

THE PROBLEM WITH JON STEWART PODCAST

Episode 202 Final Transcript

Jon: It's so nice to see you guys, you know, we haven't really been in the office because COVID is now I think it's Omicron —

Alexa: Point.

Jon: —B. A

Alexa: Three, four?

Jon: I think there was just an update. It's now like version 5.12 or something.

Jay: Yeah, I think it's the LEGOs and M&M collab that they're releasing as well.

Jon: That's right.

Alexa: Oh, wow.

Jon: It now all comes, this is in every new virus you get with a soupçon of monkeypox.

[LAUGHTER]

Jon: So that's —

Alexa: I'm gonna guess soupçon is like French for like a little sauce?

Jon: Like just a little hint, just a flavor.

Alexa: A flavor.

Jon: It's like monkeypox is the saffron in the COVID paella that is our life.

[INTRO MUSIC]

Jon: Hello, everybody. Welcome to the podcast. It's been a while. It's been 11 years.

[LAUGHTER]

Jon: We're here with our writers Jay Jurden and Alexa Loftus. We're talking today, it's a very exciting podcast. We're talking to three constitutional law scholars professors, actually co-hosts of the podcast "Strict Scrutiny," which is very difficult to say. Strict. Scrutiny. Kate Shaw, Leah Lipman, Melissa Murray.

Jon: There's an awful lot to talk about, obviously Roe v. Wade, all those different things. But there's some SEC sh*t. By the way, for the SEC, we did do the episode on Wall Street on the Apple TV+ show. There's a link in the episode description, I think. You should check that out because as you know, we spoke with Gensler

Jay: SEC Chairman Gary Gensler. You went to the belly of the beast, Jon.

Jon: I went into their belly. [ALEXA LAUGHS] Oddly enough, their belly was empty from lack of food.

Jay: Oh, malnourished.

Jon: They were malnourished. Do you remember when we went down to the SEC, there was a little sign in their coffee room that said, "We accept donations." Like the SEC in charge of regulating Wall Street didn't have enough discretionary funding to get themselves like some espresso pods.

[LAUGHTER]

Alexa: They had a GoFundMe. That's something. [JAY LAUGHS]

Jon: For their coffee they did actually, after that show, have a GoFundMe. Meanwhile there's a whole big hullabaloo online right now. They put out a — they made like this big commercial, like making it look like the retail investors have no f**king idea what they're doing. Like it's a commercial. That's like, "“You know, you can research stocks.' And the retail investors, like 'What?'”"

[LAUGHTER]

Alexa: They could have used some of that commercial budget for some coffee.

Jay: But, okay, so SEC, as a southerner, I instantly thought Nick Saban, Jimbo Fisher, but we're talking about the Security Exchange Commission, correct?

Jon: That's correct. The SEC with Fisher and Saban. They are not underfunded.

[LAUGHTER]

Jon: Their, I don't know if you know this, their coffee bars are made of gold. They have gold —

Jay: Yeah. The Alabama football team has a couple of coffee bars just in the training facility.

Jon: That's right. Nick Saban can just think about a latte, and it can conjure. It will just appear. They have the Neurolink from Elon Musk. He thinks about it and boom it's right there. So what this court case that we're gonna be talking about, I think it's the Fifth Circuit court of appeals: Jarquesy v. SEC. Jarquesy is one of those names that you really do think, like, I almost think that name is an insult.

[LAUGHTER]

Alexa: Yeah.

Jon: This guy, this motherf**ker is such a jarquesy. You have no idea.

Jay: Oh, Jon. Language, language.

Jon: Exactly. That's what I'm talking about. We saw how relatively feckless the SEC looked. Basically, they can levy a fine or two, but most people you know, they basically made a deal that they're outgunned by Wall Street.

Jay: I believe that you said, "You're the top cop." And he said, "Yeah." And you said, "So, are criminals bad?" And he went, "Criminals? Jon. Jon, I'm not here to talk about crimes. I'm here to talk about K-Cups. I'm here to talk about Maxwell House."

Jon: "We prefer to think of them as the financially law-challenged." [JAY LAUGHS] "We don't like to think of them as criminals."

Jay: Gary Gensler is a kindergarten teacher.

Jon: That's exactly right.

Jay: Listen, we don't give out Fs. We don't give out Fs. They are very, I love the passion they have. I just wish we could direct it.

Jon: That's right. But it's very clear. That they have financial institutions taking ethics classes pass/fail [JAY LAUGHS] and they don't generally do anything to do that. They did recommend I think Archegos recently to the DOJ, but very unusual for them to do that.

Alexa: They're trying to regulate crypto.

Jon: They're trying to regulate crypto They're utterly outmatched, outgunned. I'll break into a Hamilton song if I have to. Out planned, outman. And so, given that I walked away thinking, "Oh, the SEC is an abacus in a calculator world. It's they're out —

Jay: Not just calculator, TI84.

Jon: TI84, the kind that goes on your pen that your teacher doesn't even know you have. So, you got all that going, this court ruling — it's fascinating. It's the Fifth court of appeals, which as you know, is occupied by, I guess the term is crazy people.

Jay: Yeah. Foghorn Leghorn is the chief justice.

Jon: Foghorn Leghorn is the chief justice and the Duke boys are the other two. [JAY LAUGHS]

Alexa: I honestly didn't even know there was a fifth court, Fifth Circuit court.

Jon: It comes right after the fourth court. There's the fourth. And then there's the fifth.

Alexa: How far does it go? I don't even know.

Jon: I think 11.

Alexa: Okay.

