

## Getting Curious with Jonathan Van Ness & Strict Scrutiny

JVN // Whenever I hold the microphone like this, I get really intrusive thoughts about singing *The Bodyguard*, which I will not do for the third week in a row. I will not, I am not. This is me, fighting the intrusive thoughts—and winning.

MELISSA MURRAY // Do it! Queen of the night, I am the queen of the night! Do it, do it.

JVN // Ow, the trigger, ow, the trigger. Oh, deep reaction! [SINGING] Because I'm the queen of the night. Queen of the night! Oh Yeah. Oh Yeah. Oh Yeah! Oh my God. When he rushes the stage and she gets carried off, I—that metallic suit, the bob, the lip, the styling, you guys. We're focusing. I'm focusing. Welcome to *Getting Curious*, I'm Jonathan Van Ness. And every week I sit down for a gorgeous conversation with a group of experts who are freaking brilliant to learn all about something that makes me curious. Back in May, I had the literal pleasure of my fucking career to interview Professor Melissa Murray about the end of the Supreme Court term. Now she's back, with her friends. They're very special guests to tell us all about what's going on with the nation's highest court, what we can expect for next year. You know SCOTUS always makes me very curious. So welcome back, Melissa Murray, Leah Litman, and Kate Shaw, who are all three constitutional law professors giving me *Destiny's Child* of literal scholar, fucking, legal constitutional fucking law. Ah! And they're also the co-hosts of *Crooked Media's* podcast, *Strict Scrutiny*. But unlike *Destiny's Child*, they are never breaking up and they are literally all coequals who are slaying the fucking game. How are you guys?

KATE SHAW // We're so happy to be here.

MELISSA MURRAY // We are great, Jonathan. So happy to be here.

LEAH LITMAN // Very excited to be tagging along as Melissa's less fashionable, less cool friend.

JVN // I gotta say, Leah, though! I'm obsessed with your fucking collarbone-length haircut. I fucking love it. I mean, I thought that, like, I was, like, is Kate Middleton here? Like, is the princess of literal Whales—I mean, like, like everyone's so fucking gorgeous here. It's, like, is that, like, a rule to be gorgeous and, like, be a host at your podcasting place? Like, what's going on? I have to be honest with you guys. We just did our, like, *Ask JVN* segments, which is, like, my new, like, after dark, highly sexually charged, like, it's giving *Talk Sex with Sue Johanson*, like, question and answer, like, relationship advice. So my brain's been more there for the last hour. So I have to, like, pull it back cause now we're going into, like, SCOTUS—

MELISSA MURRAY // Or don't! Or don't!

JVN // Or lean in, maybe all of *Getting Curious* just needs to be, like, more high velocity slut. You're right. Why am I leaving parts of my personality at the door? You are so right, Melissa.

MELISSA MURRAY // You should be super slutty and you should let a billionaire come put you on a private jet and take you on vacation. That's the energy.

JVN // My body is so ready for Clarence Thomas', like, hold on luxury gifts. Like, he really, really—can that be how we start this episode. I don't think my mouth has ever made such a sentence and even forming it was weird. It came out like marbles and it—

MELISSA MURRAY // I love that you called him "Clearence" instead of "Clarence" because he's definitely not shopping the clearance rack anymore. He is, like, he's not Clearance Thomas. He's, like, full luxury Thomas.

JVN // Can you imagine, like, him and Ginni walking into your store? Like, to do some shopping? Like—

MELISSA MURRAY // Like, a TJ Maxx. Absolutely not. A gift group? Yes, 100% with someone else's credit card. Yes, 100%.

JVN // Also that fucking goddamn fucking other fucker was, like, "There is nothing in the constitution that says that we can't be—"

LEAH LITMAN // Sam, Sam Alito.

JVN // Alito. But then, but then our other girl who we love was, like, "Actually, it does, rude!" Like, in her probably highly paid for symposium—

MELISSA MURRAY // Elena Kagan.

JVN // Yeah, Kagan. And she probably got, like, 350 for being there. But, you know, God love her. They're all, you know, on their speaking circuits—good for them. Just not disclosing shit. Getting super, I mean—

MELISSA MURRAY // She does disclose, because she disclosed that she received, like, a lox platter from her high school friends and she had to refuse it. And you know, if you know about Russ & Daughters in New York City, like you don't refuse a Russ & Daughters lox platter. But she did, and I say ethics!

MELISSA MURRAY // JVN // Wow. And how dare me—

I know!

JVN // That I, like, literally, like, everybody's corrupted them. Like, I literally sounded like such a Republican. I'm so ashamed. I'm sorry, I do come from, like, a place that voted for Trump 3-to-1 and those roots are still in me and I have to unlearn it every day. There's a nightmare there. So, wow. So really, like, it's giving me, like, good progressive vibes like all of our girls and boys that are just doing good, like all the progressive ones are, like, not corrupt—

KATE SHAW // Just girls, it's just the girls.

JVN // Yeah, because once that Stephen Breyer left honey, he, because he was, he was progressive.

MELISSA MURRAY // He was the Allen of the court. He, he was the Allen to their Barbie.

JVN // Oh my God, he was! But I love our girls. But what's going on with him and Ginni? Like, new revelations? Are they going to get regulated? Probably not.

MELISSA MURRAY // Well, I mean, the TLDR is that he seems to have a bunch of billionaire friends. And it is true, it is not unconstitutional to have friends. But when your friends give you a lot of free things, including vacations, rides on their private jets, host you at their resort like homes, you really should disclose it, especially if some of these friends have business before the court. And, you know, it's been noted by some conservative pundits that not everyone here has an actual case before the court. But I think it's fair to say that among this sort of conservative milieu, they're all really interested in the same core set of issues. So even if they don't have a specific case before the court, they're deeply, deeply interested and maybe even invested in a particular set of issues, whether it's deregulation

or affirmative action or whatever else. And there's Justice Thomas in the middle of this, apparently, you know, hanging out with his billionaire friends and living a billionaire life on a justice's salary.

JVN // Because if Kagan or Sotomayor or Ketanji Brown Jackson got caught on a private plane of a, like, billionaire who had cases...

MELISSA MURRAY // Forget the current ones, Jonathan! Imagine if Thurgood Marshall, who in 1967 was in the seat that Clarence Thomas now occupies. If the first African American to serve on the court had done *any* of this, there would have been bipartisan calls for him to resign from the court. And if he was unwilling to resign of his own accord, I am confident there would have been calls to impeach him. And so the fact that there isn't bipartisan outrage over this is just unbelievable to me.

JVN // Because these ethics violations are really huge. And also I think that's part of why I thought, "Oh, maybe everyone's doing it and that's why the Democrats are being quieter because they don't want to, like—

MELISSA MURRAY // No!

JVN // Bring to light that some of the ones on the left are doing this." That's actually, like, what I really did think. So is that just not what the disclosures bear out like? Why isn't there more outrage around this?

KATE SHAW // I mean, and let me say a couple of things. One, I mean, there are definitely many conservative commentators who have tried to suggest, "Everyone does this. Breyer and Ginsburg both accepted paid vacations." The thing is we know that they did that because they disclosed it. So with Thomas, I think there are two distinct problems. One is just kind of the volume problem. Well, there's actually many distinct problems, but just to name a couple, you know, the most recent round of ProPublica reporting was, like, 38 destination vacations, 26 private jet flights, eight additional helicopter flights, like, VIP passes—

JVN // 26 private plane flights?!

