Intro:

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

Intro:

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."

Leah Litman:

Welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. If things feel strange to you, that may be because it is July, and we got some Supreme Court opinions and argued cases. Putting aside the term last year, which occurred during a pandemic that caused the court to delay an entire sitting to the month of May, the last time the court released opinions after the end of June was 1996.

Leah Litman:

So this year with the court expected to issue opinions in only 50 some cases, one of the lowest numbers in recent terms, we expected the court to finish in June, which meant Melissa planned some travel for today, and Kate is closing on a house. Whoops, lesson learned, don't structure your lives in reliance on the Supreme Court's past practice. We maybe should have figured this out by now, based on the Court's very clear view that stare decisis is for suckers, because they waited until July to release the final opinions, and such important opinions on the law of democracy.

Leah Litman:

So to make up for the wrench they threw into our podcasting, we demanded that fellow Voting Rights Act enthusiast, Wilbur Ross, the Secretary of Commerce under Trump, who famously and ridiculously insisted he was adding a citizenship question to the census in order to better enforce the Voting Rights Act, wink, wink, come on to sub for Kate and Melissa, and discuss with me how the court gutted his favorite civil rights statute. Alas, he's too sad about the decision to do that, so we got something even better.

Leah Litman:

I'm Leah Litman, in case you didn't realize this I'm one of the regular hosts, and I am joined today by not one, but two of the country's foremost experts on the law of democracy to help us break down the opinions from today. The first is Wilford Codrington who will be here for the first segment, breaking down the opinions with me. And then later on, we'll hear some quick thoughts from Rick Hasen. So welcome to the show, Wilfred.

Wilfred Codrington:

Thank you, Leah. It's great to be here on July one.

Leah Litman:

So I am delighted to be here with Wilfred. He is an assistant professor of law at Brooklyn Law School and a fellow at the Brennan Center. Professor Codrington is a scholar of constitutional law, election law, and voting right. He was previously the Bernard and Anne Spitzer Fellow and Counsel at the Brennan Center

for Justice at NYU, where he focused on voting and election security. He is also the co-author of the forthcoming book, The People's Constitution: 200 years, 27 Amendments, and the Promise of a More Perfect Union, which examines the history of constitutional amendments and the tension between the overall progressive arc of constitutional change and the conservative grip on the broader conversation about the constitution.

Leah Litman:

So Wilfred, I guess, first, I want to ask you, why do you think the justices waited until July or couldn't release these opinions until July? Before today, my theory was, they're pissed that they can't do their usual summer trips to Europe, because of the pandemic, and they want it to ruin everyone else's summers too.

Wilfred Codrington:

Yeah. Perhaps that's it. We're all looking forward to our July 4th break, so maybe they wanted to give us a little something to chew you on over the long weekend. Maybe it has something to do with a forthcoming of retirement announcement. I don't know how you would tie one to the other, but there's a whole array of reasons that it could be, but they did drop something on us today.

Leah Litman:

My theory in light of what they did drop on us today is that Sam Alito was complaining that Justice Kagan was being too mean to him in her dissent, in Brnovich, and accused her of quote, "Trying to cancel him," and that caused some delay, but let's not get too ahead of ourselves. So let's just dive into Brnovich, which, of course, is the case that I was alluding to. This is a major Voting Rights Act case we've been watching and have talked about before, but to appreciate the significance of the case, got to have some backgrounds, so bear with me listeners.

Leah Litman:

The case involves Section 2 of the Voting Rights Act, which prohibits two kinds of voting restrictions. The first are those that intentionally discriminated on the basis of race. And the second are those that result in selective disadvantages on the basis of race. That is those that have a disparate negative effect on voters of color.

Leah Litman:

This case is the first vote denial case under Section 2 that has reached the court. The court has previously addressed redistricting cases, but this case involves a challenge to laws that actually prevented people from voting or prevented counting their votes. The first voting restriction was an Arizona prohibition on counting provisional ballots that were accidentally cast in the wrong precinct on election day. And the second was an Arizona restriction that prohibits the collection of ballots by most people who aren't the voter.

Leah Litman:

What was on the table when the court heard this case, for possible theories about what Section 2 might mean? If you remember from argument, there were a few ones bubbling around. The first was the idea that only those laws that result in a "substantial disparity," rather than just any disparity violate Section 2. The second was the so-called equal opportunity theory. The idea that as long as some of a state's

voting policies or procedures remain equally open to everyone, it doesn't matter if a state shuts down some voting practices or procedures that are more used by racial minorities. The third was almost like a safe harbor type theory. The idea that longstanding voting restrictions or common voting restrictions can't violate Section 2.

Leah Litman:

So Justice Alito had the opinion for the court. This was expected, in light of the other opinion assignments at the time. And I think honestly, after oral argument, we were all lulled into a sense that whatever the court was going to do in upholding the Arizona voting restrictions, it wasn't going to do something super crazy and embrace the most ridiculous version of these theories. In particular, the equal opportunity theory, which would just completely gut Section 2, because if the prospect that some of the state's voting policies or procedures remained open to everyone was enough to defeat a Section 2 claim, then it would be really hard for any Section 2 claim to prevail.

Leah Litman:

I think this opinion is worse than I was expecting, because it seems to embrace all of the theories that were being advanced to limit Section 2, and gives states and conservative judges a variety of arsenals to rule against Section 2 claims. Is that kind of how you read Justice Alito's multi-factor analysis?

Wilfred Codrington:

Yeah. It's actually quite interesting as you were going through the three, I was thinking the same thing. If somehow three entities can sort of merge into one or have some sort of offspring, that's what you get. He kind of just sprinkled a bit of that into his analysis. And the analysis we're talking about is this totality of circumstances inquiry. And for the totality of circumstances inquiry, typically, what courts would look to was the 1982 Senate report. These factors that kind of, in sort of actuality, did pertain more to vote dilution claims, most of them did. But without Section 5, which was gutted, Courts started looking towards this and seeing how we could apply those to vote denial cases like this one.

