

## Getting Curious with Jonathan Van Ness & Melissa Murray

**JVN** [00:00:00] Welcome to Getting Curious. This is Jonathan Van Ness. And every week I sit down for a gorgeous conversation with a brilliant expert to learn all about something that makes me curious. Summer. It's a time for beach days and barbecues, SPF, and sweat-wicking fabrics. It's also when the Supreme Court hands down its decisions. Today, we're discussing this year's SCOTUS cases and the current state of the nation's highest court. Welcome, Melissa Murray, who is a leading expert in constitutional law, family law, and reproductive rights and justice. She's a professor at NYU law and co-host of Strict Scrutiny, a Crooked Media podcast about the United States Supreme Court and the legal culture that surrounds it. Melissa, how are you doing?

**MELISSA MURRAY** [00:00:46] I am doing great. I'm so glad to be here, Jonathan.

**JVN** [00:00:49] Ohmigod, me too, you. I feel like I need a massage or, like, a chiropractor from the whiplash that my neck has from the Supreme Court decisions that have been handed down in my lifetime. Like, I remember when gay marriage became law of the land. I was in West Hollywood. The energy was electric. I was outside the Abbey, like, people couldn't believe it. It was like I couldn't believe it.

**MELISSA MURRAY** [00:01:10] WeHo loved that decision. And that was a big decision.

**JVN** [00:01:13] It was huge. It was such a time. Then I was in New Orleans when Roe v Wade was overturned and I was, like, marching in the streets for that, you know, when we were filming Queer Eye last year. So it's, like, every June, you don't know what we're going to get. We're not tracking, like, some other, like, Roe v Wade monstrosity this year, or is there some equally big ones that we're about to, like—are we just going to get shellacked right now?

**MELISSA MURRAY** [00:01:34] Oh, yeah, we're about to get shellacked. This court year, like, we call it a term. It's not really a year. They call it a term. Every term starts on the first Monday of October and it usually ends around June. And, you know, there's discretions. Sometimes they push into July, but most of the time they end by June so they can jet off to Padua or wherever they're going for their little junkets, who knows? But we're going to get a whole spate of decisions and we got a lot of really impactful decisions last term. As you say, there was the Dobbs decision which overruled Roe versus Wade and Planned Parenthood versus Casey, which had been the twin pillars of the court's abortion jurisprudence. But in addition to Dobbs, there was a massive case on gun control. There was also a big case on religious freedom. So it was a really big term last year. And typically the rhythm of the court is: when you have a really blockbuster term like last term, the next term is a little more muted, like, they settle down a little bit, like, sort of go back under their rocks or whatever they do and sort of chill for a little bit. But not this year, right. This year, we're really seeing this conservative six-three super majority doing the most. So they've already had a barnburner of a term and

apparently they've got more barns to burn. So this term we're going to have a massive decision on affirmative action in higher education. So this is the whole idea about whether or not you can think about an applicant's race as part of a broader admissions calculus for creating your entire class of students and populating your institution of higher education. There have been a couple of conservatives on this court who have been itching to dismantle affirmative action for years, and finally, they have the numbers to do it. And so when you've got a conservative supermajority, you might as well make the most of it. So it's not going to be a quiet term.

**JVN** [00:03:23] Okay. So affirmative action is...

**MELISSA MURRAY** [00:03:25] Voting rights are also on deck.

**JVN** [00:03:27] What's the voting rights one?

**MELISSA MURRAY** [00:03:29] This is a case called Merrill versus Milligan and it comes out of Alabama. And in 2021, the Alabama legislature drew their district maps for congressional districts. They have seven congressional districts, and they did what is basically known as a racial gerrymander, which is to say they packed a whole bunch of African-American voters into one district and made that a majority-minority district. But they dispersed other big pockets of areas in the state where African-Americans lived into a bunch of different districts. And in so doing, they diluted the force of that minority vote. They could have made another second majority-minority district, but they chose not to, instead diffusing these African-American voters throughout a number of districts, really minimizing and diminishing their electoral power. The voters sued and a three-judge district court panel, which included two Trump-appointed justices, agreed that this was an unconstitutional gerrymander under Section Two of the Voting Rights Act. The Voting Rights Act was passed in the 1960s and was meant to provide means of eradicating racial discrimination in voting. And again, this is a huge piece of legislation, but it's also been under fire by the conservative legal movement over the last couple of years.

In 2013, there was a major case before the Supreme Court called Shelby County versus Holder. And the court in that case dismantled what was known as the Voting Rights Act's preclearance regime. So if you were a state with a history of voter suppression or discrimination in voting, if you made any change to your voting laws. You have to first preclear it before a court or with the Department of Justice. In that Shelby County case, the court said, "You know what? The pre-clearance formula is totally unconstitutional. We're dismantling it. If Congress wants to write a new formula, they can do so." But of course, Congress is too polarized, too messed up right now to do anything. So they never created a new pre-clearance formula. And as a result, the pre-clearance regime basically died. It's why you're having all of these new really draconian voting laws that say, "You can't give people water in line or you can't give people snacks while they're waiting in line to vote." There's nothing there to stop

the states from passing these laws that are intended to deter people from voting and to suppress the vote, certainly among certain communities.

But when the court decided that case in 2013, they were adamant there were other ways to get at suppressive voter laws, and namely the other way was Section Two of the Voting Rights Act, which allows you to sue states when they pass restrictive voting laws. And so here, this racial gerrymander has been challenged by those African-American voters under Section Two of the Voting Rights Act and the state of Alabama, which has created this law, tried to defend it. That three judge panel said, "Nope, this is an impermissible gerrymander." It went up to the court in 2022, just before the November 28, 22 midterm election, and the court basically allowed that map to go into effect and to be used in the 2022 election. And they said that they would defer consideration of the overall merits of the case until later. And so that map went into effect. And now we're actually deciding whether or not it was unconstitutionally drawn. Basically, Alabama's already won because that map was already used. But we're going to find out what the real impact of this case is going to be for the Voting Rights Act writ large and for Section Two in particular.

**JVN** [00:06:56] And that's the Morrow one?

**MELISSA MURRAY** [00:06:58] It's called Merrill versus Milligan or Allen versus Milligan. And it's a major, major case. Basically, the Voting Rights Act only has a few legs left to stand on. And this is a big one. And if the court hobbles this further, it's going to be very hard for individuals to challenge the state when they pass restrictive voting laws.

**JVN** [00:07:18] Ooooh!

**MELISSA MURRAY** [00:07:20] Honey, right?

**JVN** [00:07:21] Any other ones?

**MELISSA MURRAY** [00:07:23] Well, I mean, the affirmative action cases are massive. They're two affirmative action cases. We can talk about those students for fair Admissions versus Harvard and Students for Fair Admissions versus the University of North Carolina. They're related cases. They both challenge the use of race in college admissions protocols, but they're actually two very different legal challenges. The North Carolina case is a constitutional challenge because the University of North Carolina is a public school operated by the state. And under the 14th Amendment, the state cannot engage in racial discrimination. And basically, what Students For Fair Admissions is arguing is that any time race is considered, however minutely, in the college admissions calculus, it violates the equal protection clause of the 14th Amendment. The Harvard case is slightly different because Harvard is a private school. It's not a state actor. Instead, Students for Fair Admissions is challenging Harvard's use of race in its admissions protocol on the ground that it violates Title Six of the Civil Rights Act of 1964, which says that "any institution that receives federal funding cannot engage in racial

discrimination.” And so students are fair admissions, arguing that any time you use race in a college admissions protocol, it's basically racial discrimination. And so that's going to be a huge hot button case that's going to decide if we have affirmative action going forward, whether universities and colleges can think about diversity as they cobble together their classes of students each year.