KATE SHAW // 26! And that's, I think, in addition to the already reported, these are 26 *new* ones they found.

JVN // But even if you're going, like, Houston to Austin, that's, like, 15 or 20,000 dollars. 10, 8500—like, a lot. So lowest—

KATE SHAW // This is millions. Millions and millions.

JVN // That's millions of dollars of gifts.

KATE SHAW // Yeah, yeah, and *none* of them disclosed. So those are distinct problems. I would throw in another problem which is that these relationships, at least in this ProPublica story, all seem to be relationships with people he became friends with after he was a justice. Like, if he had existing friends who happened to be billionaires and he vacationed with them, I think you still need to disclose that. But I also think it's different. These are all people with whom he forged these relationships—coincidentally, I guess—after he was already on the Supreme Court. He met them through these conservative legal circles, through this Horatio Alger Association, through other conservative think tank speaking engagements. So the kind of corruption...

JVN // Why aren't Democrats running on that?

KATE SHAW // They don't have the fight in them about this. They do not. And I agree, it's a huge problem.

MELISSA MURRAY // I mean, I think there are a couple of things. You know, it, it's gross. The optics of it are terrible, and I think the Democrats should be making more of this. They should be making hay of it. But I also think it goes to this sort of conservative playbook with judges. And the conservative playbook over the last 20 years has been basically to appoint younger and younger judges to the point where, you know, fetuses might actually serve on our courts at some point. You know, when you appoint someone at the age of 30 to the federal bench. They're never going to get their opportunity to really make money as a lawyer. Your prime earning years as a lawyer are usually between 40 and 50 if you're in private practice. And so if you're someone who's slogging it out in government service like Clarence Thomas did, he only had one stint in private practice working for Monsanto and he never really made a lot of money but he talked about how he very much wanted to make a lot of money.

But when you're appointed to the court that early—I mean, he was in his forties, when he was appointed to the Supreme Court—you just don't get that opportunity. And if you have the appetite for wealth, the only real avenue for living that life is going to be through these sinecures from billionaires. And, you know, I, I think you've got to kind of think about, you know, maybe part of the problem here is the way in which the conservatives have really insisted on nominating younger and younger people with an eye toward keeping them on the courts for a long time. But also maybe the flip side of that is they're unusually susceptible to this kind of entreaty because they just aren't in a position to amass wealth in a long term way. And that may be especially problematic for people who are never in a position to have intergenerational wealth.

JVN // What are, like—other than getting to take lavish trips and not disclose them—what are, like, Supreme Court justice perks? Like, do they get, like, lifetime secret service? Do they get, like, what's like their salary? Like, if they get, like, do they get some bomb ass health care? Like, do, like, is there, like, a Camp David for each one of them? Like, do we even know what the perks? Like, what do you get?

KATE SHAW // Yeah, I, I mean, there are some, there, there's some sort of, like, weird intangibles. The salary is, like, \$275,000 a year. It's, you know, like, it's obviously a very comfortable salary but it's not a *billionaire* salary, and the chief makes a little bit more. But they get, like, here's one: they have these beautiful chambers inside the Supreme Court and at least by custom, they can, like, borrow any piece of art from the Smithsonian or any of the, like, federal museums in—or partly federal museums in—DC to, like, hang on their walls. They do have a security detail. They have a driver basically anywhere they want. Some of them traditionally have and some of them have not used the driver. They can go, they spend their vacations typically being invited—and this is all of them, this isn't just, like, Thomas—being invited to Europe to do these kind of cushy sort of sinecures, sometimes sponsored by us. Law schools, sometimes sponsored by European Universities—

JVN // And they would get paid for that, right?. Like, nothing bars them from collecting speaking fees or doing books or—

KATE SHAW // There is a cap on their outside payment, for everything but books. So books are the big exception. So they've done these book deals, like, in the millions in recent years. And that's, you know, Sotomayor and Jackson in addition to Barrett and I don't know if anybody else has, like, been in the millions in their book deals. Thomas had a memoir, but I don't remember how much he made for it. Not that much. I don't think so. I think that's in some way to kind of Melissa's point that those of them, for whom a lot of material wealth was a real objective, like, are limited in their ability to realize that objective, even though

they do have plenty of perks. Not that it's exonerating, but that I think is one potential psychological explanation for why at least Thomas and maybe others, we don't know—although I'm pretty sure the girls are clean—but have been so receptive to these kinds of overtures.

JVN // But they don't get, like, a lifetime residence or anything that we know of.

KATE SHAW // They have their salaries for life.

JVN // But even if they retire, they still get their 275 a year forever?

KATE SHAW // Certainly, like lower courts when they hit the rule of 80. I think that's right about the Supreme Court. Yeah, they—yeah.

MELISSA MURRAY // You're gonna be totally comfortable. You're gonna have great health care. You know, you'll go to Walter Reed to get your mammogram or whatever. Like, it's, you know, it's a pretty cush life. It's not a billionaire's life, though.

KATE SHAW // No, but it's also, like, you know, they hear cases three days a week, two weeks a month, seven or eight months a year. They work, like, *actually* hear cases six hours, 12 hours a month. I mean, like, it's, and then their whole four months of summer is off. They have clerks who help them a great deal. So, like there are, there are perks but, you know, that they're just not private jet type perks.

JVN // Right? But apparently they are!

MELISSA MURRAY // Well—

KATE SHAW // You make your own perks, and that's the private jet perks.

JVN // So in light of the new ProPublica reporting, like, is there gonna be an impact on the Supreme Court? Like, I know, like, Dick Durbin, I think senator from Illinois, there were some senators that were talking about, like Supreme Court reform doesn't seem like it's a top priority that anyone's really talking about or running on. But, like, do we see these disclosures as having the potential to impact oversight of the Supreme Court?

LEAH LITMAN // I don't think, like, a direct impact. We're already seeing their effect as far as plummeting public approval ratings when people look at this and it's gross and distasteful. But you know, we have a divided Congress right now, where Democrats control the Senate but not the House and Republicans have made very clear they have zero interest in any sort of oversight or ethics reform regarding the court. And so, you know, the Senate has a markup on some of Senator Whitehouse's legislation that would actually impose some ethical constraints on the court. But I don't see that getting past the other house of Congress, at least not in the short term.

JVN // But then couldn't that law just be challenged and then the Supreme Court itself could, like, rule against it?

LEAH LITMAN // That, too! Because of course, justice Alito, as you noted said, he doesn't think Congress can actually regulate the Supreme Court, notwithstanding the text of the Constitution itself, which literally has a thing called the "exceptions and regulations" clause, giving Congress the authority to constrain the kinds of cases that the court hears and Congress has a ton of authority over the course and has exercised it over the last 200 years. But yeah, there's a very real chance that this court will say, "Actually, we think it's our constitutional right to be insulated from any measure of accountability and to lead this baller life, you know, no consequences whatsoever."

JVN // Have any other justices been dragged into this? Has anyone else's undisclosed things trickled out?

LEAH LITMAN // Sam Alito! Ok. It's just the greatest story ever. So this guy literally took a private plane, jet trip to Alaska for a fishing trip. There's a big picture of him grinning like a shit-eating fool holding a big salmon with his friends. He basically talked about this with the Wall Street Journal before the piece ever came out. And he said, "Look, there were reports that maybe we drank \$1000 wine. I don't remember. It certainly didn't *taste* like \$1000 bottled wine." And so, yeah, he was dragged into this and he took a flight trip with a guy who actually *did* have a case before the Supreme Court, whose financial interests were at stake. YOLO!

