's pretty much spent his entire legal career making originalist arguments, and I think Professor Waldman in the last panel kind of critiqued, not me directly, but people like me for believing, I think critiqued Justice Jackson, for believing that originalism can provide a pathway to sort of the liberal results that we want, the protection of the rights that we want. And that's something I worry about a lot. Sort of legitimizing originalism, not that like me doing anything legitimizes originalism, but legitimizing originalism by taking it seriously and giving the court the stuff to do originalism with, will make those sort of bad results inevitable with originalism more possible.

That said, I also think that there's a real possibility, especially with sort of like a principles-based approach, like Justice Barrett advocates for, and like the court adopted in *Rahimi*, that this originalist turn ends up being kind of like a liminal period between sort of like liberal living constitutionalism, where you have Supreme Court cases that create tests, and then you apply those tests. And this period of originalism, where you identify principles, and then you create tests to apply those principles, and then you apply those cases, and all cases going forward—where if you identify those principles and then create tests, you just end up in the same place, having gone through this odd period in between. So, we'll see what happens.

MS. PERARIA: It's a positive note to end on before lunch, so thank you. Any other questions?

AUDIENCE MEMBER: Hi, I'm going to ask a question that's perhaps broader than I'm going to excavate methodologically, but I'm particularly interested in suggesting a possible mechanism by which that, Professor Araiza, your prediction that originalism is opening up and maybe offer a way forward and reanimate the methodological debate. Because now we're looking at things like tradition and history and things like that.

Okay, six of the nine sitting justices are former clerks of the Renhquist court, except for Chief Justice Roberts, from my understanding. That means that they were, from the start of their careers, steeped in a debate between originalism and living constitutionalism, which also mapped down fairly cleanly at the time to textualism versus whatever the opposite of textualism

is, and formalism and functionalism, with preference for rules versus preference for functionalist standards.

Now, this sort of second generation, if you want to call it that, is still engaged in an originalist debate, but it's not clear that all of those other commitments that accompany originalism, like textualism, formalism and so on, necessarily accompany them in the same way. And so, is it the case—first of all, does that sound like a plausible catch to you, what's going on? And does that seem like a way in which originalism could be coupled with non-textualist, non-formalist ways of deciding and gap-filling things? Like what is the right level of generality, right? I mean this isn't a common law court the way Justice Cardozo, a century ago, or Judge Friendly, a half century ago, would have just felt comfortable filling in the gaps and answering questions, even if they were otherwise committed to something like original meaning, or expectation, or issues.

PROF. ARAIZA: Yeah, so I'll start. I think that's a great interesting question because it ultimately raises this question about what Mark was addressing about progressive originalism, and can you find an originalism that is more functionalist on separation of powers issues, or, you know, kind of more holistic in terms of statutory interpretation issues, if that even kind of maps on coherently. But, is there a future for an originalism that is kind of not the caricature of originalism, right? And I think that's a really a fascinating question that—to which—we don't have an answer, right?

So, as I was walking over to the law school this morning, I was remembering when Henry Kissinger had a conversation with Zhou Enlai, when Kissinger accompanied Nixon to China. And so, they're talking political theory. And so, Kissinger asked Enlai, "So what do you think the ultimate effect of the French Revolution was?" And Enlai says, "Too early to tell," right? So, too early to tell, whether progressive originalism in fact is a cul-de-sac, as Mr. Waldman said earlier, or whether, in fact, there's some real generative opportunities here.

I think one thing we need to realize in thinking about that is there's a lot of radical potential in the original meaning, like 13th Amendment, the 14th Amendment, even an originalist understanding of what the 11th Amendment really was intended to take care of, right? Just overruling *Chisholm* and that's all it's supposed to do and nothing more. So I think there's a lot of room for thinking about originalist interpretation through a progressive lens.

I think it may—this is getting really kind of extremely speculative. I think it may carry with it the seeds of originalism's ultimate collapse. Because if, in fact, and I think Mr. Waldman was saying that originalism in the 14th Amendment, what does that do for transgender people, or for women, or you know, et cetera? There are originalists who would say "oh,

it does a lot" because the correct originalist understanding of the Equal Protection Clause is that it was an anti-caste provision. And that's a generally applicable all-purpose anti-caste provision that protects everyone across all axes.

And the originalists have said—some originalists, Steve Calabresi, has said—this about sex equality. So if, in fact, that's how you do originalism, then at some point someone's going to say, "Wait a minute. Aren't we just doing living constitutionalism" and maybe that's Jack Balkin's point ultimately. So, I think there is room there. I think the end point is still far from being determined, but I do think that there's room there. And it might well pick up.

For example, a functionalist approach to separation of powers with—Julian Mortenson in Michigan talks about the original understanding of the non-delegation doctrine. He's like, "Oh yeah, the First Congress delegated lots of stuff without any concern at all." And so, maybe there is, in fact, some generative potential from a progressive point of view for originalism.

MR. MEISELES: Yeah, and I think that there are a lot of places where you know there's good—really good—originalist arguments for progressive ideas. And it kind of comes down to who's making those decisions, whether to buy them or not. And so, I think that there's, like you said—you know, really the non-delegation clause is a great example—when you look at the Mortenson's article, it's like, "Wow, this is super persuasive." Is that going to be persuasive to the originalists on the court?

I mean, I know that—and so it is my opinion that—it's going to do the work and present these arguments and show that. And if you lose that, it kind of highlights then what the Justices are doing and that it is not an objective methodology. That it is just a pick-and-choose, and just a way of reaching the results they want. And then people who say the originalists are only saying that because that's a way to—I mean, when went to law school, Justice Alito was not an originalist. Now, apparently he is. So, I mean—so it's fun. So I think that it is either the work or it highlights kind of the contradiction of originalism, so I think know these are very important, good things to be doing.

MR. FRASSETTO: Yeah, and I do think the conservative legal movement is sort of building its escape ship from originalism already, with whether you're seeing Adrian Vermeule with common good constitutionalism. And even seeing that in some Second Amendment cases now, there is a recent concurrence in the Third Circuit by Judge Matey, which drew on a lot of these common good constitutionalism ideas where he was quoting like Cicero and Augustine and, I don't know, a variety of classical sources, to argue against the constitutionality of a prohibition of firearms possession by a felon, a very sympathetic issue, unless they're willing to

technically fall within the federal felony prohibition. But we are seeing those ideas come in more and possibly seeing a movement away from originalism and the conservative legal movement, and especially in the sort of Trump-affiliated conservative legal movement.

MS. COHEN: Thank you so much for having us, for joining us today.

IV. PANEL 3: IDEOLOGY & JUDICIAL DECISION MAKING

MR. DONELIAN: Hello, everyone. My name is Matt Donelian, I'm the Managing Editor of the *Journal of Equal Rights and Social Justice*. Thank you all again for coming, we're so honored to have such brilliant moderators and panelists here with us today. The discussions thus far has been enlightening, and I'm so thrilled to present to you the third and final panel of our symposium. This panel will delve into the nuances and distinctions between and Justice Jackson and Justice Barrett's judicial ideologies.

