

Intro:

As Chief Justice, may it please the court, it's an old joke but when a man argues against two beautiful ladies like this, there's one that has the last word.

Intro:

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

Leah Litman:

Hello and welcome back to Strict Scrutiny, the podcast about the Supreme Court and the legal culture that surrounds it, a project of The Appeal. I'm one of your hosts, Leah Litman, and today I'm joined by two guests that I am super excited about. First we have Josie Duffy Rice, the president of The Appeal and host of the acclaimed Justice in America Podcast, who now joins Elie Mystal as the only person to ever make a repeat appearance on the podcast. So thanks for putting up with us twice, Josie.

Josie Duffy Rice:

Thank you for having me. That's very esteemed company, so I'm very grateful.

Leah Litman:

And we also have with us today, Jay Willis, a senior contributor at The Appeal who's writing we have talked about on this podcast before. So welcome to the show, Jay.

Jay Willis:

Hey, thanks so much.

Leah Litman:

You join Senator Sheldon Whitehouse as the only straight, white, cis man to ever appear on the show, so congratulations.

Jay Willis:

Also privileged company. Josie and I met 10 years ago in the 1L section, and this is exactly what the law school career services office promised you. You go to school, you make friends, you get in the alumni network, and then 10 years later you're writing on the internet, doing tweets, doing podcasts, living the dream.

Josie Duffy Rice:

You know, they said you should go clerk for the Supreme Court, and we said we want to do something even more influential than that. We want to tweet. We're very, very glad to be here. So thanks for having us.

Leah Litman:

Let this be an inspiring for all of the law students, particular first year law students listening. Make friends and then you will find yourself on a podcast and social media platform with them 10 years later.

Leah Litman:

So today we are going to be covering, in addition to whether and when or why to tweet, some Supreme Court news, we'll also be previewing a case that will be argued this upcoming week and then we will talk about a set of cases that together and collectively raise some important questions about the scope of policing authority. Let's get started on the news.

Leah Litman:

The Supreme Court decided to hear *Wooden v. United States*, a case about the Armed Career Criminal Act. ACCA is the federal law that prohibits certain people from possessing firearms, including people with a felony conviction. Ordinarily that crime is eligible for a maximum of 10 years in prison, but ACCA imposes a mandatory minimum of 15 years for people with three or more prior convictions for quote violent felonies that were committed on occasions different from one another. Most of the courts prior ACCA cases have addressed the definition of violent felony, but this case is actually about what it means for offenses to have been committed on occasions different from one another. And specifically it's about whether it is enough that offenses were committed sequentially rather than at the same time, even though the offenses might have been committed on the same day, just in succession, at the same place, et cetera. So the court will hear this in OT2021, but I wanted to highlight it ACCA is a passion project of mine.

Jay Willis:

When we say offenses that might have been committed on the same day, in the same place, we mean that very literally. His previous offenses for which he was sentenced are one aggravated assault, and then 11 burglary convictions, 10 of which occurred in the same year, 1997, and they occurred in the same year because those 10 burglary convictions are from one night when he and some friends burglarized a mini storage facility in Georgia, and the way those got charged is that instead of getting charged for burglarizing the facility, he got charged for burglarizing each individual locker. That's 10 different counts, and as a result, 20 years later, he gets hit with a mandatory sentence under ACCA.

Josie Duffy Rice:

It's just yet another sign of the judiciary and the system sort of pretending that their hands are tied, without acknowledging all the discretion that went into making the decisions to begin with. So the mere idea that this is 10 different charges instead of one charge is because of a host of circumstances, many of which don't even have to do with the defendant. In different circumstances he would have pled to one charge, he would have pled to something different, the question about sequentially is so interesting given that there was so much discretion basically misused or abused to begin with in this case.

Leah Litman:

And the extent of prosecutorial discretion is something that this court has actually exhibited some concern about, at least when it comes to say white collar criminal defense cases, like the *Bridgeway* case of Kelly, or the campaign finance or campaign fraud cases like *McDonnell*, but here the question is always are they going to advance that same concern when we are talking about a different kind or different set of crimes. Thus far they haven't exhibited quite as much concern, although their willingness to invalidate some provisions in ACCA as unconstitutionally void for vagueness is perhaps a step in the right direction, and hopefully that set of concerns will be present when the court later hears this case.

Josie Duffy Rice:

Yeah, relatedly I think not just SCOTUS, but the state legislatures, Congress, and the other elected officials are just generally now starting to exhibit some suspicion of prosecutorial discretion, but it's notable that they've only started to sort of care about that when prosecutors have said they were going to be more lenient, they were going to decide to not charge things, and not when we faced 30 years of overcharging. And so after three decades of mantra that prosecutors have good judgment and they know what they're doing and they unfettered discretion and they can do what they want, we are now seeing people all the sudden be like, "Well I didn't mean not charge drug cases." Which just really highlights just how hollow so many of these principles are once they are actually challenged by the beliefs of those people who make the decisions.

Jay Willis:

Yeah, if you ask anyone who's not a lawyer how many places did Wooden rob? They would be like-

Josie Duffy Rice:

One place.

Jay Willis:

One, the storage facility. It just wouldn't occur to you to be like, so he went into 10 different lockers, I'd certainly see how that is 10 independent constituent crimes. It's an example to me of the way the legal system finds ways to just stack punishments, especially on vulnerable people.

