

[Transcript] Honestly with Bari Weiss / Affirmative Action, Gay Rights, and Free Speech: What The Supreme Court's Rulings Mean for America

Hi guys, it's Barry with a really exciting announcement for you. As listeners of the show will know, one of the reasons that this exists in the first place is to embody and promote honest, frank conversations and good faith debates, both of which feel increasingly rare in our polarized country. That is why I'm so excited to announce that the Free Press, along with FIRE, the nation's leading defender of free speech rights, are hosting a live debate on a very sexy and contentious subject on Wednesday, September 13th at 7 p.m. at the historic Ace Theatre in downtown Los Angeles. The proposition? The sexual revolution has failed. Arguing for the proposition is co-host of the podcast Redscare, Anacachian, and author of the case against the sexual revolution, Louise Perry. They're going to be facing off against musician and producer Grimes, and writer and co-host of the podcast A Special Place in Hell, Sarah Hader. I'm going to be the moderator and I couldn't be more excited. This is going to be an amazing night. It's a chance to meet other people in the real world who also like thinking for themselves and who listen to this show. You can get your tickets now by going to [thefp.com backslash debates](https://thefp.com/backslash/debates). Again, that's [thefp.com slash debates](https://thefp.com/slash/debates). I can't wait to meet some of you guys in person. And now, here's the show. I'm Barry Weiss, and this is Honestly. We've got some breaking news this morning. The Supreme Court has struck down race-based admissions policies in colleges as unconstitutional. We're following some breaking news out of Washington. The Supreme Court struck down President Biden's plan to cancel up to \$20,000 in student loan debt for millions of Americans. We come on the air with breaking news from the Supreme Court at this hour. The justice is deciding on a pair of cases, sweeping implications here for the First Amendment, anti-discrimination laws, as well as student debt. And the court has just ruled now on the first of those cases. Last week, the Supreme Court came down with a flurry of highly anticipated decisions. The Supreme Court ended its term this past week with the Sixth Justice Conservative Supermajority flexing its muscles to make big changes in law and society. Two of them got a lot of attention. This one's certain to have a lasting impact on millions of Americans, students across this country. The court has just handed down a decision on affirmative action. Students for fair admissions, a nonprofit organization had sued the...

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One effectively ended affirmative action in higher education.
Now striking down both Harvard and UNC's program
when it comes to race used in admissions, the court going forward...
And the second ruled that a web designer in Colorado
could refuse to make a wedding website for a same-sex couple.
And the court has held that that website designer
does not have to, that free speech is her right
and that Colorado's anti-discrimination law
cannot force her to do this website for same-sex couples
if she does not want to.
So let's go right to...
Two very big decisions, and the prevailing sentiment
coming out of the mainstream media over the last week has been this.
These are the sorry consequences of a conservative majority court.
And ruling after ruling, the conservatives on this court
have worked to turn back the clock on the rights
of disenfranchised citizens in this country.
Go down the list from abortion rights to voting rights
to a fair and affordable education
to the right to openly express your sexual orientation, even gender identity.
This court has made its central mission
to undo progress wherever it sees it.
This court not only overturned Roe v. Wade last year
in a major setback to women's rights,
but now they've undone decades of precedent,
precedent that helped historically disadvantaged students
have a chance at the American dream.
Since Roe was overturned, it is clear this court has no qualms
about undoing long-established precedent.
And believe me, there were mountains of precedent
upholding the constitutionality of affirmative action in America,
specifically because of the 50-year Republican project
aimed at destroying that policy.
And a decision that's sending us backwards by weakening gay rights.
This is absolutely discrimination.
It is giving license to businesses to deny services to LGBTQ plus people
simply for being who we are, simply for loving who we love.
Now, I also think it's true that what the...
This ruling and a bunch of other rulings from this court
pains me, and it pains me personally.
This decision is wrong.
It is absolutely wrong.
And so the Supreme Court just made it possible for private businesses

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to discriminate against people like me
simply because they fear that they might have to do something
that no one asked them to do.

This decision is definitely a poison on society,
also because it's so broad.

Who's to say that it doesn't stop at web designers or private businesses,
that it doesn't lead to more erosion of rights for protected classes?

The courts, if they were to proceed without any check on their power,
without any balance on their power,

then we will start to see an undemocratic and, frankly,
dangerous authoritarian expansion of power in the Supreme Court,
which is what we are seeing now,

from the overturning of abortion rights to the ruling that discrimination...

When President Joe Biden was asked at the end of a press conference
about whether or not this is a rogue court...

Is this a rogue court?

Joe Biden basically seemed to say yes.

This is not a normal court.

He muttered, this isn't a normal court as he walked through the door.

Well, is that true?

Is this court not normal?

Or do these decisions reflect a legitimate reading of the Constitution?

To help separate signal from noise, fact from hyperbole,

today I've invited three legal experts that I'm really excited to talk to.

Harry Litman is an attorney who has clerked for two Supreme Court justices,
Thurgood Marshall and Anthony Kennedy.

Jeanie Sue Gerson is a writer for The New Yorker.

She clerked for David Souter.

And lastly, Sarah Isgar is a columnist for The Dispatch,
an ABC contributor.

She clerked for the Fifth Circuit

and served as the Justice Department spokeswoman
during the Trump administration.

We'll be right back after a quick break.

Hi, honestly listeners.

I'm here to tell you about an alternative investing platform called Masterworks.

I know investing in finance can be overwhelming,
especially given our economic climate.

But there's one thing that will never go in the red,
and that is a painting from Picasso's Blue Period.

Masterworks is an exclusive community that invests in blue chip art.

They buy a piece of art and then they file that work with the SEC.

It's almost like filing for an IPO.

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You buy a share representing an investment in the art. Then Masterworks holds the piece for three to 10 years, and then when they sell it, you get a prorated portion of the profit's minus fees. Masterworks has sold \$45 million worth of art to date from artists like Andy Warhol, Banksy, and Monet. Over 700,000 investors are using Masterworks to get in on the art market. So go to masterworks.com slash honestly for priority access. That's masterworks.com slash honestly. You can also find important Regulation A disclosures at masterworks.com slash cd. Jeanie, Sarah, Harry, welcome to Honestly. Great to be here. Thanks very good to be here. Thank you.

So to start, I think what would be most helpful is if we go through each of these three cases and talk through what was actually decided, what the reasoning of the majority was, where Americans actually stand on the issues, and what the impacts of the ruling will be, legally, culturally, and politically. And then at the end, I want to have a conversation about the Roberts Court more generally, and the faith that Americans have or don't have in the Supreme Court as an American institution. Okay, so let's start with the affirmative action ruling, which seemed to be the biggest case of the term. We've got some breaking news this morning.

The Supreme Court has struck down race-based admissions policies in colleges as unconstitutional. The court ruled against Harvard University and the University of North Carolina into cases brought by the group Students for Fair Admissions, which have argued that the school's affirmative action policies discriminate against white and Asian-American applicants. The rulings broke down along partisan lines. Sarah, I wonder if you could walk me through the two suits that were brought to the court by students for fair admissions. One against Harvard and one against UNC Chapel Hill,

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the nation's oldest private
and oldest public college, respectively.
And just lay out, if you could, for me the facts of the case.
How did this case reach the Supreme Court
and what was being argued by the plaintiffs?
Well, there's two cases here.
There's the Harvard case
and the University of North Carolina.
And a group of Asian-American students
argued that they were being discriminated against
based on Harvard and North Carolina's
specific admissions policies.
Now, those admissions policies were slightly different
between the two schools,
but the records were not great for the schools
in the sense that, by and large,
the number of Asian students percentage-wise for the class
had stayed remarkably similar over a long number of years.
They had, particularly in the Harvard case,
a lot of conversations, frankly, between admissions officials,
making sort of gross racial stereotypes,
both about Asian students,
but also about other racial groups of students.
And the group of Asian-American students
argued that these policies violated
the 14th Amendment Equal Protection Clause
and violated the Civil Rights Act as well.
The Supreme Court holding in both cases
that, in fact, yes, these admissions policies
did violate the Constitution.
And so the actual holding of the Supreme Court
is to strike down Harvard and North Carolina's admissions policies.
But, of course, lots of schools use admission policies
like Harvard and North Carolina's,
which is why we have to sort of get into
what specifically the court said
was wrong with those admissions policies.
And for that, I think there can be some real,
honest conversations and disagreements
over what will be allowed moving forward.
But you have states like California, Michigan, Texas,
that, by state law, banned affirmative action.
I mean, California banned it in 1996.

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It went into effect in 1998.

So we have long-running big public popular schools that have been doing versions of this for a long time.

And then across that spectrum, you also have schools that have been using checkboxes, you know, check your race here.

And so that's what we're sort of talking about now after the Supreme Court's decided this case is where along the spectrum the Supreme Court is saying your new admissions policy can fall.

Here's what Justice Roberts wrote.

Many universities have for too long concluded wrongly that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin.

He went on, our constitutional history does not tolerate that choice.

The student, he said, must be treated based on his or her experiences as an individual, not on the basis of race.

And current policies, he added, fly in the face of our colorblind constitution.

Jeannie, help me understand what the court's majority decided in these cases and why.

I think it's really important to distinguish in the opinion, in Roberts' opinion, the idea of taking race into account as race in itself and taking into account, as he said, challenges bested and, you know, hardships that have been overcome or things that have been inspired by because of your race.

