Speaker 1:

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

Speaker 2:

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.

Leah Litman:

I'm Leah Litman.

Melissa Murray:

And I'm Melissa Murray. The Supreme Court continues to play with everyone's emotions, except yours, Leah. They have been scheduling multiple opinion days each week in June, but they only release ACCA opinions, which I know thrills you, Leah. But the rest of us are kind of like, "This is what we came for?" I don't know.

Leah Litman:

Audience of one.

Melissa Murray:

But what a one. Anyway.

Melissa Murray:

Since that's their game plan, we're going to play ball. And I'm not going to lie, Leah is really, really thrilled about it. So, Leah, do you want to give us the rundown for today's episode?

Leah Litman:

Yes. So today we will cover some news on the Court's docket, as well as the opinions that were released on Monday, which while exciting, pale in comparison to Borden. And then we will cover some Court culture that includes a notable state Supreme Court opinion, and some sit up and take notice Stephen Breyer statements.

Melissa Murray:

So in terms of breaking news, we got a development in Students for Fair Admissions v. President and Fellows of Harvard College. And we've covered this case before. It is the challenge to Harvard's admissions policies. The plaintiffs here argue that, one, it is illegal for schools to consider race in admissions and, two, that Harvard's admissions practices unlawfully discriminate against Asian American students. Both the District Court and the First Circuit rejected those arguments. And under existing precedent, it's well established that schools may consider race in their efforts to achieve a diverse

student body. And the key precedent in all of this is Grutter v. Bollinger, which is a 2003 case from the Supreme Court. And obviously with this new challenge, Grutter is really in the cross hairs. It was an equal protection case.

Melissa Murray:

But this case, because it doesn't involve a public university is going to be decided on statutory grounds, Title 6, a federal statute that imposes conditions on schools receiving federal money, including the condition that they not discriminate on the basis of race. And so the real development here today is that the Court called for the views of the solicitor general in this particular case. And so what do we think this means? For my money, Leah, and you can tell me if you disagree with me, I wonder if this request for a CVSG is really about kicking this can down the road a little bit, given that we already have some really significant cert grants for the upcoming term with abortion and gun rights that the Court does not want to have an absolute barn burner of a term. And they're trying to just punt a little bit on this.

Leah Litman:

Yeah. So I think doing the CVSG, basically inviting the solicitor general to weigh in on whether the Court should take certiorari, the conventional wisdom is that increases the grant, the likelihood that a court will take the case. But I don't really know what the deal is here. That just doesn't seem to be that relevant, given that the reason why the Court might not take this case in order to revisit affirmative action is, as you noted, the fact that this case involves a statutory question rather than a constitutional one. Although the statutory term has been interpreted to be coextensive with the constitution, but that's still a bit of a vehicle problem. So I still think the CVSG slightly increases the odds of a grant. Although I don't necessarily understand why that was needed.

Kate Shaw:

Just seems like there were obviously four votes to take this case. Why bother with the CVSG? Except for, I think, maybe for the kind of political and optical timing reasons that Melissa identifies, right? Definitely four of them want to reconsider and probably five or six of them want to reconsider it and maybe overrule or dramatically narrow Grutter. So I'm puzzled by this.

Melissa Murray:

I'm not sure that this really does kick it down the line that far. They could grant cert in this, as Leah says, at the beginning of next term. So is this just simply an avoidance mechanism? Is it a courtesy? There has been a change in the administration. I think it's likely the Biden administration has very different views on this than the Trump administration would have had. But I imagine that there probably is an appetite amongst some on the Court just to avoid this case entirely. But is this the way to do it? I don't know.

Leah Litman:

Yeah. I don't think the CVSG does that. And I think that the end of summer is sometimes when you get a fair number of the CVSG briefs in, in which case it won't actually lead to the Court delaying hearing the case until the following term. So I don't know.

Melissa Murray:

Unless, doing something here in this case on this day means that they're going to do something like throw some real bombs on Thursday when they announce more opinion. So maybe this is a distraction for Thursday. I don't know.

