

Episode 238: The “Neutral Umpires of the Supreme Court

Lizzy: Hi, I'm Lizzy Ghedi-Ehrlich.

Lisa: And I'm Lisa Hernandez.

Lizzy: And we're your hosts for Scholars Strategy Networks's No Jargon. Each month we discuss an American policy problem with one of the nation's top researchers without using jargon. This month we're talking about the Supreme Court of the United States and the philosophy of neutrality.

Lisa: Once again, what a timely conversation to have, especially considering this last week. and the decision on jobs and all the other SCOTUS decisions that are coming out.

Lizzy: We are, coming to you, a few days after the historic decision rescinding Roe. in the Dobbs case that was in front of the Supreme Court, along with many other consequential rulings on gun rights, uh, Miranda rights, immigration regulation, there's and a few more to come.

Lisa: Yeah. We still even have some environmental ones. I mean, we really have a jam packed—

Lizzy: It was quite a docket.

Lisa: Yeah, absolutely.

Lizzy: And of course, you know, for those of us on the ground, whether you're a court watcher or just a citizen whose life is affected by policies or the lack of them or policies that are shifting, these are things that have big implications. And to me, at least not seemingly neutral ones at all.

For me when I hear philosophy of neutrality and, you know, we'll learn a little bit about, what that is, but I think, you know, what, if you could write a law that the language that it used was perfectly neutral and it didn't call out to the fact that it was targeted at certain groups, or would have an effect on certain groups more than others.

But then it did, turns out that's kind of a little bit of what the whole deal with this philosophy is. And Professor Cedric Merlin Powell is gonna tell us more about it. He's a professor of law at the University of Louisville. Powell's research focuses on constitutional law and is rooted in critical race theory.

Overarching themes in his writing include the ways in which race neutral court rulings reinforce inequality in various areas of society. And he has a new book that should be out this fall: Post Racial Constitutionalism and the Roberts Court.

Here's our conversation...

Lizzy: Hi Professor Powell. Thanks for coming on No jargon.

Cedric: Well, thank you so much. It's an honor to be here.

Lizzy: Well met. It is definitely an excellent time for our topic today. So let's dive right in. The Supreme Court of the United States has been making major headlines.

Certainly this is what everyone's thinking about. And the overturn of Roe v Wade last week, no matter how you feel about abortion, I think definitely. We have to admit that this is, this is huge for the Court. This is not typically how things progress in the states. The rescindment of a right is a big deal.

So I think it's worth us processing that and processing the weight of the decision. Now you are an expert on the Roberts Court. That's the current Supreme Court led by Chief justice John Roberts. Tell me what your thoughts were. And we'll start, uh, a few weeks ago when the draft of this Dobbs Opinion was just leaked.

Cedric: Well, I read the opinion and what is so really striking is that it, it just adheres to the draft that was released. So that was clear. That was an intentional attempt to signal that Roe would be overturned. It's a devastating opinion, and it really ties into the last chapter of my book because in the book Post Racial Constitutionalism in the Roberts Court, I talk about how the court is now very aggressively expanding state power and, and Roe versus Wade. The overturning of Roe versus Wade is an example of that. And people are talking about how this court is really changing. It's not really the Roberts Court anymore. People are calling it the Alito Court. It's certainly not in name because he's not the chief justice, but there is a noticeable shift in how the opinions are worded, how aggressive they are and how they reject Chief justice Roberts' call for middle course. In fact, the opinion is really dismissive of Chief Justice Roberts and says now is the time to overturn Roe v Wade because there was no right to abortion ever in the constitution.

And if you look back to 1868, when the 14th amendment was enacted, uh, most states, Justice Alito says criminalized abortion. So this was something that the court made up, he says, and now it's time to get rid of it after 50 years. And what's really striking is there's no real consideration of bodily autonomy, privacy, reproductive freedom, uh, the women's place in the world, eradicating structural inequality.

None of that is in there. It is just the power of the state and how we view the world. And that's what we're gonna do because we have six votes.

Lizzy: And you bring up your book here, um, which we're glad about because you know, you've been studying the Roberts court for a long time or perhaps The Alito court, uh, maybe, maybe won't have that catch on. and that's a big focus of your book and this idea of post racial constitutionalism. We'll get into the enumerated and unenumerated rights that you just listed there.