Jon: It's all regional.

Jay: I thought you were going to sing, "Hallelujah." I thought this was just a brilliant way for you to get into another song bit. So I was like, if he sings, "Hallelujah."

[JON SINGS "Hallelujah" BY LEONARD COHEN]

Jon: I can't, man. You know better than that.

Jay: "It goes like this, the fourth, the fifth." That's what you did. I want you to know that's what I heard.

Jon: Any Leonard Cohen reference, whether it, it be happenstance or purposeful is so welcome on this program.

Jay: Oh, OK.

Jon: Jay Jurden's gone Nick Saban and Leonard Cohen in the same podcast. That clearly is gold star work.

Alexa: I had a boyfriend ruin Leonard Cohen for me. This is a tangent.

Jon: But this is actually important. How? How did that happen?

Alexa: So we were dating. We were listening to a Leonard Cohen album, and I was like, "Yeah, I don't know if it's really my thing." And he is like, "Well, you haven't gone through enough breakups."

Jon: Wow.

Alexa: And I was like, "What does that mean?" And then we broke up.

Jon: Wow.

Jay: Wait. [JAY LAUGHS]

Jon: Can I ask you a question? Did Leonard Cohen make sense at that point?

Alexa: All of a sudden I was like, "It's genius!"

Jay: Alexa, no.

Jon: That's brutal.

Alexa: So I don't know. I should revisit.

Jon: I have to say though, I get his point a little bit in that Tom Waits had a little bit of that for me. There was occasions when I would break up with somebody and I would be so sad and I would just be sitting, feeling sorry for myself. And I would get Tom Waits on, "Piano Has Been Drinking", something like that.

Jon: And I'd get a bottle of my favorite tequila or whiskey. I would sit alone in a room until my sadness became hilarious.

Alexa: Everyone has their process.

Jay: If we wanna talk about music, we can talk about this case, because there's a musical element. Jon, we've been sitting on some very fun information for you.

Jay: There's a blues element to this case. I don't know if Jon knows this.

Jon: A blues element?

Jay: The guy who is at the center of this case, Jarquesy, he is an amateur blues artist. And he actually —

Alexa: He's on YouTube.

Jay: — has a song called "The Obama Blues."

Jon: What?

Jay: I'm not making it up.

Alexa: "Bad Obama Blues."

Jay: "The Bad Obama Blues."

Jon: Now, Jay, I'm gonna ask you, this is just an etiquette thing, protocol, maybe. Are white guys allowed to write blues songs about black guys? [JAY LAUGHS] I know we're allowed to take, I know we're allowed to take the chords and I know we're allowed to profit off them. Are we allowed to actually write them about black guys?

Jay: I mean, writing a blues song about a black man as a white man? That is like a Christian writing the music to a musical about how much they hate Jewish people.

Jon: Holy s**t. What is it? So, and the song is like Obama sucks."

Jay: You're not far off.

Alexa: We can actually listen to it, I think.

Jay: Do we have it queued up?

Jon: For real?

Alexa: Oh, I think we do.

Jay: I think we do.

[MUSIC — "THE BAD OBAMA BLUES" BY GEORGE JARKESY]

Alexa: Wow. This is passion.

Jon: You know what I like about that? Yeah. Let's, let's get out of that.

Alexa: Let's listen to the whole thing.

[SONG ENDS]

Jon: Now I would think that that alone would make him lose almost any court case.

Alexa: Yes. Yes. [JAY LAUGHS]

Alexa: Play the song, it's over.

Jay: The judge is like, "What do you have to say for yourself?" [JAY SINGS PART OF "THE BAD OBAMA BLUES"] Oh, alright. We can, we, can we get this out real quick?

Jon: Only the Fifth Circuit, which by the way, like if they were to put out a playlist. That would be on it. [JAY LAUGHS] Like the Fifth Circuit is so out

there but generally the idea was that this guy was challenging the SEC's right to regulate. And that is why that brings us to our podcast team that's here today. They're gonna explain to us what the ramifications of this are because the court found in favor of the blues man, which basically means our government is actually useless.

Jay: So we're — they have no teeth and we're still pulling teeth.

Jon: Zero teeth.

Jay: Also, Robert Johnson did not sell his soul at the crossroads for *that* to become blues. [JON LAUGHS]

Jon: Do you think the devil would've brought that up? He would've said, "You know, I'm gonna use this for white guys, right?"

[LAUGHTER]

Jay: The devil's gonna be like, "I'm gonna set a precedent here."

Jon: Alright. So I — here's what we're gonna do. I've enjoyed this very much.

Jay: Too much.

Jon: As I always do, talking to you guys, but we're gonna talk about it's the Fifth Circuit of appeals *Jarkesy v. SEC*. I found that the main way that the SEC goes after and penalizes securities fraud is unconstitutional. You guys gonna listen?

Alexa: Yeah.

Jay: Oh yeah. I'm gonna eavesdrop.

Jon: That's exactly right. Let's bring in the team from the podcast. It's called "Strict Scrutiny."

[TRANSITION MUSIC]

Strict Scrutiny Interview

Jon: Hello, Strict Scrutiny. You're Kate Shaw, Leah Litman, and Melissa Murray.

Melissa: That's us.

Leah: We are.

Kate: Thank you for having us.

Jon: First of all, tell me. The podcast, Strict Scrutiny, how did it come? What is your area of expertise? How do you know each other? How did this come to be?

Melissa: Well, our origin story is a little bit like the Marvel Universe. We came together like basically gems in an L stone that some massive titan put together because we realized that there weren't —

Jon: You are talking my language, Melissa.

