Jay Floyd:

Mr. Chief Justice, and may it please the Court. It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.

Ruth Bader Ginsburg:

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

Kate Shaw:

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

Melissa Murray:

I'm Melissa Murray.

Leah Litman:

And I'm Leah Litman.

Kate Shaw:

And we have a jam packed show for you today. So, we will start with some breaking news on cert grants from the court. We will then turn to the last oral argument of the term, perhaps the last telephonic argument of the pandemic. We will then break down the four most recent opinions issued by the court and we will finish up with some court culture.

Melissa Murray:

So, first up, cert grants heard round the world. Obviously, the cert grant that we're going to highlight first is what we think is a major development in the court's abortion jurisprudence, and that's the court's decision to grant cert in Dobbs v. Jackson Women's Health Organization. And this is a legal challenge to Mississippi's ban on abortion at 15 weeks of pregnancy. And first of all, I'm just going to say, there's been a lot of discussion and questions about whether commentators are being hyperbolic and saying that this portends the end of Roe. I don't think that's hyperbolic. I think it is an open question whether the court will go whole hog and overrule Roe, but I think regardless, this is the beginning of the end of what we know as the Roe era.

Melissa Murray:

And so, let's highlight a couple of interesting things about this grant. We have talked about this case before. We've noticed that it had been listed for conference many times over the course of this year, I think, almost 17 times previously before this cert grant, which suggests that maybe there was some infighting here at the court. I also think the fact that it was pending for so long on the search list may suggest or give some more insight into some of those really sharp elbowed dissents from Justices Sotomayor and Kagan about stare decisis over the last couple of weeks. They have both called their colleagues on the carpet for playing fast and loose with precedent. And perhaps this is why.

Melissa Murray:

It's also worth noting here that there was no circuit split on this issue. Every lower court that has reviewed one of these challenges to the so called heartbeat laws has invalidated the law on the ground that they obviously contradict Roe and Casey. So I will also note, however, though that even as those lower courts refuse to uphold those laws citing Roe and Casey, they also noted that they were constrained by Roe and Casey. And so, in some cases, there were concurrences from particular judges inviting the court to take up this issue again, and perhaps change precedent and make new precedent that would allow them to uphold these laws.

Melissa Murray:

And so, the court took up that invitation. Leah, I know you wanted to say a little bit about how the court has framed this question that it's going to review because there were two options for how this question could be framed. One more narrow, one quite sweeping, and the court not surprisingly, took the more sweeping alternative.

Leah Litman:

Yeah. So, I think this speaks to your question about whether people are being hyperbolic or overreacting to the cert grant, which we often hear time and time again when it is women and female Supreme Court commentators suggesting that we have reason to worry about the court and people are like, "Oh, we don't have to take seriously you hysterical lady brains talking about the red robes." But part of

Melissa Murray:

Take a Midol ladies and chill.

Leah Litman:

Part of why we are concerned is because of the question that the court chose to grant cert on. Mississippi had presented the court with several questions and the question they granted cert on is whether all pre-viability prohibitions on elective abortions are unconstitutional, instead of taking up the question about whether laws like this should be analyzed under "The undue burden standard from Casey," or the whole woman's health balancing test. And the reason why it's significant that they took up the viability question is because of how significant viability is to the law governing abortion restrictions right now. So, Planned Parenthood v. Casey when it reaffirmed the right in Roe said the core of the abortion right is that states cannot prohibit abortions before viability. That is literally what Casey said.

Leah Litman:

The Mississippi statute conceivably does this. And that means the options on the table to uphold the Mississippi law are either overrule Roe and Casey or basically undo the viability line and say that even before viability states can prohibit women from having abortions under some circumstances, and if they do that, then that will all of a sudden make real these questions about all of the pre-viability bands like Texas has recently enacted ban on abortions after six weeks of pregnancy, or other states that enacted bans after 10, 12, you name it, weeks of pregnancy. And that's why this is so significant. So, I guess I would ask are any of you surprised that the court took this case, or took an abortion case less than a year into justice Barrett's tenure on the court?

Kate Shaw:

I was a little surprised they move now to take the Mississippi case. I expected them to begin with one of these maybe so called reason bands that Melissa you've obviously written a great deal about. Maybe another one of these either two trip or waiting period requirements, these kinds of more conventional restrictions on access to abortion, but not an outright ban that is facially impossible to uphold while continuing to express this continuing vitality in some sense of Casey. So, I guess that more gradualist approach is the one I would have predicted. This decision to grant suggests to me that the maximalists on the court have won out at least at this cert grant stage, which as we all know, requires four rather than five votes. So, to my mind, one really big and important question is how many votes to grant cert that were on this case? And I don't know if it was four or five or six? Melissa, what do you think?

Melissa Murray:

So I was slightly surprised, not necessarily because I did not imagine that there would be four to take this up now regardless of the consequences, but the fact that the timing is really terrible. This case will be heard and likely decided around June of 2022 as we go into a midterm election. Sorry y'all, some people are doing some hammering at my house. I don't know if you can hear that, but I actually thought that the political ramifications of this might have persuaded at least some on the court that maybe just wait. It's not like you're not going to have this 63 conservative majority going forward. It's going to be hard for any democratic president to undo this for a long time. So why not slow your role?

Melissa Murray:

I'm surprised that they decided to take this up. And I think this goes to your point, Kate, the Chief Justice surely understands the timing. And I wonder if what we're going to see here is him joining the four who are certain votes, I think, maybe bringing Kavanaugh along with him, but keeping the opinion for himself to write something that is more narrow that maybe doesn't overrule Roe explicitly, but creates a lot of confusion around viability and what the standard is going forward. And then after the midterms you've got this pending case, which I'm sure is going to be appealed and Preterm-Cleveland v. Himes, one of those trade selection laws, and then you have the opportunity to just finish the job. And there's no political ramification for it.

Kate Shaw:

Yeah, in terms of how thinking ahead to how the opinion might come out. Yes. I mean, I definitely, after giving it some thought initially thinking, "Well, look, I don't..." And I still don't totally know where Roberts and Kavanaugh are going to come down. I agree with you that four votes are not in any question. But I actually do think that the most likely scenario is that Roberts joins the conservatives, keeps the opinion for himself, tries to write something moderate and measured, but then loses his majority because the four of them are unwilling to go along.

Kate Shaw:

And so, he writes something joined by Kavanaugh, in which he basically says, "Look, Casey failed to sufficiently value the state's interest here. And maybe the lower court should take another look without this incorrect viability line, but without really clarifying much." And then four of them say, "No, we should just overrule it all." And then the lower courts and state legislators have basically no guidance about what the principled dividing line between the unconstitutional and the constitutional restrictions are. And then it's just chaos, but it's quiet in the political sense. I think that then maybe then just after the midterms, you're right, then they come back with the one two punch. But it strikes me that's a very confusing splintered result without a majority is the most likely outcome I think as I sit here.

