The Supreme Court Upholds South Carolina's Voting Map

Thursday, May 30, 2024

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[00:00:00.3] Jeffrey Rosen: On May 23rd, the Supreme Court upheld the South Carolina congressional map challenged by the NAACP. In Alexander v. South Carolina State Conference of the NAACP, the court found that the South Carolina legislature conducted a permissible partisan gerrymander and not an unconstitutional racial gerrymander.

[00:00:24.5] 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. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode of We the People, we'll discuss Alexander v. NAACP, as well as the concurrence and the dissent, and we'll explore what the case means for the future of racial gerrymandering. Joining me to discuss this case are two of America's leading election and voting rights scholars, and it is wonderful to welcome them both. Joshua Douglas is a professor at the University of Kentucky Rosenberg College of Law. His newest book, *The Court v. The Voters: The Troubling Story of How the Supreme Court Has Undermined Voting Rights* was released on May 14th. Josh, congrats on the book, and it's great to welcome you to We the People.

[00:01:20.6] Joshua Douglas: Thank you so much for having me, Jeff.

[00:01:21.6] Jeffrey Rosen: And Derek Muller is a professor at the University of Notre Dame Law School and a nationally recognized scholar in the field of election law. He's published widely and has co-written a federal court's casebook. He's also a contributor at the Election Law Blog. Derek, it's wonderful to welcome you to We the People.

[00:01:37.4] Derek Muller: Thanks for having me.

[00:01:40.3] Jeffrey Rosen: Let's begin with the case, Alexander versus NAACP. Josh, why is the case important and what did the court hold?

[00:01:45.8] Joshua Douglas: So this case involved a South Carolina map for its congressional districts, and there was a challenge to the map on racial gerrymandering grounds. The concept being that the map drawers used race impermissibly to essentially pack too many minority voters into few districts so that they could control just a few and have no influence in the surrounding districts. This is a doctrine that has existed ever since 1993, in a case called Shaw v. Reno, where

the court recognized a claim for racial gerrymandering under the Equal Protection Clause of the 14th Amendment to the US Constitution, essentially saying that you can't consider race too much when drawing district lines, that it's impermissible to do so. So the court in this case was faced with another one of these long lines of cases, and the court rejected the findings from the lower court. The lower court had found an unconstitutional racial gerrymander that the state had used race too much in considering the district lines. And the court on a 6-3 vote rejected those factual findings from the lower court. And in my view, I think also in many ways changed the law of racial gerrymandering without saying so explicitly, which will make it a lot harder for plaintiffs now to bring claims under the Equal Protection Clause challenging a map for using race too much.

[00:03:22.6] Jeffrey Rosen: Thank you very much for that. Derek, how would you introduce the case? What did it say and why is the case important?

[00:03:32.6] Derek Muller: Sure. So I think it's interesting to think about all these redistricting cases because every 10 years we have a census, we have to redraw the maps to account for equal population, to try to accommodate the changes that have happened in growth or loss of population across districts. And so Josh set the case up very nicely in thinking about many of the challenges that arise here. Here in South Carolina, there are seven congressional districts, and this has split for a long time along partisan lines of six being fairly safely controlled by Republicans and one fairly safely controlled by a Democrat. And when South Carolina went to redraw the map, and it's massaging some of the lines in some ways to keep account for population, but to consider geography. And in some other respects, they wanna keep some of the balance they have. They like having Representative Jim Clyburn, a very senior Democrat, in one of those districts. They like some of the other Republicans to have safe districts and maybe make some of them safer.

[00:04:24.9] Derek Muller: So you always have a lot of motives that are happening when you are drawing these maps. And the question was, when they were drawing the map to sort of preserve that Democratic district, to shore up other Republican districts, what was their motivation here? And I think one of the longstanding challenges in this line of cases has been disentangling race from party, because we know that there's a high correlation between how White voters vote and how Black voters vote with Republican Party or Democratic Party votes. So that creates some challenges as we're trying to figure out what you are really motivated by? Are you really motivated by neutral factors? Are you motivated by things like politics? Are you motivated by things like race? And the court here, consistent with a series of cases, although not necessarily in a straight line. I think there have been some changes over the years the courts approached these issues. But really, again, sort of said, unless you have some really good evidence for us to suggest that it's race predominating here, there's lots of other plausible explanations.

[00:05:22.4] Derek Muller: And in fact, we think the best explanation here is that it was really politics and not race driving these decisions. This is really what divides the majority in dissent. Part of it is deferring to or whether or not to defer to the lower court. Because this is a three-judge panel that had made a decision previously that race predominated in the drawing of districts here on appeal to the Supreme Court, and the majority says that's not the case, it was

really politics, and for the dissent, they say, no, it really was race. So it's thinking about those motivations and the facts and trying to separate these issues. Is it race or is it something else?

[00:05:54.8] Jeffrey Rosen: Well, let's dig into Justice Alito's majority opinion. He portrayed the case as building on prior precedents, and he set out two principles. He said, first, in voting rights cases, there's a high presumption of legitimacy and deference to the state legislature. And second, that courts should draw an adverse inference when the plaintiffs fail to provide an alternative map. Josh, tell us about those two holdings and whether you think that they're consistent with prior precedents or not.

[00:06:30.5] Joshua Douglas: Well, as Derek said, there's a long line of cases involving racial gerrymandering, going back to that first Shaw versus Reno case. And there's been cases in almost every redistricting cycle invoking this theory since the 1990s. It lay dormant a little bit, and I think it was after the 2010 round of redistricting. But in sort of every cycle besides that, there have been changes in the way in which the doctrine has been used. It's also interesting that the doctrine has been used by White plaintiffs initially to sort of challenge the map that's drawn in focusing on race too much and providing too much of a thumb on the scale of including what's known as majority-minority districts. And then now it's sort of been reversed to where it's typically Democratic and Black plaintiffs who are bringing these challenges, saying that, well, the map is not egregious enough under the Voting Rights Act to invoke the Voting Rights Act to challenge the maps, and there's a whole level of doctrine there, but the map drawers still focused on race too much in drawing the lines.