JVN // And if that came out about a justice appointed by a Democrat, don't we think that Republicans would absolutely come unglued?

MELISSA MURRAY // Yeah.

LEAH LITMAN // I mean, they came unglued when there were reports that Senator Chuck Schumer was having lunch with justice Sotomayor. Those reports were false. He was having lunch with his wife!

KATE SHAW // With his wife, who had a similar haircut!

LEAH LITMAN // Right, but they came unglued then!

MELISSA MURRAY // I mean, they came unglued about Justice Sotomayor and her book tours where her assistant was, like, "Are you sure you have enough books for all the people who are coming to this? They might be disappointed if they can't get a book." I mean, like they were making hay of that. Like, you know, "She's on these book tours just milking people for their money." I mean, it's everything they say is just projection and deflection from what they're actually doing, which is: this is bonkers. Like, I mean, this is actually bonkers and the only person I think on the conservative side who I think understands how horrible this looks is probably the chief justice, who I think wants no part of this and really laments the fact that this is happening and every five minutes it seems the court is being dragged into the pages of ProPublica again.

JVN // Because John Roberts is the chief justice, right?

ALL // Yeah. Yeah.

JVN // And he was Bush Two's first judge.

MELISSA MURRAY // Yes, he was supposed to take the seat that Sandra Day O'Connor vacated but in the run up to his confirmation, William Rehnquist, who was the chief justice and for whom Roberts clerked passed away unexpectedly from thyroid cancer. And George W. Bush slotted John Roberts into the chief justice slot and that made room for Samuel Alito to replace Justice Sandra Day O'Connor. That's how that happened.

LEAH LITMAN // Sam thinks he should have been named Chief.

JVN // Sidebar, just diving right back in because Melissa, honey. The last time we saw each other, we were on the precipice of some rulings and—

MELISSA MURRAY // Everything I said was going to happen, happened!

JVN // Except the one that I thought about so much for you was, we were really scared about voting rights and they did give us—weren't they, like "We aren't saying no forever but, like, on a technicality, like, we are, like, siding with..." But then, but then they went

back and made, like, an equally as racist congressional map that they, like, just submitted, like, yesterday in real life, right? So it's...

MELISSA MURRAY // I don't think they should get credit for Allen versus Milligan. You're right. They did a good job on that, but that was after they did a bad job allowing those maps to go into effect for the midterm election anyway, which may or may not have given control of the House of Representatives to the GOP. So I'm glad they got there. I wish they'd gotten there back in February of 2022. Not in June of 2023. But yes, that was a good one for SCOTUS. So, cookie for them.

LEAH LITMAN // Well, and also like they did a good thing and that five of them said the Voting Rights Act's prohibition on drawing districts to dilute the voting power of racial minorities that can stay for the time being. But only five of them said that. And you had these four horsemen of the apocalypse be, like, "Let's just blow up the other part of the Voting Rights Act now." And that's part of what I think is driving what you were alluding to Jonathan, Alabama coming back and be, like, "Nanny Boo boo. We know we have at least four votes to do whatever the f we want in drawing districts to make our congressional map not representative." And they are just testing to see whether they can get Brett Kavanaugh to do what he suggested he was "curious" or open to doing in his separate writing, maybe kill the Voting Rights Act down the road.

JVN // Oh, and so let's get into that a little bit more. So what did Brett Kavanaugh say in that, like, separate opinion in Allen? Like, that he was curious?

KATE SHAW // So he cast the fifth vote to join the opinion, authored by Chief justice Roberts and joined by all the Democratic appointees, that basically said the Voting Rights Act Section Two still means something. These maps drawn by the Alabama legislature were impermissible under the Voting Rights Act. But yes, in this sneaky separate writing, Kavanaugh basically said, "I agree that under existing case law that the maps that Alabama legislature drew are unlawful. And we haven't really been even presented with the argument that section two of the Voting Rights Act, the part at issue may have once been necessary and constitutionally permissible but has become unconstitutional. Alabama didn't really make that argument so we don't really have to pass on that argument, but I don't know, maybe we should think about it down the road." So he basically left the door open to the argument that the entire Voting Rights Act, what remains of it, is unconstitutional. And Alabama has taken up that invitation in its—both the way the legislature has returned to the task of drawing maps. It basically drew a map that didn't do anything different than the originally unlawful map and it is arguing in its briefs, in the litigation that is now pending that, you know, it's basically doing the thing that Kavanaugh invited it to do, which is to argue that the entire Voting Rights Act—again, what, what remains of it—is unconstitutional. And we just don't know what Kavanaugh will say when the argument is really presented to him.

JVN // So basically now Alabama has redrawn the maps and they're making this litigation because the maps were challenged. But they're saying, "Hey, it's evolved, it's unconstitutional. We don't need these anymore. Like, you're impeding our right as, like, a state to make our own maps." Is that what they're saying in the new litigation?

LEAH LITMAN // Yes.

MELISSA MURRAY // I mean, yes. And, and then there's the additional, like, "Hey, we saw your decision back in June and we say 'f you' to that," like, I mean, there's just outright defiance as well.

JVN // Because they think that the four definitely support them and they, if they can just pick off Kavanaugh with a different argument, then they are going to get that decision reversed because they know that this court's really open to reversing big decisions.

LEAH LITMAN // Yeah, basically, I mean, because if you look at, you know, the cases from the previous term, they know that basically defying progressive precedents in cases like Roe versus Wade. You know, you reward them in Dobbs, when you say, "Let's overrule this case, I'm gonna change my argument midstream." Or, right, they're just, like, they don't do anything when states defy them, like in the Texas SBA case where the court just allowed Texas to nullify Roe, you know, before they outright overrule it. And so of course, Alabama is gonna try again, right? Because there's no cost to them doing so when you have a court that's willing to go along with this lawlessness.

JVN // And also, like, that's, like, taxpayer money that, like, spends, that pays the lawyers right to, like, make that case and, like, appeal it and stuff—like, right? I hate it here sometimes.

MELISSA MURRAY // The good people of Alabama are paying for a lot of litigation but not getting a lot of representation.

JVN // Yeah, and that fucking Tuberville. Ah! He's such a conservative that I'm not even, like, just so disgusting. I hate him in every single way. I'm just saying, I hate him so much. It makes my skin crawl and I know everyone agrees. And I miss that Doug Jones. Where is, where is that nice Doug Jones? You remember that nice Doug Jones? I was on a plane when he won and I was, like, "Oh my God, I can't believe he's gonna win," and then he lost. And where is that poor Doug Jones? Anyway, that wasn't a question.

MELISSA MURRAY // Well, he was hanging out at the White House last year helping Ketanji Brown Jackson become a justice of the court. So he's been busy and doing good things.

JVN // Okay, love that! Maybe he'll become an ambassador or something. Anyway, because this litigation is already happening, is it—could it be fast enough that the new Alabama Maps could make it on to, like, the next roster for next year?

MELISSA MURRAY // The court docket for next year? Like, a challenge to the new Alabama maps?

JVN // Yeah.

