

Recapping *Allen v. Milligan*: The Court Upholds Section 2 of the VRA

June 22, 2023

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. National Constitution Center's a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. Earlier this month, the Supreme Court handed down a major voting rights decision in the *Allen and Milligan* case. In a five to four ruling, the court upheld the 1982 amendments to the Voting Rights Act and found that Alabama's Congressional map was likely to violate to Section 2. In this episode of we the people, we'll break down the *Allen* decision and ask what it means for the future of voting rights in America. Joining us are two of America's leading scholars of election law. Rick Hasen is professor of law and political science at the UCLA School of Law. He has written about the *Allen* decision in the *New York Times* and *Slate* and is the author of *Cheap Speech: How Disinformation Poisons Our Politics and How to Cure It*. Rick, it's great to welcome you back to we the people.

[00:01:07] Rick Hasen: It's always good to be with you.

[00:01:08] Jeffrey Rosen: And Jason Torchinsky is a partner at Holtzman Vogel, specializing campaign finance and election law. He filed a brief on behalf of the National Republican Redistricting Trust in support of Alabama in this case. Jason, welcome back to we the people.

[00:01:23] Jason Torchinsky: Thank you for having me.

[00:01:25] Jeffrey Rosen: Let's start with the obvious question. Rick, why is *Allen and Milligan* important? And what did the court hold?

[00:01:34] Rick Hasen: Well, this case is important in an unusual in that it preserves the status quo. That, itself, in a voting rights case is a big deal, worthy of the front page of the *New York Times*. So, since 1982, the Voting Rights Act has had a provision commonly known as Section 2, which prevents laws that have a discriminatory effect on minority voters. The question in *Allen versus Milligan* was whether under that law, the state of Alabama when it was going through its each decade long redistricting process, had to draw a second district in which the state's Black voters could elect a representative of their choice. Alabama has seven Congressional districts. About 27% of the population is African American. Most of the others are, are, are white voters. And only one of those seven districts is drawn in a way that

allows the Black voters in the state to elect a representative of their choice. The question was whether or not the lower court was right in saying that Black voters in the so-called Black Belt Counties in Alabama were entitled to have a district drawn so that they could elect a representative of their choice. And the Supreme Court affirmed the lower court and said that "Yes, indeed, Alabama's gonna have to draw that second district."

[00:03:02] Jeffrey Rosen: Thanks so much for a great setup. Jason, why would you say the case is important? And what did the court hold?

[00:03:09] Jason Torchinsky: So, and Rick captured it pretty well. But I think what's important here is: I think a lot of what you saw from, particularly, Justice Kavanaugh is I don't think he thought that Alabama made its case well at the preliminary injunction stage. And I know a lot of the press is saying, "Well, they're gonna have to draw a second majority Black district." But I think the court laid out a path if the state wants to test further evidence, to why they shouldn't have to. I don't know if that's where the state's gonna go. I have no inside information on that. But I think, you know, things like, for example, when the court talked about communities of interest, they said there were two witnesses who testified that the Gulf Coast region was a community of interest, but their evidence wasn't very convincing. Right? And then they said, "Well, we gotta pay some attention to what, what is referred to as the Black Belt of Alabama, referring to the, the fertile soil that also happens to have high concentrations of minority population. And they talk about, you know, keeping communities of interest together."

[00:04:08] Jason Torchinsky: But every single map put forward by the plaintiffs divides what they refer to as Black Belt counties, essentially, in half. So, I think there's a lot that Alabama could do on remand. How the court's gonna address it, I don't know. I believe the Alabama legislature said that they will have a new map ready for judicial review by July 21st, so about 30 days from now. And it's gonna be interesting to see whether Alabama chooses a, a path of least resistance and passes two majority Black Congressional districts or whether they try to do something short of that and try to address some of the points that, that Justice Roberts and Justice Kavanaugh indicated they were lacking on an evidentiary basis.

[00:04:48] Jeffrey Rosen: Well, let's talk about the constitutional stakes. Rick, Chief Justice Roberts surprised many observers by joining the liberal justices and Justice Kavanaugh and rejecting the claim that Section 2 of the Voting Rights Act to the degree that it required a consideration of race was unconstitutional. Tell us about Chief Justice Roberts' constitutional conclusion.

[00:05:15] Rick Hasen: So, I think to answer that question, I have to go back and give a little bit of history. Back in 1965, Congress passed the first iteration of the Voting Rights Act. And among the provisions in that act is a provision that was not at issue in the Milligan case was a provision commonly known as Section 5, which said that states like Alabama with a history of racial discrimination in voting had to get pre-clearance or federal approval from the Department of Justice or a three-judge court before they made any changes in their voting rules. And they had to show that these changes wouldn't make minority voters worse off. And in a case that came after the passage of the act in 1966, the Supreme Court upheld this provision against a constitutional attack in a case called South Carolina versus Katzenbach.

