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Leah Litman:

I'm slightly worried that after this episode, people are going to think I'm obsessed with Sam Alito.

Melissa Murray:

Are you?

Leah Litman:

Right, I mean, he just personifies so much of what motivated me to become more vocal and do more public commentary about the federal courts and the Supreme Court in particular, so anyways.

Kate Shaw:

Oh my God, he's actually to thank for all of this.

Leah Litman:

You brought this on yourself, Sam.

Speaker 4:

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

Speaker 5:

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

Melissa Murray:

Welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. The band is back together. We are reunited, and it feels so good. I'm Melissa Murray.

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw. Today, we've got a term recap episode for you, so we will discuss what we saw as some themes of this term, do a lightning round of highs and lows from the court's term and proceed to a court culture segment that is, like last year, a commentary largely on court commentary. Of course at the end, we'll discuss the retirement that was not, or at least not yet to be. So Leah, will you kick us off with some of the big themes from the term?

Leah Litman:

One theme that I feel the need to discuss is Sam Alito versus the world. Despite the fact that we have a 6-3 conservative court, Sam still feels like he is getting the short end of the stick and losing the battles that he ought to win, whether it is the 77 page concurrence in *Fulton*, 77 pages to concur. I mean, it's not crashing the Supreme Court's website and server like his dissent in *Bostock*, but you know, this guy is still ready to fight, or the ACA dissent, the *Brnovich* majority, the descent from the summary vacatur in

the courts, excessive force, case Lombardo versus City of St. Louis in which he said the court had vacated an excessive force claim because it feared denying the petition and bearing the criticism that would inevitably elicit as well as some behavior oral argument we'll discuss. It is Sam versus everyone in his mind.

Melissa Murray:

I'm totally with you on this, Leah, but I don't know why he's so vexed. I mean, he's living his best life. He has a 6-3 conservative, super majority. He is winning all over the place. He is 71 years old, and has the skin of someone 20 years younger. What is there to be mad about? You are living your best life. The only person doing it better is Oprah Winfrey. Why are you so upset?

Leah Litman:

It's because some of those six conservatives are noted squishes, Clarence Thomas, Amy Coney Barrett, and Brett Kavanaugh, right?

Melissa Murray:

Like wobbly.

Leah Litman:

Exactly.

Melissa Murray:

Wobbly.

Leah Litman:

Very wobbly, unreliable, not at all conservative, not fellow travelers.

Melissa Murray:

Souters all of them, every single one.

Kate Shaw:

You mentioned fulton, Leah. Is it possible that coming so close, at least in his own mind, to fundamentally changing the law in Fulton and then not quite getting it done, at least not explicitly, kind of had the spillover effect in terms of his overall mood for the whole term. It feels to me like that might've happened.

Leah Litman:

I mean, it's possible, but again, he already got that on the shadow docket in Tandon versus Newsom and Roman Catholic Diocese, so he already got the fundamental change to Smith that he wanted. He just didn't get all of the fundamental changes in as explicit of form on the regular docket, I guess. That was enough to send him into a spiral.

Melissa Murray:

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Here's my take on why he is actually mad. He's been on this court since 2005, right? So he's going into his 16th year now.

Leah Litman:

It's Sam's sweet 16.

Melissa Murray:

Ahh.

Melissa Murray:

My super sweet 16. We're going to overrule everything.

Melissa Murray:

Okay, bear with me. He's in his 16th year on the court. He's seen the court move to the right, but it's been a slow drift, right? It hasn't been as seismic, I think, as he would like. I think that's really the core of this anger. He wants real changes and he wants them right now. He's kind of like Veruca Salting this, like, "Give it to me now."

Leah Litman:

Yes. While the contrary is ...

Melissa Murray:

Do you know who I'm talking about?

Leah Litman:

Oh yes, of course.

Kate Shaw:

Charlie and the Chocolate Factory, one of the kids, yes, yes.

Melissa Murray:

Thank you. Listeners, Veruca Salt, "I want it now, Daddy I want it now." I want you overrule Smith now.

Kate Shaw:

And John Roberts is daddy here.

Melissa Murray:

I think he might be. Who's your daddy.

Leah Litman:

This episode has really gone zero to 150 in five minutes, and it's not even my fault. I'm so happy to have you back ladies.

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Melissa Murray:

How's it my fault. It's not my fault.

Leah Litman:

I'm not saying it's anyone's fault.

Melissa Murray:

I'm just citing literature.

Leah Litman:

I'm saying it's to your credit. Yes, great literature. Great works of literature like Charlie and the Chocolate Factory.

Melissa Murray:

Yeah, great literature, works of literature. I think that is why he's mad. He wants more movement. He wants explicit movement. He wants it right now.

Kate Shaw:

I think, I mean, this is a metaphor, I think we've used before, but it's been clear for a long time that the court is moving into conservative direction, and I think in particular, when Kavanaugh replaced Kennedy, there was this question of whether the court, it was like a train that was going to go directly to these really conservative destinations or like a local train that was going to proceed much more gradually. It's obviously a New York City metaphor, but I think it works.

Melissa Murray:

Very New York City.

Kate Shaw:

I think it's a fairly local train in certain respects, and that is what he is so mad about.

Melissa Murray:

He's on the one, He's asked to be on the A.

Leah Litman:

This means nothing to me, just to be clear.

Kate Shaw:

A Michigan metaphor [crosstalk 00:06:23] ...

Leah Litman:

I'm a real American.

Kate Shaw:

What is like ...

Melissa Murray:

He's basically on the D train to Coney island, and he would rather be in an Uber.

Kate Shaw:

No, we still need a Michigan metaphor.

Leah Litman:

He's on the Amtrak to Chicago that has to yield to all of the freight trains.

Melissa Murray:

He's stuck on on Mackinac Island on a horse going slow when he would rather be in Detroit in F9 style.

Kate Shaw:

Okay. Right, right, right, right. Okay, that's good. Yeah. That's the source of his frustration.

Leah Litman:

Second theme that I would highlight is just the fact that it's a 6-3 conservative court matters. We saw this in a few different aspects, although court commentary downplayed this, as we'll touch on at the end of the episode. One, we saw this in summary reversals. It is a rule of procedure at the court that to summarily reverse a case, that is to decide a case without argument, you need six votes rather than five. The fact that there were six votes on the court mattered. It allowed the court to reinstate death penalty sentences in summary reversals at the end of the term, in Dunn versus, Reeves, as well as earlier in Shinn versus Keyer.

Leah Litman:

We also saw this on the shadow docket, where there were more than 20 rulings in which three justices appointed by democratic presidents publicly dissented, and the court made major changes to the governing law and precedent on the shadow docket, including in the religion cases we've already referred to like Tandon versus Newsome. This is also mattered on the shadow docket for the death penalty cases, where you had a majority of the court allowing the Trump administration to proceed with a flurry of executions in the waning days of the administration, despite the fact that defendants wanted to raise challenges to the execution protocols, among other things.

Leah Litman:

This also mattered because there were a few cases in which if it was still a 5-4 conservative court, the outcome might've been different. In particular, the Arthrex case, the appointments clause challenge to administrative patent judges, as well as TransUnion, the case on standing under the Fair Credit Reporting Act. Those cases might've come out the other way if we still had a Justice Ginsburg, rather than a Justice Barrett.

Kate Shaw:

It's hard to know, right, the counterfactual and TransUnion, if Thomas hadn't been needed to form a five justice majority, would he still have felt at liberty to peel off and join the liberals or would he have said, "I'm a good soldier. I'm going to provide the fifth vote." I think with TransUnion, I genuinely don't know. I tend to think of him as actually, obviously extremely idiosyncratic views, many of which I find pretty insane, but principled in his views. But the fact that he has been willing to peel off from the conservative so much more on a 6-3 than a 5-4 court makes me wonder how much he fell into line in prior cases and doesn't need to now.

Melissa Murray:

Well, I mean, conservative legal project marches on without him so he can afford to take stands. I mean, it's like Kagan and Ramos last term where there was a secure majority and she could pick a stand about stare decisis.

Leah Litman:

And not only that by peeling off from the fellow conservatives, he generates a bunch of headlines about how the court is not voting ideologically and how the court isn't a partisan ideological court, even while the law proceeds vigorously in one direction. Though not quite as furiously as Sam Alito would like.

Leah Litman:

The last thing I would say, as far as the theme is the liberals descent, both respectfully and kind of not respectfully or kind of respectfully for now. This is where left to my own devices, I would just proceed reading additional passages from Justice Kagan's dissent in Brnovich which basically was the excuse for the last few episodes as well.

Kate Shaw:

We could just do a reading of it in one of our summer episodes, like in its entirety.

Leah Litman:

That is an idea that I am on board with. Yes.

Kate Shaw:

Another theme that's kind of related to this question of a 6-3 court and Justice Kagan and the other liberals on the court is, so I think we are all in agreement that the 6-3 court matters a great deal. But we did have, in a number of cases, what we have called with a hat tip to Dahlia Lithwick, this kind of phone enmity right, either unanimous or near unanimous rulings that make the court appear, just as you were saying, Leah, more unified and more moderate than it actually is. Exhibit A here, I think is definitely Fulton, nominally, a unanimous case. You scratch the surface and there was just tons of disagreement there.