When you talked about all the things that were not considered in this ruling, but let's talk about what this post racialism and constitutionalism mean, you know, to get those terms out there. So can you tell us what is post racial constitutionalism and then, you know, tell us more about how you're seeing that play a role in this court's decision making.

Cedric: Great. I think that post racial constitutionalism can be defined as the court's, uh, conscious attempt, to avoid race at all costs. And whenever race is brought up. The court is going to view it very skeptically. And even if it is a race conscious remedy, that's designed to deal with some type of inequality.

The court is gonna strike it down because we've moved past race. And that isn't a new thing, uh, with the Roberts court. I argue that the court has always been post-racial. So for example, if you look at a case like, uh, the civil rights cases, uh, started in 1883, just 18 years after the civil war was over.

And it was a, a group of cases where, the newly emancipated slaves were trying to be full members of society. So they wanted public accommodations. They wanted to go to the opera house. They wanted to go to restaurants and just live in society as citizens. Uh, they bring this litigation and the US Supreme Court basically says, well, you might have a remedy, but it's, it is not here because we can't really deal with private conduct.

There's nothing the state is doing wrong here. Uh, this is just the way that we live and if you wanna litigate it, you go back to the state. There's even a really chilling discussion of where African Americans fit in society. It really says that you're really whining about your place in society.

You already are not slaves. You're already citizens. It's almost like what more do you want? Is it the passage that says there comes a time when a man moves away from the shackles of slavery and, and ceases, to be the special favorite of the law

Lizzy: And it's about 18 years since after the shackles of slavery. That's when we can expect that.

Cedric: Exactly. Exactly. And, and so it's really like stop whining. You, you don't wanna be the special favors of the law. You're only a mere citizen and that's the way you should conduct yourself. And we're not gonna get into any private areas of society and we'll leave it at that. And so you can see how 13 years later that leads to Plessy and all of that.

And then not until 50 years after that, do you have Brown v Board of Education,

Lizzy: Briefly.

Cedric: Yeah.

Lizzy: Rulings in Plessy and, and Brown were?

Cedric: Plessy said, uh, we have a color line in the United States, separate but equal is the law of the land. And you cannot make, uh, states remove that color line because it is simply how we conduct ourselves in society. So it's not depriving African Americans of any of their rights. They just have to conform to the social conventions of the day, which means, uh, you go to the back of the trolley car in New Orleans.

Everyone knows that there is a color line. and so through constant litigation over the next 50 years, we finally get brown versus board of education, which overturns Plessy and says that separate but equal is inherently unequal. And that schools have to be integrated. You can't have a dual school system.

One for blacks, one for whites, one, separate and inferior. And so now we need unitary school systems where everyone can go to school on an equal basis, and not be stigmatized by the state saying that you're inferior just because of the color of your skin.

Lizzy: Thank you.

Cedric: Yes.

Lizzy: And so, so we're seeing that there are some ups and downs that has not been a linear trajectory of complete post racialism or one of, of progress of racial consideration. Um, so there's some, there's some movement there, but there's definitely seems as if, uh, the, does the recent Dobbs ruling striking down Roe V. Wade fits into a, a piece of what has been, not just the Roberts courts, but various courts before it. The general guidelines that they're adhering to is what it's sounding like.

Cedric: That's exactly correct. And. I'll use a big word, but I'll, I'll sort of break it down, uh, retrenchment and retro regression. And, and so throughout history, whenever we make a little

bit of progress, there is a reaction to it. So retrenchment means we stick to this, uh, structural inequality, systemic inequality, uh, the racism that exists.

Comes back in another form. And so retro regression means we go back. And so a lot of people are arguing that we're in the third reconstruction. The first was what we were just talking about right after the civil war for maybe, uh, 10 to 12 years after that, then we have this, this long period probably from Plessy all the way, to Brown v Board of Education, where you have Jim Crow, the Black codes and all of that.

And then. What really starts the second reconstruction is Brown itself. And then all of the civil rights actions that we have, the Civil Rights Act of 1965, Voting Rights Act of '64, the Fair Housing Act of 1968. All of those things are really the second reconstruction where we're using the Congress to enact laws that we did a hundred years before, but which were, not, uh, effective in gaining equality.

And so now this third reconstruction is really a reaction to the Obama presidency and we see the Roberts Court expanding power.

