Intro:

Mr. Chief Justice, may it please the Court. There is an old joke that when a man argues against two beautiful ladies like this, they're going to have the last word.

Intro:

She spoke, not elegantly, but with unmistakable clarity she said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

Melissa Murray:

Welcome back to Strict Scrutiny, a podcast so fierce, it's fatal and fact. We're your hosts. I'm Melissa Murray.

Leah Litman:

I'm Leah Litman.

Jaime Santos:

I'm Jaime Santos.

Kate Shaw:

And I'm Kate Shaw.

Melissa Murray:

And we are back for our term recap of October term 2019. So get ready, we're going to break it all the way down. Kate, what's our outline for the show today?

Kate Shaw:

We're going to do breaking news first. We're going to start with actually some podcast related breaking news, and then some court and broader country related breaking news. We will then go on to some term recaps. We recapped a lot of the cases as they came down, so we're going to go look at some bigger themes and underappreciated dynamics of both the opinions, and the commentary on those opinions. And we will wrap as always with some court culture.

Leah Litman:

So the exciting podcast news, we are thrilled to announce that strict scrutiny is partnering with the appeal, which covers how politics, policy and legal system affect vulnerable communities in this country. We are beyond excited to be working with the appeal. They have been doing incredible things over the last few years bringing attention to the ways in which our society, and politics neglect the less powerful such as people in prisons, and jails and detention centers, lower income, people experiencing homelessness and the like.

Leah Litman:

We try to discuss on this podcast not only the ways the court's decisions shape the law, as it's taught in Law School and practiced in courtrooms. But also how the Justices' work affects people's everyday lives; their ability to vote and elect leaders, their reproductive freedom and access to health care, the fairness

with which the government treats them, the process due to people in criminal court and so on. In the upcoming term, we'll be paying special attention to these and other issues, how this court protects the interests of less powerful people, and interest in organizations and how it does not.

Kate Shaw:

And we're particularly excited about this partnership, because none of us really have a core expertise in criminal justice. And so we are hoping to do some episodes with people from the appeal to cover more of those issues in more depth. So to Josie Duffy Rice, who's the president of the appeal, please consider this a formal invitation to come on the show with us.

Melissa Murray:

Your support has made our first year possible, and we're so grateful. We really could not have done this without you. But we're really thrilled that an organization like the appeal wants to help us to make the podcast a more permanent gig, which allows us to do things like pay melody her real rate, offer our listeners transcripts, which will make the podcast more accessible. And to allow us to record with people who don't have professional setups. And so with this partnership, we're going to be able to do all of that. But we're also going to be able to, once we get out of this pandemic situation, be able to do live shows, where we can meet with our listeners again, and hold receptions afterwards that we can talk through some of these issues. So this is really fantastic for us just in terms of broadening our expertise, bringing in new people, and also allowing us to bring the podcast even closer to all of you. So we're really, really excited.

Leah Litman:

And it will also allow us to better enforce the Voting Rights Act.

Melissa Murray:

If you are anyone who follows the court you will know that the last couple of hours, or last 36 hours have been really difficult ones because Justice Ruth Bader Ginsburg announced in a personal statement from the court that she is experiencing a recurrence of cancer. So on July 17th, Justice Ginsburg released a statement explaining that on May 19th she had begun a course of chemotherapy, and that she was going to continue to do her job at full tilt because she felt fully able to do that. But this is really difficult news to take, Justice Ginsburg has had more than a few skirmishes with cancer over the last couple of years. She was recently hospitalized in May for a gallbladder infection, where apparently these lesions on her liver were discovered. But we are obviously worried about her and sending her all of our good vibes and good thoughts. And again, as always, deeply admiring of her fortitude, her strength and her ability to continue plugging along and doing this really important job that she does. So get well soon, Justice Ginsburg, and we are of course, cheering you on.

Leah Litman:

And just to give you a sense of that fortitude, this is her second bout with cancer this last year. Last August, at the beginning of the term, she was treated for pancreatic cancer. This time it is liver cancer, and this is the third hospitalization she has undergone over the last few months. And yet still she is producing high level work at the court.

Jaime Santos:

Absolutely. I've made jokes about using hand sanitizer or donating my organs, but this update just made me just deeply sad. I think some of the physician commentary has been that this looks like it might be metastasized cancer from her original pancreatic cancer. And I just hope she's not in pain or discomfort, and I wish her all the best in her treatment.

Jaime Santos:

A second very sad piece of news, Congressman John lewis, perhaps the most towering member of the Civil Rights Movements still surviving, passed away after a bout with cancer as well. There have been lots of kind words, and really amazing memories and stories shared about Congressman Lewis. A great way to honor him would be to restore the Voting Rights Act, which he, I think sponsored legislation to do after the Supreme Court Shelby County decision. I am deeply sad as I know many are, and his memory will be thought about for a long time and he will be deeply missed.

Kate Shaw:

Yeah, it's a devastating loss, obviously of towering both civil rights, and specifically voting rights hero. And the loss comes at a time when we are still so far from racial justice, and when voting in particular feels incredibly precarious. I do think that, as Jaime just said, trying to galvanize both Congress and the public to support a new round of voting rights legislation would be an appropriate way to honor the legacy of John Lewis. There have been efforts to pass a new version of the Voting Rights Act since it was gutted by the Supreme Court and John Roberts, specifically in the Shelby County decision. And I think that would be a fitting tribute. And so we very much hope that, probably not Mitch McConnell Senate, but a new Congress takes that very seriously. There was a lot of blood and sacrifice that underlay the original Voting Rights Act, and we have a long ways to go. And so, I think another round of federal legislation would be an appropriate step.

Leah Litman:

I like to openly mock Secretary of Commerce, Wilbur Ross's suggestion that they were interested in adding a citizenship question to the census to enforce the Voting Rights Act, just because it does, I think make a mockery of the seriousness of the law and the importance of protecting voting rights, particularly coming from an administration that has done nothing to protect voting rights and a lot to undermine them. And I know we're going to be talking a lot about John Roberts in this episode, because that has been kind of an important theme of this last term, and also a feature of a lot of the commentary surrounding this last term.

Leah Litman:

And when John Roberts authored the decision in validating the voting rights act in Shelby County, John Lewis said this, "Those Justices were never beaten or jailed for trying to register to vote. They had no friends who gave their lives for the right to vote. I want to say to them, come and walk in my shoes." Again, I make jokes surrounding the Voting Rights Act, but it is in part because of the horrific treatment that this administration and this court have given to voting rights.

Melissa Murray:

One of the points I made yesterday that I think is worth making again, especially as we've seen this morning, this flurry of lovely elegies from both sides of the aisle about John Lewis's legacy, it's always surprising to see some of these individuals I think, who would support the cutting back of the Voting Rights Act, or who would limit the opportunity to vote or call for a more stringent voting requirements

to sort of hail this man as a hero. Because when he was doing this work in the 1960s, John Lewis was as radical as they came. I mean, the way we... The way that Republicans I think, or some republicans talk about Black Lives Matter is the way that people talked about John Lewis in 1964 and forward.

Melissa Murray:

And so I think there's some sort of an interesting kind of symmetry in the way in which these ideas that seems revolutionary, and indeed radical become mainstreamed over time. Like the idea of justice, of being allowed to vote without poll taxes, or being beaten, or being intimidated just became a kind of mainstream thing. But that idea was actually incredibly radical in the 1960s. And he was the one forcing people to confront how unjust our system of representation was, like the fact that broad swaths of individuals from the south could not participate in the polity. And today, he's a mainstream hero as these accounts suggest but he was a fighter. And I think it's really moving, and perhaps telling that the last photograph that we have of him is in front of the White House on Blackboard Lives Matter Plaza standing with Washington, DC Mayor Muriel Bowser. He was very... He felt very much a part of that movement, and that it was an extension of the work that he did.

