

Melissa Murray:

We'll pull up in my Prius and get you.

Leah Litman:

Beep, beep, get in loser.

Intro:

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

Intro:

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

Melissa Murray:

Hello, and welcome back to Strict Scrutiny, your podcast about the Supreme Court, and the legal culture that surrounds it. We're your hosts. I'm Melissa Murray.

Leah Litman:

And I'm Leah Litman.

Melissa Murray:

And today we have quite the episode as there have been a lot of SCOTUS developments since we recorded our term preview live at NYU Law. So, Leah, do you want to give us a little rundown?

Leah Litman:

Yes. So we are going to cover some Supreme Court news that will have some court culture elements to it. After we do that, we will recap the first week of the October sitting. And finally, we will do a lightning round of court culture that will mostly be us noting things that happen in the world related to the court.

Melissa Murray:

All right. Well, let's dive right in. So, there was some big news around the Supreme Court, but mostly it had to do with the court giving rise to what might be called a genuine super spreader event for the Coronavirus. So, we are not talking about our life term preview at NYU. We held that show remotely via Zoom. What we are talking about is the Rose Garden ceremony that was held on Saturday September 26th, in which President Trump announced his nomination of Judge Amy Coney Barrett to the Supreme Court. And if you all were alive and listening in eighth grade English, you might remember the basic plot elements from Edgar Allan Poe's, *The Masque of Red Death* because it was incredibly relevant to this particular event.

Melissa Murray:

So, for those of you who don't have eighth grade firmly in mind, *The Masque of Red Death* follows Prince Prospero and his attempts to avoid a dangerous plague. I think it's in Venice by hiding out in his abbey/castle. But then after actually surviving the plague he decides to hold a lavish party for all of his

friends who have also survived the plague. So, he invites them all to his castle. And not surprisingly, the plague is actually invited in so all I could think about was The Masque of Red Death when all of this started coming out about the various people who had contracted the Coronavirus after attending this, and it is worth talking about.

Leah Litman:

Some of the language, even, from Masque of the Red Death is wild when you graft it on to the scenes we saw from the Rose Garden ceremony. So, it posed telling it was a voluptuous scene, that masquerade. But in spite of these things, it was a gay, and magnificent revel, and now was acknowledged the presence of the Red Dead.

Melissa Murray:

It was a gay and magnificent affair, right? People were hugging and kissing on the face.

Leah Litman:

Without masks, indoors and outdoors.

Melissa Murray:

There were a couple of people with masks on, but the thing that just stunned me was, I mean, people so ebullient in the prospect of this nomination that they were literally double hugging people and kissing people on the face. I haven't kissed anyone to whom I am not married or who has not literally been birthed by me since March.

Leah Litman:

I haven't been less than six feet away from someone I don't live with since March. People have canceled weddings. They have not been able to go to funerals. They have not been able to be with sick relatives. And we just saw this massive gathering at which people are in close proximity to one another hugging and kissing, celebrating while the pandemic rages on, and perhaps unsurprisingly, a lot of people at that event have since tested positive for the Coronavirus including the president.

Melissa Murray:

Leaving aside the Coronavirus, the whole scene was... We talked about this a little bit when we had our episode, our emergency episode about the nomination. But there was no social distance. Everyone was close together. It was like another world, like they lived in a place where the pandemic was not happening. And when you think about all of the things that people have sacrificed like children going to school on Zoom, college students having to be sequestered even if they are on campus, and yet in the Rose Garden, it's as if nothing had happened, life just went on as usual. And then you find out it wasn't just this big outdoor event. They were actually inside shaking hands in close quarters with each other, no masks, and it's just like wild. I mean, just such a giant FU to the whole country who's been literally locked down dealing with this.

Leah Litman:

Yes. And, of course, that giant FU would subsequently be replicated as The Senate is now insisting on pressing forward with the confirmation hearings, even though they have yet to act on a Coronavirus relief package, even though there are millions of Americans suffering greatly because of the pandemic.

And even though several of the members of the Senate Judiciary Committee have tested positive for the Coronavirus. They are insisting.

Melissa Murray:

It's Tom Thillis and Mike Lee.

Leah Litman:

Mike Lee.

Melissa Murray:

So, two, and we don't even know who else has coronavirus.

Leah Litman:

Well, some of them are insisting on not getting tests.

Melissa Murray:

Well, that's good for making sure you don't have positive cases when you do it.

Leah Litman:

Exactly. The president has informed us, no tests, no Coronavirus.

Melissa Murray:

Yeah, that's how you know. It works that way for pregnancy too. It works for about nine months, and then it doesn't work. Yeah, so I don't even know what to say to that. There was some concern about the nominee, about Judge Barrett herself, and her family who all were present at that event, obviously, but then it turns out that Judge Barrett actually had Coronavirus over the summer and had since recovered. No one actually put a time stamp on this-

Leah Litman:

No.

Melissa Murray:

I just want to know that summer officially ended on September 22nd.

Leah Litman:

We don't know anything about the Coronavirus really as far as the length of any acquired immunity, how long someone might be able to be contagious. We just know nothing about this and so many other things related to Coronavirus at the White House.

Melissa Murray:

To be clear, I'm not suggesting that she is the genesis or origin of any of this. I'm just saying there are so few specifics about the circumstances. And we learned that she did have it, but we didn't actually learn anything about when or what the timeline might have been related to this, which I thought was not surprising but awfully cagey.

Leah Litman:

Right. We've already alluded to this, but it does not appear as though the Coronavirus outbreak at the White House and in the Senate will delay the hearings. Senator Lindsey Graham, the Republican Chair of the Senate Judiciary Committee has noticed the hearings from Monday the 12th, and Senator Ron Johnson has indicated he will appear at the hearings even in a moon suit if he had to-

Melissa Murray:

I want to see that. I really want to see that.

Leah Litman:

... to vote for the nominee. So, it appears like this is going forward pandemic or no pandemic.

Melissa Murray:

I mean, this is not something you want to wish on anyone. I know a couple of people who have had Coronavirus over the course of the last couple of months and people that I know have lost loved ones. It's not something you want to wish on anybody. I just think given what we know of it and how little we know of it, it's really surprising and telling that the caucus would be willing to risk the prospect of other people contracting it. And not just senators, I mean, the staff, the people who work in the building. I mean, it's a very sort of casual disregard for how virulent this is. And that people who don't have the opportunity to get a moon suit may very well be in jeopardy.

Leah Litman:

Yes. No, that's part of what makes it appalling is they are risking anyone employed by the Senate or other offices who might be attending the hearings, as well as the residents in DC, and elsewhere because the senators and representatives are flying back and forth to different places after convening in-person. There were also some notable Cert grants from what is called the long conference. The long conference is the justice's first meeting of a new term, which is held the week before arguments actually start. It's the long conference because during the term, the Justice conference weekly, essentially, but the long conference includes petitions that built up over the summer.

