

Intro:

Mr. Chief Justice, may it please the court. It's an old joke, but when a man argues against two beautiful ladies like this, they are 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."

Kate Shaw:

Hello and welcome to a special episode of Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. For this episode we're your hosts. I'm Kate Shaw.

Leah Litman:

And I'm Leah Litman.

Kate Shaw:

And as you probably know, this week there is a lot happening at and around the Supreme Court. So first, and most obvious, the confirmation hearings for Judge Amy Coney Barrett. But also second, the cases that the court is hearing, as well as some action that is happening on its stay docket. So there is a lot to cover, and rather than doing this as one seven hour episode delivered to your inbox on Monday, we thought we would do a short episode today just on the confirmation hearings, and then Monday we'll bring you a regular episode, including the court's activities for the week.

Leah Litman:

Because we're masochists.

Kate Shaw:

So we're just going to do that, because we're masochists, and maybe you are too.

Kate Shaw:

Leah, you want to start us off on the confirmation hearings? What were some of the notable themes that came through during the hearings?

Leah Litman:

Sure. In the opening statements in particular, but also in the follow up questioning, there seemed to be some consistent themes emerging between the two parties. On the Democrats' side, the Democrats were extremely focused on the Affordable Care Act, and the threats to the statute. They focused in particular on the pending case that the court is going to hear in November, the week after the election, California v. Texas, and they brought photos of people who depend on the Affordable Care Act. Kind of like bringing family photos to a gunfight.

Leah Litman:

I think that it was a good strategy to talk a lot about the Affordable Care Act. But I worry that focusing on the particular case in November misses or obscures the broader picture, because the Affordable Care

Act is in Abbe Gluck and others' words, Abbe Gluck is a professor at Yale who's studied the Affordable Care Act I think more than anyone, the Affordable Care Act is the most challenged federal statute in recent memory. There was the original constitutional challenge, and NFIB v. Sebelius, the statutory challenge that could have ended the exchanges that are the backbones of the Affordable Care Act, King v. Burwell. There is the funding challenge to risk corridors, Moda, the court, her last term, there are challenges to the contraception mandate, Hobby Lobby, and other cases.

Leah Litman:

And with a 6-3 conservative court, the Affordable Care Act simply would not have withstood all of those challenges. There's just no question about that. And so-

Kate Shaw:

Right, if Barrett had been on the court during NFIB, during King v. Burwell, absolutely the ACA would be no more.

Leah Litman:

Right. So I just don't think there's a reason to think that was the end of challenges to the Affordable Care Act and focusing on the November case, which just as a legal matter is laughable and ridiculous, is I worry missing the broader picture, and also setting up the Democrats for a real failure in pushing toward court reform if they say, "If you confirm Justice Amy Coney Barrett, the court is going to demolish the Affordable Care Act," when that doesn't happen, are they going to say, "Okay, fine, the court isn't political, you're right, let's just back off the court?" This is some of my concern with the narrative that they are spinning that is focused only on this November case.

Kate Shaw:

I think that's a really good point. And also, if you are going to focus just on this case that's scheduled for argument on November 10th, it may make sense, rather than trying to just pin Judge Barrett down on how she'd likely vote on severability, which seemed to be their strategy, to emphasize the fact that the reason this case is in the Supreme Court at all is because a bunch of red state attorneys general and the Trump administration are trying to get the Affordable Care Act thrown out. It was just mind bendingly infuriating to see all these Republican members of the committee roll their eyes at the suggestion that the ACA could be invalidated in its entirety when that is what the president of their party is seeking to do. So it just felt like a little bit of a mistaken emphasis, I think you're right, too narrow to focus just on this challenge and not the broader legal strategy of trying to throw out the ACA using just this litany of different theories to do it, but also missing the point that the ask is in some ways where the action is as opposed to how she would likely vote, or at least not exclusively how she would likely vote.

Leah Litman:

Right, exactly. I think the one senator who did this more successfully than others was Senator Whitehouse, who brought out the fact that the judge in Texas who invalidated the Affordable Care Act on this theory and said that the rest of the Affordable Care Act has to fall as well was actually an aide to Senator John Cornyn of Texas before he became a judge.