[00:07:48.5] Joshua Douglas: So to get to your question, Justice Alito claims that this decision follows precedent, but he doesn't really, in my view, grapple enough with one of the most recent cases on racial gerrymandering before this one, which was Cooper v. Harris in 2017. That case involved North Carolina's map, and the court struck down two different districts, the 1st District and the 12th District in that case for considering race too much. And Justice Alito was in the dissent in that case. And one of the arguments he made in dissent in Cooper v. Harris is that the plaintiffs had not brought a sufficient claim because they didn't provide an alternative map. They didn't show a map that would achieve the state's goals in the same way without considering race. The majority rejected that argument in the Cooper v. Harris case by noting that whether you show a map is an evidentiary question. It's certainly helpful evidence if you can provide a map that achieves the state's goals, whatever they may be, without considering race too much. But that's not a threshold question, because if you have other evidence that is probative of a racial element, then you don't need to show an alternative map instead.

[00:09:13.0] Joshua Douglas: But here, Justice Alito says the plaintiffs didn't bring a map at all, and that's fatal to their claim, despite all the other evidence that the plaintiffs brought with respect to the racial intent. And as Derek noted, the problem here is disentangling a racial intent with an intent to achieve partisan gains or a partisan advantage. And here, Justice Alito said, the plaintiffs didn't do enough to demonstrate that there's an alternative map that achieves the same partisan goals, but doesn't think about race so much. The problem, of course, for the plaintiffs is that in a state like South Carolina, race and partisanship are so intimately intertwined that it's, I think, difficult for anyone to separate the two when it's true that you have what's often referred to

as racial bloc voting. Minority individuals tend to vote for one kind of candidate or one party. White individuals tend to vote for the other party.

[00:10:09.3] Joshua Douglas: So the holding here, I think, does go beyond prior racial gerrymandering cases. And in particular, Justice Alito is able to make his dissent from that 2017 case into a majority in this case, although it doesn't say so explicitly. And I think this is a theme that we get in a lot of the court's election law cases, is that they sort of try to be incremental or seemingly incremental, but when you add them all up together, you do see a significant change in the law.

[00:10:40.4] Jeffrey Rosen: Derek, the Cooper case was five to three. The three dissenters were Justice Alito, Chief Justice Roberts, and Justice Kennedy. In that case, Justice Thomas joined the then liberal justices. Has the court's view on voting rights changed since then? And do you agree with Justice Kagan's charge that Justice Alito has elevated his dissenting opinion in Cooper into law or not?

[00:11:09.4] Derek Muller: Yeah, so there's definitely been a personnel change on the court. Justice Gorsuch was the latest addition to the court in Cooper and didn't participate in that case. And we've seen the addition of Justices Kavanaugh, Barrett, and Jackson to the court. So there's been a lot of turnover even in the few years since Cooper. And I think you see a lot of those dissenters in Cooper in the majority now. A lot of those majority authors now reduced to the minority here in Alexander. So it's definitely a change in personnel and a change in approach. And I think about these two sorts of issues, you identified, Jeff. The first is this presumption of good faith. And this is a presumption that you see pretty regularly in these redistricting cases. It's thrown out there in some of the racial gerrymandering cases stretching back to 1995 in Miller v. Johnson and some of the others. I wrote an article a few years ago talking about faith in elections, and we think about this language of faith and good faith and thinking that the legislature is behaving, we wanna get that presumption. And for the majority for Justice Alito, it's offensive and demeaning to come at a legislature and say you were engaged in some sort of racial districting.

[00:12:14.3] Derek Muller: You were focused overwhelmingly on race. With that, you have a burden. You carry that burden to sort of overcome this good faith presumption. Justice Kagan in design is not so thrilled with that and saying just because somebody has sued you does not automatically mean it's offensive and demeaning, even when it's involving race. So I think there's this sort of emphasis that we're gonna presume good faith. The legislature is the one that's principally responsible for this. The courts are secondary. If the plaintiffs wanna second guess what's happening with the legislature, they have a high hurdle to overcome. And then when it comes to thinking about Cooper, again, there's different ways of thinking about what happened here. If the Supreme Court is reviewing what happened to lower court for clear error, which is a deferential standard that courts of appeal typically give to the facts that were found at the lower court level, the Court of Appeals, and here the Supreme Court has to determine what kinds of facts should have been used, could have been used, ought to have been used. And when you're looking at an alternative map, saying the legislature could have done everything it wanted with respect to geography, keeping compact districts, equal numbers of population, protecting

Republicans, whatever you wanted to do, you could have done all those things while having less sort of racial influence.

[00:13:29.1] Derek Muller: That would be very persuasive evidence, right? And I think for the majority, they would say, the other evidence that you have isn't really very valuable compared to this piece of evidence that you could have put forward and didn't put forward. So we have a hard time embracing the rest of it. For the dissent, they're saying, oh, listen, what you're doing is you're saying now there's this must-have component in all future cases. There's no question that in future cases, if you fail to produce an alternative map, it's gonna be very, very hard to convince a panel going forward. Maybe some of your other experts can identify these things. But the point is, how can you show the legislature only engaged in racial gerrymandering, that there are other ways it could have achieved the same goals but for it. So it's this fight between the majority and the dissent. Yes, it's about Cooper and what those sort of inferences were. Is it a change in law or an expectation of the standards and the facts? But part of it is also sort of trying to identify how do we disentangle these motives and what is the best evidence to get us there and what kinds of evidence ought the parties be bringing forward? So they're certainly unnoticed, and I do think it is a change in mood, if not in law, or if not expressly in law from the Supreme Court here.

