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Live from the Aspen Ideas Festival: 2022-23 Supreme Court Review

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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 non-partisan nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people.

[00:00:20] Jeffrey Rosen: This week I'm in Aspen, Colorado and I'm talking to you from the Aspen Ideas Festival where we just held a great panel about the end of the Supreme Court term. From affirmative action to the independent state legislature theory to the voting rights decision and much more, this has been an important term, and I was joined by three of America's leading legal scholars to discuss it. Neal Katyal, Pam Karlan, and Clark Neily are our panelists. The program was recorded live at the Ideas Festival and I'm thrilled to share it with you now. Enjoy the show.

[00:00:58] Jeffrey Rosen: Hello friends, and welcome to the Aspen Ideas Festival Supreme Court Panel. The Supreme Court, as always, has checked in with the organizers of the Aspen Ideas Festival and has thoughtfully handed down its affirmative action decision moments before we convene. And we are here to discuss the momentous decisions that the Court has handed down in the past few weeks, including affirmative action, the future of American elections, the future of the Voting Rights Act, and much more.

[00:01:37] Jeffrey Rosen: We have a remarkable panel of America's leading Supreme Court thinkers and litigators. They have a diversity of views and our goal is both to help you understand the legal reasoning of the decision and their implications, both the majority opinion's and the dissent's, so that you can make up your own mind. So, we're gonna jump right into it.

[00:01:58] Jeffrey Rosen: I am thrilled to introduce, first of all, Neal Katyal of Georgetown Law School, Hogan Lovells, one of the leading Supreme Court

litigators, who has just won the independent state legislature case. As- As- As those of you who have been to this panel before know that Neal is my brother-in-law and this is the latest installment of our roadshow, Brothers in Law. Next to Neal we are thrilled to welcome Pam Karlan of Stanford Law School. Pam is one of the leading constitutional thinkers of America, and it's so great to welcome her to Aspen. And also to welcome Clark Neily of the Cato Institute, a leading thinker, and it will be great to have his perspective.

[00:02:51] Jeffrey Rosen: Let's jump right in with the affirmative action decision. The Court, by a 6-3 vote, has held that the affirmative action programs of Harvard and the University of North Carolina violate the equal protection clause. The Court repudiated the holdings of the Bakke and Grutter cases, which had held that educational diversity is a compelling interest. And the Court said that the only way to justify racial classifications under the equal protection clause are to show that you're remedying identifiable race discrimination in the past, or you're avoiding an emergency in the future. And because educational diversity is neither of those things, it can no longer be considered a compelling interest.

[00:03:38] Jeffrey Rosen: Clark, why don't you lead us off? Describe the majority opinion's reasoning and also that of those of the concurring justices who argued that the equal protection clause is colorblind. What did the majority hold and do you agree with it?

[00:03:54] Clark Neily: I sympathize, kid. This is a really difficult-

[00:03:55] Jeffrey Rosen: [laughing]

[00:03:55] Clark Neily: ... tough,

[00:03:55] Jeffrey Rosen: It was... It was my introduction that-

[00:04:01] Clark Neily: [laughing]

[00:04:01] Jeffrey Rosen: Very sensible response, but...

[00:04:03] Clark Neily: This is a tough decision to make sense of. There's a disagreement between the Chief Justice, who wrote the majority opinion, and Justice Thomas, who wrote a concurrence, about whether they did or didn't overrule a prior precedent, including particularly the Grutter case from University of Michigan on the question of whether achieving diversity on campus is a sufficiently compelling governmental interest. So, it's really gonna

require a deep dive on these lengthy opinions. I forget what the page count is. Over-

[00:04:30] Pam Karlan: 239.

[00:04:31] Clark Neily: 239. Pam would know for sure. Yeah. I mean, it's a lot to digest. And I'm just gonna be really honest with you, I haven't had time. But I think I can still, you know, sort of try to hit the highlights and- and what it comes down to is this: I think there are three questions that- that these cases present. The first is whether it's ever permissible to use race in deciding whether to admit a student to either a public university like the University of North Carolina, or a private university that receives federal funds under Title VI. Or I'm sorry, that is controlled by Title VI and the '64 Civil Rights Act. And Harvard does take federal money.

[00:05:02] Clark Neily: So while the constitution doesn't forbid Harvard from using race the argument is that as a recipient of federal funds, they have a- a statutory obligation to essentially be colorblind. Or at least to stay within the parameters of however much race the Supreme Court says a university is allowed to use. So that's the first question. Can you take race into account?

[00:05:22] Clark Neily: Second question is, if so, to what extent? The argument that Harvard made in court essentially was, look, it's just a very... it's a small part of our decision. We have a holistic approach. We take into consideration a tremendous number of factors and race is really just one of those.

[00:05:37] Clark Neily: And then third is a more practical question, namely what is the university really doing? And there was actually a lengthy trial a bench trial, meaning a trial in front of a judge, in the Harvard case that produced a significant body of evidence that was not... prior to that had not been made public about how Harvard's admission process actually worked. And one of the most difficult things, I think, for Harvard to sort of contextualize... I was about to say run away from, but I don't wanna be pejorative yet. Was that the admissions policy at Harvard had a significant impact on applicants of Asian descent. My wife is half Japanese, my kids therefore a quarter Japanese. And so, this is something... you know, an issue of particular concern in my household.