Leah Litman:

Yeah. And when I have scheduled a vacation to Northern Michigan, so of course that's when we'll get like the ACCA opinion and everything else.

Melissa Murray:

Cancel your plans.

Leah Litman:

I'll be in the woods. Don't tell me. I will live in bliss.

Kate Shaw:

Are you really going to be totally off the grid for a little bit?

Leah Litman:

That was the hope.

Kate Shaw:

You should do it.

Kate Shaw:

So, all right, well, we will obviously keep a close eye on this. My prediction, I think our collective prediction, is that this is just a very slight delay, they will get the brief back. The brief will say, "Don't take the case." They'll take the case. They'll decide it next term. So I'm not sure why.

Melissa Murray:

Maybe this is an invitation to actually name a solicitor general.

Leah Litman:

That's what they meant.

Kate Shaw:

Maybe it'll spur that.

Melissa Murray:

Yeah, just inviting you. We're going to solicit views from somebody who has not been appointed in the hopes that you will appoint this person.

Kate Shaw:

Well, if that works, that'd be great.

Kate Shaw:

Okay. So let's move on to opinion recaps. As Melissa said at the outset, we first got a pair actually of ACCA cases. That's the Armed Career Criminal Act, not the Affordable Care Act. So this pair of ACCA cases, unlike Borden, we got to tell you, doesn't spark joy in Leah in quite the same way. So we are going to luxuriate much less over this opinion.

Melissa Murray:

This is not a Marie Kondo moment for us.

Kate Shaw:

That's right.

Kate Shaw:

Okay. So the specific question in Greer is how plain error review works in the case of so-called Rehaif errors. Okay, so plain error review refers to an appellate court's review of claims of error that were not raised in the district court, right? So something went wrong, but not something that the district court was alerted to or considered. And Rehaif errors refer to errors under the Supreme Court's 2019 decision in Rehaif. Rehaif held that a violation of the federal statute prohibiting felons from possessing firearms requires that the individual with a felony conviction knew that they had a prior felony conviction before possessing the firearm.

Kate Shaw:

Okay, so under plain error review, a defendant has to show an error, has to show that the error was plain and that the error affected their substantial rights, which means there must be a reasonable probability of a different outcome. And here the Supreme Court says that ordinarily Rehaif errors, at least in cases like the ones before it, don't affect the defendant's substantial rights, because there isn't a reasonable probability of a different outcome. So the opinion was written by Justice Kavanaugh and was basically unanimous with one small exception that we will note. The Supreme Court noted that defendants in these cases had multiple felony convictions and that it is basically okay to presume that individuals with multiple felony convictions know that they have those felony convictions. And so it said unless a defendant can make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know that he was a felon when he possessed the firearm, the plain error standard just isn't satisfied.

Leah Litman:

And the Court cites pages from the transcript from the argument that the Court says show a defendant could indeed make such a showing. But I'm not totally sure that all of the citations actually really show that defendants could or how defendants could point to evidence that they didn't know they had qualifying felony conviction. So one of the citations is just to Justice Breyer asking questions about whether defendants could do this and when they could do this. So why don't we play that clip here?

Justice Breyer:

One quick question, it seems to favor you, but you're going to hear a rebuttal. So, I mean, look, there's an error at the trial. It seems like it's absolutely harmless. It had to do with what the weather was like on a certain day, was it raining and the defendant was walking out in the middle of it and would have

known. I mean, okay. But, actually there is a defense and it has to do with that. The defense is it's something that's not in the record. Is there anything to prevent the defendant from telling the Court of Appeals that? [crosstalk 00:09:20] And if they don't hear about it until your brief, which came later, they're the appellant, yours comes later, so then they file a reply brief. The Court of Appeals doesn't have to make any finding, does it? It just has to send it back.

Justice Breyer:

Am I right or wrong about that? I wasn't a trial judge, but I was an appeals court judge.

Speaker 7:

If I'm understanding the question correctly, Your Honor, we are fine with a rule that says that the defendant-

Justice Breyer:

No, I want to know how it works. I mean, I would have thought trying to remember that if the appellant, who was the defendant, had some extra evidence that they didn't put in because of the error they would tell the appeals court that, and indeed describe it. And if they didn't find out about it until late in the appeal, they file an extra brief. Am I right about that?

