

Melissa Murray:

After homeschooling my children for seven months, I was ready to take control of the debate stage, I guess.

Melissa Murray:

Stop it!

Speaker 3:

It's an old joke, but when a man argues against two beautiful ladies like this, they're going to have the last word.

Speaker 4:

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:

Hello there, welcome back to Strict Scrutiny, a podcast so fierce it's fatal, in fact. We're your hosts. I'm Melissa Murray.

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw.

Leah Litman:

And you're not in the closet, Kate.

Kate Shaw:

I've been let out just for the next 90 minutes, so I can record this with you all, but I will be retreating back to the closet for the next month or so.

Melissa Murray:

It's not just a special event because Kate has managed to extricate herself from her hostage situation. It is also special because this is a live show. Yes, we are broadcasting live via Zoom with the faculty, staff and students of the greatest law school in the world, NYU, so thank you so much to Dean Trevor Morrison for inviting us to participate in NYU's forum.

Leah Litman:

And shout out to the University of Michigan reunions that are happening virtually this year, and in person hopefully soon.

Melissa Murray:

And we can also edit that out later.

Kate Shaw:

No, don't edit that out, and also don't edit out what I'm about to say, which is, I want to give a shout out to my 1Ls who just finished our elements of law course yesterday. Thank you guys. You were awesome, and for the law students out there listening, your professors really appreciate it when you nod and smile at us via Zoom in the little windows. It is hard to know how this is all landing.

Melissa Murray:

All right, so in addition to this being the first of our live COVID time shows, this is also our traditional term preview. So every year, just before the first Monday in October, we take to the airwaves to let you know what's on deck for this upcoming SCOTUS term, and we are watching for lots of different things. So Leah, can you give us a breakdown of today's show?

Leah Litman:

Yes. So here is the rundown. We are first going to do breaking news and a little bit of how I spent my summer SCOTUS edition. Then we will do the meat of our term preview, and end with a court culture segment. We have Chris Wallace moderating and keeping time. So if we run late, just know who to blame.

Melissa Murray:

Chris Wallace...We'll get to that. Okay. I'll get it started with how I spent my summer SCOTUS edition, and there's not really much to say here. Let's face it. This was a pretty atypical SCOTUS summer. There were no jaunts to Europe, no teaching abroad. Not only did the Coronavirus keep the Justices at home, more sadly, on Friday, September 18th Justice Ginsburg's passing really put a pall over what remained of the Court's summer season.

Kate Shaw:

And we will talk more about Justice Ginsburg's passing and the battle currently underway around Judge Amy Coney Barrett, but first, while we don't know exactly how the Justices spent their summer breaks, we can safely assume that they spent at least part of the time figuring out how they would hear cases this term. The pandemic is showing no signs of abating, rates are actually up in many places. The court remains closed to visitors, and so on September 16th, the Court, I think, took the very sensible step of announcing that it would continue to hear cases, at least for the October sitting, telephonically, as it did last spring. November and December still remain to be determined.

Kate Shaw:

There has been no formal announcement, although I suspect those two will be telephonic. So what do we think this might mean? What might round two of the Court's telephonic sitting look like might differ from round one?

Melissa Murray:

Well, I'm hoping that everyone gets their flushing together and learns how to mute before they get back together.

Kate Shaw:

Mute, unmute both, right? They need to learn both.

Melissa Murray:

Yes.

Leah Litman:

And I think that there's some question about whether the Chief Justice will reconsider the stilted seniority questioning that they employed last term, although it didn't sound like from the announcement that was necessarily going to happen, but perhaps he will do a slightly better job of more evenly policing the guidelines he set for the various Justices. So at the end of the May sitting, I recorded the amount of time each of the Justices spoke, and Justice Alito, perhaps unsurprisingly just spoke for much longer uninterrupted periods, and the conservative male Justices also got to speak for much longer periods of time in particular cases than any of the other Justices did.

Kate Shaw:

Yeah. So I feel like that must have... Some of that critique must have penetrated for the Chief Justice. I think Leah had a piece, an SSRN piece a Times op-ed, and there was a lot of discussion about this empirical confirmation of the impression that some of us had the left with, which was that there was not perfectly even distribution of speaking time among the Justices, mostly after the first round of questions. It was more even in the first round, but the follow-ups didn't fall evenly among the Justices, and it in particular high salience cases. It was particularly true about, say, the contraceptive mandate case.

Kate Shaw:

So they were all doing something uncharted, and so I would hope that he's able to take in the spirit in which it was intended the feedback and critiques, the he being the Chief Justice, and make some refinements.

Melissa Murray:

To be fair to him, I think it's really hard, though, to play traffic cop in that kind of scenario. I mean, just think about teaching class. You really don't have a full appreciation of what the time dynamics are or who has spoken. Like things may seem longer than they are or shorter, and so I don't want to assign any nefarious intent to it, although it may just reflect more implicit understandings of how we just allow people to talk, and who we allow to talk as opposed to anything more calculated.

Leah Litman:

It was in part for that reason that I recommended one of the solutions being that he actually have someone else keep time, rather than himself because it's just, I think, too much for one person to do and do well. So in addition to preparing for the new term, the Justices are maybe getting ready to welcome a new colleague on Saturday, barely a week after Justice Ginsburg's passing, and before her burial President Trump nominated Judge Amy Coney Barrett to the Supreme Court. Since we recorded the last episode on Judge Barrett's nomination, we also have some new details about the timing of the selection.

Leah Litman:

So on Judge Barrett's Senate questionnaire, she described how the White House Counsel's Office called her the day after Justice Ginsburg died Saturday, and then on Monday, the President offered her the job, which he waited to announce until the next Saturday. That confirmation battle is already underway, as Kate alluded to, with an accelerated timeline with what seem like plans to seat Judge Barrett before the end of October.

Kate Shaw:

So Judge Barrett is already having meetings with senators. A few senators have announced that they're not planning to meet with Judge Barrett. They believe the nomination process is illegitimate, so it really doesn't matter what answers this nominee might give to the questions that they pose, if the entire thing is illegitimate and so Senators Blumenthal, Hirono, Schumer, Gillibrand, Kaine there might be others by now, there may be some symbolic or expressive value in declining to participate. For their part, I think a lot of Republican senators seem to be shrugging this off, maybe saying, all right, well, all the better things are going to move along more quickly if we don't have to spend the time doing all of these meetings.

Kate Shaw:

So I am not sure. I think there is a certain principled conviction demonstrated by saying this is not about her. This is about the timing, the process, the President. So I think it's probably wise. I think there's a related question. We talked about a little bit last weekend about participation in the hearings themselves.

Melissa Murray:

Does it appear churlish to not meet with her at all?

Kate Shaw:

There's a risk, I think, potentially.