[00:06:18] Clark Neily: And there was I think rather compelling empirical evidence that Asian students had to perform substantially better across a whole variety of measures in order to have a chance of being admitted to Harvard. There was further evidence that if Harvard had a strictly kind of colorblind

approach to admissions, that something like 46% of the student body at Harvard would be Asian. And the idea that even if, for example, we say that it's permissible for a university to take race into account, perhaps even to try to remedy past dis- discrimination, which is something that featured heavily in both Justice Sotomayor's and Justice Jackson's dissents what this case to me at least brought forth was that that's not always cost free. And so, if one group is going to receive a preference, which Harvard clearly was doing for African Americans and people of Hispanic descent, then other ethnicities may end up getting short shrift. And it's pretty clear at Harvard that Asians were in fact getting short shrift.

[00:07:13] Clark Neily: And so, those are really the three questions that I think are in play in this case. Can a public or publicly funded academic institution take race into account? If so, to what extent? And then third, what are they really doing? Put aside what they say they're doing. What are they really doing?

[00:07:27] Clark Neily: Going forward, I think it's clear that universities will be able to continue to take race into account to some extent. Chief Justice Roberts was very clear that applicants will be able to write about their experience in their essays, for example. What it... You know, what it has meant to me to be a member... Not me, but what it has meant to a hypothetical applicant to be a member of a particular ethnicity what hurdles have you had to overcome as a result, and that that would be a permissible way going forward for universities to- to take race into consideration to at least some extent. The devil is really, I think, going to be in the details in terms of how the schools respond and what the courts say about how they responded.

[00:08:00] Jeffrey Rosen: Th- thank you so much for setting up so well. Pam there is a practical question about how race can be used moving forward. And as Clark said Chief Justice Roberts observed that universities can continue to encourage students to write about race on their essays, as long as they tie that to particular challenges or adversity that they've overcome. And there is one other exception saying that the military could continue to take race into account. In practice, what do you think the effect of the decision will be? And how will affirmative action be changed at universities?

[00:08:32] Pam Karlan: So I should say that I'm speaking here in my personal capacity. Because when I was at the Department of Justice in the Civil Rights Division, I worked on DOJ's amicus brief in the Harvard and North Carolina cases. I- I think, you know, an affirmative action program done right can survive the chief justice's opinion. Because what he says there is that rather than just looking at whether someone checked a box saying that he was Latino, or

she was African American, you should look at how the person explains how their race goes to the qualities that make them an attractive applicant for the school. And I'll just say parenthetically along the lines of something that Clark said. As somebody who has always tested extraordinarily well, test scores are not everything-

[00:09:21] Clark Neily: Mm-hmm.

[00:09:22] Pam Karlan: ... in deciding whom to let in. At Stanford we reject a number of people with much higher test scores than the people we let in. In part because we are looking for a well-rounded class of people who've done interesting things, and test scores are not everything. So that means that schools will have to look more carefully.

[00:09:41] Pam Karlan: And the one concern that I have about this in the short run is, for students who are upper middle class or who go to... who have gotten scholarships to go to excellent schools or the like, they will have guidance councilors who will be able to tell them how to write the kind of essay that will talk about their experiences in a way that will help to make them an attractive applicant. For students who are going to underfunded public schools in the middle of nowhere where the ratio of students to guidance councilors are 400 or 600 to one, they are not going to understand how this new process works. And so, they are less likely to write the kinds of essays that will make them attractive candidates under this kind of new regime. So, that's- that's the first piece of this.

[00:10:31] Pam Karlan: The second thing to look at though is there are cases coming down the pike that the court didn't address in its opinion today that are worth understanding. And the- the next one up, I think, is gonna be the Thomas Jefferson case.

[00:10:42] Jeffrey Rosen: Mm.

[00:10:42] Pam Karlan: For those of you who are not from the Washington D.C. area but are from the New York area, Thomas Jefferson is the Bronx Science of the- the D.C. metro area. It's a math and science high school. It's incredibly selective. It's a public school. And they changed their admissions policies recently to get rid of a test that had a huge disparate impact on Black and Latino applicants, and to use a race blind process. And that race blind process has been challenged, because the reason they adopted it was to increase the diversity, racial diversity, in the school. And if that case goes to the Supreme Court and is decided, then we're in a very different... I think very

different world going forward, talking about what schools can do to make their classrooms diverse.

[00:11:27] Jeffrey Rosen: I'm so glad you flagged that crucially important case for our audience. And as Pam Karlan suggests, the big question moving forward is whether any race consciousness is unconstitutional and a violation of federal law, even if it results in the adoption of facially neutral policies. Neal, help us think through the really important litigation on the horizon. Pam suggested a gap between the majority opinion and that of Justices Thomas and Gorsuch. Justice Gorsuch essentially suggested that the text of Title VI and Title VII of federal law require total colorblindness. If his view got a majority, would that mean that any race conscious corporate recruiting would violate federal law? And what kind of division do you see among the justices on this crucial question of how much race consciousness is permissible moving forward?

[00:12:19] Neal Katyal: Thank you. It's so great to be here with all of you again. I think I've done this now for about eight or nine years, and I love being here and I love this audience. So, thank you. I, like Pam, am speaking personally. I represent, like everyone in this space, so I'm really very much talking personally here.

[00:12:34] Neal Katyal: My reaction to the affirmative action decisions is that they were not nearly as bad as they thought they would be. That they left a lot of room open. So Pam isolates one important thing, the last two paragraphs of the Chief Justice's opinion. Say, if an applicant self-identifies on the basis of race and explains why her experience matters and what she will bring to the university, that's okay. Well, that's what, you know, a well constructed affirmative action program will be able to do. Pam's 100% right that this is going to benefit, you know, people who have more sophisticated counseling. I mean, it's kinda like how Donald Trump was good for lawyers. The Supreme Court's good for guidance counselors. You know?

[00:13:18] Neal Katyal: You know, and that does really concern me. But nonetheless, I do think it's possible for universities to maintain a diversity based program that's well crafted. And I think the military exception, the language about that, helps as well.