Leah Litman:

That's so important about how he was viewed as radical at the time, even though he is celebrated as a hero today, because part of how you get ideas like John Lewis's to be made into a reality is people insist on that being taken seriously, even when they are viewed as out of the mainstream, or not receptive, or likely to be received by people in power. And the speech that he had originally drafted at the rally about the Civil Rights Act included a line that was deleted in preparation to the speech about how one problem with the Civil Rights Act of 1964 is that it did nothing about police brutality. And his original draft talked about how we were living in a police state. And as we were thinking about Black Lives Matter protests and Portland, these are words that have continued resonance today.

Melissa Murray:

All right, so let's turn to recapping this term and what a term it was. We said at the outset that this is going to be a barn burner of a term. It did not disappoint. But Leah, were there any particular themes that emerged in your view that were especially pronounced?

Leah Litman:

I'd actually like to first discuss a theme that others identified in the last term before we get to the theme that I think some of us saw in this last term. As the courts term drew to a close, a lot of people focused on the fact that the Chief Justice was now decidedly the new median Justice on the court. Some people called him the new swing Justice. He was in the majority more than other Justices. He was in the majority in all of the five-four decisions, except for one. He wrote extremely significant opinions in the Deferred Action for Childhood Arrivals case. He wrote separately in June Medical, the abortion case. He wrote the presidential immunity cases, he wrote important religion decisions and Espinoza. And he really left a significant mark this last term, and I think in part because some of those decisions did not fall along purely ideological lines.

Leah Litman:

One theme that emerged in the commentary from this past term is how independent, and what an institutionalist John Roberts is. So Adam Liptak's story for the Times was titled, The Supreme Court Tacked to the Center, or National Public Radio Described Unexpected Splits. Jeff Rosen of the Atlantic,

who heads the National Constitution Center wrote a piece about how John Roberts is just who the Supreme Court needed. Or Akhil Amar wrote in The New York Times, In a Polarized Nation, The Justices Continue to Defy Politics: The Roberts Court is Nothing like America. And there was really a common thread in these takes that the Supreme Court was somehow above politics, not political, or at least the Chief Justice himself was.

Leah Litman:

I want to be clear, that is not really a distillation of my views.

Melissa Murray:

I think it was interesting, and I think it was a species of the same kind of commentary that followed June Medical Services where, Dahlia Lithwick was the one who pointed this out. We had this group of men all saying that this is a decision to be cheered. Then there were these hysterical women, me, you, Leah, Dahlia, among them Linda Greenhouse too suggesting that this decision was much more problematic and limited than perhaps than they thought. To me, it seemed that a lot of the commentary was sort of, of the vein of Chief Justice Roberts is doing something good. And we should praise him so that he will continue to do these good things again some more.

Melissa Murray:

And I was reminded of this New York Times article from a couple of years ago, that basically the gist of which was, are you worried about how to get along better with your husband and how to make your husband do more housework? Think about these tips that killer whale trainers use. Like when you're training a killer whale, you praise them lavishly for doing something. You should do the same thing with your husband. I thought that this was exactly what these commentators were doing with John Roberts.

Leah Litman:

And so in this analogy, the chief is the killer whale.

Melissa Murray:

He is. He is.

Leah Litman:

Is that how we're supposed to be treating him?

Melissa Murray:

That's exactly, yeah. That's exactly it. And like, jump higher, good job, John. Good job, John. That sort of struck me as what they were trying to do, and to sort of salt him with bits of praise, so that in the hope that he would, in future cases, future and perhaps more momentous cases, again tack to the left or tack to the center. But that presumes what he did was tacking to the left or center, and I don't know that that was the case.

Kate Shaw:

But there is a question here about, what it is supreme court commentators are trying to achieve. On some level, they are trying to distill complicated decisions and group together a number of decisions,

and identify some true and correct themes that emerge from those cases. But you're obviously right that it is not as simple as that, like the commentary is emerging into a world that the Justices in habits...

Melissa Murray:

They consume...

Kate Shaw:

... And they themselves read. They read the New York Times, they listen to NPR, at least some of them do. And so of course, it has to enter your mind how these kinds of reviews of the courts' performance might be received by the Justices. I mean, I will say when we do this podcast, I never think about that. I don't know if you guys do, like John Roberts if you're listening. And what , I would love to have them listening to our podcast? But I'm not really worried about that coming to pass anytime soon.

Leah Litman:

I mean, I obviously...

Kate Shaw:

But .

Leah Litman:

... Send the chief all of the links to the podcasts when they go up. No. No, I don't really do that.

Kate Shaw:

But there's somehow the uniformity of that, of the take that Leah just described, which was John Roberts transcending partisanship. The great unifier was sort of strikingly uniform in a lot of this, kind of the sort of the big takes on the marquee cases. And I think that both you, Leah, and you, Melissa have been very important public critics of the correctness of that narrative. And I think I probably fall somewhere in between. I do think, Leah, and I did another podcast yesterday that suggested that for progressives like dodging bullets, rather than notching a lot of big wins was really what this term was about. That it is of course, correct that there could have been, if June and Bostock and God forbid the Vance, and potential congressional cases had resulted in big wins for abortion restrictions, employers who want to discriminate on the basis of sexual orientation and gender identity, presidential immunity, that would have been truly horrific. So I don't want to discount the significance of the wins in any of those cases. And yet for reasons that we can talk about, the wins are all of them quite qualified.

Kate Shaw:

And John Roberts did plenty of other things this term, including in cases on the shadow DACA, which we'll talk about, that are quite inconsistent with the narrative that Leah just described.

Jaime Santos:

I also think it's important to flesh out some of the views that Leah and Melissa have been talking about publicly because I think we need to be cautioning organizations who are crafting impacts litigation strategy, that just because the chief voted in one way in this case does not mean he's necessarily going to be a friend down the line in similar or related cases. So we need to be really, really careful about what cases we're bringing to the court, how we're litigating cases, what kind of records we're creating. Then

the other thing I wanted to add about this notion of the chief as an institutionalist, which I think we've talked about a lot over the last of couple years is, I think it oversells the way he's doing so. And it also undersells other Justices' institutionalist tendencies.

Jaime Santos:

So I think that Justice Kagan is also an institutionalist, but I think it just means something different for her than it does for the chief. So for the chief, I think being an institutionalist means trying to avoid the appearance of partisanship. Trying to avoid weighing in on disputes that he sees as political, particularly those having to do with voting rights or disputes between the political branches. I think it's a form of institutionalism but it's focused more on optics than on substance, whereas for Justice Kagan, I see her as an institutionalist but that for her means the court cannot avoid those really tricky and sticky disputes. It means that the court exists in part to ensure that the political branches don't run roughshod over constitutional rights, and most fundamental among them the right to vote. And finding ways to punt on those difficult issues is an abdication of the courts very reason for existing. And I think she would think that that is worse than just having people upset at the result.

Melissa Murray:

So much ink has been spilled, and so much has been said about the chief justice as an institutionalist. And I'm as guilty of it as anyone else. I mean, I think it is the most obvious way to understand what he does, but I think you're right. In framing him that way, we overshadow other kinds of institutionalism that may actually be more meaningful in terms of securing the legitimacy of the institution. I mean, his, I think is perhaps a kind of selective, and maybe even itinerate institutionalism that, as you say, is more concerned about the public veneer of non partisanship as opposed to actually being really about the longevity of an institution.

