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00:02:10.740 --> 00:02:12.260

Dean Leonard M. Baynes: Good afternoon!

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00:02:12.360 --> 00:02:20.579

Dean Leonard M. Baynes: I'm Leonard Baynes, Dean of the University of Houston Law Center. Welcome to the 2026 U.S. Supreme Court Update.

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Dean Leonard M. Baynes: I'm the dean, and I've been dean of Law Center for going on 12 years. I'm the longest-serving dean in the state of Texas. And the Law Center is a top-tier law school with top programs, intellectual property, health law, and our part-time program. This is our 12th

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00:02:39.020 --> 00:02:50.259

Dean Leonard M. Baynes: U.S. Supreme Court Update. And the recent U.S. Supreme Court decisions are shaping some of the nation's most consequential legal and policy debates.

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00:02:50.260 --> 00:02:59.890

Dean Leonard M. Baynes: University Houston Law Center faculty will examine these issues, these rulings, and the broader implications of the CLE. They will shed light

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00:02:59.890 --> 00:03:02.059

Dean Leonard M. Baynes: Not heat on these questions.

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00:03:02.060 --> 00:03:19.150

Dean Leonard M. Baynes: But each Supreme Court term shapes our nation's legal and policy landscape in profound ways, impacting many lives. Our faculty bring exceptional insight and expertise to these discussions, helping attendees understand not only what the Court decided.

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00:03:19.150 --> 00:03:24.930

Dean Leonard M. Baynes: But also the broader implications of those decisions for business, communities,

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00:03:24.930 --> 00:03:38.459

Dean Leonard M. Baynes: and individuals. We will focus on the 2025-2026 United Supreme Court term, highlighting some of this year's major decisions to deal with birthright citizenships,

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00:03:39.290 --> 00:04:01.799

Dean Leonard M. Baynes: tariffs, voting rights, and other election law issues, presidential power and the authority to fire members of statutorily created commissions and agencies, like the FTC and the Federal Reserve, a ban of a form of therapy that attempts to change the sexual orientation of patients. Our panelists are legal experts, U.S. Law Center faculty.

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00:04:02.390 --> 00:04:20.719

Dean Leonard M. Baynes: They'll introduce... I will introduce each of them before their presentation. They'll each speak about 30 minutes, and after all of them speak, I will moderate a roundtable discussion among them. So our first topic is going to be birthright citizenship and other restrictions on immigration.

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00:04:20.860 --> 00:04:29.600

Dean Leonard M. Baynes: Seth Chandler is our expert on this area. He's currently the Law Foundation Professor of Law at Law Center.

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00:04:29.970 --> 00:04:41.000

Dean Leonard M. Baynes: He specializes in constitutional law and the application of mathematics and computer science to law. He's been called on twice to testify before Congress on the Affordable Care Act.

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00:04:41.130 --> 00:04:53.699

Dean Leonard M. Baynes: He has a broad internet presence, including a YouTube channel for his course, Analytical Methods for Lawyers. He's also an expert in large language models

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00:04:53.750 --> 00:05:04.969

Dean Leonard M. Baynes: for use by lawyers. He teaches con law, insurance law, analytic methods for lawyers, and other courses. Let's welcome Professor Seth Chandler.

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00:05:06.620 --> 00:05:13.129

Professor Seth Chandler: Well, thank you very much, Dean. That is the wrong share. Hold on, we will get this right.

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00:05:13.470 --> 00:05:16.629

Professor Seth Chandler: Alright, desktop 2, share.

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00:05:16.730 --> 00:05:25.559

Professor Seth Chandler: Alright, so if all goes well, you should now see a slideshow. You'll also notice this QR code up in the top right.

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00:05:25.560 --> 00:05:41.250

Professor Seth Chandler: That will direct you to a website I've created that contains these slides, but also a lot of supplemental material that you might find of interest on these three cases that the Supreme Court decided last term, all involving aspects of immigration and,

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00:05:41.260 --> 00:05:59.929

Professor Seth Chandler: immigration law. We're going to talk about Trump versus Barbara, which is the birthright citizenship case. Mullen v. Doe, which deals with the executive branch's ability to terminate temporary protected status without judicial review. And Mullen v. Al Otro Lado,

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00:05:59.930 --> 00:06:14.020

Professor Seth Chandler: which is formally about asylum at the border, but actually may have some broader implications. Each of these, I think, are important in their own way. Trump versus Barbara, which is sort of the headline case,

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00:06:14.020 --> 00:06:32.560

Professor Seth Chandler: involves a challenge to long-standing Supreme Court precedent. Mullen v. Doe, in some sense, is the most immediately important case in that there are approximately a million holders of temporary protected status whose ability to stay in the United States and work in the United States

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00:06:32.560 --> 00:06:46.769

Professor Seth Chandler: is now going to be ended. And, as well, Mullen vs. Al O Lado, which deals with the extent to which the United States can effectively deter or block people from seeking political asylum

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00:06:46.870 --> 00:06:55.050

Professor Seth Chandler: in the United States. So, let's take a look at these. In turn, we have Trump versus Barbara, the headline case.

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00:06:55.050 --> 00:07:10.179

Professor Seth Chandler: And the short version is that the Supreme Court struck down President Trump's attempts to limit birthright citizenship, basically finding it facially unconstitutional.

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00:07:10.230 --> 00:07:20.559

Professor Seth Chandler: What are we dealing with here? Well, we've got two provisions that we need to pay attention to. The first is the first sentence of Section 1 of the 14th Amendment

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00:07:20.560 --> 00:07:33.340

Professor Seth Chandler: which says, and you will be tested on this at the end, all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.

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00:07:33.390 --> 00:07:49.710

Professor Seth Chandler: So, I think we're pretty clear on what it means to be born in the United States, although there actually is a little issue now about certain territories of the United States, but the big fight is about what does subject to the jurisdiction thereof mean. And that language gets repeated

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00:07:49.710 --> 00:08:04.569

Professor Seth Chandler: In the Immigration and Nationality Act in 1952, when it declares that the following shall be nationals and citizens of the United States, same thing, a person born in the United States and subject to the jurisdiction thereof.

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00:08:04.570 --> 00:08:18.700

Professor Seth Chandler: So what did President Trump try to do? What President Trump tried to say is that there were two categories of people that he did not feel were really subject to the jurisdiction of the United States. One of those

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00:08:18.700 --> 00:08:28.399

Professor Seth Chandler: was when the mother was unlawfully present at the time of the birth, and the father was neither a citizen nor a legal permanent resident.

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00:08:28.670 --> 00:08:44.860

Professor Seth Chandler: So, think of these as the unlawfully present grouping of children. And the second is what, some of the justices described, and I think it's actually a useful phrase, the temporary sojourner, the person who, is not

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00:08:44.870 --> 00:08:51.260

Professor Seth Chandler: fully... they think that maybe they're going back, or the government thinks that they're going back, and

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00:08:51.380 --> 00:09:05.180

Professor Seth Chandler: the, executive branch defined this term rather broadly to include not just the person who was on a vacation here from England, and suddenly you've got a premature childbirth, perhaps.

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00:09:05.180 --> 00:09:30.149

Professor Seth Chandler: But also people who I think, thought of themselves as being a little more than temporarily present. People, for example, granting relief under the Convention Against Torture, people who were admitted pursuant to humanitarian parole, people who were granted withholding of removal, our friends, the TPS beneficiaries, those were all included within the order as being temporarily present, and unless the father was a citizen

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00:09:30.150 --> 00:09:32.110

Professor Seth Chandler: or legal permanent resident.

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00:09:32.110 --> 00:09:45.210

Professor Seth Chandler: President Trump thought that the children should not be birthright citizens of the United States. So, we get two different theories as to what subject to the jurisdiction thereof mean.

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00:09:45.260 --> 00:10:04.129

Professor Seth Chandler: There's basically the soil reading and the allegiance slash domicile reading. The soil reading basically goes back to merry old England and says that if you are physically born in the United States, then with certain very narrow exceptions,

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00:10:04.130 --> 00:10:11.439

Professor Seth Chandler: you are a citizen of the United States, and we're not going to take a close look at what your parents' beliefs are, or how they got here.

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00:10:11.440 --> 00:10:19.510

Professor Seth Chandler: Physical presence is what matters. The exceptions are narrow, for example, the children of ambassadors.

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00:10:19.510 --> 00:10:34.770

Professor Seth Chandler: In the event of a pregnant, invading alien who penetrated the United States as part of war and happened to give birth, that child would not be a citizen of the United States. And, and this is where things get tricky.

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00:10:34.770 --> 00:10:53.489

Professor Seth Chandler: Tribal members who are born on a reservation are not considered to be citizens of the United States under the 14th Amendment, even if they later assimilate or move off reservation. So that's one theory that's advanced. As it turns out, that's the theory that's going to win.

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00:10:53.620 --> 00:11:15.620

Professor Seth Chandler: But there is a contrary theory, which says that we look at the allegiance of the parents, and allegiance can be determined, at least pretty well, by domicile. That jurisdiction refers to an undivided allegiance, and therefore the president was within his rights to say that, for example.

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00:11:15.900 --> 00:11:17.750

Professor Seth Chandler: Persons who

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00:11:17.750 --> 00:11:42.300

Professor Seth Chandler: who, perhaps were not permanently here. They were maybe vacationing at the time, or the mother who had not renounced her citizenship in the country from which she emigrated, that they would not be citizens of the United States. And so, many of the justices, it turns out, well, the dissenters, think that the domicile of the parents becomes a major factor

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00:11:42.370 --> 00:12:02.850

Professor Seth Chandler: in determining the citizenship of the child. So, this is not the first time that an issue of this sort has been before the judicial system. We can go all the way back, as I said, to Merry Old England, where the English judicial system uses this notion of

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00:12:03.070 --> 00:12:20.619

Professor Seth Chandler: subjectship based on physically where you were born, and we also have the Dred Scott case, in which the Supreme Court held that Africans whose parents were slaves

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00:12:20.620 --> 00:12:29.089

Professor Seth Chandler: were incapable of becoming citizens within the meaning of the Constitution, which did not contain the 14th Amendment at that time.

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00:12:29.090 --> 00:12:47.640

Professor Seth Chandler: We have the Civil Rights Act of 1866, which certainly attempts to... we can debate what more it attempted to do, but quite clearly, it attempted to overturn the Dred Scott decision, and said that if you were born here and not subject to any foreign power, and weren't an Indian, not taxed,

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00:12:47.640 --> 00:12:56.909

Professor Seth Chandler: you were a citizen of the United States, but it turns out, well, where does Congress get really the power to do this? And so we have the 14th Amendment.

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00:12:56.910 --> 00:13:13.269

Professor Seth Chandler: That comes in two years later, which contains the, language that we see today. Big debate about, you know, should we make any... the fact that the 1866 Amendment uses not subject to any foreign power, whereas the 14th Amendment

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00:13:13.270 --> 00:13:28.199

Professor Seth Chandler: uses a subject to the juris... not... subject to the jurisdiction, does that make any difference? That's going to be debated over the 200 pages of the Supreme Court opinion. But then we have the two precedents that really, I think, cabin the debate.

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00:13:28.390 --> 00:13:31.059

Professor Seth Chandler: One is President Trump's favorite case.

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00:13:31.060 --> 00:13:55.829

Professor Seth Chandler: Elk v. Wilkins, in which the court rules that Mr. Elk is not a citizen of the United States because he was born on an Indian reservation. And even though Mr. Elk had assimilated, wanted to vote, in Nebraska, I believe, nonetheless, he was not a citizen. We didn't really look individually at Mr. Elk and

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00:13:55.830 --> 00:13:59.359

Professor Seth Chandler: how he felt about the whole thing. He was,

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00:13:59.430 --> 00:14:08.079

Professor Seth Chandler: just simply not a citizen of the United States within the meaning of the Constitution. And for those wondering, this Congress later expands

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00:14:08.080 --> 00:14:31.060

Professor Seth Chandler: the scope of citizenship, and basically says that Native Americans are citizens within... are citizens of the United States, but that's done by statute rather than by the Constitution. So that's President Trump's favorite case, because it suggests that there's some notion of allegiance baked into the subject... to the jurisdiction there of language. On the other hand, we have

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00:14:31.060 --> 00:14:42.830

Professor Seth Chandler: Wong Kim Ark, in which we have a child who is born of Chinese parents. Those parents could not be naturalized due to our racist laws at the time.

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00:14:43.780 --> 00:15:03.920

Professor Seth Chandler: And the question was, was that child, a citizen of the United States, entitled to return to the United States, because he'd gone to visit some relatives in China, and wanted to come back? And the Supreme Court, Justice Gray, goes through

many, many pages of looking at English law and some earlier American cases, and determines that

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00:15:04.840 --> 00:15:14.250

Professor Seth Chandler: he is a citizen of the United States, and he's not particularly interested in the actual allegiance of his parents.

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00:15:14.250 --> 00:15:21.600

Professor Seth Chandler: Alright, so how does it all come out? Well, it all comes out in a little bit of a complicated way, because

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00:15:21.600 --> 00:15:45.529

Professor Seth Chandler: there are potentially two routes by which people could become citizens, and therefore two potential bases for challenging what President Trump had done. One would be to say that even if Congress had agreed with President Trump, because remember, there's no congressional statute that's been enacted recently on this matter, this is all attempting to be done by executive order, and so could

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00:15:45.530 --> 00:16:10.520

Professor Seth Chandler: President Trump, in theory with Congress behind him, place these restrictions on citizenship, and we get, with respect to children of temporary visitors, the temporary sojourners, we basically get a 5-4 split on the Constitution. With respect to children of long-term, unlawfully present parents, we get the same five justices

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00:16:11.100 --> 00:16:35.680

Professor Seth Chandler: that we had with respect to temporary visitors, but we've got two of the justices, Thomas and Gorsuch, who branch off and say, we're gonna hold that for another day. We don't need to reach that, because in order to hold the statute facial, or the action facially unconstitutional, you have to show that it's unconstitutional in almost all of its applications, and since we don't... since we think what President Trump did was okay here.

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00:16:35.890 --> 00:16:37.469

Professor Seth Chandler: That's all we need to find.

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00:16:38.590 --> 00:16:54.080

Professor Seth Chandler: Where we get the switch is Justice Kavanaugh. Justice Kavanaugh says, well, I don't really think it's constitutionally required that we make people in the President Trump listing birthright citizens of the United States, but...

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00:16:54.180 --> 00:17:10.089

Professor Seth Chandler: But the people who drafted this statute had Wong Kim Ark in mind at the time, and that the exceptions that had been found, therefore, by the court system were what he described as a closed set. That he wasn't going to permit

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00:17:10.089 --> 00:17:17.840

Professor Seth Chandler: the president to be particularly creative in this regard, he was going to say that they... the,

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00:17:18.220 --> 00:17:25.840

Professor Seth Chandler: President Trump's order violated the statute, and he didn't really have the power to do this on his own.

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00:17:25.930 --> 00:17:34.609

Professor Seth Chandler: And we've got a similar split here with respect to, the children of long-term unlawfully present.

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00:17:34.610 --> 00:17:47.140

Professor Seth Chandler: parents. So that's how it all comes out, and so, you know, the most simplistic view of the matter, which isn't all that wrong, is, well, President Trump lost on this one. But, well, let's talk about it a little more.

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00:17:47.450 --> 00:17:51.900

Professor Seth Chandler: So, Chief Justice Roberts takes unto himself the ability

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00:17:51.900 --> 00:18:10.540

Professor Seth Chandler: to write... he takes them to himself, writing the majority opinion, and as I said, he basically says, look, subject to the jurisdiction thereof is a narrow category, it means children of accredited diplomats. If you were born on a public ship that, I guess, was in the waters.

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00:18:10.540 --> 00:18:22.450

Professor Seth Chandler: my example of the pregnant invader, and then he has the issue of, well, what do I do with *Elk v. Wilkins*? Because a lot of people think of that as an allegiance case.

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00:18:22.450 --> 00:18:29.839

Professor Seth Chandler: And he just sort of argues Indians are separate, they do have a special status under American law, they're not...

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00:18:29.870 --> 00:18:49.650

Professor Seth Chandler: reservations or Indian tribes are not foreign nations, they are domestic, dependent nations under Chief Justice Marshall's decisions back in the 19th century. And so this is where he draws the line. He basically says, Wong Kim Ark got it right, not going to narrow it.

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00:18:50.000 --> 00:18:51.500

Professor Seth Chandler: And,

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00:18:51.770 --> 00:19:06.410

Professor Seth Chandler: So that he's not going to permit President Trump to carve out people who are just temporarily present or unlawfully present. Those are all citizens of the United States... birthright citizens of the United States.

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00:19:06.410 --> 00:19:12.250

Professor Seth Chandler: You've got Justice Kavanaugh, whose view is that

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00:19:12.580 --> 00:19:27.009

Professor Seth Chandler: we need to be a little bit flexible about what the Constitution means here. We didn't really have, unlawfully present persons in the same way that we do today.

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00:19:27.010 --> 00:19:29.480

Professor Seth Chandler: At the time, either

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00:19:29.480 --> 00:19:47.130

Professor Seth Chandler: that the 14th Amendment was enacted, or to some extent, possibly, at the time that Wong Kim Ark was decided, and therefore, it wasn't so clear to him, or I guess he did think that President Trump, if he had the backing of Congress

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00:19:47.140 --> 00:19:55.219

Professor Seth Chandler: could undertake the kind of restrictions that were announced in the executive order, but... But, says he

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00:19:55.220 --> 00:20:15.360

Professor Seth Chandler: you've got to look at what Congress intended when it enacted this statute. Congress can make people citizens, that the Constitution doesn't make people citizens, and he felt that subject to the jurisdiction thereof should be interpreted in essentially the same way that the majority had interpreted the Constitution.

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00:20:15.360 --> 00:20:30.270

Professor Seth Chandler: And he... his argument on Elk is... it's kind of weird to say that the Constitution can exclude children of tribal American Indians, but that it can't exclude

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00:20:30.270 --> 00:20:35.610

Professor Seth Chandler: children of unlawfully or temporarily present foreign citizens. But...

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00:20:35.710 --> 00:20:48.510

Professor Seth Chandler: the bottom line, again, is that Justice Kavanaugh finds against President Trump, and strikes down the order. You then have Justice Jackson's concurrence,

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00:20:48.550 --> 00:21:07.429

Professor Seth Chandler: which is significantly devoted to looking carefully at the history of the enactment of the 14th Amendment. It is somewhat of a response to Justice Thomas' 91-page, thank you, dissent

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00:21:07.430 --> 00:21:15.720

Professor Seth Chandler: in which he too goes through the history, and then Justice Jackson has her own concurrence, which she is alone in

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00:21:15.720 --> 00:21:40.019

Professor Seth Chandler: in which she seeks to basically interpret the 14th Amendment as being not a colorblind idea, as had been decided in the SFFA case and the Kelley case that

Professor Froomkin will talk about shortly, but as an anti-subordination provision which would permit asymmetric treatment, that is, discrimination against minorities might be treated under the 14th Amendment as different.

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00:21:40.020 --> 00:21:42.630

Professor Seth Chandler: Then discrimination against majorities.

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00:21:42.630 --> 00:21:59.179

Professor Seth Chandler: Why she took the opportunity of this case to really announce this theory or come forward strongly on this theory, I'm not so sure about it. Maybe why she only got one vote, but that's something that she does, and we'll see how much traction that gets in the years ahead.

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00:21:59.190 --> 00:21:59.970

Professor Seth Chandler: Alright.

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00:22:00.170 --> 00:22:10.829

Professor Seth Chandler: You have Justice Thomas, who wrote one of the longest dissents in the history of the Supreme Court. I cannot do it justice in my allotted time.

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00:22:10.830 --> 00:22:25.529

Professor Seth Chandler: But what I will say is he goes through a very, very lengthy discussion, looking at English history, deprecating certain American cases from before the Civil War that he didn't care for, including a New York case.

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00:22:25.570 --> 00:22:42.580

Professor Seth Chandler: And contends that if you look at all of that history, that there was not an intent to extend birthright citizenship to the people identified as temporary sojourners in President Trump's order. And since...

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00:22:44.180 --> 00:23:02.479

Professor Seth Chandler: there were substantial people within President Trump's order for which what President Trump had done was constitutional. You couldn't bring a facial challenge, and therefore he was going to set aside for another day. Well, what about the children of long-term, unlawfully present residents?

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00:23:02.480 --> 00:23:17.860

Professor Seth Chandler: All right, you've got Justice Alito's opinion, and he is basically going to go on this line of allegiance. He just pushes this theory of allegiance very hard.

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00:23:18.200 --> 00:23:31.249

Professor Seth Chandler: And he does not buy... you know, he argues that Wong Kim Ark didn't really decide this case, because the parents of Wong Kim Ark were lawfully present in the United States.

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00:23:31.580 --> 00:23:33.419

Professor Seth Chandler: And so that's where he is.

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00:23:33.670 --> 00:23:44.249

Professor Seth Chandler: You've got Justice Gorsuch's theory of the citizenship, and he's gonna push very hard that it depends on domicile

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00:23:44.250 --> 00:23:59.179

Professor Seth Chandler: that, we look to see... when they say subject to the jurisdiction thereof, they're really speaking about where are the parents domiciled, and he again has this idea that I don't have to show, or the...

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00:23:59.420 --> 00:24:09.420

Professor Seth Chandler: unless the plaintiffs here, the Barbara, can show that President Trump's order is unconstitutional in virtually all circumstances

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00:24:09.420 --> 00:24:21.240

Professor Seth Chandler: they're not entitled to succeed in their facial challenge, and so all I have to really show is that President Trump could lawfully restrict the birthright citizenship of some temporary visitors.

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00:24:21.340 --> 00:24:32.719

Professor Seth Chandler: He expresses some sympathy for the children of parents who had been here a long time, but he says he doesn't have to decide that issue. So, you might think, well, we're done.

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00:24:32.850 --> 00:24:45.369

Professor Seth Chandler: That... thank you, Professor Chandler, for that exposition, but we are not done, because just a week ago, President Trump tried again, and he has issued a new

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00:24:45.570 --> 00:24:57.430

Professor Seth Chandler: executive order, which seeks to restrict birthright citizenship. I believe we're going to talk about this a little more in the Q&A, but let me just give you the basics.

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00:24:57.430 --> 00:25:14.899

Professor Seth Chandler: Which is, he wants to argue now that the children of alien enemies, that is, foreign terrorist organizations, are not citizens of the United States. He wants to sort of expand the category of diplomatic personnel whose children are not citizens of the United States.

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00:25:14.900 --> 00:25:17.640

Professor Seth Chandler: He wants to argue that people who

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00:25:17.640 --> 00:25:26.159

Professor Seth Chandler: come here for the purpose of giving birth to their child so that they can obtain citizenship. That doesn't count.

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00:25:26.160 --> 00:25:39.160

Professor Seth Chandler: And he's gonna raise the long-standing issue about what do we do about people in American Samoa. Are they... can they become citizens of the United States?

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00:25:39.160 --> 00:25:45.640

Professor Seth Chandler: So, those are the issues that he is going to raise. As of just yesterday, thank you so much.

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00:25:45.640 --> 00:26:06.900

Professor Seth Chandler: The Barbara plaintiffs filed a motion to amend the injunction that they sought to also bar President Trump from his new order, and we will see where that goes. But let me switch now to Mullen versus Doe. This is the case about temporary protected status.

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00:26:06.900 --> 00:26:08.240

Professor Seth Chandler: And,

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00:26:08.410 --> 00:26:20.250

Professor Seth Chandler: Here's the statute, 8 U.S.C. 1254A. There is no judicial review of any determination of the Secretary with respect to the designation or termination of

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00:26:20.260 --> 00:26:36.489

Professor Seth Chandler: a designation of a foreign state under this subsection. So the Trump administration decides that it doesn't particularly care for temporary protected status for people from many nations, and decides that they are going to terminate temporary protected status.