[00:06:05] Rick Hasen: The court said, "Wow, this is a, this a big intrusion on state sovereignty. You're telling states they can't pass election rules without federal approval. But given the history of racial discrimination this provision is an appropriate exercise of Congress' powers. Congress has power under both the 14th and 15th Amendments to pass appropriate legislation. Under the 15 Amendment as relevant here, to protect the equal protection of voters, under the 15 Amendment to prevent discrimination in voting on the basis of race." And the Supreme Court repeatedly over the next few decades, upheld the power of Congress to require pre-clearance, commonly known as Section 5. All of that changed in 2013. Congress had repeatedly renewed the Voting Rights Act, sometimes expanded the Voting Rights Act, most recently in 2006, when it expanded that pre-clearance requirement for another 25 years to go into the 2030s. And in *Shelby County versus Holder*, the Supreme Court said what was once constitutional is no longer constitutional because Congress had not established that states were still engaged in intentionally discriminatory conduct that would justify such a requirement. Okay. And Chief Justice Roberts is the one who wrote that opinion. Roberts expressed some skepticism and said, you know, "A lot has changed in the South. We don't need this anymore."

[00:07:31] Rick Hasen: Okay. Fast-forward to this *Milligan* case. Alabama made a similar kind of argument, that Section 2, the, the provision that was at issue in *Milligan*, is unconstitutional. And the court had long in the Section 2 cases, assumed that Section 2 was constitutional. But here was a case where Chief Justice Roberts said affirmatively for a majority of the court that section is constitutional. And he cited back to cases like *South Carolina versus Katzenbach*. He said that just like in *South Carolina versus Katzenbach* where Section 5 was found to be an appropriate exercise of Congress' power, this was an appropriate exercise of Congress' power. Even though the 15th amendment, itself, bars only intentional discrimination in voting on the basis of race, Congress had the power to pass a law that would prevent voting rules with a discriminatory effect. And that's what Section 2 does. It's a so-called effects test. So, in a very brief analysis, a Supreme Court majority opinion by Chief Justice Roberts says it's constitutional.

[00:08:38] Rick Hasen: What's maybe most important about this is that Justice Kavanaugh who concurs in the majority opinion, agrees it's constitutional, agrees with the analysis that another Black majority district is gonna have to be drawn, says, "While I agree it's constitutional, there's a separate constitutional argument that parallels the *Shelby County* argument that Alabama didn't really develop. It's that while Section 2 used to be constitutional, it's no longer constitutional because of the passage of time and the changes in conditions on the ground." And Kavanaugh left open, the possibility that he, he could agree that it's unconstitutional in, in a future case. Now, among the dissenters, at least three of the four dissenters that is Thomas, Barrett, and Gorsuch, taking the view that Section 2 is unconstitutional. Justice Alito did not express an opinion on this and didn't join that part Thomas' opinion, but that's at least three. Alito could be a fourth, and Kavanaugh could be a fifth if this issue came back to the court. So, although the court majority in *Milligan* says it's constitutional as of now, that's a ruling that could potentially be challenged in a few years as a case is developed that addresses the issue that Justice Kavanaugh expressly left open.

[00:10:00] Jeffrey Rosen: Great, thank you for laying on the table, the three positions of Chief Justice Roberts, Justice Kavanaugh, and the dissenters. Jason, tell us about the arguments of the dissenters led by Justice Thomas, that Section 2 is unconstitutional. It's a view he's long taken. And he's said that to the degree that Section 2 requires race

consciousness in considering the effect of redistricting, it violated the colorblindness requirements of the 15 Amendment. Tell us more about his argument.

[00:10:30] Jason Torchinsky: And that's right. And this is where I think Justice Roberts and, and Justice Thomas sort of part ways in this opinion. Right? Justice Thomas for a long time has said the requirement of considerations of race renders it unconstitutional. The way the court has set this up ... And let's, let's keep in mind, all of the, the Gingles factors, which is the, the three-part initial test, that, that determine whether Section 2 requires, you know, a, a, a majority-minority district. The first ... In particular, the first Gingles prong, which is you have to have a reasonably compact minority community and have to show that, you know, not only is the minority community compact, but that there are enough of the minority population at issue to make a majority of a district you know, that consciousness alone, that intentional drawing of a majority-minority district, Justice Thomas has long held violates the Constitution. This, this is not a new position of Justice Thomas that he just rolled out in Milligan. He's held this, I believe, at least since the '90s, since he went onto the court in the '90s.

[00:11:34] Jeffrey Rosen: Rick, Chief Justice Roberts takes Justice Thomas to task for suggesting that maybe Section 2 doesn't apply to districting it at all. Maybe it just applies to things like poll taxes and discriminatory voting requirements. And Chief Justice Roberts Congress' explicit purpose in 1982 was to overturn the court's decision in the Mobile case, also arising out of Alabama, and to resurrect the effects test. Isn't Chief Justice Roberts correct about that? And on textualist grounds, how does Thomas try to argue otherwise?

[00:12:10] Rick Hasen: So I agree with you that Roberts has the stronger of the argument here. And if I'm recalling correctly, because there were justices that joined different parts of the dissenting opinion of Justice Thomas, I believe only Justice Gorsuch joined that part of Justice Thomas' dissent that said Section 2 doesn't even apply to redistricting. So, Justice Gorsuch is one of the, you know, self-identified textualists on the court. So, you know, so, how is this possible given the fact that if you look at the legislative history and you look at legislative context, it's very clear that Congress was expecting that this applied to redistricting? It actually you know ... If you look at the hearings, the committee reports, it's, it's very clear. So, the argument is the textual one. It's that when the statute makes reference to a voting practice or procedure that doesn't include redistricting. It's more about things like, "Where are locating polling places? Are you allowing voting by mail, voter ID?" Those kinds of things, and not redistricting. And so, it's based on this language.

