Leah Litman:

Hello listeners, and welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. I'm one of your hosts, Leah Litman. Don't worry, Kate and Melissa will be back next week for the term recap. But because I didn't get to read all of Justice Kagan's dissent in Brnovich on our instant recap episode with Wilfred Codrington and Rick Hasen, I thought we'd do another episode that's a deep dive on the end of term opinions, particularly Brnovich. If you haven't yet listened to our episode with Wilfred Codrington and Rick Hasen, I'd recommend listening to that one first, which unpacks the opinion.

Leah Litman:

This episode is focused more on analyzing what we identify in the opinion, because there's just a lot there to unpack. Also, the opinion as well as AFP are really significant, and they relate to many of the themes of the term we'll be discussing next week on our term recap. This week, I'm joined by two very special guests, two of the country's foremost experts on voting rights. I hope you enjoy.

Leah Litman:

Here to take a deep dive into the end of term/end of democracy opinions is Professor Nick Stephanopoulos. Professor Stephanopoulos is the Kirkland and Ellis professor of law at Harvard Law School, where he specializes in election law and constitutional law. He is also a co-founder of PlanScore, a website evaluating districting plans and a member of Campaign Legal Center's Litigation Strategy Council. Welcome to the podcast, Nick.

Nick Stephanopoulos:

Thanks for having me, Leah.

Leah Litman:

I figure with your expertise, you should be able to help our listeners understand a few things about Brnovich like why hobbling section two of the Voting Rights Act is necessary to enforce the Voting Rights Act and other things that Wilbur Ross and Sam Alito tell me, but more seriously, part of why we wanted to do this episode before our term recap is because Brnovich largely as well as Americans for Prosperity [inaudible 00:02:06] so many of the themes that we've been talking about this entire year, and that we'll return to in the term recap. One of those themes is, of course, the moderation, "moderation of the Roberts Court," like how Justices Barrett and Kavanaugh have formed a "moderate group" of three with the chief.

Leah Litman:

Don't shoot the messenger, listeners. I'm just reporting what mainstream commentators and very smart people tell me. Another theme is apparently how the justices, including the new nominees, aren't political. I know this because Justice Breyer told me so, because sometimes justices appointed by different political parties vote together, and because textualism, and last but of course not least is, of course, the supposed ascendancy of something called or something calling itself textualism. Maybe we can just start there.

Leah Litman:

Given that Neil Gorsuch joined the majority opinion in Brnovich, how would you rate the textualist bonafides of the opinion on a scale from, let's say, big textualist energy to even bigger textualist energy?

Nick Stephanopoulos:

Right, maximal textualism. They wish, right? It's a decision that starts with the text of section two of the Voting Rights Act, and then quickly forgets about the text as the court layers one nontextual limit on section two after another. All five of the factors that Alito names as factors to be considered in future section two cases are entirely nontextual. You can read the text of section two until you're blue in the face. You'll never see anything about what the world looked like in 1982, or what the rest of the state's electoral system might happen to look like, or how big of a burden on voting is supposedly imposed by some measure that creates a big racial disparity.

Nick Stephanopoulos:

Those are all just made-up extra textual factors plucked out of thin air.

Leah Litman:

I think part of why Brnovich said it was adopting those extra textual factors, as Justice Kagan called them and as we're calling them, is because of what would happen if it didn't. That is the majority opinion, and Brnovich said, "If we adopted what it called a pure disparate impact standards, something that just focused on whether the result of a law or policy was discriminatory effects on racial minorities, that would "have the effect of invalidating a great many neutral voting regulations." The court call that a radical project, and again warned of any interpretation that would have the potential to invalidate "just about any voting rule that a state adopts."

Leah Litman:

That's so weird because for the last, I guess, three, four years, some guy named Neil Gorsuch has been telling me that he only cares about the words of a statute, not Congress's purpose in enacting it, and definitely not the Consequences or implications or effects of interpreting Congress's language in a particular way. I guess before maybe I ask you what's going on here, we can play a little game like it's the end of the term, so time to have a little fun. Actually, let me pull up some of Neil Gorsuch's greatest hits, excerpts from his burn book on purposivism/his I burn for you textualism book.

Leah Litman:

I'll read some of these directives on how you interpret statutes, and you can tell me what part of Brnovich this reflects. Let's start with a quote from Bostock, his Title VII opinion that supposedly definitively proved that he is a principled textualist. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Only the written word is the law, and all persons are entitled to its benefit. Does that sound like the approach Justice Alito is using in Brnovich?

Nick Stephanopoulos:

It's literally the opposite. Alito says, "Well, if the 1982 Congress didn't envision this result, then it can't be the result today, even if the plain language of the statute would point to that result," polar opposites.

Leah Litman:

Why did Neil Gorsuch join this opinion? Part of the oddity is even if he hadn't, the opinion still would have come out the same way. It would have been a five-four opinion with the Justice Alito majority, so why would someone nominally committed to the idea that we should be interpreting a statute according to its terms... Words are how the law constraints power, yada, yada, yada. I could go on. The only thing the court can be sure of is what can be found in the law itself. Why would he join in opinion like that? How should we understand the court's project here?

Nick Stephanopoulos:

It's interesting. Non-textualist or half-hearted textualist have an answer. They might say, "Look, certain super statutes are written in really broad sweeping terms," and it's okay to adopt the non-textually driven common law method of interpretation when implementing the Voting Rights Act, the Civil Rights Act, the Antitrust Act, but that root's really not open for Gorsuch, who has wedded himself to strict let the heavens fall textualism. Of course, he never explains himself, and so what is left to suspect ideological explanations that, sure, he's a textualist, but he also doesn't want lots of right wing voting restrictions to be struck down, heaven forbid, that it's easy for everyone to vote in America, including minority citizens, including Democrats.

Nick Stephanopoulos:

When a dislike of pro-voting outcomes comes into conflict with textualism, Gorsuch picks his dislike of pro-voting, pro-democratic outcomes.

Leah Litman:

I think that observation is also important to how we understand Bostock, because I think people assume that Bostock was an example of where Justice Gorsuch's interpretive methodology textualism pointed in one direction, but his political priors pointed in another. It's not entirely clear to me that that has to be the case, given the extent of popular support, even among Republicans and elite Republicans, in particular, for same sex equality and protections for LGBTQ individuals. That's all the more so given that Justice Gorsuch specifically reserved the question of whether religious objectors would be exempt from the Title VII ruling in Bostock.

Leah Litman:

Yes, Justice Gorsuch has maintained a commitment to textualism, but because he has shown himself not just in Brnovich but also in the Affordable Care Act dissent to be a somewhat faint-hearted textualist, his punishment is that instead of Regé-Jean Page reading his odes to textualism, I will be doing that from here on out as I just did. Justice Kagan obviously seized on the majority in Brnovich's faint-hearted textualism. She poked a lot of fun at this, called it a law-free zone, said the majority fears that the statute Congress wrote is too radical, but I think she also noted that that is not in a lot of ways the real problem or the biggest problem with the majority's opinion.

Leah Litman:

She said, "I could say, and I will on the following pages, that this is not how the court is supposed to interpret and apply statutes." Maybe we can shift to the actual interpretation that the court gave to Section 2 of the Voting Rights Act. Justice Alito said, "I am not adopting a legal test." He specifically said the courts have declined to announce a test to govern all VRA section two claims like the one at issue there, namely vote denial claims, but was providing a few guideposts. I guess, how seriously did you take that because it sounded like from what followed, he was adopting a non-legal test, legal test for how

courts should assess section two claims, at least in vote denial cases where he gives them a list of factors to consider, and then proceeds to apply those factors to assess whether this section to claim should proceed?

Leah Litman:

Why is he disclaiming that he's writing a test? Is he writing a test, or how should we understand the framework that he gave us?

Nick Stephanopoulos:

I think given how the judicial hierarchy works, of course, it's a test. Your lower courts are not going to feel free to ignore Alito's five factors. I fully expect that in every vote denial case, from this point forward, the analysis will center on exactly those five factors. I suppose some more enterprising or more entrepreneurial lower courts might feel free to stress additional considerations, but no one can ignore the court's five factors, and if they point toward upholding a restrictive voting regulation, it'll be awfully hard for any court to find a way to strike that down under section two now.