Kate Shaw:

Yeah, I mean, I think, of course, Kagan's dissent in the partisan gerrymandering case last term sprang to mind immediately when you said that, and that is, of course right. I mean, the court, the court's very legitimacy is tied inextricably to a sort of set of political processes that function. So the court can only do things in counter or anti-majoritarian ways, because it occupies this special space that does have this derivative legitimacy by virtue of the Justices' appointment by the president who is selected by the people. So there is this, though indirect democratic accountability that is part of the sort of position of the Justice and the legitimacy of the court, and where they won't work to ensure the functioning of democracy as in the Rucho case, where they won't intercede to prevent extreme partisan gerrymanders, or to protect the right to vote in the face of very clear, unconstitutional infringement of that right, the courts own legitimacy is compromised.

Kate Shaw:

And I think you're right, that the style of institutional legitimacy that John Roberts seems most driven by isn't that kind of sort of deep, substantive and structural commitment to real legitimacy.

Leah Litman:

The thing that I think is interesting about that commentary that has emerged is you can look at it from at least one of two ways. One is the instrumentalist's perspective, Kate, that you were kind of giving it. And Melissa, which is the Chief Justice needs to be given positive affirmation, so that he continues to do these things. But I would think that something that is equally important from an instrumentalist

perspective is explaining what might lead the Chief Justice to feel compelled to vote the way he has. And that includes among others things, public attention to given issues, public attention to the court and public commentary about the court as a political institution.

Leah Litman:

And the court's role in American politics has come under increasing pressure after the court got thrown into the 2016 election with high profile appointments, and with politicians clamoring for and suggesting that perhaps the courts' numbers should be expanded, or their jurisdiction limited. And it is in that context in the lead up to an election year, that there is more pressure to maintain the appearance of institutionalism and impartiality, particularly again, on issues that managed to capture the public attention like DACA, or LGBT equality or abortion, but perhaps not on equally, if not more important issues like voting rights.

Leah Litman:

Then the second is some of the metrics that these studies used to argue that the Chief Justice is becoming more liberal are what are known as the Martin Quinn scores, and they measure who a Justice votes with but they are agnostic, and don't measure at all the substance of the underlying issues. So if a justice votes with, let's say, four liberal colleagues, not to overturn roe or overturn decision saying there's a constitutional right to vote, then that is viewed as equally, let's say, as a decision that that same justice could have voted with their colleagues on the opposite side overturning roe. That is, it doesn't measure changes in the law or departures from existing precedent, or how radical or not a given vote is. And it's part for that reason that I just don't think that these studies or commentary are portraying an accurate picture because they don't dive into the qualitative substance of the underlying cases or arguments. They don't include nonargued cases. And they also don't unpack the contributing forces and incentives that may have led the Chief to vote in these particular ways.

Jaime Santos:

The other thing I was thinking about is when Justice Kennedy retired, the starting narrative was that the chief would be the swing Justice. And I feel like we and others kind of got people to stop using that term, the Chief is the swing Justice and change it to the Chief is the median justice. I would argue that we should move to kind of round two of this, which is stop referring to the Chief even as a median Justice. I think the only way to really understand the court right now, is that there kind of two poles. There's the Alito Thomas poll on one side, there's the Sotomayor RBG poll on the other side. Then really all of the five other Justices remaining are can change their votes and vote on different sides in any case, depending on the precedent that exists, depending on the issue, depending on the procedural posture.

Jaime Santos:

And we don't talk about how often, Justice Breyer or even Justice Kagan votes with more conservatives, which is quite frequent, especially in criminal cases.

Leah Litman:

I'm not sure I would go that far. And I particularly wouldn't put Sotomayor and Ginsburg on opposing pole as Thomas Alito, again, just like given I think those subjects of the underlying views. But I do think it's important to unpack the different contingencies within the court.

Melissa Murray:

I take your point, Jamie to be that it's perhaps a misnomer to call the chief the median or swing Justice. In part because it suggests a kind of either moderating influence on the part of the Chief Justice, or just a kind of moderation to his ideology about the work of the court. And I actually think that he probably is in the middle, but it just means that the middle has really moved to the right. I mean, I think it is less telling to describe him as swing a Justice in terms of his own judging, and more revealing as to what it means for the direction of the Court. And I think the court has moved to the right. And the fact that he's sort of in the middle to be picked off as a sort of deciding vote in some of these big cases suggests how far to the right it has moved. And that part I don't think has been covered as extensively as this narrative about him being in the middle, and perhaps being a more moderating influence.

Jaime Santos:

Yeah. And just to be clear, I'm not saying like if the center is zero, Alito Thomas are negative 10, Sotomayor are RBG are positive 10. I'm thinking of more as like, zero, negative 14, and like positive seven, or something like that.

Leah Litman:

This is getting very quantitative.

Melissa Murray:

This is why we all took the LSAT. Okay. There are some other big cases though, where I not sure we saw the impact of this "moderate Chief Justice". And in one area, I think we're the court very firmly lurched to the right was in the area of religion. So we had a number of really important first amendment cases. And maybe this is a commentary on the commentariate I'm not sure that they got the kind of coverage in the mainstream media that they probably should have. And again, this goes back to the conversation that Leah and I had with Elie Mystal. I think they were probably covered by the print press extensively, but less so in network media or cable news, where I think a lot of Americans do get their news about the Supreme Court.

Melissa Murray:

So a couple of these cases to note, Espinoza versus Montana Department of Revenue, Our Lady of Guadalupe and Morrissey-Berru, which were two cases involving the ministerial exception. Then finally Trump versus Pennsylvania, which we have been short handing as the Little Sisters of the Poor case. So these were big wins for conservatives, and I think huge for a more muscular vision of the Free Exercise Clause. And perhaps big losses for other kinds of values that wind up being superseded by Free Exercise, including the impact of anti discrimination statutes like Title Seven, and even the Establishment Clause itself. And this is all I think, working up to a kind of grand showdown that we're going to see next term when the court takes up Fulton versus City of Philadelphia. Which is again, another challenge to the right of religiously affiliated charities to make decisions about whether they will place children with LGBT couples or LGBT persons in terms of foster parenthood. I think this is a place where we just have not seen a lot of commentary, but it was an area where the court very much displayed, I think, a more conservative slant.

Leah Litman:

Yeah. And the combined effect of the trilogy of cases you noted is that religion has to be treated the same as nonreligious entities for purposes of funding; the scholarship money has to go to both religious schools and non religious schools, but then religiously affiliated entities or entities with religious

objections have to be treated differently for purposes of anti-discrimination or civil rights statutes. Then the next iteration of that question, as you noted is Fulton, which is like in Espinoza, could the state come back and say, well, we'll make scholarship money available to anyone provided that you agree not to discriminate against LGBT employees or students. That's the question Fulton but in the context of foster care placement. And I think it's a really serious challenge were the court to say no, you can't even condition government funding, or benefits or contracts on compliance with anti-discrimination norms.

Kate Shaw:

Do we want to talk at all about Breyer and Kagan in these cases. I mean, we'd we talked to think a little bit. So in Our Lady of Guadalupe, the ministerial exemption case, they both join in full the opinion that holds that the ministerial exception in a broad exception from anti discrimination laws

Jaime Santos:

The judge made exception that is totally made up.

Kate Shaw:

Yeah. I mean, so it's grounded in the First Amendment. But the court doesn't even recognize it until eight years, seven or eight years ago. Like, it's a very... It's been a lower court doctrine for a long time, but the Supreme Court has never even affirmed that it exists. And now all of a sudden, it extends to broad swaths of employees, at least religious schools. And we don't know how many other kinds of religious organizations.

Kate Shaw:

When we first talked about it, I said, I kind of assume they've joined and didn't write separately because they shaped the opinion in ways that seemed to narrow its potential applicability. And then just at the more, or the more I thought about it, I wonder whether they just Breyer and Kagan just have a broad. Maybe not even strategic, maybe just like broaden deeply held belief that the Free Exercise Clause requires these broad exemptions like it's not... Is it principled or strategic, their decisions to go along in cases like this? Or in Masterpiece Cake Shop, or Trinity Lutheran. So, they're all slightly different cases.