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00:26:36.490 --> 00:26:44.229

Professor Seth Chandler: There is certainly an argument that they did not go through the consultations that the remainder of this statute

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00:26:44.330 --> 00:26:56.920

Professor Seth Chandler: requires that they do, and as this affected a number of people, and in particular, it affected people from Syria and Haiti,

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00:26:57.110 --> 00:27:06.960

Professor Seth Chandler: there were challenges to the, President Trump's termination of TPS. And,

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00:27:07.390 --> 00:27:20.689

Professor Seth Chandler: there are essentially two theories that the plaintiffs advance. The first is that while, yes, I suppose Congress has cut out the,

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00:27:20.710 --> 00:27:35.909

Professor Seth Chandler: judiciary from reviewing the termination of a foreign state from TPS, that didn't mean that the judiciary couldn't review the process

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00:27:35.920 --> 00:27:50.589

Professor Seth Chandler: whereby the Secretary made that determination, and in particular, whether the Secretary had complied with the other provisions of this statute, requiring various forms of consultation, and what were the conditions in the country

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00:27:50.590 --> 00:28:03.599

Professor Seth Chandler: that were being examined, and the second claim was that various arguably racist statements made by President Trump and by then-Secretary of the Interior,

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00:28:03.600 --> 00:28:09.539

Professor Seth Chandler: rendered the termination of TPS constitutionally flawed.

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00:28:09.930 --> 00:28:29.399

Professor Seth Chandler: So, here President Trump prevails, the Supreme Court reads that determination language broadly to say that not only does it bar judicial review of the bottom line, but it bars judicial review of the process by which that bottom line was achieved.

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00:28:30.560 --> 00:28:43.790

Professor Seth Chandler: And, there's a... you know, it's a statutory interpretation kind of case at this point, and, you know, the argument is, well, what if, what if the people just flipped a coin?

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00:28:43.790 --> 00:28:47.739

Professor Seth Chandler: Are you saying that the judiciary couldn't review that?

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00:28:47.740 --> 00:29:06.640

Professor Seth Chandler: And the Supreme Court majority basically says, yep, that's what we're saying, but maybe you could go to Congress and get your remedy that way. The fact

that a statute hasn't been followed doesn't mean that the judiciary has the right to overturn what's been done, where Congress has

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00:29:06.690 --> 00:29:17.990

Professor Seth Chandler: at least according to this court, barred judicial review of the matter. The second argument is the equal protection matter, and here the court is

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00:29:17.990 --> 00:29:27.410

Professor Seth Chandler: trying to decide whether it should use Trump versus Hawaii immigration deference in deciding how to apply the equal...

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00:29:27.460 --> 00:29:28.500

Professor Seth Chandler: amendments?

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00:29:28.780 --> 00:29:47.789

Professor Seth Chandler: Well, it's not really there, but the Fifth Amendment's sort of Equal Protection Clause, or the Arlington Heights standard that is generally used, and here's where things get a little, I think, interesting. The court says, well, let's just assume, we'll give you the benefit of the doubt, we will...

135

00:29:47.890 --> 00:30:06.240

Professor Seth Chandler: apply the tougher Arlington Heights statement, standard, but even if we do that, there are perfectly race-neutral explanations for the president's action. That is, just because he's terminating,

136

00:30:06.500 --> 00:30:29.799

Professor Seth Chandler: TPS for Haiti, and just because, and the dean will forgive my language here, but I'm just quoting, just because the president has called Haiti a shithole country, and said that, why can't we get people from Norway and, I believe, Sweden to

come, instead of Haitians, that there were perfectly... there were other explanations other than racism

137

00:30:29.800 --> 00:30:37.750

Professor Seth Chandler: for what the president had said. There might be different conditions, maybe it was a language preference, who knows?

138

00:30:37.750 --> 00:30:44.389

Professor Seth Chandler: And that, since there were these alternative explanations for it.

139

00:30:44.390 --> 00:30:53.500

Professor Seth Chandler: The... they hadn't made out their equal protection case. The issue here is...

140

00:30:53.640 --> 00:31:18.560

Professor Seth Chandler: is that really what Arlington Heights is going to be held to mean in domestic cases? That is, in non-immigration cases. And so that's one of the issues that I think is left open by Mullen versus Doe, but at the end of the day, President Trump prevails, and we're now beginning to see TPS being terminated, and various people being placed into custody, or actually deported.

141

00:31:18.560 --> 00:31:21.470

Professor Seth Chandler: Or self-deporting, or going into hiding.

142

00:31:21.470 --> 00:31:24.910

Professor Seth Chandler: As a result, this certainly affects our workforce

143

00:31:24.910 --> 00:31:31.340

Professor Seth Chandler: here in Texas, and so there are very practical, implications of what's going on.

144

00:31:31.340 --> 00:31:44.119

Professor Seth Chandler: Alright, let me shift, since I think I only have a few minutes left, to Mullen versus Al Otro Lado, and here, again, it's another sort of statutory case.

145

00:31:44.120 --> 00:31:54.900

Professor Seth Chandler: Let's look at when you can apply for political asylum. You, either have to be physically present in the United States

146

00:31:54.920 --> 00:32:05.820

Professor Seth Chandler: or arrive in the United States. And so the question is, what do we do about people who have

147

00:32:06.220 --> 00:32:11.639

Professor Seth Chandler: come to the border of the United States, but because

148

00:32:11.640 --> 00:32:27.439

Professor Seth Chandler: during part of the Biden administration and during much of the Trump administration, although not presently, there was this sort of metering policy in existence where they simply wouldn't even let you INTO the United States.

149

00:32:27.490 --> 00:32:36.429

Professor Seth Chandler: Could we say that since we're basically refusing to let you come into the United States

150

00:32:36.430 --> 00:32:55.910

Professor Seth Chandler: that you can't apply for asylum. And so all of this boils down to this issue of what is the meaning of in? What does it mean to arrive in the United States? Does it mean to get super close to the United States

151

00:32:55.910 --> 00:33:03.730

Professor Seth Chandler: but only be barred from entry because of sort of positive defensive actions taken by the United States,

152

00:33:04.130 --> 00:33:11.489

Professor Seth Chandler: Border Patrol, or, does it mean, you know, you actually have to...

153

00:33:11.590 --> 00:33:29.750

Professor Seth Chandler: have one foot, or maybe two feet, in the United States. And although we have indulged the fiction in the past in the Thuraissigiam case, that even though you're physically in the United States, you're not going to be treated that way for purposes of some components of immigration law.

154

00:33:29.750 --> 00:33:44.209

Professor Seth Chandler: Here, the court took a very, or the majority took a very literal view of what IN meant, and said, in meant you crossed the border. And there's this analogy to a football analogy, you know, if you get

155

00:33:44.210 --> 00:34:04.410

Professor Seth Chandler: to the one-yard line, and you're just about to score, but you're tackled, you are not in the end zone, even though it was your desire to get there. Now, whether that's an appropriate metaphor, whether we should think of the Statue of Liberty as being the equivalent of a linebacker trying to stop a running back.

156

00:34:04.430 --> 00:34:17.450

Professor Seth Chandler: That's open for discussion, but that's the way that the majority of the Supreme Court interpreted the statute. And so, we have... right, here's my little...

157

00:34:17.889 --> 00:34:20.230

Professor Seth Chandler: picture, thank you.

158

00:34:20.520 --> 00:34:32.279

Professor Seth Chandler: And so, the court holds that you have to physically be present in the United States to meet the terms of the statute.

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00:34:33.530 --> 00:34:39.679

Professor Seth Chandler: We've got dissents, that we shouldn't...

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00:34:40.800 --> 00:34:58.480

Professor Seth Chandler: read the word in in the way that the court majority reads it, that in can be interpreted more flexibly, and I think the more fundamental point that is made in the dissent is that if you sort of combine a literal meaning

161

00:34:58.600 --> 00:35:02.050

Professor Seth Chandler: of in, with the ability of the government

162

00:35:02.070 --> 00:35:13.959

Professor Seth Chandler: to perhaps not fulfill its obligations under various treaties regarding asylum, that it gives the government the power to shut off statutory asylum by blocking the doorway.

163

00:35:13.960 --> 00:35:26.379

Professor Seth Chandler: There's also an issue that Justice Jackson raises, I think quite appropriately, if I could editorialize, about whether this case is either technically moot, since the policy isn't in effect these days

164

00:35:26.380 --> 00:35:36.109

Professor Seth Chandler: or whether the Supreme Court should spend its very scarce resources deciding a case when there is not much of a live controversy

165

00:35:36.170 --> 00:35:55.850

Professor Seth Chandler: before them. Alright, and so, I think what I will do is I will stop there and, look forward to hearing, my fellow speakers. Just again, here's a little pitch to take a look at the website, which contains this slideshow

166

00:35:55.870 --> 00:36:02.110

Professor Seth Chandler: plus, also contains edited versions of the opinions and some other fun stuff. Thank you.

167

00:36:05.940 --> 00:36:13.969

Dean Leonard M. Baynes: Thank you, Professor Chandler, for a very comprehensive discussion of immigration issues that appeared before the Supreme Court.

168

00:36:13.970 --> 00:36:38.660

Dean Leonard M. Baynes: Next, we're going to talk about the legality of recent tariffs, and our expert is Elizabeth Trujillo, who's the Mary Ann and Lawrence E. Faust Professor of Law and the founding director of the Initiative on Global Law and the Policy for the Americas. Professor Trujillo writes and teaches in international trade and investment law, USMCA, Sustainable Development and Energy,

169

00:36:38.780 --> 00:36:48.900

Dean Leonard M. Baynes: contracts and international business, and she uses comparative law methods. She received the prestigious Alexander von Humboldt Research Fellowship

170

00:36:48.900 --> 00:36:51.669

Dean Leonard M. Baynes: to be resident at the Max

171

00:36:51.670 --> 00:37:09.829

Dean Leonard M. Baynes: Planck Institute for Comparative Law and International Law as a research fellow in 2015. Professor Trujillo is an elected member of the American Law Institute, which is one of the most prestigious organizations of judges, lawyers, and law professors in the country. Let's welcome Professor Trujillo.

172

00:37:10.800 --> 00:37:16.329

Professor Elizabeth Trujillo: Thank you very much, Dean. Just give me a second here to get my slides...

173

00:37:25.080 --> 00:37:26.880

Professor Elizabeth Trujillo: You can see that? Okay.

174

00:37:27.310 --> 00:37:28.100

Professor Elizabeth Trujillo: All right.

175

00:37:28.110 --> 00:37:47.730

Professor Elizabeth Trujillo: Hello, everyone. Thank you very much for being here. I'm going to be presenting on, the legality of the International Emergency Economic Powers Act, the so-called IEEPA tariffs, and we'll talk a little bit about, the Supreme Court case, the Learning Resources, Inc. v. Trump case.

176

00:37:47.820 --> 00:38:01.269

Professor Elizabeth Trujillo: But I'm going to talk about it, framing it as both the majority opinion as a trade case, or a commerce case, but also thinking it through as a foreign affairs case, which is really the perspective that the dissent took.

177

00:38:01.320 --> 00:38:09.999

Professor Elizabeth Trujillo: I'll also discuss a little bit about the concurrences and some of the issues there that I think are most relevant in some of what's happening today on tariffs.

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00:38:10.070 --> 00:38:19.649

Professor Elizabeth Trujillo: I'm also going to do a... put all of this into context by discussing some of the main trade laws on U.S. tariffs that are still available

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00:38:19.710 --> 00:38:32.569

Professor Elizabeth Trujillo: with respect to tariffs, and some of this post-Learning Resources and current implications of the Supreme Court decision on February 20th, 2026.

180

00:38:33.070 --> 00:38:52.240

Professor Elizabeth Trujillo: So our roadmap is to first look at the majority opinion, looking at this sort of trade and commerce framing of that majority opinion, and then look at... discuss the dissent by Justice Kavanaugh, through the foreign affairs framing, and why this is important, why that matters for this administration.

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00:38:52.320 --> 00:38:55.859

Professor Elizabeth Trujillo: And then talk a little bit about the concurrences that...

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00:38:55.960 --> 00:39:05.570

Professor Elizabeth Trujillo: interestingly highlight this intra-court debate that is happening, on both the Major Questions Doctrine and the non-delegation doctrine.

183

00:39:07.470 --> 00:39:10.210

Professor Elizabeth Trujillo: So, Learning Resources versus Trump.

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00:39:10.320 --> 00:39:26.019

Professor Elizabeth Trujillo: Again, decided in February, 2026 of this year. Really highlights three main themes, the majority opinion, the separation of powers argument, the non-delegation argument, and the major questions, doctrine argument.

185

00:39:26.070 --> 00:39:33.830

Professor Elizabeth Trujillo: The primary, sort of, conclusion of the case is that, the authority to pass tariffs lies with Congress.

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00:39:33.890 --> 00:39:36.049

Professor Elizabeth Trujillo: Per the Constitution.

187

00:39:36.600 --> 00:39:39.409

Professor Elizabeth Trujillo: Now, putting this case into context.

188

00:39:41.610 --> 00:39:56.440

Professor Elizabeth Trujillo: We all recall that on January 20th, 2025, the America First Trade Policy was declared, and this was a policy that said that trade policy was a critical component to national security.

189

00:39:56.650 --> 00:40:04.330

Professor Elizabeth Trujillo: There was a need to reduce the trade deficit, and there was a need to review unfair trade practices by foreign nations.

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00:40:05.000 --> 00:40:21.540

Professor Elizabeth Trujillo: Quote, the Secretary of the Treasury, in consultation with the Secretary of Commerce and the Secretary of Homeland Security, shall investigate the feasibility of establishing and recommend the best methods of designing, building, and implementing an external revenue service to collect tariffs, duties, and other foreign trade revenues.

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00:40:22.010 --> 00:40:29.680

Professor Elizabeth Trujillo: And so, this happened in conjunction with the USTR also commencing a public consultation process

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00:40:29.820 --> 00:40:40.180

Professor Elizabeth Trujillo: for the USMCA, which is the, United States, Mexico, Canadian, North American sort of free trade agreement, that, also was,

193

00:40:40.390 --> 00:40:42.799

Professor Elizabeth Trujillo: up for review this summer.

194

00:40:43.980 --> 00:41:00.409

Professor Elizabeth Trujillo: There were other issues on the table, such as examining currency manipulation and exchange rates, and reviewing all trade agreements. All trade agreements, export controls, and so forth. Under this idea that we are under a national security emergency with respect to our trade deficit

195

00:41:00.410 --> 00:41:11.469

Professor Elizabeth Trujillo: but also with respect to illicit drugs, primarily fentanyl, through the executive order of 14193, declared on February 1st, 2025.

196

00:41:11.520 --> 00:41:16.419

Professor Elizabeth Trujillo: And with respect to, immigration.

197

00:41:16.800 --> 00:41:31.190

Professor Elizabeth Trujillo: And so, you'll recall that in February 2025, two big executive orders were put into place. The one that we all remember and think of the most is the Liberation Day tariffs of April 7th, 2025.

198

00:41:31.500 --> 00:41:51.270

Professor Elizabeth Trujillo: This was under the IEEPA Act, both of them were under the IEEPA Act, but this was using the IEEPA Act to basically put a number of tariffs across, sort of globally, broadly, on countries. The tariffs ranged from 15% to 50%,

199

00:41:51.280 --> 00:42:05.740

Professor Elizabeth Trujillo: with Britain at 10% at the time, Papua New Guinea at 15%, there was many... some retaliation that occurred by countries that resulted, at one point, up to 125% tariffs against China.

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00:42:05.740 --> 00:42:17.500

Professor Elizabeth Trujillo: And then, of course, there were trade deals and negotiations that happened in the midst of all of this, lowering these tariffs. There was the de minimis exemption that was eliminated.

201

00:42:17.510 --> 00:42:23.960

Professor Elizabeth Trujillo: At the end of August 2025, with a 6-month transition, and then...

202

00:42:24.270 --> 00:42:42.780

Professor Elizabeth Trujillo: the administration began to enter into separate trade deals or reciprocal tariff agreements with various trading partners to sort of reset these tariff bindings between the two countries. Examples were with the UK, the EU, and Japan.

203

00:42:42.930 --> 00:42:45.459

Professor Elizabeth Trujillo: And these are... continue, are ongoing.

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00:42:47.080 --> 00:43:06.209

Professor Elizabeth Trujillo: And just to recall, our... a little bit of our Constitution, the separation of powers and the Supremacy Clause, Article 1, Section 8, Clause 3 of the Constitution vests Congress with the power to regulate commerce with foreign nations. Congress has delegated some of this authority to the executive branch

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00:43:06.940 --> 00:43:11.619

Professor Elizabeth Trujillo: to regulate imports, including those that pose a national security threat.

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00:43:11.840 --> 00:43:29.590

Professor Elizabeth Trujillo: But the president retains some independent constitutional authority to address national security issues with relation to foreign nations. And under the U.S. Trade Act of 1962 and 1974, there are timelines and agency oversights that provide some checks on executive power in trade

207

00:43:29.880 --> 00:43:44.300

Professor Elizabeth Trujillo: and Article 2 that grants the executive branch the treaty negotiating power, and conclusions of those treaties under two-thirds of Senate approval, and then, of course, the treaties under Article 6 become the supreme law of the land.

208

00:43:44.530 --> 00:43:56.739

Professor Elizabeth Trujillo: I think it's important to note that we are still sort of trying to understand the status of the reciprocal tariff agreements that are at play. They're not considered to be treaties in sort of the traditional... in the traditional way.

209

00:43:57.800 --> 00:44:11.929

Professor Elizabeth Trujillo: So what is IEEPA? This was the primary statute used to... for the administration to pass those broad global tariffs across the world back in 2025, which was the subject of the Learning Resources case.

210

00:44:13.010 --> 00:44:27.670

Professor Elizabeth Trujillo: Again, a little bit of history of some of the origins. In the 20th century, there were a series of 117 emergency statutes that delegated emergency authority to the executive under the umbrella of the National Emergencies Act.

211

00:44:27.750 --> 00:44:36.689

Professor Elizabeth Trujillo: The IEEPA grants the President extensive power to regulate a variety of economic sanctions and transactions during a state of emergency.

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00:44:36.840 --> 00:44:48.590

Professor Elizabeth Trujillo: In 1977, IEEPA was really enacted to limit emergency economic powers that had been delegated to the President under the Trading with Enemy Act, the TWIA.

213

00:44:49.700 --> 00:44:59.159

Professor Elizabeth Trujillo: President Nixon, as you might recall, had invoked the TWIA on the peacetime to pass temporary 10% tariffs on imports.

214

00:44:59.990 --> 00:45:16.940

Professor Elizabeth Trujillo: TWIA was primarily used during the World War I era. It empowered the President to take control of private property for public use during the war. It also gave the President lots of power over trade, investment, and migration. It was contemplated to be used in times of war.

215

00:45:17.190 --> 00:45:29.550

Professor Elizabeth Trujillo: In the 1930s, during the Great Depression, Congress delegated the President discretionary authority to declare states of emergency in peacetime and assume expansive domestic economic powers. And into World War II,

216

00:45:29.630 --> 00:45:42.780

Professor Elizabeth Trujillo: TWIA gave the president vesting power authorizing permanent seizure of property, even foreign land in which foreign country had an interest, by declaring a national emergency. It's primarily been used as a tool of economic sanctions.

217

00:45:42.960 --> 00:45:49.099

Professor Elizabeth Trujillo: During World War II and later, but also for regulating monetary policy.

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00:45:49.440 --> 00:45:50.940

Professor Elizabeth Trujillo: And,

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00:45:51.640 --> 00:45:58.589

Professor Elizabeth Trujillo: it really did place the limits on the presidential power that had been given to them, to the president under TWIA.

220

00:45:58.820 --> 00:46:20.699

Professor Elizabeth Trujillo: And it also had certain contours, the IEEPA, with respect to the President communicating to Congress once a declaration of emergency is made, during peacetime, as to what the unusual and extraordinary threat is, what actions will be taken, and identify the foreign countries with respect that such actions are taken and why such actions need to be taken.

221

00:46:21.020 --> 00:46:27.829

Professor Elizabeth Trujillo: Now, the IEEPA provision that is at stake here in the Learning Resources case is Section 50

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00:46:28.150 --> 00:46:46.110

Professor Elizabeth Trujillo: Section, 1701 of the USC 50. And it authorizes the President to, quote, regulate certain economic activities, including imports, in response to declared emergencies concerning certain unusual and extraordinary threats to national security, foreign policy, or the economy.

223

00:46:46.280 --> 00:46:57.069

Professor Elizabeth Trujillo: Once national emergency is declared, it authorizes the president to regulate or prohibit certain foreign monetary transactions to confiscate property during armed hostilities.

224

00:46:57.070 --> 00:47:12.259

Professor Elizabeth Trujillo: But it also empowers the President to regulate importation of any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property subject to the jurisdiction of the United States.

225

00:47:12.260 --> 00:47:23.119

Professor Elizabeth Trujillo: So it's this regulate importation that really is the key question in the Learning Resources case. Does that also encompass tariff power?

226

00:47:24.480 --> 00:47:36.909

Professor Elizabeth Trujillo: The responses to the IEEPA tariffs were many, but Congress had, in April 2025, a bipartisan proposal on the bill to limit presidential authority of imposing unilateral tariffs.

227

00:47:37.000 --> 00:47:56.599

Professor Elizabeth Trujillo: The two main cases are here that went to the, one went to the Court of International Trade, and the other, went to, the Federal Appeal Circuit. And ultimately, it went to the Supreme Court, they consolidated the cases into the case that we're going to discuss today, Learning Resources vs. Trump.

228

00:47:57.680 --> 00:48:00.260

Professor Elizabeth Trujillo: The main legal issues in this case.

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00:48:00.560 --> 00:48:04.129

Professor Elizabeth Trujillo: Does IEEPA grant executive power to impose tariff?

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00:48:04.490 --> 00:48:12.939

Professor Elizabeth Trujillo: Now, this is... A statutory question, but it's also a non-delegation question, and has related implications for major questions.

231

00:48:13.370 --> 00:48:22.309

Professor Elizabeth Trujillo: So the statutory question is, does the language in IEEPA regulate importation in times of national emergency, allow the president to place broad tariffs?

232

00:48:22.740 --> 00:48:41.200

Professor Elizabeth Trujillo: For Justice Roberts, the statutory approach blends with this non-delegation argument, and somewhat with the major questions argument. So the non-

delegation question is the executive broad tariff action under a presidential declaration of emergency an allowable broad expansion of that non-delegation doctrine?

233

00:48:41.200 --> 00:48:43.040

Professor Elizabeth Trujillo: The majority says no.

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00:48:43.250 --> 00:48:48.869

Professor Elizabeth Trujillo: But this related question, does the major questions doctrine allow for this executive action.

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00:48:49.240 --> 00:49:01.010

Professor Elizabeth Trujillo: Well, Justice Roberts says, yes, in part. It responds to the dissent. The major... how he discusses it is really in response to the... to Justice Kavanaugh's dissent and Justice Thomas's dissent.

236

00:49:01.010 --> 00:49:12.280

Professor Elizabeth Trujillo: By clarifying that it does not follow from IEEPA that Congress is delegating all of its major powers over tariffs to the President without clear statutory authorization.

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00:49:12.910 --> 00:49:19.700

Professor Elizabeth Trujillo: So the statutory interpretation argument under the majority opinion is one that basically

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00:49:19.840 --> 00:49:27.679

Professor Elizabeth Trujillo: frames it as the executive emergency power under IEEPA does not provide an unbounded delegation of congressional power over tariffs.

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00:49:27.950 --> 00:49:32.869

Professor Elizabeth Trujillo: On page 12, Justice Roberts disagrees with the dissent in referring to the Youngstown case

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00:49:33.090 --> 00:49:42.409

Professor Elizabeth Trujillo: reminding us that the framers understood emergencies as, quote, afford a ready pretext for usurpation of congressional power

241

00:49:42.430 --> 00:49:53.450

Professor Elizabeth Trujillo: that Congress would have used clear language to effectuate unbounded delegations, particularly of its own great... of its one great power, right, which is to regulate commerce and tariffs.