**JVN** [00:08:53] But those student groups, or the students for whatever, like, they're white people challenging it?

**MELISSA MURRAY** [00:08:58] No, not exactly. Students for Fair Admissions, again, is headed by a group of white lawyers, among them Edward Blum, who is a repeat player filing cases before the Supreme Court. But he reports in this case to represent the interests of Asian American students who he says are being shut out of higher education admissions processes because they are being set aside in favor of “less deserving” minorities. So it's actually this really kind of gross move where they're pitting two minority communities against each other. So the idea here is that undeserving African-American and Latino students are getting in and very deserving Asian students are not.

**JVN** [00:09:38] Which is very a la Stacey Abrams, like, making people fight for crumbs when these other fuckers take the whole cake. What an asshole.

**MELISSA MURRAY** [00:09:45] I mean, varsity blues right here. I mean, like, like, we're not even talking about the fact that so much of college admissions turns on students whose families are able to make large donations—

**JVN** [00:09:55] Right, legacy.

**MELISSA MURRAY** [00:09:56] Or sports. We're not even talking about that. We're literally talking about the cross. We haven't even gotten to the ethics scandals. Jonathan, I mean, like —

**JVN** [00:10:04] I mean, this fucking Clarence Thomas and Ginny, they're, like—oh my God, she she sips her tea, as she puts her tea down.

**MELISSA MURRAY** [00:10:11] It's a Ginny Tonic. It's not, it's not tea. It's a Ginny Tonic. It's the drink of summer. It's what you want to drink when they're handing down these decisions.

**JVN** [00:10:18] I literally, like, lost all control of my questions, because sometimes when you're witnessing whatever we're witnessing, things get overwhelming. So last year, the Supreme Court overturned the constitutional right to abortion, a year later, what's the impact of that fucking goddamn fucking Dobbs decision?

**MELISSA MURRAY** [00:10:37] This Supreme Court should be understood in Marvel Universe terms. This court was like Loki, like, unleashing a raft of chaos with that decision. Like, nothing but chaos and confusion has followed. Which is really funny because when the court decided Dobbs, one of the things it said it was doing was that it was resolving this question of what states could do by restoring this question to the states and to the people. It was settling this conflict that the court in Roe versus Wade had essentially engendered and had allowed to sort of overwhelm the judiciary for almost 50 years. But this decision hasn't settled anything and it certainly hasn't quieted the dockets of the federal courts or the state courts. It's actually created even more litigation as we now try to figure out: "What can states do, what can they prevent other states from doing? What can happen if you are a person who needs an abortion because you're miscarrying?" Like, all of this is up for grabs right now.

Doctors are trying to figure out: where does their medical judgment begin and the law end? Like, what's permissible under these new and ever more draconian abortion laws. So this is the decision where the court was, like, "We're going to fix some stuff," and they didn't fix anything. They actually created an even bigger headache. And the sad part about it is that a lot of pregnant people are going to die because of this decision. I mean, like, it sounds hyperbolic, but it's the truth. We've heard about women in parking lots waiting to see if their conditions worsened so that they can get an abortion because they have some sort of complication with their pregnancy and hospitals being really cautious because they don't know what they're permitted to do. Like, can they terminate a pregnancy under these conditions or does it have to be really dire? The law is unclear because, wait for it, it's written by a bunch of guys who don't have medical degrees and nobody really knows. So this decision has just unleashed a raft of chaos. We're dealing with it now. There are lawsuits that are being filed on behalf of women who suffered dire health consequence as a result of their inability to secure abortions that were necessary to deal with pregnancy complications.

**JVN** [00:12:46] I mean, I heard about some of those laws that were being brought up with Dr. Jacki Antonovich on the podcast. She's this amazing historian of abortion and reproductive rights and, like, the American West from, like, the early 1800s and 1900s. But one of her big things that we thought was super interesting was that, like, she talks about how, like, Justice Alito talks about how abortion isn't based in this country's history. And so, like, it's not a guaranteed right to protection. But then she was saying how, like, Benjamin Franklin had abortion recipes in his diary. And just, like, abortion in the 1700s and 1600s looked more like midwives giving, like, concoctions to, like, terminate a pregnancy. But people were absolutely trying to control their reproductive health care, access reproductive health care, talk about family planning like these aren't new conversations. They actually go back a really long time. But it's, like, it seems like the justices, or at least the ones that voted to overturn Roe, have a fundamental misunderstanding of history.

**MELISSA MURRAY** [00:13:39] I love this question because the six-to-three conservative supermajority on the court is always talking about, you know, "the way we understand what rights are protected under the Constitution," as if they are explicitly written in the

Constitution, which is why they're always going on about the Second Amendment. "You can't do anything about the Second Amendment 'cause it's written in the Constitution." Abortion, they say, is not written in the Constitution. So if you are going to find that there is a right to an abortion, it has to be what they call "deeply rooted" in the history and traditions of this country. And Justice Alito, as you say, in *Dobbs* says, "I've looked through all of these statutes and, you know, there's nothing here that suggests there was ever a right to an abortion. All I see are these statutes that make it a crime to have an abortion." But again, you're exactly right. He's cherry picking, right. He's extolling this history and tradition methodology.

But wait for it, he's not an actual historian. He's not trained as an historian. He doesn't have a Ph.D. in history. He's just an ordinary J.D., like millions of other lawyers. And he's basically engaging in selective, itinerant law office history where he's taking the history that works for him and really using it, and ignoring all of the history—like the history that you've been talking about—that doesn't work for his case. And, you know, that's an unfortunate place for us to be in where the court is essentially saying our understanding of rights depends on history, but no one is really trained to actually excavate what the history is. And we have Justice Thomas—last term in that gun rights case—saying explicitly, "Not all history is created equal." And you can imagine what that might mean. So again, we're in a really interesting time where they're privileging and prioritizing history, being really selective about the history that they do use and not really taking into account that there are large swaths of time in our history where individuals who we would now consider rights holders weren't even part of the conversation at all.

**JVN** [00:15:40] And they're so fucking comfortable to talk about the history.

**MELISSA MURRAY** [00:15:45] Exactly. We're basically prioritizing a history where this country operated under a severe democratic deficit, where women were not allowed to participate in these political debates, where people of color were not allowed to participate in these political debates. But we're making decisions based on that past that now impact the present where these individuals, these women, these people of color are very much a part of the body politic, and these decisions impact them profoundly.

**JVN** [00:16:16] When you think about these laws that seek to restrict education around race, I didn't learn that Black women didn't even have the right to vote in the United States until 1965.

**MELISSA MURRAY** [00:16:27] You know, one thing I did not learn at all when I was in high school, and I imagine there are a lot of my contemporaries who are in a similar position was, you know, we studied the Civil War. We studied a little bit of Reconstruction. We never studied the 14th Amendment, certainly not in the way that we studied the founding and the drafting of the original constitution in 1787. But arguably, reconstruction and the drafting of the 13th, 14th and 15th Amendments—the Reconstruction amendments—are as important to our legal landscape as the original Constitution was. Like, this was a set of amendments that were

purposefully intended to renegotiate the entire balance of power between the federal government and the states, and between the people and states, and to bring in a whole group of people that historically had been enslaved into the body politic as citizens. We don't talk about it at all. I mean, I bet if you ask people on the street, they could name one of the framers of the Constitution, right. They could talk about who was at the Constitutional Convention, because that has been so drummed into us through our basic curricula. But if you ask them, "Name me someone who signed and ratified the 14th Amendment," we couldn't name a name at all. We couldn't talk about Lyman Trumbull. We couldn't talk about any of those guys, right. Why is that? Why have we forgotten this history? Because I think part of it is, like, we don't want to know about history or they don't want us to know about their history because it's so powerful. The 14th Amendment, the 15th Amendment, the 13th Amendment change everything.

**JVN** [00:18:02] What do they say? I am guilty. Can we go off script? Will you tell us, like, tell us fucking everything!