LEAH LITMAN // So I think yes, particularly if they go via the shadow docket, which is how they went last time because last time, you know, the plaintiffs challenged the maps super quickly and the district court also very quickly concluded, "These maps are obviously illegal. You know, these maps don't comply with the Supreme Court's order in this case. So in addition to being obviously illegal, they are in defiance of the Supreme Court ruling." I don't think it will take that long to determine that. And then it is quite possible that Alabama will once again run off to the Supreme Court and ask them to allow Alabama to use the illegal maps while the case remains ongoing.

JVN // Mmm!

MELISSA MURRAY // And, and the term shadow docket that Leah refers to, it is just a distinction from the court's regular docket, which we call the merits docket. Those are the cases, the court hears oral arguments on, they get briefing on, and then they write decisions and you know, we get to read the sort of way that they decided and the reasoning behind their decisions. On the shadow docket, the court's basically handling emergency appeals, a lot of death penalty cases, but also these kinds of procedural motions that need to happen very quickly. And so there's usually not oral argument. So there's not a public argument



about these cases. And typically when they resolve these issues on the shadow docket, there isn't any decision, like, any written decision. So you don't even really know which way the justices voted unless justices register their dissents from orders on the shadow docket. So it's all not very transparent. And more recently, the court has been using the shadow docket to actually do more substantive as opposed to procedural things.

JVN // Haven't I read about, like, attempts for, like, shadow docket reform? Like, has someone been talking about that? I feel like I've read about that.

MELISSA MURRAY // Our friend Steve Vladeck talks a lot about it. He's written a book. Should we plug his book?

LEAH LITMAN // It's called The Shadow Docket.

KATE SHAW // Easy to remember.

JVN // Kate, you were gonna say something about the shadow docket.

KATE SHAW // Well, yeah, I mean, look, there are a lot of different types of Supreme Court reform that we would love to see come to fruition. But among them is the court just does an increasing amount of really high stakes work completely out of public view and without adhering to the ordinary requirements, like judges are supposed to hear arguments and give reasons when they decide cases. Like, those are the kind of core fundamental features of judging. Like, you know, actually members of Congress don't even really have to say why they're voting in a particular way on a piece of legislation. But like it's something that has always been a feature of judging our system is like they tell us why they're calling the winners and the losers the way they are. But that is often completely absent from shadow docket cases. Like literally, they will either, you know, put a map back into effect or put a lower court ruling, finding something unconstitutional or unlawful on statutory grounds on hold. And sometimes they don't even bother to tell us why. And it's lawless, like, there's no other word for it. And so requiring the giving of reasons, requiring them to set expedited hearings so they actually hear arguments and, you know, there's some sunlight that shines on their proceedings, like, these are, you know, a couple of the proposals that have been floated. But public attention, I think that Steve says this—and, and we say it, too—public attention is actually critical, and for a long time, the court just operates in the shadows and often apart from the impacted parties, the broader public wasn't even aware of what they were doing and that, I think, has changed for the better, but they're still doing far too much that is far too consequential on the shadow docket.

JVN // Melissa, do you know off the top of your head? How many cases in the term that we spoke about in 2023 are on that last merits docket. How many do they take in, like, a given session?

MELISSA MURRAY // This is a lot of math Jonathan. But you should know that the Supreme Court's docket, its merits docket is entirely discretionary. They don't have to take everything that comes before them. And more often litigants will file petitions of certiorari to the court asking the court to grant review. And so they have a lot of discretion. They typically take roughly, like, somewhere between 70, 80 cases, although it's been a marked decrease in the last 10 years in the number of cases that they take per, per term. So it's not like they're overwhelmed with cases. But you know, the cases that they select typically tend to be those that are very consequential, cases where there may be a split between two different federal circuits on a particular issue of law issues of first impression that need to be resolved. But in the last couple of years now that the court has had its conservative supermajority of six, since you only need four justices to grant certiorari, and you only need five justices to actually make a decision. The conservatives have a lot more room in determining what kinds of cases the court will take. So over the last 10 years, for example, when there was just a 5

to 4 majority, and the conservatives weren't always really sure where their fifth vote might come from, they had to be really careful about what cases they took because they couldn't be sure they would always get five to rule the way that they wanted to. And so, you know, a lot of Second Amendment cases didn't get granted cert and Justice Thomas would always register his objections to those denials from certiorari.

But now that they have a 6-to-3 conservative super majority, they're pretty sure they usually will have five votes to rule the way that they want to. And so now we're seeing them pick up cases that I think aren't necessarily ready to be decided by the court. And, and a great example of that from last term was *303 Creative versus Elenis*, which was that case about the website designer who did not want to provide websites for same-sex weddings. That was a pretty hypothetical dispute. She hadn't actually been approached to create a website for any same-sex couple. So, you know, the facts weren't necessarily as robust as they might be in a case that's before the court. But, you know, you had four people who definitely wanted to hear it and believed, rightly, that they had five votes to decide it. And so they took that case.

JVN // I did see some people online, I got into it with a few people on Instagram because there was this one gay who was, like, "What's wrong? Like, I don't want someone making my wedding cake if they don't believe in gay stuff, like, just go to someone who does believe in gay stuff." And then I was, like, "But queen, like, where does, like, creativity end? Like, what if there's, like, a cook or a chef at a restaurant that's, like, 'Well, I'm using my creativity on, like, how to get the best burgers or whatever the fuck. And I don't believe in sustaining gay relationships. So I don't want to feed gays because that's, like alternative,'" like, where do we end creativity? And so I was like, that's my issue is that like, they've just opened this huge fucking Pandora's box of, like, "At what point is it discrimination?" And so then there was these other, like, lawyers in the thread who were, like, "Ew, I really like how you interpret law." And I was, like, "Thank you, Legally Blonde."

LEAH LITMAN // What, like, it's hard?

JVN // Yeah! You know? But there was other people who were, like, echoing that sentiment. So as three constitutional scholars—everyone, I want your takes on this. What do you think about that ruling? Obviously, I don't think we were surprised. But what does this open up for us now?

LEAH LITMAN // I feel like your interpretation is the right one. Because it's not clear what the limiting principle to this ruling is. You know, in the immediate aftermath, we've already seen other service providers like hairdressers and whatnot say, "Well, I'm an artist, I'm creative and therefore I can decline to provide services as well." And we've seen, you know, anti-LGBT litigation groups rely on the decision to justify firing, right, like, a gay substitute teacher because, you know, instructing children, you know, involves some creativity and expression and basically every aspect of modern commercial and social life involves some expression and creativity. Is it possible that the Supreme Court will later on, down the road limit the decision? Sure. But in the interim, it will inflict all of this harm and uncertainty on individuals until that's worked out and also normalizing discrimination and differentiation isn't good, right? That has bad consequences, even if you attempt to cap it off and limit it later down the road.

JVN // Kate?

KATE SHAW // Yeah, I mean, I honestly cannot improve much on the way that you described your discussion. It's potentially just kind of infinite in its application in terms of how much it will erode now pretty settled expectations of a degree of at least not overt discrimination on the basis of characteristics like sex, race, sexual orientation, religion. You

know, in theory, at least partly because as Melissa was saying, this was a hypothetical case without any factual development. So when the court says things, like, "Well, website design is an expressive activity because she—this would-be website designer—said, 'Well, I'm going to sit down and make a custom website with each couple. And so my expression is going to be all over the product.'" Like, I don't know, I'm not even really sure that's how, like, website designed for, like, wedding websites works. But we just don't know because there was no actual facts in the case, it was all these abstractions that Neil Gorsuch was offering. And so, but I think you're right in terms of kind of food provision. So you, you have people for sure who were defending the opinion and basically saying, "Well, expressive activity like this can be cordoned off from the provision of ordinary goods and services on the commercial marketplace."

