



Supreme Court 2022-23 Term Preview

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. The Supreme Court is about to begin its new term on Monday, October 3rd. It could be another historic one, cases on the docket, include affirmative action, voting rights, free speech, and religious liberty, and the independent state legislature doctrine.

[00:00:38] To preview the term, we've invited two of America's leading constitutional scholars, two great friends of We the People to join us. Caroline Fredrickson is a visiting professor at Georgetown Law and a senior fellow at the Brennan Center for Justice. She served on the Presidential Commission on the Supreme Court of the United States and was the leader of team progressive for the NCC's Constitution Drafting Project. She's the author of several books most recently, *The AOC Way*, *The Secrets of Alexandria Ocasio-Cortez's Success*.

[00:01:09] Caroline, it is always wonderful to welcome you to We the People.

[00:01:13] Caroline Fredrickson: It's great to be with you.

[00:01:14] Jeffrey Rosen: And Adam White is an assistant professor of law and the executive director of the C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia Law School at George Mason University. He's also a resident scholar at the American Enterprise Institute.

[00:01:27] Adam, it's always wonderful to welcome you to We the People.

[00:01:31] Adam White: Thanks, Jeff.

[00:01:32] Jeffrey Rosen: Let's begin with what we can expect from this term. This is a term when the Supreme Court is convening. After the Dobbs decision, the justices are talking about the court's legitimacy. Um, Caroline, what do you expect in the term ahead? Are we likely to see more of the extreme polarization or is there any possibility for a bipartisan consensus?

[00:01:56] Caroline Fredrickson: Well, this is gonna be a tough one, I think, um, as much as the last term, um, was very divisive for America. This next term could be yet more so. I mean, really tackling major issues involving voting rights and election law, um, affirmative action, parental rights under the Indian Child Welfare Act, uh, environmental issues, uh, it's really going

to be quite challenging, I think, uh, to see where we end up after this term and see what it means for this country.

[00:02:27] Jeffrey Rosen: Adam, what are you expecting from this term?

[00:02:29] Adam White: Well, after years of waiting to see how the court would approach, uh, the Roe v. Wade issue, if it ever returned to it, uh, we've now been through that. And it'll be interesting to see how the court sort of proceeds going forward. I'm particularly interested in seeing what Chief Justice Roberts does in trying to lead the court going forward. I do think it is still the Roberts' court. And I think in some ways, his leadership will be more pronounced than ever, particularly because of some of the cases that we'll discuss and some other cases where he's taken the lead in the past. But then again, uh, t- the addition of a new justice always leads to a new court. Uh, the addition of Justice Jackson is, will be very much along those lines. And I'm very curious to see how the new court proceeds.

[00:03:12] Jeffrey Rosen: Well, let's talk about, uh, Justice Jackson and your suggestion about the possibilities of leadership for Chief Justice Roberts. Caroline, h- how do you think the chief might lead to achieve his longstanding goal of avoiding polarized decisions? And how might Justice Jackson fit into those plans?

[00:03:31] Caroline Fredrickson: Well, uh, that's an interesting question. I think, um, Justice Jackson is very much a person who is, um, uh, works with others and, u- uh, tries to bridge compromises, is certainly somebody i- in the demeanor of I think that the chief justice should really welcome with that project. But I, I, I think we shouldn't forget his other major project, which is to undo the statutory framework that enables race to be used in certain contexts in America, including voting rights when ... And many of us think the 15th Amendment actually should still be in the Constitution. But the, uh, the chief justice is really, um, long aimed at undermining the Voting Rights Act, has already taken a big whack out of it, and now has a, a chance to pretty much get rid of the rest of it.

[00:04:20] And then, of course, the affirmative action case is going to be the other pillar of the, the, the little bit that remains of, uh, uh, that allows for the use of race in university admissions, I think, will, uh, also go by the wayside. I think this can be quite challenging on the court in order to, to maintain the kind of, uh, the idea of some kind of consensus or any effort to maintain, uh, uh, status of the court and legitimacy across the American public, and I, I don't know how much Justice Jackson is going to be able to help the Chief Justice with that project because I think she's going to be directly, uh, antagonistic to his ideological project.

[00:05:03] Jeffrey Rosen: Thank you for that. Um, Adam, as Caroline says, race is an issue where the chief has not signaled, uh, desire to compromise. He, he's clearly articulated his view that the Constitution is colorblind and that he means to take that seriously. Um, what areas of compromise and leadership do you see for the Chief Justice, uh, given the predominance of race cases on the docket this term?

[00:05:26] Adam White: Well, that's certainly an area where he is sta-, staked out a position and he did it very early in his tenure as Chief Justice in '06 and '07, where he was putting, in his

opinions, lines, some of his most famous lines, the one about, uh, the sort of business of divvying us up by race, the, the, the subsequent line about the way to stop discriminating on the basis of race is to stop discriminating on the basis of race. Those were among the, sort of the, the biggest rhetorical flourishes of Chief Justice Roberts' career. I'll be curious to see ... And, and, of course, he stuck with ... I guess we'll get back to this later, um, but he's, he's stuck with those views. But we'll see what happens now that the court seems to be in a somewhat different position. And his leadership role is, is in some ways more tenuous than ever.

[00:06:06] I'd say there are basically two kinds of disagreements among the justices right now, broadly speaking. One is how they should go about saying what the law is, how do they interpret laws, and, and how do they b- bring precedent into that work of interpreting the laws. The second disagreement is how quickly to say what the law is, how quickly to intervene, either in granting cert or with, with relief on the, on the, the shadow docket or the emergency docket. We're seeing both substantive and also procedural disagreements, uh, in, among the justices. And for Chief Justice Roberts, he has to navigate both of those kinds of disagreement, which is why we've seen him in interesting lineups so often with the conservative justices on matters of substance, but then disagreeing with the other conservative justices on questions of the emergency docket, the shadow docket.

[00:06:57] And so those are the two lines of disagreements within the court that really have interesting and challenging effects for the Chief Justice now.

[00:07:04] Jeffrey Rosen: Well, let us dive into the affirmative action case. This is a case involving affirmative action both at Harvard University and the University of North Carolina, a private university and a public university. And in both cases, um, the court is being asked to overturn the Grutter and Bollinger decision, which, uh, challenger say was egregiously wrong as Dobbs was wrong. And to hold that, uh, institutions of higher education cannot use race as a factor in admissions, both under Title VI, uh, which binds private university, and under the 14th Amendment, which binds public universities.