Melissa Murray:

Right. So, one of the grants that came out of the long conference is a major Voting Rights Act case. This is Arizona Republican Party versus DNC and a companion case *Bronovich v. DNC*. And the cases involve a challenge to an Arizona law that prohibits the collection and return of mail in ballots by someone other than a voter or caregiver or election official. And the law that requires voters to use assigned precincts or provisional ballots won't be counted. So, the Ninth Circuit said that the laws violated section two of the Voting Rights Act, which prohibits voting laws and politics that disproportionately disadvantage racial minorities

Leah Litman:

And the case involves some important cases to election law, including how to weigh the benefits and burdens of a state law under a doctrine that's known as *Anderson Burdick*, something that several Trump nominated judges have criticized, and also whether section two applies to denial of votes, rather than redistricting cases. We will obviously cover this more in depth, but for now, suffice it to note that weakening the Voting Rights Act might be necessary to enforce the Voting Rights Act.

Melissa Murray:

Also, called back when the Chief Justice wrote his majority opinion in *Shelby County v. Holder* in 2013. One of the things that he specifically said when he was striking down those pre-clearance provisions was that section two still remained as an avenue for individuals to bring voting rights violations before a court, and lots of people noted, well, section two requires litigation that's more time consuming, and costly, and whatnot, and more difficult for challengers to mount. But here too, there seems to be at least an inkling that maybe section two itself might not even survive. So, I mean, this may be, again, the Roberts Court one, two chipping away at the pre-clearance provisions initially, and then now eliminating section two.

Leah Litman:

Right. And by eliminating or that could include just weakening, so it is practically unenforceable, and no state law is actually violated. There were also some other cases granted out of the long conference, including an arbitrary and capricious challenge to FCC media ownership rules, the *Prometheus* case.

Melissa Murray:

There were also some cases about whether the court can presume an immigrants testimony is credible without explicit adverse credibility findings. So this case is called *Dai and Alcaraz-Enriquez*.

Leah Litman:

And there's also a climate change case about appellate procedure, whether Court of Appeals can review any issue in a remand order to state court or can review only the ground for removal.

Melissa Murray:

All right. The term itself started off with a bang on Monday morning with just the orders list. And when I say bang, I actually mean a shot fired across the bow, and the shot was fired by none other than Justice Thomas and Justice Alito, who took aim at *Obergefell v. Hodges*, that is the 2015 case that legalized same sex marriage. They launched a critique of *Obergefell* in a case denying certiorari in *Davis v. Ermold*. *Davis*, of course, refers to Kim Davis, who is the Rowan County Kentucky clerk who famously refused to issue marriage licenses to same sex couples after *Obergefell*. She was sued in her individual capacity for failing to do so. And the Kentucky law has since changed so that marriage licenses are no longer issued under the name or authority of the clerk. But her point was basically that in being required to issue the license then under her own name, the state made her complicit in something that her religious beliefs deemed sinful, same sex marriage.

Melissa Murray:

In this particular response to the denial of cert, Justices Alito and Thomas sound a little bit like they're calling for *Obergefell* to be overruled, or at the very least, for serious carve outs to be available for religious freedom with regard to *Obergefell*, and its progeny. So one of the things they say here is that *Davis* may have been one of the first victims of this court's cavalier treatment of religion in its *Obergefell* decision, but she will not be the last. By choosing to privilege a novel constitutional right over the religious liberty interest explicitly protected in the First Amendment, the court has created a problem that only it can fix. Until then, *Obergefell* will continue to have ruinous consequences for religious liberty. So, their claim is that the decision in *Obergefell* is what requires or creates the condemnation or disagreement with opposition to marriage equality and frames it as a kind of bigotry. And they argue

that the religion clauses do not allow the state to force individuals into such a posture. So, Leah, I know you had a lot of takes on this.

Leah Litman:

Yeah. Well, I think it's a little bit wild to call Kim Davis a victim particularly of the Obergefell decision. I also think it is super odd to claim that Obergefell itself is what leads to condemnation for those who oppose marriage equality rather than just changing societal views. In fact, the justices said due to Obergefell, those with sincerely held religious belief concerning marriage will find it increasingly difficult to participate in society, which is crazy given that several of them are on the Supreme Court and Judge Barrett was just nominated as a nominee to the Supreme Court. Also, while because there is in fact, a religion clause implicated in the case, but it's not the one they think, because when government officials attempt to use government power to carry out their religious beliefs that implicates the establishment clause, and Kim Davis, of course, is a government official.

Melissa Murray:

And the claim that she's making here is this is about her rights to free exercise. So, we saw all of this shaping up in 2015 in Obergefell in the dissents there. Lots of discussion about religious liberty, and I think it was... Was it 2016 in Pavan v. Smith? That was Neil Gorsuch's first big writing. And he wrote, basically a kind of defense of birth certificate registration schemes that relied on biological sex for denominating parents. And he said that Obergefell may have said a lot of things, but it said nothing about things like birth certificate registration. So that fell out of the constellation of rights and privileges that went with marriage.

Melissa Murray:

So, you can sort of see lining up you definitely have Alito and Thomas being skeptical of Obergefell, if not outright hostile. And then also Gorsuch, I think has expressed some hostility, skepticism, and query, what happens when you have the chief justice, who also dissented in Obergefell. We don't know what Justice Kavanaugh would do. And then there is Justice Barrett, potentially who could provide another vote. So, I don't know that it means that Obergefell is going to be overruled, but I definitely think there are surely five votes to expand religious protections that would make it much harder for those who are in same sex marriages.

Leah Litman:

Yeah, and to narrowly interpret at scope, as you were suggesting in Pavan that it includes some rights but not others. One other piece to note on the orders list, the Supreme Court renewed the government's ability to target and possibly deport Ravi Ragbir, the immigrant rights advocate who has been targeted by Immigration and Customs Enforcement. This is significant because it signals a quiet expansion of the court's decision in Thuraissigiam. The court vacated the lower court decision and directed the court to reconsider the decision in light of Thuraissigiam. Thuraissigiam, however, involved recent arrivals to the United States. People who had just crossed the border and were apprehended within 25 feet of the border and suggested they lacked constitutional rights under the suspension clause and due process clause.

Leah Litman:

Here, however, the court is suggesting that in fact, the reasoning in Thuraissigiam, which was way broader than that actually might apply to anyone in the United States without legal authorization, and

suggesting that perhaps they too might lack rights. The courts' vacatur is consistent with that broad reading, of course, it's not precedential but it's concerning, nonetheless.

Melissa Murray:

You actually called this out when we did our case follow up, the Thuraissigiam when we had a no call on. You basically said that this was a door opening to something more expensive.

Leah Litman:

Cassandra, Cassandra, Cassandra.