[00:14:34.8] Jeffrey Rosen: Change in mood, but not in law. Josh, in a recent piece in the Washington Monthly, you argued that this South Carolina case is the latest in a line of cases where the court has refused to scrutinize racial gerrymandering that harms minorities. And you contrast this with the court's attitude in the 1960s when it issued its landmark voting rights decisions and say that ever since the 1990s, the court has been moving toward increasing deference to legislatures, which you think isn't a good idea. Justice Kagan shared that analysis. Tell us why you think that the court has retreated from its previous close scrutiny of legislative motives in voting rights cases.

[00:15:29.1] Joshua Douglas: Yeah. So the 1960s were, in my view, the high watermark of judicial protection for the constitutional ideal around the right to vote. You had a series of cases, both in the redistricting realm, the one person, one vote cases, as well as kind of traditional right to vote cases, things about a poll tax in Virginia or voter eligibility in New York school board elections where the court very strongly protected the individual right to vote and applied what legal scholars know as strict scrutiny, which basically says that the state has the burden of showing that it has a really, really good reason, a very strong justification for a voting rule, and that the rule actually is going to achieve its goals. We're not just going to assume that the state has a pure motive when it comes to running elections. The state has the onus, the burden of showing this.

[00:16:29.9] Joshua Douglas: So the threshold was on the state to prove that its law would not harm voters. But in a series of cases in the 1980s, 1990s, and leading up to today, the court has done what I've referred to as undue deference to state politicians. And the balancing has shifted. I trace it back to a 1983 case called Anderson versus Celebrezze, which involved John Anderson's run for president in the 1980 election as an independent. And there, the court began to pull back from that strong judicial scrutiny of individual right to vote. Then in 1992, in a case called Burdick versus Takushi involving Alan Burdick's desire to write in a candidate in his election.

He lived in Hawaii. He didn't like any of the listed candidates on the ballot. He decided he wanted to try to write to somebody else. I actually interviewed him for my book that you mentioned. It was a really fascinating conversation. He's still bitter to this day that he lost his case.

[00:17:39.1] Joshua Douglas: And maybe the question about whether you can write in a candidate or not is not that big of a deal. But what the court did, I think, is the bigger concern in that the court pulled back even further on the state having the burden of demonstrating the constitutionality of its law. Instead the court in Burdick starts saying things like, well, if a state wants to run its elections as it sees fit or wants to have easy election administration, then that's sufficient to uphold a law. So this case, the South Carolina case, I think is one of a number of cases in which the court basically says, look, we're gonna stay out of this. We're not going to scrutinize state voting rules. We're going to trust the state politicians to enact a voting system that is fair. Of course, I think the state politicians are the very people we should trust the least. They are most self-interested in crafting election rules that can help to keep themselves in power. So if there's anyone we shouldn't trust here, it's in my view, the state politicians, especially when you have a lower court decision that carefully goes through the facts and the court decides to not agree or not trust those facts.

[00:18:57.5] Joshua Douglas: So you have a situation here where no longer is it the individual right to vote that receives the closest scrutiny, that receives that very difficult test where the state has to demonstrate this is actually the best way. To run an election that doesn't harm voters. Instead, you get undue deference to state politicians, where the court essentially says, we want to stay out of this. You see this in the partisan gerrymandering context, you see this in the election administration context, and now you see it in racial gerrymandering.

[00:19:29.3] Joshua Douglas: That's not to say the court won't scrutinize something that is so far so off the pale of what is legitimate. But the answer of, if you don't like the voting laws that the states are enacting, you can vote the bums out, brings hollow when the so-called bums are passing rules that make it harder to vote them out. And I think that's exactly the system that the court is setting up with these series of cases.

[00:19:54.4] Jeffrey Rosen: Derek, you just heard Josh argue that the court has moved away from its former presumption, starting in the 60s, that the state has to demonstrate this is the best way to run an election that doesn't harm voters, to a presumption of deference. And he says that began in the 1980s and is continuing with these current decisions. Do you agree with that analysis? And do you think it's constitutionally correct to move toward deference or not?

[00:20:25.1] Derek Muller: So I think, descriptively, Josh has it right. There's been this move from the courts of more scrutiny of what the legislature has done to less scrutiny. And I think it's right to say that it's happened across a variety of contexts, from voting itself to redistricting and things like that. But at the same time, I'm more sympathetic to the court's moves. And I think about this in a couple of respects. Certainly under the original constitution, where it places a lot of this responsibility in the legislature. And the thought is that courts actually are not the place to be making these determinations. When we see how members of Congress are elected, Congress was given the power to judge the qualifications, elections, and returns of its members.

[00:21:06.3] Derek Muller: That is a power given to Congress because there was a worry at the founding that other branches would meddle in this process that was really supposed to be between the people and their representatives. When it comes to states making these decisions, states are acting in this context with the Alexander case. It's the state legislature drawing districts for Congress. So it's not even that it's necessarily self-interested about drawing their own districts. They're drawing districts for the representative body that represents the entire United States or each state in the United States across jurisdictions. So there's an interesting dynamic to think about in particular places. What value might we think about different actors or different political actors making these judgments? And finally, thinking about that word judgment, the notion that there are many conceptions of the best system. If we're talking about this, this is not the best rule or the best way of doing it. Now, let's take redistricting as we're thinking about this case. There are an infinite number of ways to draw districts.

