

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'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."

Leah Litman:

Welcome to a very special joint episode of Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it, and Digging a Hole, the joint legal theory podcast of Sam Moyn and David Schleicher. Welcome to the show.

David Schleicher:

Thanks so much for having us. We thought this episode, it would be a fun time to do an episode about the future of the Supreme Court, but not particular cases, but rather like in the future of the Supreme Court as a political institution, kind of take a step back from specific cases and doctrines to ask, how do we expect the Supreme Court to operate in the next half decade? How should it operate-

Leah Litman:

Very well.

David Schleicher:

Well. And given that skepticism, questions about how it should operate in democracy. And so, I thought I would kick us off with a prediction question. David Landau, a professor at Florida State has this brilliant paper where he shows that some countries under periods of one party rule, the Supreme Court becomes something like an opposition party. It fills in the role of an opposition party during periods where one party is completely in control, and this creates certain problems, and certain problems for the Court's legitimacy. You could understand what we have in Washington as a period of one party control. I mean, it's not really a period of one party control, we still have a lot of states controlled by the opposition party, the senate majority isn't filibuster proof, it's not even Manchin proof, but you could...

David Schleicher:

So, the question I have for y'all Supreme Court experts is do you think over the next, say, two to five years, or maybe just next two years, will there be a major conflict between the Biden Administration and the Supreme Court? One thing I want to preface this with is political science models are really confused on this question. Some of them think in the classic idea, the Supreme Court follows the election returns, and it's basically a majoritarian institution maybe with some lag, and the other ones are pure attitudinal models, these are many justices appointed by Republicans, and they are going to operate like an opposition party. So, do you see the next couple of years as a period of heavy administration versus Supreme Court conflict? Yes or no? And if so, over what?

Kate Shaw:

I would say, the time horizon matters a lot here I think. So, I think the chances of really acute conflict in the next year are pretty low, and in the next four years are pretty high. My sense is that the Supreme

Court is going to lay pretty low as it has this fall. I think that's in part... We talked about this on our most recent episode, but in part I think they kept the docket a little bit light because they wanted to keep space open for a lot of election cases that could arise. But, in part I think they very much dislike being in the political cross hairs, and so have tried to just keep the docket very light, and relatively low political salience cases, to the extent there are a handful on the docket, the border wall, and the Remain in Mexico policy, those are going to be mooted. So, I think this term could be the quietest, most muted term in a number of years, and I don't think that's likely to hold for a full four years.

Kate Shaw:

And I think probably it's difficult to speak in a unified way about the Supreme Court in that I think that the answer, if Chief Justice Roberts were in the driver's seat, to your question is probably really different than it actually is right now with Kavanaugh I guess as median Justice. So, I have more thoughts, but in terms of subject matter areas, if there is a really big conflict that arises in year two, three, or four of the Biden Administration, I do think that if Congress is able to actually pass much significant legislation, particularly on things like climate or immigration, I think that there could be clashes over the scope of congressional power on those questions. I think you could see potentially really big administrative law doctrine.

Kate Shaw:

I don't think it's out of the realm of the possible that you actually see the Court find that any kind of independence in agencies is inconsistent with the Constitution. I think that Gorsuch and a couple of others might want to jettison notice-and-comment altogether. So, I mean, I think we're talking about much bigger administrative law stakes than Chevron, which I think could probably be overruled without having a huge impact in terms of... I mean, I think that the impact would be significant, but I think it pales in comparison to actually invalidating all notice-and-comment rulemaking or throwing out say The Fed, which I don't think is outside of the realm of the possible.

Leah Litman:

Yeah, so what I was going to say is, similar time horizon. I don't think it's going to happen in the next year, but will happen over the next four years. And part of that is just because of the way the litigation process works. The Supreme Court will hear cases after they're heard in the lower federal courts, and so it will take some time for these cases to be brought after the Biden Administration makes some of these regulations, or Congress passes some of these statutes. In addition to the areas that Kate mentioned, one area for legislation that I think is inevitably going to spur some conflict will be voting rights. If Congress attempts to pass a renewed Voting Rights Act, there will be immediate questions about Congress' power over state legislative rules, also Congress' power to reinstate a preclearance regime, or whatnot.

Leah Litman:

And in addition to the administrative law areas that Kate mentioned, the other one that I was going to put on the table is nondelegation doctrine, and to what extent this court will actually disable administrative agencies from passing rules and regulations. So, those would be the areas that I would identify as particularly rife for court administration conflict. I did also want to look back and say the Obama Administration and the Supreme Court also had a somewhat contentious relationship. The Court was a hair's breadth away from invalidating the significant legislative achievement of the Obama administration, and did invalidate part of that in the ACA, killed the deferred action for parents of

American citizens program. So, this kind of conflict isn't going to be something new, but I do think we are going to see it over the next few years.

Kate Shaw:

With DAPA, the Court obviously tied 4-4, thus leaving in place the [inaudible 00:06:42] opinion, but I absolutely think if Justice Scalia had been on that court, they would have been eager. I don't think there's any question that they would've both found standing and then invalidated the President's authority there. So yes, we've talked about administrative agencies, we've talked about legislation, but I think this conservative court is eager to rein in presidential power when there are Democratic presidents in the White House. So, I could well see some actual core presidential authority drawn into question under this president.