Our moderator for this panel is Professor Michael Pollack, who is a Professor of Law and the Associate Dean for Faculty Development here at Cardozo. He's also the Co-Director of the Floersheimer Center for Constitutional Democracy. Professor Pollack was a law clerk to Supreme Court Justice Sonia Sotomayor and to Judge Janice Rogers Brown of the Court of Appeals for the D.C. Circuit. He was an attorney at the Department of Justice's Federal Programs Branch in Washington, D.C. Professor Pollack graduated with a J.D., *summa cum laude*, from NYU Law where he was a Furman Scholar and a B.A. with the highest honors from Swarthmore College.

Our first panelist is Professor Linda Greenhouse. Linda Greenhouse is a Senior Research Scholar in Law at Yale Law School, where she taught from 2009 to 2023. For the previous 30 years, she was the Supreme Court correspondent with the *New York Times* and won a Pulitzer Prize in 1998 for her coverage of the Court. Professor Greenhouse's commentary on the Supreme Court appears frequently in the *New York Times Opinion* pages, as well as *The New York Review of Books* and other major publications. She is a graduate of Radcliffe College of Harvard and earned a Masters of Studies in Law from the Yale Law School. Her extracurricular life includes serving on a number of nonprofit boards, including the Harvard Board of Overseers and National Senate of Phi Beta Kappa.

Our final panelist is Professor Earl M. Maltz, who is a distinguished scholar of law, Professor of Law at Rutgers Law School, and the author of numerous articles and books on constitutional law, statutory interpretation, and the role of courts and legal history. His notable works include the *The Coming of the Nixon Court: The 1972 Term of the Supreme Court and the*

Transformation of Constitutional Law and *Slavery and the Supreme Court, 1825-1861*. Professor Maltz received his B.A. from Northwestern University, where he was elected to Phi Beta Kappa. He then went on to receive his J.D., *cum laude*, from Harvard Law School. He currently teaches constitutional law, torts, employment discrimination, conflicts of law, and a seminar on the Supreme Court.

I'm going to hand it over to you now, Professor Pollack. Thank you.

PROF. MICHAEL POLLACK: Thank you. And thank you all for being here. So we're going to begin with each of our panelists, including some prepared remarks, and then I've got some questions, and then we'll leave some time at the end for Q&A. So Linda, if you want to take us away.

PROF. GREENHOUSE: So I have a question for you first. So you clerked for Janice Rogers Brown and then Sonia Sotomayor? How did that work?

PROF. POLLACK: So just for context, I don't know if this is—so Justice Sotomayor is probably the more well-known figure to—for you, but they're lovely and Judge Brown on the D.C. Circuit is now retired off the court, but was a fairly conservative Georgia judicial appointee. Judge Brown was, I think, a remarkable judge in the following sense, which is rarer these days, which is she hired law clerks regardless of politics or ideology. So, in fact, my year, myself and my co-clerks were all very liberal people. One of my co-clerks actually had worked for Senator Russ Feingold in Wisconsin prior to the clerkship and then went on to work as an advisor for Senator Warren. So, you know, Judge Brown's very ecumenical in who she hired, and I think it would be good if more judges returned to that all, nowadays.

PROF. GREENHOUSE: I apologize for the digression.

PROF. POLLACK: No, it's fine.

PROF. GREENHOUSE: I had to ask. Okay, so I'm going to start my remarks with a caution about drawing huge conclusions from the rather few data points that we have about these two justices. I've heard a couple of Justices say, and I think it's true, that it takes five years on the Court to really get grounded, to really know what you're doing. So Amy Coney Barrett is coming to the end of her fourth term, Justice Jackson is coming to end of her third, these people are still works in progress, and I don't mean that in a, you know, condescending way at all, but there is a learning curve in many dimensions and we all have temptation to find labels, put labels on people, and I just think we have to be a little bit careful about that—we have to watch what they actually do.

So I haven't been invited, I think, to give a review of each of them—it might go something like this, very briefly. Amy Coney Barrett, as you heard emphasized in the second panel if you were here, is a legal scholar, and that really matters. She's was serious legal scholar during her 15 years as a law

professor. She accumulated a substantial and quite impressive body of work on, kind of, the nuts and bolts of the civil procedure, federal courts, other subjects. She's the only serious legal scholar in the Court.

Now, you might say Elena Kagan was Dean of Harvard Law School, what about that? She wouldn't hold herself out as a legal scholar, I don't believe. So why does that matter? I think it allows Justice Barrett, or you might say forces Justice Barrett, to look from an institutional perspective at the Court's role in the development of American law and indeed the Court's role in America today.

At times, her scholarly instincts and her conservative ideological instincts might clash. In fact, I think they are clashing right this minute, and that's what makes her so interesting, which instinct will prevail in a given case, right? I mean, she gave her vote to Sam Alito in *Dobbs*, and she didn't say a word. Most of the Justices wrote one thing or another in that case, and she was silent. I thought that was unfortunate, I think she basically owed us an explanation for her vote. So I don't want to seem like I'm kind of giving her a blank slate, you know? But on the other hand, we see her admittedly silent vote with the order that came down the other day refusing the President's urgent request to stay the order requiring him to follow the law, and that's very interesting too.

Ketanji Brown Jackson, of course, is a figure of history as the first Black woman on the Court. Because President Biden had promised to nominate the first Black woman, she arrived with a certain target on her back, I think, as witnessed in the disgraceful behavior of the Republican senators, who did everything they could to her in her confirmation hearing to diminish and demean her. I don't think the phrase "DEI" was uttered, but it was implicit in the way the Republicans treated a nominee who, after all, had been the Supreme Court law clerk, as well as a federal district judge and a judge on the Federal Court of Appeals—it was just disgraceful.

So where did that bring her? Determined I think. And here I put her in line with Justice Sotomayor—and Michael could intervene, and I hope he does—a determination to make a difference, to make something out of her historic appointment, to use her voice and her vote to remind Americas of the country's uncomfortable racial history, and that's what she did, as you heard referenced in the earlier panels, during her second day on the bench, when the Court heard the voting rights case from Alabama, *Allen v. Milligan*.

She pushed back vigorously and got a lot of attention because she was such a newbie, but she didn't follow the, you know, the usual custom, which was sitting there silently. She pushed back vigorously against Alabama's argument that what the 14th Amendment stood for was simply race neutrality and that, by implication, the race-consciousness embedded in the Voting Rights Act makes that act unconstitutional.

Quote, "Why is it that you think there's a 14th Amendment problem?" she asked. It was clear she said that, "The entire point of the amendment was to secure rights for the free former slaves. I don't think" again, her quote, "I don't think that a historical record establishes that the Founders believed that race neutrality or race blindness was required, right?" And he didn't really—the Idaho lawyer didn't really have an answer to that question. And P.S., Alabama surprised most people, including me, by losing that case.

