



The Future of Affirmative Action

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Jeffrey Rosen: Hello friends. I'm Jeffrey Rosen, president, CEO of the National Constitution Center, and welcome to *We the People*, a weekly show of constitutional debate. The National Constitution Center's a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. This week on we the People were sharing a debate about the future of affirmative action, which ran recently on our companion podcast *Live at the National Constitution Center*. Two great scholars, William B. Allen of Michigan State University and Hassan Kwame Jeffries of the Ohio State University. Join me for an illuminating conversation, which was streamed live on May 4th, 2023. Enjoy the show.

[00:01:12] Jeffrey Rosen: Hello, friends, welcome to the National Constitution Center and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the President and CEO of the National Constitution Center. And as always, let's begin by inspiring ourselves for the discussion by reciting together the National Constitution Center's mission statement. Here we go. You can do it by heart, I know you can. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the US Constitution among the American people on a nonpartisan basis.

[00:01:26] Jeffrey Rosen: And now, it's a great pleasure to introduce our panel. William B. Allen is resident scholar and former chief operating officer of The Center for Urban Renewal and Education. He is emeritus professor of political philosophy in the Department of Political Science, and emeritus dean of the James Madison College at Michigan State University.

[00:01:45] Jeffrey Rosen: He's published extensively, and his work always illuminates. And his most recent book is, *The State of Black America: Progress, Pitfalls, and the Promise of the Republic*. And Hassan Kwame Jeffries is Associate Professor of History at The Ohio State University. His also illuminating work includes *Bloody Lowndes: Civil Rights and Black Power in Alabama's Black Belt*. His current book project is, *In the Shadow of Civil Rights*. And he hosts the podcast *Teaching Hard History*, and both professors Jeffries and Allen are great friends of the National Constitution Center.

[00:02:23] Jeffrey Rosen: Welcome to you both. I want to thank you, Professor Allen for reaching out and suggesting the topic of the future of affirmative action is so important. And in light of an expected Supreme Court decision on the topic, which is, going to be a landmark decision either way.

[00:02:39] Jeffrey Rosen: You suggested convening this dream team of civil dialogue, you and Professor Jeffries have united before, uh, on many occasions to discuss the topic. I'm so grateful you're both here. It's an honor always to moderate this conversation. And let me begin by asking each of you to review the modern history of affirmative action in the courts starting with you, Professor Allen.

[00:03:03] William B. Allen: Well, thank you very much. And let me first say it's a joy to join with you and with my colleague, Dr. Jeffries. I think this is a very important conversation, but you will forgive me, if I'm all the more pleased just to be able to share the time with you regarding the history of affirmative action. It is, of course, a century long history properly told, but that's not fit for us in this context.

[00:03:29] William B. Allen: We're focused on what happened since 1978 in the *Bakke* decision, when Justice Powell wrote the opinion for the court the deciding opinion, and introduced the term diversity, which establishes that forth, especially in higher education, the practice of affirmative action and which spread from higher education throughout all the major institutions of American society.

[00:03:52] William B. Allen: Ever since that time has been constantly under litigation, and at the same time has gone through a process of being, uh, litigated politically through referenda, popular initiatives in several states. And so, we know that it has an up and down history except in the course of the litigation in the Supreme Court, in which it has been in most cases consistently affirmed even though qualified.

[00:04:20] William B. Allen: And the only exception to that was in the, uh, the, the grants decision with the University of Michigan in 2003. But that was partnered with the *Grutter* decision, *Grutter v. Bollinger* in 2003, in which Justice Sandra Day O'Connor reaffirmed affirmative action, but with the proviso that it'd be limited in time.

[00:04:42] William B. Allen: She projected a period of 25 years more before fundamental reconsideration would be in order. So, that's what brings us to the present moment and the present reconsideration. It's five years ahead of schedule, but we can discuss in the course of the program why it is occurred at this point rather than waiting until 2028.

[00:05:00] William B. Allen: So, the final question I would add to this with regard to the history of affirmative action is precisely the question of whether it is still possible, within the context of American law to deal with the questions at the heart of affirmative action, or whether they require us to go outside of litigation.

[00:05:20] Jeffrey Rosen: Professor Jeffries, how would you share with our audience the history of affirmative action starting at bargain.

[00:05:26] Hasan Kwame Jeffries: Weigh in a little bit here, um, and add just a few things. Uh. First, I want to, I want to express my appreciation, Jeffrey, for hosting this conversation and, and

making this a town hall for the National Constitution Center. Uh. And express my gratitude, Dr. Allen, for suggesting, uh, this timely conversation and um, inviting me to be a part of it.

[00:05:50] Hasan Kwame Jeffries: Um. You're, you're, you're absolutely right. And you gave us a wonderful history of sort of the last almost, you know, 50 years, we're coming up on almost a half century, um, of affirmative action as it has been debated and discussed then litigated within the courts, um, centering around education.

[00:06:10] Hasan Kwame Jeffries: But of course, you know, education is just one aspect, one area in which affirmative action policies, of course, have been implemented. Originally, you know, I think it's important to note that it was the radical leftist, uh, Richard Nixon, uh, and his administration, uh, that ushers in, uh, the first affirmative action policies.

[00:06:33] Hasan Kwame Jeffries: Uh. And they were targeting, uh, not education, not schools, but rather, um, construction industry, jobs, uh, which was critical, because it, it, it, you know, there was the issue of rampant racial discrimination in the construction trades.

[00:06:52] Hasan Kwame Jeffries: And when thinking about, um, economic opportunity on a very base level, very individual level, I mean, this was one industry in which African-Americans, particularly African-American men, uh, would be capable of participating in and yet had been frozen out.

[00:07:10] Hasan Kwame Jeffries: Uh. And so, we see the Nixon Administration, um, you know, on board with this idea of opening up avenues, opening up opportunities, by requiring those in the construction trades that had some measure of working on federal contracts, uh, to make sure, uh, that they were actually employing, um, and allowing to work, uh, on the, on the sites, uh, African-Americans.

