Supreme Court Strikes Down Louisiana Congressional Map

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[0:00:00.3] Julie Silverbrook: From the National Constitution Center in Philadelphia, this is We The People.

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[0:00:08.7] Julie Silverbrook: I'm Julie Silverbrook, Chief Content and Learning Officer. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. Last week, the Supreme Court struck down a Louisiana congressional map, holding that it violated the Constitution's Equal Protection Clause as an unconstitutional racial gerrymander. In *Louisiana* versus *Callais*, the Court said that the Voting Rights Act did not require Louisiana to create an additional majority minority district. For decades, Section Two of the Voting Rights Act, or VRA, has been central to how Courts evaluate whether or not an electoral map dilutes the voting power of minority communities. In its 6:3 decision, the Court reframes how the VRA should be interpreted and updates the legal framework that will guide states moving forward. In this episode, we'll explore the majority concurring and dissenting opinions and what this ruling means for the future of the Voting Rights Act and Congressional Districting. To help us unpack the Court's ruling, we are joined by two leading election law scholars. Edward Foley is a professor of law at the Ohio State University, where he directs its Election Law program and is widely recognized as one of the foremost experts on election law. He is the author of numerous articles in law reviews and two books, including *Presidential Elections and Majority Rule* and *Ballot Battles: The History of Disputed Elections in the United States*. He also writes a monthly column, Justice, Democracy, and Law, for SCOTUSblog. Ned, welcome back to We The People.

[0:01:36.3] Edward Foley: It's great to be back. Thank you.

[0:01:38.4] Julie Silverbrook: And Michael Morley is a professor of law at Florida State University, where his research focuses on election emergencies, the Constitutional right to vote, and the Electoral Count Act. He has appeared on C-SPAN, Court TV, Fox News, and numerous local news programs, and has been quoted in a wide range of national publications. His work has been published in many of the nation's top law reviews. Michael, welcome back to We The People.

[0:02:01.1] Michael Morley: Thanks for having me.

[0:02:02.6] Julie Silverbrook: Ned, before this case, what was the state of play for the Voting Rights Act, especially Section Two? And how were Courts generally approaching vote dilution claims? What did plaintiffs need to show under the Court's existing framework prior to the decision in *Callais*?

[0:02:19.9] Edward Foley: Sure. Well, the state of play was quite complicated because there was both the Voting Rights Act jurisprudence under Section Two, which is the relevant section here. But then there was also this constitutional doctrine that comes from a case called *Shaw* versus *Reno* under the Equal Protection Clause. And for decades, really, the Court itself and election law observers had seen that these two strands of jurisprudence had been on a collision course or a potential collision course. And that had been avoided up until this *Callais* decision. So the first component of that is Section Two, and that adopts what Congress wants in terms of a results test. And Congress amended the Voting Rights Act, Section Two in 1982 to insist that it not be limited to intentional vote dilution of minority voters, but that any redistricting map that results in minority vote dilution would be subject to potential liability under Section Two. Well, the easiest way to remedy a map that underrepresents black political power, for example, is to redraw the map to create a new district that creates another majority black district. But doing so obviously takes race into account when you remedy the vote dilution in that way. But taking race into account is the problem under this separate line of cases that starts with *Shaw* versus *Reno* in 1993. And so what the *Callais* decision of last week is, tries to sort of once and for all handle that conflict that had been emerging for decades.

[0:04:13.2] Julie Silverbrook: Michael, what actually happened here? Walk us through what Louisiana did with its electoral map, why it drew a second majority minority district, and how that decision, which was in part an effort to comply with Section Two of the Voting Rights Act, led to this constitutional challenge?

[0:04:33.4] Michael Morley: Sure. So to understand what happened in *Callais*, it's necessary to start with some backstory about another case. After the 2020 census, Louisiana was apportioned six seats in the US House of Representatives, and it had to redraw its congressional districts to account for population shifts within the state. In 2022, it adopted a map called HB1, which created a one majority minority district, district number two, which covered the New Orleans area. And in a case called *Robinson*, the plaintiffs challenged this map on vote dilution grounds under Section Two of the Voting Rights Act. They argued that racially polarized voting existed in the area, that it was possible to draw another reasonably compact majority minority district, and that the totality of the circumstances suggested that black voters were unable to elect the candidates of their choice in the area. And so a federal district Court entered a preliminary injunction requiring the state to draw a second majority minority district. In response, the legislature eventually drew a new map called SB8, that, consistent with the Court's preliminary injunction, contained two majority minority districts. It retained the same district as the previous map around the New Orleans area, and then it created a second district that stretched in a relatively thin line diagonally across the majority of the state connecting Baton Rouge with Shreveport.

[0:06:10.4] Michael Morley: So this map was different than the ones that the Robinson plaintiffs

had proposed, because those plaintiffs maps would have jeopardized the seats of Republican incumbents in the House, including the speaker of the House and the Majority leader. So a new lawsuit, *Callais*, was filed to challenge this new map, to challenge SB8 on the grounds that it was an unconstitutional racial gerrymander in violation of the Fourteenth Amendment's Equal Protection Clause. The district Court agreed with the plaintiffs, finding that the creation of that second majority minority district was unconstitutional because race was the state's primary consideration in determining its boundaries. And so, as Ned said, this case involved competing imperatives. On the one hand, Section Two of the Voting Rights Act, which is what the first Court was focused on enforcing, requires states under certain circumstances to place substantial weight on racial considerations when drawing district lines, while at the same time, the Fourteenth Amendment's Equal Protection Clause, which was the main focus of the second case, the *Callais* itself generally prohibits states from making race its primary consideration when drawing legislative districts.

