Kate Shaw:

They're all acknowledging just how good she is at this. It doesn't mean she's going to win them over, but as to oral argument she really just is in her own category.

Leah Litman:

Yeah. But she will make it more humiliating for them, when they ultimately vote for this position that she has just utterly demolished within the span of 60 seconds.

Kate Shaw:

Welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. We're your hosts today, I'm Kate Shaw.

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And, Melissa sends regrets. She is, right now, recording an exciting conversation with Congresswoman Katie Porter. We're going to make that conversation available on our feed as a special podcast episode down the road, so stay tuned for that in your feed.

Kate Shaw:

So today, we're going to do a little bit of court news, there's not a ton. We'll then move onto oral argument recaps, a couple of cases in-depth, and then highlights from some notable exchanges in other arguments, move onto opinion recaps, and a little bit of court culture at the end.

Leah Litman:

The court has continued to sit on the abortion case a lot of people have been watching. This is the challenge to Mississippi's ban on abortions after 15 weeks, which the state of Mississippi asked the court to hear right after Justice Barrett's confirmation in October.

Leah Litman:

The case obviously represents a rather direct frontal attack on the Constitutional right to an abortion, and it was listed for conference again today, on Friday, the day we're recording. We'll see if they take it. It's just unclear if they have the votes to take it at this point, or if someone is writing a dissent from a denial of cert, or what exactly is happening here.

Kate Shaw:

I also am a little skeptical when people say ... Obviously, the justices act in political ways all the time, we talk about this constantly. But, do they really worry so much about the timing of their cert grants in a way some people think they do? I'm a little skeptical. But here, I think they have the votes probably to take this case, so I don't actually have a good explanation for why it is taking so long.

Leah Litman:

I honestly don't know what is happening. I also think there are the votes. It's possible that a fourth vote doesn't want to do this now.

Kate Shaw:

Right, so back to the really political explanation. Let the furor over the very late nomination and confirmation die down a bit, then take it at the end of the term when people are starting to tune out the Supreme Court. I really don't know. That is obviously very political decision making, but it seems possible.

Leah Litman:

If it's true that one of the four justices who we think are potential votes to grant is, in fact, considering this, that itself would be pretty telling. Because of course, these are also the four justices who often times throw shade, and make explicit accusations about the chief doing something untoward, when the chief justice trims his sails and adopts rulings, or reaches outcomes, that they think are because of these political considerations, but we'll see.

Kate Shaw:

Yeah. Yeah, and maybe we'll actually find out they're going to take the case now, so that's possible. Either way, they've sat on it for a really surprisingly long time.

Leah Litman:

Or, they're just going to stay the ruling and let Mississippi enforce its law per the shadow docket, as we were hypothesizing on a previous episode.

Kate Shaw:

Literally, just ending with a whimper not a bang. Maybe that's how they want to do it, and hope nobody notices. All right, well we will see.

Kate Shaw:

One other development that the court dismissed at the request of the Biden Justice Department, three challenges to the Trump Administration's Sanctuary Cities policy, which Biden is obviously ending, so we saw that dismissal yesterday.

Leah Litman:

And that was a policy that withheld Federal funds from jurisdictions that refused to cooperate with certain Federal immigration enforcement priorities.

Kate Shaw:

All right, so let's move on to some argument recaps.

Leah Litman:

We've talked about this case before, Lange versus California, but we didn't have a chance to highlight one particular exchange at argument, which we wanted to do.

Leah Litman:

Lange versus California is the case about the hot pursuit, or exigent circumstances doctrine. Generally, the Fourth Amendment requires police officers to get a warrant before they enter someones home, but there is an exception that allows a police officer to enter someones home if they are doing so under exigent circumstances and while in hot pursuit. So the question here is whether the police officer could enter Mr. Lange's home because he saw Mr. Lange commit a misdemeanor, failure to pull over when the officer turned on his overhead lights. Or, because he was supposedly violating a noise ordinance against playing loud music. So it's whether the office was in hot pursuit of him, after that.

Leah Litman:

At argument, it wasn't at all clear, as we noted on the last episode, what the justices were going to do. That is, whether they were going to adopt some bright line rule between felonies and misdemeanors, which the justices didn't seem particularly interested in. Whether they were going to attempt to distinguish between violent and non-violent crimes, which also, the justices didn't seem particularly interested in. Whether they were going to do so on a case-by-case totality of the circumstances test, which wouldn't provide a lot of clarity to officers who want to follow the law. But, one theme that came up at oral argument was the relevance of history and original meaning.

Leah Litman:

We've talked about before, how the Republican appointees on the court are often times associated with originalism as a methodology. The idea that the original meaning of the Constitution provides determinant answers, and that's was courts should look to when attempting to decided what the Constitution means. But at oral argument, Justice Kavanaugh actually asked a question, which seemed to imply he wasn't so sure whether history and originalism actually provided any real answers in this case, and potentially others. Let's play that clip here.

Justice Kavanaugh:

Let me ask you a question now, about methodology, where the original meaning of the term unreasonable in the Fourth Amendment. It seems to me that's a different kind of term than search, or seizure, or cruel and unusual, and unreasonable means unreasonable. So what we're really talking about is not original meaning, or original intent, or even original expected application because I'm not aware of anyone in the first Congress, or in the state ratifying processes that said, "Unreasonable means the common law." And the text is unlike the Seventh Amendment, which refers to the common law expressly. Professor [Will Favre 00:06:43] and others have pointed this out.

Justice Kavanaugh:

So it's not really original meaning, or even original intent, it's more like presumed original expected applications, like a Justice Douglas interpretation. No offense to Justice Douglas, but a little more freeform than what we usually talk about when we talk about original meaning. I just want to get your response to that.

Kate Shaw:

And actually, one other thing I wanted to mention in the same vein is that I thought Amanda Rice was really refreshing on this point.

Kate Shaw:

So as we've mentioned, she was in this case as an appointed amicus, to defend the California court judgment below, because both the defendant and the State of California agreed that the lower court got it wrong. I will note, as an aside, that she filed her brief as an Amicus Curiae, which I noted because I remembered that Vicki Jackson, and I think Katherine Carole, and one of the other very few female amicus appointees, actually filed as Amica Curiae, but she in fact filed as Amicus Curiae.