[00:07:37] Hasan Kwame Jeffries: And this, you know, sort of became a, a bit of the model. Uh. And then, of course, we see, you know, what has become sort of the lightning rod. And, and that let's be clear to, uh, was a, was a lightning rod issue itself on the ground in cities like Philadelphia, uh, where you have the construction trades really pushing back hard.

[00:07:56] Hasan Kwame Jeffries: Um. But I, I, I will add this and then, and then, and then we can, we can, we can, we can open it up to, um, to some other questions that Jeffrey have. Um. I think what we... I, I liked the way you framed this question, um, of, you, you know, what has... how affirmative action in education, particularly in the courts has sort of played out.

[00:08:18] Hasan Kwame Jeffries: Because it's been affirmed, as you said, but with these ever-increasing qualifications that have rendered its effectiveness, and it's a... and, and, and... in an explicit way, I think, um, almost nominal. Um.

[00:08:38] Hasan Kwame Jeffries: So, there's what's happening, especially after the 2003 decisions, which the courts did not say, in, in addition to O'Connor's, okay, let's put a, let's put a

timeframe on this, which, uh, you know, which is a subject for a different day. Uh. It would be nice if it all disappear, right, [laughs], but anyway.

[00:08:56] Hasan Kwame Jeffries: But you know, the, the emphasis... one of the things that I saw, um, coming after that, that, that those 2003 Michigan and Texas decisions is a court saying, look, like you can't... let, let... don't, don't put so much weight, right? You, you, you just can't... we don't want to quantify it, right?

[00:09:16] Hasan Kwame Jeffries: We have gotten rid of quotas, "Years before." We're not going to quantify it. You know, it can be considered but it's not going to be numerical. But one of the things that then happened, and, and I saw this at my university at The Ohio State University, is the almost wholesale dropping of race as a serious consideration in admissions and education.

[00:09:38] Hasan Kwame Jeffries: Um. You know, out of fear, potentially a lawsuit, but it wasn't that the Court said you couldn't do it. But then, we see these universities effectively taking steps already, right, 20 years earlier, right? 20 years, you know, ago, taking steps not to push through, uh, with serious consideration of race in admissions in the light. And that has had a real effect.

[00:10:00] Hasan Kwame Jeffries: Um. And we've seen that effect, uh, in terms of admissions and enrollment of African-Americans, students of color, particularly African-Americans over, over the generations. So, it's, it's, it's, you know, a, a long history, half a century almost, uh, in which it has been affirmed.

[00:10:15] Hasan Kwame Jeffries: But it's important to say this has been chip, chipping away, right, over the last couple of decades. And now, we're coming face to face, uh, with the likelihood that it will be, will be totally overturned, uh, in the next month or so.

[00:10:31] Jeffrey Rosen: Thank you both for framing the question so well and for, uh, focusing us now on what's likely to happen at the court, um, as, as you both said and as everyone a-, a-, acknowledges, there's a strong likelihood that affirmative action will be struck down at the court and-

[00:10:47] William B. Allen: Mm-hmm.

[00:10:48] Jeffrey Rosen: ... um, it could be struck down, uh, broadly or, or more narrowly, uh, ranging from the position that the Constitution is colorblind in all circumstances. And I mean, nothing short of remediating past discrimination that's identifiable can justify racial classifications to, to something, uh, narrower.

[00:11:09] Jeffrey Rosen: Uh. Professor Allen, how do you think the majority is likely to strike down a road of action? And on what legal grounds do you think it should strike down affirmative action?

[00:11:20] William B. Allen: Well, I think we can get to that fairly quickly if we take advantage of what Dr. Jeffries introduced when he, he mentioned President Nixon's goals and timetables, which he put on the direction of Arthur Fletcher back and during that administration.

[00:11:35] William B. Allen: That focus so squarely on the question of quotas that the original litigation about affirmative action became a question of whether you can use quotas or not. Ever since then, and this is what reached its peak in the back in decision in 1978, we've been trying to configure race regarding policies of entry, whether into educational or other institutions that could not be determined as quotas.

[00:12:01] William B. Allen: At the same time as we had as in the *Griggs v. Duke Power Company* case, the introduction of disparate impact and disparate treatment and distinguishing between those. I.e., we can justify giving preferences where we can create a documented record of disparate eventualities on the basis of race.

[00:12:25] William B. Allen: Well, we have backed away from all of that effectively. We haven't overturn, of course, disparate impact. We still see it operated in some arenas and the court hasn't squarely faced up to it.

[00:12:36] William B. Allen: So, part of what's going to be happening in the present case is both dealing with the question of the immediate practice of racial preferences without regard to disparate impact, and a review of the significance of disparate impact, the remediation theory that Dr. Jeffries was talking about.

[00:12:55] William B. Allen: So, we are at the point at which, I think Dr. Jeffers is quite right, where we might be saying, once and for all, we're going to put an end to that particular approach to resolving historical deficiencies or injuries. Now, one of the reasons we need to do that is revealed and what the foundation of the present case is out of Harvard and the University of North Carolina is, which is to say, the effect upon people of Asian descent.

[00:13:23] William B. Allen: And we had already put our finger on that emerging problem in the 1980s, when we identified its occurrence at UCLA and University of California Berkeley, that if there would come a time when sooner or later, it would pose a challenge to the whole edifice.

[00:13:39] William B. Allen: So, what we see now is the, the grounds will be whether you can sustain practices that originated with the primary focus on black people, but which has evolved over time to an ever expanding list of constituencies and whether that's compatible with the constitutional order.

[00:13:59] William B. Allen: That's really going to be fundamental ground that the court is taking up. And if it decides to wipe it out altogether, as Dr. Jeffries suggested maybe possible, it's no longer going to be on the basis of colorblindness. They're not going to go back to that dissenting opinion from *Plessy v. Ferguson*.

