Melissa Murray:

As we were putting this episode of Strict Scrutiny together, the Atlanta shooting occurred. We want to extend our deepest condolences and support to the families and friends of those who were killed on that day. On this podcast, we've always tried to highlight the way in which law impacts the lives of underrepresented and marginalized communities. And with that in mind, we condemn the violence that has been directed at marginalized communities, including the AAPI community, and we stand in solidarity with those communities in seeking justice.

Speaker 2:

As Chief Justice, I've pressed forward. It's no joke, but when an ugly man argues against two beautiful ladies like this, they're going to have last word.

Speaker 3:

She spoke, not elegantly, but with unmistakable clarity. She said, "I asked no favor for my sex. All I asked about Reverend, is that they take their feet off on us."

Melissa Murray:

Welcome back to Strict Scrutiny. We're your hosts. I'm Melissa Murray.

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw.

Melissa Murray:

Today, we have a jam packed episode for you with News, previews, and court culture. And I am so excited to be back with you guys. You guys have been going it alone without me in the last couple of weeks, and I've really been missing it and feeling a little lonely here on the sidelines.

Kate Shaw:

Well, the time difference isn't making it actually a little hard to get things to align with you still on the west coast. We missed you out here.

Melissa Murray:

I know, West Coast, best coast. What can I say? I'm sorry that it's making it so hard. But I'm really psyched about the episode that's going to drop with our boy Strict Scrutiny super fan, Sheldon Whiteboard White House. I'm excited to dig into that when I download it.

Leah Litman:

Spoiler alert. Senator Whitehouse is making a return to the podcast. We will air that episode after the March sitting.

Melissa Murray:

Yeah. I won't be on that episode, so I'll be listening with everyone else. And I'm so excited because he's bringing the fire. I love it.

Leah Litman:

I think we also have a good episode in store for you today, including a piece of court culture that I know you are super stoked to talk about.

Melissa Murray:

I'm so excited to talk about this aspect of court culture, legal culture more generally. So let's just get right into it. Let's do that. Breaking News. Leo. We have an opinion from the court.

Leah Litman:

We do. We got the Supreme Court's opinion in a case we previewed. It was Uzuegbunam v. Precziewski, The case about nominal damages. Specifically, it was about whether a claim for nominal damages suffices to give a plaintiff standing and allow a case to continue. Nominal damages just as a refresher means a small amount of money like $1 that wouldn't necessarily compensate someone for any or all of the often intangible injuries that they suffer. Here, the plaintiff was denied the ability to speak and distribute pamphlets about his religion. And the question was whether the claim for nominal damages gave him standing when that was all he was asking for in the case.

Leah Litman:

The case had originally also included a claim for injunctive relief, but the school then changed the policy that the plaintiff had originally sought to enjoy. And so that was no longer part of the case. This opinion was by Justice Thomas, it was heavily reliant on the permissibility of nominal damages at common law and importing that history into article three. The opinion was 8:1, and the dissenting justice was the chief justice. And this was actually his first solo dissent. And writing only for himself, he was able to let his freak flag fly, and it is full of chiefy lines. The court sees no problem with turning judges into advice columnists.

Melissa Murray:

Okay, stop right there.

Melissa Murray:

Leaving aside the implications for the justiciability doctrines. How amazing would it be if supreme court justices were advice columnists? Think about it, "Dear Justice Breyer, I'm having a dinner party. Do you have any ideas for Parkrose? Discuss."

Kate Shaw:

and then Gorsuch goes in to jump in and be like, "No, no, no, but I have a steak recipe."

Melissa Murray:

The chief is going to Chief and he definitely Chief-ed on this one. But I also think it's a really interesting opinion... Justice Thomas is really having a lot of common law moments, another place where I think the common law came in, although not in the same ways. And this opinion was in his concurrence and gamble from two terms ago when he talked about precedent and when you should follow precedent.

Again, he made this very firm distinction between article three courts on the one hand and common law courts, which he said had more room to just sort of let precedent develop, but article three courts really had to stop bad precedents in their tracks. He uses the common law for lots of different things and not always consistently.

Kate Shaw:

Definitely. The chief was I think really impatient with some of the court's wholesale importation of these 18th century English decisions. And it actually reminded me of a theme that we have heard emerge in a couple of fourth amendment cases, this term, just sort of the relevance of that founding era and pre founding history. So we'll see how that cashes out in the opinions in those cases. But this kind of snark made me think the chief is sort of fed up with this kind of wholesale adoption of those common law principles in a number of areas of law.

Kate Shaw:

Snark aside, the chief actually did seem pretty worked up about this kind of alarmist at points in the opinion, right? He suggested that the court had announced a sweeping exception to the case or controversy requirement that it risked a major expansion of the judicial role that it countenanced the dispensing of actual advisory opinions, like some pretty sharp stuff at points. But then he also suggested that actually, the case might not have such sweeping implications, because defendants might be able to end a case like this by simply paying the nominal damages. Kavanaugh actually concurred in the Thomas opinion, but did write a very short, separate opinion, saying he basically agreed with the chief about the defendant's ability in cases like this to just basically end the litigation. But I don't know if it's clear with the rest of the court thing. So I think just the full ramifications of the opinion very much remains to be seen.

Melissa Murray:

We talked before about this, about how this would be a strange bedfellow's lineup because of the implications for civil rights litigation. I think you've definitely saw that in the 8:1 lineup. Were you surprised that so many of the liberal justices joined the Thomas opinion?