Melissa Murray:

Also, on the first day of the term, the court stated decision in joining a South Carolina witness requirement for absentee ballots. Under South Carolina law, absentee ballots have to be accompanied by witness statements. The court did not state the decision as to ballots already cast, which would allow people who had already voted while they did not need to have a witness requirement to still have their votes counted, but notably Justice Gorsuch, Alito, and Thomas would have granted this day as to that, but going forward you will definitely have to have a witness for any absentee ballot cast in South Carolina. So, we're already seeing some of these election related cases pile up before the court with some interesting rulings.

Leah Litman:

Yeah, there were no noted dissents. In a writing Justice Kavanaugh cited Justice Robert's opinion in South Bay Pentecostal for the proposition that there should be deference to states on matters of scientific uncertainty. I think that this is a little bit of false equivalence. Sometimes people who are arguing that court should defer to the government on all issues related to the pandemic say, "Well, if you defer on government restrictions that potentially infringe religious liberty, you also have to defer to government restrictions on other rights as well." But to my mind, these aren't quite the same thing because there isn't really scientific uncertainty about whether voter fraud exists, and whether the state has an interest in preventing voter fraud. Whereas there is quite genuine uncertainty about what the precise number of people that can gather outdoors safely, and in what proximity they can be. So, I don't think that, that is the right generally applicable principle that should be resolving all of these cases.

Melissa Murray:

All right. Again, in election related news, later in the week, Justice Kagan denied a request for a state of a decision that would allow Montana to send out mail in ballots for upcoming elections. The Republicans had sought to prevent it in that state. She did this without actually referring it to the full conference. And notably, referrals to the full conference are within a justice's discretion and denials are actually much more common. Grants generally need to be referred. Outside of election related news, here's a decision that deals with reproductive rights. So, just last night, this is Thursday night. We're taping now on Friday morning. The court punted on the government's state application regarding lower court decision that would enjoin a regulation requiring in person visits to obtain medication abortions. Justices Thomas and Alito would have granted the application. In an unsigned order, a majority of the court said that they would wait for further developments in the lower courts. That will likely not materialize until after the election, surprise, surprise.

Leah Litman:

That's convenient.

Melissa Murray:

Well, I mean, totally on brand. So, again, perhaps a sign that they recognize that they are divided evenly on this question or perhaps a sign that they are unwilling to make abortion even a kind of peripheral abortion issue, something that the voters take with them to the ballot box. Maybe again, they are worried about having a decision on an issue like this in the public consciousness at the same time that a nominee is being confirmed or the process is going forward and the election looms. So, this maybe I think, an institutional punt as much as anything.

Leah Litman:

Yeah. Once Justice Barrett is confirmed, if she is confirmed, as President Trump has reminded us, we really have no idea how she might vote in abortion cases. Womp womp. And now to the October sitting itself.

Melissa Murray:

This has got to be a really interesting moment for the court. This is the first time they've been together since the summer when they ended the term. I guess they were together for Justice Ginsburg's funeral, but they're back doing their work, and she's not there. They're waiting for this new colleague, perhaps to join them. And then the country is kind of in like a total meltdown. The President has COVID, the first lady has COVID, the White House is a petri dish, and who knows what's going on in Congress? And they're just sitting there the third branch, just doing their job. I mean, that's got to be wild.

Leah Litman:

Yeah. Odd time at 14 street or wherever it is the justices are working remotely from.

Melissa Murray:

I think a lot of them are in DC, but they're not necessarily at the court, but they are working remotely. Again, the oral arguments are being heard telephonically, which is interesting by itself. We've actually got some really interesting court artists drawings of the advocates in their civilian clothes at home, and there so we got to see people's home office setups and how they're actually arguing. But do you want to talk about some of the cases that we heard during this first week?

Leah Litman:

Yes. So, the first case, we wanted to discuss this one that I noted on the term preview *Ford Motor Company v. Montana Eighth Judicial District and Bandemer*. At issue here is whether the state courts in Montana and Minnesota have personal jurisdiction over two lawsuits against Ford, which of course sells cars in both states. But they either manufactured or sold or both the specific cars that issue in the cases out of state. The court rescheduled this case from last time. The case involves personal jurisdiction, and to be subject to jurisdiction in a state consistent with due process, a defendant must have certain minimum contacts with it such that maintenance of suit does not offend traditional notions of fair play and substantial justice.

Melissa Murray:

So, personal jurisdiction, for those of you who are still having PTSD like I am from civil procedure is distinct from specific personal jurisdiction. So, general jurisdiction means that a defendant is subject to suit in a state for all claims, while specific jurisdiction means a defendant is subject to suits that there is some connection to the defendant's contacts with the state. Because Ford is headquartered in Michigan and incorporated in Delaware there's no basis for general jurisdiction here. So the real question then is whether there are sufficient contacts for specific personal jurisdiction to attach. And generally there's a three step inquiry for establishing specific jurisdiction.

Melissa Murray:

One, Ford must have contacts with the forum state, such as by selling, marketing, advertising or otherwise providing services to that state or by placing its products into the stream of commerce in the state. Two, those contacts with the state must give rise or relate to the claim or stated differently the claim must arise out of or relate to those contacts. And then finally, it must not be unreasonable to require for to litigate there. And the issue here is really as to the second prong of the test. When do a defendant's contacts with the state give rise or relate to the claim? And Ford is arguing that arise out of and relate to are synonymous and requires a showing that Ford's actions are the proximate cause of the underlying claims by these plaintiffs. That is, Ford must have taken or aimed some act at the states and that action must be what the plaintiffs seek to remedy by bringing their claims in state court.

Melissa Murray:

The plaintiffs by contrast argue that the test should be much simpler, and that in fact, if the court adopts the Ford's tests, it would radically reshape the landscape of personal jurisdiction in ways that would redound to the benefit of corporations, and to the detriment of consumers. So, they propose a more simple test. If a defendant deliberately cultivates a given state as a market for its product it may be sued in that state or for injuries caused in that state by that product. This is a case, Leah, I think where Justice Ginsburg's absence will be sorely felt. I think you noted that earlier. And this is really an interesting case because the consumer protection dynamics are really sharply in focus. I mean, this really is the consumer versus the corporation. And the possibility of reshaping the landscape of personal jurisdiction will obviously have implications for cases like this, but also any case in which a consumer wishes to bring a claim against some large corporation.

Leah Litman:

Yeah, so I really breathed a sigh of relief after listening to the argument. It sounded like the justices were rightly skeptical of the dramatic refashioning of personal jurisdiction that Ford was arguing for, although I have some notes of caution that I will want to flag as well. And their concerns really fell along three different axes that I saw. One was just some doubt about where on earth this test that Ford proposed came from. The basis for personal jurisdiction rules as we noted is the due process clause, and Justice Thomas started with a line of questioning that was like, how do you get from due process to proximate cause? That is why your contacts with the state have to have proximately causes injury? And I don't think petitioner, the defendant really had a satisfactory answer.