[00:13:19] Rick Hasen: I do think that there's, you know, ample evidence that at least the Congress in 2006 contemplated that Section 2 applied to redistricting. There was lots of testimony about that. And what Roberts hangs his textualist hat on is that definition of what it means to talk about what's covered under Section 2 anything that makes the vote effective. And he said, "Making a vote effective includes how districts are drawn." so this position, I think of all of the arguments, I think it's the weakest of Justice Thomas' arguments given this history. And even on a textualist basis, given the argument that's about what makes a vote effective, you know, I think more formidable challenge is the constitutional one that Jason just talked about. And what I thought was really interesting in John Roberts' majority opinion is that he does not cite Shelby County in this constitutional analysis. He doesn't compare why Section 2 is constitutional while Section 5 was found to be no longer constitution. That, you know, that was really interesting.

[00:14:26] Rick Hasen: And in fact, there's this really odd echo ... I wrote about this in my Times piece. There's this really odd echo from Shelby County that's not acknowledged by Roberts. In Shelby County, as I mentioned Roberts says things have changed enough in the South. He said something like, you know, "History didn't stop in 1965. In this case, he said history didn't stop in 1960, but he's saying it for a didn't point. He's saying it to refute Alabama's argument that this provision, Section 2, was no longer necessary. So, it makes me wonder you know, what motivated Chief Justice Roberts to change his tune, especially because ... And Roberts doesn't reference this either in the opinion. As he recounts the history of the Congressional debate over the rewriting of Section 2 in 1982 after the City of Mobile's Supreme Court case, John Roberts was the guy who was working for the attorney general on this issue and actually was lobbying against a broader language in Section 5.

[00:15:29] Rick Hasen: At one point in the Milligan opinion, Chief Justice Roberts says, "The attorney general also objected to the more expansive proposed standard for Section 2, which was then changed in a compromise crafted by Senator Bob Dole." When he said the attorney general did that, he was actually referring to those who worked for the attorney general, which was him. So, it was kind of funny. He's had a long history with the Voting Rights Act and with this section.

[00:15:54] Jeffrey Rosen: Jason, what do you think Justice Thomas is getting at? Isn't that right Congress was explicit about covering redistricting? That was whole point of overturning Mobile, which dealt with redistricting, and the purpose was clear there? Is Justice Thomas denying that history? Or you saying if you look at the text, you should try to construe it in a way that avoids the constitutional challenge, and therefore, we're gonna say that maybe it doesn't apply to redistricting?

[00:16:22] Jason Torchinsky: So, I think the textualist defense of the position of Justice Gorsuch and Justice Thomas ... And I agree with Rick's reading of who joined what among the dissenters. I think the answer there is when you look at the text, it doesn't say districts. It doesn't say redistricting. And when Congress meant to, to cover districts or redistricting it says it. Right? And you know, and I think their position regardless of "If you look at the legislative history and context, you know that it applies to redistricting." And they look at it and say, "But Congress didn't put it in the statute." And I think that's their kind of simple answer, is, "If it doesn't appear in the statute, I should have to go to legislative history and a history book to understand the context of the words that Congress actually adopted."

[00:17:13] Jeffrey Rosen: That's helpful. I'm gonna take one more beat on it 'cause it's so important. Rick this would be an example of textualism that's ignoring the clear purpose. I mean, everyone knew what the point of the 1982 amendments were. It was extremely hard thought. The compromise was, "Let's race into account in districting, but not have proportional representation." What do you make of a textualist construction that would ignore the clear purpose of the amendment?

[00:17:39] Rick Hasen: Well, I don't even think it's good textualism. So, even if you ignore the legislative history and you ignore the historical context ... And you know, there are a lot of cases where textualists will look at historical context. Well, they'll recite what the social context was in which a statute is passed. Bostock is a good example where the textualist justices debate how much social context to take into account. If you just look at the text, I think you can make a textual argument that to make a vote effective the protection of equal

opportunity to participate in the political process and to elect representatives of their choice. That's the operative language of Section 2, "To participate in the political process and to elect representative of their choice." If there is a kind of racial gerrymandering where w- white voters do not allow Black voters in Alabama to elect the candidates of their choice, that, that violates the, the actual text of the act. That's why I said that it's, it's much weaker.

[00:18:38] Rick Hasen: I don't agree with Justice Thomas on its constitutional argument, but I think it's one that can be made with a straight face, especially after Shelby County. But this one you know, it just seems weak to anyone who's you know, understands how politics works, understand what it means when there's racially polarized voting, and looks at the language of Section 2 itself.

[00:18:59] Jeffrey Rosen: Jason, would love to have your sense of the Justice Thomas textual argument and also your own. You construe the text to require that race be the cause of a voter's inability to elect representatives of his or her choice. Tell us more about that.

[00:19:17] Jason Torchinsky: Yeah. So, let me just address one other thing. I think the other difference between Shelby County and this case, at least the way Justice Roberts seems to approach it, is the, the difference was Section 5 has always had a sunset provision. Right? And Congress kept extending the sunset. Section 2 was never intended to sunset. Right? There's no expiration to Section 2. It is with us forever unless Congress amends it or the Supreme Court strikes it down. So, I think what you were hearing from Justice Kavanaugh is sort of a, "Yeah, the Congress didn't set a deadline. But perhaps, the Constitution brings a deadline in here somewhere." so, I think that's gonna be an interesting debate to see how it plays out over the next couple of cases. But back to the issue about how you can consider race, you know ... and the challenge here is separating race and politics or whether you can or not.