**MELISSA MURRAY** [00:18:07] Sure, I will tell you everything! I'll tell you all the things. And they're super important for these cases that we were just talking about that are being heard this term, because a lot of these cases turn on this question of what does equal protection mean within the context of the 14th Amendment. So the 13th Amendment is the amendment that abolishes slavery in the United States. The 15th Amendment is the last one passed, and that is an amendment purposefully aimed at bringing Black men into the political community as voters. So it doesn't include Black women. White women actually were very upset because they wanted this moment to extend the right to vote to them as well. But it stopped short. It only enfranchised African-American men. It wouldn't be until 1920 with the 19th Amendment that women were formally given the right to vote. And as you say, it actually took a little longer for Black women to be allowed the right to vote.

The 14th Amendment is meant to fill in all of the gaps. So if the 13th Amendment's abolishing slavery and the 15th Amendment gives Black men the vote, the 14th Amendment is intended to deal with all of the vestigial aspects of enslavement to prevent the South from essentially reconstituting slavery under some other name. And so it offers a number of protections, the privileges or immunities of citizenship to citizens. It provides for birthright citizenship, something slaves had not had, even though they were born in the United States. A decision by the Supreme Court called Dred Scott said that they could not be full citizens, and it also provides for equal protection of the laws and due process of laws, right. So it's a really full-bodied amendment that's intended to provide all of the trappings of citizenship and to essentially transform formerly enslaved people into citizens. We don't even talk about what that might mean when they're talking about liberty in the 14th Amendment. They understand it in contradistinction to enslavement.

So how do we know what liberty means? Well, let's think about what slavery is, because liberty is not that. So if enslavement means you don't have control over your labor, while liberty

means you get to control your labor. If enslavement means you have no control over your family, your family and your children could be sold away from you, well, liberty is about being able to control and have family integrity. If slavery means that you could be subject to sexual exploitation and made to carry your master's child because he has raped you or sexually assaulted you, well, liberty must mean that you have control over your body. You have control over your reproductive capacity. And if you think about the 14th Amendment in that way, then yes, there is a textual hook in the Constitution for something like a right to an abortion or the right to contraception or just bodily autonomy, more generally. And if you think about it in those terms, that amendment is so powerful and it's not a surprise why they don't want you to know more about it. Why we don't learn about the men who drafted it.

**JVN** [00:21:07] It's a right to HIV medication.

**MELISSA MURRAY** [00:21:09] Everything, everything.

**JVN** [00:21:11] I live in Texas—

**MELISSA MURRAY** [00:21:13] I'm sorry.

**JVN** [00:21:14] —And they're trying to take away, I know, they're trying to take away, like, PrEP access and like make it so that, like, employers don't need to provide, like, ART therapy or, like, PrEP because it, like, encourages homosexual behavior. But it's, like, isn't freedom of religion, like, your ability to practice *your* religion? Like, I feel like other people's—

**MELISSA MURRAY** [00:21:30] That's the First Amendment. So that's one of those amendments written down. And so they're usually very robust in their protections of the First Amendment. And the Supreme Court is actually—this Supreme Court—has really expanded our understanding of what religious liberty can be. But interestingly, they seem to be pulling back a little, now that people are getting hip to it, are, like, “You know what, my religion actually demands that I have an abortion in circumstances where my life is in danger. And, like, if it's between me and this potential child, like, my religion says I am to be saved.” Like, this is what happens in Judaism. And there have been a number of people who have made religious freedom-based claims about a right to an abortion. And I think this is going to really flummox this court, because this court has really prioritized religious liberty, and we're going to find out whether that prioritization was principled or whether it was selective and itinerant and really focused on only a certain issue.

**JVN** [00:22:23] Because what if you're an atheist? Isn't, like, my right to *not* practice a religion or, like, I aspire to your faith or, like, your idea of morals? Like, what if I don't believe, like, any of that? So, like, I don't want this zygote in me.

**MELISSA MURRAY** [00:22:39] We're going to find out. I mean, this is a court that's really sort of prioritized religious freedom, usually in cases that are brought by Christian evangelicals who



argue that state laws that prevent certain funding from going to religions violate their religious freedom. So they've really expanded the understanding of the free exercise clause of the First Amendment in these cases, dealing with Christian evangelicals. So the Masterpiece Cakeshop case, which you might be familiar with—

**JVN** [00:23:04] Yeah, of course.

**MELISSA MURRAY** [00:23:05] Which is when that evangelical baker refuses to provide cakes for gay weddings and argues that when he is forced to do so under a state level anti-discrimination law, it's basically like being forced to say he supports gay marriage, which his religion prevents him from doing. They have made hay of those cases. There's actually a really big case before the court this year called 303 Creative versus Elonis that basically reprises some of the arguments and claims that were made in Masterpiece Cakeshop. This time it's a website designer who does not want to provide services for gay weddings. But interestingly, when the court granted certiorari and agreed to hear this case and decided they did not take up the religious liberty claims, they didn't say they were going to decide this on religious liberty grounds, they only took up this question of speech under the First Amendment, whether an anti-discrimination law on the state level that requires you to serve all comers functions as a form of compelled speech if you're someone like this website designer who is a Christian and, you know, providing services to a gay couple, creating a wedding website would essentially be like saying the state is forcing you to say, "I love gay weddings." So they didn't actually take this up on religious liberty grounds, but rather on compelled speech grounds. And it might be because, Jonathan, they're worried that this religious liberty argument is now going to be used by other people, like, to advance pro-choice interests or to advance other kinds of interests like the ones you were talking about. So maybe they're holding up on religious freedom for now.

**JVN** [00:24:37] Okay but wait, I'm taking a hard right. I saw this fucking news—

**MELISSA MURRAY** [00:24:40] So is the court!

**JVN** [00:24:41] Ohmigod, and she's the comedian, too, get out of my face. Okay, wait. But stay in my face forever because I'm obsessed with you. I saw this article yesterday about Ron DeSantis and he was allowing this new law in Florida that allows doctors to be, like, "Oh, you look, I don't agree with your lifestyle so, like, I'm not going to treat you." But if you're coming into an E.R. and you are wearing like a drag race T-shirt and your liver's, like, hanging out because you're in a car accident, then I guess they have to treat you? Like, if it's, like, a life or death situation, they're saying, but not if it's like a casual walk in. Again, this law is very vague, so it's left up to interpretation. But they're literally like legalizing visual discrimination for being, like, "Mmm, you look too gay or you look like a lesbian, like, or, like, you're trans. So I don't agree with your lifestyle choices." The *fuck* is going on down there. But I mean, I live in Texas too, so it's, like, just as bad here. But what the fuck? Is this going to be able to stand?

**MELISSA MURRAY** [00:25:40] Is this law going to stand? It's very much like the abortion law, if you think about it. I mean, this idea that abortion is supposed to be available in circumstances where the health or life of the pregnant person is at risk, but that's perhaps a subjective value, like, how endangered do you have to be in order for a doctor to be, like, "Okay, we're calling it and we're doing it now." It's the same kind of thing here. Like, if your liver is hanging out, but you're wearing a RuPaul's Drag Race shirt, like, eh, I don't know, like, is that a life or death situation? It really kind of depends and is subjective. I don't know that we can have medical practice where everything kind of depends on that kind of subjective judgment. I think it creates an untenable situation for doctors who may want to intervene but worry that it's not sufficiently exigent, so that—

**JVN** [00:26:25] Ooh, what's exigent mean?

**MELISSA MURRAY** [00:26:27] Like sufficiently urgent, like, yes, this is a life or death situation. Like, how do they know? Like, I mean, you could have someone who genuinely is, like, "I want to treat people because I'm a doctor and I'm obligated under the oath of my profession to do so." But I don't know if the law would think this is an exigent situation. And that's basically what's happening in a lot of these abortion cases. It also authorizes those who happen to be doctors, but also may harbor homophobic views of various communities to exercise their own judgment about how they will or will not use their medical licenses, their medical expertise. And again, it's sort of this collision of individual interests, your interests to having adequate health care when you present yourself at an emergency room or when you walk into a hospital and their interests in not being confronted with things that make them uncomfortable or that perhaps contradict their own beliefs. And we always have dealt with this because we're a pluralistic society. We're not all the same. We're not a homogeneous nation. And that's kind of been the point. We all have to kind of coexist with each other. But this court and these arguments are basically pushing us to the point where you can kind of opt out of dealing with things that you don't want to deal with. And that's one of the ways that they're doing it.