Sam Moyn:

So, I want to disclaim the title David awarded to all three of us as Supreme Court stans. That's you two. I think we really want to hear a lot more about the nondelegation stuff, but I would have said that the central reason for the low likelihood of big confrontation in the near term has to be something like gridlock. The Democrats didn't win big in 2020, and so even with the senate changing hands, we're going to have little legislation, and to the extent it issues, centrist legislation that Joe Manchin, et al, sign on to, and maybe the search for some Republican buy in. So, I think there are a lot of reasons for Supreme Court caution even though there are these radical views out there about exploding the administrative state.

Sam Moyn:

But to me, the predicate for something like the 1930s experience has to be a progressive movement in power, and we don't have it. If that happens in our lifetimes, it will be very cool from my political point of view, not least because it will defeat all these political science predictions that David routinely throws at me. I mean, in the 30s, from 1932, three, four, five, six, seven, well then, the Supreme Court did not follow election returns, and it did not vote in a predictably partisan way because you had the four horsemen from different parties. Finally, after 1937, the Supreme Court did not play the role of opposition in a one party state, it was part of the one party state. So, that's what I'm looking for once again. It's just we're not there, so no confrontation yet.

David Schleicher:

So, the one thing I'd say is that I think there's plenty of room for them to be very, very conservative without creating opposition because there's a huge number of issues where they could operate with respect to the states or with respect to other issue... I mean, you guys know the docket and everything, but it seems to me if I were predicting, what I would expect to see is a huge number of civil procedure cases and access to courts questions that would not create conflict with it. But, you could already have some personal jurisdiction... There's a lot of stuff like that, that kind of falls below the level of constitutional, but it allows them to be attitudinal in their preferences but without creating conflict. I mean, there are lots of areas like that. One thing I'm particularly interested in is property law. They've already got one big property law case, and they could have a million others where they could do really high profile things. End rent control or something that would not create a controversial [inaudible 00:09:59]... And so I wonder whether at least in, Kate, short term, there's plenty of space for them to achieve their political ends or achieve part of their political project but without creating this type of

direct constitutional conflict, which I think there's reasons to believe they'd be somewhat averse to. So, that's my instinct, but you guys know better than me.

Kate Shaw:

No, I think that's all very possible. I think we were thinking more in terms of active acute conflict with a Biden Administration, and so didn't point to other sorts of issues that are part of a larger ideological project, but I think it's absolutely right that all of that could happen in a much quieter and less likely to provoke real active confrontation -

David Schleicher:

I mean, and isn't the other elephant in the room that's not a direct constitutional conflict, but would be politically... just something about abortion? I mean, that seems to me, that's like the first thing that would come to, is that that would be a way to achieve a classic conservative win but it's not a constitutional crisis in any meaningful sense I don't think, in the sense that it's going to create a conflict between the president and the administration-

Sam Moyn:

I'd love for us to turn to abortion and nondelegation because I mean, the only thing I'd add is that David's scenario, it's not new. That's what's been happening for 35 years. So, it would be more of the same now 6-3 rather than some lesser reactionary dominance. It's not as if the Court sometimes with the collusion of Democratic appointees hasn't been trending neoliberal for decades and right in other discernible areas.

Kate Shaw:

What is unique about this moment as compared to the last 35 years, and as compared to the New Deal court, every single justice on the court tracking the political preferences of the appointing president is genuinely new. So, that I think does distinguish what we've seen in recent decades and really seen historically, this Court, and I think that's part of the reason you're seeing this push for reform now. I think there are a lot of reasons, but I think that that is one significant one. But abortion, yes, I mean, I think that it certainly is a constitutional issue, it's not going to be a federal separation of powers issue, right? Because of course we're talking about at this point, state regulations. But, I think that yeah, that's something again, I think that in the next year, we're unlikely to see, and I think before the first Biden term is done, I think they probably will just overturn Roe in the next four years. That would be my prediction. Leah, I'm not sure where you are on that.

Leah Litman:

Yeah, so I don't think they will necessarily do it in the next four years, just because I think there are too many cases that allow them to chip away at it, and confirm that Whole Woman's Health is overruled and June Medical is overruled and a non precedent and so on, before they actually overturn Roe. But, there are so many of these ideological projects that are already on the docket. David, you mentioned the California property case involving the ability of union organizers to go onto land. But, there's also Fulton versus the City of Philadelphia, and religious exemptions from nondiscrimination ordinances or provisions. That's also an ideological project that they can further without actually engaging in any head on confrontation with the Biden Administration. So, there are many other cases like that that I think will easily make their way to the court in very little time.

David Schleicher:

So, Kate mentioned reform, and one of the things that was really notable about the fall quickly after Justice Ginsburg passed and during the... which kind of it was a jubilee moment for Supreme Court reform ideas. Biden announces that he's going to do a commission where he's going to bring in a bunch of law professors. I don't know who's going to be on the commission or-

Leah Litman:

I have yet to receive a call, so I don't know about you all.

David Schleicher:

Outrageous.

Sam Moyn:

They would never call me, don't worry.

David Schleicher:

Yeah, I wouldn't call you either.

Sam Moyn:

That's fine. No one calls me.