Kate Shaw:

The number of unanimous or near unanimous cases was really high two weeks before the end of the term, which led to a lot of takes about what it all meant, but by the end of the term, it was back in normal range. But I do think that there was a perhaps surprising amount of consensus in both some high profile cases, again, obviously Fulton, chief among them, and then some lower profile cases. I do think it is worth pressing a little bit on how we should understand that consensus. I have a take I want to try out

with you guys, but I'm curious if anybody has any reactions first, and then I'm going to dive into my perhaps quirky take.

Melissa Murray:

Nah, I'm all ears for your quirky take.

Kate Shaw:

Here's one possibility. I think Roberts et al., I mean, I think Roberts and probably Kavanaugh and probably Barrett are clearly interested in minimizing the closely divided cases. They want to ward off reform efforts. They are happy to proceed slowly and incrementally. They want to take the temperature down and public scrutiny off the court. But if that's all there was to it, I'm not sure we would have seen the liberals joining these unanimous or near unanimous opinions quite the same way that we did. We'll talk more about where exactly, obviously we've talked about some of this over the course of the term, but immigration cases, a lot of statutory interpretation cases, administrative law cases, at least on remedies. But I wonder if the liberals there's another type of strategy at play. I think if there is, it may have everything to do with democracy, right?

Kate Shaw:

Basically, here's the idea. Roberts, Kavanaugh ...

Melissa Murray:

Wait, wait, what is democracy?

Leah Litman:

I read Justice Kagan's dissent in Brnovich to basically be like, "Democracy, girl, you in danger."

Kate Shaw:

I think she obviously believes that, and so I guess my question is, is that motivating her in other cases that are not explicitly about the preservation of democracy? I think again, so Roberts et al., I think clearly don't want this commission messing with them. They don't want the court to be a big election year issue. They think a term with a lot of agreement will take the wind out of the commission and general reform efforts, sales. I don't think that's a project which Alito or Thomas or Gorsuch subscribed, but really just the chief and one or two others. But in terms of ...

Melissa Murray:

Can I inject something here, though?

Kate Shaw:

Yeah.

Melissa Murray:

One of the things that I thought we should talk about for the term is just the disdain for Congress. It cuts against this idea that they're interested in the commission, which would obviously require some kind of congressional cooperation or consensus in order to do anything about structural reform of the court. I

don't think they're worried about Congress or Congress actually doing something. I think to the extent they're worried about this commission and the talk of structural reform, it's really that they're worried about the talk, not that anyone is actually going to be exercised to do something about it. I think it is merely the fact that this is in the ether, that so many people are talking about it. Not that it has a snowball's chance in hell of getting through this Congress, but just that it's on people's minds. It's basically keep the court out of your mouth is kind of the strategy. I think you're right about that.

Kate Shaw:

Well, again, but do we think that that is driving Kagan, Sotomayor, and Breyer? I think if they think ...

Melissa Murray:

Honestly, I think there's a non-zero chance is driving Breyer ...

Kate Shaw:

There might be.

Leah Litman:

Breyer.

Kate Shaw:

So it could be okay, so maybe Breyer. Also possibly Kagan and Sotomayor who genuinely don't want the court politicized, come what may, but if they think that the court is charting a very dangerous course, I could well see them interested in a public conversation about court reform that might either result in structural reform, or I think you're right, Melissa, likely not, but still potentially have some incremental dampening effect on the conservative majority enthusiasm for big sweeping, fast change.

Kate Shaw:

But say that that's actually not what's driving them at all, say it's something different, right? We're talking about this term, taking a broad view. Early in this term, we saw both the pre and post election litigation, right, reach the court. No merits cases, but there were multiple rounds of lawsuits out of Pennsylvania seeking to throw out large numbers of late arriving, absentee ballots on the grounds that the legal change that would have resulted in their counting could only be made by the state legislature. That's a theory that, as we have noted on the podcast, has real support on this court. The Texas original jurisdiction suit, largely premised on the same theory. Other cases brought on lots of other different kinds of theories. The court was able to duck, right, those cases, both post and pre-election, I think largely in the end, no single state was outcome-determinative. But look, 2024 could be different, right? One of the lawsuits out of a state that would tip the balance of the election could put court at the center of a closed presidential election. There could even be something similar in 2022 if congressional race could potentially determine control of a chamber of Congress, right, the Senate or the House.

Kate Shaw:

As people are no doubt aware, and obviously as Leah, you talked about in both of the Brnovich recap episodes, since January, we have seen waves of state voting legislation that restricts access to voting in all kinds of ways, but also in some instances, that politicizes election administration, right, removes or disempowers non-partisan election officials, replaces them with partisan actors, just think all of these

developments and the continuing support for this big lie that Joe Biden was not the rightful winner of the 2020 election, I think increases the chances that a major case out of one or more states makes it to the Supreme Court in the next presidential election.

Kate Shaw:

I also think it increases the chances that the counting of electoral votes, right, which was the occasion of the January 6th insurrection, is understood as an opportunity to contest election results, and a challenge to some decision made there could also lead to the Supreme court, whether the court would decide such a case, I think is very much an open question.

Kate Shaw:

But anyway, in any of these scenarios and many, many others, I think the court could be faced with an incredibly consequential decision about the election. I can, well see the liberals on the court taking the view that the court is in a better position than any of our other institutions to protect the rule of law and basic structures of democracy, and so they should work to knit together a coalition of justices broadly committed to basic democratic norms and to the rule of law in the event that the court ends up faced with such a case. I'm not saying it's the right strategy.

Melissa Murray:

Wait. [crosstalk 00:16:33].

Leah Litman:

No, no, no. Wait. I just want to, I want to make sure I understand this theory. The theory is that the liberals are basically finding consensus and joining these superficially unanimous opinions in order to preserve the credibility of the courts to issue a decision rejecting an effort to overthrow the election and/or building credibility with the conservatives to get them to reject that challenge.

Kate Shaw:

Well, it depends on the direction from which the challenge comes, but essentially to side with democracy and to have that decision heeded by the public. But I think as a first order matter, to basically, pull together a coalition of like, "Yes, a rule of law centrist."

Melissa Murray:

Kate.

Kate Shaw:

I'm not saying this would be my strategy. This is one descriptive hypothesis.

Melissa Murray:

I hear you. I mean, I'm going to say, I think this is an Ockham's razor moment. The obvious thing here is that they're staving off or trying to slow down what is obviously going to happen in the near future. I mean, it's just like rearranging deck chairs on the Titanic. I don't think there's any grand plan to save democracy, which is not to say, I don't think they're concerned about democracy. I don't think that at all. I think they're very concerned about it, but I don't think they see their conservative colleagues as a kind of justice league for democracy, like that there's some sort of shared set of rule of law values. I think

they're well aware that there probably is a huge destruction with the other side about what the rule of law requires. I think they're just genuinely trying to just slow it down. I mean, this is finger in the dike kind of stuff. This isn't some grand plan.

Kate Shaw:

[crosstalk 00:18:12]. It is the ascent of free exercise is the most important constitutional value. There's the demise of a constitutional protection for abortion. There's those discreet "it's" that they could be trying to slow down. But I just wonder how much the September, October, November, December litigation that swirled around the court, but never centered there has remained present in the justices' minds, even as it is faded from a lot of the end of term commentary. Again, I think you're right. There's a massive divide, I think on the court. But the question is could Breyer, Kagan, Sotomayor have in their minds some sense that in fact there are multiple divides and that there may be another divide on the right that might actually be really significant in an important democracy case.

Leah Litman:

I don't think that is what is motivating them in these other cases for two reasons. One is that, let's assume that they actually peeled off from the conservatives and all these decisions were like 6-3 that moved along conservative directions. I actually think in that universe, a Supreme Court might have more credibility relative to the population for whom they would be rejecting these efforts to overturn the election to do that. That is like, if you have this like reliable set of 6-3 rulings, and then all of a sudden when the court is asked to overturn the election, you've got some of the conservatives joining with the liberals, then it's like, "Okay, well, these guys who were like always voting with us all of a sudden aren't right, maybe that's a sign that we have gone too far and we are destroying democracy."

Leah Litman:

Second is, I just don't think that rational people, and I put both Justice Kagan and Justice Sotomayor in this bucket, maybe Justice Breyer, although a little bit less certain with each passing day, I don't think a rational person would say, "My decision not to join Fulton is going to like buy me enough credibility or good will to meaningfully influence John Roberts or Brett Kavanaugh's decision not to literally pull the trigger on democracy and say, 'Yes, you've got to throw out validly cast votes and we will select the winner of an election.'" I just don't think like any sane person would think that.