Leah Litman:

And then the second line of concern was about the guiding principles of personal jurisdiction, which the court has said are federalism and fairness. On the federalism front states are supposed to have leeway to define the jurisdiction and reach of their own courts. And if a state wanted, it could adopt a proximate cause test by statute to define its jurisdiction, but Ford is saying the constitution actually

requires them all to effectively have that as their law, and they can provide for more expansive jurisdiction. So, Deepak Gupta who was arguing for the plaintiffs, the consumers in these cases, I think, really effectively brought us into the argument noting that over the objection of 40 state attorneys general, Ford asks this court to extinguish state's traditional authority to remedy harms against its resident.

Leah Litman:

And on the fairness front, again, like nothing strikes, anyone is unfair that a multi-state company like Ford with substantial markets and presence in all the states could be sued for product liability suits when it regularly sells. And there are predictably sales in all the states and Justice Breyer being Justice Breyer literally asked, "What's unfair about it? And there just isn't anything unfair about it." And then the third concern was really the implications you alluded to, which is just how unfair and arbitrary the defendants argument seemed. Justice Kagan really brought this to light asking, "If I buy an apple computer in New York, and then move to Arizona, and the computer spontaneously combust, would I really have to go back to New York to sue Apple?" And that's effectively what Ford is arguing for.

Leah Litman:

So, as I noted, I'm cautiously optimistic. I think plaintiffs are going to win. And I hope that's correct. There were some concerning statements from Justice Gorsuch about how our cases have generated a mess, and this is confusing. So, maybe we should go back to first principles, and some uncertainty about how this works in companies that do sales over the internet, but I just don't think this case presents those facts.

Melissa Murray:

There was also a really super awkward moment in the argument when Deepak Gupta, who is the lawyer for the consumers addressed Justice Kagan, but called her Justice O'Connor. And on Twitter, Kimberly Robinson, who reports on the court, I think, for Bloomberg wrote something like, "Oh, my God, Justice O'Connor." And everyone was like, "2020, what?" And I too was like, "Oh, my God." You can't do that right now. You just can't know that. So, super, super weird. But I think what he actually meant to get at... I don't think it was sort of a casual all women are fungible, you look like Justice O'Connor.

Melissa Murray:

But I think he was meaning to invoke Justice O'Connor's opinion on *Asahi*, which is another personal jurisdiction case where Justice O'Connor, true to form said that federalism concerns were front and center and should be dispositive or at least weights in favor in the decision making. These were two really terrific advocates. This was Sean Marotta of Hogan Lovells with his first outing before the court, so congratulations to him. Deepak Gupta of Gupta Wessler is part of the boutique plaintiffs from both very good advocates before the court. Also, men before the court. I'm just going to put that out there. Anyway, so yeah, we'll wait to see what happens there in terms of personal jurisdiction and the reshaping of the landscape of civil procedure for all of those in civ pro next year.

Melissa Murray:

Another case that came before the court for oral argument was *Tanzin v. Tanvir*, which is about the availability of money damages under the Religious Freedom Restoration Act. This case was filed by three Muslim men who say they were placed on the No Fly List after they refused to become FBI informants. They argue that the designation violated the religious freedom and Restoration Act. And the question is

actually more specific here. Whether money damages against federal officials in a personal capacity are available under RFRA as a form of relief. RFRA allows individuals to seek "appropriate" relief against the government for a violation of law. And government is defined as both federal officials and agencies.

Melissa Murray:

And so, the issue really turns on what this phrase appropriate relief against a government means, and specifically whether federal officials can be sued in their personal capacity for money damages. The federal district court in New York ruled that RFRA does not allow claims for damages against officials who are sued in their personal capacity. That is individuals who would be personally responsible if held liable. But the US Court of Appeals for the Second Circuit reversed that ruling. So, the case involves two principles, or maybe just two intuitions that arguably cut in different directions for different justices. So, Leah, do you want to highlight some of these distinctions?

Leah Litman:

Yeah, so the way I think about the cases, it implicates on the one hand principles of religious liberty. So, last term in *Bostock*, Justice Gorsuch described RFRA as "a super statute." So, perhaps that might suggest you expansively interpret available remedies under the statute in order to meaningfully safeguard religious liberty. On the other hand, the other principle is the courts and the conservative justices in particular. Real skepticism and antipathy toward having your day in court and judicial remedies. They've cut back on judicial remedies and lawsuits in so many different ways. Here, the government is essentially asking them to do so in an additional way, which is to adopt a clear statement rule for liability against individuals in their personal capacity. Essentially, if a statute doesn't explicitly provide for individual suits, then such suits would not be permitted. And for different justices, those principles might cut in different directions. So, an argument both Justice Sotomayor and Justice Kagan were kind of like, "But what if I don't think RFRA as a super statute, what ordinary principles of statutory interpretation would apply?" But for other justices, the two principles might cut in the opposite directions.

Melissa Murray:

Can we talk a little bit about the real politic of this because when Justice Gorsuch talked about RFRA being a super statute in *Bostock*, I think he was likely imagining a more conventional claim in which someone like Kim Davis was bringing a claim, as opposed to three Muslims who are seeking to get money damages from government officials in their personal capacity. Side note about RFRA, this is the statute that results from the court's decision in *Employment Division v. Smith*, and it was sort of promulgated on the auspices that minority religious sex might need protection from the majoritarian political process and how that played out. And so, it sort of consciously undertaken for Native American religions, and other kinds of religious sex. Not necessarily as a means of vindicating exclusively the interests of majority sets like Protestants or Catholics or whatnot. So, here, do you think that history plays out in favor of these plaintiffs? Or do you think the fact that they are in a kind of... It's not really a minority religious sect, but one that I think is distinctive from what the court has traditionally protected.

Leah Litman:

Yeah, I think in some respects, it should help their claim, because as you noted, the entire premise of RFRA was that minority religious groups needed additional protections from majority laws that would infringe their religious beliefs. And Justice Sotomayor in the argument was pointing out that some of the claims that motivated the passage of RFRA were by small religious sex. And were claims that could only

be remedied by damages, like wrongful autopsies, for example, of certain religious groups. But on the other hand, I do you think that the court has been much more productive of religious liberty interest when those religious liberty interests are on behalf of white christian conservatives like in masterpiece cake shop as we've discussed, or as Justice Thomas and Justice Alito were indicating in Kim Davis. And they have not been as willing to acknowledge religious discrimination or religious liberty interests when the person's advancing those interests are Muslim men.

Leah Litman:

You think about for example, the travel ban cases Trump v. Hawaii or you can think about cases like Ashcroft v. Iqbal, major civil procedure decisions. Or Ziglar v. Abbasi, the court most recent decision narrowing one kind of remedy, again, in a case involving some southeastern and Asian and Muslim men. And so, I worry that perhaps these remedial principles might get short shrift, and that their religious liberty interests might be discounted as well.