[00:07:41] Caroline, tell us about the legal stakes in that case, and how you imagine the different justices approaching them, to them?

[00:07:48] Caroline Fredrickson: Mm-hmm. Well, so in Grutter case that you mentioned dates from 2003 and it's, it marks the point at which the court recognized that, um, that student body diversity actually is important for learning. Um, a- and it helps prepare students for, uh, as the court says, an increasingly diverse workforce and society better prepares them as professionals. And there were a lot of interests that weighed in from the military to major businesses at the time. Um, and that has been pretty much the prevailing regime since then.

[00:08:20] And again, affirmative action is quite limited in this day and age, um, really, to the idea of trying to ensure that the universities have a diverse pool of students to draw from, and they've gone to great lengths to try and ensure that they have, um, i- increased the size of the, the pool to draw from so that they can continue to have that diverse, uh, student body. But now, um, what we have is a situation where the challenge has been brought once again. Um, you know, as you mentioned, we've had the, the Fisher case in 2016, which people thought at the time would

sort of be the end of that regime, but didn't end up actually undermining Grutter altogether, although did weaken it to some extent.

[00:09:05] Um, but now, you know, that was [laughs] a one-vote, um, margin in that decision. And now we're at a place where, uh, the court has changed significantly. I don't think anybody would be surprised if the court found that the use of race of any kind that, even considering diversity, no matter what the impact on student's education is going to be, no matter that it's actually gonna harm the vast majority of the student body as well as the students who are affected by no longer being able to include race in any fashion. Um, that doesn't seem like it will matter to this court. That only thing matters a kind of a formalistic approach to saying that race, considering race of any kind is absolutely unconstitutional.

[00:09:48] Jeffrey Rosen: Adam, help us understand any i- important differences between the two cases in, in, in the Harvard case. One question is whether Harvard properly considered race neutral alternatives under Title VI, whereas the North Carolina case is bound by the 14th Amendment. But do you agree with Caroline's argument that in the end, the court will formalistically hold it under Title VI and under the 14th amendment? Uh, race cannot be used as a factor in university admissions. And how do you expect the case to come out?

[00:10:18] Adam White: I think Caroline put the points very well. I guess I would add just a couple of things to this. Uh, first, as you point out, the two different areas of law in these consolidated cases, Harvard under Title VI of the Civil Rights Act, North Carolina under the 14th Amendment, since it's a state university, I'd be surprised, I guess, if the two cases were decided differently, but they are different bodies of law. And it'll be interesting to see how different justices navigate this.

[00:10:43] And in particular, I'm focused ... I'd say with the Harvard case, I'm most focused on Justice Gorsuch. I've long thought that his opinion interpreting the Civil Rights Act in Bostock, obviously, a very different context there, it was discrimination on the basis of sex with an eye to gender, uh, identity and sexual orientation. I thought that Justice Gorsuch's opinion in that case, when I first wrote it, it struck me as being very, very relevant to how he might approach interpretation of the Civil Rights Act, another title of the Civil Rights Act in, in, in, uh, i- in, in the college admissions context and affirmative action, so, I'll, I'll be keeping an eye on him and seeing the extent to which he or other justices harken back to the courts approach in Bostock.

[00:11:26] Now with UNC on the 14th Amendment, obviously, it's a little different there. We are looking very squarely at the Grutter decision. As we mentioned earlier, Chief Justice Roberts seems inclined, uh, not to go along with that precedent. He certainly hasn't been until now. I guess there's always the chance he could have a sort of, institutional, uh minded change, much like a Rehnquist changed on Miranda famously from his early decisions as a solo justice to his later decisions as Chief Justice. I don't expect that, but I'm keeping an eye on it.

[00:11:56] The Justice I'm keeping the closest ion in the Harvard case is actually Justice Kagan, um, not because she was the dean of Harvard Law School, but because she was dean of a law school. I'll be very curious to see what she makes of these issues of the challenges facing administrators, universities, uh, as they make admissions decisions. I think she could speak

forcefully to those issues. I mean, obviously, or frankly, I'm more inclined towards the Roberts' view on these things. But I'll be very, very interested to see what she says on these things.

[00:12:26] Justice Sotomayor has spoken, uh, forcefully and eloquently on some of these issues, although, again, I, I disagree with her on the merits. But Kagan, I think, might really take a step forward in this case in interesting ways. And I'll be curious to see how the other justices react to her.

[00:12:42] Jeffrey Rosen: Caroline, what do you imagine Justice Kagan's dissent in the affirmative action cases might look like if, if there is a dissent and she writes it? And what might she say both about why she does not believe that the Constitution or Title VI are colorblind and also about the practical effects of striking down affirmative action in law schools and universities would be?

[00:13:04] Caroline Fredrickson: Well, I, I do think that she will really take issue with the idea that, uh, either the Constitution or Title VI requires this kind of rigid race blindness because it really denies American history. And it denies, you know, for originalists, i- it denies the context in which those were adapted that were, uh, those constitutional provisions, as well as Title VI, were meant, absolutely, to address discrimination, uh, and to, and, and direct to that, discrimination that was primarily affecting African Americans. And the idea that the new court turns those provisions on their head and says that, in fact, they can't be used to help address discrimination in America. They can't be used to help alleviate longstanding systemic racism, uh, in its vestiges in America, I think, is something she is going to highlight as not only being problematic for the, all the practical consequences we could talk about and difficulties in, in administering a law school or university of any kind, but also the completely wrongheadedness of the legal understanding and the history.

[00:14:20] But I do think, um, as Adam pointed out, I think she will speak quite, um, eloquently, I'm sure, because she always does about the real-life consequences for students, for our civic life in America, um, and for our future, if these important tools that help knit our nation together are not going to be available. And I think the polarization that we have seen more and more in this country, uh, will only be exacerbated by the limits that are now put on institutions of higher learning to provide a forum where talented students from all backgrounds will have a chance to, uh, excel and, and, but also, importantly, is the Grutter court recognized to interact with each other, um, and to form relationships that extend beyond the community from which they come.

[00:15:17] And so I think it will be a dissent that will be one of those that is read over and over because of the kind of significance that it has in both describing and predicting the consequences for America.

[00:15:32] Jeffrey Rosen: Adam, Caroline, noted two points that a dissent might emphasize first that the 14th Amendment or-, was originally understood and designed to address racial inequality. And indeed, some of the briefs note that the early reconstruction congresses embraced affirmative action programs that benefited African Americans, um, primarily. And also she says that, uh, striking down affirmative action would increase polarization. What do you think the majority's response is likely to be to both of those points?