Kate Shaw:

But the theme being sometimes you do have this clash of principles, religious liberty and free exercise on the one hand, and other, anti discrimination and equality norms on the other. And they seem willing in case after case to side with Free Exercise.

Leah Litman:

I have to say, Micah Schwartzman and Nelson Tebbe wrote this article, Establishment Clause Appeasement that has really influenced my view is about what the justices are doing in these cases. So they make the case that part, at least part of what is motivating these votes is some form of institutional goodwill, where they try to make a showing of good faith and institutional credibility. And the paper analyzes kind of whether it's worth it.

Kate Shaw:

I read the abstract but not the article, but I gathered they make... That their position is no, it's not worth it. They're not getting what they give, and that's basically...

Leah Litman:

Yeah.

Kate Shaw:

What do they think? Do they hypothesize about what they... Apart from just general goodwill that may extend to other areas of law or other cases in the same area of law like what do... What are they trying to maximize here if they speculate?

Melissa Murray:

Again, in the idea of appeasement, sort of giving on free exercise for the purpose of maintaining whatever shards of the Establishment Clause continue to exist, I mean, I sort of think about the dynamic in town of Greece versus Galloway. So that was from what? 2014? And Kagan, I think, wrote the main dissent. It was like Kennedy opinion for the majority allowing legislative prayer, and to be, to open up city council sessions in the town of Greece. And it was Kagan who authored this decision that was, I think, a very robust defense of the Establishment Clause.

Melissa Murray:

So I take the idea that it isn't worth it to appease on Free Exercise because you're actually not saving the Establishment Clause at all. You're actually contributing to the incremental undermining of Establishment Clause values. And with a court like this, and we can talk about what is a court like this. But I think it is one where you don't see just these abrupt lurches. But rather an incremental and sedimentary building up of things, and suddenly the Establishment Clause doesn't mean anything at all anymore. And I think that's the point that Micah and Nelson are making in that piece. That eventually, you're going to turn around, and whatever you did is not going to be enough to save a muscular vision of the Establishment Clause.

Leah Litman:

And along those lines, one of Justice Kagan's first, and I think it was a powerful dissent was that Arizona Christian Schools versus Winn about funding to religious schools, and whether taxpayers could challenge it.

Jaime Santos:

One thing on Justice Kagan in particular is, she tends to hold her firepower until she really, really strongly believes in something and has a very strong view on it. And you can see that just if you look at the number of opinions that are authored by each Justice. On this term not counting per curiam or around 150 or so opinions drafted, the Chief wrote nine of them, Justice Kagan wrote only 10. So, really not doing a ton of concurrences. By comparison, Justice Alito wrote 24, Justice Thomas wrote 31, and by pages, Justice Alito wrote 20% of the pages released by the court in opinions this year that...

Leah Litman:

And 80% of those pages was ...

Leah Litman:

... His...

Melissa Murray:

In Bostock

Jaime Santos:

Yeah, I know. But it actually, it makes me think of like Hamilton, how do you write? Like, you're running out of time? I cannot sing but it's a very... I mean, it seems to me like Justice Kagan makes... Takes a very different approach, and she really holds her firepower until she feels like she absolutely has to speak out. And the question is, is it worth it?

Melissa Murray:

Another theme of the term was definitely executive power. There were a ton of cases this term about the executive branches power to not afford judicial review in immigration cases to remove principal officers, and agencies to defy state and federal subpoenas, and to change agency positions without adequate explanation as was the case in DACA. And as we've also seen, actually, more recently in the cases, the COVID related cases about international students attending universities in the United States. And there were, I think it's a bit more of a mixed bag on executive power. But I would say by and large, the court led by the Chief Justice affirmed that the executive has a ton of power as long as it dots its T's and crosses its Is when it's making decisions.

Jaime Santos:

The biggest exception to that would be the subpoena cases, where I think the court puts more limitations in some kind of vague multi factor balancing test that usually the Chief hates, but this time embraced. But generally speaking, it seems like the court has really embraced a pretty broad view of executive power. Do you all generally agree with that, or did you kind of have different takes?

Leah Litman:

I think I agree with the bottom line that the court definitely embraced a strong vision of executive power. I guess, I don't necessarily think of DACA, and the immunity cases as really constraining executive power that much in part because DACA declined to say the president lacked the power to enact DACA. The procedural constraints as applied to the Duke memo there were not particularly stringent. And in other cases, the court, in fact rejected some dotting I's and crossing T's rules on agencies, and in particular, the Little Sisters of the Poor challenge. They're the court cast aside these, I think, kind of important administrative law doctrines that the DC Circuit had, had. And where the court basically said, we're not going to remand a rule to the agency if the error was harmless. Like, for example, failing to publish a formalized notice of proposed rulemaking.

Leah Litman:

Then second, the court cast away this rule that the DC Circuit had, had, which said, if the agency doesn't have "an open mind" during the rulemaking process, then we can challenge the rule on that basis. And the court said, no, we're not going to do that either. So even on these kind of administrative law challenges, I feel like if anything, the Court made some moves to loosen the constraints on agencies. It was just DACA, in particular, again, given that the court was focused on the Duke memo involved like a particularly slapdash and shoddy administrative work product.

Leah Litman:

Then the immunity cases, yes, the court did not kind of embrace the administration and President's personal layers, super broad notions of monarchical executive power as a basis to challenge the subpoenas. But I actually think the multi factor test in Mazars is pretty friendly to the President, and more so than existing law was that the Court of Appeals understood and could prove to be over time.

Kate Shaw:

I do think that the both DACA, and the Little Sisters of the Poor like, so these are APA cases. These are cases where the big legal questions arise under the Administrative Procedure Act. And it does feel like the court continues to want this part of the APA that prohibits agency action that is arbitrary, capricious, and abuse of discretion are contrary to law has real teeth, and that there's real substantive review of agency decision making, and agency reason giving that the APA requires, of course. And so I do think that gets reaffirmed in DACA. Obviously, that's the principle that underlies, although in this kind of pretext focused way, the census citizens case from last year.

Kate Shaw:

And even though I think it's right that the court is forgiving of the agency's potential procedural irregularities in the birth control mandate case, Kagan does write separately to say the substantive, arbitrary and capricious review is very much still available on remand. And seems to be sending this very Kagan esque signal that, it's, the agency has to do the real work of considering the impact say, of adopting a rule that exempts the employers of well over 100,000 female employees from the birth control mandate when making its decision. And it's, so what does DACA say? The court... The agencies need to take all kind of relevant factors into consideration when making their substantive decisions. It seems to me that there are very good arguments now, especially based on the new DACA opinion that it was substantively unreasonable for the agency to have issued this rule with the breadth of exemptions that it contains.

Kate Shaw:

And so I do think, again, it's just a concurrence, but it does seem and that seems consistent with the logic of DACA. And I guess, the subpoena cases feel like kind of a draw for presidential power to me honestly, another cut at Leah's, I think, correct critique of some of these attempts to quantify agreement and move among justices. And on the part of particular Justices in their kind of ideological evolution is sort of the bluntness of some of the tools, but also their failure to account for the kinds of like, if the Supreme Court gets served up tons of crazy arguments from very conservative lawyers and rejects all of them, I guess we code that as the Supreme Court moving left, but the movement on the part of the arguments is not captured by any of those kinds of measurement tools.

Kate Shaw:

And so yeah, I think that the absolutist arguments in both of those cases were really fringy arguments, and so were correctly projected. But I guess substantively, like in terms of what changes, I mean, I guess as I've tried to think about the Mazars opinion, and sort of what it would mean for lower courts to go through the test that the Chief Justice lays out, I think these at least one and maybe a couple of these subpoenas survive that without even no reissuing required. Like I think in the lower courts, like they should take a look and like, were the... Was separation of powers, appropriately considered? And were these subpoenas necessary? And is the purpose valid?

