

## Can Courts End Partisan Gerrymandering?

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**[00:00:00] Jeffrey:** Last week, the North Carolina Supreme Court agreed to rehear a case that struck down the state's redistricting maps under the state constitution. The outcome of the decision could affect another case already in front of the U.S. Supreme Court, Moore versus Harper. That's the challenge to a decision striking down North Carolina's redistricting maps that involves the independent state legislature doctrine. Why did the North Carolina Supreme Court strike down the maps in the first place, and why is it revisiting that decision now? Will the U.S. Supreme Court still decide the Moore case and rule on the independent state legislature doctrine? And what standards should be used to decide whether redistricting maps are politically gerrymandered? Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center's a nonpartisan nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people.

**[00:00:59] Jeffrey:** To help us understand the latest developments in these important gerrymandering, we're joined by two of America's leading election scholars. Misha Tseytlin is a partner at the law firm Troutman Pepper. He argued and won the 2018 partisan gerrymandering case Gill v. Whitford before the U.S. Supreme Court, and he filed a friend of the court brief in Moore v. Harper as well as another major gerrymandering case, Rucho v. Common Cause. Misha, it's wonderful to welcome you to We the People.

**[00:01:29] Misha:** Thank you for having me.

**[00:01:30] Jeffrey:** And Guy-Uriel Charles is the Charles J. Ogletree Jr. Professor of Law at Harvard Law School. He also filed a friend of the court brief in Rucho v. Common Cause. Guy, it's wonderful to have you back with the NCC.

**[00:01:43] Guy:** Thank you. It's a pleasure to be back.

**[00:01:45] Jeffrey:** Let's jump into the first question under discussion. Misha, why did the North Carolina supreme court strike down the maps in the first place, and why is it revisiting that decision now?

**[00:01:55] Misha:** So, the North Carolina supreme court read into the certain broad phrases in the North Carolina constitution, a state law prohibition against partisan gerrymander, and then applied that prohibition that it read into the North Carolina constitution to invalidate

several other maps, including the congressional maps. Recently, the North Carolina supreme court granted re-hearing as to whether it should maintain that rule that the court had previously read into the North Carolina constitution prohibiting partisan gerrymandering. Those oral arguments were held recently, and a decision is expected in the next couple months.

**[00:02:32] Jeffrey:** Guy can you give us more detail about why the court initially struck down the maps under the North Carolina constitution, and why many folks think that the justices might reconsider their decision?

**[00:02:43] Guy:** Sure. So article one, section 10 of the North Carolina Constitution provides a guarantee that all elections shall be free, all elections in the state shall be free. And this raises a number of questions. One is, what does this provision mean or specifically, does it apply to the composition of district lines? The second question is whether the provision is judicially enforceable. Is it justiciable? And then the third goes to the elections clause question, whether the U.S. Constitution, the elections clause, article one, section four, clause one, imposes a limit on what the state supreme court can do, because the power to draw electoral lines for congressional districts is given to the state legislature.

**[00:03:35] Guy:** And the argument would be that there are no state limits that can be imposed on the legislature. So three questions. Look, what does this provision mean? Does it apply to the way lines are drawn for congressional districts? And even if it does, does the U.S. Constitution prohibit the state supreme court from enforcing this provision if they think that it applies?

**[00:04:01] Guy:** So if taking the first question, the North Carolina supreme court said, "Look this provision, all elections, this guarantee, all elections shall be free, does impose a limit on what the legislature can do." They've interpreted that provision in the context of malapportionment, and partisan gerrymandering is analogous and very similar. All elections must be free. The court said, "Means that every vote must count equally," and when you malapportion or you gerrymander a district, every vote does not count equally. Therefore, the guarantee that every North Carolina citizen has is violated by malapportioned or by gerrymandered partisan districts that are gerrymandered on partisan grounds. And so there's a violation.

**[00:04:55] Guy:** Partisan gerrymandering violates the constitutional guarantee, and the court also now then goes to the second question. Is that guarantee judicially enforceable? That is, do the courts, or does the court have a responsibility? Did the constitution provide the courts a responsibility for enforcing that guarantee? And the court said, "Yes the constitution did provide us with a responsibility for enforcing that guarantee, and we have the right to look at these maps, and to determine whether they violate the constitutional guarantee of free and fair, or in this case fair free elections."

**[00:05:33] Guy:** And the court held that the districts partisan these districts in fact violated the guarantee, and therefore, under the North Carolina constitution, they were unconstitutional.

**[00:05:47] Jeffrey:** Thank you so much for summarizing the North Carolina decisions so clearly. Misha, you've argued in your amicus brief that the court should apply a clearer statement rule, and the state can only use its law-making process to prohibit partisan gerrymandering if it expresses its intention in unambiguous statutory or constitutional texts. Tell us more about that proposal, and why you think the North Carolina court was wrong to strike down partisan gerrymandering under the free and fair elections clause.