Lizzy: And now let's talk a little bit about neutrality. Um,

This very important concept that this current court, is flexing quite a bit when talking about why it rules the way it rules. Um, you know, you have cited, of course, Chief Justice Roberts during his own confirmation hearing saying judges should act as neutral umpires.

That's a phrase that I feel like people are comfortable thinking about now when they think about the Supreme Court. And then of course in overturning Roe V Wade last week, Kavanaugh actually used the concept of neutrality to defend that ruling. you've studied this court's rulings, their actual impact, which can be different than what they say is going to be the impact. And then this language that's used to describe them. Can you tell us a little bit more about how neutrality functions in this court, how it's actually working or what it's meant to signify to people who are listening?

Cedric: Oh, that's an excellent question. And so let me sort of talk about Roe v Wade, and then connected to what we were talking about before you mentioned Justice Kavanaugh's concurrence, which is excellent because it, it does talk about neutrality, but it really illustrates my point. He says that the constitution is neutral and doesn't take sides.

Pro-choice or pro-life, it is just a neutral document and we can't read rights into it. And that seems like a neutral concept. But in order to make that argument, you have to ignore a lot of rights that are embedded in the constitution. Whether or not, they are explicitly referenced. And, and there's this discussion about what Liberty means?

Uh, there's this phrase called ordered Liberty. And so neutrality is really deceptive. It seems like you're not taking sides. But I argue that you really are taking sides because when you determine that women do not have the right to determine their own destiny, that they're not equal citizens, that they are not, entitled to this, right that they have relied upon for 50 years, you're making a judgment choice. and he is making a choice that this right does not exist because the constitution is neutral and you can tie that into a number of the Roberts Court's decisions. And I call this something called rhetorical neutrality, which means that the Court expresses itself in neutral language.

But the underlying objective is to maintain the status quo and –

Lizzy: Neutral.

Cedric: Which is not neutral and is which is invariably unequal. So in order to make this type of argument and this, this goes back to what Justice Kavanaugh did, you have to ignore history. So you have to ignore the history of women as second class citizens in this country.

And the impact that this type of decision will have. You have to define discrimination in such a way that it doesn't exist. So they do something called a rational basis, which is the lowest level of scrutiny and justice. Brian talks about this in, in his decision when you use rational basis, you're saying anything, the state does is fine.

If they can give us a good reason for it. And we're just gonna defer to what the state does. So you can see what's gonna happen in, in the years. going forward that states are gonna have increasing power, to undermine, uh, reproductive freedom, or if not get rid of it all together. And then I talk about something called the rhetorical myth, which is a way of explaining things to the American public to make them think that everything is all right. For example, when Justice Kavanaugh says, we're not talking about other rights, we're just talking about whether abortion is in the Constitution or when, uh, Chief Justice Roberts says the same things.

He, he argues, we didn't even have to overturn Roe. We just had to deal with the Mississippi law, but again, that's rejected by Justice Alito and the six, three super majority. But there are all of these constant assurances that we're not going to go down the road of eradicating all of these rights –

Lizzy: Though the reasoning they're using – it logically follows that those rights, which are also not historically situated in exactly the same way Roe supposedly was according to this opinion, why? Like, why wouldn't they all be under the same type of scrutiny?

Cedric: That is true. And you have a clear signal from Justice Thomas in his concurrence. He says, yeah, I agree with the opinion, but we can go further and we should, because I don't even believe in this substantive due process, which is a body of cases where the court has found, uh,

the privacy, right? The right to contraception, the right to same sex marriage, the right to intimacy between same sex couples.

All of that is the substantive due process, jurisprudence of the court and Justice Thomas. Is actively engaged in trying to dismantle those rights. He even says we should reconsider all of these cases because they don't make sense. And so you have that, but then you have Justice Kavanaugh talking about neutrality and Chief justice Roberts talking about let's not go too far that doesn't give the American people any real assurance.

You, you can't really believe the Court. And that's how the Court loses its legitimacy.

Lizzy: Which is also important. Can you give us a few more examples of Court cases that have used the philosophy of neutrality and then the impact that it's had on underserved and excluded communities a bit more, just so we see kind of the through line of, of history that we're working with here.

Cedric: Sure. Uh, there's another case – it's kind of obscure now, but I think it's going to come back into view when we talk about affirmative action in the next Supreme Court case, it's a case called *Shoopy vs the Coalition*, uh, for affirmative action. It comes out of Michigan and it is a case where the Court says that states can determine whether or not race conscious remedies are permissible.