Josie Duffy Rice:

You can see that there's a logic behind this, but is it a logic that we want prosecutors to be using? Is it the logic we want the system to be employing? And we also know that when an opposite logic is more convenient for them, they'll use that one. It's not this sort of thing where you say, "Well everybody knows if you rob 10 different storage units, that's going to be 10 different crimes." This is not intuitive, and yet he's going to pay a serious price for it.

Leah Litman:

And perhaps if the court is willing to actually police the use of this, ACCA, different offenses committed at different times, perhaps they will then revisit 924(c) which is just in it's own category of horribleness as far as the stacking of federal offenses. So on that perhaps slightly optimistic note, maybe we can point out something that is actually perhaps a reason for optimism on the Supreme Court's docket, which was this past week, the Supreme Court vacated a court of appeals decision that had granted qualified immunity in *McCoy v. Alamu*, in which a Texas corrections officer allegedly beat and then maced a prisoner without provocation.

Leah Litman:

So the US Court of Appeals for the 5th circuit, being the 5th circuit, granted the guard qualified immunity because there was no case with similar facts saying that beating a prisoner and macing them without provocation violated the 4th amendment. The United States Supreme Court remanded the case for the 5th circuit to reconsider in light of the Supreme Court's decision in *Taylor v. Riojas*, the case we talked about before where the courts said corrections officers were not entitled to qualified immunity for keeping a man in extremely unsanitary and grotesque conditions for several days.

Leah Litman:

Of note is that this petition in McCoy was actually brought by the same organization, or one of the organizations that was involved in the Taylor petition, Rights Behind Bars, a fantastic new organization that is doing a lot of these prisoner rights cases and trying to change the law in this area.

Josie Duffy Rice:

Yeah, another shout out to Rights Behind Bars. They're relatively new, they're a very scrappy organization, they don't have a ton of stuff, and they're really, really having an impact.

Leah Litman:

And they've carved out a practice area that didn't exist before, which was getting qualified immunity wins in the Supreme Court for prisoners. That literally wasn't a thing that happened before the Taylor case.

Jay Willis:

Groundbreaking stuff. So seeing these two, as we said, unusual qualified immunity decisions coming from the Supreme Court makes me wonder a little bit if this is a possible example of the court tracking public opinion. Qualified immunity cases for so long have pretty much uniformly gone one way, but in the midst of this national discussion that we're having about police, police violence, and even more generally the role that police do and should or should not play in society, it seems like taking action against literally some of the worst cop abuses is maybe lit the least the court could do to sort of get behind that, and especially at a time also when you have this new conservative supermajority which many people are very rightly afraid and about which they are very correctly concerned. It seems like this is a pretty low hanging fruit option to maybe earn some good will and legitimacy.

Josie Duffy Rice:

That even more than good will could be somewhat of a driving factor here. I think the fact that there's so much skepticism about the police and there is an undercurrent of policing as illegitimate, I think contributes to the need for the court to ensure that the police are still seen as an accountable, legitimate body. So I don't know how conscious that is, but it's not surprising. For years we could get away with never holding police accountable in any sort of way legally, and the approval rating of cops pretty much staying the same. And it has really only started to shift in the last seven years, and really significantly in the last year, and you can see how for any system of checks and balances, the need to reinstate legitimacy by ensuring accountability has to at least be a consideration.

Leah Litman:

Yeah, that's interesting. So perhaps these qualified immunity decisions that go against police officers or corrections officers are in some ways legitimating an institution that has started to be questioned.

Josie Duffy Rice:

Totally. The narrative, the not inaccurate narrative, is that police can do, as state actors, can do whatever they want and there's no punishment. Even more than the question of public opinion for a body that is supposed to ensure state accountability, that has to be at least worth noticing.

Leah Litman:

One case that the Supreme Court also just decided that kind of goes against this trend a little is the Supreme Court's recently released opinion of *Brownback v. King*. So that case held that the Federal Tort Claims Act judgment bar prevents plaintiffs from suing federal officers for violating the federal constitution. Once plaintiffs tried, unsuccessful tried to sued the federal officers for violating state law, and had their case dismissed under the Federal Tort Claims Act. We previewed that case briefly and just wanted to note the result here.

Leah Litman:

Some other developments that are more maybe will make their way to the Supreme Court, hopefully not in one case, and I'm not sure about the other. So a cert petition was filed in the Harvard Affirmative Action Case, which we've talked about on the show before, *Students for Fair Admission v. Harvard*. This is the case arguing that Harvard's race conscious admissions program is illegal because it violates prohibitions on discriminating on the basis of race. And the plaintiffs on the case are now specifically and explicitly asking the Supreme Court to overturn *Grutter v. Bollinger*, the Supreme Court case that had said it was permissible to consider race in admissions when the court upheld the University of Michigan Law School's admissions program. So this would be a case that the court wouldn't hear until next year, but I think it is an extremely significant case to watch, again, given that it could effectively end all race conscious admissions.

Josie Duffy Rice:

I just find the people that have built a career out of this so interesting, because they really care about unfairness, as long as that unfairness happens between September of your senior year of high school and April. Otherwise, the history of privilege or fairness before that is of no concern to them. The only thing that matters is these couple of months of school admissions. This case is also interesting that we're talking about it because Jay and I met in an Affirmative Action reading group in our 1L year, and I had seen him wear a sweater around his neck before this, so I was absolutely sure he was in this Affirmative Action reading group for reasons different than me and I was ready to, I knew I was just going to have to fight this republican, sweater neck wearing guy in my section, and then it turned out he had pretty good politics but not great style. But his style has improved markedly.

Jay Willis:

I did not expect to have to litigate my 10 year old sartorial choices on this podcast.