Melissa: I'm trying like, I'm the mother of a 10-year-old boy, this is all the language I know.

Jon: Then you get me, you understand me?

Melissa: I do, Jon. So we came together because we looked around and we realized the only people talking about the Supreme Court for the most part we're a bunch of white guys, and they often didn't talk about the things that we thought were relevant for the court and that other people wanted to hear about the court. So we figured why shouldn't we start talking about the court? We talk about the court for our jobs, and now we've decided to make it much more public. So this is really Leah's brainchild. So she started the podcast, and she brought all of us together, and we have been dropping constitutional knowledge ever since 2019. So we're well into it at this point.

Jon: First of all, Melissa, you will be my phone-a-friend in any instance where I need knowledge.

Melissa: Well, Jon, I'm a Jeopardy alumna, so I'm ready to assist you.

Jon: Are you really?

Melissa: I really am. And I'm ready to help you. Anytime you need a phone-a-friend,

Jon: We will get back to the court case. I promise you. How was that experience? Did you do it with Alex Trebek?

Melissa: It was with Alex Trebek. It was when I was a teenager. I was on the teen tournament, and I did not win, but I wore a fuschia suit with enormous shoulder pads because it was the nineties, and I went to Contempo Casuals and asked them for the kind of suit that a woman going to a powerful business meeting would wear. And that's what I wore on national television.

Jon: Melissa, you couldn't have done better, as someone who worked in the stockroom at Ormans in 1980.

Melissa: I know exactly what you're talking about.

Jon: I, listen, I was probably cleaning the carpets in the store as you were getting that suit.

Melissa: It was flammable. Good times.

Jon: So what you're doing, the court system right now has skewed so far to the right that, and I love the fact that they don't consider it activist. They're just getting back to the original intent of this document, which they, and only they, can conjure. This particular case, I know it hasn't really hit the mainstream in the way, obviously Roe and some of these other cases. And we can talk about that a little bit as well. But this case seems to strike at the heart of the government's ability to regulate anything. Clean air, clean water, food. Anything seems that that will now be in question like if you put E. coli in a can of creamed beef you're now gonna have to have a jury trial for them to, uh, get you to clean up your factory.

Melissa: No, that's exactly right. This decision found the current method that the SEC uses to enforce like basic consumer protection rules that, you know, protect people who buy stocks and publicly traded companies unconstitutional for not one, not two but three independently crazy reasons. And I think it's worth understanding the different reasons because all of them would really spell the demise of government as we know it today.

Jon: So let's back up for a little bit. Why did the SEC go after this down-on-his-luck blues man.

Melissa: It actually wasn't because he's a bad blues musician.

Jon: Interesting.

Melissa: You know, that could have been an alternative theory. They actually found that he materially misrepresented his company and its financial state and that caused people to invest in the company based on incorrect information.

Jon: So basically he did what some of the banks during the subprime mortgage crisis did: He misrepresented the health of a financial product that he was selling or something like that. People bought into it, he profited from that fraudulent representation, and the SEC brought him up on charges and found these allegations credible.

Melissa: Exactly.

Kate: And they fined him so it was, you know, not an enormous case, but you know, a routine case of the sort, the SEC brings all the time.

Jon: And the, a routine case of the sort that in my mind is exactly what's wrong with the SEC. That you can commit fraud and the SEC after an investigation will say, "You committed fraud. Give us some of that money. Just give us, like, give us a cut off the top. And you can go about your merry way." That somehow white collar crime 'cause it's crime. It's crime. And because it's not chaos in the street crime, we fine it and everybody moves on and there's no deterrence. So that's my own personal beef.

Leah: And it turns out that's still too much for the Fifth Circuit.

Melissa: Leah, that is a lot of Nespresso pods. [LEAH LAUGHS] So it's a lot of espresso pods.

Leah: Exactly.

Jon: So he says he doesn't challenge the fact that he committed fraud. Is that correct?

Leah: No.

Jon: He challenges the fact that you're not the one who can tell me, or you're not the one who can levy a fine.

Kate: "Just everything about you is unconstitutional for a bunch of different reasons." That was the crux of his argument. "You agency are unconstitutional in you know, these three distinct ways so you have no power to impose this fine on me.

Leah: Yeah, it's worth noting here that there has been a concerted effort among the conservative legal movement to challenge various aspects of the regulatory state. And even sort of small bore cases like this one that only result in a fine can nonetheless be a really powerful vehicle for challenging the authority of an administrative agency charged with enormous regulatory power over corporate interest and business interest. So yes, it is a small bore case but it's an enormous action and an enormous opportunity if you're seeking to find an appropriate vehicle to begin the process of dismantling the regulatory state.

Jon: Now, to be fair, there are legitimate concerns about government overreach in regulation about the bureaucratic state, about its ability to, and there has to be oversight over that. But this case isn't about oversight. It's about their ability to exist. Is that correct?

Leah: Yes.

Jon: Alright, Leah, tell me, tell me what were the three pillars of this case?

Leah: So the first one involves something that's called the nondelegation doctrine, and this has really become one of those en vogue things that the conservative legal movement has developed in order to undermine and undo the administrative state and this theory goes something as follows. You know, Congress is the legislature. They're supposed to be the ones that make rules, telling private citizens what they can and can't do. But Congress can't make the rules in detail about everything and everyone. And so what Congress does is it will pass a statute that authorizes some administrative agency with expertise over a certain area here, the Securities and Exchange Commission to make more specific rules about more specific industries, about what they can and can't do. So here the SEC told publicly traded companies, you know, here's what you can and can't do when you are, you know, transmitting information about your company to potential investors.