So in a key sentence in the ruling that I think a lot of people are focusing on, he says nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.

So essentially, this is not saying you can't consider race at all, it's saying you have to consider it in a certain way.

If an applicant discusses it and explains how it is important to them, then that's part of understanding who they are as a person, as an individual, not just as a member of a race.

So I consider that to be a really, really big deal that that was made very explicit because lots of people

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before the decision were saying, oh, what does this mean that somehow people are going to have to be blind to race, like actually blind to race, that students are not going to be able to discuss their race, that that seemed really implausible both as a practical matter and also as a matter of really first amendment. It just seems like it would go against the rights of expression and free speech of applicants applying to, especially to state schools and just wouldn't work. And so I'm really glad that the court made this clear that you can keep writing about your race and discussing it and having people consider it. Let's place these two decisions in a bit of historical context. Affirmative action is first instituted in the 60s, and then in 2003, it was upheld in the landmark case, Gruder v. Bollinger. The United States Supreme Court issued a pair of affirmative action rulings today. The first major clarification of this controversial issue in a generation taken together today's rulings uphold affirmative action in principle as a way to promote racial fairness and diversity at public universities, but limit its use in practice. Gruder, the Supreme Court ruled that an admissions process, in this case, the admissions process at the University of Michigan Law School, that favors, quote, underrepresented minority groups did not violate the 14th Amendment's equal protection clause. In her majority opinion in that case, Justice O'Connor wrote this. In the context of higher education, student body diversity is a compelling state interest that can justify the narrowly tailored use of race and admissions. We expect that 25 years from now, the use of racial preferences will no longer be necessary. Race-conscious admissions policies must be limited in time. The court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. So I would just want to pause on that for a second, because what I hear O'Connor saying is this, affirmative action is a tool to essentially write historic evils, to write past wrongs, which I can very much buy, frankly. But I have a hard time understanding

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what her constitutional justification for it was.

And, Harry, I wonder if you can help me understand O'Connor's argument, because if something is legal, why should it ever become illegal 25 years from the day of the case?

Yeah, it's an excellent point.

I think Sarah's summary of the case is right as far as it goes, but kind of does miss the headline.

I think that is totally right as a statement of law for the Asian-American students.

The difficulty, of course, is that the District Court and Court of Appeals, the fact finders here, said the exact opposite.

But the case, I think, clearly stands for the proposition that that 2003 case and the 1985 case that preceded it are no longer good law.

That's what a majority of the court actually said expressly.

Now, that statement by O'Connor Berry, she certainly made it there.

I don't think anyone took it then as this kind of holding of what the Equal Protection Clause requires.

Everyone agrees that affirmative action plans have to be limited in some way and time,

and Harvard and North Carolina tried to explain why theirs was.

But the case has to stand for the proposition, does stand for the proposition that that 2003 case, the 1985 case that preceded it, are dead letters, even though the court didn't say so expressly.

And then if somebody tried to bring it up again, they would be thrown out of court because the 2023 case had completely laid waste to those precedents.

Berry, can I jump in and just ask Harry, I guess, a clarifying question?

Because he's saying that it was very clear that the 2003 precedent that we're talking about, Grutter from the University of Michigan was overturned by a majority of the court, even though the Chief Justice's opinion didn't say that.

And in fact, you have a concurrence by Justice Kavanaugh explicitly saying that this doesn't overrule that.

So by my count, then, you don't have a majority.

You're down.

You've got four justices at most.

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Justice Thomas, for instance, did say,
by his understanding, this overturns Grutter,
but that's four, not five.
So where's the majority coming from
on overturning the precedent?
Yeah, so actually that's mistaken
because not just Thomas and Gorsuch,
but also Sotomayor, Kagan, and in the North Carolina case,
Jackson all said expressly that.
So first, you have a majority of the court saying expressly,
that Grutter's been overruled.
But second, it's just a fact, Grutter's been overruled.
Just think about if somebody came back now
and tried to institute the same affirmative action program.
I think there's no doubt that the court would strike it down.
But five members of the court absolutely said
that we have overruled the 2003 opinion in Grutter.
But three were in dissent.
The dissent doesn't get to say whether precedent's been overturned.
Actually, 100% it does.
Look at the Tidewater case and many others.
Five members of the court have said
it's overturned.
That's in fact impeccable reasoning that five get to say it.
But moreover, as I say there,
the more important point is it's just plainly true
that Grutter is a dead letter.
I don't think you're disagreeing with that.
I don't think it's so important which votes were where.
I think the substance of the SSFA decision
in saying that diversity, student body diversity,
is not a compelling interest.
What could that be other than an overruling of Grutter
and of the cases before that took as a given
that diversity is a compelling interest?
So given that that's no longer the case, that's an overruling.
Okay, but I don't want to lose the listener
in sort of like the legal weeds.
One sentence which is like it's so key though, Barry,
that for 45 years the court was not allowed to think like that,
to think like because of past wrongs,
we're going to remedy some past wrongs
and that's what affirmative action is about.

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It's so important that that wasn't even on the table in 2023.
The only thing that was on the table as potentially permissible
was a compelling interest in achieving student body diversity,
which is very different from the let's remedy some historical wrongs.
It's so important to me not as a legal weed matter,
but as a matter of like what we as a society think
affirmative action is trying to accomplish.
To agree with Jeannie, here in the affirmative action case,
the history of discrimination wasn't how the schools
were justifying their affirmative action policies,
they were justifying them as creating a diverse educational experience.
And the court basically said no, that's not compelling,
even though in these other two cases a history of discrimination was compelling.
And so I'd be very interested in future cases.
I think schools will move to the history of discrimination
argument. The problem for schools like Harvard
is if you want to look at the history of discrimination,
they're the ones who have the history of discrimination.
Of course, the whole holistic application process
as it was first created by Harvard was for the purpose of discriminating
against Jewish students to ensure that there weren't too many
sort of unwanted Jews in a Harvard class.
Let's talk about the reactions, right?
So on the one hand you have Joe Biden coming out in the wake of this decision
saying, we cannot let this decision be the last word,
discrimination still exists in America.
Today's decision does not change that.
And then you have Republicans like Tim Scott,
the only black Republican senator in the country saying,
this is the day where we understand that being judged
by the content of our character and not the color of our skin
is what the Constitution wants.
I wonder who you think has the better argument,
because I hear them talking in a way past each other.
One is making a political argument and one is making a legal argument.
So how does the political argument for correcting for discrimination
differ from the legal argument of a colorblind Constitution?
Jeannie, maybe let's start with you.
Well, the two that you quoted and the content of what you just quoted
is exactly what makes this such a difficult problem
that has persisted in terms of no social consensus for a long time.
And I have to say, there's even a lack of social consensus right now
on what a majority of people actually believe.

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On the left, you hear people say,
oh, a majority of people want affirmative action.
And on the right, you hear people say,
majority of people disfavor affirmative action.
So we just can't even agree on what the actual stats are.
My own perception is affirmative action has been hanging by a thread
for a very long time and certainly since 2003,
we knew in Grutter, all of us were younger lawyers then.
And when that came down, we knew that that was like kind of a Hail Mary
and that Justice O'Connor, as a swing justice,
saved affirmative action from the jaws of defeat.
And everyone I think who was a court watcher at that time,
you know, I was in my 20s.
And I think all of us knew this is a save
that is not going to last for our entire lifetimes.
That's just clear.
And so it's no surprise at all that in 2023,
affirmative action has been declared to be unconstitutional.
But it doesn't mean that Congress or state courts can do things
to react to the decision to ameliorate it.
And I basically think that both sides that you quoted have a lot of merit.
And it's just a really difficult issue to resolve.
I completely get feeling like I do not want to feel like my chances
of getting something are less because of my skin color
or even more because of my skin color.
I really completely get that.
But I also understand and feel very sympathetic to the idea
that looking at the entire society, the history of our country,
and the systemic disadvantages that exist for many groups
and the systemic advantages that exist for other groups
that got to do something to try to deal with that inequality.
And affirmative action is one imperfect solution,
but now it will not be done.
And so other imperfect solutions will have to come up in its wake.
Sarah, when you hear the Scott quote and the Biden quote,
I just hear them as talking on like different planes.
You know, it's funny because I actually felt the same thing
reading the majority, the justices in the majority,
and the justices in the dissent.
They were talking about totally different worlds in some respects.
The justices in the majority really focusing on the legal constraints
of the 14th Amendment and how race can be used as simply sort of an on-off switch,
sort of grouping people by race.