Leah Litman:

The way I understand that is if a court doesn't consider one of the factors he gave, obviously, that is very fertile grounds for reversing or at least vacating an opinion that invalidates a voting restriction either in the court of appeals or at the Supreme Court. He is also giving the now conservatively dominated Federal Court of Appeals a lot of tools that they can deploy in rather aggressive ways in the section two vote denial cases. But the legal test he adopts... We can get to the particular factors that we've been alluding to in a second. But in adopting a general framework, he says, "We are not going to import the disparate impact model employed by Title VII, the employment discrimination statute, or the Fair Housing Act. Both of those statutes contain prohibitions on policies that result in disparate effects and not just those that intentionally discriminate on the basis of race."

Leah Litman:

You've written about the intersection of various disparate impact regimes. What did you make of that analysis, because, of course, he did partially incorporate some of how disparate impact analysis works in those areas, just not others?

Nick Stephanopoulos:

I think Alito's stereotyped view was the traditional disparate impact law in the employment context or in the housing context is too friendly for plaintiffs. I think he thinks it's really easy for plaintiffs to find some employment practice or some housing regulation, link it to some supposed racial disparity, and strike it down. I think he ideologically wanted to make it as difficult as possible for plaintiffs to prevail under section two. It was afraid that the Title VII or the Fair Housing Act model isn't restrictive enough for plaintiffs. Note that he's wrong about how easy it is too win disparate impact Title VII FHA claims.

Nick Stephanopoulos:

Ask any litigator in those areas. They'll tell you that 80%, 90% of disparate impact claims fail under those statutes. But regardless, Alito wanted to make an even more anti-plaintiff-

Leah Litman:

He wanted to make it 100%.

Nick Stephanopoulos:

... even more difficult for plaintiffs to succeed. Nevertheless, as you alluded to, he hasn't managed to completely separate section two from the dominant typical disparate impact framework. The two most important parts of the regular disparate impact framework are number one, how big is the racial disparity, or how significant is the racial disparity that's been caused by a given practice? Then is the practice that's causing the disparity really necessary to achieve some substantial interest on the part of the defendant? Those two factors remain critical factors in Justice Alito's framework.

Nick Stephanopoulos:

Size of the racial disparity is one of the five factors, and the strength in the fit of the defendant's interest is another of the five factors. The core elements of the normal disparate impact model are still going to be core pillars of section two doctrine going forward just layered on with a bunch of anti-plaintiff curlicues and supplements.

Leah Litman:

I was just about to say he is keeping the parts of the disparate impact regime that are not so favorable to plaintiffs, and then adding on a few more. The parts of the disparate impact regime that also exists in other disparate impact regimes, I think, also undermine his claim that the dissents approach to section two of the Voting Rights Act is "just a pure disparate impact regime," because he expresses this concern that without this narrowing interpretation the majority adopts, any law or policy that results in any disparity will necessarily violate section two, even if the State has a super pressing need for the law or regulation that it adopts.

Leah Litman:

But that's not true given the considerations that the dissent concedes are relevant to any disparate impact regime, including section two, the two you identify, the size of any disparity as well as whether the state could pursue its interest through some other way, or whether the state has a real interest or some non-racial interest in adopting the regulation that it has.

Nick Stephanopoulos:

Right. Kagan absolutely isn't advocating just a pure naked disparate impact rule that any electoral regulation that causes a racial disparity is therefore unlawful under section two. She would preserve the ability for a jurisdiction to argue that the practice is necessary to achieve some substantial interest. Alito says, "Oh, that's too hard. It's impossible to establish necessity." Well, Title VII defendants, employers successfully do so all the time. Fair Housing Act defendants, housing providers also successfully make that necessity defense all the time. It's simply not true based on our experience with 50 years of disparate impact litigation and other areas that plaintiffs always win once they can find some racial disparity somewhere.

Nick Stephanopoulos:

Defendants very often are able to rebut that disparity.

Leah Litman:

I actually wanted to ask you about that portion of the opinion. The court specifically rejected the strict necessity requirement, and Justice Alito wrote, "For example, we think it inappropriate to read section two to impose a strict necessity requirement dot, dot, dot, dot." Stephanopoulos' disparate impact, Unified Law, parenthetical advocating such a requirement. Let's play another game, end of term like I said. Let's have some fun. Everyone can close your eyes. Now, raise your hand if you've ever felt personally victimized by Sam Alito or Regina George. Nick, are you raising your hand?

Nick Stephanopoulos:

That's right. I got a pretty funny email from another law professor whom I won't name. I wrote an op ed quite critical of the Supreme Court's decision. This guy writes back, "Nick, after Alito cited you in his opinion, this is how you repay him? Show some graciousness to poor Sam Alito."

Leah Litman:

Sam Alito is the real victim in all of these ways if you ask him.

Nick Stephanopoulos:

That's right.

Leah Litman:

Obviously, it's wonderful to be cited. Obviously, it would have been better had they just adopted your standard, but perhaps that will happen another day.

Nick Stephanopoulos:

This this court will never adopt-

Leah Litman:

No.

Nick Stephanopoulos:

... any even remotely pro-plaintiffs standard in this area, but Congress could do so tomorrow. This is just statutory interpretation. There's no hint that the Constitution requires this strained reading of the statute. Congress is considering a bill right now that would revive the other half of the Voting Rights Act, so it would be child's play to add to that bill one more sentence saying, "Oh, by the way, a section two vote denial violation is established when a practice produces a significant racial disparity, and the defendant can't show that the practice was necessary to achieve some legitimate interest." Boom, one sentence and all of the court's non-textual adventures are just brought to a halt.

Leah Litman:

Although, I think, in light of how non-textual this opinion is, I might want a little bit more added specificity along the lines of this statute does not lock in and presumed valid all currently existing measures of voter suppression or voter discrimination. Neither does it suggest any prevalent ones are presumptively lawful, or some other, let's say, helpful interpretive guidance for a textually challenged court. Maybe we can talk about the factors in the non-legal, legal test that Sam Alito notes. You've already mentioned a few of them specifically the 1982 factor, which in some ways is...

Leah Litman:

I don't know. All of them are interesting and problematic, but this one stuck out to me. Here, Justice Alito suggests and then walks back and then suggests again voting restrictions that existed in 1982, at least with sufficient frequency are presumptively valid. I guess... Did you know that discrimination and voting ended in 1982? This was something I learned reading the opinion.

Nick Stephanopoulos:

Who knew we had solved everything back in 1982? It's interesting. From my perspective, the 1982 rule, I mean, it's obviously legally preposterous, textually unmoored to the nth degree. It also means the challenges to restriction's uncertain pro-voter methods that have emerged since 1982 will now become quite difficult, right?

Leah Litman:

Right.

Nick Stephanopoulos:

There wasn't much early voting or absentee voting in 1982. There wasn't same day voter registration...

Leah Litman:

Or ballot drop boxes.

Nick Stephanopoulos:

Exactly. Restrictions on any of those things will become quite difficult to challenge. On the other hand, we've seen some creative vote suppression in recent years that didn't have analogs back in 1982.

Leah Litman:

Like Kris Kobach's schemes.

Nick Stephanopoulos:

Kris Kobach's, right. Requirements that people prove their citizenship in order to register to vote, totally not imagined back in 1982, photo ID requirements for voting. The most high profile example of voting restriction of the last decade didn't really exist before roughly 2003, 2004. If I'm taking Alito's logic seriously, maybe I shouldn't, I would say, "Well, hey, these were not widespread restrictions in 1982. Even today, they're not widespread restrictions." That ought to cut against the validity of those kinds of measures.

Nick Stephanopoulos:

The reason Georgia, Florida, Texas style efforts at election subversion, also totally unprecedented, didn't exist back in 1982, and so arguably, that ought to cut in favor of striking down these measures under section two.