Jon: What this case is saying is that Congress doesn't have the right to delegate their authority for regulation to an administrator, even if it's one with expertise. So basically they're saying is "Congress, if you wanna regulate this guy's financial dealings, you've gotta do it yourself."

Leah: I think generally true. Although I think even most courts, even the Fifth Circuit would understand that that's actually bonkers. Like, can you imagine if we charged Congress with, you know, issuing passports to individuals or alternatively, we ask, you know, a Congressman like, you know, Marjorie Taylor Greene for example, to do policy about environmental concerns, things like that. Like there's just —

Jon: Maybe it's worse than that. Maybe she, they think Marjorie Taylor Greene has to go to the Cuyahoga River and actually get the kit and go in there and say, I think there might be dioxin in here. Like she's like that's what that would mean. You can't delegate any authority.

Leah: And they know that that's actually impossible to do like you cannot run a government of this size and scope on a principle like that. So what the non delegation doctrine provides is that delegations from Congress to executive agencies like administrative agencies are permissible only where Congress provides the agency with an intelligible principle to guide its use of the delegated power and typically the Supreme Court has held that that intelligible principle can be pretty broad. It just has to be there but what we are seeing from many of these courts that are now stacked with more conservative judges is a sense that the intelligible principle that guides the agency's use of this delegated authority actually has to be pretty particular and specific. And again, it's hard to get that kind of specificity in order to guide an agency if you want the agency to actually do the work within its expertise.

Jon: But their guiding principles seem relatively clear. It's for investor confidence and capital formation.

Kate: Yes.

Jon: Alright. So that's a nondelegation goal. So the first thing they're saying is you are not able to delegate that in the non-specific way that you are even to an administrator. So now you're talking about if the SEC can't do that, clearly the FCC can't do it, the FAA can't do it. Like we don't have agencies anymore if that is the case. And did they find that that's the case?

Kate: Well, the specific argument the court bought here was that what was wrong with the kind of delegation to the SEC was basically the way it went about enforcing these securities laws? SEC enforcers have the choice to either initiate an administrative action or file a suit in federal court and giving administrative actors that discretion violated the non delegation doctrine. So it's a wedge, it's a very specific finding about this particular kind of authority being

problematic from the perspective of the nondelegation doctrine. So they don't say the whole agency is unconstitutional.

Jon: We don't buy your authority then to levy a penalty. Now put that way. That doesn't sound crazy.

Kate: It's the — it has the seeds of crazy in it. And that's, I think part of what is dangerous about it is it sounds almost reasonable. Well, maybe it is too much power to give an agency actor the authority to bring these enforcement actions inside the agency. Like that feels like an unfair home court advantage for the agency enforcer. Right?

Jon: Who's got oversight over that agency then?

Kate: Well —

Jon: What's the appeals process. Is there a impartial body that will look at that and say, "That was decided incorrectly?"

Kate: So two things, one, there's a judge inside the agency, an administrative law judge that has these structural protections sort of in that guarantee independence inside the agency. But if you're still unhappy with what happens inside the agency, you can appeal to federal court. So it's not as though the agency has this kind of unilateral authority to levy fines and that's the end of the story. You can always go to federal court.

Jon: So it's checks and balances.

Kate: Yes.

Jon: Okay. So on, on count one, I find, f**k this guy. That's my finding. That is my ruling. That ruling is final. This is clearly being done as a wedge. Give me gimme number two. What's number two?

Kate: So number two has to do with the administrative law judge inside the agency that I just mentioned basically has these protections that guarantee independence. So ALJs, as they're called, can't be removed for political reasons, right? They're supposed to be independent for the reasons that we were just alluding to so that, you know, people appearing before them get a fair shake. But the argument that Jarkey made was that it's a problem to have officials like administrative law judges inside administrative agencies who are not subject to kind of direct supervision by the president. That the president has, needs to have

under Article Two of the Constitution. And that what's so-called the Take Care Clause. The president needs to have the authority to unilaterally remove if he wants to agency officials because he's the elected head of the executive branch. They're inside the executive branch, all power has to flow back to him. He's the one that people selected, you know — asterisk, the electoral college, not always — but that's the fiction anyway and so it's a problem from the perspective of presidential power to have these officials insulated from direct presidential removal authority.

Jon: But legislative authorities, what created the agency? So isn't that a balance?

Kate: They're elected too. Congress is elected. They created the agency.

Jon: Let me go one step further. If the president has the ability to unilaterally remove judges. Does the Fifth Circuit understand that they're judges

Kate: well, they're article three judges. So they're a different kind of judges. So the president can't remove them because they're in a separate branch of government. But the argument is these guys are in the executive branch and the president gets to decide at least at the senior level.

Jon: But they were given their authority through the legislative branch. So aren't why aren't they considered in the legislative branch.

Kate: All agencies are creatures of Congress. Congress makes them, but these are considered officials within the executive branch. Now, technically the sec is what's called an independent agency, which is in a little bit of a sort of unique posture. It's kind of, some people think of it as its own fourth branch of government, the SEC, the FCC, the FEC, all these independent agencies.

Jon: Right.

Kate: But these are, they're executive branch officials like Gary Gensler, right. Nominated by the president. So they're inside the executive branch.

Jon: So they're saying that what they would call the deep state has to always be partisan? That it's only, uh, constitution legal. If it is staffed by the ideologues that went to Regent University?

Leah: Yes.

Kate: More or less.