[00:22:01.2] Derek Muller: And there are lots of things to account for when you're thinking about media markets, when you're thinking about the ease of ability of representatives to travel across them, where you're thinking about geography and farming and coastal interests in South Carolina or whatever they are. And sometimes you think about that they're motivated by partisanship, and especially North Carolina, where it's controlled heavily by Republicans and a lot of Republican involvement. But at the same time, the record in this case shows that they really wanted to preserve the ability of Jim Clyburn, a Black Democrat. Who was involved and favorably disposed to this map to say, hey, this is the kind of thing that we want to be able to preserve sort of the power and status that he has. So when it comes to this case stepping in, there's a recognition, both the majority and dissent, acknowledge that if plaintiffs want to challenge what the legislature has done, it's not that it's impossible, but it's a demanding burden.

[00:22:49.5] Derek Muller: That's the language both the majority and the dissent adopt, to say this is a demanding burden for the plaintiffs to have. And that demanding burden, if you're going to make an allegation that race is what's driving the decision-making here, requires sort of that kind of proof that's going to overcome that demanding burden and show that's what happened in this case. And so I think we can pick out on lots of different cases, and I think, Josh, think about the overall trends, but there's also thinking about what's happening in redistricting more generally, and sort of the facts of this case in particular to think about why the court at the end of the day ends up deferring to the political process rather than intervening.

[00:23:24.5] Jeffrey Rosen: Josh, there's one notable exception to a general posture of deference in voting cases, and that's the racial gerrymandering cases themselves. And as you both noted, starting in Shaw v. Reno in 1992, the court began to say that funny-shaped districts are presumptively unconstitutional if they might have had race as a predominant purpose. Justice Thomas joined those decisions, and yet in this South Carolina case, he had quite a striking concurrence saying that the court should get out of the business of policing racial gerrymandering cases altogether. What did you make of that argument? What would its implications be? And how can it be squared with Justice Thomas' previous opinions?

[00:24:08.5] Joshua Douglas: Yeah, I do think that Justice Thomas is evolving in his views with respect to the use of race in redistricting. This is consistent with some recent things he said

with respect to affirmative action. And in many ways, it is, I think, a little bit consistent with an old concurrence of his in a case called Holder v. Hall, in which he basically said the Voting Rights Act should not be used to address what's known as vote dilution. So claims that a map is diluting the strength of minority voters, that instead the Voting Rights Act was intended to really target outright denial of the right to vote. And in that concurrence, he argues for a very narrow view of the way in which the courts should be invoking racial harms in the way in which it's considering these issues.

[00:25:10.1] Joshua Douglas: So yes, he did join the Shaw versus Reno line of cases initially, but I always sort of thought of his views on that as kind of uneasy in thinking about the way that you could use race or create this new harm under the equal protection clause of racial gerrymandering. And I think now he's saying explicitly that, which is that the court should stay out of the business entirely of claiming that a state has used race impermissibly. He thinks that when talking about race with respect to drawing district lines, that it inevitably creates racial harms, inevitably creates racial tests that states are going to be invoking. And it kind of reminded me of the old saying from Chief Justice Roberts in one of the affirmative action cases about the way to stop discriminating on the basis of race is to stop discrimination on the basis of race. In some ways, Thomas' concurrence here echoes that idea that he just wants to stop talking about it entirely and thinks that the issues of racial gerrymandering or just racial differences in voting patterns can somehow go away if we just stop talking about it entirely. So he wants to take the courts out of the business of thinking about race whatsoever in these gerrymandering cases.

[00:26:36.1] Joshua Douglas: It's another example of this undue deference, what I call undue deference or extreme deference to the state politicians. He just says, let the states do it themselves. And one more point that I think responds to what Derek just said with respect to who gets to decide and the fact that there is a political solution here of, as I mentioned earlier, vote the bums out. It is true that at the founding, gerrymandering existed. Everyone knew, everyone recognized that the politicians drew district lines in a way to achieve a particular result. I think the difference today is the sophistication with which those gerrymanders occur that makes them so much more enduring. So without really wanting to devolve into a debate about originalism versus living constitutionalism, that's sort of where we are. If you're just going to think about what was understood at the founding and what those words meant then, you might think of this a little bit differently than if you think about the way in which gerrymandering exists in today's context and in today's environment and technological advancements.

[00:27:47.8] Jeffrey Rosen: Derek, what did you make of Justice Thomas' important concurrence? He cited the Harvard affirmative action case, suggesting his willingness to extend a colorblindness principle to the voting rights arena. He's also suggested in other cases that he thinks the Voting Rights Act itself is unconstitutional to the degree that it requires the drawing of districts for the benefit of minorities. Is his new concurrence consistent with that view, and do you see any chance that other members of the court might adopt it?

[00:28:20.9] Derek Muller: Yeah, there's a lot happening in this opinion. I don't know how much the rest of the court is along with it. And I think Justice Thomas, yeah, he's repudiating some of his past decisions without really coming out and saying so. It's interesting to draw the analogy as to the affirmative action context, because that's a case where the state makes a

decision or some kinds of decisions on the basis of race, and the court steps in and says, you can't do that. And this is a case where there's an allegation that the state is doing something on the basis of race, and Thomas' response here is saying, well, the courts should not be involved. So, well, we can say it's sort of colorblind and that the courts shouldn't be involved, and it's a very different involvement. Now, part of this gets into, he spent some time talking about this, and he's had this in other opinions, about how the 14th Amendment, the Equal Protection Clause, is really about civil rights, not political rights.

[00:29:08.9] Derek Muller: And later, when we talk about the 15th Amendment, which guarantees the right to vote shall not be denied or abridged on the basis of race, color, previous condition of servitude. That is a political right. It's speaking very explicitly about the right to vote. But he's saying this notion that you can vote if you're White, if you're Black, you can vote in South Carolina. It's just a question of which district you're in, whether your vote has more effect or less of an effect. And he says, that's the business we should be out of. So that's a little bit consistent with some of his opinions. But then there's this other strain. I know this isn't a podcast on legal history or legal remedies.