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And you have the dissent talking about historical discrimination and the immediate aftermath of the 14th Amendment with the Freedman's Bureau or even with the original founding of Howard University. Frankly, I think if you read both, you'll find both to be well written and deeply persuasive in their own way, but talking about totally different things. As far as where I think the country lies, you know, I look at California as being pretty good evidence. This is a deeply blue state that I mentioned, banned affirmative action back in 1996. There have been efforts to undo that even in very recent years. Those have failed in a deeply blue state. So I don't think this is just along the political spectrum of our culture wars and like, well, it's right and left and we're never going to solve it. We don't know where people are. Actually, it's not as easy as it's just following along this one access between red and blue. There's something else going on here. Now, I personally think issue polls are pretty useless on something like this. So I don't like looking at polling. I'd much rather look at how people use their feet at the ballot box, because frankly, both sides are cherry picking polls, asking very interesting poll questions to get the results they want. So I guess I would just warn listeners, if you're sitting there going, but what about the CBS poll or whatever? My answer is you can kind of light it on fire. And I'll give an example. If you asked, do people believe that universities should be able to use race in their admissions policies? You'll find a little over 60% saying no. And if you ask people whether the Supreme Court should overturn the use of race in admissions policies, you'll find about 60% of people saying no. So issue polling, what are you going to do? The polling that you should be looking at is the trend over time. And what's incredible about affirmative action is the trend over time has stayed remarkably consistent for the past 30 years of American life. OK, well, speaking of the 14th Amendment, Sarah, it seems to me that the justices just fundamentally interpret the Equal Protection Clause of the 14th Amendment differently. You have Justice Thomas writing, while I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country will live up to its principles,

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that all men are created equal, are equal citizens,
and must be treated equally before the law.
In other words, for Thomas and the other conservative justices,
the Equal Protection Clause means that the state must be colorblind.
But for the dissenting judges, for the liberal judges,
the Equal Protection Clause does in fact take race into account
because its whole purpose was to ensure equality
for black Americans in the wake of the Civil War,
and that the state can't be colorblind given its history.
Is that a fair characterization of the two sides?
And Harry, I wonder what you make of that tension
if I'm capturing it correctly.
Yeah, I think you are.
And I actually agree with pretty much everything Sarah and Jeanne have just said,
including the foibles of polls.
But I think you have two extremely different visions
and that you have essentially a majority,
I would say six, endorsing a colorblindness principle.
And that, you know, actually saying the way to end discrimination
is to stop discriminating.
And the dissenter saying no, it always was and has to be color sensitive.
My immediate take on that is it's probably a policy question,
not an Equal Protection Clause question,
better left to Congress or the different states.
But to the other points you raised, I do want to say,
it's pretty odd that Biden's got things,
and I'll add someone else to it.
Sotomayor says at the end of her opinion,
basically it's still going to happen.
So there's a widespread prediction.
I would take the law to be, uh-uh, we're finished.
It doesn't matter what students might write,
but universities can take it into account.
But I think everyone is anticipating some kind of use,
which is a little odd after the Supreme Court has held so definitively.
And I think what's going on,
you had brief after brief from different industries saying,
you've got to keep this.
It's not just about what happens at schools,
it's about a pipeline of possible minority candidates and the like.
People take it to be,
it sounds to me like maybe Sarah and Jeannie do as well,
an exigency even though the court has basically outlawed it.

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And the idea is they'll find some way around it,
but I take the law to be pretty darn categorical saying,
you may not do it.

And yet I think they will.

In her dissent, Justice Sotomayor wrote this,
what was true in the 1860s, and again in 1954 is true today,
equality requires acknowledgement of inequality.

Katenji Brown Jackson wrote in her own dissenting opinion
with let them eat cake obliviousness today.

The majority pulls the ripcord and announces
color blindness for all by legal fiat,

but deeming race irrelevant in law does not make it so in life.

Sarah, I imagine you are the least sympathetic to those kind of arguments,
but what is your most generous read of what Justice Sotomayor
and Katenji Brown Jackson are saying in those arguments?

Do you see any merit to those claims?

I guess I actually agree.

It's a totally different point to find that the law requires schools
not to treat people, individuals, as members of a group
and instead to treat them as individuals

while saying that that doesn't mean that we got rid of racism overnight.

Declaring the law colorblind is not the same thing
as declaring society colorblind, that's just true.

And I don't know that anyone's arguing with her on that point,
but that's not what the case was about.

The case was about whether these individual students
deserved individual consideration for admissions
or whether they should be considered part of a group.

And with schools like Harvard, you just had terrible facts in the record
that, frankly, the justice is in dissent.

A lot of the folks on the left don't want to talk about.

There's now been this complaint filed with the Department of Justice
against Harvard by those on the left,
arguing that their legacy admissions policy
is actually racially discriminatory.

I don't know how much legal merit I think that has,
but it sure has a lot of political merit with me,
which is this idea that Harvard was given every opportunity
for this not to go to the Supreme Court, frankly,
where I think they knew they were going to lose,
but 30% of their class is based on legacy admissions.

Well, guess what that legacy is of?

Discriminating against non-white kids,

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whether they're Jewish or Asian or black or Latino.
So the legacy admissions was heavily white.
The Dean's List kids are basically kids of famous people.
And then the athletes, and we're not talking about a football team here,
we are, but we're not.
We're talking about these sort of niche athletes
that also are primarily white.
So Harvard put their thumb on the scale
by admitting a whole bunch of extra white kids,
and then was like, no, no, we want diversity.
We want our Benetton ad, basically.
So we're going to then group people together by race
so we can fill out the rest of our class.
They were shown an admissions policy
where they simply lowered their number of that 30% group,
that legacy athletic admissions group.
And it would lower their SAT score by,
I believe it was 10 points if they did that,
and they could achieve the exact same amount
of racial diversity in their class.
And Harvard said, no, we really like our legacy admissions.
And also, we can't possibly reduce our SAT score.
That would hurt our sort of standing among other schools.
Well, wait, which is it?
Is it that the SAT doesn't matter so you can get rid of it?
And we actually just care about diversity?
Or is it that, no, the SAT deeply matters,
and we very much need to consider it,
and we need all of these legacy wealthy kids?
Because in the end, what happened is,
Harvard wasn't picking 2,000 students
to have the most interesting conversation.
They were creating this Benetton ad
based on how people looked, what checkboxes they made.
And that's what the record showed.
That's what was pretty gross about it,
because the vast, vast majority of kids at Harvard
were extremely wealthy.
And what, only, I mean, Harry's gonna have this
at the tip of his fingers, maybe better than me,
but what, 6% of these students in a Harvard incoming class
represented the bottom 50% of median and below incomes
in the United States.

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They weren't interested in diversity.
They were interested in saying that they had diversity.
But, Sarah, just one quick point.
You agree, don't you, that the district court
held against your view of the facts.
For good or for bad, you interpret them one way,
but the facts as interpreted to the court
were exactly otherwise, no?
Well, this is where some of Genie's reporting comes in very,
I'll let Genie take it, because she had great reporting
on things that the district court
did not allow people to see at the time.
Okay, but that's correct, right, the district court?
I don't agree, Harry.
First of all, I do think that the Supreme Court
has the ability to revisit the facts.
So I'm not sure what it means at this point
to say the district court disagreed.
And I'll just say that.
I don't think the Supreme Court did revisit the facts.
You're right about that, Harry.
I don't think that they went out of their way
to say that Asians were discriminated against
in any way other than just the generic way
that affirmative action is, according to the Supreme Court,
inherently discriminatory because it's not colorblind.
But the specific claim of discrimination
against Asian Americans was not really vindicated,
I think, in the Supreme Court.
They just didn't go there because they didn't need to.
They just wanted to knock out affirmative action.
In the district court, I will venture to guess that
all of you, if you had sat there day in and day out
with the trial evidence being what it was,
you would have been pretty disturbed at what you saw.
And what the district court said was,
it's not enough for me to find
that this is intentional discrimination.
What she said was, it seems like there's some implicit bias
against Asian Americans, and that was based
not on the idea that affirmative action
inherently discriminates against anyone,
but the idea that Harvard was favoring

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white students over Asian Americans.
And that is what the trial was about.
The trial did not involve affirmative action
being put on trial, even though everyone knew
that that was eventually where it was going to go
at the Supreme Court level.
The district court trial, the factual evidence
was about whether Harvard preferred white students
over Asian American ones.
And on that, the district court said,
I just find that this is not intentional.
Jeannie, you were there sort of day in and day out.
For those that weren't following the cases closely,
can you just give listeners a sense of what you heard
that you argue if all of us had been paying attention to it,
we would have been disgusted?
Well, I think one thing that would have been upsetting
for me to find out about the university that employs me
is that, of course, they try to recruit students
from areas of the country where it's hard
to get students to apply.
And they tend to be the Western kind of states,
the sort of Nevada's, the Utah's, the areas like that
that Harvard calls sparse country.
And in those areas, they send recruitment letters.
And the evidence clearly showed it was not disputed,
Harvard definitely did not dispute it,
that they would send letters based on SAT cutoffs
to try to get people to apply.
And if you were a white student in one of those states,
like say Nevada, then you would have to get
a certain SAT score in order to receive,
I think it was something like 1310, if you were a white boy.
But if you were an Asian boy, you had to score like a 1380.
On the test, the SAT scored in order to get a recruitment letter
from Harvard saying, hey, we really hope you'll apply.
And if you were an Asian girl, it was a little bit lower than 1380,
but it was still higher than the score
that a white boy would have to get in Nevada to receive this letter.
And that that is a pure racial cutoff
that the Harvard admissions office is using
to try to recruit certain kind of students to come to Harvard.
And there wasn't really a good explanation