Leah Litman:

Yeah, I think that that's right. And I think that whether that "narrow opinion" says we undo the viability line and remand. I think it will fall on people to explain why that is significant, and particularly why changing the law given the current composition of the Federal Court of Appeals is quite significant. And what we know is going to happen when the court does that.

Kate Shaw:

Yeah. We've had one more case that... So, we mentioned, I think, Leah, you mentioned the six week ban that was just signed into law in Texas. But it's not only a six week ban, it is one of the craziest pieces of legislation that I have ever seen in any realm abortion or otherwise. But so it prohibits abortions after six weeks. But rather than actually creating a state and mechanism to implement this prohibition, it creates a private right of action giving any person anywhere the power to sue abortion providers or anyone who helps a woman obtain an abortion so that the plaintiffs need not have any connection whatsoever to the woman, to the abortion provider, to anyone else. It feels so shockingly unconstitutional in a million different directions.

Melissa Murray:

Do you know what it reminds me of? There is this whole body of case law pre-Roe often brought by doctors and individuals and physicians offices challenging prohibitions to abortion in this pre-Roe period because they didn't understand what they were liable for. And they brought a lot of these challenges as constitutional vagueness challenges under criminal law. And it feels a lot like that. When people say we're going back to a pre-Roe day, this law totally looks like one of those pre-Roe laws and a pre-Roe challenge.

Leah Litman:

Yeah, and this particular part of the law. Kate, that you flagged is, I think, one of the more notable aspects of extremely notable law because obviously one effect of it is to isolate women and basically take away their support network when they might seek an abortion or require some assistance in getting one. But second, I think this mechanism is actually an attempt to evade pre-enforcement challenges because if you take away the state enforcement and you give it to private actors then it's not clear who you name as a defendant in a pre-enforcement challenge in order to get the law declared unconstitutional and unable to be enforced given some complications regarding the court's sovereign immunity jurisprudence that aren't worth getting into. But that portion of law is just-

Kate Shaw:

Yeah, there were definitely Texas legislators who explicitly said that like, "Oh, this is going to be very difficult to challenge." So, this was part of the strategy clearly.

Leah Litman:

Yeah. So bottom line not great. I would go so far as to say that, and I cannot wait to hear the commentary of a bunch of White men who treat the Supreme Court as a debating society of abstract ideas with no real consequences for people's lives. So, tune in.

Kate Shaw:

And if we're right about how the decision shakes out, I am sure there'll be a chorus of like, "See, they didn't overturn Roe. It's not so bad."

Leah Litman:

How moderate?

Kate Shaw:

Right.

Melissa Murray:

Again, like shades of June Medical Services when we were all like, "This isn't great." And all of these men were telling us that, "No, ladies. You're missing the point. It's fine."

Leah Litman:

Take a Midol.

Melissa Murray:

Go lie down with a hot pad. It's a heating pad, sorry. A hot pad is a totally different thing. It's like when I told my class, my husband and I like to Netflix and chill, and everyone was like, "That does not mean what you think it means." Sorry, guys.

Leah Litman:

It's like when I said in our interview with Michelle and Robe, "Welcome to the Red Room." Yeah.

Melissa Murray:

They're like, "That's not what you mean."

Leah Litman:

That's something else, Leah.

Melissa Murray:

But like you said, Leah, your house is outfitted for anything so...

Kate Shaw:

The Red Room is like the sub basement underneath the wine cellars.

Melissa Murray:

Also has a bar.

Kate Shaw:

Oh, definitely.

Leah Litman:

Yeah, no, that's the one thing they didn't put in.

Melissa Murray:

Okay.

Leah Litman:

So, speaking of not great cert grants, the court also decided to take Shinn v. Ramirez. This case is about whether the anti-terrorism and effective death penalty acts evidentiary limits i.e. limits on federal courts' ability to collect new evidence apply to the development of facts that are relevant to the so called equitable exception from Martinez v. Ryan. So Martinez concerns a rule that's called procedural default and federal habeas, you generally can't raise a claim if you didn't raise the claim in state proceedings, but you can raise the claim if your failure to raise the claim in state proceedings was due to ineffective assistance of counsel. Because the Sixth Amendment doesn't actually guarantee you counsel in state post conviction proceedings, which are often where litigants have to raise ineffective assistance of trial counsel claims because where else could you bring them?

Leah Litman:

So, Martinez said that where a litigant has to raise an ineffective assistance claim in state post-conviction proceedings, the state post-conviction lawyer performance can constitute cause allowing the federal court to hear the claim thus excusing your failure to raise the ineffective assistance of trial counsel claim in state proceedings. So this case asked whether a federal court can hear any evidence besides what was introduced in the state proceeding to decide whether your case falls within the Martinez exception. Obviously, if you can't, it will be super hard to establish that you fall within the Martinez exception. Given that ineffective assistance of trial counsel clients often depend on evidence outside the record as do ineffective assistance of state post-conviction counsel claims. So this case has the potential to effectively overrule and render a nullity the Supreme Court's decision in Martinez.

Kate Shaw:

And the last grant we wanted to flag was Badgerow v. Walters. This case asks whether federal courts have subject matter jurisdiction to confirm or vacate an arbitration award under sections nine and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involves a federal question. There's a clear circuit split on this issue, and I think this was expected to be granted.

Leah Litman:

So now to recap the final oral argument of the term and hopefully the last telephonic argument we will have for a while. The final oral argument was in Terry v. United States. This is the case about eligibility for re-sentencing under the First Step Act. To recap, Congress established drastic disparities in the quantities of cocaine powder versus crack cocaine that trigger mandatory minimums of five or 10 years. Congress in the Fair Sentencing Act of 2010 lowered the quantity of drugs that triggered the mandatory minimums. And the question in this case is whether people sentence under one provision, Section C, which governs unspecified amounts of cocaine could be re-sentenced under the First step Act.

Leah Litman:

Everyone agrees that people sentence under Sections A, which establish a mandatory minimum of 10 years and Section B, which established a mandatory minimum of five years could be re-sentenced. The

First Step Act allowed people with covered offenses to be re-sentenced, and it defined covered offenses as a violation of a federal criminal statute, the statutory penalties for which were modified by section two or three of the Fair Sentencing Act. The government had switched positions in this case to agree with the defendant that people sentenced under Section C could be re-sentenced under The First Step Act. Adam Mortara was appointed amicus to defend the decision below. And it was a bloodbath for the defendant and the government. There's, I guess, no question, from my perspective that the court appointed amicus' position is going to prevail. The only question is whether it's going to be unanimous.