[00:29:42.1] Derek Muller: When he says the courts shouldn't be involved, he is also citing a principle thinking about what is the power of courts to remedy a wrong? And this goes all the way back to the founding in Marbury versus Madison. There's a famous line from Chief Justice Marshall there talking about how where there's a right, there must be a remedy and thinking about this relationship between rights and remedies. And Justice Thomas here seems to suggest, well, at the founding, courts couldn't get involved in law or equity and sort of the old language we use, couldn't get involved to draw districts or draw maps or redraw maps. And in 1868, when the 14th Amendment was enacted, the courts couldn't get involved to draw districts or redraw districts or redraw maps. And therefore, we don't have that power today.

[00:30:29.9] Derek Muller: That's a very bold claim. And it's one that suggests something a little bit unusual because usually when we think about remedies, about what courts can do to fix things, these develop over time. They develop over decades. Slowly and steadily, we recognize new ways of courts getting involved to remedy harms. And again, to use that language of equity, the old, old. Crusty sort of English courts thinking about it. They wanted to provide flexibility of courts to find remedies in appropriate areas. His opinion seems to suggest that courts should be sort of stuck with the remedies they had in 1868, which is a little inconsistent, I think, with how courts have long treated sort of remedies when it comes to their ability to fashion them. So while there are lots of things happening in Thomas' opinion, again, some things that are, I think, mashing together a number of concepts.

[00:31:16.4] Derek Muller: This one is one that I'm particularly watching for in the future to see how this sort of conception about that judicial power is somehow constrained in a way under the Constitution. It's a very different claim than saying we don't have the power to do it anyway because the Equal Protection Clause doesn't let us do it. It would be another thing to say the Equal Protection Clause or some provision of the Constitution guarantees this right, but the judiciary's hand is kept from being able to step into it. And that's a very different proposition. Again, a little bit more deeper in the weeds as we're thinking about this, but one of, I think,

potentially the more significant takeaways. And again, the one that I think probably least likely to get the attention of other justices in the court, but one worth noting.

[00:31:55.6] Jeffrey Rosen: Absolutely. Well, let's continue in the weeds because it has such large applications. Josh, Justice Thomas' suggestion that the 14th Amendment covers only civil rights and not political rights would call into question not only the voting rights jurisprudence, but the entire history of the court's intervention in election cases, including and not limited to Bush v. Gore, which, as the dissenters pointed out, is completely inconsistent with the original understanding of the Constitution. What are the implications of a claim that the court should just stay out of these election cases? And do you think Justice Thomas is willing to apply the same deference in cases involving disputed elections as he is in cases involving race?

[00:32:39.0] Joshua Douglas: Well, taking your second question first, I do think that Justice Thomas would be willing to say that the court should simply stay out of this entirely. That I think that's consistent with a lot of the things he said with respect to, again, racial gerrymandering here, vote dilution claims, and then just simple right to vote cases. I think the message here is, the political process should be left to its own and the court should not be involved in that political process. Now, you could make an argument that the Bush v. Gore majority was also essentially saying defer to the politicians because it was undoing what a so-called rogue Florida Supreme Court was engaged in.

[00:33:29.5] Joshua Douglas: So I think he would say, well, I'm being consistent. In that deference to the political branches because we're telling the Florida Supreme Court, look, you can't engage in this rulemaking that is contrary to the intent of the Florida legislature in that case. The same goes for the 2020 pandemic litigation. There were a lot of lawsuits. Many of them made it up to the Supreme Court on an emergency basis about how to run the 2020 election during the pandemic. And there was a lot of discussion about, well, courts like the Wisconsin Supreme Court or the Pennsylvania Supreme Court should not be enacting voting rules that the legislature has not approved. So I think there is some consistency in his views here, even with respect to Bush v. Gore. That said, I think the implications are enormous. One of the main points of a constitution is to protect minority rights. You wouldn't need a constitution to protect various rights if the majority agreed on all of them. And so it takes me back to that famous footnote four from the Carolene Products case.

[00:34:40.6] Joshua Douglas: Again, getting into the legal weeds a little bit. But the most famous footnote in Supreme Court history in this case called Carolene Products, set out the standard where the court says normally we're going to defer to the political branches on various different aspects. The courts don't know about how to deal with economic regulations in the same way that the political branches do. But there are certain situations when the court needs to look more carefully at what those branches are doing. And the famous words are when it deals with discrete and insular minorities, or where there's a situation where the political process won't work because the majority, sort of the tyranny of the majority idea. There the court says that you should have stronger scrutiny on the voting rules. In that case it was in 1938. And so I do think that if you have a situation. If you take Thomas' opinion to its logical extreme or logical extension, you have a jurisprudence in which the court stays out of all of this and the political branches have no oversight.

[00:35:52.4] Joshua Douglas: And what's going to happen? Well, I think we're already seeing that happen in many legislatures where they know they can pass restrictive voting rules that are more likely than previously to be upheld. And so what's the incentive to ensure that you're not going to have a case that's overturning your laws when you know the courts are being very deferential to the voting system. The other thing that's interesting about Thomas' opinion here is that no one else signs on. So when Derek talked about how both the majority and dissent referred to the standard in racial gerrymandering cases as a demanding burden on the plaintiffs, that's correct except for Thomas who doesn't want these claims at all.

[00:36:40.4] Joshua Douglas: But there are still five votes for saying plaintiffs can have these sorts of claims. There's just a demanding burden. Of course, I question whether it would be possible in a state like South Carolina or North Carolina where race and party are so intertwined to meet that demanding burden.