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for why they use different cutoffs for white and Asian.
Now, in a world of affirmative action,
you can understand why they would use differential SAT cutoffs
for Asian and white versus underrepresented minorities,
like Hispanic and black applicants.
But there wasn't a sufficient explanation
for why you would use differential cutoffs
for white versus Asian.
So that was one big piece of evidence.
The other one was that despite the fact that Asian students
were getting better scores from the admissions office
and from admissions officials on interviews and extracurriculars
and on the SAT and on grades, like those considerations,
they were doing better than white students on the scores, right?
Not just the SATs and grades,
but also extracurricular and alumni interviews.
Those were Asian students were doing better than white students.
Nevertheless, at the admissions office,
at the end of the day, when they gave these students
what was called an overall rating,
the admissions officers consistently gave Asian students
lower scores than white applicants.
And this was partly accomplished by giving Asian students
what was called a personal rating that was lower,
not only than white students, but than every other group.
So what was the personal rating based on?
It was supposed to be based on interviews
and essays and recommendations from high school administrators and teachers.
And so if Asians were doing really well on the interviews,
then the other two must have been really, really bad
for Asian personal scores to be that low.
And so that was Harvard's position at the Supreme Court Oral Argument,
which is like, look, it was based on those three things,
and that's what the personal score was.
We have no way of actually seeing what the scores were for the essays
and for recommendations were,
but we do know that the interviews Asians did better than whites.
There's an argument on the left about these Supreme Court cases,
and it goes something like this.
White people are using Asians as tools to end affirmative action.
They don't actually care about discrimination against Asian Americans.
They care about protecting their own group.
There was this NPR story I read last week

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in which the reporter wrote that Edward Blum is the founder of Students for Fair Admissions, conservative activist who was the force behind the case, was merely, quote, tapping into a narrative that affirmative action was targeting Asian Americans. A narrative, in other words, not a reality. Here's another quote from an activist that was interviewed on NPR. Asians were standing in as proxies for white students. Asians serve as this sort of mask that white privilege can wear in order to hide itself. There was another headline I read last week that said, affirmative action ruling shows how marginalized groups are co-opted, and I could go on and on. Jeannie, in discovery for this case, and as you just laid out for us, it came out that Harvard discriminated against Asians by giving them these lower personality ratings, and that sounds pretty specific to Asians. So how do you understand the way that places like NPR have characterized this, and are you sympathetic at all to that argument? Well, I'm not super sympathetic to the way that the left has characterized the Asian role, nor am I particularly sympathetic to the right-wing narrative about the Asian role. I'm not sympathetic to either, because it's really clear to me that these really were two different kinds of claims. One that were really combined, in this case, litigated. They were distinct if you watched the entire litigation and saw how it went, but in the public mind, they were completely just sort of confounded and all became one, which is that the first is, did Harvard and other schools discriminate against Asian Americans vis-a-vis white applicants? That's a certain kind of discrimination that was definitely a claim that was litigated in this case. That was the entire trial in 2018, white versus Asian, that comparison. And the other one was, should affirmative action be eliminated, because it discriminates against anyone of a race that is not an underrepresented minority who would get a plus in the admissions process, and that would involve both Asians and whites being discriminated against. Those are two separate claims, but they were brought under the same complaint, multiple counts, and they were brought in the same case. And I think that the media and commentators, both liberal and conservative, really pretty much thought of them as one and the same. And for people on the left, it was really impossible for them, and I'm going to count myself as one of the people on the left. It was really hard to acknowledge even the possibility

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that Asians could be discriminated against at all in the admissions process, because there was such fear that if you acknowledged that that was even possible, then that would mean that it would undermine affirmative action. And on the right wing, it was like if you championed the Asian American students as the victims of discrimination in the admissions process, then that could be a cudgel with which to attack affirmative action. And I would just say both sides really got it wrong. They're two different claims. You could think that Asians should not be discriminated against while fully supporting the policy of giving a plus to underrepresented minorities. And that has been what I would have hoped could occur, but I just don't think the left was at all capable or in the mood to do that because they were so scared of losing affirmative action. And so the incentive there was to completely minimize the possibility of Asian Americans being discriminated against. I want to ask a question about diversity because one side argues that without affirmative action, colleges won't be able to meet their diversity goals. And the other side seems to argue that perhaps racial diversity is an unworthy goal in the first place. Justice Thomas said this earlier in the case and I can't say I disagree. He said, I've heard the word diversity quite a few times and I don't have a clue what it means. Citing the generality of terms like black and Asian, Justice Roberts argued that the use of these opaque racial categories undermines diversity. So I wanted to ask all of you, how do you understand the virtue of diversity in an educational setting? Is it an important goal or is it something that automatically reduces people to sort of being avatars of their racial or ethnic groups? One thing to disaggregate is student body diversity as a whole and then racial diversity, which is a subset of overall student body diversity. I think that probably most people agree that an educational environment that is lacking diversity at all, like everyone is exactly the same from the same exact place in same political views. We talk a lot about how diversity enhances the educational experience. I think that's pretty uncontroversial. What is controversial is whether you have to try for racial diversity because of the special place that race occupies in our country and in our constitutional system. And for some people, that means it's verboten and other people, it means it's especially important to try for racial diversity. But I do think the whole idea of you want people on campus and you want them to be different from each other, I don't really see how that is controversial,

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whether it's like you want musical people who play musical instruments and other people who are interested in architecture, you want some scientists and you want some mathematicians and you want some people who want to do the humanities. It's just that seems like, yes, of course, that's important to the goal. And then where race gets into it, when people talk about racial diversity, the interesting thing is often when they explain why racial diversity is important, they don't mean it's important to have people with different color skin on campus. The defenders of racial diversity are often talking about what you bring to the table as an individual because of your experiences and your different perspectives. So I personally think that the escape valve that the Supreme Court opinion by Justice Roberts provides, so it's just say, hey, nothing here says you can't take into account the perspective that someone brings in terms of how race affected their lives and shaped their views or shaped their future. All of that's fair game. I think that that is the way that often defenders of affirmative action explain why diversity is important and why it's important to take race into account. I'll go one step further and argue that in fact, lots of defenders of affirmative action think that's how admissions policies work. And they think that's what was struck down and I think people of good faith really believe that. I think the problem in reality is that these admissions departments are the laziest form of diversity imaginable because as I said, Harvard could increase diversity on campus, any number of ways, any number of different types of diversity. They don't want to because the easiest way to do it is to ask people to check one of these race boxes that frankly aren't even particularly valuable. Justice Gorsuch writes in his concurrence about how blunt an instrument these race boxes are. Asians, as defined by Harvard, make up 60% of the world's population. There's no difference whether your parents were in Japanese internment camps, just immigrated from China or from the Philippines, have been in this country for hundreds of years. All Asian, same with Latino, same with Black, right? The descendants of slaves are treated the same as someone whose parents are incredibly wealthy from an African country. So that's not diversity the way that I think the true defenders of affirmative action have defined diversity. And if your goal is to have an interesting conversation and bring different perspectives in the classroom, I don't see how you do that with those check boxes. You've got to look at the individual students and see what diversity they can bring to your school. That's not what was happening at these schools beforehand. The Supreme Court has said that would be just fine if they did that and race were a part of any of what those students bring diversity-wise. You just can't rely on lazy check boxes. And I've made this joke, it's not like a joke joke, but about the Benetton ad idea.

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But this idea that you're making a, quote, diverse class, because you can take a photo of your class and pat yourself on the back and go home at 4 p.m. every day while making really disgusting, crude, gross race jokes about the very students that you're looking at.

You know, oh, well, that kid's smart for a Native American kid, or too bad that kid's Asian. He looked so, you know, his numbers looked good otherwise.

Not to mention, of course, Jeannie, of course, the original reporting on one of the actual jokes being told by an admissions officer to the very people at the Department of Justice who were supposed to be protecting these kids' civil rights.

And then that, of course, was sealed from the public until Jeannie reported it.

So diversity as defended by the people of good faith, I'll join them.

I think diversity is wildly important in education.

But you can't build diversity with, you know, these gross, and I don't mean gross as in yucky, I mean gross as in large, untechnical boxes of humans.

It's just going to be way more expensive.

Yep.

It's just going to be so much more expensive.

Well, if only Harvard had some money.

Yeah, right, exactly.

Jeannie's point about discrimination against Asian Americans as she stated it, I think, is solid.

But this is a Supreme Court review, and what's very important is to note that was at most an afterthought to what the court is actually saying.

On your actual question about diversity, I think what Sarah's offered is really a caricature of why she's called out a few different things in the record.

The court overall, the district court found it wasn't discriminatory.

We could quibble with that, but I think this notion of it's just a checkbox system, the universities would roundly dispute, and they already spend tons of money in having a whole industry there.

But the direct answer to your question, Barry, is that, yeah, defenders have affirmative action. And I see the difficulties on both sides, but defenders will say it's not enough to simply try to re-translate what different racial groups can bring to the table in terms of disadvantages and the like.

That the studies that they put into the record, the shape of the river by the Harvard presidents and other things do say that there is a way in which literally having racial diversity matters.

And you're right that Robert said, what the heck does that mean for the first time?

And they did, they said, well, look, it's leaders of tomorrow, it's the academic experience of people there.

And in terms of the first point, you did have a whole bevy of industries urging the court not to do what the court did, saying you're going to make a huge social change.

It's going to make it much harder for us to get these folks.

Finally, you're right also that the other things that some people on this podcast would

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say are the more honest, straight and direct ways of justifying a firm reaction.

They were taken off the table by the court as far back as the Bakke case in the late 80s.

So the notion that the colleges were doing their best to rationalize and explain the value of diversity, including specifically racial diversity is because that's the hand they were given to play.

And so what they said was very much according to the law and the arguments that lost were exactly the ones that had won before precisely the arguments that but the court just accepted different ones here.