Leah Litman:

At argument, the justices sees not a few textual points that seems to support the amicus. As several justices noted, the ordinary usage of statutory penalties mean sentencing ranges that a defendant is subject to, but obviously, that can't be the end of this case because the sentencing ranges in Sections B and A didn't change. Those sections still impose mandatory minimums of five or 10 years. It just changed who was subject to those mandatory minimums by altering the minimum quantity of drugs that triggers them. Court appointed amicus explanation was statutory penalties for violation of a statute include the elements of the offense, the things the government must show to convict you. That hasn't changed for Section C offenders, but it has changed for Section A and B offenders. Again, because the mandatory minimum changes depending on the quantity of drugs that an individual has.

Leah Litman:

The statutory ranges have also changed for some offenders. If you possessed a quantity of cocaine that was subject to a mandatory minimum of 10 years, but it's now subject to a mandatory minimum of five, you're sentencing range has changed. But again, for people who were sentenced under Section C, their sentencing ranges haven't changed. Okay, so at argument, I wondered if some of the justices might just have forgotten there was an argument on this day.

Melissa Murray:

Are we thinking about the same episode, I think? Are you talking about the Len Bias thing?

Leah Litman:

That's one of the things I am thinking of-

Melissa Murray:

Okay, that's just one.

Leah Litman:

No, yeah. So let's play the Len bias clip that both Melissa and I are thinking of.

Justice Kavanaugh:

Two is the history of the disparity, the crack powder disparity. This all stems to June 19 1986 when Len Bias died, and that was a shocking event, particularly in this area, particularly for those of us who... I was a year younger than he was, looked up to him like everyone in this area did. And that was a shocking event in this area and ultimately in the country at large and prompted Congress along with other things, but that was really the proximate cause of Congress moving to establish the 100 to one ratio, even though that was a powder situation in the Len Bias situation 100 to one disparities ushered into the law.

Melissa Murray:

What to say? I mean, to me this was a whole frolic and it was wild, I think. So, it's true that Len Bias' death was shocking when it happened. At the time it was in the '80s, late '80s. And it did call more attention. It wasn't the first thing that called attention to it. Certainly, I mean, we'd all seen Miami Vice, but it called attention to the deleterious impact of cocaine. But I don't know that I would characterize it as the fulcrum around which the push to penalize cocaine or to penalize crack cocaine more heavily than powder cocaine really turned. And it's also worth noting, which Justice Kavanaugh eventually did note in this offhanded way, Len Bias' overdose was from powder cocaine not from crack. So, it was this weird non sequitur, but that was semi related, but not really. And I just didn't know where we were going other than it was a lens into Justice Kavanaugh's high school days on a basketball team. There's just a lot of basketball.

Leah Litman:

Yeah, so it was partially that, the lot of basketball that stuck out to me, Melissa, because it was also an oral argument from another case during the sitting, Mahanoy, that we talked about when Justice Kavanaugh also brought up basketball and specifically a player who will... Why don't I just play this clip, and then I'll comment on it? So, here we go.

Justice Kavanaugh:

And just by way of comparison about and to show how much it means to people, arguably the greatest basketball player of all times inducted into the Hall of Fame in 2009, and gives a speech. And what does he talk about? He talks about getting caught as a sophomore from the varsity team. He wasn't joking. He was critical. 30 years later, it still bothered him.

Leah Litman:

We noted, Kate, on the recap episode that Lisa Blatt in her response did bring up Michael Jordan, but Justice Kavanaugh was obviously referring to him, didn't name him by name. And I guess the Len Bias example is one thing because that was actually from the briefs. Some of the briefs did talk about the Len Bias incident. It was something else for me for Justice Kavanaugh to make an allusion to the greatest basketball player who ever lived and some events that obviously that's not discussed in the main party briefs in Mahanoy.

Leah Litman:

And so, if you're an advocate, and a justice asks you this reference to basketball and you don't know it, what are you going to say? Lisa obviously knew it, but I just didn't love this kind of like sports talk/locker room talk, presuming people's familiarity with the hypotheticals and argument because... So, Justice Kagan, just to contrast this, she will often draw on current events in her questions. But if you remember from the Taylor Swift question that we highlighted, she specifically asked the advocate, are you familiar with Taylor Swift's sexual assault case? And it was obviously a permissible answer was no. And she wasn't presuming anything. And that was just not the vibe from this Justice Kavanaugh thing, which is like, "Let me reminisce and show I know a lot about basketball." Just not my vibe.

Kate Shaw:

It's such a great point to draw that contrast. If Kagan had just opened up by saying, "What was the actual harm to Taylor Swift that underlay her lawsuit?" If an advocate was unfamiliar with the sequence

of events, that just would have been an unfair question to pose. And so, I think you're right. It is respectful and doesn't presume an entirely shared vocabulary or set of references in a way that I appreciate and that I'm not sure just even crosses Kavanaugh's mind. Look, I mean, Michael Jordan is going to be a figure known to most people and in some ways-

Leah Litman:

But are people familiar with his Hall of Fame speech in particular?

Kate Shaw:

Definitely not.

Leah Litman:

In which he calls out his high school coach for cutting him. That is not something I would think everyone is familiar with.

Kate Shaw:

No, definitely not. Yeah.

Melissa Murray:

I do know who Michael Jordan is. But yeah, I don't know anything about his Hall of Fame-

Kate Shaw:

Even before the documentary.

Melissa Murray:

I mean, I love the documentary, and I loved how he was just like Petty LaBelle. I mean he was like... And I took that personally. I was like, "I'm here for that. That's amazing." I just thought the whole unbiased thing, it was interesting to me because I remember it growing up, but it also just didn't seem to be on point. And so, introducing something that, yeah, maybe it was in the briefs, and people were talking about it, and that's fine, but it did seem like very specific knowledge. But that didn't actually match up with the point of this case. That death was about powder cocaine and not about crack cocaine, and it just didn't make any sense.

Leah Litman:

Yeah. And it was partially that, that made me wonder were they preparing for this argument? It was that question that was just like, "Here's a random speech about something that's incidentally related but not actually relevant to deciding the question." The Chief Justice also asked his first question was whether under the defendant's theory absolutely everyone who's sentenced for non-cocaine offenses had to be re-sentenced. And no one is arguing for that, and it's not even clear how that would be a possible implication of the defendant's position. Just as Barrett asked whether for someone who was sentenced under Section B, if they had to receive a new sentence on remand or at re-sentencing. Obviously, they don't have to. Their sentencing range is still the maximum that is established by the statute, and that maximum hasn't changed. Justice Gorsuch asked no questions. This is a case about statutory interpretation. Why wasn't he ready with his burn book? It was perplexing to me. It was like, again, did

you forget you had delayed this argument, and then it was happening the week after you thought you had finished?

Melissa Murray:

Leah, you know who brought his a game to this argument?

Leah Litman:

Who?

Melissa Murray:

Your boy.

Kate Shaw:

Right. But Leah's boy could be either Sam Alito or Adam Mortara, you have to clarify which one you're talking.