Melissa Murray:

Right. The justices I will say appeared divided here, which may be good for the plaintiffs if the justices divide evenly four, four then the second circuit ruling which was favorable for the plaintiffs would stand. Justice Kagan noted that RFRA says nothing about money damages against federal employees. And if it wanted money damages in this context, Congress would sensibly have said so explicitly. But she also brought up the oddity of not allowing money damages in light of the interaction with another statute, section 1983, which allows you to sue state and local officers for money damages for constitutional violations.

Melissa Murray:

When RFRA was originally passed it applied to both federal and state governments. We can get into that later in another day for common law. So, why would Congress have passed a statute that supplied a more narrow set of remedies against state and local governments than were already available? And her views which, again, surface a lot of different questions contrasted with those of Justice Breyer, who said in a colloquy with Ed Kneedler, who was arguing on behalf of the government, what's your best argument that RFRA does not authorize money damages against federal officials as appropriate reliefs? There are plenty of federal statutes where money damages are permitted as relief, and not clear that he got a really satisfying answer to that.

Melissa Murray:

Justice Sotomayor also pointed out that some of the claims that motivated the passage of RFRA as Leah said were claims that can only be remedied by damages like wrongful autopsies, for example. The case was argued by Ramzi Kassem, a law professor at the City University of New York, CUNY, a fabulous law school. We have had several listeners write in wanting CUNY shout out so here is your CUNY shout out. You've got a great law school. And although it was his first argument, he more than held his own here. He was super substantive and efficient and really relaxed. Had some fun banter with the judges. I mean, it was sort of like very rom com meet cute between Ramzi Kassem and the justices. So here's a little clip from a colloquy with Justice Gorsuch and they just seem to be having a delightful time.

Ramzi Kassem:

Justice Gorsuch, as long as that opinion concludes with and we affirm, absolutely.

Justice Gorsuch:

Naturally, I would assume no less. Thank you, counsel. I'm finished.

Leah Litman:

He really got a strong laugh out of Justice Gorsuch on that one. It's a belly laugh. So, congratulations to Professor Kassem on that.

Melissa Murray:

I'm glad they're having good time. I think the whole thing would have been so... Your first time and you can be that relaxed, props to him.

Leah Litman:

I don't have a great sense about how this one is going to come out, although we will certainly be watching.

Melissa Murray:

Yeah, this is one I think where, again, the four, four even split will really be meaningful, and so maybe they would try and narrow the range of decision in order to avoid the four, four split.

Leah Litman:

There were a few other cases that we'll cover a little bit more quickly than we did Ford and Taznin. One of them is Carney v. Adams. At issue here is Delaware's partisan balance requirement for their state Supreme Court, and a few other courts. The Delaware constitution directs that no more than a bare majority of judges on the state's five main courts can be affiliated with any one party, and it divides the seats on the Delaware Supreme Court, and to other courts between the two major political parties.

Leah Litman:

It's interesting because the case implicates an earlier decision Elrod v. Burns that said the first amendment prohibits state officials from considering partisan affiliation when making an employment decision for jobs that do not make policy. So, it kind of tees up this fun theoretical question about whether judges make policy, which courts often don't like to admit that they do.

Melissa Murray:

In the argument, the justices seemed receptive to Delaware's arguments, and perhaps will uphold the scheme. This was a case actually argued and brought by Michael McConnell who is a law professor at Stanford Law School. I also think they were justifiably skeptical of the challenge to Adams' standing, which is predicated on a statement that he would apply for positions, but for the fact that he has been disqualified from doing so.

Leah Litman:

There was also some delicious subtext to some of the questions that the justices asked. I might be reading too much into this. But I still want to flag them in case I'm not. So, in one exchange, Justice Alito to Michael McConnell wanted to know, if we hypothesize a court with nine members, at what point would a specified breakdown be inappropriate? That is, could the state say all nine justices will be

appointed from Republican candidates or six of them? He said, if it's nine to nothing would be inappropriate? What about eight to one? And this just kind of caught my attention given the public conversations about Supreme Court balance and Supreme Court reform that are happening now? And I kind of wondered to what extent there on Justice Alito's mind as well.

Melissa Murray:

It feels very meta. I don't think he just said that for fun. I mean, I'm sure they're talking about it amongst themselves, how could they not?

Leah Litman:

Or at least thinking about it and talking about it with their close friends? I mean, maybe they're not discussing this at a conference, but it's got to at least be on their minds. They read the papers just like everyone else.

Melissa Murray:

So, it's funny you say that because Justice Kagan also had a little bit of... Maybe she was trying to signal something. But in talking about balance requirements she said, "We want to create balanced courts. We want do that both for the appearance of justice that those courts won't look political. And we also want to do it because we think that those courts will make better decisions. They won't go to extremes. They'll move to the center.

Leah Litman:

Like Elena, are you trying to say something? Blink twice.

Melissa Murray:

We will come for you. We'll pull up in my Prius and get you.

Leah Litman:

Beep, beep, get in loser. No, I'm not calling her a loser. That's a Mean Girls reference. Come on, it just came out.

Melissa Murray:

Mean Girls is like 150 years ago in pandemic years.

Leah Litman:

But still cool.

Melissa Murray:

Very, I'm a cool mom.

Leah Litman:

Exactly.

Melissa Murray:

Okay, so there were some other cases that we should briefly mention. We will go over these more as decisions come out. But one of them, super important in the Bay Area very closely watched by those in the IP world is Google v. Oracle. This was actually held over from March of last term, and it may be one of the most consequential copyright cases in recent history. It involves a dispute about the Android operating system. So, when Google designed the Android operating system it used about 11,000 lines of code from another operating system, Java that's owned by Oracle. The question for the justices is whether Google's reuse of those lines of code violates the copyright laws.

Melissa Murray:

A jury held that Google's actions were fair use, but the US Court of Appeals for the Federal Circuit held that Google had violated Oracle's copyright, and that its actions as a matter of law could not be regarded as fair use. So, there are really three questions at issue in the case. The first question is whether application programming interfaces, which is the kind of code that Google used is copyrightable. So, you can copyright expressions, but you can't copyright ideas, and expressions necessary for the production of ideas are not protected. The second question is whether if they are Google's use was fair use, which depends on factors like whether it was transformative. And then there's this third prong, which is how to review the jury's verdict. What kind of deference should a court give the jury's verdict that it was fair use?

Melissa Murray:

So, it seems like the best Google could hope for here is a narrow win on the last question. But this is also a case that I can imagine being susceptible to shifts as the justices maybe try to get a better grasp of the technology underlying this, and how to deal with this. I don't even think I understand what the difference between these 11,000 lines of code mean.

Leah Litman:

No, and the case seems to turn on whether this particular kind of code is unique and understanding basic things about interoperability. And the justices were, I think, struggling to understand it just based on their repeated desire to try to analogize it to think that they did understand. So-

Melissa Murray:

Like a telegraph.