But the answer to your question is proponents of diversity and affirmative actions say specifically it's not enough to use proxies of traits you really do need.

That's why in fact the University of California, as Sarah said, has done these pretty strong medicine stuff like forgetting about standardized tests because it's not enough to have poor kids they think race really matters.

And just think about it, this is why Sotomayor is saying at the end, you go to tour one of these places and it looks like a 1950s all-white school, including with people from different backgrounds, the universities will just say this doesn't look like America and it's a problem.

And I think we all agree that that's a problem and the question is how to combat it.

Barry, can I raise one definition of diversity that I actually do want to reject?

Yeah, go ahead.

Because again, I think this is part of the problem.

We don't all agree on the definition of diversity.

Agreed, yeah.

And again, I think people of good faith can have different definitions of diversity.

There's different definitions of diversity that I think are meaningful like what Jeannie was describing, having different people with different interests, thoughts, experiences coming together in an educational environment, clearly important.

And I think everyone agrees that is a type of diversity.

But what has been created of late is this idea of adversity being the definition of diversity.

And you know how if anyone in business will know what you measure is what will matter?

There's a version of that going on culturally with these young kids where it's now just out victim hooding each other and constantly thinking about their struggles and constantly thinking about ways they've been put upon, some of which aren't really them, right?

Their mom was a single mom who was an immigrant or etc.

Like that's not your struggle.

That's your mom's struggle that is different, I think.

And I'd want very much to find a way to define diversity where it does take into account that your parents paid God only knows how much for a college counselor and you went to the best prep schools and you got the same scores and the same grades and you took the same AP test as the kid who had none of that.

Well then, yeah, I think schools should be able to look at those two kids realistically about which one might add more to their class.

But that's different than making the victim hood Olympics and calling it diversity because I think you're going to end up with a generation that is very unprepared to be those leaders

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in the future in the country.

And you know, we're off the legal topic now into more of a cultural topic, but I think it's pretty important to how these schools will respond to the Supreme Court's opinion in simply having, for instance, you know, the next laziest version is an essay question that says, tell us about adversity or discrimination you've overcome.

And again, it's going to happen no matter what now, right?

It's already happening.

Yeah.

And I think, I think these kids are in trouble.

So I agree.

Look, I agree.

And I think there's a very interesting connection between grievance culture and affirmative action.

I'll just say that the diversity practice that the universities who've really done this carefully will say is already doing that.

And they will also say you cannot be completely colorblind about it.

That's their experience.

And it was odd for the court to just override it.

Jeannie, you wrote in The New Yorker, you said the outcomes of this decision could leave Asian applicants worse off than they are now.

How do you figure?

Oh, that's because if schools have to stop considering race as a plus factor, which of course they will after this case, they have to come up with other ways to do their admissions processes.

And one of the ways is to try to get rid of categories of evaluation on which Asian and American students have done very well.

And one of those would be SAT scores.

Right.

And for example, Asian Americans, it's not a secret.

Lots of poor Asian Americans flock to, say, public magnet schools.

Their parents will invest a lot in getting them into Stuyvesant, New York.

Yeah, to get them into those kinds of free magnet schools.

And it's not enough to just use socioeconomic diversity in certain areas.

Asian Americans are quite poor.

Right.

So you have to come up with, what you're trying to do is make room in the class for underrepresented minorities to reduce the overrepresented minorities,

Asian Americans being the key overrepresented minority.

Then you're going to have to get rid of considerations that Asian Americans do well on.

And those are race neutral.

Like, let's say, for the sake of argument, Harvard's entire process becomes overwhelmed and predominantly about the personal rating.

That's a race neutral measure.

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They could make the personal rating much more important than it was in the past.

And we've got a district court opinion, as Harry points out, that says that was not discrimination.

So Harvard's like, yay, that wasn't discrimination.

We can do that even more.

Right.

We can continue to say that Asian Americans have bad personalities or whatever they were saying.

Exactly. We've been given a gold star by the district court, and the Supreme Court didn't say otherwise.

So we can just make that a much bigger part of our process.

We can get rid of all the reasons that Asian Americans think they're even entitled to spots, namely that they do well on tests.

So forget about tests or at least deemphasize them for a lot of the process, just make it really, really unimportant.

California.

Right. So California, exactly.

So you can do all kinds of stuff like that.

And so at the end of the day, are Asians going to be helped or are they going to be hurt?

There's a scenario that I can see in which Asians are hurt,

because they overwhelmingly might not have the kind of social capital

and the connections and things like that that lead to

doing well on these kinds of more discretionary, thought-race-neutral measures.

Last question on this, and then I want to move to Kay Wright's one sentence from each of you.

Good decision or bad decision?

Do you support what the court decided?

Sarah, let's start with you.

Boy, I think that's hard because I think these schools are actually just going to keep doing what they're doing and go underground.

And it's going to be harder for students to know what they're actually being judged on.

And I think you do end up with some sort of victim Olympics

or worse, as Jeannie described, the very students who are being discriminated against

to bring this suit in the first place actually just face more,

but more underground forms of, quote-unquote, race-neutral discrimination,

which we've already seen in schools like Thomas Jefferson

and that litigation that's going on as well.

But from a constitutional perspective, good decision or bad decision?

Correct decision.

Okay, Harry?

Yeah, terrible decision.

It just simply lays waste to precedent of 45 years

with no real justification offers and does it covertly.

The court leaves it to itself to say what is enough,

what discrimination should be, and the like.

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That's a common theme here.

And for that reason, just simply endorsing the previous arguments that lost was really part of their overall bloodbath of the last few days of the term.

Jeannie, I don't think any reporter in the country has covered this more closely than you.

Good decision, bad decision?

The Supreme Court decision, I think, is a bad decision.

I disagree with it mainly because Justice Thomas is going to great lengths to say the colorblind vision is what the correct vision of the 14th Amendment and I don't think that he's got the history right.

So even on an originalist argument, I think the 14th Amendment is color-conscious and that's one reason, but I also think policy-wise,

it doesn't make sense for reasons that Justice Ginsburg and my boss,

Justice Souter, said in earlier decisions that these are ways of making things more underground, having actors hide what they're doing.

This is exactly what's going to happen.

Race is going to go underground as opposed to just being more transparent.

I favor more transparency and when you tell people race is a factor that honestly forecasts to people what the admissions process will be.

We'll be right back after a quick break.

Let's move on to this case in Colorado, which, depending on who you talk to, is either a case about compelled speech or a case about gay rights.

Harry, would you mind laying out the facts of this strange case?

Sure. A web designer in Colorado, among other things, wanted to do, she had not started to, wedding websites of the sort I think we're all familiar with.

They give a schedule and they give a gift registry and the like.

She asserted that based on what Colorado had done in the past, if she did that and did not take the business of same-sex couples,

that Colorado would punish her under its accommodations law, which says that people who are running businesses can't discriminate on the basis of certain protected characteristics, including sexual orientation.

A series of stipulated facts said that this was expressive conduct, not speech exactly, but expressive conduct.

She said that it would amount to compelled speech in violation of her free speech rights under the First Amendment because it would require her to propound the message that she's in favor of same-sex marriage, which in fact she is not in favor of based on her own religious views. So Justice Gorsuch wrote the majority opinion and in it he calls freedom of speech and expression the North Star of our Constitution.

The court is apparently holding that the First Amendment bars Colorado from forcing this website designer to create expressive design speaking messages with which the designer disagrees. Here's what he says at the end of his decision.

He says, tolerance, not coercion, is our nation's answer.

The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish,

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not as the government demands because Colorado seeks to deny that promise, the judgment is reversed.

So 6-3 in favor of that web designer as we now wait.

In it he calls freedom of speech and expression the North Star of our Constitution.

But I think everyone who's followed this case is wondering,

well what does the court consider to be speech and expression versus just a service that's being provided? I thought it was really interesting that during the case Justice Jackson gave this hypothetical and here's the hypothetical. There's a photography business at the mall during Christmas

and it wants to set up a 1950s nostalgia scene and so it refuses to have Black kids sit on Santa's lap because it's not in line with their vision of the 1950s.

And she I think rightfully asks, would they be protected under this ruling?

So I want to put that question to all of you.

What is the line between refusing someone a service and compelling their speech?

Sarah, maybe let's start with you.

I think what's interesting to me about this case is how uninteresting the majority opinion is in terms of being just wholly in line with a bunch of our other free speech cases.

Why is that? Because Colorado had actually stipulated to all of the facts that people might find worth debating about this case. Why Colorado then wanted to basically stipulate all those facts and pursue this to the Supreme Court with this Supreme Court is a little bit baffling actually. They kind of intentionally lost this case it looks like to me.

So they stipulated for instance that this was creative expression, that this was her speech.

All things that for instance in a previous case about a floral designer,

a floral arrangement called Arlene's Flowers, the Supreme Court didn't take that case I think in large part because we're really going to sit there and have a whole Supreme Court argument about whether floral arrangements were speech, were they creative enough, all of this stuff.

So in that sense, once Colorado had conceded all of these facts in favor of Lori Smith, the website designer, the lower court here had ruled two to one that by virtue of her being an artist, a creator, that somehow she was a monopoly of one and that therefore the government had an interest, a compelling interest in forcing her to create speech against her that she didn't want to create because she was a monopoly. And what Gorsuch's opinion and the majority says is basically what are you kidding me? That's the weirdest idea ever. It basically means the better you are as an artist, the more valuable you are, the more well-known you are, the more interest the government has in telling you what you have to say or not say.