Jon: Uh, unless, uh, uh, a Democrat is in office, which obviously is not legitimate. And then they'll figure out something else. All right. So the two pillars we have right now is the SEC, uh, doesn't have the regulatory authority to levy those things and that the judge who levied it actually should be, uh, able to be removed. By the executive, but what's number three.

Leah: Number three. Is that the S E C actually can't hear these cases. That is, it can't be an administrative law judge of the kind that Kate is describing that decides whether to impose a fine or not. Instead, those cases have to be heard by a jury in federal court.

Jon: Get the f**k outta here. They're saying that every administrative case of finding has to be heard by a jury?

Melissa: Well, they have to be heard by a jury. Otherwise it violates the seventh amendment, right. To a jury trial.

Jon: Due process.

Melissa: Right. Where they stem from sort of common law, like. Common law claims that would ordinarily be heard by a civil jury. So in this particular case, the Fifth Circuit said that because the underlying claim sort of sounded, and in the register of common law fraud claims, they assessed that they were levying civil penalties, civil penalties are the kinds of things that would flow from a civil jury trial, not from an administrative hearing by an ALJ. So that's where it's.

Jon: Let me tell you something. Be careful what you wish for. This case — do you, do they have any idea, the hornets nest that they're opening up here? Do they really believe that a jury that hears the case about defrauding investors is going to be as lenient as an administrative state that is overwhelmed and is just trying to pass s**t through? Like, did they have any idea what they're about to get into? If you brought this to a jury trial, it wouldn't even be a civil case, it would be a criminal case about fraud and that dude would go to jail.

Leah: Well, I think the problem is, is. You mentioned administrative agencies are overburdened. So to our federal courts and juries, you know, in some places you file a case in federal court. It's not gonna be heard at the earliest for like a year and a half later. Sometimes the trial process might take years. And so it can be really expensive, you know, and burdensome to try to make all of these cases into jury trial cases.

Jon: So let me ask you this in your mind is the motivation here, a constitutional principle? Is it one thing I've noticed about the conservative movement? That's really brilliant is if they can't make what they want illegal, they'll make it impossible. So in other words, like, uh, when you talk about forcing women to carry babies, even though that may kill them, they can't make it illegal because the majority of people would support it as a, as a legislative process. It'd be very difficult to criminalize it, right? So, what they do is they put in regulations that say, okay, if you run an abortion clinic, you've gotta have two anesthesiologists and your hallway has to be 50 feet wide. Now they've just undermined their ability to regulate that by bringing these court cases, that's besides the point. But second of all, what it sounds like they're doing is they wanna make the government's ability to regulate anything, not illegal, because most people would support clean water and air and healthy food. They wanna make it impossible.

Leah: I think that's totally right. That's true of both the nondelegation argument.

Jon: Yeah.

Leah: If you require Congress to write all of these specific rules, they're not gonna be able to do so. And you've just made it prohibitively difficult for Congress or anyone to actually regulate these industries. And it's also true of this civil jury trial argument. You know, you're not saying it's necessarily illegal. You're just saying these cases have to be heard before juries, but that would overwhelm the federal courts and just be practically impossible to actually bring all of these cases.

Jon: We'd all be jurors. That's all we would do. None of us would have jobs.

Melissa: But for the conservative legal movement, Jon, this is really about, um, what they call the constitution in exile. And the ultimate goal of all of this is to restore the sort of constitutional landscape to its sort of pre new deals, status quo, where there was very limited government and certainly not an expansive regulatory welfare state. So we've already seen the attack on the welfare state from the 1980s forward, but this is the next phase of the program, which is to say rolling back the kinds of regulatory interventions that make the business landscape, the corporate landscape, um, more amenable to ordinary citizens and require that corporate interest be subject to some kind of government regulation. This is all an effort to sort of undo all of that regulation. And even, you know, if you sort of take it in tandem with everything else that's going on, it it's really an effort to kind of roll back the 20th century.

Jon: So, well, I'd go even further, I'd say roll back the enlightenment. But, uh, uh, what they're basically saying is our founders foresaw a robber baron situation, and that's kind of how it's supposed to go because in the 18th century, white male property owners were the deal and, and that's the deal. Is that what we're dealing with?

Leah: That's basically how former Trump white house council, Don McGon described their judicial nominations. He called their judicial nominations part of a larger deregulatory plan saying there is a coherent plan here where actually the judicial selection and the deregulation effort are really the flip side of the same coin. They viewed the federal courts as the way to accomplish the deregulatory agenda.

Jon: Right. Look now, let — to be fair here. There's no question that there is administrative and bureaucratic bloat that the efficiency of government agencies can sometimes be called into question. That a regulatory regime is oftentimes written by the very industries that they're trying to regulate. And so they're overly complex, purposefully so. Obtuse and very difficult to penetrate if you're a small business owner or you're trying to just get something off the ground. So I am sympathetic to the idea that we need to reexamine the simplicity of, of how we regulate. And the cost that it brings to bear, but this sounds like something very different, which is to say, government has no role.

Melissa: Yeah.

Kate: Yeah. That's not the spirit of this lawsuit or it's lawsuits of this ilk, right? It's like actually acknowledging inefficiencies and redundancies and working to improve governance and governmental capacity. It's literally just to burn the whole thing down. Right? The SEC has been around since 1933, right? It's a response to the stock market crash and the Great Depression, the idea that —

Jon: What would they say the role is? What would they say the role of the SEC should be?

Leah: Making coffee? [KATE LAUGHS]

Melissa: Buying Nespresso pods?