[00:14:15] William B. Allen: But it's going to be rather on, uh, a more originalist proposition about the Constitution and the definition of equality as equality that is distinguished by equal and fair administration of the laws, that will become the fundamental grounds of the decision.

[00:14:34] Jeffrey Rosen: Professor Jeffries, I'm going to ask you to imagine, uh, right the dissent that you imagine the, the Liberals may write. And I, I know you're... you, you flag for us and you're interested in Justice Jackson's questions at the oral argument suggesting that, uh, proponents of original understanding which, uh, Professor Allen just mentioned, should not strike down affirmative action because the 14th Amendment framers themselves were raised conscious.

[00:14:58] Justice Jackson: I understood that we looked at the history and traditions of the Constitution at what the framers and the founders thought about. And when I drill down to that level of analysis, it became clear to me that the framers themselves adopted, uh, the equal protection clause, the 14th Amendment, the 15th Amendment in a race conscious way.

[00:15:21] Justice Jackson: I don't think that the historical record establishes that the founders, uh, believed that race neutrality or race blindness was required, right? They drafted the Civil Rights Act of 1866, which specifically stated that citizens would have the same civil rights as enjoyed by White citizens.

[00:15:43] Justice Jackson: That's the point of that act. To make sure that the other citizens, the Black citizens would have the same as the White citizens, so they recognized that there was unequal treatment that people, based on their race, we're being treated, uh, unequally.

[00:15:58] Justice Jackson: And importantly, when there was a concern that the Civil Rights Act wouldn't have a constitutional foundation. That's when the 14th Amendment came into play. It was drafted to give a foundational, uh, uh, a constitutional foundation for a piece of legislation that was designed to make people who had less opportunity and less rights equal to White citizens.

[00:16:26] Jeffrey Rosen: Professor Jeffries, tell us about the significance of that clip and, and how you think it may play in the dissent.

[00:16:32] Hasan Kwame Jeffries: Well, I agree with Justice Jackson. Um. You, you know, we're, we're fooling ourselves into instances. If we think that the original framers, the founders of the nation, original framers of the Constitution, were somehow colorblind. They were creating a government to support, prop up, and extend rights using universal language but for propertied White men.

[00:16:56] Hasan Kwame Jeffries: I mean, let's, let's look at that. I think we, we, we ought to be clear about that. And then, this was a nation that fully embraced a belief in White supremacy and the exclusion of enslaved people, African-Americans, indigenous people, from the body politic.

[00:17:12] Hasan Kwame Jeffries: What we see with the 14th Amendment, what we see with the end of the Civil War, is Congress saying and eventually ratified by the states that listen, we understand that the problem of inequality, right, is rooted in race and racism. And so, in order to address these issues, we're going to speak specifically about race.

[00:17:35] Hasan Kwame Jeffries: We're, we're, we're going to say you can't exclude people on the basis of race. You can't discriminate against people on the basis of race. And therefore, in order to protect and make sure that we have, uh, equal opportunity that we have an equal, um, everyone is treated equally and fairly, that it is okay, obviously, to take race into consideration.

[00:18:00] Hasan Kwame Jeffries: I think what we have seen with the courts over, but particularly, specifically, the Roberts Court, uh, is really a, a, a twisting of reality, uh, in terms of making this argument. And, and, and, and, and, and Robertson has made this repeatedly.

[00:18:17] Hasan Kwame Jeffries: We, we, we see it in the *Shelby* decision, um, and, and most likely we're going to see it again, I think, in, in, in, in, in, in whoever writes the majority opinion here, this idea that any consideration of race is itself racist.

[00:18:33] Hasan Kwame Jeffries: And that's absurd, because we're not talking about discriminating considering the race of applicants in education, for example, is not for the purpose of discriminating against people, but rather to make sure that people of a, uh, of people of color, that African-Americans in this historic instance, have equal opportunity, equal access, because these barriers and, and these barriers have been erected over time.

[00:19:01] Hasan Kwame Jeffries: Now, if the court was being serious about... was seriously concerned, and even the, the, the, the petitioners, if they were seriously concerned about access and equal access, they wouldn't be talking about considerations of race in admissions at Harvard or at UNC Chapel Hill, they'd be talking about legacy admissions.

[00:19:26] Hasan Kwame Jeffries: Uh. People who receive extra benefits simply because their parents, their grandparents, their great grandparents, uh, attended the university or are big donors. Far more people, uh, get far more benefit when it comes to consideration of admissions when we consider this sort of legacy criteria than have ever at Harvard or UNC, uh, received the benefits simply because they are African-American.

[00:19:52] Hasan Kwame Jeffries: And so, that raises the question of disingenuousness when it comes to the arguments that we, that, that have been made and likely will serve as the basis for the decision.

[00:20:03] Jeffrey Rosen: Professor Allen, give us, if you will, the, uh, defense of an originalist striking down of affirmative action. This question came up extensively at oral argument. And why do you think as an originalist and textualist that, uh, uh, colorblindness or, or suspicion of race consciousness is well rooted in Texan history?

[00:20:23] William B. Allen: Well, uh, that defense is relatively straightforward and simple and derives from the error in Justice Brown Jackson's discussions in the oral arguments. For she traces a reference to a specific and explicit inclusion of race as, uh, grounds for decision.

[00:20:42] William B. Allen: You won't find that in the language of the 14th Amendment, just as you won't find any explicit recognition of slavery in the original constitution. So, what you have to do is go back to the legislative record.

[00:20:54] William B. Allen: You go back to the legislative record and you find Lyman Trumbull, who, in many ways, is the chief architect of reconstruction policy around which these amendments were eventually framed, who describes exactly and specifically what the intention is.

[00:21:10] William B. Allen: And yes, the reference is to the recently immediately free to people. But what he says is, our goal is to make sure that they are received into the citizen body as full and mature citizens, not as dependent minors.

[00:21:32] William B. Allen: And so, that was the point of reference to affirm the full humanity of the freed persons, and not to distinguish them in the way that Justice, uh, Earl Warren does in *Brown v. Board of Education*, as a people dependent upon the continuing wardship of a superior authority.