Leah Litman:

No, because for them, I really think this case is about a principle that is actual principle for them, which is more permissive rules about standing like they believe the court has just been too restrictive and draconian and imposing limits that they don't believe are justified on plaintiffs. And so, just like they upheld the Controlled Substances Act in Gonzales v. Raich on Commerce Clause challenges. These are substantive areas where they have real jurisprudential principles that they will adhere to, even when that sometimes leads them to outcomes that perhaps might not align with the policy preferences of the party that appointed them. I do want to live in a world in which I can write letters to Steve Breyer and ask him for advice. So maybe this is a second career he could pursue. Just want to float that like if he finds some extra time and wants to become an advice columnist, happy to help in that endeavor, Steve.

Kate Shaw:

We could have a regular segment on the pod.

Leah Litman:

Oh, yeah. Of course.

Kate Shaw:

An "Ask Steve" segment. Oh my god.

Leah Litman:

Dear... Oh, my gosh.

Melissa Murray:

How many open invitations do we have now? We have an open invitation to Taylor Swift, an open invitation to Elena Kagan, an open invitation to Rege-Jean page, an open invitation to Meghan Markle. And now an open-

Leah Litman:

And Amanda Gorman.

Melissa Murray:

And Amanda Gorman. I mean, everyone could have their own special segment of the pod going forward, and then we wouldn't have to do anything.

Leah Litman:

It's true. And for a little diversity, we added Steve Breyer for the invitation. We try.

Melissa Murray:

Slide into our DMs, Justice Breyer.

Leah Litman:

One thing that wasn't in the opinion, and then one thing that was, there were unfortunately no Taylor Swift references in this opinion. I took this as a personal attack, because this was the case where Justice Kagan asked that argument if Taylor's lawsuit for $1 against the man who sexually assaulted her could proceed under the theory that nominal damages are not sufficient. And that hypothetical really did seem to influence the deliberations of the case after she asked the question, but it didn't end up making its way into the opinion itself. So a Taylor Swift reference will happen in a Supreme Court opinion. It just hasn't happened yet. But I will keep waiting.

Leah Litman:

There was also a fun back and forth between the chief justice and Justice Thomas. Kate, you mentioned that the Chief Justice's dissent got a little snarky. The Chief Justice said in its view, the common law and to a lesser extent, our cases require the federal courts open their doors to any plaintiff who asked for $1. And Justice Thomas, in response inserted a "But see" citation to a dissenting opinion by the Chief Justice in which he said article three is worth $1 zing methodologically. I think it's also interesting that the opinions, or at least the majority opinion, with its interest in the common law, kind of vacillates between two different forms of originalism.

Leah Litman:

On the one hand, you have original intent, originalism, or original expectation, originalism. The fact that a common law, these nominal damages suits could proceed, as evidence that the framers expected that they could do so, versus original public meaning, originalism attempting to ascertain what the core semantic meaning of article three cases and controversies requirement actually means. Just an interesting methodological issue to watch for.

Melissa Murray:

Another case that we're watching is an important sentencing case, Terry v. United States. And we're raising it because the Biden administration recently noted that it was changing its position in this case, which is about the first Step act and sentencing under that law. Specifically, it's about who is eligible for sentence reductions under the Act. So the Biden administration, in contrast to the past administration, would expand the number of people eligible for re sentencing. And this would be huge given the steep penalties that federal criminal law can impose. The change in position means that someone is going to have to step in to argue on behalf of the government, and the court will have to appoint someone to do that. And so our question is, What woman is not going to get this call to be the court appointed amicus here?

Leah Litman:

No, literally, like when we were preparing the show note, the actual word in the show note is, "What white man is going to get the call?"

Melissa Murray:

Well, happily, we have gotten an answer. And unhappily, we were right on the money. Kate, who's going to do this?

Kate Shaw:

So on the money. Not only a white guy who's a former SCOTUS clerk relatively recently, but a white guy who's a former SCOTUS clerk, who's already been invited not once but twice, to argue as amicus before the Supreme Court. He argued and won Beckles in 2016, then was invited to argue a case, Wilson vs. Sellers in February 2017. The state in that case ended up changing positions, thus eliminating the need to have an amicus argue so the court withdrew its invitation to Mortara, but has now issued him a historically unprecedented third invitation to argue before the court. We should note these also one of the lawyers challenging Harvard's affirmative action policy and Students for Fair Admissions v. Harvard, which has a cert petition pending right now. Court seems pretty likely to take that case. So Mortara could have a busy couple of terms before the court.

Kate Shaw:

I guess Consovoy, I think is counsel of record. So I don't know that he would argue that case, but he's definitely on the brief. But yeah, I mean, we've made this point before, I'm kind of a broken record on this, but just it's these amicus invitations are an opportunity that the court has to genuinely do a little work to diversify the ranks of the lawyers who argue before it, and it seems really uninterested in exercising this invitation authority and service of that goal.

Melissa Murray:

All right, so let's move on. That's a lot of news, and we're going to come back to some even better news towards the end. But let's dig into what's coming up this week at the court where they have the March sitting. So Kate, there's a really big case coming up. Do you want to tell us about it?

Kate Shaw:

Yeah. So maybe we'll start with Cedar Point Nursery v. Hassid, which is a case the court is going to hear on Monday, the first day of the March sitting. A super important Takings case. But Takings case, I think is a description that really understates the potential magnitude of the case. Okay, so the case involves a California statute that requires employers to allow a limited number of union organizers on two particular premises where agricultural or farm workers work for the hour before work begins, an hour at lunch break, and the hour after work ends for limited periods of time each year. So again, this is a limited number of union organizers, they can't be disruptive, they also have to stay in areas where employees take breaks, they have to give the employers advance notice. They can only do this four times a year for up to 30 days during each of these four windows.