Leah Litman:

I think there's a risk, but they have to manage the message that is coming out when they say they're not going to meet with her, and I think they have done a pretty good job about uniformly sticking to the message of the election is underway. This is something Vice-President Biden repeatedly said during the presidential debate, the first presidential debate that just aired, and it's something that I think all of the senators who have come out with a stand have echoed as well.

Kate Shaw:

Yeah, and in some ways, I think it's respectful of her and her time, too, to say, "Rather than meet with you and have this Kabuki theater, and then come out with a statement about the substantive disagreements we might have, just to say it really has nothing to do with you, and in some ways there's like a respect broadcast to her and not know obviously in the distinct set of use about the process. So, yeah, I think, I think it's actually a pretty sound strategy.

Leah Litman:

So Republicans, as Kate noted, are eagerly pressing on in their efforts to confirm the nominee in the midst of an election, and quite possibly 18 or fewer days before election day in some of the messaging and campaigning we have seen, and we alluded to this on the last episode. Some segments of the Republican Party or conservative legal commentators are rubbing Democrats' face in the efforts to portray Judge Barrett as the next Justice Ginsburg. So Dahlia Lithwick at Slate had a great piece entitled the contempt of notorious ACB, which was describing the t-shirts, and the coffee mugs that we discussed on the last episode where they were literally plastering Judge Barrett's face on the Notorious RBG meme with a crown.

Leah Litman:

Republican senators are also avoiding any pretense of consistency about confirming Supreme Court Justices in an election year. We've seen, as we discussed last episode, Senator Cruz, Senator Graham, and a bunch of other people offering very different reasons for why it is okay to proceed with this nomination, but not with Judge Garland's. To my mind, this has some parallels and it also rhymes with another famous switch from Supreme Court history, whereas first-year constitutional law students learned about something called the switch in time to save nine. This is like the switch in time to get mine. So I don't know. I liked it.

Kate Shaw:

Get mine or get nine. They actually both work.

Leah Litman:

Yeah, no. That's true. That's true. This is either the new switch in time to get nine or the switch and time to get mine. I kind of like mine just because it portrays some of the pettiness of this.

Kate Shaw:

Totally.

Leah Litman:

But for listeners who might not know it, that reference is about President Franklin Roosevelt's proposed plan to expand the number of Justices on the Supreme Court after the Court invalidated several of his New Deal programs. After his proposal to expand the Supreme Court, one of the then Supreme Court Justices Owen Roberts switched his vote so that he was now voting to uphold the President's new deal programs that is called the switch in time to save nine because, of course, once the President got what he wanted out of his proposal to expand the court, there was no reason to follow through on actually expanding the court.

Melissa Murray:

Can we talk a little bit about the Notorious ACB meme?

Leah Litman:

I don't want to, but I will.

Melissa Murray:

Well, I think it's really interesting. So there is a way in which when there are certain vacancies to be filled, so I'm thinking specifically of 1991, when Justice Thomas was nominated to fill Justice Marshall's seat, and now this seat. The identity plays such a big role, but I don't ever think we talk about it in quite the same way in other contexts, even where the successor and the predecessor are more closely aligned ideologically. So think about in 2018, when Justice Kennedy stepped down. There wasn't a talk like that Brett Kavanaugh was a perfect fungible replacement for Justice Kennedy, although you might imagine, and this is a counterfactual--

Melissa Murray:

If Justice Kennedy had been the first openly gay justice on the court and Justice Kavanaugh was openly gay and replacing him, you would still see perhaps some of these dynamics, but it's just really interesting how it happens and how it organized around identity and identity features and traits.

Leah Litman:

So who's doing identity politics now?

Kate Shaw:

Totally.

Melissa Murray:

Well, I think that's my point.

Leah Litman:

Right.

Leah Litman:

This, of course, was absent when President Bush replaced Justice O'Connor with Justice Alito, even though Justice O'Connor was the first woman to serve on the Supreme Court.

Kate Shaw:

And I think wanted to be replaced by a woman herself, right?

Melissa Murray:

She wanted to be replaced by a woman.

Kate Shaw:

And was actively quite unhappy with the choice of the replacement, which is not to say that a president is required to defer to the wishes about a specific nominee, but it is interesting that she was disappointed, I think.

Melissa Murray:

Well, wasn't Harriet Myers first identified to replace Justice O'Connor and then it went south and then they picked Alito?

Kate Shaw:

Totally. Yeah, no. That's right. I got a sort of hit memory hold of that whole episode, but yeah, no. That's right. That's right. It lasted like a week or something.

Leah Litman:

Stand back and stand by Harriet. Sorry. I'm just reliving things.

Melissa Murray:

On that note, we just had the first presidential debate of the general election and the Court actually was the first question that was discussed yesterday, and I thought this was really interesting. President Trump was asked about his concerns that Roe v. Wade was imperiled or the concern that Roe v. Wade was imperiled by the nomination of Judge Barrett, and actually retreated on the question of Roe v. Wade. He said that we did not know how Judge Barrett would vote, which is a complete 180 from candidate Trump's statement and vow that if elected president, he would only nominate justices who would be intent on overruling Roe v. Wade. So what did you make of this about face?

Kate Shaw:

Yeah. You remember, like in 2016, he said it. He said it on the debate stage as he sort of stalked around the place. It'll happen automatically. Roe v. Wade will be overturned automatically. I was like, "Well, that's not quite how it works," but that was like a central premise of his entire campaign, and the coalition that he was able to stitch together was this promise, and it was so interesting to watch him last night. We're recording the night after the debate, really say, "Well, there's no case right now and you don't know how she'd vote anyway." So one, that's absurd. Like of course she won't say how she's going to vote.

Melissa Murray:

I think you could say that about all of last night.

Kate Shaw:

That's true.

Kate Shaw:

Right.

Melissa Murray:

It was totally absurd.

Kate Shaw:

Yeah. So queue that whenever the debate comes up, but I think particularly in that the enthusiastic reception of all of the anti-abortion groups, the enthusiastic of reception of senators like Josh Hawley, who has said Roe should be the litmus test for appointees, is more revealing than anything. The nominee is not going to say, or that the President might say or not say, but it was very striking to me that he not only didn't lean in, but retreated from saying affirmatively what we, I think all know or mostly believe to be true, that she, of course, would cast a vote to overturn Roe.

Kate Shaw:

So that was interesting to me, and it just I think suggests that on some level he may realize that the abstract prospect of overturning Roe is a better political issue for him than the reality when actually overturning Roe is within reach, and when the vast majority of Americans do not want to see that happen. Right? Polling on abortion is complicated. A lot of people have conflicting intuitions about it, but one thing is really clear when you ask people, if they want to see Roe overturned, 75, 80% of them say no, and it seems to me that the President may... He said, "Roe's not in the ballot." He wanted it on the ballot in 2016. So I think it's better for him on the ballot, in the abstract then in the concrete terms, in which it now is.