242

00:49:53.940 --> 00:50:03.649

Professor Elizabeth Trujillo: So that focus on clear language of Congress, and whether the IEEPA statute itself delegates the tariff power to the President, is the statutory interpretation argument.

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00:50:04.010 --> 00:50:06.330

Professor Elizabeth Trujillo: But there's the non-delegation argument

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00:50:06.900 --> 00:50:19.919

Professor Elizabeth Trujillo: as Justice Roberts addresses the dissent, is this executive broad tariff action under Presidential Declaration of emergency a broad expansion of that non-delegation doctrine? The short answer is no, it should be construed narrowly.

245

00:50:19.920 --> 00:50:30.349

Professor Elizabeth Trujillo: He uses this clear language argument to address Justice Kavanaugh's dissent, arguing that there is a... that the dissent argues for a foreign affairs exception.

246

00:50:30.570 --> 00:50:46.690

Professor Elizabeth Trujillo: Justice Roberts is skeptical with understanding that IEEPA gives the President power to unilaterally impose unbounded tariffs, and that there is some kind of exception, under Foreign Affairs of this, of this power, of this delegation.

247

00:50:47.340 --> 00:50:48.390

Professor Elizabeth Trujillo: So...

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00:50:48.540 --> 00:51:00.610

Professor Elizabeth Trujillo: again, here is the statute, just to recall, it's the sort of regulate importation statute. And this non-delegation argument, under page 14,

249

00:51:01.780 --> 00:51:15.080

Professor Elizabeth Trujillo: again, a statutory interpretation. The power to regulate importation. The government tries to argue that this is broad enough to incorporate the tariff power. Justice Roberts disagrees, equating tariffs with taxation.

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00:51:15.570 --> 00:51:17.079

Professor Elizabeth Trujillo: The government

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00:51:17.270 --> 00:51:32.219

Professor Elizabeth Trujillo: is not pointing to any particular statute where that power to regulate includes the power to tax. So Justice Roberts is concerned that a broad statutory reading of the executive power under IEEPA, under this term, regulate, leads to a non-delegation problem.

252

00:51:32.240 --> 00:51:50.960

Professor Elizabeth Trujillo: On page 13, he states that the President must point to clear congressional authorization to justify his extraordinary assertion of the power to impose tariffs. He cannot. This also has... does it really... does it have a major question doctrines, implication? Well, perhaps, and Justice Roberts seems to think so.

253

00:51:50.980 --> 00:52:05.340

Professor Elizabeth Trujillo: The separation of power doctrine requiring clear congressional authority to agency before it may decide things of vast economic political significance. That is the major questions doctrine, that is stated under *West Virginia versus EPA*.

254

00:52:05.460 --> 00:52:08.029

Professor Elizabeth Trujillo: Justice Roberts says, in part, yes.

255

00:52:08.250 --> 00:52:20.889

Professor Elizabeth Trujillo: There is some power under this doctrine, but on page 13, he also says that it simply does not follow from the fact that a statute that deals with major problems, for which there may be a colorable textual basis

256

00:52:20.890 --> 00:52:31.870

Professor Elizabeth Trujillo: all of a sudden gives this sweeping delegation authority to give away your power to impose tariffs. He says, sweeping delegations, particularly delegations of core congressional powers

257

00:52:31.870 --> 00:52:34.990

Professor Elizabeth Trujillo: that lurk in ambiguous statutory text.

258

00:52:35.010 --> 00:52:40.480

Professor Elizabeth Trujillo: So he's basically saying there is no major questions exception to the major questions doctrine.

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00:52:41.200 --> 00:52:47.040

Professor Elizabeth Trujillo: Now, in talking about the dissent, we should think... now put on our sort of foreign affairs hat.

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00:52:47.230 --> 00:52:50.480

Professor Elizabeth Trujillo: Because if we think of trade as a matter of foreign affair

261

00:52:52.210 --> 00:53:00.549

Professor Elizabeth Trujillo: we can read Justice Kavanaugh's dissent as arguing for a foreign affairs exception to the non-delegation and major questions doctrine

262

00:53:00.680 --> 00:53:01.750

Professor Elizabeth Trujillo: tariffs

263

00:53:01.910 --> 00:53:20.380

Professor Elizabeth Trujillo: implicates foreign relations so ambiguous, tariffs that implicate foreign relations, so ambiguous delegation should be in favor of the executive. In other words, he's flipping the major questions doctrine, so it doesn't even really apply, because we're in the context of foreign relations, and so the president should have this power.

264

00:53:20.640 --> 00:53:29.540

Professor Elizabeth Trujillo: Congress may intend substantial authority and flexibility in foreign affairs, and IEEPA empowers the President to regulate imports during national emergencies.

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00:53:29.710 --> 00:53:37.699

Professor Elizabeth Trujillo: So, Justice Kavanaugh warns that the majority approach is a magic words test, and will hamstring the President's ability to respond to emergencies.

266

00:53:37.920 --> 00:53:56.370

Professor Elizabeth Trujillo: It fits within the general narrative that has been set forth by this administration. An example of this narrative is under the White House National Security Strategy of November 2025, which basically collapses a reindustrialization policy with national security, the control of our supply chains and production capacities.

267

00:53:56.390 --> 00:54:08.130

Professor Elizabeth Trujillo: Quote, they placed hugely misguided and destructive bets on globalism and so-called free trade that hollowed out the very middle class and industrial base on which American economic and military preeminence depend.

268

00:54:08.560 --> 00:54:12.160

Professor Elizabeth Trujillo: So, if we look at this through the lens of economic security,

269

00:54:12.600 --> 00:54:35.529

Professor Elizabeth Trujillo: the rebalancing of trade, in other words, minimizing our trade deficit, ensuring access to critical minerals and other inputs, reshoring industrial production by using strategic use of tariffs and new technologies, ensuring that we're never again dependent on adversaries, reshoring our defense industrial supply chain, energy dominance, financial sector dominance, this is the goal of the national security

270

00:54:35.530 --> 00:54:39.409

Professor Elizabeth Trujillo: strategy, and therefore, should also be the goal of trade.

271

00:54:39.690 --> 00:54:44.000

Professor Elizabeth Trujillo: And so, in sum, Justice Kavanaugh's dissent encapsulates this idea.

272

00:54:44.550 --> 00:54:48.199

Professor Elizabeth Trujillo: He says on page 1, clearly, that the statutory text

273

00:54:50.540 --> 00:55:10.430

Professor Elizabeth Trujillo: the history, the precedent demonstrate that quotas and embargoes tariffs are a traditional and common tool to regulate importation. Like other trade laws, IEEPA authorizes the president to place tariffs on foreign imports under declared national emergencies. He does this from both a textual and contextual authority. He talks about, sort of, this toolbox of

274

00:55:10.430 --> 00:55:25.670

Professor Elizabeth Trujillo: of statutes that the president has to regulate importation. IEEPA's basically just one of them. He looks at some of the history that I won't go over now, but he uses the example of the President Nixon temporary tariffs as one of those precedents that justifies this.

275

00:55:25.670 --> 00:55:34.349

Professor Elizabeth Trujillo: Now, very quickly, because I don't have a lot of time, and I do want to talk a little bit about what's happening now, the concurrences by Justice Gorsuch.

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00:55:34.380 --> 00:55:41.539

Professor Elizabeth Trujillo: This really is an interesting concurrence that I think is worth reading, especially in the context of the litigation that's happening right now.

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00:55:41.540 --> 00:55:58.340

Professor Elizabeth Trujillo: It really highlights a fragmented court. Justice Gorsuch spends a lot of time criticizing his colleagues' justices regarding their decision to base their arguments solely on statutory interpretation and not major questions. That would be the concurrences of Justice Kagan, Sotomayor, and Jackson.

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00:55:58.360 --> 00:56:11.019

Professor Elizabeth Trujillo: They mostly look at this through a statutory interpretation doctrine. They do not think we have to go to major questions, although Justice Gorsuch notes that Justice Barrett's concurrence discusses major questions as a form of statutory interpretation.

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00:56:11.260 --> 00:56:26.579

Professor Elizabeth Trujillo: And then, of course, Justice Gorsuch does not agree with Justice Thomas' dissent, where Justice Thomas basically says that there's no desire to address major questions, and instead submits that Congress may hand over most of its powers, including tariff power, to the executive.

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00:56:26.860 --> 00:56:33.000

Professor Elizabeth Trujillo: So just sort of trying to wrap this up and move on a little bit.

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00:56:33.230 --> 00:56:47.110

Professor Elizabeth Trujillo: Some of the remaining gaps that are in this question, that are in this case. What are the contours of national emergency? This case doesn't really answer that question. When can the president declare national emergency, especially in peacetime?

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00:56:47.110 --> 00:56:57.230

Professor Elizabeth Trujillo: The non-delegation question. Justice Roberts equates the raising... the revenue-raising power of taxation to tariffs and separates out taxation from regulation.

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00:56:57.230 --> 00:57:11.219

Professor Elizabeth Trujillo: This is very consistent with his opinion in West Virginia versus EPA in similar cases, reducing the administrative authority to use fiscal measures for non-fiscal measures. So we're left with this question about whether Congress may, in fact, delegate its fiscal authority to the president.

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00:57:11.290 --> 00:57:27.099

Professor Elizabeth Trujillo: There are several murky waters that we have to tread with respect to administrative regulatory authority when agencies want to use fiscal measures to regulate as a result of this case, in my view. And there's little clarity as to whether presidential authority over tariffs may be different in times of war.

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00:57:27.220 --> 00:57:36.520

Professor Elizabeth Trujillo: There's no answer to the threshold of ambiguous and capricious review of agencies under the APA, although this may be arguably less relevant in this case, but I think is relevant today.

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00:57:36.720 --> 00:57:41.330

Professor Elizabeth Trujillo: So, as you've heard on the news, the post, sort of IEEPA tariffs, there was a...

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00:57:41.490 --> 00:57:50.769

Professor Elizabeth Trujillo: right after the IEEPA tariffs were, turned, shot down, the 122 tariffs came into place for 150 days

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00:57:50.770 --> 00:58:14.370

Professor Elizabeth Trujillo: as the 301 tariff investigations began. The 301 tariffs allow for an unfair trade practices that harm U.S. commerce, unjustifiably, unreasonably, or just in a discriminatory way due to foreign government practices that burden or restrict U.S. commerce. And it requires agency investigations, including public comment, and so forth.

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00:58:14.550 --> 00:58:18.479

Professor Elizabeth Trujillo: And so, it is very much, I think it's important to note.

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00:58:18.730 --> 00:58:26.340

Professor Elizabeth Trujillo: As we're looking at some of these 301 determinations, today that have just been decided July 24, 2026,

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00:58:26.750 --> 00:58:40.820

Professor Elizabeth Trujillo: that these, 301 determinations, usually take up to a year to, review, maybe 6 months, but they have been done exactly within the 150 sort of limit of the 122 tariffs.

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00:58:40.820 --> 00:58:52.689

Professor Elizabeth Trujillo: This is basically 301 investigations into 60 diverse countries, 80 economies, 86 countries, purporting, one, that the countries have maintained government policies that create

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00:58:52.690 --> 00:59:02.330

Professor Elizabeth Trujillo: structural excess capacity that burdened U.S. commerce, such as subsidies, and the failure to impose or enforce prohibition on importation of goods produced with forced labor.

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00:59:02.330 --> 00:59:21.549

Professor Elizabeth Trujillo: This is something we can talk about much more in the Q&A, but there are several cases now before the courts, including the Court of International Trade, one being this one here that I've just cited, that the complaint has just been put forth, the Learning Resources, hand2mind et al. versus the United States.

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00:59:21.790 --> 00:59:33.010

Professor Elizabeth Trujillo: So, with that, I'm going to stop. There's more I could say, but we will continue more of the discussion during the roundtable Q&A. Thank you very much for your time and attention.

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00:59:38.670 --> 00:59:47.190

Dean Leonard M. Baynes: Thank you, Professor Trujillo, for a very comprehensive discussion of tariffs. We'll see you back at the roundtable.

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00:59:47.990 --> 01:00:05.019

Dean Leonard M. Baynes: So now, I'd like to, we're going to discuss voting rights, Voting Rights Act, mail-in ballots, and campaign finance. The expert leading the discussion is David Froomkin, who's assistant professor of Law at Law Center. He's assistant professor at and he's an affiliated faculty member at Department of

298

01:00:05.020 --> 01:00:22.559

Dean Leonard M. Baynes: political science. He, he is an expert on design of democratic institutions, with primary scholarly interests in administrative law, constitutional law, and the law of democracy. He currently teaches criminal law, election law, and constitutional design.

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01:00:22.560 --> 01:00:42.370

Dean Leonard M. Baynes: He has a BA from Columbia, a JD, and a PhD from Yale, and he, his dissertation received the Leonard D. White Award from the American Political Science

Association for the best dissertation in the field of public administration in the nation. Let's welcome Professor Froomkin.

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01:00:45.480 --> 01:00:49.320

Professor David Froomkin: Well, thank you very much, Dean, for that introduction.

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01:00:49.710 --> 01:00:51.050

Professor David Froomkin: So,

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01:00:51.140 --> 01:01:09.790

Professor David Froomkin: as the Dean said, I'll be discussing developments in the past Supreme Court term in election law, and I'll be discussing three cases on three different topics, so quite a lot to cover, and I will try to do it efficiently. I will begin by talking about

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01:01:09.940 --> 01:01:25.820

Professor David Froomkin: probably the most important development in election law, certainly in the last term, probably in several decades, in Louisiana versus Callais, a case that has overhauled enforcement of the Voting Rights Act. I'll then turn to the

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01:01:25.820 --> 01:01:36.380

Professor David Froomkin: talk about the Supreme Court's decision in the Watson case concerning what latitude states have with respect to absentee ballot receipt deadlines.

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01:01:36.380 --> 01:01:46.979

Professor David Froomkin: And finally, I'll talk about the National Republican Senatorial Committee vs. Federal Election Commission case, which concerns

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01:01:47.710 --> 01:01:55.060

Professor David Froomkin: campaign finance regulations of political party coordination with political campaigns.

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01:01:55.640 --> 01:02:01.739

Professor David Froomkin: So, to begin with, Louisiana versus Callais, the most consequential statement

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01:02:01.740 --> 01:02:17.419

Professor David Froomkin: about the Voting Rights Act in decades. And I want to start by simply laying out what the Voting Rights Act was understood to say prior to Callais, and second, a separate body of doctrine on racial gerrymandering.

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01:02:17.470 --> 01:02:30.379

Professor David Froomkin: Louisiana vs. Callais is essentially the result of a confrontation between these two bodies of law. So, on the one hand, we had the Voting Rights Act, which

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01:02:31.170 --> 01:02:39.420

Professor David Froomkin: protected members of minority groups from the abridgment of their right to participate equally in the political process.

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01:02:39.440 --> 01:02:47.840

Professor David Froomkin: And the central surviving provision of the Voting Rights Act was Section 2. The Supreme Court had already

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01:02:47.840 --> 01:03:05.549

Professor David Froomkin: done a lot to constrict the Voting Rights Act, most significantly in Shelby County v. Holder in 2013, in which the Supreme Court effectively eliminated the more potent provision of the Voting Rights Act, which was Section 5.

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01:03:05.700 --> 01:03:19.640

Professor David Froomkin: Section 5 prohibited retrogression in minority voting rights in covered jurisdictions. The Supreme Court held in Shelby County that the coverage formula for identifying those jurisdictions was unconstitutional because the

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01:03:19.660 --> 01:03:28.949

Professor David Froomkin: Congress had not updated the formula in some decades, making it difficult to know whether it was still the appropriate coverage formula.

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01:03:29.060 --> 01:03:40.609

Professor David Froomkin: In rendering that decision in Shelby County, the Court emphasized that we still have Section 2 to accomplish the goals of the Voting Rights Act with respect to minority voting rights.

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01:03:41.600 --> 01:03:51.189

Professor David Froomkin: Section 2 of the Voting Rights Act prohibits the denial or abridgment of the right of any citizen to vote on account of race, color, or membership in a language minority group.

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01:03:51.300 --> 01:04:02.659

Professor David Froomkin: Section 2 was importantly amended in 1982 in response to a Supreme Court decision in City of Mobile v. Bolden, where the Supreme Court said that

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01:04:03.040 --> 01:04:13.850

Professor David Froomkin: the Voting Rights Act, along with the Constitution, only kicks in when there is an intentional deprivation of minority voting rights.

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01:04:15.040 --> 01:04:30.640

Professor David Froomkin: Congress responded in the 1982 amendments to Section 2 by emphasizing that it was creating a so-called results test, not an intent test. So Section 2, as amended in 1982, aims to assess whether

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01:04:30.940 --> 01:04:35.120

Professor David Froomkin: as a result of the state's action

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01:04:35.900 --> 01:04:51.329

Professor David Froomkin: members of the minority group are denied equal opportunity to participate in the political process, and does not require a showing of intentional discrimination. It's focused on the results of what the state has done, rather than requiring some

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01:04:51.330 --> 01:04:57.649

Professor David Froomkin: inquiry into, the... the mental processes of, state actors.

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01:04:58.390 --> 01:05:15.879

Professor David Froomkin: So the Supreme Court in 1986 gave effect to these 1982 amendments to the Voting Rights Act in devising the Gingles test in *Thornburg v. Gingles*, which, until *Callais*, had governed the application of Section 2 to the redistricting process.

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01:05:16.000 --> 01:05:24.090

Professor David Froomkin: Under *Gingles*, a state had an obligation to create a minority opportunity district when three criteria were satisfied.

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01:05:24.220 --> 01:05:34.570

Professor David Froomkin: So, *Gingles* assesses when states have an obligation to comply with Section 2 of the Voting Rights Act. It does not tell states precisely what they have to do

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01:05:34.590 --> 01:05:45.120

Professor David Froomkin: when they have that obligation to comply, it just tells them when the obligation is incurred. And the obligation to comply is incurred when, first, there's a minority group.

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01:05:45.190 --> 01:06:00.299

Professor David Froomkin: in the state that is sufficiently large in number and compact in residence that it could constitute a majority in a single-member electoral district. In other words, the state could have drawn an additional

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01:06:00.500 --> 01:06:02.510

Professor David Froomkin: single-member district

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01:06:02.980 --> 01:06:07.459

Professor David Froomkin: such as a congressional district, in which the minority group would have been a majority.

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01:06:08.240 --> 01:06:18.850

Professor David Froomkin: Second, the members of the minority group in that area are politically cohesive, in the sense that they have shared political interests, as expressed in their voting behavior.

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01:06:19.260 --> 01:06:32.909

Professor David Froomkin: And third, the members of the white majority, in the Supreme Court's words, vote, quote, sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate, unquote.

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01:06:33.420 --> 01:06:36.730

Professor David Froomkin: Those second and third criteria are often collectively

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01:06:36.760 --> 01:06:54.109

Professor David Froomkin: characterized as the requirement that there is racial polarization in voting in the jurisdiction. So we might think of the Gingles Test as measuring whether there is both a large and compact enough minority group and racial polarization in voting, and if those criteria are met

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01:06:54.110 --> 01:07:10.370

Professor David Froomkin: then the state had to do something, typically creating a majority-minority district. And that was the law, essentially, since 1986, and as recently as 2023, the Supreme Court appeared unwilling to destabilize the Gingles test.

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01:07:11.340 --> 01:07:12.719

Professor David Froomkin: On the other hand

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01:07:12.930 --> 01:07:18.300

Professor David Froomkin: scholars suggested that there was a looming confrontation with the body of law on racial gerrymandering.

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01:07:18.430 --> 01:07:27.129

Professor David Froomkin: The Supreme Court recognized, relatively recently, in Shaw v. Reno, a cause of action under the Constitution for racial gerrymandering

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01:07:27.140 --> 01:07:41.459

Professor David Froomkin: that kicks in when a racial motive predominated in a state's construction of a legislative district. If that's the case, then the Shaw versus Reno Doctrine requires applying strict scrutiny.

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01:07:42.710 --> 01:07:49.040

Professor David Froomkin: One defense in a Shaw Challenge that the state could offer would be to say

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01:07:49.320 --> 01:08:08.139

Professor David Froomkin: that their motive was politics, not race, the so-called politics, not race defense. So Shaw recognized that if the state's motive was political rather than racial, then it had not engaged in a racial gerrymandering. But if the predominant motive was race, then the district could only survive

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01:08:08.460 --> 01:08:09.630

Professor David Froomkin: strict scrutiny.

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01:08:10.030 --> 01:08:20.389

Professor David Froomkin: If the state had a compelling interest justifying the construction of the district, and the construction of the district was narrowly tailored to advance that interest, our traditional strict scrutiny formula.

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01:08:21.380 --> 01:08:30.700

Professor David Froomkin: Now, crucially, in the aftermath of Shaw, until Callais, compliance with the Voting Rights Act was understood to be a compelling interest.

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01:08:31.090 --> 01:08:43.900

Professor David Froomkin: I think it's worth observing that Shaw primarily operated to restrict states' ability to engage in minority protective redistricting. The typical scenario in which a racial gerrymandering challenge would be brought

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01:08:43.899 --> 01:08:56.900

Professor David Froomkin: would be a situation in which the state had sought to increase minority representation by creating additional minority opportunity districts, and the plaintiffs in a racial gerrymandering suit, as in Shaw v. Reno itself, would say

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01:08:56.899 --> 01:08:58.280

Professor David Froomkin: you should not have

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01:08:58.279 --> 01:09:01.109

Professor David Froomkin: created these additional minority opportunity

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01:09:01.130 --> 01:09:10.609

Professor David Froomkin: districts. So, the plaintiff in Shaw, Ms. Shaw, was a white woman who said, I shouldn't be forced to be in a majority Black district in North Carolina.

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01:09:12.529 --> 01:09:31.460

Professor David Froomkin: The racial gerrymandering doctrine has evolved in interesting ways. So in Cooper v. Harris, for example, the court held that a state had engaged in racial gerrymandering when it created a minority opportunity district that the state believed it was required to create by Section 2 of the Voting Rights Act.

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01:09:31.510 --> 01:09:34.360

Professor David Froomkin: But was not, in fact, required

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01:09:34.550 --> 01:09:45.210

Professor David Froomkin: by the Voting Rights Act, as correctly interpreted by a court. So under those circumstances, Cooper said, the state's racial motive predominated in the absence of a compelling interest.

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01:09:45.590 --> 01:09:52.300

Professor David Froomkin: Now, interestingly, just two years ago, just a year before Callais made it

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01:09:52.649 --> 01:10:07.130

Professor David Froomkin: to the Supreme Court initially. Justice Thomas had suggested that there shouldn't even be a cause of action for racial gerrymandering. So, this case could have gone in a very different direction. However, in Callais, the court ultimately

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01:10:07.570 --> 01:10:22.690

Professor David Froomkin: resolved the looming confrontation between the racial gerrymandering doctrine and Section 2 by prioritizing the racial gerrymandering doctrine. So the issue in Louisiana versus Callais was that the Louisiana

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01:10:23.100 --> 01:10:30.469

Professor David Froomkin: had created a second majority-minority district because a federal court instructed it to, after the,

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01:10:30.590 --> 01:10:37.749

Professor David Froomkin: post-2020 redistricting. The legislature initially drew a map with only one a majority-minority district.

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01:10:37.970 --> 01:10:48.290

Professor David Froomkin: That map was challenged. A federal court applied the Gingles test and said, under Gingles, you have an obligation to create a second minority opportunity district.

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01:10:48.530 --> 01:10:51.820

Professor David Froomkin: Louisiana redrew its map in order to create that second district.

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01:10:52.210 --> 01:10:57.929

Professor David Froomkin: Then that new map got challenged by a separate group of plaintiffs who alleged a racial gerrymandering.

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01:10:58.770 --> 01:11:04.539

Professor David Froomkin: Louisiana initially defended by saying that the primary motive behind the new map was politics, not race.