**[00:06:15] Misha:** Well, thank you, Jeff, and just to be clear, we filed a brief in support of neither party in the Moore v. Harper case. So I'd like to take a step back to how we got to where the state supreme courts are the ones that are generally attempting to engage with partisan gerrymandering. What the U.S. Supreme Court held in Rucho which was also a case out of North Carolina, is that the U.S. Constitution does not have, within it, any judicially-manageable standards to judge whether a map is too partisan. Politicians do political things, and the Supreme Court said there was nothing in the U.S. Constitution that governed whether a map was too political or not.

**[00:06:56] Misha:** But what the U.S. Supreme Court importantly thereafter said is that this issue can be dealt with at the state level. If states choose to combat partisan gerrymandering, they can, for example, enact specific prohibitions against partisan gerrymandering in their state constitutions or the state laws, as many states have, or they can adopt redistrict, independent redistrict commissions, or other mechanisms. So then the question became what were states going to do?

**[00:07:26] Misha:** And before and in response to Rucho, many states in fact went through the work of using the state's law-making process, usually the constitutional amendment process, to prohibit partisan gerrymandering as a matter of their state constitution. The problem that one could arguably say arises in North Carolina is that the people of North Carolina, through the law-making process, did not outlaw partisan gerrymandering. So the court read into this very broad phrase, free election clause, free and equal, the prohibition against partisan gerrymandering.

**[00:08:03] Misha:** And what we were saying in that amicus brief is, if the elections clause of the U.S. Constitution, which unless Congress acts, gives state legislatures the authority over congressional elections, not state legislative elections, means anything, is that you can't have other aspects of state government, including state courts, basically taking over that function. Now, what we said is that does not mean that what the court, U.S. Supreme Court told the states in Rucho was wrong. That is to say, the Supreme Court told the states, says, "You can deal with the issue of partisan gerrymandering."

**[00:08:46] Misha:** So what we said is, the state needs to act through its law-making process, which the U.S. Supreme Court had held in the Arizona state legislature case a couple years back, includes the referendum process to take some of the prohibition against gerrymandering and make it enforceable against the state legislature. What we said is, it is troubling and perhaps a violation of the U.S. Constitution the election clause in particular, if the state court, not having that clear statement coming from the people, takes it upon itself to essentially legislate a prohibition against partisan gerrymandering in these vague phrases.

**[00:09:28] Misha:** Now, the reason that I said that we filed a brief in neither party is there were some arguments in the North Carolina case that didn't get as much prominence, that there were specific features of North Carolina's state statutes that allowed courts to do what they did here. And we were writing an amicus brief that would impact the rule that would apply to the whole country. So then, we didn't want to take a position on what those particular state law provisions in North Carolina law did or didn't authorize in the North Carolina supreme court to do. But we did want to give the court a middle ground between the two extremes that we saw were being proposed in that case.

**[00:10:07] Misha:** The one extreme basically being nullifying that promise of Rucho, that states could effectively outlaw partisan gerrymandering and then the other extreme, which is that the elections clause's use of the legislatures' frame is essentially meaningless. So we tried to give the court a middle ground, and the other thing we pointed out is that, because states have been so comprehensive and engaging on this issue all but, almost every single case that you read about, that has partisan gerrymandering being struck down at the state level does come from a specific prohibition against partisan gerrymandering, like the case that we litigated in New York State.

**[00:10:48] Misha:** It's only a couple of scattered cases over the last two decades that really tried to use these broad, big phrases to try to deal with partisan gerrymandering not based on a specific prohibition that was enacted by the people of that relevant state.

**[00:11:05] Jeffrey:** Guy, in your article, "The Law of Gerrymandering," and in important amicus briefs, you've pointed to many constitutional provisions that might regulate partisan gerrymandering, including the republican form of government clause, the equal protection clause, the First Amendment, the election clause, and state constitutions. When you look at what North Carolina has done, do you think that it's acting consistent with other states when it struck down partisan gerrymandering under the free and fair elections clause, or do you agree with Misha that there should be a clear statement rule in order to justify court action?

**[00:11:40] Guy:** I don't think I agree with Misha, because I don't know where the requirement of a clear statement rule would come from. So here's how I understand what the court said in Rucho: "Hey, we, the federal constitutional system especially through the courts, we don't believe that we have the authority and the power to deal with this. We think that the constitutional framework left it to the states, and the states, including the state system." And the court has already held, in the Arizona case, that includes referenda from the states, that citizens can pass a law limiting partisan gerrymandering. It held a long time ago in *Smiley v. Holm* in 1932 that the executive can weigh in.

**[00:12:30] Guy:** Right? And so, I understood the court in Rucho to say, "Look, whatever processes that the state wants to use, and that which does not negate or exclude the state supreme courts from doing what they normally do, which is to interpret the state constitutions, and to say this is what our state constitutions mean," and just in the same way that the U.S. Supreme Court interprets the U.S. Constitution and says, "This is what the U.S. Constitution means." And if the state supreme court, in this case North Carolina, believes that article one, section 10 of its constitution means that partisan gerrymandering violates the free election guarantee I don't know how anybody else has a basis, whether it's the U.S. Supreme Court, or whether it's me, or whether it's Misha, of saying, "No, no, no, before you go down that route, these are the hoops that you must jump through."