Kate Shaw:

The question that these employers have brought to the court is whether this constitutes a per se taking of access, I guess to the employer's property. We'll get back to what this constitutional challenge is really taking aim at, but that at least is how it is framed. So the Takings clause provides the private property shall not be taken for public use without just compensation. And current doctrine distinguishes between what's known as a per se taking, things like severe intrusions on private property that makes it basically impossible for someone to use that private property. In those cases, the government basically always has to pay compensation and what are known as regulatory takings. So the sort of taking that limits in some way the use of private property, but still allows the owner to make most uses of the property. The government typically doesn't have to pay property owners for those kinds of takings.

Kate Shaw:

Under existing law per se, taking is a taking that deprives the property owner again of all economically beneficial or productive uses of the property, and subjects property owners to permanent physical occupation. So the property owners here are arguing that this is basically a per se taking rather than a license, so not a regulatory taking.

Leah Litman:

One reason this case is important is because of its potential implications. Think about the number of laws that require property owners to grant physical access to their property, like health and safety inspection regimes, like food and drug inspections, Occupational Safety and Health inspections, home visits by social workers, utility companies that can enter private property for surveys, or repairs, or connections, underground mine inspections, law enforcement like immigration officials, maybe even anti discrimination provisions which prohibit you from excluding someone on the basis of race or sex, or other characteristics, or through constructive exclusion like retaliation or harassment.

Melissa Murray:

So at bottom, this case represents an opportunity to expand perhaps even to weaponize the fifth amendment in a lot of different ways. And this is a point that's made by Aaron Tang, who is a law professor at the University of California Davis' law school and a former clerk to Justice Sotomayor. He has an Op-ed in the Washington Post that lays out all of this. And also note some of the origins of this

particular regulation, which was part of a lobbying effort undertaken by Cesar Chavez and the United farm workers in California, in the 1970s, as part of their efforts to secure workplace protections for agricultural workers. The case also has echoes of Janis which invalidated fair share agreements from public sector unions that allowed unions to collect dues from those who benefit from the union services as well as other anti organizing or anti collective action decisions that the court has recently issued like Epic Systems v. Lewis.

Leah Litman:

So I'm thinking this case is not going to end well for workers or more generally, the regulatory state/regulation. And yet these cases don't seem to get the same kind of attention that other major cases like the Affordable Care Act case does. You mentioned Professor Tang's Op-ed, I also wanted to flag a super great New York Times piece by Harvard law professor, Niko Bowie. In addition to noting the origins of the regulation, he also talks about a previous case, an earlier case in which an employer raised a similar takings claim and argued that they had a right to exclude unwanted visitors from their property by virtue of the Fifth Amendment. And that was the case that became Heart of Atlanta Motel v. United States, in which the court ultimately upheld the Civil Rights Act, and the provisions prohibiting racial discrimination by public accommodations.

Leah Litman:

In that case, a white owner of an Atlanta motel argue that the Civil Rights Act which prohibited refusing to serve a customer on the basis of race, violated the employer's property right to exclude unwanted visitors. He actually asked the government for one million dollars to compensate him for having to serve black customers.

Kate Shaw:

Yeah, and the Op-ed, I think very provocatively incorrectly analogizes the employer's argument to the argument made by that owner in the heart of Atlanta case, repeatedly throughout the app. So it is very much worth a read. And I'd say that Op-ed and just thinking about this case. And maybe because it is coming up while I'm covering the Commerce Clause at my Common Law one course, I don't know if you guys have done the Commerce Clause already, we all do things a little bit differently in sequence. But it's just a reminder that a conservative court that is hostile to regulation can give expression to that hostility in a lot of different ways. So the court in the last few decades of the 19th, in the first few decades of the 20th century is simultaneously reading the Commerce Clause narrowly briefly reading the non delegation doctrine, broadly affording these broad substantive due process protections of contract, reading civil rights protections narrowly.

Kate Shaw:

We talked about this a little bit when we talk to Robe about the Amend docu series, but just the idea that we sometimes really silo these areas of law. But if you look at a particular historical moment, it's sometimes wild how much is happening across these different domains. It does feel like we might be entering that kind of era. So I feel like a lot of us in the legal Academy have been focused on the non delegation doctrine and the unitary executive and these ways that a conservative court could really limit government's ability to regulate in all kinds of important ways. And this is another sphere in which the court may do really important and damaging work sort of eroding the ability of government to regulate in meaningful ways. And all this could be happening at the same time.

Melissa Murray:

Well, it's also I think, of a piece with what some scholars have called the weaponization of the First Amendment against government intervention that we've seen over the last couple of years as well. I mean, this is just using other constitutional provisions as independent limits on the government's existing powers to do things, whether it's the President's power to do something or the legislature's power to enact legislation. So again, thinking about them as coextensive as opposed to siloed is really important here. We should also note that California Solicitor General Michael Mongan is also arguing this case, he also argued the ACA case on behalf of California.

Melissa Murray:

It's also worth noting that the United States has changed its position here as well. Under the Trump administration, the SG's office initially supported the employers here. They're two fruit producers in California, and they also supported this per se theory. But a letter brief from Acting Solicitor General Elizabeth Prelogar made clear that the SG's office no longer believes that that is the correct analysis. Although to be clear, The Office did not issue a full brief in support of California's position here, either.