Wilfred Codrington:

So Justice Alito came with sort of five other things to fit into this totality of circumstances inquiry. One was. The size of the burden imposed. Another was, did the degree to which the voting rule departs from the practices that were in place in 1982. I find that one to be particularly problematic.

Leah Litman:

Oh, yeah.

Wilfred Codrington:

He says. A third one is the size of the disparities rule that's impact on minority voting. Another is, to consider the opportunities provided by the state to vote. And then the last one is, the strength of the state's interest served. I'm just going to start by saying, I find this new test problematic for a couple of reasons.

Wilfred Codrington:

First, because he starts with this sort of textual reading of the statute. So he goes into the dictionary definition of what is open and what is equal and what have you, and then he creates this test, which is

not coming from the dictionary. Second, as I said, we have some factors to be considering already in the totality of circumstances. And third, it almost seems as if he's created these factors, having already decided the case. Because if you read them, there's not one that favors the plaintiffs in the case, in the first instance. So to me, that's just like this three prong smack in the face, three time smack in the face.

Leah Litman:

Yeah. I mean, I think that's exactly right. And Justice Kagan and her dissent characterize this multi-factor test in the same way that you did, and that I read it as, which is, think of the majority's list as a set of extratextual restrictions on Section 2, methods of counteracting the law Congress actually drafted. And that's essentially what it does. It again, identifies a bunch of ways that plaintiffs could lose Section 2 claims. She also kind of calls it a non-test test, again, because it is just this list of factors that courts can invoke to rule against these claims.

Leah Litman:

So maybe we can go through each of the factors. You mentioned that the presumption of validity for voting restrictions that were in existence in 1982 was particularly problematic in your view. But maybe we can just go through each of the factors and talk about how they fit into Section 2 claims, and what they might mean for Section 2 claims going forward.

Leah Litman:

So the first one was, as you noted, the extent of the burden, whether the disparity is substantial or whether it is minor. This is something we had talked about previously. Part of what is annoying about this theory is, of course, as Justice Kagan notes in dissent, elections are fought and won at the margins. Sometimes there can be small differences that will make all the difference. Arizona statewide elections are sometimes won by 10,000 votes. So the fact that one of these voting restrictions would have tossed out over 3000 votes is not something just to pooh-pooh at. It's just a pretty concerning thing to me to just have these disparities written off, given that the cost to the state of actually counting these votes, given that they are again, 3000 would also not be substantial, like under this logic.

Wilfred Codrington:

I think you're starting to get the sense that I'm bothered by this opinion. But, yeah, so-

Leah Litman:

You're in the right place.

Wilfred Codrington:

... we're talking about Arizona here. And this is the sort of size of the burden imposed and sort of pushing away the idea of things that occur on the margins don't matter. Arizona was one on the margins in the last election. It is just ironic that he would sort of dispense with the idea that the margins don't... and the margins matter, so that, to me, is a little problematic. It's also problematic because it almost reads as if he didn't read the dissent. I mean, I wasn't a Supreme Court clerk, but from what I understand, these drafts circulate amongst people. So it's like there was nothing done to even sort of rebut or prebut that idea that it doesn't matter.

Wilfred Codrington:

To me, it also bothers me a bit, because it disparages the idea of democracy in the first instance. And even more, if we're talking about votes on the margins don't matter, getting rid of these sort of marginal votes don't matter, and we're talking about marginalized communities. There's something that just is unsettling about that. We're already talking about minority populations, so by definition communities that cannot win elections on their own. So they need every vote to matter. And if you just say these votes that are happening on the margins by these marginalized communities, don't matter, then you're just kind of undermining the idea of the Voting Rights Act in the first.

Leah Litman:

Yeah, absolutely. And I think, in particular, that factor in conjunction with, I think it was the third factor that was part of the test, which was the size of any disparities on particular racial groups. And in one remarkable passage on that factor, Justice Alito basically says, "Well, to the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations will have an effect that looks like it is on the basis of race."

Leah Litman:

And this passage, to me, was particularly insane, because it is on the cusp of a revelation that, in fact, racial disparities are systemic, that we have a problem with systemic racism. And because there are so many glaring disparities associated with race, and yet Justice Alito's conclusion from that is, and so the state could just as easily like discriminate based on employment and can capitalize on these racial disparities, and that's just fine. And to say that is kind of the tenor of the Voting Rights Act is quite a step for me, but it is just an odd perspective on the world also.

Wilfred Codrington:

Are you calling him Trollito here? We have systemic discrimination and systemic racism that occurs that affects voting, and there's no sort of connection between the way those things work. Yeah. I read that and I said, "Okay, again, let's think about this." The connection between wealth and education and employment, obviously, impact how we're going to vote. I would take that for granted. But your inability to vote is going to impact your ability to gain education and wealth and employment. And it's just like, those things are completely disconnected for him.

Wilfred Codrington:

But the other part of that is that, that plays into the totality of the circumstances.

Leah Litman:

Yes, right.

Wilfred Codrington:

So we're creating this whole new totality of the circumstances tests, which are ignoring these things that are clearly, not only clearly because they just make sense, but clearly, because these were things that were mentioned in the congressional reports, that you are supposed to take into account these historical and socioeconomic factors. And it's just like, that's not even acknowledged at all.

Leah Litman:

I think that that completely relates to a point you made earlier, which is discounting the "marginal" votes of marginalized communities, and here Justice Alito is basically like, "Well, okay. Yeah. The group that is burdened is also burden when it comes to access to employment, wealth, and healthcare, but so be it, might as well stick it to them too on voting. And that's just kind of the way things are." And again, not really kind of an attitude of a Justice who appreciates the history of the Voting Rights Act, or as you were saying, the kind of congressional history, which appreciated that access to voting and voting rights was a mechanism to correct for other types of systemic disparities. But, again, Sam is going to Sam.

Wilfred Codrington:

I just want to add, you said, he doesn't appreciate the history. He was mad at the history. He was mad at Justice Kagan for going into the history, as if this shouldn't inform the debate.