Kate Shaw:

Yeah, so maybe it's an utterly insane theory. I certainly don't think that they're doing it in any kind of explicit or even necessarily implicit tit for tat way, like Fulton and then like, "Let's preserve democracy guys. Cool?" And there's a handshake agreement about it, obviously. But if the question is if we, I mean, because if the court and Fulton is really doing what we think the court in Fulton is really doing, I'm not sure I see why we don't have Sotomayor and Kagan, at least those two, Breyer put to one side, screaming their dissent about it. There's something else driving them. If it's just that they think they get a narrower opinion that saves the actual hammer dropping for another day, I'm just not sure why it's worth the effort as opposed to galvanizing public opinion about the radical transformational change the court is making, which would be the purpose of a screaming dissent in a case like Fulton's.

Melissa Murray:

I just come back to Katherine Franke and the speculation that maybe Alito did have the majority in Fulton and he lost it. Part of the reason that he lost it was because the chief was able to peel off the

liberals to join him in something incredibly narrow, but nonetheless, quite consequential, but not as consequential as overruling Smith.

Leah Litman:

I still think there are reasons to want to prefer slow changes, right? Think about the people that will like benefit from civil rights statutes or non discrimination protections in the interim. Think about four years ago or five years ago, we didn't know we were going to be living in a world with a 6-3 conservative Supreme Court, Right? You don't know what the world four years from now or five years from now is going to look like. Maybe Democrats grow a spine. Maybe the Supreme Court looks very different. Hard to say. And so buying that time is, I think, an important value, even if there's no other purpose.

Kate Shaw:

Oh, I totally agree, but couldn't, you still have done that because you would still have the Roberts' opinion as the controlling opinion and Smith being nominally preserved, and you could still have a screaming descent from Kagan and Sotomayor. You would still have the slow, incremental change would just have made a different point.

Leah Litman:

I think a fractured opinion is just going to be less significant than a universe in which you have a clear majority, right? That's part of the problem with June Medical and why that hasn't shored up, right, abortion productions is like, there wasn't a controlling majority on the [inaudible 00:22:25].

Kate Shaw:

All right, you're completely unconvinced my mind.

Melissa Murray:

Sorry.

Kate Shaw:

I prefaced it as a wacky theory. I guess I didn't disappoint. Okay. All right, so I guess we'll see if there's more evidence to support at the end of next term. What other big term themes do we want to highlight?

Leah Litman:

What's a little textualism between friends? We saw Justice, Neil Gorsuch being tempted by the dark side, both in Justice Alito's majority opinion in Brnovich as well as the Affordable Care Act dissent. And as I suggested, I think his decision to join the Alito ACA dissent should haunt him, and it's in part for that reason that I will be reading his odes to textualism rather than Rege John Page. He just, he doesn't deserve that to anymore.

Kate Shaw:

Another textualism point, God, we talked about Van Buren when it came down, it's almost like van Buren as like this sort of reductio ad absurdum of the textualist methodology in which Justice Barrett marshals nine different dictionaries, cites them a total of 17 different times in her majority opinion. Okay, one of the cites is Thomas citing Black's Law Dictionary. But mostly to define the terms so,

although not exclusively. It just felt like what is this enterprise even about. Honestly, 17 dictionary citations to nine different dictionaries.

Kate Shaw:

I want to flag something about a case that we talked about, which is the Terry Case about the First Sentencing Act and the First Step Act, which is a little bit, again to the puzzling decision of the liberals, in cases like Terry to agree with outcomes. The more I've thought about this case after we discussed it, the more I've thought about how Justice Stevens, for whom I clerked, would have written basically something that said, "No rational Congress could possibly have wanted us to find this Terry ineligible for re-sentencing when far more serious offenders are clearly eligible for re-sentencing," right?

Kate Shaw:

The Fair Sentencing Act, the First Step Act were about eliminating or at least reducing the crack powder disparity. Congress wanted individuals whose sentences reflected that unjust disparity to be eligible for re-sentencing. Members of Congress have written briefs urging us to find Terry eligible for re-sentencing. Many lower courts and the federal government have endorsed a reading of the statute, which would make him eligible. It is the sensible way for us to give effect to the intent of Congress. That is the way to decide this case rather than decide how best to fit together a string of words sheared of all context.

Kate Shaw:

I remember, Leah, when we previewed this case, you were like, "This is a hard case. I don't think it's that easy." They make it sound like as a matter of text, it's just so easy. No one said anything about it being difficult or about there being other considerations in the mix. Obviously, as we discussed, Sotomayor took sharp issue with Thomas' reading of the history of the disparity, but as to the reading of the text, she completely went along as, did everyone else on the court. I'm just not sure as I sit here, I really understand why.

Melissa Murray:

Kate, your theme for the term is the silence of the liberals.

Kate Shaw:

In a number of key cases, I guess, maybe Fulton first and foremost, and then in a lot of statutory interpretation cases, yeah.

Leah Litman:

And this theme production, does Anthony Hopkins jump out and start eating people?

Kate Shaw:

Sonia Sotomayor is played by Jodie Foster.

Leah Litman:

Okay, great.

Kate Shaw:

Clarice.

Leah Litman:

I honestly had a similar thought about at least some of the immigration cases on the docket, so Palomar-Santiago, about whether an individual who was ordered removed on the basis of a crime that didn't actually make them removable could challenge the removal order, notwithstanding some statutory restrictions that generally preclude people from doing so. The idea that that opinion would be a unanimous with no one endorsing the proposition that when there is this fundamental defect that makes you not removable is a special case accommodated for by the statute or in light of background principles of constitutional avoidance or due process was a little bit strange to me. That is part of what frustrates me about the court commentary. I know we're skipping ahead, about how this is not so conservative a court and so very moderate. It neglect all of these larger rulings in which you get consensus. That consensus is against immigrants. It is against criminal defendants. This is not a moderate court, if you account for the substance and realities of these decisions.

Kate Shaw:

I mean, that's true in the immigration context, also about Garland versus Ming Dai in which the Ninth Circuit, remember had said, "Well, in these asylum proceedings, there's a presumption of credibility if there's no finding to the contrary." Nothing in the INA is really explicit about that one way or another. Gorsuch basically says, "Well, the INA doesn't say you can use this presumption, so the Ninth Circuit was without any basis to create it." But I know I can imagine in another era, at least a couple of justices saying, "The INA just isn't clear one way or another, and this is a perfectly reasonable rule to forge in the face of statutory silence." You had nobody make that point.

Kate Shaw:

Yellen versus The Confederated Tribes of the Chehalis Reservation, wasn't a unanimous opinion, but we also talked at some length about the oddity of how much focus there was on text and canons of interpretation and how little focus there was on these broader, even substantive canons but policy considerations that actually feel like court should really consider when they're deciding statutory case. But the court at least explicitly has been remarkably uninterested in indulging those kinds of conversations. Although, as we, I think, also have noted, clearly it is being guided in a lot of these cases by [inaudible 00:27:55]. Take Garland versus Ming Dai, the assumption that the INA embodies a kind of a hostility to asylum claims. There's no words in INA that say that, but that is clearly, I think what Gorsuch is using as an overlay on the INA.

Melissa Murray:

A theme that I wanted to highlight from this term is the courts, I think, pretty obvious disdain for Congress. I think it's related to some of the points that you've made about statutory interpretation, Kate. The case that really brought this home for me was TransUnion versus Ramirez where the court held that only a plaintiff that was concretely harmed by a defendant's violation of the Fair Credit Reporting Act has article three standing to seek damages against that defendant in federal court, completely blowing through the cause of action that Congress provides to such plaintiffs in the statute. This was a 4-5 decision with Justice Kavanaugh writing. Justice Thomas, this was one of those unusual opinions where he peeled off from the conservative block to join the liberals, and he wrote a dissent in which Breyer, Sotomayor and Kagan joined. Then Kagan also filed a dissenting opinion in which Breyer and Sotomayor joined, so she didn't get Thomas for that one.

Melissa Murray:

But again, just the idea that not only are we dismissive of Congress when they don't say things and don't provide clarity in a statutory scheme, when they actually do explicitly note something in a statutory scheme, we're still going to say like, "We don't care, DGAF. Sorry, Congress, try again." Again, I just, when people talk about the restraint of this court and how this is a court that understands its role in a tripartite federal system, again, I come back to TransUnion. Where is the respect or deference to Congress at any point here?

Kate Shaw:

Yeah, and I actually thought a couple of the administrative law cases that we talked about also reflected this kind of contempt for Congress or dismissing of Congress as a big theme of the court. In both of these cases, Arthrex and Collins, the court invalidates these institutional design choices made by Congress, right, and the president. The political branches make these design choices about how to create and empower these administrative patent judges in Arthrex or the head of the Federal Housing Finance Administration in Collins, and in both of these cases, the court finds that the institutional design choices made by Congress are constitutionally impermissible because the court is so fixated on this idea of total presidential control over subordinates within the executive branch.