[00:16:04] Adam White: They're very important points. Uh, we've seen a flourishing of scholarship and books around the enactment of the 14th Amendment in the aftermath of the Civil War, uh, the early era of reconstruction, and the building of things like the Freedmen's Bureau. They're very important, I think, to keep in mind when trying to understand the original intentions and the original meaning of the 14th Amendment. Uh, so that's ... I think that's an important point.

[00:16:25] One of the challenges in this case is that ... Uh, sorry, in the Harvard case is that here, we have the cases brought in large part, uh, with an eye to the impacts of, of affirmative action at Harvard for Asian-American students and the impacts on them. And of course, America's ugly history with racial discrimination, uh, it's, it was exemplified, of course, by the evils that were perpetuated against blacks, uh, up to and in the aftermath of the Civil War. Um, but we've had, uh, a lot of ugly history since then, including the mistreatment of Asian immigrants, Chinese and, and Japanese, and the Japanese Americans in the United States.

[00:17:05] And so this question of how best to vindicate the meaning and attention to the 14th Amendment becomes much more complicated in, in the present era with a much more diverse country with many more minority groups with interests at stake. And, and so I think that's one thing the, the majority and the dissents will, will have to grapple with. I agree with Caroline that there'll be a lot of sort of formal interpretation of the laws. I also think it's gonna be a very practical-minded case, as, as she said, questions of how universities are actually supposed to go about the work, building a diverse, uh, student body, and creating opportunity for all.

[00:17:41] And I think to that end, there are gonna be questions about the workability, the admissions process under both the absence of affirmative action, but also under the continued existence of Grutter, which has always been a challenging case to really grapple with. Uh, we'll be curious to see what the justices in the majority, especially, make of the universities, you know, arguments that they are doing their best in good faith to, to, to build up a diverse student body with an eye to the legal constraints of the 14th Amendment or, or the Civil Rights Act.

[00:18:12] And in terms of predictions, the prediction I keep in mind is, is the famous prediction of Justice O'Connor and Grutter in 2003, where she said, you know, 25 years from now, we don't expect to need this anymore. Hasn't been 25 years yet, but we can see it around the corner. And I think that'll weigh on the minds of the justices, uh, as well.

[00:18:31] Jeffrey Rosen: Well, the same law firm that is challenging race in admissions to Harvard and the University of North Carolina is also representing Alabama and the plaintiffs in two cases the court will soon hear involving, uh, the Voting Rights Act. And the question that the court has agreed to hear in that case is whether the state of Alabama's 2021 redistricting plan for its seven seats in the US House of Representatives violated Section 2 of the Voting Rights Act. But the real question, according to, uh, many commentators, is this is Section 2 itself constitutional.

[00:19:05] Caroline, tell us about the stakes in the Voting Rights Act and, and how the court might address it.

[00:19:11] Caroline Fredrickson: Well, this is a really, uh, big deal because, um, you know, for listeners who are familiar with the Shelby County decision, uh, they know already that, uh, the court overruled the ability of, uh, of Congress to require districts to be new, new voting changes to be preapproved by either a court or the Justice Department, uh, in, in states with a history of discrimination in voting. Um, that preclearance section, Section 5, was hugely significant. Uh, and the court basically, um, rendered the formula, uh, and said the formula was unconstitutional and that I could no longer be applied.

[00:19:52] Uh, so that left really Section 2, which was it's not as strong in terms of fighting to protect voting rights because it doesn't allow the prevention of problems normally in advance of an election, but, uh, with the change as, as it's being proposed and it tends to be exposed. In this case, however, it's dealing with maps that have not yet been, um, applied in an election. So it's sort of in the middle [laughs], in some sense.

[00:20:19] And what we have is the Section 2 allows the challenge of districts that would give black voters significantly less representation than the share of the, uh, state's population would suggest, which is the case in Alabama. And, uh, it's quite important to ensure that racial gerrymandering that can be undertaken by state legislatures is not allowed to go forward and, therefore, continue to undermine the ability of black voters to have, um, representatives of their choosing.

[00:20:52] So this is a really significant case because if the Supreme Court finds that, uh, it's not permissible, uh, to structure such districts without a direct showing of discrimination, that is the current regime suggests that if the plaintiffs could show that they should have another district, um, uh, and a few other factors that have to be considered, um, based on their percentage of their population, they don't have to prove through direct evidence that the legislature was actually discriminating in the sense that they explicitly said, "Let's deny black voters a district." Uh, but now that might be, um, where the court goes to require actual evidence of intent, as opposed to simply showing that the outcome of the maps would render, uh, the, uh, black voters less able to, uh, choose elected officials of, who they believe would represent them better.

[00:21:46] And so, so we have, in this case, uh, a situation where you have, uh, African Americans who are not quite a third of, of Alabama's voters, but, you know, close to 30%. Um, and yet, under the new maps that Alabama has chosen, they, uh, would only get one out of seven congressional districts. And that means that only would be represented, uh, as if they were 14%. Um, so that half of what, uh, their population would suggest.

[00:22:14] Um, and so even the court, the lower court that considered it found, uh, these maps unconstitutional under the, uh, under the standards that are prevailing, um, and that's two Trump appointees, uh, on that lower court panel. And nonetheless, the Supreme Court seems to be racing ahead to undo an area of the law that has, is really one of the last [laughs] remaining tools to protect against racial gerrymandering.

[00:22:40] Jeffrey Rosen: Uh, the case we're discussing is Merrill versus Milligan. Uh, it's a complicated one, but, Adam, just to put the question clearly, do you agree with Caroline that the court may well hold that you need to prove intentional racial discrimination to prove a violation

of Section 2 of the Voting Rights Act? And if it does hold that, wouldn't that be a repudiation of precisely what Congress was trying to achieve since the whole point of Section 2 was to repudiate the idea that you needed intentional racial discrimination as the court had held in the, in the Mobile case, and instead to adapt an effects test that made it possible to prove, uh, racial discrimination when minorities found it harder to elect representatives of their choice, whether or not there was intentional voting discrimination?

[00:23:24] Adam White: The court may well take that path. I'll be very curious to, to hear the oral arguments on, I guess it's October 4th, uh, because they, they may well decide that's the, the clearest and most direct way to, in their view and for Section 2 of the Voting Rights Act.