Kate Shaw:

Anyway, Gorsuch was pressing her on this same question but from a different direction than Kavanaugh, on whether at the time of the founding it was clear that officers had the power to enter homes in pursuit of any and all suspects. He kept repeating, "as an original matter, as an original matter," like a mantra. So let's listen to that clip, and how Amanda responds.

Justice Gorsuch:

Well, I thought we just agreed that there is no rule of common law that any and all misdemeanors allow entry to the home in exigent, in hot pursuit, or the Sister General's view. I thought that was common ground. I'm sorry.

Amanda Rice:

No, no worries Justice Gorsuch. I think the point is that the common law just doesn't map on very well to the questions presented in this case. That's true for a number of reasons, including that an unlawful entry would not have provided a basis for overturning a conviction. But also, because some authorities which were debated in patent suggested that a warrant wasn't required to enter a house to make an arrest in the first place, so the hot pursuit justification wouldn't have been necessary.

Amanda Rice:

But, I think it's fairer to say that there just wasn't a clear answer here, at common law. So other modes of Constitutional analysis should control.

Kate Shaw:

So I just thought it was, again, very refreshing that she just seemed to say to him, "This line of inquiry isn't going to get us there. There just wasn't a clear answer at common law, so we have to look to other modes of Constitutional analysis."

Kate Shaw:

It was actually this moment that I felt like, maybe only an appointed amicus or amica has the freedom to do. If you're representing a client, and Gorsuch wants you on this original meaning train, you've got to get on the train.

Leah Litman:

Right.

Kate Shaw:

You give him what you can. But I think, if you're here because they have pulled you in, maybe it's okay to be a little bit more forceful about what you view the limits of a particular methodology to be. The moment really struck me as one you don't often encounter, and I do think it was the particular unique status that she occupied in the argument that permitted her to resist a little bit, what Gorsuch was asking of her.

Leah Litman:

That's really interesting. And it, again, makes me wonder about the propriety of this practice of amicus appointments. Because you would think that, if people who are representing clients feel the need to tell a justice yes when they are representing an actual client, that's because they think it's more likely that they will win. So, does that mean court appointed amicii are not actually representing the interests of the side that they are being appointed to represent because the other side isn't adequately doing so is just an interesting question.

Kate Shaw:

It's so interesting. Well, and it really goes to how under specified the role is. I don't think the court ... I think it was an intermediate appeals court, actually, that was the ruling that was being reviewed. Does that appeals court have an interest in actually winning on the terms that Gorsuch will, you know what I mean? It's just the identity of the client is so ambiguous when you are the amicus.

Kate Shaw:

In this case, it was especially odd because the Solicitor General's Office was on the same side. So in some ways, that position was being represented. It wasn't as though Erica Ross for the SG's Office was taking the exact same position, it was a much more categorical position that Rice was advocating, which was the position that the California court had taken. Which was hot pursuit is hot pursuit, misdemeanor, felony, whatever, you don't need probable cause, you can just go in if you think somebody's committed a crime or if you have probable cause to believe that they have. Ross' was a little bit more nuanced a position, but it wasn't an unrepresented position.

Leah Litman:

Right.

Kate Shaw:

Anyway, I just think it's an endlessly fascinating practice, and I love all these arguments. And I also love listening to see whether the chief will deviate from the script that he always uses at the end, to thank an invitee for participating. I don't actually remember it verbatim right now, I should have looked it up before we started recording. But, "You briefed and argued this case at our invitation. You have ably discharged that responsibility." I always am, "Maybe he'll just tweak it a little bit," but never.

Leah Litman:

No.

Kate Shaw:

Not even a syllable, nothing different.

Leah Litman:

I think he knows what would happen if he did tweak it, as we'll talk about when we get to the Supreme Court's opinion release and US Fish and Wildlife Services. People would be pouring all over it, and trying to find hidden clues.

Kate Shaw:

Totally, it's so true.

Kate Shaw:

All right, so let's move on to recapping some lengthy arguments from this last week. The first we were going to talk about was United States versus Arthrex, which is this super interesting Appointments Clause challenge to the structure of the Patent Trial and Appeals Board, or PTAB. And in particular, the constitutional status of the administrative patent judges, or APJs, who sit on that board who decide [inaudible 00:12:04] review cases, and other things pertaining to the validity of patents.

Kate Shaw:

So little bit of background here. Under the Appointments Clause, principle officers have to be appointed by the President and confirmed by the Senate. But, inferior officers can be appointed by the heads of departments, like the heads of agencies. In this case, the Commerce Department. Here, the first question in the case is whether these PTAB judges are principle officers or inferior officers. The Federal Circuit held that they were principle officers, and thus they are an appointment by the Commerce Secretary, which would be fine, if they were inferior officers was unconstitutional.

Leah Litman:

I think it's important to understand this case as part of the broader project, or desire to increase the amount of Presidential control over administrative agencies. You can think of the case we talked about last term, Seila Law versus CFPB, as one part of that trend. And of course, Justice Gorsuch actually explicitly brought this up at argument, so let's play that clip here.

Justice Gorsuch:

Good morning, Mr. Stewart. Last term, the court in Seila Law said that, "Executive officials must always remain subject to the ongoing supervision and control of the elected President. To the President's oversight, the chain of dependents is preserved so that the lowest officers, the middle grade and the highest, all depend as they ought on the President, and the President on the community."

Justice Gorsuch:

I'm struggling to understand how that interpretation of our Constitution squares with your argument that not even the President of the United States, either himself or through his subordinates, can reverse a decision of APJs. Where is the chain of dependence?

Leah Litman:

Again, you could think about this issue as being how much Presidential control is required over these administrative agencies. And for the court's conservatives, they think it's important to basically give more control to the President over these agencies, whether that's to make them more accountable, whether that's to more clearly but them beneath the presidency, which is actually a constitutionally

created branch of government rather than this fourth branch. Unclear, but again, it is this project of remaking, or restructuring, or just changing what the administrative state is about.

Kate Shaw:

Yeah. Justice Kavanaugh also beat Justice Scalia's famous line from Morrison versus Olson, about the same issue, into a dead horse. Let's play that clip here.

Leah Litman:

It's actually multiple clips, so we're going to have two of them.

Kate Shaw:

Okay, stay tuned.