Leah Litman:

... the Chief Justice. Right, exactly. Exactly. Is this like a telegraph? No, they didn't bring up that. But the chief wanted to know, "Is this like cracking a safe to get money?" Or he later asked, "Is this like opening a restaurant and wanting to have a traditional order of menu." Or Justice Thomas likened it to trading football players and asking for the playbook or Justice Kavanaugh likened it to copying a song. They were all trying to get the case oriented around a set of facts, I think, that they could better understand.

Melissa Murray:

So, should you think that counsels in favor of maybe just deferring to the lower federal... the intermediate appellate court, which is a kind of specialized court that's used to dealing with these things?

Leah Litman:

It is, but I also think that there's been a significant empirical study and questioning about that specialized courts bias either in favor or against particular claims of intellectual property. The third question that you flagged in this case isn't really specific to patent law so much as a Seventh Amendment question about how courts should treat jury verdicts. And I don't think that that's a question that the Federal Circuit should get any particular kind of deference on.

Melissa Murray:

There was also, I think, an ideological split, in how the justices appear to receive the information. We don't necessarily think about copyright as having any kind of ideological valence, although I think copyright scholars would dispute that. But it seems like Justice Breyer, Sotomayor, and Kagan appear to be very sympathetic to Google, whereas the Chief, Thomas, Kavanaugh and Alito seemed more sympathetic to Oracle.

Leah Litman:

Yeah, I will definitely be watching to see how this will play out. I think it at least based on my feed, and what I have read, most copyright scholars are much more sympathetic to Google. And they think that being able to use this code across the different operating systems is really important to have different kinds of programming operate efficiently and effectively with one another. But-

Melissa Murray:

I think that's the posture of Creative Commons, and who wants just more expansive understanding of fair use. And their argument is that it actually spurs more innovation when you can make use of these things.

Leah Litman:

Yeah. And whereas the court just did not seem to understand that there could be any distinction between computer code in general and API codes in particular. That just didn't seem to be really something that resonated or registered with them.

Melissa Murray:

All right. Then there were two other smaller cases, Texas v. New Mexico, which is an original jurisdiction case involving riparian rights under the Pecos River Compact. And then there's also Rutledge v. Pharmaceutical Care Management Association. So, this is a petition for the court to consider the extent of preemption under ERISA. Preemption means where some federal statute effectively forbids the state from enacting or enforcing certain kinds of laws in the same area. So, in this particular case, Arkansas regulates the reimbursements that pharmacies receive when they sell prescription drugs.

Melissa Murray:

And so, said that the so called pharmacy benefit managers, which make deals for prescription drugs on behalf of employers can't pay less money to pharmacies for drugs than it costs the pharmacies to actually acquire the drugs. PBMs were saving money by pinching the pharmacies causing the pharmacies to close. The question is whether that law from Arkansas is preempted by ERISA. So, ERISA has a broad preemption provision that prevents any law that "relates to an employee benefit plan." But an important decision limiting the reach of that provision. This was New York v. Travelers, the court held

that states could regulate what commercial insurers pay to hospitals with surcharges. So this raises the question of whether the Arkansas law is also similarly permissible as a rate regulation of the sort credited and Travelers, which regulated hospitals. So, the question, I guess, is one of analogy. Is this more like the regulation of hospital seen in Travelers or is it something entirely different, and therefore preempted under ERISA?

Leah Litman:

I think the case is really significant because it affects state's authority to contain healthcare costs by regulating surprise bills or other things. And the court has previously taken a pretty expansive interpretation to a recess preemption provision in a 2016 decision maybe in Gobeille holding that to Vermont reporting requirement was preempted over a dissent by Justice Ginsburg. And this case really involves whether Travelers was good law in the scope of that exception to the preemption provision.

Leah Litman:

Reading and listening to it, I think the court is sympathetic to Arkansas. Although I'm not sure which of the two arguments it will embrace if it says that the Arkansas law is not preempted. Are they saying this doesn't regulate or relate to health insurance plans themselves because it regulates pharmacy benefit managers? Or instead, might say something like rates, unlike reporting requirements aren't central to plan administration. And I thought that they were sympathetic to Arkansas because a lot of the justices actually passed when given the chance to question the solicitor general who was supporting Arkansas. And usually that's a sign that they agree with that side if they're not peppering him with questions.

Melissa Murray:

This was also a sort of breakout moment for Justice Kagan. So, the Chief Justice invited questions by saying, "We have extra time if justices want to ask additional questions here." And she was basically like, "Don't mind if I do." Broke the seriatim questioning format? I do have some questions. Here they are. So, I thought that was interesting. Good for her.

Leah Litman:

Yeah, I enjoyed that. It just made the court's arguments feel a little bit less stilted that sometimes seriatim format can feel like.

Melissa Murray:

Yeah, more like it usually feels like where they're sort of riffing off of each other. So, maybe more of that as we continue for the very foreseeable future doing these telephonic arguments as Coronavirus continues to rage unabated throughout the country.

Leah Litman:

On that positive note, maybe we should shift to our court culture segment. Two of which we're going to focus on how the telephonic arguments have been going thus far when we get into the October sitting. We discussed after the telephonic arguments from the May sitting that perhaps the Chief Justice hadn't done an optimal job as far as ensuring equal argument time and questioning time for all of the justices and the rules weren't really being enforced in the same way for all the justices. It seems like at least this point the court, and perhaps the Chief Justice has directed all of the justices to try to watch their own time. In addition to having the Chief Justice do so because at several points during several arguments

the justices would casually mention the fact that their time had expired, which indicated again to me that there is some internal understanding and communication about the amount of time they are allowed.

Melissa Murray:

What do you think happens if someone just goes off the rails? Is there a timeout in conference? Like you have to sit with your face in the corner? What do you-

Leah Litman:

Well, I mean, the chief was still available to end segments even when the questioning justice was not, and he continued to end some segments. But there were also indications that the individual justices were trying at least some of them to monitor their own time. So-

Melissa Murray:

What Justice Breyer did was, forget that question, I'm out of time.

Leah Litman:

Exactly.

Melissa Murray:

He was definitely self regulating.

Leah Litman:

Exactly. Justice Sotomayor in Rutledge apologized to an advocate for interrupting them saying, "I'm sorry, but I have limited time. Otherwise, I'd let you finish. But I got to get to my questions." And then in Ford, Justice Gorsuch also like Justice Breyer said, "That's okay." Basically, stop, I've run out of time. And it seems like the advocates are kind of clued in on this as well because in Taznin, Ed Kneedler arguing for the government asked if he could finish at some point after justice's question. So, it seemed like he was aware as well the total time.

Melissa Murray:

We're hearing all of this only through audio. I wonder if they're seeing something or if they at least have sort of some time clock, I don't know. I've actually observed these Zoom arguments here in California at both the state level and the federal level. And they actually, when they're done visually, as well as audio, but remotely, they actually have this big clock where you can see how much time both the advocates have. And then sometimes the justices or the judges will also have clocks for their specific bursts of time as well.