[00:23:38] Now, Section 2 is incredibly important. Uh, I sure hope the court doesn't strike it down. I don't expect them to strike it down. The problems that the court saw in Section 5 in the Shelby County Act had to do more with, with pretty clear as the court sought discrimination among states, which they thought was unconstitutional. I don't see that issue here. Uh, so I don't think Section 2 itself is at risk. But clearly, some precedents surrounding Section 2 are at risk. And, and I don't think it's entirely unreasonable that the court would rethink this area of law for, for years, uh, that, that some of these issues have been governed by the Gingles test.

[00:24:13] That precedent, which is a few decades old, tried to set up a three-factor test that would, you know, lend some structure, some juror's prudential structure around the broad mandate of Section 2 in these kinds of cases. And, and to be clear, I, I think there is a real risk that governments can hide a lot of bad intent behind, you know, seemingly neutral approaches to, to voting laws. I think that is something the courts need to guard against. They need to really look, you know, **at the, the effects of, uh, the state laws and not just take them at face value.**

[00:24:46] Um, of course, the challenge there is that the Voting Rights Act is, is framed and phrased in terms of the right to vote, not necessarily the right to a, a particular district or majority within a district. In earlier decades, when people for, I think, very unfortunate and, and oftentimes very terrible reasons, you know, segregated or were segregated, uh, by, by race, living in, in, in sort of compact groups where, where white people live with white people, black people live with black people. Um, you could see, I think, a lot of bad intent in the effects of voting laws, which on their face might be neutral, but which really, um, limited the effective voting power of blacks by putting them all on one district.

[00:25:28] But now that people ... I mean, thank God, people live in much more diverse, uh, suburbs, uh, urban areas, uh, where we live, uh, you know, with people we don't look like, I think the judging these things by the effects becomes a lot more difficult. And so for that reason, I wouldn't blame the court for rethinking the Gingles test and trying to think about what is the best way to really give effect to the wor-, the, put the letter and the spirit of Section 2. But that might not necessarily be in preserving the, the three-factor test that the court has and the lower courts have tried to imply, a- apply until now.

[00:26:03] Jeffrey Rosen: Caroline, just to help listeners understand the stakes here. Congress in 1982 said that you don't have to prove intentional racial discrimination in any voting practice that made it harder for minority groups to elect representatives of their choice violated Section 2.

And the court in construing that said when there was a history of racially polarized black voting and the opportunity to create a majority-minority district, then you should do so. The court, if it strikes down, uh, Section 2, and says that you need to prove intentional racial discrimination, uh, would say that the 14th Amendment prohibits, uh, Congress from requiring those majority-minority districts to be created.

[00:26:43] What are the dissents likely to say if the court takes this route and, uh, since the 14th Amendment was not intended originally to apply to racial discrimination at all, and Congress wanted to go beyond what the 15th Amendment requires, uh, wouldn't the dissenter say that, once again, this is a violation of the original understanding of the Constitution?

[00:27:03] Caroline Fredrickson: Well, absolutely. I think it's ... Uh, that's the, that's the main point [laughs] that they will make is that, once again, the majority will be turning the Constitution on its head. Those who claim to be originalists will be ignoring the original, um, public meaning, um, if we don't talk about original intent anymore, but the original public meaning of those, uh, the amendments, as they were adapted, were d- directly to address discrimination and racial subjugation in American s- society. And the idea that somehow they wouldn't permit, um, Congress to, uh, to look at how districts are constructed without plaintiffs having to prove intent, uh, intentional discrimination to have districts that are representative is, is completely missing history and throwing out their favorite method of constitutional interpretation.

[00:27:58] So I think hypocrisy, as well as disregard of precedent, uh, and, uh, ignorance of history, I think, will all be things that will be cited in, in the dissents. But I think we do have to recognize that the Chief Justice has made this l-, his life's project. And he was in the Justice Department in, in '82 and, and that was a period in which the Reagan Justice Department, I believe, actually supported, ended up supporting the congressional overturning of the Supreme Court's restrictions on the Voting Rights Act. Um, he was opposed to it. He didn't want the Justice Department to endorse it f- for the exact reason that you suggest, Jeff, is that he thinks it's, he thinks that any consideration of race is unconstitutional.

[00:28:42] And he apparently doesn't care much about the fact that the reconstruction amendments were absolutely directed to with the sole purpose of trying to remedy the horrible history of racism and slavery in the United States and try and create a, a constitutional framework to provide a way forward. Um, that will no longer be the case. Um, and C- Chief Justice Roberts will have finally fulfilled his vision, um, as a young lawyer working in the Justice Department to completely eviscerate the Voting Rights Act.

[00:29:14] Jeffrey Rosen: Adam, what is the Chief Justice's, uh, response to all that likely to be? He is not an originalist, unlike some of his colleagues. Will he argue that the text of the 14th Amendment essentially requires government to be colorblind and the Voting Rights amendments violate that textual prohibition? Give us a sense of what his constitutional reasoning is likely to be.

[00:29:35] Adam White: I do disagree with, uh, my friend Caroline's, you know, view of the, the original meaning of the 14th Amendment. Also, maybe the way Chief Justice Roberts is

approaching this. A- And so I suppose his dissent would probably be along those line-, or his majority opinion, if, if he writes the majority or dissent, is in the dissent, will be along those lines, I think, on, with respect to the text of the, the 14th Amendment, the 15th Amendment, and this, and the Voting Rights Act. Uh, I think he is gonna probably parse the words themselves, you know, w- with an eye to the, the spirit in which they were enacted, but certainly keeping the focus on the words because I think that's always been at the heart of Chief Justice Roberts' view of some of these, these, these issues about racial classifications in the law.

[00:30:19] So I think that's how he'll approach the legal issue and say, "The 14th Amendment says this, the 15th Amendment says that, and the Voting Rights Act speaks in terms of the right to vote." And those principles can and must be vindicated, but not in ways that, that, that raise other legal concerns under those same areas of law. Obviously, the precedents become more difficult. I do think that, that the court may well, if, if it does take an original, originalist view of the Voting Rights Act, may end up, uh, disavowing the Gingles standard.

[00:30:48] Um, but with Chief Justice Roberts, I, I, you know, I, I do take a much more favorable view towards his approach on these issues, not in every respect, but in general. I, I do think for what it's worth, Jeff, that, uh, I do think he is an originalist of a sort, although that might be the one thing that everybody is united on on both the right and the left, um, that he's not an originalist. I think he's an originalist of a sort. I think that'll characterize h- his jurisprudence i- in this case. But as Caroline said, he has clearly had fundamental concerns about this i-, about racial classifications and distinctions in the law from the very beginning of his time on the court and, and, and i- it seems before that, even before he was appointed to the court.