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01:11:05.010 --> 01:11:06.920

Professor David Froomkin: They were told that we have to

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01:11:07.080 --> 01:11:11.780

Professor David Froomkin: create a second Minority Opportunity District to comply with Robinson, but

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01:11:11.950 --> 01:11:22.239

Professor David Froomkin: beyond compliance with the Voting Rights Act, our goals are political goals, namely protecting incumbents in other congressional districts in the state.

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01:11:22.790 --> 01:11:30.370

Professor David Froomkin: But the three-judge district court in Callais determined that race predominated, so strict scrutiny applied.

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01:11:32.000 --> 01:11:45.320

Professor David Froomkin: The Supreme Court ordered reargument, so the case was not ultimately decided in 2025, was decided a few months ago, because the court expanded the issues to include this,

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01:11:45.620 --> 01:11:56.030

Professor David Froomkin: very big question, quote, whether the state's intentional creation of a second majority-minority congressional district violates the 14th or 15th Amendments to the U.S. Constitution.

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01:11:56.120 --> 01:12:02.630

Professor David Froomkin: Unquote. So, I'm saying we're going to resolve this... this question of the relationship between the racial gerrymandering

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01:12:02.650 --> 01:12:22.469

Professor David Froomkin: doctrine under the Constitution and the status of Section 2 of the Voting Rights Act. So, alternatively put, the question might be seen as, is districting that would otherwise constitute a racial gerrymander under the Shaw versus Reno Doctrine saved by the need to comply with the Voting Rights Act? And the Court responded, no.

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01:12:24.180 --> 01:12:32.940

Professor David Froomkin: So, here are two pictures. The picture on the left is the map that, illustrates the

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01:12:33.060 --> 01:12:38.270

Professor David Froomkin: state's ability to create a second minority opportunity district.

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01:12:38.540 --> 01:12:43.700

Professor David Froomkin: The map on the right is the map that the state ultimately adopted in response

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01:12:43.740 --> 01:13:02.299

Professor David Froomkin: to Robinson. You can see on the... in the map on the right, the Central District 6. This is the district that gets challenged as a racial gerrymander, and as in Shaw and other racial gerrymandering cases, the shape of the district is such that courts think it looks suspicious.

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01:13:02.580 --> 01:13:10.680

Professor David Froomkin: That is a central factor in a lot of these racial gerrymandering cases. The sort of snake-like character of this district looks weird.

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01:13:11.480 --> 01:13:23.479

Professor David Froomkin: And the state has a very simple answer for that, which is we wanted to protect incumbents in districts 1, 3, 4, and 5. So that's why the district is shaped like that.

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01:13:25.220 --> 01:13:40.820

Professor David Froomkin: But the Supreme Court was unwilling to accept that rationale, because it ultimately took the view that race consciousness in itself was what created the constitutional problem with this redistricting.

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01:13:41.410 --> 01:13:46.920

Professor David Froomkin: So, so the court said in Callais, although we have long assumed without deciding

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01:13:47.040 --> 01:13:51.000

Professor David Froomkin: that compliance with Section 2 of the Voting Rights Act is a compelling interest.

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01:13:51.190 --> 01:13:54.599

Professor David Froomkin: We're deciding that it is not. And so we can't get out of...

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01:13:55.450 --> 01:14:03.260

Professor David Froomkin: we can't take that easy way out of applying the racial gerrymandering doctrine to a redistricting such as this one.

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01:14:06.090 --> 01:14:20.169

Professor David Froomkin: On the other hand, the court also said it was engaging in constitutional avoidance in Callais. It did not strike down the Voting Rights Act, it purported to be reinterpreting Section 2 of the Voting Rights Act in a way that would save it from a constitutional

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01:14:20.340 --> 01:14:21.170

Professor David Froomkin: problem.

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01:14:21.420 --> 01:14:22.120

Professor David Froomkin: Huh.

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01:14:22.610 --> 01:14:23.440

Professor David Froomkin: what...

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01:14:23.550 --> 01:14:31.770

Professor David Froomkin: would that constitutional problem be? Well, essentially, it is the problem that the Court had identified in City of Boerne

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01:14:31.820 --> 01:14:43.689

Professor David Froomkin: versus Flores in 1997, which is that in the modern Supreme Court's view, Congress does not have the power to expand constitutional rights.

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01:14:44.500 --> 01:15:04.479

Professor David Froomkin: It's the job of the Supreme Court to decide the scope of constitutional rights. Here, pertinently, the 14th and 15th Amendment rights, and what Congress sought to do in the Voting Rights Act, possibly, was to expand the scope of those 14th and 15th Amendment rights beyond what the Court understood them to be.

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01:15:04.860 --> 01:15:08.069

Professor David Froomkin: And so, applying the doctrine of constitutional avoidance

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01:15:08.310 --> 01:15:15.620

Professor David Froomkin: the court in Callais tells us we should interpret the Voting Rights Act So that it is not

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01:15:15.870 --> 01:15:18.970

Professor David Froomkin: committing that error, so that it is not expanding

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01:15:19.130 --> 01:15:25.300

Professor David Froomkin: individual rights beyond the scope that the Supreme Court understands them to have.

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01:15:29.080 --> 01:15:38.970

Professor David Froomkin: As Justice Alito's opinion tells us, quote, a law that seeks to enforce the 15th Amendment by prohibiting mere disparate impact

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01:15:38.970 --> 01:15:49.359

Professor David Froomkin: would fail to enforce a right that the amendment secures. That is never appropriate, because Congress cannot enforce a constitutional right by changing what the right is.

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01:15:49.410 --> 01:15:50.230

Professor David Froomkin: Unquote.

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01:15:50.540 --> 01:16:08.300

Professor David Froomkin: And so it's important to interpret Section 2, Justice Alito tells us, in a way that requires a strong inference that intentional discrimination had occurred in the redistricting process. The second principle that the

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01:16:09.520 --> 01:16:25.060

Professor David Froomkin: lays out in the Callais opinion is the importance of deference to state legislatures in the redistricting process, telling us that the Constitution does not impose any districting criteria on states. States are free to choose their own districting

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01:16:25.060 --> 01:16:31.199

Professor David Froomkin: criteria. And in addition to so-called traditional redistricting criteria, like

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01:16:31.620 --> 01:16:41.850

Professor David Froomkin: compactness of districts, contiguity of districts, maintaining the integrity of political subdivisions and preserving the core of existing districts, even protecting incumbents,

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01:16:41.990 --> 01:16:58.930

Professor David Froomkin: Justice Alito insisted that another political interest that states are entitled to pursue under the Constitution is that of, quote, drawing of districts to achieve partisan advantage, unquote. So I think that the second central principle of Callais

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01:16:59.040 --> 01:17:15.789

Professor David Froomkin: is the principle that it is constitutionally important to protect states' ability to engage in partisan gerrymandering. So two central principles here. On the one hand, the principle that the Constitution only properly targets intentional racial discrimination.

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01:17:16.230 --> 01:17:21.490

Professor David Froomkin: That has to be established with a very high burden, and on the other hand, the principle that there is something

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01:17:21.630 --> 01:17:27.319

Professor David Froomkin: important about protecting states, right, to engage in partisan gerrymandering.

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01:17:28.380 --> 01:17:40.810

Professor David Froomkin: So the implication of those two principles is, as Justice Alito tells us, quote, if either politics or race could explain a district's contours, the plaintiff has not cleared its bar, unquote. So we're trying to disentangle

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01:17:41.360 --> 01:17:42.949

Professor David Froomkin: racial motives from

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01:17:43.450 --> 01:17:50.240

Professor David Froomkin: partisan or political motives, and if we can't do that, then we have to assume that the state was entitled to pursue its political

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01:17:50.360 --> 01:17:51.370

Professor David Froomkin: objectives.

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01:17:51.700 --> 01:17:54.720

Professor David Froomkin: So the most important new rule, after Callais

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01:17:54.810 --> 01:18:11.020

Professor David Froomkin: is this first rule here, that a plaintiff may carry its disentanglement burden only by offering an alternative map that achieves all of the state's objectives, including partisan advantage and any of the state's other political goals, at least as well as the state's map.

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01:18:11.020 --> 01:18:21.849

Professor David Froomkin: In other words, after Callais, plaintiffs in a Section 2 case must show that the creation of an additional Minority Opportunity District does not interfere with any of the state's political objectives.

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01:18:22.060 --> 01:18:33.370

Professor David Froomkin: Quote, if the state's aims in drawing a map include a target partisan distribution of voters, a specific margin of victory for certain incumbents, or any other goal not prohibited by the Constitution

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01:18:33.470 --> 01:18:37.890

Professor David Froomkin: the plaintiff's illustrative maps must achieve these goals just as well.

411

01:18:38.040 --> 01:18:45.440

Professor David Froomkin: Unquote. And I think that that is the new requirement after Callais that will be most difficult for plaintiffs to meet.

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01:18:46.120 --> 01:18:59.689

Professor David Froomkin: It's going to be vanishingly rare that plaintiffs can show that it's possible to create an additional minority opportunity district without interfering with any of the political goals that the state legislature articulated.

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01:19:00.240 --> 01:19:05.029

Professor David Froomkin: There are some other new requirements as well that I have identified on this slide, so...

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01:19:05.080 --> 01:19:24.199

Professor David Froomkin: the court tells us that a remedial district cannot be constructed, quote, by using race, unquote. So I assume what that means is that remedial maps now need to be generated through some sort of random generation process that will be more computationally costly, but I think that that ultimately is a less consequential

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01:19:24.470 --> 01:19:25.250

Professor David Froomkin: rule.

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01:19:25.450 --> 01:19:31.089

Professor David Froomkin: The court also

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01:19:31.900 --> 01:19:41.790

Professor David Froomkin: insisted that historical discrimination should not be of central importance in a court's totality of the circumstances analysis in a Section 2

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01:19:41.910 --> 01:19:48.090

Professor David Froomkin: case, because,

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01:19:49.610 --> 01:20:03.240

Professor David Froomkin: quote, vast social change has occurred throughout the country, and particularly in the South, where many Section 2 suits arise, unquote. So, changed circumstances in southern jurisdictions mean that, historical,

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01:20:03.540 --> 01:20:12.070

Professor David Froomkin: trends of discriminatory behavior no longer should have a bearing on the analysis of current practices.

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01:20:12.760 --> 01:20:24.219

Professor David Froomkin: And, finally, Justice Alito, suggests that Section 2 really should only kick in, in, in intra-party settings.

So, so,

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01:20:24.460 --> 01:20:40.560

Professor David Froomkin: settings in which the relevant choice, say, is between a white Democrat and a Black Democrat. That Section 2 should protect minority representation at the expense of white Democrats, but not at the expense of white Republicans, because if

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01:20:40.570 --> 01:20:56.459

Professor David Froomkin: the statute were permitted to advance minority representation at the expense of white Republicans, that would be pursuing a political rather than a racial objective. So, in Justice Alito's view, it's a statute that's supposed to protect

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01:20:56.540 --> 01:21:02.209

Professor David Froomkin: minority Democrats from white Democrats, not from, white Republicans.

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01:21:03.020 --> 01:21:11.650

Professor David Froomkin: I think it's worth observing, finally, that the effect of Callais is to return Section 2 to,

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01:21:12.640 --> 01:21:13.829

Professor David Froomkin: what is in effect

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01:21:13.980 --> 01:21:17.090

Professor David Froomkin: an intent test, even though Congress

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01:21:17.600 --> 01:21:30.839

Professor David Froomkin: said that they wanted to do something different. What are the effects of Callais? Well, potentially very significant. We've already seen Louisiana, Alabama, Tennessee, Florida, and North Carolina engage in

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01:21:30.840 --> 01:21:41.040

Professor David Froomkin: mid-decade redistricting in order to eliminate minority opportunity districts. This analysis from the New York Times suggests that we might see more of that in the near future.

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01:21:41.460 --> 01:21:53.300

Professor David Froomkin: I think also that Texas mid-decade redistricting is on much safer ground after Callais would, under prior law, have been much more vulnerable to a challenge under Section 2.

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01:21:53.640 --> 01:22:02.770

Professor David Froomkin: A very consequential decision, one of the... one of the biggest reallocations of political power by the Supreme Court in American history.

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01:22:03.390 --> 01:22:14.609

Professor David Froomkin: Okay. The second case that I'll be discussing is the Watson case, Watson v. Republican National Committee, about state laws concerning mail-in ballots. So the question in Watson

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01:22:14.610 --> 01:22:24.300

Professor David Froomkin: was whether federal law prohibits states from counting mail-in or absentee ballots that were cast by, but received after Election Day.

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01:22:24.710 --> 01:22:39.889

Professor David Froomkin: So the basic, legal framework here, is the Elections Clause of Article 1, which says that, by default, states get to make election laws concerning federal elections, but Congress can,

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01:22:41.180 --> 01:22:45.519

Professor David Froomkin: make or alter election laws concerning federal elections.

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01:22:45.850 --> 01:22:53.179

Professor David Froomkin: So, the default rule is states make the rules for federal elections unless Congress intervenes to preempt those state

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01:22:53.550 --> 01:22:54.350

Professor David Froomkin: loss.

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01:22:54.660 --> 01:23:01.690

Professor David Froomkin: So the question is, has Congress preempted state laws on this question? On the question of the... the...

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01:23:02.500 --> 01:23:04.810

Professor David Froomkin: deadline for,

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01:23:04.970 --> 01:23:19.290

Professor David Froomkin: receiving mail-in ballots. And the statute that the plaintiffs pointed to, or rather the three statutes, were federal statutes setting the day of the election for elections for Representative, senator, and President.

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01:23:19.750 --> 01:23:23.990

Professor David Froomkin: So the Tuesday, after the first Monday in November

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01:23:24.350 --> 01:23:26.939

Professor David Froomkin: in even-numbered years is the day of the election.

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01:23:27.680 --> 01:23:38.299

Professor David Froomkin: And the question is, does that statutory language preempt state laws that permit the counting of mail-in ballots postmarked by, but received after Election Day?

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01:23:39.320 --> 01:23:51.850

Professor David Froomkin: This is quite a consequential issue. The use of mail-in ballots has increased substantially in recent decades. Now, almost a third of ballots cast are mail-in ballots.

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01:23:52.600 --> 01:24:11.170

Professor David Froomkin: But the legal issue, I think, is quite straightforward. So the... this is a statutory question. Did these federal statutes preempt state laws on the question? And the court's analysis proceeded straightforwardly, first analyzing the text. What does it mean to say that there is a day of the election?

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01:24:11.300 --> 01:24:30.090

Professor David Froomkin: Well, that language refers to when the electorate makes its choice, and the electorate's choice is made when the voting is complete, not when the ballots are received. So, first, a straightforward textual argument. Second, the court engaged with historical

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01:24:30.150 --> 01:24:32.640

Professor David Froomkin: evidence about, when

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01:24:33.040 --> 01:24:39.159

Professor David Froomkin: states had, in fact, counted ballots. The dissent makes a lot of the fact that

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01:24:40.190 --> 01:24:43.090

Professor David Froomkin: for much of American history, most states

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01:24:43.440 --> 01:25:01.450

Professor David Froomkin: collected all ballots by the day of the election, but the majority tells us that that history is not dispositive, because, quote, historical practice detached from statutory text is not controlling. Statutes do not trap in amber every contemporary practice on the same subject matter.

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01:25:01.630 --> 01:25:03.939

Professor David Froomkin: unquote, citing Rahimi.

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01:25:04.520 --> 01:25:20.050

Professor David Froomkin: So, if the history had some bearing on the meaning of the words election or choice, then it could be instructive. But a mere historical practice that does not inform our understanding of the text is not particularly instructive.

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01:25:20.520 --> 01:25:34.270

Professor David Froomkin: Finally, the court relied heavily on what we might call intertextualism, this additional statute, UOCAVA, the Uniformed and Overseas Citizens Absentee Voting Act, which

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01:25:34.270 --> 01:25:44.859

Professor David Froomkin: imposes obligations on states to provide absentee ballots to certain overseas individuals, including members of the military.

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01:25:45.570 --> 01:25:57.730

Professor David Froomkin: While UOCAVA requires certain deadlines for the provision of ballots, it defers to state law as to deadlines for the receipt and counting

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01:25:57.830 --> 01:25:59.570

Professor David Froomkin: of the ballots.

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01:25:59.710 --> 01:26:15.669

Professor David Froomkin: So the court in Watson thought that it would be very strange for Congress to have taken that view in 1986 in UOCAVA if it really were the case that this much older federal statute had decided the question. Certainly Congress more recently, did not believe that

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01:26:15.800 --> 01:26:24.729

Professor David Froomkin: federal law had decided the question of the deadline for the receipt of mail-in ballots, and had accepted that that was a matter of state law.

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01:26:25.070 --> 01:26:36.569

Professor David Froomkin: There's also a big policy issue discussed in Watson having to do with voter fraud. The dissenters make a lot of the idea that there's a big problem of

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01:26:36.650 --> 01:26:53.549

Professor David Froomkin: vote fraud. And in particular, this argument that Justice Kavanaugh has advanced in the past, that late-arriving ballots create the perception of fraud when they might, quote, flip the results of an election. In other words, counting all of the mail-in ballots may mean that a different candidate is winning

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01:26:53.830 --> 01:26:59.509

Professor David Froomkin: than the candidate who seemed to be winning when only the in-person votes had been counted.

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01:26:59.710 --> 01:27:05.449

Professor David Froomkin: And that this contributes to perceptions of vote fraud. The majority responds by saying

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01:27:06.030 --> 01:27:09.349

Professor David Froomkin: the policy issue is not what we're deciding in this case.

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01:27:10.000 --> 01:27:20.229

Professor David Froomkin: Number two, the actual issue in this case has very little to say about the extent to which there will be vote fraud. We're deciding in Watson

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01:27:20.230 --> 01:27:35.049

Professor David Froomkin: a question about the deadline for receipt of ballots, not a question about how many people will be voting by mail, as opposed to other methods of voting. So, even if this were a valid concern, and the evidence suggests that it is not

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01:27:35.860 --> 01:27:39.450

Professor David Froomkin: it's really not pertinent to the question in Watson.

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01:27:40.210 --> 01:27:45.989

Professor David Froomkin: Finally, the case NRSC versus FEC, on

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01:27:46.450 --> 01:27:52.809

Professor David Froomkin: some big developments in campaign finance law, which is ultimately governed by the First Amendment.

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01:27:53.340 --> 01:28:03.299

Professor David Froomkin: So the question in the NRSC case is, do the FICA limits on political party spending that is coordinated with candidates

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01:28:03.410 --> 01:28:05.340

Professor David Froomkin: violate the First Amendment.

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01:28:05.480 --> 01:28:17.240

Professor David Froomkin: And I'll note that these limits were already upheld by the U.S. Supreme Court in the Colorado Republican 2 case in 2001, but in NRSC versus FEC,

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01:28:17.290 --> 01:28:29.370

Professor David Froomkin: this year, the court overruled its prior decision in Colorado Republican 2. And it did so by applying the Buckley Framework, as any campaign finance case does.

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01:28:29.620 --> 01:28:33.890

Professor David Froomkin: The Buckley Framework has three central principles. The first is that money is speech.

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01:28:34.680 --> 01:28:38.199

Professor David Froomkin: The second is that the only government interest that can justify

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01:28:38.380 --> 01:28:43.209

Professor David Froomkin: regulations of campaign finance is the government's interest in preventing corruption.

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01:28:43.850 --> 01:28:47.860

Professor David Froomkin: Buckley also said, in preventing the appearance of corruption, but

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01:28:47.970 --> 01:28:56.680

Professor David Froomkin: after Citizens United, that rationale has largely fallen away. And so I think that, you know, Citizens United is often pointed to as a really significant

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01:28:56.910 --> 01:29:09.789

Professor David Froomkin: campaign finance case, and I think this is the respect in which it was legally significant, in terms of the unleashing of money in politics, Buckley is really the culprit, not Citizens United.

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01:29:10.070 --> 01:29:18.479

Professor David Froomkin: Number three, Buckley distinguishes between regulations of contributions and regulations of expenditures. So contributions, donors giving money to

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01:29:18.610 --> 01:29:37.490

Professor David Froomkin: candidates or campaigns, expenditures, individuals spending their own money on speech. So expenditures are just direct speech, and they shouldn't be regulated at all if money is speech. But contributions can create a potential for corruption, and so there is some scope for the government to regulate contributions.

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01:29:38.320 --> 01:29:45.860

Professor David Froomkin: There's a diminishing scope, so, for instance, McCutcheon said that aggregate limits on how much individuals can contribute across

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01:29:46.080 --> 01:29:47.180

Professor David Froomkin: campaigns

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01:29:47.470 --> 01:29:59.740

Professor David Froomkin: Can't be justified by the goal of preventing corruption, because they... you know, there's only a... if the amount that donors give to any individual candidate is limited, that imposes a bar to,

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01:29:59.870 --> 01:30:04.139

Professor David Froomkin: the extent to which contributions can be vehicles for corruption.

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01:30:05.000 --> 01:30:19.370

Professor David Froomkin: In this case, we're talking about spending by national political parties in coordination with political campaigns. And it's that coordination that blurs the line between expenditures and contributions. So,

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01:30:19.540 --> 01:30:31.999

Professor David Froomkin: it might look like an expenditure, this is the party spending money to advance its speech objectives, but it's also money that the party received from donors, so it could be a way for donors to circumvent

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01:30:32.690 --> 01:30:36.020

Professor David Froomkin: campaign finance laws limits on their ability to give money

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01:30:36.170 --> 01:30:48.560

Professor David Froomkin: to candidates, and so it might create the potential for corruption. So that's really the question in this case. So we might ask two questions. One, is there some potentially corrupting influence of parties on candidates?

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01:30:49.050 --> 01:30:57.679

Professor David Froomkin: Is that even something that we want to prevent? The court is very skeptical. Maybe we actually want to encourage parties to coordinate with their

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01:30:57.800 --> 01:30:58.770

Professor David Froomkin: candidates.

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01:30:58.840 --> 01:31:12.280

Professor David Froomkin: On the other hand, we might be concerned about the influence of donors on parties, or the influence of donors on candidates via parties, and that's what the dissenters are really concerned about in this case, so that they center

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01:31:12.280 --> 01:31:24.200

Professor David Froomkin: the anti-circumvention interest in preventing donors from having this alternative pathway for exerting influence on candidates in potentially corrupting

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01:31:24.300 --> 01:31:42.689

Professor David Froomkin: ways. And of course, that is the rationale that the Supreme Court had accepted in Colorado Republican 2. A case in which Justice Thomas amusingly dissented, arguing that even a \$20,000 contribution would not be enough to corrupt a candidate. Someone amusing as Justice Thomas

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01:31:42.780 --> 01:31:56.259

Professor David Froomkin: saying that, but an interesting position nonetheless. In 2026, the limit on individual contributions to national party committees is \$44,300 per year, so that's a much higher amount

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01:31:56.280 --> 01:32:03.570

Professor David Froomkin: then the limit on contributions to individual candidates, raising this anti-circumvention concern.

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01:32:04.150 --> 01:32:05.430

Professor David Froomkin: The... the...

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01:32:05.910 --> 01:32:14.840

Professor David Froomkin: Media framing of the significance of the case has really focused on the question of, you know, this sort of horse race question, who benefits from it?

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01:32:15.360 --> 01:32:27.420

Professor David Froomkin: A number of Democratic campaigns are doing quite well in fundraising. On the other hand, the National Republican Party has considerably more cash on hand, and so the framing has kind of been, while this case has helped the Republican Party

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01:32:27.440 --> 01:32:45.230

Professor David Froomkin: for that reason, I think that's a very simplistic way of understanding what was going on in this case. I think that the far more significant implication of NRSC versus FEC is really about the status of political parties in our political system. It's really a case about the extent to which

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01:32:45.230 --> 01:32:49.709

Professor David Froomkin: candidates ought to be influenced by the parties that they're a member of.