[0:07:27.1] Julie Silverbrook: I wanna get into the holding a little bit, and Ned, let's start with you. What did the Court ultimately hold here, and how did Justice Alito, who was writing for the majority, frame the core tension between Section Two of the VRA and the Equal Protection Clause?

[0:07:43.2] Edward Foley: Sure. Well, it is a bit complicated, but I'll try to unpack it as best as we can. Ultimately, what Justice Alito says for the Court is that he's doing a reinterpretation of Section Two and what Section Two requires in order to avoid some of the constitutional problems that we were just talking about. So I think the... It's fair to say the main thrust of the majority opinion is a rewrite of the statute. As I mentioned, the statute used the term results, and that was in the 1982 amendment, and that was in response to a prior Supreme Court decision that had limited Section Two of the Voting Rights Act to intentional discrimination or intentional vote dilution. And Congress said, no, no, no, we don't want that. We want a results based test, which means that if maps have the effect or the result of causing minority vote dilution, that can trigger liability. What Justice Alito does is essentially turn the statute inside out or upside down, or however you wanna say it, because he basically recreates an intent standard, even though the statute's a results test. Now, he says we don't quite require a complete proof of intentional discrimination or intentional vote dilution, but if you go through the entirety of the opinion and you see how he discusses what plaintiffs actually have to do to win a case, it's functionally become an intent standard all over again.

[0:09:24.1] Edward Foley: At least I think that's an accurate description. So he again, quite conscious and candid in saying he's motivated by constitutional interpretation to do this. I think many listeners will know the canon of constitutional avoidance, which is you try to construe statutes to avoid a constitutional problem. And I think everybody believes that that's a good doctrine. The issue is, as the Court has often said, in fact, Justice Alito himself has said in prior cases, you can't use that canon to undo the statute completely. You can't change yes into no or up into down and changing results into intent, I think is accurate to say a rewrite of the statute instead of a genuine interpretation of it. So you can debate about whether this is a faithful application of the doctrine of avoidance. The other thing I wanna put on the table, but it will require more of a discussion, is there are really two separate constitutional issues lurking in the background, and the majority opinion kind of goes back and forth between the two, in a way, I think, is confusing and ultimately problematic. So one we've already talked about, which is this equal protection doctrine

that Michael and I both mentioned under this case, *Shaw* versus *Reno*.

[0:10:52.4] Edward Foley: Which says you can't let the use of race predominate or be the primary factor in drawing district lines. That's clearly a motivation of the majority opinion here. It's where the Court starts its analysis. But ultimately, that's not where the Court does the real work of its canon of constitutional avoidance. Instead, what it says is that it has to find power on the part of Congress to enact this statute in the first place. And the Court says that power has to come from the Fifteenth Amendment because the Voting Rights Act was designed to enforce the Fifteenth Amendment. And Congress, under Section Two of the Fifteenth Amendment, does have the power to enforce the Fifteenth Amendment. But what Justice Alito says is that the Fifteenth Amendment is limited to prohibiting intentional race discrimination in voting, and therefore the only constitutionally permissible enforcement of that amendment that Congress can enact is a statute that's designed to eliminate intentional discrimination on base of race with respect to voting. And it's that claim that Congress's power is limited to trying to root out or eradicate intentional discrimination is what really forces the majority to rewrite the statute in the way that I've described. And I think that that move to the Fifteenth Amendment is problematic for several reasons. But I won't list them all right now because I don't wanna go on too long. If it's of interest, we can talk about why that's true, but I just think...

[0:12:37.9] Julie Silverbrook: I do wanna dig in on that for sure.

[0:12:41.2] Edward Foley: Sure. Well, let me just try to quickly put them on the table. There had been a long standing view of the Supreme Court going back to the 1960s, that Congress has more latitude in its enforcement power to ban forms of discrimination that are not necessarily unconstitutional. And the Court has used the term prophylactic reasoning. In other words, Congress is empowered in the interest of eradicating intentional discrimination to sweep more broadly, including to eliminate discriminatory effects. The Court has articulated that doctrine, for example, in employment discrimination, so that Title VII, the employment discrimination law, outlaws both intentional discrimination as well as so called disparate impact discrimination. The Court in a case called *Fitzpatrick* versus *Bitzer* from 1976, said that's perfectly appropriate within Congress's enforcement power, even though the Constitution itself is limited to intentional discrimination. And so for Justice Alito to now say Congress only has the power to outlaw intentional discrimination is really a radical rewriting, a rethinking of what Congress's powers under the Reconstruction Amendments are. This is an implication that goes far beyond just election law into all aspects of civil right law. And it's done quite cavalierly in Alito's opinion, but it's right there.