David Schleicher:

But, there was a whole bunch of proposal from the narrower to Sam's, then to some things that I think are pretty outlandish, or at least bank shot-y in terms of effects on the court. But, something that I think that is a good question to ask about if there is conflict or maybe even if there's not, what problem do you think or do you think the Biden Administration either does think or should think, and kind of take this wherever you want, is the problem that the court reform stuff is trying to solve?

Kate Shaw:

What I said I think a couple of minutes ago, just that we have what is the appearance of excessive partisanship, that for the first time this court really in history, the justices reliably vote the policy preferences of the president's who appointed them, and that that feels just really inconsistent with the role of the Supreme Court in our democracy, and that that the court as a counter majoritarian institutions only works if it is understood in some fashion to stand outside of politics. But, if it is just another partisan institution, not deploying tools and decisional processes that differ from those utilized in the political branches, it's hard to see what it does derive its legitimacy from. So, I think that's at the core of it. But, there's lots more to say, but I think that's the first thing.

Leah Litman:

Yeah, so I kind of think of it as a Democratic deficit along three dimensions. One is as Kate was saying to the extent that the justices are just voting the preferences of the political party that appointed them. There is zero reason that those decisions should be made by the court versus in the political branches, and so some attempted reallocation of power to either administrative agencies or Congress just to address that relative make up. But then, second is it's also to me the fact that now a supermajority of

the Supreme Court represents a minority view in the United States. So, it's not just that it's a relatively undemocratic institution, but that it's also a relatively undemocratic institution that is comprised of people whose own views are out of step with a majority of the country's, and then you add to that in my mind what has become an asymmetry between the two parties and their ability to appointment justices based on winning popular votes and willing elections, and that too creates this asymmetry where you have one political party dominating an institution not because they represent more people, not because they have one more elections, but just because of happenstance and asymmetric conduct between the two parties. And all of that leads to a situation where you have an institution that is making these decisions that for no apparent reason that we would want them to be doing that.

Kate Shaw:

Yeah, and just to sort of throw a little additional detail in there, so right, on this court we have five justices appointed by president's who lost the popular vote, three by a president who lost the popular vote by a very significant amount. You have Justice Kavanaugh was confirmed by 50 senators, represented 44% of the public in addition to having been appointed by a president who lost the popular vote by three million. So, where Democrats are able to overcome the structural impediments imposed by the electoral college and the Senate, and actually get a majority and do some governance, then to have this other body that doesn't appear to be functioning in a way that is different from the political branches and actors operate, and has no claim to actual representativeness, though deploying the same tools as the actual representative branches, to then undo the work the Democratic output of the political branches and that's a little bit predictive. Like, I'm talking about now Democrats controlling these political branches.

Kate Shaw:

But, I think looking down the road, seeing the likelihood of that coming to pass I think is what makes this feel like something of a legitimacy or democracy crisis. Maybe if I can throw one more thing in, I think right now, Trump has appointed obviously three justices in a single term as compared to Barack Obama two over two terms, and sometimes that's the breaks you catch as a president. But, I think the view of a lot of people is that that actually wasn't the breaks that Trump caught, that definitely one and maybe two of those seats were not legitimately filled by President Trump. Certainly Justice Scalia's seat should have been filled by Barack Obama, and arguably Justice Ginsburg's seat should not have been filled prior to the November election. So, I think it's not just that it's a court that's making a lot of decisions that feel inconsistent with democratic processes, it's a court whose actual composition feels deeply compromised by the sequence of events from basically 2016 to late 2020.

David Schleicher:

The court did briefly represent almost all the boroughs of New York City though, so you have to give it that. Not anymore I don't think, but it briefly did.

Leah Litman:

You coastal elites at Yale, that's all you care about.

Sam Moyn:

As well as Harvard and Yale Law Schools. You know, I want to just go back, because it sounds like we're all in agreement that there's some democratization remedy. But, it sounded like Kate was... I don't want to put words in your mouth, nostalgic for a time when the court had a legitimation it now lacks. Of

course, the coin of the realm in some of these discussions is some value called legitimacy, and I just want to get clear first what one means by that because of course you could mean, and you kind of hinted at this, that the people accepted once as a nonpartisan institution whatever it was actually doing. Or, did you mean it actually had democratic legitimacy rather than what we call descriptive legitimacy-

Kate Shaw:

Or -

Sam Moyn:

Or sociological-

Kate Shaw:

Sociological legitimacy-

Sam Moyn:

Sometimes used for descriptive.

Kate Shaw:

Yeah, I think I meant more sociological or yeah descriptive as opposed to deep democratic.

Sam Moyn:

Do you imagine that there is a mechanism or means for restoring it, and more important, why would we want to if we conclude that whatever it's descriptive or sociological legitimacy, ie, it's accepted as nonpartisan, it may still lack democratic or normative legitimacy.

David Schleicher:

Can I throw in one more addition there? What's the evidence that it has lost its sociological... I mean, the court is still, it's trended less popular over time like all American institutions, but it's still much more popular than any actually democratic institution, and has more... I mean, the partisan respect for it bounces up and down basically whether you're winning or losing, but people still like people in robes, and they still respect... As long as there are robes and columns, they have something going for them.