Kate Shaw:

In Arthrex the court finds that these APJs who sit on this patent trademark appeal board are exercising too much power and too much independence for individuals who were appointed the way these folks were, which is as inferior officers, and that the court says, "Look, we've got to change the laws of that the head of the PTO can review their decisions." Then in Collins, the court says that this FHFA director has this improper protection from removal.

Kate Shaw:

We should say in both of the cases, the court exercises, I think pretty wise remedial restraint, right. But in so doing, it reveals how arbitrary I think its rulings are, and just more broadly, it feels to me really perverse for the court, kind of in the name of democracy, right. It's important the president, because the president is elected to have control over all subordinates within the executive branch, but also to undermine that the choices as to how to structure and empower these offices are also made by Congress, which is composed of individuals also selected. I do think the contempt for Congress theme that you just mentioned, Melissa, is on display in those administrative law cases as well.

Leah Litman:

So should we move to a lightning round of highs and lows from this term?

Melissa Murray:

Roses and thorns?

Kate Shaw:

You have to stretch to find the roses, but we've found a few.

Leah Litman:

Yeah, so let's start with our favorite majorities. As Kate, you just suggested, this was a stretch for me, and so I have chosen to select Borden, the Armed Career Criminal Act case in which Justice Kagan technically wrote a plurality opinion, finding that crimes with the mens rea of recklessness don't qualify as valid felonies on the ground that they have, as an element, the use of force. But I am transforming this into an effective majority. Presto bitches. Presto is alive. She's in her descent. Haha, get that reference. Anyways, yes, so Borden plurality, one of my favorites.

Leah Litman:

In saying this was one of my favorites, I did want to maybe have an aside on the tone of some of Justice Kagan's writings because on the day we are recording this episode or maybe the day before, the National Review came out with this piece, Justice Kagan's Rhetoric Diminishes the Court. This drives me bonkers. It just drives me insane, because one, where were you guys when Justice Alito was calling the court's opinion in Bostock a textual is pirate ship? Where were you when Justice Scalia was saying the court's opinion in Boumediene was going to get Americans killed or he would hide his head in the bag if he ever joined a majority opinion like that and Obergefell versus Hodges. I think sometimes Justice Scalia's rhetoric was overblown, but I also think you sometimes do need to change the tone in order to convey how wrong and how ridiculous a majority or a counter argument is. That's something Justice Kagan does as Franita and I talked about with the Brnovich dissent, that's what I think she did there.

Leah Litman:

Nothing makes these people angrier than if you treat their arguments as not serious. They always want their arguments to be met with a resounding embrace of good faith and have them treated as reasonable and within the bounds of debate and convention. Sometimes that's just not true and it has to be okay to sometimes say, "And that's absurd." If I had to name an actual majority, I might say that Chief Justice's opinion in PennEast, which we didn't talk about, but it's about the federal government's authority to allow private parties to exercise the federal government's condemnation power against states. Maybe Justice Gorsuch's opinion in NCAA versus Alston, the antitrust case. But again, you're really scraping the barrel here.

Kate Shaw:

Although, even scraping, did you just pick a Gorsuch opinion as one of your favorites, Leah?

Leah Litman:

I mean, it's not horrible.

Melissa Murray:

We are nonpartisan and moderate.

Leah Litman:

Exactly.

Kate Shaw:

I'm talking about him as a writer. I'm not talking about his substantive views.

Leah Litman:

Well, I'm capable of providing objective analysis. This opinion isn't full of overwrought pans about textual interpretation, because it is interpreting what the Sherman Act, an act that has effectively been treated as common law and allowing judicially created law. He doesn't go insane about that. It is a very reasonable opinion, applying principles and precedents that the court has previously announced.

Kate Shaw:

No, it's totally true. When he was doing in Indian law cases in this NCAA, when he's not really actually just pulling out the burn book and dropping textualism one-liners, his writings vastly improved. I will say that. I feel so basic saying this, but Mahanoy, is that too obvious a choice as a favorite opinion? This is Justice Breyer's opinion, the salty cheerleader case. It was just short, snappy, fun.

Melissa Murray:

Short, snappy, fun.

Kate Shaw:

It was. The student wins, but the school still get to actually exercise some authority.

Leah Litman:

Everybody wins.

Kate Shaw:

Everybody wins. I mean, most importantly Justice Breyer gets a good assignment, and so Justice Breyer wins. I just feel like, I mean, when, I'm trying to think. When I clerked on the court, Justice Breyer was just coming off of his, I don't know if record holding, but certainly long 11 year streak as the junior justice. That's just a long time. He just never got good opinion assignments. I just, I feel really good for him that he's getting them now.

Melissa Murray:

This is the Oprah Winfrey of opinions, like "You get free speech. You get authority to decide what speech gets disrupted." Everyone got something. I just, this was a fun case. It's also worth noting it was decided just as that really huge New York Times profile about the ACLU no longer taking civil liberties cases or free speech cases came out, which was completely bananas because they've brought so many free speech cases. This was one of them. It was totally unmentioned here, so I thought that was a nice sort of confluence. Check your facts, New York Times. Check your facts.

Melissa Murray:

I have to say, I think you all are asking a lot of me here to select my favorite opinion of this term, because the pickings were slim for roses. You guys got to the good ones first. If this were the flower market at Whole Foods, you guys got there and got all the good sunflowers, and I'm left with the really janky sunflowers with no pedals on them. I think my favorite opinion of the ones that are left, maybe Uzuegbunam versus Preczewski, which was that case about nominal damages. It was the really odd, strange, bedfellows coalitions where liberals were in favor of the nominal damages, conservatives were in favor of the nominal damages. This is not about the writing per se, but I think the outcome was really important for civil rights plaintiffs as we highlighted on a past show. Yeah, I guess that's where I'll be on that one. But I don't think there were a lot of really stand out ones for favorites this term.

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Leah Litman:

I'm sure the next term's opinion in Dobbs, the Mississippi abortion ...

Melissa Murray:

Will probably be my favorite.

Kate Shaw:

It's an early contender for our favorite.

Leah Litman:

Not.

Leah Litman:

I'm just claiming that one preemptively.

Leah Litman:

I hope the ACLU will make me a shirt in advance.

Kate Shaw:

Right, exactly.

Melissa Murray:

It will just say fuck on it. Not the fuck school, fuck softball, fuck cheer, fuck everything on a shirt that they make.

Leah Litman:

It won't be beige. It'll be red.

Kate Shaw:

We haven't said that Leah is wearing that shirt right now.

Leah Litman:

I am wearing Mahanoy inspired t-shirt. Now separate category, this one might be a little bit easier, favorite writings, concurrences or dissents. Obviously, I would include Justice Kagan's dissent in Brnovich.

Melissa Murray:

Putting the burn in Brnovich.

Leah Litman:

I want my own Brnovich book, a Brnovich burn book. I am just going to make a separate book with all of her best lines from that opinion. I will read it at night when I am feeling bleak and sad. It'll all be good. Other one might be her dissent and Edwards versus Vannoy, the case about the retroactivity of Ramos

and whether people who were convicted with non unanimous juries could challenge their convictions. Sleeper option, maybe when Justice Brett Kavanaugh wrote separately in NCAA versus Alston to embrace critical race theory. By which I mean, he said, sorry that, anyways, that was a funny joke to me. He said ...

Melissa Murray:

I'm laughing.

Leah Litman:

On the inside.

Melissa Murray:

You can't see me. On the floor, I'm picking myself up.

Leah Litman:

Justice Kavanaugh wrote, "Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six and seven figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African-American and from lower income backgrounds, end up with little or nothing."

Melissa Murray:

Yeah, I like that. It was, I don't know if that's quite critical race theory.

Leah Litman:

I was being slightly specious. It's only critical race theory in the sense that it mentions race and racial disparities, which according to some state legislatures ...

Melissa Murray:

That's enough, yeah.

Leah Litman:

... are elements of critical race theory and prohibited as a result, but yeah.

Kate Shaw:

Fair.

Melissa Murray:

My favorite writing wasn't one that was on the regular docket, but was on the, I guess, so-called emergency shadow docket. This was Justice Sotomayor's dissent in FDA versus ACOG. This was about the FDA rule that required individuals who are seeking the medication abortion two pill protocol to actually show up in person to get the pills, show up at a doctor's office to get the pills as opposed to having the pills mailed to them. Justice Sotomayor wrote what I think is her first reproductive rights opinion in the history of her time on the court, which I thought was significant, in which she took up the

baton from Justice Ginsburg who'd passed away a couple of months earlier, but added her own, I think repro justice intersectional twist on it.

Melissa Murray:

I mean, so she talked about how COVID impacted minority communities disproportionately, that the requirement to show up in person would be borne disproportionately by people who were poor, communities of color, and so there was a real intersectional element to it that did not often come across in Justice Ginsburg's writing about reproductive rights. I was encouraged to see that come to the fore and see her really take the stage in a reproductive rights case.

Leah Litman:

I guess I would also add, now that I'm thinking of it, when you mentioned that Justice Sotomayor's dissent on the shadow docket of the United States versus Higgs, one of the cases in which the court allowed the federal government should proceed with executions in the waning days of the Trump administration.