Leah Litman:

But thankfully, Justice Alito provided four other factors that courts and he could use to uphold them. Don't get too excited, although I do, of course, agree with you that that particular factor-

Leah Litman:

... should not affect these challenges to more novel voting restrictions. But part of what struck me about this 1982 test is, of course, the history about what was happening at the time, or at least the political history of what was happening at the time within the Reagan Department of Justice, because at the time, the Supreme Court had recently held that the Voting Rights Act didn't prohibit voter discrimination. That wasn't intentional. That is voting laws or policies that merely had the result of discriminatory effects. A young lawyer within the Reagan Department of Justice was charged with basically advocating for the administration's position.

Leah Litman:

This young lawyer argued that the Voting Rights Act should not be amended to prohibit voting laws or policies that resulted in discriminatory effects, argue that violations of section two shouldn't be too easy to prove, and argued that the administration should take the position that the Voting Rights Act was doing just fine, and that voting discrimination wasn't really a problem, that the Voting Rights Act had already solved it. That young lawyer, of course, was John Roberts, now the chief justice of the United States who joined this opinion that essentially locks in his own view or at least preferred view of the Voting Rights Act, which is it doesn't actually prohibit most of the voting practices in existence during 1982.

Leah Litman:

I think that's part of what really stuck out to me about this 1982 factor is just how much it overlapped with the interpretation of the law that was being advocated for by the Reagan Department of Justice, and how this interpretation achieves what the Reagan DOJ couldn't achieve in the legislative process, namely, not amending the Voting Rights Act to prohibit those voting laws or policies with disparate racial effects.

Nick Stephanopoulos:

If it's the case that Alito's opinion basically negates all or almost all section two vote denial claims, then you're right. This is basically a victory for the stance that the young John Roberts took. I tend to think that the effects of the ruling won't be quite that sweeping. Unlike in redistricting, for example, there's no direct appeal of these cases to the Supreme Court. There are lots and lots of section two cases out there. There are some favorable circuits and lots of favorable district court judges. The court gives us five factors that now lower court judges, including liberal lower court judges, will feel free to balance however they want.

Nick Stephanopoulos:

I'm optimistic still that the Supreme Court won't be able to put a tight lid on how section two operates in the future. There'll be too many cases, many of them involving small potatoes defendants. If I go and sue some municipality somewhere for a section two vote denial violation, and I get a liberal district court judge, is John Roberts, is the Supreme Court really going to step in and reverse that liberal ruling? Probably not, so I think a fair amount of progressive work might still bubble around at the district court and circuit court level.

Leah Litman:

The ones that I more had in mind was, for example, the voter ID challenge out of Texas, that the Fifth Circuit had invalidated the Texas voter ID relying on the factors that the Supreme Court says are mostly relevant to vote dilution claims rather than vote denial claims. I just don't know if the Supreme Court had taken that case adopting this standard if there would be five votes to invalidate the voter ID law. Then I'm also looking at the Georgia lawsuit, which again involves a rollback of some of these recent advances in voting access.

Leah Litman:

I think those challenges, as we were suggesting, are just less likely to succeed, and that's part of where I think this test has [inaudible 00:25:14].

Nick Stephanopoulos:

I think when it comes to photo ID, I'm not quite sure how the analysis plays out. I've no doubt that in Roberts and Alito's hands, they would find a way to apply all the five factors against the plaintiffs. Photo ID serves the compelling interest in preventing fraud. The impositions on voters are tiny. Just bring your driver's license to the polling booth. The racial disparities aren't big enough. Texas provides you all these other ways to vote and so on and so on. If the case doesn't get to the Supreme Court, the liberal Ninth Circuit, the liberal Fourth Circuit, I could easily see coming up with a different conclusion, even in a photo ID case under section two post Brnovich.

Nick Stephanopoulos:

In Georgia, I think you're right to the extent that most of the provisions in the Georgia law are rollbacks of recent convenience measures for voting. I think those will be awfully tough to challenge under section two now. Of course, it's not like the world before Brnovich was this paradise for plaintiffs. There are a handful of high profile plaintiff victories before Brnovich, but lots and lots of high profile plaintiff defeats in Virginia, in Alabama, more recently in Texas. The lower courts were hardly accommodating for these kinds of claims in recent years.

Leah Litman:

No, I think that that's right. I think part of my fear about what you were alluding to, namely this standard in the hands of the chief justice as well as Justice Alito is how active the court was earlier this fall on the shadow docket when it came to the voting rights cases that were related to measures taken to relieve burdens on voters in light of the coronavirus pandemic. If, let's say, these cases are litigated in the shadow or lead up to elections, I can imagine a world in which the Supreme Court doesn't actually take them for full briefing and issue full opinion saying, "Under the standard we announced in Brnovich, these voting restrictions are fine, but instead would just stay decisions of the lower courts enjoying these restrictions in the lead up to elections, just like it did in the lead up to the 2020 election."

Leah Litman:

That's part of why I feel like this standard is again problematic given that the body that is policing it, I just have little doubt about how they will be applying that standard.

Nick Stephanopoulos:

There's a really weird disjunction between the court's regular docket and the court's shadow docket. In the regular docket, you really rarely see voting restriction cases. There's Brnovich. There was an Indiana

photo ID case Crawford back in 2008 or something, and that's it for the last 20 years or so. But then in the shadow docket, everybody gets a Supreme Court ruling. Wisconsin, Texas, Georgia, you name it, everyone-

Leah Litman:

Alabama, South Carolina, Rhode Island.

Nick Stephanopoulos:

Everybody. The saving grace for plaintiffs is that the shadow docket decisions aren't really reason. They don't have the same precedential value. They don't tell you what the court is actually thinking about either section two or the Constitution. If I'm a plaintiff right now, I don't try to do anything in the run up to an election. I'm willing to accept another bad election under bad rules. The hope is just to win relief in normal procedural time without any extraordinary relief before an election, and then just hope that there's no shadow docket opportunity for the Supreme Court to get involved.

Leah Litman:

I guess we were talking a little bit about the political context of these amendments to the Voting Rights Act. Part of what the court leans heavily on is what it calls the dole compromise, the idea that section two contains not just a prohibition on those voting laws or policies that result in discriminatory effects, but also contains a definition about which voting laws or policies impermissibly result in discriminatory effects, and that that definition was added by the Senate after the house initially proposed the prohibition on voting laws or policies with discriminatory effects, and that this definition was intended to narrow the set of voting restrictions that were invalid under section two.

Leah Litman:

I guess, what did you make of the majority's analysis of this legislative history? Part of what struck me just to put my cards on the table is, again, going back to the John Roberts memo from DOJ, he talks about this Dole amendment as not addressing the concern with so called quotas, because part of the Reagan DOJ's concern was this amendment is basically going to require proportional minority representation, and that's the context for this Dole Compromise that it was intended more for vote dilution claims and to address proportional representation, but now, Justice Alito is saying, "No, it is this cudgel against vote denial claims as well."

Nick Stephanopoulos:

Right. I think the response to this argument is just that the paragraph of section two that the Senate added, only a little bit of that is the Dole Compromise that says that section two is not meant to result in proportional representation. The other part is just fleshing out how one establishes a violation of the statute, and it has nothing to do with proportionality or any senate compromise. That Dole Compromise only dealt with redistricting and representation. The point of it was to make sure there was no requirement that you have proportional representation of minority citizens in legislators.

Nick Stephanopoulos:

God forbid, we have proportionality for disadvantaged blacks and Latinos in America. Where would the country be if whites weren't massively over represented in every legislature in America?

Leah Litman:

What a radical project.

Nick Stephanopoulos:

Exactly. But the key point is that nobody was thinking about vote denial claims in 1982. The whole fear of people like Dole was that districting challenges would inevitably result in proportional representation, and so Dole tried to prevent that outcome with his key clause. It's just more extratextual rabbits out of hats. When the court says, "Oh, by the way, this Dole disclaimer about proportionality somehow has some bearing also on vote denial challenges," Dole wasn't thinking about voting challenges then. Nobody who voted for the Dole compromise was thinking about vote denial claims.