And it's why you get into all of these hypotheticals, Barry, like the one that

Judge Jackson raised at Oral Argument, but all of these others as well. I saw people online saying, I'm not going to serve Trump voters anymore. Well, nope. Actually, one of the concessions that Colorado made was that the website designer would serve gay customers. She just wouldn't create

a wedding website for them. So that was already conceded. She wasn't discriminating against them because they're gay. I saw other people saying online that a henna artist was like, I won't make henna tattoos of crosses for people. Yeah, that's actually what the Supreme Court opinion says you don't have to do. If you're an artist and you're Jewish, you don't have to make a swastika cake.

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Or if you're Muslim, you don't have to make a long live Israel cake or some, you know, all of these different iterations of people's speech that they don't want to say on behalf of other people. And I think it gets to this very fundamental part of free speech that I feel incredibly strongly about. I think one of the proudest moments in our country's history is when the Supreme Court held that the Nazis could march in Skokie through a predominantly Jewish neighborhood of Holocaust survivors. There is no speech more odious out there. There might be ties for it, but not more odious. Look, this is about odious speech. We have long held in this country that you have a right to believe and say things that the rest of us don't like. If free speech only protected the speech we agree with, we wouldn't need to protect it at all. And so for those who don't like what she believes, don't want to agree with her on that, great. But that's how you know that your speech is protected, too. In her 38-page dissent, Justice Sotomayor wrote, today the court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. What do you make of the dissent's argument, Jeannie? Well, I've been pretty disturbed, first of all, just by the way in which that sentence that you read from Sotomayor and then the way that people have described this decision makes it sound like the Supreme Court said you can just be turned away if you go into a store because you're gay. And that's just not what the Supreme Court said. And I think it's pretty disturbing that lots and lots of people, including on the left and the right, are kind of describing it this way. And it's just not accurate. And I don't like the fact that Sotomayor expressed in her dissent that that's what the Supreme Court said. So Jeannie, when the AP says, like puts out a headline, like in a defeat for gay rights or Axios, PBS, CNN, the Daily Beast, all characterize this ruling as one that, quote, limits LGBTQ protections. Is that just inaccurate? I don't think it's inaccurate to say it limits LGBTQ protections. I wouldn't go that far. But I think it is inaccurate to say, after this decision, now it's open season on turning people away from stores or from anyone who just doesn't want to do business or serve gay people. That's just plain inaccurate. I think it's dangerous. And the idea that lots and lots of gay people and gay kids, I have several, are we going to be told that? So I'm not happy about that messaging at all. But I also want to say that I don't think this was an easy case. I don't think it was a slam dunk in either direction. I happen to agree with the lower court that this would survive strict scrutiny because of the compelling state interest in anti-discrimination. But at the same time, I understand. But I also think that a lot of it depends on who the specific people are and what religions they are. If you ask a bunch of people, at least people I know, is it okay for a kosher caterer to say, I am not going to cater your wedding because this is an intermarriage between a Nanju and a Jew, even though one family is Jewish and the other is not? We don't approve of that kind of marriage. So this is a little bit more on all fours because it's about a marriage. And if the kosher caterer says, I will do any other event that you want to do, but I will not do an interfaith wedding because that's just not something that I approve of. I don't even think of it as a real wedding. That would be closely related. And I myself have always, I mean, I've heard of those situations and I always thought of that as like completely okay and plausible and within the free exercise rights and the free speech rights of the caterer, even though it didn't specifically involve as much expression as even a web designer. I think it's the sympathies all shift because this is about gay people. Do you have a real right to like not be discriminated against on the basis of your interfaith marriage status? Well, not as

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much. You could make that argument that being discriminated on the basis of your gay marriage status is actually more upsetting, disturbing and discrimination than being discriminated against on other bases, like being a Trump supporter or whatever. That's not a protected category. Harry, Biden said that he's concerned that this decision could invite more discrimination against gay Americans. Do you share that concern? Do you think that that's founded in reality? Certainly the rationale, Barry, there are some hypotheticals going around that are probably not that likely, but they could be. The opinion is sort of like a loaded weapon. I really do think that you've been discussing to date a different case. This really is. It's just accurate to say it's the first time in the court's history that it's granted business open to the public, a constitutional right to refuse to serve members. The difference between her and an artist, one understands with an artist, it's not open to the public to all comers. But website designers, manicures or gardeners, they are people who generally hold open their business. And the state of Colorado did not concede or stipulate it was free speech, which they said is it was expressive conduct, but they specifically argued the court and it was rejected. But it's the first time that in fact she wasn't being compelled. But one of the several problems here is the absence of a limiting principle. I know a few people have fired questions at me. So let me just do the hypothetical where the couple goes to next door and says, they just turned me down because we're same sex and the designer said, oh, that's not a problem for me. However, you are interracial and I got to tell you, I don't believe that it's a good idea to have interracial marriages. What result under 303 creative? Isn't it not indistinguishable and doesn't that person have a right to discriminate because it's a marriage between people of different races? I think that under this ruling, if someone's making the claim that this is their religious belief and their religious belief says that. But it needn't be religious, right, under the opinion. That's true. That's true. Just sincere. Yeah. Yeah, that it doesn't need to be religious, but you should not be compelled to speak. And all of the action going forward in that hypothetical that you presented, Harry, and also the one about the kosher caterer isn't come down to, is this a compelled expression or speech? Yeah. Because so many businesses are not. And so it depends on how expansive your idea or the court's idea of what is expressive and what is not. I mean, there's a version of this on which every decision I make and in every way in which I interact with the world is a form of expression, even in my business and a way in which almost none of it is. And so just all of us as writers and content producers, I mean, do I want to be compelled to provide, say, my ghost writing or editing services to somebody who comes to me and says, actually, I want to write a book that is a screed against gay people? Do I want to be compelled to do that? I absolutely do not. But you're not an accommodation who holds yourself to all comers as others. But that's the real difference. Let's say I were. Let's say I said, I put out a website and says, I am a ghost writer. I'll take anybody except gay people. No, but Harry, it's not, it's not but gay people. That's in fact exactly what the court said this was not. That was part of the concession. I didn't say it was gay people. I said gay marriage. You said, well, you actually said gay people just now. But let's say I put out a like, you know, I'm genie, I provide ghost writing and editorial services. So contact me if you want to do that. Somebody comes with a book that I just don't want to work on because of its content. And because of my beliefs, whether they're religious or not, I want to have the right to turn them down. And you do under the law, what you don't have the right to is to turn them down.

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Because if what you're saying that this is tantamount to saying, I like gay marriage, just as people said, by the way, this is another instance that where all the losers one just automatically people did argue in the sixties, if you force me to integrate, this is tantamount to my saying, I agree with integration when I don't. That's exactly what the accommodation laws have always been in the real distinction. It may be what they said, but that wasn't correct. That was analytically not correct to say, oh, if I need to integrate. But and it's just been accepted. Genie and Sarah, Harry's insisting that this is the same as that. You obviously disagree. For me, let's take the manicurist point. You walk into a manicurist, they can't turn you away because you're black, but they can turn you away if you want swastikas drawn on each of your nails. That's the difference. And that's where Harry, I think, is saying, well, it's open to the public. Yep. And so they can't say, I'm not serving you because of one of your protected qualities, race, religion, national origin. What am I missing? Oh, sexual orientation, obviously. But it's the message that you're asking them to convey. And so, yeah, look, I think that is, in my example, odious speech. I don't want to make your website because you're an interracial couple. But yes, I also think that when you're talking about the parade of horrors, by which we need the worst options on either side, either you have to paint swastikas on people's nails, or you can be forced to make a website for an interracial couple, something that most of us, the vast majority of us, are like, ugh, of course you should do that. Which one can the government force you to do? I'd rather the answer be none of the above than all of the above. Yeah. And that's a very instructive concession because the question is, is the website designer stating, I really support gay marriage or is she just doing a website? But what if someone, just to continue the manicurist analogy for one second, what if someone came in, what if I came in and said, I'm getting married to my fiancée tomorrow, can you do my nails for my same-sex wedding tomorrow? Under this ruling, could the manicurist say, I'm not doing them because I don't support your marriage tomorrow? No, they would have to do your nails. 100% she could. That's a fine hypo. This is a really great hypo because I think I completely disagree with Harry. That means hypothetical for those who have not been in law school. Yes, she didn't go on. I think that you've really hit upon a key disagreement in terms of how we interpret this decision. Harry is indicating that that person could be turned away, that you could be turned away. And I am indicating that based on my read of this decision, no way. In no way does this Supreme Court decision says you can turn that person away on the basis of their sexual orientation. And I agree, no way can you turn that person away. So the manicurist in doing the nails is not saying, I like same-sex marriage, but the website designer in doing a website is, I guess, that's your point? Yes, because she has to type the words, this is a beautiful marriage and she doesn't believe it is a marriage, sort of like Jeannie's ghost writing example. Yeah, maybe it's someone else's name on the cover, but it's Jeannie writing the words, I don't like gay people. And she's like, no, I don't want to use my services and my skills to write that sentence, even if it's going to be under your name, because I don't believe that. And I think it's fair to say that has always been covered by the discrimination ordinance, but now it isn't. There's a bit of a controversy that's erupted around this case that goes beyond the content of the case. Colorado's attorney general has called