**[00:13:27] Guy:** That was not what was prescribed by Rucho. Rucho simply left it to our federalism system, which is going to mean that some states are going to do this through referenda and initiatives. Other states are going to do it through their state legislatures. Other state are not going to do anything at all, and other states, it's going to be their state supreme courts that are going to address these types of issues. That's sort of like the decentralized federal process that we have, and there doesn't seem to me to be a justification for saying that the elections clause especially when the court has already held that the executive can engage in that process, and sort of odd then to say that the organ that has the primary responsibility for interpreting the state constitution either does not have a say, or must have a say only in these specific circumstances.

**[00:14:22] Guy:** I don't know where the basis for that comes from, or would come from. It certainly doesn't come from the U.S. Supreme Court or U.S. constitutional law, and if it has no basis in the state's law then we're just simply making it up and imposing a limitation. So under our federalism system, I think that's up to the state to decide how they want to deal with it. That's that, where the Supreme Court left it, and I'm perfectly fine with it. I would've preferred a different outcome in Rucho, but given the outcome that we have, what North Carolina did seems to me to be perfectly consistent with what state supreme courts have always done.

**[00:14:58] Jeffrey:** Misha, Guy-Uriel says that the requirement of a clear statement rule authorizing the regulation of partisan gerrymandering by the state doesn't come from the U.S. Constitution or from state constitutions. Where do you think it comes from? And tell us about that New York case you mentioned, where there was a clear statement rule.

**[00:15:14] Misha:** Right, so the dispute before the U.S. Supreme Court is only about the limits that are on states, including state courts when you're dealing with congressional elections. Everything that that Guy said about our federalism system, I think it is undisputed, that with regard to the state, state legislative lines, the supreme court of a state to accept as permissible under the state law can do what it will.

**[00:15:42] Misha:** The fundamental difference is when you're talking about congressional lines. That is an authority not of the state under its state constitution. That is an authority given to the state legislature by the U.S. Constitution. So when a state legislature adopts congressional lines, it's not acting under a power given to it by a state constitution. It's acting under a power given to it by the U.S. Constitution.

**[00:16:10] Misha:** And one of the reasons we know that is the elections clause actually says that Congress can override any of this stuff. So if Congress wants to enact a prohibition against partisan gerrymandering under the elections clause, it could override a state supreme court's constitutional interpretation saying that that would be unconstitutional under our state constitution. So this is a federal power that a state is using when it's enacting congressional lines.

**[00:16:37] Misha:** So when you have a federal power, you have to look at what limits are given to the state when it, when it's given that power by the federal constitution. And what the Constitution says is the elections, unless Congress provides otherwise, are determined not by the state generally, by the legislature thereof. So then, that's where you get the extreme

rule proposed by the petitioners in this case, which says that means the court should have no role whatsoever.

**[00:17:08] Misha:** But then, that's where the Arizona state legislature case comes in. And there was a dissent, but it said a lot now, said that when you have a referendum process, that is the legislature. Within the original public venue of legislature, the referendum process includes the legislature, and Guy mentioned the governor's involvement. That's just the governor, Supreme Court saying the governor can veto legislations at the state level, and be in compliance with elections clause. Of course, a veto is traditionally thought of as part of the legislative process.

**[00:17:46] Misha:** The fundamental difference that you have when you have a court using these broad phrases, that is no part of the legislative process. That's the court speaking. So where does this clear statement rule come from? Well, frankly, it's trying to draw a middle ground, because there are two very extreme positions that are being put before the court. One is this notion that court, state courts have no authority to get involved whatsoever, even if the people, using the legislative process as defined by Supreme Court, through a referendum say, "No partisan gerrymandering," which was the case that, that we litigated in New York, which I'll talk about in a minute.

**[00:18:24] Misha:** The other extreme is that the fact that the Constitution in the elections clause, in giving this power to the states, uses state legislature, doesn't have any meaning. You can just blue pencil out state legislature, and write in "the state," and it would have the same meaning. So we thought that either of those extremes was an untenable result, and we thought our proposal of a middle ground was very sensible, because it gave some meaning to the clause, but it also allowed the court to keep the promise that it made to the states in *Rucho*, and also, by the way, it wouldn't impact many cases at all.

**[00:19:01] Misha:** Most states whose courts have dealt with these issues are doing so under a specific state law prohibition, and that's what we were dealing with in New York. What happened in New York is that, in 2014, the people of New York adopted a constitutional amendment, which was submitted to them by the state legislature, that was a comprehensive prohibition against partisan gerrymandering. It set up a two-step commission process to channel the, the redistricting process through a body that was going to be politically divided and therefore, hopefully to produce a compromise result, and thereafter, at the back end, it had an explicit prohibition against adopting any lines that favored any political party, or disfavored any political party, incumbent or competition.

**[00:19:54] Misha:** So there, you have the people, through the law-making process, as blessed by the Arizona state legislature case, prohibiting partisan gerrymandering. And so, what happened in, in New York, in the very first election cycle, after the people adopted, overwhelmingly, this prohibition against partisan gerrymandering, is that the legislature essentially sabotaged the commission process, and then adopted what folks across the political spectrum identified as perhaps the most egregious gerrymander in the country.