Justice Kavanaugh:

Thank you Chief Justice, and good morning Mr. Stewart. I'm not sure this wolf comes as a wolf, Mr. Stewart, "but I still think it may be a wolf," as Justice Scalia famously said. And he said in those cases it can be discerned by careful perceptive analysis of ... Those questions pointed that out. And what I'm worried about, this is the wolf. What I'm worried about is this gives a model for-

Kate Shaw:

I thought this was just such another example of this strange status of this Scalia dissent in Morrison. It's a dissent, it is still a dissent, the court hasn't overruled the majority opinion.

Leah Litman:

It was a dissent in an eight-one case.

Kate Shaw:

Yeah. It was a lone dissent, he was alone. And yet, it has been treated ... I think Kavanaugh treats it as binding law. He talked about it that way at his confirmation hearing, I think others do, too. Kagan has said extremely favorable things about it. I think there's been some debate about whether she was praising the writing, it's a very well written dissent. Or, the substance.

Leah Litman:

Based on her writing in the Seila dissent, it's somewhat clear she doesn't actually think the dissent was right in Morrison, given that she was favorably inclined to read the majority opinion pretty broadly.

Kate Shaw:

Totally. But, she definitely likes the writing.

Leah Litman:

Yeah.

Kate Shaw:

We all can agree, it's a very well written dissent. And yet, it is not the law. And yet, it is treated ... I think that's for a couple of reasons.

Kate Shaw:

One, I think it's because the intervening events, in particular Ken Starr as independent counsel seemed to have borne out some of Justice Scalia's dire predictions about the danger of this unchecked roving prosecutor inside the Executive Branch not answerable to the President.

Kate Shaw:

And also, because technical reasons. Edmond, this later Appointments case, distinguished Morrison when asking about how you decide if somebody is an inferior officer.

Kate Shaw:

But, there is just something strange about the way a number of justices on the Supreme Court talk about this lone dissent. Again, very well written, lots of memorable lines. Or in particular, that "this wolf comes as a wolf line." But, it's not our law.

Leah Litman:

Well, it's actually a really fascinating example of this phenomenon that some people call the Constitution in exile, or Jurisprudence in exile. Basically, when one ideology's side, or when one political group's side loses an opinion at the court, a group of academics, a group of lower court judges will basically try to bring back the dissent, or bolster the dissent so that, one day, that dissent will become the law. And, we've seen a bunch of academic commentary, again, praising the Scalia dissent, talking about how it was obviously correct in light of intervening developments, blogs posts, lower court judges. When Judge Kavanaugh was on the DC circuit, he would write about how Morrison was basically proven right, and Humphrey's executor was this lone, one-off exception.

Leah Litman:

And this is something that, again, the conservatives are really, really good at, basically developing their own bodies of law. And then, they emerge basically ready to become the actual law when they have control of the courts. Whereas, there's just nothing really akin to that, on the progressive side, from what I can tell. Where's the movement of progressive scholars who are treating Justice Kagan's dissent in Seila Law as if it was law?

Kate Shaw:

Oh, God.

Leah Litman:

What lower court judges are doing that as well? It's just not happening.

Kate Shaw:

We are doing our part, Leah. We are doing our part.

Leah Litman:

Okay.

Kate Shaw:

But yeah, as you were talking I was like, "Right." I feel like there are binders that Fed Soc has prepared, that literally have draft opinions that contain the language. You know, the majority-

Leah Litman:

"This wolf comes as a wolf. This is Justice Scalia's wolf."

Kate Shaw:

Or literally, that Morrison was wrong the way it was decided, it should be in here, by is overruled. Kavanaugh has that drafted, somewhere, and it's just a question of when he gets to deploy it with four other people, or five other people on his side. Anyway, that was an interesting subtext of the entire argument, I thought.

Leah Litman:

Yeah. And it came up again, as you were alluding to, about whether subsequent cases have, in fact, vindicated the Scalia dissent. You know, the subsequent case Edmond is one of them, and here is an example of Justice Kavanaugh, again, flat out asking whether Morrison is, in fact, still good law.

Justice Kavanaugh:

Okay, so Morrison tests still alive after ... for Morrison tests, for Appointments Clause purposes, still alive after Edmond?

Leah Litman:

Another way of thinking about this case, in addition to thinking about the amount of presidential control that is required over administrative agencies, is about these competing intuitions between flexibility on the one hand, and hard and fast rules on the other. There were repeated suggestions that this case is somehow particularly troubling, because this is the only kind of administrative law judge for which the decisions of the ALJ aren't ultimately reviewable by the head of the agency. You know, the PTO director, or the Secretary of Commerce.

Leah Litman:

But here, there's an arguably pretty good reason for that. We're talking about an adjudicator, and you might think that it's not appropriate to vest final review of a decision of an adjudicator in an Executive Branch official.

Leah Litman:

Also, brief, selfish plug, this provides an occasion for the courts to right another historical wrong, beyond the Morrison decision apparently, and that is the court's failure to cite my anti-novelty article which argues that the mere fact that a practice is new, and is an historical anomaly, is not in fact an indication that it's unconstitutional. So Steve Breyer, Elena, Sonia, I'm looking at you.

Kate Shaw:

Fight the good fight on the substance of this opinion, but if you're going to lose at least cite Leah going down.

Leah Litman:

Right, exactly. Exactly.

Kate Shaw:

So Steve Breyer, speaking of our friend Steve, asked a classic Steve question. Let's play that one now.

Justice Steve Breyer:

I'm just curious. You may not have thought about this, but maybe the SG's Office has. But in Peekaboo, if we go back to that, I dissented and had a very long appendix with dozens and dozens of people that I suddenly thought they seemed to be like here, we used to call them hearing examiners. Really, they used to be civil servants, all kinds of shapes and sizes in terms of power. They suddenly all became officer of the United States, but the majority said, "We're not saying they all are, we're just talking about Peekaboo. Are these people officer of the United States? Why is my answer. I'd like a line, if you've ever thought of one. Between the statement in Peekaboo, in the majority, Don't worry, they're not all officer of the United States." Have you thought of a distinction there, between the long list in Peekaboo and would it apply here?

Kate Shaw:

In addition to revealing that he calls the case, that I always call Free Enterprise Fund, Peekaboo, which I've heard people call it before but never a justice. Have you?

Leah Litman:

I don't know that I've heard a justice call it that before. But if anyone was going to do it, it was going to be Steve.

Kate Shaw:

Clearly.

Leah Litman:

I just love he references his appendix. "Why is my answer, why." It's just everything about Steve came through in this question.