Leah Litman:

Yes. No, you're right. He specifically takes issue with the fact that Justice Kagan recounted the history of voter suppression and racial discrimination in this country, as well as the history of how the Court has weakened the Voting Rights Act, and Justice Alito called that, like, "Irrelevant and yada yada yada." And he was so angry about that. He is angry even when he is winning. He has an emotional register that ranges from angry to 76 page dissents that crash the US reports. And that is the kind of spectrum that we're working with. And I guess we just got angry here.

Wilfred Codrington:

Quick math says, according to Justice Alito, "About 80% of Justice Kagan's dissent is irrelevant"-

Leah Litman:

Right. Right.

Wilfred Codrington:

... just by the page count.

Leah Litman:

Right. Yes. So then we should get to the other factors that Justice Alito invokes, which I think are arguably even more problematic than the ones we've already taken issue with. The first, as you noted, is this presumption that voting restrictions that existed in 1982 are somehow completely fine. What? The whole point of Section 2, as well as this 1982 Amendment, was intended to disrupt the status quo and outlaw entrenched forms of voter suppression, not to lock them in for perpetuity. And also, this theory will make it impossible to challenge a lot of the recent rollbacks of expanded access to voting.

Leah Litman:

So think about, for example, rollbacks to absentee voting or early voting. Well, if those things didn't exist in 1981 or 1982, I guess, it's okay for states just to knock them out. It's a circular theory that has no basis in the statute and is very opportunistic, as you were suggesting. It is just going to knock out Section 2 claims, right and left.

Wilfred Codrington:

Yeah. A 100% on that. I mean, the problem that we're going to use 1982 as the baseline, as if history doesn't move, is, well, one, the problem is that there was rampant discrimination in voting then. So why just start there. But second, we evolve in the ways that we make our democracy accessible. And if one thing doesn't point that out, it's the pandemic this year. Drop boxes weren't available in 1982. But by his logic, if everybody made that available and then they just take them away and they impact people of color more than everybody else, because for example, you want to put one in Harris County, Texas, but one in every other county, irrespective of the size, that is okay with him. And to me, that's appalling, and it's insulting.

Wilfred Codrington:

But then he also does this thing where he says like, he kind of moves away from the fact that 1982 is the baseline. He says, "It should be the baseline," but then he says, "it shouldn't be, or all what I'm saying is not to say that it is the baseline." And then he goes back and says, "Basically, yes, it is the baseline." And I'm not sure why he's doing that, if he's not comfortable saying what he's saying wholeheartedly or, or something. But there was just sort of like this movement of his own baseline of 1982 being the baseline, which I'm just really troubled by.

Wilfred Codrington:

Again, we make voting easier as time moves on. It's going to be because of technology, it's going to be because of outside circumstances. And if we want to say the baseline doesn't move with that at all, or the baseline just stays where it was 40 years ago, we're going to be in trouble. We're going to lag throughout the country. We're going to have disparate systems and we'll lag behind the rest of the world. It's just, it's troublesome.

Leah Litman:

Also, I thought Shelby County said, "History didn't end in 1972 or 1982," but I guess it did when it comes to Section 2, but doesn't for Section 5. I mean, whatever.

Wilfred Codrington:

Whatever. Whatever is right.

Leah Litman:

I know. I don't mean, whatever, in dismissing this case. I think this case is an affront to Section 2, it is an affront to the protections of the Voting Rights Act, it's an affront to the multiracial democracy that we are attempting to build, but the analysis in this opinion is frankly embarrassing.

Wilfred Codrington:

It's embarrassing. I just want to go back quickly to the fact that he got so mad at Justice Kagan for just sort of laying out the history. And it is so clear that we are dealing with Section 2, which is the most potent thing we have left of the Voting Rights Act, because of what the Supreme Court did in 2013, and that seems to bother him. And that's why I think, why he starts out with a history that is so bereft of what actually went on and get so mad at that time. And then he stays in history. He stays in 1982, which... Yeah, it's embarrassing. It's embarrassing.

Leah Litman:

Yeah. That was, in his defense, the year before I was born, and I think he's been like a little bit angry with all the nicknames I've given him. So I understand the impulse to turn the clock back to 1982, but, Sam, that's not based on the statute.

Leah Litman:

So another, again, factor that he kind of tosses out as a way to defeat Section 2 claims is, I think, basically, the equal opportunity theory that the Arizona Republican party was arguing for. Because Justice Alito says, "Where a state provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means." And again, we mentioned how this might apply to restrictions on early voting or absentee voting, when in-person voting remains available, or imagine a state does away with Sunday voting, but retains Monday through Saturday voting. All of a sudden, you are forced to have to analyze the remaining voting restrictions and prove that the system, as a whole still, has a disparate effect.

Leah Litman:

And that I think will be extremely detrimental to Section 2 claims going forward, because... Especially given how like Justice Alito applied that theory here, he basically said like, "Sure, the Arizona system casts out many more out of precinct ballots than any other state, but the state offers other easy ways to vote, and so that can't be a problem." And that logic and that analysis is just going to be very difficult in Section 2 litigation going forward.

Wilfred Codrington:

Yeah. The more ways you make it available for people to vote, the more you can discriminate in any of those particular ways of voting. That to me, that the logic... I mean, that's the logic, and he's okay with that, because that's exactly what we're dealing with here. We're saying that early voting is available, you can mail-in your ballot. You can drop it off. You can have a postal worker bring it in. You can have your mom bring it in, what have you. But if one of those ways become discriminatory, let's say, that all black people's mothers are dead or something, so you have one last one. And we know that, so that's fine. Or all black people, they're further away from post offices, so that's also okay. But that's exactly what we're dealing with.

Wilfred Codrington:

The specific issues we're dealing with here are the outer precinct voting and the ballot collection. But because we know that minorities are making more use of the ballot collection, really, which became clear in the debates of... I'm getting ahead of myself, I'm going to start talking about the intent part of this to, which Justice Kagan did not touch on. But it became very clear in the debates that this was a means that was used more by Native Americans and people of color, because they don't have access, but that's okay, because you have these other alternatives for voting.