**[00:20:25] Misha:** We litigated that case, and because there were judicially clear standards that were set out by the people in the state constitution, we had a five-two ruling from the state's courts, from the state's highest court, the court of appeals, striking down this partisan

gerrymander. And what I thought was so heartening about that case was, even though the party that had enacted the partisan gerrymander, who was in control in New York which was the Democratic Party, enacted it, all seven judges on the court of appeals in New York, and they're called judges in New York, were appointed by Democratic governors, and they still struck down that map five to two.

**[00:20:56] Misha:** I think that shows the benefits of acting under a clear directive from the people, rather than kind of making it up from broad phrases, which often and almost always ends up dividing along political lines of those who were appointed by the relevant governor or elected under a what everybody in the state knew was a frankly partisan state supreme court election.

**[00:21:26] Jeffrey:** Thank you for noting New York case. Guy Misha points to New York as an example of clear standards for evaluating gerrymandering in the state constitution. What standards did North Carolina use in interpreting its free and fair election clause, and what have other states without clear mandates in their constitutions used post-Rucho? I'll note that in your Rucho brief, you talked about the need for statistical models to compare neutral with non-neutral maps. What kind of standards are state courts using?

**[00:22:00] Guy:** So, a couple things, and first, just to respond in some ways to something that Misha said, I certainly admire and like the idea of trying to impose some type of a limitation here, and I think if this were a congressional statute that said, "Look, there must be a clear statement rule," I could see the authority and the basis for it. And I think that strikes as a wonderful avenue for imposing some type of a limitation, given that Congress does have supervisory authority with respect to congressional elections.

**[00:22:38] Guy:** The problem, though, is that we're not talking about a congressional statute. We really are talking about a rule that is imposed, and it's not clear exactly from where. Now, the argument is, look, there's got to be some type of a limit, and my answer would be, yeah, maybe that ought to come from Congress. Maybe that's where the guidance ought to come from, if Congress believes that a limit needs to be imposed here on what the state courts are doing.

**[00:23:12] Guy:** In many respects, what the state courts are doing, they're doing something that is very much analogous to what the U.S. Supreme Court has done ever since the one person, one vote cases. The question that they're asking is, to what extent when you malapportion or when you gerrymander, when you try to create lines in a way that undermines the vote of one voter as opposed to another? So in 1944, the United States Supreme Court in *United States v. Saylor* described that, oh, the right is the right to vote that is that is free from being impaired, lessened, diminished, diluted, and destroyed.

**[00:23:57] Guy:** You know, so for a very long time, for about 80 years or so at the very least, 60 years or so, we've had this conceptual idea within our jurisprudential system, especially at the federal level, but then eventually at the state level, that the government dilutes the right to vote when it draws line in a manner that either arbitrarily distinguishes among voters or prefers some voters over others without a significant compelling interest.

**[00:24:34] Guy:** So that conception is the one that courts have been, have been working with, and sometimes that conception is articulated in state law. Sometimes it is through a commission process, and sometimes, it is interpreted by the courts themselves. And the distinction, the one distinction that I have with Misha's approach is, he's certainly right, the question under the elections clause is, well, when the elections clause says "legislature," what does it mean?

**[00:25:07] Guy:** The court has already interpreted legislature much more broadly, to mean not just the legislature, to include the people, and initiative, and referenda. Not just the legislature, to include also the governor. So because the court is saying, "Look, we're looking at the state's law-making process, and its law-making process includes a lot of different components beyond strictly the legislature." And now, the question is, does that also include the state supreme court?

**[00:25:44] Guy:** I think it would just be an odd division to say, "Legislature does not mean strictly legislature. It means also the people through an initiative and referendum process. It includes the role of the governor as well but it does not include the state supreme court." That would be inconsistent with the way that we've done American law from basically the very beginning. We recognized that courts have a role to play in the law-making process as well. Limited, yes, right? It comes to them in under a certain set of circumstances that are very different.

**[00:26:23] Guy:** The people have a role to play. The governor has a, has a role to play, right? So lots of different parts of it form the law-making process. That seems to me to be a much more coherent understanding of the elections clause than one that carves out the state the state supreme court, but includes the governor and other organs of the law-making process. And it seems to me that the state supreme courts are following the guidance of the U.S. Supreme Court in the one person, one vote cases to think about what does vote dilution mean. And they've articulated a legal standard, and then the question is, okay do we have a method of proving, of showing the constitutional violation?

**[00:27:10] Guy:** And the brief that mathematician Moon Duchin and I filed in Rucho, she and others have developed a mathematical method, the ensemble method, to identify the constitutional violation. It isn't saying that it is the constitutional violation. It's saying, "Okay, how do we prove, how do we show that there has been vote dilution?" Which is something that experts do in many, many contexts where there's a legal standard. And then, the question is, how do we show that that legal standard has been violated?

**[00:27:44] Guy:** And there are methods available. So my preferred one is the ensemble method to identify the legal violation, and to show that something has been gerrymandered in a way that is inconsistent with the legal standard.