[00:36:56.5] Joshua Douglas: This might be one of the situations where the court essentially says, Yeah, there's a potential claim out there, but no one could ever satisfy it. And so it gets away with seeming like it's being incremental by saying, Look, we're not cutting off all possible claims, but the reality is that they are based on the standard. So there's some difference there between the Thomas approach and the majority's approach here, but maybe in the practical world, there's little difference after all.

[00:37:25.3] Jeffrey Rosen: Many thanks for that. Thank you for flagging footnote four in the Carolene Products case. Dear We The People listeners, for those who are listening closely, as I know you are, as Josh said, that's maybe the most famous footnote in the 20th century. And it says that courts should generally defer to legislation with the exception of legislation that affects discreteness of minorities, violates the Bill of Rights, or restricts the political process. And Josh reminded us that. That general refusal to be deferential in cases involving restrictions on the political process is now up for grabs. Derek, so much to say about this wonderful thread that we've set down, But I don't think of this courts as being deferential to the political process in voting, starting in reconstruction, the court struck down Congress's efforts to enforce the 15th Amendment in the Klu Klux Klan case, and was eviscerated the ability of the enforcement of the reconstruction amendments. And more recently in cases like Shelby County striking down section five of the Voting Rights Act, the court is hardly deferential to Congress. Is Justice Thomas' claim of deference to state officials to do what they like to state legislatures. Do you see it as consistent with the rest of his jurisprudence? And how much of a move do you think there is within the originalist movement to join Thomas in getting the court out of second guessing these kinds of decisions?

[00:39:01.6] Derek Muller: Yeah, it's a great point to think about Congress because from Klu Klux Klan to Shelby County, there's no question that the court has routinely closely scrutinized what Congress has done in enacting legislation, and saying there needs to be some kind of fit. There needs to be justification to Congress of limited enumerated powers. We need to make sure that whatever it's promulgating fits those things. And in some cases, perhaps the court's review has been a bit stingy. Again, it's wheeled back from that. In other cases later on, cases like Ex Parte Siebold or cases like Katzenbach versus South Carolina, where it's very deferential to

Congress, and then in other places where it's not, so it certainly has ebbed and flowed over the years when it comes to Congress.

[00:39:39.6] Derek Muller: Now, that's a little different than the redistricting process because the drawing of districts is something that has to happen, period. It has to happen in some respect. It's not necessarily affirmative legislation as much as that drawing district. And when we're thinking about the fact that it's principally left to states and Congress for these congressional districts, again, some deference at least, or some degree of deference here from the court in that front. But there's no question. I think you're right, Jeff. There's a tension in how the court's level of judicial scrutiny and review looks. I think there's a distinction perhaps to be drawn on these sort of structural issues of Congress exercising its enumerated powers versus other things. But I don't wanna split things too finely to identify the tension. And then, but then onto the, to where the court's going. I mean, I think some of the justices in the court. Chief Justice Roberts, Chief Justice Kavanaugh, Chief Justice Barrett as three in particular, when they're thinking about stare decisis or they're thinking about all of these cases, as Josh identifies going back to the '60s, before you overturn those things, you need to have some theory about why you're gonna do so, or why you need to step in or why I need to change things or show that it's so palpably wrong.

[00:40:52.2] Derek Muller: And it's done so in some cases, there's no question about that. Cases dealing with abortion or affirmative action that have been under fire for 50 years, a sustained fire for 50 years have been overturned by the court in recent years. But there are a lot of other cases that have much less salience. And in some of these election law cases in particular, I think we could expect some of those to fit the same bill where other justices and Justice Barrett and Justice Kavanaugh in particular have talked about how you need to have this explanation, this theory about why you're trying to step in and intervene and overturn the precedents. Justice Thomas does so very quickly, he is very happy to overturn those things, thinks very little of stare decisis when it comes to these constitutional matters. But for other issues to say one person, one vote, or some of these other ballot access cases or party cases or Voting Rights Act cases, or whatever they are, but I think it's gonna take a significant lift for the court to step in and overturn some of its precedents and change some of its understanding.

[00:41:44.7] Derek Muller: It recently had a decision out of Alabama interpreting section two of the Voting Rights Act, and what that looks like in districting and race and all these sorts of questions. And the majority of the court was more deferential to what happened to the lower court, more deferential to those fact findings and less deferential to the legislature. And there were some hints in that opinion suggesting we're not gonna go overturning our precedents in this area. And to the extent there's more of those cases coming under the Voting Rights Act, we might see some similar trends. So it's hard to know and hard to predict in some places except to say that these racial gerrymandering claims have certainly been disfavored in recent years. Again, Cooper was something of an exception, but they have been disfavored in recent years, and this is the latest. It's sort of a string of cases on that basis. But I don't know what that portends in other areas, justice Thomas aside, or how many others are willing to join them.

[00:42:36.8] Jeffrey Rosen: That's such a powerful point about the court's failure to articulate a theory in these voting rights cases that might justify the reexamination of these precedents. Josh, in your new book, *The Court v. The Voters: The Troubling Story of How the Supreme Court Has*

Undermined Voting Rights, as your subtitle suggests, do you think that these voting decisions are part of a general trend toward what you call anti-democracy? And you say that the decisions have built on each other to make it almost impossible to challenge a restriction on the right to vote, an unfair gerrymandered map, or a limit on the overwhelming amount of money spent in campaigns. And they're united by the principle that at every turn politicians have won, and individual voters have lost. Tell us about that thesis and do you think that the turn toward deference to legislatures in these racial gerrymandering cases is part of a bigger trend?