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the suit a made up case and says that the court shouldn't have heard it because it has no basis in reality. And that's because the plaintiff, this web designer, Lori Smith, has never actually been forced to make a wedding website for a gay couple. The whole case is something called a pre-enforcement challenge. And her argument is that current Colorado law would compel her to make the website. Is this a common way to make a ruling, or is this something so exceptional that it would justify the attorney general of the state calling it a made up case? Harry? It's a really rare instance. Look, I think everyone conservative and liberal would agree that if people made this up and put it in front of the court, first, pre-enforcement review doesn't say anything. You still have to have standing. If they did it and hoodwink the court, it's really bad. And we may or may not find it out. But I think the court will still let it stand under a special rarefied doctrine for just the court saying once we've decided, even if there wasn't standing, we get to go forward. Okay. Let me ask one more question about this, because I think listeners are going to be confused by what they're reading. One of the reasons that some people have claimed that this is a fake case is the fact that Laurie Smith, the web designer, cited an email request from a guy named Stuart. And she claimed that this guy named Stuart reached out to her in 2016 about making a website for his marriage to a person named Mike. And you would assume that that would be a gay marriage given the names. But last week, this guy, Stuart, told reporters that he never submitted the request and he didn't even know his name was being invoked in the lawsuit until he was contacted by the press about the case. He said he was incredibly surprised given the fact that he's been happily married to a woman for 15 years. This case gets more absurd the more I look at it. And everywhere I look, people are talking about this revelation. But how much does it actually matter to the legal standing of the ruling, if at all? I think it's pretty much a distraction if she received this email. And I'm not sure if people are claiming that she never received this email. That would be one thing if she made up the whole story and never received the email. But if it's taken for granted that she did receive an email from someone named Stuart, naming someone named Mike as the person they're going to marry, then I don't really see what more there is to say about it. How was she supposed to know that Mike is actually a woman or that Stuart was not looking for a website for a gay wedding? So I think the whole thing is pretty much a distraction. And even if these facts hadn't come out with Stuart coming out and saying, oh, I never sent this email, it still would be the case that people would be upset about this being a made up case because people thought, well, she wasn't actually offering her web designing services on the market for wedding websites anyway. And people thought that it should have been gotten rid of even on that basis alone. But I think here we have to think about how people, depending on the constitutional right that's at stake, are more willing or less willing to have the Supreme Court weigh in on them. So imagine if this were abortion rights and like an abortion provider who had never provided an abortion, like let's say it was just a healthcare provider who said, oh, I'm really scared to get into the abortion providing business because I am scared that my state's really restrictive abortion law, like let's say it was Texas before Dobs, I'm going to be criminally prosecuted or sued for many thousands of dollars. And people who are supportive of abortion rights generally would have wanted a federal court to weigh in

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pre-enforcement. And you could also see the same thing for many kinds of free speech issues where someone on the left would want a court to weigh in to say, no, no, no, you can't restrict that kind of speech even before the person has engaged in it or has set up any kind of business that is going to provide some service that is expressive. So I just think a lot of it depends on, I think this is one of these like political things where you're going to switch sides on whether a court should weigh in. The only thing I'll add to what Jeanne said is it would be the height of self-owning if the left wanted to heighten the need for pre-enforcement challenges, because by and far in a way I think it's those on the left who have been successfully using pre-enforcement challenges. Jeanne mentioned the abortion example, but we have cases pending right now on the drag queen show bands in I think the state of Tennessee just passed one. That's under a pre-enforcement challenge right now. So I mean, what? Like we've never said that those are made up cases before and rightly so. And the only other factual note is that the email came in after the lawsuit had been filed. So they actually filed the lawsuit as a pure pre-enforcement challenge just based on the fact that she wanted to start this business. Then the email comes in when they amend the lawsuit six months later they add in that fact. So you've got three possibilities. The lawyers for the website designer made up the email or she did, fine, like I'm putting that all in one bucket. Two, the guy who says he'd never heard of it, he did it, maybe. Three, a third party used his name and did it and we'll never know who that was. ADF, the lawyers for the website designer have released the IP address showing that it was from San Francisco where this guy lives. I don't know that that tells us anything in all of this except we're not going to know and it didn't matter because they didn't need it for the case anyway. And several of the courts that ruled on this never even mentioned this as an important fact to the overall standing argument. So I agree with Jeannie totally political. Okay, one sentence from each of you. Good decision or bad decision in 303 creative? Harry? Yeah, so I think really bad for exactly the reason what it makes is a veto's right. Precisely these same arguments were proffered in all the other discrimination cases. They were always rejected and since I have to go, maybe I'll give my overall, you know, diatribe. I think it was in general. Ed Whalen is right. He's a big conservative and he said this just finished court term was the second best. Last term was the best. Next term is going to be the third best. It's a conservative juggernaut. It means they're taking over policy decisions by the people who should make them, aggrandizing their own power and really by a group that everyone has to agree wouldn't have made it if they were different from the Trump justices. Okay, Sarah, good decision or bad decision? The only decision if you care about the government not telling you what to say. Jeannie?

I think it's more complicated and that I think that under previously decided cases there definitely was a straightforward way to come out the other way. But I also understand the general principle that this serves and I agree with some of it. But I don't like the fact that discrimination against gay people, which for a lot of people it's hard to distinguish between discrimination against gay people and discrimination against people who want to get gay married. But to the extent that you can make that distinction and really hold onto it, I understand it and I see it. So Barry, how about you? Good decision or bad decision? I think fundamentally good decision for many of the reasons. Jeannie, I feel like you've laid out. I wouldn't want to be compelled to do the swastika manicure or make the cake that says death and destruction to the state of Israel, et cetera, et cetera. But it's not clear to me where speech ends and where whatever the other

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category is, public service begins. And you guys are much more versed in this than me. But I read that example of the 50s nostalgia scene and I'm like, yeah, that holds water for me.

That's what made this case easy when I described it as easy because Colorado had already said that it was speech, that it was that creative content. Whereas I think our argument over where that line is, Barry, floral design on one side, cakes maybe on the other, it gets really hard.

So it was very helpful and dumb of Colorado to just go ahead and concede that.

But do you guys agree with me that let's just take the example of the manicurist or the floral arrangement? Is that a service or is that speech? I really don't know.

I think a French manicure isn't speech and I think a floral design isn't speech. But I think if you put a balloon in the flowers and you had to make the balloon and paint on it and it said,

I hate interracial couples, that that then is speech or if you have to put a swastika on the nails.

Yeah, I mean, at some point when you're making a message that other people can understand that speech. Okay, last few questions. As we heard, Harry unfortunately had to drop. I want to talk to the two of you a little bit about the court's term overall and what to make of these decisions.

A reporter asked Biden, as I mentioned earlier in this conversation, if America

was dealing with a rogue court and he responded, this isn't a normal court,

what does that mean? Do you guys buy the idea that this isn't a normal court?

Oh, that line really, really bothered me because Joe Biden ran on this idea that he was going to bring back norms to the presidency after Donald Trump. And yet here he is, I think, very much intentionally trying to undermine one of the branches of government when he doesn't like a decision and knowing that the vast majority of Americans don't know a lot about the Supreme Court. So fun facts from this term. 50% were unanimous. 89% of the decisions had at least one liberal justice in the majority. Only 8% were decided with the six Republican appointees on one side and the three Democratic appointees on the other side. 14 cases last term were decided that way. And this term was the lowest number of straight ideological split decisions in the last six years. And I think the part of this is that the order that the decisions came out in was kind of unfortunate because you had the unanimous decision on religious observance.

The court has now ruled on a case involving religious accommodations in the workplace.

That case centered on a postal worker who resigned after being forced to work on Sundays despite citing his religious need to attend church. The court has now ruled that an employer who denies a religious accommodation must show that the burden of providing the accommodation would result in substantial increased costs. Upholding the Indian Child Welfare Act.

In a 7-2 decision by Justice Amy Coney Barrett, the court upheld the Indian Child Welfare Act of 1978, a landmark law that gives Native American families priority in the adoption of Native children. The court rejecting the challenge to Biden's deportation policies from Texas and Louisiana.

New here from the border, Governor Greg Abbott is not happy about a new Supreme Court ruling surrounding immigration. Today, justices ruled that the Biden administration can prioritize who gets deported from the U.S. Both Texas and Louisiana filed lawsuits against the Biden administration for changing their immigration priorities. And then the court, of course, rejecting the independent state legislature theory that had been embraced by Trump allies, embracing Section 2 of the Voting Rights Act. The U.S. Supreme Court today rejected a controversial legal theory that state legislatures have almost unlimited power.

To decide the rules for federal elections and draw partisan congressional maps

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without interference from state courts. The so-called independent state legislature theory regained attention after the 2020 presidential election, when then President Donald Trump's allies raised it as part of an effort to reverse the election outcome.

All of these decisions that were either certainly weren't

OMG MAGA extremists take over the Supreme Court decisions, and yet you have the president saying

this isn't a normal court. Look, they struck down your student loan plan, but they uphold your immigration plan. 50% that would get you in the baseball hall of fame.