Kate Shaw:

And I think they're actually really Congress favoring answers to all of those questions, if the court will, in good faith, just let the lower courts implement what it has set forth in those cases. So I guess, I think a good draw. And again, to go back to grading on a curve, it certainly is the case that, that very bad law and presidential power could have been made and was not. And I continue to feel like there is obviously value in that.

Leah Litman:

Speaking of lower courts implementing the subpoena cases, the court actually issued the mandate in the New York grand jury case, thereby allowing the lower courts to proceed. And a little bit of a, I told you so that district Judge in the case, Judge Marrero indicated he was a little bit confused about what to do in light of the courts remand. So the President indicated he was going to bring kind of new legal challenges and the court, was kind of like, gosh, I kind of think I basically already ruled on all variations of this, but the Supreme Court seems to envision otherwise. So they set a kind of expedited, briefing schedule with I think, all papers to be due mid August.

Leah Litman:

But this is something we flagged on the last episode, where and the Supreme Court seemed to play a little bit fast, and lose with the terms of the second circuit's disposition in the case to the lower court.

Melissa Murray:

Can I flag another theme from the term that I think was also kind of a mixed bag and that was I think, just questioning of race more generally. And I think we had some really interesting race decisions. Ramos versus Louisiana was certainly one that resulted in jettisoning Apodaca, a 1972 opinion on the grounds that it wasn't really precedent. It was sort of an anomalous Sixth Amendment case, and also had failed to appreciate the underlying racial dynamics by which the state of Louisiana had created this non-unanimous jury conviction rule. Then we also have that contrasted with the Comcast case, which I call the Byron Allen case, where the court actually made it tougher for civil rights plaintiffs to bring claims about racial discrimination and contracting to the courts.

Melissa Murray:

And then we had the DACA case, where apparently the only person on the court who could recognize race was Justice Sotomayor, who wrote a very lonely dissent, arguing that the plaintiffs should at least be able to continue to press their case as a procedural matter in the lower courts. So all of those together, to me sort of lend themselves to a kind of interesting sort of outcome, which is to say that, I think in places where the racial animus is obvious and there is obviously consensus that racial animus exists, the court is okay with recognizing it. And I think Ramos was one of those situations where, literally, Louisiana was the only state in the union that had this particular rule. And everyone could understand how it would dilute the votes of black jurors.

Melissa Murray:

But in other cases like Comcast and DACA, this sort of racial dynamics that undergird those circumstances, I think were harder for various members of the court to recognize, and indeed to act upon. And so that again, is a kind of mixed bag. I think it will be even more consequential going into this election cycle, where we'll probably see even more emergency petitions regarding Voting Rights, that on their surface present a kind of race neutral way, but actually have quite raced context in terms of, whose vote is being suppressed and who is being denied the opportunity to vote.

Leah Litman:

I think that gets back to what you said earlier about John Lewis, Melissa, which is at the time, John Lewis was viewed as something that's a radical, even though today, we recognize him as a hero. And it's in a lot of ways very much easier to recognize the wrongs of the past than to recognize the wrongs of today.

Melissa Murray:

Yeah, that's a great way to put it.

Jaime Santos:

It's also extraordinarily troubling. I think, if the standard for the Justices, at least four or five of the Justices being able to recognize a race discrimination or racial animus problem is like Ramos. Like if that's the standard, we're in a whole world of trouble. And it made me think of something that I think one of you said in recapping June Medical, which is the substantial burden test. None of the conservative Justices are ever going to think something's a substantial burden. Like it would be... The burden would have to twist the Chief Justices' nose and cause him to erupt in pain for him to actually see it as a burden. And I worry that discrimination and racial animus are going to kind of have a similar future. I certainly hope that's not the case, and certainly more diversity on the court would provide a greater perspective and life experiences that would aid in that addressing these issues.

Kate Shaw:

I mean, and to go back to what you were saying, Melissa, about how race and these voting cases that we are likely to see more of between now and November intersect. And it is the case that under some circumstances, we have seen John Roberts willing to basically call government actors out on their bullshit a little bit. In DACA, not as explicitly in the commerce decision, so where you have these restrictive laws, or government actors in the States unwilling to make accommodations in voting to respond to this unprecedented pandemic and frankly, it's wildly racially disparate impacts, I just... It would be so... It would like it is going to be really important that people like John Roberts are willing to look at the representations if state actors say, we're just but concerned about absentee ballot fraud, and that's why we're going to roll back, or at least refuse to extend access to absentee voting. When really it is the case that they have made the projection rightly or wrongly... Like, it could be wrong, but they did this to their political disadvantage to make absentee voting easier.

Kate Shaw:

Roberts should be able to see that and appreciate it, and that is part of the reason I find Bill Barr's willingness to second the President's absurd, and ludicrous and wildly dangerous charges about absentee ballot fraud. So scary, because Barr lends a degree of credibility to those kinds of charges that I worry will then give Roberts the cover he would need to say, look, these state actors say they're worried about fraud, like that's all they're doing, when everyone knows and Robert should be able to appreciate that that is not what they were worried about. Where they're attempting to suppress voters that they think won't break their way, and that those voters will be disproportionately people of color.

Melissa Murray:

The other part of that I think, Kate, is that there is a tendency, and I think the Chief Justice is perhaps the biggest sort of proponent of this view that talking about race in a straightforward and emphatic way is somehow uncivil. I mean, and it was Justice Alito, who said this in his dissent from Ramos. But the Chief

Justice has done this over the years, and in numerous cases, this idea that discussing race is somehow uncivil. And to talk about it is to call someone on the other side a bigot. Again, I come back to Justice Sotomayor, who has said just openly, the only way to get past this past that we have and that is so salted with racial animus is to actually talk openly. It's not uncivil. It's not problematic to talk about it. In fact, honesty is like the only way we'll ever move forward.

Melissa Murray:

And yeah, I just think the Chief Justice is sort of skittishness about addressing it forthrightly. It would I think, perhaps inform the way he writes, the way he judges, and perhaps lead to decisions that I think missed the point in the way that you're suggesting.

Leah Litman:

Yeah. On Ramos, the Chief Justice actually joined that portion of Justice Alito's dissent, even though Ramos involved a law that I think most people recognized at the time, the permissibility of non unanimous juries was based in racial animus. That decision was still six-three with the chief justice as one of the dissenters. Kate, as you were talking about absentee ballots and voter fraud, and I don't know if you could hear Stevie barking. But she could hear the dog whistle. And actually, when, again, not to make this kind of like the theme of the episode. But when the chief justice was nominated to the federal courts, one person who testified against his confirmation was John Lewis. Why did he do so? Because of John Roberts record on voting rights and trying to restrict voting rights. He said his record demonstrates a strong desire to reverse the hard won civil rights gains, and so many sacrificed to achieve. And you can't elevate an individual to a powerful lifetime position when their record demonstrates a strong desire to reverse the hard won civil rights gains, and so many sacrificed so much to achieve.

Leah Litman:

So even if the chief might be a, let's call it like superficial or perceptive institutionalists on some issues, I just don't think voting rights is going to be one of them so long as that issue just does not get the kind of national attention that DACA, and abortion rights and LGBT equality do. And that's really sad.

Kate Shaw:

It is. And it's also a good segue because we're going to continue, and I think it's I think for words worth, it's totally fine if this is one of the themes of the episode because it is I think, one of the themes of the term. And that is to talk a little bit about the shadow docket, which does feature a number of voting cases. And the shadow docket just refers to cases that the court decides without the full briefing, and/or arguments that typically attach to the cases that are scheduled for either in person or in the pandemic days, these telephonic arguments.