Kate Shaw:

Yeah, maybe wonder whether the court should do something in these cases where there's a change in positions on the part of the Solicitor General. There was the same issue in the Arizona Voting Rights Act case. The SG changed positions, wrote kind of a puzzling letter brief, but didn't fully spell out its new view. And I actually thought in that case, it would have been useful to know exactly what the federal government thought. And so to hear there's just like a page and a half of a brief definitely repudiating the prior position. But I don't know, it feels like this is a really high stakes case, and it would be worthwhile for us to have a full treatment of the views of the federal government on this really novel constitutional argument that these employers are raising. And it just made me wonder whether they shouldn't delay cases like this, to give the federal government a chance to actually fully brief a question like this, and they haven't typically done that.

Melissa Murray:

All right. Another case that's headed to the court next week, this week, as it were, is Caniglia v. Strong, which is a really important Fourth Amendment case that Leah previewed when she had that fascinating conversation with Josie Duffy rice and J. Willis from the appeal. The question here is whether police officers can enter someone's home to seize property without a warrant. Generally, the Fourth Amendment requires a warrant before police officers can enter a home and take property. In a prior case, Cady v. Dombrowski, the court said the warrant requirement doesn't apply when the police are performing what are known as caretaking functions. But Cady involves the entry in search of a car that had been towed, it didn't involve entry into someone's home. So the question here is whether there's an exception to the Fourth Amendment that allows police officers to enter someone's home when the officers are performing a community caretaking exception, and what the scope of that exception might be? So specifically, when are officers performing a community caretaking exception?

Melissa Murray:

The facts of this case are somewhat disturbing. Mr. Caniglia and his wife of 20 years got into a fight. He brought out a gun and said, "Why don't you just put me out of my misery?" She leaves the home sleeps at a hotel, but calls next day and when he doesn't pick up, she then calls the police to do a wellness check. The police arrive, they find him alive, but he says some things that convinces the police officers

that he needs to go to the hospital. They convinced him to go to the hospital. And there is some dispute here about what he was told about his admission to the hospital. They then enter the home under the auspices of the wellness check, and they find a cache of guns that they take. The case, of course, has a cross ideological coalition of amici here. So again, this is another one of those strange bedfellows circumstances where those who are concerned about Second Amendment rights and what search and seizure might mean for Second Amendment rights are very interested in this, as well as those who are more interested in the broader question of government encroachment in areas of privacy like the home.

Melissa Murray:

So again, a lot of different groups here. Leah, you talked a lot about this with Jay and Josie. But the police actually performed a shocking number of functions outside of merely investigating crimes and collecting evidence of those crimes, to which this kind of exception might apply. And it can be very difficult to separate out the investigation of crime from these other community caretaking function. So where that line is, is a difficult one to draw.

Leah Litman:

Another case we wanted to preview is United States v. Cooley, which is an interesting case about the authority of police officers of Indian tribes. The question involves whether police officers of Indian tribes, have the authority to detain and search someone who isn't a member of a tribe and is on a reservation? Technically, he was on a right of way within the reservation. This question is really important, given the sometimes selective enforcement and lack of enforcement or policing on native lands by federal officers. I recall that states lacked jurisdiction to prosecute a bunch of crimes that occur on reservation to the extent there is policing, it is done either by federal law enforcement or tribes or states in agreement with tribes and the lack of policing, and enforcement on reservation lands is part of what has created the horrible endemic of violence against native women. Native women are at much greater risk of being victims to sex crimes, and many of the perpetrators are non natives.

Leah Litman:

These crimes often can't be prosecuted by states. And so the federal government might not take these cases for a variety of reasons, including the remoteness of reservations, as well as perhaps more pernicious reasons. This case is related to a series of cases in which the court has limited tribes authority over non tribal members. Specifically, the Court has said tribes can't prosecute individuals who aren't members of a tribe. And I guess the question now is whether the votes have changed. Remember that Justice Gorsuch joined with the then For Liberals on the court to preserve tribal treaty rights in McGirt v. Oklahoma, which really marked an important turning point in the court's Native American affairs jurisprudence. But with Justice Ginsburg no longer on the court, it's not clear there would have been a fifth vote then. And it's not clear what the court will do on Indian law cases going forward.

Melissa Murray:

All right, let's do some court culture. Leah, do you have some things to note?

Leah Litman:

Unfortunately, the first development is that we don't yet. We still don't have anything to note, because we don't have any judicial nominees yet from the Biden administration. Chris Kang, who is at Demand Justice, had a Twitter thread about how we shouldn't be panicking. I am kind of starting to panic, so I appreciated his perspective. But he was just noting that, in fact, pre May appointments are usually

somewhat rare and not always happening in large volume. And that perhaps one explanation for what is happening in the Biden ministration is if the Biden administration is really pursuing nominees with less typical backgrounds for federal judges, civil rights lawyers, public defenders, workers rights lawyers, that perhaps it might take them longer to put together an application since they haven't been preparing for this their entire lives, or at least since the first year of law school, like some people do.

Kate Shaw:

And maybe there will be a big batch, right? It won't be just one or two or three, like one week. It's a few dumps of a big number each time. I at least hope that's the case, because they do need to get the machinery going. I will say since you mentioned Chris Kang that I did an event with him yesterday. He really knows the Senate. He was with Senator Durbin for a long time. And he mentioned that he thinks the filibuster isn't long for this world, or at least like in some forum, there'll be substantial filibuster reform. And I actually put a lot of stock in that. So it's separate, of course, from the question of judges for him. There's already no filibuster. But things like the big democracy bill, HR 1, possible structural reform of the Supreme Court. The landscape just looks so different without a filibuster, so I actually was really heartened to hear that.