[00:13:33] Neal Katyal: There's this really hard question which Pam is flagging, which all universities are thinking about now, which is, what if we do something that's a proxy for affirmative action in a race conscious program? So, say we look at Pell grants or some sort of socioeconomic status. And will that be challenged as just doing affirmative action through the back door?

Absolutely. It's gonna be challenged. This opinion doesn't give us very much guidance on it. Pam's again 100% right that the Thomas Jefferson case would but I don't anticipate the Supreme Court to take another case in this space for a little while. Typically, when the Supreme Court decides a case, then the other cases that raise similar or even adjacent issues they just throw back to the lower courts for additional percolation. And here not only did they decide a big case, they overruled or semi-overruled or partially overruled, or whatever you wanna call it, Mr. Chief Justice the old cases of Grutter and Bakke. And so, I do expect a lot of this litigation to return to the lower courts.

[00:14:36] Neal Katyal: So there will be fights at the K-12 level, there'll be fights in the universities. And my last point, as Jeff said, is there will be fights in the corporate setting as well. That is this decision has implications for how corporations think about their DEI programs, their commitments to affirmative action and the like. The Supreme Court in two cases, Johnson and Weber, that those, those programs exist on a somewhat different footing. They're not diversity based affirmative action, they're designed to compensate for past wrongs. And so there are strong arguments for why corporations can still continue to do this, but Justice Gorsuch flagged the argument on the other side.

[00:15:15] Jeffrey Rosen: Great. Well, thank you for introducing the crucial questions that the affirmative action cases opens up. I do wanna encourage you to read the opinions, the majority opinion, the concurrences, and the dissents. This is part of your education as citizens, and you'll see a remarkable constitutional debate between Justice Thomas and Justice Jackson about the history of colorblindness from the Civil War to the present, the meaning of the efforts to achieve racial equality, and whether or not efforts to help recently freed men and women should lead to a colorblindness requirement or not. It's well worth reading and I hope you'll do that.

[00:15:54] Jeffrey Rosen: Let's turn now to the independent state legislature case, and since I'm not objective about this, I'm gonna quote from the remarkable tweet and tribute from Judge Michael Luttig who said the following about Neal's victory in that case. And I need my constitutional reading glasses to read it. He said, "It would be impossible to overstate the enormity of yesterday's seminal decision in Moore v. Harper. Not only is it now the single most important constitutional case for American democracy since the nation's founding almost 250 years ago, it is also now one of the most important constitutional cases for representative government in America." Congratulations on that, Neal. And why does Judge Luttig think that this is the most important constitutional case for American democracy since the founding?

[00:16:41] Neal Katyal: Well, it was such a privilege to do this case, because basically what the Republican Party was saying was that elections would be governed by the raw political power in state legislatures. The state legislatures can do whatever they want. This theory was used, it was the basis of Trump's 2020 theories about the elections. You might recall that there were about 62 decisions that were going on in the 2020 election. Many of them were in state courts. And John Eastman and Trump's advisors all said these state court decisions are illegitimate. They considered everything from, you know absentee ballots and, you know, polling hours; all sorts of things. How you count ballots. All sorts of things.

[00:17:23] Neal Katyal: This case came from North Carolina and it was about gerrymander. And basically the North Carolina state legislature... North Carolina is a very evenly divided state, has 14 congressional seats. The North Carolina legislature, which is overwhelmingly Republican, gerrymandered it so it was about 10 to 4 or 11 to 3 in favor of Republicans. That went to the North Carolina Supreme Court. The North Carolina Supreme Court said, "This violates our own state constitution," leaving the Republicans to go to the U.S. Supreme Court and say, "Oh, state courts have no business in federal elections. State constitutions have no business in federal elections."

[00:18:02] Neal Katyal: And the reason why, I think, Judge Luttig is saying that is because he found that contrary to the tradition of checks and balances in this country, going all the way back to the Articles of Confederation. Courts have always played a role and state constitutions have always played a role in governing federal elections.

[00:18:24] Jeffrey Rosen: Clark, help us understand the argument of the three dissenters Justice Thomas, Justice Gorsuch, and Justice Alito partially joined them. And essentially they said that it all turns on the meaning of the world legislature. And since a legislature in its ordinary meaning only means a legislature and not the state courts that review the legislative acts, therefore state courts had no role to play. And essentially they said that all of the precedent and history and tradition and practice from the time of the founding until today that suggested state courts were expected to review the acts of legislatures, should be ignored, 'cause the meaning of the world is clear. Do I have that right? And try to help us understand their argument.

[00:19:06] Clark Neily: Yeah, I think you have it right. I'm trying to put my words carefully here, but I guess I'll just throw caution to the wind, since I'm the libertarian on the panel and I know it's expected of me. Like, I think this is such a stupid question that I'm amazed the Supreme Court had to get involved.

Right? Do I have to stop this car and, like deal with you kids in the back seat? I think it flows from this ridiculous kind of hypertextualism that we sometimes see, and I'll give you an example. The Sixteenth Amendment says that Congress shall have the power to lay and collect taxes on incomes. And the argument in the North Carolina case strikes me as if somebody said, "Oh, well the Sixteenth Amendment says Congress shall have the power to lay and collect taxes. So the IRS can't collect taxes. It has to be Congress." Right? That- That's- That is a preposterous hypertextualism that's, I think, unhelpful and unworthy. To me, that's the spirit that animates this dissenting opinion, animates the arguments that were made below in the North Carolina case.