Kate Shaw:

Right. So this outlandish theory that it's ridiculous that the Democrats are suggesting might carry the day, I think that's right on the merits, on the substance, and I do think there's pretty cross ideological consensus about that. But it turns out even really bad legal theories can get a single district court judge on board.

Leah Litman:

Yes. And court of appeals judges too.

Kate Shaw:

And court of appeals judges, and then this is how things move from off the wall to on the wall, and all of a sudden I don't at all have a hard time counting to three or four, and I don't think it's that hard to maybe count to five on maybe the whole thing getting thrown out. So it just felt really bad faith to suggest this wasn't a live possibility. It is.

Leah Litman:

Absolutely.

Kate Shaw:

So let's pivot from the ACA. What else ... Did the Democrats talk enough about everything else that's at stake?

Leah Litman:

I think that they tried to, but I think in their focus on the Affordable Care Act they may have under-emphasized the other issues that the 6-3 conservative court could change. Voting rights and law democracy didn't really come up until the second round of questioning, which I think is really striking given that the court granted certiorari in the big Voting Rights Act case, and as the hearings were happening, the Supreme Court granted a stay of the decision halting the government's attempts to end the Census count early. The court allowed the government to halt the Census count as these hearings were happening, and the democracy issues I think are so important to thinking about the role of the court in our constitutional democracy that I was sad to see that they weren't really happening or brought to light until the second round of questioning.

Kate Shaw:

Yeah, and I mean I think this speaks to, it's not like they weren't germane to the things Judge Barrett was saying. She again and again returned to this proposition that courts don't make policy, that basic principles of democratic accountability and legitimacy means that the elected branches of government are the ones who make policy. And okay....

Leah Litman:

The Voting Rights Act would like a word.

Kate Shaw:

Right, right, right. So A, that's right but B, it also, it feels to me as though if democracy, if courts aren't going to make sure that democracy works so that there actually is some reflection of the will of the people, that actions of elected officials represent, the whole thing seems to me to collapse. So it just felt

like this small example of the inability of I think a lot of Democrats on the committee both to really listen to what she was saying and respond accordingly, and to actually incorporate developments in the world into their exchanges with her. It just felt like there was a wooden and scripted quality to a lot of the exchanges. Not to paint all of the Democrats on the committee with the same brush. There was I think a real range. But close listening and responsiveness I think was not a real strength of the questioning on the committee.

Leah Litman:

Yeah. That was the Democrats and the theme that emerged on that side. The Republicans were also unified around the following themes. One is the idea that Judge Barrett simply has no ideology whatsoever. They were very keen to be pressing this point. And the other was this victim narrative, which we've brought up before. The Republicans repeatedly brought up Judge Barrett's religion, and insisted the Democrats were attacking her for her religion when in fact no Democrat brought up her religion at all. Only Republicans did. So no Democrat said anything about her family beyond praising them in glowing terms. And yet Senator Joni Ernst and Senator Josh Hawley repeatedly brought up the Democrats' bad faith attacks on her religion. And it was almost like they had made their statements in advance and expected that the Democrats would say something about her religion, and they just said it anyways even though that didn't materialize. But it was extremely weird.

Kate Shaw:

Yeah. And then, because there had to be this straw man manufactured, Tom Tillis at one point ended up reading mean tweets by random people and bots about Judge Barrett and making her sit there and listen to them. Because the Democrats actually didn't give them any material to work with. They really were I think very respectful, did not talk about faith, only complimented her family, and I think to that degree actually they were quite disciplined. I think they learned the lesson of Dianne Feinstein's missteps in her Seventh Circuit confirmation hearing, and I think at least on that point, I think they spoke with one voice.

Leah Litman:

Yeah. And Tom Tillis literally broke quarantine to read mean Tweets into the record, just to be clear.

Kate Shaw:

That's awesome, thank you so much, internet.

Kate Shaw:

Okay, so unified in some ways, but there definitely was some variation among the Democrats, and some of this was good, a divide emphasis strategy, I think, so highlighting the different issues that are potentially at stake. Senator Booker talked about Roe, Senator Harris talked about LGBT rights, Senator Klobuchar emphasized voting rights, both Senator Feinstein and Senator Booker tried to press her on things that President Trump had said or intimated. She was remarkably nonresponsive, I think with those lines of questions.