[00:21:51] William B. Allen: So, the, the argument for an original understanding doesn't mean that when the reconstruction amendments were passed, everything was settled. It does mean the principles upon which those amendments were passed embraced everyone and did not license race regarding a race specific policies.

[00:22:13] William B. Allen: So, the slaughterhouse cases, which is the only source for an original understanding of the race specific content, and which is therefore the wrong, uh, place to return for an original understanding, made a distinction between the races and set us on the course of treating race regarding policy as the legacy of those amendments.

[00:22:35] William B. Allen: That is where we went awry to begin with. So, so, it's really important for us to understand that when the Civil Rights Acts were passed in 1867 and 1873, and especially when they refer to assuring that Black citizens have the same rights as White citizens. That is correct.

[00:22:53] William B. Allen: But it didn't mean to say that Black people, therefore, had to be the beneficiaries of benign discrimination. The very expression of same rights is enough to lead us away from the expectation of some benign practices in relationship to it. So, the, the historical recent history that is defense of affirmative action as benign discrimination as opposed to malign discrimination is not a reflection of an original intent.

[00:23:24] Jeffrey Rosen: Professor Jeffries, your response? Because I think you both really put your finger on the central question, which is, what, what, what does it mean to, um, have caste legislation that signals of group as subordinate or dependent or less than equal? I, I, I think both sides agree that the framers of the 14th Amendment meant to prohibit caste legislation.

[00:23:47] Jeffrey Rosen: But you seem to be disagreeing about whether or not affirmative action does make African-Americans, uh, equal or suggest that they're, in some sense, dependent? Is, is that right? And, and, and what are your other responses to Professor Allen?

[00:24:04] Hasan Kwame Jeffries: Yeah. I, I, I don't think that the having policies that are designed to ensure access and opportunity to people who are discriminated against, um, creates discrimination against the people you're trying to solve problems for. That I don't quite understand.

[00:24:26] Hasan Kwame Jeffries: I may have to, you know, sit in on a, a, a couple of Dr. Will Allen's classes. You know, I'm, I'm not following that particular logic. In other words, and, and, and, and, and, and, and I also have to, you know, take, take a look, I... I'm just... I'm uncomfortable with this idea of, you know, benign discrimination and malign... and, and, and malign discrimination.

[00:24:48] Hasan Kwame Jeffries: Because we're not talking about discriminating against people. We're saying this is, this is what always has troubled me about sort of, you know, the argument that somehow making sure, ensuring that the door is open is somehow closing it on other people.

[00:25:05] Hasan Kwame Jeffries: And, and that's not the case, right? I mean, we're looking at policies that make sure that African-Americans are not in admissions historically discriminated against. And we cannot pretend as though we haven't had a history of discrimination, where Black folk just simply were not allowed to attend major state universities because they were Black, period.

[00:25:29] Hasan Kwame Jeffries: And so, the question is, okay, once you say, all right, that is unconstitutional, you can't just discriminate against people on the basis of race. And then, finally, we're going to enforce that, that doesn't mean that either the attitudes or the system that had been in place to funnel people into these universities suddenly evaporated.

[00:25:47] Hasan Kwame Jeffries: That, that, that's a timetable, uh, that we have to seriously consider. How long does it take for that kind of equality to be reached will only be determined on how long it takes for the systems that create that equality that have been in place even when you don't have bad actors or ill-intentioned actors, uh, to, to produce full equality of opportunity.

[00:26:12] Hasan Kwame Jeffries: And that's what I think affirmative action even though it isn't a, you know, a solution, uh, was simply designed to do. And I think that is important for, for us to recognize. If we're serious, if we're serious.

[00:26:29] Hasan Kwame Jeffries: Last, if we're serious about addressing problems that have been born of racial discrimination, then we have to be serious about considering race in the solutions that we're proposing to address those issues. Otherwise, otherwise, we're just like, well, we hope that addresses the issue.

[00:26:53] Hasan Kwame Jeffries: Either you want to address the issue of discrimination and its impact or you don't. Because if you're wanting to address it on the basis, uh, you know, racial discrimination, then we got to consider race. Otherwise, we're just playing games. And we're like, "Ah, maybe, maybe it's not so bad, they'll figure it out."

[00:27:08] Jeffrey Rosen: If we wanted to consider discrimination, we have to consider race. And Professor Allen, of course, uh, John Roberts, uh, memorably said the only way to stop discriminating on the basis of race is to stop discriminating on the basis of race. Um. And tell us specifically in, in legal terms, um, um, exactly what the court decision is likely to say.

[00:27:30] Jeffrey Rosen: And we'll repudiate diversity as a compelling interest for, uh, purposes of, uh, racial classifications? And will it then just allow for race consciousness to remedy specific and identifiable acts of past discrimination? And will the court's decision in your view will leave any room for race consciousness in higher education, admissions or not?

[00:27:54] William B. Allen: Uh. I think you've just stated it. Yes, indeed, it will be a denial, uh, of, of access to principles of racial reference as terms of admission and participation. You, you can't have a lottery at the same time that you're having race regarding choices, it's no longer a lottery then.

[00:28:12] William B. Allen: Now, is it ever a lottery? Because that's the question Dr. Jeffries is concerned with. He thinks there's so many ways in which is not a lottery. Uh. That is certainly true within limits. But those limits can't be extended so broadly as to make all terms of entry terms of specific preferences in order to erase discriminatory preferences.

[00:28:36] William B. Allen: It is, it is a case as it seems to me that what Justice Roberts means should be read in the following way. That only if we take race off the table, can we discipline the use of race? For as long as we leave it on the table, people will through subterfuge and otherwise continue to apply it malignly, even though they claim to be doing so for benign purposes.

[00:29:01] William B. Allen: So, what you actually get out of affirmative action is the paternalism that the very patrician Lewis Powell was in fact practicing when he wrote the opinion in Bakke, and that paternalism will reinforce the power to shift from one category of preference to another by discretion.