Kate Shaw:

It was a very thorough appendix, I went back and looked at it after the argument.

Leah Litman:

Oh yeah, it was. It was.

Kate Shaw:

I had forgotten quite a lot. I remember it being long, but it was really thorough. I don't know if there's a clip that distills this in quite the same way, but Kagan was also, I thought, just really terrific in this

argument. I felt like, you just were talking about Seila Law, all of the fire that she brought in that Seila Law dissent, and then some of the parts of her Gundy plurality in which the sex offender registration narrowly survives this non-delegation doctrine challenge. And in that case, she's striking this incredulous, "Really? We're going to burn down the whole apparatus of government?" All of that energy, I thought, was on display in this argument. She just feels, to me, kind of exasperated by her colleagues fetishistic formalism, in these separation of powers cases.

Kate Shaw:

In Seila Law, her outrage of the idea that the court is just going to blow up agencies now. It's a more surgical remedy, in the CFB v. Seila Law, but the court is generally willing to undo much of what Congress does in creating the administrative state. This particular court has shown itself willing to undo a lot of Congress' handiwork, because they decide that certain institutional arrangements will somehow slightly encroach upon an unfettered presidential removal power. That by the way, is nowhere written in the Constitution, they've just decided that it's this sacrosanct principle. And, all that operates to give the President massive power, but of course that's okay, because the President's popularly elected, except as we've talked about many times, the court actually isn't willing to enforce the mechanisms by which popular election of the President, even within our Electoral College system, is meaningful.

Kate Shaw:

But, the majority's total unwillingness to defer to Congressional choices about how to structure administrative agencies, and then paired with, to come back to Gundy, the majority's insistence ... I'm saying majority, it wasn't a majority in Gundy. But, it's the majority that is clearly coming. Because in Gundy....

Leah Litman:

It's our Constitution in exile.

Kate Shaw:

Right, exactly. That's right, yeah. Even if the doctrine hasn't caught up yet, we're already in the defensive crouch of exile.

Kate Shaw:

So, the view in Gundy, the non-delegation doctrine, might actually unsettle a lot of administrative agency arrangements. And, that the Gorsuch wing of the court wants to do that, to revive the non-delegation doctrine, in the ostensible defense of Congress. But in doing so, it's going to invalidate tons of what Congress does in choosing how to structure administrative agencies, is just a maddening set of, I think, conflicting convictions.

Kate Shaw:

And here, to bring it back to the case more concretely, the tenor of some of the questions from the conservatives, and obviously the arguments, were just this insistence that the type of review to which these APJ rulings have to be subject ... It's not sufficient here, because there isn't a politically accountable superior whose able to actually reverse or overrule the rulings of these APJs. Somehow, that that undermines democratic accountability, because people need to know exactly who to blame for these specific decisions so they can hold them accountable. And that there's going to be a meaningful

difference from, the perspective of democratic accountability, between some meaningful review but total de novo review just, seems to me, kind of an absurd proposition. Again, it's this really fetishistic, formalistic approach to agency design.

Kate Shaw:

I think Kagan's point, in her colloquies in this case and a lot of her writings in this area, are just like, "Congress actually has always had a lot of leeway to experiment with agency structure." This, of course, goes back to your debunking anti-novelty. And, that none of the specific attachment to particular Constitutional rules, some of which don't even have any foundation in the text of the Constitution, should not be used to unsettle those kinds of choices and longstanding arrangements.

Leah Litman:

I don't know why I thought of this just now, but I taught Seila Law for the first time this last week in constitutional law. And as I was doing it, and particularly as I was prepping for the class reading Justice Kagan's dissent, I just repeatedly had the thought, "You can stop, he's already dead."

Kate Shaw:

Oh my God. I don't teach it in my one [inaudible 00:26:22] law class, I should do it. Was it good, did it go over well?

Leah Litman:

I mean, hard to say. But, I enjoyed teaching it.

Kate Shaw:

Was it fun to teach?

Leah Litman:

Yes.

Kate Shaw:

Oh yeah. It's a truly incredible dissent. Which, I have practiced writing the sentence, "Kagan's dissent into law. It was correct the day it was written."

Leah Litman:

Seila Law was wrong the day it was decided.

Kate Shaw:

Exactly.

Leah Litman:

It's wrong in the court of history, it was overruled in the court of history. We take the formal step today.

Kate Shaw:

Oh, I cannot wait until we get to write that.

Leah Litman:

So now, back to the case.

Leah Litman:

PTAB judges, okay. In the case, there's also this equally important secondary question. Which is, if the current arrangement is unconstitutional because PTAB judges are principle officers rather than inferior officers, what is the remedy in the case? That is, what provision or provisions should the court invalidate?

Leah Litman:

You mentioned Seila Law, that case involved a restriction on the President's ability to remove the head of an agency. In those kinds of cases, the remedy is clear, you just eliminate the restriction on the President's ability to remove a director. Here however, there are a bunch of different provisions that constitute the responsibilities and powers of a PTAB judge and who they're accountable to, and it what sense. So the Court of Appeals for the Federal Circuit, which held that PTAB judges were principle officers, chose to invalidate the provision that restricts the Secretary of Commerce's ability to fire PTAB judges. On the theory that well, if they could fire PTAB judges at will, well then, that would make PTAB judges inferior officers.

Leah Litman:

But, you could play a similar game because there about a million different features of the PTAB structure that might be the one that could change a PTAB judge from a principle officer to an inferior officer, such as whether the PTO director has the authority to review their decisions. And this raises this larger question about whether the court should even be playing around with this at all, or instead should basically remand the case for Congress to decide how it wants to fix it, and let Congress choose which provisions to amend in order to make PTAB judges inferior officers who can be appointed by the department head.

Kate Shaw:

Yeah. As the remedial exchanges played out, I just found myself thinking if the court does reach the, I think, clearly incorrect conclusion that these judges are principle officers, it's really hard for me to see a clean fix that the court could defensibly make. Probably Congress just needs to decide what it wants.

Kate Shaw:

The idea of requiring Presidential appointment and Senate confirmation for the 200 plus of these judges seems insane to me, there are already hundreds too many Presidential appointees subject to Senate confirmation. But, that was certainly one of the remedial prospects that was floated at the argument. Presumably Congress wouldn't choose that route, but that it would probably make more sense to just give it. But of course, Congress chose what I think is a perfectly defensible arrangement here, so it shouldn't have to go back to the drawing board. But, probably the court should give it a chance to do that, if it decides that this arrangement doesn't fly.