Melissa Murray:

I actually meant her other boy, SGB. He was ready, and he had lots of questions. Leah has so many boys. Got a stable of boys.

Leah Litman:

If anyone ever refers to Sam Alito as my boy except for the two of you, I will be a little concerned.

Melissa Murray:

For all those people saying that he should retire, he was just like, "I got questions, and I'm not afraid to ask." He seemed genuinely on the fence both about the practical implications of this. And the broader discussion about what this would mean for statutory interpretation, and he seemed genuinely perplexed.

Leah Litman:

Yeah. So, Justice Breyer, more than anyone understood the mechanics of this case. So, he understood better than anyone how the relevance of the career offender guideline mattered here. I won't go into an in depth explanation-

Melissa Murray:

And not surprising given his work on the sentencing guideline.

Leah Litman:

No, not surprising at all. But that was super important to understanding how people who were sentenced under Section C had their sentences determined, and no one else besides Justice Breyer seemed to understand that. We did want to highlight one exchange that was, I think, a little bit awkward. And if it ends up being Justice Breyer's last question at an oral argument I might be a little sad. So, why don't we just play this clip here?

Justice Breyer:

Why did the government argue what it argued? They know these as well as I do. Probably better.

Adam Mortara:

Your Honor, I am here to explain many things. The behavior of the United States government in this case is not one of them.

Kate Shaw:

One of the interesting thing, I think, to highlight in the cases that the Solicitor General's office as we mentioned at the outset switch positions in this case, and the Chief Justice began his questioning of Eric Feigin, the deputy SG by asking him about the change in positions. And so, the chief asked, is it just that you think the position, the prior position is wrong, and you would have reached a different one? He's essentially just saying, "Tell me about what the standards for a change in positions really look like right now." It was a little conspicuous, I think, to press the Biden's Solicitor General's office where the chief really hadn't done that in the Trump administration in spite of a number of changes in positions.

Kate Shaw:

But so Feigin was a little bit caught off guard by the question, it seemed. And he basically said, "Well, Your Honor, I don't know that we have a specific set of procedures or guidelines that I could publicly share." But it almost sounded like he... I mean, at the beginning of the answer, he really seemed to be saying, "Oh, we don't have anything. We just make it up as we go along." And then finish the sentence with that we could publicly share. Surely, there are guidelines and procedures and I just felt like it was a missed opportunity to say something like, "We take these seriously. We give them real thought and care. And we don't do it cavalierly." Because I think you could say that much without revealing the tradecraft of the Solicitor General's office. You could do that, and I think shut down any follow up questions effectively, but he ended up just sounding like the SG's office just is making it up as it goes along, which I think is not a great look.

Leah Litman:

I would have loved it if Feigin could have repurposed the amazing I must decline your invitation for secret reasons response. I must decline to answer your question. We have secret reasons that I cannot disclose. That would have been-

Melissa Murray:

I can tell you, but I would have to kill you. I'm sorry.

Leah Litman:

So now we have a special message from the winner of the Strict Scrutiny shout out at the Michigan law student funded fellowships auction that supports public interest work by Michigan law students. So, Will Jankowski, acapella singer and law student extraordinaire would like to shout out Tyler Lee for being a legal superwoman, law clerk extraordinaire, and the love of Will's life. Thank you for being such a perfect partner. I know. This shout out is going to... It's just great.

Leah Litman:

We would also like to shout out the Michigan law class of 2023 Section MNOP. The student section I taught. I can attest they're great, for making this, this being online virtual hard and choose any relevant adjectives that may apply first year of school an incredible one, you all rock. To mom and dad, Dottie and Peter Jankowski, and the rest of the Jankowski clan, Jack, Charlie and Kate for giving Will absolutely everything anyone could wish for in a loving family. And last but certainly not least, to Juno, the Jankowski family pup. And to Stevie Nicks, my dog who Will is confident will be Juno's best friend. I hope you're listening Stevie. If that doesn't warm the cockles of your heart I don't know what will.

Melissa Murray:

My cold dead heart is literally springing back to life. Will Jankowski, you've touched my soul.

Kate Shaw:

Really touched my soul.

Melissa Murray:

That was really lovely.

Kate Shaw:

All right, so let's move on to opinion recaps. We got four opinions last week. None of the huge ones we've been waiting for, but some very important opinions nonetheless. So let's try to march through them as quickly as we can. The first is Edwards v. Vannoy. In that case, the Supreme Court held that Ramos v. Louisiana is not retroactive. So, Ramos, recall held with the Sixth Amendment requires states to obtain criminal convictions via unanimous juries. So, non-unanimous juries will not do. So, that was the holding of Ramos.

Kate Shaw:

Ramos relied pretty heavily on the fact that some of the non-unanimous jury rules were first adopted for explicitly racist reasons. So, in Louisiana, these rules were adopted during Reconstruction in an attempt to dilute the power of Black jurors to disadvantage Black defendants and Oregon, which had been previously the last other state to permit non-unanimous juries. The non-unanimous jury rule was adopted based on antisemitic, anti-Catholic, and explicitly xenophobic reasons.

Kate Shaw:

So, going into the argument in Edwards, and really afterwards, it is not that surprising that the court said that Ramos was not retroactive. Generally speaking, new rules of Criminal Procedure are not deemed retroactive. That general default rule has historically been subject to important exceptions. Although that is now really down to one important exception, we will get there. But historically, the general rule of non-retroactivity was subject to an exception where a new substantive rule was announced. So new substantive rules were deemed to apply retroactively. But this unanimity requirement is not a new substantive rule. It doesn't hold that certain conduct can't be punished, or that certain offenders can't be subject to particular punishments, or that a criminal statute is invalid. So, that takes us to the second exception. So, historically, the second exception has existed for what are known as new watershed rules of criminal procedure that affect the likelihood that an innocent person has been convicted.

Leah Litman:

So in my own personal view about what I knew watershed rule criminal procedure is properly understood, I think Ramos would qualify, but under the court's cases, it was an uphill climb. In particular, the court had said that the jury trial right itself, the right to have a jury find the elements of an offense was not retroactive. So that was the Supreme Court's decision in Apprendi v. New Jersey and other decisions, too. Indeed the court has never found a new rule to be a watershed rule. It has said the only rule that would qualify is Gideon v. Wainwright, the decision announcing that defendants have a right to counsel even if they cannot afford one.

Melissa Murray:

But the majority could have stopped there and just said that, but it actually went further. And it says that Ramos doesn't qualify as a watershed rule because the right to a jury itself didn't qualify as a watershed rule. And the court basically decided to just wipe out a bunch of federal habeas and retroactivity doctrines while it was at it, and said that there are no procedural rules that are retroactive. When you put differently, there can be no watershed rules of criminal procedure that could be announced that would apply retroactively. And the exact quote is, "New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must be regarded as retaining no vitality." And so that's some big stare decisis for sucker's energy.