Kate Shaw:

Yeah, I mean, I don't think the public opinion data actually is that revealing. It's like in the 40s I want to say now. In 2002, it was 50 right after Bush v Gore, which was as my old boss, Justice Stevens predicted, basically, that was a fatal and self inflicted wound for the court. But actually, it was not reflected in the public opinion data. So, I just tend to think that the polling is really imprecise and so I don't put a ton of stock in it with respect to the court. Look, I think that when it's functioning in a couple of key ways, the court actually is really important to the functioning of our democracy. One, in a Elyian way of actually facilitation the effective functioning of democracy, right? Unblocking stoppage in the political process is a core and correct democratic function of the court.

Kate Shaw:

Maybe this is something that we should have identified when you were just posing a descriptive question of what isn't working and what is leading to these calls for reform. I think that some of the work that the court has done that has been most distressing in the last decade or so, so if we're thinking back to Shelby County, is to undo democratic enactments, sometimes to overturn interventions by lower courts, but both that have the express purpose of facilitating the functioning of democracy. So, in some ways, you have this little institution that right now has majority of members appointed by presidents who didn't get popular votes and confirmed by Senate that doesn't represent the majority of Americans undoing these attempts to actually facilitate the functioning of democracy either in the pandemic or before that. And I actually include decisions like Citizens United in that, like trying to actually, through congressional enactments, limit the distorting effects of excessive accumulation of capital on democracy. So, the court to undo all of that seems to be to flip exactly on its head the sort of proper role of the court in a democracy, again in an Elyian sense.

Sam Moyn:

Just for anyone who's listening, she's referring to John Hart Ely, this constitutional law theorist who proposed that the court should not intervene in the name of substantive moral visions, but to clear obstructions in the process of democratic rule formation, and especially for the sake of minorities. I just query first whether you think that ever happened, and if it did why it was so brief, and what we would have to do again to set up an institution that played that function and no other, without getting captured in the way it has been for more or less all, with maybe a few years to the side, of our history?

Kate Shaw:

Well, let me just say, I think Baker v Carr, and the one person, one vote cases are sort of the paradigmatic example, and I think that's critical. I actually think that the court in Rucho the case in which the court kind of ridiculous reading of the political question doctrine determined that partisan gerrymanders were nonjusticiable I think revealed, though it would clearly deny this, that the majority disagreed with Baker versus Carr, and believed the court should never have intervened, and that set of decisions was unbelievably important to ensuring an actual functioning democracy, and I worry that this court-

Sam Moyn:

Agreed.

Kate Shaw:

Actually doesn't believe that that was appropriate.

David Schleicher:

I want to shift for a second. What do you think this commission should do? So, if they're going to make a proposal so that... What do you think they should... I mean, they were again, a million proposals out there, many of which I think run into some of the sociological legitimacy question, like there's a big debate, would packing the court be unpopular? It would be I think. But, that's my cards on the table. But, if you were put on this commission, we said none of us got this phone call, but what would you tell President Biden how he should think about the Supreme Court?

Leah Litman:

I would say take Joe Manchin out to a great steak dinner, ask him what West Virginia needs. No, I'm just kidding.

David Schleicher:

Right, someone said every bill is going to be called "The West Virginia infrastructure bill and."

Leah Litman:

Right. Gold highways for West Virginia, and voting rights reform. No. I think all of this discussion is necessarily hypothetical and theoretical for as long as the existing control remains, and existing breakdown remains in the Senate and the House. That being said, I think that what some lawmakers lack right now is a full sense about the panoply of options at their disposal. So, for example, in the kind of thousand flowers blooming period of court reform that you were referring to, I remember having a discussion with some journalists, where they asked me, "Is jurisdiction stripping a real option? Is that actually something that Congress has the authority to do? That seems so wrong to me. How is that possibly constitutional?" And so, I think just beginning discussions with lawmakers, creating white papers and all of that to say, "Here are all of the examples where Congress has thought about jurisdiction stripping over constitutional cases, here's the constitutional authority for this.

Leah Litman:

Here's why they weren't done, here's why they were done. Again, Congress has never vested the federal courts with the full scope of federal question jurisdiction over constitutional issues. So, getting people to appreciate that this describes the status quo would I think be helpful. So, part of it is just getting people in Congress on the same page as far as understanding what the actual options are is I think a big part of that, and particularly with respect to jurisdiction stripping and non Supreme Court expansion which I honestly don't think people really appreciated as constitutional or at least as possibly constitutional as many of the other reforms that were being floated.

Sam Moyn:

That sounds totally right. I just want to, not pouring cold water on this situation, but Biden's campaign announced the commission at a very dicey moment. I think it was little more than a week before the election, and the goal was essentially to throw a hot potato over November 3rd so that the debate around that would-

David Schleicher:

That's what all committees are for.

Sam Moyn:

Well, of course, so-

David Schleicher:

It's the purpose of committees is to put -

Sam Moyn:

I just want to... I think first of all, it's been reported in Politico that the commission is being staffed. We shouldn't treat it as something real yet, even to the extent it comes to exist. Not to mention that it was

explicitly announced as a bipartisan commission of law professors of different political beliefs and so forth. I hope that includes at least some on the left, but-

Leah Litman:

I'll hold my breath.