**[00:28:00] Jeffrey:** Misha, in Rucho of course, the U.S. Supreme Court rejected the idea that there was a federal right against vote dilution on the grounds that there was no means of identifying it that was predictable and coherent. Do you agree with Guy that there is, broadly, a right recognized by state courts over the past 60 years that forbids arbitrary distinction among voters, or preferring voters without compelling interest? And do you think that methods like the ensemble method might plausibly identify vote dilution or not?



**[00:28:35] Misha:** So I agree with half of what Guy was saying, and disagree with the other half. I will start with the disagreement. I do not believe that notions of vote dilution, that is literally you have one person's vote counting more than the other, have any kind of analog to partisan gerrymandering. I think that's just trying to put a square peg in a round hole, or vice versa, and that is what we argued in both Rucho and Gill. And Gill was the precursor case to Rucho, and the advocates on the other side there argued, "Well, there's this concept called the efficiency gap. It defines what is unconstitutional."

**[00:29:17] Misha:** And then they got to the U. S. Supreme Court, and they changed tactics. They started pointing to other methods. So I think that shows that the notion of one person, one vote, which is a very easy concept to understand: Everyone's got, everyone's got a vote, got it, count the same. You can't have rotten boroughs. You can't have, you know, 50,000 people in one district, and 20,000 people in another, and they get the same representatives. I think that's a clear concept. What is the standard for a political advantage when you're talking about phrases like being equal, or equal protection clause? I think that's very different.

**[00:29:54] Misha:** However, some states like New York have prohibited partisan gerrymandering. So you don't have to get into these theoretical questions about whether this is a violation of equal protection principles, or of being equal principles. There, you just have a prohibition, and the court's job, when the people enact a prohibition against partisan gerrymandering, is to do their best. And under the current state of the art in social science, the ensemble method is the best state of the art for identifying what is an outlier, for what is an outlier from what you expect if you didn't have map-drawers drawing to partisan advantage.

**[00:30:38] Misha:** And there are various ways to do the ensemble method, but generally, the way it works is, you tell a computer, "Draw some, draw 50,000 maps, 100,000 maps, million maps," and you tell the computer, "You could take into account this factor, this factor in state law." Contiguity, compactness, population deviation when you're talking about state legislative lines, because the population deviation of congressional lines has to be zero.

**[00:31:07] Misha:** You put all of these in, and there are various methods for computers doing basically randomized, and create large numbers of maps. And then you plot those maps on a chart, and then you plot the actual adopted map. And if you see that the actual adopted map is a significant outlier, then you have a strong suspicion that something beyond neutral, non-partisan map-drawing is going on. And then, once you have that important clue, then you look at the political process. You see if the party out of power was excluded from the process, their ideas were taken into account.

**[00:31:46] Misha:** And there, you can identify, as best the current state of the art allows, what is probably a partisan gerrymander. Now, again, when we were litigating Gill in 2018, the ensemble method was just in the beginning phases, and more crude methods were being used. So perhaps, in 10 years, there'll be an even, a different, more sophisticated method than even this ensemble method to identify partisan gerrymandering as prohibited in some states' constitutions. But right now, I do think that the state of the art is the ensemble method, and perhaps Guy was a little ahead of the bell curve when he was in Rucho.

**[00:32:25] Misha:** Certainly, we used the ensemble method as our primary social science method in the New York, in the Harkenrider case, and the courts did find that analysis persuasive.

**[00:32:37] Jeffrey:** Wow. Well, it sounds like Guy was indeed ahead of the curve. And Guy first off, I'll ask, given what appears to be an emerging consensus around the ensemble method, you think the court of course was wrong in Rucho to reject it as a federal touchstone for partisan gerrymandering, but tell us how the ensemble method would apply in North Carolina. Would it find an unconstitutional gerrymander or not, and given the availability of the ensemble method, is this something that other states can apply in regulating partisan gerrymandering? And are they applying it?

**[00:33:10] Guy:** Well, first Misha and I are, I think, in agreement on the ensemble method being the state of the art and I should give credit to Moon Duchin, the mathematician we worked with on this brief. And certainly, from my perspective, I think part of the strategic mistake of the people who were on my side arguing in favor of justiciability is reliance upon the efficiency gap. That was just a strategic mistake, and maybe the court would've done this anyway, but I think made it hard for the court to think about these issues, and in a more robust way.

**[00:33:58] Guy:** And I think the one point that I would make is, there are two questions that I think need to be separated, and I think we're doing a pretty good job of separating them, but I want to be sure that we're clear about that. There is a question of, look, how do we understand and articulate the constitutional standard? And then, there's the question of, how do you prove the constitutional standard? Part of a mistake that I think both academics and litigators make is, they look at the one person, one vote cases, and they say, "Oh, we need something just like that."

**[00:34:33] Guy:** But they don't understand that the court was actually doing two things in the one person, one vote standard. The court was saying, "Okay, what is the constitutional principle of equality? And then, how do we identify it?" Now, I think Misha is right. In the case of malapportionment, it's easy to identify it, because you can count. You could say, "Oh, this district only has the great Jeffrey Rosen as the person who occupies it. These other ones, there are 10,000 Mishas and Guys in those districts." So one or 10,000, it's pretty clear to us that the great Rosen gets to wield a lot of power, and those bunch of little Guys and Mishas don't get to wield power.