Leah: Listening to blues music? [JON LAUGHS]

Kate: This agency has been around for a hundred years and they're saying no one ever noticed, but the whole thing is just completely unconstitutional. And

just like the arrogance of these judges sort of announcing like we, and we alone have seen through the, you know, agency that's been doing — I mean, I think you're right, Jon, like under enforcing, like in some ways, like the fact that it is a, you know, it's a paper tiger in many ways it's being painted as this like administrative Leviathan in this opinion, like it's doing all of this vast overreaching and like, it's not really doing that much at all.

Melissa: So Kate said something about the judges and we should, and, and Leah to mention something about this too. We should tie together. Um, you know, Leah noted that there has been a concerted effort to stock the federal judiciary with these judges who believe very much in this theory of the constitution and exile, and the project —

Jon: That's all from the Federalist, the Federalist Society and Regent University and all of that.

Melissa: The Federalist and it's been in — It's really been in place since George W. Bush's administration and it really picked up steam in the Trump administration, this case is decided by a three judge panel of the Fifth Circuit and the two judges who are in the majority here very much reflect that conservative legal movement. Um, one is appointed by George W. Bush. The other is a Trump appointee. The dissenter, the lone dissenter here, is a Gerald Ford appointee. So, I mean all the way back from the 1970s.

Jon: A Gerald?

Melissa: A Gerald Ford.

Jon: How old is —

Melissa: He was born in the 1930s.

Kate: Wow.

Melissa: He's an older individual. He's born in the 1930s. Um, Judge Davis. Um, but yeah, he's the dissenter here who's sort of like, and, you know, he knows what the regulatory state should look like because —

Jon: Right.

Melissa: — he's been around for much of its development. And I don't mean that to be glib. [MELISSA LAUGHS]

Jon: Let me, okay. So let's, this court does that. Now we all know that circuit courts and things like that sometimes make cases that are, uh, they do so with the reason to provoke. That they're attempting to be provocative or they're attempting to make a thing. But I don't understand how the SEC survives because I can't imagine a Supreme Court with Gorsuch, Alito and those others saying, no, they have the authority. I can't imagine.

Leah: Neil Gorsuch has basically been salivating since his days from prep school. Just waiting to knife the administrative state in the back. I mean, this is the project that he cares.

Jon: It's an easy target. Nobody likes the administrative state.

Melissa: Well, Kate actually has a theory. It's like a sort of like origin story about Neil Gorsuch's antipathy for the administration state.

Jon: Come on, Kate.

Kate: It's not, I'm not, I'm still workshopping at Melissa [MELISSA LAUGHS], but I will share it in early form, Jon, which is that, you know, his mom was Reagan's EPA administrator Anne Gorsuch Burford, and there's some family psychodrama there that I don't yet fully understand, but she left after being the first cabinet secretary to be held in contempt of Congress because of a refusal to turn over some documents to the house judiciary committee. These were the events that led to another big, important Supreme Court case Morrison vs. Olson.

Jon: Oh sure. Morrison vs. Olson is a, that's a big one.

Kate: You know, you know, we'll talk about next time. Um, but anyway, there's a family story there that again, I'm still fully sort of fleshing out, but he's not a stranger to the administrative state.

Jon: So basically we're not gonna be able to have functioning aircraft because Neil Gorsuch's mom got a raw deal. You know —

Kate: That's basically right.

Jon: It's incredible. When that happens, that that anger permeates, you know, they say that Kushner's the same way that it was his father's court case. And, and how that, that, like, I feel like we're living in Gotham City and it's all just like, "How that guy turned."

Jon: Or a Greek tragedy. This is very Oedipal.

Jon: Yes. So if the Supreme Court takes the case or it's appealed, what are the ramifications of it and how can it be countered? And who would even counter it?

Melissa: So it's an open question, whether the SEC will seek a further appeal on this case. I mean, you know, recognizing that the court itself might be amenable to exactly what the Fifth Circuit has done. So, you know, there, there are a couple of possibilities here. Um, if the SEC seeks. A review of this. Um, there could be a review by the en ban Fifth Circuit, which is to say all of the judges of that court would get together and they would hear the case and make a decision all together as opposed to this three judge panel. And, um, if that were appealed, then it possibly could go to the Supreme Court if the court agreed to review it. And then I think you really have the kind of familial psychodrama that Kate has outlined, but is unwilling to stake her academic reputation on.

[LAUGHS]

Kate: I will. I'm just not quite ready.

Jon: And let me tell you something, your academic, uh, reputation speaks for itself.

Kate: This is the first line of my resume, starting tomorrow.

Jon: I really appreciate you guys staying here. I really appreciate you laying out the stakes to this, obviously there's, uh, Roe V. Wade and Alito. We don't have time to get into that today. Uh, but just briefly, do you have any hopes that this has somehow been overstated? Or do you believe this comes out and, uh, abortion is no longer legal for women in America?

Melissa: That part.

Jon: The last part?

Melissa: That part.

Jon: Let me throw something out to you to see if you believe because what they're saying is there is no constitutional right? Yes?

Leah: Right

Jon: To that?

Melissa: Yes.

Jon: They're saying the government has no legal rights. So let's tie it into the SEC case. The government has no legal right to regulate anything, but you are uterus. Why can't your uterus sue to say that I deserve a jury trial?

Leah: Because these states will happily put women and their uterus before juries in order to send them to jail, because they're not just seeking civil fines. They want to throw 'em in jail.

Jon: They're smarter than that because they know if they play out their game, it becomes untenable because here's the thing. Women die in childbirth and not with notice like they die. So who's then responsible for that murder? If you force somebody to do something that kills them, who's responsible for that?