Leah Litman:

I think that's exactly right, and I think this is going to come up again when we talk about the Affordable Care Act litigation because in both that case and this one, it seems like the President is doing his best to avoid admitting what their actual position was in 2016 to 2020, at least up until the presidential election cycle, but it was also frustrating during the debate that no one said, "Well, Mr. President, you promised to appoint justices who would overturn Roe. Senators of your own party have announced that Judge Barrett meets their litmus test of a justice who would overturn Roe, and also she has said Roe was wrongly decided. So it would be difficult to come up with more or better evidence, particularly given her votes on the court of appeals about how a nominee would vote with respect to Roe than with Judge Barrett."

Melissa Murray:

To be fair, there was a lot going on last night, and Chris Wallace was having a hard enough time just dealing with what was going on stage, as opposed to bringing up the vagaries of individual jurisprudential commitments.

Leah Litman:

Well, on that note, Melissa, you're going to love this next topic. I just can't help repeating things from last night. Okay.

Melissa Murray:

Inject this into my veins. Go ahead.

Kate Shaw:

No, yeah. I love the next topic. So just to stay on this for one more second, that segue, there was some commentary I saw today that suggested there was something really dark and disturbing about this like attempt to appeal to flatter, as opposed to just assert like, "Oh, we were talking about something else." There's like an abusive dynamic that it's suggested in which you say like, "Please stop yelling. I'm going to give you something you're going to like," which was like actually chilling, I think, to reflect on. We're not talking about you, Melissa.

Melissa Murray:

I'm just saying like, after homeschooling my children for seven months, I was ready to take control of the debate stage.

Melissa Murray:

Stop it! All right. Any other developments?

Kate Shaw:

Yeah, so we have a couple of developments we want to flag, just within the last week. Some of them related to presidential immunity, and some of the subpoena cases that we have talked about previously. So The New York Times has obtained copies of the President's tax returns. We are not going to go through the findings. Another source of deep disappointment for me is how little this was discussed at the debate last night, but there's a lot. So there's a lot to talk about, but in brief top line findings, the President paid \$750 a year in income taxes the year before he entered the White House. His first year in the White House \$0, not 750, 0 for some years before that he owes \$420 million in personal debts that will come due in the next four years, some of them to lenders unknown.

Leah Litman:

He also claims 70,000 in deductions for hairstyling, which is a look.

Melissa Murray:

Or a shame, depending on your view.

Melissa Murray:

I don't know what is more tragic, the \$420 million in personal debts, which suggests a national security problem perhaps, or the \$70,000 in hairstyling with the resulting look.

Leah Litman:

Or the zero to \$750 a year in taxes, which just suggests an utterly corrupt, decrepit political regime.

Melissa Murray:

Or a bad tax code. I mean-

Leah Litman:

Yes.

Melissa Murray:

... let's put that out there, too.

Leah Litman:

Right.

Melissa Murray:

This was awful. This is so awful.

Leah Litman:

And it is relevant to the subpoena cases that the court heard last term because Congress had asserted an intelligence need to determine the president's financial entanglements, and as numerous people have pointed out, the excessive debts are considered a risk to security because it makes you susceptible to influence.

Melissa Murray:

Influence. Also relevant, I was thinking when I was thinking back to the national security issues and the subpoena cases, there was that really striking colloquy between Justice Alito and Kari Dunn, who argued Vance on behalf of the Manhattan DA's office, in which Justice Alito pressed Dunn arguing that there was a habitual inclination of Manhattan DA personnel leaking to The New York Times, which I thought was interesting, and I wondered if this was Justice Alito trying to like make a bid to get into our Cassandra Club. Like he knew something and he was like, just letting us know in that moment. What do you think, Leah?

Leah Litman:

No dice Sam. Good try, but this was not a result of a leak from the Manhattan DA's office because the proceedings challenging that subpoena are still pending, and the U.S. Court of Appeals for the Second Circuit stayed the lower court decision that rejected the President's challenges to the subpoena, and so the subpoena is not yet in enforced and, therefore, it's not because the grand jury or the New York DA has this information that The New York Times got it. Sorry, Sam, maybe next time you can be like Cassandra.

Kate Shaw:

He's going to have to find some other way into the club.

Melissa Murray:

The Manhattan DA is still involved.

Leah Litman:

Still involved.

Melissa Murray:

Okay. All of this is to say that the temperature at 1 First Street is already in the triple digits. It's fire season at the court, and we haven't even started talking about the docket, yet.

Leah Litman:

Maybe we can each pick one to two cases or issues that we are watching this term.

Kate Shaw:

All right. I am going to lead off with the Affordable Care Act insanity, which is Texas v. California, California v. Texas. This is basically the latest, full frontal attack on the Affordable Care Act. So there's the first big constitutional challenge there's King versus Burwell, the statutory challenge. There are several cases involving the contraceptive mandate that are also ACA cases, but this is, I would say, is the second or third full frontal attack on the lawfulness of the ACA writ large, and the background here is that in 2017 Congress could not repeal the Affordable Care Act. Instead it reduced to zero the penalty

imposed on Americans who choose not to buy health insurance, but it retained every other provision of the Affordable Care Act.

Kate Shaw:

So Texas and a number of other States are now arguing that because the mandate was sustained in *NFIB v. Sebelius*, the first big ACA case as a tax, and because there is now no penalty attached to this tax, the law can no longer be sustained as constitutional. It was already viewed as exceeding Congress's Commerce Clause authority, and so it must be struck down in its entirety, and the last piece is where the action is, and I think the craziest.

Kate Shaw:

What a zero penalty provision, how is properly classified, I think maybe you could disagree about, but even if you stipulate that there's no tax, that this isn't properly taxed, the idea that the entire Affordable Care Act should therefore be struck down flies in the face, I think, of pretty well settled at severability doctrine to the point that I actually can't believe that the Solicitor General's Office is advancing this aggressive argument. Even putting aside the politics of doing it in the face of this pandemic, it's a pretty distorted reading of the law, which basically says, and the Court has said this in cases as recently as last term, in a Roberts's opinion, in a Kavanaugh opinion.

Kate Shaw:

If there's a constitutional problem with part of the statute, we use a scalpel, not a sledgehammer. We excise that piece of the statute, and with the ... The ACA has not only the more controversial contraceptive mandate, black lung benefits, requirements that employers have lactation rooms for nursing moms. Like the list is so long of independent provisions of the Affordable Care Act that the Trump Administration is arguing all need to fall, every single one of those provisions, including maybe most importantly, the prohibition of discrimination on the basis of pre-existing conditions. I think this is a very long shot argument. It was accepted in the district court, although the Fifth Circuit sent the case back down until the district court to take another look.