Kate Shaw:

In some ways, them trying to divide and conquer I think was good. Some of this was less good. There was not I think high level agreement among the Democrats about whether to treat this hearing like a

normal confirmation hearing. So I think in particular the older members of the committee who went first, right, Dianne Feinstein is the ranking member, "Hello Judge Barrett, top of the morning to you," like a very normal, cordial exchange. And then some of the senators who went later with the questioning, proceeds by seniority, were basically pretty direct about the fact that they thought the fact that this was ongoing at all was an embarrassment to the country, to the Senate, to democracy, to the Supreme Court. That it was happening now, weeks before November 3rd, in the wake of the still raging pandemic, with lots of members not able to participate in person because they're quarantined or being careful.

Kate Shaw:

And where the Senate has declined to take up a badly needed package of legislation, of aide, around COVID, because this is the priority. Cory Booker really made this point very explicitly. He said nothing about today is normal, this is not normal. Sheldon Whitehouse, remember, had a memorable line, said the whole thing, just like Trump, has been an irresponsible botch. Klobuchar saying we need a reality check, we shouldn't be here now, and this again was more about the Coronavirus relief package or the Senate's failure to consider it.

Kate Shaw:

So they weren't really on the same page about whether this should be treated like a normal hearing. I mean this would have been better if they had been unified in that way.

Leah Litman:

I think it would have been better just because that would make it easier to extract bigger takeaways from there. If you repeat the same message, that message is more easily heard. And I think there was also a good amount of variety about whether to act as if Judge Barrett's views on certain issues were somehow unknown. Senator Feinstein questioned Judge Barrett as if Senator Feinstein was trying to ascertain the nominee's views about abortion and Roe and Casey, when in fact she has made her views quite well known in public writings, among other things. And that was quite different from Senator Harris, who in her first opportunity for questioning, began with, "I would suggest that we not pretend that we don't know how this nominee views a woman's right to choose and make her own health care decisions."

Leah Litman:

Again, there was just some disparity between the Democrats about whether to act as if this hearing was normal and should be taking place and also about whether to act as if they didn't really know what Judge Barrett's views on Roe and stare decisis were.

Kate Shaw:

Yeah, and I mean credit to Josh Hawley, which we don't give him a lot of credit on this podcast, but in his closing, he said, "I will proudly vote for a pro life nominee to the Supreme Court." And then she just said, "Thank you," warmly, and smiled back. So in some ways that was the closest we got to her agreeing, yes. So maybe you can argue there was a distinction between her being avowedly and proudly pro life, which I think she is and explicitly has ... No, I think she is, of course she is, and she has said she is, and as a personal moral and religious matter, and necessarily voting to overturn Roe. In theory there could be a distinction drawn between those two. I don't think there's any distinction in her particular case.

Kate Shaw:

But I think that Josh Hawley meant to signal both in that sign off, and I thought the warm exchange between him and Judge Barrett was the most revealing thing [inaudible 00:13:40] which is really a low bar. That's the thing we learned the most from was her smiling back at him.

Kate Shaw:

But there was nothing she was going to say, because she both adhered to and I think even further cemented the norms of non responsiveness I think well beyond, it was a little bit rich to hear her continually invoke Justice, then, obviously, sitting Judge Ruth Bader Ginsburg's no hints, no forecasts, no previews, when Ginsburg was actually extremely forthcoming about the centrality of Roe as a matter of equality and liberty. And there's a difference between not forecasting votes in a future case and acknowledging or describing and even offering views on the court's settled law, and she seemed to really offer an expansive vision of what the ... You couldn't even forecast your opinions about things the court had already done, which doesn't quite compute.

Leah Litman:

That was one notable moment. Maybe we should get into some other notable moments from the hearings that might set the stage for some of our final holistic assessments. Maybe we'll break these down into some ludicrous, some revealing, and some high points, if there are any. First the ludicrous.

Kate Shaw:

Yeah, let's start with ludicrous.

Leah Litman:

Okay. One ludicrous moment for me was Senator John Kennedy's, who is the Republican from Louisiana, opening statement. These were actually in his prepared remarks. He offered up the following. Quote, "It hurts to be called a racist. I think it's one of the worst things you can call an American." He also called the Kavanaugh hearings a quote, "Freak show," and a cantina bar scene out of Star Wars, and again these were the senator's chosen, prepared remarks to open the hearings with.