Leah Litman:

Also, Justice Breyer retirement Twitter is now a thing. There is a new account on twitter @retireBreyer that notes every day that Justice Breyer has not yet retired. I want to take this moment to make clear this account is not me.

Melissa Murray:

It's actually not any of us.

Leah Litman:

So let's be really clear-

Kate Shaw:

Although Leah, you're mad, it's not you.

Leah Litman:

No, I don't think I need to be doing that Twitter account right now.

Kate Shaw:

But we're all obviously following that Twitter account. I mean, I think we just need to keep talking about this every week until he announces his retirement.

Leah Litman:

And becomes an advice columnist. Dear Steve, when are you going to retire?

Kate Shaw:

A co host.

Leah Litman:

A co host, yeah.

Kate Shaw:

I don't know. We should probably talk offline about this position and whether Melody would ever work on that.

Leah Litman:

Yeah, that's true. That's true. We would have to run this by Melody given his, let's say, tendency to talk for extended periods of time.

Kate Shaw:

Indeed.

Melissa Murray:

I will not hear a word against him. I would love to have him as a co host here. Like listen to his Zoom call with those students at the International School in New York. He was delightful. I think he would add a lot here. He'd certainly expand our diversity.

Leah Litman:

He might be able to even match or perhaps exceed Kate's optimism, so maybe it would be welcome company for you Kate.

Melissa Murray:

He is very optimistic.

Kate Shaw:

I would appreciate that.

Melissa Murray:

Balance out the Cassandras. Yes, he is a Cassandra himself, but more rosy eyed than the rest of us. Okay.

Kate Shaw:

All right. So a couple other things to note. The gender and race breakdown of advocates arguing in the March sitting remains pretty abysmal. We have 15 advocates arguing three women. Minor progress and that we have more women than Erics this sitting. Only two Erics, three women, progress ladies.

Melissa Murray:

Slow clap.

Leah Litman:

Although all of the women are arguing as amici.

Kate Shaw:

Right, all three are from the Solicitor General's office. There are two lawyers of color, zero women of color.

Melissa Murray:

That actually is progress. Three women from the Solicitor General's office. We did not necessarily say that at this time last year when we were talking about who was arguing on behalf of the government. That is actually progress.

Kate Shaw:

That is true. And I think that acting as Solicitor General, Prelogar makes her debut as acting Solicitor General. She argued as an assistant in the office, but this will be her debut in that role in NCAA vs. Austin. That's exciting.

Melissa Murray:

We should all channel our inner Stephen Breyer and be happy about that. That is actually progress.

Leah Litman:

There we go. Speaking of channeling our Steve Breyer's. I wanted to note something that we didn't get a chance to mention in our February recap, which was that arguing on behalf of enforcing the Voting Rights Act, that is the lawyers who are arguing that the Arizona laws prohibiting ballot collection and throwing out votes cast in the wrong precinct were a rare pair. A woman, Jesse Amunson, at Jenner and block, and a lawyer of color, Bruce Spiva, who I believe is that Covington & Burling. So a welcome development when these are the two lawyers representing one side in the case, also, it's nice. Just to note when law firm lawyers get to appear at the Supreme Court arguing on behalf of castles like this.

Melissa Murray:

In other years and just in time for Women's History Month, there has been a new cert petition filed by the National Coalition for men, challenging the selective service system, which requires men but not women to register for the military draft. The Supreme Court, as many of you know, previously upheld the draft in Rostker v. Goldberg. At that point, though, women were not eligible to serve in combat positions in the military, which was key to the court's reasoning. They are now eligible to do so. And so the National Coalition for men, which obviously wants to make the world better for gender equality for all women and men, they're challenging this. They've also challenged a lot of other legislation that they believe to be discriminatory on the basis of gender, including organizations like ladies get paid, which sponsors workshops for women on how to negotiate their salary, and they make those workshops available for women.

Melissa Murray:

They've challenged those under state public accommodations laws on the grounds that they discriminate against men. Lots of activity there for the National Coalition for men.

Leah Litman:

In this particular case, they have a great group of lawyers on the case including Ria Tabacco Mar of the ACLU and Cate Stetson at Hogan Lovells. During Women's History Month, the army actually released an

ad reminding people to register for the draft. And the tenor of the ad was basically you become a real man when you register. So they showed this young child who then takes out a phone registers for the draft, and then all of a sudden becomes this huge muscley man with a deep voice, almost confirming that this x role stereotyping that is behind some of this.

Melissa Murray:

Let me be clear about this. I have thoughts about this. And I've actually written about some of this. I have no problem with challenging the draft, especially because it seems undergirded by the SEC stereotypes about men and women. But there does seem to be something different about challenging events and organizations that are trying to help bridge the gap between men and women and pay equity, for example, by teaching women skills that they might need to be able to do that. And those things are being challenged too. This perhaps is the more benign form of the litigation that they've engaged in. But they've also done some stuff I think, actually makes it harder for women to make up ground and penalizes groups that are trying to equip women with some of the skills they might need to ameliorate their position. That is where my snark comes from.