Leah Litman:

Yeah, this is my personal bad place, Brett Kavanaugh messing up federal habeas by showing no regard for the court's precedents on. And aside from that, the analytical path that the court took to get there just didn't make a ton of sense to me. So the court basically said, "Look at our prior cases that declined to find watershed rules. That's evidence that no watershed rule exists." That just isn't how logic works. We have never found a rule to be a watershed rule, therefore, it doesn't exist. And Justice Gorsuch's concurrence even more pointedly relied on that logic. I just think it takes a fair amount of hubris to look around at the world around you, and in particular, the criminal justice system. And think there are no watershed rules that we have yet to enforce that affect the likelihood of an innocent conviction. And the court just unnecessarily and aggressively closes the door for any future rules of criminal procedure. It's just why do that?

Melissa Murray:

So, there was the concurrence from Justice Gorsuch, which has You said reiterated, I think the question about logic, that whole line of argument. But then there was this incredibly fiery, sharp dissent from Justice Kagan. And it's worth remembering that Justice Kagan, perhaps uncharacteristically was in the dissent in Ramos and we speculated last year that she was in the dissent because of the fact that Ramos really reflected a departure from established precedents. And she was hewing with Justice Alito and the Chief Justice in order to preserve the whole idea of stare decisis and to maintain fidelity to that. But in this opinion, Justice Kagan really lit up the majority. She dissented and she was joined, not surprisingly by Justices Sotomayor and Breyer. Leah, I think, do you want to issue another invitation to her?

Leah Litman:

I think it's important to underscore that Justice Kagan is invited on Strict Scrutiny to discuss not only nominal damages, but also retroactivity and federal habeas. Many options, take any of them.

Melissa Murray:

And Taylor Swift.

Leah Litman:

And Taylor Swift.

Melissa Murray:

I will just note, we've invited her a million times and now it's beginning to feel a little bit like When Harry Met Sally, when Marie notes that the guy she's dating is never going to leave his wife for her. And Sally says, "You're right, Marie, he's never going to leave his wife." She's like, "I know. I know." I feel like we're doing that. She's never going to come on the show. Is she?

Leah Litman:

As Justin Bieber would say, "Never say never."

Melissa Murray:

Okay.

Leah Litman:

Got to be a believer.

Melissa Murray:

It's too late. Don't do that. Okay, I'm going to go cleanse myself after this. Okay. All right. Okay, first of all, what does she do here? She literally uses the master's tools to dismantle this house. So first, she takes all of the soaring rhetoric that was deployed in Ramos and she turns it against them. So she says, "A verdict taken from 11 is no verdict at all." That was the note that the court proclaimed last term in Ramos and then she notes that citing centuries of history the court and Ramos termed the Sixth Amendment right to a unanimous jury vital and essential, and dispensable, and fundamental. And two concurrent justices added to support discarding this egregiously wrong precedent that the unanimity rule prevents improper verdicts. If those words mean anything, it must mean that this decision in Ramos was so pivotal, so fundamental, such a sharp departure that it must count as a watershed rule. I think that's probably right or else those words, as she put it, are just a lot of words.

Leah Litman:

Yeah. She also continued on in her unrelenting.

Melissa Murray:

She was like Dracaryus. Elena Targaryen coming in on a dragon blowing up King's Landing.

Leah Litman:

So, she wrote, "The majority are using reply that the jury unanimity rule is not so fundamental because... Well, no, scratch that. Actually, the majority doesn't contest anything I've said about the foundations and functions of the unanimity requirement." Yeah, I was there for that.

Melissa Murray:

She snatched a wig, snatched a wig.

Leah Litman:

She did. And then she went on to characterize the two moves the majority made in response to her dissent, "Called the first throw everything against the wall, call the second slice and dice."

Kate Shaw:

And Kavanaugh did not let Kagan's dissent just stand unanswered and took the sort of bizarre tactic I thought of suggesting that Kagan should not be heated here because she dissented in Ramos. And she just says, "Look, Ramos is the law. Stare decisis is now on its side. I take the decision on its own terms. I give it all the consequences it deserves. What are you talking about?"

Leah Litman:

Like, I'm sorry I'm principled, and will apply cases as their reasoning suggests, even when I disagree with them.

Kate Shaw:

He's like, "No, you're supposed to stay mad." It was just such a bizarre Kavanaugh telling on himself, I thought. And then the defensiveness of him saying, "Look, the criminal defendants are as a group better off under Ramos." And even if not retroactive per today's decision than they would have been if Kagan had her way.

Leah Litman:

So, she did not let that go and answered. She said, "This suggestion is surprising. It treats judging as scorekeeping and more scorekeeping about how much our decisions or the aggregate of them benefit a particular party. So, no one gets to bank capital for future cases. No one's past decisions insulate them from criticism." It's just like you go Elena!

Kate Shaw:

Yes.

Melissa Murray:

There's another opinion here I wanted to call attention to. So this is Justice Thomas's concurrence, and I think we really have to call out he does this a lot. Justice Thomas puts away seed corn for the winter. He just lays the foundation to take another frolic somewhere else and do even more stuff in the future. And so, in this concurrence, he says that the court could have rejected this claim because when the state courts adjudicated it, this wasn't unreasonable. He opens up the possibility that the court will say that AEDPA doesn't actually codify Teague's exceptions, or what is now an exception for substantive rules. So, this is focusing on procedural rules. But he's laying a foundation for dealing with the substantive rules later on. He does this all the time.

Melissa Murray:

Again, that was a big one. I think this one, the next opinion coming up is also big, although I don't know that people quite understand it to be as monumental as it is. And that, of course, is in BP v. Mayor and City Council of Baltimore. So, this is a case about federal removal jurisdiction. So in this case, the question was about the circumstances under which individuals could remove their cases from state court to federal court and the Supreme Court said in this opinion that, "Appellate courts can review

other grounds for removal besides whether a defendant was acting as a federal officer, which the statutes provide a special exception for appellate court review."

Melissa Murray:

So, this arose in the context of a major climate change case and which are former Strict Scrutiny guest, Sheldon Whiteboard Whitehouse filed a big brief explaining the real stakes of this particular procedural issue. But the fact of the matter is that the oil companies wanted this case to be heard in federal court because they believed that it would be a more hospitable venue for them. And this decision actually makes it easier for them to litigate their cases in federal court because it allows defendants more bites at the removal Apple for getting their cases into federal court.

Melissa Murray:

So, basically, if a district court had previously said, "No, you cannot remove this case," to federal court, the only basis for federal appellate review would be to decide that the case could be removed to federal court because the defendant was a federal officer. And in this case, of course, the oil companies are not although they are actually heavily regulated, but they're not federal officers. So, that doesn't apply. Now the court has explained that appellate courts can review any ground for removal, including whether federal common law governs these climate change suits, which again, gives these companies, these defendants more opportunities to remove their cases to federal courts.