[0:14:16.8] Edward Foley: It's absolutely explicit. So that's one particular problem that I have with how he relies on the Fifteenth Amendment. The other main concern I have is that... Or one of the other two main concerns. Is that because, as Michael said, this Louisiana map is talking about congressional districts, it's not talking about state legislative districts or city councils. The Voting Rights Act encompasses all elections. And so Congress does need to rely on its Fifteenth Amendment authority to enact the Voting Rights Act if it's going to interfere with state and local elections. But Congress independently has legislative authority under Article One, Section Four to enact time, place and manner rules for congressional elections. So Congress could have made the results test of the Section Two of the Voting Rights Act applicable to congressional elections

without relying on the Fifteenth Amendment as its source of authority, could have relied on Article One, Section Four. And the Supreme Court is supposed to sustain congressional power. If there's any basis for congressional power, Congress doesn't have to be correct about which power it relies upon. Under *Marbury* versus *Madison*, the Court's supposed to say, if Congress has the power to enact this law under the Constitution, it gets to enact the law.

[0:15:43.5] Edward Foley: So the Fifteenth Amendment really didn't need to come into play at all. And the third key concern that I have is that it's important to distinguish between liability under Section Two and the remedy if there is liability. The concern of *Shaw* versus *Reno* and the equal protection doctrine that Michael and I talked about is the concern about the remedy that happens if you find minority vote dilution, because the remedy was this race conscious redrawing of the map. But there are ways to remedy minority vote dilution without that particular remedy. That's the easiest remedy. But there are other forms of remedy, like proportional representation schemes or cumulative voting schemes that can avoid vote dilution without race conscious line drawing. And if the Court had really relied on just the *Shaw* versus *Reno* problem, it could have limited the remedy. But instead, by running to the Fifteenth Amendment and rewriting the statute, it completely eviscerates the liability standard under Section Two, so that no remedies as a practical matter can be used. So I think there's kind of an extreme overreach on part of what the Court did in light of the constitutional concern that most motivated it.

[0:17:11.3] Julie Silverbrook: I wanna give Michael an opportunity to weigh in on Justice Alito's reliance on the Fifteenth Amendment and also in inserting an intent requirement into the Court's analysis.

[0:17:27.5] Michael Morley: Sure. So I think one of the complicating factors of trying to move to the Elections Clause in order to try to save the previous version or previous interpretation of Section Two insofar as it applies to Congress, is that is, I guess, twofold. Number one, I think you would still have constitutional avoidance issues with regard to Section Two, regardless of the statute under which it was passed. When you're thinking about it in terms of Congress's power under the Enforcement Clause, what you're asking is whether this law is congruent and proportional to preventing actual violations of constitutional rights as those rights have been interpreted by the Court. And so, as Ned said, because the Supreme Court in *Callais* interprets the Fifteenth Amendment to prohibit only intentional racial discrimination, a law that sweeps much further than that and that prohibits a much wider range of state action that doesn't involve intentional racial discrimination doesn't fall within the scope of Congress's enforcement power. But if you turn to the Elections Clause, I think the very same race conscious considerations that Section Two implicates would arise because you have to take race into account in ways that *Callais* says would at least raise serious questions under the Fifteenth Amendment, if not outright violate the Fifteenth Amendment.

[0:19:09.3] Michael Morley: So even if Congress were to try to either pass, reenact the statute under the Elections Clause, or to the extent that the Court were to consider it under the Elections Clause, I think very similar constitutional avoidance questions would arise, not with regard to the scope of the Enforcement Clause, but rather with regard to the scope of the core provisions, Section One of the Fifteenth Amendment, and potentially even the Equal Protection Clause of the Fourteenth Amendment. And especially given the tenor of the *Callais* opinion, I think it would be

unlikely that the Court would have come out differently had it been squarely presented with a rigorous Elections Clause type argument. To say nothing, of course, of the severability questions that arise in saying that the Section Two of the VRA would either be unconstitutional or raise serious constitutional questions as applied to a broad swath of issues, but not with regard to one core subset. There are bigger picture questions that the Court's current severability analysis leaves somewhat unanswered in terms of how much of a law can be unconstitutional, while you... And still allow you to save the rest of that statute. So I think that the Court's interpretation of Section One of the Fifteenth Amendment is doing just as much work in the opinion as its importation of this congruence and proportionality standard to Section Two of the Fifteenth Amendment, the enforcement clause.

[0:20:48.2] Michael Morley: And the other thing I'll say is, I mean, this is a question that really goes back to 1996, right? During the civil rights era, the Supreme Court had construed both enforcement clauses, the Fourteenth Amendment's enforcement clause and the Fifteenth Amendment's enforcement clause as giving Congress broad sweeping discretion to figure out what the best way to protect constitutional rights are, what the best way to prevent racial discrimination is, what the best way to protect voting rights are. In 1996, in *City of Boerne* v. *Flores*, the Supreme Court rejected that interpretation of the Fourteenth Amendment's enforcement clause, Section Five, the Fourteenth Amendment. It replaced that very, very deferential standard which the Court itself had analogized to the *McCulloch* v. *Maryland* necessary and proper standard, and instead adopted this strict congruence and proportionality test to say, we wanna make sure that in the course of purportedly enforcing constitutional rights, Congress isn't actually changing the scope or the definition of those rights and thereby intruding on our job as the Court to say what the law is, to say what the Equal Protection Clause means. And so since that ruling, then, this question has hovered over the Reconstruction Amendments, the Fifteenth Amendment's enforcement clause is written very, very similarly to the Fourteenth Amendments. It was adopted roughly contemporaneously, it performs the same function. So this question remained in terms of whether the Court would narrow its interpretation of the Fifteenth Amendment's enforcement clause in the same way it did the Fourteenth Amendment's. And *Callais* puts that to rest. *Callais* not even treating it as a big deal, *Callais* just goes on to apply that congruence and proportionality standard under the Fifteenth Amendment.