Leah Litman:

The only way the court can say the additional fleshing out of the section two definition restricts the availability of section two relief is because it ascribes to the Senate and to Congress a purpose of restricting section two relief. That is not at all based on, as you were saying, the actual text of the statute. That is the majority just, again, reading its own version into the legislative history, and ascribing that purpose to Congress.

Nick Stephanopoulos:

The actual language is incredibly consistent with a pure disparate impact standard. There are terms like equal opportunity, equal openness. Those say nothing about proportionality or fears of proportionality. What they do explicitly embrace is an equality principle. They condemn inequality in voting openness or in voting opportunities, so that language is totally inconsistent with any limit on the reach of section two.

Leah Litman:

Since we were talking about how this Dole Compromise was mainly about redistricting and vote dilution claims, do you think that the standard that Justice Alito announces in Brnovich for vote denial claims could find its way into vote dilution claims? Because Justice Alito both says, "Look, we're just announcing these factors for vote denial claims, and the Senate report is mainly about vote dilution claims. That's why we don't think those factors are relevant here for vote denial claims," but could it really be that the same prohibition adopts two distinct legal tests for different kinds of challenges, or do you think there really is going to be a separation between these different kinds of challenges?

Nick Stephanopoulos:

In the eyes of courts and professors and lawyers, there really has been this distinction for years between vote dilution and vote denial claims. For years, we've all known how to think about vote dilution questions, and we've had no guidance from the court whatsoever on vote denial questions. I do think there is a pretty real separation between the two kinds of claims. I don't doubt that defendants will try to quote Brnovich in vote dilution cases. They'll say, "Hey, look, our district maps like ours were ubiquitous in 1982." Surely, Congress didn't intend to displace or strike down all maps like ours, but I think there's so much water under the bridge when it comes to vote dilution.

Nick Stephanopoulos:

You've got more than a dozen Supreme Court cases on section two vote dilution.

Leah Litman:

We know how much Neil Gorsuch and Clarence Thomas care about those as much as Justice Alito seem to care about the court's prior precedent. No, I'm just giving you a hard time. Of course, those should matter, and those obviously will matter in the lower courts.

Nick Stephanopoulos:

It's also not like those are great for plaintiffs. I mean, the Roberts Court has been voting against every section two vote dilution claim it sees as well. It's just that we have a body of law, or it's not a very pro-plaintiff body of law, but it's an established body of law. I think it would be odd and hard to make that case that we should ignore this explicitly relevant body of law in favor of clear dicta from Brnovich, but then again, with the partisan gerrymandering cases a couple years ago, they dealt with partisan gerrymandering only, and yet now we see defendants in voting cases, in section two cases quoting the court about how courts can't possibly resolve these things.

Nick Stephanopoulos:

It's all political. Courts have no authority to judge disputes that involve political power. I think there'll be some spillover, but not a huge amount of spillover here.

Leah Litman:

Maybe before we go on to Americans for Prosperity, one last question that I've really been struggling with on Brnovich, which is what emo music do you think Justice Alito may have been listening to when he wrote this opinion? As we've said, we really think Fall Out Boy was his jam for the ACA dissent, and maybe even Fulton, but wasn't really sure what vibe this angry, winning majority really channeled.

Nick Stephanopoulos:

Brnovich is not an angry case. It's a victorious opinion. He doesn't have the anger. The righteous fury is more in the dissent. The only anger in Alito is when he has to be troubled to deal with the dissent.

Leah Litman:

Yes.

Nick Stephanopoulos:

The footnotes are angry. The rest of the opinion is pretty tranquil, I think. What music best fits this? Probably not hard rock. Probably not rap, I don't think. I have to think some more about that.

Leah Litman:

Some of our listeners suggested maybe Creed or... Anyways, just

Nick Stephanopoulos:

I think, it's my party. I can do what I want to do.

Leah Litman:

You're right. That definitely works.

Nick Stephanopoulos:

We've got six votes, and you don't, so we can make up whatever restrictions we want on the Voting Rights Act.

Leah Litman:

Exactly. I don't care. I love it, Charlie XKX. Wrecking Ball, Miley Cyrus, any of the above might do. Let's shift to Americans for Prosperity just for a second. This is the other major end of term case that the court decided in which it invalidated the California law requiring charities to disclose their donors in reports to the government. In the case, the court redefined the applicable standard of review exacting scrutiny to require the government to show that a law is narrowly tailored to an important governmental interest. The court in the course of announcing that standard had noted that it had applied this exacting scrutiny standard in both cases involving the electoral context as well as those that don't involve the electoral contexts, like here, which involves nonprofit trust law.

Leah Litman:

One big question, of course, is whether and how this standard might do work in the electoral context, involving campaign disclosure requirements. I guess one question I had is how different did it seem like the court's application of exacting scrutiny in Americans for Prosperity was relative to how the court has applied exacting scrutiny in, let's say, pre-Roberts Court cases like Buckley or even Roberts Court cases like Citizens United in which it has upheld, again, campaign, finance disclosure or reporting requirements.

Nick Stephanopoulos:

Until recently, as you're suggesting, disclosure was the one campaign finance regulation that basically everyone on the court except Thomas could come around, and say, "This is legitimate. It's not that intrusive, and it serves compelling governmental interest in preventing corruption, in informing voters about flows of money in politics, and the very conservative Citizens United Court 81 upheld all the disclosure requirements in that case." On the one hand, one could argue that the AFP decision isn't that threatening. It doesn't change the official standard of review, and also, because it's a non-electoral disclosure case, it doesn't involve the interests that are the ones that sustain disclosure regimes in the electoral context.

Nick Stephanopoulos:

There are two interests. One is the prevention of corruption, and the other is informing voters about financial flows. Neither of those interests are present in the charitable donor context of the AFP case. I'm cautiously optimistic that nothing officially has changed, and that one can still count the five votes, maybe more than five votes, in favor of campaign finance disclosure systems, but I'm more uncertain now than I was two days ago.

Leah Litman:

Can I give you my Cassandra-like pessimistic approach, and you can tell me where it's wrong or why I should sleep more easily at night? One is more a realpolitik angle. The second is, I think, a doctrinal angle. The realpolitik angle is there has been a change in some of the court's personnel, switching out Justice Kennedy and Justice Scalia, who were both conservative voices in favor of disclosure requirements to Justices Kavanaugh as well as Justice Gorsuch and then, of course, Justice Ginsburg to

Justice Barrett, but also more generally, I think, a shift in the ethos of some of the court's Republican appointees, where there is, I think, a very real perceived sense of conservative persecution and conservative victimization that makes them much more receptive to claims that conservative political movements or conservative causes face serious risks of harassment or persecution when they are known to be associated with conservative political causes or conservative movements.

Leah Litman:

I think both the shift in the court's personnel as well as a shift in some of the justice's worldview, who have been on the court for slightly longer leads me to wonder whether their perception about disclosure and reporting requirements might have changed. Then the doctrinal angle is just how the court applies the narrow tailoring requirement in AFP, both suggesting that there has to be some fit as well as requiring the government to show, "Here is evidence about how you have actually used this information or this law to advance your asserted purpose." I can imagine how that might be difficult when you're talking about both of the interests you know.

Leah Litman:

Let's talk about the appearance of corruption. If you're talking about a reporting requirement for $200 or $500, I can imagine a court saying, "Well, does a $200 contribution really give rise to an appearance of corruption like, "What if the state's reporting requirement was higher?" That level of fit, again, in the hands of either this court or a court of appeals like the Fifth Circuit or 11th Circuit, I can imagine going awry. That's my sense of weariness after reading this opinion is just a sense that there's a shift in how the court perceives disclosure and reporting requirements, at least among the conservatives, as well as, again, the application of this legal standard seems to maybe pose some problems if the court uses it in the same way at least to assess some of the interests that the government asserts in the electoral context.

Nick Stephanopoulos:

I agree with those currents that are swirling among conservatives, the sense of victimization, the sense that it's always big, conservative donors who want to be anonymous, and then when they're not anonymous face certain consequences in terms of retaliation or harassment or something like that.

Leah Litman:

Like being mocked by Stanford Law Students, or very serious consequences like that.