[00:43:37.3] Joshua Douglas: Yeah. This is sort of what we've been talking about this whole time, is this case is another in the line of cases. So the book looks at nine key Supreme Court cases, some people have heard of, like Citizens United or Shelby County. Others people have not heard of, like those two I mentioned earlier, Anderson from 1983 and Burdick from 1992. And explains how there's this march toward undue deference. And Derek talked about Shelby County, I even think Shelby County is a case about deference. It's not deference to Congress. The result is deference to the state legislatures because in overturning that aspect of the Voting Rights Act, the coverage formula that then led to this notion of pre-clearance or certain states had to seek pre-approval, the pre-approval was for state voting laws. So yes, the Supreme Court was not deferential to Congress, but in doing so, it was deferential to the state politicians in letting them enact the voting rules they wanted without federal oversight.

[00:44:45.6] Joshua Douglas: So I think the same story is being told here. The other thing we see in this case, these cases, and I don't think it's, we really recognize it unless we take a 50 year retrospective. I think when the court decided Anderson and the court decided Burdick again, 1983, 1992, people didn't really recognize the ways in which there were some seeds planted in those cases that would blossom into a theory that pulls back on strong judicial protection for the right to vote. So Derek talked about perhaps the court is not ready to overturn some of those key cases. The court doesn't need to because it's chipping away a little here and there. I think in the South Carolina case that we're discussing, the court has done exactly that. It's chipped away at Cooper vs Harris, the 2017 case, without explicitly saying that we are overturning precedent.

[00:45:41.0] Joshua Douglas: So the book looks through, and it's a book for the general public. I tell a lot of stories in the book. I interviewed over 30 people, 35 people may be involved in each of these cases. Like I said, I interviewed Alan Burdick, the guy that brought this lawsuit in Hawaii to challenge write-in voting. I interviewed the people involved in the Shelby County decision in the Citizens United case to kinda get the behind the scenes story. And through the stories, I tell a narrative about how in combination the court has now pulled back on protection for voters and instead given protection to state politicians. And, so that's why it's called the Court versus the Voters, because the voters used to be the paramount entity as the foundation of democratic engagement. Now, that's not to say the court has always been good, I mean, I start my story in the 1960s. Prior to that, the court was not very strong in protection of the right to vote. So that was a high watermark in the '60s. And then things have, in my view, gone downhill from there.

[00:46:44.2] Joshua Douglas: But it's been in a steady march. It's not been one or two cases that have changed the scope of things. It's, we chip a little away here and there, and you get to a point where you don't need to overturn precedent, it looks like perhaps you're being incremental, but in

the aggregate, in the whole, we see under protection for the constitutional right to vote. The South Carolina case could be another chapter in the next edition, I suppose, in which the court essentially does the same thing all over again.

[00:47:13.7] Jeffrey Rosen: Derek, Josh's thesis is broad, it involves many cases and there are many complications among them. But I think that you're more sympathetic to the court's trends in many of these cases involving voter ID laws, disenfranchisement and gerrymandering. To the degree you think the court's going in the right direction, is that because you think these decisions are consistent with the text and original understanding of the Constitution, or what broad defense would you make?

[00:47:48.6] Derek Muller: Yeah, again, I think many of these decisions of the court, I think Josh is right to say that you can chip away or you can limit the ability to take these precedents to the next level has certainly been a consistent theme of this court. I think of several years ago when in a redistricting case where there's a question to suggest, it was really an apportion case to suggest that Texas should exclude non-citizens when it's drawing districts saying, We should have equal numbers of people, but that should exclude non-citizens. So that would've, in a sense, sort of been a step beyond those cases from the 1960s about one person, one vote, adding sort of some conceptions about what this ought to look like.

[00:48:28.2] Derek Muller: And the court steps in says, No, we don't think that's something compelled by the constitution. That's something that ought to be left to the states, and that the states make these decisions. Most of them are basically, are all of them right now including non-citizens in their districting, there are certain very rare exceptions where if you have a military base or a prison or something like that, you might choose not to include the people there in your redistricting. So there are places where the court has sort of said, Yeah, we're not going beyond where we've already had these things, where we've drawn these lines. And again, at least in my judgment, I think this is consistent with the original understanding, although, again, Josh pointed out there are those who would think we should take some more contemporary concerns into account. The notion is that the political process is something that the courts are not well equipped to intervene into, or the language of the 1960s from the dissenters to be stepping into the political thicket.

[00:49:18.7] Derek Muller: Because there's no question that when you step in as the judiciary and say, We think these people can't vote, these people can't vote. We think that these district lines need to be moved around. We think that these tools are acceptable, unacceptable. The more the court is making those judgment calls, the more it is looking like it is enacting the kinds of policies that can affect the outcome of an election. I certainly agree that when you step back and do nothing or say that we're not going to intervene, the failure to intervene doesn't affect a choice. It undoubtedly affects the election. But it's a choice that's first and principally made by the political actors. So I have great faith in the political process and defer to the political process and trust it for that reason. And I understand people who don't think that the political process is the place to trust that and putting that into the courts as has been the trend at least in some respects 60 years ago.

[00:50:08.7] Derek Muller: But again, I think consistent with that original understanding, consistent with how we might be thinking about the people controlling the political process more heavily with their representatives, that's the place we wanna be. There's always tension in that. And there's certainly when the foxes are guarding the henhouse, that is when the legislature is passing the rules for its own election, that can be some tension. I think that tension is a little bit diffused when we're talking in the context like we're talking about today with Alexander, where it's the legislature creating rules for the federal Congress. There's a little bit of a separation happening there, the ability of a Federal Congress to step in and pass rules that can affect all federal elections across the United States that would prohibit any one legislature from meddling in the process. There's no question, it's the reason why Josh and I can have such great robust conversations, as we think about the best place for these rules to be made and the best actors situated to make the resolution of these disputes.