Leah Litman:

It feels like there is definitely something they're watching because in Rutledge, the Chief Justice apologized to Seth Waxman when he initially cut him off, and ended the questioning period. And then he corrected himself and said, "No, we can actually continue. I was looking at the wrong time allocation." And so, they're definitely watching something.

Melissa Murray:

I think he's worried that you're going to come for him, Leah. That you're timing him.

Leah Litman:

I mean, I am. But I think it's good that the chief asked his colleagues to take more of a role than policing themselves given that as we discussed, I don't think it's possible for him to do that as well as participate fully in the argument.

Melissa Murray:

We'll see how long this continues. So, this was just the first week everyone was trying... Everyone had their new school clothes on, their new sneakers, their new kicks. We'll see how these look in November and December, and what happens. I think one thing we definitely saw was that telephonically there was just more room for error, both human error and technical error in just the way this came off.

Melissa Murray:

So, I was alerted to this amazing Twitter thread that Deepak Gupta posted on the day of his oral argument. Basically, kind of a post mortem explaining that right before he was about to argue his line went down. And he talked about working with the tech people at the court and his own law firm's office. I think he was at someone else's law firm because the technology was determined to be more conducive for holding the line. And then it didn't work. And can you imagine? I literally would have died.

Leah Litman:

Oh, my gosh. It's available on the transcript where the Chief Justice calls on Deepak, and then when he doesn't come on he says, "We're going to take a brief moment to take a recess to address audio issues," and then comes back and makes a joke. Mr. Gupta, "I assume you didn't want to rest on the briefs. And, Mr. Gupta says, "No, I'm sorry, there was a technical problem." It's actually been edited out from the audio file that's available on Oyez, but it's on the transcript. But I can't imagine doing that. I did an event that was live where my Zoom actually wasn't working, and I had to sign on, on my phone. And I just completely panicked and lost it. I can't imagine this happening during the Supreme Court argument. I just really can't.

Melissa Murray:

It's basically like Ben Stein. Like, Mr. Bueller, Bueller, Bueller? It's just like that. Yeah, I hate it when you're on Zoom in teaching and sometimes if you have a really big class it's just hard to hold the line. It'll say your internet is unstable-

Leah Litman:

Exactly.

Melissa Murray:

I mean, that literally, I just sweat buckets every time that happens. I can't even imagine doing it in this context.

Leah Litman:

Yeah, same, but with the court and the advocates will be dealing with this for the time being the court announced today Friday that it will be hearing arguments over the phone at least to the end of the calendar year for the November and December sitting, and that includes the Affordable Care Act case.

Melissa Murray:

But go ahead have an event at the Rose Garden, sit really close to people, double hug people, kiss people on the face. We got nothing going on. We got this all handled.

Leah Litman:

Speaking of the rules not applying to everyone.

Melissa Murray:

Yes, yes. I'm really mad about this.

Leah Litman:

Oh, me too.

Melissa Murray:

I'm doing remote school. I'm like a fourth grade teacher, come on. At least stop kissing people on the face publicly.

Leah Litman:

Yeah. Some of us can't see our sick, elderly parents. Some of us cannot see our siblings. Some of our siblings who have risks were literally cloistered in studio apartments for months afraid to go outside. And while they go outside now, they still have had no human contact for months, and it's appalling.

Melissa Murray:

Just pretend that you are in it with us, and just refrain from kissing people on the face.

Leah Litman:

Kissing people who aren't your family.

Melissa Murray:

When I was in law school there's this class called History of the Common Law, and John Langbein taught it, and I sat in the back with a group of people. And there were a couple of my friends would pass notes or whatnot in the back. Not me, obviously, and they were giggling. And at one point, John Langbein was like, "Ladies in the back, contain your mirth." That's what I want to say, "Contain your mirth. Stop kissing people on the face. Just make it look like you're in it with us for a minute."

Leah Litman:

Right. I know.

Melissa Murray:

Contain your mirth. Anyway, so can we talk about the vice presidential debate?

Leah Litman:

That was what I meant when I said, "Speaking of rules not applied to everyone."

Melissa Murray:

Okay. Good. I know it's not exactly about the court, but it is court adjacent, I think. And I just want to say, Kamala Harris, my Jamaican Indian sister from the East Bay, shout out to you because like me your face has no chill either.

Leah Litman:

And I truly loved to see it. It was so relatable because she knew she couldn't just unleash on Mike Pence, and say, "You're lying. You are talking over your time. You're interrupting me." And instead, she had to hold back and be very nice about it. But gosh that face, loved it.

Melissa Murray:

My favorite was when she was like, "I'm speaking," and then she smiled. And I'm like, but she wasn't smizing with her eyes. She was like, "I will cut you after this."

Leah Litman:

Exactly. There were daggers. Or again, when she said, "I would like equal time."

Melissa Murray:

Susan Page started off strong. And then she was just like, basically, the vice Chris Wallace.

Leah Litman:

Right, exactly.

Melissa Murray:

Later in the end like, "Thank you, Mr. Vice President." I was like, "Girl, don't thank him for running all over you."

Leah Litman:

I know. I mean, that's what the all the justices do for the Chief Justice too. They all begin their questioning by saying, "Thank you, Chief Justice." And I'm like, "Just cut it out." But in the VP debate it was additionally inappropriate.

Melissa Murray:

So, first of all, how do you think she did?

Leah Litman:

I think she did. exceptionally well. I think she basically did as well as she could have in that particular format given all of the constraints and expectations on her, I thought she had several very sharp, memorable moments. I remember when Vice President Pence was saying how he and the president calmly handled the pandemic and her response was to look at the American people and say, "How calm were all of you when you weren't sure where you were going to get your toilet paper?"

Melissa Murray:

Okay, that literally scared me so bad. I went to check, do we have toilet paper? Because this is all... The White House by itself could start a second wave. And I'm like, do we have toilet paper?

Leah Litman:

Right.

Melissa Murray:

I mean, she actually held back, and I will say, I went lurking about conservative Twitter and people were saying things like, "She's so arrogant. She's so smug. She's so uppity."

Leah Litman:

They called her a bitch. They call her arrogant.

Melissa Murray:

Oh, Harlan Hill, did you see Harlan Hill?

Leah Litman:

Oh, yeah, yeah. No, they were saying like, "Oh, that was canned," which, again, is just a way of saying she was exceptionally well prepared-

Melissa Murray:

God forbid we should have an exceptionally well prepared person leading our country in any capacity. But I thought she really threaded the needle beautifully. I actually thought she could have nailed him to the wall. Like when she first started with his COVID response. I mean, the real answer was like, "If you think you've been so great on this, please notice the two plies of Plexiglas separating us. That is proof positive that this response has been completely shambolic. Do you see the way I said that? I sounded like I was going to literally shove him. She couldn't do that.

Leah Litman:

Yeah, but again, given all the constraints on her, I thought she balanced everything as best in a lot of ways that she could have, and I was extremely into it.

Melissa Murray:

So, can we talk about the fly?

Leah Litman:

Oh, yeah, definitely.