Nick Stephanopoulos:

Just like the consequences faced by donors, the NAACP, 50 years ago, right?

Leah Litman:

Sure. Very similar.

Nick Stephanopoulos:

Exactly, but I'd say first of all that Alito and Roberts were on the court at the time of Citizens United. They've already voted to uphold campaign finance disclosure, so just the two of them, plus the three liberals get two to five. I would tend to think that Kavanaugh would also be on that side, so my best guess is that disclosure still has six, maybe even seven votes on the Supreme Court. Second is the

campaign finance disclosure just looks a lot different than the disclosure system issue in California. It's public. It's not confidential disclosure to the California Attorney General.

Nick Stephanopoulos:

It's also deeply familiar. For decades now, we've all seen these FEC reports or certain websites also publicize these reports of who donated how much money to whom. None of this is new or new-fangled. Also, a lot of other campaign finance doctrine builds on the constitutionality of disclosure. Part of why contribution limits or expenditure limits are more suspect is because conservative justices always tell us, "Hey, there's a less restrictive means of preventing corruption, of achieving your own stated interest, and that's disclosure."

Nick Stephanopoulos:

If disclosure is unconstitutional, that undermines the logic of those earlier decisions that struck down other more restrictive policies, because of the existence of this less restrictive alternative.

Leah Litman:

You mean like the court struck down section five of the Voting Rights Act by saying, "Don't worry, section two is out there as a protection against voter discrimination," and so, of course, when that's the premise of invalidating section five, they never come for section two. Sorry. It's great to have you on the show, because you're like the Kate Shaw perspective, and that allows me to play my inner Cassandra role, so it all looks that great.

Nick Stephanopoulos:

I feel like over the longer term, maybe the Cassandra role is the right one. Maybe disclosure survives a little bit longer. But as you get more decisions like yesterday's, it chips away at the logic of the doctrine that upholds disclosure regimes. My content disclosure will be around for 10, 20 more years. What if you replace Alito and Roberts with two more Gorsuch-like conservatives? What if Breyer gets replaced by a conservative after he doesn't retire? This could all go further downhill, I think. Absolutely.

Leah Litman:

Maybe that's a good note to end on since that's usually the theme of the podcast. Thank you so much, Nick, for joining the podcast. It's been a pleasure to have you on, and we hope to have you back sometime in the future maybe when the court finally adopts one of your legal standards.

Nick Stephanopoulos:

Well, I'll be back when I'm 80 years old then. I look forward to that return visit when we're both old and gray.

Leah Litman:

Hope springs eternal. I am delighted to now be with Professor Franita Tolson, vice dean for faculty and academic affairs and professor of law at the University of Southern California Gould School of Law, where she also holds an appointment in the political science department at USC. Professor Tolson teaches and writes on election law, voting rights and constitutional law. She has testified before the House Judiciary Committee regarding reauthorization of the obviously unconstitutional and totally

unnecessary Voting Rights Act. That's an editorial. She is the author of the forthcoming book In Congress We Trust?: Enforcing Voting Rights from the Founding to the Jim Crow Era.

Leah Litman:

Welcome to the podcast, Franita.

Franita Tolson:

So excited to be here. I'm a big fan.

Leah Litman:

We are delighted to have you. Why don't we just get started with Brnovich?

Franita Tolson:

Yes.

Leah Litman:

I realized it might be hard to choose, and I feel like I will probably be talking about this case to anyone who will listen for all eternity, but I guess I wanted to start with two questions. The first is what's the biggest big picture takeaway you have from the opinion? Second, what's the biggest small picture or nitty gritty thing you noticed about the opinion?

Franita Tolson:

Well, I don't even know where to start. I think the biggest big picture takeaway... I'm pretty sure... At least I hope I'm not alone in this is the sense that it's very difficult to determine what voting restrictions will violate section two moving forward. I think that is... To me, that's the equivalent of the court coming out and just invalidating section two outright, because it can't be the case that section two still exists, and any litigation as broad, the state automatically wins. But you read the opinion, and you get this really clear sense that the court is treating the state's electoral regime as presumptively valid.

Franita Tolson:

There's this language in the decision about what were the laws in place in 1982, and to some extent, that should be the baseline from which we adjust the laws that are in existence and being challenged now.

Leah Litman:

I think that's also my read, and Justice Kagan basically refers to the non-legal test, legal test tasks that Justice Alito provides, the list of five factors as basically a host of extra textual considerations to be deployed against section two claims to basically mitigate any potential successor inroads the section two plaintiffs might be able to have.

Franita Tolson:

Thee five factor test is really interesting, because conservatives are very conscientious about not legislating from the bench, but where does this come from? One of the things I think about when I teach jingles is the fact that Justice Brennan and thinking about the section two vote dilution claims, he comes

up with this three-part test that he pulls from law review articles. We know that. We accept it, but it seems really odd for a conservative to do something very similar, and didn't claim that it derives from the text. There's nothing in the text of section two that demands this five-factor test that puts a thumb on the scale of the regime that the state has in place. It's just a very odd opinion in that sense.

Leah Litman:

Justice Alito is obviously no professed textualist, but it is a little bit weird to see people like Justice Neil Gorsuch or Justice Amy Barrett, who have said, "I only care about the text and just the text joining an opinion like this, which as Justice Kagan notes, congratulates itself early on for paying attention to the text, and then proceeds to immediately disregard it for the rest of the analysis." For me, one big thing relates to the presumption of validity. You mentioned regarding state voting restrictions as well as the majority's opinion, reference to laws and existence in 1982, or somehow fall within a safe harbor of the statute.

Leah Litman:

My sense from reading this is it's almost like a Rorschach test for your views about the state of American democracy because for the majority, reverting back to the way it existed in 1982, what's the big deal? They look around the world, and they're like, "Voting in Arizona, not so hard." Justice Kagan's perspective is, "This is a perilous moment for our nation's commitment to equal citizenship." Few laws are more vital in the current moment. It's really that perspective that stuck out to me in reading the two opinions. For the majority, reverting back to 1982, or keeping voting the way it is, what's the big harm, whereas the dissent approach was the Voting Rights Act was intended to make us an actual multiracial democracy.

Leah Litman:

That is the project the statute embodies, and the majority basically dismisses that as too radical.

Franita Tolson:

It's so odd because disenfranchisement and suppression evolves, the tactics evolve, so for the majority opinion to ignore the fact that we don't live in 1982 anymore, and that political operatives and elected officials have changed their tactics in order to continually disenfranchise and make voting harder for people of color, and the statute has to reflect that. Now, we're in a position where Congress has to continually update the statute, because of this 1982 baseline of presumption. Does that mean that every five years, Congress is now required to come in and change the statute in order to reflect what's now problematic as opposed to the court adjusting within the context of the language as written?

Franita Tolson:

That has the effect of abridging or denying. It's not like we need new language here. It's just that he's interpreted the statute in a way that really ties the hands of those bringing these lawsuits in order to attack laws that are currently disenfranchising people of color.

Leah Litman:

That's such a great point, and it really calls to mind a parallel in what the court is doing to section two in Brnovich that the court did to section five in Shelby County, because in Shelby County, remember, the court faulted Congress for not updating the statute, and basically created an obligation for Congress to

continually revisit this statute every few years in order to make it effective, and Brnovich is basically saying, "Well, when a statute was enacted, that basically locks in the state of affairs, and can only be designed to address problems that exist at the time, but it's not going to do anything after that."

Leah Litman:

It's obviously a completely unrealistic expectation that the court has for Congress to update all of these statutes all of the time when the language that is enacted in the statute obviously covers circumstances that didn't exist at the time the statute was enacted, but that is, in some ways, what the court is doing. That is another, I think, parallel you could draw in the tactics the court has used to basically dismantle the Voting Rights Act.

Franita Tolson:

It's so odd how they approach the statute, because one could say, "Why didn't they approach it like they approach Title VII?" Alito talks about this briefly, put it in a way that's completely unconvincing. I mean, an effects-based statute is an effects-based statute. To this point, I was really interested in how he uses the legislative history and the senate factors to basically say that effects is not the central point of the statute. Intent matters, too. But then he says, "The Senate report and the factors don't matter, and I had to come up with my own list of factors."