[00:31:25] It seems to be the predominant, the issue that he cares about more than just about any other, except maybe administrative law issues where he's also taken the lead. And so when I said at the outset of our conversation that I think this year really will be the year of the Roberts court again. This is one of those cases that I have in mind where I think he will probably take the lead at or-, i- if not at oral argument that, then in writing a majority opinion, and bringing the law back in a direction that he thinks is more faithful to the original meaning of, of the Constitution of the Voting Rights Act.

[00:31:53] Jeffrey Rosen: Well, maybe just one more, uh, round on the race cases. The court is also hearing *Haaland v. Brackeen*, which is a case involving whether the Indian Child Welfare Act of 1978, which has a placement preference disfavoring non-Indian adoptive families in child placement proceedings, uh, discriminates on the basis of race and violation of the Equal Protection Clause. Uh, Caroline, t- there's widespread expectation, once again, that the court will strike down this, uh, prohibition on race consciousness in adoption for Native American families.

[00:32:25] If the court does that, what are the implications for race consciousness in other areas of law? And could the three of these cases taken together, affirmative action voting rights in this Indian adoption case, uh, really set up a strong presumption of colorblindness that would make race consciousness, uh, illegal across the board?

[00:32:43] Caroline Fredrickson: Well ... And in this case, I mean, they're all very troubling. But this case is, is troubling on, on many fronts because not only does it address some really

important family issues, uh, but it also addresses tribal sovereignty in a very direct way. Uh, so people really should keep in mind, um, first of all, that Native Americans are in a special constitutional place because of the sovereignty that they enjoy, you know, under the Constitution. But there's also a really, really terrible history in this country, of families being torn apart by the US government. Uh, Indian children who were taken away from their families with an effort to so-called Christianize them, um, forcible removals that, that happened, uh, where children were taken from, from families and put in boarding schools that were meant to really destroy, uh, Native American culture, uh, and family life.

[00:33:42] Um, so i- it was in that context and against that background that Congress adapted the Indian Child Welfare Act, uh, in 1978, which would prioritize if a child is gonna be taken from their family or is otherwise to be adopted, the priority should be given to, uh, an American Indian family, uh, or Native American family, um, if possible member of their own extended family or, or their own tribe.

[00:34:08] Now, that law, um, is being challenged by some non-native American families, uh, and some red states. They've raised several constitutional challenges, um, but certainly, this issue of, of Native Americans being able to protect their cultures and, and families, um, against a, a backdrop, as I said, of a history of really sorted and sad of children being taken out of their families and put in these boarding schools, I think, is, i- it really just would display an incredible disregard for that part of American history, uh, real disdain for the provisions that protect native American sovereignty.

[00:34:56] Um, and I do think you're right, Jeff, in sort of putting these three cases together, that if the court goes as we think it will go, in all three cases, I think it's a radical rethinking of the United States and its rejection of who we are as a people, which is a diverse, uh, multifaceted, multiracial society at this point in time, as if they're attempting to reclaim some vision of history that actually never existed. Um, and I think it will really have extremely unfortunate ramifications. Uh, and this case, I think, does really symbolize as much as any that kind of, of blindness about American history and society.

[00:35:42] Jeffrey Rosen: Adam, uh, those who are challenging the Indian Child Welfare Act of 1978 say it's a dramatic example of, of race consciousness, of, of, of racial favoritism in federal law, and therefore it should be struck down. Uh, what's your response to Caroline's claim that the Indian Child Welfare case, combined with the affirmative action voting rights cases, might lead the court to represent a radical rethinking of the American history? And, and why do you think it's constitutionally, uh, wise to embrace colorblindness as a core meaning of the 14th Amendment?

[00:36:12] Adam White: I agree with Caroline that this case, in particular, the set of, this last set of cases with the Indian, the Indian Child Welfare Act. It is complicated, um, legally, by the fact that Native American tribes have unique status as a legal matter in American constitutional government. And as Caroline says, they've been often horribly mistreated, um, by the United States government, uh, and by states and individuals for two centuries. And so that, that, of course, does, um, create not just that, I think, a historical aspect we need to keep in mind, but

also a legal aspect that Indian tribes do as a matter of their sovereignty have, uh, particular powers, um, and particular interests.

[00:36:52] And, of course, that's, that's been before the court in recent cases, including the last couple of Oklahoma cases, uh, which have raised some of these issues. So I'll be keeping an eye on that. The broader question of this case in the last few cases we've discussed about, uh, racial or, or tribal lines and the law. And I agree fundamentally with Caroline's premise that these are crucial issues in a diverse and historically diverse country, where our diversity is improving over time and, uh, but always with an eye to some of the, the worst aspects of American history. But I'm not exactly sure which way that cuts both in this, the, the Indian Child Welfare Act case and in the earlier cases.

[00:37:31] What's the better way to, to promote diversity and the interests of all Americans? Is it to adapt, uh, colorblind views of the, uh, readings of the constitution so that all individuals, uh, in all of our diversity, uh, are, are judged, uh, individually, or if it's better to preserve, uh, group, uh, or historical identities through racial and other classifications in the law? I mean, again, my, my reading of the 14th Amendment, the 15th Amendment, Civil Rights Act, and the Voting Rights Act is I think much closer to Chief Justice Roberts' view of these things than, than my friend, Caroline. Um, but these are difficult and challenging cases, both as a matter of law and as a matter of history for a reason. And so they, they clearly will be a dominant theme of this year's Supreme Court term.

[00:38:16] Jeffrey Rosen: Well, let us turn now to a F-, important First Amendment case, 303 Creative LLC versus Elenis. And that's a case involving a company owned by, uh, Lorie Smith to design studio that offers website and graphic design services. And, uh, Lorie Smith wanted to decline any work that contradicts her Christian beliefs, including creating a website that promotes a concept of marriage that is not solely the union of one man and one woman. And, uh, one question is whether the Colorado Anti-Discrimination Act, which r-, forbids her from sanctions and wanna create this website, uh, violates her first amendment rights to free speech and free exercise of religion.

[00:38:59] Uh, Caroline, how is the case, uh, being framed? And, and how's the court likely to approach it?

[00:39:04] Caroline Fredrickson: Well, I mean, this is an interesting case because I think one wonders how it's even before the court at this point in time. Lorie Smith, for all we know, um, hasn't actually started a business to create websites for weddings, um, simply is considering it. And so, you know, we're at a situation where she's made no website no one has asked, no gay couple has asked her to create a website for them and been refused. So ... And we have no indication that, you know, of what the, uh, uh, what the state of Colorado would do in those circumstances. And yet, we're before the court o- on this case.