Melissa Murray:

Yeah, she's trying to add light to the shadow docket.

Leah Litman:

Yes.

Kate Shaw:

There was another Sotomayor concurrence from the other lower profile Fulton case on the docket. This was City of Chicago versus Fulton regarding bankruptcy law. She concurred in this decision that had to do with a repossession of vehicles and their interaction with the bankruptcy law regime. But she wrote separately to urge Congress to take another look at amending the bankruptcy code in light of the importance of vehicles to, in particular, low income individuals, communities of color in actually making good on the fresh start rationale of bankruptcy. She writes to basically say, "Look, if a driver has a fine she cannot immediately pay, the balance balloons. She needs the car to actually serve as reliable transportation to and from work. She finds it impossible to pay her debt, recover her vehicle. The cycle thus continues, disproportionately burdening communities of color." Again, she is bringing this intersectional lens. On the bottom line, she's agreeing with what the court says, but urging Congress to take up the issue.

Kate Shaw:

Okay, so in terms of other separate writings, the other one I wanted to highlight was Justice Kagan in Collins, bringing more big stare decisis is not for suckers energy. She says, "Look, I lost Seila law." That's the case from last term involving the CFPB. We should say, we don't think she lost Seila law in the court of history, but she did lose in the actual Supreme Court Seila law. She says, "I concurrently ..."

Leah Litman:

Right, new favorite majority opinion, Justice Kagan's opinion Seila law.

Kate Shaw:

Seila law, oh god, yes. Thank you, god.

Leah Litman:

Issued by the court of public opinion.

Kate Shaw:

Right, but in terms of the actual court, that was not a majority opinion. She says, "Look, I lost Seila law, so I got to go along with what the majority does here, which is to basically apply Seila law. I agree there are not meaningful distinctions between the position the court found constitutionally infirm Seila law and the position here." But she doesn't join any of the court's reasoning on the substance because she thinks the court extends Seila law. She schools the court in what it does from the majority with respect to presidents, so she says, "Thus departing from Seila law, the majority strays from its own obligation to respect precedent, to ensure that our decisions reflect the evenhanded and consistent development of legal principles, not just shifts in the courts, a stare decisis demands something of justice is previously on the losing side." Right?

Kate Shaw:

They meaning here, I was fairly applied decisions with which they disagree, but fidelity to precedent, also places demands on the winners. They must apply the court's precedence, limits and all, wherever they can rather than widen them unnecessarily at the first opportunity. It's important to say that, yes, sometimes you're stuck with decisions that you don't like, but also she's almost shifted to this damage control mode, which is winners at least need to proceed modestly or with caution in terms of expanding the footprint of these decisions. That too is part of the obligation of stare decisis.

Melissa Murray:

Winners shouldn't act like losers.

Kate Shaw:

Exactly.

Leah Litman:

That's directed at you, Sam that's right. General caveat.

Leah Litman:

Maybe we can go on to favorite moments from oral arguments.

Melissa Murray:

Yeah, this is better. There was some good, there was some spicy takes at oral arguments.

Leah Litman:

Okay, so my favorite moments, basically all things Sam Alito by which, I mean, these aren't actual favorites, but they are things that were again, very evocative of this new court, and I think indicative of, various justices' outlooks on the world. One example is when Justice Alito just bulldozed through the Chief Justice's attempts to begin Justice Sotomayer or his questioning time in Trump versus New York,

the challenge to the president's efforts to exclude undocumented individuals from the census. We talked about that previously on the show. It's so crazy that that was just this past term.

Kate Shaw:

This term, I know.

Leah Litman:

It feels like a lifetime ago.

Kate Shaw:

Yep.

Leah Litman:

It was just December or November, just crazy. Second is Justice Alito happily taking over Justice Breyer's argument time after Justice Breyer had an audio problem. Then the two judges wrongfully cut him off in the ACA case, California versus Texas. We talked about that previously. Justice Breyer was like, "Wait, my machine wasn't working." Justice Alito said, "I thought it was Justice Breyer's time." Then Chief was like, "No, Justice Alito." Justice Alito's like, "Okay, great. Here I go." Then Justice Alito bringing up the NAACP LDF brief as we predicted he would in Americans for Prosperity Foundation versus Bonta.

Kate Shaw:

This isn't a moment, but a general observation about the telephonic format of the arguments this term, and obviously at the end of last term, which is that Thomas's chops were on full display, right? I do think there is a mistaken impression among some quarters that he normally doesn't ask questions at oral argument, because he's checked out or not engaged.

Melissa Murray:

Now, be fair about this narrative. It's not that he's checked out or not engaged. People say he doesn't ask questions because he's stupid. There is nothing further from the truth about that.

Kate Shaw:

No.

Melissa Murray:

Not my favorite justice, but the idea that this man is dumb is so off the charts insane and wrong.

Kate Shaw:

Both offensive and it's racist, clearly.

Melissa Murray:

It's totally offensive. It's super racist. They said the same things about Thurgood Marshall. They say the same things about Justice Sotomayor. This man is playing chess just like the rest of them, so do not sleep on Clarence Thomas.

Kate Shaw:

Right, and to be clear, there are plenty of fair attack lines on Justice Thomas, but checked out, not engaged, not smart, none of that is remotely true.

Melissa Murray:

None of that.

Kate Shaw:

I think it was useful for the general public to have a sense of just how engaged he is, how good his questions are. He was really on it much more than some of the other justices. I don't know. I'm so curious about whether he'll revert to form when they returned to in-person arguments in the fall or whether having gotten in a habit of asking questions, he's going to do more of it. I genuinely don't know.

Melissa Murray:

One of my favorite moments from oral arguments also involves Justice Thomas. He had some great hypotheticals this term. There was the very unexpected and abrupt and took me aback hypothetical about the serial killer in *United States versus Cooley*. Was not expecting that at all. He was like, "What about if you pull over someone and he fits the description of a serial killer." I was like, "Whoa, a lot of stuff going on there." I was not expecting that. Then there was another one, I think this was in the case involved, the statutory interpretation case involving the guy who went and looked up someone's profile.

Kate Shaw:

Oh, Van Buren.

Melissa Murray:

The car rental guy. Thank you, Van Buren. When he had that off the wall hypothetical, like, "What if you were checking up on your wife?"

Kate Shaw:

Oh, right.

Melissa Murray:

Yeah, yeah, yeah, yeah.

Melissa Murray:

I was just like, "Wow, what's living in your head?"

Kate Shaw:

Yeah, what if your spouse installs a tracking device on your RV? That was a funny one.

Melissa Murray:

That was very funny. Then, also not to be out done in the wacko hypotheticals, Justice Breyer and Cedar Point. "What if it wasn't a union organizer, but a spaceship?" That was insane.

Leah Litman:

What if we were back in the plague time?

Melissa Murray:

I mean, they were just here doing the most and I was here for it. Oral arguments, I think, were actually fun. It was really nice to hear them as they were happening. If you're listening justices, please keep that up. That was really good fun for all of us.

Kate Shaw:

All right, so an easier category, least favorite opinions. This is just an abundance of riches, so many to choose from.

Leah Litman:

Yeah, exactly. How can I pick just one? Obviously Brnovich, the stunning indifference to democracy and multiracial democracy at an extremely tenuous moment in the country's political history, not great. Second is TransUnion versus Ramirez. I just think the edifice and architecture on which that entire jurisprudence is built, namely the idea that it is the court not Congress who gets to determine who is injured, what injuries are real is absurd, and just in affront to the separation of powers, not grounded in history and just indefensible as a matter of political theory, so that one is also probably up there for me.

Kate Shaw:

Obviously, the majority opinions Brnovich and AFP versus Bonta does spring to mind. Leah, you did terrific recap episodes of both of those opinions with, Franita Tolson, Nick Stephanopoulos, Rick Hasen, Wilfred Codrington, I should say all four of those guests were so great. I have just a few things maybe to add about both of those. One, I don't think ...

Leah Litman:

Yeah, they can come back anytime. It's always shocking to me when white men are capable of giving good interviews and commentary on the court, particularly straight white men. It's just bigotry of low expectations, maybe. I don't know. It's just, it's stunning to me how articulate they are sometimes.

Kate Shaw:

Rick did well. Yeah, yeah.

Leah Litman:

Yeah, no, Rick and Nick, great job guys.

Kate Shaw:

Rick and Nick.

Leah Litman:

Wait no, exactly, not just one example, but two.

Kate Shaw:

Who would have thought.

Melissa Murray:

On one episode, you found two. That's incredible.

Leah Litman:

No, that was actually two distinct episodes.

Kate Shaw:

You could not possibly have two white men on one episode. Oh God.

Leah Litman:

Please, who do you think I am? I did have two men on one episode and that was a little bit much for me. I'll be honest with you.