Jon: Here's another thing they might try. What's the amendment about quartering soldiers? Third?

Leah: Third.

Melissa: The Third Amendment.

Jon: Third Amendment. How do you know that that fetus isn't gonna be a soldier? [MELISSA LAUGHS] How can you be forced by the government to quarter a soldier inside you?

Leah: These are the things the progressive legal movement needs to be thinking about [JON LAUGHS] over the next several decade horizon, as we are developing our own constitution in exile.

Melissa: In exile.

Jon: Boy, you — I gotta tell you guys, I was thinking you'd be a little bit more optimistic or fired up about what some of the ramifications, like the resilience of this, and how it could be bought back, but I'm not sensing that at all.

Melissa: No.

Leah: So. I think the reality is there isn't a single shot, easy solution that you can just do on say the federal level or national level in order to address the conservative takeover of the federal courts, the Supreme Court and the lower courts. I think progressives need to get in the habit of making courts, uh, more regular part of their life and going to the polls in order to select politicians who will appoint federal judges who are not out to destroy the administrative state or women's right to bodily autonomy. The reality is, as Melissa was saying, this has been a project at the conservative legal movement and conservative politicians —

Jon: Since the New Deal.

Leah: Exactly. For several decades. This is a long term project that will be met in small gains and increments over a long time horizon. And people just need to be ready to stay in the fight for that time period.

Melissa: And, and it's also inextricably linked to the effort to limit the vote and to basically redraw all of the districting maps. I mean, you don't get a law, like the one that's being challenged in the Dobbs case out of Mississippi, unless you've completely gerrymandered a state so that the progressive influences that would object to such a law cannot have their voice registered in the state house. Right? And the court has essentially insulated itself from the inevitable back[slash] it will receive from the public by making it possible for states to pass suppressive voter laws that make it harder for you to register your objections at the ballot box. Like this is a project that is comprehensive in ways that I don't think we have fully appreciated. It touches not only on reproductive rights, but it involves voting rights. It involves dismantling the welfare state involves dismantling the administrative state. It's a completely joined up project.

Jon: Wou know, and I, I don't think we should soft sell the fact that there is a built in home court advantage for the conservative movement. Based on the Constitution's redistribution of power to rural, generally whiter states. What when it was, when this was designed, because it was designed with a certain compromise in mind to keep the Southern states in the union, the compromises that they made in that moment have set the stage for this kind of power grab. It's why. You can win the popular vote in America by seven million and still barely eek by in the electoral college and, and why the Senate has a 60 vote rule and Wyoming has the same amount of senators as New York. It's affirmative action for rural America. It's a socialist redistribution of power.

Kate: And it's replicated on the court. I mean, right. So you see, so Kavanaugh is confirmed to the court by senators representing like, you know, low 42, 43, 40 44 percent of the American public. So it is the structural advantage that the conservative —

Jon: So how do you. How do you battle that structural advan? How do you battle the home court advantage?

Kate: It's really, I mean, a lot of it you're right is baked into a deeply problematic constitution, the Senate and the electoral college, which replicates the, you know, uh, the advantages that underpopulated states have in the Senate are an enormous problem. Um, so I mean, getting rid of the electoral college would be a, a hugely important start amending the constitution is also a problem. The difficulty of amending the constitution is also an enormous problem with the constitution, but to my mind, that's the single most important thing.

Jon: So, so I mean to, to play that out in a dystopian way, we're talking about permanent minority rule.

Kate: I tend to be more upbeat, but I think that there is, it is an uphill battle to overcome the structural disadvantages that the democratic party and progressives, uh, just have to bear as a result of the design of our constitution. I don't think they're insurmountable, but I think it is going to be a tough fight.

Jon: All right.

Leah: I think it's just helpful to know that you are working against things. There are things you can do at state and local level, right? Like trying to amend state constitutions in order to bar partisan gerrymandering, or in order to have independent commissions draw district lines —

Jon: They're going the opposite way though. They're what they're basically saying is now these partisan legislatures have the ability to go in and just say, “Yeah, that vote's wrong. So we're not gonna abide by. We're just gonna throw it out, do something else.”

Leah: Yes. That is again, maybe a topic for a future episode is all of the ways the Supreme Court seems —

Jon: Yes! Let's do it. Come on.

Leah: Seems likely to overthrow basic, uh, artifices of democracy, but at least for the time being, you know, there are goals that you can try to shoot for at the state and local level in order to make elections more representative. And in order to make, you know, exercising political power by the people who win the popular vote possible.

Jon: Right. Okay, well, listen, that's, uh, at least you're, you're laying out kind of a game plan, which I think is really smart. I will count on the three of you. To save us. Hmm?

Leah: Oh, yikes.

Jon: Please. Strict Scrutiny. Save us! Hey, Hey. Uh, before the guests go away, let's have Jay and Alexa come back. Just make sure if Jay Jurdan or Alexa Loftus has anything they'd like to add in. Hey guys.

Alexa: Hello.

Jay: Hey!

Jon: Come on here and tell, first of all —

Jay: Strict Scrutiny.

Jon: — these guys are, these guys are great. This is —

Jay: This is so informative.

Jon: This was so informative.

Alexa: Very helpful.

Jon: So helpful. So informative. So, your thinking on it is so clear that, uh, a layman is able to understand. Jay and Alexa. Takeaways? Thoughts?