**JVN** [00:27:41] I've been in situations where I have told, like, a walk-in person, especially in my twenties, like, you know, what I needed. And I've had, like, nurses and doctors, like, say, like, judgmental, weird stuff when you're, like, "Oh yeah, like I sucked like seven dicks this weekend. Like, I was a busy girl at this party." And then they're, like, "Could you not suck seven dicks next time?" And you're, like, "I just need you to test for gonorrhea and chlamydia, lady. And if it comes back positive, like, give me my fucking, like, azithromycin. Like, I don't need this, like, morality check from you." And that's a real public health risk. Like, if this person, like, only has X amount of time off work and they're dealing with, like, you know, a gonorrhea or a syphilis or chlamydia or HIV, whatever the infection is, and you're letting someone go back out and not getting the treatment because you are uncomfortable. This is like a public health risk.

**MELISSA MURRAY** [00:28:25] But think about what the purpose of a law like this is. I mean, maybe it's meant to stiffen the spines of those who do object. Like, now you have a basis for

objecting and there's a law that allows you to object. But I think it's actually more subtle than that. I mean, it's basically forcing individuals who are non-conforming in whatever way to at least present themselves in public in ways that conform with majoritarian norms or at least the norms that Ron DeSantis and the Florida legislature find acceptable. And it's basically driving nonconformity underground. I mean, if you want to get the treatment that you need or you want to make sure that you're not going to be denied various services, butch up, get yourself to the hospital and present yourself in a way that is compatible with prevailing norms or at least some people's prevailing norms.

**JVN** [00:29:13] And I can't do a straight accent, so I would just be fucked. I literally can't, like, it's beyond my talents—it's, I don't have it. The whole thing you were talking about with, like, Alito being, like, "Oh, well, I don't see anything about abortion here. I just see stuff about, like," aren't they called, like, literalists or, like—

**MELISSA MURRAY** [00:29:28] Textualists.

**JVN** [00:29:29] Textualists. Yeah.

**MELISSA MURRAY** [00:29:30] Or maybe textual-ish because it's not all text that they're adhering to.

**JVN** [00:29:36] And then isn't that, like what, like, Clarence Thomas, Alito, like—

**MELISSA MURRAY** [00:29:40] They practice what they call originalism, which is to say—

**JVN** [00:29:43] Originalism. That's the word.

**MELISSA MURRAY** [00:29:44] Yes. Originalism is actually a pretty recent product. It's born in the 1980s as part of this effort to limit the gains that were made under the Warren Court in the 1960s and 1970s. And the idea behind originalism is that judges should interpret the Constitution based on how the Constitution would have been understood at the time that it was drafted and ratified. So in, like, 1787. So, like, let that sink in. Like, we're going to interpret a document that we're all using to guide our lives today based on what some guys in knee breeches thought in 1787, a time when women were not allowed to participate in making the Constitution, where people of color were literally enslaved or being kicked off of their land by white people, like, and were not participating in the Constitutional Convention. But that's the vision we're going to reify. And you could also think about originalism in terms of the 14th Amendment. Arguably, the 14th Amendment should be interpreted at the time it was drafted and ratified. So it's, like, 1868. And in that oral argument in *Merrill versus Milligan*, the Section Two of the Voting Rights Act case that I talked about earlier, the state of Alabama is essentially saying we should interpret Section Two in line with the 14th Amendment's original meaning. And the 14th Amendment, they're arguing, was meant to be a *colorblind* amendment. And, like, that is just like bonkers, like an amendment that was purposely aimed

at eradicating the vestiges of enslavement was race blind? Like, make that make sense. So, I mean, this is the thing. Originalism, is it some kind of objective proof? Like, "I'm doing originalism And there's one answer." It's as subjective as everything else.

**JVN** [00:31:36] It's smoke and mirrors. It's mental gymnastics.

**MELISSA MURRAY** [00:31:40] It is. They argue that originalism was a means of restraining judges' subjectivity, that during the Warren Court era, the judges were just making up rights left and right. They were just doing whatever they wanted to do. "And if we just get them to hew to the original meaning of the Constitution, we won't have all of this subjectivity. We won't have them imposing their own views of what is good on the rest of us."

**JVN** [00:32:05] But meanwhile, they're imposing their views, like, these new people are imposing their views, and they're, like—

**MELISSA MURRAY** [00:32:11] The Spider-Man meme, where they're just going like that. I mean, like, originalism does not yield objective answers, like it can yield the answers that some conservative majority want. And so, for example, in the gun rights case from last term, Justice Thomas wrote that decision. It came out on his birthday. Happy birthday to him. He basically says, like, you know, "We're going to look at the Second Amendment and the 14th Amendment together." And he talks about how after the Civil War and during Reconstruction, after the 14th Amendment brought these Black men into the political community. All of these state legislatures refuse to allow newly freed Black men to keep and bear arms. And as a result, they were uniquely vulnerable to racialized violence. They weren't understood as citizens. All of this. And he basically says, like, "You know, part of what we're doing in expanding this understanding of the Second Amendment is, like, we're bringing it in line with that original understanding of the 14th Amendment and the Second Amendment were supposed to convey in the Reconstruction period, and we're remedying this injustice that was done to Black men." I mean, this is really the interesting Jedi move, because for years, gun control advocates have argued that gun violence has been borne disproportionately by communities of color. And so what Justice Thomas is doing is essentially turning that logic on its ear by saying, "It's not a racial justice move to limit guns. It's actually a racial justice move to give *everyone* a gun." Like, we're repairing this moment in the past where Black people couldn't keep and bear arms.

**JVN** [00:33:46] By giving everyone guns.

**MELISSA MURRAY** [00:33:48] Giving everyone guns.

**JVN** [00:33:49] As opposed to just doing, like, giving them, like, land value that was, like, promised that then just like never, ever happened.

**MELISSA MURRAY** [00:33:55] I mean, 50 acres and an AR 47 or whatever it is like, I mean, who —

**JVN** [00:34:00] I mean, give me that 50 acres. It's probably worth more now than a fucking AK-57.

**MELISSA MURRAY** [00:34:04] But this is the interesting thing, Jonathan. They're using this kind of racialized logic, racial justice, logic in a lot of their cases, which is really interesting. So in the abortion case and last term, there's this really interesting footnote—Footnote 41—go back and look at it where Justice Alito talks about this idea that is being offered in some conservative circles that those who want more liberal abortion laws are bent on eliminating African-American reproduction, that, like, you know, “The majority of fetuses that are terminated,” he says, “are African-American. So in this interesting way, part of the logic for withdrawing the abortion right, for curtailing the abortion right is this idea that we are preventing a racial genocide of African American children. So we're taking away women's rights in the name of racial justice and in the gun rights case, they're basically saying we're expanding gun rights in the name of racial justice.”

“And what we're going to see here this term when they decide this voting rights case and when they dismantle affirmative action—and believe me, they're definitely going to dismantle affirmative action—they're going to argue that they're doing it in the name of racial justice, like, that the Constitution demands an equal society, but we cannot be equal if we are considering race in any way. And so we're getting rid of affirmative action so we can be equal. And we're remedying the injustice that was done by affirmative action. And we're going to further dismantle and hobble the Voting Rights Act, because the 14th Amendment is about race blindness, not about actually forcing the states to be good and not suppress the vote and not discriminate anybody, like, we cannot think about race at all when we're thinking about these voting laws.” I mean, so there's this really perverse logic at work here that the Constitution demands race, blindness and whatever we withdraw. Right. Or expand it, we're going to do it in the name of race, like they're the real “woke warriors.” They're always talking about cancel culture, wokeness. These conservatives talk about racial justice more than anyone I know, and it's always in a way that perverts the whole idea of racial justice.