Franita Tolson:

I'm like, "Somebody make it make sense." Literally, my head is exploding as I'm reading the opinion, because he's just being very selective in how he's doing his textualism. When he says he's not a textualist, or he has not expressly adhered to that, I believe him, because he doesn't do it well here at all.

Leah Litman:

No, I don't think he even tries. We've talked about the legal test he adopts and the set of extratextual considerations he layers on top of the statute. Why do you think he insists he's not adopting a test, because he says, "The court is declining to announce a test to govern all Voting Rights Act section two claims like the ones that issue here vote denial claims rather than vote dilution claims?" Justice Kagan is like, "What are you talking about? This is like a delusion of modesty." Why is he so insistent that these are guideposts? This isn't a test even though he applies them in a test-like fashion, and obviously, lower courts are going to use them in assessing section two vote denial claims.

Franita Tolson:

Well, it's very similar to how Chief Justice Roberts left section five in place, but invalidated section 4B is that claim to modesty, but not really. Clearly, these factors will become relevant in every piece of litigation brought subsequent to Brnovich. There's no doubt about that. He knows that. But at the same time, I do think that's not legislating from the bench. The creation of these five factors is a form of legislative. At one point in that opinion, he says it flows directly from the text. I don't see how. Just in any good faith reading, what he does is he elevates this notion of whether or not the political processes are equally open.

Franita Tolson:

The five factors are illuminating that, but he ignores that the statute says that it's about equal opportunity, whether or not minorities have the same opportunity as people in the majority to their candidate of choice. He ignores that. He focuses on whether or not the process is equally open. He comes up with these five factors to facilitate that. He's provided a path forward. I can't see how a lower court could ignore that.

Leah Litman:

Right. It's Supreme Court precedent. You're bound to apply it. As to where he got it from the text of the statute, I mean, I guess several of the words have Es and Os in them, so maybe it's a super close reading of the letters. I don't know. Here's a conspiracy theory that I have. A part of me wonders if this language in the opinion is designed to give fodder to people who will be responding to criticisms of the court's opinion in Brnovich, and people who will warn as we are about the likely implications of the court's decision for voting rights claims. That is some people will argue the Supreme Court was legislating from the bench.

Leah Litman:

They really went too far here. They have effectively eviscerated section two. Perhaps that may bolster some claims to Supreme Court reform in whatever form it might take. I can imagine people who are opposed to that project, and people supportive of the current Supreme Court will say, "No. Look, Justice Alito said this isn't a legal test. This isn't going to be requiring lower courts to do this in all cases." These fears are overblown. Even though, of course, everyone knows that lower courts have to apply these factors, you can't ignore how the Supreme Court says to apply a federal statute.

Franita Tolson:

I think that that's absolutely right. I think that the veil of modesty at least suggests that the court is not aggressively legislating, because he can make that claim even though we know what's going on. It's very similar to how the Supreme Court's case law has developed in other areas of election law, where the court leaves certain things unresolved. Yet, they assume without deciding, for example, that for a long time, they did that compliance with section two and section five of the Voting Rights Act was a defense to a shockline. They didn't decide that until much later.

Franita Tolson:

In some ways, this is of the same vein. They act like they're acting very tentatively, but then all of the lower courts basically follow suit, because that is what they're supposed to do. Then they eventually just commit to that path forward. Very similar with the Safe Harbor when it comes to one person one vote, there were a lot of questions from a long time about whether or not that 10% Safe Harbor when states deviate from one person, one vote whether or not that was an official thing. The court has technically never quite decided that, even though they proceed as if they have, so a very similar thing here.

Franita Tolson:

He can soft pedal all he wants to, but the reality is that these cases will work their way up through the lower courts, and they will treat this as precedent as they should.

Leah Litman:

I guess in thinking about how far this opinion might reach, we've been talking mostly about its implications for other cases involving section two of the Voting Rights Act, and particular vote denial claims. At various points, the court insists that it is not going to import wholesale, the legal test for how discriminatory effects prohibitions or disparate impact liability work in other statutes like Title VII or the Fair Housing Act, although it does import some of the same considerations courts use in those contexts.

Leah Litman:

The court does have a somewhat disaggregated approach to civil rights law, but I guess I'm curious whether you think that the court's, let's say, orientation to disparate impact liability or some of the tools that uses to minimize the scope of disparate impact liability are going to be confined to the Voting Rights Act and section two in particular, or do you see them as having potentially broader applicability to other civil rights statutes and other civil rights regimes as well?

Franita Tolson:

Oh, Leah, thank you for that question, because it invites me to talk about how we're in trouble more generally. Keep in mind, Alito dissented in Bostock. He dissented in the 2015 Texas Fair Housing Act case. Bostock is a statutory interpretation case about Title VII. The Fair Housing Act case was also about a challenge to the fact that this was in effect by statute, and so he's just laying the groundwork for the Supreme Court to revisit these issues now that there's a 6-3 conservative majority. If you think about the section two case, Brnovich in that light, he's not really distinguishing voting rights is different from these other effects-based situations really.

Franita Tolson:

He says that, but I don't believe it one bit. What he's doing is saying those cases are still good law right now, but Brnovich really is a new chapter. I think the court will revisit maybe not Bostock, because Gorsuch wrote that opinion. But the Texas case, I definitely think they will revisit this notion that affects this constitutionally permissible. He's just laying the groundwork for that. Voting rights is really in some ways no different from other civil rights statutes when it comes to having an effect space regime.

Leah Litman:

I just want to provide a little bit more background for our listeners who might not be as familiar with those cases or those areas of law. Back when Justice Kennedy was still on the court, the court interpreted the Fair Housing Act to allow plaintiffs to sue for housing laws or policies that had discriminatory effects, but were not intentionally or purposefully discriminating on the basis of race. That was Texas inclusive communities. A background issue in that case that the Supreme Court had alluded to previously in Ricci vs. DeStefano, which involved Title VII was whether it's even constitutional for Congress to prohibit entities, particularly state and local governments from adopting policies that have discriminatory effects.

Leah Litman:

The Constitutional argument goes something like this, "When the federal government requires an employer or a state government to consider the discriminatory effects of its policies, or declined to adopt a policy because that policy has discriminatory effects, that requires the employer and or the state or local government to take race into account." The theory is that impermissible racial discrimination, that is it is impermissible racial discrimination to forbid an employer or a state or local government to pursue laws or policies that result in discriminatory effects on racial minorities.

Leah Litman:

That was one of the background legal claims that people were advancing for why the Fair Housing Act shouldn't be read to prohibit laws or policies that result in discriminatory effects. I think that's absolutely right that that background legal claim is now all of a sudden back on the table in light of the changes to the Supreme Court's personnel and composition.

Franita Tolson:

The Bostock point, though, is not that I think that Justice Alito has opened up a new brand of textualism that would undermine the Bostock opinion, but I do think once you open the door to this notion that effects-based statutes are constitutionally problematic as a general matter, the opportunity to revisit Title VII will come up, and they will probably take it. Even though Bostock was written by a conservative justice, I do think that it's still on the table this question of whether or not having an effects-based regime even in the context of Title VII is problematic.

Leah Litman:

There are also, I think, other parts of the opinion that reflect a worldview that is surely relevant to other civil rights statutes. In particular, this one passage where I think it's in the third factor that Justice Alito talks about the size of disparities on particular racial groups, where Justice Alito says, "To the extent that minority and non-minority groups differ with respect to employment, wealth and education, neutral regulations are going to result in discriminatory effects." If that is your worldview, then that does call into question disparate impact regimes in the law of employment or the law of education, both of which exists right now.

Leah Litman:

If you truly think that those systemic racial disparities are just how the world works, and that's totally fine, as Justice Alito appears to believe, then that's a reason to narrow those prohibitions, because you don't actually think they are sweeping in or targeting unlawful or problematic conduct.