Josie Duffy Rice:

Yes you did, because I bring them up all the time.

Jay Willis:

I guess that's a good point. Rather than issue a substantive defense, I just want to say that obviously I have a lot in my past that I'm not proud of, it goes back to sweater proximity to my shoulders, this is something I'm trying to learn from. I'm trying to do better on in the future by which I mean-

Josie Duffy Rice:

You have improved so much, really, high five to you.

Jay Willis:

Shout out to all of our listeners right now who are very sheepishly undoing their fleece from their shoulders. I understand, sometimes it gets a little drafty, but not so drafty that you want to put it on. I just respect whatever decision you make. That's fine.

Josie Duffy Rice:

Mm-hmm (affirmative).

Leah Litman:

I mean this too is in some ways a note of encouragement for young law students listening, right? Like you too can learn, the Supreme Court can learn how to improve it's qualified immunity doctrine. Jay Willis can learn how to improve his dress.

Josie Duffy Rice:

Yes. You will not have to be today who you were yesterday. We can all change.

Leah Litman:

Speaking of not having to be today what you were yesterday, on Thursday evening, a district judge in Texas dropped a real hammer. So this judge, J. Campbell Barker who was nominated by Donald Trump at the ripe old age of 37 or 38 and confirmed at 39, invalidated the federal eviction moratorium. That moratorium protects something like 40 million people from being evicted in the midst of a pandemic. And the judge said that the federal government lacked the authority to regulate evictions under the constitution because evictions are quote not economic activity, they merely concern possession. Checks out, straightforwardly correct. JK, no. Evictions, those are literally the remedy for the breach of a contractual, commercial agreement between a landlord and a tenant when a tenant fails to pay, an eviction is the landlord's remedy. To suggest this is not economic activity was just quite interesting to read. Was thinking about sending this case to my common law students as a FYI, but then also didn't want to confuse them, so really a mixed bag here.

Josie Duffy Rice:

You know, I really recommend going to your landlord and saying, "I'm not going to pay my rent. But don't worry, it's not even economic activity, so it's pretty much irrelevant." I mean it's just such a perversion of reality.

Jay Willis:

It only works if you so badly twist the meaning, like the common understanding of what an eviction is, that you completely lose sight of, as Josie says, any normal semblance of reality. He talks about how this is the criminalization of possession. No, this is your house. It's your house, man. It's just like more poison brain conservative commerce clause contraction.

Josie Duffy Rice:

It's just yet another example, as well, of where this job forces you to dishonestly, right? The reality is that this guy knows that this is economic activity, he has to have some sort of reason to draw the conclusion he wants to draw, which is I think people should have to pay their rent or get kicked out. But I think the other thing worth mentioning is just that this one judge is having such a potential impact on 40 million people, but really this has been a failure of government to begin with, that we are in a

situation where 40 million people are at risk of eviction because they can't pay their bills, because they've lost their job and there is no government help. This is really a bandaid, this moratorium, it's a very important bandaid, but it's still a bandaid on a much bigger crisis, and the fact that we are expecting the moratorium and the judiciary about the moratorium to solve what is a much bigger problem is in itself kind of an issue.

Leah Litman:

I'm sure we'll solve that bigger problem in infrastructure week, though.

Josie Duffy Rice:

Oh yeah, don't worry. We've got it.

Jay Willis:

I was also thinking about this case in the context of from a couple years ago now, NFIB v. Sebelius, when Roberts famously argues that the purchase of health insurance is not economic activity, and thus can't be regulated under the commerce clause. And everyone at the time was like that's the dumbest thing I've ever heard, and it's fantastic that we're now a couple years later and the argument-

Leah Litman:

We've heard something dumber.

Jay Willis:

Yeah. Paying for your house, not economic activity.

Leah Litman:

Right. So maybe now we can switch to the preview of the case that we wanted to discuss, which is Brnovich v. DNC slash republican party of Arizona v. DNC, and this is a case actually about enforcing the Voting Rights Act, which is why I am enthusiastic to have fellow Voting Rights Act enthusiasts with me on the show today. So maybe we can do some background on the Voting Rights Act and an explanation of the Arizona laws in the case before we actually get into what the question is that the court is going to address.

Leah Litman:

So, the Voting Rights Act, where to start? Okay, the Supreme Court defanged the section five pre clearance regime, which was really the crown jewel of the Voting Rights Act, in the 2013 decision Shelby County v. Holder. The pre clearance regime had required certain states with particularly poor histories of racial discrimination in voting to obtain pre clearance that is federal permission before enacting any changes to their voting laws or procedures. After the court basically cut the legs out from under section five, what remained of the Voting Rights Act was section two. And section two prohibits of its own force those voting laws and policies that discriminate on the basis of race, and included in that prohibition are facially neutral laws, that is laws that don't explicitly mention race, that result in selective disadvantages on the basis of race. This is sometimes known as a disparate impact standard rather than an intentional discrimination standard, so laws that result in disadvantages even if not intentionally. And the statute was actually amended to include this standard, the disparate impact standard, after the Supreme Court's decision in City of Mobile.

Leah Litman:

So the question here is basically what kinds of laws or policies does the Voting Rights Act prohibit because they have the effect of selectively disadvantaging voters on the basis of race or color?