Kate Shaw:

Uh, god. Sasse had a pretty ridiculous self-important civics lecture. He also had this weird aside in which he said originalism was also known as textualism, which whatever you think of these theories, they're not the same thing.

Leah Litman:

Classic Sasse-lighting from one of my least favorite senators. Another low point for me was Senator Chuck Grassley, among others, saying something like, As a mother of seven, Judge Barrett would never invalidate the Affordable Care Act. Which, Scalia was a father of nine. He voted to overturn the Affordable Care Act. And it is also just an odd form of identity politics when they were going apoplectic when Justice Sotomayor discussed judging as a quote "Wise Latina," and here they are saying Judge Barrett's views and votes as a judge will be driven by the fact that she is a mother of seven.

Kate Shaw:

They love returning to it, and her kids sat very impressively still for a lot of the hearing. So I have to say, I have to give them credit for that. But yeah, the convenient invocation of her identity as a mom was frustrating to say the least.

Kate Shaw:

There was a weird exchange with Senator Kennedy. Obviously his opening remarks were bizarre, but then he had this exchange with her which was meant to be, I think, a set of softballs that she just got confused and sort of by and resisted, and so it ended up being a very awkward and tense exchange. He meant to make the point that she may have developed views that won't necessarily influence the votes she casts or the opinions that she writes. But it was sort of an ineptly executed colloquy. And then she I think, I don't know if she surprised him, she certainly had my jaw on the floor when she resisted acknowledging that she had any views about climate change. I think he meant to say you can have views on climate change, that doesn't tell us how you're going to vote in a case about a climate change reg, say.

Kate Shaw:

No. She said, "I've read some things about climate change. I wouldn't say I have firm views on it." Which again kind of had my jaw on the floor. In a separate exchange, she said she was willing to make some concessions that certain things are beyond dispute. She said COVID is contagious, smoking causes cancer. But then bristled at the suggestion that humans cause climate change. And both of those climate change exchanges were just so ... They did suggest that the universe that she inhabits is one that has a certain set of views and beliefs, and that things that are basically beyond dispute, like the existence of climate change and humane involvement in causing climate change, are actually up for dispute. And that is a very fringe view. And I found it extremely revealing that she twice committed herself to the question that maybe she reads all sides of the science and doesn't have settled views on climate change.

Kate Shaw:

It also just highlights-

Leah Litman:

Maybe it is a hoax perpetrated by the Chinese. Do we have firm views on that? I don't know.

Kate Shaw:

You're trying to draw her into a political controversy and she won't be drawn in.

Leah Litman:

Right.

Kate Shaw:

And that was a pretty shocking moment, I thought.

Leah Litman:

Yeah. So Senator Kennedy has been coming up repeatedly in these ludicrous moments, but I also have to bring up the moment when he asked her who does the laundry in her house, which is just so

offensive to me. Like you would never ask a male judicial nominee who does the laundry in your house. Again, I hated that entire aspect to the hearings.

Kate Shaw:

And I wish I had seen a flash of anger in her eyes, like how about your house, Senator Kennedy? But there was none of that. And I get, look, they have to obviously be respectful. But it didn't even seem to bother her. At least so far as you could tell, she just laughed. Because it should be you, obviously, but it can't be. You're too busy. So who is it? What's your secret, right? That was obviously the subtext.

Leah Litman:

Yeah.

Kate Shaw:

Okay. So those were some ludicrous moments. What were some revealing moments, did you think?

Leah Litman:

This one probably bridges the gap between ludicrous and revealing, but Senator Graham is questioning Judge Barrett about super precedent and specifically about *Brown v. Board of Education*, and he was trying to say something about how there's no question that *Brown* is good law, and no one is asking for *Brown* to be revisited. And in the course of explaining why segregated public schools and segregation was not going to return, he referred to us not going back to the quote "good old days" of segregation. I think he meant it as a joke, but it was just extremely gross for him to say that.

Kate Shaw:

Yeah, just this sentimental invocation of pre-*Brown* state of affairs. I mean, we're probably being uncharitable, but it was a strange thing, and sometimes these asides are revealing. What about Barrett herself? what were some revealing things you thought she ... There was the climate change reveal, which I think we both thought was revealing. What else?