Franita Tolson:

Right. It's really interesting too how he asserts that as a fact that we just have to live with. In reading their opinion, you just wonder the level of comfort with people of color haven't internalized these burdens, right? This goes to his point about the fact that the out of precinct ballot policy and the prohibition on ballot collection only affects a small amount of voters more generally, even though there's a disparity between minority and non-minority voters within the category of voters who are affected. To some extent, the disparity though, the willingness to live with the disparity without considering whether or not the state can achieve its goals in other ways is probably more problematic than anything.

Franita Tolson:

I can live with a five-part test. He talks about the size of the burden. He also mentions the disparity. He mentions it, but it gets barely any airtime. It's like, "Why even bring it up?" Because obviously, it doesn't matter. It can't be the case that we are okay living in a world, and we purport to hold ourselves out as a democracy, where we are okay with a certain segment of voters having to internalize these burdens. Then we just say, "Well, as long as there are disparities in these other areas, housing, education and so on, then this is just a fact of life."

Franita Tolson:

Well, no, section two is Congress's way of trying to do something about that fact of life, and so why interpret the statute in a way that makes that difficult? Because of the fact of life. Leah...

Leah Litman:

I do not envy your having to teach this opinion, Franita. I will just say that. Although I feel like I get my share of them teaching con law and fed courts, I at least don't have to do this one, although there actually is a part of it, now that I say that, that I might have to allude to in federal courts, and it also relates to our point about how Brnovich might be more broadly applicable to other civil rights regimes. That is Justice Gorsuch writes separately, and he's joined by Justice Thomas here, and he says, "Our cases have assumed, as you were noting, that they often do in this area, but have never decided whether there's actually a cause of action under section two."

Leah Litman:

What?

Franita Tolson:

Sir?

Leah Litman:

Right. Sir, this in an Arby's. No, just to explain to our listeners what a cause of action is, a cause of action is the idea that a private litigant, so a voter or a voting rights group, could bring a lawsuit. Justice Gorsuch is literally questioning whether any of these lawsuits can exist. He is suggesting that the only people that can bring section two claims are the federal government.

Franita Tolson:

Yep, and then if you get an administration like the Trump administration, that means that there is no enforcement.

Leah Litman:

Are you sure about that, because Wilbur Ross told me that they really wanted to enforce the Voting Rights Act, Franita? I'm remembering something about that. That obviously would be the problem since they never actually brought a Voting Rights Act lawsuit, but this would be just a monumental shift in how voting rights litigation proceeds. The Supreme Court, we are recording on Friday, earlier today agreed to take up a question about whether there is a cause of action to enforce some prohibitions on policies with disparate impacts in the healthcare space. This too is a question that could trickle over into other civil rights regimes, and I think was a stunning concurrence for me to read.

Franita Tolson:

Of course. This is how we know this effort to distinguish voting rights and the voting rights context is just wholly disingenuous. We have quite a bit to be worried about, but I feel like for the last 30 years, voting rights advocates, actually, anyone who does this work in the civil rights space has been on the defensive. I don't think anything's changed there. But Leah, I have to be honest. I do wonder if... In reading the opinion, he offers his view of the world, and his vision of how section two should work. How is it any different than just invalidating a statute outright? I just...

Franita Tolson:

Perhaps that's just too negative and too dark, but I was thinking about this in the context of the Georgia statute law, where... under the Justice Alito opinion, he tries to take this holistic view in a perverse way, this holistic view of the state's regulatory apparatus. He says like, "Look, you might have a voting restriction, but as long as the state makes it easier for voters to cast a ballot in other ways, then that makes the restriction less problematic." In Arizona, voters have all of these different ways they can cast a ballot, whereas these prohibitions are not problematic under section two.

Franita Tolson:

If you take this holistic view, how does any restriction ever violate section two in the case of the Georgia voting law? One of the things that Georgia legislature did was they made it more difficult for voters to cast absentee ballots while expanding voters' access to early voting. They did so because in the 2020 election, white voters were more likely to vote early in person, and voters of color use absentee voting at a higher rate than they had historically. The new voting restrictions were reflective of that. They made it more difficult to vote absentee, and made it easier to vote early.

Franita Tolson:

If you're looking at the system holistically in that way, and not thinking about the disparities within the categories as much, then the Georgia system is perfectly fine under section two, and that cannot be right.

Leah Litman:

I completely agree that what Justice Alito said in Brnovich is hugely problematic for trying to challenge any of the rollbacks that have been happening since the 2020 election, and I think also just challenging how voting works in general, because in a world in which there are multiple different ways to vote, it is going to be easier to say, "Well, there's this other way that a voter can always use so like, "Who cares if a state has made one of these ways harder to access for minority voters?" That is essentially part of the analysis in Brnovich that six justices sign on to.

Franita Tolson:

Yes.

Leah Litman:

Thinking of going forward, you're probably the nation's leading authority on congressional authority over elections. There was one passage in Justice Alito's opinion that made me really nervous, and I wasn't sure how nervous I should be about it because just thinking about the solutions, one solution would be for Congress to pass, a new or revised section two that discards the multifactor tests that Justice Alito adopts, and adopts a broader prohibition on discriminatory effects. In one passage, Justice Alito says, "But section two does not deprive the states of their authority to establish non-discriminatory voting rules, and that is precisely what the dissent's radical interpretation would mean in practice."

Leah Litman:

I wasn't sure if he was intending or maybe subconsciously suggesting that he and or some of the other justices might question whether Congress actually could prevent states from enacting facially neutral rules with discriminatory effects. Is that a concern? Should that be a concern in light of this opinion?

Franita Tolson:

Yes, it should be a concern, because I do think that... Let's not forget that in these opinions where they are talking about all of these things that Congress can do, they are simultaneously limiting Congress's ability to do it, either in that opinion or in other opinions. That was the problem with Rucho for me. They talk about Congress's ability to pass legislation to require independent commissions, but then there's an earlier decision that's 5-4 also out of Arizona that calls into question whether or not independent commissions are legal under the election's clause.

Franita Tolson:

Not to get into too many details for your listeners, but just in a sense understand that the court give it, then the court take it the way, either in the opinion or in other opinions, but Congress absolutely can prevent states from imposing laws that are non-discriminatory will have a discriminatory effect. These are laws that relate to the time, place and manner of federal elections. This is different from Congress's ability to prevent states from imposing non-discriminatory laws that affect voter qualifications. Congress is much more limited in that category, but when it comes to time, place and manner, so think about rules regarding voter registration or rules where the states are redrawing congressional districts, as I've mentioned, these are all time, place, and manner regulations that Congress has substantial authority over.

Franita Tolson:

Keep in mind that we're talking about discriminatory effects, Leah, but that's not required either, right? There's really no textual limitation on Congress's ability to display state laws in this area. Congress does have broad authority, but always striking to me how the court will point to that, but at the same time, tie Congress's ability to effectively use this authority to reach these laws.

Leah Litman:

What is a way for people to be optimistic and or not lose hope after reading this opinion? I feel like part of my coping mechanism is to poke fun at the opinion to make clear exactly how silly and how ideological and how partisan a project the court's evisceration of the Voting Rights Act has been in order to instill in people a sense about what they should be fighting for and what they are fighting against. But, how do you read this opinion and not feel just completely dispirited?

Franita Tolson:

I don't need people to be optimistic. I actually need people to be pissed. I think that that is much more effective in this space, because optimism has really been misplaced. Once Shelby County hit, I think, all optimism went out the window, and instead, the fight instinct took his place. It made me realize that unless we are vigilant, then things... Things will get worse, right? I just think that they will continually chip away at the Voting Rights Act and then civil rights statutes from the Warren Court era that we point to as the jewels of the civil rights movement, but I do think that we have to be aggressive about responding and kind.

Franita Tolson:

I think that's why there's so much focus on packing the court, because it's a response and con. That's not about optimism. That is about fight. This is about trying to take back the democracy that we feel is being taken from us. In some ways, it has to be a partnership. It has to be a partnership between voting rights

advocates who bring this litigation. I don't think that Brnovich should discourage them. I do think you have to get creative. You have to maybe rely more on state constitutions, for example, but also the policy side. Congress has authority, right?