**JVN** [00:36:20] It's always giving, like, your problematic white dad who's, like, “Listen, because I said so,” like, but then doesn't have anything to be able to like, just like, gaslights the living shit out of you.

**MELISSA MURRAY** [00:36:31] They can gaslight us and they actually have the means to do it. It's, like, they're gaslighting us and right now they're winning.

**JVN** [00:36:40] Yeah, We hate that story. That Second Fucking Goddamn Fucking Amendment. I know it says “can't be infringed upon,” but isn't the whole first sentence “in order to maintain a well-regulated militia”? Is that not, too, also written on the Second Amendment?

So isn't it, like, we need a militia to fight. France or England. Or, like, an oppressive federal government. Isn't that what they meant originally? Like, it wasn't for everyone to have AK-47s, right?

**MELISSA MURRAY** [00:37:16] That's a very good textualist reading. Like, as you suggest, text is important. And there's the whole prefatory clause in the Second Amendment that talks about the Second Amendment being predicated on militia service. Carol Anderson, who is a professor of history at Emory University in Atlanta, has argued that the founding fathers were very concerned about the militia and wanting to make sure that the militia was well staffed, not because they were concerned about fighting France or England or an oppressive federal government, but because militias were really useful for quelling slave rebellions. So there's this really interesting racial history of the Second Amendment that goes all the way back to its original intent. And she also traces it to the present and notes a lot of the initial interest in gun control was aimed at making sure the Black Panthers, for example, did not have guns, like, the Black Panthers knew the laws. They lawfully armed themselves—

**JVN** [00:38:15] Yeah, the shot[guns], yeah.

**MELISSA MURRAY** [00:38:16] Because they knew that the police were not going to protect them. And so they decided to protect themselves. In California, the initial gun control laws were actually aimed at taking guns out of the hands of the Black Panthers. And this is the kind of history that Justice Thomas kind of sort of selectively deploys. So he'll talk about the effort to take the guns out of the hands of the Black Panthers. But he won't talk about this earlier history where the whole interest on the Second Amendment is about keeping slaves down and stopping the slaves from rebelling.

**JVN** [00:38:49] So but, but these justices just don't give a fuck. We don't care that the Second Amendment really says, like, "in order to maintain." You said it was predicated on being in a militia! But where are these men that blow their wives' brains out? And this domestic abuse and these gunmen and gun women and gun people, where are their, where's the militia?

**MELISSA MURRAY** [00:39:08] Jonathan, you're exactly right. And for years the Second Amendment was interpreted as, like, there could be limits on it. Like, you had this broader right in the context of militia. So in 2008, there's a case called D.C. versus Heller. This was the case that kind of opened up the door to this more expansive understanding of the Second Amendment. Justice Scalia wrote the majority opinion for a 5 to 4 court, and he essentially said that the prefatory clause, the militia clause, was sort of surplusage, like, it wasn't meant to mean anything, which is, again, so wild if you are saying that, you know, "All we do is textualism, we're looking at the plain meaning of this document." Like the document says all this stuff about a militia. And he's just like, "They were, like, 'Eh, let's put that in there.' Didn't mean anything." I mean, it's basically what he says. It was mere surplusage. And was it meant to limit the force of the operative clause, which is about keeping and bearing arms. And so, you know, he kind of just jettisons a whole set of precedents that really limit the scope of the

Second Amendment on the view that it's most robust in the context of militia service and in other contexts, the state has the latitude to regulate the keeping and bearing of arms.

Scalia blows that out of the water, like, militias mean nothing, doesn't matter. And now we're beginning to see the court continuing to push the envelope on that. So they pushed the envelope. In that case last term. The case is called Bruen. This is the decision that Justice Thomas wrote where he's, like, you know, "We need to think about gun control regulations in a kind of history and tradition way. So *if* there is a gun control regulation we have to think about, 'Would this kind of regulation have existed and been okay at the time the Second Amendment was drafted and ratified back in the 1780s?'" And so with regard to your example, laws that prohibit those who are either accused of or convicted of domestic violence from keeping and bearing guns, there have been a couple of lower court cases that have followed the court's decision in Bruen and it said, "Well, you know, this law that prevents guys who are engaged in domestic violence from having a gun, like, were there any analogs to that in 1787? No. So I guess this is invalid, he can have a gun." Well, ask yourself, "Why didn't we have regulations prohibiting—"

**JVN** [00:41:30] Because women weren't even, because—

**MELISSA MURRAY** [00:41:31] Because women weren't considered, domestic violence wasn't a crime. Like, you could legitimately beat your wife as long as you didn't kill her. And that's why we didn't have these regulations. But, like, I mean, it's just, like, the sort of bonkers deployment of history.

**JVN** [00:41:46] Is there any way for us to retry that case, like, now that Scalia's dead? Dead as a doornail. Just deader than—

**MELISSA MURRAY** [00:41:52] No, no, no way to retry that would have been to give Merrick Garland a Senate hearing and have a progressive 5 to 4 majority on the court, yeah.

**JVN** [00:41:03] Wow. Okay, so when a Supreme Court justice gets nominated and they do their Senate confirmation, there's always, like, that big, like, you know, "I don't want to answer that question because I, you know, have to be impartial." And there's this, like, idea of, like, impartiality in the court. But then we obviously see that like that doesn't actually translate because everyone's always, like, bringing their, the fullness of their lives into the court. Does this idea that judges are supposed to be impartial, does that come from fact? Is that obviously a misnomer?

**MELISSA MURRAY** [00:42:32] So, I mean, the idea that judges and courts are supposed to be impartial comes from this idea that the law is a kind of objective tool that, you know, the law just sort of plays it straight down the middle. It's not Democrat, it's not Republican. It's sort of straight down the middle. It also stems from the idea that the court is unlike the other branches of the federal government, the other branches are political branches. Like, Congress

is elected by the people, they represent the people. The president's elected by the people, represents the people. The court doesn't necessarily represent the people at all. Like, justices are nominated by the president and confirmed with the advice and consent of the Senate. But other than that, they're outside of the political process, and being outside of political process is supposed to insulate their decisions, like, allow them to be independent. They're not beholden to any political party in any way—or allegedly, that's how the logic goes. And so, you know, that's important for the court because unlike the president and Congress, the court doesn't really have a way to enforce what it does. Like, so Congress, you know, when it passes a law, if someone doesn't adhere to it, they have plenty of enforcement mechanisms for dealing with that. They can throw you in jail, they can cut off your funding, they can do all kinds of things. And the president, you know, if you don't comply with the laws, if you don't comply with following the rules, the president can send the National Guard in. This is what happened in Little Rock when the South was not complying with desegregation. President sent the troops in.

The court doesn't have an army, though, and the court doesn't have the power of the purse. It can't make us obey. The only thing that keeps us obeying the court is our own view that what the court is doing is somehow legitimate. Right? So the court's big weapon is its own institutional legitimacy. And for centuries it has jealously guarded that institutional legitimacy. You know, the court wields the power of judicial review. It can strike down acts of Congress, you know, acts and laws that the people's representatives made. But it hasn't done it that often. The first time the court ever struck down an act of Congress was in the 1800s with *Marbury versus Madison* when it announced the power of judicial review. It didn't do so again until it struck down the Missouri compromise in *Dred Scott versus Sanford*. So they exercise, or at least they have exercised their power very judiciously. They tried to keep sort of in line with the people. Their decisions aren't necessarily so far outside of the fray, nor, like, so far in the other direction lately, try to sort of keep to the middle, I think, in order to sort of maintain this institutional legitimacy.