[00:51:01.6] Jeffrey Rosen: Many thanks for that. Well, it is indeed a great conversation and we'll look forward to continuing it, but it's time for now for closing thoughts about the South Carolina case. Josh, why do you think the court was wrong in the South Carolina case, and what are the implications for the future of voting rights?

[00:51:19.8] Joshua Douglas: So we see that the court has ballooned its election law jurisprudence in terms of the number of cases that it's hearing. I mean Derek and I are both election law professors. That wasn't a thing 20, 25 years ago. But now almost all law schools have someone like us who focuses on this area. So it, I think, demonstrates the importance of a fair resolution of the cases because the court has taken so many election cases, there's been so many disputes, I think that in many ways is a legacy of Bush v. Gore that led to a huge increase in politicians trying to use the courts to affect political change. So the question for me then is in thinking about Derek's comments of should we defer to the political process, are there guiding principles that should emanate the way in which the court thinks about these decisions? Because I agree, we wouldn't want the court being seen as choosing political winners and losers based on politics as opposed to core guiding principles.

[00:52:30.0] Joshua Douglas: And so this is where I talk in the conclusion of my book, I refer to four principles of a grand election compromise that I think everyone should agree on as a starting place for our conversations. And those four guiding principles are that every eligible voter should have easy access to the ballot, that the system should be set up to deter election fraud, that voters should be well educated and that the losing candidates should graciously accept defeat. And I think those are the four guiding principles here that should be part of every conversation when it comes to voting rights. Now, the racial gerrymandering case is about political representation, so they don't fit so nicely into the four principles. Except for that every voter should have easy access to the ballot, which to me also means that every voter should have fair representation when it comes to the lines that are drawn and the districts that they're voting in.

[00:53:30.7] Joshua Douglas: So ultimately, the South Carolina case violates that idea because we're letting the politicians themselves choose winners and losers instead of letting the voters be the ones that are paramount in the process. So this is another in a long line of cases in which the court has, as I've said, already deferred to state politicians. But in doing so, I think it violates this

concept of a grand election compromise where all voters should have easy access to the ballot. And as part of that, all voters should have fair representation as a guiding principle regardless of politics and party. And that's why this decision among many others, the court has issued on voting rights is really concerning to me for a strong democracy.

[00:54:16.8] Jeffrey Rosen: Many thanks for that. Derek, last word in this superb discussion is to you, do you think the court was right or wrong in Alexander versus South Carolina? And what are the implications for the future of voting rights?

[00:54:29.8] Derek Muller: Yeah, again, I think on the whole, I think the majority gets it right. I think the really driving concern here was partisanship, you see that with the Republicans sort of statements you see with the efforts to shore up a Democrat in the state who was on board with the districting plan. And the point is, I think these claims, again, brought by both Republicans and Democrats over the years, when we think about racial gerrymandering, they really have been kind of running as an approximation for partisan gerrymandering. That is, I don't think the plaintiffs in this case, and I think this is part of the alternative map solution, would've been terribly thrilled if we shifted around some white and black voters in the state, but still had a six Republican, one Democratic map. And I think when we're thinking at a national level, we're thinking about the composition of Congress, we're thinking about a very closely contested house, a lot of these claims, and again in the '90s in North Carolina, brought by White voters who are really trying to represent Republican interests and in cases like these ones today with some of the flipped interests and alignments and valances, a lot of these efforts are trying to sort of redraw the maps to give a party an edge or less of an edge in the national maps, or sometimes if it's at the state level, the state maps.

[00:55:41.3] Derek Muller: So at the end of the day, I don't know how much of an effect this is gonna have. The court a few years ago closed the door on partisan gerrymandering challenges. It's now closed the door here on these racial gerrymandering classes, or at least makes it much harder in some respects to bring these claims. But these claims hadn't been gaining as much traction in recent years. Again, Cooper aside, they've been sort of falling out of favor, and there's been a really increased effort in the states by initiative or by other measures to pass redistricting reform to say, this is what should be, these are the principles that are guiding our redistricting process, not the politicians or their own idiosyncratic preferences.

[00:56:15.6] Derek Muller: And so I'll be interested in watching, as we head to the 2030 census and thinking about what that apportionment redistricting looks like. As we move into that sentence, we're not gonna have some of these tools that we've thought about in the past about partisans gerrymandering, racial gerrymandering claims, but we're gonna have an increased number of initiative statutes that are regulating and changing how we do researching in the first place. So it's an interesting change in dynamic. I don't know how much this opinion is gonna affect redistricting more generally, or particular maps in the United States. There's a case out of Louisiana happening that might be an interesting one for a different podcast, in the future for listeners who wanna be aware. But I think we're sort of reaching the end of some of the major cases for this decade as we're looking at the next decade of redistricting.

[00:57:02.6] Jeffrey Rosen: Thank you so much, Josh Douglas and Derek Muller for a thoughtful, civil and really deep conversation about the crucially important question of the future of the constitution and voting rights. It would be an honor to continue it, and I'll really look forward to reconvening before long. Josh, Derek, thank you so much for joining.

[00:57:21.4] Joshua Douglas: Thanks so much.

[00:57:22.4] Derek Muller: Thank you.

[00:57:24.7] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Samson Mostashari, and Bill Pollock. Was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of civil and thoughtful and deep constitutional illumination and debate. Sign up for the newsletter at constitutioncenter.org/connect. And always remember whether you wake or sleep that the National Constitution Center is a private nonprofit. Recite the mission to yourself, moments before bed, of course recite it when you wake up. And always remember that we rely on your generosity, your passion, your engagement. Show that passion and engagement by becoming a member at constitutioncenter.org/membership Give a donation of any amount, $5, $10 or more to support the work and including the podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.