[00:29:22] William B. Allen: And so, trying to root out those discretion seems to be the only way to make sure the door is open. To quote Dr. Jeffries again, he says it's equal opportunity that is sought, and he's aware that it was Lyndon Johnson who set the tone for us when he told us equal opportunity is not enough.

[00:29:41] William B. Allen: Well, if equal opportunity is the objective, that one must draw the line in such a way that you come as close as possible to a lottery effect. And, and that is where the legal opinion is going to go. I'm not stating it in legal language because I think there's something else going on here and I don't want to deflect us from the conversation.

[00:30:01] William B. Allen: But I think there's something else at stake besides the question of remedying past racial discrimination. And that is the history of a Roberts Court, whether there's going to be a Roberts Court or not. Uh. That was called into question a year ago. It adopts decision, uh, a decision that Roberts was not pleased with.

[00:30:21] William B. Allen: And now, we're standing at the threshold of a moment in which is good is gonna be determined is exactly what rule of prudence. John Roberts is going to follow to try to reestablish that his will be a distinctive court as we what spoke of a Rehnquist Court or a Warren Court or a Marshall court.

[00:30:42] William B. Allen: He may be on the threshold of losing that degree of authority in terms of the breakdown of votes on the court. And so, his decision is in some way, I predict, going to be mediated with reference to that.

[00:30:58] Jeffrey Rosen: That's so interesting. And of course, Chief Justice Roberts would have the opportunity to write the decision if he's in the majority. And what a mediating decision would look like, is a very interesting question.

[00:31:09] Jeffrey Rosen: I'll, I'll ask you, Professor Jeffries, what, what, what... whether you think there's any mediating majority opinion short of a, a version of colorblindness that doesn't allow for racial classifications except for specific acts of past discrimination?

[00:31:24] Jeffrey Rosen: And then, let me ask you to basically write the dissent. Will, will it simply reaffirm Bakke and Grutter and say diversity in higher education is a compelling interest? Or might the liberal justices take a more expansive view about what kind of affirmative action is permissible?

[00:31:39] Hasan Kwame Jeffries: Well, I think that judging from, um, Chief Justice Roberts' opinion in *Shelby*, um, *Shelby v. Holder*, which was a voting rights case. Uh. I think that he signaled where he will land on affirmative action. I mean, we saw there, you know, in which he saying, you know, right?

[00:32:01] Hasan Kwame Jeffries: If, if you consider race, that's the problem. Any consideration, a race is the problem. Um. And you know, therefore, uh, you know, we're not gonna consider it, uh, you know, in, in, in, in going forward. Now, when *Shelby*, it's like, look, there were mechanisms in place.

[00:32:19] Hasan Kwame Jeffries: And, and here, we're talking about the, the, you know, the Voting Rights Act and, and uh, and the, the requirement for preclearance. In other words, those

states that have historically discriminated against African-Americans were required to pre clear changes, uh, to their, to their voting, voting laws, uh, before they went into effect.

[00:32:41] Hasan Kwame Jeffries: And Roberts in that decision very tellingly, uh, says like, "Oh, no. You know, got to change the formula." So, that's the technical ruling, right? The formula is outdated. And I agree with that, it was outdated. It should have been expanded, right, at Ohio.

[00:32:53] Hasan Kwame Jeffries: But the key, the key in that instance was this idea that, you know, because one of the things he says in there is this notion that well, you know, you know, Black people are voting, right? And we see this in the gerrymandering cases that come forward, right? Like increasing numbers of Black people to voting, so how is this a function of discrimination?

[00:33:10] Hasan Kwame Jeffries: And Ruth Bader Ginsburg gives in that dissents. Speaking of dissents, probably, what will be, you know, her, her, her legacy dissent, right, in which she says, you know, if it's... it, you know, if you, if you're out and I'm, I'm, I'm, I'm gonna do a poor job of paraphrasing her.

[00:33:26] Hasan Kwame Jeffries: But instead, if you're walking in the rain and you have an umbrella and you're staying dry because the umbrella is open, you don't remove the umbrella, right, and then get... and then you get surprised that you're wet. Of course, you're gonna get wet.

[00:33:38] Hasan Kwame Jeffries: You're staying dry because of the protections that were in place. Once you remove them, don't be surprised when you get wet. And this is what I'm saying when it comes to this question of, you know, considerations of race. If, if we, we, we've already seen the signs and signals of this.

[00:33:53] Hasan Kwame Jeffries: I was gonna use Ohio State as one example. When they shifted from, uh, considerations more strong, stronger considerations of race in admissions after those 2003 decisions. Over the next 15 years, the percentage of African-Americans at The Ohio State University dropped from 15% to 5%.

[00:34:15] Hasan Kwame Jeffries: We are going to see, and, and we've seen similar things happen in Texas. We've seen similar things happen in California. You know, the terms of access and opportunity at minimum, we have to consider... I would like to see consideration of the race in terms of keeping that door open.

[00:34:33] Hasan Kwame Jeffries: A separate question for a separate townhall is what should we be doing and should we? And I believe we should be striving for equality of outcome, that's, that's separate. And the court is not ready to deal with that yet, right? But the opportunity is so, is so important.

[00:34:47] Hasan Kwame Jeffries: So, I think in the dissent, I think we will see a reaffirmation of the significance of diversity, right, and, and saying that this is critical. It's important to have, you know, so diverse populations, diverse communities, um, and you can't have diverse ideas.

[00:35:04] Hasan Kwame Jeffries: And the creativity that is born of diversity and the impact that it has, uh, on people if you don't have, you know, diverse folk coming into these institutions to higher learning. I, I think more than likely because that's what so much of the argument, uh, has been based in, in, in recent years around this question, the question of diversity.