[00:20:10] Jason Torchinsky: In particular in Alabama and in another, number of other places where there are African Americans, the correlation between Black vote and the Democratic Party vote is very, very high. I mean, in Alabama, I believe it's north of 90 something percent. And so the question is, when an African American can't win a statewide election in Alabama, is it because they're Black? Or it because they're running as a Democrat? And I think that that's some of what, I think, the courts should be trying to untangle in these cases. And if they're not winning because they're a Democrat, I think that's a different question than, "Are they not winning because they're African American?" And again, in particular, in African American community, it can be hard to sort of figure out exactly what's happened.

[00:20:59] Jason Torchinsky: You know, there was another redistricting case out of Alabama, I think, involving the state judiciary where the court really ... The court in that case, lower court, went through really, the history to decline other Democratic Party overall in Alabama. You know, Alabama used to be a Democratic state in the 1960s. It was all run by Democrats. And 60 years later, it's all run by Republicans. And the court chronicled essentially the decline of the Democratic Party. So, you know, separating race and politics or dealing with the intersection of race and politics is, I think, what's at base here. And I think ... Look, why is, you know ... For example, Marc Elias, who's a, you know, no bones about it, a Democratic Party lawyer, why is he representing people in this case? 'Cause he wants another

Democratic district in Alabama. You know, so, I mean, there is a real political overtone to this that is separate, I think, from the race question.

[00:21:52] Jeffrey Rosen: Rick, what is the relevance of the correlation between race and politics that Jason mentions in deciding whether or not Gingles test, which Chief Justice Roberts reaffirmed for now, remains a good test of whether or not Black voters have the opportunity to elect representatives of their choice?

[00:22:11] Rick Hasen: Well, if you go back Gingles ... And Gingles was the 1986 case that was the first time the Supreme Court construed the revised section 2. You know, Congress fixes or, or revises Section 2 in, in 1982. The Supreme Court interprets in 1986. And the court says that, you know, causation doesn't matter. It doesn't matter Black voters and white voters may prefer different candidates. It just matters that they do. Doesn't matter if it's because they're poor or because they're from parties or whatever. That was the line in Gingles. That was the line that I believe is a plurality and not a majority, and which is why this issue keeps coming up. You know, maybe Milligan maybe Roberts is, is best understood as having adopted that position, that, that causation really doesn't matter. But I agree with Jason. And I've long written that there's a huge artificiality in the court's understanding of these voting cases where we have what political scientists called conjoined polarization. In lots of places in the South, most Black voters vote for Democrats. Most white voters, a slightly smaller majority, but most white voters vote for Republicans.

[00:23:19] Rick Hasen: And so when there's discrimination against Democrats, is that discrimination against Blacks? And this comes up more frequently in the racial gerrymandering cases. And we had a big racial gerrymandering out of Alabama a few years ago called Alabama Legislative Black Caucus. The court spends all this time trying to figure out if race or party predominates. And I think it's a nonsensical question because when there's conjoined polarization, when you discriminate against Democrats in Alabama, you are discriminating against Blacks. And it's a violation of Voting Rights Act, and it doesn't matter whether it's because they're Democrats or because they're Black. It has the same effect. And this is an effects test. I did wanna make one other point. To go back to this question about the lack of a sunset provision in Section 2, Section 5 had an actual sunset for five years, five years, seven years, 25 years, 25 years. That was the pattern. Section 2 doesn't have a sunset explicitly built in, but has a natural sunset.

[00:24:19] Rick Hasen: So, under the Gingles test, you have to show three things for you to pass what's called the threshold to make a kind of Section 2 claim be at least plausible. First, you have to show that the minority group is large and relatively compact enough that you could draw a district where minority voters can elect a representative of their choice. But the second and third requirements are those of racially polarized voting, that white voters and minority voters, each vote is block and that the white voters can usually defeat the candidates of their choice. Once racially polarized voting stops, that is once white voters and minority start supporting the same candidates. Once there is no longer that kind of private racial discrimination that's going on in places like Alabama, then Section 2 naturally sunsets. And so, it has a natural sunset. It sunsets when we stop seeing racially polarized voting. But unfortunately, in lots of parts of the country, in the South especially, racially polarized voting is still a reality.

[00:25:20] Jeffrey Rosen: Thank you for that helpful explanation of Gingles. Jason, you in your brief, suggest reading a causation requirement into Section 2 and saying that race has to be the cause of the inability to elect representatives of choice. But Rick has said that Gingles court, now maybe joined by Justice Roberts, says it doesn't matter why voters prefer the candidates they do. It just matters they do. Tell us why you think the causation test should be read into Section 2. And, and how is that consistent with Congress' desire to resurrect the effects test in Section 2?

[00:25:57] Jason Torchinsky: Sure. Section 2 says, "On account of race." And I think, you know Rick is right. You've got sort of the conjoined issue of African American voters and the Democratic Party. Where I think this becomes a lot more challenging is with Hispanic voters. Hispanic voters, depending on where they are in the US and what the sort of history of that particular Hispanic community is, has a lot more variation than you see among African American voters. And I'll give you a great example. There was a case out of the southern district of Texas that involved the Texas judiciary. And basically, the judge said, "look, Hispanic Republicans win statewide judicial offices in Texas. Democratic Hispanic candidates don't." And the judge said, "Look, this isn't a case of race discrimination. This is a party thing. Right? When the Republican Party nominates Hispanic judges, they win. When the Democratic Party nominates, you know, white judges or Hispanic judges, they lose."