In this moment where so many of the court's decisions seem out of step with where the country and the people are is really where you find the court in a really difficult position. Like, 70% of Americans want a right to an abortion. They believe the Constitution protects the right to an abortion, and they're very critical of this decision. Most Americans want some form of gun control. They're very critical of the decision that the court announced last term. Like, you know, I'm not saying the court follows public opinion, but it has to be attuned to public opinion because it depends on the public trust in order for it to have its legitimacy. And of course, it depends on having the public's trust. And, you know, if that is lost, it's really problematic, which is why these recent ethics scandals are so, so damning for the court. Like, the idea that the court is not only enmeshed in perhaps politics, but perhaps people are influencing justices. That doesn't do anything to ensure the public trust and it actually diminishes the court's institutional integrity.



**JVN** [00:46:29] So I mean, it seems like the court is broken. Like, I think especially in light of the corruption that, like, Clarence Thomas has been engaging in, and I'm sure he's not the only one. And I actually, I was just reading in the news that, like, they showed this rare unan, unan—

**MELISSA MURRAY** [00:46:46] Unanimity.

**JVN** [00:46:46] Yes, thank you. They were all, like, “None of us are down for, like, you reviewing our shit.” Like, they were all, like, “Nope.” So I'm sure, like, we're all doing a little bit of higgledy piggledy, like, but I'm sure everyone's like, not all higgledy piggledy is created equal, as Clarence Thomas said.

**MELISSA MURRAY** [00:47:01] Also, we should be clear, there has been no corruption that's been proven. What we do have here is some really bad optics, right? So I mean, and again, it's not just Justice Thomas. Like this has been bad for, like, at least a year. So there was reporting back in November of 2020 by Jo Becker and Jodi Kantor of The New York Times about what is essentially an influence campaign that this conservative group waged where they were basically matching some of their very wealthy donors with justices to socialize with and, like, become friends with the justices. And then, you know, the wealthy people would invite the justices to their homes in Jackson Hole, whatever. And, and they would strike up these friendships, like, it's sort of like Hinge but for justices, like, super weird. This conservative influence campaign was so well-funded, so massive that they actually bought a building across the street from the Supreme Court for, I think, some absurd amount of money, like, a \$30 million building so that they would have an opportunity to be able to easily mix with the justices in these sort of happenstance ways. I mean, that's a really concerted influence campaign. And, you know, nobody knows if they actually were able to have the kind of influence that they sought with the justices. But just the fact that this is happening, that they are, you know, buying influence at the Supreme Court Historical Society—which is a separate organization from the Supreme Court, but which the justices attend quite regularly—because they want to have this kind of face time with the justices is just weird and the optics are poor, for the public trust. So that was already being reported on in November, well before we found out that Justice Thomas is like Fergie from the Black Eyed Peas and he wants the glamorous life and he's on, you know, private jets and going to the Galapagos and hanging out at Harlan Crow's Adirondack resort in the summers and getting his private school tuition paid for. We didn't even know about that.

**JVN** [00:48:57] So that doesn't qualify as corruption, like, getting 150k of tuition paid and you never reported it?

**MELISSA MURRAY** [00:49:03] We don't know if there's a “quid pro Crow” here. Excuse me. That—I made a funny.

**JVN** [00:49:08] So it could just be “a gift.”

**MELISSA MURRAY** [00:49:09] It could be a gift. We don't know. But I mean, it doesn't actually matter, though, for the ethical part of this, because the appearance of impropriety is as bad for the court as actual impropriety. I don't know if Justice Thomas is selling his vote. Like, maybe he's not. Maybe this is really just his good friend who does really good friend things like fly you around in a private plane and pay for your kid's private school tuition. We don't know if there's any actual corruption, but it doesn't have to be actual corruption to just look really, really shitty for the court. This is a public institution that depends on the public trust. This is really, really bad. And the problem for the court is, is that there's no one who's going to stop him. I mean, Justice Thomas and all of the justices are essentially like Shereé Whitfield from *The Real Housewives of Atlanta*, "Who gon check me boo? Nobody."

**JVN** [00:50:00] So what about court packing? Is that a way we can hold them accountable?

**MELISSA MURRAY** [00:50:03] Well, you could pack the court.

**JVN** [00:50:04] If we took the House, the Senate and somehow Biden? I don't know.

**MELISSA MURRAY** [00:50:12] That's a lot of things to have happen. I mean, like court packing so requires a completely different political composition in the political branches to make something like that happen. The only other time court packing has even been on the table was during Franklin Delano Roosevelt's administration, when the court was invalidating all of his provisions for the New Deal and he threatened to pack the court. He actually had a Democratic Congress who would have been on board with his domestic agenda. But even the Democratic Congress was, like, "Oh, dude, that's a bridge too far." They weren't likely to support court packing, but it was the threat of court packing that actually brought the court in line. Again, like, the court was, like, "Okay, like you're serious, You're pretty mad. Like, maybe we'll get in line on this." I don't think court packing is something that's going to happen right now, especially given the kind of polarization that we see in Congress. But Congress has other things that they could do. They just don't seem to be willing to do them.

**JVN** [00:50:05] Like what?

**MELISSA MURRAY** [00:51:06] So Congress can, in addition to expanding or limiting the number of justices on the court, Congress can strip the court of jurisdiction, limit the kinds of cases that it hears.

**JVN** [00:51:17] How?

**MELISSA MURRAY** [00:51:18] Like, you just pass a law. The Constitution allows the court certain kinds of jurisdiction. In other kinds of cases, they can hear are to be determined by Congress. So Congress can set the jurisdiction in a different way. Congress also funds the court. You could take away all their money.

**JVN** [00:51:33] Stand by, stand by stand by, I'm so sorry. You're just you're moving so fucking fast and I just didn't even know that stuff. So you're telling me that if we had, like, a supermajority in the House, in the Senate, you could pass a law that says that, like, "All reproductive cases heretofore come to the Senate." But then wouldn't the Supreme Court just said that's an unconstitutional law?

**MELISSA MURRAY** [00:51:55] I mean, there are limits to the limits you can draw, but like they've limited the court's jurisdiction. I mean, Congress can write limits for all of the federal courts, not just the Supreme Court. So they have limited in the past the kinds of relief that prisoners can seek in the courts. So limited what courts can do on behalf of prisoners. They could limit the court's jurisdiction in terms of voting rights cases. I mean, there's a lot that they can do. Congress also has the power to fund the court so, you know, they can say, like, "Listen, unless you pass an ethics reform package that you were going to enforce yourself and be quite rigorous about, we're not going to give you money for clerks, write those opinions yourself. Do all the research yourself. We're just going to defund you." I don't see that happening any time soon. But I think the real pressure on this court to, like, get right and stay right is going to come from the people. I think the more that comes out and again, I think ProPublica has just been on this beat and they have been absolutely relentless and they should be, right. The media has opened all of this up. It should be transparent. And they're just showing, like, there's just a lot of room here where these justices have a lot of latitude and sometimes they're not using that latitude in ways that advance the public trust. And it's kind of shocking. And I think if there's more sort of media coverage of this, you know, more pressure on them to act right, to get right and stay right, then that can only be to the good. I mean, I almost, like, certainly Congress can do things here, but we can also do and demand things. The media is a big part of that. But we should also be, like, marching, like, why is Clarence Thomas getting tuition from a friend? I mean, that's quite a friend. I wish I had friends like that.

**JVN** [00:53:39] Yeah. So, okay, so I am also reading about, like, more of a concerted effort for, like, left leaning and left, like, progressive people, like, utilizing a state court route to try to get more rights and to try to, like—so how can we look beyond the Supreme Court to protect and reclaim our rights?