But I'm just not sure that logic holds. Like, just as you said, like, people who provide, who make food like the predecessor case, Masterpiece Cake Shop, like, involved baking a wedding cake. That wasn't decided on the merits the way this case was. But certainly you had a baker there who said, "My cakes are artistic expressive creations." And maybe you could draw a line between like a custom wedding cake and, like, a sandwich that you buy at a deli. But I don't know, like, people may be able to argue that, like, custom sandwiches are creations. And, to the kind of I think very profound point you made, if you have somebody who runs this deli who literally says, "I don't want to provide sustenance to this gay couple that walked in because I fundamentally disagree with their lives. Like, I fundamentally find them illegitimate," right? Or "fake," as Laurie Smith, right, who was the website designer who basically said, "I believe that same sex marriages are false." That was the term that she used. That's the same position that Smith was making in defending her right to refuse service. So I'm just not sure if sandwiches are actually different and if they're not, that literally means that you could be discriminated against in attempting to secure literal sustenance to live. And the Supreme Court just enabled that.

JVN // Melissa, darling!

MELISSA MURRAY // So, two points, you know, we've been thinking about Obergefell a lot since Dobbs happened because Obergefell and Dobbs sort of rest on the same kind of fragile foundation. And I think there's probably no appetite among the conservatives to attack Obergefell directly right now. But this is a sort of back door way of doing that. If you make it difficult for same-sex couples to exist in public life—to get services, to be treated fairly—then you're normalizing the expectation of discrimination and normalizing the fact that it's okay to discriminate against same-sex couples. So there's that. The other thing I think that's worth talking about that, you know, I, I think not everyone has focused on is these objections to same-sex marriage, these religious exceptions are the same kind of objections that people launched against interracial marriages in the 1960s and 1970s. And there's a whole body of Supreme Court precedent that says, "Yeah, you can have religious beliefs, but you can't use them in ways that implicate other people's civil rights." And one of the things I think is happening with these cases, like 303 Creative and Masterpiece Cake Shop is we are beginning to see the prospect of discrimination against LGBTQ persons being hived off from the discrimination that we rightly view as abhorrent against racial minorities. And there's a distinction that's being drawn that makes racial discrimination really problematic and discrimination against sexual minorities as maybe not so problematic at all. And I think that's a really big problem that they're beginning to set up. And it's one that can be used to divide these communities that really should be banding together in the face of all of these conservative assaults.

JVN // I wrote down "legacy admissions" because I wanted to ask about legacy admissions and how we think if that's gonna, like, make its way quickly to the Supreme Court. Because what was that case called? The one about affirmative action?

MELISSA MURRAY // Students for Fair Admissions versus Harvard and Students for Fair Admissions versus the University of North Carolina. They were consolidated for argument and decision.

JVN // Which were groups of, like... Republican white kids or no. Yes? No.

KATE SHAW // Well, and Asian American students as well, but recruited by a white guy who is, like, a "cause guy" who has been trying to dismantle race consciousness and education and everywhere else, for decades.

MELISSA MURRAY // His name is Edward Blum, name names.

KATE SHAW // He's the villain here.

LEAH LITMAN // He was involved in the case that blew up the other part of the Voting Rights Act, Shelby County versus Holder.

MELISSA MURRAY // He's, he's got lots of tentacles.

JVN // That was the 2013 one, right?

LEAH LITMAN // Yeah, yeah.

KATE SHAW // Exactly.

JVN // So, like, is there a challenge already working its way up about legacy admissions? Because, like, what a glaring thing.

MELISSA MURRAY // So there isn't a challenge working its way up to the Supreme Court, there is a group that has filed a complaint and now the Biden administration has also filed a complaint with the Department of Education to investigate Harvard's policy of admitting legacy students. So that is definitely going to get some attention. And you're right, it's a glaring loophole in the whole affirmative action debate. I would say recruited athletes are also an equally glaring loophole that were not addressed. But I think the difference there is that, you know, whether you are a legacy or whether you are a recruited athlete is not a protected characteristic under the constitution, like, race is a category that requires the courts to be more searching. Legacy status, whether you're in state or out of state, whether you're a recruited athlete, those are not. And so even if those were to be challenged, it's very unlikely.

JVN // Judge! Judge Murray, darling. But what if my angle as a lawyer, darling, was, like, "But because legacy admissions were so fucking racialized, like, most often, like, there are some Black Legacy admissions, there are some, like, other, like, you know, Latino, like, other races, but, like, most of them are white because of, like, the racial..."

MELISSA MURRAY // Yeah. Does it have a disparate impact of advantaging white people? Sure. But the Supreme Court has basically made the whole question of whether a disparate impact can rise to the level of a constitutional violation really remote. So again, unlikely to be successful. And you know, there's a lot you could say about legacy admissions. And I think schools would say, you know, "A big part of letting legacies in is that they usually pay full freight, which then enables us to redistribute some of that tuition money to kids who can't afford to come here on the full freight tuition or to deploy our resources in other ways to scholarships and whatnot." And so, you know, that's something to think about. I think the Black people in my life have been pretty exercised over this issue because it feels a little bit, like, "Gotcha!" that they are finally in a position where they have gone to some of these elite institutions and are now in a position to pass that legacy status on to their children. And suddenly it's being challenged in the same way that affirmative action has been

challenged, and that feels a little bit like a “Gotcha.” But, you know, I think it's very clear that this is a system of perpetuated privilege and for lots of different reasons and there are lots of perpetuated privileges all over the college admissions process. There was just really interesting reporting in The New York Times by David Leonhardt about the way in which income and wealth play such a surprisingly impactful role in who gets admitted to these elite colleges. And again, all of this is about elite admissions, 70% of students in the country do not go to these schools. And so for the bulk of Americans, this whole issue is entirely moot.

JVN // Mmm! Okay, coming in hot and hard with the nuance, as always. Obsessed! Sidebar, I do want to do a role play where you're the judge and I'm a lawyer and I get to be, like, a mock trial lawyer and just basically just to say, like, “I object!” and then for you to be, like, “That argument doesn't really like, do, do anything. So, you sit down.”

MELISSA MURRAY // Well, let's do a role play where you're Clarence Thomas and I'm Ketanji Brown Jackson.

JVN // Ok. Actually, ew, first of all, how dare, like, I mean, aside from the obvious cancelable ethical implications of me role playing Clarence Thomas—ew! Why does it have to be so conservative? Like, what?! Like, maybe I could do Ginni. I think I could do a bitchin' Ginni, I could be such a conservative villain, my blow dry and my shoulder pads and my chunky fugly heels and, like, my hose that aren't quite the right color. I would fucking kill it. I would bring a Dolores Umbridge to that role. That's actually probably my breakout scripted role. If there wasn't a strike is, like—oh my God, I can't believe I'm gonna be, like, a trans nonbinary Ginni Thomas. Wow. Ok. Anyway—

KATE SHAW // Make this happen.

LEAH LITMAN // I feel like we'll have to have you on our podcast to role play Ginni when we're, like, reading her text messages and stuff, so, okay—

[CROSSTALK]

JVN // Anytime! Please, I will, I will cosplay her role, play her any time you need to.

KATE SHAW // Ok. We're going to hold you to that, seriously.

JVN // Please, invite me on, yesterday. It's all I've ever wanted in my life.