[00:39:41] Um, it's a free speech case, as, as you mentioned, where she argues that she's being compelled to speak or stay silent with respect to her website about desiring to refuse to serve people who are not straight. And so that is the question that the court is going to be answering. It's clear that, you know, that the consequences of this decision where the court to say that she

and therefore other businesses have the right to make those kinds of, uh, discriminatory choices, it's not going to be limited simply to gays and lesbians or non-straight people in terms of their, uh, companies being able to reserve s-, refuse them service, but to what extent does it reach to other groups?

[00:40:27] And I think, again, we have a, a case where, uh, it could have very significant consequences going forward in undoing a lot of the important work [laughs] of the 20th century in addressing some of the major societal problems that have resulted from American history. And so, um, I look at this case as all the others were talking about with a great deal of trepidation because I think it will and could mean the undoing of our anti-discrimination laws that are meant to provide, ensure that people, um, who are receiving s- services or e- engaged in purchases, um, are not treated differently when they walk in the door of a retail establishment or now more and more attempt to do some, uh, do their business online. Um, and so we'll see where that goes, but it's, uh, it's very worrisome.

[00:41:21] Jeffrey Rosen: Adam, uh, in this case, uh, Lorie Smith and 303 Creative argue the court should not embrace a public accommodation exception to existing First Amendment jurisprudence. Um, if the court agrees, how broadly is, might that strike? Do, do you agree with Caroline that could call into question laws that prohibit folks from saying, "We don't wanna serve black people or women?" Or might the court articulate the principle more narrowly to apply only to artists or perhaps only to discrimination against LGBTQ people, um, in a way that wouldn't call those, uh, race-based anti-discrimination laws into question?

[00:41:56] Adam White: This has certainly been a, an, an emerging area of conflicts of different areas of law. We saw it a few years ago with M- Masterpiece Cakeshop with the collision of, I guess, there, too, was Colorado with their anti-discrimination laws and religious liberty. Uh, now, again, with Colorado and, and in this case, um, uh, Ms. Smith, uh, raising claims under both First Amendment religious live free exercise and First Amendment free speech, and saying that those, uh, those constitutional rights, a- as she practices them, should not be chilled by the, the existence and the possibility of enforcement by these, the, the California, uh, state government.

[00:42:31] You're right that this could cut pretty far. I'm not quite sure exactly how far it'll go. As Caroline says, there are other questions about the proce-, the, just the posture of this case, the rightness of this case, the respondent certainly argue that the court should have heard the case or shouldn't have granted cert in the first place because, uh, Ms. Smith, although she's an online creator, I, I think Caroline is right, she hasn't created wedding ... Is it wedding specific websites and she hasn't created yet at this point? So there is that.

[00:42:56] But, of course, in, in free speech generally and, and increasingly so in religious liberty, I think judges and justices are wary of the chilling effect that even seemingly neutral areas of law, uh, might have as a, as a chilling effect on the exercise of those rights. I think in this case, there is a question about ... At least from Ms. Smith, the question is, should she even continue to endeavor in this line of work if she or her continuing work on online, uh, artistic

renditions is, is, uh, at some point by, by California law forcing her to accommodate people, uh, in creating artistic messages with which she just fundamentally agree, uh, disagrees.

[00:43:36] And I think those are important issues that we would, do want clarity in the law so that people can build businesses and, and carry out their lives, knowing what the basic ground rules are. And I think the legal uncertainty around this collision of anti-discrimination laws and these constitutional rights would benefit from some, some clarity. I certainly hope that the court doesn't bring this case so broadly as to eliminate protections fo-, against race-based discrimination in public accommodations. And as we've discussed a few times, Caroline says, that's a particularly, um, significant aspect of American constitutional history that I don't think the court needs to undo here. And I'd, I'd be surprised if they did reach it, um, but this will be a very, very interesting case to watch in how the justices see the actual facts of the case.

[00:44:20] As I said earlier, Jeff, the two big lines of dispute among the justices are not just what the law is, but how the courts ought to go about their work, deciding and declaring what the law is. I, I could have mentioned a while ago with, um, the, the redistricting case. Uh, there were fundamental arguments over, over the court's intervention. First, the district court's intervention and then the Supreme Court granting a, a, a, a stay of its own.

[00:44:46] Uh, here, the court has granted cert in this dispute where the facts are a little bit murky. We'll be ... I'll be curious to see how the justices actually parse not just the meaning of law, but their own role in declaring what the law is in this particular case in this particular time.

[00:45:01] Jeffrey Rosen: Thank you for that. Caroline, picking up on Adam's helpful distinction between what to hold and, and how quickly to hold, First Amendment cases are ones in which there's been more consensus on the court. Uh, can you imagine a narrower decision that Chief Justice Roberts might carve out here? And if so, what would it look like? The, the appellant, Lorie Smith, has made a distinction between rejecting members of a protected class and objecting to the message a member of that class wants to communicate. Could you imagine a decision limited to websites by artists, um, and not, uh, calling into question anti-discrimination laws more generally?

[00:45:38] Caroline Fredrickson: I ... That's a possibility. Certainly, I think the idea that the court could try and circumscribe the protected group to those who are, who are engaged in some kind of expression that is much more artistic than a cake baker, um, to sort of set aside, um, people who are engaged in a business that are, you know, more routinely thought of as, um, maybe skills based but not necessarily artistry, uh, as opposed to say ... I think the, you know, the typical types of other examples would be musicians or people who provide some kind of, uh, artistic products to, to people on order, um, that are o- of a nature that is different.

[00:46:20] I ... You know, I think the, the problem for the, for the court is that that's really ... It's a very hard line to draw, I think. Um, you certainly ... Um, the baker in the Masterpiece [laughs], uh, Cakeshop case, I'm sure, would argue that his cakes are as much art, art as a website and perhaps more. Um, uh, they taste better in any case. Um, and so, um, I think it's, it's, it is a possible way that the court could try and, uh, limit the impact of its decision here. But I, I will be interested, as, as Adam had said, and seeing how the court might go about doing that, and what

are the criteria that it could actually use that would be, in any way, that lower courts could apply? Because it seems to me that once you start getting into the business of making those kinds of distinctions, it's hard to know where those cases will end up. But I think it'll ... Basically, if they do that, it's gonna be back in the, at the court very soon.