Leah Litman:

Yes. I also think some of her statements about the Affordable Care Act were revealing. She tried to say that the ACA's protections for pre-existing conditions were not an issue in the Affordable Care Act case before the court. As numerous people pointed out, this is of course not true given that the second argument about severability is that all of the Affordable Care Act including its protections for pre-existing conditions must fall. On top of that, she insisted that the only issue in the Affordable Care Act case is severability. That's also not true. You only get to severability if you conclude that the minimum coverage provision is unconstitutional.

Leah Litman:

And then she also refused to say whether she thinks Medicare is constitutional, which I don't even know what to say about that. It is both indicative of how potentially fringe her views are, but also I think perfectly encapsulates that a 6-3 conservative court poses to any agenda that the Democrats might reasonably have if she things that Medicare is unconstitutional or potentially unconstitutional.

Kate Shaw:

Or not beyond reasonable disagreement. So why not Social Security, right? It literally, all of the federal government's work, the work of agencies, statutes passed by Congress, I mean I don't think it's alarmist to say that all of that is drawn into question if you have a Justice Barrett on the court.

Kate Shaw:

But one of the things that was so frustrating about the hearing was that there wasn't any really, any explicit grappling with any of that, right?

Kate Shaw:

Okay, so on the law of democracy, which we've mentioned a little bit, here I thought some of her non responses were some of the most important moments of the hearing, honestly. She refused to say whether the constitution or federal law gives the president the authority to unilaterally delay a presidential election. She said she'd have to research it, talk to her law clerks, talk to her colleagues, consider the matter. I mean, this is a no brainer, right? This is a no. No, it doesn't. You're a student of the constitution. You understand the basics of our democracy. Of course the president has no unilateral authority to move an election.

Kate Shaw:

The president making outlandish claims doesn't automatically turn those claims into reasonable ones, and this is a place where she could have potentially assuaged some very serious concerns about the things the president might do and the ways the court might respond to things the president might do by saying very clearly, "No, I'm not ..." She could even have said it in a way that wasn't direct or confrontational. She could have said something like, "I'm not aware of any arguments, and I'd be surprised if there are any good arguments that the president has the ability to unilaterally delay the election."

Kate Shaw:

I was reminded of this moment in John Roberts's confirmation hearings actually, when I think it was Senator Leahy was pressing him, and this was a couple years, this was 2005, not so far post 9/11, and there's a long exchange about Justice Jackson and about Korematsu, and then he's basically asked about, Korematsu at this point had not been formally repudiated by the Supreme Court, what about a policy that involved rounding up individuals on the basis of race or religion or national origin? And Roberts said rounding people up and turning them on the basics of one of those characteristics, and Leahy said, "Yeah."

Kate Shaw:

Look, this was 2005, this was the height of the War on Terror. He could easily have said, I can't opine on something that might come before me." He could have said that. And you know what he said? "I suppose a case like that could come before the court. I would be surprised to see it. I would be surprised if there are any arguments that could be made in defense of it."

Kate Shaw:

And that I think has really important symbolic and expressive value. It's suggesting that certain kinds of things are off the table, are totally inconsistent with our constitutional values and thus shouldn't be

seriously considered, and it's okay to say that, and it's okay to draw those lines. And she just, I think she drew none of those lines.

Kate Shaw:

So there was the moving of the election, there was the question from Senator Booker about whether the president should publicly commit to peacefully departing office if defeated. There too, she said, "I think you're trying to draw me in a political controversy because there's a question about whether President Trump will leave." I mean, again, this is a clear, this is an easy softball. The answer is yes, of course the president should commit to that value, that's basic.

Kate Shaw:

And then the second time when he followed up, she said, "Well, there is a tradition of peaceful departures, and Americans accept results." But she conspicuously didn't say defeated candidates have to accept results. I just felt like those were extremely disappointing and potentially really worrying signals about her likely approach to one of these cases should they arise.