Jay Willis:

The two laws at issue here, the first one prohibits the counting of provisional ballots that were accidentally cast in the wrong precinct. So if you're a voter and you decide to vote on election day as opposed to early or by mail, and you show up to the wrong spot, your ballot gets thrown out. This policy has a disproportionately adverse impact on voters who live in urban areas where polling locations change frequently. Non white voters tend to vote outside their designated precincts about twice as frequently as white voters. There's a great quote from the ninth circuit below who says that finding your way to your polling place in Phoenix is like "the changing stairways of Hogwarts, constantly moving and sending everyone in the wrong place."

Jay Willis:

And then your second law prohibits the collection of ballots by most people who aren't the person actually casting the votes. It's sometimes I think pejoratively called ballot harvesting. The collection of these by community groups, political parties, campaigns, volunteer organizations. So this law also has a significant impact on different groups. So there's the finding in the lower court that outside of Arizona's two most populous counties, Native voters, less than a fifth of them have access to home mail service, and they may need to travel up to two hours just to get to the nearest mailbox. So both of these laws make it more difficult for people of color to participate in democracy, which is why the conservatives and republicans are so excited about them.

Leah Litman:

So in the course of deciding whether those two Arizona laws violate the Voting Rights Act, the bigger question that the Supreme Court is going to be answering is what kinds of laws actually violate section two, that is what do you have to prove in order to establish that a law results in disadvantages on the basis of race or color. So one argument that Arizona is advancing is that state laws have to result in a substantial disparity, rather than just a mere disparity, in order to implicate or violate section two, and Arizona says there's no substantial disparity here because the laws only affect a few thousand voters.

Josie Duffy Rice:

You can discriminate against people as long as there aren't that many people.

Jay Willis:

Yo, you can be racist but just not like too racist.

Josie Duffy Rice:

Right. Only if there are a few thousand of them.

Leah Litman:

In addition to concerns about tolerating some degree of, again, making it harder for voters of color to participate in democracy, it's also the case that some laws with relatively small effect can be quite consequential. The margin of victory in some of these states will be something like 10,000 or so votes,

so you put one of these laws on the books, you put another one of these laws on the books, and then all of the sudden you determine the outcome of the popular vote in a state, and given how the electoral college works, that could also decide the fate of a national election on top of state wide races.

Josie Duffy Rice:

Especially in a place like Arizona, right? That's an important state. I mean I'm in Georgia, and we were down to the wire in the 2020 election, and I don't think it's an exaggeration to say that the only reason Georgia went blue was because there was a concerted effort over a decade of ensuring that people of color had access to the polls, which still isn't much to write home about, their access, but it's better than maybe it was in the past. A few thousand voters is huge.

Leah Litman:

That's still an embarrassment to democracy if you're making it so burdensome or excluding a few thousand voters from voting in an election. That's not how democracy is supposed to work.

Josie Duffy Rice:

And even in the most sort of cynical cost benefit analysis, the allegations about voter fraud, in any sort of instances that it's been proven, it's never a couple thousand votes.

Leah Litman:

No.

Josie Duffy Rice:

It's maybe a couple votes. So even if you were just measuring what are we risking, the fact is that every single time we have an entire sector of the American public that is willing to risk more people being disenfranchised than a couple people, whatever, wandering into a precinct and voting twice.

Jay Willis:

I'd like to talk about the margin on which the republicans place so much emphasis here, because basically it argues that, as we said, it doesn't affect that many people so it can't be illegal, and the number in the 2016 election of ballots that got tossed as a result of being out of precinct was like three or four thousand, something like that. And they say it would be too difficult for us to count those ballots. But I don't think you can really have it both ways here. If it doesn't affect that many people, why not just count the votes? Again, if you asked anyone who's not a lawyer, what's a better fix for this problem that, as you conceded, affects a de minimis amount of people, is it better to take the time to count those? Or is it better to be like, sorry you're not in this election. That's the right thing to do.

Jay Willis:

Arizona had about two and a half million votes cast in it's 2016 presidential election. It takes days, weeks now to count votes in a presidential election. Who care? Take the time, get it right, and it's really part of this, in my view, this broader tenant of the conservative movement which is that democracy is kind of inconvenient for them. They feel like they're the ones that should be in power and elections are just sort of this hurdle that they have to clear in order to stay that way.

Josie Duffy Rice:

It really is very toddler logic. This is too hard, but I want the reward for doing. Even a slight examination it doesn't add up, and it really is only explained by, like you said, wanting to leave people out of the franchise. Which by the way, this is not a deviation from any sort of American tradition. What we're talking about with the Voting Rights Act is 50 years old. There was actually a beautiful essay in The Atlantic this week by Van Newkirk about the fact that his mother recently passed away and she was born the year that the Voting Rights Act was passed, and she was in her 50s when she died. What we're seeing is this is the American tradition, not democracy but disenfranchisement while pretending to care about democracy and we seem to be inching closer and closer back to what that looked like at it's worst moments.

Josie Duffy Rice:

I think it's worth mentioning that the Arizona GOP has the single craziest social media accounts on earth. Like full QAnon-

Leah Litman:

That's saying something. That is really saying something.

Josie Duffy Rice:

No, it's really bad. It's a lot of conspiracies, a lot of QAnon, it's just not surprising and makes it even more concerning that these are the people who have some sort of political power in the state, significant political power in the state, and there's no question what they're going to do when given the opportunity to disenfranchise voters.

Leah Litman:

Yeah. These are the people that censured Cindy McCain, Jeff Flake, and so on for deigning to suggest that maybe we should elect the person who didn't incite an insurrectionist mob to storm the capital.

Josie Duffy Rice:

Right. Oh my gosh, I forgot they were like, you can't be part of our club anymore. And they're like we don't care. It's cool, whatever, man.