Some Court analysts have used the phrase, and I'm using it here, "progressive originalism" to describe Justice Jackson's approach. I think that's just a label, frankly, to satisfy the need for labels. I think what we see her doing is excavating historical truth and applying it to today's controversies. Her dissenting opinion in *Students for Fair Admissions*, the Harvard and North Carolina affirmative action case, is grounded in historical facts, not in interpretive theory, quote, "Our country has never been colorblind," unquote, she said.

Since our project today is at least in part a compare and contrast exercise, I'll close by comparing these two Justices in their vote to a fascinating case from last term that I think has not been mentioned so far in this symposium, a case called *Moyle v. United States*. This was a case about federal preemption. It presented a clash between the federal law known as EMTALA and the virtually complete abortion ban in the state of Idaho. EMTALA requires hospitals to provide "stabilizing treatment to anybody who arrives in the emergency room in the throes of a medical emergency." Sometimes, in a pregnancy going terribly wrong, that first aid treatment is termination—is abortion.

Since Idaho allows abortion only to save a woman's life and her health, women were being denied treatment—and will be again because of what the Trump administration is just doing, but we'll leave that aside—and were being airlifted out of Idaho on a regular basis. The Biden administration brought a lawsuit. I'm only into the weeds of that case, it's very fascinating, but I just need to provide the context that our two justices reacted to.

The Federal District Court in Idaho found preemption, enjoining to the operation of the Idaho Abortion Law in situations of medical emergency. The Ninth Circuit refused to stay that injunction while setting the state's appeal for expedited argument. But before the argument could take place, the Supreme Court swooped in, imposed a stay over the District Court's injunction and granted cert before judgment, hearing the case at the end of April. Certiorari before judgment, I should note, takes five votes, not the usual four.

So clearly, a majority of the Court was attentive to and, we can assume, sympathetic to Idaho's argument that the federal government was impinging on the state's sovereignty in trying to create abortion enclaves, that's what

the state said in its brief, in Idaho's hospitals. Nine weeks later, in an unsigned per curiam order, the Court dismissed the grant of certiorari as improvidently granted and put the injunction of Idaho's Abortion Law back into effect. What happened?

According to Justice Barrett, in an opinion concurring in the dismissal, the briefing and the argument had indicated uncertainty about what the Idaho law actually required and what the federal government was actually demanding. The speed with which the Court intervened in the case had proven to be unwise. She said quote, "It was a deviation from normal appellant practice. The case would return to the lower court to sort matters out." Had Justice Barrett been one of the five, or maybe six, votes to hear the case, or had her misgivings emerged only later? We don't know. But her response in the state's position during oral arguments suggest that the real danger that the Idaho law posed to women's welfare once it dawned on her only at the merit stage, quote, "Counsel, I'm kind of shocked," unquote, she said to Idaho's lawyer when he would not or could not give a straightforward answer to her questions about what the law provided for women in a crisis pregnancy. Buyer's remorse perhaps?

Justice Jackson, in a separate opinion, took a very different position. "The Court should not dismiss this case," she said, "but rather should go ahead and decide in favor of the federal government." Quote, "this months-long catastrophe was completely unnecessary," unquote, she wrote. And dismissing the writ at this stage was simply an excuse to avoid issues that the Court ultimately did not want to decide, quote, "it is too little too late for the Court to take a mulligan and just tell the lower courts to carry on as if this did not happen." As the old adage goes, she said, "the Court has made this bed, so now must lie in it by proceeding to decide the merits of the critical pre-emption issue that this case presents."

So, for each of these two justices, how do we label what we see here? Conflict avoidance on the one hand versus confrontation on the other? A different view of the underlying merits? A reluctance to wash the Court's dirty linen in public versus a felony to let it all hang out in public view? Pretty interesting, yes. I look forward to our conversation.

PROF. POLLACK: Thank you, Linda, and I definitely look forward to probing a lot of that in our conversation, but first, let's turn to Earl for his opening remarks.

PROF. EARL M. MALTZ: So, I think some of my remarks are going to build on some themes that we've heard from both Linda and some in the previous panels, and I want to begin by talking about the difference between the appointment processes with respect to the two justices.

PROF. MALTZ: So, if I want to start with the appointment process for Justice Jackson—which was actually, except for one thing, pretty normal.

That is, what happens is, that you start off with a president saying, "Okay, what's the basic sort of ideological and jurisprudential approach that I want from the next justice?" And after we get to that, then they say "Well, there's a group of justices who fit that standard, who fit that. Then a somewhat smaller, but still large, group of justices who have what I would describe as somewhat appropriate qualifications for the job who fit that standard." And then, you have to pick from that appropriate group, and it's been over time pretty standard for presidents to say "I will pick a person from—for political reasons that satisfy the wishes, if you will, of part of my political supporters—who also fits the other two classifications," and that's Justice Jackson, right?

Justice Jackson, when I say she fit the other two qualifications and the political thing, she's not Sandra Day O'Connor, who had no plausible qualifications who had no plausible experience to be on the Supreme Court. She fit the other two things, and indeed the only reason that I think that her nomination—well, there are two reasons that her nomination was controversial. First, that Republicans generally didn't want to put another progressive on the court, although they didn't have the ability not to do that. But second, because it raised specifically the race flag. My point is that in this context, the racial thing was no different than if we go back when they would appreciate this, perhaps, William Brennan, who was chosen because he was a person from a Catholic, from a particular area of the country that Dwight Eisenhower wanted to please, right? So that was—but there were other things about William Brennan, but that's the point. There was nothing particularly unusual about the qualifications of Justice Jackson for the job except, and again, what raised the red flag was race.

There was, again, we start off with the same thing with the choice of Amy Coney Barrett, and that is that what we want is somebody who was basically conservative—political and judicial ideology, which I will talk about in a moment—and who fit the basic qualifications for the job. Now, as Linda pointed out and as some other people have pointed out yesterday that she was different and the reason that she was chosen was different. That it has actually been pretty the only reason that she, the big reason that she stood out—the fact that she was a woman may have been part of it—but the big reason that she stood out was that she was known as a superstar originalist scholar. And when I say she was known as a superstar originalist scholar, I—if you want to think, Mark Tushnet talked about what a great scholar she was, and if you all know who Mark Tushnet is—you don't know who Mark Tushnet is, he is a far left constitutional scholar, and he talked about what a great scholar she was compared to, for example, Kavanaugh and Gorsuch. So that was what was unusual.

The second thing is going back to the originalism part of it, and that is that for beginning in the 1970s and 1980s for reasons that had to do with being a response to the Warren Court, trying to describe a neutral response to Warren Court jurisprudence. Originalism became embedded in conservative political judicial ideology. And so, as a result of preaching this—so that's why you want to pick an originalist, not only a conservative but an originalist that makes a big thing. Well, it is also embedded in Amy Coney Barrett, provided Justice Barrett's own sort of personality and who she is. She is an originalist scholar. That's what her identity is. I think that's part of her personal identity—an originalist scholar, and a formalist, and an originalist.