Melissa Murray:

The fly that launched 1000 memes.

Leah Litman:

Yeah. Further signs of the plague, and that we are really living in the end of times was the fly who sat on Mike Pence's head during the debate.

Melissa Murray:

So, for two whole minutes, and so it's worth noting that Mike Pence has this really amazing head full of snow white hair. So, the contrast between the fly and his hair was incredibly striking, and the fly just sat there for two minutes. And to be fair to him, I don't know that he could have done anything because if he'd slotted it about he would have looked insane. So, he just left it there. But that also made him look slightly insane. So, I'm going to pull back from my art history at the University of Virginia, and just pull out a little knowledge for you. In Renaissance art, the fly is a particular symbol that is used to signal decomposition, decay, or corruption, a broad array. It is also a symbol of one of the sort of devils, Beelzebub, hence the term lord of the fly-

Leah Litman:

Of the flies. Right.

Melissa Murray:

I was just taken back to Christopher Jones's history of art class when I saw that, and I was like, "Oh, my God, this is amazing." How do you think that went down at the White House after the fly became the most talked about thing of that debate?

Leah Litman:

I think the president was probably pretty upset and thinks that Mike Pence should have murdered the fly on live television in some sort of display of strength.

Melissa Murray:

I think it took every ounce of self control to not literally excise him from the ticket, and put Nikki Haley on. Am I right?

Leah Litman:

Honestly, given the specter of the president's roid rage on Twitter, and various conservative media outlets, you're probably right.

Melissa Murray:

Again, it was amazing. The other thing I wanted to point out from the debates was the court related content that was discussed. So, toward the end of the debate, there was a question that Susan Page offered to Vice President Pence about Roe v. Wade specifically, and what would happen in Indiana, his home state if Roe v. Wade was overruled by a Supreme Court, and Pence did not answer it at all. Instead, we got this sort of winding very long winded answer about Amy Coney Barrett, her sizable American family, and the court and her nomination, but no real answer about what would happen in Indiana were Roe to be overruled, or even if Judge Barrett would be the critical vote to overrule Roe. When she came back to it and pressed him on it all he said is that I'm pro life, and that was it. What do you think was going on here? This is the second debate in which the GOP representative in the particular event refused to forthrightly address the question of Roe v. Wade, and whether they want to see it overruled.

Leah Litman:

I mean, this is a repeat of what happened during the presidential debate and something that we noted, which is despite the fact that they have been promising to appoint justices who would overturn Roe. Despite the fact that they have been saying, "I'm pro-life, and I would appoint justices who were pro-life." Now that the prospect of actually overruling Roe is on the table they don't want this to be an issue at all. And they don't want this to be on American's minds when they go to vote because overruling Roe is not a position that has majority support in the United States. In fact, precisely the opposite. And so, I think, I forget exactly whether it was you or Kate who said this in the last episode. But the theoretical possibility of overruling Roe was politically to their benefit. The actuality that it might happen is not and this was just another manifestation of that.

Melissa Murray:

Well, so the really interesting thing was that Pence in not answering this question, and being incredibly evasive as to this question then asked Senator Harris a question like, "Are you going to pack the court?" Which she was also quite evasive about. So, she never really hit a clear answer to that. And what do you think that was about? So one, you could say, Susan Page didn't ask her that question, so she doesn't have to answer it. She's not there to answer questions for Mike Pence. But I thought it was interesting because Joe Biden also refused the question of whether or not he would pack the court.

Leah Litman:

Yeah. Well, I think more recently he has said, you'll know my answer after the election. I think his approach to answering that has been that this distracts from the actual issue at hand, which is whether to confirm Justice Barrett in the midst of an election, and possibly overturn Roe and jeopardize the Affordable Care Act. And so, their take has been that question is irrelevant, and only follows if these events come to pass. And I think that's also partially what Vice President Biden has been gesturing at what he says like, "You'll know my answer, basically, depending on what happens in these next few weeks." If the Republicans don't ultimately confirm Judge Barrett to the Supreme Court, I think there's precisely zero possibility that a President Biden would endorse a court expansion plan for the Supreme Court.

Melissa Murray:

So, I thought Harris actually had a really nice pivot on that question. And for all of the reasons that you suggest, maybe you want to keep your powder dry. You don't know how this is going to turn out, and you if you have to do something extreme don't. But she turned to the question, "You want to talk about packing the court? Let's have that conversation." And then she brought up the way in which the Republicans have really been intent on transforming the lower federal courts, which you and I both think is the more immediate concern, and will have long lasting consequences.

Melissa Murray:

I think though, she really did miss an opportunity to hammer the point home by saying, one, you all are so intent on stalking the courts with your nominees that you won't vote for Coronavirus relief for American citizens. You are having super spreader events to congratulate yourselves about a vacancy that you desperately want to fill. And she stopped short of that. I don't know if she's trying to sort of again smize with her face, I don't know. But I thought that would have been the way to nail that more clearly.

Melissa Murray:

It goes to the point that we have made over and over again in that the democrats really keep missing these opportunities to show the electorate how integrally involved in their day to day kitchen table issues the court. Like so, this morning, I think I told you this. I listened to one of these podcasts and it was featuring a group of northeastern Pennsylvania voters who had previously been Democrats, voted for Trump in the last election, and are even more stalwart in their support for him today. And one of the things they kept saying was that the Democratic Party is not the party of unions anymore. It's not the party of the little guys. It's a party of corporations. And it was just like, wow, because if you're watching the court, and reading the court tealeaves it's the conservative majority on the court that has really embolden corporate interests and nearly decimated unions.

Leah Litman:

Exactly. I think that Senator Harris' response was the right move to point out that Republicans are packing and stacking the courts now. What they are doing is a kind of core packing. But you're right, that even she who I think is the best spoken Senator for the Democrats on the Judiciary Committee couldn't finish that answer by pivoting to the -

Melissa Murray:

It's like Mortal Kombat. Finish him. Just do it.

Leah Litman:

She didn't take that next step about driving home the substantive implications for Americans, and highlighting what the Republicans were prioritizing between the court and American suffering in the pandemic.

Melissa Murray:

Or before the pandemic. I mean, the union stuff is well before Coronavirus, and Democrats just don't make that case.

Leah Litman:

On that positive note-

Melissa Murray:

I'm going to kiss somebody's face today.

Leah Litman:

Right.

Melissa Murray:

It's probably somebody I'm related to.

Leah Litman:

Thank you to our producer, Melody Rowell. Thanks to Eddie Cooper for making our music. Thanks to all of you for supporting the show. You can sign up to be a supporter at glow.fm/strictscrutiny. You can also

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get your own personal glow up at our website strictscrutinypodcast.com with some Strict Scrutiny merch. And we are going to do our best to try to cover as much of the confirmation and nomination process as we can together with the courts docket. I know we did a lot this episode, but we are just trying to get in as much as we can. So, continue to stay tuned. See you.