**[00:35:20] Guy:** Now, in the case of partisan gerrymandering, when you create a district that says, "Hey, wait a minute. We can create 10 districts. We're going to stuff seven of them with Democrats, and three of them with Republicans." I think there, it can be pretty clear to see, look, the outcome is preordained. Then there are the tougher cases, in which it's not clear that the outcome's persuasive precisely because of the reasons that Misha is saying.

**[00:35:46] Guy:** You know, what is the population dispersion? What does the geography look like? What are redistricting principles? And this is where the ensemble method comes into play to help identify and say, "Oh, no, no, look, we ran the simulation a trillion times, and there's an outlier here. And it's pretty clear that the only explanation for this is because that the Democrats were trying to undermine the votes of the Republicans."

**[00:36:11] Guy:** So there, I think the same conceptual idea, the same normative idea, the same constitutional idea, is equivalent to the one person, one vote, and then the question becomes, how do you show it? And I think we agree, and this is going to happen a lot at the state level. The move is the ensemble method and I think the ensemble method does give us a very reliable way.

**[00:36:36] Guy:** What would it show in North Carolina? I don't know. That I don't know. I think the lower court was convinced that this was a gerrymander, but I have not looked at that myself to be able to provide a definitive answer.

**[00:36:50] Jeffrey:** I really need to thank both of you for helping illuminate this consensus around the ensemble method. This is a major advance in our understanding of a non-partisan way of evaluating partisan gerrymandering, and it's great to have this discussion. Misha, some have suggested that, now that the composition of the North Carolina court has changed, and is now majority Republican rather than Democratic, the court will uphold the map, rather than strike it down. Is that your understanding or not, and what would a principled way of evaluating the North Carolina gerrymander be, using the ensemble method or other methods?

**[00:37:27] Misha:** Well, so this is what I was talking about before, where the real danger of what I believe the North Carolina supreme court did, and very few courts have actually done this. When you read these broad phrases that have been in the state constitution for 200 years, never did anyone imagine before the last decade that those could be read to prohibit partisan gerrymandering.

**[00:37:52] Misha:** What you end up as a practical matter is, you end up with, with the justices and the elections for the justice being proxies for the political process. So, whereas what we had in New York was a clear prohibition against partisan gerrymandering right in the state constitution, you could have a situation where you had seven judges appointed by Democrat governors, five of them striking down the map as a partisan gerrymander. I would respectfully submit that that's never going to occur in a state where, frankly, the judges are frustrated by partisan gerrymandering kind of making it up.

**[00:38:27] Misha:** And so, what happened is that, in North Carolina, you had non-partisan state supreme court race, but everyone knew which side you were going to vote on, what was going to happen. And then, you had the election results that happened, and people understood which supreme court justice won, and which party they're more aligned to, and then you had the re-hearing. You know, we currently have a race right now in Wisconsin, where there is no prohibition against partisan gerrymandering in the state constitution, where one of the judges that wants to be a justice is frankly running a campaign saying, "If I win, I'm going to strike down that map."

**[00:39:07] Misha:** She was asked at the debate earlier this week, "Well, you're getting all these donations from the Democratic Party. How can anyone ask you to assume that you're going to be a fair judge on this case?" And she said in a debate, not hiding the ball, "Well, everyone can look at those maps and say they're unfair." And this is exactly, I think, what the majority of the U.S. Supreme Court was worried about in *Rucho*, about the courts becoming really politicized.

**[00:39:33] Misha:** But that's going to happen when partisan gerrymandering is before the court. And sometimes, the people might decide the juice is worth the squeeze. They might say, "Partisan gerrymandering is so bad that we are going to risk the courts becoming politicized." Frankly, we had an amazing victory in New York, and it was a brave decision by those judges to vote for us. But in the very next judge confirmation process, a very well-qualified judge attempted to be appointed by a Democrat governor, was blocked by the state legislature, and everyone understood the subtext of that was they were worried that he was too fair, too neutral, and he wouldn't vote to overturn our decision striking down the maps as a partisan gerrymandering.

**[00:40:23] Misha:** So that's what happens when the courts are injected into the partisan milieu of gerrymandering. Now again, if the people want that, if they adopt the constitutional amendment in their state that said, "Court's have to monitor partisan gerrymandering," the courts really do have to enforce it. But courts should be really cautious, as the Supreme Court was, about doing it on their own, because we see what's happening in states like North Carolina, and in states like Wisconsin, where you have the judiciary becoming politicized by being injected into a very political process, and not through the mandate of the people, but by the judges themselves saying they want to be injected into this process.

**[00:41:07] Jeffrey:** Guy, give us a sense of how things are going at the state level post-Rucho. How many state courts are intervening? How effective are they in neutrally evaluating partisan gerrymanders? And what does the future look like post-Rucho?