Now, that's really interesting that fits into our discussion about, uh, state power and democracy. And it really does the same thing that the abortion rights case does it turns it over to the states. So in this case, there was a referendum to amend the Michigan state constitution to say that race conscious remedies cannot be considered in, in affirmative action in, in, education, in public contracting in anything that the state does.

We're not going to consider a race that was put up, uh, in a referendum. In the past the citizens said that they did not want a race to be considered. So in Michigan, now there is no consideration of, of race and affirmative action program. And, and that totally, uh, destroys it. And it's ironic that, the Michigan law school case really comes out of Michigan.

And now, uh, you can't even consider race in Michigan because of this constitutional amendment, but that leads to neutrality because the Court doesn't look at the history of discrimination in Michigan. There's segregated schools, that doesn't come up. And there's a horrible case by the US Supreme Court called *Milikin vs Bradley*.

That really stops, uh, school, integration and desegregation efforts in 1974. So there's no discussion about that impact. There's no attempt to define what a structural inequality, really means in Michigan. And then the Court just explains it by saying, this is part of the democratic process. People who have spoken, citizens should have this right.

Uh, but what's really dangerous about that neutral argument is that you're really placing fundamental rights in the hands of a majority who can determine what is right and what is wrong. That's the same thing that is happening with abortion. So the Court is dangerously expanding state power. So we're now voting upon fundamental rights.

Lizzy: Which was kind of exactly what we were not supposed to do. What, what the judicial branch was literally supposed to be about. Um, looking back into the history of the Court, has the philosophy of neutrality always looked this same way?

Was it simply that there were not a majority of justices who were willing to use that as their philosophical through line? Do you see, echoes of it in the past, or were we at any point on a different trajectory? And if things had been different, we wouldn't be here now.

Cedric: Well, I think the court has always been skeptical about race and it has used different devices to analyze race and come to a particular result. So even in good times, when you have a decision like *Brown versus Board of Education*, there are limits that the Court places in that decision. So *Brown* sounds like a strong, constitutional mandate.

And, and it is, but it's followed by *Brown 2*, which says all deliberate speed. And then that's interpreted, in many ways to avoid the constitutional mandate of getting rid of, two race schools, dual school systems. So I think the Court always plays around the edges with substantive rights. It never goes as far as it can.

And that's the point of my book that neutrality actually perpetuates inequality because the Court really never fully embraces, uh, substantive equality. In other words, identifying systems that oppress people of color, the poor, discrete and insular minorities, those people who don't have a voice in the system, and that is supposed to be the United States Supreme Court's duty to open up the political process to make sure people aren't, uh, but the Court has been passive, at best, and actively engaged in dismantling rights at worse and, and *Roe versus Wade* and the other decisions that we've been talking about are examples of that.

Lizzy: Do you think the court would be accused of activism if it were to consider race more strongly and explicitly? Is that what the charge would be? If that were what we were working with?

Cedric: Probably so, but, uh, so I'm sort of dismissive about the charge of activism because the, the Court uses this term activism, uh, whenever it's convenient, even in this last case, the Court characterizes *Re versus Wade* as a raw exercise of judicial power. Uh, the court is legislating and making decisions that the people don't want and inventing this privacy, right.

That's connected to abortion. And neither one of those are mentioned in the Constitution. So the Court is really selective about when it uses this term, Decision making power is sort of, it is

convenient in Roe versus Wade because they wanna overturn it. And so they say that that's a raw exercise of judicial power, but interestingly and ironically, the overturning of Roe versus Wade is really the raw exercise of judicial power.

Uh, but they hide behind that by saying this it's neutral. It's not mentioned in the Constitution. So I think neutrality has been weaponized.

Lizzy: Yes. So if this Court then with its power and using this philosophy of neutrality, is worsening racial inequalities in tangible ways, what remedies then are available to those who want to address this? Who, how do we intervene on this particular branch of government acting in a way that, you know, you lay out is the opposite of what the whole philosophy of the judicial branch is supposed to be?

Cedric: Well, it's really difficult. I think the avenues in terms of the judiciary are really limited because we have now an aggressive, uh, six, three, everyone is calling it a super majority that almost predetermines the results of decisions, based upon the right or group that is impacted. Roe versus Wade is an example of that, the voting rights cases, uh, the last several terms are examples of that.