Now, it is true that Justice Jackson makes originalist arguments sometimes. But I think that it's different for progressives—that what originalism was for progressives was not "oh, we are doing this because it's originalist," it's "we have these other constitutional theories, and now these other people have raised originalist objections to them and so"—no, I'm not meaning to be negative—"and therefore, I should address these originalist objections to them as well." So, what is this—so I'm not sure if I have anything particularly insightful to say about Justice Jackson's jurisprudence, other than that it is basically, I think, most of the time, basically the progressive jurisprudence, that's what it is.

By contrast, sometimes the originalism and formalism that's so deeply embedded in Justice Barrett's identity, if you will, conflicts with what is sort of standard conservative ideology, and so she has a conflict. And I'm not saying that, in resolving those conflicts, she is not influenced by her conservative ideological perspective. It's that she has this conflict and sometimes, because originalism is more important to her than it is to some other justices, she goes over and says "you know what, even though my predisposition is the other way, I'm going to go with the originalist or formalist approach." But I have to say that sometimes—and this is not accusing anybody, I don't want to accuse, I'm not trying to accuse anybody of intellectual dishonesty—but sometimes, people's predispositions affect their view of evidence generally. And sometimes—and again I agree on this in the affirmative action cases—that's what wins out. It's not that she's being intellectually dishonest, it's just that it affects the lens through which she views the relevant evidence.

Now—but there are other cases where her formalism wins out. And one of the cases, that somebody pointed out to me—when I asked "can you give me a case about specifically Justice Jackson, where she abandoned her ideology?"—that she was the person who left her more progressive colleagues more frequently, and it's *Fischer v. United States*. *Fischer*, which is a very formal technical case about some of the January 6th rioters. And

the interesting thing about that case is that the majority interprets the statute in a way that's favorable to the defendants and the majority, which included the 5 conservative Justices and Justice Jackson—who might very well in that case have been influenced by her background as a public defender—read the statute narrowly. On the other hand, Justice Barrett dissents together with Justice Kagan and Justice Sotomayor, presumably because of her formalist reading of the statute. So, that's really all I have to say about in general terms.

What does this mean for the future? Well, there's one case in particular that I think it might mean something for the future, again, particularly with respect to Justice Barrett, and that's the fear that many progressives have expressed that this court is going to overrule *Obergefell*. Now, one of the things that Justice Jackson has written significantly about is the relationship between stare decisis and originalism. And unfortunately, like most people, when she writes about that, she says, sometimes—

And I should say this just to give context. Speaking as a person who thought that *Obergefell* was wrongly decided, I think—and I think that Justice Barrett would also agree with me that—it should not be overruled. And the reason it should not be overruled is that, from a formal perspective, this is a classic case where there has been a lot of reliance and that it would create an unholy mess if you overruled it at this point. So, I would be very surprised if Justice Barrett voted to overrule *Obergefell*, whether that makes a difference or not, I don't know. I've been wrong before, not often. I thought I was wrong once, but I was mistaken, that—so that's sort of all I have to say about that. And I welcome your questions about this.

PROF. GREENHOUSE: If I could say a few things here.

PROF. MALTZ: Uh-huh.

PROF. GREENHOUSE: You know, they're not gonna overrule *Obergefell*. What they're gonna do is create, through the Free Exercise Clause, in my opinion, a gross misreading of the Free Exercise Clause, all kinds of religious opt-outs from having to treat LGBTQ people with equality, and that will—

PROF. MALTZ: [Interposing] That, that, that's—

PROF. GREENHOUSE: Yeah.

PROF. MALTZ: We can have a long discussion about that at some point.

PROF. GREENHOUSE: Okay. It's something else I'd like to say in response—I think when we talk about originalism, what's really interesting about Justice Barrett is the way she has distanced herself from the strict history and tradition aspect of originalism that's come to the fore in the last couple of years, and in one of the earlier panels somebody mentioned the case of *Vidal v. Elster* which came down a month or so before *Rahimi*—a term ago. This was the trademark case, and it was a history and tradition majority

opinion by Justice Thomas, and Justice Barrett concurring in part, that said this—I'm just gonna read the one paragraph because it's really important. "I think going forward," she says, "rather than adopt a generally applicable principle, the Court," the Thomas majority, "assesses the names clause in isolation as part of the trademark law at issue, treating the supposed history and tradition of the clause as determinative. In my view, the historical record does not alone suffice to demonstrate the clause's constitutionality. For one thing, the record does not support the court's conclusion. For another, I disagree with its choice to treat tradition as dispositive of the First Amendment issue." That's super important, and of course, we see that again in *Rahimi*. So, I think, you know, originalism has become this huge, big mush of a cloud in the sky, but what really matters is what individual quote "originalists" make of it.

And one more thing I'll say while I have the floor, and the *Rahimi* discussion, which was quite interesting, I think nobody brought out the fact that *Rahimi* presented the court with a major, I'll say political problem, and I mean small "p" politics writ large. So, here was this federal statute—here was this 40 or 45-year-old federal statute—that made it a crime for somebody under a court order for domestic violence to possess a gun. The 5th Circuit has said under *Bruen*—well, first, the 5th Circuit had upheld the law and then, *Bruen* came down and the 5th Circuit said "oh *Bruen*, okay, now, this law is unconstitutional for the Supreme Court of the United States to say there's a constitutional right for somebody under a domestic violence court order to run around with a gun." I mean, really, they were gonna say that? And I think it—I think the outcome of *Rahimi*, the pullback from *Bruen*, yes—was doctrinal, was jurisprudential, but it really was the Court, kind of defending itself from what would have been a real self-inflicted wound. So, that leads to, really, a broader inquiry that, you know, all of us in this room are equally qualified to engage in. I mean, we have no expertise up here, which is what is the Court gonna make of the current moment. I mean, that's what we really all care about, right?

And we saw the spectacle in the Trump speech the other night. There was Chief Justice Roberts and Justice Barrett sitting there in their robes in the front row listening to, you know, an idiotic rant that went on for 90 minutes, they couldn't leave. They were a captive audience and, you know, when I first saw them there I thought, well, why did they come? And then I thought, I'm so glad they're there because it was in their face. They had to confront what actually the country is having to put up with.

And so, you know, will that determine the outcome of the 100 lawsuits that are now pending challenging the various depredations of the Trump administration? You know, I can't sit here and say, yes, it'll determine, you know, the 70 and maybe not those 30, but it's got to play into it. The court

realizes that it's the only thing that stands between Donald Trump and—you find them out, okay, we can all find it out and so, I think we just have to keep in mind these are people who live in the world. I mean, yes, they're kind of siloed and privileged and everything, but, you know, they don't get houses when they become chief justices. They live in the community, they can even, you know, hang upside down flags, whatever, and you know they don't get cars and drivers except for the chief. They're people in the world and that's what really is gonna matter going forward in the coming terms.