Franita Tolson:

Congress has authority to address a lot of the voting restrictions that are being passed in states today. They have to find a way to use that authority. Getting rid of the filibuster, I am not optimistic that they'll get rid of the filibuster. Instead, I'm going to be really pissed if they don't, and I'm going to fight. I'm going to write, and I'm going to try to advocate in order to bring about that change. My suggestion is not optimism. It's just fight, or you have to continue to just fight. It's going to be also the partnership not only between voting rights advocates, between academics like ourselves and also the grassroots folks.

Franita Tolson:

Those are the people who are getting folks out to vote. They're marching, and they're making their voices heard. All of these things to me work together towards address and a lot that's going on as opposed to hoping that the court won't dismantle more of the civil rights regime that has pretty much ruled since the 1960s. It will happen.

Leah Litman:

When you were describing that, it actually reminded me of what we were talking about earlier. I had asked you who was Justice Alito writing for when he was saying this is an illegal test? I think Justice Kagan wrote her dissent to get people pissed and to get them ready to fight. There are portions of the dissent that really read to me as an effort to canonize Justice Ginsburg's dissent in Shelby County. She basically accuses the court of contributing to the rise of voter suppression and voting discrimination. Over the last eight years, she invoked some of the most memorable lines from Justice Ginsburg's dissent in Shelby County, she calls the rashness of the court's act, and invalidating the Voting Rights Act soon became evident.

Leah Litman:

I took her writing to basically be accusing the majority of unjustified hostility to the Voting Rights Act. She says, "The court has treated no statute worse," talking about the tragedy of undermining so significantly this provision of the Voting Rights Act given what is happening in the country. That is what I took her writing to be doing. I am very glad she did that, because those are not always the dissents that she writes. I think, I did not read Justice Alito to be too happy about the fact that she wrote dissent in this case.

Franita Tolson:

No. I love how it starts. He's like, "The Voting Rights Act is the best of us, and is the worst of us." To me, that just captures our love-hate relationship, not just with the Voting Rights Act, but with democracy. When we think about especially the... Justice Alito was focused on the status quo and preserving the 1982 status quo. Our status quo is actually undemocratic. It's not inclusivity. That is our status quo. He uses the word pedigree over and over again. These laws have pedigree. It's a pedigree of exclusion. The question of who is he talking to, it's not us. I have no idea, because even at one point, he talks about even his discussion of the Arizona political system and how you have to think about all the different ways that Arizona voters can vote.

Franita Tolson:

There's no discussion of the fact that Arizona has closed a number of polling precincts since 2013, a Shelby County decision. He ignores this fact. He glosses over and said, "Surely, if people have a difficult time finding their precinct, they can just vote in all these other ways." I don't know who... Is he talking to the voter who can't find their... I don't know who he's talking to, honestly. It's not Congress-

Leah Litman:

No.

Franita Tolson:

... because what he's proposing is not realistic. Continually updating the statute in order to reflect the new status quo, that is not realistic. The language is fine. He just mangled it, so I have no idea who he's talking to.

Leah Litman:

On the subject of Sam Alito, I can't help but ask. What do you think is the most Alito part of this Alito opinion if anything comes to mind? I can share mine. I think it is the indignant projection and the fact that he accuses the dissent of being engaged in a "radical project" as if he's dismantling the remaining revision of the Voting Rights Act that the majority assured us was sufficient to guard against voter discrimination when they invalidated section five is itself not the radical project or the conservatives stacking of the Supreme Court that made those decisions possible. That would be my vote for the most Alito part of the Alito opinion.

Franita Tolson:

This is going to sound really, really weird, because... I agree with you. His indignation is number one for me, the audacity, but this is... I'm going to say it anyway, though. The second sentence of the opinion, I was infuriated, because you just know where it's going. It's a sentence that people will probably read and not think anything of it but understand the weight. He starts off, he says, "In these cases, where I called upon for the first time to apply section two to regulations that govern how ballots are collected and counted. Arizona law generally makes it very easy to vote."

Leah Litman:

Yes.

Franita Tolson:

That's the second sentence.

Leah Litman:

Yes.

Franita Tolson:

What?

Leah Litman:

No.

Franita Tolson:

I read that sentence, Leah, and I just saw red because I'm just like, "That is not the point. That is not the point of this. The statute specifically asked whether or not people of color have equal opportunity to elect their candidate of choice as people in a majority. For the opinion to then proceed as a textualist's opinion, it was just too much for me. The second sentence, when I read that, I was like, "This is about to be a cluster."

Leah Litman:

That is definitely one that stuck out to me. I can't help it out another while I have you, which is his explanation of the factor that he underscores courts must weigh a state's interest, and in particular, the interest in preventing non-existent fraud. He says, "One strong and entirely legitimate state interest is the prevention of fraud."

Franita Tolson:

Yes.

Leah Litman:

You identify zero evidence of the existence of fraud, but I guess that's a strong and entirely legitimate interest now. Then he goes on to say, "Fraud can also undermine public confidence in the fairness of elections, and the perceived legitimacy of the announced outcome," and that perceived legitimacy part just seem to give credence to the big lie of 2020, and the idea that criticizing an election or calling into doubt its outcome is enough to render an election somehow suspect or problematic that these spurious allegations of fraud are themselves sufficient to create a problem for the state to do something about. That just also stuck out to me given what is happening in the country.

Franita Tolson:

It's so odd that he keeps talking about and references the district court opinions discussion of this too, the fact that legislators have this sincere belief about fraud. A sincere belief in something that is not empirically true is the very definition of a rationality. Doesn't that mean that even... Think about when... We talk about rational basis review, which is the lowest level. It is that type of a rationality that in other contexts would lead a court to question whether or not a statute even passes rational basis review. Yet, in this context, having a sincere belief, even when he talks about the facts behind one of the policies adopted in Arizona, it had to do with the election that was very racially polarized.

Franita Tolson:

There was apparently this video circulated, where it was racially tinged, so the election, I guess, went left in some ways. He's like, "Okay," despite this video. After that, the conversation over HB 2023 was very heartfelt and meaningful and sincere, right?

Leah Litman:

Right. Yes.

Franita Tolson:

I'm just like, "What?" That was another moment where I was like, "So we're going to forget the..." Especially with a statute like section two that really focuses on whether or not they are racialized appeals as a part of the totality of those circumstances, this racial video would be something that matters in thinking about whether or not there's a section two violation. He's like, "Well, putting that to the side, the legislature was really heartfelt in their belief that there was a problem here that needed to be addressed." In my opinion, he makes it very difficult to even read his opinion in good faith, because it's just so absurd.

Leah Litman:

Anything else you want to touch on in the opinion or that we didn't cover?

Franita Tolson:

Well, I think the main question your listeners probably have is what's the path forward? What does this mean for section two litigation? It's bad. The opinion is far worse than I thought it would be. I just-

Leah Litman:

It's worse than I thought it was going to be after argument, absolutely.

Franita Tolson:

Oh, man, even though I was starting to lose faith when following you on Twitter and others suggesting that Alito had the opinion, I was like, "No," but it's way worse than I thought it would be even with that.

Leah Litman:

Which really makes me wonder why Sam was so angry earlier in the term, given that he got this opinion and really did about as much with it as he possibly could.

Franita Tolson:

Outside of just invalidating the statute.

Leah Litman:

Exactly.

Franita Tolson:

I guess only time will tell.

Leah Litman:

one was asking for it in this case.

Franita Tolson:

I think that voting rights advocates have risen to the occasion before in the face of a hostile court, and so we'll see. Maybe we just have to get creative.

Leah Litman:

On that note, thank you so much, Franita, for joining us. We really appreciate it, and we would love to have you back on when your book is out to discuss Congress' authority over elections.

Leah Litman:

Awesome.

Franita Tolson:

All right, thank you so much. This was so much fun.

Leah Litman:

Thanks, everyone, for listening. Thanks to Nick and Franita for joining the podcast. Thanks to Melody Rowell, our producer. Thanks to Eddie Cooper who makes our music. Thanks to our summer intern, Liam Bendicksen. No thanks to you, Sam Alito.