[00:19:55] Clark Neily: Another example on the other side would be, you know, the Second Amendment says that it the right of people to keep and bear arms shall not be infringed. Putting aside the militia clause, are we really gonna interpret the word arms to be every single thing that is an arm, including nuclear weapons? No. That's preposterous. But that would be the kind of hypertextualism that I think is both unhelpful and unworthy of such, you know, an important document. I think it belittles the document to approach it in that way and to sort of fail to keep perspective that this is first and foremost a framework for government, a framework for a particular kind of government, liberal government and rule of law government. And that's the spirit that in my judgment prevailed, that animated Neal's arguments and that prevailed in the Supreme Court. And any other result I think would've made, you know, frankly a kind of a mockery of what is very clearly the spirit of this document.

[00:20:44] Jeffrey Rosen: Wow. Significant words from you, Clark Neily. You are one of the leading Second Amendment defenders in this country. You've won some of the major Second Amendment cases. And to learn that you're not a fan of that hypertextualism, to put it mildly, is notable.

[00:20:57] Jeffrey Rosen: Pam, help us understand the significance of this debate. There's a big divide, to put it mildly, between the, let's call them traditional originalists, including Justice Kavanaugh and now Justice Barrett in Neal's case, as well as the Chief Justice, and Justices Gorsuch and Thomas and Alito. And the hypertextualists, as Clark describe them, would've denied courts any role to play in reviewing elections, as well as requiring a degree of colorblindness that's far more extreme than the more traditional originalists. So, help us understand the nature of the debate, and what are the consequences of this hypertextualism moving forward?

[00:21:37] Pam Karlan: Sure. Can I just back up one minute though and say a little bit about one of the big pieces of significance about Neal's case here? And

that is, the Supreme Court of the United States took itself out of the business of policing political fairness and gerrymandering cases in the Rucho case a couple of years ago. And so, the only place you could go to claim that there was unfairness in the way the state legislature draws congressional districts or draws state legislative districts, or the way your city council districts are being drawn, is to go to the state courts. And the court said there, "Go to the state courts." And then to turn around and say, "But the state courts can't do anything either," was deeply problematic. So, that's the first big thing, I think, to note here.

[00:22:19] Pam Karlan: The second big thing to note is what the Supreme Court has done here. And this is, I think, Chief Justice Roberts at his most clever institutionalist in some ways. Is he has not taken the U.S. Supreme Court out of the business of policing what state supreme courts do. He's left open the question of when has a state court gone beyond traditional judicial review and really started to impose its own notions of fairness. So, it'll be really interesting to see how that plays out.

[00:22:48] Pam Karlan: Now, what you're seeing, I think, in a lot of the cases in front of the Supreme Court, and I think this may be what you're getting at in part, Jeff, is there are justices who are institutionalists and who are thinking about in the long term what's best for the court to, kind of, retain its power and to retain its central position. And Chief Justice Roberts is an example of this. And then there are what Leah Litman's referring to as the You Only Live Once justices, the YOLO court justices, who are grabbing for as much right now given how these arguments play out right now. And that's what, I think, is going on with the independent state legislature doctrine. That, as Neal says, it started out as something that was far cleverer than it was wise, far more textual than it was contextual, and as a result it looked like something that would be good for one side in the political debates now. And I think that's what drove the justices to that position. I would have been very surprised if they had adopted the, kind of, independent state legislature doctrine in the way they did in a case where it was going to advantage the Democrats tremendously. I would've been very surprised.

[00:24:00] Jeffrey Rosen: Great. Well, that's a helpful distinction between the institutionalists and the YOLA justices. And let me ask you how that plays out in the third big case that we're gonna-

[00:24:09] Neal Katyal: Jeff, before we get-

[00:24:10] Jeffrey Rosen: Yeah.

[00:24:10] Neal Katyal: ... to the third case just one thing I'd like to say more about this case. 'Cause I think it connects to the themes of the Ideas seminar and indeed the first session, which was about listening to one another. So an interesting thing happened in this case after I argued it. The North Carolina Supreme Court, where this case was from, changed its mind on some of the key questions. And there were five parties on my side versus the Republican Party, and the five were a bunch of very liberal groups, as well as the Biden administration, the Solicitor General. And when that decision by the North Carolina court was made, these folks all went to the United States Supreme Court and said, "Get rid of this case. Get rid of Moore versus Harper. It's moot now, because the North Carolina court has changed its opinion." and they thought they were gonna lose.

[00:25:00] Neal Katyal: And we looked at it and I have such a diverse team of people on my staff and my method is always to really try and take what the United States Supreme Court says seriously. We live in a kind of soundbite caricature age. And I looked at, I thought about it, and I said, "I think we're gonna win the case, and I think that these people are having a knee-jerk reflexive reaction to what the U.S. Supreme Court is about."

[00:25:29] Neal Katyal: And so, we stood alone. We told the Supreme Court, "Don't get rid of this case. Decide the case on the merits." and we won. And that to me is an illustration of what this week is all about. It's about trying to take each other seriously and listen. And of course they're open to all sorts of criticism, and I give it to them too, but sometimes there still is space for good results, even when we are opposed to one another.

[00:26:00] Jeffrey Rosen: Bravo. Absolutely. It's a hugely important point. And the fact that you persuaded the court to take the institutional view in briefings after the case have been argued, is part of this remarkable victory and its why Judge Luttig paid you and the case the tribute that he did.

[00:26:19] Jeffrey Rosen: Well, the theme of institutionalism is raised by our- our third case, which is the Alabama Voting Rights Case, the Milligan case. This is one where Chief Justice Roberts and Justice Kavanaugh joined the liberal justices in refusing to strike down Section Two of the Voting Rights Act, which requires legislatures to be race conscious when there's been evidence or racially polarized voting, and in the process to preserve the... one of the last parts of the Voting Rights Act that remains available.