Speaker 7:

Yes, you're right about that, Your Honor.

Leah Litman:

Some of the other portions of the transcript that Justice Kavanaugh cited too do come closer to establishing that defendants on appeal could introduce possibly new evidence that they didn't know that they had qualified felony conviction. So the assistance to the solicitor general noted a rule that allows people to introduce evidence that was omitted in error below. But again, some of the citations just aren't super relevant to the question of how defendants could make a showing that there's a reasonable probability that they didn't know they had a qualifying conviction. So another citation is to Justice Barrett positing that, at a minimum, the Court can consider the pre-sentence report as evidence that defendant did know they had a qualifying felony conviction. But that doesn't show how the defendant could introduce evidence showing that they didn't know they did. This sounds nitpicky, but it was a little bit weird for the Court just to declare that obviously this could happen, cite the transcript, and then the transcript is basically the justices questioning whether this could happen.

Melissa Murray:

So Justice Sotomayor concurred in part and dissented in part. She noted that the Court's analysis here doesn't apply to harmless error cases when defendants raised that objection in district court. And she underscored that the substantial rights, reasonable probability, plain error standard incorporated the fact that it is the government's burden to prove the elements of an offense beyond a reasonable doubt, including that a defendant knew they had a felony conviction. Kind of a noteworthy acknowledgement from someone who spent part of her career as a prosecutor where she bore the burden to prove these elements. And then it's also worth noting that it is a partial dissent because she would not have decided whether Mr. Gary, who was the defendant in the companion case, failed to show that his substantial rights were affected and would have instead remanded the case to the Court of Appeals to make that

case specific determination under the proper standard. And here the Fourth Circuit had held that Rehaif errors automatically satisfied plain error review.

Kate Shaw:

The other case we got was Terry v. United States, an important First Step Act sentencing case that Leah is all over. So Leah, do you want to walk us through Terry?

Leah Litman:

Sure. So this is the First Step Act case argued extra late in the April sitting after the Biden administration changed positions. And the issue in the case is whether person's convicted of crack cocaine offenses under Section 841, subsection (C), which criminalizes the possession of an unspecified amount of cocaine, are eligible to be re-sentenced under the First Step Act.

Kate Shaw:

So Justice Thomas writes for a unanimous court that people convicted under section (C) that's of 21 USC section 841, are not eligible to be re-sentenced under the First Step Act. The Biden administration had agreed with the defendant that section (C) offenders were eligible to be re-sentenced and the court, as we have discussed, appointed Adam Mortara as amicus to argue that they were not. And as seemed pretty clear coming out of the argument, the Court agreed with the court appointed amicus's position that 841(C) offenders are not eligible for re-sentencing.

Melissa Murray:

So there's some background both to the case and the statute that's relevant to the majority's reasoning and is a point of contention between the majority and Justice Sotomayor here. So first, the case relates to the 100:1 crack cocaine ratio disparity in the Anti-Drug Abuse Act, which basically says that the minimum quantity of crack or cocaine that triggered certain penalties or mandatory minimums differed substantially, dramatically even, between crack and powder cocaine. The Fair Sentencing Act of 2010, reduced that disparity from 100:1 to 18:1 by altering the minimum quantities that trigger certain penalties and mandatory minimums for cocaine offenses. And then the First Step Act of 2018 provided for some resentencings, including for people sentenced under the pre-Fair Sentencing Act provisions.

Melissa Murray:

So section 404(B) of the First Step Act provides that a court that imposed a sentence for a covered offense may impose a reduced sentence as if sections two and three of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed. And then section 404(A) defines a covered offense to mean a violation of federal criminal statute, the statutory penalties for which were modified by sections two or three of the Fair Sentencing Act of 2010. That was committed before August 3rd, 2010. So everyone agrees that people convicted under 841(A) and (B), which established a mandatory minimum of 10 and five years respectively for possessing certain levels of crack or cocaine could be re-sentenced.