[00:35:20] Hasan Kwame Jeffries: What is off the table and has been off for so long is the question of redress, right, like, like this, we should be... and I... and I'm a redress person. I think we should be doing more, not less, uh, to, to tackle significantly the legacy of not just slavery but Jim Crow and the way in which it continues to impact people and people today.

[00:35:39] Hasan Kwame Jeffries: I don't think that we will hear anything from the court on that. It might surprise me in that we do. It will be nice. I would love to hear it, you know. Uh. But I think the dissenting opinions will, will attack the basis for the argument, will critique the basis for the argument about the purpose of, of colorblindness.

[00:35:56] Hasan Kwame Jeffries: You got to have color blindness, when in reality, we're just pretending if we think that there are, um, the laws on the books that are on the face, use colorblind language, but we're seeing this again in voting rights that are specifically designed to attack, uh, and disenfranchise African-Americans.

[00:36:13] Hasan Kwame Jeffries: What gives us any reason why we should think that in many of those places that we should... that there will be anything different, uh, when it comes to admissions once that... once those points of opportunity to access are removed.

[00:36:30] Jeffrey Rosen: All right. Now, let's turn to the crucial question of what happens next. Professor Allen, let's imagine that the court strikes down the Harvard and the UNC programs, uh, on the grounds that diversity in higher education is not a compelling interest.

[00:36:44] Jeffrey Rosen: That the 25 years is almost over and that there's no specific discrimination to remedy. Um. What do you imagine university admissions officers will do? And how will they respond?

[00:37:01] William B. Allen: Well, that's where they answer that question is to point to the current environment in which we can say there is decreasing legitimacy for the court in the minds of many people. And so, the reactions are going to be based on the fact that they're unwilling to accept the court as arbiter.

[00:37:16] William B. Allen: Uh. That means two things. One, doing what has been historically the case, finding subterfuges in ways around decisions, creating new grounds for new cases and new decisions.

[00:37:27] William B. Allen: And two, protest. Uh. I would expect lively protest, uh, equally lively, if not more, as what we saw following the *Dobbs* decision by people who will be unreconciled no matter what formulation is used in articulating the decision. The very principles of the legitimacy of the court will be rejected, not as an abstract form of rejection, but rather in the terms of describing this as a partisan judgment and therefore not worthy of respect.

[00:38:02] William B. Allen: Uh. I think I can predict that with almost 98% certainty. And the question then will become whether that will generate large scale protests, that may very well happen. Although, unlike the *Dobbs* decision, this one will occur far enough away from an election that it may not inspire people to put as much energy into it because they're not looking to have an immediate electoral effect.

[00:38:29] William B. Allen: That was the, the really distinguishing feature of the *Dobbs* decision. But there's another element to this, which I will introduce. The protest, of course, will signal the continuation of the efforts to defend, uh, I'll use the terms of gain benign discrimination, to... or at least defend affirmative action.

[00:38:51] William B. Allen: But uh, I think the debate has changed since the emergence of the anti-racism campaign. I don't think antiracism is about affirmative action. And I think what will come to the forefront once a primitive action is always turned is a direct confrontation with the anti-racism campaign.

[00:39:11] William B. Allen: I think that in some ways, uh, that's implicit in what Dr. Jeffries has said. And, and what antiracism means is no longer thinking about remediation, but thinking about a complete revision of power relationships and authority within the society.

[00:39:28] William B. Allen: And so, it is an uncompromising demand that we reconfigure the grounds of our civil association in order to eliminate in the eyes of some historical practices that are unacceptable. I think that will become the ground upon which people will stand and fall in the aftermath of the anti-affirmative action decision.

[00:39:55] Jeffrey Rosen: Professor Jeffries, let me ask you how you believe that universities and society will respond once the court strikes down affirmative action as expected in June?

[00:40:06] Hasan Kwame Jeffries: Well, I think Dr. Allen is right. Um. I fully expect there to be some protests. Um. I, I, I doubt they will. I think there, there will be mitigating factors in terms of size. Uh. And scope, I think one of the mitigating factors is likely this will happen during June, so it will happen during summer where most universities, uh, will not have, um, you know, many or most of their students on campus.

[00:40:32] Hasan Kwame Jeffries: So, that will be a mitigating factor as well as the fact that it's not brushing up against, uh, an election. Um. So, you know, I think the protests might be limited in scale and scope, but I certainly think that will be there.

[00:40:44] Hasan Kwame Jeffries: And I think we, we may not see them in an immediate sense, but perhaps, and on sort of a rolling basis, as it... as, as state.... legislatures state governments, state governors, um, and uh, universities begin to issue particular mandates or change policies that become clear.

[00:41:06] Hasan Kwame Jeffries: And so, I can almost imagine immediately, uh, Mississippi, Florida, Alabama. Ron DeSantis, um, you know, you know, saying that race will not be considered in any way, shape, or form in any way, this, that and the other. Uh. And we're doing away with diverse.

[00:41:24] Hasan Kwame Jeffries: I mean, he's always trying to do, do away with these things, uh, uh, right now. And so, that will just add sort of win to his sale, win to their sale. Um. So, that will be one thing, I think, one of the reactions that we'll see. Another reaction that will trickle down and have, uh, an, an impact on the largest state university to public universities.

[00:41:43] Hasan Kwame Jeffries: But of course, this is, you know, we're talking about Harvard University, so with, with some of the impact on private universities as well. And there, I think, we will have to wait and see, uh, to how, you know, sort of universities reconfigure and reimagine.

[00:41:56] Hasan Kwame Jeffries: My guess is that we'll see, you know, a lot more sort of socio-economic, um, sort of framing of admissions, which was the response to, um, uh, the 2003 decisions. Okay, we'll just, we'll just, we'll just do away with race and we'll look at socio economics and these sort of other factors, you know, which will catch some, but obviously not catch all.

[00:42:19] Hasan Kwame Jeffries: Um. And, and, and then, lastly, I think, you know, Dr. Allen is absolutely right. I mean, one of the things that came out of the summer 2020 was sort of young people calling for an end to systemic racism, and, and talking about sort of anti-race and saying, "Listen, we got to deal with the ways in which inequality is, is, is sort of built in."