Leah Litman:

One other development we wanted to note was a notable dissent in a DC Circuit opinion McClain v. Global Witness publishing. The case is a defamation case filed by two former Liberian officials against Global Witness, a human rights organization, alleging led reported falsely imply that they had accepted bribes in connection with the sale of an oil license for a plot owned by Liberia. It's a fairly straightforward application of existing law because in order to prove defamation of a public figure or a public official, you have to show actual malice, which means proving by clear and convincing evidence that the speaker made the statement with knowledge that it was false, or with reckless disregard for whether it was false. And now comes Judge Silberman in dissent.

Leah Litman:

Where to start.

Melissa Murray:

Let's overturn some precedent.

Kate Shaw:

Right. So he calls for the Supreme Court overturn New York Times v. Sullivan.

Leah Litman:

Big Stare decisis is for suckers energy in this opinion. Huge, huge.

Kate Shaw:

And he does so in what is this kind of like, sort of right wing screed, right? He calls the New York Times and The Washington Post, virtually Democratic Party broadsheets. Describes a bias against the republican party as a long term secular trend in a footnote sites, "Who can forget Candy Crowley's debate moderation?"

Melissa Murray:

Well, I actually had forgotten it.

Kate Shaw:

Same. I remembered it when he mentioned it, but it took me a minute to recall what he was even talking about.

Melissa Murray:

I appreciated him reminding me-

Leah Litman:

This was the 2012 presidential debate between President Obama and Mitt Romney during which Candy Crowley fact checked Mitt Romney and Judge Silberman has apparently been holding on to this-

Kate Shaw:

Stewing over this for a decade.

Leah Litman:

Exactly. Bearing this burden for years.

Melissa Murray:

Nine years. Nine years he's been holding on to this.

Melissa Murray:

He also accused quote unquote, "Big Tech" of censoring conservatism and likened those kinds of restrictions to McCarthyism. He specifically criticized Twitter for restricting the New York Post's Hunter Biden laptop story, says all of this is a threat to democracy. And here's a quote, "The first step taken by any potential authoritarian or dictatorial regime is to gain control of communications, particularly the delivery of News. It is fair to conclude, therefore, that one party control of the press and media is a threat to a viable democracy." Don't disagree, but, "See also."

Leah Litman:

So I don't know about you, Melissa, are you aware of any major press outlets that, let's say are not super left leaning?

Melissa Murray:

I can't think of any facts off the top of my head.

Leah Litman:

Right. He does address this in a footnote, and the footnotes are really next level. In footnote 12, he says, "Admittedly, a number of Fox's commentators lean as far to the right as the commentators and reporters of the mainstream outlets lean to the left." So nice acknowledgment of a counter argument, I guess. Footnote 13. He opines that, "The reasons for press bias are too complicated to address here, but they surely relate to bias academic institutions."

Melissa Murray:

It's always our fault.

Leah Litman:

It is.

Melissa Murray:

Have you noticed that it's always our fault?

Leah Litman:

It is.

Melissa Murray:

Keep going. I want to hear about footnote six.

Leah Litman:

Yeah, so footnote six was the biggest stare decisis for suckers energy in which he describes stare decisis as a constitutional Brezhnev Doctrine. He says, convincing the courts to overrule these precedents, in addition to calling the courts to overrule New York Times, which is Sullivan, he also throws in bids to overturn Bivens and Monroe v. Pape, Since those are clearly implicated here as well anyways. He says, "When forces that are hostile to socialism try to turn the development of some socialist country towards capitalism, it becomes not only a problem of the country concerned, but a common problem and concern of all socialist countries. Thus, once a country has turned communist, it can never be allowed to go back." That's the version of quote that he is again, seeing some parallel to stare decisis with.

Melissa Murray:

So this is really an exercise in, I don't know, judicial minimalism.

Leah Litman:

Originalism, textualism, right? Any of these isms are really, really on display here.

Melissa Murray:

Leah, what do we know about Larry Silberman as a judge?

Leah Litman:

We have talked about him before on this podcast. He is the judge that sent an email to the entire DC Circuit listserv criticizing the quote, "Desecration of Confederate graves," by which he meant the effort to rename military assets that were named for Confederate soldiers. He said in that email, "Lincoln did not fight the war to free the slaves." And his evidence for this was that his great grandfather's brother who fought for the Confederacy, quote, "Never owned slaves as best I can tell." That email, of course, as we noted, prompted a law clerk to reply. The law clerk identified himself as one of only five black law clerks in the circuit and corrected Judge Silberman's assertions. So clerk for Judge Silberman.

Melissa Murray:

Tell me, Leah.

Leah Litman:

Justice Barrett. There are of course, lots of Silberman clerks, doesn't necessarily mean she shares his views. But that is the judge for whom she clerked on the Court of Appeals.

Melissa Murray:

Well, this also, I think, sounds in the register of something else that we've talked about on this podcast, namely, Justice Alito's speech at the Federalist Society gala earlier. I guess it was last year. It feels like this year is a continuation of last year, but it was last year. Some of the themes that Judge Silberman echoed in this dissent, very much sounded in the same register as Justice Alito's Federalist Society speech from last year. And indeed, also echoed some themes that Judge Silberman himself sounded in a speech that he delivered, I guess it's almost, is it 30 years ago now? In 1992, in a speech to the Federalist Society. So these have been percolating for some time. So Leah, can you maybe shed some light on some of the linkages between the dissent and these earlier speeches and themes?