Leah Litman:

Another argument that they are advancing as to what the Voting Rights Act could mean is what some people have started calling the equal opportunity theory. Under this theory, a state law or policy doesn't violate section two so long as the state affords all voters the theoretical equal opportunity to vote. That is a state can end voting practices that are used by a greater number of voters of color so long as it provides an alternative voting procedure that is again theoretically available to anyone. So let's say, for example, more voters of color use early voting or mail voting. Under this theory, a state could end all early voting, all mail voting, and the Voting Rights Act would have nothing to say about that because those voters could, again, still vote in person, and this is the equal opportunity theory that the state republican party is advancing.

Josie Duffy Rice:

So how far would that go? Could that go to only having two polling places in the state and if you have to drive three hours you can still vote? I'm not a big slippery slope argument fan, but that one feels real messy.

Leah Litman:

Yeah, this one, again, taken to its conclusion is a state can eliminate all alternative forms of voting besides in person voting and that's just nonsensical given what we know about different groups using different kinds of voting. Eliminating voting procedures or policies that are disproportionately used by certain groups is again just kind of an embarrassment to democracy. Why would you make voting harder, particularly for particular groups like that seems exactly like the kind of thing the Voting Rights Act was designed to remedy.

Leah Litman:

Not to be outdone, we have the real enforcing the Voting Rights Act enthusiast, a group of republican senators led by Ted Cruz and 10 other republican senators including senate minority leader Mitch McConnell.

Josie Duffy Rice:

I love the way that sounds.

Leah Litman:

They are arguing that section two, if it actually prohibits state laws that result in disparate impacts on voters of color or any meaningful disparate impact standard would be unconstitutional. This argument sounds outlandish, but this is an argument that came close to succeeding at the Supreme Court almost a decade ago in the context of a different disparate impact statute. So in Ricci v. Destefano the court was asked to essentially decide whether a federal statute prohibiting employment policies with a disparate impact violated the equal protection clause of the constitution because it required employers to take race into account when deciding what employment laws or policies to pursue. And a majority of the Supreme Court kind of ducked the question in an opinion by Justice Kennedy.

Leah Litman:

Justice Scalia wrote separately to say someday we're going to be forced to confront whether statutes that prohibit disparate impact liability are actually constitutional, and the issue again kind of went away when Justice Kennedy wrote this Fair Housing Act opinion saying the Fair Housing Act prohibits policies with a disparate impact, but now with a different majority, the idea that disparate impact liability is unconstitutional is kind of back on the table as far as an argument that might attract some Supreme Court Justices, and so this brief sounds kind of out there but as we were talking about when we were suggesting in some corners of the internet slash article three, evictions aren't economic activity, stranger things have happened.

Jay Willis:

Look, if anyone can make that argument with a straight face, Ted Cruz Cancun. I'm so sorry.

Josie Duffy Rice:

I saw your face really excited to say something and I was like hm I wonder what point Jay's going to make, and it was the worst joke ever.

Leah Litman:

But will he take Snowflake with him if he argues the case? We'll have to wait to find out.

Josie Duffy Rice:

Poor Snowflake.

Leah Litman:

I know. I know. Okay. So another question in the case is about whether these Arizona laws intentionally discriminate on the basis of race or color, so some ads in support of the bill included one that was put together by a Maricopa County GOP official who managed to generate this ominous looking surveillance footage of a man who appeared to be Hispanic, and the ad called him a thug, and this man was stuffing a ballot box with illegal votes. And of course the rationale for this law was that it's necessary to prevent voter fraud despite there being no evidence that voter fraud exists in ballot collection and that has never really taken place in the state. So that's another legal claim in the case aside from whether the statute results in a disadvantage on the basis of race.

Jay Willis:

And I think this has a really important intersection with some of the voter suppression laws that we're seeing unveiled by republican state legislators right now, which is the argument that Arizona is making is that even if the lawmakers who voted to pass this bill barring ballot harvesting, even if they were wrong that it was necessary to prevent voter fraud, as long as they believed it in good faith it can't violate the Voting Rights Act, and that is precisely the rationale that republicans are trotting out in the aftermath of the 2021 election for these new voter suppression bills. And it's just a really easy sort of pattern cycle to follow, right? Trump says the election is stolen, people who voted for him worry about voter fraud, and then republicans say, "Well my constituents are so concerned about this, we have to address this."

Jay Willis:

So in Georgia the quote is, "We need to restore confidence in the ballot box." I'm quoting from republican lawmakers here. In Pennsylvania they say, "Thousands of constituents have shared with us their concerns regarding the 2020 general election." So on. And it's this sort of rhetorical slight of hand that cloaks the same old voter suppression agenda in the trappings of this anodyne sounding election integrity movement, and my concern is that the court is basically being asked here to bless the precise rationale that's being offered in favor of this legislation.

Josie Duffy Rice:

This has been going on, I mean especially in this form, for years, where there has literally been a major controversy or major wrongdoing invented in thin air. Voter fraud, the fact that it takes up as much space that it does in the political sphere is completely illogical given that it's not even a thing, now this is turbo charged but we've long seen republican politicians intimate about voter fraud and then say they need to pass stricter laws because this is something that people care about. They only care about it because you brought it up. This is your fault. I think it's also just another reminder of who they care about when they say election integrity and trust. Because actually passing these laws just reinforces a

long history of people of color, especially black people, not trusting that the democratic system is supposed work in their favor because it's not. There are very few black communities where you go to where people really feel like their vote matters as being counted and it's easy to cast, but that's not actually concerning to these politicians, what's concerning is their people are worried about it.