I mean, that's not the only person that's been weighing in, right? You had AOC on CNN saying, we will start to see an undemocratic and frankly dangerous authoritarian expansion of power in the Supreme Court, which is what we are seeing now from the overturning of abortion rights to the ruling that discrimination and frankly stripping the full personhood and dignity of LGBTQ people in the United States. These are the types of rulings that signal a dangerous creep towards authoritarianism and centralization of power in the court. These rulings quote signal a dangerous creep toward authoritarianism and centralization of power in the court. There also must be impeachment

on the table. We have a broad level of tools to deal with misconduct, overreach and abuse of power, and the Supreme Court has not been receiving the adequate oversight necessary in order to preserve

their own legitimacy. And in the process, they themselves have been destroying the legitimacy of the court. You have elected officials calling the court illegitimate, calling it dangerous.

It's not for unelected justices to override what Congress has passed and that's what this court is doing. It's very dangerous. Everything should be on the table, reform and expansion.

Others are calling for the remedy should be sort of packing the court in order to water down the conservatives power, conservatives currently the majority. I've always thought of the Supreme Court as an institution that's kind of above the fray of American political life when so much else has been brought into the gutter. And I wonder where we wind up as a culture and as a country if these kind of attacks continue. Jeannie, what do you make of statements like AOCs and what it does to the public's perception of this really important institution?

So let me try to, from the perspective of a liberal left lawyer, explain why a statement like that might come into being. I think that from the mid 1980s until a few years ago when you thought about constitutional law and the Supreme Court, it really was a world in which in really controversial

cases it would be a divided by four decision and there truly was suspense on how it would come out because there was that swing justice, whether it was Sandra Day O'Connor or Anthony Kennedy.

And that's what we were living with since the 1980s, that it could come out either way on these really controversial issues and most of the important decisions came down to the votes of one justice. That's what we got used to as, quote, normal. So I don't think that it is wrong to say that what we thought of as normal for all of those decades is now no longer the case.

And in that way, people on the left are going to say this is not a normal court because what we got so used to, which is like relying on that one swing justice to throw cases our way in the really important ones, we can't rely on that anymore. So that's not normal for us because that's how we got, we're used to something different. And so I think it's an accurate

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statement in that sense. But if he means it's abnormal and illegitimate, then I don't agree with that. If people don't like what the Supreme Court is doing, the solution is not to cast out on its legitimacy. The solution is to say, well, what other institutions are there that can do something different that can override the Supreme Court? There are lots of situations in which Congress, if it only had its act together and didn't like what the Supreme Court was doing, would be able to do something different. And the Supreme Court is not necessarily the final word on every single constitutional issue that comes their way. And so I really think that this whole idea that we need to cast out on the Supreme Court's legitimacy, that's less productive than saying, hey, what other solutions are there other than relying on a Supreme Court with those very few individuals voting the way they do. Justice Roberts had a sentence in a case that we didn't get to in this conversation, but it's a case that killed Biden's massive student debt forgiveness program. But I mentioned these lines because they speak to sort of these broader criticisms of the court, which are clearly getting to Roberts. Here's what he wrote, it has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. And then you have Kagan countering Roberts comments in her dissent in this same case. And she says this, the court majority makes itself the decision maker of all things federal student loan policy. And then per chance, it wonders why it has only compounded the sharp debates in the country. In other words, she's saying the majority is making decisions that are polarizing and overstepping. And then they, or Roberts in this case, has the gall to say, how dare you criticize us? Who has the more meritorious claim here, Kagan or Roberts? I think clearly the chief justice is deeply frustrated and that's coming through. It's worth noting, I hadn't heard it articulated that way, but love the way Jeannie described the what was normal is what we were used to with that single swing justice. And now we have arguably three. I mean, I've described it as a 3-3-3 court before instead of a 6-3 court. Kavanaugh, this term was in the majority 96% of the time. He's been the most in the majority, meaning that swing vote, the last two other terms as well. Roberts was 95% of the time and then Amy Coney Barrett 91% of the time. And so she's right. Instead of having Anthony Kennedy or Sandra Day O'Connor as your swing vote, now you've got three in play, which is why you have all of these weird opinion groupings, which I think is great for the court and important. And we talked about diversity before. A lot of diversity in opinions coming from the Supreme Court and which justices are in the majority. I share the Chief Justice's frustration that the court is being made sort of a political whipping boy for campaign purposes. And there's not a whole lot he can do about it, except to say that's not what we're doing. Someone looked back at each of the courts, meaning the Roberts court, the Rehnquist court, the Berger court and the Warren court, and found that in fact, the Roberts court has overturned fewer precedents by far than those other three. So that's going back 80 years or so at this point. And yet, I think if you asked people, they would feel like this court is overturning more precedent because of, for instance, Dobbs. So that's the frustration of Roberts court. He wanted to be a minimalist Chief Justice deciding as narrowly as possible. And yet, despite maybe even having accomplished that in a lot of cases, including very hard politically sensitive cases, he's getting tagged as the leader of this activist court. I think that overall what you see the court doing is telling Congress to do its job and sending things back to Congress. Congress can pass student loan debt relief tomorrow.

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They're not going to. We know they're not going to. And then you have folks on the left frustrated. I mean, Joe Biden himself said that his administration couldn't forgive student loan debt before he then did it. Barack Obama said he couldn't do DACA before he did it. In both of those cases, Congress could do it tomorrow. And the Supreme Court, instead of enhancing their own power, I think is most often in the last few terms, wiping their hands of it and saying, it's not our job to decide whether this is good policy or bad policy. We're going to make the best call we can here based on the law as we see it. But Congress, feel free to jump in here anytime you want and tell us what you want the law of the land to be. Congress chooses not to do that. That's not the Supreme Court's fault.

I don't know if this is too much for this discussion now, but the actual legal question is the meaning of wave or modify. Does it mean that you can cancel student debt altogether under the meaning of wave or modify? Or is that exceeding what Congress wrote?

To be honest with you, I don't think that one side has the completely right interpretation. It's kind of like duck rabbit. You can see it as, sure, it's modifying it to say that it's nothing or waving. But on the other hand, it seems like no, if Congress passed a law about student debt, then it envisioned that there would be student debt, not that it wouldn't exist. I really do think that as a question, it was not one where liberals clearly had the right interpretation. I know how you guys feel about polling, given your statements earlier in this conversation about lighting them on fire. But I will end with a poll that I read that I was struck by. It was a Gallup poll from last year that said that public confidence in the Supreme Court fell to historic low to 25%. We know what happens in this country when people don't trust the CDC. We know what happens when people don't trust mainstream papers. And I wonder, what does

the country look like if people stop trusting or respecting the decisions of the court? What are the implications of this lack of trust? Should it worry us? I was just recently at a conference with lots of business people, people who own companies or work at companies. I was really struck by the number of times I just heard, oh, the Supreme Court's going to say that.

I don't understand why we should obey that. It was really said in a very sincere way. They said that we can't consider a race or they're going to say that we, I don't see why we need to obey that. So I don't know if this is a sign of our times or if this is kind of what people in corporate America tend to think. I don't know, but it was very striking to me that there was this attitude of like, why the hell should we listen to them? Wow. Sarah? Two things on this. One, look, the polling on the Supreme Court does move around a lot because when you ask questions like name a justice on the Supreme Court, you're not going to get a lot of answers on that. And so what we saw after Dobbs was Supreme Court approval rating dropped a lot. Six months later, it was already rebounding quite a bit. Then a bunch of stories about ethics scandals come out that may or may not have merit, then it drops again. But when you ask people whether they approve or disapprove, for instance, of justice Kagan, instead of getting a particularly important approve or disapprove number, what you're going to find is that about 75% of people don't know who

that is. So take all those polls with a grain of salt. But I think your question is getting to something more fundamental, which is fine. But imagine the Biden administration saying, yeah, the Supreme Court said we couldn't forgive student loans, but we're just going to do it.

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What does that mean moving forward? Honestly, it means the end of self-government as we have known it for the last 247 years since we just celebrated the fourth. It's a profound change in how our country operates, where instead of having referees that we all agree to work by the same rules, it'll be whoever's in power, and it'll be even more outcome-driven, less process-driven. I'm a process girl, so I think that would be dangerous for anyone who wants their rights protected. If you are not in the majority, an outcome-oriented world is a bad world for you. I'm definitely a process girl as well, but I actually interpreted Biden's statements afterwards to mean not, oh, we're just going to do it anyway, but rather let's find a lawful way to do it. Sorry, I don't mean he did say that at all. I meant if a president at some point was like, I'm just going to ignore the Supreme Court and do what I want. That is not what Joe Biden said, and Jeannie's exactly right, that instead he said, fine, we're going to go to Plan B. Jeannie, Sarah, Harry, they're the ghost of Harry. Thank you so much for talking with me today. I really appreciate your time. Thanks, Mary. Thank you.

Thanks as always for listening. If you liked this conversation, if it provoked you, if you really disagreed with Sarah or really agreed with her or Harry or Jeannie for that matter, that's great. That's the whole point of shows like this. I love having roundtables because I like hearing the smartest positions articulated for me, and I know I left this conversation with more questions than I had answers. So if you felt similarly, share this episode. Also, rate us on Spotify, Apple, or any of those places. It helps. And use this to have an honest conversation of your own. Last, there's only one way to support what we do. It's by going to VFP.com, T-H-E-F-P, like the free press, and becoming a paid subscriber. Thanks for listening, and we'll see you next time.