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01:32:49.830 --> 01:32:53.770

Professor David Froomkin: So I tend to agree with Samuel Issacharoff

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01:32:53.830 --> 01:33:01.259

Professor David Froomkin: who has advanced the argument that this case actually might be a valuable corrective for the political system if parties are vehicles of accountability

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01:33:01.320 --> 01:33:11.139

Professor David Froomkin: then perhaps increasing the influence of political parties over their candidates is a vehicle for holding candidates more accountable to voters.

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01:33:11.170 --> 01:33:30.790

Professor David Froomkin: And so the argument draws on a theory in political science called the responsible party government theory, which says parties serve two core functions for the political process. One, they articulate platforms that help voters understand what candidates stand for, ex ante. And number two, they hold their members

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01:33:31.190 --> 01:33:42.860

Professor David Froomkin: once they hold office accountable to those platforms ex post. And so by performing those two functions, they arguably are vectors of accountability, according to the responsible party government theory.

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01:33:43.900 --> 01:33:49.630

Professor David Froomkin: I suppose that does leave us with the question, are political parties in fact vectors of accountability today?

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01:33:50.110 --> 01:33:56.919

Professor David Froomkin: So, to wrap up, I would say overall, you know, we have a mixed bag here, but,

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01:33:57.610 --> 01:34:09.050

Professor David Froomkin: Callais was clearly the most consequential of the cases that I have discussed. Rick Hasen, an election law expert, said that it was, quote, one of the most pernicious and damaging Supreme Court decisions of the last century.

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01:34:09.370 --> 01:34:28.230

Professor David Froomkin: Unquote. Certainly a decision that will have enormous effects on the political process, both in the reallocation of political power between the parties, and likely substantially decreasing minority representation at both state and federal levels.

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01:34:28.760 --> 01:34:45.210

Professor David Froomkin: Watson was a statutory case, where the statutory analysis was quite straightforward, but I think also noteworthy that four justices foregrounded concerns about voter fraud, despite the substantial evidence showing that voter fraud is very rare in the United States.

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01:34:45.290 --> 01:35:04.220

Professor David Froomkin: And finally, as I've said, the implications of this campaign finance case are unclear, to the extent that it is part of a damaging trend that's really attributable to damage that Buckley did decades prior, and NRSC versus FEC might even be a valuable corrective for the political marketplace

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01:35:04.220 --> 01:35:10.880

Professor David Froomkin: in view of the explosion of money in politics, we might prefer that it goes through political parties.

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01:35:11.000 --> 01:35:12.340

Professor David Froomkin: I'll stop there.

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01:35:19.340 --> 01:35:28.630

Dean Leonard M. Baynes: Thank you, Professor Froomkin, for a very full analysis of what's going on in election law and voting rights. Many, many thanks. I'd like now to introduce our next panelist.

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01:35:29.390 --> 01:35:47.189

Dean Leonard M. Baynes: Our next panelist is going to talk about presidential powers, and agency authority, and the end of Humphrey's Executor. Emily Berman... Emily Berman is a professor of law and the William B. Bates Distinguished Chair in Law and Assistant Dean of Faculty Development at the University of Houston Law Center.

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01:35:47.320 --> 01:35:57.249

Dean Leonard M. Baynes: She is a constitutional law scholar with expertise in executive power and national security law. She teaches constitutional law, federal courts, and national security.

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01:35:57.250 --> 01:36:11.889

Dean Leonard M. Baynes: She was editor-in-chief of the NYU Law Review when she was in law school, and after graduating from law school, she clerked for the Honorable John M. Walker, Jr, of the Second Circuit Court of Appeals. Let's welcome Professor Emily Berman.

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01:36:13.080 --> 01:36:17.130

Professor Emily Berman: Thank you, Dean Baynes. Hello, everyone.

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01:36:17.450 --> 01:36:28.190

Professor Emily Berman: Hope you're all hanging in there in this long but interesting afternoon. I am going to share my screen, because I have just a few slides.

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01:36:28.940 --> 01:36:33.119

Professor Emily Berman: So,

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01:36:34.320 --> 01:36:45.770

Professor Emily Berman: Today, I'm going to talk about two cases that the Supreme Court decided on the same day, June 29th, 2026, Trump versus Slaughter, and Trump vs. Cook.

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01:36:45.880 --> 01:36:47.310

Professor Emily Berman: And...

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01:36:47.470 --> 01:36:55.439

Professor Emily Berman: just to start off, I think it's important to note that the case... the cases need to be read together, because

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01:36:55.760 --> 01:37:07.080

Professor Emily Berman: Slaughter establishes a broad constitutional rule favoring presidential control over principal officers exercising executive power.

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01:37:07.540 --> 01:37:14.130

Professor Emily Berman: At the same time, Cook recognizes an exception for some

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01:37:14.370 --> 01:37:23.530

Professor Emily Berman: exercises of executive power, explicitly here at the Federal Reserve, based on its historical pedigree.

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01:37:23.730 --> 01:37:32.169

Professor Emily Berman: But... Neither case goes on to define exactly how broad

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01:37:32.910 --> 01:37:42.020

Professor Emily Berman: either the rule or the exception applies. So, we have a rule, an exception, and a lot of, uncertainty.

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01:37:42.780 --> 01:37:54.190

Professor Emily Berman: So, so let's start with, with Slaughter. So, the Federal Trade Commission, created by the Federal Trade Commission Act in 1914, is

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01:37:54.240 --> 01:38:04.349

Professor Emily Berman: headed by 5 commissioners who serve 7-year staggered terms, no more than 3 of whom can belong to the same political party.

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01:38:04.480 --> 01:38:14.100

Professor Emily Berman: And according to the FTC Act, they may not be removed except for inefficiency, neglect of duty, or malfeasance in office.

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01:38:16.030 --> 01:38:27.640

Professor Emily Berman: Congress's statutory protections in the FTC Act had been upheld in a case that may sound familiar to many of you, called Humphrey's Executor from 1935.

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01:38:28.020 --> 01:38:46.010

Professor Emily Berman: And in that case, the court held that President Roosevelt could not remove an FTC commissioner just because their policy views differed, because the FTC Act limited removal to instances of inefficiency, like neglect of duty or malfeasance in office.

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01:38:46.170 --> 01:39:02.259

Professor Emily Berman: And the court reasoned that the FTC performed what they called predominantly quasi-legislative and quasi-judicial functions, and therefore could be constitutionally insulated from at-will presidential removal.

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01:39:03.030 --> 01:39:09.600

Professor Emily Berman: Subsequent Supreme Court cases, particularly under the Roberts Court, had...

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01:39:09.790 --> 01:39:23.070

Professor Emily Berman: chipped away at Humphrey's Executor, and seemed to undermine its rationale in many respects, but it had not yet been overruled.

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01:39:25.520 --> 01:39:26.610

Professor Emily Berman: Until...

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01:39:27.270 --> 01:39:40.690

Professor Emily Berman: this particular case. So soon after taking office for his second term, President Trump fired the two Democratic commissioners on the FCC, Rebecca Slaughter and Alvaro Bedoya

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01:39:40.820 --> 01:39:56.160

Professor Emily Berman: without any statutory cause. He told them that their continued service was inconsistent with his administration's priorities, and that he was removing them solely under his Article II authority, despite what the statute said.

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01:39:56.820 --> 01:40:02.560

Professor Emily Berman: Bedoya later, resigned his position, leaving only Slaughter, in the case.

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01:40:02.670 --> 01:40:09.360

Professor Emily Berman: And the, the Supreme Court, took it up, looking...

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01:40:10.420 --> 01:40:21.350

Professor Emily Berman: particular, claim. So, in a 6-3 holding, this sort of, 6-3 split, you would...

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01:40:21.550 --> 01:40:25.489

Professor Emily Berman: we've come to expect on the court with Chief Justice Roberts

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01:40:25.830 --> 01:40:35.410

Professor Emily Berman: wrote the opinion, was joined in full by Alito, Gorsuch, Kavanaugh, and Barrett, and joined in part by Justice Thomas.

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01:40:35.800 --> 01:40:41.529

Professor Emily Berman: And really, the opinion represents, something that the

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01:40:41.850 --> 01:40:58.840

Professor Emily Berman: Supreme Court has sort of been tiptoeing around, or maybe stomping around, in recent cases, which is a full embrace of the unitary executive theory. The idea, the court says, the Constitution places the executive power in one president.

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01:40:59.060 --> 01:41:11.569

Professor Emily Berman: And that makes the president responsible for the faithful execution of all of the laws. In this case, Justice Roberts says no ifs, ands, or quasis about it.

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01:41:11.990 --> 01:41:20.389

Professor Emily Berman: But they acknowledge the president can't execute all federal laws on his own, so he must rely on subordinates.

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01:41:20.500 --> 01:41:29.880

Professor Emily Berman: And subordinates have to be answerable to the president if he is responsible for the faithful execution of all laws.

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01:41:30.020 --> 01:41:40.810

Professor Emily Berman: And the majority, in this case, treated removal authority as sort of an... one of... an essential means of maintaining that line of accountability, to the president.

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01:41:41.610 --> 01:41:48.619

Professor Emily Berman: And the majority supported its conclusion with a historical argument and a precedential argument.

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01:41:48.720 --> 01:41:57.450

Professor Emily Berman: So the historical argument goes back to the First Congress, what's sometimes referred to as the Decision of 1789

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01:41:57.720 --> 01:42:05.160

Professor Emily Berman: where James Madison argued that presidential removal was part of the executive power.

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01:42:05.680 --> 01:42:18.820

Professor Emily Berman: And executive officials had to form a chain of dependents running from the lowest officers all the way up to the president, and then ultimately from the president to the electorate.

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01:42:19.130 --> 01:42:22.899

Professor Emily Berman: So that's the historical argument.

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01:42:23.360 --> 01:42:34.949

Professor Emily Berman: The presidential argument is another case you may recall from law school called Myers v. United States, and that was a case where Congress said, that the Senate could not

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01:42:35.150 --> 01:42:48.000

Professor Emily Berman: Congress could not require the Senate to be involved to approve the removal of the Postmaster General. In other words, Congress couldn't reserve for the Senate

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01:42:48.130 --> 01:42:56.590

Professor Emily Berman: a role in determining whether or not, a principal officer could be removed.

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01:42:57.860 --> 01:43:04.110

Professor Emily Berman: And... so in... in reaching this... this conclusion that... that we're going to...

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01:43:04.360 --> 01:43:12.350

Professor Emily Berman: embrace the idea that the president, stands at the top of this pyramid, all of which needs to be accountable to him.

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01:43:12.950 --> 01:43:14.839

Professor Emily Berman: There were a few... this...

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01:43:15.050 --> 01:43:24.229

Professor Emily Berman: The... the opinion says that this is going to apply any time that an officer is exercising the executive power.

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01:43:24.380 --> 01:43:29.920

Professor Emily Berman: So the question then becomes, okay, well, what exactly is the executive power?

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01:43:30.030 --> 01:43:47.839

Professor Emily Berman: And the court, gives us some definitional information about this. They say that rulemaking, investigation, prosecution, administrative adjudication, and bringing civil enforcement actions in federal court

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01:43:47.890 --> 01:43:51.450

Professor Emily Berman: are all forms of executing the law.

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01:43:53.670 --> 01:44:06.229

Professor Emily Berman: And the court says the FTC exercises all of these powers, and in fact, if we're being honest, the majority says even the FTC in 1935 exercised at least

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01:44:06.590 --> 01:44:13.220

Professor Emily Berman: some forms of executive power, and so Humphrey's Executor was always based on,

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01:44:13.270 --> 01:44:31.809

Professor Emily Berman: sort of a fiction that these agencies... that this agency was not exercising executive power. So, accordingly, the court says all that can remain of Humphrey's Executor is its recognition that an entity exercising no executive power might exist outside

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01:44:32.050 --> 01:44:39.399

Professor Emily Berman: presidential control. To the extent it stands for anything more than that, the court said, it's now overruled.

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01:44:40.160 --> 01:44:58.580

Professor Emily Berman: And then, applying that rule to the FTC, it pointed out it makes substantive rules, it investigates private conduct, it conducts administrative adjudications, it brings lawsuits seeking penalties and other remedies, all of which are executive functions.

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01:44:58.910 --> 01:45:07.070

Professor Emily Berman: Because... so because FTC commissioners exercise executive power, the president has to be able to fire them at will.

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01:45:07.340 --> 01:45:10.640

Professor Emily Berman: Slaughter was therefore the president's subordinate

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01:45:11.460 --> 01:45:23.090

Professor Emily Berman: and he could fire her without establishing the cause required by the FTC Act. So, that is what the court decided in Slaughter.

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01:45:23.310 --> 01:45:29.190

Professor Emily Berman: We have the general rule that executive power

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01:45:29.340 --> 01:45:43.689

Professor Emily Berman: has to be overseen by the president, and that includes the ability to remove officials, at will. But there are a lot of things that the court did not decide in this case.

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01:45:44.010 --> 01:45:48.320

Professor Emily Berman: And so we really don't know the scope of this rule.

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01:45:48.440 --> 01:46:05.949

Professor Emily Berman: it didn't talk about... it explicitly said, we're not going any further than this. There might be other instances where, it makes sense for this rule not to necessarily apply, and it explicitly said

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01:46:05.960 --> 01:46:15.090

Professor Emily Berman: when it comes to non-Article III adjudicators, expressly mentioning the judges of the tax court and the federal

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01:46:15.120 --> 01:46:19.049

Professor Emily Berman: Court of... Court of Federal Claims.

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01:46:19.470 --> 01:46:27.799

Professor Emily Berman: It identified the Federal Reserve as a possible exception because of its historical pedigree, and talk more about that when I get to Cook.

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01:46:28.280 --> 01:46:37.250

Professor Emily Berman: And it said absolutely nothing about the status of inferior officers or ordinary civil servants.

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01:46:37.930 --> 01:46:48.540

Professor Emily Berman: The language of this chain of dependents reaching down through the executive branch, all the way up to the president

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01:46:48.740 --> 01:46:55.000

Professor Emily Berman: seems to... Indicate that, as a sort of theoretical matter

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01:46:55.470 --> 01:47:10.329

Professor Emily Berman: that same rule of fore-cause removal being impermissible would apply to anyone exercising executive power, which would, of course, include inferior officers and civil servants.

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01:47:10.790 --> 01:47:26.419

Professor Emily Berman: But the holding itself concerns principal officers exerting sort of a substantial amount of executive power, and so it's not clear, what that's going to do when it comes to

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01:47:26.430 --> 01:47:32.950

Professor Emily Berman: inferior officers, or, importantly, the civil service, because if

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01:47:32.990 --> 01:47:36.299

Professor Emily Berman: for cause removal protections are not permissible

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01:47:36.350 --> 01:47:45.810

Professor Emily Berman: at the civil service level, then all... then the Civil Service Reform Act itself would be unconstitutional, and the sort of,

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01:47:45.870 --> 01:47:54.670

Professor Emily Berman: protections for non-politicization of the civil service would be, would fall prey to the Slaughter rule.

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01:47:55.710 --> 01:48:08.560

Professor Emily Berman: So, there were, several important, separate writings. So, first, Justice Thomas concurred, but he declined to join the portion of the opinion that

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01:48:08.940 --> 01:48:19.380

Professor Emily Berman: suggested exempting the Fed from this at-will removal rule. He'd adopt a blanket rule, that would include the governors of the Fed.

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01:48:20.300 --> 01:48:25.230

Professor Emily Berman: Justice Gorsuch concurred, and he sort of...

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01:48:25.350 --> 01:48:31.349

Professor Emily Berman: sounded a warning about the consequences of the majority's opinion, which he joined in full.

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01:48:31.640 --> 01:48:34.230

Professor Emily Berman: But he said.

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01:48:34.470 --> 01:48:40.300

Professor Emily Berman: I'm not gonna close my eyes to the impact that this decision is going to have.

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01:48:40.510 --> 01:48:55.470

Professor Emily Berman: Congress, he said, has assigned independent agencies enormous regulatory and adjudicatory powers, partly on the assumption that those agencies would not be controlled entirely by the president.

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01:48:55.790 --> 01:49:08.890

Professor Emily Berman: And we don't know, he says, would Congress have passed that same legislation? Would they have delegated as much power to the executive had they known that these removal protections were unconstitutional?

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01:49:09.180 --> 01:49:12.070

Professor Emily Berman: But given the amount of

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01:49:12.420 --> 01:49:17.830

Professor Emily Berman: delegation that Congress has done, Gorsuch said, Slaughter might now concentrate

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01:49:17.980 --> 01:49:23.149

Professor Emily Berman: too much legislative, executive, and judicial authority in the president.

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01:49:23.900 --> 01:49:29.829

Professor Emily Berman: And so this sort of... fits in with...

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01:49:29.920 --> 01:49:41.559

Professor Emily Berman: Justice Gorsuch's concerns over... expressed over the past, you know, several years, that he would like to see maybe a non-delegation

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01:49:41.600 --> 01:49:55.869

Professor Emily Berman: doctrine revived. The major questions doctrine, I think, is... is part of this concern about the extent to which, Congress is delegating, to the executive branch. And so

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01:49:56.250 --> 01:49:58.730

Professor Emily Berman: he essentially...

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01:49:59.880 --> 01:50:09.390

Professor Emily Berman: hints at the... well, I think he comes right out and says, it's basically Congress, created this situation by assuming that

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01:50:09.710 --> 01:50:12.939

Professor Emily Berman: poor cause removal protections are unconstitutional.

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01:50:13.140 --> 01:50:17.219

Professor Emily Berman: Now that we've held that they're not, it's going to be up to the court

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01:50:17.450 --> 01:50:33.690

Professor Emily Berman: to limit those delegations that we used to allow Congress to permit. And so he's sort of using it as a springboard toward cutting back on the amount of authority Congress can delegate to

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01:50:33.960 --> 01:50:35.450

Professor Emily Berman: the executive branch.

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01:50:35.860 --> 01:50:41.970

Professor Emily Berman: And then finally, we have, Justice Sotomayor's dissent, joined by Justices Kagan

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01:50:42.130 --> 01:50:43.759

Professor Emily Berman: and Jackson.

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01:50:44.250 --> 01:50:53.399

Professor Emily Berman: And, and Sotomayor's central objection was that the majority essentially elevated presidential accountability

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01:50:53.450 --> 01:51:10.409

Professor Emily Berman: above competing constitutional values, like continuity in government, expertise, impartiality of adjudication, faithful administration of statutory law. And she made several points,

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01:51:10.580 --> 01:51:25.629

Professor Emily Berman: first, she said, Humphrey's Executor directly controls this case. It was about the FCC, it was the same agency, it was the same constitutional challenge, and there is no reason that the court should

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01:51:25.890 --> 01:51:32.680

Professor Emily Berman: be overruling Humphrey's Executor. So just as a matter of stare decisis, Humphrey's Executor should be the end of this.

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01:51:34.990 --> 01:51:48.930

Professor Emily Berman: Second, she disputed the majority's historical account, and in her view, the decision of 1789 established only that the president could remove officers without Senate participation.

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01:51:48.930 --> 01:52:08.740

Professor Emily Berman: It didn't say anything about whether Congress could impose constraints or limitations on those removals. Simply that Congress couldn't reserve for itself a role in the removal doesn't necessarily mean that it couldn't impose other kinds of limitations.

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01:52:09.490 --> 01:52:16.080

Professor Emily Berman: Third, she relied on historical practice. She says, beginning with the Interstate Commerce Commission in 1887,

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01:52:16.100 --> 01:52:35.470

Professor Emily Berman: Congresses and presidents have repeatedly created multi-membered agencies with fixed terms and bipartisan membership with removal protection. It became even more common after *Humphrey's Executor* in the court had accepted it for roughly 90 years, so...

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01:52:35.810 --> 01:52:37.220

Professor Emily Berman: does that mean...

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01:52:37.450 --> 01:52:46.140

Professor Emily Berman: that since 1887, we have been living in an unconstitutional system, with these independent commissions.

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01:52:46.720 --> 01:52:57.610

Professor Emily Berman: Fourth, she emphasized, as one reason not to overrule *Humphrey's Executor*, the reliance that both,

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01:52:57.820 --> 01:53:01.609

Professor Emily Berman: the public and Congress had

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01:53:02.170 --> 01:53:18.780

Professor Emily Berman: had on this rule that they were permitted to create independent agencies. So bipartisan membership and staggered terms lose much of their significance if the president could just fire every member of the opposing party.

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01:53:18.910 --> 01:53:22.009

Professor Emily Berman: Yet Congress created agencies like

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01:53:22.730 --> 01:53:38.470

Professor Emily Berman: the NLRB, the Merit Systems Protection Board, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the Consumer Product Safety Commission, all of these agencies on the understanding that they would be making decisions,

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01:53:39.700 --> 01:53:50.420

Professor Emily Berman: with some independence from partisan control, and the majority is now hoarding that expectation and reliance interest.

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01:53:50.950 --> 01:53:53.089

Professor Emily Berman: And then finally, Justice Sotomayor

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01:53:53.490 --> 01:54:02.359

Professor Emily Berman: argued that the majority's rule is less workable than the precedent that it displaced. She says, you know

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01:54:02.930 --> 01:54:09.210

Professor Emily Berman: we... we don't know... the scope of the Slaughter rule. We don't know...

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01:54:09.290 --> 01:54:24.339

Professor Emily Berman: is the Federal Reserve the only agency that has the historical pedigree to qualify as an exception? What happens to the principally adjudicatory bodies, like

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01:54:24.390 --> 01:54:41.099

Professor Emily Berman: the Merit System Protection Board and the National Labor Relations Board. And she pointed to the sort of flashing red question marks over the status of inferior officers and protected civil servants. And so, she says this sort of

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01:54:41.100 --> 01:54:46.069

Professor Emily Berman: you know, to whatever extent you think Humphrey's Executor was unadministerable

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01:54:46.070 --> 01:54:50.219

Professor Emily Berman: this new rule that you have laid down

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01:54:50.350 --> 01:54:54.150

Professor Emily Berman: doesn't do anything to clarify the situation.

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01:54:55.490 --> 01:55:01.109

Professor Emily Berman: So, that brings me to, Trump versus Cook, decided the same day.

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01:55:01.330 --> 01:55:17.370

Professor Emily Berman: This was a case brought by, Lisa Cook, who was a... appointed to the Federal Reserve Board in 2022, and then later confirmed to a full 14-year term, scheduled to end in 2038.

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01:55:17.750 --> 01:55:28.289

Professor Emily Berman: According to the statute, Federal Reserve governors remain in office for the duration of their term unless sooner removed for cause by the President.

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01:55:28.650 --> 01:55:35.370

Professor Emily Berman: The statute does not, however, define what qualifies as cause for removal.

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01:55:36.310 --> 01:55:44.879

Professor Emily Berman: In August of 2025, the Director of the Federal Housing Finance Agency accused Cook of mortgage fraud.

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01:55:45.040 --> 01:56:00.769

Professor Emily Berman: The allegation being that before joining the Federal Reserve, she had represented two different properties as her principal residence, allegation that, this agency made against numerous public officials.

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01:56:01.620 --> 01:56:17.389

Professor Emily Berman: And President Trump initially posted on social media that Cook must resign, and then later sent her a letter purporting to remove her. She was not given a formal explanation of the evidence

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01:56:17.780 --> 01:56:22.349

Professor Emily Berman: or any opportunity to respond to the allegations.

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01:56:22.860 --> 01:56:31.789

Professor Emily Berman: Now this case came to the court in a preliminary posture. The district court preliminarily enjoined

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01:56:31.860 --> 01:56:46.570

Professor Emily Berman: Cook's removal based on Humphrey's Executor, which was still good law at the time. The DC Circuit then declined to stay that injunction, and the government then sought a stay from the Supreme Court.

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01:56:47.310 --> 01:57:02.559

Professor Emily Berman: So, Cook involved this application for sort of interim relief rather than a final merits judgment, but the court... the court did, schedule oral argument and issue an extensive precedential opinion.