[0:22:40.3] Julie Silverbrook: I wanna ask Ned if you agree with Justice Kagan in her dissent, who argues that the Court in *Callais* has made Section Two “all but a dead letter”?

[0:22:51.1] Edward Foley: I do agree with that. And just to pick up on the point that, Michael made, I think Michael accurately analyzes what happened under Congress's enforcement power, but I just think we need to pause and stop and realize just how momentous this is. The Court had been careful in the *Shelby County* case not to say that this so called congruence and proportionality standard from the *Boerne* case applied in the context of race discrimination in the context of voting, because as Michael said, going back to the 1960s, right at the time that the Voting Rights Act was adopted, the Court had this generous latitude standard that Congress could pursue the elimination of race discrimination in voting in the ways that Congress thought best. And the Court wasn't going to keep Congress on a short leash in terms of permissibility about how Congress was gonna try to enforce this really most important statute in American history, the Voting Rights Act. And so for the

Court, in the way that Michael accurately describes, just sort of in passing, says no big deal, we're gonna apply this much stricter test that we develop. Remember, the *City of Boerne* case was a case about Congress sort of trying to rewrite what the free exercise clause meant. You know, that's very different from the context of racial discrimination in voting. And just to sort of, without real thought, sort of apply the *Boerne* test that the careful... The Court had been careful not to apply in *Shelby County* is truly momentous. And in fact, that is the engine that causes Justice Kagan to be correct. Because that's what causes Alito to insist that the clause be interpreted so narrowly that it effectively renders it useless in terms of what Congress wanted it to do.

[0:24:56.2] Julie Silverbrook: So, Michael, clearly if you look back from *Shelby County* to *Callais*, the Roberts Court is reshaping voting rights jurisprudence. Can you help explain for our listeners how they're doing that and how *Callais* fits within that broader trajectory?

[0:25:16.0] Michael Morley: Sure. I mean, I think one of the big picture stories of the Roberts Court is that many of their rulings, not just with regard to voting rights, but even with regard to constitutional issues much more broadly, is that... Is a focus on one of the core disputes about the proper interpretation of the Fourteenth Amendment. Going back to *Brown* versus *Board of Education*, there's two very different interpretations that have arisen. There's two very different stories you could tell about what the Constitution requires in terms of equal treatment and the prevention of racial discrimination. On the one hand, you can read provisions like the Equal Protection Clause, like the Fifteenth Amendment from, what is often called in literature, from an anti-discrimination perspective, where the core evil that these provisions are aimed at is government's classification of people based on race, government taking race into account when making decisions, when taking actions. Right. This anti-discrimination interpretation is premised on the notion that it's inherently pernicious to consider race, that race is virtually never a morally or legally relevant characteristic to government action. And so these amendments should be interpreted in a way to remove racial considerations from public life and ensure that... Or compel the government to treat people of all races equally.

[0:26:56.4] Michael Morley: Right? This is sometimes referred to, just referred to through Chief Justice Roberts' colorblind interpretation of the Constitution. And there's certainly provisions in *Brown* versus *Board* that can be read to support that interpretation. And on the other hand, there's what's often referred to as an anti-subordination interpretation where the point of these amendments isn't necessarily to prevent all consideration of race, but rather it's to prevent the government from establishing racial hierarchies, to prevent the government from perpetuating systems of white supremacy. Certainly to the extent that you think about the context in which the Reconstruction Amendments were adopted, trying to undo the systemic effects that slavery had had throughout the southern states, trying to guarantee rights for formerly enslaved people from an anti-subordination perspective, race, racial concerns are unconstitutional and racial concerns raise serious problems if they're used to perpetuate racial hierarchy, used to perpetuate white supremacy, used to oppress discrete and insular minorities. But if they're used in... If they're applied in non-malicious ways, if they're applied in ways that are aimed at dismantling racial hierarchies, undoing racial inequalities, rectifying racial discrimination of the past, then the Constitution permits it. And I think that big picture, one of the main themes of the Roberts Court is shifting the Court's analysis away from an anti-subordination interpretation of the Fourteenth and Fifteenth Amendments toward an anti-

discrimination interpretation. Where we see this in the affirmative action cases, we see this here in *Callais*. I think it's certainly one of the underpinnings of *Shelby County*. And I think we're going to continue to see it across the board, especially as the administration continues to take aim at many race conscious programs. I think that that's one of the main ideological and philosophical and constitutional underpinnings that links together what we're seeing across many of these otherwise disparate opinions.

[0:29:22.1] Julie Silverbrook: Ned, do you think that the Voting Rights Act can survive that pivot?