[00:26:59] Jason Torchinsky: And the judge concluded that that was not ... And again, this gets to Rick's point, which is, "It wasn't racially polarized voting. The polarization that you saw, the differences that you saw in the voting patterns were on the basis of party." And you really can sort of tease this out in a sense. You can look at general elections. And when the race of the candidate varies, but the partisan levels or the, the voting patterns of a particular minority group stay exactly the same, you know, you start to think, "Well, maybe it's party." But then you can take a step back often, and you can look at primaries. And when you look at primaries, that's where you really start to see whether ... You know, where you've taken the party label out of it. Right? Everybody's a Democrat that's running in a primary. Are the Hispanic Democrats and the white Democrats, or are Black Democrats and the white Democrats voting for the same candidate in the primary? Or are they splitting?

[00:27:54] Jason Torchinsky: And if they're splitting in the primaries, that suggests that what you see in the general election is really a partisan cue and not a race issue. And I think the courts need to add more, more nuance to this when they look at it. And I think it helps you divine whether this is really race or politics. And I think the, "On account of" language in Section 2 is something critical that the court needs to wrestle with.

[00:28:19] Jeffrey Rosen: Rick, let's talk about the sunset requirement. You suggested there's a natural sunset requirement in Section 2 as interpreted by Gingles. When racial polarization stops, so would the Section 2 constraints. Is Justice Kavanaugh suggesting that he might be open to reading a sunset requirement into Section 2 even though Congress didn't put one in?

[00:28:42] Rick Hasen: Yeah. Well, I say effectively yes because he says that ... He calls it the temporal argument. That is an argument based on time, that yes, in the past, Section 2 was necessary, but maybe it's no longer necessary. And it doesn't have an exact parallel to Shelby County. Right? So, it echoes Shelby County. Shelby County said, "You picked these as the bad guys. These are the ones that have to get pre-clearance." And then Congress doesn't

change that formula. So, how was that formula derived? It was based on data about voter turnout from 1965 or 1970. And it was tied to whether or not those jurisdictions that had turnout below 50% also had a test or device for voting, like a literacy test. And then when Congress renews the Voting Rights Act in '82, they don't touch the formula. When they renewed again in 2006, they don't touch the formula.

[00:29:42] Rick Hasen: And I actually testified before the Senate Judiciary Committee. And I said, "Given the, what the court has done, ..." What I called the federalism revolution, which Jeff, you've written a lot about, the cases like *City of Boerne versus Flores* and a bunch of other cases. I was concerned that if Congress did not update the coverage formula that Section 5 could be vulnerable to a constitutional challenge. You're using old data. And how can you show that these places that are covered are still a problem? Now, the reason I say that doesn't easily translate into the Section 2 context is that Section 2 is a national standard. It doesn't single out particular states or jurisdictions. It says anywhere in the country where you can meet the Gingles threshold factors that we talked about, the, the minority group is large and compact enough, and you've got racially polarized voting, then you make a claim and go to what they call a totality of the circumstances, and figure out if there's a good Voting Rights Act violation here under Section 2.

[00:30:45] Rick Hasen: It can happen in New York City. It can happen in Los Angeles County. You know, we've had suits all over the country. So, it's not geographically based. And then it's not singling out any bad guys. And as racially polarized voting ends in particular places, and as minority voters get a fair chance to elect the candidates of their choice, it naturally sunsets. And so I'm not sure exactly what the temporal argument would look like. Part of the issue was that Alabama didn't give a lot of attention to this issue in its briefs. To be quite frank with you, I think Alabama's arguments, some of them were very shoddy and not well-developed. And I think the court wants to see good arguments. And what Justice Kavanaugh is saying is, "If you've got a good argument that, you know, the time has passed, develop that. Develop that in the lower court. Develop the evidence, and then come back to this court." I think, so, he's open to that kind of argument. But I'm not sure exactly how that Shelby-County-like argument is gonna translate in this particular context.

[00:31:46] Jeffrey Rosen: Jason, what would the temporal argument look like? Justice Kavanaugh cites the *City of Rome* case from 1980. But that was before the '82 amendments obviously. He says, "As the court explains, the constitutional argument presented by Alabama is not persuasive in light of the *City of Rome* case." But then he says, "Justice Thomas notes even if Congress in '82 could constitutionally authorize race based redistricting for some period of time, the authority to conduct race based redistricting cannot extend indefinitely into the future." What cases or arguments does Justice Thomas have in my mind when he says there might be a time limit to the remedial authority?

[00:32:22] Jason Torchinsky: You know, I think maybe where he's going is ... There's a, a couple of cases that really has been used kind of more outside the voting area, but kind of the congruence and proportionality line of cases where, you know, Congress has taken this, this very broad sweep for what is a narrow problem. And I think, you know ... In addition to, to that, I think the other temporal issue that, that Rick raised, is, you know, on the racially polarized voting, I think there's another aspect to that I think is probably gonna be important to the court, which is residential patterns are changing, right, over the last few years. In the 1940s, 1950s, you had neighborhoods where people of certain minority groups couldn't even

buy a house. Right? And so what's happened over the last 60 years when you consider that 10% of Americans moved every year a lot of what were concentrated minority communities aren't as geographically concentrated anymore as they were, you know, in the era of segregation.