Leah Litman:

Yeah. It's sad because in some ways it's a larger cycle and phenomemon about exactly what we saw with the 2020 election and specifically on January 6th when Congress met to certify it, which is the various senators and representatives who objected to the election said there are concerns about the election. Well there are concerns because they said there were concerns, so they generated the basis for the objections and then they objected on the basis of their own generated concerns, and that circularity, just again reinforce what culminated in the attack on the Capital and all of the problems that resulted and this is what is happening on the state level, and has been happening on the state level with respect to voter fraud as well.

Josie Duffy Rice:

I've got to say, it's kind of a great tactic. I'm going to use this in my household. I'm like we should watch Legally Blonde again. And then I'm like everybody is saying we should watch Legally Blonde again, so I just feel like I've heard a lot about Legally Blonde lately so I feel like we really need to watch it again. Just generating your own controversy and then responding to it.

Leah Litman:

You're joking about this, but more seriously, going back to something we were talking about earlier in the episode, qualified immunity, that's kind of what we're suggesting may have happened with the Supreme Court's attention to actually policing the access of qualified immunity, which is many people started say many people are concerned with qualified immunity and what this means about the accountability or lack thereof of police officers, and then all of the sudden that concern started to resonate with the people it needed to resonate with and something happened. So this power shouldn't be abused of course and made to have our democracy be made worse, but this is something that does seem to work on some level. That's why tweeting works, children.

Josie Duffy Rice:

Exactly.

Jay Willis:

I'm also thinking about earlier when we were discussion in the evictions, the distinction between criminal possession of real property versus what are we talking about here, losing your house. And this is a really prominent feature of issues like voting rights within the conservative legal movement is obfuscating the intent by really dealing in abstractions. So when Chief Justice Roberts was a lawyer in the Regan administration, he couched his opposition to the section two effects test by arguing that the violations "provide a basis for the most intrusive interference imaginable by federal courts into state and local processes." And even today you'll hear this argument that what's really at issue here is federalism, the proper delineation of responsibilities between state and federal governments, but all due respect to you, Leah, no one outside the very upper echelons of academia and the legal profession care about federalism, right? What they care about is is my vote getting counted, or are my elected officials reaching over backwards to throw my votes out, it values-

Leah Litman:

Have you talked to diners in Pennsylvania, Jay? I'm pretty sure what they care about ...

Josie Duffy Rice:

They're like democracy is important but it's just actually much more important to me that the federal government stay out of this one.

Jay Willis:

Local control, local control.

Josie Duffy Rice:

Right, right, right.

Leah Litman:

Exactly. Spears of sovereignty, take that to the ballot box.

Jay Willis:

It just values process over substance, and because the substance which is again, disenfranchising people and particularly people of color, is not popular. So you have to make it about something that sounds good, or at the very least, too boring to care about, because your actual position does not have popular support.

Josie Duffy Rice:

Right.

Leah Litman:

So anything else on Brnovich?

Jay Willis:

My opinion is that it's bad. Not a fan.

Josie Duffy Rice:

Jay for the Supreme Court.

Leah Litman:

Okay. So as I noted in the introduction, we also wanted to talk about a cluster of cases that the Supreme Court is hearing this term that touch on the fourth amendment and about policing rights in the home, or protections in the home from policing. One of these cases the court heard this past week, *Lange v. California*, and that case is about whether a police officer can follow someone into their home without a warrant simply because that person committed a misdemeanor, they're a noise infraction and the police were in pursuit of them.

Josie Duffy Rice:

Obviously fourth amendment doctrine just generally is kind of a mess and very screwy, this reemphasizes, to Jay's point about federalism, it reemphasizes when the justices are focused on principal and when they're not. Overall, these might be important questions, the felony versus misdemeanor, the violent versus non violent, hot pursuit, it's not that the variables are completely irrelevant, but just that the fact that whether or not someone has fourth amendment protection so closely turns on these very thin lines, and that actually aren't clearly defined anyway, is I think symbolic to me of, again, when the court is willing to rely on principle and values and when they're not. You don't hear Roberts talking about federalism now, government intervention now, when it's the cops coming into, you know, in the same way he's talking about federalism in the voting rights case, and I just think it highlights once again, and we see this all the time in criminal justice policy, you have these rights except when they're inconvenient for us, or except when we think that those rights are worth trampling in this exact moment because of what we see at a glimpse.

Jay Willis:

So the other fourth amendment case that the court will hear in the March sitting is *Caniglia v. Strom*, and it's about whether what's known as the community caretaking exception to the fourth amendments warrant requirement extends to the home. So this community caretaking doctrine, the court created it in 1973 to give cops basically leeway conducting warrant less searches, while performing what the court called community caretaking duties. So things that cops do that aren't related to investigating or solving crimes. So the archetypal example here is a car that gets in an accident. It needs to be towed, and maybe the police officer happens upon it and he gets out and as this car is getting ready to be impounded, he just does a check to see what's in there. This is relevant of course because in the 1973 case, *Cady v. Dombrowski*, such a search of a car turned up evidence of let's say very much criminal in nature homicide.

Jay Willis:

So since that decision, courts have expanded that doctrine let's say well beyond the context of broken down cars, and they do so because as we all know, police in this country are charged not only with ostensibly stopping crime, but also with doing a whole bunch of other stuff. So judges have extended the community caretaking doctrine to officers conducting checks on noise complaints, performing wellness checks, breaking up parties, helping overdose victims, even assisting people in the midst of mental health crises or substance abuse crises.