[0:29:29.3] Edward Foley: Not in the form that Congress wanted it to. By the way, I should say that many people have criticized *Shelby County*. I was not one of them. I thought *Shelby County* was a perfectly reasonable decision because Congress had not updated the coverage formula for the preclearance provision. And the preclearance provision was particularly onerous on states, requiring states to get prior approval for changes in the laws. That's not what sovereign states usually have to do. It also applied only to some states and not other states. I think the Court was correct in *Shelby County* to talk about a kind of equal protection principle applicable to sovereign states. So that if Congress is gonna treat some states much more onerously than others, it has to have a good reason to do so. And Congress doesn't have a good reason if it simply has a coverage formula that's on autopilot for decades and decades. So, you know, I did not join the critics of *Shelby County*. That's why I think the *Callais* decision is much more problematic and much more momentous than *Shelby County* ever was. And I think that some of the coverage that lumps the two together really misses the tremendous earthquake that *Callais* is.

[0:30:50.0] Edward Foley: It goes off the Richter scale much more than *Shelby County* does and has implications. I think Michael is accurate in terms of the distinction between anti-discrimination theory on the one hand and anti-subordination on the other. And I do think the Court's move in the affirmative action case, the *Harvard* case, is relevant here. The Court in fact cites it. But what I think is important to understand is that the liability for minority vote dilution that Congress adopted in Section Two is not an affirmative action policy. It's designed to eliminate genuine electoral disadvantage on the part of American citizens who are entitled to equal electoral opportunity. And so to basically cripple a statute that's trying to remedy that is different than trying to eliminate affirmative action. It's much more aggressive in stopping, it really stops the capacity to achieve anti-discrimination in my judgment. And to go back to one point, that may be a point of difference between Michael's analysis and mine, I think the equal protection concern about avoiding race based districting can be credited. But it's not inevitable in my view, that if Congress tried to pass a Voting Rights Act under its enforcement, excuse me, under its Article One, Section Four power, or if the Court had allowed this statute to be treated as this Article One, Section Four statute for purposes of congressional elections, that that inevitably implicated the *Shaw* versus *Reno* equal protection line of cases, it only would implicate it if the remedy for undoing vote dilution is a race concept remedy. But as I said earlier, there are other tools in the toolkit. A proportional representation system can avoid vote dilution without race conscious districting. Again, that may be a less familiar remedy, a more complicated remedy, but nonetheless it is an available option, at least if the liability standard still exists. So eliminating the liability standard, I think was uncalled for even under the doctrine of constitutional avoidance.

[0:33:45.3] Julie Silverbrook: I wanna go back into the opinion a little bit and look at some of the doctrinal shifts in the case. So, Michael, part of Justice Alito's decision is his updates to the *Thornburg* v. *Gingles* framework. Can you walk us through what the framework was previously and what Justice Alito's updates entail?

[0:34:06.3] Michael Morley: Sure. So prior to *Callais*, in order to be able to bring a successful Section Two claim, voters had to satisfy a three pronged test under *Thornburg* and then move on to show what was called the Senate factors because they were drawn from a Senate committee report that accompanied the amendments to the VRA identified as relevant. So to somewhat oversimplify something that I'm sure Ned and I can both spend entire classes on, prior to *Callais*, in order to succeed, plaintiffs had to show that racially polarized voting existed in an area that African American or whatever racial minority group tended to support certain candidates, the white majority group tended to support different candidates, that it was possible to draw a reasonably compact district consistent with traditional redistricting principles in which that minority group would constitute a majority. And so I'll point out that one very easy way the Court could have completely gotten out of the *Callais* situation would have just been to say that the district that the legislature drew was not reasonably compact, was not consistent with traditional redistricting principles, and so therefore doesn't count as a valid remedy under Section Two. That the type of district you adopt as a remedy needs to be the sort that would have given rise to liability in the first place.

[0:35:37.8] Michael Morley: And so to go back to the standard, then once the Court ascertains that you've had racially polarized voting, this has tended to prevent members of the minority group from electing candidates of their choice. It is possible, consistent with traditional redistricting principles, to draw another majority minority district. The Court then takes a totality of the circumstances approach to try to confirm whether or not this inability of members of the minority group to elect their preferred candidates was due to race. And so they would look to things like history of overt racial exclusions from the right to vote, in some cases going back decades, or even by this point, a century or more, they would look at the types of appeals that were made in campaigns to see if there were either overt or implicit racially charged campaigning or issues being brought up, the extent to which policies that are preferred by members of the minority group were successfully implemented by the government. And so taking into account all of these factors, the Court would then conclude, based under the totality of the circumstances, whether the minority group had been denied the right to elect the candidates of their choice.

[0:37:02.2] Michael Morley: And so one of the big picture shifts that we see under *Callais* is that rather than just showing that it's possible to create a second majority minority district based on traditional redistricting criteria, things like compactness, contiguity, or communities of interest, now plaintiffs need to show that it is possible to draw some unspecified substantial number of alternative maps that would have a second majority minority district, but using the exact same criteria that the state used to draw the map at issue. So rather than showing that by applying traditional redistricting criteria, it is possible to draw a second majority minority map, now taking advantage in part of these computer systems that the majority refer to at several points in the opinion, now plaintiffs need to show that using the same exact factors that the state deemed important, and one of the most important factors that the Court focused on is partisan effects, right? If it, to the extent that a state is drawing a particular map because it wants to benefit particular incumbents or because it wants to

benefit particular members of a particular political party, plaintiffs now need to show that it is possible to use those same factors, it is possible to achieve the same effects that the state was looking for to include partisan effects.