Wilfred Codrington:

And that is really problematic. It's problematic on that level itself. It's also just problematic because it ignores the language of the law. It talks about political processes and participation in the political process, not as if it's just one thing, it's any sorts of modes of participating in the election whether their primaries or the general election. So if you cut off one way or you make it substantially more difficult, one way, and every other way is sort of even, you are still discriminating against the people who have a more difficult time to use the other way.

Leah Litman:

Yeah. Then we get to the last factor, which is, even if you find that a law does create a disparity or even a substantial disparity in the whole operation of the system, you can find that the state's interest behind this law outweighs that disparity. And here Justice Alito writes into the opinion that fraud is a real risk that accompanies mail-in voting, even if Arizona had the good fortune to avoid it, what does this mean?

Leah Litman:

Even if a state has no evidence that fraud exists, even if it has no evidence that it's loss solves an actual problem, that hypothetical interest is enough to outweigh actual evidence of discriminatory effects. And here, the Samsplaining seems to be that like the real untold story of the Voting Rights Act is that it was enacted to prevent black people from voting based on spurious claims of voter fraud. This is not the Voting Rights Act or any Voting Rights Act with which anyone would be familiar, but that is baked into the opinion. And that becomes part of his analysis.

Wilfred Codrington:

Yeah. The obsession with the phantom voter fraud is real. And to me, it just becomes more pronounced in every election case that comes from the court. And the problem is, there are no facts to support them. So what they'll do is they'll look for the latest instance where they can find something. Now, this one cites North Carolina's election fraud in 2018, as if that's what the Voting Rights Act was concerned about. And then on top of that, it's not just the phantom of voter fraud, it's also like, there's this passing line about, "Oh yeah, well, intimidation could also be a state interest." Well, what are we talking about? There's nothing about intimidation here. Who being intimidated are we actually talking about?

Wilfred Codrington:

Really the crux of that argument is on the voter fraud, and it just sort of goes to this other thing to like throw out these potential other state interests that might bolster a state's decision to enact laws that discriminate against other people. The voter fraud fallacy is just real in their minds. It is not a thing. And yet it finds its way in every voting decision.

Leah Litman:

Yeah. So you've already alluded to this, so maybe we can skip ahead to the portion of the opinion on intentional discrimination, because the US Court of Appeals for the Ninth Circuit had also invalidated the prohibition on ballot collection on the ground that the state had enacted it in order to intentionally discriminate on the basis of race. As you mentioned, there was, basically, uncontradicted record evidence that outside of Arizona's two largest counties, a large proportion of the Native population lived in areas that were far away from post offices. And so, therefore this restriction would have a disparate impact on their ability to vote. And a former Republican state Senator had, basically, lobbied for this bill by touting non-existent threats of voter fraud. And then putting together a ominous looking surveillance footage of an apparently Hispanic man who the video called a thug, purportedly stuffing a ballot box.

Leah Litman:

And based on that evidence, as well as, I think the general history of discrimination on the basis of race and voting in Arizona, the Ninth Circuit concluded that this was intentional discrimination on the basis of race. Previously the Supreme Court actually, in an opinion by Justice Alito, Abbott versus Perez from

2018, had made it really hard to prove that voting restrictions were intentionally discriminating on the basis of race.

Leah Litman:

But this opinion, I think, goes even further and makes it even worse, because it suggests that partisan motives. That is a desire to hurt political opponents and entrench your own political power, are completely separate from and independent of racial motives. So the mere fact that someone was trying to enhance their own political power doesn't show that they were discriminating on the basis of race. And they also say that even with that evidence that a state Senator was engaged in, basically, very obvious racial motivations for the law, the fact that other legislatures "engaged in serious debates" is enough to sanitize the law. And those two parts of the court's reasoning, I think, will also make it difficult to prove intentional discriminations outside of disparate impact claims under the Voting Rights Act as well.

Wilfred Codrington:

This intent part really, really bothers me. The fact that you have this obvious video that it's, let's call it what it is, it's a racist video, right?

Leah Litman:

Yep.

Wilfred Codrington:

And it's trying to imply that you're going to have these Latino men come steal your ballots and change the results of the election one way or the other. That you can have that as the basis to start some debate, and then somehow the debate becomes sincere, is problematic to me. And so just stop there. We have something that is obviously racist. It foments debate, and that debate now becomes awashed of race. I don't understand how that's possible.

Wilfred Codrington:

But then there's this slight of hand he has where it does move from race to partisanship, in the next paragraphs go back to race a little bit, but really it just says, "We can move quickly from race to partisanship," completely ignoring the fact, and I know that conservative loved to do this, but ignoring the fact that minorities vote overwhelmingly for Democrats. And that is just a truism. And to me, that's one of those things that we should also be considering in totality of circumstances. This is part of our history. There's a reason why minorities vote for Democrats more often than not.

Wilfred Codrington:

And therefore, when we talk about race in elections, we're going to be talking about party in elections. And this does by just sort of blending the two, as if, one doesn't exist anymore, that does make it harder to prove intentional discrimination. I'm not sure what that means for the future. I don't think there was enough ink spilled on it here to tell us, but it just makes me very nervous for the next Section 2 case to come out of the Supreme Court.

Leah Litman:

Yeah. So I kind of want to read some of my favorite excerpts from Justice Kagan's dissent, which was really powerful and had some passages that I think are worth highlighting. So in particular, the opening notes that, "If a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals, democracy and racial equality. And if a single statute reminds us of the worst of America, it is the Voting Rights Act, because it was and remained so necessary."

Wilfred Codrington:

It is the best of times, it is the worst of times.

Leah Litman:

Right. Exactly. And she also, I think, calls out the Court's hostility to the Voting Rights Act. She says, "Yet, in the last decade, this court has treated no statute worse. To take the measure of today's harm, a looked at the Acts passed must come first." She also explicitly invokes several times Justice Ginsburg's dissent in Shelby County. She notes studies that have suggested that the Court's invalidation of Section 5 actually led to some of the voter suppression laws that have been enacted since then. She also has some very memorable footnotes and digs at Justice Alito. So she says, "The majority brands this historical account, part of an extended effort and misdirection, I am tempted merely to reply, 'Enough said about the majority's outlook on the statute before us.'"