Kate Shaw:

I definitely thought, I'm sure that you did, too ... I was just listening to the argument, trying to hear clues about the ACA case, because of course severability is so central to that case. I didn't really have a clear sense.

Leah Litman:

No.

Kate Shaw:

Except for Kavanaugh who was like, "Severability is a misnomer." I was like, "What does he mean by that?" But otherwise, I didn't feel like I got any clues. But my only thought is that, whatever the court does here, I do hope Kagan writes because I just love her in this area.

Leah Litman:

Yes, me too.

Leah Litman:

Okay, the second case we wanted to talk about in-depth is Brnovich versus DNC. This is the case about enforcing the voting rights, but actually enforcing the Voting Rights Act. Specifically, as we talked about last week, the cases about what kinds of state laws or procedures violate Section Two of the Voting Rights Act, because they result in or have the effect of disadvantaging voters of color.

Leah Litman:

On the preview episode, we noted that Arizona and the Arizona Republican Party, were advancing various theories to limit the Voting Rights Act, and various theories that would make it more difficult for plaintiffs to prove that a law has the effect of disadvantaging voters of color in a way that violates the Voting Rights Act. And, in part because the advocates were maybe not the best, and in part because Justice Kagan brought out her ninja knives at oral argument, it seems like the court is not going to embrace some of the wildest, or most expansive theories for limiting the Voting Rights Act.

Leah Litman:

But, I also think it's clear the court will be limiting the Voting Rights Act in some way, and making it more difficult for plaintiffs to show that a law results in discrimination. But again, maybe not in the ways that the Arizona and Arizona Republican Party were asking for. So what Arizona and the Arizona Republican Party were arguing for were two rules.

Leah Litman:

One, was that laws that result in a substantial disparity by the Voting Rights Act, but laws that merely result in some disparity, are fine. Again, because the laws at issues in these cases affect something like three to 4000 voters, that might not be a substantial disparity.

Leah Litman:

And then, the second theory, which is I think the more far-reaching one, was that laws that preserve an equal theoretical opportunity to vote are fine, even if a state eliminates voting procedures that are predominantly used by voters of color. So the example we talked about in the preview episode is if a state, for example, eliminates early voting or mail-in voting, all voters still have the theoretical equal

opportunity to vote in-person, and therefore it's not clear that that would violate the Voting Rights Act. That would be a dramatic reduction in the scope of the Voting Rights Act, and again, would allow states to refashion voting procedures in ways that seem to advantage particular kinds of voters.

Kate Shaw:

There's an amicus brief arguing that Section Two is actually just unconstitutional. It did not seem as though that was on the table as a possibility, but it didn't even actually seem like Arizona was seeking that from the court.

Leah Litman:

They were never asking the court to invalidate Section Two in this case, but one of the reasons they were giving for why the court should narrow the scope of Section Two was that, if Section Two were interpreted so as to call into question many different laws and policies that result in differential burdens on voters of color, then that would be unconstitutional because it would have the effect of requiring states to take into account of race, of adopting some sort of proportional representation in voting system, and that raises constitutional problems. It was really, I think, a backdrop to some of the arguments they were making about how the Voting Rights Act should be interpreted.

Kate Shaw:

You used a ninja metaphor. I thought of Justice Kagan playing chess while everybody else was playing checkers. And that includes her colleagues, definitely the lawyers for Arizona and Arizona GOP.

Kate Shaw:

Did you watch The Queen's Gambit on Netflix?

Leah Litman:

Yeah.

Kate Shaw:

Yeah, that early scene where Beth Harmon goes to that middle school gym, or maybe it's a high school gym, and round robin plays and beats everybody in 20 minutes. I just felt like she did that, first to Michael Carvin who is representing the Arizona GOP, and then to Brnovich, who is representing the state of Arizona. Basically, she didn't even bother to repeat her question. She asked this deadly question that we'll play in a minute, and then just turned to the second lawyer for that side and said, "What'd you think about that question?"

Leah Litman:

You basically have 15 minutes to think about this, and you come up with anything good ...

Kate Shaw:

Well, I had this moment of terror, which of course he was listening, it's his case. But I could imagine being really focused on honing a few things I wanted to say and tuning out, and God forbid you have to ask, "I'm sorry Justice Kagan, what was that question again?" But no luckily, for him not for the quality of his answers, but just for the cringe factor for all of us, luckily he clearly had been paying attention which didn't really help.

Kate Shaw:

But okay, let's play that. Basically, what happens is Justice Kagan gets Carvin to back away from this full-throated, pretty insane equal opportunity theory, by acknowledging that some laws, in theory, preserve equal opportunity but clearly result in differential burdens, would violate Section Two. Let's play that clip now.

Mr. Michael Carvin:

Justice Kagan?

Justice Elena Kagan:

Mr. Carvin, I have a number of hypotheticals for you, and I'd be grateful if we could run through these fairly quickly just so I can get an understanding of your position.

Justice Elena Kagan:

The first one is that the state decides that each county can have one polling place. And, because of who lives in larger counties, that creates a disparate impact that Black voters have to wait in line for 10 times the amount that white voters do. Two and a half hours, instead of 15 minutes. Is that system equally open, in the language of the statute?

Mr. Michael Carvin:

I would say not. Equally open means, takes into account demographic realities. If you have one polling place for five people and one polling place for five million people, obviously in the latter situation, those people do not have an equal opportunity to vote.

Justice Elena Kagan:

Okay, how about this one.

Mr. Michael Carvin:

I would think-

Justice Elena Kagan:

That's helpful. That's helpful, Mr. Carvin.

Justice Elena Kagan:

A state has long had two weeks of early voting, and then the state decides that it's going to get rid of Sunday voting on those two weeks, leave everything else in place. That Black voters on Sunday 10 times more than white voters, is that system equally open?

Mr. Michael Carvin:

I would think it would be, because let's think about it. Sunday is the day that we traditionally close government offices. It would be the exception rather than the rule to have government workers come in on a Sunday.

Justice Elena Kagan:

You know, it's an exception to have government workers come in on a Saturday, too. That's not a real problem.

Mr. Michael Carvin:

Well, there are Sunday closing laws as we know, from McGowan v. Maryland, which are different than Saturday. But in all events, Saturday would implicate other religions.