Leah Litman:

Right. I mean, it suggests maybe either that she is concerned that the president might pull her nomination, and that that concern is more important than signaling that these deeply anti democratic, authoritarian steps are inconsistent and out of bounds with our constitutional tradition, or alternatively it suggests that she actually does think it is actual controversy about whether presidents can do these things. She refused to say whether voter intimidation was illegal, she refused to say if she agreed with Justice Scalia that the Voting Rights Act was the perpetuation of racial entitlement, and she refused to comment on whether voting discrimination still exists as the chief justice said it did in his opinion in Shelby County. So the law of democracy issues I think were some of the most concerning in the hearing.

Kate Shaw:

I totally agree. And again, she could have reaffirmed basic principles of participation and non-discrimination, and democratic values, and she, for whatever set of reasons, I think you identify a couple of possibilities, was unwilling to do that.

Leah Litman:

Right.

Kate Shaw:

Reproductive justice?

Leah Litman:

Yeah.

Kate Shaw:

Also pretty concerning. She, after herself bringing up Brown and super precedent, got really flustered when asked whether Roe is super precedent, and asked Senator Klobuchar, "What do you mean by super precedent," after having just used the term herself. But clearly she doesn't. She doesn't think it's super precedent. She says, "Look, the fact that I'm getting all these questions about it means it's still in

dispute." And I think she clearly thinks that it was demonstrably erroneous to use Justice Thomas's formulation. And I don't think she thinks that it has created, or it and Casey have created a workable set of standards.

Kate Shaw:

I think to me the real action is what she thinks reliance interests mean in the analysis of whether to overrule a case like Roe, and I just, I cannot ... I mean, those have to be taken seriously, but I can't imagine her deciding that the reliance interests are strong enough to overcome the other considerations.

Leah Litman:

Not at all, just given that she, like Justice Thomas, in her academic writings has written that refusing to overturn wrongly decided case on the basis of effectively policy considerations like reliance interests is inconsistent with the constitution. So she things stare decisis itself might violate the constitution in some instances.

Kate Shaw:

Yeah, or certainly a strong form of it. Yeah, no, I think that's right. She wouldn't even comment on whether Griswold was correctly decided, this important Roe predecessor case that establishes a right to privacy there, marital privacy in using contraception. And she did something that was very Bork-y. Remember one of the things that really got then Judge Bork into trouble when he was being considered for the Supreme Court was his criticisms of Griswold, and she didn't criticize Griswold. And he actually did something very similar, which is to say, "I can't imagine anybody trying to enforce any kind of criminal prohibition on contraception, or police don't go storming into bedrooms." Uh, okay. Sometimes they do, actually.

Kate Shaw:

But he said it's unlikely that it would arise again. But he had been explicit in his criticism. So she wasn't explicit at all in her criticism of it, she refused to comment on it. All she did was to say that it's unthinkable that it would be revisited. But that is wrong.

Leah Litman:

I think, yeah, exactly, like Justice Thomas's writings have likened contraception as well as abortion to eugenics. Obviously the entire Hobby Lobby line of cases is chipping away at access to contraception on the basis that there are sincere religious objections to it. Also, you have numerous senators as well as sometimes judges referring to contraception as a kind of abortion, as abortifacient.

Leah Litman:

That was also concerning.

Kate Shaw:

Yeah, so it is certainly conceivable to me that she joins the Thomas wing of the court on this too, which I think does carry with it a degree of skepticism about constitutional protections for access to contraception. She referred very casually, to go back to eugenics, to the eugenics portion of the Indiana abortion law that the Seventh Circuit struck down in 2018. That part, this sex selective and disability

selective abortion ban, was actually not at issue before the Seventh Circuit, it was just this fetal remains disposal provision. Easterbrook went out of his way to talk about the so-called eugenics provision of the law. She didn't write but she joined that portion of the opinion. And again, she casually mentioned, "Oh, are you talking about the eugenics portion?" Which was not the name of the statute.

Kate Shaw:

Easterbrook even used quotes, he said, "I'm going to call it the eugenics provision," acknowledging that that was a fairly provocative way to describe it. But there were no air quotes around her use of eugenics when she talked about it.