Kate Shaw:

And that, as Leah just suggested at the end of what she was saying, the cases on the shadow docket invariably received less public notice and attention than the cases that the Court hears argued. And so it means that in these big sort of think pieces about what the term did and meant, there is an under appreciation and valuing of the really important work that the court does on the shadow docket. And that did in the last few months include some important voting cases. So voting, not exclusively, but maybe we'll start by talking about voting.

Kate Shaw:

We've talked on the show a couple of times about the Supreme Court's intervention in Wisconsin case back in April right before the Wisconsin primary election, in which it, and this is also a case that Leah has written about, but that it put on hold a Wisconsin district court order that would have extended absentee voting timelines, did the same... Basically the same thing in Alabama. Both of those were five-four cases in which four Justices would have just let stand these District Court opinions that after very careful review of facts and records made some changes to state voting laws in order to avoid these serious constitutional infringements upon the right to vote in this pandemic. There's one new entry kind of on the ledger of cases like this.

Kate Shaw:

Just this past week, the Supreme Court decided not to stay an 11th Circuit decision that had put on hold a District Court injunction against Florida's pay to vote scheme, which the legislature and the state courts basically added to the States. There was a constitutional amendment back in 2018 restoring the right to vote for close to... I don't think it's... The number's over a million Floridians with felony convictions who had previously not been able to vote, and yet state officials have interpreted that amendment to mean restoration only upon the payment of all fines and fees in restitution, which means people, a very significant number of individuals are functionally not able to vote.

Kate Shaw:

A District Court found that this interpretation of the constitutional amendment violated the equal protection the due process clause, the constitutional prohibition on poll taxes. And the 11th Circuit without any explanation stayed that district court injunction, which was just weeks before this August primary. And the Supreme Court declined to lift the completely unreasoned stay of the 11th Circuit. Meaning people won't be able to vote in the August primary in Florida, and it's very much an open question of whether they will be able to in November. And that is a hugely significant both in terms of the constitutional right to vote, but also the fact that a million individuals or close will be impacted by this decision by the court. So these are three used cases, but did people hear about them when they heard about the marquee cases? Of course, not.

Leah Litman:

Can I pile on for a second on the Florida case because that, I think merits are even worse than that description might suggest because the legislature and state Courts clarified that serving your sentence for purposes of the felon re-franchisement constitutional amendment meant paying all your fines and fees and whatnot. But in Florida, there's actually no centralized system to determine whether you have paid all of your fines and fees. So an individual who thinks well, okay, can I vote? They can't call up some centralized place and get this decision/statement about whether they can vote. And if they mistakenly vote, wrongfully voting in Florida is a felony, and there's no mens rea requirement. So they are subjecting themselves to a felony, which is part of where the due process challenge came from. And that was one of the basis for the district court invalidating that state gloss on the state constitutional amendment.

Leah Litman:

A panel of the 11th Circuit actually upheld that, but then the full 11th Circuit is what issued the stay more than like a year or so after the initial District Court decision. And I think part of what was so striking about this decision is, so you had a last minute stay in the case, but that stay actually led to the

restriction of voting rights but it was last minute. And usually, we think of last minute court changes to state's voting laws as enfranchising rather than disenfranchising. But notwithstanding that the court still declined to disturb the stay, and I think it just made the entire specter of the recent voting rights litigation all the more troubling. Because the court doesn't actually care about the last minute nature of the stays, then why is it bothering to invoke the Purcell principle? Instead it should just say, we just don't think court should write and modify state restrictions on voting at all, because at bottom, we just don't care about the burdensome nature of the restrictions.

Jaime Santos:

One thing maybe to note on that would be that Justice Sotomayor, and Justice Ginsburg and Justice Kagan noted their dissents from the Supreme Court's decision, but Justice Breyer did not.

Kate Shaw:

Which doesn't necessarily mean he didn't join. Sometimes we just said, noted dissent as Jamie said, but I'm not sure why he did not publicly note the dissent here.

Jaime Santos:

Yeah, I don't know either. There were also other important stays/decisions on the shadow docket. We've mentioned the Trump administration's request for stays for decisions enjoining some of their regulation. So they receive stays, and among other things, decisions enjoining the public charge rule. This past week, they also received not quite stays, but actually vacaturs of lower court injunctions involving challenges to federal executions. So the Barr Justice Department announced that it was deciding to resume federal executions for the first time in over a decade, and it scheduled the executions for some number of federal inmates, who then brought a series of challenges in part to the methods of their execution, and other procedural challenges to the Barr memo as well as other claims. And they obtained prior to the first execution, a district court injunction that found they were likely to succeed, in particular on their Eighth Amendment challenge, that the method in which they were going to be executed raises substantial risk of cruel and unusual punishment.

Leah Litman:

The Court of Appeals, the DC Circuit declined to stay that injunction, and thereby leaving it in effect and ordered expedited briefing. But then the court by a five-four vote, vacated the injunction. And the federal government executed the first inmate, Daniel Lewis Lee, and then subsequently executed Wesley Ira Purkey as well.

Jaime Santos:

One thing I wanted to note on this, these cases is there was a powerful Op-ed that came out this morning from Kate Stetson and Ruth Friedman, who represented Mr. Lee in one of these cases, and also Kate Stetson was representing in the administrative law at the APA challenges to the execution protocol. They added the Op-ed, added some really enraging color on what happened. In Mr. Lee's case, the Supreme Court had issued its stay of the district court's order pausing, Mr. Lee's execution. Then DOJ rescheduled his execution, even though there was a separate order from another district court that remained on the books pausing the execution, and then the Justice Department said it was going to execute him anyway.

Jaime Santos:

It was only after the Justice Department was threatened with contempt sanctions that it decided to file an emergency motion to lift that remaining stay. And through that entire time, for four hours, Mr. Lee was strapped to a gurney waiting to be executed. The government then went ahead and executed Mr. Lee, even while multiple motions were pending, that were seeking a stay of execution remained pending and without even notifying Mr. Lee's counsel that they were executing him. And I think that the courts' consistent vacatures of stays in these capital cases only emboldens the government to act in a way that I consider truly shameful

Jaime Santos:

Also two, I mean, just the characterization of the appeal as last minute was really interesting. And this was a point that Justice Sotomayor also made much of in her separate dissent, that there was nothing last minute about this at all.

Kate Shaw:

Just like one final thing. Historically, it was the case, that if four justices in a capital case that was scheduled for execution wish to consider some aspect of the legal challenge that this prisoner was raising, a fifth Justice would cross over and cast a fifth vote to stay the execution. Because remember, it takes four votes to grant the stay petition, but five to issue a stay. So you can have this disconnect in capital cases, or you could have four justices wanting to take a petition but unable to do that because the individual is executed before consideration is possible. And I thought it was really conspicuous that although there were, it seemed to me really potentially substantive and meritorious claims around both suitability for execution of these individuals, and the lethal injection protocols themselves, the Chief Justice would not cast a vote to at least stay the executions, so that the considerations that these lower courts had decided should be given to these claims could occur.

Melissa Murray:

And the government was already given expedited briefing in the DC circuit. They just weren't satisfied with that, and then went up to the Supreme Court to ask that the injunction be stayed.

Leah Litman:

It's worse than the breaking of the norm that you characterized, Kate because here, there was already a stay in place. So it's not just that the Chief declined to give a stay of an execution. He voted to overturn an injunction that was in place.

Kate Shaw:

It's significantly worse, actually.

Leah Litman:

Yeah. And that rule partially exists to prevent these cases from becoming moot. And in fact, after the execution of Daniel Lewis Lee, a court, the district court found he was likely... He and the other defendants were likely to succeed on another one of their claims that the Barr memo was contrary to federal law involving the regulation of drug safety. So, those were another significant chunk of cases.