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01:57:03.370 --> 01:57:10.340

Professor Emily Berman: So, again, we have Justice Roberts writing, but for a very different, majority coalition.

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01:57:10.550 --> 01:57:15.760

Professor Emily Berman: He was joined by Justices Sotomayor, Kagan, Kavanaugh, and Jackson.

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01:57:16.750 --> 01:57:24.630

Professor Emily Berman: And they denied the state, finding that the government had not demonstrated that it was likely to succeed on the merits.

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01:57:25.040 --> 01:57:32.549

Professor Emily Berman: And the opinion made, sort of, 5... important points, I would say.

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01:57:32.990 --> 01:57:43.790

Professor Emily Berman: So, first and most consequentially, the court confirmed what it had implied in *Slaughter*, which is that the Federal Reserve's removal protection is, in fact, constitutional.

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01:57:44.070 --> 01:57:53.039

Professor Emily Berman: The government had actually expressly declined to challenge the provision, but given the,

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01:57:53.290 --> 01:58:06.649

Professor Emily Berman: the uncertainty that *Slaughter* may have created, and in response to Justice Thomas's arguments, the court decided to clarify the question, and so they addressed it and explicitly held

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01:58:06.820 --> 01:58:21.809

Professor Emily Berman: the Federal Reserve is an exception to the rule that all officers exercising executive power must be removable at will. And they traced the independent central banking idea back from

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01:58:22.460 --> 01:58:32.510

Professor Emily Berman: the Bank of North America, through the First and Second Banks of the United States, up to the Federal Reserve. And they said the principle underlying this history

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01:58:33.200 --> 01:58:37.500

Professor Emily Berman: is that monetary policy should be insulated from direct

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01:58:37.600 --> 01:58:47.109

Professor Emily Berman: political influence. And although the Federal Reserve is more powerful and complicated and does more things than just monetary policy

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01:58:47.240 --> 01:58:54.840

Professor Emily Berman: Constitutional traditions need not remain frozen, Justice Roberts said, in 18th century form.

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01:58:54.980 --> 01:59:00.440

Professor Emily Berman: And so they treated the Federal Reserve as sort of this special arrangement sanctioned by history.

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01:59:01.580 --> 01:59:04.479

Professor Emily Berman: Second,

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01:59:05.120 --> 01:59:17.799

Professor Emily Berman: and also, importantly for the sort of functionality of that removal protection, is the court said the President's determination that caused to remove

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01:59:17.850 --> 01:59:34.310

Professor Emily Berman: a Fed governor exists, is judicially reviewable. That had been an argument the government was making, that the court can't tell the president whether, whether there is cause for removal. That's up to him, and the court said, no, we will, we will review this

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01:59:34.380 --> 01:59:50.410

Professor Emily Berman: cause itself imposes a substantial threshold, though the court declined to define that threshold, and declined to say whether the mortgage fraud allegations would satisfy that standard.

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01:59:50.410 --> 01:59:54.430

Professor Emily Berman: But it did make clear that there's got to be something there.

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01:59:55.280 --> 01:59:59.270

Professor Emily Berman: And the courts have the power to keep

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01:59:59.530 --> 02:00:12.310

Professor Emily Berman: the Fed governor in place while the litigation proceeds. So one of the challenges had been that it's beyond the equitable powers of the court to tell the president that he has to continue employing

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02:00:12.360 --> 02:00:19.569

Professor Emily Berman: an executive branch official that he wants to fire, and the court said, no, the courts have this power.

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02:00:20.550 --> 02:00:25.600

Professor Emily Berman: And then, finally, they said that this

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02:00:25.860 --> 02:00:30.350

Professor Emily Berman: removal protection, brings with it some

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02:00:30.470 --> 02:00:44.330

Professor Emily Berman: procedural protections. So Cook was entitled to notice and an opportunity to respond before removal, even though the statute itself doesn't expressly mention such requirements.

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02:00:46.350 --> 02:00:59.349

Professor Emily Berman: So, at the beginning of August, the White House sent Cook a letter, giving her until August 26th to respond to the mortgage fraud allegations, and...

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02:00:59.360 --> 02:01:11.780

Professor Emily Berman: presumably now restarting the process of removing her, this time following the statutory requirements of cause. So presumably at some point

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02:01:11.780 --> 02:01:24.550

Professor Emily Berman: the court might have to come back and address some of the questions that left open about, you know, what is the definition of cause, what exact process is due,

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02:01:25.150 --> 02:01:35.279

Professor Emily Berman: what's... what sort of burden of proof? Who has the burden of proof, and how high is it? All of those sorts of questions remain... remain open.

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02:01:36.160 --> 02:01:39.530

Professor Emily Berman: So this case, too, had, some dissents.

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02:01:41.120 --> 02:01:56.639

Professor Emily Berman: Justice Thomas's was the broadest assent, and he said that the Federal Reserve Board exercises executive power and is materially different from the largely private first and second banks.

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02:01:56.850 --> 02:02:07.130

Professor Emily Berman: And therefore, under Slaughter, the governors have to be removable at will. In other words, we announce the rule in Slaughter, we should apply the rule across the board.

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02:02:07.590 --> 02:02:08.730

Professor Emily Berman: He also...

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02:02:09.370 --> 02:02:26.679

Professor Emily Berman: disagreed with a lot of the court's, determinations about the operation of the statute. So, he said Cook lacked a cause of action, that traditional equity didn't permit courts to reinstate a removed executive official, that

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02:02:26.970 --> 02:02:35.480

Professor Emily Berman: Cook had no constitutional due process claim, because her office does not qualify as a property interest.

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02:02:35.620 --> 02:02:41.430

Professor Emily Berman: That mortgage fraud plainly satisfies the cause requirement.

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02:02:41.490 --> 02:02:55.769

Professor Emily Berman: And that the court improperly inserted this notice and hearing requirement where Congress hadn't mentioned them. So he sort of took issue with all of the ways in which the court interpreted the statute, but

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02:02:55.810 --> 02:03:02.110

Professor Emily Berman: big picture is he thought Slaughter announced the rule, and Slaughter should apply to the Fed as well.

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02:03:03.120 --> 02:03:09.390

Professor Emily Berman: Justice Alito, joined by Gorsuch, pointed to the preliminary nature

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02:03:09.500 --> 02:03:18.260

Professor Emily Berman: of the claim, and said, given the absence of a factual record about the allegations of mortgage fraud, he would have limited

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02:03:18.400 --> 02:03:20.650

Professor Emily Berman: his inquiry into

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02:03:20.690 --> 02:03:39.219

Professor Emily Berman: only two of the lower court's decisions. One, that pre-office conduct could never constitute cause, and that Cook possessed a constitutional property interest in her job. So those were two questions of law that didn't need the record. He said he would have

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02:03:39.700 --> 02:03:51.449

Professor Emily Berman: decided both of those in the opposite direction, and would have granted the stay without addressing the, constitutionality of the removal provision

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02:03:52.240 --> 02:03:54.330

Professor Emily Berman: in the Federal Reserve Act.

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02:03:55.050 --> 02:03:59.199

Professor Emily Berman: And then finally, there was Justice Barrett, who, sort of...

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02:04:00.190 --> 02:04:02.429

Professor Emily Berman: called out the elephant in the room

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02:04:02.490 --> 02:04:15.459

Professor Emily Berman: pointing to the deep tension between Slaughter's ostensibly categorical removal rule when it comes to executive officials, and then Cook's historical exception.

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02:04:15.460 --> 02:04:24.930

Professor Emily Berman: And she raised some of the same questions that Justice Sotomayor had pointed to in her Slaughter dissent...How far does this exception extend?

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02:04:25.840 --> 02:04:29.389

Professor Emily Berman: Are there powers at the Federal Reserve

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02:04:29.410 --> 02:04:46.810

Professor Emily Berman: has that go beyond monetary policy, and are those also covered by this exception? Are there other agencies that maybe can claim comparable historical pedigrees? What is... what is required? So, the court had sort of

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02:04:47.200 --> 02:04:48.580

Professor Emily Berman: set out this...

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02:04:48.780 --> 02:04:57.350

Professor Emily Berman: bespoke exception for the Federal Reserve, and that may be all it is. It may be sort of a ticket for

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02:04:57.660 --> 02:04:59.360

Professor Emily Berman: Federal Reserve only.

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02:04:59.460 --> 02:05:08.269

Professor Emily Berman: But... They don't say that, and so the case, leaves some uncertainty in that regard.

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02:05:08.520 --> 02:05:14.799

Professor Emily Berman: So taken together, Slaughter and Cook established that there is a general rule

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02:05:15.550 --> 02:05:35.500

Professor Emily Berman: that principal officers exercising executive power are removable at will. And that is a big change, right? That is... that calls into question all of the, quote, independent agencies that Congress has created in order to do things, based not on

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02:05:35.620 --> 02:05:41.100

Professor Emily Berman: partisan views, but on whether it be science or expertise.

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02:05:41.220 --> 02:05:48.630

Professor Emily Berman: Or, you know, take your pick of other grounds for making decisions.

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02:05:49.110 --> 02:05:55.339

Professor Emily Berman: But it also announced this exception, whose scope we don't know.

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02:05:55.510 --> 02:06:03.299

Professor Emily Berman: It is important that, to the extent you do fall under the exception,

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02:06:03.540 --> 02:06:12.040

Professor Emily Berman: the statute... the removal protections that you have are, in fact, relatively robust and subject to judicial review.

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02:06:12.300 --> 02:06:18.640

Professor Emily Berman: And have some, you know, due process requirements along with them.

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02:06:18.900 --> 02:06:35.260

Professor Emily Berman: And then finally, the... the uncertainty that I mentioned at the outset, that we just don't know, how this applies to any number of executive officials,

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02:06:36.510 --> 02:06:45.540

Professor Emily Berman: adjudicatory officials, inferior officers, civil servants, agencies claiming their own historical pedigree,

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02:06:45.680 --> 02:06:58.730

Professor Emily Berman: executive officials who don't engage in what the court will consider exercises of the executive power. All of that sort of remains up in the air, and I suspect that some of those fault lines

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02:06:58.730 --> 02:07:06.569

Professor Emily Berman: are likely to be at issue in the next wave of removal cases, should they come.

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02:07:07.220 --> 02:07:11.780

Professor Emily Berman: So I will stop there, and I look forward to the conversation.

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02:07:14.410 --> 02:07:17.950

Professor Emily Berman: Let me unshare... my screen.

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02:07:22.670 --> 02:07:38.789

Dean Leonard M. Baynes: Thank you, Professor Berman, for that very comprehensive view of Humphrey's Executor and all that follows. Next, we're going to have our faculty expert, James Nelson, who's going to talk about the challenge to the ban on conversion theory.

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02:07:38.920 --> 02:07:57.270

Dean Leonard M. Baynes: therapy. He works at the intersection of corporate, employment, and constitutional law. He holds the Vinson and Elkins professorship at law. His current research focuses on the free speech, right of free speech, religion, association of the workplace.

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02:07:57.270 --> 02:08:15.400

Dean Leonard M. Baynes: After graduating from the University of Virginia Law School, where he was editor-in-Chief of the Virginia Law Review, he clerked for the United States Court of Appeals for the Fifth Circuit. He's a recipient of the University of Houston's Campus-Wide Award for Excellence in Research and Scholarship, and also 's Campus-Wide Award

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02:08:15.400 --> 02:08:21.589

Dean Leonard M. Baynes: for teaching excellence. Let's welcome Professor Nelson to the conversation. Thank you.

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02:08:24.200 --> 02:08:28.520

Professor James Nelson: Thanks, Dean Baynes, and thanks to everybody for sticking it out this long.

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02:08:28.630 --> 02:08:36.280

Professor James Nelson: So with my time today, I'm gonna talk about the case, called Chiles v. Salazar.

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02:08:37.340 --> 02:08:46.449

Professor James Nelson: So the Chiles's case involved a First Amendment challenge, as the Dean said, to Colorado's ban on conversion therapy.

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02:08:47.570 --> 02:08:55.320

Professor James Nelson: Case was brought by Kaylee Chiles, who is a licensed counselor in Colorado.

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02:08:56.410 --> 02:09:03.860

Professor James Nelson: And one thing that Chiles does is she offers counseling to clients, including clients who are minors

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02:09:04.310 --> 02:09:10.719

Professor James Nelson: to help them to change their sexual orientation or their gender identity.

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02:09:11.850 --> 02:09:16.870

Professor James Nelson: That kind of counseling, however, is at odds with Colorado law,

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02:09:17.030 --> 02:09:24.009

Professor James Nelson: which prohibits licensed counselors from engaging in conversion therapy for minors.

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02:09:24.510 --> 02:09:36.019

Professor James Nelson: Now, more specifically, the law forbids, quote, any practice or treatment that attempts to change an individual's sexual orientation

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02:09:36.210 --> 02:09:37.770

Professor James Nelson: or gender identity.

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02:09:39.020 --> 02:09:44.910

Professor James Nelson: So Chiles challenges this law as a violation of her free speech rights.

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02:09:45.400 --> 02:09:51.579

Professor James Nelson: And the court rules in her favor, and it does so by a vote of 8 to 1.

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02:09:52.250 --> 02:09:56.229

Professor James Nelson: And Justice Gorsuch writes the opinion for the court.

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02:09:57.580 --> 02:10:08.840

Professor James Nelson: So what I want to do is try to break down this opinion and its reasoning in a bit more detail to understand what's going on in the case, and what we might be able to take away from it.

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02:10:10.240 --> 02:10:19.689

Professor James Nelson: So, at the outset of the opinion, Justice Gorsuch emphasizes that Kaylee Chiles only offers talk therapy.

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02:10:19.810 --> 02:10:23.070

Professor James Nelson: Right? She's only offering speech.

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02:10:23.770 --> 02:10:31.329

Professor James Nelson: She doesn't engage in any of the aversive therapy practices that had been practiced in the past,

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02:10:31.510 --> 02:10:38.850

Professor James Nelson: things like, inducing nausea, inducing vomiting, inducing paralysis

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02:10:39.210 --> 02:10:44.099

Professor James Nelson: or maybe subjecting clients to severe electric shocks

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02:10:44.600 --> 02:10:57.300

Professor James Nelson: or telling clients that they should snap elastic bands on their wrists when they have unwanted thoughts. She doesn't do any of that, right? All she does is talk.

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02:10:57.580 --> 02:11:05.959

Professor James Nelson: And so the court says that all of the therapy that Kaylee Chiles offers is speech protected by the First Amendment.

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02:11:08.420 --> 02:11:20.959

Professor James Nelson: Now, related to that point, the court says that Chiles is only challenging Colorado's conversion therapy ban as it applies to her practice of talk therapy

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02:11:21.380 --> 02:11:29.559

Professor James Nelson: which is to say, she is not challenging the validity of Colorado's conversion therapy ban law on its face.

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02:11:29.900 --> 02:11:40.220

Professor James Nelson: Indeed, she concedes that the state has a strong interest in regulating the kind of aversive physical therapy practices that I mentioned. She doesn't

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02:11:40.220 --> 02:11:51.429

Professor James Nelson: practice those, and she agrees that the court has a strong interest in regulating those, right? She's only challenging Colorado's law as it applies to her practice of talk therapy.

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02:11:53.060 --> 02:12:01.659

Professor James Nelson: Here's the most important point from Chiles. Most importantly, the court says that as applied to Chiles' talk therapy,

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02:12:02.680 --> 02:12:06.959

Professor James Nelson: Colorado's law discriminates on the basis of viewpoint.

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02:12:07.540 --> 02:12:17.419

Professor James Nelson: And that viewpoint discrimination is an especially egregious violation of the First Amendment, an especially egregious violation of its principles.

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02:12:18.610 --> 02:12:21.779

Professor James Nelson: So here's how the logic goes for the majority

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02:12:22.430 --> 02:12:38.200

Professor James Nelson: to reach the conclusion of viewpoint discrimination. It says, licensed counselors in Colorado are allowed to provide acceptance, they're allowed to provide support for individuals' gender identity and their sexual orientation.

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02:12:38.850 --> 02:12:43.709

Professor James Nelson: But they're not allowed to try to help them change those identities.

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02:12:43.810 --> 02:12:51.910

Professor James Nelson: Right? And so what the court says is that Colorado has taken a side on this issue, and it's a controversial issue.

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02:12:51.910 --> 02:13:04.020

Professor James Nelson: Right? It allows speech on one side of the controversy, while banning speech on the other side. You can't do that, that's viewpoint discrimination. That is an egregious violation of the First Amendment.

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02:13:06.120 --> 02:13:15.129

Professor James Nelson: Okay, now Justice Gorsuch then, addresses some potential counter-arguments to this conclusion, and to his analysis for the majority.

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02:13:16.400 --> 02:13:26.209

Professor James Nelson: So first, he considers the possibility that Colorado's ban on conversion therapy is not a speech regulation, it's instead a regulation of conduct.

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02:13:26.450 --> 02:13:35.320

Professor James Nelson: Right? Here, his idea is that maybe the ban on conversion therapy regulates just ordinary professional conduct.

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02:13:35.320 --> 02:13:50.340

Professor James Nelson: It regulates the treatments that licensed professionals can give in the state of Colorado, or their therapeutic modalities that are available. It just regulates the kind of conduct a professional in the state might

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02:13:50.380 --> 02:13:54.609

Professor James Nelson: engage in, that healthcare professionals in the state can provide.

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02:13:55.000 --> 02:14:04.830

Professor James Nelson: And, no, and he notes this, if that argument were accepted, then a much weaker standard of review would apply to Chiles' claim.

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02:14:05.830 --> 02:14:11.299

Professor James Nelson: But Justice Gorsuch has two responses to this counterargument, right? He rejects this idea.

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02:14:12.160 --> 02:14:18.810

Professor James Nelson: First, he says that relabeling Chiles' speech, her talk therapy, the stuff that she says.

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02:14:19.090 --> 02:14:33.720

Professor James Nelson: Relabeling that speech as conduct is just to engage in sort of word games, and he has this quip that the First Amendment is about more than just word games, right? Or that the First Amendment is no mere word game.

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02:14:34.780 --> 02:14:42.289

Professor James Nelson: Now, I think he's got a more substantive response, that he follows with. More substantively, he points to previous cases.

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02:14:42.540 --> 02:14:49.009

Professor James Nelson: Cases like *Cohen v. California*, which involved a breach of the peace statute.

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02:14:49.860 --> 02:14:59.450

Professor James Nelson: And a more recent case called *Holder v. Humanitarian Law Project*, which involved restrictions on providing material support for terrorism.

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02:15:00.700 --> 02:15:09.179

Professor James Nelson: In those cases and others, he says that the court rejected attempts to get out from underneath First Amendment scrutiny

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02:15:09.230 --> 02:15:27.539

Professor James Nelson: by relabeling speech as conduct, right? It could have been done in those cases, and it wasn't, and he rejects the idea that you can just relabel things that are, that are speech, as if they were conduct, and thereby get out of the First Amendment free card.

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02:15:29.230 --> 02:15:44.029

Professor James Nelson: Now, a second counterargument that Justice Gorsuch addressed was the idea that Colorado law regulated a thing called professional speech, a category that might be distinctive, that we might think of as professional speech.

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02:15:44.030 --> 02:15:55.790

Professor James Nelson: And under this category of professional speech, well, maybe this state has more latitude, or gets more deference, has more ability to regulate professional speech.

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02:15:56.570 --> 02:16:15.400

Professor James Nelson: But here, he's got some strong precedent on his side in rebutting this idea. He points to a 2018 case called *NIFLA v. Becerra*, where the court rather firmly rejects this idea that there is this special, separate category called professional speech

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02:16:15.760 --> 02:16:25.380

Professor James Nelson: that is exempt from ordinary First Amendment principles. It rejects the idea that professional speech stands outside of ordinary First Amendment analysis.

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02:16:27.270 --> 02:16:42.109

Professor James Nelson: Now, finally, Justice Gorsuch rejects what I think of as a related idea, though distinct. He rejects the idea that there might be some kind of, quote, medical speech exemption from the First Amendment.

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02:16:43.150 --> 02:17:01.059

Professor James Nelson: Here, his analysis is more brief, but he basically says two things to respond to the idea that medical speech, is exempt or is subject to lighter scrutiny. He says, first, the Supreme Court has and should narrowly interpret

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02:17:01.129 --> 02:17:10.510

Professor James Nelson: the categories of unprotected speech. There are some categories of unprotected speech that have been recognized, but the court must interpret them narrowly.

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02:17:10.590 --> 02:17:29.119

Professor James Nelson: And second, the court ought to be and is reluctant to create new categories of unprotected speech, right, that stand outside of ordinary First Amendment coverage, that get the First Amendment scrutiny. And he says the court simply has not created one of these categories for something called medical speech.

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02:17:29.940 --> 02:17:38.580

Professor James Nelson: So, the court finds that Colorado's law, bottom line, engages in impermissible viewpoint discrimination.

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02:17:38.770 --> 02:17:44.739

Professor James Nelson: That's bad, and the court decides the case on that basis.

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02:17:46.610 --> 02:18:06.410

Professor James Nelson: Now, I think surprisingly to some commentators and observers who were anticipating this decision, it was surprising, I think, to some people that Justices Kagan and Sotomayor joined the majority, right? This was not a 6-3 case along traditionally ideological or partisan lines, it was an 8-1 majority.

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02:18:07.010 --> 02:18:13.629

Professor James Nelson: And Justice Kagan writes a concurrence to explain why she joins the majority here.

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02:18:14.590 --> 02:18:25.399

Professor James Nelson: So first, she repeats the idea that viewpoint discrimination is an especially egregious violation of the First Amendment and its animating principles.

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02:18:26.049 --> 02:18:40.680

Professor James Nelson: Right? And it agrees, she agrees with the majority that Colorado took a side in this debate, right? It allowed speech on one side of a controversial issue, or one side of a dispute, a social dispute, a political dispute

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02:18:40.879 --> 02:18:43.720

Professor James Nelson: and banned speech on the other side.

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02:18:44.799 --> 02:18:50.040

Professor James Nelson: But, she was quick to... Add to that agreement

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02:18:50.430 --> 02:18:58.419

Professor James Nelson: that, in her view, if Colorado had instead engaged in, content discrimination

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02:18:58.860 --> 02:19:04.080

Professor James Nelson: by, say, restricting speech on both sides of this debate

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02:19:04.090 --> 02:19:21.179

Professor James Nelson: right? Banning therapy affirming or seeking to change gender identity or sexual orientation, then she thinks that that would trigger a different kind of analysis, a more forgiving kind of scrutiny under the First Amendment, and maybe the result

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02:19:21.180 --> 02:19:35.090

Professor James Nelson: would have been different. But, she says that's not what Colorado did. Colorado discriminated on the basis of viewpoint, and so, so we don't need to resolve what would happen if instead it had engaged only in content discrimination.

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02:19:37.150 --> 02:19:43.019

Professor James Nelson: Now, Justice Jackson writes a solo dissent, right? She's the one in the 8 to 1.

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02:19:43.719 --> 02:19:52.929

Professor James Nelson: And she frames her opinion around the idea that the state has broad police powers over the practice of medicine.

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02:19:53.450 --> 02:19:57.750

Professor James Nelson: And that what Colorado was doing was regulating conduct

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02:19:57.860 --> 02:20:06.030

Professor James Nelson: which is to say, they were regulating the conduct of practicing medicine, Which only incidentally burdens speech

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02:20:06.220 --> 02:20:16.470

Professor James Nelson: and that means that a lower standard of review should have applied to the case, not the very high standard that the court suggested

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02:20:16.740 --> 02:20:19.449

Professor James Nelson: was, was triggered.

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02:20:20.030 --> 02:20:36.959

Professor James Nelson: Now, here I actually think it's important, to recognize a distinction that Justice Jackson is making in her, in her dissent. She makes this important distinction. She is not saying that Colorado was only regulating conduct. That's kind of the counterargument that Justice Gorsuch

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02:20:36.980 --> 02:20:45.819

Professor James Nelson: trained his eye on, but that's not the argument she was making. She was saying, yes, Colorado is regulating speech.