Jay: Since we're just spitballing new legal procedures, what if we got Margaret Atwood to sue the Supreme Court for IP infringement [LAUGHS] because they're stealing all their ideas from Handmaid's Tale?

Jon: Boom.

Melissa: Yes.

Jay: We gotta really think about how we get into this. Okay?

Leah: Mm-hmm

Jon: I like the no quartering of soldiers.

Jay: Mm-hmm.

Alexa: Yes that's great.

Jay: I love that.

Jon: Uh I like your idea there. Just outta curiosity. This is a real question. How can they make a decision like that? When it, to me, clearly violates equal protection. When you regulate something that women have, I like forget about right to privacy. How is this not an equal protection issue?

Kate: Melissa has a beautiful brief in the Supreme Court that made this argument that Alito cited to just say like, oh, don't worry about that, but didn't actually respond.

Jon: Come on, come on, Melissa. Talk to me.

Melissa: I mean I think you're exactly right. Um, I think abortion restrictions are a species of pregnancy discrimination, which is a species of sex based discrimination that violates the Equal Protection Clause. And, unfortunately, I, there are not five people on the Supreme Court who would agree with me. And Justice Alito in that weak draft opinion, kind of laid waste to the Equal Protection Clause. Like there's nothing to see here and, you know, kept it moving. So, yeah, I think every woman in America should be asking why this isn't an equal protection problem, given who gets pregnant and who has principal responsibility for childbearing as both a social matter and in many cases, um, often a legal matter.

Jon: Uh, if this goes through, if I need a kidney, will I be able to force a person to give me their kidney? Because —

Leah: No, because you're a Democrat.

Alexa: Ah.

Melissa: And obviously, so that's the problem. If you could hide it more. [JAY LAUGHS]

Jon: If everyone else who lives in my town needed a kidney. Cause I see the flags. [LAUGHTER] If everyone else in my town needed a kidney and my kidney was a match, why is my bodily autonomy in any way different than a woman's bodily autonomy when it is a matter of life and death?

Melissa: Well, I think you should really be channeling Justice Amy Coney Barrett and instead of asking about kidneys, ask about vaccines, because that is an area where, um, apparently we are already willing to deviate from concerns about bodily autonomy, according to Justice Barrett. And abortion should also be one of those places where we can impose our will on others.

Jon: It's — this is wild stuff. I can't thank you enough for being here. The podcast is called Strict Scrutiny. It's not easy to say I'm going to have a call with your marketing people. [LAUGHTER]

Melissa: That would be us. [LAUGHTER]

Jon: Uh, I think —

Alexa: Strict Scrutiny.

Jon: I think your podcast to me deserves, uh, a name that can be said by those with less adept linguistic skills. Strict Scrutiny.

Alexa: [ALEXA LAUGHS] That was good.

Jay: Tune into the podcast, Red Leather, Yellow Leather. [JAY LAUGHS]

Jon: Kate Shaw, Leah Litman and Melissa Murray. Thank you very much for joining us. We very much appreciate it. Thank you so much for articulating all this for us and, and giving us a much clearer picture of what's at stake and some of the things that we can do to remedy it. And we really do appreciate you guys being here.

Melissa: Thanks for having us.

Leah: Thank you.

Kate: Thank you so much.

Jon: All right. Take care guys.

[TRANSITION MUSIC]

Jon: All right. That is the show.

Alexa: Wowza.

Jay: Woo.

Jon: That was wildly upsetting.

Alexa: Can I just say the idea of, let's say Marjorie Taylor Greene being in charge of let's say our drinking water. Um, uh, it does worry me because I feel like she only drinks Powerade?

Jay: [JAY LAUGHS] And she doesn't have a favorite flavor. She has a favorite color. Yeah.

Alexa: Yeah. Blue. Oh, it's definitely blue.

Jay: Oh yeah.

Jon: I — if she was in charge of the water though, we would finally get that damn fluoride out of it. [LAUGHTER] And you would stop.

Jay: It's controlling your brain. You know, Jon.

Jon: That's what I'm talking about.

Alexa: Yeah.

Jay: It just makes you wanna sing. It makes you wanna sing a blues song. [JAY SINGS SONG] The election was stolen. [JAY ENDS SONG]

Jon: Gotta get a little bit of gravel in your voice. Little bit of growl.

Jay: [JAY SINGS] CRT is a lie.

Jon: [JON HUMS]

Jay: All of my favorite superheroes are now gay, lesbian or bi. [JAY STOPS SINGING.]

[LAUGHTER]

Jon: Come on. It writes itself, Jay. This is perfect. We're gonna come back. We got, I don't know what our cadence is now on podcast. I think we do one, uh, whenever we feel like it. [LAUGHTER] But, uh, we wanna thank Kate Shaw Leah Litman, Melissa Murray for joining us, their podcast is called Strict Scrutiny and, uh, we will be back soon. Please let us know on Twitter or however else you do let people know things, uh, what you think and what are some of the things you'd like to be hearing about and I look forward to seeing you all at Jay's concert. His blues show.

Alexa: I heard tickets are already sold out.

Jon: They're already on sale.

Jay: It's done.

Alexa: It's already sold out. [JAY LAUGHS] Yeah.

Jon: All right. See you guys soon. Take us out, Jay!

Jay: [JAY SINGS] Give teachers guns, take books away from kids. I'm not scared of no virus. [JAY COUGHS] Okay. I'm a little scared. I'm a little scared. [JAY STOPS SINGING]

Jon: All right, we're done.

[OUTRO MUSIC]

Jon: The Problem with Jon Stewart podcast is an Apple TV+ podcast and a joint Busboy Production.