Leah Litman:

To my mind, this holding creates the potential problem of gamesmanship. What is to stop defendants from including the argument that this case can be removed because they're a federal officer in their removal notice or briefing? Even when it's obviously the weakest argument and not even a super plausible one, the court dismissed that concern as a policy argument for Congress to consider and noted the possibility of sanctions, which of course, courts are just super reticent to impose, particularly on private litigants. So, that didn't seem to me to be that meaningful of a deterrent.

Kate Shaw:

Yeah, and moving from substance to style. This is a Gorsuch opinion. It's a statutory interpretation case. So, of course, there was a lot of overwrought prose that included a sprinkling of foe judicial humility toward the task of interpreting Congress's handiwork. So there are just a couple of nuggets I will read. I feel like we need to cast someone. I think we need an occasional guest host who could actually voice Gorsuch for these segments. I don't know. We should give some thought to how we would make that happen because I don't feel like I'm really up to the task of doing it justice.

Leah Litman:

Rege-Jean Page.

Kate Shaw:

Oh, he's looking for a new gig. This is a great idea.

Melissa Murray:

Yes, he is. Yes, please.

Leah Litman:

Look, and I'm sure Justice Gorsuch would love to be portrayed by such a fine actor. So, really, everyone in this situation.

Melissa Murray:

Maybe we could just have a whole show where Rege-Jean Page reads Bostockto us by candle light. The whole thing.

Kate Shaw:

Oh, my God. I feel like maybe Shonda should just make that, right?

Melissa Murray:

Yes. Bostock/Bridgerton.

Kate Shaw:

Okay, so I obviously cannot do this now. I guess I'm trying to

Leah Litman:

You better.

Kate Shaw:

Look, -

Melissa Murray:

Okay. I'll do it.

Kate Shaw:

You do it. I'm sorry. Step in, exceptions and exemptions, like that. I was going to

Melissa Murray:

All right.

Kate Shaw:

All right, do it.

Melissa Murray:

Exceptions and exemptions are no less part of Congress's work than its rules and standards, and all are worthy of a court's respect.

Leah Litman:

I burn for you, textualism.

Melissa Murray:

Often lawmakers tread in areas fraught with competing social demands where everyone agrees trade offs are required. Whatever the reason for a legislative compromise, we have no right to place our thumbs on one side of the scale or the other.

Leah Litman:

Daphne.

Melissa Murray:

Often lawmakers-

Leah Litman:

Lady Whistledown. We'll just insert, Daphne, after all of Justice Gorsuch's burn book phrases while we read them before-

Melissa Murray:

I want to change it to the I burn for you book.

Kate Shaw:

It's not a burn book. It's a I burn for you book.

Leah Litman:

That sounds good to me. So, Justice Sotomayor dissented in the case. Justice Alito did not participate, likely because he was recused.

Melissa Murray:

And this is also a case where there was discussion about whether Justice Barrett would recuse because I think one of her relatives was employed at BP-

Leah Litman:

I think her father.

Melissa Murray:

... affiliate, yeah, something and she did not.

Leah Litman:

So, other case, we wanted to recap CIC v. IRS. In this case, the court found that a challenge to an IRS notice, a reporting requirement, the violation of which would carry statutory tax penalties was not barred by the Anti-Injunction Act. It's an interesting case because the court, I think in my view, essentially created another a textual exception to the Anti-Injunction Act, which says no suit for the purpose of restraining the assessment or collection of any tax shall be maintained. And here, if successful, the suit would preclude collecting tax penalties for violation of the regulation given that the regulation is being challenged. But the court says that's not barred by the Anti-Injunction Act because the challenge notice is punishable by criminal penalties and imposes its own affirmative reporting obligations. And so the court seems to say in functions/effect, this is an affirmative command/regulatory

mandate, not a regulatory tax. And again, that's a squishy distinction that is not mentioned in the Anti-Injunction Act, and yet did not prompt any textualist temper tantrums.

Melissa Murray:

Kate, the last case.

Kate Shaw:

Yeah, last case. All right, so this was a brisk four page unanimous opinion-

Melissa Murray:

Can I stop there?

Kate Shaw:

Yeah.

Melissa Murray:

Because it bothered me that this is four pages because the wind up for this case was so incredible. I mean, the oral argument here, we were just made to listen to a million different hypotheticals about elderly women on the floor because they'd fallen and they couldn't get up, cats and trees, bubonic plague infested rats, priceless works of art being damaged by overflowing bathrooms, and then we got four pages. I just felt like we deserve more.

Kate Shaw:

And the lawyer who was pummeled with those hypos did not walk out of the argument or shut off his phone or whatever expecting a unanimous win. I don't think. It really was an illustration of the sometime divergence between the impression coming out of an oral argument, at least in this format, and the result. Now, we should say that it was unanimous, but with a couple of concurrences that made really explicit that the case was fairly narrow in terms of what it did not resolve or tackle. But basically, in terms of what the four pages did hold the court in this Thomas opinion says that the community caretaking exception does not allow police officers to enter homes and seize people's belongings without a warrant. So that exception that the court referenced in passing in a car case, that caretaking exception, which involved police officers towing cars and then searching those cars. The court said that exception does not apply to the conduct of entering homes, at least on these facts.

Kate Shaw:

So, as I mentioned, there are a couple of short concurrences that say that there are other kinds of exceptions to the Fourth Amendment's warrant requirement that might apply. So, what the court is not saying here is that you could never ever enter a home without a warrant. Clearly, other kinds of exigencies might apply in a couple of the different concurrences won by the Chief and Breyer highlighting that preventing violence or giving emergency aid might justify deviating from a warrant requirement. Alito writes separately to gratuitously mention red flag laws maybe raising questions, even though that was really pretty far afield from what this case involved. I mean-

Melissa Murray:

I thought what was interesting about his concurrence is he really centered this prospect of assistance to the elderly. The Chief Justice question concerns an important real world problem. Today, more than ever, many people, including many elderly persons live alone. Many elderly men and women fall in their homes or become incapacitated for other reasons. And unfortunately, there are many cases in which such persons cannot call for assistance. In those cases, the chances for a good recovery may fade with each passing hour.

Melissa Murray:

So, in the Chief Justice's imaginary case, if the elderly woman was seriously hurt or sick and the police headed petitioner's suggestion about the Fourth Amendment's demands, there is a fair chance she would not be found alive. This just went to a very dark place. And so, what is going on here? I mean, is this a court of individuals past 60 getting AARP notices just really worried about what it is like to be an elderly person in the United States? I mean, I genuinely ask as someone who is also becoming an elderly person. It just felt very personal.

Kate Shaw:

It just got very personal there, Melissa.