Kate Shaw:

I don't know for sure what Amy Coney Barrett would think about a case like this. So she has been critical of both *NFIB* and *King v. Burwell*. Those were different questions, but I just keep thinking about how Justice Scalia in *NFIB* both in the joint dissent and the oral argument in that case, just kept driving home that the whole law had to fall. The whole law had to fall, and there's a very good chance having proudly proclaimed that Justice Scalia's judicial philosophy is hers.

Kate Shaw:

It's not to say she won't break with him on anything, but it seems to me a decent, but at least plausible chance that she will agree that the entire Affordable Care Act needs to fall, and I think then there could be five votes for that proposition, which would wipe away in this raging pandemic, the protections against discrimination on the basis of pre-existing conditions, and wipe away the healthcare of millions of Americans. I kind of can't believe that President Trump's Administration has decided that the politics of this are good for them.

Leah Litman:

I know everyone says, and we were focusing on how ludicrous the severability argument is, but I actually think the first step in this case is pretty wild as well because their argument that the individual mandate is now unconstitutional rests on the premise that the Republican Congress in 2017 actually strengthened the mandate rather than repealing it because in *NFIB v. Sebelius*, the court construed the mandate to not actually impose any independent freestanding obligation to purchase health insurance, but instead just to impose a tax penalty for failing to do so.

Leah Litman:

And so the argument that the mandate is now unconstitutional includes as one step in that argument that the 2017 amendments by the Republican Congress signed by this president actually strengthened the mandate rather than repealing it, but that is also the kind of wooden hollow textualism that I am concerned that a majority of this Court would embrace, and again, that every Republican appointed judge to date has adopted that first argument that indeed the 2017 Congress strengthened the mandate and made it unconstitutional.

Melissa Murray:

Besides looking at Amy Coney Barrett, it seems like the two people to really look at are the Chief Justice and maybe Justice Kavanaugh as potential peel offs. So even if assuming she is confirmed, Justice Barrett voted to strike down the entire act, if the Chief Justice maintained the view that this could be excised through severability, and was able to bring along Justice Kavanaugh, then you would have enough votes or would you?

Kate Shaw:

Yeah, no, definitely. If Thomas, Barrett, Gorsuch, and Alito, if we say... They are likely to be receptive to this argument, that the whole thing needs to fall, and I think they are, then I think that's the question. Can they also get Kavanaugh? I don't think-

Melissa Murray:

Was it the robocall? It was the robocall case.

Kate Shaw:

Yeah it was *Barr v. Political Consultants*, in which he, too, seemed to take the position that it's we try not to strike down the entirety of a congressional enactment unless we have to, but the reason I worry that Barrett, or one of the reasons I think Barrett, will be receptive to the non-severability argument is there's like this strain of intentionalism that has always run through severability. It's like, "What would Congress have wanted?" And if you think that's a fundamentally illegitimate inquiry it's, I think not a stretch then to say, "Well, the whole thing we should throw out the approach to severability," but I think you're right, Melissa, to focus on the fact that Kavanaugh doesn't...

Kate Shaw:

I don't think Roberts is on board with that and Kavanaugh, at least in that *Barr* case, signaled some skepticism. So it may well be that because there already is this rhetorical retreat among some congressional Republicans, and certainly a lot of the conservative legal commentariat, saying, "Of course this is a ridiculous argument and no one's going to buy it, and Barrett probably wouldn't buy it, and

certainly five wouldn't buy it." I'm not sure why they think that it seems at least plausible to me that she will and that five will, but I think you're right. Maybe the action lies in the Kavanaugh vote.

Leah Litman:

The thing that troubles me about this case is one, I agree that both of the steps in this argument are ludicrous, but there is justice history in Affordable Care Act cases in particular, and other high profile ideological salient cases in general, where the justices don't do as great a job with sticking with legal principles. So in the first constitutional challenge to the Affordable Care Act, the Court's prior case and *Gonzales v. Raich* should have easily resolved the constitutionality of the minimum coverage provision, and instead you basically had justices saying, "Well, we would prefer not to apply the reasoning or outcome in that case and get around it."

Leah Litman:

So it's because of that history, as well as the last decade of just unmitigated opposition to the Affordable Care Act, both politically and through litigation, and the fact that these three Republican appointed judges have endorsed the first step in this constitutional challenge that make me nervous and I don't know what to do. Well, I do know what to think. It's extremely frustrating to see Senator Mitch McConnell and conservative legal commentators saying there's no chance this challenge succeeds, when again, every Republican-appointed judge to date has embraced it, and the Republican party has attempted to repeal the Affordable Care Act repeatedly over the last 10 years, and opposed it, and tried to undo it through litigation on several different fronts.

Leah Litman:

We mentioned the identity politics in the nomination earlier. So I wanted to highlight one case that will be argued in October that is maybe less high-profile, but I think equally or not equally, but very significant, and this is the case about personal jurisdiction and it's two consolidated cases involving Ford. So the case is about personal jurisdiction, whether a defendant, here Ford, can be sued in a particular state. The plaintiffs in these cases were injured in car crashes in the states where they reside and they want to know, "Can I sue the car manufacturer, Ford, in the state where I reside, where I was injured, where Ford sells cars, and where I may have even purchased this particular car?"

Leah Litman:

I think under any sensible theory of personal jurisdiction and under the court's current cases, the answer should be yes. Ford is arguing that the answer is no, that the plaintiff may be required to sue in a state where the car or the particular part of a car was either originally manufactured or initially sold. In order to get there, they would graft a proximate cause type test. So ask whether there is a causal relationship between the defendants in state conduct and the plaintiff's injury in order to determine whether the defendant can be sued in a particular state.

Leah Litman:

This case was going nowhere fast before Justice Ginsburg passed away, although the cert grant was admittedly troubling, given that the issue was splitless, but now it stands a chance of revolutionizing the law of personal jurisdiction in a way that is just deeply anti-unfriendly to plaintiffs, and very advantageous to corporate interests where large corporations can pick where they are sued, and individual plaintiffs who are injured have to travel to different locations, and they might already have a hard enough time finding a lawyer, and to me it really symbolizes the kinds of cases that don't capture

public attention, but that really transformed the federal courts and the practice of law to be so business friendly, anti plaintiff, and unwelcoming.

Kate Shaw:

Was the CivPro world surprised when they took this case at all?

Leah Litman:

I think that they were. The amicus support in the case is extremely lopsided with all of the civil procedure professors and community in support of the plaintiffs here. I think this is also a case where we are really going to feel the loss of Justice Ginsburg who was, of course, a civil procedure professor, authored several of the Court's recent major personal jurisdiction cases in which she included hypotheticals and reasoning underscoring that in fact, yes, an in-state resident who is injured by a car accident by a national manufacturer could sue in that state, and so it will be sad to see this case argued and decided without her.