[00:42:39] Hasan Kwame Jeffries: Racial discrimination is sort of embedded in some of our systems and structures. And if we're going to deal with that, then we are talking about, you know, a wholesale change, the way in which we reimagine much of what we do not just, you know, at the, the point of admissions.

[00:42:56] Hasan Kwame Jeffries: Because in many ways, that's almost too late, it's always almost been too late, that we have to be thinking about, you know, sort of education, uh, from the beginning, right, from, from, from preschool and K, uh, kindergarten, the early grades.

[00:43:11] Hasan Kwame Jeffries: You know, if we ever dealt with that in a substantial way, then the question of admissions, uh, would be off the table. Uh. But we haven't dealt with the early, we've put the burden on universities and we're, we're... we've been trying to play catch up

there. So, hopefully, this will force us to look more expansively at ways to create change and opportunity.

[00:43:33] Jeffrey Rosen: Well, you both put on the table several important reactions ranging from protest, uh, efforts to implement the decision. Um. Professor Allen, you called it subterfuge.

[00:43:47] Jeffrey Rosen: And, and Professor Jefferies, you, you called it, you know, an effort to get questions of race involving other means like socio-economic, uh, focus and also, uh, questioning of, of the nature of the, of the movement for, uh, Black equality and what its goals are.

[00:44:05] Jeffrey Rosen: Um. Let's focus on the practical response of admissions officers and what can they do? This was a question Justice Barrett asked at the oral argument. Uh. Professor Allen, will people be allowed to put in their essays accounts of how, uh, they overcame racial discrimination.

[00:44:21] Jeffrey Rosen: And how can and can't universities take that into account as they make their admissions decisions? What did you mean by subterfuge and how do you think it'll pan out?

[00:44:33] William B. Allen: Well, uh, by substitutes, I meant, of course, that there are ways in which to talk about holistic decision making that are simply a cover for making race-based decisions. And so, I think you'll still see some of that effort in universities. Uh. As to what people are permitted to put in their applications, uh, certainly, there'll be no limitation on that, they will describe themselves in self-identifying terms.

[00:44:56] William B. Allen: Of course, we're living in an age now in which we grant to people the discretion to identify as they will, which makes it problematic to take those things very seriously, since you, you might always get the, the Rachel Dolezal effect. Uh. So, so, you don't know from those declarations exactly what it is you're looking at.

[00:45:15] William B. Allen: But it is also the case that seems to be and I've, I've written about this with... to great extent in many of my publications. There's a lot to do for admissions officers if they got off their butts and reached out to people properly. And I've done it personally as a deed.

[00:45:31] William B. Allen: They can go into communities and make opportunities known to people where they aren't always known. I've always told people, look, my mother always wanted me to go to Harvard University when I graduated high school. Uh. She, she had this... what... fascination. [laughs].

[00:45:48] William B. Allen: But of course, we were poor, coming from a small southern town. And we had no idea what, what... I mean, I could qualify the into Harvard, we didn't know how

to get there, we had no money to do it with. And there was no outreach to us to provide us that gateway.

[00:46:04] William B. Allen: And so, there is plenty of room for robust outreach if people were serious about their commitment to change in terms of engagement in these regards. And I always say to people, if you don't see that robust outreach into distant pathways, you know, they're lying about their commitments to make a positive contribution.

[00:46:29] Jeffrey Rosen: Professor Jeffries, how do you think admissions officers will respond given the fact that people can describe their experiences with their racial identities on their essays? And, and given the fact that many universities are now test optional? Will the decision change things all that much or not?

[00:46:50] Hasan Kwame Jeffries: Well, I'm hopeful that, um, colleges and universities and particularly those of, um, that historically have, have not had a strong presence of African-Americans and people of color, that they will do exactly what Dr. Allen suggest that they should do. That's exactly it, a robust policy and action of recruitment.

[00:47:11] Hasan Kwame Jeffries: You know, um, Ohio State University, majority of players on the, on the football team, uh, for the Ohio State University. And Dr. Allen understands how, you know, big 10 football works. [laughs]. Uh. And that, you know, majority of his brothers playing on his football team.

[00:47:27] Hasan Kwame Jeffries: They don't just miraculously show up, they are recruited, right? I mean, there's a robust effort to reach into neighborhoods and recruit talent, and that talent is these young, African-American, African-American men and student. We can be doing the same thing if we wanted to.

[00:47:43] Hasan Kwame Jeffries: And so, I am hopeful that there will be that sort of response. I am afraid though that we will not see that in enough places. I'm afraid that, uh, universities out of fear of being sued, because this is what we saw on... in, in 2003, we'll pull back and, and, and pretend as though they're doing something and, and, and are not doing nearly enough.

[00:48:09] Hasan Kwame Jeffries: Well, we'll say that their hands are tied and they, they can't reach into the communities, uh, that they should be reaching into. And, and so, I think the, the, the unfortunate effect will be that we, we don't see that kind of robust engagement that we see with recruiting, uh, African-Americans to play sports.

[00:48:27] Hasan Kwame Jeffries: Uh. And therefore, we will see an unfortunate decline, and in some places, a precipitous decline, uh, in the presence of African-Americans, uh, on the college campus.

[00:48:39] Jeffrey Rosen: Professor Allen, might a decision establishing um, um, a more colorblind approach to the 14th Amendment? Have legal implications and other spheres and

employment and promotion in hiring and firing? And of course, Title VI may be construed here too to be more colorblind. Uh. Could you imagine it transforming the legal landscape?

[00:49:07] William B. Allen: Uh. Of course. And in fact, the most emphatic influence or effect of the decision will be throughout the federal workforce. For, for we are embedded with so many policies there and practices that foster recourse to permit of action loosely describe that there will be a thorough housecleaning will be necessary following the decision.