Kate Shaw:

You did those great recaps. I don't have tons to add, actually. I just, one thing was Justice Alito in Brnovich had this incredibly peak, true Alito invocation of the Justice Stevens opinion in Crawford, the voter ID case that just made me see red. He kept the usual incidents of voting, the usual burdens of voting, just this gratuitous mention of the author of the Crawford opinion. I just thought it was like he loved doing that. It just drove me nuts. I will say I just like little clerkship background, I had to suffer through Crawford twice as a law clerk. I clerked for Judge Posner in the Seventh Circuit when he wrote the opinion upholding the Indiana voter ID law. Then I clerked for Justice Stevens on the court when he wrote the opinion upholding the voter ID law out of Indiana. I still felt traumatized. I think, this podcast isn't me working through that case exactly, the same way that Leah's working through and NFIB, but I do think it still haunts me. But anyways, so that made me see red.

Kate Shaw:

Just one thread I wanted to pull together actually from both of the two conversations you had, Leah, which I thought was just such an interesting thread. Obviously, you guys talked about Shelby County, which of course Kagan discusses at length in her Brnovich dissent. Franita mentioned Rousseau, the partisan gerrymandering case. Nick struck an optimistic note about AFP and the future of campaign finance disclosure. Just those threads made the point, just separately, but I just wanted to make the points together, that the court, in a lot of these cases, these democracy cases in particular does this sort of democracy erosion two-step right, or like even three or four-step, which is in these cases, you see the court either affirmatively invalidating attempts to make democracy genuinely representative or in Rousseau saying it's powerless to intercede, which has the effect of keeping democracy not particularly representative.

Kate Shaw:

Each time it does that, it leans heavily on these other avenues that it says remains open for pursuing these worthy interests of actually improving facilitating democracy, right? In Shelby, it starts in section four, but really section five, functionally. But hey, you've still got section two, right? Remember the end of the opinion, I think as you pointed out, Leah, says, "Our decision to no way affects the permanent nationwide ban on racial discrimination in voting found in section two." But then of course, here they

come in Brnovich for section two and what else might be subject to that same treatment, right? In Rousseau, the court says, "Sorry, we can't help on gerrymandering, but Congress under article one or states themselves could do what Arizona has done and create these independent commissions." But the court only very narrowly upheld Arizona's power to do that as Franita pointed out. We don't really know what this court would do if faced with that question.

Kate Shaw:

In Citizens United, it strikes down these long standing corporate expenditure limits, but enthusiastically upholds disclosure, not only uphold it, but reasons that the very existence of disclosure as an alternative justifies what the court does in invalidating these other limits predicated on anti-corruption rationales. The question, I think, is when it will drop the hammer on these other things. But anyway, I just thought those two conversations together really nicely laid that groundwork, which is the court likes to appear modest and measured in pointing out that it's not closing all avenues to improving or reforming democracy, but subsequently often returns to close or slam shut the remaining open doors.

Kate Shaw:

Then the one other thing I was going to say was, I'm not sure this was made explicit, but just how different the court is in its receptiveness to the government interest, especially the fraud rationale in Brnovich versus AFP, right? In Brnovich, the courts like, "Oh, it should go without saying, a state may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." Then in AFP, the chief says, "It goes without saying, there's a substantial government interest in protecting the public from fraud, but the record supports the district courts finding there wasn't a single concrete instance in which pre-investigation collection of this information did anything to advance the AG's investigative efforts." Arizona doesn't have to wait for evidence of fraud before preventing people from voting, but California has to wait for evidence of fraud before requiring non-profits to give non-public lists of major donors to state authorities. It's just so wrong and I think worth contrasting the court on that specific point. Okay, that's all I got.

Melissa Murray:

I agree with you about the itinerant or selective commitment to fraud prevention in AFP versus Brnovich, which stood out as well. I think there's just so many terrible opinions to choose from in this term. How can you pick just one? It really is a kind of Sophie's choice. Cedar Point was pretty bad. What was especially, I think, terrible about it is that it just never acknowledged the degree to which it was really skirting this line toward having huge ramifications for all kinds of property rights issues and just regulation more generally as it relates to impositions on other people's property rights, just completely unacknowledged in that regard, in the opinion that they made it seem like they were making this one very surgical intervention about this California law, but it was obvious that it was an opinion that laid the groundwork that could later fuel an entire revolution in how we think about the regulatory state and the requirement of entering into private property in order to do regulatory things, so that one I think was incredibly problematic.

Melissa Murray:

Fulton was a disaster. I mean, everyone talks about the unanimity of Fulton. There were three justices who pretty much said we would be on board to overrule Smith. Then you had Justice Barrett's concurrence that was like, "Everyone says Smith is really terrible. There are all these criticisms, well-taken criticisms of Smith, but this isn't the right vehicle," which was like an invitation, please bring the

right vehicle to really overturn Smith. Again, I'm not sure why the liberal justices entered into that kind of appeasement opinion, but it's coming. They made it pretty clear that a true challenge to Smith is coming and coming pretty soon.

Melissa Murray:

Tandon was pretty terrible. If you want to, what's your pick from the shadow docket, that's pretty terrible. There was no actual opinion in FDA versus ACOG. It was just an order, but an order to make people leave their homes in the middle of a pandemic to seek a two pill protocol from a doctor when you're telling everyone to stay home for all of these other reasons just sort of evinces the disdain for reproductive rights, and so that was a problem.

Melissa Murray:

TransUnion, pretty problematic for all the reasons you've suggested, but a decision that has really floated under the radar in terms of the commentary. I do wonder if the decision might have a silver lining in that if the legislature cannot provide a private cause of action to get into federal court in the consumer protection realm in TransUnion, does that suggest that the Texas law, the Texas abortion law, SB8, which basically turns individual private citizens into private attorney generals to go in and force the substance of this abortion law, does that mean that that sort of private right of action can also be dismissed by a court going forward? I wonder if TransUnion might be able to be a way to defeat this enforcement issue in the SB-8?

Leah Litman:

I don't think so, because it would just be in state court, right? It doesn't have federal legs obviously, but could the same logic, like we don't have to listen to the legislature when the legislature provides us with a private cause of action to do certain things.

Melissa Murray:

I don't know if the Texas state courts interpret the Texas State Constitution to contain the similar kind of separation of powers rationale that underlay TransUnion, but maybe. I don't know. It's not really the separation of powers issue in TransUnion. It's just the whole idea that you don't have a particular injury, which I think is the same in SB-8, like what is your injury if someone else gets an abortion and you just happened to know about it, so I wonder.

Kate Shaw:

Yeah, the the logic, if this Texas courts did deploy it, I think it right, could be helpful. But I think I agree with Leah. I just think it turns on how the Texas courts interpret the Texas Constitution, and I don't know the answer.

Melissa Murray:

Well, I've heard the Texas courts are famously liberal and very progressive.

Melissa Murray:

Least favorite oral argument moments. I like, again, I like some sports. I enjoyed watching the Golden State Warriors, especially when they were winning, but I really don't like the inside baseball, kind of sports stuff where people just splay out really sort of idiosyncratic knowledge of sports and you're

you're expected to know it. And so I hated when Justice Kavanaugh invoked the Michael Jordan you hall of fame speech where he talked about being cut from the team in high school or middle school or wherever, such an inside basketball moment and assuming that everyone knew it was just gross. I actually hated all of his basketball shenanigans. I was just like, "Join a league, talk amongst your friends. No need to do that." I also really hated Justice Alito invoking the LDF brief in the oral argument for Americans for Prosperity versus Bonta, because I'm not sure he cares about all the other stuff that LDF does in other contexts.

Leah Litman:

I'm not entirely sure he does either. Obviously, all my favorite moments are also my least favorite moments. Whether it is Justice Alito invoking the LDF brief, cutting off Justice Breyer.

Melissa Murray:

Just rewind, rewind.

Leah Litman:

... interrupting Justice Sotomayor. Exactly, play that one more time, yeah.

Kate Shaw:

There was that one moment that, I don't know if this is a least favorite moment exactly, but it was a fascinating moment when Barrett, I think inadvertently elicited this incredibly revealing answer from Michael Carvin representing the Arizona Republican Party, which is like, "Why? Why do you guys want these laws? Why aren't you in the case at all?"

Melissa Murray:

Because we want to win. We want to shave off points and win.

Kate Shaw:

The people who we think would vote democratic, who are disproportionately voters of color from voting, because politics is a zero sum game. He basically said those words. Then, so I thought it was like, it wasn't an instance of her being an incredibly stupid questioner. I think she was just taken aback by the answer, I think, as maybe, Leah, you observed on the episode that recapped it. Then she quickly changed the subject, realizing what had just happened.

Leah Litman:

You sir, have given away the whole game. We're not allowed to say that out loud.

Kate Shaw:

Right, and the problem is actually the court might say, "Partisans seeking the partisan advantage is totally fine. If that correlates to racial disadvantage, sorry." I think that that actually is a deep problem that it wouldn't even necessarily be problematic if the court does that. But the court doesn't even really talk about it. That's just a messy fact we don't want to engage.