Sam Moyn:

No, I mean, I agree with Leah, that it's about we've got a generation of mainstreaming and undoing the damage of American Civics Education, where we all learn what Kate said, that this is a crucial institution that's played this incredibly important role in the state of American democracy. I just think if we get a better sense of what its actual role has been, then we can take more seriously credible reforms, and teach Article 3. If we're going to talk about jurisdiction stripping, tell our students just how much power the constitution textually gives to Congress to structure the jurisdiction of the federal courts.

Leah Litman:

And if I could just add one additional thing, which is I think any serious court reform is going to be technically quite difficult because think about the democratic deficit problems that we laid out on the table. Different kinds of jurisdiction stripping will solve some of these, but not others. If you strip the Supreme Court's ability to invalidate federal statutes on constitutional grounds, that is going to do nothing for the Supreme Court's ability to say whether Biden regulations adhere to the Clean Air Act or comports with the Administrative Procedure Act.

Sam Moyn:

Of course.

Leah Litman:

But, I don't think a lot of people want to strip all judicial review of administrative regulation. So then, the question is, okay, well, which ones, how, how do you craft that reform policy to actually allow administrations the ability to carry out their policies in a socially useful democratically legitimate way? And I think that implementing that is quite difficult. I don't know that I've seen the perfect package of Supreme Court reforms that would address all of the problems that we've raised, and there are other ones as well that we haven't even put out on the table. So, I think just educating lawmakers, getting people to think more about this, identifying the different problems that they should be trying to solve. And getting smart people to think about this is I think a first step, and perhaps the only one that we can realistically expect this commission to start, given where we are right now.

David Schleicher:

I would have thought that the answer you guys would have given would have been in more dialogue with the beginning of the discussion, which is that when Biden first proposed the commission, it was happening as they were filling the Supreme Court seat. As I understood, part of the gambit was to try to sell them on not doing so by holding out the threat of we're going to end the... whatever it is. It was some version of that type of politics, and one idea is that the thing you want is a Supreme Court with not... because all the technical and other problems, is just with its sails clipped a little bit rather than actually achieving any of these reforms. So, one possible response to that is I don't believe there's such a thing that can exist, given these people, that's not a realistic belief. Or, another version is that because the

game theory of it is such that they understand the technical problems to be so severe or the politics to be so severe that they are willing to play the game because they don't think in the tit for tat there'll ever be a tat.

Leah Litman:

I just don't think the commission represented a real effort to try to get Republicans not to fill the seat, in part for the reasons you gave, and two, just given who the democratic presidential nominee was and who's in the democratic Senate. No reasonable person would think that the Democratic party was about to go hog wild and expand the Supreme Court.

David Schleicher:

For kind of Nixon-China, I just might be crazy strategy, you have to credible, actually, possibly be crazy, and I completely agree that it didn't seem super likely one way or the other.

Sam Moyn:

Yeah, David, I think it was about punting. I do think that there are a lot of people who openly say that the whole Supreme Court reform discussion, not the commission which was punting, but the whole discourse is about credible threat to the institution to avoid radical outcomes, especially a warning to John Roberts in particular. I think that's fine, but I don't think we can let the good be the enemy of the perfect, and we need to use this opportunity which is once in a lifetime to open up a full fledged discussion about what is the proper role for this institution, what role has it played historically, how can we fine tune it? Totally agree with Leah that that's the task, is to focus on the fine tuning including of jurisdiction because it has a role to play but not the role its played, and even if its sails are trimmed, it will play, for the reasons you addressed, David, which is that the below the radar, it can do immense damage and has done so for decades.

Kate Shaw:

Can I ask, Sam, I don't want to put you on the spot, but I know that you've... So, we've been talking a little bit about jurisdiction stripping, and I share Leah's concerns about some of the kind of workability in the details. But, I couldn't tell whether you sort of think we should focus on jurisdiction stripping and not expansion or whether that's... I mean, I tend to think that expansion should be on the table as a very real prospect, in part for the last four years and those reasons, and I think adding two seats, which could of course set us on a path of seat addition arms race, but actually don't know how bothered I am by a continually expanding Supreme Court. I'm not quite sure where I am myself. I think Jamal Greene has, maybe just on Twitter, I'm not sure if he's ever written anything longer about it, but he's recently very much a comparativist and suggested our Supreme Court is much too small as compared to the size of the court in other democracies, and I think that makes a certain sense. So anyway, I guess I'm not worried about expansion in and of itself as a problem. I was just curious, I couldn't tell whether you had a view on size.

Sam Moyn:

I'm all for expansion of the lower judiciary. I'm kind of shocked, maybe it'd be interesting to raise this with Leah also. Why hasn't that been more frontal in recent weeks, because it seems like that's not even controversial relative to Supreme Court reform going back to Jimmy Carter. And if you're really concerned about the Trumpification of the judiciary, what's the barrier there? But no, I guess my trouble with expansion is that by itself, it preserves the power of the court and trades on this notion that it just

recently fell into illegitimacy because of Mitch McConnell when honestly he seemed to just exercise the power that the Constitution gives to Machiavellian players of that kind, which says nothing about the modalities of hearing and replacement of justices. So, I think if court expansion makes sense, it could for Jamal Green's reasons that it would be great to have panels at the apex court, but it would really be a shame if we really purport to care about democratic legitimacy to end up with an expanded Supreme Court that isn't part of the progressive reform of the country. So, somehow fitting together, if we wanted an expansion agenda, with what we've called a disempowering agenda seems to me the position I want, the hill I want to die on.