PROF. POLLACK: So that actually leads right to a question that I wanted to ask, which is: so at the Presidential Address to a joint session of Congress the other night, there's a video that I see on social media as Trump is coming in and he, you know, shakes hands with the Justices and she just appeared in this video to be sort of glaring at him as he—as he walks by. And because now my Twitter feed is mostly like right-wing memes because that's what Twitter is now, there's a lot of, like, anger at Justice Barrett for being a swish, a liberal, a rhino, whatever, because she, like, didn't smile enough at President Trump. And some of her critics, including some of the academy, were talking about, you know, how she clearly is just a Justice who was responsive to flattery and so, that's why the left is now like giving her positive reinforcement for, you know, glaring at Trump to try to woo her to the left just like with Stevens or Souter, or O'Connor or Kennedy, all Republican appointees who lean insufficiently right for a lot of more conservative folks. And this conversation we just had now is a bit about how, you know, Justice Barrett's approach is not only conservative, right? How our commitments to her scholarship and jurisprudence make her more nuanced. So, there's a lot of compare and contrast that you want to do. But personally, I think Justice Barret is a far more fascinating Justice, and so I just wanted to delve a little bit in on Justice Barrett. You both alluded to this a little bit in your remarks, but can you further explore for us the daylight between her and, for example, Justices Thomas or Alito, both in methodology and in—to the extent you can sort of take it up—any other commitments that she may have?

PROF. GREENHOUSE: Well, I think it came out pretty early. So, her first term, there was a case called *Fulton v. City of Philadelphia*. So, this was a free exercise case about whether the Catholic Church had a free exercise right not to have LGBT people approved as potential foster parents, despite the non-discrimination contract that filled up and required of non-profits that engaged in this work.

So, the underlying question in that case was whether the court should use it as a vehicle to overturn the employment division against them. And Alito—Justice Alito—wrote a "concurring" opinion of many, many pages saying that that's what the court should have done. He obviously drafted it as a majority opinion, but he couldn't hold a majority for it.

And Justice Barrett, one of her first published opinions was a concurring opinion, concurring with the Roberts majority, saying, "You know, there may be a time to overturn *Employment Division v. Smith*, but before we do that, we really want to know what we would replace it with." So, that was her saying, I think, to Sam Alito, "Don't take me for granted. I'm not, you know, a female version of you, even though we both come from a serious Catholic background. And, you know, you think I'm on your side on a lot of things, and I may well be, but I need to work from some kind of principle."

And I think that, of course, then she signs his opinion in *Dobbs*, so I'm not, again, I'm not, you know, we have to be very specific about what we're talking about. But I thought that was a kind of remarkable performance in the first term, standing up against this powerful presence on the court, Sam Alito. And, you know, I think it's kind of gone on from there. And, of course, he is no scholar. He never cashed a paycheck that wasn't written by the federal government. He is basically a federal bureaucrat himself. And, you know, she's got a lot of points on him when it comes to both principle and IQ.

PROF. POLLACK: So, I believe that, correct me if I'm wrong, that opinion, that concurrence in *Fulton*, that Justice Barrett—or Justice Breyer joined her in that opinion, I believe—it's a terrific opinion. It's a really thoughtful discussion of, as Linda was saying, "Okay, if we were to overrule *Smith*, what would it—what would we—how would we replace him? How would we answer all these questions that follow?" And that was remarkable enough. But I also think she got Breyer on that opinion, too, which further just sprangles the sort of neat ideologies, as you might expect.

PROF. MALTZ: So, correct me if I'm wrong. First, just about *Smith*, wasn't it Scalia who wrote *Smith*?

PROF. POLLACK: Yes.

PROF. MALTZ: And at that time, this is something which is kind of noteworthy about how things have changed. It was the progressives who dissented in *Smith*. And there's a long story about that, about how religion, things have changed. But—so that's—but that sort of leads into a broader point, which is not so much about Justice Barrett as it is about originalism. And I can, you know, in five minutes I will summarize everything about originalism.

But—so most of you weren't alive then—but it is true that originalism developed, as I said, in response to the progressive jurisprudence of the Warren Court to give a, at least, facially neutral response. The famous case—the famous article was in 1971 from Robert Bork, *Neutral Principles and Some First Amendment Problem*, to what was going on in the Warren era. My point about—and it became known as (a) a doctrine of deference, and (b) basically conservative, when in fact it is neither.

Originalism, and again, whatever form of originalism you want to describe, is not a doctrine of restraint. It is a doctrine of constraint. And in addition, it is a theory of judicial activism. That is, it describes the situations in which the court should replace what I described as the baseline rule of law with some other rule of law.

My point about that is—and again, this goes back to the—to my initial talk, is that, now, originalism creates other sorts of difficulties for conservatives, and other sorts of difficulties for somebody who believes in judicial restraint. And I don't know—I mean, honestly, I don't know—that there's anybody on the Supreme Court now who really believes in judicial restraint.

So—and that's what creates this tension for Justice Barrett when she deals with some of these cases—that is she has this strong—this deeply embedded in her—belief in formal originalism. And again, I won't describe which form of formal originalism, but she obviously really believes in it, but it is sometimes in tension with her conservative ideology, or conservative political perspective, let me say, not ideology, conservative political perspective.

And like most justices, it depends on the case which one is going to win out. And it depends how strong the originalist evidence is, and how strong the belief, this feeling of believing in the—what a Martian would think of as a—originalist perspective, compared to the conservative ideological perspective. And I don't have any answer to that, and I don't have any specifics, but we see it working out on a case-by-case basis, and it just depends. That's very formal analytical analysis. It just depends.

PROF. POLLACK: I mean, I think this is an important theme, which really sums up the panel perhaps today, right, which is, this is far more nuanced than left and right, or even originalist and progressive, as Earl was saying in his opening remarks, right? There is a bit of "it depends on the case" and that's in part because not—every justice is a little inconsistent, right? And then sometimes departs from their methodology in a different case to another one and another case. Or maybe it only looks to us that way, but in their minds, they've figured out some Ptolemaic whatever that, you know, this epicycle makes me consistent, and now it's all fine.

But I think that as observers, it's important for us to be thoughtful about looking at jurists, and maybe this is me answering the first question today about my two quick tips, to look at judges not as one thing but as complicated individuals. But at the same, they're also people who live in the world and interact with the world, and that influences their thinking as well. And then, of course, judges change over time, right? Even one of the stories about, you know, even during the Warren and Burger Courts, you know, the justices

who, when they were first nominated, were pretty consistent in one thing, and over time drifted.

Stevens, you know, is often thought of as this liberal lion, but when Ford nominated him, he was—his first few years in the court—a pretty center-right vote. Souter also for a few years at the end was a more center-right vote. And, you know, they learn things, they see things, they adapt to their colleagues and what they do. I think it's important, just reinforcing what both our guests have said, to be thoughtful about the nuance there. Yeah?