Leah Litman:

And so what the court does in Terry is it interprets the covered offense language that Melissa read and specifically violation of a federal criminal statute to mean the elements of an offense. And it says that the First Step Act allows people to be re-sentenced if the elements of their offense that they were

convicted of had been changed by the Fair Sentencing Act. And that's true for 841(A) and (B) offenders, the minimum quantity of drugs that subjects them to a mandatory minimum had changed. And that quantity is an element of the offense that the government has to prove the defendant possessed. But that's not true for 841(C) offenders. The elements of their offense, possessing an unspecified amount of crack cocaine remain the same. The opinion is unanimous, but Justice Sotomayor, concurred to criticize Justice Thomas's, "Unnecessary, incomplete, and sanitized history of the 100:1 ratio."

Leah Litman:

And included in that disagreement, there was this interesting exchange between the majority which, again, Justice Thomas wrote, and Justice Sotomayor about whether Black communities in particular had supported the crack cocaine penalties. So in a footnote Justice Thomas' majority says that many Black leaders in that era professed concern about crack, and cites the President of an NAACP chapter in the DC region. Also sites a DC council member who spearheaded an effort to create mandatory minimum penalties. Justice Sotomayor responds that the help that Black political leaders and Black citizens requested never arrived, just leaving the tough on crime laws rather than the holistic approach the Black community sought to address the crack cocaine crisis. And I think it's an interesting point of disagreement because on one hand, it's not clear why Justice Thomas had to go out his way to note that Black communities supported the-

Melissa Murray:

This is straight out of the Box v. Planned Parenthood playbook. Again, I cannot emphasize this enough, totally different cases, the complete resurfacing of an alternative but racialized history. And so Justice Thomas is siting to James Forman's Pulitzer Prize winning book, Locking Up Our Own, and noting that it is true that DC council members and even the mayor of DC at the time, they were in favor of these increased sentences, because they were worried about public safety. DC is a majority minority city, and was at the time, and they were concerned about the Black community more broadly. But they also asked for serious reinvestment from the federal government in DC. And that is the part that Justice Thomas completely neglects. And again, the history that he acknowledged and surfaced in his Box concurrence was partly true, but largely in complaint. So this is like a weird rehashing of that whole move. And I know why he's engaged in this kind of law office history, but it would be great if he would continue reading the books and add more of that in.

Kate Shaw:

Yeah, so for readers who are interested in this, it is obviously worth checking out the materials that both the majority and the Sotomayor opinion rely on. In particular, James Forman's book, Locking Up Our Own. Elizabeth Hinton and others have also written about this, including an op-ed that Hinton wrote with Julilly Kohler-Hausmann and Vesla Weaver. And I think it may be worth excerpting a little bit of that op-ed. So they write, "There's no question that by the early 1990s, Blacks wanted an immediate response to the crime violence and drug markets in their communities. But even at the time, many were asking for something different from the crime bill calls for tough sentencing and police protection were paired with calls for full employment, quality education, drug treatment, criticism of police brutality. It's not just that those demands were ignored completely it's that some elements were elevated and others were diminished, what we call selective hearing. Policymakers pointed to Black support for greater punishment and surveillance, without recognizing accompanying demands to redirect power and economic resources to low-income minority communities."

Kate Shaw:

And so that's the history that Sotomayor rightly accuses Thomas of completely ignoring. And in addition, she calls him out for saying virtually nothing about the wildly disparate racial impact of these enhanced sentences. So we have an examination of history that looks just at the history that precedes the adoption of this penalty scheme, and selectively does so, and then fails to actually grapple with what happens once these enhanced penalties with this radical disparity between crack and powder and a disparity that bears disproportionately on criminal defendants of color. And of course, that was recognized in Congress, which took steps to try to ameliorate that disparity. So I think Sotomayor correctly and efficiently calls him out for all of those omissions.