Leah Litman:

Yeah, no-

Kate Shaw:

Clearly not becoming an elderly person, Melissa. I got to refute that part

Melissa Murray:

I'll reiterate my praise of Justice Alito's skincare regime. The man is turning 71 this year, you would never know it. He has a quite youthful visage. But I mean, this really went to a dark place. This imaginary woman may have regarded her house as a castle. But it is doubtful that she would have wanted to be the place where she died alone and in agony. Jesus Christ, what a picture?

Leah Litman:

Also, a part of me wonders if this is a dynamic in the Fourth Amendment cases that we've seen before, which is the justices views about their own personal situation and experiences and likelihood to encounter different forms of state action influences their perception of fourth amendment cases. So, for example, in Jones or in Riley where you're talking about surveillance, which they might perceive themselves as potentially falling victim to, they're quite concerned about Fourth Amendment rights, whereas other types of police investigative work, they are much less concerned about. And here, Justice Alito might be imagining himself or someone he knows in a situation that would require police assistance. I don't know.

Melissa Murray:

It's so striking that you say that because it reminds me of Justice Scalia's opinion in that Fourth Amendment case about the lady in her bathtub and the heat wave surveillance. I don't think he was worried about him, but the prospect of his wife being surveilled while in the bath or something like that.

Yeah, I thought the whole thing was very interesting, and it felt incredibly personal, like dying in agony in her castle is just like, this is really macabre.

Kate Shaw:

No, and it also just, I think, highlights so sharply how opportunistic and inconsistent the justices are in crediting the relevance of these kinds of pragmatic concerns. There are moments when Gorsuch will say, and maybe he'll have a majority for the position that the Fourth Amendment, essentially and only means and protects what it did at common law at the time of its adoption. And then sometimes I think they are very open to these kinds of concerns that touch their own experiences, or fears, or that context in which they're living and embedded and it's just they... And they should, I certainly want to embrace their ability to do that, but it frustrates me to know, and that many of these arguments unfold as if the only thing that matters is contemporaneous evidence from the time that the adoption of the Fourth Amendment, just it's nuts. All right, so should we turn to court culture?

Leah Litman:

Yes, there's a lot to cover this week. So first, the book release heard round the world.

Melissa Murray:

I hope he got a $2 million advance.

Leah Litman:

I think he would have written this for free. This week, we learned none other than Justice Stephen Breyer who may no longer be my boy will be releasing in September, a book called The Authority of the Court and the Perils of Politics. A few points worth talking about this book release. First is the book release describes him as a sitting justice. For a book released in September I don't think that's that particularly significant given that they're not going to announce before he might have announced his retirement that he might be a retired justice in September on this book release. So, I didn't put much stock in that.

Leah Litman:

I was more concerned about the substance of the book, to be honest. One particular passage in the squib says, "The peril facing the Supreme Court comes less from partisan judges than from citizens who encouraged by politicians equate impartial justice with agreeable judicial outcomes." Where to start about all of this? First is I just think it's a bad look for justices to be like, "The problem in a democracy is citizens." Second to suggest that citizens are somehow being misled or not smart enough to read into what politicians are saying about the court or about the court's work itself. And then third, for a pragmatist to suggest it is somehow wrong to think about outcomes. I mean, come on, guy, come on. And this is the G rated version of my thoughts on the book. Stay tuned.

Melissa Murray:

Do you think he'll go on a big book tour?

Leah Litman:

If he is not retired, and he attempts to go on a book tour I can't say he will not get shouted at. That would be...

Kate Shaw:

I can say he will definitely get shouted at if he does that.

Leah Litman:

Yeah.

Kate Shaw:

I think we just hope that the blurb... I mean, first of all, we hope that the timing description is just kind of like people write marketing copy without giving it the upmost care and thoughts. So I agree with you. We can discount that. But hopefully the blurb does not accurately capture what is this more sophisticated rumination on the complex interplay between law, the courts, and politics. Who knows? But yeah, this little bit that we saw was not at all encouraging both about the quality of the book, but also about his likely short term plans.

Melissa Murray:

Regrettably, we cannot extend an invitation to him to join us to discuss the book because we've already extended our book invitation to Meghan, the Duchess of Sussex, to come talk about the bench here [crosstalk 00:55:24], with Elena Kagan.

Kate Shaw:

But if he actually finds himself with a totally open calendar next fall, then I think we could we consider issuing an invitation.

Melissa Murray:

We could work it out.

Leah Litman:

With more flexibility on his end I'm sure we could make something work. I mean, who knows? We could even give him the chance to read some passages from Justice Gorsuch's opinions together with Rege-Jean Page. I mean, talk about a beat.

Melissa Murray:

Oh, my God. That is a pairing that even Shonda could not come up with. It's so good, so terrific. The new McDreamy, Stephen G. Breyer. I love it. I love it. I love it.

Kate Shaw:

Okay, so let's move on to a couple of other court culture matters. First, this is now a week and a half old or so but we haven't had a chance to talk about it. So, we thought we would briefly mention the new McKay Coppins piece on Justice Kavanaugh. The title of the piece which ran in the Atlantic is, Is Brett Kavanaugh Out For Revenge. So this was this long reported piece about Kavanaugh. I didn't think it broke a ton of new ground, but I thought it contained a couple of interesting nuggets and a few weird moments. So, interesting nugget one. So we learned from the profile that Brett Kavanaugh has long been like a John Roberts fanboy. That he had a big picture of himself and John Roberts in his DC Circuit chambers. That a friend told Coppins that Brett idolizes John Roberts. So, that's interesting backstory

about what he was coming into his relationship with Roberts already carrying. Additional detail that I thought was interesting about the chilly or at least distant relationship between Kavanaugh and Gorsuch. I mean, we've all heard things to this effect.

Melissa Murray:

I called this. I called this.

Kate Shaw:

Well, and I feel like we knew that they weren't friends... I mean, they were a couple years apart at Georgetown Prep. They just, people did not think they were ever friends and maybe that there was actually tension or bad blood but Coppins is like, "They were very different high school archetypes."

Melissa Murray:

Neil Gorsuch is a Virgo. He is not here for Brett Kavanaugh's messiness. [crosstalk 00:57:29]. I know of what I speak.

Kate Shaw:

So, Coppins doesn't get into the astrological underpinnings of any of this although maybe that does explain it.

Leah Litman:

Oversight.

Kate Shaw:

But he basically does say, "Look, Kavanaugh was this kind of like frat boy who was organizing beach trips for his friends and Gorsuch was..." and this is quoting Coppins here, "A know it all prig who's too busy with the debate team, probably didn't get invited to said beach trips." And that-

Melissa Murray:

Big Virgo energy. That's such big Virgo energy.

Leah Litman:

He was working on his I burn for you burn book on textualism, it takes time.