LEAH LITMAN // Perfect.

JVN // So I know Melissa, we talked last time about how, like, typically, like, when there's, like, a blockbuster docket and they're just, you know, fucking running amok all over the place, they don't do that two years in a row. This year was an exception. They *did* do that two years in a row. Is next year going hard core as well? Do we know what's on next year's merit space docket. Like, what do we have to get excited for next fucking year? Is it abortion pills? Is it...

MELISSA MURRAY // So, Jonathan, you are exactly right. Typically, the rhythm has been, you know, barn burner term, [then], “Let's chillax a little bit and, like, get the heat off of us.” But this year we saw the court go from overruling Roe versus Wade to, like, getting in the middle of affirmative action and upending that. And I think next term is going to also be a barn burner of a term. There's a really important Second Amendment case on the docket that's really going to test whether or not the government can limit firearms in particular ways, limit who may own a firearm, including individuals who may have a history of domestic violence. So that's going to be huge. There's a case that may upend the Chevron Doctrine, which is a major administrative law doctrine that basically gives administrative

agencies broad deference to interpret the statutes that they are charged with executing. So that's a big deal. And, you know, we're gonna see a lot of other things. And I think Leah wants to jump in because we just had a major, major development that may also percolate up to the Supreme Court. So in real time this afternoon, we just got some news.

LEAH LITMAN // So I wasn't necessarily planning this, but just so, you know, Jonathan, the medication abortion prediction you just gave is likely true because as we are recording, the US Court of Appeals for the Fifth Circuit, the one with a very conservative reputation overseeing Texas, just released their decision in the medication abortion case in which they ruled that these anti-abortion doctors are entitled to bring back into effect the restrictions on Mifepristone that existed before 2016 and those changes. So before the Biden administration. And so they effectively ordered a judicially ordered nationwide limitation on my Mifepristone that could jeopardize access to medication abortion nationwide while drug providers and distributors attempt to distribute this. And that case is certainly headed to the Supreme Court.

KATE SHAW // We should say though, right, there's a stay that the Supreme Court issued that will remain in effect. So this is a very, very, very bad opinion, but it does not mean that *immediately* there's a change in the status of Mifepristone and people's access to it. It will remain widely available until the Supreme Court disposes of this case, it will be up to them.

JVN // But it's up to these fucking nine justices about whether or not—now, what does that question hinge on is that if it's available state by state, like, how could that make a nationwide ban?

LEAH LITMAN // So what they did is they said the Food and Drug Administration, the federal agency, they were incorrect to adopt certain rules regarding medication, abortion. And because those rules come from a federal agency, they apply nationwide. And so by undoing those rules, the court's ruling also has an effect nationwide. So even in states that permit abortion, this ruling if allowed to go into effect could have huge consequences.

MELISSA MURRAY // Well, and can we also just say that, you know, this case is, like, the Venn diagram of all of the things the conservative supermajority hates like it's abortion and the administrative state. So this is just, like, Samuel Alito is gonna be absolutely salivating over this case, like, the chance to stick it to agencies while also sticking it to abortion access.

JVN // So basically would they be saying to the FDA, "You rushed," because wasn't this whole thing about that? They rushed the process, they haven't tested it enough. Wasn't that what they said?

LEAH LITMAN // Yeah, so this isn't about the overall approval. It is about whether some additional restrictions on Mifepristone's use should be in place. So for example, like whether you can prescribe it by telemedicine or things like that.

MELISSA MURRAY // The Biden administration during the pandemic changed some of the rules to make it more widely available in large part because of the inaccessibility during the pandemic that a lot of communities experienced. And so this is about those changes in the Biden rules, like, but you're right in the initial case heard before Judge Matthew Kacsmaryk, that district court judge in Amarillo, Texas. There was a broader challenge to the FDA's initial ruling approving Prestone back in the 2000s. I think it was, like, what—2002, is that right?

JVN // So, but this new case, this new challenge is going to be at the Supreme Court for next term. We know that or we don't know.

ALL // Basically, we're pretty certain.

JVN // And so if they rule against it, that means that like no more birth control nationwide or states would have to come in and make a law that says, like, "It's ok in our state."

KATE SHAW // Well, this is medication, abortion, not birth control just to make that distinction.

JVN // Oh, that's what I meant! That's what I meant! Yeah, yeah—thank you, thank you.

LEAH LITMAN // Also, like, it still would be permitted, but there would be additional restrictions on its use. Now, that's formally true. But the problem is that these drugs have to be correctly labeled. And if the court were to say, well, actually all of these new rules and additional restrictions apply, there might be a problem where distributors and manufacturers can't actually use the existing drugs that have the old label that a court would be saying is wrong. And so that could at least lead to a temporary, you know, and if you believe the drug manufacturers and distributors, they said potentially months, if not years long, you know, inability to access medication abortion, which is the most common method of abortion in the United States.

JVN // Great. What are the other cases for next term, that we know of?

KATE SHAW // There's a couple of other cases about administrative law questions that sound kind of dry but are so so important. So one regarding the Securities and Exchange Commission, which is like, you know, an important agency that protects investors and markets and, like, tries to make the economy work generally. And some anti government forces are arguing that basically the way the sec enforces a lot of the laws, it is responsible for enforcing like violates, like, three different parts of the constitution and that basically the whole agency is unconstitutional. There is an argument that the Consumer Financial Protection Bureau is also unconstitutional—

JVN // Which is what Elizabeth Warren set up.

KATE SHAW // Her baby, her brain child.

JVN // Yeah, I was worried about the Clean Air Act and the Clean Water Act if that board was going to be up next.

KATE SHAW // And the answer is yes.

JVN // And so that would mean, like, the whole, like, Silicon Valley Bank that collapsed, like, those sorts of things would be happening way more because there would be even less regulation.

KATE SHAW // And the court may facilitate that

JVN // Okay, so back to Trump and other old crusty piece of shit—so, of the four indictments you have District of Columbia, New York State, Georgia and Florida doesn't DC or potentially Georgia have the chance of, like, going to trial and having a verdict prior to the election? So he—no.

MELISSA MURRAY // DC, yes. In part because he's the only defendant in that indictment. It's a pretty streamlined indictment. Georgia. No, I think because it's just such a big indictment and there are so many different players, like, there are 19 defendants, so Trump and 18 others and then there are also 30 other unindicted co-conspirators who may, you know, come into play at some point. So hard to say that just seems like a much more, a much more laborious kind of trial.

KATE SHAW // And we should say Willis says—the prosecutor Fani Willis has said she wants a trial date within six months. So she is certainly going for it. But I totally agree with Melissa that trying, I mean, unless they're going to be severed at the moment, they're all being charged together. They can't all be charged as fast as she would like, so unlikely to happen before DC, and maybe not before the election.

Speaker 2: Like, 19 defendants, 19 different lawyers, 19 sets of motions. Like it's, it's a lot.

JVN // And, like, Mark Meadows is already, like, motioning to have this move to, like, Federal Court because he says it was like part of his, like, duties from whatever.

LEAH LITMAN // You know, who was texting Mark Meadows about this—

KATE SHAW // “It was part of my job!”

LEAH LITMAN // Ginni Thomas! When you come on our pod, we'll talk more about it.

KATE SHAW // This will, this will be part of your role.