Kate Shaw:

Should we do a lightning round of favorite opinions and moments from the term?

Melissa Murray:

It sounds great.

Kate Shaw:

Leah yours.

Leah Litman:

Okay, favorite opinions. Definitely the Kagan dissent in Seila Justice Sotomayor's dissent solo in the DACA case, and Justice Gorsuch's in opinion in McGirt.

Kate Shaw:

Jaime?

Jaime Santos:

Sure. So at my oral argument phase, one was definitely the experience of listening to two women, Erica Ross and Lisa Blatt break new ground with two to completely different argument styles in arguing the first telephonic Supreme Court cases. Another one is, there was this moment in the Cowpasture Oral Argument, where Justice Kagan said to Tony Yang about his and Paul Clements argument, something along the lines of, your words sound pretty but they are nonsense. Like, "You write really nicely, but what you're saying makes absolutely no sense," and it just kind of cracked me up. On opinions, I agree with Leah on the McGirt opinion. And I also loved Justice Sotomayor's Our Lady of Guadalupe descent.

Kate Shaw:

I'm going to pile on Kagan's dissent in Seila Law. And actually her opinion, I'm not sure I agree with all of it. But her opinion in the faithless electors case for unanimous court was just like isn't really satisfying kind of historical wrongs. Oral arguments, basically the entirety of Julie Rikelman's performance in June Medical, and a moment in the Promesa cases, when Jessica Mendez Colberg asked the Justices to overrule the insular cases, which they declined to do here but I thought was a really righteous and amazing moment.

Melissa Murray:

My favorite moments from the term, my favorite oral argument moment was when Justice Ginsburg from her hospital bed held forth with a couple of really wonderful soliloquies that ended with a rising note to indicate that it was actually a question to Paul Clement, and Noel Francisco and Trump versus Pennsylvania. Those were fantastic. I also appreciated Justice Sotomayor's coronavirus pandemic vaccination hypothetical to Paul Clement, which is also good. And he seemed to be quite flummoxed by it. I also like Flushgate. I know that, that's perhaps a controversial take, but I think it's important to remember that the Justices are just like us. And I absolutely loved the fact that we had livestream telephonic arguments, so that was terrific.

Melissa Murray:

In terms of opinions, I really enjoyed and was proud of Justice Sotomayor for standing up for the equal protection clause, and that issue in the DACA case. I also want to just flag, this is not an opinion, but just rather a vote. But I think that, and this is a hot take, Justice Kagan's decision to vote with Alito and the Chief and Ramos, and to note the importance of precedent in that case, I think will have broader

implications downstream for other cases, where the question of stare decisis will also be meaningful. So I think that was my favorite, kind of unexpected, yet deeply strategic vote.

Leah Litman:

Can I edit two quick oral arguments as I didn't list them? One would be Justice... I'm sorry, not Justice... All the same, Justice Sarah Harrington's... No I'm going to stick with that. Justice Sarah Harrington's response to Justice Gorsuch's question in Kansas versus Glover, where justice Gorsuch started doing this New York accent imitating a police officer and Sarah said, "This is Kansas, not New York." I thought that was really funny. Then second is in Our Lady of Guadalupe, when as Melissa noted, Justice Ginsburg was actually participating from her hospital bed. Her note disclosing her cancer diagnosis that she issued in July, said she began chemotherapy on May 19th and Our Lady of Guadalupe was argued on May 11th. And in that case, she was talking to Jeff Fischer, who was arguing on behalf of the employees and she said, "You don't seem to make much out of what I find very disturbing in all of this, that the person can be fired or refused to be hired for a reason that has absolutely nothing to do with religion, like needing to take care of chemotherapy."

Leah Litman:

And she noted that one of the employees in the cases had been fired after disclosing her diagnosis of breast cancer, and so I think that that exchange took on a new meaning in light of her are sharing her health.

Melissa Murray:

And was directed to her colleagues who likely had also been apprised that she would be needing treatment.

Kate Shaw:

Worst opinions or moments?

Melissa Murray:

Leah?

Leah Litman:

I basically rattle off all of these already. But basically several of Justice Kavanaugh's opinions, that I just think we're a little bit too oversimplified. So that includes USAID, which we've already talked about, Thole the ERISA case. And then McKinney versus Arizona, which is a complicated resentencing retroactivity one.

Jaime Santos:

For me was Sineneng-Smith without question. In that case, the Supreme Court vacated the Ninth Circuit's decision about encouraging staying or moving to the United States without documentation. And the court said that the Ninth Circuit abused its discretion by relying on a ground that hadn't initially been raised by the parties. And in doing so, the Supreme Court relied on a ground that had not been raised by the parties because no one argued for vacature on this ground. It was infuriating. I will never get over that.

Melissa Murray:

My worst moment, worst opinion was Justice Alito's dissent in Bostock. And not because, I think substantively it was wrong. I do think it substantively was wrong. But I'm just like, anytime you write an opinion that's so big it crashes the whole website, you've got problems. You need to check yourself. So that's my worst.

Jaime Santos:

It's got a lot of rage to work out.

Kate Shaw:

His opinion in Vance was also pretty terrible. I mean, he also did this, all this really gratuitous exploration of like a prosecution of the president and like what that... How it's all going to work? And it's like, no.

Melissa Murray:

Maybe he know something we don't know. Maybe Justice Alito isCassandra.

Leah Litman:

It exists in the same world that his... The DA is calling the New York Times to. Like Earth... I don't even know, seven or something like that.

Melissa Murray:

Things to highlight that we've noticed on the closer read of some of the opinions.

Kate Shaw:

I want to find one thing in gore such as dissent in June Medical, which is that evidently, there's some sort of textualism exception that says you can spend four pages discussing legislative history in abortion cases. Like, it was so weird. He spends pages talking about physicians, women talking about their experiences with abortions. Whether or not any of that supports what Gorsuch wants to do here so like, you would think that his intellectual vanity as textualism's new poster child would have at least led him to suppress his desire to kind of gratuitously describe this testimony and like, I don't know. Nope, it didn't occur to him. Nobody flagged him like clerks, when your [inaudible 01:06:34] textual is justice, like you're kind of showing your cards if you're willing to spend pages on legislative history when it suits you.

Melissa Murray:

That it is a terrific point. I mean, the whole upshot of textualism is it doesn't matter. What was in the legislator's heads only matters. What's on the page? And so much of that opinion was just about, what were they thinking? Why did they do this? Like all the women they were going to say. But I was just like, I thought that didn't matter. I mean, so again, a different kind of abortion exceptionalism from the conservative wing of the court.

Leah Litman:

Yeah, it reminds me of Justice Scalia's dissent, in Madson versus Women Health Center, where he basically said that abortion works as like an ad hoc nullification machine of a bunch of otherwise generally applicable rules in the courts' jurisprudence.

Jaime Santos:

One thing I noticed, I was rereading Justice Alito's Bostock dissent this morning and I noticed something I hadn't caught the first time around because I was...

Leah Litman:

Were you trying to get yourself in rage?

Jaime Santos:

I really, honestly I was. I was like trying to get myself ready for this taping, but I was reading it having previously read Our Lady of Guadalupe. And obviously the first time around, I wouldn't have because Our Lady of Guadalupe came out, I think on July 8th, Bostock came out I think, on June 15th. So in his Bostock dissent, he used religious teachers as a kind of sky is falling argument. He said, "This Bostock decision could lead to Title Seven claims by religious teachers, even if the religion believes that sex reassignment procedures are immoral.

Jaime Santos:

At the same time that he is writing his Our Lady of Guadalupe majority opinion, holding that Title Seven doesn't apply to religious teachers. He was using religious teachers as an example of how dangerous Bostock would be, which is perhaps why we should not feel moved by sky is falling arguments in dissent.