Kate Shaw:

That's right. You cannot get that burn book Sandy . You got to keep that intact. So yeah, I also just thought, he described Kagan in clumsy terms or something in terms of what he thought was her attempt to cultivate a real relationship with Kavanaugh in a way that just I thought was probably not fair to her, this kind of suggestion. Basically, he says he quotes someone, one person who has knowledge of the court's internal dynamics as basically reporting to him that Kagan saw Kavanaugh as up for grabs, and launched a charm offensive. And there's one person familiar with the courts internal dynamics as somehow having some insight into Kagan's internal motivations. The three of us have knowledge of the court's internal dynamics. Coppins couldn't... I mean, maybe somebody speculated that was what was going on. But it strikes me that's probably more complicated than that, sort of the Kagan-Kavanaugh

relationship. Similarly, the Sotomayor-Kavanaugh relationship. He just made them all out to be, I think, more calculating or more exclusively calculating than is fair.

Melissa Murray:

It's the calculating part that I think is weird because we've seen in other context justices welcoming a new member of the court, even when that person has joined under quite complicated and controversial circumstances. So, Evan Thomas talks about Justice O'Connor going out of her way to welcome Justice Thomas to the court. Justice Ginsburg said nice things about Justice Kavanaugh, and it wasn't calculated. I mean, they have to work together in a closed environment. And to my knowledge, none of them were raised by wolves. And so, they're just polite to each other. I mean, I don't know that I would necessarily attribute her being collegial as an attempt to cultivate a relationship for purposes of swaying his vote.

Kate Shaw:

Totally.

Melissa Murray:

Anyway...

Leah Litman:

We also wanted to talk about Professor Lisa Heinzerling's book review of Professor Richard Lazarus' The Rule of Five: Making Climate History at the Supreme Court, a book about the Supreme Court's major climate case Massachusetts v. EPA. The review was published in the Michigan Law Review and is titled The Rule of Five Guys. So, it's in part of interest because it's about the litigation history of Massachusetts v. EPA. But we also wanted to highlight the review because it is also about or has some important reflections about the way we talk about the Supreme Court and the people involved in it. So, Professor Heinzerling says, "The cause in the book are a deficit in critical judgment and a surfeit of gender traditionalism. The deficit manifests in Lazarus' unalloyed reverence for the Supreme Court and apparent resistance to critiquing its work. And a frank acknowledgement of the gendered character of the men's club atmosphere of the court is lost in Lazarus' romanticizing."

Leah Litman:

She talks about her experience in the case as she sensed a gendered dimension having word by word edits of the brief wrangling over oral argument in which she was told to go through this one procedure, so she could do the oral argument only to have the whole argument stretch snatched away from her, and then having an office attempt to refuse to pay her. She says, "I sensed a gender dimension, and no one ever said anything overtly sexist, but that just seemed to be what was happening." So, I just think it's a super important review about subtle gender dynamics and people's accounting about what happens in litigation, also accounting of the Supreme Court's work. And so, I recommended it for that reason.

Kate Shaw:

It was a gutsy review. I mean, I think Lazarus and Heinzerling were colleagues at Georgetown before he went to Harvard. I think a lot of people in the Supreme Court orbit and law school and legal academia in general have read, I will say, just thinking for myself, personally, I've really taken seriously, cited a lot of Lazarus' work. He wrote a lot of important pieces shedding light on the insularity of the elite Supreme

Court bar in a way that really did bring a critical lens to it. He also brought to light the courts practice until recently of quietly revising drafts of its slip opinions after issuance, but before final publication of the opinion. So, he is able to bring a very critical lens to a lot of dimensions of Supreme Court practice, but a lot of the Heinzerling accounts takes a correctly expansive view of the kind of subtle mechanisms by which sexism still manifests, she really does.

Leah Litman:

Yeah, and I just wanted to highlight the conclusion from Professor Heinzerling's review, which is so relevant to life, and things this last week, every week, so she writes, "Many challenges facing women today come subtly, not overtly, and they come from men who may mean no harm, and yet they keep coming." It is just a phenomenal piece of writing.

Melissa Murray:

It's a terrific review. Let me just say, Leah, kudos to your students because this book review issue is a tour de force. There are so many... I mean, it's chef's kiss this year. So, let me just call out a couple of other outstanding pieces that are in this issue. There's Shawn Ossei-Owusu who's an assistant professor at Penn. He has a terrific review of Cory Robin's, The Enigma of Clarence Thomas, which we have covered on previous episodes of this show. His colleague at Penn Karen Tani has a review of Nate Holdren's Injury Impoverished: Workplace Accidents, Capitalism, and Law in the Progressive Era that's fantastic.

Melissa Murray:

But my favorite, favorite, favorite piece of this volume is Heidi Bond's fantastic Pride and Predators, which is an unbelievable read on Jane Austen's classic Pride and Prejudice. I love Pride and Prejudice. I've often had misgivings about how to think about this book that she just really captures and even goes beyond in so many ways. So, it's an absolutely fantastic volume, and well done Michigan on doing all of this work and providing these really fantastic perspectives on books that I think are really interesting. And in some cases, the review may be more interesting than the book, but I'm glad to have it all in one place. So, thank you.

Melissa Murray:

The other big court culture news is that the 36 member SCOTUS commission met for the first time to ostensibly discuss the prospect of court reform. The meeting lasted less than half an hour, so strong start for them. Just kidding. We know that they were just doing procedural stuff, but in that meeting, they swore in their 36 members and they adopted bylaws for their deliberations as well as a plan for their schedule and structure. And so, over the next six months, they're going to meet six times and they will hear testimony about the prospect court reform. And there was a lot of discussion about the commission. Certainly, when it had its initial meeting and someone described to me their view that the commission was really kind of a legal version of the Peloton bike. It looks good. It'll make you work, but ultimately it's going nowhere. Is that too harsh?

Leah Litman:

It's too harsh on Peloton, in my view.

Melissa Murray:

Do you think that's apt?

Leah Litman:

I have very little faith in the commission. I just don't think it's actually going to accomplish that much. Ryan Doerfler, who's a professor at University of Chicago had an oped in the Washington Post in which he said progressive should just ignore the commission for a bunch of reasons that people have outlined in other works. Ian Millhiser at Vox and Mark Stern at Slate and Elie Mystal in The Nation have written similar pieces and I just think they are very right in important respects.

Melissa Murray:

All right, I think that's all we have time for today. So we'll leave you with that incredibly searing image of the Supreme Court Commission with Cody Rigsby at the helm exhorting them to fix their wigs and get to work. Thanks so much for joining us. As always, we are grateful to our producer Melody Rowell and to Eddie Cooper who does our music. If you'd like to support the pod you can check out all of our great merchandise at our website www.strictscrutinypodcast.com. You can also support the pod by becoming a regular subscriber at glow.fm/strictscrutiny. See you next time.

Leah Litman:

Daphne.