Leah Litman:

I mean, look at the places where it doesn't talk about it. I mean, you had the whole partisan gerrymander cases for years and years percolating before Rousseau threw them out entirely. Would no one, the point of it was that the partisanship matched the race stuff. There was such a correlation and no one really wanted to talk about that, at least in the writings at that point. Can we do an Alito persona watch? We've had so many this term.

Kate Shaw:

I'm worried. Do you think Sam Alito is going to worry that we're obsessed with him?

Melissa Murray:

I'm not obsessed with him.

Leah Litman:

I'm not obsessed with him.

Kate Shaw:

I don't know about that, Leah.

Leah Litman:

I just, I am just watching the court and providing commentary as things arise. We might have some new listeners who might not be familiar with the nicknames that we drop occasionally, so we just wanted to give you an over view about what's going on here. By this point, we have introduced Peak-lito, Troll-lito, Of-lito, and Hack-lito. These are oldies, but goodies. I'll define them in a second. This year, we also met Al-emo/Emo-lito/Emotional-lito/ .

Melissa Murray:

I liked that one.

Leah Litman:

You like Emotional-lito?

Melissa Murray:

Emotional-lito, I like that.

Leah Litman:

Okay, then that's what we'll use. We've got a workshop sometimes. Anyway, so recaps for the new listeners. Peak-lito, this is when Justice Alito channels his inner most self, like when he explains why criminal defendants should ultimately lose their cases, even when they prevail before the Supreme Court. This was on display in Lange versus California in which he explained all of the other doctrines that might justify warrantless entry, even though the Supreme court said the particular one that the California court info did not apply.

Leah Litman:

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Then you have Troll-lito, when justice Alito tries to catch the libs in a double bind, accusing them of being the real racist or something like that. An example of this would be when he invoked the NAACP LDF brief in the Americans for Prosperity oral argument.

Leah Litman:

Another persona faux-lito, this is when Justice Alito pretends to care about originalism or textualism, two methodologies he is extremely indifferent to and has occasionally mocked, in order to assemble a coalition. An example of this would be his concurrence in Fulton, which argued that Employment Division versus Smith was wrong on originalist grounds.

Leah Litman:

Other name, Hack-lito is when Justice Alito is unable to conceal his inner Fox News commentator. An example of this would be the entire dissent in the ACA case, California versus Texas, in which in the same paragraph, he insisted that nothing that has happened since NFIB calls for a different conclusion. And at the end of the paragraph, he said, the repeal of the taxer penalty fundamentally changed the operation of the scheme Congress adopted. Other examples from that opinion abound.

Leah Litman:

We also got a little Toxic Mascu-lito and Sam-splaining and Gas-lito. Toxic Mascu-lito or Sam-splaining is when Justice Alito bulldozes through Justice Sotomayer's questioning time or Justice Breyers like in Trump versus New York or California versus Texas. Gas-lito is of course when Justice Alito gaslights. An example of this might be Brnovich versus DNC in which he insisted he was not announcing a legal test.

Melissa Murray:

Narrator voice, "He was announcing a legal test."

Leah Litman:

Exactly.

Kate Shaw:

Back to the Fox commentator Hack-lito tip, did you notice that Justice Alito was incredibly concerned with cancel culture this entire term? It really made its way into a number of opinions in Mahanoy, he was concerned about it. Very much, I think he was ...

Melissa Murray:

Americans for Prosperity.

Leah Litman:

Yes.

Kate Shaw:

AFP and Mahanoy, chief among them. But yeah, no, I think it's a theme he's going to return to, absolutely.

Leah Litman:

It's a countdown until he uses the term cancel culture in a Supreme Court opinion.

Kate Shaw:

Agree.

Leah Litman:

Next term.

Melissa Murray:

I'm sure the occasion will arise when he cancels reproductive rights. As I was saying, favorite opinion, preemptively announced.

Melissa Murray:

To be fair, I've said it before. I'll say it again. I don't think this is going to be the case, Dobbs, where they overrule Rowe explicitly. But that does not mean you should not be super mad and put on your hysterical lady parts, even though everyone will tell you, in the newspapers, that there's nothing to worry about. Rowe has been saved. No, you stay mad listeners, because they're just going to wait to really stick it to you in a couple of terms.

Melissa Murray:

On that front, let's talk about some big picture events from the term. Obviously, one in massive big picture event that shaped the entire term was the September passing of Justice Ginsburg, which foreshadowed all of this, led to the very hasty confirmation of Justice Barrett, and I think shadowed a lot of the way we think about this term, because I'm not sure that we have been really good about thinking about the term outside of what would have happened where she's still there, right? I think there are a number of cases that we recapped where we noted, like Bandemer for example, the personal jurisdiction case, like that's likely a case she would have written, I think would've come out very differently had she been there. There were just a number of cases like that where her departure from the court really did leave a quite significant void.

Kate Shaw:

Linked to that, of course, is Justice Barrett's addition to the court. For sure, a very hasty nomination, confirmation, interceded by COVID super spreader Rose Garden party. That's also this term, my God. To extend a little bit, to kind of express in local train metaphor, I do think that at least at first appearances, she seems interested in the local train rather than the express train. She hasn't been in lockstep with Thomas and Alito and the way I think that some people, including maybe us some at the time, thought there was a chance she would be. She seems more interested in a John Roberts, Brett Kavanaugh incrementalist approach.

Kate Shaw:

I did think that there was a slightly pointed dimension to her concurrence in Fulton, which was, yes, I don't think that, she's clearly skeptical about Smith. She clearly wants, rather than just burning the whole thing down the way Alito was advocating without a clear sense of what would replace it, she says we would need to know what would replace it. And also she sort of says, I found it a little arch the way

she says, "I find the historical evidence rather inconclusive." She just like, "I know Sam, you worked really hard on those 77 pages, but I just don't really agree." I thought that was a pointed attempt to at least demonstrate or display a bit of distance between herself and say Sam Alito, so I thought that was interesting, but it is very much too soon to draw any, I think, broader conclusions about her specific character as a justice. Obviously, her replacement of Justice Ginsburg is seismic, but her, I don't feel like I have a great beat on yet.

Melissa Murray:

It's hard to conclusions about any of the justices based on this term, because it was a pretty limited term. As we've noted before, there were not a lot of cases, 56 argued cases. A lot of action on the shadow docket. Maybe they were anticipating getting some seismic issues on the election law docket, but not a lot of cases, so they had a pretty thin docket, which may have worked out well given all of the tumult this year. But despite having a very limited workload, they still managed to drag this out until July. What do you think happened there?

Kate Shaw:

Which really f-ed up our end of term. I'm so, still so puzzled.

Leah Litman:

Fucked everything.

Kate Shaw:

Right? We were all traveling last week. It was such a mess. But much more important than our respective summer schedules, yeah, what was the deal? John Roberts, I have always understood him to take great pride in always finishing the term before at the end of June, just as a matter of his judicial administration chops, right? He just is an efficient manager. He gets it done. Just like that didn't happen this year, and I don't really know why since they had so few cases.

Leah Litman:

Well, I mean, they got until early July It wasn't that far.

Kate Shaw:

But they'd never gone into July with Roberts as the chief.

Leah Litman:

But still, since 1996.

Melissa Murray:

Or with Roberts.

Kate Shaw:

Yeah, yeah, and a decade earlier. Yeah, so it had been a long time, anyway.

Melissa Murray:

I think it's because weren't going on any boondoggles.

Kate Shaw:

The pressure of that, yeah.

Melissa Murray:

They weren't headed out of the country. Yeah. I mean, if you're going to Spain or Portugal, you're going to be finished and your opinions are going to be in by June 23rd, so you can pack, get you a nice sun hat, buy some suntan lotion, get ready for your trip, but that wasn't happening this year.

Kate Shaw:

It may be as simple as that. I mean, a more calculating explanation is by July 1, people are already in, holiday, July 4th holiday weekend mode. There was going to be less attention paid to Brnovich, at least. They were happy with that. I don't usually think of them as being quite that calculating about the timing of opinion release, even if they are about other things, but here I wonder.

Leah Litman:

While the regular docket was pretty small, there was a huge amount of activity on the shadow docket, particularly related to the corona virus, whether it was religious liberty exemptions, whether it was voting rights issues, also major death penalty cases, reproductive rights and justice and other matters as well.

Kate Shaw:

We had a full telephonic term. I think it was really valuable for the public to get to hear live the questions and answers. I very much hope that the court will continue to make available simultaneous audio of the arguments. I don't have a great sense of whether they will, but I think that the broader Supreme Court commentary ecosystem should make clear to the court that there's a strong desire to continue with that practice, even after the court resumed in-person arguments. I don't actually know. Do you guys agree with that? Don't you think it was useful?

Leah Litman:

Yes, absolutely.

Kate Shaw:

What are big developments or big picture events from the perspective of the podcast, not the court? Should we talk about some of those?

Melissa Murray:

Sure. Well, we launched Irrational Basis Review, which is our primer, our con law primer series, both for students and those who are teaching con law. We hope that it's been helpful. I assigned it to my con law class this spring. I think they were pretty helpful. I think students enjoyed them. We encourage you to take a look at them. We're going to add more to that library of 20 minute deep dives into certain con law topics, so keep looking for that.