Melissa Murray:

Yeah. The lack of coverage of the redistributive part of that history is really appalling because it's a big part of both the Hinton and Forman books and this op-ed that you've cited. And just to note, this is another example, I think, of the sniping in the footnotes that we've really seen over the last couple of weeks with these opinions. Last week it was Kagan and Kavanaugh mixing it up. Here, again in the footnotes, Sotomayor and Thomas. So to the extent that is, I think, a more assertive or aggressive posture. It seems like the gloves are really off.

Kate Shaw:

Yeah. And maybe just one final point to make about the Sotomayor writing. She obviously correctly notes that the political branches are certainly able to address this gap in re-sentencing. She says the statute as written simply does not qualify individuals like Mr. Terry for re-sentencing, but that Congress could tomorrow fix that and should do so.

Melissa Murray:

And that to me speaks to the kind of forceful ascendancy of textualism. She notes that the purpose of the statute was to ameliorate some of this. And just the way it was written, that just didn't happen. And now that they're all textualists, they're bound by this. And so this is an invitation and maybe some inner branch dialogue to correct what might have been just some sloppy drafting in the statute itself.

Leah Litman:

And just on the rise of textualism, this is an example where I think the expectation of Congress was that lower level offenders, in addition to the higher level offenders, would get re-sentenced. It had this odd consequence where defendants who possessed greater amounts of crack cocaine could get re-sentenced, whereas defendants who possessed lesser amounts could not, that is completely absent from the Court's opinion. This is, in some ways, consistent with textualism, but that is not the approach that the Court always takes, whether it's in cases like Bostock, where you get justices like Thomas or Alito or Kavanaugh saying, "Well, the expectations of Congress really matter." We've also seen that in decisions this last term. So, on one hand, yes, this is arguably an example of just an application of textualism. On the other hand, it is another example of a selective application of that methodology.

Kate Shaw:

Yeah, absolutely. This season, this term, we have had occasion to talk a lot about statutory interpretation, and some justices' fixation on textualism in terms of how it applies textualism or adheres to it. And so for that reason, we wanted to highlight a fascinating case that a listener drew our attention

to that pointedly raises some of the methodological questions about how best to interpret statutes that we have been discussing all term. And this case comes from the Wisconsin Supreme Court. State courts, they're where it's at. So, Melissa, do you want to describe James v. Heinrich?

Melissa Murray:

Sure. So James v. Heinrich, and there are some cases that were consolidated into this as well, poses the question of whether local health officers have the authority to issue emergency orders closing schools for in-person instruction due to the coronavirus. The plaintiffs here challenged the order on the ground that it exceeded the officer's statutory authority and that it violated their rights to free exercise of religion and their rights to parental autonomy to bring their children up in the manner of their choosing, all protected under the Wisconsin State Constitution. The Wisconsin Supreme Court, in an opinion by Justice Rebecca Bradley held both that the officer lacked statutory authority to do this and that it violated plaintiff's free exercise rights under the state constitution. And both of these holdings prompted a vigorous dissent from Justice Rebecca Dallet on the Wisconsin Supreme Court who was joined by Justices Jill Karofsky and Ann Bradley.

Kate Shaw:

So let's talk about the statutory interpretation piece. Okay, so let me maybe read briefly from the key statute at issue which empowers local health officials. Well, in what ways, I guess is the question of the core of the case. So the statute basically says that, "Every local health officer upon the appearance of communicable disease in his or her territory shall immediately investigate all the circumstances, make a full report to the appropriate governing body, and also to the department. The local health officers will promptly take all measures necessary to prevent, suppress, and control communicable diseases and shall report, et cetera, et cetera. And then the local health officer may inspect schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition." And there's a separate subsection that says, "Local health officials may do what is reasonable and necessary for the prevention and suppression of disease, may forbid public gatherings when deemed necessary to control outbreaks or epidemics, and shall advise the department of measures taken."