[00:47:17] Jeffrey Rosen: Adam, what are other ways of narrowing the decision? Um, y- you could focus not only on the class of speakers, artists, as opposed to other folks, uh, but on the kind of discrimination and say that messages involving LGBTQ people should be treated differently than race-based messages because a different standard of scrutiny applies. Uh, here, though, the court ... Uh, the, the lower court did apply strict scrutiny. So what do you imagine are other avenues available to Chief Justice Roberts might be for a narrow decision?

[00:47:46] Adam White: Thinking back to the Masterpiece Cakeshop, I, I remember how much Justice Kennedy's opinion for the court, they're really turned on factual distinctions, facts that are particular to that case, and how he a- and the, and the, the rest of the majority in the, in the court in that case saw the actual words and intentions of the, the Colorado State Board in that case. I don't think that's an option in this case, but I do think if there are gonna be distinctions drawn here, they might turn on Colorado ra-, law itself. And I'm not a Colorado lawyer, but as I understand it from just watching this case a bit, there are some exemptions baked in, my biggest bad pun, but baked into Colorado anti-discrimination law already.

[00:48:26] Uh, one exemption from the general anti-discrimination prohibitions is, uh, you know, discrimination based that ha-, that has what they call a bonafide relationship to the services of the accommodation at issue. So the justices might look at that and say Colorado ... I mean, obviously, the Su-, US Supreme Court justices aren't normally in the base, in the business of interpreting state laws. But when they look at the existence of that state exemption for the so-called bonafide accommodations, they might find particular problems with Colorado not affirmatively affording that exemption to 303 Creative here.

[00:49:03] Uh, similarly, as I understand it from the lower court opinion, um, the Colorado Anti-Discrimination Act has an implicit exemption for message-based refusals when that, that, that, the exemption applies equally to all possible customers, right, and not just on the identity of a given customer? Well, the court might look at that and say a lot then turns on how we define what the message is here, in terms of the, the message that Ms. Smith, uh, will convey or won't convey, uh, because, again, the petitioners in this case, they say, "These exemptions exist and the Colorado's failure to affirmatively provide them and assure Ms. Smith of their provision of these exemptions to her raises questions of, of non-neutrality of discrimination." That's how the petitioners are framing this less as a matter of neutral generally applicable anti-discrimination laws, and then more in terms of discrimination against religion or against a particular message in speech. So that's probably the most likely basis on which the justices might draw distinctions, uh, but, but we'll see.

[00:50:04] Jeffrey Rosen: Well, our last case is Moore versus Harper. This is the independent state legislature case. We've had several podcasts on this very important topic and will no doubt have more. The case could be decided broadly or narrowly.

[00:50:18] Caroline, tell us what is at stake in Moore versus Harper and how the court might approach the issues?

[00:50:24] **Caroline Fredrickson:** Well [laughs], this one, it's also a, a, a blockbuster. Um, this is sort of just reaffirming what I said at the beginning that this, this last, last term was huge and, and this one is huge, too. So, um, uh, the Moore case is really, um, going to, could have, make a fundamental difference to our democracy. Looking at this, um, the case, which involves a map, a district map that was drawn by the North Carolina legislature, um, was rejected by the state Supreme Court as a, a violation of the state constitution, uh, as a partisan gerrymander.

[00:51:03] Um, and the question now is whether or not the state court interpreting the state constitution, um, can be overruled by the US Supreme Court based on this theory that has never been applied. Um, the Independent State Legislature Theory. And under this theory, the ... Uh, and this is how the Republican legislature of North Carolina is framing their challenge to the state, uh, Supreme Court's decision, uh, is that the elections clause of the US Constitution says the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof.

[00:51:48] So their argument is legislature means legislature, and therefore, the state court, uh, even interpreting its own constitution, does not have the final word, that the state legislature has the final word on how to structure their elections under the US Constitution. So that really poses a, a, a, a major threat to democracy because this means that state courts no longer have a role in interpreting their own constitutions. Um, and it ignores the, the long history, uh, and the backdrop of the founding that, uh, saw the legislatures in this context as being the legislative power.

[00:52:34] Uh, it would remove ... Oh, it's not only state courts, but the citizens from the ability to affect election law outside of the legislature. That is, citizens who moved through a ballot initiative to set up, say, an independent redistricting commission or otherwise structure their state election law. They are not "the legislature" according to this theory, uh, and therefore, those efforts are also unconstitutional. I think it's radical, uh, and it will be, uh, it would make a profound change to American democracy and I think is very frightening to those who are, who are following it.

[00:53:09] The heavily gerrymandered state legislatures will be completely unbound in creating heavily gerrymandered [laughs] congressional districts and violating their state constitutions with impunity. And this will all be because the US Supreme Court has decided that it and it alone has the final word in this case on state constitutions.

[00:53:29] **Jeffrey Rosen:** Adam, do you agree or disagree with Caroline's argument that it's a radical theory that state courts have no role to play in reviewing election decisions of state legislature? And the court could decide this case narrowly or broadly? How do you see its various options?

[00:53:44] **Adam White:** I definitely agree that it would be radical for the US Supreme Court to completely throw the state Supreme Courts and state courts out, uh, throw them out of the, the

business of applying state constitutions. I see the case a little differently, uh, than my friend. I see the issue a little narrowly. I should just ... I'll say at the outset, Jeff, I, I'm a big skeptic of the broader versions of independent state legislature theory. And o- obviously, this case, even though it's focused on the state legislature's role in drawing the maps for congressional districts, it's being litigated in the shadow of the analogous power of state legislatures to set the rules for the appointment of presidential electors.

[00:54:24] There are two separate constitutional provisions, different language, um, different parts of the Constitution, but particularly in, in the shadow of the last presidential election and the one to come. I, I think there's great reason to worry about an overexpansive view of the independent state legislature theory and elections. I don't think that broad theory is exactly what's at, at issue or at least not squarely at issue in this case. And in part, it's because of the, the sort of the, the background, the procedure that gave ri-, the proceedings that gave rise to this case.

[00:54:53] You had the North Carolina Supreme Court, as I understand, that they declared the state legislature's drawn maps unconstitutional under, I think, for state constitutional provisions. Um, and I wouldn't be necessarily averse to that. I ... A- After all, the state legislatures, even though they get this particular line draw-, district drawing power from the US Constitution, the state legislatures, they are creatures of their own state constitutions, including, especially in the state of North Carolina, which predates the, the existence of the US Constitution.