Leah Litman:

She calls the majority's opinion, " a law-free zone." She says in a single sentence, the majority, "Huffs that nobody disputes various of these points of law" that she just went over and her descend. "Excellent," she says, "I only wish the majority would take them to heart." And she ends with, "This court has no rights to remake Section 2." And she basically accuses, rightly so, of the Court declining to read Section 2 for what it says and what it was intended to do, because the Court believes that to be too radical. That is, it is too radical for a federal statute to actually invalidate quite common measures of voter discrimination. And she says that's what's happening.

Wilfred Codrington:

Right. It's really poetic in a way. And it's also sort of like there are parts that are kind of tongue in cheek. In some ways it reminds me of her Seila law dissent, where she obviously is the one who commands the knowledge here and just like lays it out, knowing that it's a dissent. She throws at them some of the things that they like to sort of throw at us, the dictionary definition of abridgment. If you =.

Leah Litman:

Right.

Wilfred Codrington:

... forget that it's not only about vote denial, it's about anything that abridges the right to vote. And she also, I think, and maybe this is not for everyone, she pays homage to justice Ginsburg, right?

Leah Litman:

Yes.

Wilfred Codrington:

Just throughout, it is laced with a beautiful lines that she has served up, whether it's in Shelby or in other cases. And so I think it's important, in many regards, but, yeah, it is laced with zingers. But if you read through it reads beautifully, because it is just so methodical. And really irrespective of what Justice Alito says, I think that that history right upfront is just so important.

Leah Litman:

Oh, yeah. It's absolutely important. I mean, you can't, for example, decide what Section 2 is referenced to equal opportunity, for example, means without consulting what the Voting Rights Act was enacted to do. And the congressional reports that mentioned, the disparities in other areas we were talking about, or the hope that remedying disparities in voting would remedy other kinds of disparities. And so thinking about that history is part of what makes her competing textual moves all the more persuasive.

Wilfred Codrington:

I agree. I just wish that her analysis was the majority.

Leah Litman:

As do I. But I would, maybe as we are wrapping up our discussion of Brnovich, like to extend another invitation to Elena Kagan to join the podcast, maybe to make some Wilbur Ross jokes with me. I mean, in that opening passage that I read. Where she says, "Because it," that is the Voting Rights Act, "was and remains so necessary." Is that a necessary to enforce the Voting Rights Act reference? A part of me wondered. Maybe I just want to believe these things and I'm searching for meaning in a very dark way.

Wilfred Codrington:

Oh. With the law-free zone quote, where she says, "Every once in a while, when its lawmaking threatens to leap off the page, it thinks to sprinkle in a few random statutory words," that's searing.

Leah Litman:

Yeah. I know, It cuts deep. This is why I think Sam went to the Chief's office and was like, "You need to make her stop being so mean to me, this is so mean." And I don't know, two days ago it is possible that once again, the Chief Justice just set this day as the last day on the Supreme Court's calendar, because he's like, "Elena, you cannot keep adding more to this opinion. You have murdered us a million times over, and we're still not going to change our minds."

Wilfred Codrington:

They don't have to.

Leah Litman:

No. Yeah, no. This is like the classical embodiment of power over reason, power over law. There are no responses to, basically, anything Justice Kagan says, and it just doesn't matter. Though, hopefully, her dissent is a call to action for those who might be thinking about whether it is worth enacting new voting rights protections, and maybe how to do so.

Wilfred Codrington:

She just talks about how this is an era where democracy is really at stake. And I mean, she calls out the, the spate of bills that are going through state legislators. And she, obviously, calls out the Supreme

Court for its role in it too. So she's hoping that someone's listening. I am hoping that someone is listening.

Leah Litman:

Me too. Me too. So maybe we can just briefly recap Americans for Prosperity versus Bonta, which was the other law of democracy case released today. This is the case that involves a California regulation that requires certain non-profits to provide a list of their donors to the government. The IRS also has this requirement. The records are not publicly disclosed, although California, in the past, has had bureaucratic hiccups and oversights that resulted in the disclosure of some donor information.

Leah Litman:

So Americans for Prosperity argued that, "They have a First Amendment right to keep their donors anonymous, because publicity creates a risk of harassment to the donors." California, for its part, argued, "The regulation was necessary to ferret out fraud and to ensure that charities were, in fact, sticking to their missions. And also to verify the accuracy of organization's financial reports."

Leah Litman:

So we had been watching this case, in part, because the court had previously laid out view that these disclosure and reporting requirements were basically a way to counter act the Court's invalidation of other campaign finance restrictions. That is, the Court had previously adopted a super narrow definition about what constitutes corruption and said, "The way to police corruption is not by restricting campaign donations or campaign contributions, but instead to make that information public. To give information to the voters so that they can police the existence of corruption."

Leah Litman:

And in Citizens United, the Court upheld eight to one disclosure requirements. This case, I think, marks an important turning point in the Court's jurisprudence, where in a 6-3 opinion by the Chief, the Court invalidates this California regulation, basically, doing a few things that could signal other disclosure reporting requirements being invalid as well.

Leah Litman:

First, the Court says, "The legal tasks that courts apply to these restrictions is exacting scrutiny. And that this requires these requirements to be narrowly tailored to achieve the government's asserted interest." This is important because the Court then applied that standards to require California to demonstrate that it had actually used the reported information in actual prosecutions and enforcement proceedings. And because it hadn't done so, the Court said, "Well, you haven't shown this reporting requirement is actually necessary to achieve your interests."

Leah Litman:

The Court also upheld the First Amendment challenge, even though there was pretty generic evidence about the risk of harassment. That is, there wasn't information that like any particular donor might be subject to harassment. It was more just that the organizations themselves and causes they were associated with were subject to public criticism. And so the combination of those two things, in the majority opinion, could facilitate future challenges to other disclosure requirements or reporting requirements as well. Justice Sotomayor wrote the dissent for the three liberals and said, "The court is

basically putting a bullseye or target on other reporting and disclosure requirements and making them easier to challenge."