Kate Shaw:

Okay, so the Wisconsin Supreme Court majority opinion is like a parody about how textualism works, right? So the Court invokes the expressio unius est exclusio alterius canon, which basically says the inclusion or lists of some items implies the exclusion of other things not listed or expressly noted. So basically the court says nowhere in the statute did the legislature give local health officers the power to close schools. So because there is no explicit grant of the power to do that particular thing, to close schools, the court concludes that the power does not rest with these local health officials, regardless of the breadth of the language that does empower local health officials to do what is reasonable and necessary for the prevention and suppression of disease. So that's true about any discreet act that a health official might take pursuant to this broad grant of statutory authority, and without seeming to acknowledge the absurdity of resting so dramatically, not exclusively, but largely on this expressio unius cannon, the majority basically says, "Well, the words, 'Close schools.', aren't in the statute. So the power doesn't exist." It's wild.

Melissa Murray:

But the statute has a catchall clause that's expressly contemplating this kind of argument.

Kate Shaw:

Oh yeah. Yeah.

Leah Litman:

A broad grant of authority that doesn't include a specific list, obviates the need for a specific list, right? It's a reason why you don't read the specific list to exclude all other manners of actions that could fall under the umbrella of the broad grant of authority. You were completely right in describing it as a parody. I read this and I was like, "Why do you think that's right?"

Melissa Murray:

The catchall clause says, "Local health officers may do what is reasonable and necessary for the prevention and suppression of disease." Which might mean a wealth of things, including, but not limited to, the closing of schools or anything else that is unenumerated.

Kate Shaw:

Right. It's not clear to me how this logic doesn't apply to any particular act the health official wants to take.

Melissa Murray:

Like vaccinations, or yeah-

Kate Shaw:

Or anything.Nearly none of them are explicitly listed. It's just a broad grant of power. So I think by extension, no specific acts can be taken pursuant to the broad grant of power. So it's pretty nuts. And the opinion relies heavily, also to the point of farce I would say, on Scalia and Garner's Reading Law, which is a treatise, a sort of textualist tome. But it's elevated to this quasi-constitutional status as far as I can tell. It is just cited repeatedly and as something that sounds kind of like law and opinions, right?

Leah Litman:

And also in the most pompous ways. So they describe the book, which admittedly describes itself this way, as including in their treatise only those venerable canons representing, "What the best legal thinkers have said for centuries." It's just like, why would you describe your work that way? It's just...

Kate Shaw:

Well, textualism just doesn't. It's just the most immodest method, right?

Leah Litman:

That's true.

Kate Shaw:

So it's sort of like it goes with the terrain.

Melissa Murray:

And the opinion, invokes the whole code rule to note that another statute gave the Department of Health Services the specific power to close schools. And because this particular statute in question did not have that phrase, there is no authority given to the department to close the schools in this case. So no power for you because it doesn't say so, and other statutes explicitly did this. And there are lots of other peons to textualism here. So ladies, I think we have to get Rege-Jean ready some artistic interpretation going forward. So here's one. Cue music.

Melissa Murray:

As recognized since the founding of our nation, it is no more the court's function to revise by subtraction than by addition. I think Rege-Jean would have really killed that. He would've crush it.

Kate Shaw:

You did quite well there.

Melissa Murray:

I know, but I mean he would have smoldered while he did it.

Kate Shaw:

That's true.

Melissa Murray:

I mean, I might get some kindling going, but not like him. That would have set this on fire.

Leah Litman:

And like the application of the whole code rule there is just also... It makes such little sense because the grant of authority is to the statewide Department of Health Services Office, whereas the statute they're construing is about local officials. And there's just no reason to think that one implies the exclusion of the other. It's again a mess anyways. And the dissent has something to say about this. It's almost a rare time where you get some real big, progressive energy on the methods point. So we've talked a lot about how Justice Kagan has assumed the textualist mantle rather than challenging the hegemony of textualism. And that's one move and she's really great at that. But this descend focuses more on textualism's claims to primacy and objectivity. And that's a fight that I think is worth having too.