[00:33:27] Jason Torchinsky: So, I think there's a, there's a difference here that I think maybe Justice Kavanaugh is seeing, which is, "Look, residential patterns have changed. Housing patterns have changed. Housing laws have changed. These restrictive covenants that prohibited certain minority groups from living certain neighborhoods are, are gone or have been struck down." So, there's a, a question of whether this really should continue indefinitely or not. And I think that's what Justice Kavanaugh is raising and sort of inviting some litigant down the road to raise because there have been changes in America since the 1960s. And I think Justice Kavanaugh is saying the court needs to recognize that as well. And you know, legislation that may have been appropriate at some point in time isn't always appropriate indefinitely.

[00:34:15] Jeffrey Rosen: And Rick, if the court were to read a sunset into Congress' ability to legislate under Section 2, would that be consistent with past voting rights cases or not?

[00:34:27] Rick Hasen: Well it certainly would be inconsistent with what the court just said in *Milligan*, which is you know ... Roberts doesn't qualify this by saying you know, "We're not reaching the temporal argument." I see this as a holding that Section 2 is constitutional. And so it would mean overruling *Milligan*. And you know, it's certainly been the case that the justices have been willing to assume Section 2 is constitutional in the context of racial gerrymandering case. I would say if you go back ... And this'll take us back many years to *Bush versus Vera*, which was a, a very big Texas voting rights case in the, in the 1990s. If I'm remembering this right, and this is testing my memory, I believe Justice O'Connor concurred in her own opinion to provide a fifth vote saying that Section 2 is constitutional. So, I think that case would have to be overruled too. So I think it would be quite inconsistent.

[00:35:15] Rick Hasen: One of the things that were assured ... Those of us who were opposed to the litigation over *Shelby County*, one of the things that we were assure when Section 5 was being attacked as unconstitutional and no longer necessary is, "Don't worry voting rights advocates, there's always Section 2 to protect minority voters." And now, it's a one-two punch. First, kill Section 5. Now, they're trying to do kill Section 2. I mean, that's always been the kind of long-term plan here. If you go back to Justice Thomas ... Jason mentioned this earlier. Justice Thomas' opposition to the Voting Rights Act is longstanding. Go back to *Holder versus Hall*, which is a 1994 case, where Justice Thomas just launches this huge attack on the Voting Rights Act and its constitutionality. And so, this has been a long-term project. And I think that it's I don't wanna call it a bait and switch because I've always expected that after the attack on Section 5 was successful, there'd be an attack on Section 2.

[00:36:13] Rick Hasen: Just like in the campaign finance context, I expected that once limits started getting struck down, there would be an attack on disclosure. There's just a kind of long-term project to try to kill off those parts of the law that some people don't like. And that's ... I think it would not only be inconsistent to strike down Section 2 with what the court has done in the past, I think it would be yet another blow to minority voting rights in this country. And as I suggested in that *Times* piece ... And we're recording this before the Supreme Court issues its next set of opinions. But I think that this might be a way of trying to

soften the blow of what I expect is gonna come in the affirmative action and education cases where the court, I don't expect, is going to side with racial and ethnic minorities in this country.

[00:37:00] Jeffrey Rosen: Thank you for remembering the Bush and Vera case from '96 where Justice O'Connor does indeed write a separate concurrence to her own opinion. This prompted Pam Karlan of Stanford to remark, "At last, Justice O'Connor has found someone she can agree with, herself."

[00:37:16] Jeffrey Rosen: And Justice O'Connor in that case, stressed that simple race consciousness is not enough to doom a voting rights provision, that you actually have to have race as a predominant purpose. And Chief Justice Roberts embraces that distinction when he says there's a difference between race consciousness and racial predominance. Jason, how significant is that distinction of Chief Justice Roberts? Does that suggest that he thinks that you can have a degree of race consciousness in the voting area that you can't have, say, in affirmative action? And, and to what degree does Justice Thomas reject that?

[00:37:54] Jason Torchinsky: Well, I think, you know, we're also recording this before the Harvard and North Carolina decision's come out. I think, you know, Justice Roberts, here, I think acknowledges that Congress explicitly required consideration of race here. And I think in light of essentially, the court created law that court created in the Gingles, I think Justice Roberts is basically, you know, inviting Congress to revisit it if it chooses. What's, I think, a little frustrating about the opinion here from the perspective of people who actually have to draw maps, mainly legislators the court didn't really give a ton of additional guidance here. Right? They reaffirmed kind of the old Gingles test. But they didn't really tell legislatures what to do. Right? If they consider race too much, they've racially gerrymandered. If they don't consider race enough, they violated Section 2. And you sort of leave this question of, "What's too much, or what's not enough?"

[00:38:57] Jason Torchinsky: And I think, you know, there's another case that's pending at the Supreme Court, which is the Congressional redistricting case out of Louisiana. You know, I think there's a lot of public commentary that, that thinks that, or that suggests that Milligan is gonna require Louisiana to draw a second majority-minority Congressional district. But I think what people are missing is the factual distinctions. And I think what Milligan made clear is these cases are gonna very fact intensive, going forward. To draw the second majority-minority district in Alabama, they basically divided the Black Belt neighborhood in half, east to west, or community and state in half, east to west, went a little bit north and grabbed African American population in Montgomery, and then went a little bit south and grabbed African American population out of Mobile.