**MELISSA MURRAY** [00:53:56] I think this is a great question because, you know, the Supreme Court is just literally a band of goblins right now. So, I mean, if you can avoid taking your case to the Supreme Court, you probably should, because you're unlikely—if you're a progressive—to get the outcome that you want from the 6 to 3 conservative supermajority. But there are other courts. There are 50 other courts where you can present your interests and there are 50 state constitutions, some of which are actually more generative than the federal constitution of certain rights. So there are state constitutions that have an affirmative right to education, their state constitutions that have equal rights amendments, which we don't have on the federal level. So there are ways in which state constitutionalism is actually better for rights than what we have at the federal Constitution. And so, I mean, those are tremendous avenues. And right

now, a lot of the work in reproductive rights is being done in state courts again, because there are not only more favorable courts, but also better constitutional provisions in the states that can advance that. So that's a big thing. And it also means that when we're thinking about elections, it's not enough for us just to focus on presidential elections because presidents nominate justices. We have to focus on all of those down ballot races. There was just an off-cycle election in Wisconsin where control of the Wisconsin Supreme Court was up for grabs—

**JVN** [00:55:20] And we won!

**MELISSA MURRAY** [00:55:21] We did! Judge Janet won. But that was such an important election. It's in Wisconsin, so only Wisconsinites can vote. But all of us can lend our efforts and our support to those progressive causes, right, making sure that people turn out the vote, that people are informed about those decisions. We're not in a position at this point to leave any power on the table. So, you know, right now it's not just courts we should be thinking about. We've got to think about attorneys general, like, these are the people who are going to enforce the laws, like, Daniel Cameron, who is currently the attorney general of Kentucky and who is going to be the Republican candidate for governor of Kentucky, has already proven that he is no fan of reproductive rights. He's Mitch McConnell's protégé, and he's got broader aspirations, like, the Kentucky governor's race is going to be huge. He's already done a bunch as attorney general, and he refused to prosecute the police officers who killed Breonna Taylor. He's taken a really hard line on reproductive rights. He's going to be even worse as governor. So we've got to look at attorneys general. We have to look at governors' races.

We have to think about prosecutors at the local level. The DAs, they're the ones who are going to decide whether they're going to bring cases under some of these laws, like, if a doctor decides he's giving an emergency abortion and then suddenly someone's, like, "But it wasn't an emergency." It's the D.A. who's deciding whether or not to prosecute that. So we can't leave any power on the table. Like, run for D.A.. Vote for D.A.. Think about the school board. These bans on books and talking about gay people or race or Reconstruction or the 14th Amendment. It's the school board who helps make those policies. Like, we've got to vote. We've got to be informed about who's running for all of those positions. And we've got to vote there, too. So it can't just be every four years we tune in and it's, like, "Oh, Joe Biden, Kamala Harris." You've got to vote in every single election. You've got to be on top of these issues at both the local level and the state level, as well as the federal level, because they are running the tables on us and we have to turn the tables.

**JVN** [00:57:27] Shouting out our favorite, Sister District. Obviously, if you listen to this podcast, you know that—

**MELISSA MURRAY** [00:57:32] Oh, you love Sister District? My students started that!

**JVN** [00:57:34] We've literally interviewed them, like, three times on this podcast. We shout them out all the time. I interviewed the governor of Wisconsin through Sister District when I

was there last year. I'm obsessed with Gaby Goldstein. I'm obsessed with La Wu, we love them so much!

**MELISSA MURRAY** [00:57:43] Lala Wu was my student! So I love Sister District. Lala Wu was my student at Berkeley Law and she's amazing. And I remember after the 2016 election, she was like, "I have to do something." And they started Sister District.

**JVN** [00:57:55] Yes! And it's amazing.

**MELISSA MURRAY** [00:57:55] It's amazing.

**JVN** [00:57:56] They just secured Michigan supermajority for the first time in 40 years. They are so fucking good. I'm so inspired by them.

**MELISSA MURRAY** [00:58:04] I'm going to put in a plug too, for Crooked Media's Vote Save America, where you can, like, go to Crooked Media's website, Vote Save America. You can figure out where all the elections are, how you can help. Wisconsin Democrats was so great in organizing, both of the presidential election and of this off-cycle election. They're amazing. There's so many ways that you can be involved, even if you're not from one of those states. This is a fight across the country and we all have to be involved in it.

**JVN** [00:58:26] So now we just have to wait for, like, more people on the court to die?

**MELISSA MURRAY** [00:58:36] That's one option. I mean, again, I think maybe there is a moment. This is not the moment, I think. But I think there are meaningful reforms of the court that could be undertaken beyond court expansion. This is not the moment for court expansion. I think there are people who argue that if we expand the court right now, the next time there is a Republican supermajority in either chamber, then, you know, they will try and do the same thing and it'd just be the sort of race to the bottom. But we could talk about term limits for justices. I think there are those who have made very credible arguments that term limits could happen and that you don't require a constitutional amendment for it as long as you sort of think about cycling the justices in and, like, you know, the justices don't necessarily stop being justices of the court. They just stop being active justices of the court. And they could be—

**JVN** [00:59:22] Oh!

**MELISSA MURRAY** [00:59:23] That might be a plan. Again, some of these are forms dealing with jurisdiction stripping might be a way to deal with this. But, I mean, we really had a moment in 2016 in that period after Justice Scalia passed away. And by rights, President Obama should have been able to nominate his nominee and have that nominee get a hearing. And, you know, we saw Mitch McConnell really stonewall Obama and it was like a game of chicken and Mitch McConnell won. I mean, I also think it might have been helpful to put a

more dynamic nominee on the table. So, you know, if it was going to be a truly historic nomination, like, of perhaps an African-American woman, I think maybe you could have gotten some voters really excited about the prospect of going to vote not only for Hillary Clinton and Tim Kaine, but also for the prospect of securing this particular seat for this particular candidate. I think if Hillary Clinton had said, "You know what, Merrick Garland's not my guy, I'm going to nominate Ketanji Brown Jackson." That could have been a very exciting infusion of life to that ticket. I think a lot of people weren't super excited about Tim Kaine and Hillary Clinton. And, you know, that kind of apathy showed up at the polls. And, you know, we got Donald Trump as president and he, more than any other president in recent memory, save Jimmy Carter, really managed to use his presidency to transform—with the help of Leonard Leo and the Federalist Society—to transform the federal courts. Donald Trump, in just one term as president, nominated almost as many judges to the lower federal courts as Barack Obama did in two terms as president. That's massive.

**JVN** [01:01:10] Fuck that guy. I just don't like him at all.

**MELISSA MURRAY** [01:01:14] TFG.

**JVN** [01:00:16] Wow. Well, I have to be honest with you, Melissa, outside of this day, it's already been a kick in the tits about 27 times, and I feel like my tits are convex at this point. My tits are, like, I don't even, they go back into—

**MELISSA MURRAY** [01:01:31] Okay, no, Jonathan, that's not the message, Jonathan. That's not the message we want to share.

**JVN** [01:01:36] Melissa I need a, let's end on a, what are we gonna do!

**MELISSA MURRAY** [01:01:38] Alright, so here's the thing. What are we going to do? First of all, I'm already really excited that more people are even thinking about the Supreme Court. Like, no one thought about the Supreme Court when I was growing up. Like, everyone was sort of focused on the president, Congress, no one really thought about the court. Tons of people now are thinking about the court. And that is really exciting because the work of the court is vitally important. It's the reason why we started our podcast, Strict Scrutiny. We thought, "People need to know what the court is doing." The court is making these decisions and they impact your life in so many ways. You have to understand the court is doing. So, you know, we have tons of people tuning in every week to new episodes of Strict Scrutiny. As the court starts releasing its opinions for this term, we're going to have emergency episodes, we're gonna talk about all of these decisions, we're gonna break it down. So if you care about the stuff, listen to Strict Scrutiny and get better informed about what the court is doing. Think about all of the ways that you can be a part of this political landscape that is so dynamic and it's changing all of the time. Like, you know, we don't have to be passive. We don't have to sort of go gently into Gilead like they want us to. Like, we can fight back, right? We can go and prosecute our interest in state courts. We can vote and get better candidates. Like, there

was just an election where people said, “No, I don't want that hobgoblin candidate. I don't want that hobgoblin gay ban. Like, I don't want that at all.” That's exactly what we need to be doing.