Leah Litman:

Yeah.

Kate Shaw:

Yeah, and the lower courts, it's I think great to bring that into the conversation.

Leah Litman:

Not to make this a grievance campaign, but I did write a New York Times piece about this, and didn't get a call from the commission. No, I'm just kidding.

Sam Moyn:

No, exactly.-

Leah Litman:

And like as you were saying, it's completely uncontroversial, it was most recently expanded in the 1990s, there have been bipartisan calls to expand particularly lower courts in some areas where caseloads have far outpaced the number of judges in particular areas. I hope this is something that will be taken seriously over the next few years, but who knows.

David Schleicher:

Do you think it would be uncontroversial? Because it strikes me-

Leah Litman:

I think it would be controversial now, but I don't think there is any serious constitutional question, I don't think there is any serious constitutional norm against lower court expansion. Of course the Republicans would oppose it, but Republicans are going to oppose basically any legislation I think that the Biden administration is going to introduce.

David Schleicher:

The politics of it don't strike me as obviously good in that it looks like you are filling your... It's like a type thing as much as it's anything else, as well as the kind of ordinary politics of... Ordinary, the politics that we saw, that court packing generally, which is that it seems like a breaking of whatever norms around institutionalization and burrowing. If anything, the politics seem as bad, but with less meaning than the politics around Supreme Court expansion-

Leah Litman:

What I would say is that's partially because of the failure of messaging. I also don't think this should be a standalone bill, instead I think it should be part of a broader access to justice, a broader democracy reform project. So, do you want more voting rights enforcement, do you want loosening restrictions on complaints, do you want eliminate qualified immunity, do you want to actually be able to hear constitutional cases that you file against state and local communities? Well, guess what, in order to adjudicate those cases on their merits, we need more judges in order to protect the voting rights act, in order to actually adjudicate these claims, including of partisan gerrymandering, we need more judges. So, I think it can and should be adjuncts to other legislation, and I think then the politics would look different. But, this is also partially what I think the commission could do, is like a messaging education program where you are again developing facts and teaching people about the state of the federal courts, and what is they can do, and what it is they are doing.

David Schleicher:

I completely support every member of Congress going to your seminar. I had one question about-

Leah Litman:

This is why I post my intro videos on Zoom, with background music and all, open invitation, particularly you, Joe Manchin.

Kate Shaw:

I can't even look at them, they put me to such shame. My video and PowerPoint game is just so ridiculously deficient, it's -

David Schleicher:

I've hired a DJ to do my classes for this semester, so I'm pretty excited about that. But, I do have a question about... I bet there are like a whole bunch of threads we can pull on, but I've got one that directly follows on this, which is assuming there isn't going to be any radical reforms here, what do you think nominations are going to look like during the Biden Administration? So, one of the things that was really notable about the Trump nomination strategy is that it became increasingly young people. But, it's like, do you think the Biden Administration's going to be appointing 27 year old... like you'll finish your Supreme Court clerkship and the reward will be, instead of getting a big bonus from some law firm, you're going to get a Second Circuit seat or what?

Sam Moyn:

There'll be a diversity agenda, and rightly so, especially if they prevail upon Stephen Breyer to retire as he should asap. There's no doubt... I mean, there's been a promise to whom that seat's going, and I think the diversification of the federal judiciary in light of the appointment policies that Biden's pursued politically is what's most obvious to me, and of course definitely high time for it.

Kate Shaw:

Yeah. We should say, he certainly hasn't promised the seat to anyone in particular, but he has said that he hopes to put a black woman on the Supreme Court, and I think he's got an incredible list of options. So, I don't see him not doing that. So yeah, I think that that's a promise that he will make good on. Leondra Kruger from the California Supreme Court and Ketanji Brown Jackson from the District of DC, and there's a long list of others, but those two I think are sort of the top of every... and they would both

be tremendous. In terms of the broader profile of lower court nominees, no, well, I mean, look. So, I was a lawyer in the early Obama Administration, and I think the work that we did in diversifying the lower federal courts was really excellent.

Kate Shaw:

I think that we, the Administration, I mean I was only there for the first couple of years, but fell really short on the age issue. We put a lot of older judges on the bench, many of whom took senior status not that much later. I think that it becomes more difficult, privileging diversity, often means people who have taken career paths that sometimes involved time at firms, time in government. And so, there were people in their 40s, and sometimes early 50s, who were tremendous candidates and candidates of color, but weren't 27, and these other qualities were front of mind for that administration, and I think rightly so. Obviously, the Trump Administration didn't care at all about diversity, and really did seem to privilege ideological purity and age, and so I think that the Biden team will be more attentive to youth, but it certainly isn't going to jettison diversity, nor should it. So, I think that, no, there are not going to be a lot of 27 year old judges, nor should there be in any administration.