Wilfred Codrington:

Yeah, it's strange to me, this opinion's strange to me for a couple of reasons. One is that we could have just really spoken about California and as applied. If you have a problem with the fact that California had bureaucratic problems in keeping the information confidential, then we could have tailored the case specifically to them, but this is broader than that, so that's problematic. It's problematic to me when you compare this case to the case that we were just talking about, that this is not a narrowly tailored relationship between the attorney general's stated interest and what happens.

Wilfred Codrington:

Well, how would that fit in the other case? What if we really want to use this exacting standard in the last case, and said, "Arizona hadn't used a narrowly tailored approach to actually combat voter fraud," which is the sort of reported end that they were trying to achieve in enacting the two policies.

Wilfred Codrington:

And then third, they just seem to be talking past each other, what this whole exacting scrutiny is. Which I have to admit for my con law class, my students this semester, I gave them a question about the standards of scrutiny. Good, bad, what would you add? Whatever? And I can't tell you how many of them just said there is no three tiers standard of scrutiny. And the fact that the court just adds these other ones, and it just becomes so difficult to know exactly what you're talking about, even if you are sitting in the same room, in the same building with each other, trading drafts with each other. We're not even talking about the same thing anymore. And so, I see that as problematic. It is important to know that this was not specifically about campaign finance, but it's also important to know that this could easily translate into a rationale that would eviscerate disclosure laws in the campaign finance context.

Leah Litman:

Right. If exacting scrutiny applies to all disclosure or reporting requirements, then a state or the federal government would also have to show that it actually uses the information that is reported or disclosed to further some interest. And perhaps the court might apply a looser version of that standard in campaign finance cases, similar to what it has done previously in cases like Buckley, but it's also possible, they will instead, use the Americans for Prosperity version of that standard.

Leah Litman:

And I'm so glad you actually made the comparison to Brnovich, as far as using this narrowly tailored requirement to achieve the government's purposes. Because in fact, in Brnovich the court explicitly rejects the idea that the state has to use the least restrictive means to achieve its purposes. And instead, can enact voter restrictions that result in racial disparities to achieve its purpose. Even if there might be alternative ways to achieve its purpose, that don't result in racial disparities. And so it's interesting to put those two things in juxtaposition with one another and see what rights are favored and what rights aren't.

Wilfred Codrington:

Right. And, while we're talking about race, can I just say that I really think this whole chilling effect rationale is just so exaggerated. And I think it is so unfortunate to make the comparison of these Koch Industries, to the NAACP of the Civil Rights era. The sort of repercussions, at worst, that the donors to Americans for Prosperity are likely to face are far from that, which Medgar Evers faced for being a member of the NAACP in the 1950s and '60s.

Wilfred Codrington:

Americans for Prosperity, they may face the shunning that Alan Dershowitz faced in Martha's Vineyard, but they're not going to be gunned down in their driveways, when they're going out to take out the garbage or whatever. That is just, it really... It's an insult to history. It's an insult to American history, and it is insult to the real rationale behind the First Amendment. I'm annoyed, I'm so perturbed by this.

Leah Litman:

Yeah. It was especially annoying to see these two cases released in tandem to one another, in part, because of the contrast, you've already drawn. In part, because the Court is making it easier to essentially contribute an unlimited amount of money to political causes you want than to actually participate in the political process by voting, and that does not seem to be the right way to think about what rights lie at the base of a constitutional democracy. But it is, also, because in this AFP case, and we talked about this during the argument, the Court is heavily invoking the NAACP cases from the 1960s to say that the threats faced by conservative political donors are similar in kind to those faced by NAACP members in the 1950s and 1960s. And this is just not true, mean Twitter comments or people deciding not to buy particular products is just not the same thing.

Wilfred Codrington:

There's the stalking-horse in Brnovich about this being a federal... them trying to stop a federal takeover of elections...

Leah Litman:

Yes.

Wilfred Codrington:

... away from the states. If there is anything that is in the province of states, it is charitable trust law. That is a creation of state law, and the enforcement of their laws by attorneys general of the state that is in their province. So now, they can't even set out their own regulations to ensure that these organizations are actually carrying out the purposes for which they've been established. That was maybe... Again, you asked why they released them on July one, why they released them together, maybe it was just to make you and me really, really mad by all the comparison.

Leah Litman:

It's to trigger the libs, that is a definite possibility. It's a Trollito move or a Peaklito move, not quite sure what persona, but one of the two. So any other kind of thoughts on either opinion before we wrap up?

Wilfred Codrington:

They were released today, I'm still trying to put my thoughts together. Those were some initial ones, I may want to talk again about my revised thoughts in time, but right now I think I'm going to go take a shower.

Leah Litman:

Well, that sounds great. You are always welcome to revise your takes, and we would love to have you back on sometime. Thank you so much to Wilfred Codrington for joining us to give a same day break breakdown of the Courts two major and end of term law of democracy cases.

Wilfred Codrington:

Of course, this was fun.

Leah Litman:

And now we're going to get some quick additional reactions from Rick Hasen, a Chancellor's Professor of Law and Political Science at the University of California Irvine. Rick runs the Election Law blog, and it's really one of the nation's foremost authorities on election law and voting rights. You may see or hear or read him today on MSNBC, CNN, the New York Times or any other number of places where his commentary is in such high demand.

Leah Litman:

He is the author most recently of Election Meltdown: Dirty Tricks, Distrust, and the Threats to American Democracy, and also the author of the forthcoming Cheap Speech: Savings American Elections in the Disinformation Era. Welcome to the pod, Rick.

Rick Hasen:

Great to be with you. Long time fan, first time caller.

Leah Litman:

Long time recipient of several of our voting rights related t-shirts as well. So let's start with Brnovich, I guess the first question I want to ask is a compound question, which is how sad do you think Wilbur Ross is that his favorite Civil Rights statute has been so greatly weakened by the Supreme Court?