Melissa Murray:

Were there things that we actually predicted? We're so good at being Cassandra's. Were there things that we predicted and got right, and were there things that we perhaps went overboard on and got wrong? Kate, you're looking at me with a knowing glint in your eye.

Kate Shaw:

Well, there is one moment that is, I think like a little, it's a little bit me taking a victory lap and a little bit me acknowledging that I was totally wrong. You remember that. Melissa, you and I did an episode with Emily Bazelon and I said sort of sheepishly that I thought Gorsuch, and possibly the Chief were still in play in Bostock. And that maybe if, at least Gorsuch went that route, the kind of conservative legal commentary it would have to respect his commitment to the methodology of textualism, even if they disagree with the result in the case, and that he would gets some prompts for that. And you and Emily were like, you are... No, that's not happening. None of this is happening.

Melissa Murray:

Yeah, I think I called you a cockeyed optimist.

Kate Shaw:

I think you did.

Melissa Murray:

I did. ... I'm sorry. I can admit my wrongdoing. I'm sorry.

Kate Shaw:

My optimism was actually born out in the result, but not in the reception on the conservative [crosstalk 01:09:22] legal front.

Jaime Santos:

But sometimes it was. I mean, like didn't George Conway write a whole Op-ed saying like, this is totally reasonable textualist opinion?

Kate Shaw:

I don't know if he's a good member in good standing of the conservative legal movement.

Jaime Santos:

That's true. That's true.

Melissa Murray:

You are totally right, Emily, and I did not think the Chief would be in play in Bostock. And that, to me is perhaps the most surprising vote of the whole term. But I think I expected, and maybe you did not that this, if justice Gorsuch had sort of gone down his textualist road as he did, I didn't think that the conservative legal movement would embrace it as yes, that's where that leads. I think we were going get a sort of redux of the response to the Chief Justice's vote in Sebelius, the Obamacare case. and that's exactly what we got. So let's just split the difference, we were both right on certain points. I'll eat my share of the crow if you eat the rest.

Kate Shaw:

Let's do... We're running long, so let's do a quick court culture segment. First, inquiring minds want to know, are the Supreme Court law clerks having an end of the year virtual skit? There is a skit that is typically done at the end of the term. Usually it's in person, is their virtual skit happening? What do we think?

Melissa Murray:

How would they do that? I mean, unless you're going to do it like a Brady Bunch style skit, or like

Leah Litman:

Like Parks and Rec Casted, or the SNL Cast.

Melissa Murray:

Dude, that maybe. I

Kate Shaw:

The thing is, the Supreme Court law clerk cohort is decidedly less funny as a group than the participants in this.

Leah Litman:

That's a reason not to do the skit and not a reason not to do a virtual skit.

Melissa Murray:

Also consider that they were writing opinions way longer this year, and like dissent and everything way longer this year than in prior years. So they almost surely would have had less time to be doing some of this stuff, and try to master the Brady Bunch style Zoom recording.

Jaime Santos:

I just think that this term, if you're still standing after this, like good on you, I just think this was just a grueling kind of slot by the end of it for people, especially if there were clerks with kids at home.

Kate Shaw:

Yeah. And to think about the fact that Justice Ginsburg was undergoing cancer treatment for most of it. Ah, God, I mean, this was hard, I think under the best of circumstances. And she is just fierce in her ability to turn these opinions out. She didn't get skipped for the May sitting, oh, no.

Melissa Murray:

Can I know one more piece of court culture, we could just briefly allude to it. Leah did a terrific episode the other day about diploma privilege. And this is sort of related to that, so there's lots of stuff going on right now among the class of 2020, recent graduates from law school around the bar examination, and whether or not they will actually be able to sit for the bar exam, and under what circumstances. But then there's also, I think, a raft of interesting bar examination regulations that basically prohibit women, or women identified bar exam takers from bringing in things like feminine protection products like tampons, or from lactating without certain guidelines during the bar exam because of fears of cheating.

Melissa Murray:

And I totally understand the need to protect the integrity of the exam, although it just seems like having the exam under these circumstances is a whole different question. But the fact that they are still prohibiting women from bringing their own tampons to the bar exam, like seriously?

Jaime Santos:

When I took my second bar exam I was still nursing, and I will say the bar of Massachusetts was wonderful. They created space for me, so I could pump in a closet where I was at, so I didn't have to do it in the bathroom.

Melissa Murray:

In a closet?

Jaime Santos:

Yeah, in a closet. But I wasn't having to do in a bathroom.

Melissa Murray:

That's great.

Jaime Santos:

... Is a way better option than that. And guess what? People in Massachusetts practice law all the time, and it's no problem, even if you take breaks to lactate.

Melissa Murray:

I just think that all of this like, as these like bizarre and arcane requirements surface, I'm thinking I'm looking at you, Virginia with your skirt suits for women and whatnot, I think you're just really going to get the sense that this is not about professional competency in as much as it's just kind of a hazing ritual. And look, the women are getting hazed in these really particularized and gendered ways.

Leah Litman:

And this is where the Supreme Court judges, and state supreme courts should consider that sometimes they're responsible for kind of overseeing the bar process, or their voices can have incredible power. So if you haven't spoken up, state supreme court Justices, now is the time to do so.

Melissa Murray:

Yeah. All right. So that was the term what a romp. What a romp.

Jaime Santos:

I love that romp, a romp in history, Kate. That was great.

Kate Shaw:

A rollicking romp through history.

Jaime Santos:

That we should talk about the Summer a bit. One thing, Leah already mentioned a big announcement about the show's partnership with the appeal, which is super exciting info about the show and where it's going. One other announcement for today is that this is going to be my last show as a co-host. I have had a blast working with all of you nerding out at Supreme Court cases, and talking about Supreme Court culture. And I've so enjoyed getting to know our listeners at live shows and at happy hours, and I will miss you all deeply but I wish you the absolute best of luck.

Leah Litman:

Thank you,

Melissa Murray:

Jaime, it's been great doing this with you. Thanks so much for all of the hard work that you put in this term with us. It was really fun.

Jaime Santos:

Thanks.

Leah Litman:

Plus, to what Melissa said.

Kate Shaw:

We are going to miss you Jaime.

Melissa Murray:

So, thank you so much to everyone for listening this term. Just a preview what's up for the summer. Obviously we have no new opinions to talk about with you. There will be no opinion emergency episodes, but we are going to have a more limited Summer schedule with lots for you to think about and do. So every couple of weeks or so, we're going to drop a new episode on a range of different topics. Some of them will be our Summer reading list, so we have some great interviews with authors lined up for you. We'll also do some deep dives on particular substantive areas. So don't worry, we're not leaving you in the lurch. We got you, and you can listen to us throughout the Summer on a more limited basis. And if you have ideas for episodes, please feel free to send them to us as well.

Leah Litman:

And also feel free to continue sending us ideas for merchandise too. Those are some of the things that we're considering in the hopper are Stay Mad Sam, the Cassandra Club, Baby Girl, and so on.

Leah Litman:

So thank you, everyone to listening. Thank you, Jaime, for a wonderful year. Thank you to Melody Rowell, our producer. Thanks to Eddie Cooper for making our music. Thanks to Sam the intern, a law student who is helping us with research. And that's Sam Dunkel, not Sam Alito, just to clarify. [

Jaime Santos:

But Sam Dunkel can stay mad too if he'd like.

Leah Litman:

Again, that's why....

Melissa Murray:

Sam Dunkel is never mad. He's always terrific.

Leah Litman:

That's why stay mad Sam is not necessarily misappropriation of Justice Alito's likeness since it's about any Sam. Great point. Thanks also to Bella Pori, another law student who's been assisting us over the summer. Have a great summer, everyone.

Leah Litman:

(music)