Leah Litman:

I have no idea honestly what the profile of these judicial nominees is going to be. I absolutely agree that professional diversity, diversity on the basis of race, sex, sexual orientation, gender identity is going to be something that the administration is going to value. But, I don't know whether they will try to nominate and push and go to bat for someone who has taken unapologetically left leaning positions and political positions in the same that the Trump Administration did for their appointees. I just don't know the answer to that question, and it's possible they don't know and they might try some and see how they go. But yeah, I don't know.

Kate Shaw:

But, I do know that's going to be a priority. I mean, also to harken back a minute to the Obama Administration, I think that in the early days, the progress was way too slow on filling vacancies, and I do think that there'll be probably a lot of judges taking senior status, and there are not a lot of vacancies right now to fill because Trump filled so many of them. He really basically filled all of them. But, I think that as more judges take senior status, I think that there probably will be a lot of vacancies. And I have no doubt that that team is just not going to let vacancies sit.

David Schleicher:

The West Virginia gold plated highways and judicial vacancies act of...

Leah Litman:

Yeah, but even though this administration has said they are prioritizing filling nominations, they sent that letter from the White House Council telling senators they had to submit possible nominees within 45 days of a vacancy. That itself is still a much longer period than the Trump Administration took to nominate people for vacancies. They had someone nominated to fill Judge Barrett's then seat on the Second Circuit immediately when she was nominated, before she was even confirmed. So, I am taking some hope from the letter from White House Council and the fact that Ron Klain is Chief of Staff, and Paige Herwig is in the White House Council's office. All of those are really good things, but I still just I don't know what we're going to see.

David Schleicher:

So, I'm going to do one counterpoint here, which is that it's not obvious to me in any way, shape or form that given a limited agenda that this is the most valuable thing. I mean, it's possible it is, it's possible, and there are ways in which it is, but there's a regular criticism of the Obama Administration that they didn't focus on this enough. But, part of the reason they didn't focus on this is because they were focusing on a lot of other things that they were doing that were also very valuable, and the Biden Administration just has a lot of stuff to do. So, I don't know how excited they are, especially in a 50-50 Senate, I don't know how excited they are about a million vacancies because they have to get all their people nominated, they're going to have to save the country from a pandemic and whatever else.

David Schleicher:

It's one of the things that I find about the Supreme Court discourse as an outsider to it, is like it's primacy is assumed rather proven, and there are periods in which it's deeply important, and there are lots of periods in which it's not so important. I mean, I joked during 2008 that not only was the Federal Reserve more important than the Supreme Court as an institution, it was more important in one given year than the Supreme Court had been for decades. There's probably, if you go through the crisis period, it was more important each 12 hours than the Supreme Court had been for 12 months. So, I don't know, I'm curious to see whether they adopt this Supreme Court primacy type view.

Sam Moyn:

Look, I mean, I think the answer to your question depends on how big the threat is, which leads me to, I hope, ask a last question which is for our two real experts. It concerns something we bypassed, which is the nondelegation doctrine. The emerging picture in *Gundy* versus United States that there are actually a lot of votes to destroy the administrative state, even before Amy Coney Barrett ascended to power. So, that would be a very big deal if in the next two years, just the majority that existed before she came around with Sam Alito saying in *Gundy* that he was going to until Brett Kavanaugh was in his seat. Now he is, and they've got an extra. That would be a huge big deal, and I just want to... We talked about abortion, but how real do you think the prospect is that they'll beef up the nondelegation doctrine, which would then I believe provide an answer to David, that actually it's an incredibly big priority to circumvent that or have a response ready if it happens.

Leah Litman:

So, I personally think that that is a very real threat. I think even if they don't endorse the same version of the modified or overturned nondelegation doctrine from Justice Gorsuch's dissent, I think we will see a more rigorous review of congressional delegations to agencies, and I think that poses a major burden to addressing things like climate change. And even if they don't reinvigorate the nondelegation doctrine, I think there are enough tools at their disposal to basically gut administrative efforts to address climate change. I think back to the clean power plan, again during the Obama Administration, or again using statutes like in *Michigan* versus EPA, there are just enough tools at their disposal to do that. They have shown a willingness to do that that I think the Biden Administration needs to multitask, and yes I understand they want to prioritize things like a clean Dream Act, coronavirus, climate regulation, voting rights, and so on, but we have to learn to do more than two things at once. Governing is hard. Find people who will work around the clock to do that.

Kate Shaw:

You just need 20 Leachs in the White House Council's office and this can all get done. I assure you, it is doable.

Sam Moyn:

Or just one.

Kate Shaw:

Or maybe just one, it's true.

Leah Litman:

I mean, it's just like, I totally get what you're saying, David, but it bothers me a little bit when I hear that, "Well, we can't do judges because we need to do this other thing."

Kate Shaw:

Also to respond to David's question, yeah, so I think you're right. Its import does sort of wax and wane, but obviously you have to put the judges in place now because you have no idea when those moments might come. On nondelegation, I actually think that I may be on... and when I said at the beginning, maybe finding all notice-and-comment rulemaking unconstitutional, that's on a nondelegation theory. That just like actually agencies issuing binding rules, rules that have the force of law is impermissible lawmaking, and that only Congress and not agencies can do that. That's how agencies do most of the important work they do is these rules. So, you don't have to read tea leaves, they have said it, probably a majority of them. Now again, saying it when you aren't actually voting for it, it's a little bit different.