Justice Elena Kagan:

Okay, that is equally open. Thank you, Mr. Carvin. Can we just go onto another one?

Justice Elena Kagan:

The state says we're placing all our polling places at country clubs, and that decision means that Black voters have to drive 10 times as long to the polls, and have to go into places which are traditionally hostile to them.

Mr. Michael Carvin:

Yeah, I would think that would provide them with less opportunity that non-minorities.

Justice Elena Kagan:

Why is that?

Mr. Michael Carvin:

Well, because they have to travel further into hostile territory, where non-minorities can travel one block to very sympathetic. Under any definition of whether or not-

Justice Elena Kagan:

Okay, that's helpful.

Justice Elena Kagan:

The state says we're going to have Election Day voting only, and it's going to be from nine to five. And, there's plenty of evidence on the record that voters of one races are 10 times more likely to work a job that wouldn't allow them to vote during that time period. Is that system equally open?

Mr. Michael Carvin:

It seems like it, because that would be pretty much the status quo in 1982. And of course, if it was eight to seven, you could make the same argument about-

Justice Elena Kagan:

How about nine to three?

Mr. Michael Carvin:

I think any time you diminish from what I will call the usual burdens ... If you went to 15 minutes, to use an extreme example, then obviously you're effectively denying the opportunity-

Justice Elena Kagan:

So nine to five is okay but 10 to four would not be okay, is that the idea?

Mr. Michael Carvin:

Again, these are all hypotheticals that have never existed in the real world.

Justice Elena Kagan:

This doesn't seem so fanciful to me. Nine to five is okay, 10 to three is not, is that the idea?

Leah Litman:

It might be difficult to appreciate just how devastating this was. Again, it's important to remember that, in the brief, the Arizona Republican Party was arguing that all laws that, again, preserve equal opportunity in theory, that don't create one set of rules for voters of color and another set of rules for white voters, were presumptively fine under Section Two. And then, in the first 30 seconds of her question, Justice Kagan got the GOP Arizona lawyer to back away from this, and illustrating how significant and just devastating this was. Other justices who questioned later, would refer back to what Michael Carvin said in his brief, rather than said today, again signaling just how much confusion this had created when the lawyer was backing away from the position in the briefs.

Kate Shaw:

Yeah. I don't know if it's going to move votes, but it definitely seemed to be ... Barrett seemed potentially moved by Kagan's hypo, she definitely referred to the question and the answer Carvin had given in her questions. I think, in the second round of questioning, Brnovich didn't get to finish his last answer to Kagan. And Gorsuch just said, "Oh no, just answer that. I want to hear the answer."

Kate Shaw:

I just feel like they're all acknowledging just how good she is at this. It doesn't mean she's going to win them over, but as to oral argument she really is just in her own category.

Leah Litman:

Yeah, but she will make it more humiliating for them, when they ultimately vote for this position that she has just utterly demolished within the span of 60 seconds.

Kate Shaw:

Yeah, she will.

Leah Litman:

Where do I think the court will go, if they're not going to embrace the full-on equal opportunity theory? I think it's probably a combination of things that they're going to say, to make it more difficult for plaintiffs to prove Section Two claims.

Leah Litman:

One is I think they will probably embrace some version of the substantial disparity theory, or at least say that the disparity can't result from either state laws that are common, or the disparity can't result from

the usual, or what they would describe as standard burdens of voting, like some amount of wait time, or perhaps also leaving your house.

Kate Shaw:

Can I just say I found that ... Carvin said this a bunch of times. I found that so maddening, because the idea that we want to cement this notion that leaving your house and voting in-person is interchangeable with voting, in a moment in which ... First of all, Arizona I think has had pretty expansive vote-by-mail for a long time, most Western states have. But certainly, many states in the country have, for the first time, allowed most or all people to cast votes by mail. But to say, again and again, "This is part of voting. This is an ordinary incident of voting is to leave your house, go to the polling place, find your name," there's no essential truth to that. It has historically been part of voting in lots of places, not everywhere in this country, for decades. But, he would like it to be. I found that a sneaky attempt to frame the issue, such that requiring that is never going to be a burden.

Leah Litman:

It was also, to me, doing a real disservice and undermining how significant the Voting Rights Act itself was, as if this major legislation, which followed on the heels of Bloody Sunday in which peaceful voting rights, protestors were met with extreme police violence, leading the President to meet with civil rights leaders and pass this major legislation. That legislation did not lock in state laws that were common at the time, which again, people recognized were problematic and that's why we needed Federal legislation.

Leah Litman:

It really bothered me, at several points when various justices were like, "Well, the bill contained this particular compromise." Yeah sure, all bills contain compromises. That doesn't detract from, again, how significant and revolutionary this law was to our constitutional democracy and we should be interpreting it in that light.

Kate Shaw:

Right. That's true about, of course, the original Voting Rights Act, and it is also true about the 1982 amendments that explicitly allow for disparate impact liability, after the Supreme Court mistakenly held challengers to a higher standard in the City of Mobile versus Bolden. Congress came back and said, "No, you don't have to show intentional discrimination if a law has a disparate effect on the basis of race, that's enough to violate Section Two." I just felt like this whole project is in such tension with that obvious purpose of the amendment.

Leah Litman:

Yeah. That's one way that I think they will probably trim the sails of Section Two a little.

Leah Litman:

I think they will also do so by saying the state doesn't have to prove that it is solving an actual or real problem. That is, there's conceitedly no evidence of actual fraud here, when people other than the voter return a ballot. And yet, the justices seems to say, "Well, the state doesn't need to prove instances of actual fraud. They can say well, this commission basically said prohibitions on ballot collection are fine and that's enough, even without an actual problem."

Leah Litman:

And then last, I think they will also probably do something to make the causation standard in these voting rights claims potentially more difficult for plaintiffs to show. And basically, suggest or require that plaintiffs prove that the disadvantage results from the state law, rather than what the Arizona lawyers or the Arizona GOP lawyers were calling demographic realities, or socioeconomic status. Which, of course, is super problematic because you're basically saying states can enact laws that they know create these burdens in light of demographic realities and socioeconomic status, and that somehow makes it less problematic rather than problematic, or more problematic. But, I think that is where I took the justices to be heading.

Kate Shaw:

A couple of other maybe notable moments from argument. Justice Barrett, of all people, got Michael Carvin to say that the RNC had an interest in this case because it doesn't want certain people to be able to vote or certain votes to be counted. It was a pretty striking moment. Let's play it here.