Leah Litman:

Yeah. In that 1992 speech, he railed against, among other things, the quote, "Greenhouse Effect." Which he was describing as the influence that then New York Times supreme court reporter, Linda Greenhouse, had on the Supreme Court. The New York Times at the time actually, criticized Judge Silberman's speech. In this latest dissent, he actually favorably cites that New York Times criticism as almost a badge of honor or another piece of evidence of the bias of the mainstream media. In the speech, the 1992 speech, he had said, "The more important influence and the key explanation for the recent misbehavior of judges is the press." He accuses the American working press of accepting and embracing the tenets of judicial activism. He says the lawyers, reporters, are among the most unbalanced of the press. And that the worst in his view, was found in the pages of the New York Times but that The Times was by no means unique.

Kate Shaw:

Melissa, you mentioned the Alito Federalist Society speech where we debriefed that with Senator Sheldon Whitehouse. This really did feel to me like that speech in dissent form. Particularly, the footnotes. It's just clearly somebody who spends a lot of time immersed in right-wing media and just decided to unleash a lot of what he is hearing in right-wing media, into the pages of the F-third. It was just so inappropriate. It was really shocking. I mean, it's one of the most shocking I think, judicial writings in an opinion form, that I have encountered.

Melissa Murray:

All the other recent nominees are like, "Hold my beer, Kate."

Melissa Murray:

I thought this is actually amusing. The Greenhouse Effect could both be used to rail against the New York Times and Linda Greenhouse, and to dispute climate change. It's a multipurpose kind of-

Kate Shaw:

Totally.

Melissa Murray:

... meme. I like that part.

Melissa Murray:

Anyway, ladies, you know what I'm going to do for Hot Girl Summer? I'll get vaccinated and just let loose. I'm getting ready for my second shot, and I'm going to make it happen. What about you guys?

Kate Shaw:

Leah and I both coincidentally, got our first shots this week. Got in off of random waitlists. I don't know about you, but I found out I got a spot. We tore over across Brooklyn in the middle of an afternoon. Like, "I can't believe this is happening, I can't believe it's happening." And then it happened, and I'm so relieved. Obviously, we have to get the second shot, we have to wait. But it does feel like a gamechanger. Doesn't it?

Leah Litman:

It really does.

Melissa Murray:

It does. The place where I got my first shot was a massive sports arena. It looked filled with FEMA personnel and National Guard. I mean, this has gotten so bad that it's actually a military effort to get people safe. So thank you to all of those National Guard personnel, all the FEMA folks, and everyone who did this, worked on the vaccine. Thank you. Thank you. Thank you. We are-

Kate Shaw:

It really was amazing. I didn't go to the big FEMA site in Brooklyn, but a big site run by a pharmacy, but it was the same. Just unbelievably well organized and well run. I just felt like I was in such good hands. I feel so grateful to everyone who had some role in getting us here.

Melissa Murray:

And getting us back to in-person podcasting down at the basement.

Kate Shaw:

And maybe in-person River Dance TikToking. We'll see.

Melissa Murray:

I mean, anything could happen once like it did-

Leah Litman:

During Hot Girl Summer.

Leah Litman:

Hot Girl Summer. Definitely. Definitely.

Kate Shaw:

So who else is ready for Hot Girl Summer?

Leah Litman:

The supreme court justice is, apparently. The courts-

Kate Shaw:

The people one most associates with Hot Girl Summer

Leah Litman:

Exactly. When I think Hot Girl Summer, I think Sam Alito. Melody cut that.

Kate Shaw:

No, Melody. Don't cut that.

Leah Litman:

The Supreme Court's Press Office reported that most of the justices met in person in the conference room for their regularly scheduled private conference reflecting the CDC guidelines regarding indoor gatherings of fully vaccinated people. Court is ready to get back to things and maybe we will be able to join them sometime soon.

Kate Shaw:

Yeah, they're definitely going to do the April sitting telephonically.

Kate Shaw:

Yeah, but it seems as though public will be able to return to visiting the court in the not too distant future. They are going to resume conferencing in-person, I guess, barring some kind of additional uptake. But slowly, slowly, it feels like things are returning to normal. And that's great.

Melissa Murray:

Any other news?

Kate Shaw:

One little thing. Senators Durbin and Grassley have introduced a bipartisan bill to require televising Supreme Court arguments. I think that's... A televising oral argument, it's one of these Supreme Court issues I can personally never get that worked up about, although a lot of people get really worked up about it. But I do think that it's been really socially useful in the last year to have the public be able to just sort of dip into these arguments when they're happening telephonically. I think that that might increase the likelihood of a bill like this actually getting some real traction. I think the fact that it's bipartisan is potentially helpful. Do I think it's the most pressing issue involving the supreme court? No. But I think it would be great.

Melissa Murray:

Kate, can I insert a wrinkle?

Kate Shaw:

Yeah.

Melissa Murray:

I'm all for transparency. I think telephonic arguments have been really great. I don't love the sort of seriatim questioning that's happened, but that doesn't have to happen. I am worried about televising this though. In part because of what happened to Judge Esther Salas in the District of New Jersey. The fact that the individual who killed her son and shot her husband, and was looking for her also, had a dossier on Justice Sotomayor makes me worried that... These are people who I think are relatively under the radar. But when they become public figures... When you can actually identify them, and some of them are more identifiable than others. To be clear, the women I think, are much more visible. Minorities on the court are much more visible than their counterparts might be. But I worry that televising it would just make them more of a target. So while I'm all for the transparency, I would actually like to maybe inject, you can have transparency with telephonic arguments and audio that's really...