PROF. GREENHOUSE: I'm smiling because—so, Justice Souter, I guess at around his second term, and I can't remember the case, but he voted with the liberals on the Court. And, I guess, I found that quite significant, so in my capacity then as a daily journalist, I wrote about this. And I then ran into Justice Souter in the building, and he said to me, "So I got a call from my mother this morning. And my mother said, 'I've been reading the *New York Times*, dear, and it says here that you've become a liberal.'"

[laughter]

PROF. POLLACK: What did he have to say about that?

[laughter]

PROF. GREENHOUSE: Anyway, we digress.

PROF. POLLACK: So, something you both brought up also in your opening remarks was stare decisis in the context of *Obergefell*, for example, or just more generally. So, I'm curious if you have a sense of both of their views about stare decisis. Now, as you said, unfortunately, Barrett didn't write anything in *Dobbs*, so we don't hear directly from her, but she joined the elite majority with its views on stare decisis.

Justice Jackson articulated some of her own views about that as well. So, I'm curious if you have thoughts about where they might land just on the abstract question of stare decisis. And then, yeah, of course, how they might apply to other questions like *Obergefell* or others.

PROF. GREENHOUSE: So, stare decisis is a very interesting subject because—I've given this a lot of thought lately—it seems to me that, in the current court, there's a lot of stare decisis going on, which is to say there's a kind of metastasis of stare decisis, of deciding cases that in the hands of the current court have come to stand for much broader, more aggressive, principles than they were originally intended.

Now, I'm not directly answering your question, which was "what do I think these two justices make of stare decisis," but let me just put this out there because I think there ought to be some more academic attention to this.

So, I'm going to mention two cases. One is called *Glucksberg*, and one is called *Lukumi*. So, *Glucksberg* was a case from the mid-90s that rejected the constitutional claim to physician-assisted suicide. And the Court—there were many separate opinions, but it was basically nine-nothing—and the

Court said "there is no history and tradition of recognizing a right to have a doctor help you kill yourself, and so, we don't find this in the Due Process Clause." It was a very specific holding about a very specific claim. Okay.

Lukumi was a case that followed *Employment Division v. Smith* by two or three years. So, *Employment Division v. Smith*, as you know, held that as a matter of free exercise, there's no free exercise right to a religious-based exemption from a law of general applicability, a neutral law of general applicability. And as Earl said, this created a huge cry, even though it was a Scalia opinion, led Congress to think it was overturning *Smith*, and resulted in the passage of the Religious Freedom Restoration Act, and so on.

So, a couple of years later, a case comes to the Supreme Court from the city of Hialeah, Florida, in which followers of Santeria, which is an Afro-Cuban religion, had been moving into Hialeah and wanted to put up a church. And part of their religious tradition is animal sacrifice. So, the city fathers of Hialeah were taking a very dim view of these Santeria adherents moving into Hialeah. So they passed a law that said there could be no animal sacrifice. There could be no killing of animals for ritual purposes. Of course, there could be killing of animals to butcher them, to eat them, but not for ritual purposes.

So, a free exercise case came up to the Court. And the Court said this law is unconstitutional because it was not a neutral law of general applicability. It was targeted at this one religious group. Okay, so those are the two cases.

Look at the Court's jurisprudence today. *Glucksberg* is cited in every one of these history and tradition cases. It has come to stand for something it was never intended to stand for, which is a kind of originalist, you know, the kind of rigid originalism that I think Justice Barrett was responding to in the paragraph I read in *Vidal v. Elster*. It's really had a remarkable—I call it—metastasis.

And *Lukumi* has come to stand for a kind of, you know, if there is any slither of a difference in how religion is treated from how non-religion is treated, that means it's not a law of general applicability, and it violates the Free Exercise Clause. It's kind of the foundation for the, you know, what's the phrase? The most favored nation claim about religious exercise. That's not what *Lukumi* was about.

Lukumi was, in my opinion—and it was unanimous—the Court's response to the ruckus over *Employment Division v. Smith*. It was the Court's way of saying, "Look, we're not against weird little religions. You misread us when you read *Employment Division v. Smith* to say we're against weird little religion sets. That wasn't the point. We were interpreting the Free Exercise Clause more generally and see, we're standing up even for ritual sacrifice in this weird religion of Santeria."

But yet it's come to be the engine of, you know, if you treat religion a tiniest bit different from anything else, that's unconstitutional. So that's what I have to say about stare decisis. And it'll be, you know, super interesting to see going forward whether—especially Justice Barrett, given her scholarly chops, you know, whether she is willing to say, "Wait a minute, what precedent are we honoring when we use these two in this way?" And I'd love your response to this.

PROF. POLLACK: No, I think it's an important point that, I mean, when we talk about what we do about precedent, there's—the question we often think of is, you know, overrule it or not. And I think what Linda's getting at is between overrule it and not, there's all this space in how big do you stretch it, how—where do you take it, how much do you let it metastasize? I think that's absolutely right. And I take you to be saying, "Hey, we don't quite yet have a lot of data points on these two justices on that point."

PROF. GREENHOUSE: Yeah, we have an instrumental role in precedent. We don't like the precedents we don't like. And the ones that might be useful in some way, we love those.

PROF. MALTZ: So, first thing, my first observation. My first observation about *Glucksberg* is that really—the test in *Glucksberg* is not an originalist test at all. History and tradition is not an originalist test. I guess you might read it someplace as the substantive due process somehow, but it's basically not an originalist test at all.

So, *Glucksberg* stands, if nothing else, again, for the proposition that it's only in narrow circumstances, supposedly, that we are going to apply, find a non-originalist right. But of course, that's not exactly been true, I think, in cases involving religion and a variety of other cases. But the other—the problem in talking about, trying to say, these are the metrics that matter in determining whether a particular justice or any particular justice is likely to honor stare decisis.

I mean, honestly, I think that for living constitutionalists—well, it's not connected precisely, but I suspect that Justice Jackson, if she ever got a chance to be in a majority, ever in a case where there was a political dispute, I would suspect that she would be less influenced by stare decisis than Justice Barrett, just because Justice Barrett is a formalist. But the problem is that there is nobody on the court, and there hasn't been for a very long, well, for a very long time, who says, you know, once it's decided, it's decided and it's over.

So, the only thing you can say after that is, when do we look at—when is stare decisis going to be important? And the answer is, sometimes, I think reliance—I think this idea of reliance is important.

And I also think that the question of whether this is a really core value that is not jurisprudential but more political is important as well. So I think that if you are going to talk about one thing that was a really core complaint about conservatives generally prior to—prior until very recently—it was abortion and also abortion was different for other reasons. So it was really, really important.

So there's the really, really important rule, and there's the reliance rule, and there is the will to create a mass rule. And those are the only three rules that—and all you can do is talk about that on a case-by-case basis.