Leah Litman:

So the dissent is authored by Justice Rebecca Dallet and it first talks about the method of textualism. And it makes a point that we were just alluding to which is, to start with the obvious, Scalia and Garner's book is not the law. It's astonishing that this is a point that is worth making. But it is, given the degree to which textualists are just like, "This is the canon of textualism." And saw this in Bostock with the justices fighting over, "Which opinion would Justice Scalia have joined? That's how we know who the true textualist is." I think it's good just calling out like the absurdity of this, particularly given that, as justice Dallet notes, the Scalia Garner book conflicts with some of the Wisconsin Supreme Court's own precedent on statutory interpretation. She also goes on to say, "Even when interpretive tools are relevant or helpful, they are not gospel."

Leah Litman:

Again, I think this is really great language, because it calls to mind, again, the obsessive fetishization of the Scalia and Garner book, it goes on to suggest that legislative drafters have no idea about what the interpretive canons are based on empirical work about how legislatures work. And then I think what is, in some ways, the most fun part of the opinion shows how all of these methods and canons are misused in the majority opinion. So we've talked a little bit about the absurdity of expressio unius but then she notes that the general principle that a specific provision controls over a broader one is misapplied because that only applies when necessary to harmonize two conflicting statutes. And as we were just saying, there's no conflict between both statewide offices and local public health officers having the authority to close public schools in order to prevent the spread of disease.

Leah Litman:

She also notes that the majority invokes surplusage, noting that, well, the specific list of the public health officials activities would be unnecessary if you read the general grant to contain that authority. And she's like, "Well, you just rendered the general grant of authority complete surplusage. So that's not exactly supporting your argument either." And just on this list point, the list point drives me insane because the power to inspect schools is only given to the local officer to ensure the schools are in sanitary conditions. It's not given to them to actually prevent the spread of communicable disease. So saying the grant of that one authority excludes the power to close schools, or any power over schools in order to prevent the spread of disease, it's just like, "Did you read this? I can't tell. I cannot tell from your opinion."

Kate Shaw:

So beyond the rejoinders to the various canons that the majority uses, the descent pretty vigorously contests the majority's reading of the statute, in part based on legislative history and statutory history, which the majority does spend some time on, right? So the majority is not exclusively focused on tax, does look at the background of the statute and even the circumstances surrounding its adoption. I think that Scalia and Garner would really disapprove.

Melissa Murray:

That means it's illegal because that's the law.

Kate Shaw:

Exactly.

Kate Shaw:

So the descent notes in the aftermath of the Spanish flu outbreak the Wisconsin legislature expanded the authority from what was needful and proper to what is reasonable and necessary; notes that at least three statutes and one administrative code provision recognize that local health officer's orders may close schools. So other provisions of law that presume this authority exist. That's quite relevant. And the majority at one point says, "Well, the descent doesn't really develop these arguments very much. So we're not even going to bother responding to them." Which I feel like is kind of a tell.

Melissa Murray:

Again, I think it's also a rejoinder to the whole code reading. I mean, if you're going to look at all the codes, look at all of the codes. And there are these other statutory provisions that do reference this kind

of authority. And to be clear, the descent's rejoinder to the majority had the majority feeling some kind of way. Because the majority responded with this, what can only be characterized as a, name calling footnote. So here's a quote, "Judges who reject this textually grounded method of decision-making refuse to yield the ancient judicial prerogative of making the law. Improvising on the text to produce what they deem socially desirable results ." Quoted from Scalia and Garner Reading Law. Which is really like a Bible at this point for this opinion.

Leah Litman:

That's why it was so good that she accused them of treating it like gospel.

Melissa Murray:

It goes on to say that Justice Dallet disparages these canons because they interfere with her desired results. So activist judge is going to activate. "Contrary to Justice Dallet's policy-focused approach...", judicial activism, "... the canons serve as helpful neutral guides." And then it follows up with, "Justice Dallet distorts the words of textualists to support her rejection of the fair reading method of statutory interpretation." So I the underscore of all of this is that activist judges going to do activist stuff and all to achieve their desired ends, which is to close schools, take your freedom and have your kids in your home with you. And to be clear, I get the anxiety about having to close schools, but I also do not want to have another 15 months of living with COVID. So I'm okay with it, despite my PTSD over this last year.

Leah Litman:

Also could these textualists just come up with some new comebacks, right? Or some new jibes, like these whole... I don't know.