[00:55:21] But I think what happened after that is U-, the state Supreme Court decision is what complicates things here. The case goes back to the Superior Court, the Superior Court ends up creating a panel of special masters, the special masters a- a- and the courts end up rejecting, if I remember correctly, the state legislature's second bite at the apple on drawing maps, I might get that wrong, but I think that's right. But the key then is that the maps that were ultimately adapted, they really, as I understand, were drawn from the ground up by the special masters in this state judicial process. And that's where even I, as a skeptic of the Independent State Legislature Theory, do get a little weary, um, because the courts, the state courts certainly have a role to play in applying their own constitutions and to the state legislatures there and binding the state legislatures to that.

[00:56:07] But this strikes me as a case where the state judiciary really did end up drawing maps, basically, from the ground up on its own. And that strikes me as pretty hard to square with the, the US Constitution's reference to state legislatures. I might be botching the history here. I don't think I am, but I might be. Uh, I don't think I am.

[00:56:24] Now, the question is, what state constitutional provisions really would bind the state legislatures? And then put ... And the, the state in this case, they do concede very generally that, that, of course, in, in general, generally applicable constitutional provisions, they do bind the state legislatures. The question becomes, what happens when you have much more focused specific targeted constitutional provisions that limit the legislatures carrying out of this federal constitutional power? And then again, in this case, what happens when the state courts become much more deeply involved in writing, drawing the maps from the ground up?

[00:56:59] So that's what I'm watching for in oral arguments, really how the justices actually see what's happened in this case, and then what the constitutional stakes are.

[00:57:07] **Jeffrey Rosen:** Caroline, Adam agrees with you that the radical version of the independent state legislature doctrine is not well founded, in the sense that it might allow legislatures to set new rules and regulations and districts on a federal level with few checks against overreach and maybe even change the result of an election after this take place. But he says that you, you could have a narrow approach here. And indeed, um, in the Rucho case in 2019, Chief Justice Roberts himself, writing for the court, said the state courts could continue to hear cases involving partisan gerrymandering in the context of congressional redistricting.

[00:57:42] But Adam is suggesting that state courts may not be able to write the rules for gerrymandering from the ground up relying on vague constitutional provisions like free and fair elections. Uh, do you agree with him that there could be a narrower way to resolve this case without opening up the radical theory? And what would it look like?

[00:58:00] **Caroline Fredrickson:** It's certainly possible that the court could try and make some distinction based on the actual process, again, sort of going back to the facts of this case and trying to, um, carve out a particular approach to map making, um, I think, as, as Adam had described it as from the ground up. Um, it's certainly a possibility. But I think, um, as I said in earlier that the, that the big worry here is that they will swing a little bit more broadly, uh, and that the implications for other areas that are described in the state constitution as being fundamental, uh, fundamentally protected rights were perhaps, you know, describe how elections need to be run, could be overtaken by what the state legislature decides to do.

[00:58:50] So that's, I think, you know, the, the quite, a likely possibility, uh, that the implications for the court, um, from a court decision that was cutting more broadly than simply trying to really restrict this case to its facts. I think the implications for the types of provisions that say that require secret ballots, say, or, or allow for absentee voting or set up other mechanisms to ensure a fair and free, uh, election process might be threatened. Um, and I think as you mentioned, Jeff, the idea that they can change the results of an election after the fact that something, taking us back to the, the selection of, of electors, uh, in the electoral college, that is, you know, the ultimate worry that is behind all of this that, uh, if a state legislature thinks that it can rewrite the rules and the state constitution doesn't matter, then where are we as a democracy?

[00:59:41] **Jeffrey Rosen:** Thank you so much for that. Adam, the last word in this excellent discussion is to you. Um, I'm struck in listening to your good conversation with Caroline and previous conversations about the independent state legislature doctrine on this podcast, that there's no clear answer in constitutional text, history, or tradition about the role of state courts in reviewing, uh, election decisions. The 14th Amendment, um, as o- our guests noted recently on a podcast, wasn't originally intended to apply to political rights at all. And once you can see that state courts have some role to play, it's hard to know how much deference they should get and, and when they're prohibited from reviewing election results. So how should a principle textualist originalist decide this case?

[01:00:25] Adam White: This is an area where it is just so hard to draw lines between, say, a state court just faithfully, uh, interpreting, doing its best to interpret state law and, and the US Constitution, and reining in a state legislature that's overstepped its bounds versus a state court that sort of willfully goes beyond the reasonable readings of state or federal law and, and asserts its own will over the state legislature. And surely, in most or all those cases, it's gonna be in the eye of the beholder. I, I like you ... I, I mean, this is not an area I've studied too closely. But perhaps, all of us, I suppose, are studying it more quite, closely than we'd like to have to study at these days.

[01:01:04] And, and I, I do have trouble sort of thinking about how to draw a principled line between the state court's sort of proper role and the state court's overstepping their bounds. In this particular case, as I said earlier, I think the court, uh, can decide the case pretty narrowly without having to reach the broader issues. And it calls to mind Chief Justice Roberts' line and his Dobbs concurrence that, uh, if it's, uh, not necessary to decide an issue in a case, then it's necessary not to decide an issue in that case. And, and I hope that's the court's approach here. I hope they get a clear answer to this particular case, um, but certainly, don't swing more broadly and, and certainly don't endorse a theory of, um, state legislative power and the election process that would allow states to, to overturn elections after the fact.

[01:01:56] I, I don't think they'll need to reach it. And hopefully, that, that case will never arise and the court will never have to decide that issue, um, but certainly not in this particular case.

[01:02:04] Jeffrey Rosen: Thank you so much, Caroline Fredrickson and Adam White, for a civil, thoughtful, and illuminating discussion about these extremely contested cases. Uh, the court itself may not avoid the polarization and you've helped us to understand that it is likely not to win the race cases. But you've both provided us a model for what thoughtful and civil disagreement and agreement can look like. And that's why it's always a privilege to have you on with the people.

[01:02:29] Caroline, Adam, thank you so much for joining.

[01:02:31] Caroline Fredrickson: Thank you.

[01:02:33] Adam White: Thanks.

[01:02:39] Jeffrey Rosen: Today's show was produced by Melody Rowell and engineered by Dave Staats. Research was provided by Kel Sangoma, Liam Kerr, Sophia Gardell, Emily Campbell, Sam Desai, and Lana Ulrich. Please rate review and subscribe the We the People, recommend the show to friends, colleagues, or anyone who's eager for civil, thoughtful, and illuminating constitutional debate. And always remember that the National Constitution Center is a private nonprofit.

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[01:03:32] Happy first Monday, everyone. It's gonna be an extremely important year for constitutional, uh, dialogue and debate. And on behalf of the National Constitution Center, I'm Jeffrey Rosen.