Leah Litman:

Then back to outside the podcast, we have the presidential commission on the Supreme Court, a topic that I think we are going to return to this summer. I am thinking about basically submitting all of our episodes as comments to the commission as public comments, but I could be convinced not to do that. Then maybe the last thing to mention is the thing that didn't happen, our boy, Steve retiring, so no retirement announcement at the end of the term or soon after. We're recording this on Wednesday, no retirement announcement now. I honestly think that with each day that passes the odds of a retirement this summer or this term go down dramatically, because the confirmation process does take time. Even the super speedy Barrett confirmation took six weeks. And so if you want to confirm someone before the start of the next Supreme Court term, that gives the administration a more limited amount of time. I think if he doesn't go by the end of July he's not going this year.

Kate Shaw:

Yeah, it still seems possible to me that he will go during July. Everything is a little bit weird from a calendar perspective right now, right? Just like there is an argument that the court was very busy in June. The sort of ordinary announcement from the bench, which is not invariably something that justices do, but somehow that was never on the table anyway. He's not constrained by how this has often been done and into early July, I do think that was when O'Connor announced. It's definitely something that can happen, but I think you're right, Leah, once August hits, it's a little harder to see it happening. But of course, if he makes his retirement conditional upon the confirmation of his successor, he can leave in the middle of a term. I mean, I think they probably prefer not to do that, but there's no reason that he can't. I think that from the perspective of actually having a confirmation done before the fall 2022 midterm elections, it would be much better for him to do it in the middle of next term than to wait until next June.

Melissa Murray:

Do you think he's waiting to see if Ketanji Brown Jackson gets some experience on the DC circuit? Is that what's holding him up?

Leah Litman:

I just, I don't think that that's that relevant.

Melissa Murray:

I don't think so either, but do you think that's what's driving him?

Leah Litman:

I think maybe he could convince himself that that is part of why he's waiting, but I don't think that would be the real reason.

Melissa Murray:

Do you think he's really just at home like, "This job finally got good?"

Leah Litman:

Yeah, he's like, "I got to write the ACA case. I got to write Mahanoy." I will say that to his credit, with his more seniority, I think he has done a really good job of sharing good dissents with his more junior liberal colleagues. Justice Sotomayor had the great dissent in Americans for Prosperity Foundation. Justice

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Kagan had the great dissent in Brnovich. Justice Breyer capped Cedar Point for himself. Justice Breyer also assigned Justice Kagan the dissent in Edwards versus Vannoy and Justice Sotomayor the dissent in Jones versus Mississippi. I think that is a great institutional citizen, sharing those kinds of opinions with his colleagues. I think he probably is enjoying himself. He is doing a good job in some respects, but I cannot believe, I truly cannot believe he has convinced himself that yes, given everything that is happening, I'll just stick around.

Kate Shaw:

Right. I mean, I am quite sure that Justice Sotomayor, who will become the most senior liberal justice if Justice Breyer's replaced, will also be magnanimous in her sharing of the dissent assignments. He's not irreplaceable in that respect or any other respect, as much as we obviously are extremely fond of Steve Breyer. It's just such a razor thin Senate majority the Democrats hold, and I think that given what Mitch McConnell has said, signaling that if he can, he will block any replacement. It is just pretty shocking that he has not made any announcement now, but July's young.

Leah Litman:

It's getting older. It's getting older.

Kate Shaw:

It's not that young. That's true.

Melissa Murray:

God, we had so much to cover the court, we didn't even get to talk about the new Trump lawsuit against Facebook and Twitter. I can't wait until those go all the way up to the court.

Leah Litman:

And Justice Alito finally recognizes a Bivens cause of action against Facebook, the apparently federal government actor who is violating the first amendment. There's so much in here.

Melissa Murray:

That's true. You love to see it.

Leah Litman:

I mean, so good.

Kate Shaw:

I have to go back and listen to it, but I'm pretty sure at the end of our Irrational Basis Review episode about the state action doctrine, we were like, "This stuff could be in flux. There's lots of interesting ideological scrambling happening around social media platforms." [crosstalk 01:16:50]

Melissa Murray:

We did say that.

Kate Shaw:

I think we anticipated this entire lawsuit.

Leah Litman:

We have all these people's numbers, not just Sam Alito.

Leah Litman:

Cassandra, destined to know the truth and not be believed. Speaking of knowing the truth and not being believed, maybe we can turn to, as a core culture segment, commentary on the Supreme Court commentary because it is all driving me insane. I can't single out, because there are just too many. The number of pieces that say something along the lines of, "This is a moderate court. This is not the extreme conservative court we were warned about. Roberts, Barret, Kavanaugh institutionalists. The court is a model of restraint." Again, I could go on and on. Institutionalists compromise moderated. I don't even know where to start with these people. For many of them I would start with, "Have you heard of this thing called the shadow docket? Because there, there were more frequent ideological divisions that divided along ideological lines."

Leah Litman:

Second is to remind them you cannot talk about what is happening at the Supreme Court without engaging with the substance of the court's decisions. So to say that the "moderate wing of the court" is the group of justices who wouldn't throw out ballots that were cast under the then controlling rules in South Carolina, this was literally one of the COVID voting cases that the court decided in the lead up to the 2020 election. Justices Thomas, Alito and Gorsuch would have thrown out ballots that South Carolina citizens cast in the election under the rules as the district court had established them. Saying that Justice Barrett and Justice Kavanaugh and the Chief Justice didn't do that does not establish that they are moderate. That's just a complete insane comparison.

Leah Litman:

I don't know why, well, I have some suspicions, why reporters do this, but you can't provide commentary on the direction of the Supreme Court without actually making a judgment about the substance of the court's ruling, their effects and their relationship to the court's prior precedent. None of these pieces really does that.

Melissa Murray:

I don't have more to add to that. I feel like every year at the end of term, we do a thing like this where we not the disjunction between our take on things and what's going on in the world. Maybe the problem is them. Maybe the problem is us. I think we are being quite clear-eyed about how we are looking at the court. Maybe we are more pessimistic than other commentators, but I think if you just scratch the surface and dug a little deeper on some of these claims, they all just fall apart immediately, like this idea that the court is being moderate. Well, I guess that's right if you only count up these decisions and the fact that they're still not done, and also you didn't count the shadow docket as well. That's how you get a moderate court. But all anyone wanted to talk about for the last few weeks is this moderate nonpartisan court. Here we were screaming into the ether that this was a mistake, don't buy this. Then you have Brnovich and Americans for Prosperity on the last day giving truth to the lie.

Leah Litman:

Yeah, aside from the destruction of voting rights and democracy, the play was great. Mrs. Lincoln. I mean, come on.

Kate Shaw:

Yeah, I mean, for what it's worth, I do think that there has been some backlash. Obviously, we have been critical, Steve Vladeck on Twitter and others have been extremely critical of the discounting of or completely ignoring of the shadow docket in some of these tabulations at the end of the term. I have a feeling that going forward, a lot of coverage of the court is going to try to attend a bit more of the shadow docket, because it's just such a wildly unrepresentative picture to just focus on the fully argued cases. I hope that that is something that was a feature of this term that we're not going to see carry forward. Although again, maybe that's too optimistic.

Leah Litman:

I don't think so, because I think you can always select, as a baseline, the court didn't do what Justice Alito wanted. If you select that as the baseline or comparison, right?

Kate Shaw:

It's always going to look moderate by measure.

Melissa Murray:

Then you're always going to be able to have the story, right, that there is this other group of conservative justices who are moderate and that they just seem committed to that approach.

Leah Litman:

I think that's all we have time for today. I hope this will sate you listeners for the long summer. We will have other episodes on, but obviously the court's not going to be doing much as they gear up for what will certainly be a barn burner of a term in October, 2021. But until then, you should know that we are no longer going to be affiliated with The Appeal, which is shutting down, which that means you just have more of an opportunity to support us in other ways, like with our glow campaign. We would encourage you if you enjoy the podcast, please consider subscribing and supporting us so that we can pay our producer, Melody Rowell a fair wage. Check out our glow campaign, glow.fm/strictscrutiny.com. We also have new merchandise. There is now a line for every Supreme Court justice, and that can mean a lot of things, so take a look at all of that on strictscrutinypodcasts.com.

Leah Litman:

We are thankful for Melody Rowell, our producer, Eddie Cooper, who does our music and our summer intern, Liam Bendickson, who's done great work for us. Also, hardy congratulations to our Strict Scrutiny super fan, Clara Steen, who won a Tennessee wide PTA award for her essay, I Matter because I'm an Activist. Importantly, Clara accepted her award in our own Strict Scrutiny merchandise, the angry feminist podcaster t-shirt. I'm just going to say Clara, chef's kiss. You looked amazing. It all came together. Congratulations. We're so glad to have you out there repping the pod. Listeners, we'll see you soon. Have a great summer.