[00:26:52] Jeffrey Rosen: Pam, you're America's voting rights expert. It's a complicated case, but help us understand it and why it, once again, reaffirms Chief Justice Roberts's institutionalism.

[00:27:02] Pam Karlan: Sure. So again a disclaimer. I worked on the case with the Department of Justice. So when President Johnson signed the Voting Rights Act into law in 1965, he said it was the toughest civil rights statute American had ever enacted. And in 1982 the statute was amended to say that states could not use voting practices or procedures that resulted in minority voters having less of an opportunity to participate and to elect candidates of their choice than other voters. So, it's a statute not just about the right to participate in elections, but about the ability to elect candidates of your choice.

[00:27:40] Pam Karlan: And in large parts of the country the only way for minority voters to elect candidates of their choice is to have them be a majority of the electorate, because voting is racially polarized in those parts of the country. It's not true everywhere in the United States. It's gone down over time in much of the United States, but there are still places where racial polarization is real and it determines the outcome of elections.

[00:28:03] Pam Karlan: In the 1990s, Alabama was forced to draw one majority Black congressional district. It has seven congressional districts and it was forced to draw one by the Voting Rights Act. And that district has been redrawn and redrawn and perpetuated from the 1990s to the 2000s to the 2010 to 2020. And in 2020, Alabama redrew its districts again, creating one majority Black district and six majority white districts. And a variety of different groups brought suit in Alabama saying it was possible to draw a second majority Black congressional district and that the level of racial polarization in Alabama remains high and that otherwise Black voters in Alabama wouldn't have a equal opportunity to participate and to elect.

[00:28:48] Pam Karlan: It- This was a classic case under a 1986 Supreme Court decision called Thornburg against Gingles, which coincidentally was decided the year I was clerking. So, my whole life as a voting rights lawyer has been in the Gingles regime. A three-judge district court in Alabama heard evidence in the case; there was a preliminary injunction trial, several weeks of evidence, and said that the Alabama plan likely violated the Voting Rights Act by failing to draw this second majority Black district. The three judges who decided the case decided the case under the Gingles test, which the Supreme Court has used since 1986 and has been used around the country. And this was really a cookie-cutter case. There was nothing interesting about the case at all, except for one thing.

[00:29:35] Pam Karlan: And we've been talking a lot this week about technology, and it was technology that was the interesting thing. Which is, scientists now have super computers that can run hundreds of thousands of simulated elections. They can redraw the districts millions of times and see what the result of the elect-... Of the redrawing the districts would be. And it turned out that there were some political scientists who had run, I think, 100,000 simulated maps of Alabama and they never produced two majority Black districts unless they took race into account. And so, Alabama said, "See? We have a colorblind constitution. You'd have to take race into account too much in order to draw two districts. Therefore, abandon the Gingles test."

[00:30:19] Pam Karlan: The case went up to the Supreme Court on the shadow docket, which I think we may talk about a little bit later, and the Supreme Court stayed the order of the three-judge district court in Alabama so that the election in 2022 went forward under the six white district, one Black district, one majority Black district, plan. Elected six Republicans and one Democrat.

[00:30:40] Pam Karlan: At the time the Chief Justice dissented from the granting of the stay by saying, "I think the Gingles case dis- you know, decides how this case should come out, but I'm not sure Gingles is right. I think we need to rethink Gingles a little." And so, then the Supreme Court heard the whole argument and ultimately the Supreme Court came back and said, "No, we're- we're sticking with the Gingles test. This is a case that meets all of the factors under Gingles, and therefore we are sending the case back for more proceedings." And the proceedings are gonna be a remedy that will presumably draw two districts from which Black voters in Alabama can elect candidates of their choice.

[00:31:21] Jeffrey Rosen: Beautifully explained, and it just shows how incredibly significant the case is and by some accounts it will result in the election of- from three to five more Democratic seats in the next house elections. Because this Gingles test, which Pam described... Which, just to review, 'cause it's complicated requires legislatures to draw districts where minorities constitute a majority in cases where there's a history of racially polarized block voting and the minority communities are geographically compact and contiguous. That test remains alive. If the other side had won, then there wouldn't be a requirement to create those districts, making it harder for Congress to require that minorities have an equal opportunity to elect representatives of their choice, as they said in passing amendments to the Voting Rights Act in 1982.

[00:32:11] Jeffrey Rosen: Clark, just to bring this back to av- a version of the colorblindness debate, Justice Thomas in his dissenting opinion in Milligan said essentially the constitution is colorblind and therefore the voting rights amendments violate the constitution. Congress wasn't allowed to say in 1982 that legislatures have to take race into account to give minorities an opportunity to elect representatives of their choice. And therefore he would've made it impossible for that to happen. Do I have that right? Explain the consequences of Justice Thomas's strong colorblindness view. And do you think Justice Thomas was right or wrong?

[00:32:49] Clark Neily: Let me start by saying that I have as much trepidation about talking about voting rights in front of Pam Karlan as I would about pop music in front of Taylor Swift. A bit preposterous. But if you insist, I will say I think you have the characterization right. I think that the... The fundamental problem with Justice Thomas's perspective is that it's built on an ipse dixit which is... in essence it's an unfounded assertion that the constitution is in fact colorblind. I'm a hardcore libertarian and I take equal protection very seriously, as I know we all do. Reasonable people can differ about what that means, but I don't think that- that it incorporates an absolutely requirement of colorblindness.

[00:33:22] Clark Neily: And I think we can think of a number of settings in which that would be extraordinarily problematic. Pam and I were talking about one earlier which is some prisons are heavily self segregated along racial lines. There's a whole interesting kinda anthropology about why prison gangs tend to be, not tend to be. They're almost exclusively based on race. And the idea that a prison could never take into account the fact that if you mix some of these prison gangs together, you will have a riot I think is preposterous. I'm not saying that Justice Thomas would take a different view. In fact, he's written a dissent in which he doesn't embrace that view. But that seems to undercut, to me at least, undercut his categorical assertion that the constitution is colorblind.