JVN // But I was also reading this opinion piece, I think in the Wall Street Journal that said that, like, the 14th Amendment says that anyone who aided or abetted, like, insurrectionists, like, is barred from running for state or federal office, but, like, who's in charge of that? And could it be up to, like, state's attorneys generals to say you're barred—or Secretary of State, rather.

MELISSA MURRAY // Yeah.

KATE SHAW // You're asking all of—you really should be a lawyer, not, I mean, you've done great in all these other spheres, but I'm just saying, if you ever want to go to law school, you will dominate.

JVN // Well, I was reading about it! I was just reading about it.

KATE SHAW // I mean, yes, that's in the 14th amendment. The question, but the big question is who enforces the prohibition on serving in public office for individuals who engaged in rebellion or insurrection? I think there is an argument that a single Secretary of State could basically decide they have the authority to enforce Section Three of the 14th amendment and prevent Trump from being on the ballot in their state. And that, I think, would force the issue up to this Supreme Court, which takes us back to the recurring problem of this conversation, which is, it all comes back to this Supreme Court.

JVN // Now, what if the Secretary of State sued the *state* Supreme Court because, like, this is, like, a con—but that would have to be in the state constitution, that same provision about insurrectionists. Right?

KATE SHAW // Yeah, I mean, I, I think it would be presumably the Trump campaign would challenge a decision by the Secretary of State to keep him off the ballot and the issue would be filed in federal court. And it's a, you know, there's nothing that prevents a state court from passing on it. But ultimately, it's the federal constitution that has the prohibition and the United States Supreme Court would ultimately answer the question of whether he can be disqualified. But I don't know if in theory, like, he doesn't even need a conviction. Like, in theory, a Secretary of State could try to keep him off just because they make the determination that he has engaged in disqualifying conduct.

JVN // But then he, his campaign would most certainly sue and that would immediately go to the Supreme Court. And then that would lay that out really quick if he's allowed to run or not.



KATE SHAW // I think that's right.

JVN // From a 14th Amendment perspective. But then if he gets convicted in DC by next year and he's a convicted felon, then you can't run for federal office as a convicted felon, right?

MELISSA MURRAY // You just can't vote for yourself!

JVN // Oh!

KATE SHAW // The general understanding is the only things the constitution really requires. If you're going to be qualified to run for president are you've got to be 35, and a natural born citizen....

JVN // Shit. And so there's really, he's gonna run and he's going to be their nominee. Is that our verdict, our prediction?

MELISSA MURRAY // They seem to really love him. I, I feel like all of the other people in this field are running to be his vice president.

JVN // I'm scared of that Vivek, honey. He is really intense.

MELISSA MURRAY // Oh, Vivek. Yeah, Ramaswamy.

JVN // I read an article about him that said he was Trump Squared. Anybody who gets the title of Trump Squared. I'm running the other way. It's a Chunky Heel day.

LEAH LITMAN // I went to college with him.

MELISSA MURRAY // That's another Yale Law school product.

JVN // You did not! You saw him in your classes or just like you loosely heard about him or you, like, literally, like, had to do a project?

LEAH LITMAN // I mean, we were both in some of the, like, political-ish circles, so I, like, ran into him. I didn't know him by, like, any means.

JVN // Was he just, like, openly talking about raging conservative ideologies back then? Would he just be, like, "Fucking gays!" or no?

LEAH LITMAN // No!

JVN // So he kept it more close to the vest. He was more of—of the guy who shot Hamilton. He was more of a Burr.

MELISSA MURRAY // Aaron Burr? He's, like, "Just you wait!"

JVN // So okay, so this fall we're launching a new series called Curious Now, which you were all invited on. We need you to be, like, our co-anchors that like, come on to talk to us about constitutional things. And one goal of Curious Now is to keep our listeners up to date with LGBTQIA+ rights and legislation. What are some of the LGBTQIA+ rights cases y'all are following? There's just a lot to keep, especially on the state level. But what are you guys looking at?

KATE SHAW // We have highlighted before this is just a district court case, but a really important win out of Tennessee that struck down Tennessee's, like, first in the nation, horrendous drag ban and that was successfully challenged on First Amendment grounds. So we talked about it a bunch when that came down and that's kind of a, you know, model challenge for, like, other awful similar copycat legislation being considered other places. So that was a rare spot of really good litigation news.

JVN // But the fifth circuit could rule differently if Texas does—because they were gonna, like, tax drag queens here more. They were, like, doing all sorts of, like, potential things. I don't think that, that I think they ended up not passing that stuff this year or in this term, but they were still talking about it. But is the first circuit even more—because that's Tennessee? So it's probably pretty conservative.

ALL // Sixth circuit.

JVN // Sixth circuit.

MELISSA MURRAY // It's pretty conservative. It's very conservative. You're right, Jonathan. I mean, there has been a spate of LGBTQIA unfriendly legislation around the country over the last two years. And the anti-trans legislation is, is obviously the sort of locus of this at least 20 states since, like I, I guess of this year, at least 20 states, if I, I'm thinking of the research I did have banned at least some kinds of medical care for transgender children. And again, a lot of this is being done on the view that it is quote unquote "child abuse" to allow children to have this kind of gender-affirming care. So, you know, one thing that's going on is we're refashioning existing child abuse laws to reach these kinds of practices. And then we're also passing affirmatively anti-trans laws to prevent this in the first place. So that's going on. But there have been some glimmers of hope. An Arkansas district court imposed a permanent ban on that state's anti-trans legislation that would have prevented children from getting gender-affirming care. So, you know, that's an important victory in that state, but there's assault after assault after assault on all of these things. And so we're just, everyone's just sort of fighting on all fronts at this point. Yeah.

LEAH LITMAN // And Sixth Circuit actually allowed the states in the Sixth Circuit to enforce their laws prohibiting gender-affirming care. So just as we are thinking about, like, what that court might do on the drag bans, like, that's what they did in this other area where all of the district courts that have decided the issue had decided that prohibiting gender reforming care was unconstitutional. And you had a conservative, you know, court of appeals saying, "Actually it's not." And so that's a risk there. And I think, you know, we are going to see the trial of Kim Davis, who refused to issue marriage licenses to same-sex couples after Obergefell versus Hodges, that's going to be happening in the fall. And I think that is going to be part of a broader trend and category of cases where people are seeking exemptions from civil rights statutes and rights that the LGBTQ community has right now.

JVN // What about Florida? Don't Say Gay? My little book Peanut Goes from the Gold, they were attempting to ban it in St. Johns County, Florida. I also would be remiss if we didn't mention this because I know I talk about it all the time but when it comes to gender affirming care, Alicia Roth Weigel, she's coming on Curious Now, she'll actually be our first guest on Curious Now. Her book Inverse Cowgirl is coming up, but she's a huge, amazing activist. She's an intersex activist. I love her. She's from Texas. But I think it's just really important that we say that all of these anti-trans children care laws that say, you know, "Gender affirming care for kids is child abuse," is in those same places, there is a carve out for intersex kids. So when a child is born with intersex characteristics, which affects up to 2% of the population. Like, even biological sex is not a binary because intersex people do exist in the millions. And these laws specifically carve out intersex kids to have permanent medical decisions on babies to keep the gender binary functioning as is. So anyway, last thing—this is gonna be really fun. Well, second to last things just to be clear, I don't wanna make false promises. Last episode we did an epic Fuck, Marry, Kill with pop culture legal cases. What's our new one to end on for pop culture trials? Or it could be, like, historic trials as well? Like, I need a win, like, for our Marry.