Justice Amy Coney Barrett:

Okay Mr. Carvin, let me move onto a different question. I'm interested in knowing why the RNC is in the case? The DNC had standing and the District Court said that it had the standing to challenge the out of precinct policy because the policy placed a greater imperative on democratic organizations to educate their voters, and because the policy harmed its members who would have voted out of precinct. What's the interest of the Arizona RNC here in keeping, say, the out of precinct voter ballot disqualification rules on the books?

Mr. Michael Carvin:

Because it puts us at a competitive disadvantage, relative to Democrats. Politics is a zero sum gain, and every extra vote they get through unlawful interpretations of Section Two hurts us. It's the difference between winning an election 50 to 49, and losing an election-

Justice Amy Coney Barrett:

Okay, thank you. My time is up.

Leah Litman:

I don't think she was intentionally trying to get him to say this. I think she was rather surprised, and tried to stop it pretty quickly. But, it was just this super wild, "Oh, you're just saying it, I guess," moment from the argument that was quite revealing.

Kate Shaw:

Yeah. In terms of your bottom line prediction, I think you're probably right. I am really curious to see where Chief Justice Roberts lands in this case. Ordinarily, I would presume that if there's a chance to restrict the Voting Rights Act, that John Roberts is going to be on board, and I think that's still probably right.

Kate Shaw:

But, I actually do wonder, to the extent that we wrestle of this question of whether John Roberts in 2021 is the same John Roberts from 2013, the author of Shelby County. I'm not sure he is. Either way, I think it'll be very interesting to see where he lands in this case.

Leah Litman:

We shall see.

Kate Shaw:

All right, so should we move on? We've got a couple of opinions this week. Should we talk about those?

Kate Shaw:

Okay, so the first of these, US Fish and Wildlife Service versus Sierra Club, was Justice Barrett's first majority opinion. It was a seven-two opinion siding with the government, in a case involving t Freedom of Information Act, or FOIA, specifically whether certain draft biological opinions are covered by the deliberative process privilege, which means that they are exempt from disclosure under FOIA, actually Section B5 of FOIA.

Kate Shaw:

The Sierra Club had argued that these documents were final, and thus they were not pre-decisional and deliberative, which is required to qualify for the exemption. But Barrett said, "No, these documents are understood as drafts of drafts, and thus they are pre-decisional and deliberative. They are subject to this exemption so they can be withheld under FOIA."

Kate Shaw:

It was interesting. Look, new justices often get, as their first opinions, pretty narrow unanimous opinions. This was a narrow opinion, but it wasn't a unanimous one. It was short, it was 11 pages long. But, it was interesting and it made me wonder whether Breyer and Sotomayer peeled off because they dissented. Although, we should say this was a pretty gentle dissenting opinion, Breyer doesn't usually bring tons of fire anyway. Sometimes he does, but not all the time. But here, there was no fire. He was like, "I think I would have remanded for the lower court to determine whether these documents actually were drafts of drafts. And if they were, then the majority is right." It was a mild disagreement, which meant it really raised some eyebrows when he said, at the end of his opinion, "I dissent," and omitted the customary "respectfully," or "with respect."

Kate Shaw:

People noticed. It was a fun 24 hours of speculation. And then, in less than 24 hours, he had edited his opinion to say, "For these reasons, with respect, I dissent." I don't know, it's fun to speculate. Maybe it's nothing, but there's a couple of possibilities.

Kate Shaw:

One is that maybe there actually is some bad blood in there. It made me think about ... I hadn't thought about this in a while. Remember how, early on in Gorsuch's tenure, you'd hear a little bit about beef between Gorsuch and other justices. He was irritating others, and in particular the Chief, I remember that exchange. I don't even remember what the case was, but when Gorsuch jumped in, in oral argument, to correct the Chief Justice's ... he was asking a question about interstate I-90 versus I-95.

And Gorsuch jumped in to say, "Oh no, no. It's interstate I-80." And then, 10 minutes later, I think maybe interrupted again, or maybe was about to ask a question and then said, "I'm sorry," totally chagrined. "I'm sorry Mr. Chief Justice, it was I-90." Roberts like, "That's what I said." He actually jumped in, to incorrectly correct the Chief Justice. I felt like you had a little bit of glimpse that maybe the two were not getting on famously.

Kate Shaw:

Anyway, is that what we just saw a glimpse of with Breyer and Barrett?

Leah Litman:

Hard to say. I was not entirely convinced this was a super narrow opinion, just because while it was ostensibly just about biological opinions that the EPA was doing, or Fish and Wildlife Services was doing, I think she says it would apply to all drafts. And given the court's conclusion that, on these facts, these were definitely drafts, or drafts of drafts, I can see this particularly in the hands of Executive Branch lawyers, making arguments about whether something is subject to FOIA disclosure or not, this opinion being quite expansively deployed.

Kate Shaw:

Interesting. Okay, so you think that maybe the agreement is sharper than I suggested. So maybe, Breyer really was mad and meant to signal it?

Leah Litman:

I mean, hard to say. But yeah, I guess I didn't read this opinion as necessarily that narrow.

Kate Shaw:

Okay. So putting that aside, is there a possibility that it was just the omission of respectfully or with respect, he was distracted because he's working on another major writing project?

Leah Litman:

What would that other major writing project be? "With respect, I retire."

Kate Shaw:

Exactly.

Leah Litman:

You know what, you can leave out the with respect in that one, Steve. Just get to the punchline.

Kate Shaw:

Just, "I retire."

Leah Litman:

Just get to the punchline.

Kate Shaw:

He needs his windup. He can take whatever wind up time he needs, he just needs to get there is the point. No, I am sure a retirement letter would be a long one. It just seems in character.

Leah Litman:

Probably.

Kate Shaw:

Maybe he's refining it.

Leah Litman:

Yeah, maybe it has an appendix. We'll see.

Kate Shaw:

Will we see?

Leah Litman:

Okay. A second opinion we wanted to recap was Pereida versus Wilkinson, this is a five-three opinion by Justice Gorsuch with Justice Breyer dissenting, joined by Justice Sotomayor and Justice Kagan. Justice Barrett was not yet on the court when the court heard oral argument in this case.