[00:33:58] Clark Neily: So, if we reject that, which I do, then we have to have a more thoughtful discussion about to what extent may the government take into consideration racial ethnicity. And to what extent is the government's own history of complicity and disfavoring. That's a euphemism. In, you know, supporting a system of chattel slavery, of enslaving human beings and then propping up a system of racial apartheid in the wake of the civil war; the idea that that's not relevant I think is also preposterous. And Justice Jackson makes that point in her dissent in the tHarvard and UNC cases today.

[00:34:34] Clark Neily: So, I think two things are true. I think it's quite clear that the constitution is not literally colorblind. But then at the same time that

doesn't... it's not a carte blanche. That doesn't mean that the government can just do anything it wants when it comes to racism; much more nuanced and a much more challenging opinion. And for nuance and- and intellectual, you know, analytical virtuosity I would defer to Pam.

[00:34:54] Jeffrey Rosen: Great. Well Neal, help us understand this debate between Justice Thomas and Justice Jackson about whether or not the constitution is colorblind, which plays out in both of these cases. And then what's the significance of Chief Justice Roberts's decision to join the liberals in this voting rights case and the conservatives in the affirmative action case? Does he think the constitution is always colorblind or not?

[00:35:17] Neal Katyal: So the Alabama case, just the same disclaimer. That's my team's case, so I'm speaking personally in the like. I think that Justice Thomas today... It's quite remarkable. He says, for example, the Freedman's Bureau is race neutral. I've read a lot about the Freedman's Bureau. Nobody I've ever heard of it describe it as race neutral. It was set up after the Civil War to basically protect the freed people, the former slaves. The whole point was it was race conscious. And so, there is a race consciousness that was built into the foundations of the Fourteenth Amendment in the 1860s. Of course Congress was thinking about doing special things for them. We had to. We had an obligation after they had been enslaved for so long.

[00:36:08] Neal Katyal: But yet, you know, Justice Thomas is caught between his embrace of history as his method and the fact that history here totally looks the other way. Totally goes the other way. I mean, I was struck. I think Justice Jackson has had a remarkable first term. Unlike any other justice. In my lifetime at least. And as I say, I've been involved in every one of these affirmative action cases for 25 years. I'd never heard the point that Justice Jackson made in the affirmative action arguments.

[00:36:37] Neal Katyal: She said to the challengers, she said "Okay, can I write this essay? I'm applying to the UNC. I'm a fifth generation North Carolinian. My father went to UNC, my grandfather went to UNC, his father went to UNC. It's really important that I go the UNC." Answer from the challenger? Yes. "Okay. Now can I write this essay? I'm a fifth generation North Carolinian. My great-grandfather couldn't go to UNC because he was enslaved. My grandfather couldn't go because of Jim Crow, and my father faced the lingering effects of that as well. Can I write that essay?" And there wasn't a very strong answer to that, which is why I think you see the Chief Justice bracket that. But someone like Justice Thomas isn't bracketing that. Justice Thomas is saying, "Nope. Race

neutrality, race neutrality, race neutrality." Wanting to get rid of a lot of the texture and history of this country's relationship to race.

[00:37:33] Neal Katyal: And I don't think we can talk about the Alabama case without understanding that this Supreme Court has had a concerted attack on minority voting. And most recent most, you know, powerfully 10 years ago this week in the Shelby County case, striking down a different provision of the Voting Rights Act than the one Pam was talking about. Sections four and five, which said... which is kind of the heart of the act, which said basically, when a jurisdiction that has a history of race discrimination wants to change its voting rules, it had to have pre-clearance from either a judge or from officials in Washington D.C. And the Chief Justice in an opinion 10 years ago, that I think is one of his gravest mistakes, said that that was unconstitutional. That it treated states differently and violated what he called the equal footing doctrine and joined by all the conservatives on the court.

[00:38:24] Neal Katyal: The equal footing doctrine's a really interesting doctrine. Because for someone who claims to be a textualist, as these folks do, there is no equal footing doctrine in the constitution. You can look up, down and sideways. It isn't there. But it's a made up doctrine used to basically eliminate this key provision in the Voting Rights Act. And it really does show how far we've gone. I mean, my 46 arguments ago, I guess in 2009, I argued the predecessor case, Northwest Austin versus Holder in which the court 8-1 upheld that same provision of the Voting Rights Act. And just four years later they strike it down. And so, I am very worried about the court on voting.

[00:39:04] Neal Katyal: The Alabama case was an extreme case. Those three judges that Pam Karlan was talking about, two of them were Trump appointees and yet they found the same problems that Pam identified. It was an easy case. I'm worried about the next one.

[00:39:17] Pam Karlan: Can I just add one thing here, which is about the history? And it is that if you look at what the Fourteenth Amendment says, a lot of people stop after reading section one of the Fourteenth Amendment-

[00:39:28] Jeffrey Rosen: [laughs]

[00:39:28] Pam Karlan: ... which is the equal protection clause and the due process clause. And they never get to section five of the Fourteenth Amendment, which was the section that says Congress shall enforce the provisions of the... of this article. And the reason that provision is there is because the congress that proposed the Fourteenth Amendment and the people

who ratified the Fourteenth Amendment did not trust the Supreme Court to protect the rights of Black people. Because their experience with the Supreme Court and Black people was Dred Scott. And the Voting Rights Act is one of the signature examples of Congress using its Section 5 powers to say, "Here's how we understand equality to be."