PROF. POLLACK: I want to turn now to what might be sort of the next important, or the next big thing, right, which is presidential power, whether it's in the guise of presidential immunity, like in the *Trump v. United States* case or in, that's what I was alluding to, the Order just from a day or two ago compelling the president to comply with appropriations law. How do you—what evidence do we have, what indications may we have about how Justices Jackson and Barrett would approach or are thinking about these questions of executive authority and their willingness or how far they're willing to defer to the president as opposed to not?

PROF. GREENHOUSE: Yeah, of course the first panel did a very deep dive on the immunity case with a good look at Justice Barrett's withholding her vote from kind of a key—how such a case would actually play out in court. So I don't have much to add to that.

One thing that's interesting is the Chief Justice and Justice Alito, Justice Gorsuch, really kind of cut their eye and teeth in the heart of the executive branch in OLC, and the White House Counsel's Office, and the SG's office, and so on. And so their whole instinctive mechanism is, they are executive power guys. Neither Justice Barrett nor Justice Jackson has that background. I mean, not to be overly reductive and say, because of that background you think X. But it is a distinction.

And so, I just think that's kind of worth keeping in mind. I don't have any kind of great predictive capacity other than what I said before, which is that I think they're very aware of what's going on. And I think the Order the other day is, it's—it easily lends itself to over-interpretation because, of course, there was no writing and there was writing in dissent from Alito, but there was no writing by the majority and it's just a temporary refusal to extend the stay while the lower courts work out—work the thing out. So, in a sense it was an easy vote unless you were really committed in the way that Alito was.

So, we don't know, but we're going to find out pretty soon. I thought we would find out with the Hampton Dellinger case, but he's not pursuing it and I'm sure he was advised by friends, this is not the hill that we want to die on, right? But the other case, there will be plenty of raw material.

PROF. POLLACK: Earl?

PROF. MALTZ: I think Justice Jackson, I don't think, although she did vote, even though wrote a concurring opinion to protect basically Trump from Article III, but I think Justice Jackson generally is not going to defer to the—all the things line up for Justice Jackson not to defer to President Trump. And also, because she is not a formalist, she doesn't have those problems. I think—I don't—I just don't have any insights into what—how Justice Barrett would think about this because the originalist arguments are complicated, and the institutionalist arguments are complicated, and the world is complicated for a variety of reasons.

PROF. POLLACK: Linda, you said earlier, just in your answer to me just now, that Roberts and Kavanaugh, they came up in the executive branch and the piece of the executive power people. Was that true during the Biden administration?

PROF. GREENHOUSE: Well, Biden actually did better at the Court than Trump I, did. So, yeah, maybe. But, of course, to say they're executive branch people, now, of course, the takedown of the administrative state, [crosstalk] which we see going on, that's against the agencies and it's basically an aggregation of power to the Court itself. So, you can put that in different boxes. And I'm not sure what boxes to put them in, although, you can certainly put it in a presidential power box as against the independent agencies.

And will we see *Humphrey's Executor* being overturned or won't it matter because of the way they are going to be taking down these agencies case by case, following *Jarkesy* and *Loper Bright*, so, we'll see.

PROF. MALTZ: My only observation about that is that if I would teach *Humphrey's Executor* for more than 10 minutes 10 years ago, the question from students would have been, "What? What are you talking about? Why are we talking about this?" And so, things change.

PROF. POLLACK: Indeed. The—and I'm getting us a little bit off the topic of the panel, but I think this exchange was just very interesting because, oftentimes, we talk about executive power, executive power, and what we mean by that generally was both the president and the agencies. But increasingly it just means the president, and when the Court overruled *Chevron*, sort of in the name of presidential power, meaning, as Linda said, to control the independent agencies, the reality is actually to give more power to the Court because now the Court is the place where the interpretation of the statute takes place.

And so, in the name of presidential power, the Court has actually eroded executive power and narrated and expanded the scope of judicial power. And Justice Barrett was on board for all of that in *Loper Bright* and the Court

oppose to the other sort of set of—as you mentioned, the other recent administrative state cases, and Justice Jackson was not, right?

It's hard to—at least for me, it's hard to—read too much into that because those cases have tended to sort of fall along crude left-right ideologies for a long time. And Justice Jackson's time in the D.C. federal court system, both at the District Court and the Court of Appeals level, was relatively brief. We didn't get a whole lot of administrative law jurisprudence from her on the Court of Appeals. And Justice Barrett in the Seventh Circuit didn't have a whole lot of opportunity to decide many of those cases either.

So, from my perspective, at least, it's a little bit early to see exactly where they land on the administrative law thing besides some of these kind of more nuanced cases, besides some of these bigger ones. I don't know if you have a different view of where they might be on the admin law stuff.

PROF. GREENHOUSE: Well, the question is, what's going to be left of administrative law? I mean, it's interesting. I read, I couldn't quite believe it, but I guess it's true. There's an executive order now that basically says, we don't need no notice and comment under the APA, right? Excuse me. So, there's just lots of weird stuff going down. And I kind of gasped when I read—you read that to me. Am I making it up?

PROF. MALTZ: Probably.

PROF. GREENHOUSE: So, we'll see.

PROF. MALTZ: Do—should we see if there are any questions? I know we're right at the end.

PROF. POLLACK: This is a very good time to begin to open up for audience Q&A. I have some on my own, but yeah, go ahead. Yeah, you want to come to the microphone?

FEMALE VOICE 3: Thank you both, and thank you, Professor Pollack, for your remarks. They've been really interesting. I'm curious, I have a more specific question about standing, because there's been a kind of change to the approach of standing. It's always been a little bit of a, I don't want to say flimsy doctrine, but it's changed over time. It feels a little bit more freewheeling than it ever has in certain instances, specifically thinking of *303 Creative* and the standing in that case.

And I'm curious, I don't know how much it applies specifically to Justice Barrett or Jackson, but in general, the approach of this current Court to standing and some of the overall problems it has had in cases like 303 Creative. Do you have anything to say about that?

PROF. MALTZ: So could I just start with the—an anecdote from before the *Bakke* case, with that case before the *Bakke* case, which had to deal with the—somebody who was challenging a race-conscious admission program to the University of Washington Law School that the Court dismissed as moot. And I believe it was Richard Epstein who said that the

rule of that case was that hard cases are moot. And I think standing law tends to be a little bit like that at the court. When they really want to get to an issue, they are standing as freewheeling, and when they're—sometimes they don't.

PROF. GREENHOUSE: [Interposing] Well, it's a super interesting question because, as you suggest, the political polarity has completely flipped. So when I took federal courts back in the day, the progressive view was, open the courthouse door as wide as possible. And the first dissenting opinion that John Roberts wrote as Chief Justice was in the case of *Massachusetts v. EPA*, where the Court, as a 5-4 decision, accorded standing to the state of Massachusetts to challenge the EPA's refusal to regulate emissions. And I don't think the Court today would have—I mean, certainly not.