Melissa Murray:

Okay. The case I want to talk about is called *Fulton v. City of Philadelphia*, and in some ways this case is a Frankenstein case, a follow on from both *Masterpiece Cake Shop* from 2018 and *Espinoza v. Montana Department of Revenue*, which has heard last term. Just by way of background, the issue in *Masterpiece Cake Shop* was whether a christian baker who refused to provide a cake for a same-sex wedding celebration could be exempt from the application of generally applicable anti-discrimination laws on the ground that his refusal was animated by genuine religious belief. In one of his last opinions for the Court, Justice Kennedy punted on the broader question of whether civil rights must yield to religious liberty, concluding that the underlying judicial proceedings on the baker's case had actually been hostility toward the baker's religious views.

Melissa Murray:

Espinoza, which is the case that was heard last term, in that case, the Court held that states could not withhold public funding from private religious schools once it decided to offer such funding to private non-religious schools, and the decision was criticized by many as prioritizing the Free Exercise Clause over the Establishment Clause and dismantling the traditional divide between church and state. The issue here in *Fulton* is whether a state can offer public funds or in this case, a government contract to an entity. In this case, the entity is Catholic Social Services on the condition that the entity does not engage in discrimination against certain groups, and here the group are LGBT couples who are trying to be licensed as foster parents.

Melissa Murray:

The question before the Court is, again, whether groups that have genuine religious beliefs can be exempt from the application of generally applicable laws, whether it's requirements for government contracts or anti-discrimination laws more generally, but also included in this cert grant is the question of whether the Court should reconsider and indeed overrule its 1990 decision in *Employment Division v. Smith*. So this is an enormous case with lots of implications, not just for LGBTQIA rights, but also reproductive rights because of the overlay of religious exemptions in the reproductive rights area, and obviously this will also implicate that perennial collision between civil rights on the one hand religious liberty on the other.

Leah Litman:

Yeah, I am not really looking forward to seeing the Court bulldoze through the distinction between conditions on the one hand, and generally applicable obligations on the other, as well as I think they'll probably narrow Smith, I would say and say like, "This isn't truly generally applicable either because it selectively affects one religious group or is somehow like a proxy for them, but yeah, that's how I see this case going, and it's going to be argued in October.

Melissa Murray:

No. It's November 4th. It's the day after the election.

Leah Litman:

Oh, right.

Melissa Murray:

It's the day after the election.

Leah Litman:

Ugh okay. Awesome.

Kate Shaw:

So that's interesting. You think they'll just narrow Smith. There definitely are people out there who think they're just going to overturn it, and so that would be a very significant development, and it would also, I think, tell us something about how a newly constituted Court, if Justice Barrett is in place by then, is going to approach stare decisis because this is a settled law. Congress has legislated against the background of it. It has generated some controversy, but has it been unworkable? I think some people would say yes, and there might be enough to say yes. That's interesting that you don't think so, Leah.

Leah Litman:

Well, so now realizing it's going to be argued in November and adding up the votes, given that Thomas, Gorsuch, Alito, and Kavanaugh have all written that they are open to revisiting *Employment Division v. Smith*. If Justice Barrett or Judge Barrett is on the court by then, I guess I see it as a possible overrule, but I still think that just more naturally you could use this case to narrow Smith, and then in a later case say *Fulton* illustrates the unworkability of Smith, and then overrule Smith just like they did in *Janus* and are likely to do with *Casey*, so on and so forth.

Kate Shaw:

Yeah, so a more incremental approach. That sounds right, and certainly an approach that like Chief Justice Roberts would like. I'm not sure. It's possible that like they decide to go big. Why wait, when you got five?

Melissa Murray:

You're saying incremental as though it were a long time horizon, but incremental in *Janus* is like literally four years.

Leah Litman:

Right.

Melissa Murray:

Okay.

Kate Shaw:

Or in Shelby County, like yes. We know a number of these two steps. So this may be would just be that. Okay, so fine. If you're right, that's not incremental, but it's like driving the knife and slowly, I guess, maybe is a better description.

Melissa Murray:

Yes.

Leah Litman:

Okay.

Melissa Murray:

Are there any criminal justice cases, Leah? I just want to tee up if you have any.

Leah Litman:

Yeah there are. We'll be previewing these cases more in depth than we do particular previews for individual sittings, but Jones v. Mississippi involving sentencing of juveniles to life without parole; Edwards v. Vannoy, which involves the retroactivity of the Court's decision invalidating non-unanimous juries, Ramos, as well as Torres v. Madrid, the question about whether a police officer, when he or she shoots you, but you are nonetheless able to physically walk away, if the police officer has nonetheless stopped you for purposes of the Fourth Amendment. There are also some cases that might be mooted, depending on what happens in the election. So there is the latest census case involving the President's memo, indicating that he has directed the Secretary of Commerce not to include non-citizens in the census count used for apportionment.

Leah Litman:

The Supreme Court granted the motion to expedite consideration of the case. They haven't yet decided whether to order argument, but depending what happens in the election, that case could either go away or be resolved quickly.

Kate Shaw:

Yeah, and I think that the three judge panel declined to stay its ruling, right?

Leah Litman:

Yeah.

Kate Shaw:

Like last week, and then there was separate potential contempt proceedings ongoing in California because it looked as though Commerce was walking up to the line of disregarding a ruling in a different case, but on the same question of the permissibility of this executive order. So I think there will be more census developments almost certainly in the Supreme Court. It seems to me they have to take the... I mean, this is a mandatory jurisdiction case.

Leah Litman:

Summarily affirm, yeah.

Kate Shaw:

Affirm or reverse, but I don't see either of those happening, so I think they take the case. There is the Twitter blocking lawsuit, which is like this case that I just keep being shocked is ongoing, which is the President. I mean, it's just like the pettiness of this claim.

Melissa Murray:

Are you?

Kate Shaw:

Yes, I am. My hope springs eternal, and it's dashed constantly, but I keep thinking. So basically the claim here is that the President has the right to block people who are mean to him and say mean things about him on Twitter, and that defending his prerogative to do that is a good use of the litigation resources of the very smart and hardworking lawyers at the Department of Justice and okay. They did it in the district court, and then they did in the Second Circuit, but surely I thought someone is going to prevail on him that seeking cert in the Supreme Court to defend this blocking prerogative is not a good use of governmental resources, and again, my hopes were dashed. They are asking the Supreme Court to take this case and we will see. I should say other politicians block people on Twitter, too. I think that none of them are permitted to. I think the First Amendment doesn't allow it, and that seems clear.

Kate Shaw:

So occasionally, you'll have Trump defenders who say, "Well, like AOC blocks people on Twitter." It's like, "No, I don't think anything should block critics on Twitter." If there are things like threats, that I think raises an entirely different set of questions. There's no argument, but that is the issue here. The President's lawyers have conceded that he has blocked these people because they have criticized him and for no other reason, and I just can't see how the First Amendment, the other forum questions, a forum is Twitter, but the analysis in the district court in Second Circuit seems really sound to me.