[00:40:07] Pam Karlan: And this was not a partisan issue. It was not a partisan issue in 1965. Every one of the extensions and amendments and strengthenings of the Voting Rights Act was signed into law by a Republican president. In the case Neal was talking about, the Northwest Austin case, and then in the Shelby County case, I had the privilege to represent the bipartisan leadership of the House of Representatives in support of the act. And so, you know, politics didn't used to have the kind of racial connotations in the late 20th century that it now seems to be having again, and that's a real problem.

[00:40:41] Neal Katyal: In fact, in the argument in Northwest Austin the- the Justice Scalia asked my co-counsel, "This act was authorized in 2006 and it was voted for unanimously in the United States Senate 98-0." And he says, "That must've been symbolic. Nothing important passes 98-0." And I'm sitting there in the chair, looking at him. I was like, "If I were up there, I could drop the mic and be done with my life as a Supreme Court lawyer." Because I would say, "Mr. Justice Scalia, your confirmation vote was 98-0."

[00:41:19] Jeffrey Rosen: It's a crucial debate that we're having, which we're gonna continue tomorrow. But I think Neal helpfully you know, puts his finger on it when you say that Justice Thomas is caught between the text and history. And as I understand his argument in both the affirmative action and the voting rights cases, he's saying because the text is clear, because the text obviously requires colorblindness, we don't have to look at the messy history which suggests that in the years before and after the Fourteenth Amendment there was race consciousness. And it's a version of the argument that he made in the independent state legislature case. Because the word legislature is clear, we just don't have to look at all the history which suggests that no-one ever expected to exclude state courts. You know, of course the question of whether the text is clear is the central question in all these cases, and people are fighting wars and filing a lot of briefs contesting the idea that the text is clear. But at least as I understand it at that point, that's the difference between the two camps.

[00:42:19] Jeffrey Rosen: Well, let's use our remaining time. We'll probably have at least one last intervention. Clark, you are the leading Second Amendment litigator among them in the country and there's a case on the horizon called Rahimi involving domestic violence in the Second Amendment.

It comes on the heels of this very significant case called Bruen where the Court just recently struck down New York's concealed carry laws and required a text and history test where you have to find a historical analog for gun control regulation to support it. Justice Breyer said this means that there's now a cottage industry in Second Amendment historians seeing whether or not assault weapons, you know, are consistent with the statute of Northumberland of 1393. But tell us about the state of play of the Second Amendment and why Rahimi may create further clarity or confusion.

[00:43:09] Clark Neily: Yeah, thanks. So I think two things are true. I think that the Supreme Court correctly decided the last Second Amendment case that came before, which challenged New York state's system of deciding who gets to carry a concealed weapon. And they had... they're one of the few states that have what's called a discretionary permitting system. So you had to meet certain objective criteria, but then you also had to convince some local bureaucrat that you had a special need to carry a gun. There's no other constitutional right that we only get to exercise if we convince some... Do you really need to have that parade? What are people gonna say? Do they really need to hear that? We don't do that in any other area. And the Supreme Court, not surprisingly, said that New York can't do that with respect to deciding who gets to carry a gun outside the home.

[00:43:51] Clark Neily: The reasoning I think was quite concerning, because what the court did... I don't wanna get too deep down in the weeds, but normally what the court does is it applies a kind of a balancing test. So, to go back to a parade permit, for example, can you require somebody to get a parade permit? Yes. But can you charge them $10,000 for it if there's no connection between that and how much it will cost to provide security? No, you cannot. That's the kind of balancing that I'm talking about. That's what the court normally does in most cases where you've got this kind of a righted issue where there are real concerns on both sides, like who's carrying a gun outside the house.

[00:44:21] Clark Neily: What the Supreme Court did in this most recent case called Bruen was it just threw all that out and said, "What we'll do is we'll look back at history." and they're not even sure what the relevant timeframe is by the way. It could be 1791 when the Second Amendment was added to the constitution, or it could be 1868 when the Fourteenth Amendment was added. Who knows? "But whatever the time is, we'll look back and we'll see how they were doing things back then." And if, you know the thing that's being challenged today was not a feature of the regulatory landscape back then and there's no reasonably analogous regulatory scheme back then, you just don't get to do it.

[00:44:54] Clark Neily: I am really flummoxed by this approach. II think for so many reasons it's... I think it's pragmatically really difficult. I think just even, sort of, jurisprudentially it doesn't really make a lot of sense to me. Like, why would we look back at a time you know, when people were carrying muskets and, like, shooting wild turkeys, you know like, literally on the way to work? 'Cause everybody lived in the country. Not everybody, but you know, it was a different time. And of course there were no high capacity weapons back then with ammunition that would shoot through three walls. I just, you know, I am a Second Amendment guy, as you know. I think some of you know. But it just doesn't really make sense to me, so I don't really get this new approach.

[00:45:27] Clark Neily: I also think that a lot, in fact maybe even most, of constitutional adjudication ultimately boils down to line drawing. And just to give you an example, how old should you have to be to own a gun? There's nothing in the constitution about that. I got a nine-year-old son and eight-year-old daughter. I don't think they're old enough. On the other hand, you're eligible to serve in the armed forces when you're 17 years old and you'll be given a firearm and told to go kill people with it. But then to say to you, "Oh, but if you're a civilian, no." Ah, it's tough. It's a line drawing challenge, and it is a challenge. I just don't see how this, what we now call the text history and tradition approach that was announced in this Bruen case, helps us do that. In fact, I think it not only doesn't help, but I think it actually clouds the issue and- and is likely to lead the Court into more errors than not.