Kate Shaw:

Just can retain the practice of this last year

Leah Litman:

Yeah, like live streaming the audio, I think the court should do that. But yeah, I think that the cameras became much more complicated, in light of the increasing threats against federal judges.

Melissa Murray:

Senator Durbin, listen to us. Listen to us, we know of which we speak. We can do this and be safe too.

Kate Shaw:

So the last thing we wanted to turn to. Melissa, I can't believe how patient you've been waiting for this topic. Why don't you take it away?

Melissa Murray:

So there is an event happening on March 25th, that I am so excited about. But regrettably, I can't attend because I have to teach my class. I hope you all will register to attend. But the heritage foundation is hosting an event titled, The Crown Under Fire: Why the Left's Campaign to Cancel the Monarchy and Undermine a Cornerstone of Western Democracy Will Fail. Wow, I don't even know where to start. Let's start first with the fact that if there's anything that's un-American, it is not necessarily canceling the rule of a hereditary English monarchy. In fact, that may be the most American thing we've ever done. Indeed, it might be the basis for which we are American. So I think it's really interesting that the Heritage Foundation, which I think it's fair to say leans a little bit to a conservative ideology, very pro framers, very supportive of originalism. It's really hard, I think, to be at once pro framers and pro-monarchy. And so I wish I could attend this to find out how they're striking that delicate balance with being very pro founding fathers and standing for Queen Elizabeth II. How does that happen?

Kate Shaw:

It speaks to the power of Meghan Markle. That she can-

Melissa Murray:

It does.

Kate Shaw:

... send people into such contortions. It's really astonishing.

Melissa Murray:

She took a DNA test. Turns out she is 100% that bitch.

Leah Litman:

The British monarchy was bad until they started harassing a black woman is the take home I am getting from this.

Kate Shaw:

That seems like the TLD.R

Leah Litman:

But yeah, it's a weird flex for an organization that's extremely there for original meaning, to all of a sudden be pro-monarchy.

Melissa Murray:

But we've actually seen that over the last couple of weeks since that very trenchant interview with Queen of America, Oprah Winfrey aired, that there actually are a fair number of individuals, many of whom sort of identify with this part of the ideological spectrum who have come out in full-throated support of the British monarchy. Again, the monarchy is not really consistent with the values that are typically associated with this side of the aisle. So it is surprising, and I wonder what drives it?

Leah Litman:

I think it's their heartfelt concern about canceled culture, right? They didn't want us to cancel the British monarchy in 1776. They don't want us to do it now. That's what I think is happening.

Melissa Murray:

You will be back like before (Singing)

Leah Litman:

I did think about that song.

Melissa Murray:

I did. I hope that'll be the entry music to this webinar-

Leah Litman:

Oh, that would be amazing.

Melissa Murray:

That's what they should do. Listeners if you get a chance, it's a free webinar. You should register. I did actually register before I realized I had a conflict. But they do ask you if you have questions for the panelists, one of whom is Camilla Tominey, who is a British reporter who's a member of the Royal [Roda 00:50:10], that reports on the British Royal Family.

Kate Shaw:

What's a Royal Roda?

Melissa Murray:

It's just like a collection of reporters from all of the newspapers/tabloids. They're the ones who are sort of licensed to report on The Royal Family. Harry and Meghan-

Kate Shaw:

Oh, it's like the supreme press court, but for the royal family.

Melissa Murray:

Yeah, but for the royal family. These are the people that Harry and Meghan sort of blame for their decision to leave because they felt that they were getting unfair and abusive coverage by this group. A whole different story. But she's one of them, so you can ask questions of them. I really hope that some of our strict scrutiny listeners will sign up, listen to this, report back to us about what happened. But definitely ask them how they are managing to reconcile their interests in the founding and the basic principles on which the country was founded with this new interest in preserving the monarchy as a cornerstone of Western democracy.

Leah Litman:

This tension between pro-monarchy and originalism reminds me of the article that my colleagues Nick Bagley and Julian Mortenson just published this week in the Columbia Law Review about the originalist foundation or really lack of originalist foundation for the non-delegation doctrine, in which they debunk the idea that there is, in fact, originalist support for the proposition that Congress cannot delegate rulemaking authority to administrative agencies. Maybe we can talk about that article over the summer. It's definitely important and interesting, but when you were kind of painting the conflict in the same light, I thought of that.

Melissa Murray:

Well, I read that the other day, and I think that's exactly right. The one quibble, I guess, criticism I would have of that article is that there is not a single cite to the Duchess of Sussex, which I think would have really made the point even more clearer.

Kate Shaw:

Maybe we can get Nick and Julian on this podcast this summer. They can defend that choice.

Melissa Murray:

I mean, is it defensible? I don't know if we can invite them on the podcast ever. They did that. So just to be clear, we have not yet issued an invitation. This is still pending under consideration given the lack of citations to the Duchess of Sussex. If you want to help us with the citation issues around the Duchess of Sussex, while also perhaps helping to cancel the monarchy and owning the Heritage Foundation. You might consider getting something from our Duchess of Success merchandise line where all of the proceeds go to benefit World Central Kitchen, that's chef José Andrés organization that he has partnered with Archewell, the Duke and Duchess of Sussex's umbrella charity organization to benefit those who are dealing with food insecurity. All of the proceeds go to World Central Kitchen and you can support us. Our own take on originalism and be a cornerstone of democracy as well. So please consider that.

Leah Litman:

Thank you to our producer, Melody Raul. 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 also become a glow supporter at glow.fm/strictscrutiny, and thanks again for listening.