**[00:41:25] Guy:** Yeah, so, I don't disagree with much of what Misha said. I think one of the implications of the U.S. Supreme Court, its failure to establish a national baseline, is that things are going to play out in the states, and they're going to play out in a lot of different ways. So in many respects, some good things have happened. We have a number of states that have resolved this issue through initiatives, referenda, or through commissions. We have some states that have addressed this question through the state legislature, and then we have then the debate with some states not doing anything, and other states going through their courts.

**[00:42:16] Guy:** And yes, it is true, in the system that we have in which we judges at the state level the vast majority of them either are elected directly or indirectly, first appointed and then elected, these political questions, these political issues, not in the technical sense of the word, but in the vulgar sense of the word, these political issues are going to feature in these judicial elections.

**[00:42:45] Guy:** I think that is a consequence of the failure to constitutionalize those questions and to take them off the table and I think the system will play it out. And I think the way that it is playing out is that we're seeing resolution in ways that I think are admirable. Again, initiatives, referendum, or through commissions through codification, and then, there are going to be sort of like a small set of places where we're seeing the fight.

**[00:43:20] Guy:** One could argue the benefits of Rucho, one could argue the benefit of judicial non-intervention here, is that, look, the political process is playing this out at the state level. Aspects of it are going to be a little bit ugly but there is a lot of progress. And in fact, part of what is great about this area is that we are seeing a slow but definitely emergent

national norm that, targeting the voting rights of your opponents, voters as well as politicians, because of their political identity, is inconsistent with a notion of democratic fairness.

**[00:44:05] Guy:** And now, how does that get expressed? Or does it get expressed through the state constitution? Does it get expressed through codification? Does it get expressed through initiatives and referenda? Does it get expressed through commissions? Lots of different options for how it gets expressed, but that's kind of what the landscape now looks like, and perhaps in 15 or 20 years, we might look back, and we might see the pattern. In the same way that we don't have a debate about one person, one vote, we won't have a debate about whether it is consistent with democratic fairness to target your opponents because of their political identity. And that seems to be the direction that we're headed.

**[00:44:47] Jeffrey:** Misha, in one of your Supreme Court oral arguments, you said that there was a danger involving the justices invoking, or as you put it, launching a redistricting revolution based on social science metrics. You'd have federal courts engaging in a battle of the hypothetical experts. Are you more comfortable with applying the ensemble method at the state level when it's explicitly authorized by the state constitutions?

**[00:45:13] Misha:** Look, it's a balance. I think that the ensemble method does a good job of identifying outliers of helping to identify maps that were drawn with partisan intent. That's what the ensemble method helps to identify, by creating these neutral maps. However, I do think that the dangers we warned about in Gill and Rucho have been borne out at the state court level. So my position is that there is a great danger to any judiciary getting involved in the question of how much politics is too much, because politics is so powerful, so pervasive. And even if you have judges, like in New York, who just do a really neutral, amazing job, it's a feedback loop.

**[00:46:04] Misha:** We basically had the Democratic Party of New York launch an attack on the judges appointed by the governors for their own parties in the press, savagely attacking the chief judge. Now, blocking an incredibly well-qualified nominee because they were worried that he was going to be fair in another case where partisan gerrymandering came along. It's a really dangerous thing to a system, whether it's the federal system or the state court system, to have courts getting involved in this deeply political thicket. But the danger to the courts is just one value, and ultimately, the people decide their own state constitutions.

**[00:46:49] Misha:** So if the people say yes, that we're willing to take that harm to our state judiciary, because we think the harm of political gerrymandering, some of the harms that Guy eloquently articulated, is worse, that's a position that the people of a state can take. So I think I stand by everything we said in Gill and Rucho about the dangers to the judiciary from doing it, and if the judiciary itself is deciding whether to basically come up with a prohibition against partisan gerrymandering that's not in the state constitution, I don't think the judiciary should do that.

**[00:47:23] Misha:** But if the people of a state say, "Yes, we take those risks on. We want a prohibition that requires partisan gerrymandering," then as a justice of that state, it is your job to enforce the state constitution, even if it is harmful to the judiciary, and you have to do your level best. And the state of the art right now is the ensemble methodology. It might be

something else later, but right now, that's really the best approach that judges and justices who are given this job by the state constitution have to undertake.

**[00:47:57] Jeffrey:** Before we wrap up by asking the effect of the resolution of this North Carolina case on the U.S. Supreme Court case, Guy, I want to note that in your essay, "The Law of Gerrymandering," you note that the founders were centrally concerned with the question of apportionment, redistricting, and rotten boroughs, that George Washington's only subsident proposal at the convention was that every member of Congress represent no more than 30,000 people to guard against great disparities.

**[00:48:24] Jeffrey:** And indeed, as visitors to the National Constitution Center know, the original proposed first amendment to the Bill of Rights would've said that, after the first enumeration required by the Constitution, there should be no less than one representative for every 40,000 people. Tell us about the significance of that history for your understanding of a constitutional prohibition against extreme vote dilution, and how you think courts should take that into account.