**JVN** [01:03:03] Oh, in Jacksonville.

**MELISSA MURRAY** [01:03:04] And on the local level. So, I mean, being attuned to local politics, state politics, that's how we fight back. That's how we reclaim our power by being informed, by listening, by putting our money where our mouth is, by voting with our feet and getting out there and putting some sweat equity into this electoral landscape. We can't afford to be passive anymore. No one's going to save us. This court's not going to save us. We have to save ourselves.

**JVN** [01:03:29] They're inflated again. They are back to perky. They are back to—

**MELISSA MURRAY** [01:03:34] Tits up, let's go!

**JVN** [01:03:36] Yes, tits up, chin up! Melissa Murray! This was, like, the most fun I've ever had. Will you come back on? We have to have you back on for Curious Now!

**MELISSA MURRAY** [01:03:44] Always, always!

**JVN** [01:03:46] I mean, you really hit that out of the park. So hardcore. What if someone is, like, me after this time with you, *obsessed*, like, with Melissa Murray. I mean, we've gotta be able to follow our people, but also, but also, like, obsessed with, like, your ability to, like, cover constitutional law, honey. Like, what if someone wants to become a literal constitutional scholar, lawyer expert?

**MELISSA MURRAY** [01:04:05] Well, I went to law school. I went to law school at Yale Law School, which is great. I teach now at NYU Law School, which is even better. So highly recommend. But if you don't want to invest all of that time and money, you can listen to our podcast. Like, we talk a lot about the law. We try and break it down in ways where you don't have to be a lawyer to get what's going on and to understand. So definitely follow us. You can download our podcast from all of the various platforms that you get your podcasts. We're also part of the Crooked Media empire, so you can download us there. We love talking about the court and we love making the court more accessible. So that's something that you can do. You can follow us on Twitter. Our podcast has its own Twitter handle. It's [@strict\\_scrutiny\\_](#). You can follow us there. We're on Instagram, on Twitter, I'm on Instagram, on Twitter, [@ProfMMurray](#) on both. Fair warning, my feeds are an odd amalgam of Supreme Court content and Meghan Markle content—

**JVN** [01:05:05] We love that.

**MELISSA MURRAY** [01:05:06] I do, I love Meghan Markle. I'm unabashed. Like, I swear—

**JVN** [01:05:10] We're here!

**MELISSA MURRAY** [01:05:11] I write about the Supreme Court, I write about abortion. I never get more hate mail than when I am online being Meghan Markle's pro-bono attorney. Like, being, like, "That is not true. Meghan Markle did not do that. Like she did not say she wanted privacy. She said that what she wanted was to be able to have a private life while also engaging in public service." Like, and, like, I get so much deranged hate mail from folks, like, [BRITISH ACCENT] "You're disrespecting the queen. The crown is not a documentary."

**JVN** [01:05:36] It's probably just Samantha.

**MELISSA MURRAY** [01:05:39] It probably is just. Samantha Markle. We also cover Samantha Markle's case on Strict Scrutiny because it's in the Federal court, which I love. So it's just, like, a weird amalgam of stuff, like I tweet pictures of my dog, you know, stuff like that.

**JVN** [01:05:50] Here's an interesting sidebar for you. I think that you're going to get this, and then we can be out. Fuck, marry, kill, but with celebrity court cases. Okay? Gwyneth. Gwyneth Paltrow.

**MELISSA MURRAY** [01:06:02] So good. Gwynocence.

**JVN** [01:06:05] Amber and Johnny.

**MELISSA MURRAY** [01:06:08] Writing this down.

**JVN** [01:06:10] And for our third, I'm going to have to do a—

**MELISSA MURRAY** [01:06:15] E. Jean Carol and Donald Trump.

**JVN** [01:06:17] Thank you. Thank you, Melissa. So fuck, marry kill. Break it down.

**MELISSA MURRAY** [01:06:23] Okay, So. I think the fuck is E. Jean Carol and Donald Trump because that was just masterful how Robby Kaplan, who was her lawyer, was amazing. The deposition was amazing. Like, Donald Trump couldn't even figure out who his wife was versus some woman that he assaulted in, like, a dressing room. Insane. That was, so that was the fuck like, amazing. The marry is Gwyneth because first of all, the quiet luxury, the soft cashmere knits, no labels, just, like, Park City Chic. I fucking loved it.

**JVN** [01:06:57] "Because he hit me in the back!" It was so good.



**MELISSA MURRAY** [01:07:02] And then the best was at the end, she's like, "I wish you well." Which was, like, "Motherfucker, don't you ever do this to me again. Like, don't you do it to anyone." Like, so I stan. That was amazing. And then the kill is Johnny and Amber. That was, like, a travesty to watch, it was terrible.

**JVN** [01:07:17] I stand by your fuck, marry, kill. I think that was such a great break down. My only last ending note. And I know I said at the beginning, but I just want to make sure we get it. And I know that you're, like, a literal attorney, like, teacher at, like, our foremost fucking institutions, but you're a fucking glam beauty game. Just the sight, the perfect haircut, the glasses, the—no, whoever is cutting your hair is so top drawer. It is so good. The shape!

**MELISSA MURRAY** [01:07:43] Can I give a shout? Sarah Garrity, Marquee Salon in Oakland. Sometimes I fly back to California.

**JVN** [01:07:50] No, the shape. The shape on it.

**MELISSA MURRAY** [01:07:53] She did it.

**JVN** [01:07:55] And with your glasses, I mean, you just. You look amazing!

**MELISSA MURRAY** [01:07:58] Ohmigod, I'm getting the Queer Eye seal of approval. This is amazing.

**JVN** [01:08:02] No, you look fucking amazing! It took me all, I thought I already said that, like, four times. I'm, like, not understanding your surprise. I thought I voiced it, I might just have said that in my head.

**MELISSA MURRAY** [01:08:10] My children who think, like, my whole style is just, like, my—I have a 15—

**JVN** [01:08:14] Really? They don't get it?

**MELISSA MURRAY** [01:08:15] My fifteen-year-old is, like, "Are you really going to wear that?"

**JVN** [01:08:19] No, it's really major. She'll understand someday how cool you are. Yeah, give her, like, three years. Like, 18, I feel like she'll get out now. Yeah, 15 is, like, a time. Are lawyers, like, esquire? Like, what do you say at the end, like, Esquire? Melissa Murray, Esquire. It was so good to chat with you. Thank you so much for coming on Getting Curious. This was so much fun. We have to have you back for Curious Now. We love you so much.

**MELISSA MURRAY** [01:08:40] I would love to, love you. You guys are great.

**JVN** [01:08:43] You've been listening to Getting Curious with me, Jonathan Van Ness. You can learn more about this week's guests and their area of expertise in the episode description of whatever you're listening to the show on. Our theme music is "Freak" by Quiñ - thanks to her for letting us use it. If you enjoyed our show, introduce a friend - show them how to subscribe. If you enjoyed our show, introduce a friend and show them how to subscribe. Follow us on Instagram @CuriouswithJVN. Our editor Andrew Carson. Getting Curious is produced by me, Erica Getto, and Chris McClure with production support from Emily Bossak and Julie Carrillo.

**MELISSA MURRAY** [01:09:13] You know, I used to be an intern at Court TV?

**JVN** [01:09:17] It's, like, amazing, though. Is it, like, the best TV network of all time or no?

**MELISSA MURRAY** [01:09:19] I was an intern and I worked on Nancy Grace's desk, so I had to write these scripts for Nancy—

**JVN** [01:09:23] Ooooh! No! No! No! No!

**MELISSA MURRAY** [01:09:28] So I had to write in her voice, and it was, like, "We are coming live to you from this trial and the husband is about to testify."

**JVN** [01:09:34] You wrote for Nancy Grace?! Not many people can fucking say that, Melissa.

**MELISSA MURRAY** [01:09:38] This was, like, a summer internship. Like, it was wild.

**JVN** [01:09:41] On your TikTok, if you have one, that trend of, like, "things I ate and survived," where you're, like—and then it goes to Nancy Grace, like, reading your scripts. That would be, like...