Leah Litman:

Yeah. She also refused to say whether in vitro fertilization was manslaughter, or was sometimes manslaughter. She was part of a group that had called for IVF to be criminalized. One of the reasons why this was concerning is because sometimes one part of an IVF treatment is after you implant fertilized eggs, there is a process called selective reduction, where if too many eggs take, fertilized eggs take, you remove some of them, and some of the critics of IVF say this is a form of abortion and manslaughter, and several senators pointed out that this was very disturbing. Senator Tammy Duckworth has pointed out that she has relied on IVF in order to have children, and so it was very disturbing to see a nominee refuse to say whether IVF was a form of manslaughter.

Kate Shaw:

On LGBT rights, there was this really striking, startling disconcerting moment early on when she referred to sexual preference rather than sexual orientation. People caught this immediately. And I think also it's reflective of the universe I think she inhabits. I think she probably doesn't spend time around a lot of LGBT people, or there's no way she just uses the term sexual preference. It's an offensive and dated term.

Kate Shaw:

She then did have a chance later that day, Senator Hirono came back to her and said, "You used kind of an offensive term," and she didn't offer an explanation, and she also didn't say, "No no no, I didn't mean to broadcast the view that sexual orientation is some sort of choice, I just misspoke." She just said, "Oh, I would never intentionally use a word that is offensive." But this is something that is not just semantic. There are real doctrinal implications of deciding or broadcasting a view that sexual orientation is a choice. Equal Protection Doctrine does focus to a degree on immutability. So it matters a lot if you think sexual orientation is a choice, the constitution protects you against discrimination on that basis a lot less than if in fact it is not a choice.

Kate Shaw:

That was, I think that people jumped on that, but I think rightly so it was a terminological choice that had real substantive implications, and she didn't do anything really to assuage concerns when she had a chance with Senator Hirono.

Leah Litman:

Those were some of the revealing points. Any high points? Any? Bueller?

Kate Shaw:

The mics went out twice.

Leah Litman:

That's true. That's true. I'll go with that as my high point too.

Kate Shaw:

I think the Democrats were disciplined and effective in making Amy Coney Barrett as a person sort of irrelevant, and that I think is correct. It was, I think it was again, not as disciplined or unified as it should have been, but her substantive positions and the process writ large were the two things that however imperfectly were the focus of the Democrats in the hearing, as opposed to Amy Coney Barrett, who by all accounts is an extremely nice colleague and wonderful to her law clerks and respectful to the lawyers who practiced before her, and I think that they were substantive and rigorous, but basically polite and respectful. And I think that actually, I'll call that a high point.

Leah Litman:

Okay, great. I'm glad we could think of one besides the mics going out. I guess maybe we wrap up with some takeaways from the hearings, or just our high level assessments of them.

Kate Shaw:

Sure, sounds good.

Leah Litman:

We opened with saying that there was a disconnect among the Democrats about whether and to what extent to pretend that her views were somehow unknown on certain issues. I found it rather frustrating for Democrats to think that they should use questioning to discern what her views are when it's not at all a mystery what her views are on issues, particularly issues on reproductive rights and justice. It was additionally frustrating for me that we have reached a point in confirmation hearings where someone won't or refuses to discuss views that they have already expressed, so she signed ads which she noted were in her capacity as a private citizen, calling for Roe to be overturned and calling it barbaric and infamous. But it was just as though we had to pretend that she either no longer held those views or we couldn't discuss them. I just found that very frustrating.

Leah Litman:

I just did not enjoy the Democrats, particularly people like Senator Feinstein, asking questions about her views when, again, her views are known, and it was just like watching this thing play out where I was wondering well are the Democrats going to solve this mystery about whether a person who has denounced Roe and called it infamous and pledged to oppose abortion thinks Roe is wrongly decided and might overrule it? It's not a mystery.

Kate Shaw:

No. And in the context of president who for years has been promising to appoint justices who will vote to overturn Roe, I mean, I'm not ready to say let's jettison the whole ritual of confirmation hearings, but I do think that trying to pin a nominee down on how they're likely to vote is just a piss poor use of time when I think we know the answer. I mean I think there are questions about whether strategically she

would be someone who would vote potentially in a pragmatic and institutionally minded way if there's concern about drawing blowback from the perspective of institutional reform, court expansion, things like that if a very quick overruling of Roe and jettisoning of other precedents is something that might increase the likelihood of those things coming to pass.