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02:20:46.360 --> 02:20:52.469

Professor James Nelson: But that speech that is regulated is incidental to the regulation of conduct

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02:20:52.760 --> 02:21:02.740

Professor James Nelson: which is to say that speech was not the target of the regulation. So it's a subtle difference, but I think an important difference that structures her analysis.

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02:21:03.670 --> 02:21:10.780

Professor James Nelson: So the crux of her argument, then, is that a lower standard of review should have applied because...

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02:21:11.130 --> 02:21:15.460

Professor James Nelson: the regulation of speech, yes, there was speech that was being regulated.

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02:21:15.900 --> 02:21:29.909

Professor James Nelson: But the regulation of speech was incidental to the state's otherwise legitimate regulation of medical treatment, right? Something that it has regulated for a long period of time, and something almost nobody doubts they have the authority to do.

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02:21:30.480 --> 02:21:34.230

Professor James Nelson: And that under that lower standard of review

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02:21:34.230 --> 02:21:39.469

Professor James Nelson: Colorado, rather obviously, has a strong interest in protecting minors

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02:21:39.470 --> 02:22:03.310

Professor James Nelson: from the harms that might come from conversion therapy, she says, on which there is a wide medical consensus that such practices are ineffective, and in many cases, they are harmful, right? This is the kind of thing that the state has the power to regulate, and it is a strong interest that they have, which should survive the court's review.

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02:22:05.780 --> 02:22:23.380

Professor James Nelson: Okay, now, stepping back just for a few minutes with the time that I have left, I want to suggest that Chiles leaves at least me with a few questions, right? Some questions I'm not sure where this doctrine goes in the wake of the Chiles decision.

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02:22:24.570 --> 02:22:27.570

Professor James Nelson: One practical question, I think, is...

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02:22:27.930 --> 02:22:33.739

Professor James Nelson: What's left of the state's authority to police standards of care?

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02:22:33.980 --> 02:22:38.730

Professor James Nelson: Standards of medical practice care when speech is involved.

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02:22:39.010 --> 02:22:47.060

Professor James Nelson: Right? So I wonder whether the state can require certain answers on medical licensing exams after trials?

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02:22:47.280 --> 02:22:54.350

Professor James Nelson: Can they require people taking exams to say things like, smoking increases the risk of cancer?

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02:22:54.520 --> 02:23:11.030

Professor James Nelson: Can they require people taking tests to say that diet and exercise are good for heart health? I'm not a doctor. These are the kinds of things, though, that I might expect them to be able to require, but it's not clear under Chiles that on a licensing exam, they can require

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02:23:11.220 --> 02:23:17.089

Professor James Nelson: test takers to, to affirm these propositions.

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02:23:18.230 --> 02:23:25.399

Professor James Nelson: You might also wonder after Chiles whether the state can stop a doctor who wants to tell a patient

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02:23:25.600 --> 02:23:29.819

Professor James Nelson: that bacon is the best cure for high cholesterol.

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02:23:30.200 --> 02:23:43.710

Professor James Nelson: It's not clear why they would be able to do so, under the Chiles opinion. You might also wonder whether a doctor can tell patients that blood clots are no big deal, and that they shouldn't get treatments.

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02:23:43.930 --> 02:23:58.960

Professor James Nelson: It's not obvious to me, after Chiles, that they are able to do so, and if they are able to do so, why they are able to do so, and why that is not a violation of the court's explanation of viewpoint discrimination.

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02:23:59.960 --> 02:24:10.389

Professor James Nelson: Now, Justice Gorsuch briefly does allow for the possibility that although this, Colorado law, is... is...

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02:24:10.920 --> 02:24:24.440

Professor James Nelson: inapplicable or cannot be applied to Kaylee Chiles' talk therapy. Maybe in the future, though, state malpractice claims might still be brought for medical speech that falls below the standard of care.

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02:24:24.890 --> 02:24:41.120

Professor James Nelson: And he suggests here that maybe the elements of state malpractice claims, things that would require plaintiffs to demonstrate causation and injury or damages, that maybe those are sufficient to protect the First Amendment interests that

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02:24:41.180 --> 02:24:45.059

Professor James Nelson: the court and the majority are worried about in Chiles.

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02:24:45.550 --> 02:24:56.780

Professor James Nelson: Now, I'll just say that I found this analysis to be a bit underdeveloped and somewhat speculative, which is to say it's hard for me to see

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02:24:56.780 --> 02:25:10.660

Professor James Nelson: how state medical malpractice claims would survive the court's viewpoint discrimination analysis, and we don't get much sense as to why that would be the case. It's not... it's not really very well fleshed out, in the opinion.

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02:25:12.780 --> 02:25:27.460

Professor James Nelson: Now, Chiles also raises some broader questions about First Amendment values, right? This is something that is very important in the area of First Amendment law, to understand the values that, that undergird the doctrine.

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02:25:28.050 --> 02:25:35.980

Professor James Nelson: One big question that emerges in the realm of First Amendment values is about the so-called marketplace of ideas.

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02:25:37.420 --> 02:25:45.159

Professor James Nelson: In his closing remarks in the opinion, Justice Gorsuch alludes to this classic First Amendment value.

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02:25:45.310 --> 02:25:57.089

Professor James Nelson: He relies on the idea that the marketplace of ideas is the best means for discovering truth, right? This is a classic foundational First Amendment justification.

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02:25:57.810 --> 02:26:03.889

Professor James Nelson: But to me, this seemed like an odd invocation, an odd thing to say about professional medicine.

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02:26:03.990 --> 02:26:17.019

Professor James Nelson: It seems to me that in the field of professional medicine, we have various structures and institutions for pursuing truth. We have things like peer-reviewed medical journals.

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02:26:17.080 --> 02:26:26.949

Professor James Nelson: We have things like experts making judgments based on scientific standards. These are the kinds of institutions that are designed to produce knowledge.

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02:26:27.510 --> 02:26:36.459

Professor James Nelson: Moreover, it seems to me that medical practice is full of viewpoint discrimination. It's all over the place in medical practice.

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02:26:36.780 --> 02:26:41.939

Professor James Nelson: Which is to say, you need to be able to determine, and you need to be able to talk about

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02:26:42.020 --> 02:27:00.779

Professor James Nelson: what are good treatments, and what are bad treatments, right? You're making a, you're discriminating, on one view about what's a good treatment and what's a bad treatment. It seems like that happens all the time in medical practice, and the marketplace of ideas doesn't seem to be responsive to that, to that reality.

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02:27:01.360 --> 02:27:14.070

Professor James Nelson: Another way of putting it is that the marketplace of ideas isn't really how scientific medicine advances, doesn't seem to me to be a good model for how doctors treat patients, either.

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02:27:14.410 --> 02:27:33.720

Professor James Nelson: To quote Yale Law Professor Robert Post on this point, he said, in the context of medical practice, we insist on competence, not debate. Right? So, to me, it seems like the marketplace metaphor falters at the end of the opinion.

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02:27:34.760 --> 02:27:36.180

Professor James Nelson: All that said

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02:27:36.330 --> 02:27:45.360

Professor James Nelson: I think there's one thing that is quite clear after Chiles. It was certainly there in the doctrine before, but it is emphatic in the Chiles decision.

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02:27:45.660 --> 02:28:03.750

Professor James Nelson: And that is that the Court has a strong and foundational commitment to a nearly categorical ban on viewpoint discrimination. Viewpoint discrimination is an egregious constitutional violation, it cuts at the heart of the First Amendment. As I said, this is not a new position.

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02:28:04.040 --> 02:28:11.170

Professor James Nelson: But it is a reminder in Chiles of the scope of the viewpoint neutrality requirement.

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02:28:11.300 --> 02:28:22.489

Professor James Nelson: And the strength of that principle, right? How strong that principle will be, and how, how the court will apply it vigorously if it thinks that

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02:28:22.490 --> 02:28:31.490

Professor James Nelson: the state is taking one side of a debate, right? This is a principle that has been for a long time and continues to be at the heart of the First Amendment.

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02:28:31.490 --> 02:28:45.120

Professor James Nelson: And I think that, if nothing else, Chiles will be cited alongside other cases, but it'll be cited as an emphatic reminder of the principle that viewpoint neutrality is required by the First Amendment.

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02:28:45.600 --> 02:28:53.930

Professor James Nelson: So that's my, two cents on Chiles. I will stop there, and I will look forward to hearing thoughts, questions, and discussion.

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02:29:01.280 --> 02:29:16.249

Dean Leonard M. Baynes: Thank you, Professor Nelson, for that wholesome review of the Chiles case. I'd like to welcome all of our panelists back for Q&A on for the next half an hour or so on some of the things that we discussed.

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02:29:19.300 --> 02:29:23.640

Dean Leonard M. Baynes: oh, there we go. Are we gonna do Brady Bunch style?

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02:29:24.040 --> 02:29:30.320

Dean Leonard M. Baynes: There we go, okay. All right, so let me ask you, so some of the questions will be directed at some of the panelists.

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02:29:30.320 --> 02:29:44.749

Dean Leonard M. Baynes: And then we'll get to some questions that are more broadly directed to all of the panelists. So the first thing, Professor Chandler, you had mentioned at the close of your remarks about the President's new executive order on birthright citizenship. That seemed to

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02:29:44.750 --> 02:29:49.070

Dean Leonard M. Baynes: try to tailor it, or to restrict it

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02:29:49.140 --> 02:30:03.149

Dean Leonard M. Baynes: to birth tourism, children as older, born in the United States based on birth tourism, or parents engaging in some sort of fraud to get citizenships, or alien enemy terrorists

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02:30:03.330 --> 02:30:11.200

Dean Leonard M. Baynes: children who were born in the United States. Do you think this revised order will be any more successful than the previous order?

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02:30:12.220 --> 02:30:13.760

Professor Seth Chandler: Right, so when this...

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02:30:13.760 --> 02:30:37.049

Professor Seth Chandler: question, we first discussed it, it was sort of a hypothetical idea, you know, what might the president do, but it turns out, you know, between the time the CLE was planned and today, not only did the president actually issue such an order, but there's now a motion in the original Trump v. Barbara case to challenge it. So, which I will frankly say I have not had a careful time to review, because it just came out yesterday.

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02:30:37.130 --> 02:30:42.619

Professor Seth Chandler: And I just learned about it this morning. Anyway, but... but...

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02:30:42.750 --> 02:30:52.059

Professor Seth Chandler: It's... it's a... President Trump's order is kind of clever, in that it turns an abstraction, the notion of...

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02:30:52.060 --> 02:31:04.819

Professor Seth Chandler: people who are unlawfully present or temporary visitors into things that sound kind of unpleasant. The person who comes to the United States

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02:31:04.820 --> 02:31:18.499

Professor Seth Chandler: deliberately so that they can have their child here and gain the benefits of American citizen, or a member of a designated foreign terrorist organization. You know, what if Mrs. Bin Laden had a kid

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02:31:18.500 --> 02:31:36.209

Professor Seth Chandler: here at some point in time? Would we say that the Constitution required that Baby Bin Laden be a citizen of the United States? And so, you see, I think President Trump taking a more targeted approach, and the question is

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02:31:36.210 --> 02:31:44.820

Professor Seth Chandler: Is that targeting going to change the opinions of some of the justices on the Supreme Court?

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02:31:45.230 --> 02:32:03.140

Professor Seth Chandler: And, you know, it's always difficult to hazard a view, but I think if he... it's gonna be hard work for President Trump to prevail because of the way that Justice Roberts wrote his opinion, and in fact, it may be hard for him to get cert

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02:32:03.250 --> 02:32:20.839

Professor Seth Chandler: on it, if the lower court does what I predict it will do, and say that E02, his second executive order, is really not much better than E01, where are the votes coming from? Because if you accept... and I did notice in the

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02:32:20.900 --> 02:32:23.349

Professor Seth Chandler: motion that's been filed

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02:32:23.870 --> 02:32:35.779

Professor Seth Chandler: interestingly enough, the Barbara people love Justice Kavanaugh's opinion, even though he only did it on statutory grounds. Justice Kavanaugh is the clearest to say, look

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02:32:36.260 --> 02:32:45.759

Professor Seth Chandler: the statute creates a closed set. There are only a few very limited categories of

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02:32:46.070 --> 02:33:01.479

Professor Seth Chandler: people who are not true birthright citizens. And maybe Congress can change that, says Justice Kavanaugh, but President Trump cannot do it on his own. And so if you accept even the Kavanaugh perspective

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02:33:01.480 --> 02:33:06.860

Professor Seth Chandler: I think saying that, you know, Baby Bin Laden, or...

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02:33:06.920 --> 02:33:20.630

Professor Seth Chandler: mom who really wants that kid to be born in the U.S, I think he's... President Trump's gonna have a very hard time, and I tried to think, where are the votes coming from? And I'm not sure I see where the votes are coming from, although he...

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02:33:20.790 --> 02:33:37.829

Professor Seth Chandler: you know, it's cleverly positioned to play, to raise cases where, you know, reasonable people such as myself might wonder, do I really want Baby Bin Laden to have full rights of citizenship?

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02:33:37.960 --> 02:33:51.819

Professor Seth Chandler: But if you look at the way that the majority wrote its opinion by rejecting the allegiance theory that the dissenters were pushing, or the domicile theory that the dissenters were pushing

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02:33:52.000 --> 02:34:02.580

Professor Seth Chandler: they would have to, you know, sort of say, oops, we hadn't really thought about that, in their opinion, and I'm not so sure the Supreme Court wants to admit oops just a year later.

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02:34:04.450 --> 02:34:17.979

Dean Leonard M. Baynes: Thanks so much, Professor Chandler. Let's move on to the second question directed at Professor Trujillo, that's looking at the tariffs, and as Professor Trujillo mentioned Trujillo had mentioned in her remarks, there have been several different iterations of the tariffs

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02:34:17.980 --> 02:34:26.999

Dean Leonard M. Baynes: and now we have the newest tariffs that are arguing or alleging that there's, that these countries, these trading partners

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02:34:27.000 --> 02:34:39.059

Dean Leonard M. Baynes: have not effectively dealt with forced labor and the restriction on forced labor. And then we have 25 states who have sued for these tariffs, going to pretext to replace the old ones.

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02:34:39.060 --> 02:34:52.610

Dean Leonard M. Baynes: So, Professor Trujillo, what are some of the main legal issues at stake? Are they similar to the ones in learning resources... in the Learning Resources case? And in what ways or not do you think it will go... do you think it will go to the Supreme Court?

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02:34:53.770 --> 02:34:58.530

Professor Elizabeth Trujillo: Yeah, so thank you, Dean Baynes, for that question.

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02:34:58.830 --> 02:35:18.360

Professor Elizabeth Trujillo: So I, I think I have to back up a little bit, and so we all recall that after Learning Resources v. Trump was decided, a few days after, or actually the same day, the USTR announced that, well, we have other tools, trade tools and statutes that we can use

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02:35:18.360 --> 02:35:32.399

Professor Elizabeth Trujillo: to sort of bring back these global tariffs. So, under this idea, there is this allegation now by the states and other plaintiffs as well, that are bringing suits around the country

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02:35:32.400 --> 02:35:40.609

Professor Elizabeth Trujillo: that there was this pretext, right, to use the Statute 301 of the Trade Act,

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02:35:40.610 --> 02:35:54.919

Professor Elizabeth Trujillo: the U.S. Trade Act that, in fact, to basically reenact the same global tariffs. And the effect of the tariffs currently that have been put in place as of July 24th, 2026,

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02:35:54.920 --> 02:36:05.780

Professor Elizabeth Trujillo: is, 99.4% of all imports into the United States have between a 10% and 12.4% tariff.

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02:36:06.310 --> 02:36:16.600

Professor Elizabeth Trujillo: And so, that has large, sort of, economic and national implications, and global implications. And so,

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02:36:17.260 --> 02:36:34.119

Professor Elizabeth Trujillo: some of the issues that I think will be raised under this action by the USTR, which we recall is, right, an agency, right, of the United States, part of the Department of Commerce, and they have

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02:36:34.900 --> 02:36:37.879

Professor Elizabeth Trujillo: delegation of authority to...

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02:36:38.060 --> 02:36:45.420

Professor Elizabeth Trujillo: deal with tariffs, right? And to put in place tariffs. And under 301, you put in place tariffs

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02:36:45.420 --> 02:37:01.829

Professor Elizabeth Trujillo: if, in fact, you can show that a specific country is, in fact, doing, actions, commercial actions that are discriminatory and place a burden, economic burden, on the U.S. domestic market.

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02:37:02.140 --> 02:37:04.119

Professor Elizabeth Trujillo: And so,

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02:37:04.380 --> 02:37:12.250

Professor Elizabeth Trujillo: now the claim is, that under forced labor regulations that are in place in the United States

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02:37:12.360 --> 02:37:15.890

Professor Elizabeth Trujillo: that these are not being adhered to

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02:37:16.010 --> 02:37:32.440

Professor Elizabeth Trujillo: right? by other countries, because they are... through the extensive supply chains that we have, somehow we are still getting goods from countries that use some form of forced labor in violation of forced labor laws

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02:37:33.300 --> 02:37:42.229

Professor Elizabeth Trujillo: not just U.S. laws, but generally. And so, therefore, that triggers Section 307 of

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02:37:42.230 --> 02:37:55.829

Professor Elizabeth Trujillo: the U.S. Trade Act, which deals with forced labor, and now the USTR can, in fact, not only begin these investigations under 301, but impose these tariffs to resolve that.

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02:37:55.840 --> 02:38:00.470

Professor Elizabeth Trujillo: Some of the legal issues that come up in this context

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02:38:00.690 --> 02:38:12.640

Professor Elizabeth Trujillo: is that, one, if you... if we, in fact, argue that there is a pretext to basically resurrect the global broad tariffs that were already... that were put in place by IEEPA,

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02:38:12.640 --> 02:38:23.699

Professor Elizabeth Trujillo: that in fact, we are, in violation of the Administrative Procedure Act, that these investigations are arbitrary and capricious.

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02:38:23.720 --> 02:38:30.749

Professor Elizabeth Trujillo: And there's no rational connection between the facts that are found and the action that's taken.

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02:38:30.760 --> 02:38:49.090

Professor Elizabeth Trujillo: There's, if you look at the Federal Register report and, at some of the litigation, the complaints that have already been put forth, there's a record of sort of showing how the administration is sort of making broad, sweeping conclusions based on a few examples

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02:38:49.090 --> 02:38:55.580

Professor Elizabeth Trujillo: of goods that have used... purportedly used forced labor somewhere in their supply chain

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02:38:55.580 --> 02:39:08.670

Professor Elizabeth Trujillo: and then connecting it broadly to this need to sort of solve it through this 10% to 12.5% tariff. 301 investigate... the other argument is that this has been rushed.

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02:39:08.860 --> 02:39:13.779

Professor Elizabeth Trujillo: So, usually these investigations take anywhere from 6 months to a year.

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02:39:13.780 --> 02:39:29.450

Professor Elizabeth Trujillo: They're very country-specific, country to country, and you have to show causation. You have to show that, in fact, there is some direct sort of burden on U.S. commerce due to that country's specific actions. And, arguably, this has not been done

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02:39:29.450 --> 02:39:31.550

Professor Elizabeth Trujillo: by the USTR.

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02:39:32.020 --> 02:39:41.829

Professor Elizabeth Trujillo: And so, this is also sort of a procedural matter that, in fact, is questioning the investigations themselves.

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02:39:43.520 --> 02:40:03.489

Professor Elizabeth Trujillo: They're not individualized findings with respect to the forced labor is not un... it's unreasonable, so the forced labor has to create a burden that is also unreasonable, right, and discriminatory to the U.S. commerce, and the government is saying that these, in fact, are unreasonable and affect our competitiveness around the world, because

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02:40:03.490 --> 02:40:06.370

Professor Elizabeth Trujillo: these countries are benefiting from forced labor.

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02:40:06.450 --> 02:40:16.350

Professor Elizabeth Trujillo: And the response to that is that, in fact, this creates a even broader, sort of

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02:40:16.480 --> 02:40:22.440

Professor Elizabeth Trujillo: larger, sort of, problem, economic sort of problem for the country

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02:40:22.440 --> 02:40:47.429

Professor Elizabeth Trujillo: that goes beyond what Congress actually delegated to USTR to do under the Statute 301, which is meant to be very technical and very sort of narrowly construed. And so that is also one of the arguments. I think there'll be a claim that, that there is a violation of the non-delegation doctrine, specifically set out through the intelligible

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02:40:47.430 --> 02:40:49.620

Professor Elizabeth Trujillo: principle, which has been used.

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02:40:49.620 --> 02:41:08.710

Professor Elizabeth Trujillo: and sustained under *Campton, J.W. Hampton Jr. & Co. versus the U.S.*, that basically provide... is the principle that is used to sort of sustain the, it authorizes Congress, sets out this intelligible principle to guide what an agency does.

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02:41:08.710 --> 02:41:26.350

Professor Elizabeth Trujillo: And that under 301, that guidance is there, and it's explicit, and so the cases are claiming that this is just too broad of an investigation, and too broad of a solution, if you will, through this sort of implementation, again, a resurrection of all of the global tariffs.

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02:41:26.350 --> 02:41:31.120

Professor Elizabeth Trujillo: And that is not what was delegated to,

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02:41:31.280 --> 02:41:39.780

Professor Elizabeth Trujillo: to the agency, and so it affects the entire national economy, and this is not what the intelligible principle was intended to do.

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02:41:39.840 --> 02:41:51.320

Professor Elizabeth Trujillo: And so, I think there are a lot of interesting implications here that will raise questions around the intelligible question... the intelligible principle again,

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02:41:51.320 --> 02:42:11.289

Professor Elizabeth Trujillo: the non-delegation doctrine as well as major questions. It sort of might resurrect some of the issues that I mentioned in the concurrence, especially Justice Gorsuch's concurrence. And it raises questions generally about the Administrative Procedure Act and agency power that has been raised also in some of the other cases that we heard

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02:42:11.290 --> 02:42:21.649

Professor Elizabeth Trujillo: today. Will it go to the Supreme Court? Right now, as it stands, there are... there's at least one case that is before the Court of International Trade, it's just...

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02:42:21.650 --> 02:42:32.790

Professor Elizabeth Trujillo: beginning. We have to wait for the response at the end of September. Depending on what that decision is, it may, in fact go to the Supreme Court, under some of these constitutional questions.

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02:42:38.150 --> 02:42:48.240

Dean Leonard M. Baynes: Thank you so much, Professor Trujillo. Next question is directed to Professor Froomkin. You talked about the Voting Rights Act. I want to hone in on what is left.

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02:42:48.460 --> 02:43:00.099

Dean Leonard M. Baynes: What's left of the Voting Rights Act? Does it need to be reformed? And it seems as though, as you mentioned in your remarks, that the Supreme Court made a kind of dramatic change

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02:43:00.100 --> 02:43:19.999

Dean Leonard M. Baynes: in how it... just in 2 or 3 years, with the Callais case, the Allen v. Milligan case, some other case made a hard turn in a different direction with Voting Rights Act as it relates to racial discrimination, racial preferences. Could you give us a little overview of that

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02:43:20.220 --> 02:43:23.279

Dean Leonard M. Baynes: answer to me. Thank you, Professor Froomkin.

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02:43:24.290 --> 02:43:28.059

Professor David Froomkin: Sure, thank you. So I...

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02:43:29.420 --> 02:43:34.269

Professor David Froomkin: With respect to the question of what's left of the Voting Rights Act, I think the answer is

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02:43:34.400 --> 02:43:43.820

Professor David Froomkin: fairly straightforward, I would say after Callais, the Voting Rights Act is now fully defunct. There is nothing meaningful left of the Voting Rights Act.