[00:39:43] Jason Torchinsky: In Louisiana, the plaintiffs proposed maps reach fingers into every single city in eastern half of the state. And they draw, you know, part of New Orleans, part of Baton Rouge. They split the city of Monroe. They split the city of Alexandria. They split the city of Lafayette. And when they divide the cities, they divide them entirely along racial residential patterns. So, I'm not sure that Justice Kavanaugh and Justice Roberts think that Section 2 requires you to go carve up all the cities in the state and divide them along racial residential patterns. And so it's gonna very interesting to see what they do with it. But I think we may see a different view from Justice Kavanaugh and Justice Roberts when they look very closely at the, the proposed maps in the Louisiana case.

[00:40:33] Jeffrey Rosen: Thanks for reminding us of the fact that these cases will be in fact, specific. Rick much was made in this case about the fact that two million simulations with a neutral map didn't produce the need to have a second majority-minority district. But Chief Justice Roberts countered, "You might have a trillion, given the scope of the challenge here." Tell us what those numbers mean. And, and also, this is Alabama. This was the place where the Mobile case arose. Is the Black Belt as it's called here, geographically compact? Or why is it that those two million maps didn't produce another district?

[00:41:10] Rick Hasen: I believe that Roberts said trillion, trillion or something like that. Like, it wasn't just a trillion. Let me make a general point about that before I turn to your specific question. Roberts is really skeptical about the use of computers to solve, ... An algorithm to solve these problems. He expressed similar skepticism in a case called Gill versus Whitford, which was a case that was a precursor to the Rucho case, involving partisan gerrymandering. He thinks that these maps don't really show all that much. You may remember that Kagan, in her dissent in the Rucho case, thought the maps were helpful in figuring out, you know, whether or not partisan was, you know, the key factor in understanding how districts might've been drawn there. The problem with trying to use districts that were drawn by computer in this case is that that ... Unless you, unless you program race into that determination of drawing districts, you'd be using a race neutral process to try to understand how to enforce a race conscious statute.

[00:42:10] Rick Hasen: That is the Section 2 of the Voting Rights Act says, "You must take race into account to assure that minority voters have a fair opportunity to elect representative of their choice." And in fact, if you look at the maps that were drawn by the plaintiffs to demonstrate that you could draw these majority-minority districts in a reasonably compact way, they were more compact than the districts that were actually drawn by the state of Alabama. So you know, the computer didn't do it randomly. But this is not a random process. This is a process where it's supposed to be race conscious, race conscious, but not proportional. And John Roberts goes out of his way ... In part, this goes back to his history in 1992 when he fought against what he thought Section 2 would lead to proportional representation, which is something that Roberts really doesn't like also. Part of the, the Dole compromise, what got Section 2 through Congress, was a part of Section 2 that says, "No guarantee of proportional representation."

[00:43:08] Rick Hasen: And Roberts drops a footnote in Milligan. And he says, "Minority voters in this country have never had proportional representation." He's saying that is something to be celebrated. I think some of us would see that as something that is an unfortunate reflection of how power is divided in the United States. But, for whatever it's worth, Section 2 has never required proportional representation. It does not require making race the predominant factor. And so I think Jason's claim that this is, you know, really putting state legislators to the test because, you know, if they take race into account too much, it's a racial gerrymander. If they don't take into account enough, it's a Section 2 violation. Roberts in this opinion says, "There's plenty of space here to be able to not make race the predominant factor, but still assure that in, in, in those places where minority voters are concentrated and there's racially polarized voting, they get a fair shot to elect the representatives of their choice."

[00:44:01] Jeffrey Rosen: Jason, do you agree with Roberts' factual claim that there's places like Louisiana where it's possible in the face of racially polarized voting to create that

district? And what will the new district look like in Louisiana? And do you think it's consistent with the text of Voting Rights Act or not?

[00:44:19] Jason Torchinsky: So, I think the, the problem is, you know, "Well, what is a traditional districting factor?" Right? I mean in Alabama, they weren't dividing up all the cities. They were keeping lots of counties whole. In the proposed Louisiana maps, they literally divide all the cities. I don't think Justice Roberts is gonna be as receptive to that as he was to what was presented in Louisiana. And I think with respect to the simulations ... And I think Justice Roberts, I think, called it social science gobbledygook. And I think that's his concern. Right? Because if you try to set up Section 2 so it's like, you know, "Whose algorithm can draw the more compact district that cuts the least number of cities, towns, and counties?"

[00:45:02] Jason Torchinsky: You know, I mean, if that's what we're setting up, is a battle of the algorithms, I think that's what Justice Roberts really wanted to avoid here because if, if Alabama looked at it and was like, "Okay. You know what? They cut X number of counties and hit these compactness scores. We're gonna have our computer simulation guys say, you know, 'The compactness score must be, you know, must be this number. And the county splits must be less than Y.'" And you can have a computer draw that." Right? And I think what Justice Roberts, I think, feared was the battle of the computer algorithms to decide, you know, what districts should look like. And I think he doesn't want that. And I think some of this discussion is to prevent that.