[0:38:38.1] Michael Morley: So drawing additional Republican districts in this case, for example, it's possible to use the state's same criteria to achieve the same goals and nevertheless create a substantial number of maps that have additional majority minority districts. At that point then, Justice Alito suggests, if there's no good reason why the state rejected this substantial number of majority minority maps, why the state... If it was possible for the state to achieve all of its intended goals and also have majority minority... An additional majority minority district under many of the various possible maps that would have achieved its goals, at that point then, a strong inference of racial discrimination occurs. And therefore, Section Two, interpreted in light of the Fifteenth Amendment as *Callais* interprets it, allows a Court to step in. And one of the things that the Court is a little bit unclear about is, as Ned said before, the Court says, we're not requiring that plaintiffs actually show that intentional racial discrimination occurred. But we are requiring plaintiffs to provide evidence that can support a strong inference that intentional racial discrimination occurred. So I don't know if one way to try to interpret that is to say that the Court is requiring that plaintiffs prove intentional racial discrimination, but perhaps not by a preponderance of the evidence standard. That perhaps what's going on here is that if just a strong enough inference is enough, maybe it's not necessarily rising to 50.1% certainty or however you would choose to describe preponderance, but to say that you don't have to prove actual intentional discrimination, but you do need to raise a strong inference of intentional racial discrimination. I think that that's something that we're going to see some potentially conflicting lower Court opinions about over the years to come.

[0:40:48.8] Julie Silverbrook: I definitely walked away with a question of what a strong inference of racial discrimination meant, and I'm sure everyone else did as well. Ned, can you walk us through the application of the updated *Thornburg* framework in this case?

[0:41:04.7] Edward Foley: I wish. I'll try, I'll try.

[laughter]

[0:41:05.5] Julie Silverbrook: Or try, or try.

[0:41:09.5] Edward Foley: I guess, I think maybe the easiest way to understand it is to think about it in a concrete example that builds off of what Michael just said. So again, there's all this talk about how now, given the *Rucho* decision, *Common Cause* versus *Rucho*, that partisanship is a legitimate redistricting criteria in the way that used to be distasteful and even if it couldn't be enforced, but now there's a complete green light to draw maps with maximum partisan effect. And that's perfectly valid. That's just as valid as trying to draw compact maps or protect cities and county lines and so forth. So imagine a state that has 10 congressional districts and a minority population of 20%, but that the map makers in the state, for purely partisan reasons, wanna create a 10:0 map for their partisan advantage. And they can do that, given the computers that Michael is talking about. And it also turns out that even though it may not have been their intent to have any racial impact because they were purely motivated by partisanship, the consequence of their 10:0 map in favor of their

party leaves zero districts in which the 20% racial minority in the state has districts of their own.

[0:42:40.1] Edward Foley: In other words, there's no majority minority districts that are created. So that's what we used to call a prima facie case of minority vote dilution. The consequence of Alito's analysis, as I understand it, is to say that unless plaintiffs can prove that the mapmakers could have equally achieved their 10:0 partisan goal, by including at least one minority majority district, they're allowed to do the vote dilution and go 10:0 for partisan effect. The consequence, because if the state comes back and says, the mapmakers, we couldn't max out our partisan advantage without resulting in zero majority minority districts. Sorry, but that's our situation. Alito says that's just fine. The reason why I think that's a misconstruction of the statute is Congress didn't say it was okay to have the result of minority vote dilution if there were reasons to have it. Congress said in 1982 that the problem of minority vote dilution is so important that sometimes valid redistricting criteria have to give way to the need to undo political inequality based on race. The need to create political equality for all American citizens is so important that it doesn't matter that you wanna protect incumbents or that you wanna have the most compact districts. Yes, those are valid criteria, but we've got a priority as a legislative matter of making sure we eradicate the unequal political power based on race. And that's what Alito's opinion completely undoes. There is no protection for equality, if mapmakers have purely partisan goals and they need to do what they do to achieve their partisan goals, there's no longer any liability for causing lack of equal political power. So I think that's the practical effect of the way Alito rewrites the *Thornburg* versus *Gingles* analysis.

[0:45:08.6] Julie Silverbrook: Michael, do you agree with Ned's assessment?

[0:45:11.9] Michael Morley: Yeah, I mean, one of the things that Justice Alito's reasoning does is adopts a very different interpretation of what the majority deems racial equality. Right? And there's a few pages in the opinion that focus specifically on that issue. Right? So the Court says, well, in order to figure out if somebody is being discriminated against based on their race, we need to hold everything else equal and see if there is evidence that racial factors have influenced a decision. Right? So that's exactly why the Court says if a state's engaging in partisan gerrymandering, then plaintiffs need to show a map that achieves that same partisan gerrymandering goal, but has additional majority minority districts. And this goes back to the Court's understanding of what exactly the Fourteenth Amendment and Fifteenth Amendment are seeking to do. And what I think Justice Alito's opinion does is put a lot more weight on formal equal treatment of voters rather than any sort of outcome based approach that, as Ned was saying, would guarantee members of racial minority groups some level of representation in a particular legislative body.