Leah Litman:

So the specific facts of this case are I think just interesting to know. A husband and a wife of 27 years, the husband is in his 60s, had an argument in which the husband gets out his gun and says, "Well why don't you just shoot me and get me out of my misery." The wife spends the night in a motel, calls her husband the next day, the husband doesn't answer, so she calls the police to do a wellness check and that is a community caretaking function that doesn't involve the investigation of a crime.

Leah Litman:

So the officers go to the house, get the husband to go to the hospital, and call the fire department, enter the home to do an inspection and seize the husband's guns. So this notion that the police perform all these different functions is I think interesting and important but I think the reality is as this case kind of illustrates and even the [inaudible 00:45:58] case you referenced illustrates, there is no perfect dichotomy between these community caretaking functions and the investigation of crime. Many times

investigating a crime could also plausibly involve a community caretaking function, protecting someone from harm or doing a wellness check or whatever the case is you want to make, investigating some kind of nuisance in a neighborhood. All of these things could ostensibly be community caretaking functions that also overlap with criminal activity.

Leah Litman:

If you're going to extend the exception this car you are really going to be, again, blessing the collection of evidence without warrant, without probable cause, which is kind of one of the basic protections that the fourth amendment has, we'll see what happens in this case, another interesting aspect to this particular case is just because it involves the collection of guns and this background idea of is the notion that the husband had a gun driving the wellness check and the police officer's entry into the home, it has a second amendment angle that could influence the justices perception of the propriety of the police's activities, and if they don't think what's legitimate or fair for the police to be additionally skeptical because he is a gun owner, perhaps that could convince them to limit the community caretaking exception, at least in this case, and potentially adopt a general rule to do so.

Josie Duffy Rice:

I think what this also highlights, two things it highlights, one is that when we talk about shifting the role of police and having police at the very least focus on what we all imagine to be police work, right? Investigating crimes, addressing quote unquote criminal activity, there's often a lot of pushback to that idea and it's important to remember that one, that police are incentivized to do work far outside of the scope of what we would find reasonable for many reasons, but one of them is stuff like this, doing the work that ostensibly is supposed to help a community also gives you the ability to bypass some other regulations that you would otherwise have to follow. I think it also is a reminder that in to shift policing we also have to remember that the current structure of policing is also bad for police, right? It's not actually good that we are requiring this body of professionals to work so far out of their realm of expertise, often just because we know that what they're doing could lead to information about criminal activity, to your point, Leah.

Josie Duffy Rice:

I think that that as a standard is so expansive and used so much by police, you hear it all the time with the death penalty, well we need the death penalty because we need it to incentivize people to give us information, or we need to violate people's rights or violate our own professional standards because that helps us solve crimes, and that is actually not the standard we want our police force to be following. This is not actually how we want our police themselves think about policing.

Leah Litman:

Yeah, and I also worry that the community caretaking exception could create an incentive for police to act outside the scope of their expertise, right? Like if police start claiming we're doing more, a wellness check, or performing, I don't know, mental healthcare services rather than investigating a crime, then that would lead them to be able to justify-

Josie Duffy Rice:

Yeah, exactly.

Leah Litman:

-the collection of evidence if they're performing this community caretaking exception, but performing those functions also puts the police in these situations that they are not equipped to handle, they have not been trained to actually perform and provide social services to people with mental disabilities. A lot of the excessive force cases in the courts of appeals that involve very grotesque facts, involve people with mental illnesses who the police are called to respond to and they respond with force, sometimes lethal force. So this community caretaking exception just involves this really potentially I think toxic combination between extremely expansive criminal laws for which you might always be able to find some evidence, as well as an ever expanding scope of police functions for which the police might not be adequately trained. If the Supreme Court again blesses this use of the community caretaking exception, they are potentially creating incentives to expand it even further.

Josie Duffy Rice:

To be clear, that is what most of policing, maybe not most, but a significant chunk of policing looks like today. I think the biggest chunk of policing is traffic enforcement, but after that it is functionally this community caretaking stuff. It is non violent emergencies, it is mental health crises, addiction. Police spend about 4% of their time dealing with violent crime, and there is this sort of irony in this idea of we need to continue to do this community caretaking because it allows us to investigate violent crime, instead of actually just dealing with crime. Pretty much any city you go to the homicide solve rate is hovering around 50% and yet we're arguing about whether or not police should be handling people in a mental health crisis. It's just so clearly that this is not the role for them, and like you said, they also just tend to exacerbate situations like this when in a spousal argument where someone is suicidal, I don't think it reduces anxiety to see the cops show up, right? Usually seeing the cops does not calm you down, and what we find is that they are in these situations not only ill equipped to handle them, but even if they were trained, they're the wrong person for the job.

Jay Willis:

I'm just thinking right now about being one of Alito's clerks and being like gun rights, enabling cops, oh no, what to do?

Leah Litman:

The struggle is real.

Jay Willis:

Yeah. Speaking of struggling, I think one of the reasons courts have such a hard time grappling with the outer limits of this doctrine is because they're sort of asking the wrong question which is why do we have cops do all this stuff in the first place? And in cities across the country right now they're trying pilot programs, there's a great one in Denver, I believe, where they're dispatching non armed emergency first responders to deal with things like mental health crises, substance use issues, that person who goes to check on somebody, they don't need to have a gun, and they certainly don't need to be a police officer, they need to be an expert in those types of crises. Now a Supreme Court opinion that limits community caretaking doctrine, it's not like it's going to solve the issue of police funding or divestment overnight, but the more rationales they have at their disposal to ignore the fourth amendments limitations, the more often they'll do so.