Kate Shaw:

I guess either nobody can say it to him or he doesn't listen, but they are going to continue to press this argument potentially in the Supreme Court.

Leah Litman:

I'm just waiting for a Joe Biden to Tweet at the President. "Will you just shut up, dude?" And then the President blocks him.

Kate Shaw:

Right. Yeah, blocked.

Leah Litman:

And then he'll like try to intervene in the case that could add a new flavor.

Kate Shaw:

Well, I think still subject to the district, I think he has had to unblock all these people under the district court's ruling. So I think that Biden can't actually be blocked right now, to have him intervene in the case would be kind of amazing.

Melissa Murray:

Somewhere the anti-federalists are literally rolling over in their grave. Like the Bill of Rights is being used to protect the President's Twitter feed or to like to open up the President's Twitter feed. Like this is what the First Amendment was for. This is it.

Melissa Murray:

Beyond those cases, and those are some big ones, but of course, as Leah said, we will be covering the specific sittings as the term goes on. So please look out for more comprehensive coverage of the various cases, but we also want to highlight some themes or things to look for as you go through the term, and I think the most obvious thing that we are keeping our eyes peeled for is the quote unquote elephant in the room, which is, how will the nomination of Judge Barrett to replace Justice Ginsburg and the likely resulting 6-3 conservative super majority change the Court and the institutional dynamics on the court? So Kate, you've been thinking a lot about the election. So can we talk about the election first because that seems to be top of mind for lots of people?

Kate Shaw:

Sure. And look, the President to return to last night's debate yet again, was asked specifically about his expectations for the Supreme Court in the event of an election dispute, and he literally said, "We're counting on them to look at the ballots," which was a pretty shocking claim, and I'm not even sure what he meant by it. Let me maybe take a step back and just say, even before we get to the Supreme Court, we're obviously a Supreme Court podcast, that's what we're going to focus on, but the rhetoric, the President's baseless accusations of voter fraud, and rigged elections are potentially having impact on the ground right now, even outside of the context of any legal dispute that a Court would resolve.

Kate Shaw:

George Packer had a piece in the Atlantic this week that cited some stats, a significant majority of Americans believe that fraud or suppression is likely to exist in the election. Again, I think that those two are obviously are distinct, and the worry is that a lot of people will say, "Well, why bother? Like the whole thing is too fatally corrupt even for my vote to have any impact, and so I'm going to opt out." And there is, I think, a very good possibility that is the goal. Right?

Melissa Murray:

Yeah.

Kate Shaw:

There is a political coalition that believes that maximizing participation is to its electoral advantage, and there is a political coalition, which is the President's, which seems to believe that minimizing participation is to its electoral advantage.

Melissa Murray:

Kate, the fundamental truth here is that too much democracy is bad for democracy.

Kate Shaw:

That's right.

Melissa Murray:

That's the truth.

Kate Shaw:

That is the revealed belief, right? I think of the Republican party in the year 2020. So how could all of this potentially intersect with the work of the Supreme Court? We should say at the outset, every state has different rules and procedures for resolving election disputes. If votes are close, there could be recounts; either automatic recounts, if the state folks are close enough or recounts requested by one of the candidates. There could be litigation. I think there will be litigation around things like how to count absentee votes that don't necessarily involve perfect compliance with state requirements on how to sign, and how to seal, and even how to fill out a ballot. It seems as though that one piece of President Trump's strategy right now is to try to deploy a lot of observers or watchers on the ground in states to identify potential trivial or more serious, who knows, violations of state procedural requirements in the opening or counting of absentee ballots.

Kate Shaw:

So there could be litigation around things like that. There's lots of litigation ongoing, some of which we've talked about, regarding the permissibility of some of the steps that states have taken to expand access to the votes, so just last week, Pennsylvania Republicans went to the Supreme Court asking for a stay of a state court decision that extended the return time for absentee ballots, like allowed them to be counted if they arrive within three days of election day. They cite *RNC v. DNC*, the Wisconsin case in which the Supreme Court, 5-4 struck down a lower Court's decision to similarly expand the return time for absentee ballots in the face of pretty clear, inability on the part of Wisconsin officials to process absentee ballots consistent with the existing deadlines.

Kate Shaw:

So the Pennsylvania case is one example. I do think that it's a fairly specific case, so I am not sure whatever the Supreme Court does here because I think there is a possibility that it reverses what the Pennsylvania Supreme Court has done, but I think it's possible to cabin that to is that a repeat of what's happening in Pennsylvania or other kinds of litigation could potentially draw out our knowing the identity of the winner for quite some time. Federal law sets December 8th as what is called the Safe Harbor Deadline, so if a state certifies its election results and sends them to Congress by December 8th, those results will presumptively be the ones that Congress counts when it gets together and tallies the Electoral College votes.

Kate Shaw:

If a state misses the December 8th deadline, things get trickier, and depending on how this litigation proceeds in some of these states, it is at least conceivable that that could happen. A state could send more than one slate of electors. Congress could be in a position of picking which of the states competing elector slates is the correct one, but actually, all of that should be happening in Congress. The Electoral Count Act is an 1887 statute whose provisions are famously, and truly impenetrable, and so it's not totally clear if the House and the Senate say disagree on some of these matters how it gets resolved, so I do think there's a good chance, although I think the Electoral Count Act contemplates Congress resolving some of this.

Kate Shaw:

I think there's a good chance that someone evokes the jurisdiction of the Supreme Court, and then the question is, does the Court maybe say this is a political question and we're not going to get involved or does step into decide some specific legal question, but in a broader sense who the winner of the election is?

Melissa Murray:

Well, luckily, three members of the Court actually have experience handling this kind of election litigation from Bush v. Gore, so Amy Coney Barrett, if she is confirmed, was on the Bush team down in Florida, as was Justice Kavanaugh and Justice Roberts, so that will be invaluable experience, I think.

Leah Litman:

Yeah, to help advance neutral principles of counting votes, and voting rights.

Melissa Murray:

So I mean, think about that. Doesn't tossing this into the Court really undermine the Court's legitimacy, especially if you think about this history where three of nine justices actually have experience doing this kind of thing in an election that was hotly contested, and a Supreme Court decision that resulted in the election of a president that was also very controversial.

Leah Litman:

I mean, you would think so, but on the other hand did Bush v. Gore ultimately have that much of an effect on the public perception of the Court's legitimacy? I think it did in a certain segment of the lawyerly community, but I don't think the broader public now today views the Court as meaningfully different than it did before Bush v. Gore, at least before Justice Ginsburg's passing, and we went into this fight about her replacement. I don't know.