[0:46:50.1] Julie Silverbrook: So this is the shift or the emphasis on opportunity versus outcome.

[0:46:54.1] Edward Foley: Yeah, but it's not opportunity. If you use my example, and saying there's 10 congressional districts, blacks are 20% of the population of this state. For purely partisan reasons, the mapmakers have created a 10:0 map in favor of their party without any evidence of racial intent. But the consequences is that there are no majority black districts in the state. Under the old way of thinking, under Congress's way of thinking, that was a lack of opportunity of the black residents of that state to have equal or fair access to political power. And to say that that's not a lack

of equality, I don't think conforms to what most Americans would think is sort of common sense understanding of what it means to have political equality or not. It's not about outcomes. It's about the opportunity of minority citizens to have a fair chance of electing representatives of their choice. And in my hypothetical, I think there would be no fair chance of that.

[0:48:06.8] Julie Silverbrook: I wanna shift a little bit and focus on Justice Thomas's concurring opinion with which Justice Gorsuch joins. Michael, can you tell us a little bit about what Justice Thomas argues in that opinion?

[0:48:20.0] Michael Morley: Sure. So one of the main focuses of the opinion is whether Section Two of the VRA should apply to redistricting at all. The language of Section Two prohibits states from adopting any "standard practice or procedure" that denies a person's right to vote on account of color. And the majority opinion expressly said, we're taking it as a given that this phrase includes drawing legislative district maps. There have been decades of Supreme Court rulings that have applied Section Two in the context of redistricting cases. The dissent, drawing on earlier dissents that Justice Thomas had issued in several other cases, also going back for decades, suggests that this phrase should be understood as applying only to the rules that govern either a person's ability to get a ballot or to have their ballot counted. That the drawing of legislative districts or the adoption of a particular legislative map is not a standard, it's not a practice, it's not a procedure. And so therefore, just as a matter of textualism, it doesn't fall within the scope of the Voting Rights Act. Particularly in light of the thrust of that dissent, I think it's fairly interesting that the majority didn't delve more into whether from matter of dictionary definitions or public understanding or their historical precedents. I think it's pretty interesting the majority didn't spend more time defending that point, that they simply said at this point in our history of the VRA, that's a given. But nothing else, or very little else that we've been doing so far in interpreting the VRA is a given that we're going to continue adhering to as well.

[0:50:18.1] Julie Silverbrook: Ned, I wanna spend a little bit of time on Justice Kagan's dissent, not a “respectfully dissent,” just a “dissent” from her, and walk us through a little bit of her concerns that she raises in the dissent?

[0:50:33.0] Edward Foley: Yeah, I think we've... I mean, without talking specifically about her opinion, I think we've covered some of the same ground insofar as I think some of my analysis tracks hers. What else would be useful to say? I mean, you know, she starts her opinion with the hypothetical of her own to try to sharpen just what the consequences of the majority opinion are. I think, again, the thing that I would wanna distinguish my analysis from hers is that she does place a lot of emphasis on linking the *Callais* to... This new case, *Callais*, with two other Voting Rights Act cases we've talked about, one of them being *Shelby County*. Another one is one called *Brnovich*, which also involves Section Two, but not in the context of redistricting. It involved it in the context of what we call the nuts and bolts of election administration, casting votes in precincts or absentee ballots. And Justice Kagan was a dissenter there. And so she paints this broader picture. As you know, there's this trilogy of cases that the Court has done offense to the Voting Rights Act in her perspective, and this is just yet another of slamming the door shut when it was slammed twice before. Different doors in the same voting rights house were shut, and now the third door is slammed. That, I think, is the overarching tenor of her opinion. But again, from my perspective, it

underestimates the significance of this new opinion by treating it as part of a trilogy. I think this stands alone for its significance. So I hope that's something useful to say in this context.

[0:52:37.9] Julie Silverbrook: Michael in a separate move, the Court took the unusual step of making its ruling effective immediately, expediting certification so lower Courts could act right away. What did the Court do there procedurally, and why might the Court have felt it was important to give this decision immediate effect?

[0:52:58.8] Michael Morley: Sure. So the Court expedited issuing what's called the mandate. The mandate is the point in time in which a Court ruling actually takes legal effect. So when *Callais* itself was handed down a few days ago, lower Courts couldn't immediately jump to start implementing it. There is a time period in which, among other things, the losing party has the opportunity to petition for rehearing, to ask the Court to reconsider its ruling or reconsider some aspect of its ruling. Those petitions are... It's extraordinarily rare that those petitions are successful. But nevertheless, like other appellate Courts, there's this waiting period before the mandate issues, and then lower Courts are given the green light to act in accordance with the Court's judgment. So here the Court granted a motion to immediately issue the mandate to allow lower Courts to begin implementing its ruling in order to allow, or at least one of the consequences of this is going to be to allow Louisiana to be able to adopt a new set of congressional districts, or at least attempt to adopt a new set of congressional districts. There's some question under state law as to whether or not this is going to be permissible at this late point, especially since I believe voting in the primary has either already begun or is imminently beginning. And so had the mandate not issued, there are very strong arguments that the procedural posture of the federal cases between *Robinson* and *Callais* itself would have impeded the state's ability to adopt new districts in time for the 2026 election.