Rick Hasen:

Once I saw that Justice Alito had the majority opinion in this case, I knew that it was going to be a day that conservatives were going to love and liberals were going to hate. And it really is an evisceration of Section 2 of the Voting Rights Act, in the context of vote denial cases. That is, not redistricting cases, but cases where the claim is that minority voters have a harder time registering to vote or actually voting.

Leah Litman:

So, I guess, could you expand more on that, and specifically compare it to the equal opportunity theory that some of the litigants were raising as a way to limit Section 2? The equal opportunity theory was, as we noted on our preview and previous episodes, the idea that so long as a state's voting policies remained theoretically open, in some capacities, to a voter, then restricting alternative ways of voting couldn't violate Section 2. So to make that more concrete, if, theoretically, voters could vote in person,

then a state doing away with early or absentee voting wouldn't violate Section 2, even if that had a disparate impact on voters of color.

Leah Litman:

Now that's not explicitly or formally like a uniformed theory of Section 2 that the Court adopts, but I think Justice Alito kind of does incorporate parts of that into the standard he announces for Section 2, and his application of the legal tests that he announces bears some resemblances to that. So could you explain more about why Justice Alito's opinion is an evisceration of Section 2?

Rick Hasen:

I think the easiest way to understand this is to contrast what Justice Alito did with what Justice Kagan wanted to do in the dissent. Justice Kagan said, "The cornerstone here should be disparate impact." That is, you should look at a law and ask, do minority voters have a harder time voting because of this law? So if you're a Native American and you're living on a reservation in Arizona, you're going to have a harder time voting according to the evidence, if you can't have third party ballot collection, so-called ballot harvesting, because there's not regular mail collection and people live far distances. That's a pretty good place to start with figuring out whether or not minority voters have less opportunity than others to participate in the political process and to elect representatives of their choice, which is the language of Section 2 in the statute.

Rick Hasen:

Justice Alito, says, :No, no, no, it's not about disparate impact." And then he goes through just kind of a whole litany of ways in which voters who have some chance to vote are not deprived of an opportunity, even if their preferred way of voting is now harder, and even if, overall, it's harder to vote in the state than it used to be before. For example, if it's just a usual burden of voting, whatever that means, then that's not subject to a Section 2 challenge. So we're going to have lots of litigation over what a usual burden of voting is. Or if the state says that the law is necessary to prevent fraud, the state doesn't have to actually prove that fraud is a real problem, because it shouldn't have to actually go through those paces, but minority voters have to prove that the law imposes a severe burden on them.

Rick Hasen:

This is very much parallel to what the Court did in the 2008 case called Crawford versus Marion County Election Board. And in that case, the court made a similar move when restrictive voting rules are challenged on a constitutional basis. Plaintiffs have to come forward with a ton of evidence that they have overall been really restricted in being able to vote. And yet the state can just assert an interest in preventing fraud or administrative convenience as enough to potentially defeat it, unless it's a really severe burden. And so, as I was going through the majority opinion, it was hard for me to think of any law that's being challenged that would flunk the majority's test. That's what I mean by an evisceration.

Leah Litman:

That's what I was just about to ask you. Because in the wake of Shelby County, the very conservative US Court of Appeals for the Fifth Circuit did uphold a Section 2 challenge to Texas's voter identification law, finding that it unlawfully resulted in disparate burdens on voters of color. And I guess my question was going to be, do you think that conclusion or the Fifth Circuit's analysis holds up in light of Brnovich? And/or do you think any of the recent wave of voter suppression laws, like the one in Georgia, could stand a chance of being invalidated under Section 2, in light of what Justice Alito said in Brnovich?

Leah Litman:

I mean, my concern is Justice Alito gave, what seemed like, a host of factors to be deployed against Section 2 lawsuits, such that a court in a case challenging, let's say, restrictions on Sunday voting, could say, "Well, Sunday voting has always been a tradition or wasn't that common in 1982, so that's a way to kind of rule against that lawsuit," or, "The rest of the state's voting procedures remain open to voters, the other six days a week. And that works just fine for a lot of voters, so who cares if it doesn't work great for this number of voters of color." And it just seems like that type of analysis will be fatal to all of the Section 2 lawsuits that could be coming up or that we've seen before.

Rick Hasen:

So I think that's mostly right. I think that the whole reason why voting rights plaintiffs did not want this case before the Supreme Court, and why many were upset that the Democratic party pushed this case, relatively weak cases, in the lower courts plaintiffs were having some success bringing these lawsuits. The very strict Texas voter ID law was found to be in violation of Section 2 by the Fifth Circuit, as you mentioned, which was the most conservative courts in the country. Texas then tweaked its law to make it a little bit less strict, and then the Fifth Circuit upheld it, it showed kind of the statute was working. There was a test, the lower courts had developed a test, that test is not even mentioned in the Supreme court's majority opinion. It was kind of like a three-part test or two and a half part test.

Rick Hasen:

Now, it's being replaced by something, which I think, you're right, it just gives conservative judges ample chances to say, "This law is not burdensome enough," or, "This law is not unusual enough to constitute a Section 2 violation." Now, the reason I said, "I think you're mostly right," is because I think that in the hands of a much more liberal judge, you could see language in Justice Alito's opinion be used to claim that there's a Section 2 violation.

Rick Hasen:

But as these cases work their way up the food chain and as more courts, appeals courts and the Supreme Court, are dominated by conservative judges and justices, those victories in the district court, few and far between as they may be, are likely to be reversed. So thinking about the Georgia law, one of the provisions that Georgia law cuts back on some days of absentee voting, particularly during the runoff period, another provision of that law requires that you provide an identification number when you're voting absentee. Do these things flunk section 2 under the majority test? I find it very hard to believe that the Supreme Court would say that they do.

Rick Hasen:

The Department of Justice, as you may recall, recently filed a lawsuit challenging George's new law, and it was drafted in a savvy way to avoid a potential bad outcome in Brnovich by focusing only on discriminatory intent rather than discriminatory effect. But there's another part of the opinion of Brnovich, where justice Alito, following on his terrible opinion a few years ago in Abbott versus Perez, makes it even harder to prove discriminatory intent. And so I have a very hard time believing that a challenge to the new Georgia voting law or to the upcoming Texas law is going to be found to be a violation of Section 2 or found to be unconstitutional.