Melissa Murray:

So this is where me being 150 years older than both of you. It's like I remember Bush v. Gore. I was in law school during Bush v. Gore, and it was like a huge deal, and maybe it was just by a virtue of the law school I attended. All they wanted to do is talk about Bush v. Gore for probably two years afterwards. So it looms large in my mind.

Kate Shaw:

It looms large, but I think that Leah might be right. Justice Stevens writes in Bush v. Gore that the clear loser of the 2000 election is I don't remember the precise language, but the Court's status as an impartial guardian of the rule of law, I think. He deeply believed that, although he didn't like to talk much about Bush v. Gore. None of them did, right? I think it was a bruising and even kind of traumatic experience for the justices and the clerks that time.

Leah Litman:

It's the decision that shall not be named or cited, or serve as precedent, etc. etc.

Kate Shaw:

Totally, yeah. Scalia would famously say, "Get over it," when asked about it publicly, but I think Leah, you might be right that there was a short-term hit in public confidence that Bush v. Gore caused, but I think if you were the Chief Justice, and you were reflecting on how much damage the Court sustained by appearing to resolve and appearing to resolve along partisan lines that election dispute. I'm not sure. I wish I could say it was a near-fatal blow to the court and the court could not sustain another such blow, and thus, there has to be a way for the court either to stay entirely out of it or to find a way to reach some apolitical consensus that sort of transcends the party of appointing president.

Kate Shaw:

I would hope that would be the case anyway, but I think, yeah. The public opinion polling on the Court in Bush specifically doesn't necessarily bear out Justice Stevens's prediction and it pains me to say that.

Melissa Murray:

That's a good segue to talk about how the institutional dynamics of the Court will be shaped. I'll just say I think one thing that distinguishes this moment from 2000 is that we did not have a sitting president who had already called into question the impartiality of sitting judges, to the point where the Chief Justice felt compelled to publicly address it and say, "There are no Trump judges. There are no Obama judges. There are just federal judges doing their level best," and on and on. That wasn't the case in 2000, so I wonder how much the last four years and the assault on the judiciary as an impartial institution will shape the way the Court takes up what is likely to be an election-related challenge in this term.

Melissa Murray:

They've basically cleared their docket in order to take on some kind of existential challenge, and I think it's not unlikely we'll see it, but I think that makes it different.

Kate Shaw:

I think that's a really important point, and I did wonder last night whether the justices, and the Chief in particular, were watching the debate. I mean, every time the President opens his mouth and says, basically, "They're my Justices," the same way he would talk about my generals. I wonder if that-

Melissa Murray:

My beautiful justices, my beautiful Court. It's going to be beautiful.

Leah Litman:

The best justices, the best people.

Kate Shaw:

I wonder if that inches the Chief Justice closer to the position that the Court can't possibly retain its legitimacy, and resolve an election dispute in the way that President Trump is projecting that he wants and expects it to.

Leah Litman:

We should go onto talking about the dynamics of the court, but I'm a petty B, and I just need to make one side note, which is that the U.S. Court of Appeals for the Seventh Circuit just issued a decision saying that the RNC and Republican legislature actually didn't have standing to appeal the decision in Wisconsin expanding the mail-in deadline, so it's very possible that the Supreme Court issued a decision in the case without jurisdiction so hastily and so shoddily, forcing Wisconsin voters to vote in person in the midst of the pandemic. Now, to the dynamics of the Court.

Kate Shaw:

Can I just let the record reflect that Leah heeded the directive that we keep this clean. She referred to herself as a petty B.

Melissa Murray:

Thank you because I still have to work here when this is over. This podcast does not pay.

Melissa Murray:

Okay.

Kate Shaw:

Good to know.

Leah Litman:

I try. You'll notice I paused.

Melissa Murray:

Thank you.

Kate Shaw:

You did great.

Leah Litman:

Now to the dynamics of the Court. So we also wanted to talk about what this new term and the possible confirmation of a new justice might do to the behavior of the court as a whole, and to individual justices. So one thing that I am going to be watching is how Justice Breyer and Justice Kagan respond. We saw them last term, and over previous terms. They are the more likely of the more liberal justices to compromise and find middle ground with people like the Chief Justice. Are they going to continue to do that, but clip their wings even further to try to appeal to someone like Justice Kavanaugh or are they going to say, "No. It is time to unleash my fiery dissents," and Justice Kagan's powerful rhetoric in service of more liberal principles?

Leah Litman:

Realizing that trying to get Justice Alito or Justice Gorsuch, or Kavanaugh's votes in some of these cases might be a fool's errand. I don't know, but that's one thing I'm watching.

Kate Shaw:

It's a great question, and I particularly wonder in religious liberty cases where the substitution of a Barrett for Ginsburg could just be... At least there were five votes for a lot of things anyway, but there were actually seven votes in some of these religious liberty cases last term, and if there's no way to shape in a more potentially moderate direction, which is I think maybe some of the... We might not have all agreed about why Breyer and Kagan joined the conservatives in some of these cases, but whatever the reason is, those dynamics have surely shifted, and so I'm always in favor of Justice Kagan unleashing the dissents

Melissa Murray:

We'll go from the appeasement Neville Chamberlain compromise position to a true Winston Churchill. Like Rucho style, but

Kate Shaw:

In single term, yeah, maybe.

Melissa Murray:

Maybe.

Kate Shaw:

It's possible, although I wonder whether she decided religious liberty is not the area in which to stake out that terrain, and these structural questions about democracy, Seila Law, and Rucho is, I guess, a little bit more, but it's presidential power, democracy, those kinds of themes are the ones that she is really going to the mat and fight for, and maybe stick with the appeasement strategy in other domains. I'm not sure. I also think it's possible that you could have a Kagan, Breyer, Roberts, Kavanaugh pragmatist bloc on some matters, and then they have to find one. Again, hope springs eternal around election-related issues.

Kate Shaw:

I wonder if that's a possibility, a possible bloc. I'm sure that they would love nothing more than to resolve an election dispute in a way that appears to transcend partisanship, and that is a bloc that I could imagine... I'm hesitating because certainly I'm not sure, but I could imagine coalescing.

Melissa Murray:

Leah wants to jump in. Leah dissent. Leah?

Leah Litman:

One, I dissent. Two, I just feel like I would be remiss if I didn't note that is something like a personal patriarchy hellscape for me where we have now shifted to a world in which people are talking about Brett Kavanaugh as the median justice or swing justice. I say that only because his confirmation hearings

were two years ago at this point, at which the allegations of sexual assault came out, and in which he said that this was a conspiracy to get back for the Clintons. I just don't know that I have moved beyond that, and I don't know that it is responsible to move beyond that entirely or just to forget those allegations, and what came out around it, and so just discussing him as a median justice is just a little odd to me.