[0:54:53.5] Julie Silverbrook: Ned, there's a sharply worded exchange here between Justices Jackson and Alito. What is Justice Jackson's concern with the Court expediting certification?

[0:55:04.1] Edward Foley: Well, I think Justice Jackson feels that the Court is acting in a partisan way. Of course, then Justice Alito accuses her of the same thing. I do think it's noteworthy that Justice Kagan and Justice Sotomayor did not join Justice Jackson's dissent for this procedural ruling. And probably somewhat noteworthy that not all the members of the majority joined Justice Alito's response. Justices Gorsuch and Thomas did, but not the others. I think the exchange between Jackson and Alito is evidence of just how raw the nerves are at the Court and how hot the emotions are at the moment. It probably is not a pleasant building to be in right now. And so I think the fact that the other Justices didn't sign on to that exchange was somewhat of an attempt to lower the temperature on their parts. I also think, again, as someone who has obviously been very critical of the majority opinion in *Callais*, I think my own view is Justice Jackson was an overreaction. I mean, once the ruling is the ruling, it is appropriate to issue the mandate immediately, given the consequences of it. And I think it's important for the Court institutionally to be able to move on.

[0:56:34.0] Edward Foley: You have your disagreements, you write your opinions. Majority concurrence is dissent. And then the next issue comes along, you have to treat it kind of on its own terms. And I think Justice Jackson's attack was kind of leftover criticism. You know, it was noteworthy that Justice Jackson didn't write an additional dissent in the main *Callais* case. She let

Justice Kagan speak for herself there. I think many Court watchers had thought that Justice Jackson would either write the dissent for the three dissenters or want to add her own voice. And for whatever reason, she didn't. And so now that this was a chance for her to get her digs in, in the kind of second round of this. So I think it more speaks to, again, issues of emotions than it does to sort of issues of substance of legal analysis.

[0:57:34.8] Julie Silverbrook: As we come to a close, I wanna give each of you an opportunity to reflect on what voting rights cases in the Voting Rights Act will look like in the post *Callais* world?

[0:57:47.4] Edward Foley: Well, it's a really important question. I've tried to give some thought to the long term historical consequences of *Callais*. None of us have a crystal ball, but I do worry about what American life and history looks like, if what we're starting to see is the complete elimination of black representation in Congress, because *Callais* allows for that to be undone. And again, I'm focused on opportunity, not outcomes. But nonetheless, if black American citizens feel that a consequence of this Court decision is that the dream that Martin Luther King had of where we had genuine equality in the United States no longer exists because that equality has been taken away, has been ripped away, what does that do for race relations in this country going forward? There was a different vision in the civil rights era between the Martin Luther King vision of assimilation and integration versus the Malcolm X vision of separatism and violence. And we were fortunate that the Martin Luther King vision prevailed because the Voting Rights Act prevailed and the Civil Rights Movement prevailed. And this is gonna be perceived as undoing the second Reconstruction, and this is gonna be perceived as undoing the Voting Rights Act. And people are watching it happen immediately before their eyes. As politicians in states say, we wanna undo these districts, I don't think that's gonna be good for America as a cohesive multiracial society. I hope I'm wrong about that, but I fear that's the consequence.

[0:59:40.1] Julie Silverbrook: Michael, what are your thoughts?

[0:59:43.5] Michael Morley: I think that one of the big consequences of *Callais* is that it'll lead plaintiffs to shift to other potential grounds for challenges. So plaintiffs will be... Will likely seek remedies under state constitutions. Many states have state Voting Rights Acts, and I think one of the big questions that will arise now is the extent to which those acts can survive scrutiny under *Callais* and its clarification of the Court's interpretation of the Fifteenth Amendment. There are other provisions of both the Civil Rights Act as well as the Voting Rights Act, which historically have not received that much attention from plaintiffs simply because Section Two had historically done most of the heavy lifting and plaintiffs generally could rely on Section Two claims. And so I think that particularly uniformity requirements under the Civil Rights Act as well as the National Voter Registration Act are going to get more attention. The materiality provision of the Civil Rights Act has been litigated much more in recent years than it had been over decades past. So I think that at least some of the consequences that Ned is talking about could potentially be ameliorated depending on how other provisions at both the state and the federal levels are interpreted and enforced by the Courts.

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[1:01:14.6] Julie Silverbrook: Michael, Ned, thank you so much for joining me for a really thoughtful conversation taking us through the opinions in *Callais* and the consequences. I think we can all agree this is both a complicated and consequential area of the law and one we are definitely not done talking about. So thank you again for joining us and being with the We The People audience.

[1:01:35.1] Edward Foley: Thanks for having us.

[1:01:36.6] Michael Morley: Thank you.

[music]

[1:01:41.0] Julie Silverbrook: This episode was produced and mixed by Bill Pollock, with production support from Charles Sahm. Research was provided by Anna Salvatore, Trey Sullivan, and Tristan Worsham. Please recommend We The People to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional education and debate. I am excited to share that the National Constitution Center will publish a book on May 12th, The Promise of America: Reflections on Our Enduring Ideals. For more information, visit constitutioncenter.org/promiseofamerica. And as always, remember that the National Constitution Center is a private, nonpartisan nonprofit, and we rely on your generosity, passion and engagement for all of our programming, including this podcast. Please consider donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Julie Silverbrook.