Kate Shaw:

I think all that is perfectly fair game. And whether and how the court might chip away at versus overruling Roe outright, I think those are also things that reasonable minds can disagree about. But whether she would just, because stare decisis is an important value, decide to adhere to Roe and Casey, is just I think sort of a ridiculous question to spend our time pretending to debate.

Leah Litman:

Yes.

Kate Shaw:

Of course. A frustration is I think that she took even further, I had pulled the Roberts transcript because I remember that exchange about Korematsu, and I read through it, and I was struck by, even 15 years ago, there was just tons more substance than there was this week. And I think that the woodenness of the indication of her methods and her inability to speak specifically about either future cases or past cases subject to this arbitrary set of exceptions, like she'll go deep on Heller and severability, and that just felt like opportunistic, like there's a few things that she's willing to talk about because there are not really political consequences to doing so. And yet no clear explanation of where those lines are.

Kate Shaw:

I do think that this is a new low in terms of the lack of usable, actionable information that a nominee provides. So that I think is one big takeaway. It was not like we learned much from Gorsuch or Kavanaugh. But I think we actually even learned more from them, just from the hearing than we did from her.

Leah Litman:

Yeah. I was also frustrated somewhat about the continued hypocrisy of Republicans on a few fronts. One was they were trying to distance themselves from the idea that Supreme Court justices are political or are on a political team, and yet of course they were arguing that vacancies should be filled only when Republicans had the presidency and the Senate, or they deny that the president is selecting a justice because a justice has particular views, and then last spring and summer we saw them throwing massive temper tantrums and screaming betrayal on the rare occasions when a Republican appointed justice actually diverges on a major case like the chief and Justice Gorsuch on Title VII, or the chief on DACA, or the Affordable Care Act. I just ... There's only so much of that I can take.

Kate Shaw:

Yeah, yeah. And especially when, as we have said, it's clear that she was selected based in large part on the criteria in their own party platform about the views that prospective nominees would have to hold. Trump very clearly has said he wants justices who will vote to strike down the ACA and vote to overrule Roe, and then has more recently broadcast, vote with him in a disputed election case. The Republicans returned to this, and she returned several times to this claim that she didn't promise anybody, she made

no deals, she made no pledges, and of course that's not the point. She doesn't have to. If she's selected because of a pretty broadly shared understanding of how she's going to vote in these cases, no one would ever need to extract a pledge at all. That's not really responsive to the argument.

Leah Litman:

Yeah.

Kate Shaw:

The other thing that I thought was a takeaway that is, I'm not sure how broadly applicable this is because it is so specific to these particular events, but the specter of the Senate continuing this event which could be another possible super spreader event right after the Rose Garden announcement ceremony in which President Trump introduced Judge Barrett to the world, which was definitely a super spreader event, so you have at the hearing mask-less senators who themselves tested positive for the virus. We have a number of Democrats participating remotely, responsibly so. Especially in light of news that just dropped this morning that a senior staffer to Senator Harris has tested positive for the virus.

Kate Shaw:

In some ways it was the hearing as a microcosm of the broader Trump administration policy, which is just pretend this isn't happening. And so pretend there's not a relief package that we are ignoring. And also just pretend we're not in the middle of a pandemic that renders it really unsafe to be in close quarters with a lot of other people. And I think, Judge Barrett did wear a mask on the first day. She seemed to put it on when she left the hearing room, although she didn't put it on in between her statements. It was pretty much off after the first day. I really wondered whether the White House gave her some directive.

Leah Litman:

[crosstalk 00:39:59] Yeah.

Kate Shaw:

To that effect. Because she wore it the whole first day. And the split screen of her there with a mask and the questioners or the speakers giving their opening statements, I'm sure the president, who obviously watches TV all day, really hated, and so she didn't seem to have a lot of masking happening after that. So that was one big frustrating takeaway, one that I hope will not be applicable to future such hearings. But certainly was to this one.

Leah Litman:

So, thanks everyone for listening. A reminder that you can support the show by becoming a Glow subscriber at glow.fm/strictscrutiny, and if you enjoy the show, please rate us on iTunes. Thanks to our producer, Melody [Rowell 00:40:34], and thanks to Eddie Cooper for making our music, and thanks to all of you for listening.

Kate Shaw:

Thanks so much. We'll see you next time.