So whenever you have race involved, you know, that the Court is going to pretty much hold any type of positive remedial effort unconstitutional. And all of that is to say this, maybe the Courts aren't the place to look. Uh, maybe we need to look more at policy decisions on the state and local level, maybe Congress, but that's tied back into elections and we have a real battle with voting rights now as, as well. There's a series of US Supreme Court decisions that make it difficult to vote. I mean, they haven't certainly haven't taken away the right to vote. But it is more of a burdensome right. That is going to impact people of color and the poor and people who don't have access to the polls. So policy making solutions, grassroots activism, maybe even a third political party, because I, I think we're arguing back and forth about the middle without really defining it.

And the Republicans have their own view of reality and how society should be. I think Democrats are somewhat incrementalists and they sort of go piece by piece. So oftentimes the Republican party is so aggressive. That the Democrats lose out. And so maybe there is a way to think of alternatives, but this is going to be a very long struggle because the federal judiciary, not only the US Supreme court, but the federal judiciary has been transformed by the former president

Lizzy: Right. And I would argue not, just the former president, but, the Federalist society and a long line of, you know, political actors who understood what it would mean, to have sort of ideological control over higher courts. Um, we're getting rather dystopian, which we try not to do.

But at the end of the podcast, though, of course, you know, we're here to discuss, uh, research and evidence based perspectives.

And if that's where, that's where it leads us, then that's where we go. so throughout this conversation, you know, we've talked a lot about Roe, but less explicitly about what the impact of that ruling is going to be and how it is really not at all neutral when it comes to how it specifically impacts communities of color. and that's really important to point out, you know, this made a difference in the lives of pretty much anyone who has a uterus.

So right away, you're talking about, you know, a separation of groups of people in the country and. but also, you know, states that are now going to move to rescind. The protections of Roe are states that have high proportions of Black residents, high proportions of indigenous residents. So right away, you know, the burdens that are gonna fall on those populations are higher.

And that's not neutral at all. And that's a big part of what you study and what the critical race lens can bring to how we look at laws and what they actually do. What do you say to folks who are hearing all that and intuiting it and saying to themselves, Well, then what do we do? You know that the Courts are essentially gone.

If by using this philosophy of neutrality, this is the kind of disproportionate impact they're able to have then where do we put our energy? If we wanna intervene on the system and also, you know, second question, how do we combat some of the feelings of hopelessness and, and hopelessness that sort of naturally occur?

When we look at a situation like this, how do you do it on your own?

Cedric: Well, you know, you just sort of have to think of it as a long term struggle and things happen in cycles. And this is a very disturbing and depressing cycle. And I have a 18 year old daughter who's getting ready to go to college and she is really concerned about this opinion. and you could get down into the reasoning of the opinion and it is very dismissive.

And as you point out somewhat dystopian, but, there is hope in struggle. And you, you recognize that some of this, Struggle sort of adapts to, whenever we make progress. So this is a reaction to all the progress that has been made. Our duty, our call, our mission has to be, to make sure that we don't, uh, slide backward, that we don't retro regress, uh, that we make America live up to its ideals.

And there's all of this discussion. How great America is and, and what it does, but we have to really actualize all of those ideas. So it certainly is frustrating. It certainly is discouraging. it certainly is maddening. But. There has to be an effort on our part to keep moving forward. I think the other side would've won if, if we stopped, engaging in these efforts, so protest is good.

All of that marching is good. But then how do we translate that into actual efforts. So voting is going to be key. Policy initiatives are going to be key, maybe rethinking, how we approach the

Court may be key. And so all of those things have to be going on at the same time, because there are numerous issues and components to this struggle.

Lizzy: Well, thank you so much for those words, Professor Powell, I think that is important. And I think that, keeping your eyes on a long term project. Not necessarily what human nature is very good at, so that part's tough. But then, you know, you see, you see the work of people who are opposed to you and you know, it can be done well cause they certainly did.

So even though that's kind of ironic, I take some energy from that too. So thank you so much, Professor Powell for having this really important discussion with us today on No Jargon.

Cedric: Thank you so much for having me. I truly enjoyed it.

Lizzy: And thanks for listening. For more on Professor Powell's work check out our show notes at scholars.org/no-jargon. No jargon is the podcast of the Scholar Strategy Network, a nationwide organization, connecting journalists, policy makers, and civic leaders with America's top researchers to improve policy and strengthen democracy.

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