[00:49:29] William B. Allen: That's where the greatest trauma is actually going to be experienced. It won't be in the large corporations because they can pretend to clean it up just as they pretended that they were doing something else before that.

[00:49:39] William B. Allen: They, they, they have such a wide scope of discretion that they aren't terribly worried and don't have to worry about someone looking closely over their shoulders. But the federal workforce and to some extent state workforces, they will come under close scrutiny.

[00:49:55] Hasan Kwame Jeffries: If I may, Jeff. Dr. Allen is, is, is absolutely right. And I'm especially concerned about that because the federal government, state government in general, has done a much better job of being open and providing access to, uh, African-Americans, uh, and people of color.

[00:50:15] Hasan Kwame Jeffries: But historically, African Americans, disproportionately the Black middle, the Black middle class, uh, works for government, uh, because government has followed these policies of, uh, of equal employment, uh, of, of creating these opportunities.

[00:50:32] Hasan Kwame Jeffries: And so, if we do have this sort of housecleaning, uh, as Dr. Allen suggests, and it ... and, and is very likely, uh, to occur, I think that will have a disproportionate and unfortunate, uh, impact on African-Americans and the Black middle class, who for so long, uh, have found, um, the government employment, uh, not dependency, not creating dependency.

[00:50:57] Hasan Kwame Jeffries: We do, in fact, need a government, right, to do certain things. That government employment has been a point of entry into the middle class, uh, because so many other doors in the private sector have been, have been closed. So, I'm, I'm concerned, I'm concerned, uh, about that fate and future.

[00:51:14] Jeffrey Rosen: So, so interesting. I think this may be closing thoughts, although it's clear that we must bring you both back after the decision actually comes down and, and, and continue the discussion, because you're both so incredibly illuminating on this crucial topic.

[00:51:27] Jeffrey Rosen: But Professor Allen, you suggested that there was about to be a historic clash between what the Supreme Court says is legally and constitutionally permissible in the goals of what you described as the anti-racism movement, which is to redistribute power in

society. Tell us more about that clash and how do you think that the courts and society will resolve it?

[00:51:49] William B. Allen: I think what we'll see happening is a ratcheting up of the effort to delegitimize the court. That's a short-term gamble that's being pursued already. It's short term in the sense that people do not see an opportunity to make a genuine impact on legal interpretation, unless they can develop the political thrusts to gain a temporary foothold there and develop the kinds of decisions they would wish to impose.

[00:52:14] William B. Allen: So, they can do that if they can delegitimize the court within the short-term horizon, while it's still possible to get new appointments to the court, force people off the court.

[00:52:25] William B. Allen: And therefore, that means you're going to have a heightened volubility to the rhetoric of instability and delegitimization over the course of the next 15 months. This is going to be the critical period and I think that's what's going to follow from it.

[00:52:41] Jeffrey Rosen: Professor Jeffries, last word to you. How, how, how do you think, uh, society will resolve this clash we're about to see between the court and the portions of the citizens?

[00:52:54] Hasan Kwame Jeffries: Well, I think there will be a questioning of the legitimacy of the court. Um. But it's interesting, because I think the, the blueprint or the playbook that Dr. Allen that you just laid out is what political conservatives, uh, was their playbook.

[00:53:11] Hasan Kwame Jeffries: I mean, this for the last two and a half, two and a half decades, um, until they gained the majority on the court calling out the court against the activist judges, you know, those activist judges, activist judge, activist judges. Now, we have a majority on the court, no more activist judges, right?

[00:53:29] Hasan Kwame Jeffries: Now, the court suddenly has this renewed legitimacy. And when we look at some of the contemporary actions of, uh, justices and then how they arrived on the court, I think it is legitimate, uh, to question, not the legitimacy, uh, but rather the credibility, right, the integrity.

[00:53:50] Hasan Kwame Jeffries: I, I think that's different. I think we should, uh, you know, always question in all of our institutions, you know, the credibility of the people who were there. Um. But I think it's important that we acknowledge the legitimacy, um, of, of the court, of the branches of government.

[00:54:07] Hasan Kwame Jeffries: Uh. Because in the absence of that, what do we have? I mean, that's just, that's just chaos. Uh. And so, we don't want that. Uh. But we also have to demand integrity, so that decisions even when we disagree with them, uh, we can believe that they came from a place of, um, sincerity, uh, and not, uh, uh, sort of base ideology.

[00:54:29] Hasan Kwame Jeffries: Uh. And, and it's hard to see, uh, given the current some of the previous rulings, uh, that that will be the case or it will be this ruling will be received that way, uh, going forward.

[00:54:44] Jeffrey Rosen: Professor Allen and Professor Jeffries, thank you so much, really providing a model for civil thoughtful dialogue on this most contentious of all issues. It's an honor to host this debate. I learned so much from them and I, I know our listeners do too. And I'm very eager to see you both again after the decision comes down. Professor Allen, Professor Jeffries, thank you so much for joining.

[00:55:07] William B. Allen: It's been a pleasure to join you and thank you.

[00:55:09] Hasan Kwame Jeffries: Absolute pleasure. Thank you.

Jeffrey Rosen: This episode was produced by John Guerra, Tanaya Tauber, Lana Ulrich and Bill Pollock. It was engineered by the National Constitution Center's AV team. Research was provided by Sam Desai, Lana Ulrich, and the constitutional content team. Please recommend the show to friends, colleagues, or anyone who's eager for a weekly dose of constitutional, illumination and civil debate. And if you enjoyed the episode, please also subscribe to *Live at the National Constitution Center* that's on Apple Podcast, Stitcher, or your favorite app. And it's the live feed from all of our great debates at the NCC. You can sign up for our newsletter@constitutioncenter.org slash connect. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, and the engagement of people across the country who are inspired by our nonpartisan mission of constitutional education and debate. Support the mission by becoming a member@constitutioncenter.org slash membership, or give a donation of any amount to support our work, including [this podcast@constitutioncenter.org](mailto:podcast@constitutioncenter.org) slash donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.