There's—the Court's going to be put to the test on this. And of course, in the mifepristone case, a term ago, the Court found no standing with this phony group of crazy doctors. That case has been revived in the same friendly court of Judge Kacsmaryk. And the plaintiffs now, maybe you all know this, but if you don't, you should. The plaintiffs now are three states. It's Kansas, Idaho, and another—and the three state attorneys general suing the FDA for its extended approval of the abortion pill.

What is their claim to standing? Their claim to standing is that because the pill enables abortions, more abortions than there would be without the pill. Our states, where women are using these pills, are not growing in population as we should.

PROF. MALTZ: [laughter] Jesus.

PROF. GREENHOUSE: We'll be losing population. And consequently, we have injuries. So we might get fewer federal funds. Now, this case was framed before there was such a thing as no federal funds, but fewer federal funds. And we may even has—have less representation in Congress, in the House, than we would otherwise. And that's our claim to standing.

So, assuming that Judge Kacsmaryk, of course, says, yes, well, you're welcome here, and suing the Fifth Circuit. Likewise, this will come up very quickly to the Supreme Court, and we will see. That'll be very interesting. So standing is a very hot button now. And as I say, it's totally shifted.

PROF. POLLACK: You can bet that when Justice Alito writes the majority opinion, he will cite *Massachusetts v. EPA* in support of the position that, of course, these states have standing. Massachusetts did, and so do these states. But to the point about the polarity or inconsistency, at the same time as that argument is advancing, Justice Thomas and others have suggested that associational standing should be eliminated. So we should restrict standing over here, but expand it over there. And as Earl was getting at before, it's

hard to escape the conclusion that where we're restricting and expanding standing is designed to achieve particular outcomes. Other questions?

PROF. GREENHOUSE: We've exhausted everybody.

PROF. POLLACK: Exhausted everybody, yes.

FEMALE VOICE 4: I have kind of half-baked questions, so I'll pitch it anyway. So, we talked a little bit in a prior panel about how in *Rahimi* Justice Jackson criticized the Court for issuing standards that were unworkable. Do you think that—and part of that discussion was the fact that Justice Jackson did not take part in *Bruen*. Do you think—it seems that she does have a lot to say about judicial decision-making. Do you think that will continue as she starts to decide cases that she—that challenge something she formerly decided?

PROF. GREENHOUSE: I'm in trouble here.

PROF. POLLACK: That's a great question. So I think what you're getting at is, right, when—if the cases—new cases are about cases that Jackson wasn't here for, how is she going to talk about them and frame them? Is that what you're getting at?

FEMALE VOICE 4: That she was here for.

PROF. POLLACK: So, *Bruen* case, she wasn't there for, right? When she's got a case she was here for, how is she going to talk about it?

FEMALE VOICE 4: Yes. Correct.

PROF. POLLACK: Okay. So in *Rahimi*, she wrote an opinion where she said, "I wasn't on the Court for *Bruen*. If I was, here's what I would have—here's how I would have voted in it. I would have dissented in it. But it's the law, and so here's how I'm going to—here's how I would apply it in this case." I thought that was an interesting, sort of, peek behind the curtain. The justices typically don't randomly tell you how they would have voted in a case they weren't there for. And so I don't know if maybe she's going to be inclined to do that a little bit more.

PROF. GREENHOUSE: That's really breaking the norm.

PROF. POLLACK: Yeah.

PROF. GREENHOUSE: I didn't notice that. I mean, because usually, the minute somebody comes on the court, they're saying, we held, right? That's the form.

PROF. POLLACK: Yes.

PROF. GREENHOUSE: We held in case, so the norm is they adopt—make of it what you will. They can make of it what they want, but they have to acknowledge it as a joint project, and they're part of that project.

PROF. POLLACK: I connected to—and I don't know if this is just wild speculation, but there's—some of the justices have adopted a practice where, if they recuse themselves from a case, they'll say why, right? So when

the Court issues its order list on Mondays, listing what's—where cert has been granted or denied, at the end of it, there will be "cert denied in this case" and they'll say Justice so-and-so took no part in the consideration or decision of this petition.

And Justices Kagan and Jackson have started citing a particular canon of the code of conduct—indicating the—essentially, "I recuse because I heard this case before, or I worked on this case when I was in government." The other justices have not done that. They just recuse with no explanation.

I connect Jackson's comment in *Rahimi* to a general sort of statement like "I want to be more transparent about my thinking." Right? "How I'm thinking about cases." And I think that's admirable. It would be nice if, I think, all the justices were more transparent about how they're thinking about cases. And I guess I should say the other person who I think is very transparent about how he thinks about cases is Justice Thomas. He most certainly writes the most separate opinions of any other justice on the court.

And so, whereas, we were maybe being a little bit critical earlier of Justice Barrett didn't say anything in Dobbs. Maybe she should have. You can't say it about Justice Thomas. He will always tell you why he has voted the way he has. And I think that's good. I don't want to see a return to nine opinions in every case. But a little bit more explain your thinking, I think, is a valuable lesson.

PROF. GREENHOUSE: You know, there's a huge religion case coming up. It's going to be argued next month. The question is whether a school system that has charter schools is obligated to also have religious charter schools. And Justice Barrett is recused. So the question is, why is Justice Barrett recused? She didn't say. The thought is that it's—there were two cases below, and it's consolidating, that one of the petitions was filed by the Religious Liberty Clinic at Notre Dame and that she has recently spoken or taught at Notre Dame, for which they paid her.

Now, there's no canon, actually, that would require her recusal, in my understanding. It was voluntary on her part. She didn't cite any canon because there is no—she wasn't required to recuse. Unlike, Justice Jackson was recused from the Harvard part of the affirmative action cases because she was on the governing board of Harvard. That's more clear. But if Justice Barrett got a $1,500 check for giving a talk at Notre Dame, that's not—it's not a case that unfolds every day.

So, it's interesting. And will her absence make a difference in that case? I mean, I would really like to hear what she thinks about that issue, but we won't, at least not in this case.

PROF. POLLACK: Final questions, final thoughts from the panel?

MS. PERARIA: Thank you so much for your time today.

PROF. POLLACK: Thank you very much.

[applause]

PROF. POLLACK: I believe we have some closing remarks.

V. CLOSING REMARKS

MS. COHEN: We would like to thank the moderators and panelists for your incredible insights today. Additionally, we really appreciate the time and energy dedicated by everyone who helped us make this symposium possible. We would also like to thank our Junior Symposium Editors, Serena Roche, Daisy Elliot, and Hannah Cohen, for all their hard work curating, organizing, and helping us run the event today. We hope this has been an encouraging, engaging, and thought-provoking conversation on the different jurisprudence of Justices Barrett and Jackson.

As a reminder, if you have registered to receive CLE credits, please see Emily Abrams, she's seated in the back, to receive your certificate. Lastly, thank you all for coming, and we hope you have a great weekend.

[applause]