[00:46:11] Clark Neily: And the last thing I'll say about it is this: there's- there's an astonishing footnote in the majority opinion in Bruen that's also picked up on by Justice Kavanaugh in a concurrence that says in effect, "Oh nothing in the opinion today should cast into doubt the legitimacy of states requiring a license to carry a gun outside the home." Guess what? There was no licensing requirement. Either at the founding or in 1868, so everything in those opinions calls into question this requirement that half the states now have to get a license before you carry a gun. And to just blithely assert that this new text history and tradition approach doesn't call into question the government licensing of who can carry a gun, I just... is absolutely mystifying to me and I think, frankly, a bit disingenuous.

[00:46:54] Pam Karlan: Can I say something about what the case that's likely to go to the Supreme Court is about? Because it's important for people to realize it.

[00:47:00] Clark Neily: Do you have to?

[00:47:01] Pam Karlan: I do.

[00:47:02] Clark Neily: Okay. [laughs]

[00:47:02] Pam Karlan: I gotta. I gotta.

[00:47:04] Clark Neily: [laughs]

[00:47:04] Pam Karlan: This is a case that involves a man who was subject to a domestic violence restraining order after he threatened his partner with a weapon. And he was then convicted for carrying a gun after the restraining order was issued against him. And his position, which succeeded in front of the Federal Court of Appeals, was essentially there were no laws like this in 1868. But do understand that in 1868 domestic violence wasn't a crime, marital rape wasn't a crime. So to say we should look back to those times to figure out whether carrying a weapon today after you've threatened your domestic partner with a weapon is a core constitutional right, takes things very far.

[00:47:51] Pam Karlan: And the other thing I'll just say about this is, one of the things about Supreme Court opinions is justices often join onto stuff that they're not going to stick with the next time around. So it'll be interesting to see how many of the justices who joined the opinion in Bruen peal off when it comes to felons in possession, or domestic violence restraining order folks in possession.

[00:48:14] Jeffrey Rosen: We have time for Neal, you're gonna have the last word. But tell our friends what they should expect moving forward. This turned out not to be a simple 6-3 court in every case. We did see Chief Justice Roberts as an institutionalist. How will that play out for the future, and what should we think about the future of the Supreme Court?

[00:48:34] Neal Katyal: Well, the most remarkable thing about this panel is that we've gone an hour and haven't mentioned the word abortion. And that looms over the Court, it haunts the Court, I suspect will continue to haunt the Court in all sorts of very serious ways. What happened in Dobbs last year I think was a travesty and I think very hard to justify from even the Court's own premises. And if they can overrule Roe versus Wade, a super precedent like that, then nothing is safe and that's, I take it, what Pam was saying.

[00:49:06] Neal Katyal: So, I think this year the court looks very different than it did last year in terms of just the composition of its decisions. Like, if you were to ask last year which justices were in the majority the most, it was the

Chief Justice and Justice Kavanaugh. 95% of the time in the majority. I only have the data for the first 40 cases decided of the 60 haven't compiled the rest, but of those first 40, Justice Sotomayor was the justice in the majority the most, and it was Alito and Thomas who were in dissent the most. So, this is looking like a different term. The question is, will that continue?

[00:49:40] Neal Katyal: And, you know, some of those cases are important but abortion will continue to define what the Court's about. So, as you look to the next year, you look to the mifepristone case, that's also my team's case, which- in which basically a conservative organization shopped for a certain lawsuit in a certain jurisdiction, drew a judge who basically invalidated this abortion drug, which had been around and approved since 2000. And the theory by which the the judge allowed that to happen said, "Well, doctors have legal standing because their patients might take the drug and have some adverse side effect." you know, if that's true, every doctor, my wife's one, is gonna have standing for every possible drug, 'cause they all have side effects. It's an insane, insane theory.

[00:50:26] Neal Katyal: It went up to the United States Supreme Court on this what we call the shadow docket. Not an argument, just an accelerated pace to say should there be an immediate temporary injunction or preliminary injunction. And the Court there, the Supreme Court, fortunately did the right thing, let the drug continue. But that case is now going to work through the Court of Appeals and come to the United States Supreme Court the next year. And there will be other abortion cases as well, and I think that will be the haunting issue of our time.

[00:50:56] Jeffrey Rosen: Well, thank you for that. And most of all friends, as you've listened to this remarkably illuminating panel, you have a sense of the need for each of you to read the opinions. You cannot make an informed judgment about whether you agree or disagree with the Court unless you take the time to read the majority opinion, read the concurrences, and read the dissents. These opinions are written for you. And if you accept my assignment and pick one of the decisions that we've been talking about, affirmative action, the independent state legislature, voting rights, and read it through, you'll see it's not just written for lawyers. They're written for ordinary citizens and they allow you to make up your own minds.

[00:51:35] Jeffrey Rosen: Most of all I wanna thank my panelists for having educated all of us and provided a model for civil discourse about the U.S. Constitution.

[00:51:50] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock, Sam Desai, and Samson Mostashari. Special thanks to the team at the Aspen Ideas Festival for this recording. Research was provided by Yara Daraiseh, Connor Rust, Tomas Vallejo, Rosemary Lee, Harlan Katyal, Samson Mostashari and Sam Desai and Lana Ulrich. The homework of the week, as I said during the show, please read one of the Supreme Court decisions that just came down, the majority opinion, the concurrences, and the dissents, and make up your own mind. And please recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional illumination and debate.

[00:52:28] Jeffrey Rosen: Sign up for the newsletter at constitutioncenter.org/connect, and always remember that the National Constitution Center's a private nonprofit. We rely on the generosity, the passion, the engagement of people from across the country. We're inspired by our nonpartisan mission of constitutional education and debate. Support the mission by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support our work, including the podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.