Kate Shaw:

So, I guess I would say, I'm on nondelegation, where it sounds like Leah is on abortion, which is I think, they probably do it in a number of steps. I think they probably take a case that is Gundy-esque, that involves criminal penalties, and there, find an excessive unconstitutional delegation, maybe find a extremely broadly worded statute. And actually, I mean, that would be a huge deal. I don't want to undersell the significance, but I can't imagine they basically say that in one decision as opposed to a series of decisions that much of the administrative state is unconstitutional. But, I do think it's very possible that the Supreme Court as currently constituted could get there, and I don't know what the time horizon is. I don't even know if it's the next four years, but I think it could be. But, certainly in the next decade if we don't see big changes.

David Schleicher:

So, I've always wondered something about the nondelegation doctrine, which is that... So, nondelegation is very active in state courts, that it has a... For those of you who pay attention to New York City, the soda ban, the big soda case is a nondelegation case in New York, and the world didn't end. I mean, it's an unbelievably stupid opinion and an unbelievably stupid doctrine in the states. So, the question is, do you think that they will use it a kind of stupid but, not harmless, but modestly harmful way, or in a end the federal government sort of way. I think-

Kate Shaw:

According to Kagan, much of administrative governance is unconstitutional is what Kagan has said. So, that's not an alarmist position. I think it was a rhetorical flourish that was quite deliberate and not

necessarily short term predictive, but she wanted I think to issue a warning. Yeah, I think it's an interesting question. I mean, the soda ban was like this weird... It was a local regulation, there was some sort of complicated backstory as to the soda ban, but it's certainly right that there's a more robust nondelegation doctrine in the states. I think there's a new paper on this, like within the last couple of weeks somebody actually took a good look at it in the states.

David Schleicher:

Yeah, Keith Whittington has a piece on it, it's pretty good.

Kate Shaw:

Oh, does he? Okay, so I'll have to look at that. But yeah, like how much is it... I don't know, states can be pretty dysfunctional, so it may well be that it's actually going to keep-

David Schleicher:

It's only one of the reasons they can be dysfunctional but sure.

Kate Shaw:

Right.

Leah Litman:

I mean, like in Michigan, they used the nondelegation doctrine to invalidate one of the governor's coronavirus restrictions. So, even if they do it in a quote, modestly harmful way, and don't invalidate all of government, again I would go back to climate regulation. It's just going to be first on the chopping block, and that's real bad.

Kate Shaw:

Yeah, so Nick Bagley had a great piece in the Atlantic, that basically said that Michigan's Supreme Court decision is a blueprint for the Supreme Court if it wants to strike down something significant. I don't remember if he pointed to climate or federal COVID interventions, I'm not sure. But yeah, I mean, I think that the groundwork has been laid in some state courts for sure. I mean, obviously [inaudible 00:50:13] doesn't apply, but you could transpose it pretty easily to the federal context.

Sam Moyn:

I'd just add that we wouldn't want to wait around for the showy world ending decisions. I mean, if you take abortion, I mean, the evisceration over a generation is already so advanced that weren't not talking about the same abortion right anymore. So, the climactic overruling of Roe becomes less necessary, but the court's power is dangerous, especially when it's exercised by

David Schleicher:

Sam, you must be in favor of it.

Sam Moyn:

Of the nondelegation doctrine?

David Schleicher:

No, no, no. Of the putting abortion decisions back on the states .. I mean, it's a court denying type thing. I'm just trying to get Sam in trouble here. I mean, you must be thrilled about the abortion decision. They're enabling democracy.

Sam Moyn:

Well, you know, given my druthers, I'd love to see the Democrats respond in the face of all the kinds of injustice we have, notably white supremacy, which it's now permissible to talk about including in inauguration speeches, that Congress should adopt a section five strategy, and say, "We own the Fourteenth Amendment, we can, among other things, pass a federal abortion right, and demand the overturning of City of Boerne v Flores," and say, "We can define the people's rights," which the Congress mostly has, Civil Rights Act, the American's with Disability Act, Voting Rights Act. Why we would want to defend this one precedent rather than taking the power in the Congress that the Constitution gives, precisely to allow for citizen's rights, I don't know. But no, fair is fair is cool.

Kate Shaw:

Boerne's a huge obstacle there. I wonder... Boerne versus Flores, not Bernie Sanders.

Leah Litman:

Not the dude in the cold and the mittens.

Kate Shaw:

He's just really on the mind today. But, Biden did talk about this, a federal protection, on the campaign, but I don't think he said anything about it recently. I don't know. I think strike it down, but it does seem like it should be certainly permissible as far as I'm concerned.

Leah Litman:

Thanks everyone for listening. Thanks to David and Sam for this joint episode.

David Schleicher:

Thank you guys so much for say, having us on, or us coming on, or whatever it is, what you do when you have a joint episode, but this was really fun, I learned a lot, and I thought this was terrific, do thank you so much.

Sam Moyn:

Thank you, you're amazing.

Leah Litman:

Thanks to Melody Rowell, our producer, thanks to Eddie Cooper for making our music, thanks to all of you for listening. If you'd like to support the show, you can become a Glow subscriber at glow.fm/StrictScrutiny.