[00:45:41] Jeffrey Rosen: Rick, what will the significance of Milligan be on districting in practice, moving forward?

[00:45:51] Rick Hasen: So, I think this remains to be seen. I see this as an opinion that mostly maintains the status quo, that sends a message to lower courts that you should keep applying the Gingles as though it has teeth and it matters. I don't think it was meant to make any new law on the statutory question of what the Gingles standard is, which is kind of weird because Chief Justice Roberts, when he dissented from the stay that was put in place I guess now a couple of years ago in this case, he said you know, "There's a lot of nuances to Gingles. We should revisit those." And then he doesn't really revisit those. So, they're still hanging out there. But, you know, I think it maintains the status quo. The real question ... And I know Jason is gonna be fighting for Louisiana to not draw that district. And we're gonna see fights in Georgia and Texas, and elsewhere. The real question is, you know, applying Gingles as it's commonly understood, what is that going to mean?

[00:46:50] Rick Hasen: You know, there have been some analyses looking at Congress, saying that as many as five seats could shift from being white Republican districts to likely Black Democratic districts. I don't know. I mean, these cases ... I think one thing Jason and I agree on is these cases are really fact intensive. And you can't just say you know, because there's a large of minority voters, that they're necessarily gonna win their Section 2 claims. Section 2 claims are hard to bring. They're hard to win. They're very expensive. That's one of the reasons why many of us didn't want to see Section 5 go away in Shelby County. So, I think it's really hard to tell. I think the corollary question is, "What would it have meant if Justice Alito had written the majority opinion or Justice Thomas?"

[00:47:37] Rick Hasen: Justice Thomas wrote it, "Section 2 goes away. It's unconstitutional." But what about Justice Alito? We haven't talked about Alito at all. Alito says, you know "Alabama kind of came up with this crazy argument that you should read Section 2 race neutrally." Well, that's not right. And then he tweaks the Gingles, first Gingles standard in a way that would've meant fewer successful Section 2 cases. And so the corollary question is, "What would've it have meant for Alito to have written the majority opinion?" It would've meant that it would be harder to have minority representation in Congress, in state legislatures, in city halls, on county boards. And so this maintains the status quo. And each case is gonna fought on its own facts and merits.

[00:48:20] Jeffrey Rosen: Jason, what do you think the practical effect of the decision will be? Do you agree with estimates that it could shift as many as five congressional seats or not and, and maybe a beat on Justice Alito's alternative? Was that convincing narrowing of, of Gingles to you, or not?

[00:48:36] Jason Torchinsky: So, I don't agree that it's gonna result in the shift of five seats. You know, I think we'll see what the court decides it's gonna do with the Louisiana case. That may give us more substance frankly than, than Milligan did about sort of what the current court's view is 'cause I think it raises some different questions. And I think the question is, "How crazy does a district have to look for it be required?" And I think that's the tension between the 14th Amendment and Section 2. So, I think Milligan is gonna lead to substantially more litigation. I think Justice Alito ... Right? And Justice Alito's in, really, a unique position on the court. I think he's the, you know, next to Justice O'Connor, probably the one who has the most personal connection to the whole mapping process. And Jeffrey, I think I said this before on some of your programs.

[00:49:25] Jason Torchinsky: Justice Alito's father was the director of legislative services for the New Jersey legislature when the Karcher versus Daggett case went through in the early 1980s. And there's actually a footnote in there that cites to an affidavit from Sam Alito Senior. And Justice Alito has talked about sort of watching his dad draw maps at the dining room table. Justice O'Connor drew maps when she was in the state legislature. So, I think they are probably the two justices who've had the most direct mapping experience. And if you listen to Alito during the argument, he sort of says, "Well, what are we trying to tell the legislators here? What guidance are we giving them? What is a legislator who has vote on one of these supposed to take away from this?" So, I think Alito was looking for more clearer lines to give to legislators because I think he's got a different perspective on it. And so I think it'll be interesting to see if his view essentially emerges out of this. You know can he cobble together five out of his six for some more clear instructions? I'm kind of hoping that he does 'cause frankly, advising legislators these days is really tough. And that's where I'm kind of hoping this, this will end up going. But I do think there's gonna be a lot more litigation leading up to it.

[00:50:36] Jeffrey Rosen: Thank you so much, Rick Hasen and Jason Torchinsky, for a thoughtful, civil, and really illuminating discussion of extremely tough constitutional and statutory arguments around the meaning of Section 2 of the Voting Rights Act. Rick, Jason, thank you so much for joining.

[00:50:56] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock, Sam Desai, and Samson Mostashari, was engineered by David Stotz. Research was provided by

Yara Daraiseh, who's just joined us as a content fellow. Welcome Yara, along with Sam Desai, Samson Mostashari, Tomas Vallejo, and Connor Rust. This is the last episode of we the people produced by Sam Desai, my special assistant. Sam has been the Pythagorean embodiment of a superb colleague and friend for the past two years. And he shaped this show every week with industry, order, temperance, and resolution. He's off to Yale Law School. And I will miss him. Sam's successor is Samson Mostashari, who's just started this week. And it is wonderful to welcome Samson aboard. Please recommend this show to friends, colleagues, or anyone anywhere who eager for a weekly dose of constitutional debate. And always remember that the National Constitution Center's 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. Sign up for the newsletter at constitutioncenter.org/connect or give a donation of any amount to support our work, including the podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.