MELISSA MURRAY // I'm, like, honestly waiting for this Prince Harry versus the tabloid situation and I, I think when Megan Markle won against the Daily Mail, that was epic.

JVN // Okay, but can I just say like that speaks to, like, the desolate fucking desperate times that we're in that we have to look all the way to fucking England for a place where we're fucking winning, ok? That's not a good goddamn sign, because it's not going that well over there either, you guys. I'm nervous. Should we start a scholar commune where you guys are the constitutional experts? I'm the wannabe one who does nice haircuts, blow dries. I'll give you hand massages. I'll make food, like, I do have five cats and a husband and three dogs. What are our cases, Erica? Do we actually have some prepared or was this part of the question that we need to, like, literally source them ourselves. Ah! Or should we Fuck, Marry, Kill, like—

KATE SHAW // What about justices?

JVN // Yes, justices.

LEAH LITMAN // I'm not doing that one.

MELISSA MURRAY // Yes, you are.

LEAH LITMAN // I opt out of this experience.

JVN // I think that's, like, a really hard one. But I think we should, if you really want to, Leah, I think you should see how open we're about to be. And then if you feel like matching our vulnerability, you're welcome to. But no pressure because this is an open place.

LEAH LITMAN // Can I just say I was really excited to nominate my case, which was the Taylor Swift counterclaim for a dollar for assault. Like, that's a great case!

KATE SHAW // That's good. That's good.

JVN // That's definitely the one to marry.

KATE SHAW // Yeah, it's just so easy. Like, everyone will marry that one.

MELISSA MURRAY // I do think the justices is, like, it's harder.

JVN // I think it's kind of a win, Melissa. I think you're right. I, I'll go first. I'm gonna put myself out there. Fuck Mary Kill, Supreme Court justices of all time. Obviously going to marry Thurgood Marshall. Stunning, gorgeous, really attracted. I am curious about if he was tall, but even if he was a short king, I'm still here for him. I feel like the movie I was, like, into like whoever—like, I'm into it. I'm here for it. Yes, Marry. I also feel, like, we would have some, like, good ass, like, long—even though I'm pretty sure he was straight. But like in my, or maybe I would have been like a lady, whatever. I just feel like our chemistry would have been hard core, like in the public bathrooms. Like, oh my God, like, the Justice gets in trouble because like, I was, like, diddling him in the bathroom, like, “Oh my God.” But, like, we come out and it's, like, just impossibly fresh and, like, “No, we weren't! What do you mean?” So I'm definitely marrying him. I'm fucking, I'm definitely probably bottoming for Roberts in a sauna at the YMCA. It's probably, like, probably bottoming for and he's probably, like, not into kissing but, like, his Adam's Apple. I'm just, like, “Oh okay, like, let's do role play.” Like I feel sad but like you're gonna use me and like, but it was OK, just, like, for a quick, like, breed me. Undetectable = Untransmittable, like, you, like, it's fine. Like I disclosed my HIV status, like, just fuck me.” You know what I'm saying? Like, you're and then bottoming like your top, it's gonna be fine. Killing, I'm probably, definitely killing. Should it be someone who's already dead? I don't want the FBI to come for me.

LEAH LITMAN // Yeah, I'd go with someone who's already dead here, they take this stuff seriously

KATE SHAW // Already dead, definitely already dead.

JVN // Who was, like, a nightmare dead justice who, like, was there, like, a teapot dome justice? Like a really justice who was, like, a racist justice who ruled wrong on—

LEAH LITMAN // Roger Taney?

MELISSA MURRAY // Roger Taney.

KATE SHAW // We're all gonna pick Roger Taney. Yeah. Yeah, he's the author of Dread Scott said Black people could never be citizens.

JVN // Kill him, kill him. Yes. Yeah.

KATE SHAW // We're with you.

JVN // I also did have an intrusive thought that's much worse than that, which we are not going to say. Miss Murray, I'm gonna need you to fuckin', just quickly, you don't have to explain it too much, but, like, anyone—

MELISSA MURRAY // I think we're at time, and I don't know if I can ever top this.

JVN // That was, like, really mortifying, like, why? No? Like, no because, like, John Roberts just, like, fictitiously fucked me in public, so...

KATE SHAW // I think Benjamin Cardozo was kind of a snack. I think he was kind of cute. I'm gonna go with Benjamin Cardozo.

MELISSA MURRAY // Old school! That's old school!

KATE SHAW // And I think I would marry KBJ, no question. I would marry Elena Kagan, too.

LEAH LITMAN // If you marry KBJ, I would marry Elena Kagan. Maybe fuck William Brennan, right? Like—

MELISSA MURRAY // Oh, he would know what he was doing!

LEAH LITMAN // Yes, also a snack. And then kill James McReynolds.

MELISSA MURRAY // Yeah, those four horsemen? Yeah.

LEAH LITMAN // There you go.

KATE SHAW // Very good, too.

JVN // Yeah. And I also loved our FBI catch. That was great. I wonder if that is gonna come for me for, like, me saying, I wanted John Roberts to breed me at a YMCA, like, that's probably an equal offense for him, with the FBI.

LEAH LITMAN // But I don't know that that's, like, a threat, you know.

JVN // To him it is! It probably is, you know? Hide your kids, hide your wife, Justice Roberts because my fucking hole is coming for you. I've had it with being oppressed. So, I love you guys so much. Final question. What's next for all of you and for Strict Scrutiny? And also, if you wanted to, like, 1A, 1B because we did ask Melissa last time about, like, her journey on becoming a constitutional law scholar slash icon, like, for, like, women and, like, women plus, non-binary, queer people, like, marginalized groups who want to become like a fucking constitutional goddamn lawyer. Like, any advice. How did you get here? Is it a dumpster fire and we should leave already? Is it too late to be saved? What's next for Strict Scrutiny? Yes!

MELISSA MURRAY // How did you guys become icons? Leah? Kate?

KATE SHAW // No, we're just icon-adjacent, or at least I won't speak for you, Leah. I consider myself merely icon adjacent and uh surround yourself with brilliant fucking ladies and um ones you can vent constructively with.

MELISSA MURRAY // Basically be the Supreme Court minority, right? Find yourself two other ladies who are dope and hang out with them.

LEAH LITMAN // And then just dissent, dissent, dissent repeatedly.

MELISSA MURRAY // Dissent!

KATE SHAW // Know that it's a long game. It's gonna take a lot of time.

JVN // Go listen to Strict Scrutiny, you guys. Get smarter over there with these fucking amazing ladies. I am so obsessed with you guys. Thanks for coming on, getting curious. I love you guys so much. Any final thoughts or do you feel complete?

MELISSA MURRAY // You complete us!

JVN // Don't threaten me with a good time, if you ever want to have me on Strict Scrutiny, I'll come yesterday.

MELISSA MURRAY // Oh, we will have you on, we'd love to have you on.

JVN // I love you guys so much. Yay, Getting Curious! You've been listening to Getting Curious with me, Jonathan Van Ness. You can learn more about this week's guest and their area of expertise in the episode description of whatever you're listening to the show on, honey! You can follow us on Instagram @CuriousWithJVN, yes! Our theme music is "Freak" by Quiñ - thank you so much to her for letting us use it. Our editor is Nathanael McClure. Getting Curious is produced by me, Erica Getto, Chris McClure, and Allison Weiss. With production support from Julie Carrillo, Anne Currie, and Samantha Martinez.