Melissa Murray:

I think focusing on who the median justice will be is where a lot of people are looking. I'm actually really interested in what happens to, what remains of the liberal wing of the court. Justice Ginsburg and Justice Sotomayor really held that down, and often Kagan and Breyer would peel off. This really leaves Justice Sotomayor on her own out as the anchor for the liberal flank, and especially in issues that involve social justice. I'm thinking about the two of them dissenting in tandem, in the Little Sisters case, Trump v. Pennsylvania last term. I think that will be difficult.

Melissa Murray:

I was reminded of when Justice Sotomayor came to the Court, Justice Ginsburg I guess was for want with the female justices, gave her a jabot, which Justice Sotomayor put on, but then never wore again. This is not my jam. I'm like, "This is your jam. Thank you so much." But I think they actually had a warm relationship being New Yorkers, and I think there is sort of a personal and professional kind of being on her own on the Court in that respect. And then the other person I think who's really someone we ought to be watching is obviously got to be the Chief Justice, whose behavior I think will change in profound ways. We saw the Chief Justice voting with the liberals a lot in key cases last term.

Melissa Murray:

So June Medical comes to mind. Does he do that now where there really is no incentive to do so? There are three liberal justices to join them only gives them four, and you still have a five-person conservative majority. Do you stick and hang tough with the conservative bloc in order to be able to control who writes the opinion, and to be able to shape the majority opinion? I think there's going to be a really strong incentive for him to behave in ways that prioritize his ability to control the direction of the Court, in just the same way his joining the liberals was about maintaining control over the direction of the court.

Leah Litman:

Yeah.

Kate Shaw:

Yeah. Sticking with his conservative colleagues and shaping opinions may be a more narrow ways. It seems much more likely to be-

Melissa Murray:

I also think we ought to mention, too, there is the regular docket, but I think the fact of a 6-3 conservative super majority may also shape dynamics on the shadow docket. So these are the cases that come up on stays. They don't have full briefing. They don't have full oral argument, but there's a lot of activity that is happening on the backstage of the court with regard to the shadow docket, and with a

six-three conservative majority I could imagine you could see the DOJ, which has already made quite significant use of the shadow docket being even more emboldened to do more with it at this point.

Leah Litman:

So Chris Wallace is nervously signaling that we are running short time. Perhaps we can go to our Court culture segment because this is something we had wanted to talk about for the last two episodes, but were not able to fit into them, so I wanted to make sure that we did so this time.

Leah Litman:

The topic kind of came into clear picture when we saw the images coming from Justice Ginsburg's funeral, and the efforts to honor her at the Supreme Court. In particular there's a tradition of a Justice's clerks serving as honorary pallbearers, and standing guard at the funeral and honorary proceedings for the Justice at the Court, and so Justice Ginsburg's clerks were all standing on the steps of the court, and those images underscored something that I there we had discussed on the episode with the Appellate Project and the MacArthur Justice Center, which is the homogeneity of her clerks, and specifically the fact that the overwhelming majority of her clerks are white, and she had only ever hired one black clerk during her many years on the Court.

Melissa Murray:

So I have thoughts about this. One, I think that it is fair game to criticize it. It is part of her record. I think it's an appalling part of her record, and I think it's fair game to talk about it. I don't think it diminishes the other work that she did. One of the things that I've been seeing on Twitter is that Justice Ginsburg was racist like this record makes her racist. I think that's overstated in some degree. I also think that there has been a lot of discussion about whether her particular jurisprudence was about elevating a kind of traditional white feminism that did not include women of color, and I think that is actually objectively wrong.

Melissa Murray:

One of the things that she did in her jurisprudence was to challenge these sex role stereotypes that posited women as home-bound caregivers, and men as breadwinners, and she wanted to dismantle that to allow men to be caregivers if they wanted to, allow women to be breadwinners if they wanted. But I thought that was especially important, not just for all women, but particularly for women of color and black women specifically. Black women have always worked outside of the home. We frequently are the breadwinners for our families, so any kind of jurisprudence that elevates the disruption and dismantling of those kinds of stereotypes redound to the benefit of black women, so I just want to say that.

Melissa Murray:

Did she speak in the language of intersectionality? No. But the language, the vernacular wasn't there at the time she was litigating those cases, but I do think her jurisprudence, and her work as an advocate is shot through with what we would later call intersectional flavor. I also think talking about her record on clerk hiring is misleading, in part because it is absolutely appalling to have only one black clerk, but focusing unduly on her record leaves aside the many other judges and justices throughout the federal judiciary who have similar records or are also, I think, very uneven in terms of their clerkship diversity.

Melissa Murray:

So to focus on her choices makes it a kind of individual choice when it is both an individual choice, and part of a larger systemic and institutional problem that's not just about the judiciary, but also about the law schools, and how we fuel the pipeline of clerks getting into the system, and so this is something that I care a lot about. I worked a lot on this at Berkeley trying to do a lot of work on it at NYU. Law schools have to do more to get more diverse students into the pipeline, and we also have to encourage judges to be broader in who they look to, who they ask for recommendations, and who they seek counsel from when they're selecting their clerks.

Melissa Murray:

The focus on her I think diminishes all of that, and also diminishes space to talk about the justices who are doing it well, and Justice Sotomayor has actually done a very good job of having a diverse chambers, always, and Justice Kavanaugh famously had the first all-female clerks chambers in his first year on the court. So we also take away space to talk about that as well.

Kate Shaw:

It is very possible for a justice like Sotomayor for any of them, but Justice Sotomayor is proof positive of how doable this is. You actually can have diverse classes of law clerks and she has. I think has done amazingly, both on the Court of Appeals, and on the Supreme Court. It is possible to do better, and she's living proof. Okay, so one thing I just want to flag because we really are now over time but, of course, Wallace has completely lost control of the conversation. So let's just charge ahead, which is that... because it's just a preview of something we're going to come back to, which is a discussion has been swirling about Supreme Court reform. If the Democrats take the White House and the Senate, should they add more seats to the Supreme Court?

Kate Shaw:

Should they pursue something like term limits? Potentially, strip jurisdiction from the Supreme Court over certain kinds of disputes. So we're not going to talk about any of that today because we are working on a special episode on structural reform questions, and the Supreme Court writ large, so stay tuned for that.

Leah Litman:

One other thing to highlight, the Court just released its hearing list for the October sitting. There are 25 advocates arguing at the Court, four our women, zero are women of color, so this is also something that we are going to be watching throughout this term, as we did last. That is all we have time for but, of course, as the Court's term gets underway, we will be back to keep you up to date on what's going on at the Court. We're so grateful to NYU Law for inviting us to kick off their 2020-2021 Forum Series; to Melody Rowell, our terrific producer, and Eddie Cooper, who does our music, and as always, we are grateful to all of our terrific listeners, especially those of you who support the podcast by being a regular subscriber on Glow.

Leah Litman:

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