**[00:48:53] Guy:** Yes, thank you. I think there are times in which people think that concerns about extreme vote dilution is a modern one, and do not recognize that we as a polity, as a republic, have been struggling from the very beginning with the self-interestedness of our elected officials, and how it is that we hold them accountable. That's the whole purpose of our checks and balances, and separation of power systems, is a distrust of the self-interestedness of our elected officials, and the ways in which that they can structure the process by, say, creating a rotten borough, by failure to reapportion, that allows them to stay in power and not to be held accountable, that for a very long time, we've been really worried about these mechanisms.

**[00:49:55] Guy:** And we've been really worried about these types of questions. This is not a modern worry. This is not a worry of the 21st century. And then we've tried to use multiple methods and mechanisms to struggle with that question. I agree a lot with everything that Misha said in his last set of comments. I think part of the problem is, you look at a state like North Carolina, North Carolina does not have initiatives and referenda process. So that makes it hard for the people themselves to figure out what they can do to combat their elected officials when the elected officials decide that they're going to try to manipulate voting systems, so that way, which is going to benefit the elected officials at the expense of political competition, at the expense of democratic accountability.

**[00:50:48] Guy:** So without that mechanism, then the recourse has to be through the courts because you could lobby the legislature, but the legislature is self-interested and not doing anything about it. And these are not new concerns. These are questions that we've had from the very beginning, and we've always been trying to think about how do we create systems of checks and balances, and separation of powers, and federalism to protect liberty, and to hold our elected officials accountable. And these are continuing questions in a democracy.

**[00:51:28] Jeffrey:** Well, let's wrap up by talking about the effects of the North Carolina decision. Misha, if the justices in North Carolina decide to uphold the map, will that and should it moot out the Supreme Court case, or not?

**[00:51:44] Misha:** Yeah, there were letters submitted on this technical issue about whether it takes the jurisdiction away from the Supreme Court. There are fair arguments on both sides. But I do think that what it shows is the stakes for redistricting in particular of this case are not as high as some people worry. It may be that those stakes are higher on the elections clause interpretation for election administration. The truth of the matter is, assuming that the Supreme Court was not going to adopt the extreme position, and courts can't even enforce state prohibitions against partisan gerrymandering, if the real worry was kind of courts enforcing these vague phrases, the North Carolina supreme court was really the only supreme court in this cycle that did anything like this.

**[00:52:42] Misha:** Every other state supreme court that enforced a prohibition against partisan gerrymandering was acting under a specific prohibition that would've satisfied what we call our clear statement rule. So I think that with North Carolina looking like it's going to most likely reverse this position, that the free and equal language in its constitution prohibits partisan gerrymandering, I think the stakes for the U.S. Supreme Court case, however it comes out, as long as the extreme position doesn't get adopted, for those who want to fight against partisan gerrymandering, are not particularly high.

**[00:53:14] Jeffrey:** Guy, last word in this wonderful discussion is to you. If the court in North Carolina reverses, will it and should it moot out the case, and what do you think the stakes of the U. S. Supreme Court case are?

**[00:53:26] Guy:** Yeah, I think I agree again with Misha. I think this is a hard question. If you listen to the oral arguments in the Harper to North Carolina case, it doesn't seem as if the judgment in Moore v. Harper is being questioned. I've been of two minds of this and checked in with my federal courts colleagues. At first, I thought, look, I think the court will no longer have jurisdiction but from the oral arguments, it seemed like the judgment and then the case before the court is not being questioned.

**[00:54:01] Guy:** I think the significance of Moore is wide. That is, we do need some guidance in terms of what are the limits. How far can state legislatures go and to the extent that the U.S. Supreme Court can provide that guidance, I think that would benefit our democratic system. And but maybe it might be the case that the court feels like, look, this is an opportunity to punt and might take this as an opportunity.

**[00:54:26] Guy:** But it's a close call. It's not clear exactly what the litigators are asking for, and to what extent what they're asking for North Carolina undermine the judgment in the Moore case. And if it will, then I don't think the U.S. Supreme Court would have the jurisdiction. But that's a bit unclear for me.

**[00:54:45] Jeffrey:** Thank you so much, Misha Tseytlin and Guy-Uriel Charles, for a superbly clarifying discussion of this crucially important question of partisan gerrymandering. Dear We the People listeners, a central goal of this podcast is to convene thoughtful scholars so that we can reason together, and try to achieve understanding about the most difficult constitutional issues in America today, and Guy-Uriel and Misha have really helped us in that endeavor in this wonderful discussion. Guy and Misha, thank you so much for joining.

**[00:55:17] Guy:** Pleasure, thank you.

**[00:55:20] Jeffrey:** Today's episode was produced by Lana Ulrich, Thule Pollack, and Sam Desai. It was engineered by Greg Scheckler. Research was provided by Sophia Gardell, Emily Campbell, Liam Kerse, Sam Desai, and Lana Ulrich, and thanks to Emily Campbell for the great idea for the show. Please recommend this show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination, civil dialogue, and debate, and always remember that the National Constitution Center is a private nonprofit. We rely on the generosity of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Support the mission by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership), or give a donation of any amount to support our work, including the podcast, at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.