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02:43:46.480 --> 02:44:02.569

Professor David Froomkin: Where does that leave us? Well, in theory, Congress could respond to a statutory interpretation decision by amending the statute to provide more robust protections. The problem is, that's exactly what Congress already did in 1982.

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02:44:02.720 --> 02:44:14.849

Professor David Froomkin: It precisely responded to a Supreme Court interpretation that limited the act's protections to protections against explicit acts of intentional racial discrimination.

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02:44:15.010 --> 02:44:29.630

Professor David Froomkin: Congress responded by saying, no, we want to provide broader protections that don't require plaintiffs to provide conclusive evidence of intentional racial discrimination. Instead, we want it to be sufficient for plaintiffs to provide evidence that

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02:44:29.630 --> 02:44:37.180

Professor David Froomkin: members of minority groups are not able to participate equally in the political process and to elect representatives of their choice.

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02:44:37.420 --> 02:44:40.839

Professor David Froomkin: And Congress already made that clear in 1982,

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02:44:40.940 --> 02:44:49.339

Professor David Froomkin: and the Supreme Court essentially, in Callais, reverted the ball to the pre-1982 state of the world.

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02:44:49.340 --> 02:45:07.489

Professor David Froomkin: So I don't have much confidence, in view of that history, that if Congress were to respond with an amendment to the Voting Rights Act, that it would be able to achieve its objectives in the face of this Supreme Court. So the court in Callais said it was engaging in constitutional avoidance. That implies that

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02:45:07.590 --> 02:45:16.500

Professor David Froomkin: they think there is a constitutional issue lingering in the background that they might bring more into the open in the future if Congress were

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02:45:16.790 --> 02:45:39.749

Professor David Froomkin: to do that, and I think we could imagine something similar about other provisions of the Voting Rights Act. So I focused in my talk on Section 2, which was the provision at issue in Callais. There's a lot of interest in resuscitating Section 5, which, as I said, is in many ways a more effective mechanism for protecting minority voting rights. But I think that before this Supreme Court, it would face

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02:45:39.770 --> 02:45:42.050

Professor David Froomkin: much the same challenges

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02:45:42.220 --> 02:46:00.820

Professor David Froomkin: as probably would judicial efforts to reinvigorate Section 5 by drawing on Section 3, the so-called bail-in provision that enables federal courts to subject jurisdictions to the coverage of the Voting Rights Act. So, I'm not confident that any of those

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02:46:00.890 --> 02:46:16.330

Professor David Froomkin: avenues would provide much protection for minority voters. That said, I think the way forward is clearly for Congress to focus on race-neutral alternatives to the kind of race-conscious statutory provisions that we are more familiar with in

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02:46:16.330 --> 02:46:23.950

Professor David Froomkin: U.S. election law. So I think that there is ample opportunity for Congress to legislate to do things like

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02:46:23.950 --> 02:46:38.449

Professor David Froomkin: provide resources to jurisdictions to increase the number of polling locations, staffing, try to extend the hours of voting, extend early voting, require that states permit mail-in voting,

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02:46:38.480 --> 02:46:44.890

Professor David Froomkin: mandate automatic voter registration, make Election Day a federal holiday, all the sorts of...

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02:46:45.090 --> 02:46:52.979

Professor David Froomkin: rules that would do a lot to encourage and increase voter participation

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02:46:53.190 --> 02:46:57.000

Professor David Froomkin: that are... that are facially... Neutral.

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02:46:57.210 --> 02:47:10.499

Professor David Froomkin: And would not be affected by any of the kinds of constitutional obstacles that the court is raising in cases like Callais. Another very important thing that Congress ought to do, I think, is ban partisan gerrymandering.

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02:47:10.840 --> 02:47:30.739

Professor David Froomkin: For instance, by requiring that states use independent redistricting commissions to draw their congressional maps. That's something that is clearly within the power of Congress. In fact, the Supreme Court said as much in its Rucho decision. It said, we're not going to regulate partisan gerrymandering, but Congress can and should, implicitly.

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02:47:31.670 --> 02:47:35.290

Professor David Froomkin: With respect to your second question about how

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02:47:35.610 --> 02:47:50.590

Professor David Froomkin: how we think in changing ways about racial discrimination, I think there's something very deep and important there, and we're seeing an interesting dual

set of developments, where on the one hand, the court is developing doctrine that increasingly

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02:47:50.610 --> 02:48:04.000

Professor David Froomkin: blocks states' ability to engage in minority protective redistricting. The contours of the racial gerrymandering doctrine tend to have the effect of inhibiting states' efforts to increase minority representation.

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02:48:04.250 --> 02:48:19.839

Professor David Froomkin: While at the same time, the court in recent years has increasingly blocked federal courts from providing remedies in those few cases where federal constitutional law still provides minority protective remedies.

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02:48:20.180 --> 02:48:24.340

Professor David Froomkin: So, so the court has categorically

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02:48:24.440 --> 02:48:31.510

Professor David Froomkin: prevented remedies for anything other than intentional racial discrimination. But even where lower federal courts have identified

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02:48:32.040 --> 02:48:44.280

Professor David Froomkin: direct evidence of intentional racial discrimination in recent years, we've seen the Supreme Court intervene to set aside those rulings. For instance, in cases out of Alabama and Texas.

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02:48:44.990 --> 02:48:50.500

Professor David Froomkin: And I think the... Alabama decision just a few months ago was particularly

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02:48:50.640 --> 02:49:04.399

Professor David Froomkin: surprising in that what the district court said in that case was, we are simply enforcing again a violation of the Constitution that we identified two years prior.

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02:49:04.830 --> 02:49:13.790

Professor David Froomkin: So the rationale that the Supreme Court has invoked in these cases is the so-called Purcell principle that says that federal courts shouldn't change election rules on the eve of an election.

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02:49:13.960 --> 02:49:19.459

Professor David Froomkin: That's not what happened in the Alabama case, and it's very hard, I think, to understand

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02:49:19.750 --> 02:49:29.389

Professor David Froomkin: why the Supreme Court thought it was appropriate to prevent a lower federal court from enforcing a constitutional protection against racial discrimination in that case.

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02:49:32.610 --> 02:49:43.710

Dean Leonard M. Baynes: Thank you, Professor Froomkin, appreciate that. Next, I'll ask a question to Professor Berman about, her lecture.

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02:49:44.950 --> 02:49:46.450

Dean Leonard M. Baynes: Professor Berman.

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02:49:47.370 --> 02:50:03.950

Dean Leonard M. Baynes: So, it seems that allowing the president to fire or terminate the agency or commission members gives him a lot more power than was contemplated in the original enactment of these statutes, creating these agencies and commissions.

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02:50:04.130 --> 02:50:22.529

Dean Leonard M. Baynes: It means that the President's appointees can establish detailed regulations on a wide variety of issues, I guess. Is this any different than the way these relationships happen in the past with these independent agencies? Were these agencies really independent? And what scenarios do you envision happening in the future?

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02:50:24.400 --> 02:50:27.999

Professor Emily Berman: Yeah, I mean, I think it is... it is a big...

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02:50:28.190 --> 02:50:38.940

Professor Emily Berman: change. In the past, there has... Congress has had maybe 3 ways of

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02:50:39.220 --> 02:50:46.140

Professor Emily Berman: influencing agency behavior. So... so one is the...

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02:50:47.220 --> 02:51:02.329

Professor Emily Berman: the structure of the agencies themselves. You know, Congress creates the department, and how many commissioners are there, and how many, sub-commissioners, and what are the different divisions. So... and that includes

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02:51:03.150 --> 02:51:08.629

Professor Emily Berman: tenure protection. So, they've had... they've been able to shape the executive branch

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02:51:09.130 --> 02:51:22.020

Professor Emily Berman: administratively in ways that make sense to them. So that's one tool that now has been partially, we don't know quite how far scaled back.

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02:51:22.090 --> 02:51:36.650

Professor Emily Berman: Another way has been simply oversight and control of the budget. That's, you know, always a potent tool should Congress seek to, to use it.

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02:51:37.330 --> 02:51:40.890

Professor Emily Berman: And then... Going

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02:51:41.060 --> 02:51:48.460

Professor Emily Berman: back a little bit now, it... the legislative veto used to be a big part of the way that Congress

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02:51:48.730 --> 02:51:51.890

Professor Emily Berman: sort of... shaped

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02:51:52.020 --> 02:52:07.469

Professor Emily Berman: the administrative state, they would delegate authority to the president or to the agency, but reserve for themselves an opportunity to say either one house or both houses together, to say, no, no, no, that's not what we meant. We're gonna

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02:52:07.690 --> 02:52:12.860

Professor Emily Berman: put a stop to that particular execution of that power. And of course, the Supreme Court

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02:52:12.990 --> 02:52:21.650

Professor Emily Berman: held that to be unconstitutional. So now, Congress is in a position where, you know, once it delegates that authority

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02:52:22.180 --> 02:52:26.060

Professor Emily Berman: it doesn't really have any control over the way that it's used

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02:52:26.200 --> 02:52:35.609

Professor Emily Berman: unless it wants to come back and change the legislation in response to... to particular use that it... that it's not

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02:52:35.780 --> 02:52:42.370

Professor Emily Berman: happy about. And so, well, I think that...

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02:52:42.710 --> 02:52:56.440

Professor Emily Berman: to some degree, I mean, there's always been a debate over the extent, like, do Congress control... does Congress control the agencies, or does the president control the agencies? And, who drives their behavior?

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02:52:57.620 --> 02:53:01.840

Professor Emily Berman: And I don't, you know, I don't know the answer to that debate

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02:53:02.450 --> 02:53:10.700

Professor Emily Berman: specifically, but definitely with respect to the independent agencies, and the ones that are explicitly bipartisan

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02:53:11.230 --> 02:53:15.090

Professor Emily Berman: I think that is a structural tool that has had

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02:53:15.270 --> 02:53:21.780

Professor Emily Berman: a real impact on what the agencies do, and it seems as if that

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02:53:22.120 --> 02:53:28.550

Professor Emily Berman: may now not be available. I think...

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02:53:29.200 --> 02:53:36.039

Professor Emily Berman: you know, one... one constraint, on... on the president, sort of

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02:53:37.010 --> 02:53:48.669

Professor Emily Berman: exercising too much authority might just be pragmatic. You know, the president can't pay attention to everything that happens in the executive branch, and so he'll...

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02:53:48.850 --> 02:53:52.589

Professor Emily Berman: so far, it's always a he, he'll have

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02:53:52.660 --> 02:54:08.920

Professor Emily Berman: strong views on maybe what the Department of Justice does, or the Department of Defense, or Department of State, but it may be that it's not particularly interested in looking into, like, you know, what is the NLRB doing, or what is the EPA doing, or who knows?

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02:54:08.990 --> 02:54:18.609

Professor Emily Berman: So I think that some agencies are going to be left alone to do their thing just by virtue of there being

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02:54:18.740 --> 02:54:22.020

Professor Emily Berman: so much that the executive branch does.

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02:54:24.050 --> 02:54:36.130

Professor Emily Berman: But I do... I do worry, and Justice Gorsuch sort of hinted at this in his concurrence, that the fact that the President now does have such power over the agencies is going to prompt the court

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02:54:36.310 --> 02:54:37.989

Professor Emily Berman: to ratchet back

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02:54:38.220 --> 02:54:55.039

Professor Emily Berman: what Congress can actually do, so what Congress can delegate to the agencies. And so, in some ways, they're already doing that with the major questions doctrine. I think they might revive the non-delegation doctrine, and...

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02:54:55.190 --> 02:55:06.680

Professor Emily Berman: so, I think that the... I doubt the court will allow the new equilibrium to stay... that...

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02:55:07.340 --> 02:55:17.999

Professor Emily Berman: much in the President's favor, but rather than ratcheting back what the President can do, I think I... I foresee them ratcheting back the powers Congress can give to the President.

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02:55:20.520 --> 02:55:36.660

Dean Leonard M. Baynes: Thank you, Professor Berman. Last question, or well, last question directed each panelist is Professor Nelson. So, Professor Nelson, you dealt with a Chiles case which dealt with conversion therapy, and, and I think you talked a little bit of why you thought it didn't split along

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02:55:36.670 --> 02:55:55.289

Dean Leonard M. Baynes: the ideological lines in your presentation. But in the aftermath of the ruling, Colorado amended its conversion therapy ban in order to comply with the ruling by redefining conversion therapy as directing a patient toward a predetermined sexual orientation

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02:55:55.290 --> 02:56:12.759

Dean Leonard M. Baynes: or gender identity outcome, or eliminate or reduce attractions toward individuals, particular sex or gender, or eliminate or reduce attractions to an individual of a particular sex or gender. Do you think this... how will Chiles, do you think, deal with this issue and this, new

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02:56:12.810 --> 02:56:14.880

Dean Leonard M. Baynes: amended statute ban.

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02:56:16.120 --> 02:56:33.239

Professor James Nelson: Well, I think that's a terrific question, and I think that's a really tough question. So I think what Colorado is doing here is basically taking the lead, the hint that Justice Kagan dropped in the concurrence, to say, well, what if you had made this content-based instead of viewpoint-based? And I think that's the attempt to do so, right,

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02:56:33.720 --> 02:56:48.599

Professor James Nelson: to regulate both sides of this debate, you know, to make it even-handed, even if it's a speech restriction, which would trigger, in her view, a weaker standard of review that the state would be more likely to pass, right, viewpoint discrimination

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02:56:48.600 --> 02:56:48.930

Dean Leonard M. Baynes: is

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02:56:48.930 --> 02:57:07.699

Professor James Nelson: just poison, but maybe it would be okay if this were content discrimination. I think that's what Colorado's doing here. The trouble is, is that content discrimination is still quite suspect, and still subject to a very demanding standard of review, subject to strict scrutiny. So I think that basically what Colorado has done has made this

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02:57:07.700 --> 02:57:20.130

Professor James Nelson: for the court a tougher case, a closer case, but by no means a slam dunk, in front of the court. They might just rely on something like Reed v. Town of Gilbert to say, well, content discrimination is

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02:57:20.130 --> 02:57:30.189

Professor James Nelson: is really bad, too. We restrict speech, and that's not a good thing under the First Amendment, and it must survive, you know, very high standard of review, strict scrutiny, and this doesn't... doesn't...

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02:57:30.190 --> 02:57:42.609

Professor James Nelson: you know, this doesn't pass muster. I basically want to say that they have made this a closer case, but it's not obvious to me that they have solved, you know, an underlying constitutional infirmity.

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02:57:44.090 --> 02:57:59.560

Dean Leonard M. Baynes: Thank you, Professor Nelson. We have two more questions directed to everybody. Let's see if we can do them in the few minutes that we have. So, a recent Gallup poll found that 33% of the Supreme Court had a 33% job approval rating.

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02:57:59.680 --> 02:58:03.919

Dean Leonard M. Baynes: Why do you think this is, and what can the court do about it, if anything?

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02:58:09.440 --> 02:58:12.940

Professor Emily Berman: I mean, the thing that I found most...

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02:58:13.200 --> 02:58:24.889

Professor Emily Berman: concerning about that poll it's not the overall number, but about the partisan split in the views. And I guess it shouldn't be a surprise that

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02:58:25.300 --> 02:58:33.959

Professor Emily Berman: like everything else in our society, the Supreme Court has become a polarized issue, but I think

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02:58:34.140 --> 02:58:36.080

Professor Emily Berman: you know, the last...

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02:58:36.280 --> 02:58:46.060

Professor Emily Berman: several terms, have seen the court do things that, as a general rule, progressives are less excited about.

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02:58:46.710 --> 02:59:02.590

Professor Emily Berman: And that's what explains that... that difference, but I think it's a really bad sign for the court, that it's starting to be viewed in that way. And, you know, there are lots of things they could do about it, but

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02:59:02.900 --> 02:59:14.049

Professor Emily Berman: it does... I mean, they pick the cases that they take. They decide if they're going to step into these sort of political landmines, and so they don't seem...

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02:59:15.200 --> 02:59:21.189

Professor Emily Berman: inclined to step back, but I think that's really, what it would take

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02:59:21.370 --> 02:59:26.219

Professor Emily Berman: for people to... for that sort of goodwill to... to rebuild.

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02:59:27.560 --> 02:59:28.540

Dean Leonard M. Baynes: Any other thoughts?

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02:59:32.430 --> 02:59:43.120

Dean Leonard M. Baynes: All right, let's move on to the next question, then. Last question, final question. What future cases do you think are particularly noteworthy, and that are on the horizon, and what impact do you think they'll have?

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02:59:45.400 --> 02:59:54.730

Professor Seth Chandler: I'll take one. It's a bit of a sleeper case, but it's a separation of powers case called Sun Valley Orchards, which is nominally about

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02:59:54.970 --> 03:00:14.010

Professor Seth Chandler: whether the Department of Labor has power under congressional statute to adjudicate and fine a farming corporation that apparently was being very nasty to immigrant laborers. And in light of the Jarkesy case that was decided a few years back

1012

03:00:14.040 --> 03:00:31.020

Professor Seth Chandler: the farmers, the corporate farmers, are saying this needed to be decided by an Article III court, this is really just a breach of contract action in disguise, and potentially the case gets at this issue of public rights, of the extent to which

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03:00:31.060 --> 03:00:42.199

Professor Seth Chandler: Congress can give adjudicatory power to an agency, rather than having it decided by Article III judges with life tenure and the rest.

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03:00:42.300 --> 03:00:44.270

Professor Seth Chandler: And so,

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03:00:44.660 --> 03:01:01.070

Professor Seth Chandler: it could be decided on very narrow grounds, it, you know, in the immigration context, that's special, but also if the court starts to want to make a bigger deal out of Seventh Amendment and related Article III issues, I think this Sun Valley Orchards case could potentially be important.

1016

03:01:03.000 --> 03:01:05.450

Dean Leonard M. Baynes: Thank you. Any other thoughts? Professor Trujillo?

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03:01:05.780 --> 03:01:16.949

Professor Elizabeth Trujillo: So I, I know Professor Berman mentioned that it's very likely that the non-delegation doctrine will be revived and revisited, and so I think there's several contexts in which this can happen, but clearly in...

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03:01:17.150 --> 03:01:26.010

Professor Elizabeth Trujillo: trade, I think this is going to be an area that we might see more on. I mean, clearly we have a court that

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03:01:28.170 --> 03:01:39.269

Professor Elizabeth Trujillo: is somewhat suspicious about expanding executive power in the context of the economy and revenue-raising, issues, right? When they, in terms of tax

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03:01:39.440 --> 03:01:49.489

Professor Elizabeth Trujillo: issues, which they are treat... Justice Roberts does treat the tariff in the context of the IEEPA as a tax, and so it comes under congressional authority.

1021

03:01:49.740 --> 03:01:53.920

Professor Elizabeth Trujillo: Clearly, there's some,

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03:01:54.210 --> 03:02:00.089

Professor Elizabeth Trujillo: fragmentation on the court with respect to how to deal with major questions and the role of agencies.

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03:02:00.570 --> 03:02:18.940

Professor Elizabeth Trujillo: For me as a... from a trade perspective, I'm interested to... to know what the court might think about the role of the USTR, right, in using trade statutes to sort of implement more expansive trade, you know, tariffs.

1024

03:02:19.090 --> 03:02:23.350

Professor Elizabeth Trujillo: Furthermore, as you all may have heard on the news recently, the,

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03:02:24.290 --> 03:02:29.390

Professor Elizabeth Trujillo: the recent Lindsey Graham sanctioning Russia and Iran Act of 2026,

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03:02:29.490 --> 03:02:35.200

Professor Elizabeth Trujillo: has a sort of non-delegation issue sort of embedded in it, but

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03:02:35.310 --> 03:02:52.240

Professor Elizabeth Trujillo: allegedly, perhaps, it may not be an issue, but it has been raised by Senator Rand Paul as a potential sort of non-delegation problem, in the sense that it allows for the President to sort of place sanctions, right, on Russia, and on any

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03:02:52.240 --> 03:03:04.760

Professor Elizabeth Trujillo: country that is importing oil and gas from Russia, and, and gives... and embedded in that is this tariff authority to the president

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03:03:05.000 --> 03:03:14.269

Professor Elizabeth Trujillo: to, also impose a tariff on goods imported directly from the... from Russia, a high tariff.

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03:03:14.630 --> 03:03:25.560

Professor Elizabeth Trujillo: And so... you know, that is a concrete, delegation of congressional authority, tariff power, to the president.

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03:03:25.750 --> 03:03:31.210

Professor Elizabeth Trujillo: Arguably, narrowly construed, narrowly targeted, but...

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03:03:31.560 --> 03:03:48.880

Professor Elizabeth Trujillo: we shall see, because I think it's something that could be litigated. So this in combination with sort of what we're seeing now with respect to the 301 determinations, I think could be an issue. And then, of course, the, agency issues and the

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03:03:49.040 --> 03:04:04.750

Professor Elizabeth Trujillo: arbitrary and capricious sort of issue around the Administrative Procedure Act, may also, I think, be something that will be of more importance. If I can just finally say one more thing, there's other forms of litigation that I think are worth mentioning

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03:04:04.750 --> 03:04:20.759

Professor Elizabeth Trujillo: that, the public might be interested in, which is contracts litigation around the tariffs. We are seeing a lot of contracts litigation because the refund litigation that has happened, the refunds that have come back, which is around \$166 billion

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03:04:20.760 --> 03:04:26.570

Professor Elizabeth Trujillo: right? of Customs Border Protection collections from tariffs are eligible for refunds.

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03:04:26.600 --> 03:04:40.219

Professor Elizabeth Trujillo: So far, there's a purported \$100 billion of tariffs that... or of refunds have paid back to corporate importers, and we have several class actions that have already been brought by consumers

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03:04:40.220 --> 03:04:49.969

Professor Elizabeth Trujillo: to corporations, with respect, under contracts law, sort of claiming that there's an unjust enrichment, because these

1038

03:04:50.080 --> 03:04:57.569

Professor Elizabeth Trujillo: sort of, these higher prices that were passed on to consumers during the time of the IEEPA tariffs, right?

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03:04:57.640 --> 03:05:05.570

Professor Elizabeth Trujillo: Now we have a double benefit to corporations, because they are also receiving a refund, and the consumers that were impacted were not.

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03:05:05.570 --> 03:05:19.129

Professor Elizabeth Trujillo: It's very interesting litigation, just from a contract, sort of private litigation, side. So I thought I would just mention it, that these tariff cases have much larger implications, I think, than

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03:05:19.130 --> 03:05:24.469

Professor Elizabeth Trujillo: maybe people realize, in terms of not just the constitutional questions and the trade questions

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03:05:24.470 --> 03:05:35.920

Professor Elizabeth Trujillo: agency... administrative agency questions, but also there are some serious supply chain questions and contractual, issues as well, and consumer, questions as well.

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03:05:36.150 --> 03:05:38.990

Dean Leonard M. Baynes: Thank you, Professor Trujillo. Any others?

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03:05:39.450 --> 03:05:40.669

Dean Leonard M. Baynes: Before we break?

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03:05:41.010 --> 03:05:42.050

Dean Leonard M. Baynes: Going once.

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03:05:42.480 --> 03:05:43.450

Dean Leonard M. Baynes: One or twice.

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03:05:43.450 --> 03:05:44.900

Professor David Froomkin: I would say... Oh.

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03:05:45.620 --> 03:06:03.980

Professor David Froomkin: One thing that I'll be particularly looking out for in the coming months is how the Supreme Court applies the independent state legislature doctrine in cases challenging the counting of votes in the upcoming midterm elections.

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03:06:03.980 --> 03:06:23.390

Professor David Froomkin: Because the Supreme Court in recent years has embraced at least a limited version of the independent state legislature doctrine, giving itself the power to second-guess state court determinations about matters of state law that implicate federal elections. So I think that will be very interesting and significant.

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03:06:24.270 --> 03:06:27.120

Dean Leonard M. Baynes: Thank you, Professor Froomkin. Anyone else?

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03:06:27.510 --> 03:06:30.890

Dean Leonard M. Baynes: Well, let's break. Let's thank our panelists.