Melissa Murray:

It's almost as though they were given a playbook of things to call other judges who disagree with them.

Leah Litman:

Yeah. Almost. Almost.

Kate Shaw:

Right. And we didn't even talk about the completely unnecessary half of the opinion that reaches the constitutional question, despite finding this closure order.

Leah Litman:

They're like, "Yeah, we've invalidated the order on statutory grounds."

Melissa Murray:

Wait, wait, wait.

Leah Litman:

"You know what we should do next?"

Melissa Murray:

We're not activists though. But-

Leah Litman:

"We're not activists. And so we'll go ahead and invalidate it on constitutional grounds too. Let's do it and be legends."

Melissa Murray:

What is judicial minimalism if not a decision striking down something and then saying, "I will go further."

Leah Litman:

Right.

Melissa Murray:

Good times.

Leah Litman:

Law. Look it up.

Melissa Murray:

Good times.

Leah Litman:

Just doing law.

Melissa Murray:

Just reading law.

Leah Litman:

Just reading law. My bad.

Leah Litman:

Speaking of judges just doing law or acting as if that is all that is happening. We wanted to have a short, additional Court Culture segment just in case anyone whose name rhymes with Stephen Breyer is listening at this point in the show. And we specifically wanted to flag that on Hugh Hewitt's show, Senate Minority Leader, Mitch McConnell, says it's, quote, highly unlikely he would allow Joe Biden to fill a Supreme Court vacancy in 2024 if he becomes Senate Majority Leader. He also was unwilling to commit to allowing a vote on a nominee if a seat opened in 2023.

Melissa Murray:

What happens if a seat opens as early voting begins in the election, maybe around September of the election year, would that be okay?

Leah Litman:

Quote, "We'd have to wait and see what happens." The point is people... People, Steve, need to take seriously the prospect that a Republican controlled Senate under Mitch McConnell would not confirm a Democratic president's Supreme Court nominee. They are saying this and so I don't take that as just like wild speculation, horror stories. They're just coming out and saying it.

Kate Shaw:

The point is the time is now. The time is in the next couple of weeks when there is the thinnest of Democratic majorities in the Senate and who knows? Things can happen. That majority is not a sizable enough one for Justice Breyer to take his time this summer, think it over, travel, return.

Leah Litman:

Some pot roast.

Kate Shaw:

You said pot roast, but I thought it was like a hot justice summer that you were going to... I heard hot and not pot and it wasn't sure where you were going with it. Yeah, I mean, I want him to have a hot justice summer, but I want him to have it after his announcement.

Kate Shaw:

Anyway, it's the middle of June. There are a few weeks remaining, I think hope springs eternal that we will have an announcement from him by the time the court is done for the term. Me and Melissa.

Leah Litman:

We are bringing some Justice Breyer-level optimism.

Kate Shaw:

Optimism. Well, that's my rule.

Melissa Murray:

Right.

Kate Shaw:

But obviously, the stakes of delay are getting clearer and clearer.

Melissa Murray:

On that inspiring note, I just want to wish all of the students at NYU and Michigan and Cardozo and all of the law schools everywhere who are now in the clerkship hunt... Because clerkship season has officially started. So good luck to all the students. Thank you to all of the judges who have agreed to abide by the hiring plan to impose some boundaries on what has often been a pretty unstructured process. The professors appreciate it. I know the students appreciate it. And to those of you who are in the hunt, stay sane, stay calm, and we are thinking of you and hoping that all of this works out. May the odds be ever in your favor.

Leah Litman:

So that's all for today. Thank you so much to Kathryn Fink, who is substituting in for Melody Rowell, as Melody is celebrating her birthday. Thanks to Eddie Cooper who makes our music. Thanks to all of you for supporting and listening to the show. You can support the show glow.fm/strictscrutiny. Give Melody a birthday present by supporting and subscribing to the show via Glow. Thanks to our summer intern, Liam Bendicksen, who's been helping us with some research for these shows and some future ones. And thanks to the Wisconsin Supreme Court for bringing that big progressive energy to the textualist rodeo.