Leah Litman:

The case is about eligibility for certain forms of relief from removal, in particular cancellation of removal. The structure of immigration law is, super basically, non-citizens who commit certain crimes are subject to deportation and removal, but they may be eligible for relief from removal if, for example, they have lived in the United States for a long time, have US citizen children or dependents, present no security or safety threats, and so on, they might be eligible for cancellation of removal. Here, Mr. Pereida had lived in the United States for over 20 years, he has children including a child who is a US citizen, so he applied for cancellation of removal. But, you're not eligible for cancellation of removal if you have been convicted of certain crimes, and those are a different subset of crimes than the ones that make you deportable.

Leah Litman:

The question in this case was basically, how do you know if someone was convicted of a crime that makes them not eligible for cancellation of removal, when they were convicted under a statute that contain multiple crimes. Some of which would make you eligible for removal, and some of which would not. So Justice Gorsuch, in the majority, basically resolves this case by saying, "An immigrant has to demonstrate their eligibility for cancellation of removal, and the immigrant can't carry that burden when the record shows they were convicted under a statue listing multiple offenses, some of which are disqualifying, and the record isn't clear which crime from the basis of conviction."

Leah Litman:

So you're not eligible for cancellation of removal if you committed a crime involving moral turpitude. Mr. Pereida was convicted of criminal impersonation. But, you can be convicted of criminal impersonation by doing a million different things, including just carrying on a profession without a license. But, other forms of criminal impersonation are pretty serious, like doing things to deceive, or

harm others, like stealing their identity and taking all of the money out of their accounts and so on. Those more serious crimes would be crimes involving moral turpitude.

Leah Litman:

In dissent, Justice Breyer, rather than focusing on who bore the burden of establishing eligibility was all, "Yo, remember the categorical approach?" So it's a major rule in the court's cases on what counts as qualifying convictions for immigration law and criminal law, and the rule, the categorical approach is that you only have a qualifying conviction if the statute you were convicted under defines crimes that fall under the Federal definition. That is, if the statute prescribes more conduct criminalizes more conduct than fits the Federal definition, you don't have a qualifying prior conviction. That rule, Justice Breyer said, resolves this case because if you apply that rule, then of course Mr. Pereida is eligible for cancellation since he was convicted under a statute that prescribes more conduct than would qualify as a crime involving moral turpitude.

Leah Litman:

The case is potentially quite significant. It could disqualify a bunch of lawful permanent residents from being able to get cancellation of removal, particularly in cases like Mr. Pereida's, that involve criminal impersonation, people who might not be authorized to work the in United States doing so anyways. And, Nevada's criminal impersonation statute isn't all that on representative.

Kate Shaw:

Okay. Let's just briefly wrap with a little court culture. In some ways, we're going to note the absence of good material for our final segment, because we would-

Leah Litman:

Give us some good material!

Kate Shaw:

We're basically begging for judicial nominees. That's what we would spend the next 10 minutes talking about, what kind of nominees Biden is sending to Senate. And yet, we can't talk about that because he hasn't nominated anyone.

Leah Litman:

If he's not going to nominate people, I'll nominate people. I choose Dale Ho for the Second Circuit.

Kate Shaw:

See, I have a pretty permissive view of the Appointments Clause, but I'm pretty sure that wouldn't fly.

Leah Litman:

He can ratify these choices.

Kate Shaw:

That's right, absolutely. Yeah, Dale Ho for the Second Circuit, we're obviously on board. Look, there have been a lot of retirements. There are still a lot of judges eligible to take senior status who have not yet

done so, and I think they are slowly following the lead of former Chief Judge of the Second Circuit, Judge Katzmann, in the circuit that New York is in. Yay Judge Katzmann. We definitely noted this.

Leah Litman:

Yeah. Yeah, we talked about it. Yeah.

Kate Shaw:

On the 21st of January, one day after inauguration. People have followed, but there are many yet to follow. Obviously, the big kahuna to follow we talked about a few minutes ago.

Kate Shaw:

But, we're talking now about the Courts of Appeals. Trump, even while he was busy drafting the travel ban, and other such things in his first couple of weeks and months in office, got his first Appeals Court nominee for the Sixth Circuit nominated on March 21st, 2017. The clock is ticking. Not that I'm matching, the Trump record should be the benchmark. I would hope that Biden would like to exceed it. But at least in the month of March, we have to get some Appeals Court nominees out of the White House, headed for the Senate. It's a process, and they have to start the process before they can get people seated. And, the Senate majority is just so slim, and things can change quickly.

Kate Shaw:

It just seems like a massive wasted opportunity not to get a whole bunch of Appeals Court nominees up in March and April, so I very much hope the Biden team will do that.

Leah Litman:

Yeah, me too.

Kate Shaw:

Not just for our court culture segments.

Leah Litman:

No.

Kate Shaw:

But for the country. But, also for our court culture.

Leah Litman:

Two birds, one stone, something like that.

Kate Shaw:

Exactly.

Leah Litman:

But, I think it's also reason to hope, again, based on what happened over the last four years, that not all future nominations might take as long as the first nomination, maybe because they're getting the

process up and ready, because they will start considering people who can then be considered for future vacancies that arise. So hopefully, for these reasons, like we saw during the Trump presidency while the initial nomination took two months, not all subsequent ones might necessarily have to do so.

Kate Shaw:

I think that's right. Once the machine restarts going, it really can go. But, you got to get it started.

Leah Litman:

Yeah.

Kate Shaw:

Good note to end on.

Leah Litman:

Also, if any Federal judges are thinking about retiring, maybe we can do a special summer episode where we celebrate judges who have decided to take senior status.

Kate Shaw:

See, this is the inducement people are waiting for, obviously.

Leah Litman:

Exactly.

Kate Shaw:

We will showcase you and your accomplishments in the special episode, I love that.

Leah Litman:

Melody, you can take that out.

Kate Shaw:

No don't take it out, leave it in. Now, Melody's going to put it in the opener.

Leah Litman:

True. That's what happens, that's what happens when I get punished for saying something and then wanting to take it back.

Kate Shaw:

Exactly.

Leah Litman:

Now, it really is time to wrap up. Thanks to our producer, Melody Rowell. Thanks to Eddie Cooper, for making our music. Thanks to Megan Markle, for giving Melissa a reason to live and a cause to fight for in

these dark times. And, if you'd like to support the show you can do so by becoming a Glow subscriber at glow.fm/strictscrutiny. Thanks everyone for listening.