Leah Litman:

I was just about to say, the more liberal Justices, in whose hands this new standard will work just fine, I assume by that you're referring to the very moderate Chief Justice, Justice Barrett, and Justice Kavanaugh, about whom we've heard so much over these last few weeks, right? No, no, not them.

Rick Hasen:

I had this fantasy of Crawford redux. So in the Crawford case, which I mentioned earlier, in 2008, the court divided 3-3-3, they were the three most conservative justices led by Scalia, who basically would not allow any challenges to voter ID laws to go forward. But then there was this middle block, which was Justice Stevens along with Justice Kennedy and Chief Justice Roberts. And they took us somewhat middle position, which left the door somewhat open. And I was hoping, given the kinds of uncertainty that Justice Barrett annunciated in her oral argument questions, she seemed pretty uncomfortable with eviscerating Section 2, during oral argument, I don't know what happened.

Rick Hasen:

Kavanaugh has shown himself to not be friendly to voting rights at all in opinions related to the emergency-

Leah Litman:

COVID.

Rick Hasen:

... COVID election litigation on the shadow docket that you've talked about on your show numerous times. So I can't say I'm surprised, I can say I'm disappointed, but I had a 29 point tweet thread yesterday, and I had two worst case scenarios. One was-

Leah Litman:

Justice Alito has the opinion.

Rick Hasen:

A majority not just plurality opinion. And the other relates to the other case today, the AFP v Bonta case, where Chief Justice Roberts pretends he's being minimal, and is actually issuing a maximalist, terrible decision.

Leah Litman:

And both of the things kind of came true, right? Since AFP-

Rick Hasen:

Not even kind of.

Leah Litman:

Yeah, definitely. So I know we're running short on time, so maybe I can just ask you two quick short questions about Bonta. First is, what's the most significant part of that decision? Is it that the court said, "There is a narrow tailoring requirement as part of exacting scrutiny"? Is it that they didn't require any

evidence of actual threats of harassment for a facial challenge to succeed? Is it that they upheld the facial challenge rather than an as applied challenge? What's the biggest thing?

Rick Hasen:

I think it's the first two things. The facial challenge just follows from the other two. Which is that, once you redefine exacting scrutiny, and Roberts did this once before in a case called McCutcheon, involving campaign contribution. Once you redefine exacting scrutiny to be, as Justice Alito puts it, in his concurrence, "Having teeth." Once you defined it as almost strict scrutiny, that calls into question a whole bunch of campaign finance laws. And I think there's going to be a lot of challenges on the way that used to fail, but now we'll have a fighting chance.

Rick Hasen:

Number two, you don't have to demonstrate chill, ordinarily when the court sees plaintiffs, it doesn't like, like voting rights plaintiffs, it says, "Show us some real evidence." But here are some fear of conservatives worried about harassment, and it's, "Oh, don't bother with the evidence." As Justice Sotomayor said in her dissension, "Where's there even standing here? How are these people being injured?" But of course, standing is in the eyes of the holder as we well know.

Leah Litman:

Yes. And the second question was just going to be, what do you think the next challenge, based on AFP, is going to be? Is it going to be too the parallel IRS rule? Is it going to be to the campaign finance disclosure or reporting requirements? Is it going to be to some, I don't know, public health measure that requires posting of calorie counts or something else? Or where do you think this case is going to go?

Rick Hasen:

I'm kind of focused on election law, and so I'm not really thinking about the implications otherwise for disclosure, which could be significant. But in my area, what I'm worried about is campaign finance disclosure laws. So the Supreme Court in Citizens United and McCutcheon said, "When we're talking about corruption, it's only about quid pro quo corruption or its appearance and laws have to be justified to promote that."

Rick Hasen:

So you can easily see, this is not narrowly tailored to prevent corruption, because most donors who are giving money are not corrupt. I mean, there's a lot more to it. I do think that campaign finance disclosure laws have a fighting chance under the standard, but it's a new lease on life. Generally speaking, courts have been quite dismissive of challenges to disclosure laws. In Citizens United itself, the Court approved a very broad disclosure law, but we don't have Justice Kennedy or Justice Scalia on the Court anymore.

Rick Hasen:

And on disclosure, they were really important conservative voices in favor of disclosure. Justice Scalia wrote a number of opinions where he talked about the importance of standing up for what you say and not hiding behind a cloak of anonymity. In one of the cases he said, "There's nothing honorable about an anonymous leaflet, any more than an anonymous phone call." They're gone. They're replaced by Justices who believe that conserves are under siege and that they are full of threats of harassment. Even

though, again, as Justice Sotomayor says in her dissent, "Where's the evidence of harassment? It's not here."

Rick Hasen:

So we are just really in a very bad position for American democracy. More dark money, fewer protections for voting in the federal courts, amidst a wave of voter suppression, amidst a flood of money coming in to try to influence our politics. And in a hyperpolarized atmosphere where elections are being fought in such existential terms, it's just a really bad combination for our democracy right now.

Leah Litman:

Yeah. You read these two cases together, and it's, you have a right to buy an election, not a right to vote in one, I guess. And-

Rick Hasen:

Well, what am I to end the term? I mean, maybe-

Leah Litman:

Yes, exactly.

Rick Hasen:

... by the time we record this, there'll be a Breyer retirement, but none was on the horizon when we started recording.

Leah Litman:

Right, so thank you so much, Rick, for joining. I know today is super busy for you, and we very much appreciate your time.

Rick Hasen:

Great to be with you. And, hopefully, I'll come back someday when we don't have the Supreme court issuing two opinions within 10 minutes of each other, that I've been following for the last year and a half.

Leah Litman:

Fingers crossed.

Leah Litman:

Thanks to our producer, Melody Rowell, thanks to, Eddie Cooper, for making our music. Thanks to our summer intern, Liam Bendickson. Thanks to Rick and Wilfred for joining me for a Supreme Court in July., And thanks, as always, to all of you. We'll be back for a term recap, and we'll also have regular summer episodes. So stay tuned.