Jay Willis:

When we talk about the debate over police funding, police divestment, like many bureaucracies, police departments sort of behave like gas, they expand to fill the roles that have been given to them. So you have decades of chronic underinvestment in mental healthcare and substance abuse treatment, for example, have left police as sort of the default crisis first responder, which in turn lead to an ever increasing police budgets that make it difficult for cities and states to step back and address those chronic underinvestment that drain police resources as Josie said earlier in the first place.

Josie Duffy Rice:

The policing crisis we have right now is indicative of a combination of uniquely American social problems. The fact that we often divest from social services on the front end and we expect the back end systems to fix that, the fact that we rely on the criminal justice system to address as an individual fault for addressing systemic problems, but also it's yet another example of the austerity crisis that has gripped states and localities for decades, and especially I think since the '08 recession where you see a deep unwillingness to fund social services that aren't cops. So in many communities, cops are not only the only thing that can get money, but also the ways that localities are making money through fees and fines with the cops.

Josie Duffy Rice:

There is a deeper rot here that the Supreme Court actually can't address of why we rely on cops the way we do, it is so deep in kind of our ethos and overlaps with so many elements of how we think about social problems in America that it's not a policy solution, it's not a court ruling that's going to fix that, but having the court at least question the false premises of the construction of this profession I think would be ideal, would be valuable. It really is just outrageous that the idea of the fourth amendment is to say you have some privacy from the government, but we're going to ask the government to do more things, and therefore they get to take more of your privacy. It's like I thought the whole point was you guys were supposed to stay out of it. Also I just love the idea of community caretaking as a term. It's just so beautifully ironic.

Leah Litman:

It's so benign and-

Josie Duffy Rice:

So sweet, right?

Leah Litman:

It calls to mind they're like gardening or planting flowers.

Josie Duffy Rice:

Totally. It reminds me of one of my toddlers books. Just so absurd.

Jay Willis:

There's an implication of benevolence behind it almost.

Josie Duffy Rice:

That is it, absolutely.

Jay Willis:

Police aren't taking care of their community. You can't look at policing in this country right now and say they're the ones who are keeping things in order.

Josie Duffy Rice:

Nor should they, right? They don't need to be our community caretakers. They're not doing it and it shouldn't be their job and the fact that they're failing at it and we're still giving them more responsibility is just such a farce. I was going to give the example of last year when a hawk, a huge hawk flew through my bedroom window in the middle of the day and when I called animal control-

Jay Willis:

I am so excited to see how this metaphor works.

Josie Duffy Rice:

Oh it works. When I called animal control they were like, "We don't do birds, call the cops." And when I called a private specialist asking him to come remove this huge bird, "We don't, I guess call the cops?" Called the fire department, "Maybe call the cops?" And it's like the cops don't know what to do with a hawk.

Leah Litman:

Right. There's a wild bird in my house.

Josie Duffy Rice:

There's a wild bird in my house and animal control is like, "Oh we don't do that, but maybe the cops?" It's like literally, that doesn't feel right for anybody. It doesn't feel right for me, it doesn't feel right for animal control, and I'll tell you it probably doesn't feel right for the cop who has to show up to my house and maybe try to remove the bird. And I think it really just underscores how it's the fallback for everything, and that's what we call community caretaking.

Leah Litman:

It's just horribly ironic because we really do treat the police, as you were saying, the fallback, the social safety net as well. We don't have meaningful welfare programs, we send people with mental health issues, people who are poor, these are the people that end up in jails and prisons and it's because we have just become accustomed to using the police as kind of the fallback system.

Josie Duffy Rice:

Absolutely.

Jay Willis:

The good news is it's a really heartwarming story how, Josie, you've accepted the hawk as a member of your family now for over a year.

Josie Duffy Rice:

It's true, he still lives here. No, he flew out eventually, and it took another day for the squirrel who came in after the hawk to get out. It was a huge situation, I cried multiple times.

Jay Willis:

Is there any chance we were talking about a chase situation? Like the hawk chased the squirrel in and the squirrel was taking refuge-

Josie Duffy Rice:

That's exactly what happened. The squirrel was on the windowsill, the hawk dove down to get the squirrel, came into the room, the squirrel stayed, we had to go buy a pool net and drag the squirrel out, my dad got involved, it was just really a rough experience. And I'm still milking it for all I can out of everybody in my house, how I was traumatized during the hawk.

Leah Litman:

I'm pretty sure that catching squirrels and hawks in your home is somehow necessary to enforce the Voting Rights Act.

Josie Duffy Rice:

Either you should have social services to get the hawk out of my house, or you should let me vote. You can't not let me have either, that feels unfair.

Leah Litman:

These are the choices.

Josie Duffy Rice:

Right. Exactly.

Leah Litman:

Thanks everyone for listening. Thank you to Josie and to Jay for guest hosting with me.

Josie Duffy Rice:

Thank you so much for having us.

Jay Willis:

Thanks so much, Leah.

Leah Litman:

Thanks as always to Poppa Appeal slash Momma Appeal, not quite sure what the right terminology is. Thanks to our producer, Melody Rowell, thanks to Eddie Cooper who does our music, and if you want to see or hear people yell at me, Leah, about my hair, smile, and or voice, please follow us on TikTok at Strict Scrutiny Podcast.

Josie Duffy Rice:

I'm very excited about following you guys on TikTok.

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